

**IN THEORY AND
IN THE LIGHT OF DECISIONS
OF THE EUROPEAN COURT
OF HUMAN RIGHTS**

**FREEDOM OF
EXPRESSION**

ADVISOR

Assoc. Prof. Sibel İNCEOĞLU

**Mehmet EKİZ
Şanlıurfa 2006**

FREEDOM OF EXPRESSION

INTRODUCTION.....

1

I. MEANING AND EXTENSION OF THE FREEDOM OF EXPRESSION

1.			
DEFINITION.....			4
2.			
IMPORTANCE.....			8
3.			
COMMUNICATION.....			9
4.	THOUGHTS		
EXPRESSION.....			10
5.	ACTS	AND	
EXPRESSION.....			12
6.			
EXPRESSIONS.....			15
7.			
EXPRESSIONS.....			17

VERBAL

AS

SYMBOLIC

ARTISTIC

COMMERCIAL

II JUSTIFICATIONS OF THE FREEDOM OF EXPRESSION

1.	THE	ARGUMENT	OF	SEARCH	FOR
	TRUTH.....				20

1.1. FREE EXPRESSION (FREEDOM OF DISCUSSION).....	22
1.2. JUDICIAL APPROACH(THE THEORY OF MARKETPLACE OF IDEAS.....	25
2. INDIVIDUAL FREEDOM (SELF- FULFILMENT).....	26
3. DEMOCRACY AND SELF- GOVERNMENT.....	29

III. ELEMENTS OF THE FREEDOM OF EXPRESSION

1. THE FREEDOM TO RECEIVE INFORMATION AND OPINION.....	35
1.1. FREEDOM OF PRESS.....	37
1.2. THE FREEDOM FOR BROADCASTING.....	48
2. FREEDOM TO HOLD OPINIONS.....	50
3. THE FREEDOM TO EXPRESS INFORMATION AND OPINION.....	51

IV. LIMITS OF FREEDOM OF EXPRESSION AND APPROACH OF THE EUROPEAN COURT OF HUMAN RIGHTS

1.GENERALLY.....	
54	

2. THE ROLE OF THE ECHR IN INTERPRETING OF THE CONVENTION.....	60
3. BEING FORESEEN LEGALLY OF THE RESTRICTION.....	63
4. PRESENCE OF A LEGITIMATE AIM.....	64
4.1. NATIONAL SECURITY AND TERRITORIAL INTEGRITY.....	66
4.2. PUBLIC SECURITY AND PREVENTING OF COMMITTING A CRIME.....	71
4.3. PROTECTING OF MORALS AND HEALTH.....	76
4.4. PROTECTION OF THE REPUTATION AND RIGHTS OF OTHERS.....	80
4.5. PROTECTING OF THE EFFICIENCY AND ESTEEM OF JURISDICTION.....	88
5. ACCORDANCE OF THE RESTRICTION TO THE NECESSITIES OF A DEMOCRATIC SOCIETY.....	92
5.1. PRINCIPLE OF PROPORTIONALITY (TOOL-AIM BALANCE).....	96
CONCLUSION.....	102
REFERENCES.....	105

INTRODUCTION

We begin to be perceived as an independent individual by our environment, firstly, when we begin to express ourselves, namely to use oral communication way, because we think and give meaning to events by the help of words. This systematic process of personality/identity realization is the self-expressing of the individual and it is the unique condition of his existence.

Each individual is affected by the social environment in which he lives, academic life, economical and political events etc, in this identity-forming process. On one hand, while being shaped by these facts, on the other hand, each individual also try to perform the duties assumed by the society he belongs, by giving meaning and intervening these facts.

At this point, every restriction applied on the expression is an intervention both to the ontological self-realization process of the individual and the process of his making-up the public opinion, and it explains the reasons of the existence of the freedom of speech as well.

This freedom has been a problem needs to solve for every system in which humanity organized from clans to states through the history. Since humans are the unique creatures who can gather the information, opinions, thoughts and ideas together in order to give them a meaning and get results from them, they wanted to interfere to the change and maturing of the society they live in. This condition necessitated to determine the reasons and limits of the freedom of expression.

We did not contented only with the decisions of judicial offices, which are reflected to the positive law, while examining the problem of reasons of existence and limits of the freedom of expression, but we also preferred to examine the philosophical reasons of this freedom throughout this thesis, unlike other studies that scrutinized this matter. For, a real

theory of freedom of expression will become a concept whose basic frames can be determined, only in this way.

We began our work, first by defining the concept of a real theory of freedom of expression, as it is used in philosophy, daily life and decisions of judicial offices, keeping in mind that a real theory of freedom of expression can be achieved by generally defining this concept. Just after this general definition effort, what the scope of this concept should be is examined in the first chapter by referring to the Court decisions. Although the oral communication, ideas, artistic and commercial expressions take part in almost all works concerning this freedom as an expression, we have tried to give place to absent subjects, which is related to this form of expression by definitions and exemplifications concerning actions and symbolic expression as a form of expression.

In the second chapter, we treated theoretical and practical arguments concerning why this freedom should exist. Just as enacting a law, coming to a decision by a court or our all acts and relationships in daily life cannot exist without a reason, so does this freedom. In this context, we have given place to John Stuart Mill who set forth the most valuable theses about this freedom and is quoted in every work treats the freedom of expression, by quoting widely. Likewise, it was added to this work the arguments concerning the theses of individual freedom/self-fulfilment and self-governance with the references to the theory of “marketplace of ideas” that was created by decisions of the US Supreme Court and to the decisions of the European Court of Human Rights.

Freedom of expression is only possible with the presence of an information and opinion subject to expression. The main condition of this is to secure a healthy running of this process. In this context, freedom of press, and radio and television broadcasting we treated under a sub-title occurs to be the most functional form of the freedom to hold opinion. We tried to explain these freedoms about which people mostly discuss and the problems are mostly congested, by using the decisions of European Court of Human Rights, and we completed the third chapter in which we gave place to the elements of freedom of expression, by defining the frame concerning the explanation of expression.

In the last chapter, rather than the theoretical discussions, we give place to the scope of the freedom of expression and to the approach of the Court to this freedom, in the light of the decisions of European Court of Human Rights, in conformity with the general frame of our thesis. Being powerful of our reasons concerning the freedom of expression is one of the essential elements for this freedom to exist. However, determining whether the intervention to this freedom is legal is another vital condition to guarantee this freedom. The court, in this context, decides by examining what the aim is by this restriction to freedom specified in the Convention is applied (national security, territorial integrity, public security and prevention of crimes, protection of moral and health, protection of other people's reputation and rights, protection of activity and esteem of judiciary), what the means directed to the aim is, the means-aim equilibrium, and finally whether the limitation is appropriate for the necessities of a democratic society order. In this last chapter, we finished our work, by giving place to the decisions of a supra-national Court that aims to establish a common European Public Order.

CHAPTER 1

MEANING AND EXTENSION OF THE FREEDOM OF EXPRESSION

1. DEFINITION

“Parachuting from a plane, Having a dinner at home or in a restaurant, and Writing out a cheque... Are these sorts of expression? Why, if they are not? Each one of these acts expresses something: a desire of excitement, sense of hunger, and obligation to pay a bill. However, are they expressions in the context of the freedom of expression? What is that makes something an expression or a speech? Is it necessary to be speech to be entitled to protection? On the other hand, has it to be a written one? Does the freedom of expression include actions such as a silent protest march? Is a picture a kind of expression? Is the thinking a sort of expression that needs to be protected?”¹

Before making any definition, we have to emphasize as a basic point that we will prefer to use concept of “expression” throughout the thesis. The phrase “freedom of speech” is also used as anonymous of “freedom of expression”. However, the word “expression” will be used here because of preferring of this in decisions of the European Court of Human Rights and in the academic milieu, and of includes activities such as writings, pictures and actions, together with mere speech.

The concept of expression is used at two different meanings in daily life. First, in a narrow sense, it is to express our position in the face of a particular event or present circumstances. For example, as the dressing form we choose in accordance with the weather condition. Whereas others can prefer a different form in the same circumstances, so everyone makes his/her choice. We can also define the expression as defining oneself roughly or exhibiting his/her psychological condition. Expression, secondly, implies

¹ *Robert Trager v. Donna L. Dickerson*, Freedom of Expression in the 21st Century, Pine Forge Press, 1999, p 13.

communication in daily use, and in this case, there is reciprocity, and we express us by an instrument (writing, word or act), namely, this is the case in which there is an addressee who perceives our expression and interprets it.

The word “expression” we have tried to define in daily meaning would have an identity of scientific/technical if we use it in the legal meaning, and a definition in this context will supply a level of particular protection and threshold for the free expression exists in all the international papers and national constitutions in which rights and freedoms must be secured. Moreover, every fixation concerning definition of expression will be far from to define this concept with its all clearness. Because the definition is, in many respects, dependent on solving the undetermined behavioural, ethical and empirical issues to which the justification of a freedom of expression is based on. In addition, the technical meaning given by different societies to the “expression” and therefore the level of protection threshold will be different. “Imagine, for example, a society founded on the premise that government is illegitimate. Anarchy reigns supreme. In this society there would of course be freedom of expression (defined for now as freedom from government interference), but it would be almost incomprehensible to talk about freedom of expression as we currently understand it. Freedom of expression would be an instance of total freedom from government restraint, but it would not be a principle in its own right. Moreover, in defining ‘expression’ we are not just attempting to describe something. Rather, we are trying to carve out categories of activity and give to the activities thus circumscribed a particular degree of protection. In this sense, ‘expression’ is a functional term, and it must be defined by the purpose of a deep theory of freedom of expression, and not by anything the word ‘expression’ might mean in ordinary talk. We must remember that ‘the freedom of expression’ is defined not by what it is, but by what it does”.²

Definition makes the things meaningful and comprehensible, and keeps them away from abstruseness, by interpreting them. However, the thing we are trying to define here appears as a multi-dimensional concept. In this situation, to determine whether the expression in a particular case would obtain a protection is to define the “expression” in different ways, and it can be said that this is a clearer definition.

² Frederick Schauer, *İfade Özgürlüğü Felsefî Bir İnceleme*, Liberal Düşünce Topluluğu, Trans: M. Bahattin Seçilmişoğlu 2002, p. 7, 130, 131.

After all this explanation, if we respond the question of what is an expression, by choosing the first alternative, we can say that it includes manifesting or offering of a thought, belief, opinion or attitude to common use by a peaceful way, such as verbal and written expressions, artistic performances, individual preferences of image and appearance, shows, marching, meetings and organizations. For example, “they are individual or social expression means such as to write and to publish a book, article, essay, novel or a story, to paint or to sculpture, to put a play on, to put on particular clothes, to participate in a march or a meeting and to establish an association or a community”.³ Well, can the right of not to talk be considered within the scope of freedom of expression?

The European Court of Human Rights has been determined the scope of expression, by coming to a decision about whether the expression in question will deserve a protection, followed by determining presence of an interference to the freedom drawn up in the article 10 of the Convention, in each case brought before it, and, at the same time, by defining the issue in question.⁴

The freedom of expression that has taken part in the first paragraph of Article 10 of the Convention is for everyone under the all contracting governments, according to Article 1 of the Convention. The Court has underlined that the rights recognized by the Article 10 of the Convention have a worth of “disclaim the borders”.⁵ Views and opinions, whatever their contents may be, qualities, levels of truthfulness, manners, methods and environment

³ Mustafa Erdoğan, “Demokratik Toplumda İfade Özgürlüğü: Özgürlükçü Bir Perspektif” in Teorik ve Pratik Boyutlarıyla İfade Hürriyeti, Ed: Bekir Berat Özipek, Liberal Düşünce Topluluğu, Ağustos 2003, p. 37–8. The freedom of expression, of course includes the speech concept. And this concept embraces advocating his own thought, telling it to the others, publishing it (freedom of press), trying to get someone to accept it, and trying to inculcate and to suggest it. The act of propaganda that means to convey a thought systematically and persuasively to more than one person is also in the scope of this freedom provided that to be given to place to the opposing thoughts and opinions in a democratic medium. To give a lecture, to address, to say a poem, to sing a song, to organize a meeting, to publish a newspaper or a magazine, to try to tell or to caricature a particular thought by some artistic activities such as theatre, painting and caricature are all in this scope. Yılmaz Aliefendioğlu, “Düşünce Özgürlüğü ya da Düşünsel Özgürlük”, in Düşünce Özgürlüğü, Ed: Hayrettin Ökçesiz, HFSA (Hukuk Felsefesi ve Sosyolojisi Arşivi Yayınları: 3), Afa Yayınları, İstanbul, 1998, p. 234.

⁴ See Vahit Bıçak, Avrupa İnsan Hakları Mahkemesi Kararlarında İfade Özgürlüğü, Liberal Düşünce Topluluğu, July 2002. The eighteen decisions about the freedom of expression have translated in this book. In addition, can be referred to official web site of the Court, www.echr.coe.int. Moreover, 254 decisions were given placed in www.yargitay.gov.tr/aihm.php. Ergin Ergül, Avrupa İnsan Hakları Mahkemesi ve Uygulaması, Yargı Yayınevi, Ankara 2003, p. 13–82.

⁵ *Autronic AG v. Switzerland*, 12726/87, 22.5.1990, paragraph 47; *Association Ekin v. France*, 39288/98, 17.07.2001.

expressed in it may be, remain within the scope of this freedom. The Court, before all else, underscores that it guarantees the freedom of expression for “everyone”; it does not discriminate neither in terms of the nature of aim to be desired to reach (aim of profit or not), and nor the role which is taken part by real or corporate bodies in the utilization of this freedom.

After this brief explanation about the ECHR’s approaching for determining the scope of the freedom of expression, when we continue to find a response to the question above-mentioned, moving from the first alternative, the question of whether the right to not to talk is a right in the sense of freedom of expression, we can see that the difficulty of answering this question is equal to the difficulty of making a definition about this right. However, if we move from the second alternative, to answer the question about whether the event in question remains within this scope for each case would be easier and clearer. Indeed, in the case of *Goodwin*, the problem has been brought before the Court, because of a warning to a journalist to reveal his sources of information and fining him in consequence of opposing this warning by a regional court. In this concrete fact, the Court did not find necessary to fine a journalist who does not reveal the source of information about the activities by various companies by the reason of protecting the right of others in a democratic society.⁶ The Court, of course, protects the right of not to talk of a journalist who does not want to reveal the source of information, which consists of the negative part of this freedom, along with the right of speech that constitutes the positive part of its, just as it protects the all expressions made by using the means of all kind of artistic, aesthetic and communicational.

In addition to definition we tried to make from the beginning, a matter needs to point out is that, not only the content of the expression, but also the means which are used to convey it and its methods and forms⁷ are profited by protection in the 1st paragraph of the Article 10 in the Convention.⁸

⁶ *Goodwin v. United Kingdom*, 17488/90, 27.3.1996, paragraphs 39, 42-46.

⁷ *Oberschlick v. Austria*, 11662/85, 23.5.1991, paragraph 57.

⁸ *Müller v. Switzerland*, 10737/84, 24.05.1988, paragraphs 27, 33, 34; *Otto-Preminger-Institut v. Austria*, 13470/87, 20.9.1994, paragraph 50.

Consequently, each society that will give place to the freedom of expression has to define first what the expression does mean. This occurs in two ways. Either making wider definitions of which expressions will be taken under the protection, or examining the individual cases as in the Court's decisions. The definitions, of course, constitute essence of the issue, as the courts hear a case.⁹

2. IMPORTANCE

What is that makes the expression valuable and gives to it legitimacy lies in its presenting itself as a different view, not in the expressing a correct judgement. In other words, it lies in exposing the worth of thoughts and opinions by exhibiting in the "marketplace of ideas". One of the basic criteria of being a democratic society is identical with the wideness of the protection secured by it for this freedom, and the notions constitute the essence of such democratic societies, as pluralism, tolerance and open-mindedness are closely linked which level of protection is ensured in these societies for freedom of expression.

The assurance of the freedom of expression has been still kept its importance today, as in the history, because it is the foundation of all civilizations. Construction of civilizations has been realized due to the best form of government, namely, the consequence of participatory state administration, in which the individuals have both given a meaning to their lives by criticisms they made to the age they lived in and their societies –and due to its undeniable function for their psychological resting by responses to his ontological truth and, feeling themselves as a part of his society– and in which a "speech" refuted another, a propaganda responded another, the thoughts was discussed freely. Complete and free discussion keep away from being unprepared to the coercions trying to destroy the civilizations, as well as from the stability.¹⁰

The freedom of expression is the first basic right of a man and to think freely outside of dogmas and to be able to express that thought fearlessly is only way to feeling himself as a human, and to attain to new inventions. Man progresses and attains to truth by

⁹ *Trager v. Dickerson*, ibid, 33.

¹⁰ Mevlüt Uyanık, "İfade Özgürlüğü –İslam Felsefe Tarihi Açısından Bir Sunum"-, in *Teorik ve Pratik Boyutlarıyla İfade Hürriyeti*, Ed: Bekir Berat Özipek, Liberal Düşünce Topluluğu, August 2003, p. 142.

thinking, expressing his thoughts and receiving multilateral thoughts, news and information.¹¹ This freedom, at the same time, is an indispensable value that ensures that the right to receive information and to hear of truth of people to be put into practice.¹² To ensure freedom of expression for thoughts that disturbs the people because of being outside our opinions that are satiated and taken over as a heir or is the product of our own prejudices is important for the developments allowed by new approaches and opened by new horizons, as well as for the freedoms need to be have in a democratic regime. The modern world is grateful its today's place to the discussion of different views rose all the time, influence by these on societies and the agreement come to at the end.¹³

3. VERBAL COMMUNICATION

It is possible to solve the problems we feel and to adapt oneself to social atmosphere as an individual by only communication. Although first remembered thing is the definition of a man with his biological frame when we talk about verbal communication, in the context of freedom of expression, or in technical meaning, it implies the fact to share our acquisition with another, by reshaping all data in our mind, which we gained by senses sometimes as voluntary and sometimes as involuntary. Although the language, namely the capacity to talk, which is the most important instrument for communication, of course, is a power by birth, the words and phrases used to represent the ideas and things are products of our own construction. We think by words and dream by them. We have the capacity of using the language to symbolize both abstract ideas and the concrete things. We have the inventiveness to find out symbols to match them with facts made known by our senses. The words that may be verbal, written or signed, are instruments to express our ideas, to know and introduce us. The words transmits more than their literal meaning, by emotions and images conveyed,¹⁴ and they do more than merely "refer to" reality, also constitute

¹¹ Yılmaz Aliefendioğlu, Bir Temel İnsan Hakkı: Düşünce Özgürlüğü, Yeni Türkiye, Year: 4, No: 22, 1998, p. 813.

¹² Algan Hacaloğlu, "Düşünce ve Düşünceyi İfade Özgürlüğü Demokrasinin Omurgasıdır...", Yeni Türkiye, Year: 4, No: 22, 1998, p. 777.

¹³ Safa Reisoğlu, Uluslararası Boyutlarıyla İnsan Hakları, Beta Basım Dağıtım, İstanbul, 2001. p. 66–7.

¹⁴ Trager v. Dickerson, ibid. 26, 27. "The freedom of expression is necessary, because the words are vague. Individuals and communities cannot come to a decision, unless to discuss on this vagueness. We, only in this way, can come to an agreement by discussing the different comments of the words stems from our preconceptions and experiences, and can transfer the information. Some people, including those in power, do not desire that others use the words openly, because they have a meaning. Whereas the words are only words at most. They cannot break one's leg or window, or cannot conspire against governmental leaders, by

reality.¹⁵ Verbal communication is one of the main elements that secure the development of man who is called a political and social being, and only in this way, we establish a relation with others. “Thoughts and beliefs flourish, change, and gain details, or come together, and sometimes are left. The thesis of freedom of expression as a natural right is based on supposition that this process will operate effectively merely in the presence of communication. Since the thoughts develop and grow up in human’s mind, it will be necessary to accept that reading, writing, speaking, exchanging the opinions with others have a vital importance. The thesis aims to protect the thinking process, not the thought. It is important to remember that language is not only the medium of communication; it is also the medium of thinking. We think not in complete abstractions, but (most commonly) in words. Our ability to think creatively, therefore, is to a great degree dependent upon our language. If communication is stifled, the development of language is restricted. To the extent, therefore, that we curtail the development of linguistic tools, we chill the thought process that utilizes those very same toolsc”.¹⁶

4. THOUGHTS AS EXPRESSION

The term “thought” includes both a process and many various products such as ideas, insights, opinions, beliefs and necessity proposals of the thinking activity. The only product not included is information, because proposals of information are independent being from person who puts forward it –whatever may be the ontological characteristic of this being. Proposals of information, therefore, are verifiable or falsifiable. Whereas opinions and beliefs are personal, and are bounded to those who have them: an opinion or a belief always belongs to someone. Yet, when someone expresses his own opinion, this may be a matter of belief for another one. Similarly, every proposal –which has information or

themselves”. *Trager v. Dickerson*, *ibid*, 32, related by P. Chevigny, *More Speech: Dialogue Rights and Modern Liberty*, Philadelphia: Temple University Press, 1998.

¹⁵ Wojciech Sadurski, *İfade Özgürlüğü ve Sınırları*, *Liberal Düşünce Topluluğu*, Trans: M. Bahattin Seçilmişoğlu, Sept. 2002, p. 178.

¹⁶ Schauer, *ibid*. 78. There is little point into delving deeply into the variety of linguistic communication. If it is communication that is to be protected, then linguistic communication, spoken and written words (generally formed into sentences) comprises the largest proportion of what we are protecting. Language developed from the need to communicate. Language is separate from communication only in the exceptional instance. In the standard case, one is inseparable from the other. There are instances in which the use of language is not communicative, such as the shrill utterance of a single word in order to prevent someone else from being heard. But by and large if we are to protect communication, then we cannot go very far wrong by treating linguistic communication, as at least presumptively within the range of the principle of freedom of expression. It seems useful, therefore, to treat language as a core and move outwards in the analysis to discuss the fringes of communicative methods. Schauer, *ibid*. 136-7.

not, true, false or absurd proposals etc– may be a matter of believing for other persons; namely, others can believe that they are “true”.¹⁷

The activity of “thinking” gains a characteristic of “expression”, when it is shared with the outer world. Otherwise, it is possible to talk about only a freedom of interior sphere. In the Article 9 of the Convention, while it is defined an integrity of belief and philosophical doctrine by the conceptions of freedom of “thought” or “thinking”, “conscience”, “religion” and “belief”, it is mentioned the “opinion” or “view” which has a broader meaning and extension, namely, to have a personal opinion (the manner of thinking and attaining to a value judgement) obtained as a result of being informed, in the Article 10. In the context of freedom of expression, it is defined the dimension of disclosure of thought (revealing) apart from mere “thought” (an integrity of belief and philosophical doctrine).¹⁸

In this frame, it cannot be said that the “freedom of thought” acknowledged on condition that not to share it with others is of a value ethically and legally.¹⁹ Because the functionality of thought is completed by being an instrument that ensures the dialog between men by reflecting to the outer world, not being confined to the interior world of man. Otherwise, it cannot be talk about that a thought which does not disclose to the outer world would benefit men and society. Therefore, when we talk about a thought as an expression or the freedom of thought, we mean the “freedom of expressing a thought” as a logical conclusion and its functionality in democratic societies.²⁰

However, we must accept the difficulty of distinguishing by a clear line the difference of meaning, extension and content in the articles mentioned above. The Commission and the Court appreciate the articles 9 and 10 in connection, as these are within the other. That is, when the thoughts and beliefs mentioned in the Article 9 are revealed, or expressed, the question is appreciated according to the Article 10. For

¹⁷ İoanna Kuçuradi, “Düşünce Özgürlüğü: Nedir Acaba?”, in *Düşünce Özgürlüğü*, Ed: Hayrettin Ökçesiz, (HFSA- Hukuk Felsefesi ve Sosyolojisi Arşivi Yayınları: 3), Afa Yayınları, İstanbul, 1998. p 25.

¹⁸ Şeref A. Gözübüyük and Feyyaz A. Gölcüklü, *Avrupa İnsan Hakları Sözleşmesi ve Uygulaması Avrupa İnsan Hakları Mahkemesi İnceleme ve Yargılama Yöntemi*, Turhan Kitabevi, 4th Press, Ankara, 2003. p. 356.

¹⁹ Hacı Ali Özhan and Bekir Berat Özipek, *Yargıtay Kararlarında İfade Hürriyeti, Liberal Düşünce Topluluğu*, July 2003, p. 4.

²⁰ Ömer Korkmaz, “Düşünce Özgürlüğü ve Sınırları”, a present to Prof. Dr. Seyfullah Edis, Ed: Zafer Gören, Dokuz Eylül Üniversitesi Yayını, İzmir, 2000, p. 145.

instance, on assertions about violation of the Articles 9 and 10 together in the case of prohibiting the commercial advertisements of Scientology Church, a religious institution, the Commission has come to a decision that the very nature of the commercial announcements is a commercial activity that aims a profit, and this cannot be regarded as a matter of religious belief, and therefore is in the outside the scope of Article 9, but can be treated in the level of Article 10 which ensures a more extensive protection. Commission, with this interpretation, has emphasized the necessity to seek directly to solve the disagreement in the level of Article 10, not indirectly by the other articles of the Convention, in the instances of the freedom of expression in question exclusively, because the freedom to hold opinions drawn up in the Article 10 has a wider meaning and content, and therefore, it has a *lex generalis* nature in the face of the freedom drawn up in the Article 9.²¹

5. ACTS AND SYMBOLIC EXPRESSION

The form of expression we prefer for ideas and information is usually verbal communication. However, the individuals sometimes use symbols have non-communicative elements to go beyond the words in the messages they want to communicate to their audiences. For example, people can make a demonstration to protest a governmental determination, and even they may harm to some public properties in these demonstrations, or some people may imprison themselves into a factory, by the same justification. On the other hand, the others may prefer to wear a t-shirt bears the messages of “educational volunteers” by choosing a more silent form, in an activity against to ignorance. Despite the differences in the forms preferred, the object in all is usually to make the message more alive, by attributing further meanings to it. It is likely to communicate more messages than a silent protest to the audiences by the destruction made. On the other hand, it has been more stressed the sensitivity about education, by the t-shirt worn.²²

For this kind of expressions we communicate by making additions to them, the fact that the government would not control the communication effectively as far as the other

²¹ Gözübüyük and Gölcüklü, *ibid*, p. 356–7; *Ezelin v. France*, 11800/85, 26.4.1991, paragraph 35.

²² Schauer, *ibid* 141.

forms of conduct is one of the main elements in arguing for the thesis. In addition, the message tried to communicate by these kinds of expression, such as marching, demonstrations and meetings is emotional rather than being mental, and the expressions concerning opinions in the books, newspapers and magazines and in the other forms of communication that are less obstructive is possible to announce by a more abundant voice in this way. Because in some circumstances, it is frequently necessary, literally or figuratively, to shout to be heard. A method of gaining a listener's attention is by the use offensive words or pictures and to restrict these methods of communication is to restrict the effectiveness of speech and also to restrict the extent to which new or controversial ideas may be brought to the attention of potential listeners.²³

The very question in communicating the expression by action or symbolic expression is the likelihood that to be confronted with some instances which produce severe burdens for public order or more affect it. For example, the address may be noisy or, delivering the pamphlet may bring about to a disorder. The expression is never "pure"; it always has a "plus" (conduct which makes the expression possible), although the forms of the "plus" are varied.²⁴ However, it can be thought as following here: cannot someone communicate his messages, without additional expressions? In fact, the difference between two instances is clear. "The whole point is not that the act or the form of symbolic expression communicated by that person accompanies or carries pure expression; but that it is an expression or rather, it is its equivalent. For instance, when a flag is burned, it is not fact that a fire hazard is created, or that the burnt fabric left on the street reduces the cleanliness of the city, that provoke the calls for prohibition. It is fact that some people are deeply offended and upset by the symbolic meaning of an act, which is the true reason for a prohibition, or at least, for the calls for a lower scrutiny of a prohibition. To be sure, other troubling consequences may occur as well (destruction of property, fire hazard, litter on the

²³ Schauer 133, 274–5; See, also, Susan M. Easton, *The Problem of Pornography, Regulation and The Right to Free Speech*, Routledge, New York 1996, p. 85–90.

²⁴ Sadurski, *ibid* 57. In a Supreme Court of the United States decision about a demonstration, The Court decided that a state could regulate picketing in a manner unaffected by the First Amendment rules because picketing was more than just a communication of ideas. Justice Douglas protested in his dissent: 'where, as here, there is no rioting, no mass picketing, no violence, no disorder, no fisticuffs, and no coercion –indeed *nothing but speech*', then full First Amendment protection should be provided. But, strictly speaking, it is untrue that there was "nothing but speech"; there *was* conduct (picketing). The fact that the conduct was not harmful does not render it any less conduct-like, and does not transform it into being "nothing but speech". Harmful conduct and pure speech do not exhaust all the possibilities; harmless conduct is a third option". Quoted by Sadurski, *ibid* 57, *Teamsters* case, 354 U.S. 296 (The dissent of Justice Douglas).

streets, but they are clearly trivial compared to what constitutes, in the eyes of the critics of legal impunity of flag burning, genuinely troubling aspects of those acts. Otherwise, the intention to suppress the expression by the justifications of the expression-plus imposes substantial costs on public and these costs are produced by collision of this “plus” with the legitimate interests of other people will bring us face to face with passing over the substance that is inseparable component of the expression”.²⁵

ECHR, in the case of *Chorherr*, has scrutinized the expression-plus because of impeding of the applicant who expressed his ideas by showing a banner and delivering pamphlets. In a ceremony of celebration to which 50,000 people participated in the square of town in Vienna, act of applicant to protest the buying fighter planes for the Austrian army has been impeded by the reasons of restricting the participants’ view and may be lead to a chaos, and at the end, has been punished on account of breaking the peace. In the Commission report, pointing out that the protest has realized in a public place, it has been specified that this kind of acts have to be tolerated by authorities in a democratic society, it is possible to reach goal by only taking the banner down, and the reason of mere restricting the participants’ view is not enough to retain the applicant from communicating his message. However, the Court has come to decision that the intervention to applicant’s act aims to prevent potential disorders and therefore, this restriction for public order is necessary in a democratic society.²⁶

In the case of condemning a person who published a pamphlet by the name of another person who is prohibited, and giving a decision that the confiscation of those copies in which the fact that the Jews was burnt during the Second World War is interrogated and intended to justify those horrible acts of Nazis, the Commission has found

²⁵ Sadurski, *ibid.* 61-2. In a decision of the US Supreme Court concerning the conviction of a man for wearing a jacket in a courthouse with the words, “Fuck the draft”. Expressions, Justice Harlan said, serve a dual communicative function, not only to convey ideas capable of relatively precise, detached explication, but also, otherwise inexpressible emotions that emotive function may often be the more important element of the overall message sought to be communicated and it is often not the case that we can forbid particular words without also running a substantial risk of suppressing ideas in the process. Quoted by Sadurski, *ibid* 63-4, *Cohen v. California*, 403 U.S. 15, 26 (1971).

²⁶ *Chorherr v. Austria*, 13308/87, 25.8.1993, paragraphs 9–11, 30–33; See Şeref Ünal, “Avrupa İnsan Hakları Komisyonu ve Mahkemesi’nin İfade Özgürlüğüne İlişkin Kararları ve Bunların Türk Hukukuna Muhtemel Etkileri”, *İnsan Hakları ve Yargı*, (Sorunlar ve Çözümler), T.C. Adalet Bakanlığı Eğitim Dairesi Başkanlığı, June 1998, p. 113.

righteous the intervention aims to guarantee the public order, namely the restriction of the freedom of expression by the local court.²⁷

As seen in the decisions quoted above, the Convention organs adjudicate whether the intervention in question constitutes an opposition to the Convention, by examining the balance between intervention to this freedom and the form, time and place of expression of the opinion and its disagreement to the individual and social legitimate interests, when is used an expression-plus.²⁸

Consequently, there are instances in which it is impossible that some expressions are communicated without use an expression-plus, and it is necessary to protect these pluses in the same level with the expressions associate them. This implies the fact that the autonomy of action is more important than the worth of the substantive consequences of one's action because it is a condition of human self-expression and self-fulfilment.²⁹

6. ARTISTIC EXPRESSIONS

Trying to produce a creation by means of artistic expressions is an effort for both a self-expression and conveying it to third persons by attributing some messages to it. The artistic expression that looks for beautiful and new constitutes "intellectual superstructure" of a society, while the science and technology form the "objective infrastructure" of it.³⁰ There is no any difference between such expressions aim to communicate and the other kinds of communication, and so, it must be regard as necessary to provide the freedom

²⁷ *Engel and others v. Netherlands*, 5100/71; 5101/71; 5102/71, 08.07.1976, paragraphs 94-100.

²⁸ The Turkey Constitutional Court has examined the issue from the viewpoint of public order, in a case in which there is an allegation that the use of an expression-plus constitutes an opposition to the Constitution. Concerning an act of a person who wrote the words "Commando, off with you!" to the wall of a third person's building and his appeal of objection, the Court expressed that initially the people have the right to communicate their opinions and convictions by means of judicial and legal methods such as graffiti to the public roads or to the walls of a third person's building, to be injured to the substantive of that right and freedom if it is subjected to restrictions which extremely makes the use of appropriate to aim of that right difficult or useless, however, cannot be alleged that there is no possibility of expressing and conveying of thoughts and opinions, or is extremely difficult in the instances of considering some conducts as crime and covering with the effective punishments for the purposes to preserve the public order and individual rights. (E. 1980/68, K. 1981/3, D.D. 15.01.1981, AMKD, No: 19, p. 1-13), Reyhan Sunay, *Anayasa Mahkemesi Kararlarında İfade Hürriyeti, Liberal Düşünce Topluluğu*, April 2003, p. 138-9.

²⁹ Sadurski, *ibid.* 16.

³⁰ Ünal Emiroğlu, "San'at ve San'atçının Yazgısında İnsan Haklarının İzdüşümü", *Journal of Yeni Türkiye*, Number: 22, p 829.

which is ensured for the communication to these expressions as well, for establishing a strong principle of freedom of expression.

Although the artistic expressions or expressions in the field of art are not specifically and openly mentioned in the Convention system, the Court has shown by its decisions that the expression meant in the Article 10 includes, whatever may be, social, political or legal and so on, the all kind of statement of opinion, and the artistic expression is within the same protection scope.³¹

The ECHR, in a case brought before it by confiscation of some pictures that describe roughly the sexual intercourse between a man and an animal by Müller, citizen of Switzerland and his nine friends, and punishing of them, declared initially that the expression, whatever its form may be, would be protected in the Convention system and the artistic expressions which ensures the exchange of cultural, political and social information and ideas are within this scope of protection as well. The Court has continued as following: the artists who exercise this right are under obligation and responsibility, therefore are not exempted from the reasons of restriction, in the concrete fact, the applicants exercised the freedom of expression by presenting their creations to public. However, the Court decided that, as the message wanted to communicate by the pictures was not understood, if it is taken into consideration the nature of people lived in Fribourg Canton where the pictures are exhibited and the exhibition was open to all age groups, the intervention applied in the form of penalty and the confiscation is necessary in a democratic society and therefore that the freedom of expression was not violated.³² The Court, in another decision, has emphasized that it is ensured the exchange of cultural, political and social information and the all kind of thoughts by means of the freedom of expression, and those who creates, performs, delivers and exhibits the works of art also do

³¹ *Müller and others v. Switzerland*, 10737/84, 24.5.1988, paragraphs 27, 28; *Casado Coca v. Spain*, 15450/89, 24.02.1994, paragraph 35. See, also Sadurski, *ibid.* 58, 59. The United States Court of Appeals for the Seventh Circuit declared nude dancing performed as entertainment to be protected under First Amendment. The Court found that the theme communicated by the dancers to the audience was one of the eroticism and sensuality, and refused to draw the line between the communications of ideas and the communication of emotions, or between “high” art and “low” entertainment: nude barroom dancing, though lacking in artistic value, and expressing ideas and emotions different from those of more mainstream dances, communicates them, to some degree, nonetheless. (*Miller v. City of South Bend*, 904 F. 2d 1081 7th Cir. 1990).

³² *Müller and others v. Switzerland*, 10737/84, 24.5.1988, paragraphs 27, 28.

the same job, and therefore the artistic expressions have a function that has a vital importance and the duty of state is not to interfere with them in any way.³³

7. COMMERCIAL EXPRESSIONS

The commercial expressions, in general, are also considered within the scope of freedom of expression. However, the characteristic to be point out is that the main object of this sort of expressions is rather to market a product than a communication or expressing information or an idea, in addition, that they aim at the interests of an individual or a company, rather than a general interest. Therefore, the commercial expressions are obtained less protection than the other forms of expressions, and many governments subject them to more supervision than the others. Despite their nature and although there is no a sanction such as prohibition of the advertisements entirely, it should be specify that the false or deceptive advertisement or the advertisement of the illegal products and services is not within the scope of protection.³⁴

The Convention organs specified that the commercial expressions (the campaigns of advertisement and promotion) are within the scope of the freedom of expression drawn up by the Article 10, by their decisions.³⁵ For instance, the Court did not deem necessary to make an abstract principle decision for the case of *Barthold* concerning expressions in pursuit of a commercial object, and decided to applicability of the Article 10 in this concrete fact, by directly examining the content of substantive expression, and by emphasizing that the various elements existing and one within the other constitute a wholeness, and a communication of “information” concerning a public interest and an “opinion” exist in the essence of this integrity.³⁶ In the concrete fact, briefly, a newspaper treated the event of therapy of a cat by the applicant who is a veterinary, out of working hours, and gave place to the name of applicant, his photograph and the name of clinic where he officiates as a director, in an article. About this article, the association of struggling against unfair competition sued Dr. Barthold in Hamburg Law Court, and

³³ *Karataş v. Turkey*, 23168/94, 08.07.1999, paragraph 49.

³⁴ *Trager v. Dickerson*, ibid 168.

³⁵ Gözübüyük and Gölcüklü, ibid 359, M. Semih Gemalmaz, “İnsan Hakları Hukuku Açısından İfade Özgürlüğü”, Present to Prof. Dr. Sahir Erman, İstanbul Üniversitesi Hukuk Fakültesi Eğitim, Öğretim ve Yardımlaşma Vakfı, Pub. No: 8, p. 308.

³⁶ *Bartold v. Germany*, 8734/79, 25.03.1988, p. 42.

asserted that the article was a nature of advertisement contrary to the professional rules of veterinary medicine and therefore it violated the Act of Unfair Competition. Hamburg Court of Appeals, being the authority of ultimate decision, agreed to the claim of that association, and warned the applicant not to repeat the expression in question in the big newspapers otherwise he would be fined. As for the Court (ECHR), it specified that the article would have an effect on the announcement of the name of applicant's own clinic, however this effect was secondary in respect of to be heard of issue by the vast crowds, in the exclusive circumstances of the case.³⁷ The Court decided that the intervention in question violated the Convention, because such strict approaches about advertisement and publicity to those who are belonging to a self-employment have a risk of discourage these people from participating to public discussions about the issues that influence the social life, and it emphasized, in this concrete fact, that it was not justly balanced the two conflicting interests for the aim pursued by restriction.³⁸

The Court, in another case, treated the intervention that is in the form of prohibition to the activity of a publication company within the scope of Article 10, due to the expressions prohibited to reiterate are commercial information, although they aim at a narrow commercial milieu. In the concrete fact, a German publication company has criticized the activity of another company sells its products by post, namely by delivering letters to its customers in limited number. The Court decided that the information in commercial nature could not be excluded from the field of first paragraph of the Article 10, because this judgement could not be restricted to only some information, ideas or forms of expression, the restriction by Germany Federal Court in the concrete fact did not go beyond the borders of the judicial discretion left to local authorities, concerning some formalities, conditions, restrictions or sanctions, in the frame of applications of second paragraph of the Article 10.³⁹

³⁷ In the content of article subject to the case, it was narrated that, on becoming ill of a cat named Shalen at night, although the possessors appealed to two different veterinary and an emergency service they failed to cure it, but at the end of further investigations, Dr. Barthold helped to the possessors by treating the cat at night. The journalist who has learned the event narrated it in his article, and aimed to call attention to a social problem by his column titled "How did Shalen succeeded in surviving, for all that", in which an interview was summarized by Dr. Barthold, and he wrote that many people have been come face to face with similar conditions and run up against difficulties in Hamburg where the event happened, therefore there must be an emergency service that works regularly out of working hours. *Barthold v. Germany*, 8734/79, 25.02.1985, paragraphs 10, 11.

³⁸ *Ibid*, paragraph 58.

³⁹ *Markt Intern Verlag GmbH and Klaus Beerman v. Germany*, 10572/83, 20.11.1989, paragraph 40.

The Court treated the issue in the context of commercial expressions, in a case on advertising of a lawyer to the newspapers and the decision by Constitutional Court of Spain that the fine by bar by the reason of opposition to prohibition of advertisement did not violated the right of information. The Court firstly emphasized that the Article 10 is not only confined to particular kind of information, thoughts or expressions in the form of political or artistic expression, the advertisements are within this scope as well. The Court, in addition, stressed that the restrictions within the scope of advertising need a more critical attention, the rules about the commercial advertisement of professional services of lawyers may be different from a country to the other, these rules exhibits a detente in majority of contracting states, due to the social development and increasing of the role of media, but there are various regulations and approaches in some contracting states, and therefore the problem became more complicated, as the characteristics of the concrete fact. The Court, in this context, specified that it is necessary to leave a judicial discretion to the national authorities in such issues as especially complex and ambiguous unfair competition, this is exactly applicable to the field of advertising; and it, evaluating the intervention to the freedom of applicant in the light of criterion of necessity in a democratic society, decided that the national supervision agencies and the local courts are more advantageous than an international court in terms of evaluating the requirements of the operation of the justice system properly, prestige of a profession, right to be informed concerning legal aid to all and whether a lawyer would advertise his office, and therefore the intervention is not disproportional with the aim pursued.⁴⁰

⁴⁰ *Casado Coca v. Spain*, 15450/89, 24.02.1994, paragraphs 35, 55, 56, 57.

CHAPTER 2

JUSTIFICATIONS OF THE FREEDOM OF EXPRESSION

1. THE ARGUMENT OF SEARCH FOR TRUTH

The main assertion in this argument is the plea of being free of expression in order to find out the “truth”, that is the ultimate object of humankind, in the course of all history. The truth is valuable and must be defended, because of having qualifications such as good, true, beautiful and wisdom. However, it must be kept in view that the each individual and each age has own true.

Undoubtedly, the most comprehensive theory concerning this argument was presented by John Stuart Mill (1806-73). This justification developed in the second chapter of Mill’s “On Liberty” was subsequently transformed in American First Amendment jurisprudence by the Supreme Court into the “marketplace of ideas”.⁴¹ This argument says that the open discussion, free exchange of ideas, freedom of enquiry, and freedom to criticize are necessary conditions for the effective functioning of the process of searching for truth and without this freedom, we are to be destined to stumble blindly between truth and falsehood. With this freedom, we can identify truth and reject falsity in any area of human enquiry.⁴²

Mill has expressed his determination by the following excellent sentences: “If all mankind minus one, were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind. Silencing the expression of an opinion is that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is

⁴¹ Wojciech Sadurski, *İfade Özgürlüğü ve Sınırları*, Liberal Düşünce Topluluğu, Trans: M. Bahattin Seçilmişoğlu, September 2002, p. 3.

⁴² Frederick Schauer, *İfade Özgürlüğü Felsefi Bir İnceleme*, Liberal Düşünce Topluluğu, 2002, p 21.

right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error”.⁴³

That the value of expression is in the search for truth is a conventional view of Enlightenment, which is depicted by Milton before Mill, and lastly by Judge Oliver Wendell Holmes in the 20th century. This is a broad concept includes the philosophical, political, religious and social facts. There was Milton’s search for truth in the core of his arguments against authorization, in his *Areopagitica* (1644 and 1971), he wrote 350 years ago: “let truth and false compete against each other, those who have the truth will leave the false on the hook, in an open and free confrontation.”⁴⁴

The validity of this argument turns initially on the legitimacy and importance of its goal. Only if truth is worth pursuing can a method of identifying truth claim recognition as a principle of political theory. The argument from truth is premised on the initial assumption that the search for truth is a desirable aim.⁴⁵ There is no reason to think whether the truth is valuable. For Plato, Aristotle and Mill, truth is universally a desirable one.⁴⁶

Well, does truth, when articulated, make itself known? Does truth prevail when placed side-by-side with falsity? Does knowledge triumph over ignorance? Are unsound policies rejected when sound policies are presented? The question is whether the theory accurately portrays reality.⁴⁷ The affirmative answers to these questions, in fact, will make the theory conflicting in itself. The aim of this argument is not the assertion that the free speech would always lead to truth, rather to manifest a comprehensive methodology concern to achieve truth. The argument, by words of Schauer, defines a rational thinking process. Listening to other positions, suspending judgement (if possible) until opposing views are expressed, and considering the possibility that we might be wrong. Rationality in this sense may not lead to

⁴³ John Stuart Mill, *Hürriyet Üstüne, Liberal Düşünce Topluluğu*, Trans: Mehmet Osman Dostel, July 2003, p. 57.

⁴⁴ *Trager v. Dickerson*, ibid 118–9.

⁴⁵ Schauer, ibid 24.

⁴⁶ John M. Finnis, “Scepticism, Self-refutation, and the Good of Truth”, *Law, Morality, and Society: Essays in Honor of H. L. A. Hart, Hacker, P. M. S and Raz, J.* (ed), Oxford, 1997, p.247-67, quoted by T. Ayhan Beydoğan, *Avrupa İnsan Hakları Sözleşmesi Işığında Türk Hukukunda Siyasi İfade Hürriyeti, Liberal Düşünce Topluluğu*, August 2003, p. 34.

⁴⁷ Schauer, ibid 36-7

increased knowledge, and there may at times be better methods of searching for truth. However, all academic disciplines presuppose that this type of rationality has value, and it would be difficult to prove this presupposition unwarranted. In such rational thinking, maximum freedom of discussion is a desirable goal. In systems of scientific and academic discourse, the argument from truth has substantial validity.

1.1. FREE EXPRESSION (FREEDOM OF DISCUSSION)

Mill, in this context, focuses our attention on the possibility that truth may lie in the suppressed opinion. If this is so, then a general policy of prohibiting the expressions of opinions that are regarded as false extinguishes some knowledge and perpetuates some error.⁴⁸ By Mill's words, "if though any opinion is convicted to silence, this thought may be true, although the things we certainly know. To deny this is to suppose that we are infallible".

However, we should stress that ensuring of a "free" medium and conditions is necessary for appearing of the truth, as an essential element, according to this argument. The citizens only can realize the discovery of truth, if they have the means for necessary this searching, such as education, access to information and open, unimpeded, discussion forums. In other words, to discover the truth needs an open and serious democratic system that is not influenced by the power, money and authority and in which everyone equally participates, and a freedom of discussion.⁴⁹ The process starts with the participant's suggestions in the debate in which each one is independent to suggest and to criticize and nobody coerces the others to adopt or to deny particular suggestions, and arguers discuss the suggestions, and at the end, it is attained to the "true" suggestions, one of them is consented only due to "the power of better" and obtained by reason.⁵⁰

Mill, starting from the fact that no one is far from false and nobody monopolize the truth, has said that the most reliable means of correcting one's false is debate and experience, and emphasized that the false thoughts and practices would gradually surrender

⁴⁸ Schauer, p 34.

⁴⁹ *Trager v. Dickerson*, ibid 37, quoted by Sunstein, 1993, p. 19.

⁵⁰ Iris Marion Young, *İletişim ve Öteki: Müzakereci Demokrasinin Ötesinde*, Ed.: Seyla Benhabib, in *Demokrasi ve Farklılık*, Trans.: Zeynep Gürata and Cem Gürsel, *Demokrasi Kitaplığı*, First Edition, 1999, p. 177-8.

to the fact and evidence, pointing out, however the fact and evidence need to spread out before human will to be able to influence the mind. Mill has continued as following: a fact able to tell everything by itself without explaining its meaning is rare. Then, reasoning of man, since its all power and value depends on its ability to correct the false, is to be trusted in merely by consistently allowing it to correct false. It is necessary that the individual is open to criticism by others concerning his thoughts and conducts, and is ready and willing to listen to everything can be told to him, to profit from them as possible as and to accept to be fallible. He needs to understand that the approaching to know the all of a matter is only through the listening to those who have different views about that matter and they could express their own various points of view concerning that matter to him. The habit to contrast own thought with that of others and correct and complete it, is a unique sound base to be trusted and to be rested on, in putting it into practice. The man who could accomplish this can learn everything to be told him at least those can be told clearly, and can take his position to those who all argue against him. He knows that he had asked for the objections and difficulties, instead of escaping from them, and that had not veiled to any light to be thrown on his thought. Then, such a man has the right to think that his own reasoning is better than that of any person or crowd not to be subjected to such operation.⁵¹

Mill, secondly, starting from the premise that the opinion we suppress on account of its supposed falsity may turn out to be true, or that the suppressed falsehood may contain a “portion of truth”, argued that the elimination of suppression would consequently increase the likelihood of exchanging error for truth, in his argument the search for truth who employed as the keystone of his plea for liberty of thought and discussion.⁵² If though an opinion silenced is false, this may contain a portion of truth. Indeed, it has been confirmed many times. That is, the thought prevailing or shared by a majority in a matter, can be rarely whole of truth. Then, completion of truth is possible by only collision of opposing thoughts.

Milton, Locke, Mill and Holmes, all of them have said that the free thought was the entry to truth. The more an issue is discussed, the more possibility of understanding of truth. Holmes’s theory of marketplace of ideas was not about that recognizing and defining

⁵¹ Mill, *ibid.* 61-2.

⁵² Schauer, *ibid.* 21-2.

of what true is. On the contrary, it was to secure that the searching for truth was an open one. Continuing or changing of existing opinions was not as important as the guarantee of process of ability of expressing the beliefs and thoughts openly.⁵³ Man will think, will be able to tell his thought and to listen to the other thoughts and so will reach to true and truth.⁵⁴

Mill lastly said that if though the thought supposed as deniable was not only true, but really was the whole of the truth, yet should be endured to be objected strongly and seriously to that thought. Even this certainly should be done. Otherwise, many of those who think it as an invariable truth believe in it in a manner of prejudice, because they do not know the inside of that thought. The result is the risk of the truth we have to lose its meaning, strength and the influence on our character and behaviour. We call this result as a dogma. Dogma is an instance of merely apparent embracing, and it occupies needless, yet suppresses any real and hearty opinion to disclose by reason and personal experience.⁵⁵

The relationship between discussion and truth is a product of the uncertain status of our beliefs and the fallibility of the human mind. Because we cannot be sure of any our beliefs, it is possible that any given belief will be erroneous, no matter how firmly we may be convinced of its certainty. To hold otherwise is to assume infallibility. Because any belief might be erroneous, the suppression of the contrary belief entails the risk of upholding the erroneous belief and suppressing the true belief. The risk is magnified in practice because most beliefs are neither wholly true nor wholly false, containing instead the both truth and falsity. Only by allowing expression of the opinion we think as false, we allow for the possibility that that opinion may be true. Allowing contrary opinions to be expressed is the only way to give ourselves the opportunity to reject the received opinion when that opinion is false. A policy of suppressing false beliefs will in fact suppress some true ones, and therefore a policy of suppression impedes the search for truth.⁵⁶

⁵³ Mill, *ibid* 107-8.

⁵⁴ Yılmaz Aliefendioğlu, *Bir Temel İnsan Hakkı: Düşünce Özgürlüğü*, Yeni Türkiye, Year: 4, Number: 22, 1998, p 813.

⁵⁵ Mill, *ibid* 107-8.

⁵⁶ Schauer *ibid* 32

1.2. JUDICIAL APPROACH (THE THEORY OF MARKETPLACE OF IDEAS)

This theory is the reflection of interpretation of the judgement taken part in the First Amendment of the American Constitution that “Congress... cannot enact a law that limits the freedom of expression” to the doctrinal decisions of the Supreme Court. The theory firstly has taken place in the famous dissent of Justice Oliver Wendell Holmes that “the best test of truth is the power of an opinion to cause to accept itself in the market competition”.⁵⁷ For this theory called usually “marketplace of ideas”, people will exhibit their opinions in the marketplace, all these opinions will freely be expressed in this market uncontrolled and open to all, at the end, the “invisible hand” of Adam Smith will make feel itself over again and therefore the truth will appear. In fact, what makes this theory more significant is that it determines the position of state before citizen with regard to the freedom of expression, in the liberal democracies. In this way, the truth would be subjected to a sounder test than an evaluation of any individual or the state.

The Supreme Court has made numerous decisions about the freedom of expressions following the First Amendment that was performed before 200 years of Holmes’s dissent. However, in the years in which The United States joined to the First World War, the anti-war activists has accelerated their activities, in the consequence that Federal Government has put severe restrictions to freedom of expressions into practice,⁵⁸ and prosecution over 2000 have been started concerning activities in question during the war, and near half of them was brought before the Supreme Court. In a case that is defined as a milestone, Abrams and his four Russian friends had delivered a circular supporter of Russia. In the Supreme Court, while the majority of judges applied the test of inclination and intention to evil to the case, Judge Louis Brandies and Holmes, opposing to decision, emphasized that the need of a more refined and democratic doctrine of the “clear and present danger” test. Holmes, in his dissent, wrote that “now, nobody can claim that a foolish declaration

⁵⁷ *Abrams v. United States*, 250 US 616, 630 (1919) (The dissent of Justice Holmes). Zühtü Arslan, ABD Yüksek Mahkemesi Kararlarında İfade Özgürlüğü, Trans.: İrfan Neziroğlu, Liberal Düşünce Topluluğu, December 2003, p 57-66.

⁵⁸ Paul L. Murphy, *The Meaning of Freedom of Speech*, Greenwood Publishing, Westport, 1972, p 4, 21–22.

published by an unknown person would create an immediate danger”, and expressed that the words cannot be punished unless the public order is subjected to a present danger”.⁵⁹

Thenceforth, this theory appeared in both judicial and non-judicial, various expressions of justices like Brandies, Frankfurter and Hand who opposed together Justice Holmes as well. According to the theory of marketplace of ideas, if the government ceases from regulating of expression, the citizens will obtain the opportunity of hearing the all opinions, good or bad and relevant or irrelevant, and so they will determine by themselves, which is good and beneficial.⁶⁰ Frankfurter observed, “The history of civilization is in considerable measure the displacement of error which once held sway as official truth by beliefs which in turn have yielded to other truths. Therefore the liberty of man to search for truth ought not to be fettered, no matter what orthodoxies he may challenge”.⁶¹ In the decision of *Thomas v. Collins*, in 1945, Justice Jackson made a significant contribution to theory, saying, “It cannot be the duty or right of the state to protect the people to harmful opinions. The main purpose of the First Amendment is to prevent the public agencies to attempt to protect people’s mind by regulating the press, expressions and beliefs”.⁶²

2. INDIVIDUAL FREEDOM (SELF-FULFILMENT)

To treat the thesis of freedom of expression and in this context the individual freedom as independent from liberal discourse will bring us face to face with the fact to make the argument ineffective. Liberalism, by the values such as the stress made on individual autonomy before the state and the majority, and the main argument of the difference and diversity are the indispensable conditions of a modern society in its core, make this thesis an expounding of liberal doctrine.

This stress made on the individual as a value, undoubted, is one of the most significant arguments in this century. However, before this stress, every age has also taken measures concerning the both physical and moral integrity of man, in proportion as its civil development, and has taken these values to foreground. To be sure, in the modern societies

⁵⁹ *Trager v. Dickerson*, ibid 73–4.

⁶⁰ *Trager v. Dickerson*, ibid 118-19.

⁶¹ Schauer, ibid 22.

⁶² *Thomas v. Collins*, 323 US 116 (1945).

in which the democracy is considered as an indispensable value, the individual is henceforth a unique value; and in these societies in which the diversity is continuously stressed, characteristic of the public opinion to be open to all and maintaining of this is the only criterion of regarding the state as healthy, which is defined as a living organism.

Undoubtedly, when we talk about the individual autonomy and self-fulfilment of individual, for the realizing of this consequence, we considered the individual as an autonomous being at the very beginning. When we talk about autonomy, we understand a condition in which the individual feel himself as independent in his decisions, opinions, expressing values he believes and concerning how he would act. Human dignity or human personality may be perceived as inherently personal. It is mine, intrinsically and morally beyond the force of government coercion. Because thought may be inherently as well as morally beyond the reach of state power, it is plausible to suggest that the province of thought and individual decision-making is an area, or the only area, in which the individual is truly autonomous.⁶³ In addition, a good preserved autonomy of private life assures the creating a public autonomy; similarly proper use of the public autonomy guarantees rise of an autonomy of private life.⁶⁴

Human obtains the possibility of self-expression by communication and this defines a process in which the exchange of information, opinions and ideas with the rest of society who are in fact us. The process in which our identity is formed, and in consequence, our capacities become distinguishable, is impossible without open communication with our fellow human beings.⁶⁵ In the conditions that the communication/expression is not to be allowed or being restrictions by putting obstacles, the development of personality of individual is being limited. Human beings cannot develop intellectually and morally unless to be free for formulating their beliefs, political approaches and their responses to the other's criticisms.⁶⁶

⁶³ Schauer, *ibid.* 99.

⁶⁴ Jean L. Cohen, "Demokrasi, Farklılık ve Özel Yaşam Hakkı", Ed.: Seyla Benhabib, in *Demokrasi ve Farklılık*, Trans.: Zeynep Gürata and Cem Gürsel, *Demokrasi Kitaplığı*, First Edition, 1999, p. 268 quotation from Jürgen Habermas, *Paradigms of Law*.

⁶⁵ Sadurski, *ibid.* 17.

⁶⁶ T. Ayhan Beydoğan, *Avrupa İnsan Hakları Sözleşmesi Işığında Türk Hukukunda Siyasi İfade Hürriyeti*, *Liberal Düşünce Topluluğu*, August 2003, p 44.

“As human beings, we may desire to think about the possibilities presented by life to us, and to imagine the past and future, and in addition, to express openly these possibilities in various forms such as verbal communication and acts;”⁶⁷ and only in this way we can realize ontological potentials and ourselves. This freedom, at the same time, is either mainstay or supporter of all the other humane values and one of the basic moral values of self-fulfilment. “Personality” comes into existence only by the self-expression, and free and autonomous personality is possible merely by the free expression.⁶⁸

Mill qualifies the individual freedom as the only key of happiness and a necessary instrument of self-fulfilment. An individual will make a choice in every fact he will confront, using his ability of reasoning and even his moral inclinations, in the process of being himself, and only in this way, will gain the quality to be an individual. Otherwise, one who does anything because it is a custom is not considered as a choice of him. That person, in this situation, cannot develop his any respect to choose the best and to want it. Capacities is not be used by doing anything only on account of others want it, or by believing anything mere as it is others’ belief. If a person agrees to an opinion, although it is not satisfying, his power of reasoning can draws back, let alone progress. Because, if the things that brings an individual into action do not stem from his own thoughts and desires, they will cause to grow lazy him, instead to make his emotions and thoughts active and energetic. This means that we would come face to face with the fact of a monotonous society that consists of individuals who has no characteristic anything but mimicking entirely. Mill continued expressing that just as we meet the differences of thought as normal, starting from the fact that men cannot reach to absolute maturity, so we must consider as usual the presence of different manners of life and as a right. It should be granted freedom to different manners of life, and be supplied to the individual opportunity for acquiring a life experience as he wishes, provided that he does not do harm to others. Briefly, the individual, first, should able to said, “I am present” in the issues concerning him. If a person is forced to act in the direction of desires of others, not his will or

⁶⁷ *Trager v. Dickerson*, ibid. 117.

⁶⁸ Mustafa Erdoğan, “Demokratik Toplumda İfade Özgürlüğü: Özgürlükçü Bir Perspektif”, in *Teorik ve Pratik Boyutlarıyla İfade Hürriyeti*, Ed: Bekir Berat Özipek, Liberal Düşünce Topluluğu, August, 2003, p. 41.

capacities need, the most fundamental dynamic of development of both individual and social is excluded.⁶⁹

According to this argument that is also called the argument form equality and dignity, when the state suppresses a person's ideas, or when the state suppresses that person's expression of those ideas, the state is insulting that person and affronting his dignity. When we suppress a person's ideas, we are effect saying that although he may think his ideas to be as good as (or better than) the next person's, society feels otherwise. By the act of suppression, society and its government are saying his thoughts and beliefs are not as good as those of most other people. Society is saying that his ideas, and by implication he himself, are not worthy. He is not deserving of treatment as an equal member of society.⁷⁰

Lastly, we should emphasize that it can be talked about a free individual in only a society in which the difference/diversity was guaranteed, about this argument. A developed society is only possible by carving the individuality. A development cannot be expected from a society in which the all individuals are same of each other.⁷¹ To construct a society in which everyone hears each other, but they do not discuss, any noise of disagreement is not heard, men are sterilized and pasteurized, and being other is abolished is a biggest crime to be committed against humanity.⁷² On the contrary, the consequence that the presence of individuals who can be himself more and attaining to a higher happiness would be possible in a society in which the all thoughts, beliefs, opinions and norms are "equivalent" or identical as value, and the equal respect to all cultures and the fact that "the value of being dissimilar" or "the right to be dissimilar" is encouraged is operating.⁷³

3. DEMOCRACY AND SELF-GOVERNMENT

It is obvious that a general defining of democracy term is difficult. Because this concept is may perceived as different by each man, and so it may implies different

⁶⁹ Mill, *ibid*, 114-117.

⁷⁰ Schauer, *ibid*, 90-2.

⁷¹ Mill, *ibid*, 113.

⁷² Sami Selçuk, *Zorba Devletten Hukukun Üstünlüğüne*, Yeni Türkiye Yayınları, 4th press, 1999, p. 30-1.

⁷³ İoanna Kuçuradi, "Düşünce Özgürlüğü: Nedir Acaba?", in *Düşünce Özgürlüğü*, Ed: Hayrettin Ökçesiz, (HFSA- Hukuk Felsefesi ve Sosyolojisi Arşivi Yayınları: 3), Afa Yayınları, İstanbul, 1998, p. 18.

meanings as the number of all men in the world.⁷⁴ To say that it gained perhaps the richest content in this century will not be an exaggeration. Especially democracy as a form of government, which is increasingly becoming global by promoting of most country to it in the process of ending by collapsing of the block that is called communist system at the end of last century is appeared before us as a notion has a richer content gaining new meanings and definitions, in consequence of more numerous people showed themselves with new demands. However, a point needs to express, as a consequence of the process mentioned above is also that this concept “now acquired rather emotional strength, as lost all genuine meanings up to now it has”. It is possible to define the democracy in a narrower sense, as a system that regards that the original political power belongs to people, the people as an organ that really controls the procedures of government directly or through the independent and elected representatives.⁷⁵

In a different approach, it is possible to define the democracy, as a process that creates a public opinion (citizens who came together to talk about collective problems, aims, ideals and acts). This process is directed to discuss the collective interest mentioned, rather than everyone competes with each other for self-interest. Citizens change their choices to public aims and reason together about nature of these aims and the instruments to realize them, instead of reasoning from the individual viewpoint that aims to maximize the self-interest, by a public debate. At the end of this process that is a free and open dialogue, “the power of better argument” appears and causes to adopt itself to others, through the assertions and arguments are subjected to criticism.⁷⁶

The views that justify the freedom of expression in social plane are usually based on the fact of self-government. Men should discuss the political issues in the open and

⁷⁴ Despite of this impasse of definition, it is possible to determine that the democracy is a method of self-government of a people living all together, its basic principles are individual freedom, the free elections that ensure operating of the system of attorney and represent, the pluralism that means the suffrage to everyone and the government based on majority, and lastly the freedom of opposition. H. Tahsin Fendođlu, “Demokrasi, Demokratikleşme Dalgaları ve Çıkış Garantileri”, a present to Prof. Dr. Seyfullah Edis, Ed: Zafer Gören, Dokuz Eylül Üniversitesi Yayını, İzmir 2000, p. 80-1. See also, Meltem Canikliođlu, “Çađdaş Demokrasi ve Çađdaş Devlet Üzerine Düşünceler”, a present to Prof. Dr. Seyfullah Edis, Ed: Zafer Gören, Dokuz Eylül Üniversitesi Yayını, İzmir 2000, p. 99-103.

⁷⁵ T. Ayhan Beydođan, *Demokrasilerde İfade Hürriyeti*, Yeni Türkiye, Year: 4, No: 22, 1998, p. 821-8.

⁷⁶ Iris Marion Young, *İletişim ve Öteki: Müzakereci Demokrasinin Ötesinde*, in *Demokrasi ve Farklılık*, Ed: Seyla Benhabib, Trans: Zeynep Gürata and Cem Gürsel, *Demokrasi Kitaplığı*, 1st press, 1999, p. 176.

democratic societies.⁷⁷ They should freely criticize the governments and authorities that are elected or non-elected by a procedure based on an open discussion.⁷⁸ The public criticism (criticizing openly the public authorities), within this frame, is the foundation stone of democracy. A democratic public debate is only possible by the free criticism and legitimate opposition.⁷⁹ If there is no criticism, there is no a legitimate opposition, and vice versa. The only legitimate way to determine who right is, and what true is in a liberal democratic society is an open-ended public debate based on controlling of everyone each other by means of criticism and questioning. Criticism is possible in a place where all sort of expression is free; and it is no possible to find out the “common good” where criticism and free expression do not exist. In fact, there is no mean to talk about an issue called “common good” in such a milieu.⁸⁰ For the ECHR, one of the main characteristics of democracy lies in allowing of governments to solve the problems encountered by dialog, without appealing to violence. Democracy is an existing by only freedom of expression. Under this relationship, a political formation must not fear by virtue of its want to discuss openly the destiny of a part of nationals of the state and to participate in political life for the purpose to discover solutions that would satisfy the all related persons, in a proper respect to democratic rules.⁸¹

The argument from democracy, as its name indicates, requires for its deployment the *a priori* acceptance of democratic principles as proper guidelines for the organization and governance of the state. To the extent that the argument from truth is valid, its validity

⁷⁷ Decisions of Germany Constitutional Court say that the freedom of expression “has a constructor nature for a liberal-democratic state order, because it makes the struggle possible between the different opinions, and this is an element keeps the democracy alive”. Klaus Finkelburg, “Demokraside İfade Özgürlüğü”, Trans: Nihat Ünler, in *Düşünce Özgürlüğü*, Ed: Hayrettin Ökçesiz, (HFSA- Hukuk Felsefesi ve Sosyolojisi Arşivi Yayınları: 3), Afa Yayınları, İstanbul, 1998. p. 200. Again, Germany Constitutional Court emphasized that the freedom to express opinions is a constituent/indispensable element of a liberal-pluralist democratic order, because it makes the “continuous mentally settling accounts” and “struggle of thoughts/discussion” which are the vital elements of this order possible. Sami Selçuk, “Düşün Özgürlüğü”, in *Düşünce Özgürlüğü*, Ed: Hayrettin Ökçesiz, (HFSA-Hukuk Felsefesi ve Sosyolojisi Arşivi Yayınları: 3), Afa Yayınları, İstanbul, 1998, p. 303-4.

⁷⁸ *Trager v. Dickerson*, ibid 8.

⁷⁹ Individuals have no always a necessity to adopt the political system and to think suitable to constitutional order, in the democracies. The duty of individual as a citizen is to act appropriate to the constitutional and legal rules. The freedom of expression is not restricted except the particular conditions in the modern democracies due to its qualifications and properties. Algan Hacaloğlu, *Düşünce ve Düşünceyi İfade Özgürlüğü Demokrasinin Omurgasıdır...*, *Yeni Türkiye*, Year: 4, No: 22, 1998, p. 776-9.

⁸⁰ Mustafa Erdoğan, “Demokratik Toplumda İfade Özgürlüğü: Özgürlükçü Bir Perspektif”, in *Teorik ve Pratik Boyutlarıyla İfade Hürriyeti*, Ed: Bekir Berat Özipek, *Liberal Düşünce Topluluğu*, August 2003, p 37-47.

⁸¹ *Türkiye Birleşik Komünist Partisi v. Turkey*, 19392/92, 03.01.1998, paragraphs 57, 58.

applies to any form social organization. But the argument from democracy is wholly inapplicable to autocracies, oligarchies, or theocracies.⁸² Because unlike the despotic governments, democratic system is founded on principle that the national will become manifest without obstruction by expressing of the thoughts and opinions freely. A society cannot be qualified as a democracy, if that people cannot produce any idea on the issues interested in its life and future, and express them. Democracy is not a regime in which only the representatives can have the right to express a thought or speech. The people may influence the process of decision-making and contribute to it concerning issues interested in its own future by expressing its opinions, in today's modern, pluralist and participatory democracies.⁸³ Indeed, the emphasis on the rights of the listener rather than on the rights of the speaker is one of the most important contributions of the argument from democracy.⁸⁴

The argument from democracy consists of two elements that support the principle of freedom of expression. The first is that the sovereign or the people are wholly independent in use of these powers. The voter must freely form his opinion before free elections.⁸⁵ At this point, it can be seen that the freedom of expression is an element of democratic will. If there is no a freedom of expression or a constitutional order is deprived of freedom of expression, cannot be given an elective decision. Therefore, freely to be able to form an opinion in a matter, to be able to speak, to be able to discuss and to be able to inform are the indispensable components of a democratic state order. Individuals who are left uninformed and are kept back from the ability of hearing the various opinions, voice of critics and calls of opposition are far from giving an elective decision, they vote in a particular direction, merely due to not to know better.⁸⁶ In other words, there is a necessity of making all relevant information available to the sovereign electorate, so that they, in the exercise of their sovereign powers, can decide which proposals to accept and which proposals to reject. Because the people are the ones who make the decisions, the people are the ones who need to receive all material information before making any decision.

⁸² Schauer, *ibid*, 51.

⁸³ Şeref Ünal, *Avrupa İnsan Hakları Sözleşmesi*, TBMM Yayınları, Ankara 1995, p 242.

⁸⁴ Schauer, *ibid*, 61.

⁸⁵ The free political elections are the core of concept of democracy. One of the functions of them is to bring face to face the existing practice of political decision-making process with an unknown future for this practice. This does not exclude that which decisions or proposals would provide to be elected again, or which proposals would ensure the overthrowing of the government. Nikolas Luhmann, "İfade Özgürlüğü, Kamuoyu, Demokrasi", Trans: Nihat Ünler, in *Düşünce Özgürlüğü*, Ed: Hayrettin Ökçesiz, (HFSA- Hukuk Felsefesi ve Sosyolojisi Arşivi Yayınları: 3), Afa Yayınları, İstanbul, 1998, p 191-2.

⁸⁶ Klaus Finkelburg, *ibid*, 200.

Although a restriction on the general liberty of the individual would not necessarily affect the democratic governmental process, a circumscription of speech would limit the information available to those making the decisions, impair the deliberative process, and thereby directly erode the mechanism of self-government. Because we cannot vote intelligently without full information, it is argued, denying access to that information is as serious an infringement of the fundamental tenets of democracy as would be denying the right to vote.⁸⁷

Second, the freedom of expression is one that it requires the presence of this freedom as the necessary consequence of the people being sovereign in democracies. Then, the leaders and the power must exist in order to serve to wishes of that sovereign. The freedom of expression is the only way for the people to communicate the demands to the government, and any suppression of the public's demands is a censor and is inconsistent with the notion of government's existing for the precise purpose of responding to the demands of the people. Again, this results in pre-selecting of the information available to the sovereign by the servants, whereas the role of government as servant compels it to recognition of the right to reject and criticize our leaders. Under the theory of self-government, this lies at the very core of democracy. As a consequence of this presumption, it is not for governments to decide what is true and what is false, especially in political matters.⁸⁸ Because as servant the government has an institutional role of trust based on and requiring impartiality or neutrality towards the people, and therefore towards the various ideas held by the people. Inherent in the ideal of self-government is the proposition that it is for the people alone to distinguish between truth and falsity in matters relating to broad questions of governmental policy.⁸⁹

The European Court of Human Rights have also been interpreted this freedom as considerably extensive, specifying that the freedom of expression is indispensable element

⁸⁷ Schauer, *ibid*, 55-6.

⁸⁸ Besides, for the European Court of Human Rights, the free discussion of ideas and thoughts proposed that provide the operation of democracy fall outside of evaluation of truth. Because both political and civil society are fostered by free change of opinions, and the clash of the opinions known as true or false gives opportunity for the individuals to form opinions peculiar to themselves. The state and its organs are liable to take care of complete neutrality before uncontrolled individual or collective opinions, philosophical, ideological or religious may be. İbrahim Kaboğlu, "Pozitif Anayasa Hukukunda Düşünce Özgürlüğünün Sınırları", in *Düşünce Özgürlüğü*, Ed: Hayrettin Ökçesiz, (HFSA- Hukuk Felsefesi ve Sosyolojisi Arşivi Yayınları: 3), Afa Yayınları, İstanbul, 1998, p. 214.

⁸⁹ Schauer, *ibid*, 57.

for democratic societies, in its many decisions. For instance, the Court made the following interpretation about the vital function of this freedom for democratic societies, in *Handyside* decision: Freedom of expression constitutes one of the essential foundations of a democratic society. It is applicable not only to “information” or to “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no “democratic society”.⁹⁰ Again, the Court, in another decision, specified that the right to freedom to receive information and opinion basically prohibits a government from restricting a person from receiving information that others wish or may be willing to impart him. Otherwise, the restricting or demolishing of the freedom of expression would prevent the being responded as is due to the wants of governed in a society in which the government is the servant to the people.⁹¹

⁹⁰ See, instead of many, *Handyside v. United Kingdom*, 5493/72, 7.12.1976, paragraph 49.

⁹¹ *Leander v. Sweden*, 9248/81, 26.03.1987, paragraph 74.

CHAPTER 3

ELEMENTS OF THE FREEDOM OF EXPRESSION

1. THE FREEDOM TO RECEIVE INFORMATION AND OPINION

Exercise of this freedom, called right to information as well, is only possible by existing of opportunities to access to information and documents.⁹² The individual, in this way, will attain to the new syntheses, handling raw materials/information he has, and will try to arrive at a conclusion. Information produced by means of thought constitutes, at the same time, the basic data of new thoughts and the new solutions. Acquisition of true information by a person is a perceiving condition in which the all sense organs, especially the ability of reading, seeing and hearing participate in. Perceiving the information truly depends upon to be able to remain in the outside of dogmas and prejudices, being doubtful of having knowledge and to test it and to be free in expressing his thoughts, receiving news and collecting information. Being changeable of the opinions by subsequent new data (information) is the merit of freedom of thought. This is the corrective characteristic of the intellectual faculty.⁹³

The ECHR also treated the freedom of information in the context of freedom to receive information and opinion. For example, in the case of *Gaskin* brought to before it by reason of a local court decision that dismisses the applicant's claim, who was left to public care up to be adult, to access to the records kept relating to him in that term for the purpose of suing against some families cared him, on account of ill treatment, the Court decided that the Article 10 does not charge such burden to the government. However, the Court specified that there was a violation against to applicant's private and family life, because of

⁹² İbrahim Kaboğlu, *Özgürlükler Hukuku*, Afa Yayınları, 5th Press, December 1999, p. 215.

⁹³ Yılmaz Aliefendioğlu, *Bir Temel İnsan Hakkı: Düşünce Özgürlüğü*, Yeni Türkiye, Year: 4, No: 22, 1998, p. 804-813.

failure of government to ensure a legal way by which the applicant could be battle in case of denial of giving information to him by authorities.⁹⁴

The freedom of information is a preliminary condition, not an outcome, of the freedom of expression. Creation of a thought is possible without information, but this is not a responsible one.⁹⁵ The freedom of information in this form incorporates the political, religious and philosophical discourses into its scope, going beyond the limits of freedom of declaration, in the European plane. This right having a privileged position before the personal rights is the first amongst the equals in Europe.⁹⁶ Despite its vital function, the Court decided that the Convention was not violated by a narrower interpretation in the case of *Leander*. In the concrete fact, applicant's appeal for a public service was denied due to he has not trustworthiness required by this job. Thereupon, the applicant has wanted information from government about content of file held by it of him to explain or refute any erroneous information. The Court, in the case was brought to before it in this manner, decided that this restriction did not constitute any contrast to the Convention, partly because of the appointment to a public service did not shielded by the Convention, and partly because of the Article 10 neither ensures the right to access to information concerning themselves for individuals, and nor imposes an obligation to transfer such information to individuals for government, in such cases.⁹⁷

The freedom of information is one that both has an individual respect attributable to progressing of individual, manner of increasing his accumulation of knowledge by fostering from many sources as possible, and has a social respect due to forming free and really informed public opinion.⁹⁸

⁹⁴ *Gaskin v. United Kingdom*, 10454/83, 07.07.1989, paragraph 51.

⁹⁵ Ömer İzgi, Zafer Gören, *Türkiye Cumhuriyeti Anayasasının Yorumu*, TBMM Basımevi, Vol: I, Ankara 2002.

⁹⁶ İbrahim Ö. Kaboğlu, "Pozitif Anayasa Hukukunda Düşünce Özgürlüğünün Sınırları", in *Düşünce Özgürlüğü*, Ed: Hayrettin Ökçesiz (HFSA- Hukuk Felsefesi ve Sosyolojisi Arşivi Yayınları: 3), Afa Yayınları, İstanbul 1998, p. 209-211.

⁹⁷ *Leander v. Sweden*, 26.03.1987, Serie A, No: 116, p. 29, paragraph 74, quoted by Donna Gomian and David Haris, *Freedom of Thought, Conscience, Religion and Expression*, Belge Yayınları, May 1998, p. 139.

⁹⁸ Klaus Finkelburg, *ibid*, 204.

The right to receive information should not be impeded; similarly, it should not be raised difficulties to freedom of information.⁹⁹ To violate the immunity or secrecy of communication is also directly connected with the freedom of thought, from another dimension.¹⁰⁰ For instance, the ECHR evaluated the freedom of information within the scope of freedom of expression, deciding that the freedom of expression of one person who was not permitted to receive information and impeded his communication when he was in custody and had a psychiatric treatment was violated.¹⁰¹

1.1 FREEDOM OF PRESS

The freedom of press has a special position within the frame of Article 10. Being of the majority of complaints made in the context of this article concerning the freedom of expression by press emphasizes the importance of this article for the freedom of press.¹⁰² The Court, in its all decisions about the freedom of expression, first stressed on the importance of this freedom for democratic societies and self-fulfilment of the individual and then referred to vital importance of press in realizing of these freedoms in those societies.¹⁰³ Undoubtedly, the Court acknowledges that the reasons of restriction in the second paragraph of the Article 10 of the Convention are valid for the press, however, examines more strictly the restrictions to the expression on account of legitimate aim, when the press is in question, to ensure self-fulfilment of an individual and living of a

⁹⁹ The concepts stated by the terms such as “information, news, thought and opinion have no a decisive role. The duty of state is, in this stage, to ensure freely circulation of information, keeping the channels of communication open entirely”. Tekin Akıllıoğlu, “Düşünce ve Anlatım Özgürlüğü ve Kamu Görevlileri”, in İnsan Hakları ve Kamu Görevlileri, Ed: Mesut Gülmez, TODAİE, İnsan Hakları Araştırma ve Derleme Merkezi, Ankara, 1992, p. 26.

¹⁰⁰ Algan Hacaloğlu, Düşünce ve Düşünceyi İfade Özgürlüğü Demokrasinin Omurgasıdır..., Yeni Türkiye, Year: 4, No: 22, 1998, p. 777.

¹⁰¹ *Herczegfalvy v. Austria*, 10533/83, 24.09.1992, paragraphs 93, 94.

¹⁰² “The Declaration about the Freedoms of Thought and Information” made by European Council after the gathering of year 1982 is in a character that emphasize the importance of the freedom of press. It was specified that expressing himself for everyone without any restriction, investigating any news or information whatever their source may be, and ensuring the right to declare these are aims need to be reached under the Article of the Convention in this declaration, and it was stressed that the Article 10 would constitute a foundation for the press law in the gatherings of European Ministers Responsible for Press, in Vienna 1986, in Helsinki 1988 and in Nicosia 1991. M. Şükrü Alpaslan, “Avrupa İnsan Hakları Sözleşmesi Uygulamasında Düşünce ve Basın Özgürlüğü”, A Present to Prof. Dr. Sahir Erman, İstanbul Üniversitesi Hukuk Fakültesi Eğitim Öğretim ve Yardımlaşma Vakfı, Publishing No: 8, İstanbul, 1999, p. 28.

¹⁰³ See, for the examples of case, *Sunday Times v. United Kingdom*, 6538/74, 26.4.1979, paragraphs 41, 42; *Lingens v. Austria*, 9815/82, 8.7.1986; *Castells v. Spain*, 11798/85, 23.4.1992; *Jersild v. Denmark*, 15890/89, 23.9.1994; *Fressoz and Roire v. France*, 29183/95, 21.1.1999. The examples can be increased. The Court, concerning to this freedom, *mutatis mutandis* refers to its former decisions, and recalls the vital significance of the press in democratic societies, in cases which brought to before it and about freedom of press.

democratic society. Being such important of the freedom of press derives from people's right to have information and various opinions, as well as the press undertakes the responsibility of conveying these.¹⁰⁴

The first complaint concerning the freedom of expression in the press was the case of *De Becker* brought to before the Court in 1960, which was about excluding one person from the journalism and authorship career for lifetime. After amendment of the act interested by Belgium government in 1961, the Court decided to drop the suit on account no need to continue.¹⁰⁵

Although the Article 10 does not mention the freedom of press openly, the Court has built up a considerable case law that puts a series of principles and rules to guarantee the freedom of press, by its decisions.¹⁰⁶ For instance, in the case of *Sunday Times* in which the Court made its first comprehensive evaluation concerning the freedom of press, it has specified that it is necessary that the notion of "necessity in a democratic society" is interpreted narrowly, or the necessity of restriction to the basic right concerning the freedom of press needs to prove precisely, when the freedom of press on matters interested with public benefit is in question.¹⁰⁷ In the case of *Bladet Troms and Stensaas*, it set forth that the freedom of press does not consist of only a freedom to transmit the information and opinions, but also, the public has right to receive them.¹⁰⁸

The main function of the press in democratic societies, first of all, is to provide a free political discussion and checking the political power that are necessary for the operating of democratic process, by presenting comments about the opinions and acts of authorities to the public. This, at the end, will produce effectiveness and efficiency in public services, and the possibility of control the determinations and applications of political and bureaucratic staffs by democratic methods and rules.¹⁰⁹ However, qualifying an event as a news necessitates that it is "true", "actual" and "for public interest" and is presented in an

¹⁰⁴ *Sunday Times v. United Kingdom*, 6538/74, 26.4.1979, paragraphs 65, 66; *Lingens v. Austria*, 9815/82, 8.7.1986, paragraphs 41, 42.

¹⁰⁵ *De Becker v. Belgium*, 214/56, 27.03.1962.

¹⁰⁶ Monica Macovei, *İfade Özgürlüğü*, Avrupa İnsan Hakları Sözleşmesinin 10. Maddesinin Uygulanmasına İlişkin Kılavuz, İnsan Hakları El Kitapları No: 2, Ankara, November 2001, p. 12.

¹⁰⁷ *Sunday Times v. United Kingdom*, 6538/74, 26.04.1979, paragraphs 58-68.

¹⁰⁸ *Bladet Tromsø and Stensaas v. Norway*, 21980/93, 20.5.1999, paragraphs 62, 73.

¹⁰⁹ Sabri Tekir, *Düşünce Hürriyeti ve Medya Boyutu*, Yeni Türkiye, Year: 4, No: 22, 1998, p. 876.

objective form that is, there must be a connection between the news and its form of presentation. It can be talk about, only in these circumstances, the right of public to receive information and therefore the scope of protection of this freedom.¹¹⁰ Otherwise, in the condition that the press gives misleading news or assaults someone's personality unjustly instead of criticisms to the acts of him, restrictions automatically will appear. The ECHR also did not recognize any right of vituperation or insult, while exercising the right of criticism by means of freedom of expression, because there is no a connection between hard criticism and vituperation. Therefore, a press organ must criticize, without any qualification or assertion would create an assault to rights of personality. That is, the press will criticize hardly, but not curse. If it curses to people under the name of criticism, then will endure to the sanctions would be decided by jurisdiction.¹¹¹

The Court applied these principles to the case of *Lingens* of 1986. The applicant named Peter Michael Lingens has severely criticized Bruno Kreisky who was the federal prime minister in that time, in a magazine named Profil, by the words "this is a basest opportunism, immoral and honourless, in addition to others", in the dates of 14.10.1975 and 21.10.1975, and at the end of trial of two actions for libel was sued against him, he has penalized for crime of insult, because he did not able to these words contains a value-judgement. Upon that, he has made an application to the Commission, by allegation that the decisions by Austrian courts violated his freedom of expression guaranteed by the Article 10 of the Convention.

The Court stressed that it was intervened to the freedom to make his views known by authorities in consequence of case sued against him and a decision of condemnation, that this was stipulated by an act, and that this consequence intends a legitimate aim to protect the rights and reputation of others. The Court mentioned that the case does not necessitate to be treated according to the right of respect to private life, by contrast with the defence of Austrian government.¹¹² The Court, emphasizing that the restriction in question was

¹¹⁰ Sahir Erman, "Türkiye'de Kitle İletişim Özgürlüğü", a present to Prof. Dr. Sahir Erman, İstanbul Üniversitesi Hukuk Fakültesi Eğitim Öğretim ve Yardımlaşma Vakfı, Publishing No: 8, İstanbul 1999, p. 13.

¹¹¹ Bülent Hayri Acar, *Düşünceden Değil, Düşüncenin Açıklanmasından Doğan Cezasal ve Bireysel Sorumluluk*, Yeni Türkiye, Year: 4, No: 22, 1998, p. 853.

¹¹² The government, in this case, alleged that there is a confliction between the two rights protected, the freedom of expression (Article 10) and the right of respect to private life. It was pointed out that the wide comment concerning to this first right, which is adopted by the Commission did not tolerated to be taken precautions to meet need of protecting the second right. *Lingens v. Austria*, 9815/82, 8.7.1986, par. 37.

against to the freedom of expression of the applicant, and, in this context, the basic characteristic of the freedom to make one's thoughts known is that the news, as well as thoughts, could be shocking and painful in a democratic society, decided that the sanction in question was disproportionate. In addition, the Court specified that the public would be aware of opinions and policies of the political leaders only by an effective means such as the freedom of press, and that this would ensure the presence of the freedom of political discussion that constitutes the core of a concept of democratic society taken to the foreground throughout the Convention. Therefore, the acceptable limits of criticism about the politicians must be wider than that of other individuals. A politician, unlike he others, has opened out his every speech and behaviour to the public's views and criticisms, intentionally and voluntarily. The second paragraph of the Article 10 of the Convention requires that the honour and self-respect of individuals be protected against to others' unjust assaults, and this protection includes the politicians as well, however, in such circumstances, it must be made an evaluation by comparing this requirement of protection with the benefits of discussing the political issues openly.

The Court, in its same decision, mentioned that a distinction between the facts and value-judgements is necessary, the facts can be a matter of proving, but cannot be said the same for the value-judgements according to this distinction, there are various ways of criticism, however, the applicant has chosen this form of criticism in the direction of his own value-judgements in this case, to fulfil the requirement of proving is impossible concerning the value-judgements, the regulations by Austria to protect the personal rights being imposed such an obligation to a person is in a nature that violates the freedom of expression that constitutes the core of freedom guaranteed by the Article 10 of the Convention.¹¹³

The Court, in the case of *Oberschlick*, emphasized this aspect of the freedom of expression again. The fact which is subject of this case was being attributed an offence to the politician Grabher Möyer who was the general secretary of the party that is the partner of coalition, concerning his some speeches about the discriminatory practices in funds paid to Austrian women and immigrant mothers, in an elective campaign by a journalist, and being published of this news in Forum, a political magazine. The journalist has written that

¹¹³ *Lingens v. Austria*, 9815/82, 8.7.1986, paragraph 41.

the politician mentioned above has made racism, speaking in a manner that may arouse the feelings of grudge and hate in a part of people, and that has used speeches appropriate to the aim and philosophy of National Socialism, in his news. The Act of Prohibiting of National Socialism in effect has been forbidden such publications in a nature that provokes society and breaks the peace. At the end of the trial, the applicant was condemned by insult and decided that the issue related of Forum magazine to be seized and the decision to be issued in the next number. The ECHR has expressed that the freedom of expression constitutes the foundation of a democratic society and an indispensable condition for self-development of an individual, and this freedom is not only valid for ideas and thoughts approved in society, but also for those which shakes and shocks the society, the acts and defects of a government are not mere subject to close research of legislation and jurisprudence, but also to that of press and public, in a democratic system. The Court, stressing that the press is one of the best instruments that were provided for the public to be known of opinions and attitudes of political leaders concerning public matters, specified that there is a public interest in the discussion of whether the citizens and foreigners would be subjected to a discriminative treatment for the social funds, and the applicant tried to call attention to the proposals that probably surprised many people by this publication, in the concrete fact. Unquestionably, the politician has also right of protection of self-honour even outside of private life, but it is necessary to balance the requirements of this protection with the benefits of free discussion of political issues. It must be remembered that, the politicians are people who take place on the political stage and their each speech and behaviour are controlled closely and carefully by the people, as well as journalists. Therefore, the tolerable limits of criticism are wider about politicians than that of ordinary citizens.¹¹⁴

The Court has different doctrines according to each concrete fact about criticism of armies that vary, to some extent, from other institutions because of both security and hierarchy in different countries. For example, in case of *Engel*, the Court stressed that everyone is within the scope of freedom of expression, and, although they are under a different discipline regime, the soldiers are so. In the concrete fact, the soldiers were punished by disciplinary penalty, by virtue of their criticisms to their officers in a magazine issued by them. The Court, pointing out priorities of army life and that it is

¹¹⁴ *Oberschlick v. Austria*, 11662/85, 23.5.1991, paragraphs 11, 23, 57, 61-63.

necessary to be taken into consideration consequences this life gives to birth to, and that this intervention aimed to preserve the order and discipline in the army, and the all society can be influenced by this, in a case of breaking this order and discipline down, did not find the procedure contrary to the Convention.¹¹⁵

It is necessary to remove all the obstacles before the press to reach to all information sources, and to provide a relationship of secrecy in some degree between the press and its sources, for securing the freedom of expression entirely. For, only in this way it is possible that the press would function wholly. When is impeded to reach to the public information by a reason such as governmental wisdom (*raison d'état*), people will not be able to learn pure truth or will be informed incompletely. In such situation, the processes and determinations by public authorities would be exempt from the public control that is regarded as one of the indispensable elements of a democratic society, wrong steps would be taken in the public matters continuously, and the individuals informed falsely about their leaders would make false decisions in the terms of election.

The Court specified that the press would not be compelled to make clear its information sources, for securing the freedom of expression entirely and to protect the journalists from all kind of pressure and anxiety during their service. In the decision of *Goodwin*¹¹⁶, the Court decided that fining of a journalist by the reason to protect others rights, who has not followed to a warning by a local court concerning making clear his information sources was a violation of the freedom of expression, it is necessary that there is a prevailing interest than to be informed of public, but there is no such interest in the concrete fact, and therefore restriction in question was disproportionate with the legitimate aim. The Court underlined that hiding of their information sources by the journalists is one of the tenets of freedom of expression, this fact would be understood from the professional rules in effect in many contracting states and from a great number of international documents about freedom of expression, and emphasized that the press would not be able

¹¹⁵ *Engel and others v. Netherlands*, 5100/71, 5101/71, 5102/71, 5354/72, 5370/72, 8.6.1976, paragraphs 100, 101. Reyhan Sunay, *ibid.* 156; Osman Doğru, *İnsan Hakları Avrupa Mahkemesi İçtihatları*, Vol. I, Beta Yayınevi, İstanbul, October 2002, p. 134-155.

¹¹⁶ *Goodwin v. United Kingdom*, 17488/90, 27.3.1996.

to carry out its duty to inform properly in the absence of such protection, and therefore the process of informing of public would be interrupted.¹¹⁷

The press, although it must pay attention to the limits concerning preserve the vital interests of the state such as national security, integrity of country, preventing of violence and crime, has the main duty to inform especially in the political matters, even if they are in a nature to lead to divisions and decompositions. The news regarded as divisive is included to this. To learn the news and opinions is the right of public, as well as to inform these is the duty of press. The freedom of expression allows making the conducts and opinions of the political leaders known and shaping their ideas about these conducts and opinions for the people.¹¹⁸

The Court has repeated its view that the press is one of the most important means of operating healthily of political democracy in another decision. In the concrete fact, by the reason of divisive propaganda in an interview by Selami İnce in a magazine named “Democratic Opponent” edited by Ümit Erdoğan, both two persons were punished. For the interviewer, “the developments happened recently in the South-East Region of Turkey will bring about revival of Kurdish culture in the region, and the organization named PKK contributes to come into existence of a Kurdish society, and some districts will play a role of a seed for establishing a Kurdish state, with the Turkish army withdraw and discharging of certain police stations”. He criticized the approaching of Turkey to Kurdish problem, by the words “the government will be forced to consent some realities, owing to current armed resistance in Kurdistan. The violence carried out by Turkish forces will not stop the rise and progress of PKK”. The court has stressed that the applicants are an editor and a journalist respectively, and were punished by the crime of making a divisive propaganda and the press has a main function in the operating of a political democracy properly. The Court added that to inform in political matters is a necessity, as well as the people have the right to receive these, including those that are divisive, although the press must not go to beyond the limits laid down in order to preserve the national security or to impede the disorder and crime. The Court expressed that the contracting states have a more limited judicial discretion on restrictions concerning political speeches or discussions about public

¹¹⁷ *Goodwin v. United Kingdom*, paragraphs 37-46.

¹¹⁸ *Okçuoğlu v. Turkey*, 24246/94, 08.07.1999, p. 44.

interests or problems, and the limits of criticisms about the government is wider in comparison with the ordinary people even the politicians. The conducts and deficiencies of government should not only in close control of judiciary or legislation, but also of public.¹¹⁹

The Court stressed that the duties and responsibilities associated with the use of freedom of expression by media members have a special importance in cases of conflict and tension, in the same decision. It must be taken a special care in determining whether the views of representatives of organizations appealed to violence against to the state are published in order to impede the hate-speeches to take place in media or becoming of media an instrument of encouraging violence. In addition, the contracting states cannot impede the people's right to receive information, by charging the burden of Criminal Code on media because of preserving integrity of country or national security, or preventing of disorder and crime, in the instances that the views in question cannot be classified as divisive.¹²⁰

The one of the main characteristics that makes the freedom of press (which we called freedom of information as well) indispensable is the fact that a freedom of thought is not talked about without this freedom. In other words, this is the necessity of accept information as a pre-requirement for the forming of thought by an individual. The Court has provided a very strong protection for the press just as the freedom of political expression, by virtue of its indispensable place in democratic systems.¹²¹ Again, the Court strictly examines the criteria of censor by legitimate aim and necessity in a democratic society.

The Court decided that being prohibited publishing a photograph of an accused person whose trial is continuing is disproportionate with the legitimate aim. In the concrete fact, the photographs of a person who was arrested by the suspicion of playing a part in an action that known as "the campaign of letters bombardment" by people has taken place in the issue of December 1993 of the *News* magazine, and the news about campaign of letters

¹¹⁹ *Erdođdu and İnce v. Turkey*, 25067/94, 250667/94, 250668/94, 08.07.1999, paragraphs 8, 48, 50, 52.

¹²⁰ *Erdođdu and İnce v. Turkey*, 25067/94, 250667/94, 250668/94, 08.07.1999, paragraph 54.

¹²¹ *Lingens v. Austria*, 9815/82, 8.7.1986, paragraphs 42, 46; *Castells v. Spain*, 11798/85, 23.04.1992 paragraph 42; *Wingrove v. United Kingdom*, 17419/90, 25.11.1996, paragraph 57.

with bomb, the actions of extreme Rightists and especially connection of arrested person with these events associated with photographs. Thereupon a publication ban was placed to the magazine by the local courts. The ECHR expressed that the publishing of one's photographs can be prohibited if there are satisfying causes relating to the content of crime and the conditions of the fact. However, the Court observed that the news and photographs was published in a period in which the bombed letters was sent to certain politicians and to others those who were in foreground in Austria and they caused to injure severely some of them, and these assaults were in a nature that the public were considerably interested in. Furthermore, the offences to be accused of suspected are turned towards the nature of a democratic society and based on a political ground. At this point, the duty of the press for its liabilities and responsibilities is to influence all the information and opinions connected with public, in the matters concerning other's rights and reputation or execution of the activities of judgement properly, provided that not to go beyond particular limits, and to contribute to making the events known by the people by such news.¹²² For this reason, this is wholly suitable to aim pursued by the first paragraph of Article 6 of the Convention that the compulsion of sessions being open to people. It is not only a duty for the press to make such information and opinions known by the people, but also the people have a right to learn these. Consequently, the Court decided that being gone beyond the requirements for innocence presumption or for protecting of the rights of interested by the absolute prohibition of publishes relating to photographs, and that the Convention was violated.¹²³

Another decision of the Court is related to censorship to a film named "Council in Heaven", which was put in effect on appealing of Catholic Church, following of the determination to project of it by the applicant who is a licensed administrator of cinema. It was begun a prosecution due to a despising criticism to persons and notions that was considered as sacred by Catholics in the film would cause to indignation in places where Catholics are living densely, and has made a decision of seizure to film at the end of the trial, by the local court. The ECHR observed that those who would exercise the freedom of expression must do this in the frame of obligations and responsibilities, therefore the expression would not be able to use in a manner of breaching the other's rights and despising them. It continued stating that two basic rights guaranteed by the Convention,

¹²² *The Bladet Tromsø and Stensaas v. Norway*, 20.05.1999 paragraph 65.

¹²³ *News Verlags GmbH & CoKG v Austria*, 31457/96, 11.1.2000, paragraphs 15, 40, 55, 56, 58, 60.

namely, the rights of applicant's to express his opinions and being informed of people have come face to face with the right being respected to the freedom of religion and conscience, undoubtedly the right to express includes criticisms to the religion, but in cases in which these criticisms go beyond the limits, it would be necessary to take into account the judicial discretion of competent authorities, however the judicial discretion is unlimited, but is bounded to observation of interests of society as a whole. The Court decided that the intervention by Austrian authorities to the expression aimed to secure religious peace and to prevent some people's to be seized to sense of being subject to an unjust assault to their religious beliefs, and the national authorities have a more advantageous position in appreciating whether such precaution is necessary, in this concrete fact, the state has not passed over the margin of judicial discretion left to it and therefore not violated the Article 10.¹²⁴

It is essential to take steps in order to secure the pluralism and to prevent monopolization, particularly in the press sector. Respect to pluralism of instrument for information means, at the same time, that strengthening of right of the individual as addressee of this right.¹²⁵ Otherwise, this will lead to a feckless mentality of publishing in which the mechanism of self-control disappears, the information and news are used for bad will and interest relations prevailed.¹²⁶ Indeed, the Commission commented that taking precautions for preventing monopolization in the press would not constitute a disagreement to the freedom of expression, as long as they are not in conflict with the Article 10, in consequence of the importance of press in public life and the important place of pluralist thought in a democratic society.¹²⁷

The Court has noted that the state has a positive duty of providing the conditions necessary for conveying the information to the individuals, as well as a negative one for removing all the obstacles before reaching to information. In the concrete fact, although the some staffs of a newspaper were face to face certain violence and menace events, the authorities did not investigate these allegations effectively; on the contrary, issue of the newspaper became impossible by virtue of an operation of research and arrest aimed at

¹²⁴ *Otto-Preminger-Institut v. Austria*, Series A. No. 295-A, 20.9.1994, EHRR, Vol. 19, 1995, p.58-60.

¹²⁵ İbrahim Ö. Kaboğlu, *Özgürlükler Hukuku*, Afa Yayınları, 5th press, December 1999 p. 310.

¹²⁶ Sabri Tekir, *Düşünce Hürriyeti ve Medya Boyutu*, Yeni Türkiye, Year: 4, No: 22, 1998, p. 874-7.

¹²⁷ *De Geillustreede Press v. Netherlands*, 5178/71, 6.7.1976, DR 8, p.5, quoted by Gözübüyük, Gölcüklü, p. 361.

newspaper staffs by security forces in the headquarters of newspaper, the fines, jail sentences and seizure as a consequence of criminal proceedings about 486 numbers of 580 totally of the newspaper and the decisions of blocking the issuing of the newspaper for from three days to a month. The findings of Commission Report pointed out that this disagreed to the responsibility to protect the freedom of expression guaranteed by the Article 10 of the Convention.¹²⁸

The Court first recalled the importance of the freedom of expression as one of pre-requirements of operation of democracy. The exercise of this freedom not depends on merely the duty of state not to intervene, but it also requires taking precautions of protecting even for the individual relationships.¹²⁹ It must be attached importance to balance between the general interests of society and individual ones tried to reach by Convention, in determining of whether a positive responsibility exists. This responsibility, inevitably, varies according to different conditions of contracting states, to difficulties in governing the modern societies and to preferences concerning priorities and resources. However, this should not be interpreted that as such responsibility is an impossible or an unjust burden for governments. The Court emphasized that the important role of the press for working of a democracy properly, and noted that the interviews by members of a forbidden organization or speeches by them, and clarifying of the identities of some state officials who have participated in the struggle against terror, and blaming of the state for destroying certain villages in the South-East Region of Turkey in some columns that have already been subject of a criminal case are even if appreciated as provocative, did not provide justification enough for the restriction of this freedom. The Court stated that the Convention was violated by not providing an effective protection by the responsible state despite all requests, and by taking many unjust, disproportionate steps disagreeable to the legitimate aim, by the operations of research and arrest, and by many cases sued concerning various issues of the newspaper and by the decisions of condemnation, and at the end, by causing failure to issue the newspaper.¹³⁰

¹²⁸ *Özgür Gündem v. Turkey*, 23144/94, 16.04.2000, paragraphs 9-23

¹²⁹ See, *mutatis mutandis*, *X and Y v. Netherlands*, 8978/80, 26.03.1985, quoted by Osman Doğru, *İnsan Hakları Avrupa Mahkemesi İçtihatları*, Vol. I, Beta Yayınevi, İstanbul, October 2002, paragraph 23, p 842-50.

¹³⁰ *Özgür Gündem v. Turkey*, 23144/94, 16.04.2000, paragraphs 58, 63,71.

1.2 THE FREEDOM FOR BROADCASTING

Radio and television are more frequently being a matter of regulation in comparison with print media. The main reason is that the broadcasting can be present everywhere at any moment. When we enter a shop or a home or get into a car, the radio is always on air. The television is turned on in many houses. Although the newspapers, magazines and cable TV services have to be bought, the broadcast of radio and TV is free and for everyone. Second, the parents are especially sensitive relating to their children may be exposed to the broadcast of radio or TV by themselves without their permission. Furthermore, the radio and especially television are more influential than the print media. Particularly, the pictures and sounds have an effect that words no have. Finally, the most important reason for subjecting to a regulation is that broadcasters use the electromagnetic wave bands to send the signals from broadcasting stations to the radio and television aerials. “It is a physical characteristic of the nature is that allows the wave band radio signals, for example the X rays to move from a point to the other. However, the part which is used for AM and FM radio and VHF and UHF television of the wave band is limited. The number of station that can operate in the each four broadcast services is maximum one for any geographic area. When is exceeded the maximum number, the signals of extra broadcasting station would interfere that of the existing ones. Since it has to be permitted to only certain part of persons or companies who wants to broadcast, then those who have a wave band have a special responsibility to the people”. This includes acceptance of program regulations for public interest and presence of an authorizing/licence system.¹³¹

The Court recalled that it has specified that the third sentence of first paragraph of the Article 10 authorized the states to regulate the broadcasting particularly in point of technical necessities establishing an authorization regime, and that specified that such regulation might includes the other considerations, e.g. properties and goals, probable mass of audience at level of local, regional and national of the facility to be wanted to set up, the rights of a certain group of audience, and obligations arise from international conventions, as well as technical conditions. Thus, there will be limitations whose aim is legitimate according to third sentence of first paragraph, even if they do not fit to any of goals in the second paragraph. However, the accordance of such interventions to the Convention would

¹³¹ *Trager v. Dickerson*, *ibid.* 198–9.

be appreciated in the light of other necessities in the second paragraph. Moreover, the Court, acknowledging the monopoly position of the states in these matters, recognizes their authorities to subject the broadcasting to certain restrictions and conditions, by stipulating to be licensed for the private enterprises.¹³² The Court maintained that it is impossible to allege that the government has no less limiting formulas, and pointed out that certain states moderated this condition, by stipulating special participation forms to the activities national radio-TV institution, or giving participation licenses in particular areas. It noted that the economical justification that was put forward by Austrian government that the Austrian market is not in capacity to support the quantity enough of TV-radio station to prevent the forming of private monopolies was not true because the public and private stations could display activity simultaneously in many European countries have same magnitude with Austria, and that this concern was improper. The Court has decided, by all reasons mentioned above, that the Article 10 was violated by adjudicating the restrictions to applicants who wanted to broadcast privately, it was disproportionate with the aim pursued and therefore was unnecessary in a democratic society.¹³³

In a similar case against to Switzerland, the Court decided that the Article 10 was violated again. In the concrete fact, it was rejected the application by a company named Autronic AG in Switzerland to build a private dish antenna in order to transmit the broadcastings from a Russian satellite, on account of both preserving regulation of telecommunication and prevention of disclosing of the secret information, by government of Switzerland. The Court, examining the case, stated first that the Convention “protects not only the content of information, but also the transmittal means and instruments, otherwise the right to inform and to be informed would disappear”. It noted that the all cases have different conditions, and added that many telecommunication satellites have come into service, following occurrence of the fact in this case, and again, many states have authorized receiving the signals no coded from telecommunication satellites after signing of European Convention on Transfrontier Television. The Court, appreciating all

¹³² The Court, for instance, in its decision relating to a prohibition of broadcasting for a Swiss company which is licensed and established in Switzerland, but buys and retransmits the cable-TV programs that were broadcasted from Italy, noted that this prohibition was not an intervention to the freedom to express opinions, the aim pursued was preserving and regulating the international communicative system and thus the state regulation related, therefore the intervention in question did not exceed the judicial discretion of national agencies. *Groppera Radio AG and others v. Switzerland*, 10890/84, 28.03.1990, paragraphs .70, 74.

¹³³ *Informationsverein Lentia v. Austria*, 13914/88, 15041/89, 15717/89, 15779/89 and 17207/90, 24.11.1993, paragraphs 32, 35, 39.

these points together, expressed that to receive a TV broadcast by a proper antenna is within the scope of freedom to hold opinions, the prohibition by the Swiss authorities retained the Autronic AG from legally receiving/broadcasting the signals from a satellite, and was gone beyond the limits of judicial discretion in the Convention.¹³⁴

2. FREEDOM TO HOLD OPINIONS

This freedom is one of the sine qua non requirements of the freedom of expression, and due to its nature concentric with both the freedom of thought¹³⁵ in the Article 9 of the Convention and the right to information¹³⁶ that is one of the basic elements of a democratic society and classified as a distinct right. Human mind thinks and takes a shape with the perceptions presented by the outer world. If these inputs are limited, then the activity would be limited and eventually error margin would be high.¹³⁷

No one can be disturbed and condemned by his opinions. This freedom does not requires the guarantees only for everything endangers the expression of opinions, but also for every unfavourable factor that disturbs individuals who have different political, philosophical or religious beliefs or impedes adopting these freely. The right to be different for opinions appears itself especially in public services. Neither can it be burden additional responsibilities to the person in question due to his different beliefs, nor he can be deprived from some facilities and services; this freedom, hence, has a meaning by indiscriminating in public services.¹³⁸ In this context, the Court has also said, “free discussion of ideas and

¹³⁴ *Autronic AG v. Switzerland*, 12726/87, 22.5.1990, paragraphs 44, 47, 63.

¹³⁵ Not being accused because of his thoughts is already an inherent situation as long as they remain in his mind, not being manifested. Therefore, it seems unnecessary to be guaranteed as a freedom. Hence, for instance, the German Constitution has given only to freedom to express a thought. (Article 5). Ömer İzgi and Zafer Gören, *Türkiye Cumhuriyeti Anayasasının Yorumu*, TBMM Basımevi, Vol. I, Ankara 2002, p. 309.

¹³⁶ This right (information) is appreciated as a pre-requirement or a fundamental element for freedom of opinion, because it brings in faculty of thinking and making up an opinion. İbrahim Ö. Kaboğlu, *Özgürlükler Hukuku*, Afa Yayınları, 5th press, December 1999, p. 215. The freedom to hold opinions that can be qualified as a guarantee of the freedom takes place in Article 10 achieves almost an absolute protection in the sense that being immune from restrictions counted in the 2nd paragraph of the Article 10, therefore, “any restriction to this right” would constitute an inconsistency with the nature of a democratic society”. The Report of Committee of Ministers, in *Theory and Practice of the European Convention on Human Rights*, Van Dijk and Van Hoof, Kluwer, 1990, p 142, quoted by Monica Macoevi, *İfade Özgürlüğü*, Avrupa İnsan Hakları Sözleşmesinin 10. Maddesinin Uygulanmasına İlişkin Kılavuz, İnsan Hakları El Kitapları No: 2, Ankara, November 2001.

¹³⁷ Sami Selçuk, “Düşün Özgürlüğü”, in *Düşünce Özgürlüğü*, Ed: Hayrettin Ökçesiz, HFSA-Hukuk Felsefesi ve Sosyolojisi Arşivi Yayınları: 3, Afa Yayınları, İstanbul, 1998, p. 293.

¹³⁸ İbrahim Ö. Kaboğlu, *ibid* p. 215.

opinions put forward which ensure the working of democracy remain outside of assessment of truth. Because political and civil societies feed by free exchange of opinions, conflict of opinions known as true or false allows the individuals to create an opinion peculiar to them. State and its organs are obliged to take care an entirely impartiality before the individual opinions and collective mentalities uncontrolled, whatever may be, philosophical, ideological or religious”.¹³⁹

This freedom is also described as the freedom of not to talk, owing to guarantee of “not to be forced to express”. The freedom of not to talk includes one’s right to no expressing anything he believes, or no telling anything he does not believe.¹⁴⁰

The Court treated the application in the context of freedom to hold opinions, in cases of *Kosiek* and *Glasenapp*. In the facts in question, the applicants were not be appointed and put an end to their statue of candidateship of civil servant, on account of Glasenapp’s membership of a party which advocate pre-eminence of Nazi race and Kosiek’s being a member of Communist Party, and their activities in question disagrees with their oath of allegiance to the Constitution. The Commission decided that there is no disagreement, specifying that the oath of allegiance that is stipulated for appointment to civil service is not an obstacle to the freedom of expression, that the public agencies related have the right to appreciate the opinions and activities of public servants, that such control is necessary for understanding of whether the person related would perform the service to be assumed properly, and that the Convention does not guarantee the right to be a civil servant.¹⁴¹

3. THE FREEDOM TO EXPRESS INFORMATION AND OPINION

Sharing one’s opinions with others is both a social need and one of the main requirements of working of the social life healthily. Otherwise, the society will be face to face with a situation in which there is a single-type thought, the borders of social

¹³⁹ *Lingens v. Austria*, narrated by Kaboğlu, ibid, p. 217. See, Özcan Özbey, İnsan Hakları Evrensel İlkelerinin Avrupa Mahkemesinde Uygulanması, Adalet Yayınevi, Ankara 2004, p. 517.

¹⁴⁰ Reyhan Sunay, ibid, see 58.

¹⁴¹ *Kosiek v. Germany*, 9704/82, 28.8.1986, paragraphs 35–37, 39; *Glasenapp v. Germany*, 9228/80, 28.8.1986, paragraphs 49, 50, 53. The Court has eviscerated this decision, by its evaluation that the obligation of allegiance that is stipulated for appointing to public services does not injure the freedom of opinion. İbrahim Ö. Kaboğlu, ibid see p. 215.

consciousness starts to become narrow thoroughly, and it ultimately will lead to a pain for individuals and to a deprivation from those opinions for society, by imprisoning those thoughts to the individual's mind.

Expression includes the feature of functionality defined as the thoughts become perceptible by others, coming out from inner world and domination area of a person,¹⁴² advocating these opinions, and the propaganda which means that those are tried to get others to accept or conveyed to more than one systematically and persuasively.

To be sure, giving a lecture, delivering a speech, saying a poem, singing a song, organizing a meeting, issuing a newspaper, a journal or a pamphlet, or certain artistic activities such as theatre, painting and caricature are instruments for these aims and under the protection of the freedom to express opinions.¹⁴³

The ECHR also described ensuring to express the information and opinions as a necessary element for the permanence of political life and democratic frame, and noted that the free elections would be impossible in the absence of this freedom, in its decisions.¹⁴⁴ Another point emphasized by the Court in this context is that the expression of information and opinions would be possible only owing to pluralism under the state's guarantee. The state monopoly that puts serious restrictions to expression is the most inconvenient way to secure this point.¹⁴⁵ Accordingly, the states are obliged to bear in mind that their main duty is to provide the freedom to express opinions and the polyphony, in regulating the broadcastings and stipulating them to particular conditions and sanctions.¹⁴⁶

The Court, in a case concerning denial of an application of authorization to set up a television station, by Austrian authorities, because of the law in effect provides a state monopoly, has stated that the restraints necessitated by wave frequencies now became invalid before the technical developments of the day, and therefore the restriction in

¹⁴² Adnan Küçük, İfade Hürriyetinin Unsurları, Liberal Düşünce Topluluğu, September 2003, p. 66.

¹⁴³ Yılmaz Aliefendioğlu, "Bir Temel İnsan Hakkı: Düşünce Özgürlüğü", Yeni Türkiye, Year: 4, No: 22, 1998, p. 805.

¹⁴⁴ *Handyside v. United Kingdom*, 5493/72, 7.12.1976.

¹⁴⁵ Said Vakkas Gözlüğü, Avrupa İnsan Hakları Sözleşmesi ve İç Hukukumuz Etkisi, 2nd press, Yetkin Yayınevi, Ankara, September 2002, p. 203.

¹⁴⁶ Safa Reisoğlu, Uluslararası Boyutlarıyla İnsan Hakları, Beta Basım Dağıtım, İstanbul, 2001, p. 69.

question impeded the expression of opinions.¹⁴⁷ In the concrete fact, the Court stressed that the third sentence of first paragraph of the Article 10 authorized the states to regulate broadcasting –especially for technical necessities– by establishing an authorization regime, and such regulation might includes, together with technical requirements, the other considerations, for instance, properties and goals, probable mass of audience at level of local, regional and national of the facility to be wanted to set up, the rights of a certain group of audience, and obligations arise from international conventions, and may also puts restrictions attached to other reasons. The Court decided that the restriction to applicant’s right to impart in the form of no authorizing him to broadcast aerial was not disproportionate with the aims of neutrality and objectivity of the news of a national TV channel set forth by Principal Broadcasting Act and guaranteeing the diversity of opinions, and that this restriction did not constitute a disagreement with the Convention, before the evidences of possibility of almost every residence to connect to cable-TV network in Vienna and the cable-TV broadcasting is a powerful alternative to aerial broadcasting in the region of Vienna, as against to allegation of applicant that the cable-TV broadcasting is not identical to aerial broadcasting especially for inaccessible for viewers and being of the aerial broadcasting only in monopoly of the state is not justifiable.¹⁴⁸

¹⁴⁷ *Tele 1 Privatfernsehgesellschaft v. Austria*, 23118/93, 25.11.1999, paragraphs 31, 32, 39, 40. The Court

¹⁴⁸ *Tele 1 Privatfernsehgesellschaft v. Austria*, 23118/93, 25.11.1999, paragraphs, 31, 32, 34, 38-40. The Court, in the course of time, after its decision 27.09.1995 dated concerning private broadcast companies can transmit their programs by means cable-TV, decided that the Convention was not violated, between years of 1996 and 1997.

CHAPTER 4

LIMITS OF FREEDOM OF EXPRESSION AND APPROACH OF THE EUROPEAN COURT OF HUMAN RIGHTS

1. GENERALLY

The freedom of expression has never been limitless in nowhere, although it existed in all democratic constitutions as an indispensable requirement of democratic societies.¹⁴⁹ Because, as the freedoms having a privileged position does not require alone qualifying them as absolute, it is not possible to say that there is always a regular, balanced and stable life in a place where absolute freedom exists as well; therefore, it is appealed to certain necessary restrictions in some conditions for ensuring the public authority in democracies.¹⁵⁰

Reason for the presence of this freedom is to provide protecting the right and interest of people who have the right to constitute their thought and opinion by sharing information and opinions, and again by this way, contributing to process of forming of public opinion and expressing himself by this interaction. However, the exercise of this freedom sometimes may harm to the other's rights or interests by its form or content. This requires to balance the conflict of interests appeared at this point, by the Constitution and legislator, and to choose between the rights and interests came face to face.¹⁵¹

To insist that all expressions, regardless of their nature, should presumptively be equally protected will be both inimical to the freedom of expression that is in fact valuable

¹⁴⁹ Sahir Erman, "Türkiye'de Kitle İletişim Özgürlüğü", a present to Prof. Dr. Sahir Erman, İstanbul Üniversitesi Hukuk Fakültesi Eğitim, Öğretim ve Yardımlaşma Vakfı, Pub. No: 8, p. 14, See, Zeki Hafizoğulları, Laiklik, İnanç, Düşünce ve İfade Hürriyeti, Us-a Yayıncılık, Ankara 1997, p. 74-107.

¹⁵⁰ Yusuf Şevki Hakyemez, "Temel Hak ve Özgürlüklerin Sınırlandırılmasında Ölçülülük İlkesi", a present to Prof. Dr. Hayri Domaniç, Vol. II, Özel Hukukun Diğer Dalları ve Kamu Hukuku, Ed: Abuzer Kendigelen, İstanbul 2001, p. 1287.

¹⁵¹ Sahir Erman, ibid 15.

and would be able to harm to democratic state itself that directs its presence to protect this freedom. For, certain expressions may injure, harm to other people and to whole society when they are used. To protect such expressions is like as saying that the order of freedom compels us to endure resignedly unwanted opinions, undesirable thoughts and offensive views. As the US Supreme Court said: “the fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker’s opinion that gives offence, that consequence is a reason for according it constitutional protection”.¹⁵² This, of course, does not follow that all speech must be protected equally.¹⁵³ For instance, expressions such as blackmail, false witnesses, misleading advertisement and child pornography are not protected in any jurisprudence, and these being carried out by words would not constitute a sufficient reason to be exempted from legal intervention.¹⁵⁴

The justifications for restriction in system of Convention which take place in the second paragraph of the Article 10 are as follows: “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”.¹⁵⁵ The reasons for restriction is based on this manner of regulation have an exhaustive characteristic, both by duties and responsibilities imposed by this freedom and by a categorical counting concerning reasons of restriction. Therefore, this freedom would not be restricted resting on another reason of restriction.¹⁵⁶

This freedom is restricted by two reasons directed to protect the individual and public order or the state in the Convention, as they take place in all national and inter or supranational papers. Although the necessity and extension of individual restrictions is not

¹⁵² *FCC v. Pacifica Foundation*, 438 US 726, 745 (1978), related by Sadurski, *ibid*, 46.

¹⁵³ Sadurski, *ibid*, 45-6.

¹⁵⁴ *Trager v. Dickerson*, *ibid*, 9.

¹⁵⁵ Tekin Akıllıoğlu, *Avrupa İnsan Hakları Sözleşmesi Avrupa İnsan Hakları Mahkemesi İçtüzüğü Başvuru Bilgileri*, İmaj Yayınevi, Ankara, May 2002, p. 32-3.

¹⁵⁶ Francis G. Jacobs and Robin C.A White, *The European Convention on Human Rights*, Clarendon Press, Second Edition, Oxford 1996, related by Reyhan Sunay, *ibid*, see p. 78.

controversial too much, the second group of reason is more discussed, because they are influenced by various natures of societies, technological developments, vital function of press in democratic societies and non-governmental organizations etc. However, as a general regard, this freedom is protected if it aims to forming an opinion by exchanging of information and views, but is not, if it creates an effective act on addressee.¹⁵⁷

When the expression being a racial vilification, pornography, harmful to personal rights of a person or violating the secrecy of private life, such speeches, writings or acts remain outside the scope of the freedom of expression, and are restricted for protecting individual.¹⁵⁸ For, this kind of expressions has a lower social value than the kind of expressions that a society has in mind when it entrenches rights to free expression, and again, this inferior value of “certain well-defined and narrowly limited classes of expression” is due to the fact that they “are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality”.¹⁵⁹

In matter of protection provided for the expression because of right and interest of people, the reasons of restriction concerning national security and public order would be used as a criterion, ‘when the difficulty of distinguishing between to express an idea and to fulfil an act arises’. “The European organs discriminate between the statements that are only expression of opinions and the speeches which provoke to an action punished by the state law or to overthrow the democratic institutions by violence. In this situation, what is restricted is not pure expression of an opinion, but a discourse has a result, which prepares and organizes an unlawful action”.¹⁶⁰ By other words, providing protection to an

¹⁵⁷ Adnan Güriz, “İfade Hürriyetinin Sınırları”, in *Düşünce Özgürlüğü*, Ed: Hayrettin Ökçesiz (HFSA-Hukuk Felsefesi ve Sosyolojisi Arşivi Yayınları: 3), Afa Yayınları, İstanbul, 1998. p. 85; Zühtü Arslan, *İfade Özgürlüğünün Sınırlarını Yeniden Düşünmek: “Açık ve Mevcut Tehlike”nin Tehlikeleri*, in *Teorik ve Pratik Boyutlarıyla İfade Hürriyeti*, Ed: Bekir Berat Özipek, Liberal Düşünce Topluluğu, August, 2003, p. 58.

¹⁵⁸ Yılmaz Aliefendioğlu, “Bir Temel İnsan Hakkı: Düşünce Özgürlüğü”, *Yeni Türkiye*, Year: 4, No: 22, 1998, p. 804-13.

¹⁵⁹ *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), related by Sadurski, *ibid*, see p. 51.

¹⁶⁰ İbrahim Kaboğlu, “Pozitif Anayasa Hukukunda Düşünce Özgürlüğünün Sınırları”, in *Düşünce Özgürlüğü*, Ed: Hayrettin Ökçesiz (HFSA- Hukuk Felsefesi ve Sosyolojisi Arşivi Yayınları: 3), Afa Yayınları, İstanbul 1998, p. 227. Justice Holmes, in his dissent in the case of *Abrams v. United States* (250 U.S. 616, 630 1919) argued that all expression acts should be protected unless they “so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country”. These criteria indicate both the immediacy and the gravity of the danger that the restriction aims to arrest. Again, the Supreme Court of the United States, in its decision of the case of *Consolidated Edison Co. v. Public Serv. Comm’n*, (447 U.S. 530, 540, 1980) announced that, in order to pass constitutional muster, a

expression is a necessity sine qua non, in the event that the interest or harm occurred while exercising of this freedom is limited to only that individual. However, in case that the expression turns into an action, going beyond the individual, or in the event that it causes to breaching of public order by encouraging to an offence, it is unthinkable that the protection in question is provided to such expressions/actions in the same degree. Such expressions can be refused and get under control by de facto intervention by other people. They absolutely must be getting under control in further cases.¹⁶¹

According to the European Court of Human Rights, the main criterion in restricting this freedom by pursuing legitimate aims mentioned above is to look after a balance/proportion¹⁶² between the interest to be wanted to protect and the expression to be wanted to restrict by the state.¹⁶³ The main criterion in the principle of proportionality is necessities of a democratic society, and this criterion may have a different flexibility for each legitimate aim. Accordingly, the ECHR has laid down some principles that evoke an absolute protection by its doctrines for the political expressions and those that inform the society.¹⁶⁴ Moreover, the Court has made a wider interpretation concerning the criticisms to politicians, on the other hand, subjected the aim of restriction to a stricter examining for criticisms to ordinary citizens in its decisions relating to criticisms to individual.¹⁶⁵

This flexibility in the interpretations laid down by the Court in its doctrines stems from the diversity of the reasons, conditions and measures of restriction exhibited in contracting states and from the mechanism of protection established by the Convention

governmental restriction must be “a precisely drawn means of serving a compelling state interest”, or that the regulators must choose “the least restrictive means of achieving some compelling state interest”. Related by Sadurski, *ibid*, see p. 48-9.

¹⁶¹ Mill, *ibid*, see p. 113.

¹⁶² This criterion that was defined as the principle of “proportionality” in decisions of the European Court of Human Rights is taken place as criterion of “temperament” in Turkish Constitution dated 1982 and by the principle that “there must be a ‘reasonable’ and suitable to justice relationship between the intervention made to individual’s rights by law and its interests to public in decisions of the US Supreme Court. Algan Hacıoğlu, “Düşünce ve Düşünceyi İfade Özgürlüğü Demokrasinin Omurgasıdır...”, *Yeni Türkiye*, Year: 4, No: 22, 1998, p. 776-9.

¹⁶³ T. Ayhan Beydoğan, *Avrupa İnsan Hakları Sözleşmesi Işığında Türk Hukukunda Siyasi İfade Hürriyeti*, *Liberal Düşünce Topluluğu*, August 2003, p. 28-9.

¹⁶⁴ *Lingens v. Austria*, 9815/82, 8.7.1986, paragraphs 41, 42; *Sunday Times v. United Kingdom*, 13166/87, 26.11.1991, paragraphs 65, 66; *Oberschlick v. Austria*, 11662/85, 23.5.1991, paragraph 59.

¹⁶⁵ *Nilsen and Johnsen v. Norway*, 23118/93, 25.11.1999, paragraphs 47, 51, 52; *Castells v. Spain*, 11798/85, 23.04.1992, paragraphs 67, 68, 72.

being secondary (subsidiary)¹⁶⁶ in these countries. The Court, starting from this fact, stated that the contracting states are in a more tangible and convenient position than the institutions of Convention for determining their own conditions, needs and the reasons of restriction, and gave a place to this principle named “margin of appreciation”¹⁶⁷ by it in its decisions. Again, the Court noted that the contracting states must remember that the authority they have exists in combination with the supervision of institutions of Convention, is not limited, and subject to supervision for each case, in appreciating the necessity of intervention.¹⁶⁸ The Court does not limit itself by determining whether the decisions of local courts are just, appreciates the decisions as a whole, while using its authority of supervision the judgement. This appreciation also includes which context in which the articles of Convention applied to applicant. For the Court, the state in question has to determine whether the restriction in hand is proportionate with the legitimate aim pursued by the restriction and the “appropriateness” and “satisfactoriness” of the reasons of restriction by national courts.¹⁶⁹

Well then, what is meant by the phrase “these freedoms whose exercise includes duty and responsibility” in second paragraph of the Article 10 of the Convention? This phrase, before all else, emphasizes that the individuals consistently should have an “auto criticism”. For, the democratic systems burden a responsibility to the individuals as well, while recognizing their rights and freedoms. Then, every individual has to respect to the other’s rights, freedoms, and social necessities, exercising his own rights and freedoms, not by fear of legal sanctions, but because of a conscious sense of responsibility stems from his own level of personality and nature of moral. For example, a political leader, a columnist or a television commentator must regard as a requirement of his personality and “sense of responsibility and duty” not to insult to the other’s personal rights, to refrain carefully from

¹⁶⁶ The Convention first leaves the duty of protection the rights and freedoms covered by itself to each Contracting state. The institutions established by the Convention make their contribution to this duty, and the Convention intervenes only by arguable cases and following exhausting the all means of domestic law according to the Article 26. See *The Case of Belgium Educational Language*, 1474/62, 1677/62, 1691/62, 1769/63, 1994/63, 2126/64, 23.7.1968, paragraph 10; *Handyside v. United Kingdom*, 5493/72, 7.12.1976, paragraph 48. Osman Doğru, *İnsan Hakları Avrupa Mahkemesi İçtihatları*, Vol. I, Beta Yayınevi, İstanbul, October 2002, p. 170.

¹⁶⁷ *Sunday Times v. United Kingdom*, 13166/87, 26.11.1991, paragraph 50; *Oberschlick v. Austria*, 11662/85, 23.5.1991, paragraph 60; *Nilsen and Johnsen v. Norway*, 23118/93, 25.11.1999, paragraph 43.

¹⁶⁸ *Handyside v. United Kingdom*, 5493/72, 7.12.1976, paragraph 49; *Tele 1 Privatfernsehgesellschaft v. Austria*, 2311893/93, 25.11.1999, paragraph 34; *Informationsverein Lentia v. Austria*, 13914/88, 15041/89, 15717/89, 15779/89, 17207/90, 24.11.1993, paragraph 35.

¹⁶⁹ *News Verlags GmbH & CoKG v. Austria*, 31457/96, 11.1.2000, paragraph 51.

derogatory idioms counted as an insult and unjust blames, and not to conduct against the public security, in expressing his views and making assessments or criticisms. Similarly, it must be remembered that the characteristic of public service assumed may lead to additional limitations. For instance, judges, military officers, lawyers and other public servants¹⁷⁰ will narrowly exercise the freedom to express thoughts than the ordinary citizens and come face to face with the restraints peculiar to the profession. Those who perform such offices would have to keep themselves out of, for example, the political discussions, due to individual sense of responsibility and/or legal restrictions originate from the nature of mission.¹⁷¹

For example, in the case of *Zana*, the Court, by emphasizing the identity of applicant, stated that the words would be more influential in this situation and the intervention by the state party did not violate the Convention, interpreting the phrase “using of which requires responsibility”. In the concrete fact, the applicant who was former mayor of Diyarbakır expressed that the armed struggle of PKK against to Turkish state is a national independence war in a speech published at date of 30.08.1987, and added that however he did not affirm the massacres by the PKK against to the civil people, and but everyone might make a mistake and so killing of the women and children by PKK is a mistake. The Court, stressing the extreme tension existing in South-East of Turkey and the murderous attacks by the organization mentioned in that term, stated that the speeches subject to the case that were expressed by persons who occupy a particular political position would have a greater influence and drive the state addressed to more concern, and therefore the punishment for the applicant was in a nature which meets “a pressing social need”, and the justifications put forward by the national authorities was “appropriate and sufficient”, in this situation, the intervention was proportionate with the aims pursued in the face of the judicial discretion exercised by the authorities, in its decision.¹⁷² In a similar case which

¹⁷⁰ Leon Duguit, in his *Constitutional Handbook*, wrote that “certainly, the question must be answered is: the objective missions and duties in a special nature, which are not dictated to other individuals, are imposed to the public servants. To be sure, the public servant is obligated with performing these official missions. However, this is not the matter. The very point should be known is that the public servant is subject to more limitations than the statute of ordinary citizenship due to his title and qualifications, for performing of the service”. Narrated by Helene Pauliat, “Memurlar ve İfade Özgürlüğü”, Trans. by Tuğba Ballıgil, in *Düşünce Özgürlüğü*, Ed. Hayrettin Ökçesiz, (HFSA- Hukuk Felsefesi ve Sosyolojisi Arkivi Yayınları:3), Afa Yayınları, İstanbul, 1998, p. 268.

¹⁷¹ Safa Reisoğlu, *Uluslararası Boyutlarıyla İnsan Hakları*, Beta Basım Dağıtım, İstanbul, 2001, p. 73.

¹⁷² *Zana v. Turkey*, 18954/91, 25.11.1997, paragraphs 49, 50, 57-61. İnsan Hakları Mahkemesi Kararları, T.C. Adalet Bakanlığı Eğitim Dairesi Başkanlığı, the Bulletins of 1997, 1998, p. 93-109.

brought before the Court due to punishing of the applicant who is a lawyer by the disciplinary committee of the Bar, on his speeches that the administration and the law of Lucerne Canton has violated the human rights for many years, in a press conference, it came to a similar decision, emphasizing that the lawyers are ‘liable’ with contributing to properly operating of the judiciary and not to shake the people’s faith and respect to the courts.¹⁷³

2. THE ROLE OF THE ECHR IN INTERPRETING OF THE CONVENTION

It can be said that the Convention aims to guarantee legally the certain rights included by the United Nations Universal Declaration of Human Rights as both its form taken part in the ‘Beginning’ section and in the process of making up.¹⁷⁴ It can also be maintained that this document gave an end to regarding the matter of human rights as an own domestic problem of the countries and made contributions to creating minimal standards and solutions concerning the rights and freedoms guaranteed collectively, if it is taken account of the number of countries signed it and its protecting mechanisms. The document was prepared by starting from the understanding that preserving the rights and freedoms is the main obligation of the states, and it is emphasized that it constitutes the basic principles of the European public order and these principles have obliging effects on the contracting states.¹⁷⁵

The Convention that puts forward an effective and collective supervision system and has an objective character against to violations of human rights¹⁷⁶ is not a classical type that ensures a reconciliation of interests (synallagmatique) between the parts/nations, is a “law contract” which imposes objective obligations to the states party as the content and aims, and has a character of “directly applicability” in domestic law as such.¹⁷⁷ It is aimed a “Europeanizing” in understanding of human rights and democracy, and to establish a

¹⁷³ *Schöpfer v. Switzerland*, 56/1997/840/1046, 24.04.1998.

¹⁷⁴ Gözübüyük and Gölcüklü, *ibid*, see p. 137.

¹⁷⁵ The Court, for instance, has stated that the Convention has some characteristics according to which the reservations in a general quality by the countries part cannot be considered valid, and these characteristics constitute the European public order, in the case of *Loizidou*. The Convention, for the Court, is in a position of being the constitutional paper of the European Public Order, in the field of human rights. Narrated by Reyhan Sunay, *Avrupa Sözleşmesi Çerçevesinde Oluşan “Avrupa Kamu Düzeni” Kavramının Kapsamı ve Fonksiyonel Değeri*, Selçuk Üniversitesi Hukuk Fakültesi Dergisi, Vol.: 7, No: 1-2, 1999, p. 309-10.

¹⁷⁶ Reyhan Sunay, *ibid*, 309. “Avrupa...”

¹⁷⁷ Gözübüyük and Gölcüklü, *ibid*, 139.

“European Judiciary for Rights and Freedoms” by a method¹⁷⁸ by which reinterpreting the domestic laws of contracting countries in the light of social, political and legal developments throughout Europe by the Court¹⁷⁹ to provide a genuine and actual protecting for the rights and freedoms in the Convention.¹⁸⁰

The application of the abstract norm to concrete fact requires interpretation of it, namely determination its scope and content. The Court makes use of the rules of Vienna Convention on the Law of Treaties dated 1969 by interpreting the Convention that is described as an international agreement,¹⁸¹ and the international law has weighed down in interpreting of the Convention in its former decisions, by majority of its members consist of international jurists and representing of reformist line of the international law.¹⁸² It is necessary to interpret the agreements “by well-intention, by accepting the terms in an agreement with its ordinary meanings and by taking into account the subject and goal of the agreement” for the convention above-mentioned. However, the Court has appealed to nearly all various means of interpretation because of insufficiency for concretizing the Convention that aims to constitute a common European standard and written in two different official languages.¹⁸³

It has been preferred the terms of which content is not clear to remove the divergences before the likelihood of being prolonged or coming of deliberation an impasse due to the disagreements between the member countries of Council, and were left the interpretations fit to developments to the Convention organs by the articles 19 and 32. This choice has also created the doctrine of autonomous concepts that takes part in the decisions of the Commission and the Court.¹⁸⁴

¹⁷⁸ İbrahim Ö. Kaboğlu *Özgürlükler Hukuku, İnsan Haklarının Hukuksal Yapısı Üzerine Bir Deneme*, Afa Yayınları, İstanbul 1994, p. 61; Bülent Tanör, *Siyasi Düşünce Hürriyeti ve 1961 Anayasası*, Öncü Kitapevi, İstanbul 1969, p. 152, narrated by F. Sudre, *L’Europee des droits de l’Homme*, p. 242.

¹⁷⁹ Abdurrahman Eren, *Özgürlüklerin Sınırlanmasında Demokratik Toplum Düzeninin Gereklere*, Beta Yayınevi, İstanbul 2004, p. 166.

¹⁸⁰ The decisions by the Convention organs are in a declaratory character. They are contended with the presence of a violation. They cannot by themselves remove and defuse the domestic decisions or laws. Aslan Gündüz, “İnsan Hakları İle İlgili Uluslararası Sözleşmelerin Kurduğu Denetim Organları Kararlarının Hukukumuzda Etkileri”, in *İnsan Hakları ve Yargı, Sorunlar ve Çözümler*, Adalet Bakanlığı Eğitim Dairesi Başkanlığı, Ankara, 1998, p. 99.

¹⁸¹ Said Vakkas Gözlügöl, *Avrupa İnsan Hakları Sözleşmesi ve İç Hukukumuzda Etkisi*, 2nd Press, Yetkin Yayınevi, Ankara, September 2002, p. 302; *Golder v. United Kingdom*, 4451/70, 21.02.1975, paragraph 29.

¹⁸² Mustafa Yıldız, *Avrupa İnsan Hakları Mahkemesi Yargısı*, Alfa Yayıncılık, İstanbul, 1998, p. 25.

¹⁸³ Gözübüyük and Gölcüklü, *ibid* 139.

¹⁸⁴ Abdurrahman Eren, *ibid* 168, Gözübüyük and Gölcüklü, *ibid* 137.

The Court has not considered itself as bound to definition of domestic law of a particular country while giving a meaning to the terms in the Convention, although it frequently refers to the practices of the member states in cases brought to before it, until today.¹⁸⁵ The Court, in this context, have used the method of autonomous interpretation with the intention of the terms having a European meaning valid for the all member states,¹⁸⁶ preserving the guaranties set forth by the Convention as independent from the appreciations in domestic laws, and determining a common European standard and its scope and therefore preventing of going out of the Convention.¹⁸⁷ The jurisprudence of the Court, of course, provides the compatibility and harmonization of the regimes of the states party by this interpretation method using.¹⁸⁸

The Court qualifies the freedom of expression drawn up in the Article 10/1 as an autonomous concept, and subjects it to the method of “autonomous” interpretation. As an example, this concept as the form in the Convention “includes, of course, all kind of publishing/broadcasting that conveys an opinion or information”, and as a consequence, the announcements and music are appreciated within the scope of information and are protected. In the situation which is the consequence of the autonomous interpretation, this article does not protect the information not by only its quality and content, on the other hand, it also includes the “means of transmitting or receiving” and “produced” information (e.g. radio and television programs), “commercial discourses” aiming at communicate a product or service, and a work of art.¹⁸⁹

The Court, starting from the fact that the Convention is a living instrument, which needs to be interpreted in conditions of today, has adopted an understanding of dynamic interpretation, by taking into consideration the changing circumstances and social developments.¹⁹⁰ For, everything changes, the effect of mass communication devices on

¹⁸⁵ Durmuş Tezcan, Mustafa Ruhan Erdem and Oğuz Sancakdar, Avrupa İnsan Hakları Sözleşmesi Işığında Türkiye'nin İnsan Hakları Sorunu, Seçkin Yayıncılık, Ankara, 2002, p. 142.

¹⁸⁶ İbrahim Ö. Kaboğlu, ibid 152.

¹⁸⁷ Tezcan, Erdem and Sancakdar, ibid 142

¹⁸⁸ İbrahim Ö. Kaboğlu, ibid 152, quoted from F. Sudre, L'Europee des droits de l'Homme, p 108.

¹⁸⁹ İbrahim Ö. Kaboğlu, “Pozitif Anayasa Hukukunda Düşünce Özgürlüğünün Sınırları”, in Düşünce Özgürlüğü, Ed: Hayrettin Ökçesiz (HFSA- Hukuk Felsefesi ve Sosyolojisi Arşivi Yayınları: 3), Afa Yayınları, İstanbul 1998, p. 211.

¹⁹⁰ *Handyside v. United Kingdom*, 5493/72, 7.12.1976, paragraph 48.

societies increases, and consequently, these changes and transformations concerning the concepts of human rights produce differentiations in the policies of criminal of the member countries. Thus, the Convention organs, starting from the fact that the Convention is a living document, use the dynamic interpretation method to guarantee the rights in the Convention effectively and practically, not theoretically or imaginary. For instance, the Court has declared that the Article 10 includes the freedom of artistic expression, and again has extended the scope of the Article 10 to the schoolbooks, academic papers and researches, commercial speeches, advertisements by the professions of medicine and law, and broadcasting of programs by cable, using this interpretation method.¹⁹¹

3. BEING FORESEEN LEGALLY OF THE RESTRICTION

The phrase “being foreseen legally of the restriction” in the Convention aims providing the presence of a legal ground can be constitute a justification to the intervention in the law of state party and thus a genuine legal security which has constancy, clarity and attainability for restriction of this freedom set forth in the Article.¹⁹²

For the Court, what needs to be understood by the “foreseen legally” is that, “firstly, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able –if need be with appropriate advice– to foresee, to a degree that is reasonable in the circumstances, the consequences that a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms

¹⁹¹ Rick Lawson, “İfade Hürriyetini Güvenceye Almak: Avrupa İnsan Hakları Mahkemesi İçtihatlarında Üç Eğilim”, in *Teorik ve Pratik Boyutlarıyla İfade Hürriyeti*, Ed: Bekir Berat Özipek, , *Liberal Düşünce Topluluğu*, August, 2003, p. 247-268.

¹⁹² Jean Morange, “İfade Özgürlüğünün Hukuki Esasları”, Trans.: Tuğba Ballıgil, in *Düşünce Özgürlüğü*, Ed.: Hayrettin Ökçesiz, (HFSA-Hukuk Felsefesi ve Sosyolojisi Arşivi Yayınları: 3), Afa Yayınları, İstanbul, 1998, p. 91.

which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice”.¹⁹³

The Court has stated that the “law” in the phrase “foreseen legally” includes not only the “law” that is produced by the disposal of the legislation, but also unwritten “common law”, in the same decision. The Court, therefore, expressed that interpreting that the law concerning the intervention as “not foreseeing by the law” because of it is a “common law” and not be written would be clearly contrary to the intentions of those who drawn up the Convention, and the foundation of the law would be shaken from its roots when a state which has a common law remains outside such a protection.¹⁹⁴

The Court has described the rules concerning the professional ethic, which are laid down by the Association of Veterinary Surgeons that is a professional association as a “law”. In the concrete fact, it was applied an article of the Professional Conduct Statute to the applicant as one of the legal reasons of the intervention. The Court decided that the intervention is foreseen legally, specifying that the Statute on which the intervention is based resulted from the authority of laying down a norm because of parliamentary authorization.¹⁹⁵

It would not sufficient to redeem only formal conditions of “law” in the phrase “foreseen legally”; they are, at the same time, necessary to be on good terms with the Convention and not to be contradictory to a democratic society.¹⁹⁶

4. PRESENCE OF A LEGITIMATE AIM

The second paragraph of the Article 10, which regulates the freedom of expression counted the reasons of restriction concerning this freedom. The reasons for restriction given place to as suitable to each right for the another group of rights in the Convention have an exhaustive (numerus clauses) nature, and it is acknowledged an authority of

¹⁹³ *Sunday Times v. United Kingdom*, 6538/74, 26.4.1979, paragraph 49; *Barthold v. Germany*, 8734/79, 25.3.1985, paragraph 47; *Open Door Counselling Ltd. and Dublin Well Woman v. Ireland*, 14234/88, 14235/88, 29.10.1992, paragraphs 59, 60.

¹⁹⁴ *Sunday Times v. United Kingdom*, 6538/74, 26.4.1979, paragraph 47.

¹⁹⁵ *Barthold v. Germany*, 8734/79, 25.3.1985, paragraph 46.

¹⁹⁶ *Leander v. Sweden*, 9248/81, 26.3.1987, paragraph 64, narrated by Gölcüklü and Gözübüyük, p. 325.

restriction only bound to determined reasons of restriction for the contracting states. The Court, for instance, in a case brought to before it due to the violation of the right to Assembly and Association with others taken part in the Article 11 of the Convention, was not convinced that, in the face of the reason of restriction is extended by the contracting state as “preserving of national security, preventing of disorder and preservation of cultural traditions and cultural and historical symbols of Greece”, the last one of these aims constitutes one of the “legitimate aims” mentioned in the second paragraph of Article 11. For the Court, “exceptions to freedom of association must be narrowly interpreted, such that the enumeration of them is strictly exhaustive and the definition of them necessarily restrictive”.¹⁹⁷

The contracting states have to rest on any of “legitimate aims” which must be narrowly interpreted for the doctrines of the Court. It is impossible to make restrictions by creating a new legitimate aim or a reason of restriction excepting the “aims” in the article. In the same direction, use of a legitimate aim in an article as a reason of restriction for another article is contrary to the Convention as well. The contracting state that rests on one of “foreseen legitimate aims” in this manner cannot later make its way to deviate from the aim, and it has not an authority to interpret this aim on a large scale. Only the Court can decide whether the legitimate aims brought forward to justify the intervention by the contracting states are within the scope of the legitimate aims in the Convention.¹⁹⁸

Another point we have to mention lastly is the flexibility in the judicial discretion of the Court concerning the “legitimate aims” counted as the reasons of restriction. The Court interprets the judicial discretion of national authorities narrowly or widely according to its content by taking into account of cultural differences and social nature of each country. The Court, for instance, appreciates wider the judicial discretion of a state for an intervention for the purpose of common morals, while it interprets narrower the judicial discretion of the national courts for a restriction to the freedoms aims to public security.¹⁹⁹

¹⁹⁷ *Sidiropoulos and others v. Greece*, 57/1997/841/1047, 10.07.1998, paragraph 38.

¹⁹⁸ Abdurrahman Eren, *Özgürlüklerin Sınırlanmasında Demokratik Toplum Düzenin Gereklere*, Beta Yayınevi, İstanbul, 2004, p. 192-5.

¹⁹⁹ Abdurrahman Eren, *ibid*, see 192-5.

4.1 NATIONAL SECURITY AND TERRITORIAL INTEGRITY

The main argument for existing of the fact of national security/territorial integrity as the reason of restriction in the system of Convention is possibility that the certain expressions turn into harmful acts without an opportunity for thinking or deliberative process, for the state related. Undeniable dangerous effects may arise because of such expressions in this situation that exhibits limitless differences for each state. Thus, one basis of the claim of national security is that certain threats to national security prevent the operation of the deliberative process. Another basis of the appeal to national security, however, relates not to the conditions for the exercise of freedom of expression, but rather to the strength of the countervailing interest. Thus, it can be argued that the destruction or enslavement of the nation is of such great danger that it always outweighs the free expression interest, and in such situations, it is argued that the interest from the freedom of expression would not be protected against the greatness of the danger. However, the point to be determined is whether the possible danger is clear and present. Otherwise, if it is used dangers distant and improbable to justify the limitations on expression, then there is a great danger to free speech interest. Therefore, there must be a minimum threshold level of both probability and immediacy in order to provide sufficient deference to the weight of Free Expression Principle. However, if the dangers to national security are highly probable, likely to be immediate and of great magnitude, then a restriction of freedom of expression in the name of national security is consistent with recognition of Free Expression Principle.²⁰⁰

National security, in general, contains the matters of maintaining domestic and foreign security of the state and country, and is a concept that has legal, political and economical respects in top level and that provides the maintaining of established order of country, not only of people. The activities that break the national security are usually prolonged, continuous and dangerous acts both from inside and outside, and concern whole country and the permanence of state, and influence all the people and aim to abolish the present order, even if they are confined to only a particular region.²⁰¹

²⁰⁰ Schauer, *ibid*, see 267-271.

²⁰¹ *Sunday Times v. United Kingdom*, see Tayfun Akgüner, 1961 Anayasasına Göre Milli Güvenlik Kavramı ve Milli Güvenlik Kurulu, İstanbul, 1983, p. 328, narrated by Tezcan, Ruhan, Erdem and Sancakdar, Avrupa İnsan Hakları Sözleşmesi Işığında Türkiye'nin İnsan Hakları Sorunu, Seçkin Yayınevi, Ankara 2002, p. 328.

The ECHR has determined the limits of the freedom of expression from the aspect of national security in its decision of *Observer and Guardian*. In the concrete fact, it was given place to details that include certain unlawful actions by British Intelligence Agency and written out by a retired member of it, by the newspapers of Observer and Guardian in June 1986. It was decided to stop the publishing in question by the national court, adopting appeal by the attorney general because of the newspapers mentioned breach the national security. This information was published in a book titled *Spycatcher* in July in the same year in the USA, and this book became a bestseller. Certain copies of the book was bought by British citizens, but the British authorities did not make any decision concerning prohibiting of the book to push into the country. In 1987, on issuing of some chapters of the book by Sunday Times, the House of Lords forbade the publication of that newspaper and the other all media means, basing on the former decision of court and by justification of binding and prestige of the court decisions. The book, meanwhile, was published in many countries excepting the United Kingdom. The ECHR decided that the temporary prohibition of issuing by the British court is necessary for the national security and the state party did not violate the Convention. It was described, on the other hand, the second prohibition to Sunday Times and the other media means as an unnecessary intervention in a democratic society. For the Court, the justification about protecting the national security disappeared because the memories in question have no more secrecy after the publishing in the USA. Other justification about preserving the efficiency and prestige of the intelligence agency was not sufficient alone for a prohibition of publishing.²⁰²

The Court, in the case of *Zana* against to Turkey, examined the balance between the legitimate aims of national security, territorial integrity and preserving the public order and the freedom of expression of an individual, and decided that Turkey did not violate the Convention, stating that the discretionary margin of a state face to face with a situation threats the territorial integrity is wider than its discretion in the face of a case of which effects are limited to an individual level. In the concrete fact, *Zana* was inflicted to a prison sentence according to the Article 312 of Criminal Act at the end of trial, on his speeches that he described the actions of PKK as a movement of national independence and he

²⁰² *Observer and Guardian v. United Kingdom*, 13585/88, 26.11.1991, paragraphs 19, 42, 61, 62, 68.

upholds this movement, not favour of massacres, but everyone might make a mistake, killing of the women and children by the organization in question is a mistake, published in 30.08.1987. For the Court, it must be investigated “a just balance” between the basic right to freedom of expression of an individual and the legitimate right of a democratic society to defend itself to the attacks of the terrorist organizations. Therefore, the Court, making a fixation that the applicant’s speeches mean a support to the armed struggle by the organization mentioned by his describing the PKK as a movement that struggles for a national independence, the mortal attacks was continuing ceaselessly by the organization mentioned in the term in which the fact in question happened, expressed that the speeches by Zana who was former mayor of Diyarbakır which is one of the biggest cities of Turkey had a character that would make the situation that already exists and came to a point of explosion worse in that region, again the applicant has stated his support to PKK but he is not favour of massacres, killing of the women and children is a mistake, in this situation both supporting an organization uses violence to reach to its own goal and describing these as mistakes that may be made by everyone is a contradiction in itself.²⁰³

The Court found that the intervention to the freedom of expression by justifications of national security and public security was contrary to the Convention in its decision of *Şener*. In the concrete fact, the applicant was editor of a weekly magazine and an article titled “Confession of an Intellectual” was published by him in the number 4th September 1993 of it. The applicant, in his article, expressed that a nation is subjected to genocide by incidents in the Southeast region of Turkey, and those incidents continuing are an ugly war in which the chemical weapons are used, it is lamented instead of crying out, whereas Kurdistan burns in flames while is talked about the right of self-determination of nations and the fraternity of the peoples of Kurdish and Turkish, and at the end, the movement of the Kurdish people towards the freedom remains fruitless, and all this is a confession. Then, the applicant was inflicted to six months prison sentence and some fine by the national court on ground of the propaganda of divisiveness, and that number of the magazine was confiscated. The ECHR noted that, when is appreciated the article in its wholeness, it is investigated the Kurdish problem by the viewpoint of an intellectual, is reflected the double-faced attitudes and standing by of the intellectuals in the face of such

²⁰³ *Zana v. Turkey*, 18954/91, 25.11.1997, paragraphs 49, 50, 57-61. See İnsan Hakları Mahkemesi Kararları, T.C. Adalet Bakanlığı Eğitim Dairesi Başkanlığı, 1997 Yearly Bulletin, 1998, p. 93-109.

events, is criticized the practices of government in the region, is wanted the recognition of Kurdish reality and using of peaceful methods instead of appealing to military methods to solve the Kurdish problem, is expressed the sadness because of shedding blood in the armed struggle between the Kurds and Turks. Moreover, it has stated that the applicant expressed that he is opposed to all sorts of chauvinism including that of both Turks and Kurds, he did not use the speeches that provokes the people to the hate, revenge or an armed rebellion, on the contrary he suggested to solve the Kurdish problem by peaceful methods, and criticized the attitudes of authorities on this problem.²⁰⁴

The Court has re-examined the concept of national security on appeal by the applicant who was inflicted for divisiveness in another case against Turkey. In the concrete fact, the applicant is the chief of a trade union, and wrote an article titled “Word is for the worker; it will be too late tomorrow” in the number dated 21-28 July 1991 of a weekly newspaper. The applicant gave place to views that the events happened in the East and Southeast of Turkey are the state terror, extrajudicial killings, collective custodies and disappearing under custody rapidly increase in those regions with the Act of Anti-Terror recently enacted, this situation is an indication that the next days would be difficult, in his article. The applicant continued that it is stood by to the genocide that increasingly intensify in Turkey in front of eyes of all the world, and this fact is as important and vital as it would not be evaded with a few speeches or announcement. He stated that what needs to do is to oppose to these blooded massacres and the state terror, in an organization and coordination as possible, by making a corporation of action with the democratic mass organizations, political parties and all person and institutions to be allied with, in spite of all obstacles in the laws. For the applicant, “otherwise, the turn will inevitably be to the working class and labourer people for the monopolist capital circles aim to silence the Kurdish people. We invite our all people who say, “It will be too late tomorrow” to take part actively in this struggle. The applicant was inflicted to a year and eight months prison sentence and some fine by this article and by justification of divisiveness. The Court decided that the criticism about the activities in the regions interested of the country by Turkish authorities is harsh and the style used is sharp, the violence happened in Southeast Anatolia in recent years is described by a Marxist terminology, but the article as a whole suggests the democratic solutions and encourages the organization and cooperation for the

²⁰⁴ *Şener v. Turkey*, 26680/95, 18.07.2000, paragraphs 6, 7, 44, 45, 47.

events happened in regions mentioned, it must be taken into consideration that the article in question was published a short time later than the War on Gulf, while many Kurdish people escape from the oppression in Iraq and take shelter to borders of Turkey, the applicant as a leader of a trade union and a politician did not encourage an armed resistance or a rebellion in spite of his harsh style in the article, therefore the intervention is contrary to the Convention.²⁰⁵

The Court has emphasized that the freedom of expression is valid for not only the tolerable, indifferent, harmless and no aggressive expressions, but also is valid for information and opinions that disturb the state and some part of the people, chock them, are against them, contrary to them, irregular, surprising or worrisome, this fact is necessary for the democratic societies which contain the principles of pluralism, tolerance and open-mindedness, has repeated *mutatis mutandis* this stress in the cases subject to limitations to expression for national security and public order reasons.²⁰⁶

The Court, in another case, decided that the state party did not violate the Convention, taking into account that the preserving the military hierarchy and the vital role of the army for the territorial integrity. In the concrete fact, the applicant was punished for the encouraging the soldiers to desertion, due to wanting them to run away from their duties by delivering proclamations to the soldiers waiting to be dispatched in a military camp. The Court decided that the decision of condemnation was not contrary to the Convention, stressing that the applicant's action aims to criticize the policy of Northern Ireland of the United Kingdom has to obtain less protection in the face of the legitimate aims of ensuring the order in the army and preserving the national security of the state.²⁰⁷

4.2 PUBLIC SECURITY AND PREVENTING OF COMMITTING A CRIME

The concept of public security that means ensuring the material and physical integrity of the society and preserving of the domestic peace is in general protecting of a particular political and social legal order against to disorders, although it has a relative and variable

²⁰⁵ *Ceylan v. Turkey*, 23556/94, 08.07.1999, paragraphs 8, 33, 35, 36.

²⁰⁶ *Handyside v. United Kingdom*, 5493/72, 7.12.1976, paragraph 49; *Castells v. Spain*, 11798/85, 23.04.1992, paragraph 42; *Oberschlick v. Austria*, 11662/85, 23.5.1991, paragraph 57.

²⁰⁷ *Arrowsmith v. United Kingdom*, 7050/75, 12.10.1978, narrated by Şeref Gözübüyük, "Avrupa İnsan Hakları Komisyonu Kararlarından Seçme Özetler", İHMD, vol. 3, no. 1, 1995, p. 37-38.

character in point of time and place. What is meant by this protection is not guaranteeing any political philosophy or social form, the necessity of restriction of the expressions that may lead to a disorder in the social life.²⁰⁸ The intervention to the freedom of expression for public order will become legitimate “when the difficulty of separation a speech or expressing of an idea that has a character that would initiate an action would be dangerous for the society or the state from starting of an action clearly raise”. The European organs treat differently being shared of an opinion and the expressions violate the public order or try to violate the structure of a democratic society by means of violence, and keep the latter outside the scope.²⁰⁹

The Court has made the fixations that the concept of public order, in general, relates to the domestic security, and the activities that break the public order have a local character, belonging to a particular region, usual, ordinary and interests only in that region and has no continuity and temporary, every fact that relates to domestic security may breach the public order unlike the concept of national security.²¹⁰ The Court expressed that the contracting states have a certain discretionary margin in determining of contents of these notions, but this discretion is under the supervision in every concrete fact, taking into consideration the difficulty in determination of definition and scope of it.²¹¹

The Court has treated the intervention for the public order in the case of *İncal* against to Turkey. In the concrete fact, *İncal*, the applicant is a member of board of directors in İzmir organization of the Party of People’s Labour (HEP) about which The Constitutional Court decided to turn off in the year of 1993 when the incident happened. A proclamation

²⁰⁸ Reyhan Sunay, Avrupa Sözleşmesi Çerçevesinde Oluşan “Avrupa Kamu Düzeni” Kavramının Kapsamı ve Fonksiyonel Değeri, Selçuk Üniversitesi Hukuk Fakültesi Dergisi, Vol.: 7, No: 1-2, 1999, p. 310; İbrahim Kaboğlu, Özgürlükler Hukuku, İnsan Haklarının Hukuksal Yapısı Üzerine Bir Deneme, Afa Yayınları, İstanbul 1994, p. 61; Bülent Tanör, Siyasi Düşünce Hürriyeti ve 1961 Anayasası, Öncü Kitapevi, İstanbul 1969, p. 138-140.

²⁰⁹ Hasan Girit, Düşünce ve Anlatım Özgürlüğünün Ulusal Üstü Ölçütleri, Yeni Türkiye, No: 22, p. 865, see F. Rigaux, “Introduction Generale”, p. 8-9, narrated by Kaboğlu. See, also Kaboğlu, Özgürlükler Hukuku, İnsan Haklarının Hukuksal Yapısı Üzerine Bir Deneme, Afa Yayınları, İstanbul 1994, p. 189.

²¹⁰ *Sunday Times v. United Kingdom*, Durmuş Tezcan, Mustafa Ruhan Erdem and Oğuz Sancakdar, Avrupa İnsan Hakları Sözleşmesi ve Uygulaması, T.C Adalet Bakanlığı Eğitim Dairesi Başkanlığı, Ankara 2004, p. 262-265. The Turkish Constitutional Court has stated that the concept of public order means the general tranquillity/calm and order, it includes all the regulations in every field aiming at securing the order of society, and expresses the protecting the state and organization of state, although it has a meaning difficult to be determined. (E. 1963/28, K1964/8, K.28.1.1964, AMKD, no: 2, p.47), narrated by Reyhan Sunay, Anayasa Mahkemesi Kararlarında İfade Hürriyeti, Liberal Düşünce Topluluğu, April 2003, p. 114.

²¹¹ *Erdoğdu and İnce v. Turkey*, 25067/94, 250668/94, 08.07.1999, paragraph 47; *Arslan v. Turkey*, 23462/94 08.07.1999, paragraph 44.

was prepared by the party organization mentioned to criticize the decisions especially against to increase of the street hawkers in İzmir and squatter's houses in surroundings of the city by local authorities, and was printed ten thousand pieces to deliver. The proclamation, beginning with the sentence "To All Democrat Patriots!", has given place to views that a campaign was started to exile the people who is in Kurdish origin to the out of city by governorship, municipality and police directorate, İzmir was determined as a pilot region for this campaign, for this purpose, as a first stage, is tried preventing the Kurdish citizens who are living on street salesmanship from doing this job under the mask of making the city beautiful and relaxing the traffic, and thus is forced this part of society to come back to their own provinces where they were born by pushing them to starvation and poverty. It was emphasized that, for attaining to this goal, the proclamations titled "The Patriotic People of İzmir" were delivered before the campaign, in which inspirations were made in the direction of not employing Kurds, not getting in touch and not getting married with them, thus hostility, grudge and hate to the Kurdish people was provoked, and nobody knew why the deliverers of these proclamations did not arrested although they were delivered daytime. It was announced that this campaign was a part of a psychological struggle against to Kurds throughout the country, thus Kurds is tried to silence getting them under oppression, it is tried to reach to the same goal by annihilating their living sources and shelters at this time in İzmir, it is necessary forming "neighbourhood committees" that would reflect the people's own power in the name of solidarity for resisting too these assaults, and all Turk and Kurd patriots have to do their duties to end this struggle, the fraternity of the nations must live long, and this special war that spreads to all cities has to stop, in the end part of this proclamation.²¹²

Party's board of directors has claimed a permission to deliver the proclamation appealing to İzmir Governorship, and the public security department of İzmir Police Directorate to which this formal request was transferred has appealed to the public prosecutor's office of the Court of State Security (DGM) by the assertion that the proclamation includes a divisive propaganda that would encourage the people to resist to the government and to commit a crime, and a standby judge decided that the proclamation is confiscated and forbidden to deliver. The Court of State Security that consists of three judges, as one of them is a military judge, found the applicant guilty from acts with which

²¹² *Incal v. Turkey*, 22678/93, 09.06.1998, paragraphs 9, 10.

be accused and inflicted him to six months and twenty days prison sentence and some fine on 9 February 1993. Moreover, it decided to confiscate the proclamation copies. The applicant has appealed to the ECHR stating that he was convicted because of helping to preparing of proclamation. The Court has treated the intervention in the context of necessity in a democratic society, expressing that it was aimed “preventing of disorder” in the second paragraph of Article 10 of the Convention by the decision of conviction for the applicant.²¹³

For the Court, the proclamation wanting to be delivered has a character of criticism to some local administrative precautions taken against to especially street hawkers by authorities; it reflects the concrete facts concerning the interests of people of İzmir; very harsh expressions about the policy by Turkish government are given place in certain parts of proclamation and serious accusations are made about the Government for its responsibility for this situation; and is invited the “all democrat patriots” “to resist” by means of “neighbourhood committees”, describing the disposals of authorities as the “terror” acts and a part of a “special war” against to “Kurdish people”.²¹⁴

The Court, fixing that the freedom of expression has a vital importance for the political parties and their active members although it is important for everyone, it is an obligation for the political parties to attract attention to their voters’ problems and to defend their interests because of being their representatives, therefore it is a necessity to interpret this freedom widely concerning the political parties and their representatives, and the Court must make a much more careful examination on this issue due to the intervention to the freedom of expression of the applicant who is a member of an opponent party. For the Court, the permissible limits of a criticism is wider for the government than that for an ordinary citizen even that for a politician, and the acts and defects of the government must be subjected to not only close control of branches of legislation and judgement, but also to that of the public opinion. Moreover, the superior position occupied by government requires appealing to the criminal case only in limited situations in the event of presence of other means for meeting the unjust assaults and criticisms by its opponents. The Court decided that the Convention was violated, expressing that the state authorities have the

²¹³ *İncal v. Turkey*, 22678/93, 09.06.1998, paragraphs 11-15, 26-32.

²¹⁴ *İncal v. Turkey*, paragraph 50.

liberty of taking penal precautions that are not excessive and aiming at necessary response, as these authorities are the assurance of the public order, in the concrete fact, the expressions in question are wishes encourage the public in Kurdish origin to come together to dub some political demands with the other things, these demands cannot be seen as provocative to using violence, creating grudge and hostility between the citizens, when these are read in its own context although the meaning of “neighbourhood committees” is ambiguous, if it is alleged that the proclamation aims at other goals than the written meaning, then submitting of concrete proofs demonstrate this is necessary.²¹⁵

The Court has investigated the issue for the national security and preserving the territorial integrity in the case of *Arslan* against to Turkey. In the concrete fact, the applicant is the author of a book titled “*Mourning History: 33 Bullets*” of which first press was published in December 1989 and second one was in July 1991, and the book is confiscated following its first publishing in the first inquiry by the İstanbul Court of State Security (DGM). The book includes a preface by Musa Anter who was a politician and an author in Kurdish origin and was killed later, and it is stated briefly that the some part of country is a Kurdish region or provinces, this places must belong to Kurds, the Kurds had formed their country named Kurdistan in this region, but Turks coming from Turkistan exiled Kurds to outside Kurdistan, and this region is now under a general war and have to oppose this, in this preface. At the end of the first inquiry, it was sued a public prosecution against to the applicant by the request of punishing by the divisive propaganda because of he alleged that there were various nations in the Republic of Turkey, described the Turkish nation as barbarous, asserted that the Kurds are victims of a constant oppression if not a genocide, exalted the terrorist acts in Southeast region of Turkey, and at the end of the trial, the applicant was inflicted to six years and three months prison sentence and decided that the book is confiscated by the court on February 29th 1991. Following the abolition of the law to be based on, the punishment of the author was became null by a decision of court, and decided that the books confiscated to be given back, however the applicant, against him a new public prosecution was sued in accordance with The Anti-Terror Act for the second press of the book, was inflicted to a year and eight months prison sentence this time.²¹⁶

²¹⁵ *Incal v. Turkey*, paragraphs 51, 54, 60.

²¹⁶ *Arslan v. Turkey*, 23462/94, 08.07.1999, paragraphs 8-21.

The applicant has asserted that he should not be blamed for the preface written by Anter, and his aim was never to function for the benefit of divisive extremes, but his goal was to inform his views concerning the events happened in the province of Van where he was born and resulted in death of 33 peasants including his own family members, by repeating his defending in trial in which he was inflicted.²¹⁷

The Court first determined that the book in question narrates the issue by making a connection with the events happened in the Southeast region of Turkey, where many people died, it is a work in a literary character and in a manner of story, but the explanations of defining Turks as the occupiers and oppressors who occupied the lands of other peoples, the authorities murdered the peasants and performed genocide in these regions, and the “resistance” by the people of Kurdish in Silopi announced “the happy message concerning the day in which they would break the big castle of the violence of Turkish chauvinism” in it did not fit to defining of “exposition of the historical realities”, they aimed at providing the Kurdish population living in the region to resist to the activities of Turkish authorities and added a little violence to the criticism.²¹⁸

The Court stated that it took into account the background of the cases brought before it particularly in the matters concerning the struggle against to terror, and considered the concerns of the Turkish authorities relating to spreading of opinions from which they think may intensify the serious disturbance that going on for about fifteen years. It decided that the intervention is not necessary for a democratic society because there is no proportionality between the punishment to which the applicant was inflicted and the legitimate aim wanted to be reached, emphasizing that many people in Kurdish origin who escaped from the oppression in Iraq surged into Turkish borders in the days in which the second press of the book is printed, in the concrete fact, when all these components are appreciated together, the applicant as an individual preferred to express his own views by means of a literary work that would have considerably narrow potential influences on “security of state”, “public order” and “territorial integrity”, instead of the mass communication, this largely decreased the negative effects of the book, there is no a

²¹⁷ *Arslan v. Turkey*, 23462/94, 08.07.1999, paragraphs 25-27.

²¹⁸ *Arslan v. Turkey*, paragraphs 45, 46.

provocation to violence, armed struggle and a rebellion in the opinions expressed, although the some offensive sections draw an extremely negative picture about the Turkish population and give a hostile atmosphere to the author.²¹⁹

4.3 PROTECTING OF MORALS AND HEALTH

In spite of the fact of vital importance and function of the concept of morals in the individual and social life, the meaning given to this concept alters according to time and ways of life of the societies. Thus, when it is taken into consideration the fact of transporting of this concept to the legal field especially to the field of human rights and using as a criterion or a reason in restricting of rights and freedoms by formulating in the form of “common morals”, the difficulty of this problem become thoroughly visible and this requires a more strictly examining.²²⁰

However, another matter to be pointed out is that it is given place to the concept of “common morals” in the Convention system. Every individual, of course, has a criterion of morals peculiar to him, by influence of milieu in which he lives, the differences in knowledge, diversity in beliefs and so on. When is talked about the common morals, it is meant a value created by the individuals collectively, in other words the minimal of the ethic thoughts adopted by individuals in a particular society, in a particular time or the main values to be observed at first sight. It differs from the public order that establishes the material foundations of the social frame by constituting the moral respect and ethic framework of society.²²¹

The cases in which the reasons of restriction are regarded as legitimate aim of common morals are usually brought before the Court in the matters of obscene publications/broadcastings.²²² The obscenity concept is in general consists of the materials

²¹⁹ *Arslan v. Turkey*, paragraphs 47-50.

²²⁰ Nihat Bulut, “Hak ve Özgürlüklerin Sınırlandırılma Nedeni Olarak Genel Ahlak”, Atatürk Üniversitesi Erzincan Hukuk Fakültesi Dergisi, Vol. 4, No: 1-2, Year: 2000, Erzincan 2000, p. 29.

²²¹ Nihat Bulut, see *ibid*, p. 32, 33, narrated by Oktay Uygun, 1982 Anayasasında Temel Hak ve Özgürlüklerin Hukuki Rejimi, Kazancı Yayınları, İstanbul 1992, p. 131.

²²² *Handyside v. United Kingdom*, 5493/72, 7.12.1976, *Müller and others v. Switzerland*, 10737/84, 24.5.1988.

that have an erotic/pornographic content addressing to the sexual senses of a human²²³, and they find the new describing ways for themselves in literature and fine arts with the every progress in communication and art.²²⁴

Whether the obscenity is a form of expression in the context of free expression is controversial. We usually prefer the form of verbal communication in daily life. However, we sometimes try to affect others using different means in order to share our aesthetical emotions as well, and the great works in the past and the modern arts we used today are the examples of these means. The obscene works, of course, also influence human, but this influence is physical rather than mental. Although saying that the obscenity is within the scope of “expression” for the “free expression” is difficult, it is also difficult to say it is entirely outside of this, when we appreciate it together with all effects.²²⁵ Another subject to be pointed out is the fact that the other arguments can be presented as justification for both producing and restriction of obscene materials, when is talked about infants.²²⁶

The first justification presented for restricting of obscenity within the scope of freedom of expression is that such publications/broadcastings deviate from the standards of common morals of the society, and they are entitled to less protection, when the public interest to be obtained in restricting these is taken into consideration. Secondly, that they may lead the individuals to certain conducts that contradict with the social values, even to acts that are determined as crimes by normative judgements. Lastly, that such material makes the society ugly and gives rise to urban corruption by becoming widespread, that some people would be disturbed even by knowing presence of such material, even they are

²²³ The US Supreme Court has stated that a work should induce intensely the sexual desire, must be much clearly distressing and unpleasant and lastly should not include any social value, in order to describe as obscene, in a decision concerning a case brought before it, in relating to erotic novels by Henry Miller titled “Tropic of Cancer” (*Miller v. California*, 1973) and by John Clendan titled “Fanny Hill: or Memories of a Woman of Pleasure”. Melih Yürüşen, “Pornografiyi İfade Özgürlüğü Bağlamında Düşünmek”, in *Teorik ve Pratik Boyutlarıyla İfade Hürriyeti*, Ed: Bekir Berat Özipek, *Liberal Düşünce Topluluğu*, August 2003, p. 213.

²²⁴ Melih Yürüşen, see, *ibid*, 210. The erotic one is described as representation of sexual activities that no includes violence, despising, and is based on mutual consent, while the pornographic reflects the opposite use of same materials. Melih Yürüşen, see, *ibid*, 215, narrated from Lenore T. Szuchman and Frank Muscarella, *Psychological Perspectives on Human Sexuality*, John Wiley & Sons, New York 2000, p.290-291.

²²⁵ Susan M. Easton, *The Problem of Pornography, Regulation and The Right to Free Speech*, Routledge, New York 1996, p. 90-93; See, also Schauer, *ibid*, p. 246-7.

²²⁶ Norman P. Barry, *Hukuki ve Siyasi Açından İfade Hürriyeti*, in *Teorik ve Pratik Boyutlarıyla İfade Hürriyeti*, Ed: Bekir Berat Özipek, *Liberal Düşünce Topluluğu*, August 2003, Trans. by Özlem Çağlar Yılmaz, p. 35.

withdrawn from common expose they would not be eliminated, and all this provides legitimate justifications for the government.²²⁷

The first decision is that of case of *Handyside* by the ECHR, in which it examined the obscenity for legitimate aim of common morals and put forward the general principles for this concept. In the concrete fact, Richard Handyside, the applicant, is owner of a publishing house, and bought the copyright of a book titled "Little, Red Textbook"²²⁸ that is written by two authors from Denmark in September 1970 and is printed and/or delivered in 13 different countries of Europe and in many ones outside the Europe, and was published the first press of it and then the reviewed second one on November 15th 1971. The attorney generalship which taken into account complaints about the book on giving detailed information relating to the book by a few national newspapers following the publishing, it started an inquiry and confiscated the copies of book and pamphlets during the first inquiry. At the end of the trial, the local court, which taken into consideration that the book would be read mainly by the children under the sixteen, decided that the considerable number of children would possibly read this book would be seduced and enticed, the book is an obscene work and there is no public interest in publishing of it, and that confiscating of it, and fined the publisher.

The ECHR, examining the file, noted that it is not possible to find a uniform understanding of Europe, the approaching of each country's law to morals necessities varies according to time and place especially today when the opinions about this matter rapidly and largely change, therefore the state authorities are in a more advantageous position than an international judge in reporting an opinion about the very contents of moral needs and necessity of prohibition or penalty designed to meet them and have already a judicial discretion for this reason. Again, the Court emphasized that it is

²²⁷ Schauer, *ibid*, see 243-4. See, also Susan M. Easton, *The Problem of Pornography, Regulation and The Right to Free Speech*, Routledge, New York 1996, p. 88-90.

²²⁸ The book includes an introduction titled "All Adults Are Tigers From Paper" and the chapters "Education", "Learning", "Teachers", "Students" and "System", and the sub-titles about the "sex" of the chapter of "Students" are "Masturbation", "Orgasm", "Lovemaking and Sexual Intercourse", "Contraceptives", "Sexual Dreams", "Menstruation", "Rapars to Children or Dirty Elder Men", "Pornography" "Impotency", "Homosexuality", "Normal and Abnormal Things", "Learning More", "Venereal Diseases", "Abortion", "Lawful and Unlawful Abortion", "Let's Remember", "The Methods of Abortion", "Addresses for Helping and Recommendation on Sexual Matters". It is explained that it is an appeal book, it can be found more than to be interested and looked for and it includes many thing would increase the knowledge even in a progressive school. *Handyside v. United Kingdom*, 5493/72, 7.12.1976, paragraph 20.

necessary to treat the publication and the applicant in question in a context that includes the evidences and arguments submitted in the phases of both national and international, because the examining the decisions by national court isolated from their own conditions can be misleading.

The Court, examining the case in this context, noticed that it was preferred a schoolbook format by its content, title and price and therefore was chosen the adolescent children from twelve to eighteen as the target mass, some passages²²⁹ under the sub-title of sexuality are interpreted as encouragement to being used to harmful maturity activities even to commit particular crimes in an important phase of their growing up, although the book contains generally true and useful information, and is based on events entirely, the publishing and delivering of the book in many countries excepting the United Kingdom would not influence the conclusion because the determining of its own approach by every Contracting State especially for common morals is normal, and appreciated the preserving of moral values as a legitimate and rightful justification, and decided that there is no disagreement to the Convention.²³⁰

The Court has reached a similar decision in a case against to Switzerland in which the applicant and nine friends was condemned as well. In the concrete fact, the applicant and his friends were convicted due to the works in which the sexual intercourse between a human and an animal is represented in an exhibition organized by them, and the works are confiscated. The Court, the case brought before it by the assertion of disagreement to the Convention, stated that the artistic expressions occupies an important place in exchanging of cultural, political and social information and ideas and therefore they are within the scope of protection in the Article 10, and repeated that the artists like everyone is under the duty and responsibility. It noted that the precaution taken by the Swiss authorities is not contrary to the Article 10/2 of the Convention, taking into account the nature of people in

²²⁹ For example, in a passage titled “by yourself”, it is said, “Maybe you use narcotics, or you make love with your girl or boyfriend. Do not tell this your family or teachers, whether by fear or only wanting to hide”. In another passage, “Do not feel a sense of shame or guilt for things you really want to do. Think of these are in fact right because your family and teachers would not consent things you did. Such things will be more important than the approved ones in your future life”. In another passage titled pornography, it has taken part the phrases “porno is a harmless pleasure, if it is not taken seriously and not believed that it is a real life. One who confuses the porno with the real life would largely be disappointed. It is possible for you to obtain certain positive ideas from porno and to find some things that would be interesting for you and have not experienced before in it.” paragraph 32.

²³⁰ *Handyside v. United Kingdom*, 5493/72, 7.12.1976, paragraphs 9-20, 48-50.

Fribourg Canton where the pictures exhibited and the exhibition is open every age group by the cultural, social and religious factors, as well as not to be understood of message wanted to be informed by only the pictures representing the sexual intercourses between humans and animals, in its decision gave to an end to the case.²³¹

4.4 PROTECTION OF THE REPUTATION AND RIGHTS OF OTHERS

There are two different interests in restricting of the expression for this reason, which sometimes compete and sometimes conflict, and this requires to establish a balance between the freedom of private life that makes a person an individual and includes his most natural, untouchable and secret characteristics and right to freedom of expression that has the functions such as informing the public, investigating, watching and manifesting the persons, issues and problems in the name of public and the activities that is the legitimate consequence of this. This balance in the equation indicates a sensitive condition that would be disturbed by a little deviation against one of them, and what is aimed at is a social condition that is more regular and liveable. An excessive protective life model, for instance, may attain to a point that leads ultimately to the drawback or to corruption for reaching to a more liveable society, or on the contrary, the intervention to the private life in the name of being more informed and turning colourless is a result likely to lead to a condition which disturbs the individual and as a consequence creates a disorder and lack of tranquillity.²³² The one of the most important problems of all democratic societies has been living in reconciliation of these two rights.²³³

The fear of coming face to face with the insult, cursing, fanciful expression, contempt and so on for individuals wanting to participate in public debate would decrease the participation to democratic discussion platform. For, as the expressing views requires more than moral courage for this people whose honour and personality would be open to any assault in the lack of legal protection, this must not be expected from any person. A certain restriction to the expression by justification of protecting the personal honour/dignity²³⁴

²³¹ *Müller and others v Switzerland*, 10737/84, 24.5.1988, paragraphs 8, 14, 40, 43.

²³² Sait Güran, "Özel Yaşam ve İfade Özgürlüğü", present to Prof. Dr. Sahir Erman, İstanbul Üniversitesi Hukuk Fakültesi Eğitim, Öğretim ve Yardımlaşma Vakfı, Pub. No: 8, İstanbul 1999, p. 402.

²³³ Safa Reisoğlu, *Uluslararası Boyutlarıyla İnsan Hakları*, Beta Yayınevi, İstanbul 2001, p. 77.

²³⁴ The concept of "dignity/honour" is not a variable one for the individuals; it is regarded as a concept that belongs to all humanity, and is accepted even for a human who is hated by all society. For, denying this could

would be inevitable in this situation.²³⁵ The first justification for restriction is that the individuals have the “rights” on their own dignity similar to the property right, and the expressions in a character of directly insult by others would not obtain any protection by their harm in a certain extent to that person.²³⁶ Secondly, that such expressions must not obtain any protection because of they are deprived form the “content” which should exist in an opinion, information, message and criticism for the freedom of expression.²³⁷

However, the very question is the condition in which the expression that has a content needs to be protected is within the scope of private life. The private life can be defined as the side of life and manner of conduct that influences only him or as the field of secrecy of an individual.²³⁸ The matter to be determined at this point is whether the expression against to private life has a function of “being concerning or interested with public”, or determining of its content for “interest” and “scope”.²³⁹ For, the public interest in receiving of information sometimes may be greater, and in this situation, conveying of the information to public area does not constitute an assault to the private domain of the person who has no more any right in this domain.²⁴⁰

The ECHR decided that the intervention by reason that the events in the background of criticism is in a character which interests in the public and protecting the reputation and rights of others is contrary to the Convention, in the case of *Nielsen and Johnsen*. In the concrete fact, on starting of a feverish discussion following presenting of results of a

be behaviour against to all humanity. The human dignity cannot be measured and divided to shares. Hasan Girit, “Düşünce ve Anlatım Özgürlüğünün Ulusalüstü Ölçütleri”, *Yeni Türkiye*, Year: 4, No: 22, 1998, p. 862.

²³⁵ Hakan Hakeri, “Alman Federal Anayasa Mahkemesinin Bir Kararı Işığında Düşünceyi Açıklama Özgürlüğü ve Kolektif Hakaret”, present to Prof. Dr. Sahir Erman, İstanbul Üniversitesi Hukuk Fakültesi Eğitim, Öğretim ve Yardımlaşma Vakfı, Pub. No: 8, İstanbul 1999, p. 436.

²³⁶ Norman P. Barry, *ibid*, see 30.

²³⁷ Sait Güran, *ibid*, see 404. The Turkish Constitutional Court emphasized that such expressions is outside the scope of protection, saying “The freedom of thought and opinion gives to nobody the right to insult or assault to another person or official institutions. The separation between the freedom of thought and the offence of insult or assault is as clear as no need to explain and to distinguish easily by everyone. It cannot be seen in any state of law that to be allowed to insults and assaults made to dignity and honour of the individuals or officials and public institutions. A reverse understanding to this both does not agree with the nature of the freedom of thought and leads to a result that breaks the public order and gives rise to anarchy”. (p. 213-214), in *Anayasa Mahkemesi Kararlarında İfade Hürriyeti*, Liberal Düşünce Topluluğu, April 2003, p. 110.

²³⁸ H. Yücel Başdemir, “Bireysel Hürriyet Düşüncesi ve John Stuart Mill”, in *Teorik ve Pratik Boyutlarıyla İfade Hürriyeti*, Ed: Bekir Berat Özipek, Liberal Düşünce Topluluğu, August 2003, p. 122.

²³⁹ Sait Güran, *ibid*, see 404.

²⁴⁰ Andrew Belsey, “Mahremiyet, Aleniyet, Siyaset”, Trans: Nurçay Türkoğlu, in *Medya ve Gazetecilikte Etik Sorunlar* Eds: Andrew Belsey, Ruth Chadwick, Ayrıntı Yayınları, İstanbul 1998, p. 103.

research concerning the fact of “violence”, which performed by a professor of criminal law in the city of Bergen where 200,000 populations are living, the applicants who are administrators of a police association in that term were condemned due to their expressions.²⁴¹

The Court first pointed out that there is a feverish and long termed public discussion about appealing of police, especially Bergen police to violence in Norway in the background of the case, the discussion extended to university, inquisitional commission, judicial inquiry and courtrooms, and the expressions objected are on a serious problem interested in by the society as said by the Norway Constitutional Court. It stated that the most conspicuous respect of the case is that the representatives of the police association were subjected to a sanction due to their expressions as an answer to certain reports declared the ill-treatment of police to the people. For the Court, the expressions by the elected representatives of the applicant professional associations are a response to allegations that interrogate the uprightness of practices of that profession. The Court, noting that what needs to be determined in the present case is whether the applicants have gone beyond the limits of acceptable criticism, specified that was gone beyond the limits of permissible criticism by certain expressions used and the attitudes displayed by the police associations, but these require to be appreciated depending on they have a special statute as being representatives of the professional associations and in the frame of effect created by research in question, when is evaluated the case as a whole at the end of these fixations. The Court, emphasizing that the expressions, in addition, cannot be regarded as entirely unjust, decided that the expressions in question used in fact about those who have informed Mr. Bratholm and have not intention to give harm to his personality, therefore it is unnecessary to examine the fixations about that the reputation of the person may be

²⁴¹ The research has a volume of 280 pages, and it is based on the information about those who were exposed to violence between the dates of January 1975 and July 1976, obtained from the local hospitals. It has given place to statistical information that the police used violence in many events during its mission, it was determined precisely that 58 of these people were subjected to violence by the police, that the police swerved to way of using excessive and unlawful power in average 360 events in a year. It was stated that it must be blamed the police for these unlawful acts at the final part of research. On publishing of the research by title of “Violence and Its Victims: An Empiric Research”, a feverish discussion has begun by the assertion that the researching methods used and results reached have a poor foundation. When Mr Bratholm who continued later his researches independently published a book titled “Savagery of Police” in 1986, the applicants have used expressions that the last report of Mr. Bratholm a pure misinformation that aims to harm to police and weaken the existing trust, the all organization is leaved under suspicion by unidentified persons, and this must be regarded as an intentional lie until the opposing of this is proved. *Nielsen and Johnsen v. Norway*, 23118/93, 25.11.1999, paragraphs 8-13.

influenced negatively, the Convention provided a more comprehensive protection for such discussions interested in public problems and political expressions, and the professional reputation of the both parties is under the risk in such cases, and as a consequence, the speech and style used in the research is not comparable with the expressions that are in a character of a response to it, the restriction to the freedom of expression in order to protect the rights of researcher is not compatible with the Convention.²⁴²

Another point to be noted in addition to this is that the democracy brings about the culture of criticism and more participation to the issues concerning the public and going towards of more frequent and more intense criticism to the administrative and local authorities is normal. The officeholders have to be patient and indulgent for such publications/broadcastings as would be necessary to be criticized of them without any obstruction especially when the public interest is in question. However, they can sue a case of compensation in the event that the baseless allegations are put forth such as incapableness or corruption for them. In such cases, right to prove should be given for the assertive. The superior public interest requires the protection of press as a fourth power, in the cases that the concrete allegations are based on the real evidences.²⁴³ The ECHR, for example, has evaluated that condemning of a columnist by insult to police by his expressions “liveried monsters” and “let the barbarians and sadists to practise their perversion” which regard the attitudes of police as savagery and brutality as the violation of the Convention in the case of *Thorgeirson* against to Iceland. For the Court, the columnist has depicted his views about a specific ill-treatment event that gave rise to an extensive discussion and result in inflicting of the responsible police officer, by means of press. The Court, expressing that there is no controversy about the event communicated has truly occurred, added that the applicant leaned his column on “rumours”, “narratives” or “the views of people” obtained from third persons and they are expressions not being proved as completely unrealistic in the context of allegations about the police to use violence. The Court, pointing out that the freely discussion of public issues is one of the main principals of democratic administrations and the press has an important function in receiving information and news on these problems by the people, decided that the goal of applicant is not to give harm to the reputation of the all police agency, he initialized a

²⁴² *Nilsen and Johnsen v. Norway*, 23118/93, 25.11.1999, paragraphs 44, 46, 50, 52, 53.

²⁴³ Şeref Ünal, *Avrupa İnsan Hakları Sözleşmesi*, TBMM Kültür, Sanat ve Yayın Kurulu Yayınları, 1999, p. 266, quoted from Feldman, David, *Civil Liberties and Human Rights*, Oxford 1993, p. 612 et seq.

discussion about the responsibility of the police in this field by starting from a few events that requires a personal responsibility, an impartial and independent institution has already been established for investigating the complaints concerning the conducts of police, it is possible to regard the expressions in the column as really heavy or hard, but this hardness would not be regarded as excessive so long as it justifies the restriction, therefore the intervention to freedom of expression of the applicant is in a character of discouraging to discuss freely about the public concerns and is disproportionate with the legitimate aim.²⁴⁴

The Court has come to a similar decision in the case of *Dalban*. It decided that condemnation of a journalist by insult due to his many columns in which he wrote that the certain state dignitaries have involved in an event of forgery is a violation of the Article 10 of the Convention. It noted, in addition, that informing the people on matters relating to public interest is the duty of the press, therefore the idea that a commenting about an event is stunted to be able to prove the truthfulness of it must be denied, the columns were subjected to intervention aims at attitudes and conducts of state dignitaries in performing of their offices, not at their private life in the concrete facts of the case, thus the condemnation of the applicant constitutes a disagreement which is not proportionate with the freedom to express thought of the journalist.²⁴⁵

The Court displays a more flexible attitude for the criticisms concerning the politicians for maintenance of an effective political democracy. It specified, in the decision of *Lingens*, that the freedom of political discussion is the core of the notion of democratic society, exposing of views of the political leaders and having of people an opinion about their thoughts and conducts is a necessity of the democracy, the politicians have also the right to protect their honour, but the necessities of this protection should be balanced with the interest would be provided by freely discussion of political matters, the politicians, unlike the private persons, inevitably and intentionally open every speeches and acts to the

²⁴⁴ *Thorgeir Thorgeirson v. Iceland*, Series A. No. 239, 25.6.1992, EHRR, Vol. 14,1992, p. 865-867, narrated by Reyhan Sunay, *ibid*, see 96; See, also Mehmet Semih Gemalmaz, “İnsan Hakları Hukuku Açısından İfade Özgürlüğü”, present to Prof. Dr. Sahir Erman, İstanbul Üniversitesi Hukuk Fakültesi, Eğitim, Öğretim ve Yardımlaşma Vakfı, Pub. No: 8, İstanbul 1999, p. 323-324.

²⁴⁵ *Dalban v. Romania*, 28.09.1999, narrated by Durmuş Tezcan, Avrupa’da Düşünce Özgürlüğü Avrupa İnsan Hakları Sözleşmesinin 10. Maddesine İlişkin İçtihat, Avrupa Konseyi İnsan Hakları Genel Müdürlüğü, Etki Yayıncılık, 2002, p. 18.

close control of both media and mass of people, and therefore they have to more tolerate.²⁴⁶

The Court decided that Austria has violated the Convention, by evaluating the publications in the manner of assault to rights of personality of a private person for the public interest that would be obtained by clearing up that information, in the decision of *News Verlags GmbH & CoKG*. In the concrete fact, the news/columns were concerned with the letters with bomb that were posted to some politicians and some other reputable persons and caused some of the victims to be seriously injured in Austria. The applicant was also one for whom criminal proceedings had started, and thereupon was imposed a prohibition of publishing for the News magazine in which the applicant was made a matter of news and was published his photographs. The applicant, in his submission to the Court, acknowledged that a contradiction sometimes might be between the freedom of press and the right to protection of private or family life of the persons, when a person's photograph is published for the purpose of news. However, he noted that there was no violation for rights of personality or presumption of innocence when the news and photographs are evaluated as a whole, moreover the state that felt the danger of violation would be warned the media corporations involved instead of prohibiting. On the other hand, the government emphasized that it was assaulted to the principle of respect to private life of that person by issuing of those photographs, and the pejorative phrases associated with the photographs had violated the principle of innocence of a person until the opposite is proved. The Court stated that the events have a character that concerns the public in a great extent when it is taken into account the background of the events in question, the photographs in the news did not expose the details of private life excepting one of probably wedding ceremony. It continued that another factor to be appreciated in this case is related with the duty assumed by the press in a democratic society, and this duty is to communicate all the opinions and information to the public in the frame of its obligations and responsibilities. The Court, specifying that the interest in protecting the rights of accused would not be regarded as weightier than the interest in issuing of these photographs, decided that the restriction to the applicant limited the freedom of determining the manner of announcing of the news, as the other press organs has given place to news and comments concerning that person in

²⁴⁶ *Lingens v. Austria*, 9815/82, 8.7.1986, paragraphs 9, 10, 41, 42, 43, 47.

that term, the precaution taken for protecting of the rights of person or not violating of the principle of innocence of a person until the opposite is proved is an act quite beyond the protection, therefore there is no an acceptable proportionality between the prohibition and the legitimate aim pursued.²⁴⁷

Another case scrutinized under this title is that determination of what would be the balance in respect of restricting of the expressions concerning the “racist speeches” or “group vilification” by justification of protecting the rights of others. This terms which can be defined as humiliating and insulting of the individuals for their race, ethnic origin, colour, language and religion and exciting of the senses of hate and violence about them²⁴⁸ have been increasingly taken place in the core of discussions by claims of nongovernmental organizations and caused to problems in respect of establishing of the balance between the comprehensive protection for the expression and restricting of it by legitimate aims.²⁴⁹

The Court adjudicated that the intervention is contrary to the Convention in a case in which the racist speeches was restricted in order to protect the rights of others. In the concrete fact, the applicant who is a citizen of Denmark performs a program named “Sunday News Magazine” for a television station in date of event, and that program addressed to a cultured mass of audience has a diversity of content ranging from xenophobia to immigration and asylum. The applicant has interviewed the members of a youth group who introduced themselves as “green-jackets” and known by their racist attitude about the immigrants and ethnic groups in Denmark for two or two and a half hours. The interview reduced to about a few minutes by montage was broadcasted in that program.²⁵⁰ On broadcasting of the interview, a public prosecution was sued against the

²⁴⁷ *News Verlags GmbH & CoKG v. Austria*, 31457/96, 11.01.2000, paragraphs 39, 40, 44, 49, 52, 54, 55, 56, 58-60.

²⁴⁸ Melike Batur Yamaner, “İnternet Aracılığıyla Yayılan İrkçi Söylemlerin Yasaklanması”, present to Yıldızhan Yayla, Galatasaray Üniversitesi Yayınları Armağan Serisi No: 4, 1st press, İstanbul 2003, p. 559.

²⁴⁹ Thomas David Jones, *Human Rights: Group Defamation, Freedom of Expression and The Law of Nations*, International Studies in Human Rights, Vol. 33, Kluwer Law International, 1998.

²⁵⁰ The group members, briefly, expressed that they define themselves as racist, and Denmark belongs only to Danishes, they were involved in various crimes before, and in the part that is related blacks, they used such expressions that the blacks are animal, this fact can be understood by comparing with a photograph of gorilla as well as by examining their anatomies and is fated that they ultimately would be slaves, the all other foreign workers (Turks, Yugoslavians and others) are also animals, Danishes cannot live comfortably in their own country because of them, they are obliged to queue up and struggle with them even in order to get a social relief, many of them already earn their living on selling narcotics, they paint the their doors, give harm to

applicant on account of helping to spread of racist views and encouraging these, and the court of Denmark decided that the condemnation of applicant, notifying that the applicant personally has prepared this program and foreknew that the “green-jackets” would use racist speeches, in addition, he encouraged such speeches by his questions during the interview, the extreme views would not reach to a broad mass of people without his intervention.

For the applicant and Commission, it was demonstrated the crookedness of the racist views rather than spreading of them when the program is taken into consideration as a whole, what is aimed at is to exhibit and analyze the racism mixed up violence which is used by the adolescents who are unable to express themselves and deprived socially to the audiences and to draw attention of people a bit to these matters, and so the broadcasting had not any influence or harm on “dignity or rights of others”.²⁵¹

The ECHR, evaluating the presentations and advocacies, first stated that it is especially aware of struggling against to all forms and appearing of racism has a vital importance, a considerable future of present case is that the applicant has not used the expressions in question, but helped to broadcasting of these as a television reporter and as a requirement of his duty. The Court emphasized that it is necessary to evaluate the program as a whole in order to reach to an objective conclusion and could be determined whether the broadcasting in question propagandize the racist views and opinions, by only in this way. The Court, in this context, especially pointed out that the applicant, starting the program by referring to recent public discussions and media comments concerning racism, demonstrated his desire of watching of program in this frame by audiences, and what is aimed at is to inform the people concerning the issue caused to public concern by choosing persons who have that particular view and by exhibiting their mentality and social background. The ECHR noted that the aim was to inform the people about an issue that causes to public concern despite the fact that expressions of group in question would not reach to a broad mass of audience without the interference by the applicant, the program in

their cars, spout dye to their face while they are sleeping in order to they leave Denmark, these acts and likes involve less penalty and so they do not discourage them, they do not want their children to be like them, but they would meet with sympathy this in the event of their children commit offence against to the immigrants. *Jersild v. Denmark*, 15890/89, 23.9.1994, paragraphs 9-12.

²⁵¹ *Jersild v. Denmark*, 15890/89, 23.9.1994, paragraph 28.

question was broadcasted as a part of a critical Denmark news program and aimed at a cultured audience body, certain speeches were not entitled to protection in the Article 10 aside being hurtful for groups aimed, but this would not constitute a sufficient reason being “necessary in a democratic society” for the condemnation of the applicant, and therefore it decided by twelve votes against to seven that the intervention to the freedom of expression of the applicant on account of protecting of “rights or reputation of others” is contrary to the Convention, in its ultimate evaluation.²⁵²

4.5 PROTECTING OF THE EFFICIENCY AND ESTEEM OF JURISDICTION

The main goal for the restriction by this legitimate aim is primarily to secure the operation of the jurisdiction efficiently and properly according to the Convention system. The jurisdiction should be able to perform its function as impartial, independent and free from all external factors. The ECHR, for instance, examined the matter in the context of whether the esteem of jurisdiction faculty was violated in the case of *Schöpfer*. In the concrete fact, the local administrative agency carried a resolution concerning that Danishes working in an American base would not vote for the local elections. It was denied the claim of applicant who sued for cancel of this resolution. The applicant who is a journalist criticized the composition of the court that denied his application in his two columns. The applicant, who wrote that the court consists of a judge regular and two officials of the respondent administration, formed an estimate that this hinders being impartial and independent of the judgement and the fact that the decision of denial was taken by absolute majority indicates this. The applicant who was judged for these two columns was condemned on account of injuring esteem of jurisdiction and the trust of citizens to jurisdiction. The ECHR, unlike the Commission, decided that the intervention was not contrary to the Convention, emphasizing that the state is obligated to protect the prestige and honour of the judges.²⁵³ Again, in a similar case, the applicant who is a lawyer in Switzerland has said that the administration and the law of Lucerne Canton have been violated the human rights for many years, in his a press conference organized in order to criticize the condition of detention of his a client. On these speeches, the disciplinary

²⁵² Ibid, paragraphs 9-12, 28, 30, 31-35, 37.

²⁵³ *Barfod v. Denmark*, 11508/85, 22.2.1989, Şeref Ünal, ibid, see 267.

committee of the Bar has fined him on account of disclosing the professional secrets and talking about a case continuing. The Court noted that the lawyers are obligated to contribute to the operation of the jurisdiction properly and not to weaken the senses of trust and respect of people to the courts; in this case, the disciplinary penalty to the applicant because of being careless of his duty and talking about a case continuing did not constitute a contrast to the Convention.²⁵⁴

The Court has emphasized that the protection for the efficiency and esteem of jurisdiction is not limitless and being informed of the attitudes and conducts of judges and the operation of the judiciary is the most natural right for the people, in its decisions. For example, in a case in which a journalist who wrote about a senior Italian judicial member took a loyalty oath to the Italy Communist Party was condemned, decided that the freedom of expression was violated, by stressing that the content of expression used by the journalist is symbolic, moreover phrases concerning the criticisms of political militancy about the judicial member are based on true foundations, the public has the right to be informed about whether the juridical members perform their duties properly although it is necessary to protect them against to groundless assaults, a juridical member who is, at the same time, a member of a political party would inevitably open himself to the criticisms by the press.²⁵⁵

Many of people, as a presupposition, respect and trust in the courts or in a wider sense the judiciary about which they think as a suitable forum for the determination of right and obligations of the people and a solution of their disagreement. Therefore, protecting of prestige of this institution is an unavoidable necessary and a desirable consequence for its efficiency. The term of jurisdiction/jurisprudence includes judges by their duties, as well as the mechanism of justice and judgement branch of the state. The scope of law concerning lack of respect usually consists of acts related to either duties of judges or the operation of courts and the mechanism of justice. Then, one of the aims of this law is maintaining of the authority and impartiality of judgement branch.²⁵⁶

²⁵⁴ *Schöpfer v. Switzerland*, 25405/94, 24.04.1998, paragraphs 12, 14, 16, 26-33.

²⁵⁵ *Perna v. Italia*, Engin Yetik, "Avrupa İnsan Hakları Sözleşmesi ve Avrupa İnsan Hakları Mahkemesi Kararları Işığında İfade Özgürlüğü Kavramı", T.C Adalet Bakanlığı, Adalet Dergisi, Year: 95, May 2004, No: 19, p. 197.

²⁵⁶ *Sunday Times v. United Kingdom*, 6538/74, 26.4.1979, paragraph 55.

The ECHR has stated that the jurisdiction benefits a special protection, however this occurs in a particular context, and the matters concerning the operation of the justice could be a part of public discussions, in its decision of the case of *Sunday Times*. In the concrete fact, the limited company named Distillers working in the field of biochemistry produced licensed and marketed the medicine which was firstly developed in Germany and which contains the substance known as thalidomide in the United Kingdom, between the years 1958 and 1961. This medicine that has a tranquilizer characteristic was especially prescribed to the pregnant women. Many women who have taken this drug in their pregnancy term gave birth children who have serious defects in 1961, and then it has been understood that 450 babies of this kind was born. Distillers removed all drugs contain thalidomide from the market of United Kingdom in the month November of the same year. Thereupon, the parents of babies have sued the actions for damages against to company that produced the drug in the United Kingdom. Some part of the families have chosen the way of coming to an agreement with the company mentioned at the end of the discussions, and the company has established a relief fund for the children who remained outside the scope of agreement and offered to the court to be ratified in September 1972. The newspaper Sunday Times has issued a column titled “National Shame: Our Children with Thalidomide” in 1972 when the case yet is continuing, and announced that it would publish a series of articles which would explain in detail how the tests performed with the drug have led to this disaster. The company produced the drug has appealed to the court by the assertion that the articles in question aimed at influencing the cases continuing and giving harm to the prestige of the jurisdiction by interfering with it. Thereupon, it was placed a prohibition to the newspaper involved not to publish the articles it announced, and this prohibition has continued along four years.

The ECHR has stated that a threat to the authority of jurisdiction did not definitely arise in the fact in question in its decision. The Court, pointing out that the fact is known by everyone that the courts do not operate in an entirely isolated medium, although the courts are places where the disagreements are solved, emphasized that this does not mean that the matters of disagreement would not discuss beforehand by press or people. It stressed that the important matter is to respect to limitations for the proper operation of the jurisdiction and being applying of justice right, securing of the course of news and information concerning the cases hearing by the courts in the matters interested in public

interest is necessary, and decided that the restriction not based on a righteous reason is incompatible with the Convention.²⁵⁷

The Court has come to a decision different from the Commission in the case of *Prager and Oberschlick*. In the concrete fact, the applicant who criticized the attitudes of Austrian judges in the penal cases in his an article titled “Beware! Severe Judges” was fined at the end of a case of insult against to him. The Court has expressed that although it accepts the effective function of the press in a state of law, the intervention to the severe criticisms that is deprived of well intention and incompatible with the ethic rules of the press concerning the personal and professional capacity of the judge by the applicant is a restriction which aims at capability of performing of the jurisdiction its function wholly and is proportionate with the judicial discretion left to the states and is necessary in a democratic society.²⁵⁸

ECHR has stressed that neither the public discussion nor the criticism concerning the conclusive decisions of the courts can be prohibited, and it maintained a similar attitude about a respect to the rule of law and the decisions of courts in its subsequent decisions. For instance, an applicant was fined and prevented from participating in such demonstrations for 12 months on account of breaking social peace, on his impeding the hunting of hunters together with his 60 friends by waylaying them in order to protest the foxhunting. However, his fine has been turned into 28 days prison sentence because of his denial to obedience to the prohibition. The ECHR decided that the inflicting of him to a prison sentence is not contrary to the Convention because of providing a respect to the rule of law and the decisions of courts, in the face of exposing by the applicant that he intended that he would maintain such actions despite the prohibition by the court.²⁵⁹

²⁵⁷ *Sunday Times v. United Kingdom*, 6538/74, paragraphs 8-12, 55, 56, 60, 64 and 68.

²⁵⁸ *Prager and Oberschlick v. Austria*, 15974/90, 26.4.1995, paragraph 33.

²⁵⁹ *Steel and Others v. United Kingdom*, 23.09.1998, ECHR Press Releases (2 September-30 October 1998), p. 31 et seq., Şeref Ünal, *ibid.* see 267.

5. ACCORDANCE OF THE RESTRICTION TO THE NECESSITIES OF A DEMOCRATIC SOCIETY

There are *sine qua non* building stones of a democratic society, and it is not possible talking about a democratic society unless these minimal criteria are provided. The essential elements of such a society can be determined as international positive norms, and the freedom of thought, pluralism, tolerance and open-mindedness in the direction of doctrines of the ECHR. It will be necessary to take into consideration the universal democratic principles, minimal guarantees set forward by the international law of human rights and practices in today's democratic states.²⁶⁰

The guaranteeing of maintenance of the democratic society is one of the fundamental goals gained importance in the process of making up of the Convention. The phrase that "providing and maintaining of peace and justice in the world" was taken part in introduction of the Convention is only possible by the presence of the democratic society, and the concept of democratic society has appeared as a notion that constitutes the mainstay of the Convention and secures not restricting of freedoms unnecessarily and excessively.²⁶¹

The tolerance that was given place as one of the essential elements of a democratic society is to endure to living of another as he wishes by everyone.²⁶² For, I have some racial/ethnic, religious, sexual and positional differences than others, and these differences between men determine the way of life adopted by them.²⁶³ Thus, we define ourselves according to others, and recognizing and adopting of the individual differences is an inevitable necessity for ontological security of an individual identity. Therefore, the "other" is not only one whom I must tolerate externally, at the same time one is who

²⁶⁰ Abdurrahman Eren, *ibid.* see 175–183. The democratic society includes and guarantees the pluralist democracy and the law of human rights that are the foundation of the Convention system.

²⁶¹ Reyhan Sunay, *ibid.*, see 106; See, also Mustafa Yıldız, *Avrupa İnsan Hakları Mahkemesi Yargısı*, Alfa Yayıncılık, İstanbul, 1998, p. 6.

²⁶² Mill, *ibid.*, see 51.

²⁶³ Melih Yürüşen, *Ahlaki ve Siyasi Hoşgörü*, present to the year of tolerance, 1995, Siyasal Kitabevi, Ankara 1994, p. 5-23

defines me. Silencing and impeding the talking of the other is, at the same time, to deprive him from his right to be a political subject.²⁶⁴

Pluralism that occurs as a moral and political principle in democratic societies implicates the idea that there are many humane goodness and values and it is impossible to set up any significant hierarchy between these,²⁶⁵ and right to be different in individual level.²⁶⁶ The political dimension of this principle, whose moral dimension can be defined in this way, expresses coming together of the different cultures and different groups of identity in the form of press, political parties, trade unions, trade chambers, associations and trade associations by ways of life represented by them,²⁶⁷ and to realize the interests of their members by influencing the branches of legislation, execution and jurisdiction, using the politics as an instrument in order to reach to their goals in this system that is free and participatory and in which there is no oppression.²⁶⁸ Modern democracy cannot abandon from pluralism; otherwise, it will kill itself.²⁶⁹

These elements that are the building stones of a democratic society were emphasized by the Court in every case. It, for example, said, “The Court's supervisory functions oblige it to pay the utmost attention to the principles characterising a ‘democratic society’. Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10 (art. 10–2), it is applicable not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no ‘democratic society’. This means, amongst other things, that every ‘formality’,

²⁶⁴ Zühtü Arslan, “Liberal Demokrasilerin Zor Zaman Krizi ve İfade Özgürlüğü”, in *Teorik ve Pratik Boyutlarıyla İfade Hürriyeti*, Ed. Bekir Berat Özipek, Liberal Düşünce Topluluğu, August 2003, p. 75.

²⁶⁵ Mustafa Erdoğan, *Liberal Toplum Liberal Siyaset*, Siyasal Kitabevi, Ankara 1998, p. 197.

²⁶⁶ Reyhan Sunay, “Avrupa Sözleşmesi Çerçevesinde Oluşan ‘Avrupa Kamu Düzeni’ Kavramının Kapsamı ve Fonksiyonel Değeri”, *Selçuk Üniversitesi Hukuk Fakültesi Dergisi*, Vol. 7, No: 1-2, 1999, p. 319.

²⁶⁷ Vahap Çoşkun, “İnsan Haklarının Evrenselliği ve Liberal Perspektif”, *Present to Yıldızhan Yayla, Galatasaray Üniversitesi Yayınları, Armağan Serisi*, No: 4, İstanbul 2003, p. 232.

²⁶⁸ Şeref Ünal, *Temel Hak ve Özgürlükler ve İnsan Hakları*, Yetkin Yayınları, Ankara 1997, p. 63-4.

²⁶⁹ Sami Selçuk, “Düşün Özgürlüğü”, in *Düşünce Özgürlüğü*, Ed. Hayrettin Ökçesiz, HFSA-Hukuk Felsefesi ve Sosyolojisi Arşivi Yayınları: 3, Afa Yayınları, İstanbul, 1998, p. 295.

‘condition’, ‘restriction’ or ‘penalty’ imposed in this sphere must be proportionate to the legitimate aim pursued” in the case of *Handyside*.²⁷⁰

The concept of democratic society presented in this manner is regarded as a guarantee for interventions to the rights and freedoms take place in the Articles 8, 9, 10 and 11 of the Convention.²⁷¹

The Court, examining first the concept of “necessity” in the case of *Sunday Times*, said, “The adjective ‘necessary’, within the meaning of Article 10 para. 2 of the Convention, is not synonymous with ‘indispensable’, neither does it have the flexibility of such expressions as ‘admissible’, ‘ordinary’, ‘useful’, ‘reasonable’ or ‘desirable’; rather, it implies a ‘pressing social need’”.²⁷² The Court, stating that the concept of necessity implies a “pressing social need” following it compared this concept with the others in this manner, stressed that the restriction to the basic rights in order to reach to aim anticipated by legislator must be necessary, and this is the reflection of the fact that the freedom must be a rule and the restriction an exception in democracies, by this comment.²⁷³

The state involved has a particular margin of appreciation in evaluating the presence of the “pressing social need”. This margin was recognized to both national legislator and jurisdiction that has the authority of putting into practice and interpreting the law in effect. However, all these, including those that are decided by an independent court and the decisions of legislation and execution, must be go hand in hand with the European supervision, and the reason of necessity in a restriction concerning a right must be persuasively demonstrated by the state involved.²⁷⁴ (“Nevertheless, Article 10 paragraph 2 (art. 10-2) does not give the Contracting States an unlimited power of appreciation. The Court, which, with the Commission, is responsible for ensuring the observance of those States' engagements (Article 19), is empowered to give the final ruling on whether a

²⁷⁰ *Handyside v. United Kingdom*, 5493/72, 7.12.1976, paragraph 49.

²⁷¹ Zühtü Arslan, “Avrupa İnsan Hakları Mahkemesi Kararlarında ‘Demokratik Toplum’, in Türkiye’de İnsan Hakları, Ed. Oya Çitçi, TODAİE, Pub. No: 18, p. 194.

²⁷² *Sunday Times v. United Kingdom*, 6538/74, 26.4.1979, paragraph 48; *Barthold v. Germany*, 8734/79.

²⁷³ Yusuf Şevki Hakyemez, “Temel Hak ve Özgürlüklerin Sınırlanmasında Ölçülülük İlkesi”, in Özel Hukukun Diğer Dalları ve Kamu Hukuku, Present to Prof. Dr. Hayri Domaniç, Vol. II, Ed: Abuzer Kendigelen, İstanbul 2001, p. 1222.

²⁷⁴ *Handyside v. United Kingdom*, 5493/72, 7.12.1976, paragraph 49; *Lingens v. Austria*, 9815/82, 8.7.1986, paragraph 39.

"restriction" or "penalty" is reconcilable with freedom of expression as protected by Article 10 (art. 10). The domestic margin of appreciation thus goes hand in hand with a European supervision. Such supervision concerns both the aim of the measure challenged and its "necessity"; it covers not only the basic legislation but also the decision applying it, even one given by an independent court".)

The Court, for instance, has appreciated the "pressing social need" in the case of *Castells*. In the concrete fact, an article titled "Scandal of Exemption" by the applicant who elected as a parliament from the Bask region was published in the issue dated 4-11 June 1979 of a weekly magazine. The applicant wrote that various armed groups assaulted the people living in Bask region, and there are murders whose perpetrators are unknown, the extreme rightist groups settled in the core of the state are responsible from this, the government is aware of these events but does not take required steps, so the government is responsible from all this. Thereupon, Castells, the applicant whose immunity was removed because of insult to the government by the parliament was first decided to be arrested taking into consideration the lower and upper limits of the offence by the court, but then was released on bail by reason that the offence attributed did not constitute any danger. At the end of the trial before the Superior Court, it was decided that the applicant condemned by the offence of insulting government, mentioning that the right to prove requested by him in order to expose the truth and prove the rightness of the assertions in his article could not be talked about this offence.

The ECHR has stated that the freedom of expression is especially important for the elected representatives of the people although this is valid for all, because they have a responsibility to call attention to the problems that busy minds of their voters and defend their interests, therefore the intervention to the freedom of expression of a member of the opposition in parliament deserves a more strict examination. The Court emphasized that the applicant preferred to express his views in a magazine although he might do this in parliament without any fear of sanction, but this would not remove his right to criticize the government, the press is one of the best instruments for the people to have an idea about the opinions and conducts of the political leaders, and it gives an opportunity particularly for the politicians to express their opinions and comments about matters that busy mind of people and to participation. It added that the acts and failings of the government are subject

not only to the close supervision of the branches of legislation and jurisdiction, but also to that of the press and public in a democratic society, the freedom of political discussion is not absolute, however the limits of the criticism about the government is wider than that about any person or even a politician, the government having a penal sanction alternative obtains an upper position, but the authorities should apply these sanctions properly and without any excessiveness. The Court, concluding the case in the light of these principles, decided that it was not recognized a right to prove for the applicant, although he repeatedly requested to demonstrate the rightness of his assertions, whereas this is very important, therefore the intervention to the freedom of expression of the applicant is unnecessary in a democratic society.²⁷⁵

Consequently, the concept of necessity is a question of looking after a balance between the protecting of the democratic society and guaranteeing of the individual basic rights. Thus, the application of the concept of necessity is stipulated to the meeting of a pressing social need.²⁷⁶

5.1. PRINCIPLE OF PROPORTIONALITY (TOOL-AIM BALANCE)

The principle of proportionality which is the last criterion in order to be regarded the intervention predicted in the Convention system as legitimate is not given placed in the Convention and its attached protocols. However, this principle finds its field of application within the scope of “necessity” or “obligation” in the Articles 2, 8–11, and 15 of the Convention and Article 2 of the 4th protocol, and again, practices of “prohibition of discrimination” in the Article 14, “prohibition of the abuse of the rights” in the Article 17 and “limits of restriction of rights” in the Article 18; and it is possible to say that this principle dominates over the Convention as a whole. As a matter of fact, although it is not clearly envisioned in the Commission and Court opinions, it is emphasized that it is a principle dominant over the Convention as a whole.²⁷⁷

This principle used to restrict a freedom or right is that the appealed tool’s being convenient for the realization of the aim which is wanted to be reached by limitation,

²⁷⁵ *Castells v. Spain*, 11798/85, 23.04.1992, paragraphs 7, 9, 12, 37, 53, 61–72.

²⁷⁶ Mustafa Yıldız, *Avrupa İnsan Hakları Mahkemesi Yargısı*, Alfa Yayıncılık, İstanbul, 1998, p. 181.

²⁷⁷ Abdurrahman Eren, *ibid.* See, 201–2

presence of a harmony between the envisioned aim and the restriction applied onto the basic right and freedom for this aim at all aspects, establishing of a reasonable equilibrium between them and not restricting of the freedom more than the foreseen.²⁷⁸ In other words, a result must be reached by comparing the public interest/general interest that is tried to be obtained/protected as a result of limitation with the interest of the applicant or the person whose freedom was harmed while this principle of proportionality is applied. Principle of Proportionality, in this frame, serves as a function that provides an equilibrium/proportion between two conflicting interests.²⁷⁹

State party has been given a certain “margin of appreciation” in restricting basic rights and freedoms involved based on the reasons of restriction. The range of this margin, which is open to supervision of the Convention organs, is evaluated by considering the situation, special problems, various conditions of the country involved and similar factors. Surely, this margin is not limitless and it is open to supervision of the Convention organs. However, one point to be expressed is that the state involved has to prove that the restriction is necessary with sufficient evidences, in order to be regarded as righteous in an application about an assertion of intervention. Otherwise, the Court will decide an opposition to the principle of proportionality.²⁸⁰ In this context, “additional values” of Strasbourg organs relating to the point where the balance between the individual’s free expression and general interest should be established has a vital importance in the respect of formation of the standards of the freedom of expression.²⁸¹

In the *Gerger* decision about Turkey, the Court decided that limits has been exceeded while estimating the evidences related to the case in using the margin of appreciation left to the state party, and that the intervention is disproportional. In the concrete fact, a

²⁷⁸ Yücel Oğurlu, *AIHM Kararları ve Türk İdare Hukukunda Temel Hak ve Özgürlüklerin Sınırlanmasında Bir Yargısal Denetim Ölçütü Olarak “Ölçülülük İlkesi”*, Present to Prof. Dr. Turhan Tufan Yüce, Dokuz Eylül Üniversitesi Yayını, İzmir 2001, p. 486; Yusuf Şevki Hakyemez, *ibid*, see 1293.

²⁷⁹ Yusuf Şevki Hakyemez, *ibid*, see 1300; Gözübüyük and Gölcüklü, 145; Reyhan Sunay, 103. Because, the use of two different legal values or interests together may not always possible, and in this situation, it would be essential to fetter and restrict these two values or interests on mutual terms according to base of proportionality, by disallowing that they remove each other. Zeki Hafizoğulları, *Laiklik, İnanç, Düşünce ve İfade Hürriyeti, Us-a Yayıncılık, Ankara 1997*, p. 86.

²⁸⁰ *Sunday Times v. United Kingdom*, 6538/74, 26.4.1979, paragraph 62; See Vahit Bıçak, *Avrupa İnsan Hakları Mahkemesi Kararlarında İfade Özgürlüğü, Liberal Düşünce Topluluğu, July 2002*, p. 21.

²⁸¹ Rick Lawson, “İfade Hürriyetini Güvenceye Almak: Avrupa İnsan Hakları Mahkemesi İçtihatlarında Üç Eğilim”, in *Teorik ve Pratik Boyutlarıyla İfade Hürriyeti*, Trans. and Ed: Bekir Berat Özipek, *Liberal Düşünce Topluluğu, August 2003*, p. 249.

commemorative ceremony was organized on May 23 1993 in Ankara for Deniz Gezmiş and his two friends, Yusuf Arslan and Hüseyin İnan. Persons mentioned have initiated extreme left wing movement among university students at the ends of 1960s. They were condemned to the capital punishment for the guilty of aiming to give harm to constitutional order by means of violence and they were executed in May 1972. The applicant was invited to deliver a speech to the ceremony, but he did not attend the ceremony and instead he sent a message to the organization committee for reading to the people. The applicant briefly expressed in his message that the Republic of Turkey is based on the refusal of the worker's and Kurdish rights, any request devoted to Kurdish rights is met with a response, but the socialist flag rose by people mentioned is still being waved and the seeds of the freedom of Kurdish people sown in those days created the guerrilla warfare in the mountains of Kurdistan. The applicant, against whom a suit was brought because of this message, was condemned for the guilty of divisive propaganda against the unity of the Turkish nation and territorial integrity of the state. The Court, examining this decision, concluded that a message sent to a meeting where limited number of people joined has a limited effect on national security, public order and territorial integrity, consequently, the message is not in a character of encouraging violence, armed resistance or rebellion, therefore, the punishment envisioned for the applicant is not proportional.²⁸²

While the Court applies the principle of proportionality to an intervention involved, it comes to a decision by applying some criteria included in the principle of proportionality. First, the tool used for restriction should be convenient, relevant to protecting of the interest aimed²⁸³, the reason put forward for this aim should be sufficient, reasonable and necessary, and being a response to a pressing social need, and finally the form of intervention should be in equilibrium/proportional. As a matter of fact, the Court comes to a conclusion by considering either one or some of these criteria and evaluating the matter.²⁸⁴

²⁸² *Gerger v. Turkey*, 24919/94, 08.07.1999, paragraphs, 10, 13, 43, 47, 51.

²⁸³ For all intervention to a right and freedom for a legitimate aim, each Contracting State has a preferential position in choosing the tool suitable to conditions of its country. However, the tool chosen by taking into consideration the relationship between the aim and tool according to the principle of proportionality must be convenient, essential and proportional for reaching to the aim. Abdurrahman Eren, 205–6.

²⁸⁴ Yücel Oğurlu, *ibid*, see 507; Gözübüyük and Gölcüklü, 146; Reyhan Sunay, 102. The ECHR sometimes use the words proportionality or commensurateness that take part in the principle of moderation, and sometimes treats the principle of proportionality separately, regarding it as an independent principle. Yücel Oğurlu, *ibid*, see 507.

Another case, which the Council examined in the context of necessity in a democratic society and concluded as contrary to the Convention for the reason that the intervention is not proportional, is the case of *Wille*. In the fact subject to the case, the applicant who was a minister in the government of Liechtenstein in 1992 was assigned as President Judge of Liechtenstein Administrative Court for one period in May 1993 on account of he did not be a candidate for the elections on May 7th, 1993, The applicant, with this attribute, gave a lecture open to public with the title “The Structure and Functions of Liechtenstein Court of Constitution”, in a series of conferences about constitutional judgment authority and basic rights in a research organization, named Liechtenstein Institut on February 16th, 1995. The applicant, in this conference, presented his ideas that “the Constitutional Court is authorized for deciding the way in which the constitution is interpreted in a case of disagreement between the Prince (Government) and Assembly”; a newspaper gave place, in an article about the conference presented by the applicant, to the opinions of him about the authorities of the Constitutional Court as well as his other ideas.²⁸⁵

The prince sent a letter to the applicant on February 27th, 1995, about the conference mentioned, and in this letter, following a summary which criticizes the applicant’s opinions in the conference and the newspaper article, in the last part, the prince said “Mr Dr. Wille, in my opinion, your attitudes cause you to lose your ability to be the chief of a public institution. I do not want to discuss this subject, whether private or public; but I will never again assign you to be the chief of a public institution even if you will be suggested by Assembly or another institution”. The applicant explained that expression of an opinion the Prince does not agree cannot be considered as behaving contrary to the constitution and because of the opinions expressed by the prince in the letter written by him, his duty of the President Judge of Administrative Court is going under suspicion, thereupon, later the President of the Assembly informed the applicant that the subject was discussed in a private session in the assembly and it was concluded that no suspicions exist about his present duty because of his opinions about the judicial subjects he presented in the conference. Although the applicant, whose duty of the President of Administrative Court comes to an end in the Spring of 1997, was again suggested to be the President Judge of Administrative Court by the Assembly of Liechtenstein, the Prince rejected to reassign the

²⁸⁵ *Wille v. Liechtenstein*, 28396/95, 28.10.1999, paragraphs 6–9.

applicant, expressing he decided that Willie is not loyal to the Liechtenstein Constitution in the letter he wrote on April 17th, 1997.²⁸⁶

The government stated in the first trial before the Court that the second paragraph of the Article 10 of the Convention gives a great discretion authority to the state on the determination of which political behaviours are “appropriate for an administrative office”. The government continued to express that disagreement of the persons who are claimant for an office to the persons who have the authority to assign, reselect and get them away from the job may create a risk and this risk is known by all those concerned and this situation has never been judged as a violation of human rights, for the nature of a judicial position, the people at that position should limit themselves when they have to make a political declaration to the public, and the aim for this is protecting the public order, strengthening the stability of the society and ensuring the independence of the judiciary.

The Court, in its decision, emphasized that every state has the authority to determine the duties of the public employees, and the public employees, as individuals, will have benefit from the guaranties by the Article 10 of the Convention. As the concrete fact, it has stated that the problem to be solved is to establish a just balance between the freedom of expression which is the basic right of the people and providing being fulfilled the aims included in the second paragraph of the Article 10 of the Convention which is considered to be a rightful interest in a democratic state by the public officials, by taking into account the peculiar conditions of each case, and this is its own duty. Again, the Court has made fixations that are peculiar to the case that in every situation the freedom of speech of public employees becomes the current issue, the “duties and responsibilities” included in the second paragraph of the Article 10 gain a special importance and the Court considers this situation. In the final decision, the Court has expressed that the conference in which the applicant expressed his opinions is a political conference for it is about constitutional law and this property of the subject should not prevent the applicant from expressing his ideas. Again, according to the Court, when taken into consideration that the opinions expressed by the applicant is shared by lots of people in Liechtenstein, they cannot be evaluated as unsupportable, and moreover, the applicant did not give place to expressions that influence continuing cases or severely criticize the people and public institutes or harm to top-level

²⁸⁶ Ibid, paragraphs 12, 13, and 20.

public officials and Prince. The Court expressed that, when is evaluated the Prince's accusations in his reactions after these events that the applicant cannot be reassigned to be the president of a public institution even if he is suggested by the Assembly or any other institution, although it finds the reasons to intervene by the government to the freedom of expressions of the applicant are relevant, these reasons can not be regarded as precautions "necessary in a democratic society", and even if it is accepted the presence of in some level of judicial discretion, the attitude of the Prince is disproportionate with the aim pursued, and therefore it was violated the Article 10 of the Convention.²⁸⁷

Consequently, the state party involved has some level of margin of discretion for intervention to an express because of "a pressing social need". Again, the state party is authorized by a complete margin of discretion in choosing the tools suitable to the conditions of its country for the intervention to demonstrate its presence effectively. However, it must be taken into account the balance between the aim and tool in accordance with "the principle of proportionality" hidden in the concept of necessity, and the tool chosen for the aim should be convenient, necessary and proportional.²⁸⁸

²⁸⁷ Paragraphs 37, 41, 44, 60, 64, 67, 69, 70.

²⁸⁸ Abdurrahman Eren, *ibid*, see 205-6.

CONCLUSION

The expression used in the meaning of communication in daily life is the manifestation and offering of a thought, belief, opinion, attitude or an emotion to the outer world in order to share by using various means such as verbal or written exposition, artistic showing, and preference of personal appearance or image, demonstrations, marching, calling a meeting and organization. Views and opinions, whatever their contents may be, qualities, levels of truthfulness, manners, methods and environment expressed in it may be, fall within the scope of this freedom. It is not made any discrimination neither in terms of the nature of aim to be desired to reach (aim of profit or not), and nor the role which is taken part by real or corporate bodies in the utilization of this freedom guaranteed for everyone by the Convention.

The verbal communication, opinions, acts, symbolic expressions and artistic or commercial expressions form the scope of the freedom defined above. It is necessary to provide for individual the possibilities for accessing to the news, information, knowledge and documents by removing all the obstacles before his freedom of information defined as freedom to receive information and opinion in order to secure this freedom. As a consequence of this, the individual would be able to share with the others, using various forms of expression, the information and opinions obtained by reshaping all the data in his mind, which he gained by senses sometimes as voluntary and sometimes as involuntary from the birth.

However, the point to be emphasized in this context is that the freedom of expression has never been limitless in nowhere, although it existed in all democratic constitutions as an indispensable requirement of democratic societies. Because, the exercise of this freedom sometimes may harm to the other's rights or interests by its form or content, and thus it needs some restrictions. This freedom is restricted by two reasons directed to protect the individual and public order or the state in the Convention, as they take place in all national and inter or supranational papers. These reasons of restriction is counted in a limited manner in the Convention system as the national security and territorial integrity, public security and preventing of committing a crime, protecting of morals and health,

protecting of the reputation and rights of others and protecting of the efficiency and esteem of jurisdiction. The contracting states have to rest on any of “legitimate aims” which must be narrowly interpreted for the doctrines of the Court in any attempt of restriction to the expression. It is impossible any restriction by adopting a new aim or a reason of restriction except for the “aims” take part in the Convention.

According to the Convention system that aims at securing a democratic society, it is regarded what the tool is which is directed to the aim in the restriction attempted by justifying with the legitimate aim counted, the balance of tool-aim, and finally being agreeable of the restriction to the necessities of a democratic society order as essential elements. The decisions of the Court that is positioned as a supranational agency and aims to establish a common European Public Order, of course, is a roadmap of a democratic society for realizing of these essential elements.

Doubtless, we can understand the truth of each age, by only exactly appreciating the conditions peculiar to that age. However, the formation of these conditions closely relate to what extent protection is secured for the expression, as we have tried to exhibit throughout the thesis. For, every society, at the same time, is a living organism. It arises, flourishes and runs out at the end, as an organism. However, the long-time and healthy survival of societies requires some interventions and practices on time and congruent just as the livings. The necessary one is the free expression and keeping alive of it for societies. For, the society can falsify or verify itself only in this manner. The opposite situation will create a society that does not feel any pain for a renewal and starts to putrefy after a time that this is the messenger for the end.

Another point to be called attention to in this subject is that what must be the limits of fragile reactions of any political structure for the maintenance of the society; and so we have concluded that the restrictions should be exceptional for democratic societies by referring to the decisions of the European Court of Human Rights which is a supranational supervisory agency concerning this freedom.

Finally, the reality of century we live in is that the liberal democracies are indispensable for all the political structures. In this context, it is necessary to introduce an

exact protection for the expression by removing all obstacles before the freedom of press and secure sharing of information and opinions freely with the others. Fulfilment of the supervision of concrete norm by the judiciary has a vital importance for realizing of this goal. The living of the freedom of expression, and therefore of the democratic society will be possible only in this way.

REFERENCES

- ACAR, Bülent Hayri, “Düşünceden Değil, Düşüncenin Açıklanmasından Doğan Cezasal ve Bireysel Sorumluluk”, Yeni Türkiye, Year: 4, No:22,1998.
- AKILLIOĞLU, Tekin, Avrupa İnsan Hakları Sözleşmesi Avrupa İnsan Hakları Mahkemesi İçtüzüğü Başvuru Bilgileri, İmaj Yayınevi, Ankara, May 2002.
- AKILLIOĞLU, Tekin, “Düşünce ve Anlatım Özgürlüğü ve Kamu Görevlileri, İnsan Hakları ve Kamu Görevlileri”, Ed: Mesut Gülmez, TODAIE, İnsan Hakları Araştırma ve Derleme Merkezi, Ankara, 1992.
- ALİEFENDİOĞLU, Yılmaz, “Düşünce Özgürlüğü ya da Düşünsel Özgürlük”, Düşünce Özgürlüğü, Ed: Hayrettin ökçesiz, (HFSA- Hukuk Felsefesi ve Sosyolojisi Arkivi Yayınları:3), Afa Yayınları, İstanbul, 1998.
- ALİEFENDİOĞLU, Yılmaz, “Bir Temel İnsan Hakkı: Düşünce Özgürlüğü”, Yeni Türkiye, Year:4, No:22,1998.
- ALPASLAN, M. Şükrü, “Avrupa İnsan Hakları Sözleşmesi Uygulamasında Düşünce ve Basın Özgürlüğü”, A Present to Prof. Dr. Sahir Erman, İstanbul Üniversitesi Hukuk Fakültesi Eğitim, Öğretim ve Yardımlaşma Vakfı, Publishing No:8, İstanbul 1999.
- ARSLAN, Zühtü, “İfade Özgürlüğünün Sınırlarını Yeniden Düşünmek: “Açık ve Mevcut Tehlike”nin Tehlikeleri”, Ed: Bekir Berat Özipek, Teorik ve Pratik Boyutlarıyla İfade Hürriyeti, Liberal Düşünce Topluluğu, August, 2003.
- ARSLAN, Zühtü, “Liberal Demokrasilerin Zor Zaman Krizi ve İfade özgürlüğü”, Ed: Bekir Berat Özipek, Teorik ve Pratik Boyutlarıyla İfade Hürriyeti, Liberal Düşünce Topluluğu, August, 2003.

- ARSLAN, Zühtü, ABD Yüksek Mahkemesi Kararlarında İfade Özgürlüğü, Liberal Düşünce Topluluğu, December 2003.
- ARSLAN, Zühtü, “Avrupa İnsan Hakları Mahkemesi Kararlarında ‘Demokratik Toplum’, Türkiye’de İnsan Hakları, Ed. Oya Çitçi, TODAIE, Pub. No: 18.
- BARRY, Norman P., “Hukuki ve Siyasi Açından İfade Hürriyeti”, Translater: Özlem Çağlar Yılmaz, Ed: Bekir Berat Özipek, Teorik ve Pratik Boyutlarıyla İfade Hürriyeti, Liberal Düşünce Topluluğu, August, 2003.
- BAŞDEMİR, H. Yücel, “Bireysel Hürriyet Düşüncesi ve John Stuart Mill”, Ed: Bekir Berat Özipek, Teorik ve Pratik Boyutlarıyla İfade Hürriyeti, Liberal Düşünce Topluluğu, August, 2003.
- BELSEY, Andrew, “Mahremiyet, Aleniyet, Siyaset”, Trans: Nurçay Türkoğlu, Ed: Andrew Belsey/Ruth Chadwick, Medya ve Gazetecilikte Etik Sorunlar, Ayrıntı Yayınları, İstanbul 1998.
- BEYDOĞAN, T. Ayhan, Avrupa İnsan Hakları Sözleşmesi Işığında Türk Hukukunda Siyasi İfade Hürriyeti, Liberal Düşünce Topluluğu, August 2003.
- BEYDOĞAN, T. Ayhan, “Demokrasilerde İfade Hürriyeti”, Yeni Türkiye, Year:4, No:22,1998.
- BIÇAK, Vahit, Avrupa İnsan Hakları Mahkemesi Kararlarında İfade Özgürlüğü, Liberal Düşünce Topluluğu, July 2002.
- BULUT, Nihat, Nihat Bulut, “Hak ve Özgürlüklerin Sınırlandırılma Nedeni Olarak Genel Ahlak”, Atatürk Üniversitesi Erzincan Hukuk Fakültesi Dergisi, Vol:4, No:1-2, Year:2000, Erzincan 2000.

- CANIKLIOĞLU, Meltem, “Çağdaş Demokrasi ve Çağdaş Devlet Üzerine Düşünceler”, A Present to Prof. Dr. Seyfullah Edis, Ed: Zafer Gören, Dokuz Eylül Üniversitesi Yayını, İzmir 2000.
- COHEN, Jean L., Demokrasi, “Farklılık ve Özel Yaşam Hakkı”, Ed: Seyla Benhabib, Demokrasi ve Farklılık, Trans: Zeynep Gürata/ Cem Gürsel, Demokrasi Kitaplığı, First Edition, 1999.
- ÇOŞKUN, Vahap, “İnsan Haklarının Evrenselliği ve Liberal Perspektif”, A Present to Yıldızhan Yayla, Galatasaray Üniversitesi Yayınları, Armağan Serisi, No:4, İstanbul 2003.
- DOĞRU, Osman, İnsan Hakları Avrupa Mahkemesi İçtihatları, Vol I, Beta Yayınevi, İstanbul, October 2002.
- EASTON, Susan M., The Problem of Pornography: regulation and the right to free speech, Routledge, London, 1994.
- EMİROĞLU, Ünal, “San’at ve Ünal Emiroğlu, San’at ve San’atçının Yazgısında İnsan Haklarının İzdüşümü”, Yeni Türkiye, No: 22.
- ERDOĞAN, Mustafa, “Kamu Alanı ve Liberalizm: Birkaç Not”, Yeni Türkiye, Liberalizm Özel Sayısı, Year:5, No: 25, 1999.
- ERDOĞAN, Mustafa, “Demokratik Toplumda İfade Özgürlüğü: Özgürlükçü Bir Perspektif”, Ed: Bekir Berat Özipek, Teorik ve Pratik Boyutlarıyla İfade Hürriyeti, Liberal Düşünce Topluluğu, August, 2003.
- ERDOĞAN, Mustafa, Liberal Toplum Liberal Siyaset, Siyasal Kitabevi, Ankara 1998.
- EREN, Abdurrahman, Özgürlüklerin Sınırlanmasında Demokratik Toplum Düzeninin Gerekleri, Beta Yayınevi, İstanbul 2004.

- ERGÜL, Ergin, Avrupa İnsan Hakları Mahkemesi ve Uygulaması, Yargı Yayınevi, Ankara, 2003.
- ERMAN, Sahir, “Türkiye’de Kitle İletişim Özgürlüğü”, A Present to Prof. Dr. Sahir Erman, İstanbul Üniversitesi Hukuk Fakültesi Eğitim, Öğretim ve Yardımlaşma Vakfı, Publishing No:8, İstanbul 1999.
- FENDOĞLU, H. Tahsin, Demokrasi, “Demokratikleşme Dalgaları ve Çıkış Garantileri”, A Present to Prof. Dr. Seyfullah Edis, Ed: Zafer Gören, Dokuz Eylül Üniversitesi Yayını, İzmir 2000.
- FINKELNBURG, Klaus, “Demokraside İfade Özgürlüğü”, Trans: Nihat Ünler, Düşünce Özgürlüğü, Ed: Hayrettin ökçesiz, (HFSA- Hukuk Felsefesi ve Sosyolojisi Arkivi Yayınları:3), Afa Yayınları, İstanbul, 1998.
- GEMALMAZ, Mehmet Semih, “İnsan Hakları Hukuku Açısından İfade Özgürlüğü”, A Present to Prof. Dr. Sahir Erman, İstanbul Üniversitesi Hukuk Fakültesi Eğitim, Öğretim ve Yardımlaşma Vakfı, Publishing No:8, İstanbul 1999.
- GİRİT, Hasan, “Düşünce ve Anlatım Özgürlüğünün Ulusalüstü Ölçütleri”, Yeni Türkiye, Year:4, No:22,1998.
- GOMÍAN, Donna/HARİS, David, Düşünce, İnanç, Vicdan ve İfade Özgürlüğü, Trans: Orhan Kemal Cengiz, Belge Yayınları, May 1998.
- GÖZLÜGÖL, Said Vakkas, Avrupa İnsan Hakları Sözleşmesi ve İç Hukukumuzda Etkisi, Second Press, Yetkin Yayınevi, Ankara, September 2002.
- GÖZÜBÜYÜK, Şeref A./ GÖLCÜKLÜ, Feyyaz A., Avrupa İnsan Hakları Sözleşmesi ve Uygulaması Avrupa insan Hakları Mahkemesi İnceleme ve Yargılama Yöntemi, Turhan Kitapevi, 4th Press, Ankara, 2003.

- GÖZÜBÜYÜK, Şeref A. "Avrupa İnsan Hakları Komisyonu Kararlarından Seçme Özetler", İHMD, Vol: 3, No: 1, 1995.
- GÜNDÜZ, Aslan, "İnsan Hakları İle İlgili Uluslar arası sözleşmelerin Kurduğu Denetim Organları Kararlarının Hukukumuzda Etkileri", İnsan Hakları ve Yargı, Sorunlar ve Çözümler, Adalet Bakanlığı Eğitim Dairesi Başkanlığı, Ankara, 1998.
- GÜRAN, Sait, "Özel Yaşam ve İfade Özgürlüğü", A Present to Prof. Dr. Sahir Erman, İstanbul Üniversitesi Hukuk Fakültesi Eğitim, Öğretim ve Yardımlaşma Vakfı, Publishing No:8, İstanbul, 1999.
- GÜRİZ, Adnan, "İfade Hürriyetinin Sınırları", Düşünce Özgürlüğü, Ed: Hayrettin Ökçesiz, (HFSA- Hukuk Felsefesi ve Sosyolojisi Arkivi Yayınları:3), Afa Yayınları, İstanbul, 1998.
- HACALOĞLU, Algan, "Düşünce ve Düşünceyi İfade Özgürlüğü Demokrasinin Omurgasıdır...", Yeni Türkiye, Year: 4, No:22,1998.
- HAFIZOĞULLARI, Zeki, Zeki Hafizoğulları, Laiklik, İnanç, Düşünce ve İfade Hürriyeti, Us-a Yayıncılık, Ankara 1997.
- HAKERİ, Hakan, "Alman Federal Anayasa Mahkemesinin Bir Kararı Işığında Düşünceyi Açıklama Özgürlüğü ve Kollektif Hakaret", A Present to Prof. Dr. Sahir Erman, İstanbul Üniversitesi Hukuk Fakültesi Eğitim, Öğretim ve Yardımlaşma Vakfı, Publishing No:8, İstanbul, 1999.
- HAKYEMEZ, Yusuf Şevki, "Temel Hak ve Özgürlüklerin Sınırlandırılmasında Ölçülülük İlkesi", A Present to Prof. Dr. Hayri Domaniç, Vol II., Özel Hukukun Diğer Dalları ve Kamu Hukuku, Ed: Abuzer Kendigelen, İstanbul 2001.
- İZGİ, Ömer, GÖREN, Zafer, Türkiye Cumhuriyeti Anayasasının Yorumu, TBMM Basımevi, Vol I, Ankara 2002.

- JONES, Thomas David, “Human Rights: Group Defamation, Freedom of Expression and The Law of Nations”, International Studies in Human Rights, Vol: 33, Kluwer Law International, 1998.
- KABOĞLU, İbrahim, “Pozitif Anayasa Hukukunda Düşünce Özgürlüğünün Sınırları”, Düşünce Özgürlüğü, Ed: Hayrettin Ökçesiz (HFSA- Hukuk Felsefesi ve Sosyolojisi Arkivi Yayınları:3), Afa Yayınları, İstanbul 1998.
- KABOĞLU, İbrahim, Özgürlükler Hukuku, Afa Yayınları, 5th Press, December, 1999.
- KAÇURADI, İoanna, “Düşünce Özgürlüğü: Nedir Acaba?”, Düşünce Özgürlüğü, Ed: Hayrettin ökçesiz, (HFSA- Hukuk Felsefesi ve Sosyolojisi Arkivi Yayınları:3), Afa Yayınları, İstanbul, 1998.
- KORKMAZ, Ömer, “Düşünce Özgürlüğü ve Sınırları”, A Present to Prof.Dr. Seyfullah Edis, Ed: Zafer Gören, Dokuz Eylül Üniversitesi Yayını, İzmir, 2000.
- KÜÇÜK, Adnan, İfade Hürriyetinin Sınırları, Liberal Düşünce Topluluğu, October 2003.
- LAMPE, Ernst-Joachim, “Düşünce Özgürlüğü, İfade Özgürlüğü, Demokrasi”, Trans: Nihat Ünler, Düşünce Özgürlüğü, Ed: Hayrettin ökçesiz, (HFSA- Hukuk Felsefesi ve Sosyolojisi Arkivi Yayınları:3), Afa Yayınları, İstanbul, 1998.
- LAWSON, Rick, “İfade Hürriyetini Güvenceye Almak: Avrupa İnsan Hakları Mahkemesi İçtihatlarında Üç Eğilim”, Trans and Ed: Bekir Berat Özipek, Teorik ve Pratik Boyutlarıyla İfade Hürriyeti, Liberal Düşünce Topluluğu, August, 2003.
- LUHMANN, Niklas, “İfade Özgürlüğü, Kamuoyu, Demokrasi”, Trans: Nihat Ünler, Düşünce Özgürlüğü, Ed. Hayrettin ökçesiz, (HFSA- Hukuk Felsefesi ve Sosyolojisi Arkivi Yayınları:3), Afa Yayınları, İstanbul, 1998.

- MACOVEI, Monica, İfade Özgürlüğü, Avrupa İnsan Hakları Sözleşmesinin 10.Maddesinin Uygulanmasına İlişkin Kılavuz, İnsan Hakları El Kitapları No:2, Ankara, November 2001.
- MILL, John Stuart, Hürriyet Üstüne, Liberal Düşünce Topluluğu, Trans: Mehmet Osman Dostel, July 2003.
- MORANGE, Jean, “İfade Özgürlüğünün Hukuki Esasları”, Trans: Tuğba Ballıgil, Düşünce Özgürlüğü, Ed: Hayrettin ökçesiz, (HFSA- Hukuk Felsefesi ve Sosyolojisi Arkivi Yayınları:3), Afa Yayınları, İstanbul, 1998.
- MUMCU, Ahmet / KÜZECİ, Elif, İnsan Hakları: Kamu Özgürlükleri(Kavramlar, Evrensel ve Ulusal Gelişimleri, Bugünkü Durumları), Savaş Yayınları, 3th Press, Ankara, 2003.
- MURPHY, Paul, L. The Meaning of Freedom of Speech, Greenwood Publishing, Westport, 1972.
- OĞURLU, Yücel, “AİHM Kararları ve Türk İdare Hukukunda Temel Hak ve Özgürlüklerin Sınırlandırılmasında Bir Yargısal Denetim Ölçütü Olarak “Ölçülülük İlkesi”, A Present to Prof. Dr. Turhan Tufan Yüce, Dokuz Eylül Üniversitesi Yayını, İzmir 2001.
- ÖZBEY, Özcan, İnsan Hakları Evrensel İlkelerinin Avrupa Mahkemesinde Uygulanması, Adalet Yayınevi, Ankara 2004.
- ÖZHAN, Hacı Ali/ ÖZİPEK, Bekir Berat, Yargıtay Kararlarında İfade Hürriyeti, Liberal Düşünce Topluluğu, July 2003.
- PAULİAT, Helene, “Memurlar ve İfade Özgürlüğü”, Trans: Tuğba Ballıgil, Düşünce Özgürlüğü, Ed: Hayrettin ökçesiz, (HFSA- Hukuk Felsefesi ve Sosyolojisi Arkivi Yayınları:3), Afa Yayınları, İstanbul, 1998.

- REİSOĞLU, Safa, Uluslar arası Boyutlarıyla İnsan Hakları, Beta Basım Dağıtım, İstanbul, 2001.
- SADURSKİ, Wojciech, İfade Özgürlüğü ve Sınırları, Liberal Düşünce Topluluğu, Trans: M. Bahattin Seçilmişoğlu, September 2002.
- SCHAUER, Frederick, İfade Özgürlüğü Felsefi Bir İnceleme, Liberal Düşünce Topluluğu, Trans: M. Bahattin Seçilmişoğlu, 2002.
- SELÇUK, Sami, “Düşün Özgürlüğü”, Düşünce özgürlüğü, Ed: Hayrettin Ökçesiz, HFSA-Hukuk Felsefesi ve Sosyolojisi Arkivi Yayınları: 3, Afa Yayınları, İstanbul, 1998.
- SELÇUK, Sami, “Zorba Devletten Hukukun Üstünlüğüne”, Yeni Türkiye Yayınları, 4th Press, 1999.
- SUNAY, Reyhan, İfade Hürriyetinin Muhtevası ve Sınırları, Liberal Düşünce Topluluğu, 2001.
- SUNAY, Reyhan, “Avrupa Sözleşmesi Çerçevesinde Oluşan ‘Avrupa Kamu Düzeni’ Kavramının Kapsamı ve Fonksiyonel Değeri”, Selçuk Üniversitesi Hukuk Fakültesi Dergisi, Vol:7, No:1-2, 1999.
- SUNAY, Reyhan, Anayasa Mahkemesi Kararlarında İfade hürriyeti, Liberal Düşünce Topluluğu, April 2003.
- TEKİR, Sabri, “Düşünce Hürriyeti ve Medya Boyutu”, Yeni Türkiye, Year:4, No:22,1998.
- TEZCAN, Durmuş / RUHAN ERDEM, Mustafa / SANCAKDAR, Oğuz, Avrupa İnsan Hakları Sözleşmesi Işığında Türkiye'nin İnsan Hakları Sorunu, Seçkin Yayıncılık, Ankara, 2002.

- TEZCAN, Durmuş / RUHAN ERDEM, Mustafa / SANCAKDAR, Oğuz, Avrupa İnsan Hakları Sözleşmesi ve Uygulaması, T.C Adalet Bakanlığı Eğitim Dairesi Başkanlığı, Ankara, 2004.
- TEZCAN, Durmuş, Avrupa’da Düşünce Özgürlüğü Avrupa İnsan Hakları Sözleşmesinin 10. Maddesine İlişkin İçtihat, Avrupa Konseyi İnsan Hakları Genel Müdürlüğü, Etki Yayıncılık, 2002.
- TRAGER, Robert / DICKERSON L, Donna, 21. Yüzyılda İfade Hürriyeti, Liberal Düşünce Topluluğu, Trans: A. Nuri Yurdusev, July 2003.
- UYANIK, Mevlüt, “İfade Özgürlüğü –İslam Felsefe Tarihi Açısından Bir Sunum-“, Ed: Bekir Berat Özipek, Teorik ve Pratik Boyutlarıyla İfade Hürriyeti, Liberal Düşünce Topluluğu, August, 2003.
- ÜNAL, Şeref, Avrupa İnsan Hakları Sözleşmesi, TBMM Kültür, Sanat ve Yayın Kurulu Yayınları, 1999.
- ÜNAL, Şeref, “Avrupa İnsan Hakları Komisyonu ve Mahkemesi’nin İfade Özgürlüğüne İlişkin Kararları ve Bunların Türk Hukukuna Muhtemel Etkileri”, İnsan Hakları ve Yargı, (Sorunlar ve Çözümler), T.C. Adalet Bakanlığı Eğitim Dairesi Başkanlığı, June 1998.
- ÜNAL, Şeref, Temel Hak ve Özgürlükler ve İnsan Hakları, Yetkin Yayınları, Ankara 1997.
- YAMANER, Melike Batur, “İnternet Aracılığıyla Yayılan İrkçi Söylemlerin Yasaklanması”, A Present to Yıldızhan Yayla, Galatasaray Üniversitesi Yayınları Armağan Serisi No:4, First Edition, İstanbul 2003.
- YETİK, Engin, “Avrupa İnsan Hakları Sözleşmesi ve Avrupa İnsan Hakları Mahkemesi Kararları Işığında İfade Özgürlüğü Kavramı”, T.C Adalet Bakanlığı, Adalet Dergisi, Year: 95, No: 19, May 2004.

- YILDIZ, Mustafa, Avrupa İnsan Hakları Mahkemesi Yargısı, Alfa Yayıncılık, İstanbul,1998.
- YOUNG, Iris Marion, “İletişim ve Öteki: Müzakereci Demokrasinin Ötesinde”, Ed: Seyla Benhabib, Demokrasi ve Farklılık, Trans: Zeynep Gürata/ Cem Gürsel, Demokrasi Kitaplığı, First Edition, 1999.
- YÜRÜŞEN, Melih, Ahlaki ve Siyasi Hoşgörü, Present to Year of Tolerance 1995, Siyasal Kitabevi, Ankara 1994.
- YÜRÜŞEN, Melih, “Pornografiyi İfade Özgürlüğü Bağlamında Düşünmek”, Ed: Bekir Berat Özipek, Teorik ve Pratik Boyutlarıyla İfade Hürriyeti, Liberal Düşünce Topluluğu, August, 2003.
- İnsan Hakları Mahkemesi Kararları, T.C. Adalet Bakanlığı Eğitim Dairesi Başkanlığı, 1997 Yılı Bülteni, Ankara 1998.