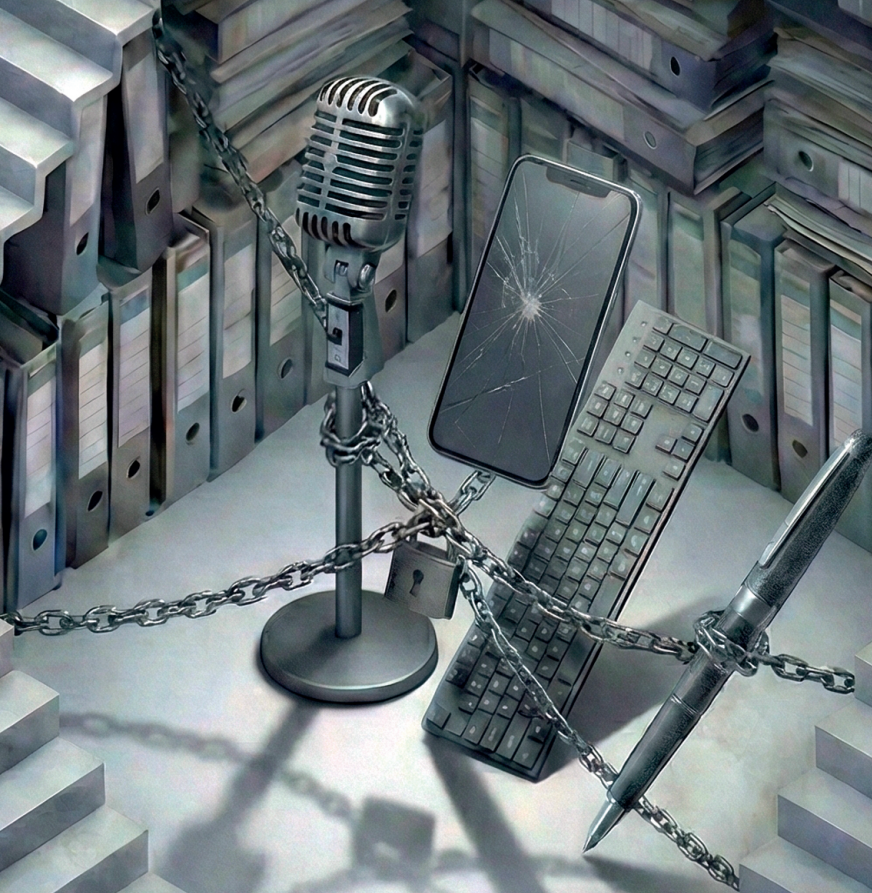


THE SECRET WEAPON OF CENSORSHIP

PROCEDURAL VIOLATIONS IN FREEDOM OF EXPRESSION CASES

KEREM ALTIPARMAK & ALİ RIZA ÇOBAN

TRANSLATED BY: İŞİL DEMİRAKIN



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Kingdom of the Netherlands

This publication was prepared within the framework of a project that is supported by the Embassy of the Kingdom of the Netherlands Human Rights Programme. Authors of the Report are the sole responsible of the content of this publication and the report does not reflect the official view of the Embassy of the Kingdom of the Netherlands.

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ISBN: 978-625-90146-0-9

March 2026

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Hasırcıbaşı Caddesi, No: 24/4, Kadıköy İstanbul
Certificate No: 44361

Design Kadir Abbas

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• RESEARCH •

On the Freedom of Expression Association and the Report on Procedural Violations in Freedom of Expression Cases

The Freedom of Expression Association (“İFÖD”), headquartered in Istanbul, Turkey, was established in August 2017. The Association focuses on the prevention and elimination of violations of the right to freedom of expression without discrimination based on language, religion, race, gender, sexual orientation, gender identity, age, disability, political opinion, or other grounds. To this end, it conducts activities to provide legal assistance to individuals whose right to freedom of expression has been violated or is under threat, to conduct research and training, to foster national and international cooperation, and to strengthen solidarity. In July 2023, İFÖD was accredited by the United Nations Economic and Social Council (“ECOSOC”) and granted special consultative status.

This report, entitled “The Secret Weapon of Censorship: Procedural Violations in Freedom of Expression Cases”, aims to examine the deepening crisis of freedom of expression in Turkey from a different and vital perspective. Until now, attacks on freedom of expression have generally been discussed in terms of “what is banned”, that is, from the perspective of substantive law. However, under the new regime in Turkey, where authoritarian legalism prevails, the question of “how” the censorship mechanism operates and how prohibition is enforced is no less critical than the content of the prohibitions themselves. At the heart of the repressive regime lies the transformation of judicial authorities and judicial instruments into tools of silencing. This report maps the systematic procedural violations occurring throughout the process, from the initiation of investigations to the final ruling, in cases concerning freedom of expression.

This chain of violations, ranging from ex officio investigations of offences created by ‘virtual patrols’ to restrictions on the right to defence, ‘copy-and-paste’ indictments, and convictions handed down without justification, is the hidden weapon of censorship. Through concrete examples, we aim to demonstrate how the guarantees of a fair trial have been rendered meaningless, and how the law has been used to suppress dissenting voices. At a time when the concept of a ‘procedural turn’ is being discussed in the context of international human rights law, the severe erosion of procedural safeguards in Turkey effectively renders the case law of both the European Court of Human Rights (ECHR) and the Constitutional Court (AYM) ineffective. This study is intended to serve as a reference for legal professionals, human rights defenders, and all other interested parties when addressing these systematic violations. Like the Freedom of Expression Association’s other publications and EngelliWeb reports, this report is available to the public. You can access the full report and our Association’s other publications via our website: <https://ifade.org.tr/>.

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INTRODUCTION: THE PROBLEM OF FREEDOM OF EXPRESSION UNDER THE NEW REGIME

Over the past decade, threats and pressures against freedom of expression have become increasingly commonplace in Turkey. Turkey has long had systemic and structural problems in terms of freedom of expression – this is well known.¹ Therefore, at first glance, it may seem surprising to link the issue of freedom of expression in Turkey to developments over the past decade. Nevertheless, the pressure on freedom of expression, a deeply institutionalised and systematic problem, has become more intricate in the last decade, particularly following the transition to a presidential system of government, which differs in certain ways from the previous system of pressure.

Firstly, the attacks on freedom of expression are far more diverse than before. This is most evident in terms of criminal law, which poses the greatest threat to freedom of expression. Many more criminal law provisions are now being applied in many more contexts and against many more people. For example, the crime of publicly disseminating misleading information (TPC 217/A), added to the Turkish Penal Code in 2022, is one such new criminal law provision used against numerous journalists. In two years, sixty-five journalists have been prosecuted for this crime, and 13

¹ For example, an examination of the statistics of the European Court of Human Rights (ECHR) from 1959 to 2022 reveals that 426 of the total 1,067 decisions pertaining to violations of freedom of expression were issued against Turkey. In other words, as of that date, Turkey accounted for 4 out of every 10 freedom of expression violations in the 47-member Council of Europe region. See: https://www.echr.coe.int/documents/d/echr/Stats_violation_1959_2022_ENG

have been detained. A total of 4,590 investigations have been opened under this article in these two years.²

Secondly, it would not be misleading to say that the flexibility and unpredictability of criminal law instruments are even greater than before. The European Court of Human Rights (ECtHR) has explicitly found provisions of the criminal code to be unpredictable, yet these are being systematically applied thousands of times.³ Furthermore, it can be seen that crimes not listed in the criminal code are created through interpretation and analogy in relation to certain individuals, who are then subjected to severe penalties. For example, journalist Fatih Altaylı was convicted of threatening the President in a manner unprecedented in previous cases due to statements he made in a social media post.⁴ Similarly, singer Gülşen was prosecuted for publicly inciting hatred and hostility against a socially distinct segment of the population, namely the graduates of *imam hatip* high schools, for making a joke about them.⁵

Finally, we can say that we are facing an unprecedented increase in the application of certain types of crimes. For example, in just a decade, we see that nearly 3 million people were investigated under Article 314 of the Turkish Penal Code, which punishes membership in a terrorist organization, and hundreds of thousands were convicted.⁶ Similarly, we see a huge surge in investigations and convictions for insulting the president, a crime that was rarely prosecuted before Recep Tayyip Erdoğan's presidency, after 2014.⁷ According to official statistics, 160,169 people were investigated under Article 299 during President Erdoğan's term until the end of 2020. Furthermore, 38,498 individuals were prosecuted, 12,881 individuals were convicted, and 11,913 individuals received suspended sentences. 3,625 individuals were sentenced to prison, while 5,660 individuals were acquitted. According to Justice Statistics, by the end of 2020, 106 of those convicted were under the age of 18, and 24 were between the ages of 12 and 14.⁸

One reason why freedom of expression is under greater attack is, of course, the increasingly authoritarian tendencies of the regime. However, this tendency alone does not explain the deeper, more multidimensional nature of the problem. People have more opportunities to express themselves than ever before, particularly because of social media. All segments of society can now express their opinions independently, respond to politicians' views, and comment on news stories. However, when combined with an increasingly authoritarian regime, this opportunity means that freedom of expression is no longer just a problem for writers, intellectuals,

2 <https://journo.com.tr/sansur-yasasi-dezenformasyon-mlsa-rapor-veriler>

3 IFÖD, Işıkırık Case Group 9/2 Presentation https://ifade.org.tr/reports/rule9/IFOD_Rule9_Isikirik_Group_Submission.pdf

4 DW Turkish, "Fatih Altaylı sentenced to 4 years and 2 months in prison," 11/26/2025, Access address: <https://www.dw.com/tr/fatih-altayli%C4%B1ya-d%C3%B6rt-y%C4%B1l-iki-ay-hapis-cezas%C4%B1/a-74888344>, Access date: 12/02/2025

5 BBC News Turkish, "Fatih Altaylı'ya 4 yıl 2 ay hapis cezası," May 3, 2023, Access address: <https://www.bbc.com/turkce/articles/clm9g1pjl0o>, Access date: December 2, 2025

6 Levent Mazılıgüney, "Türkiye'de Kaç Terörist Var? TCK 314 İstatistikleri Üzerinden Değerlendirme," *hukuki-haber.net*, 20.11.2025, Accessed on: 02.12.2025

7 IFÖD, Yargı Reformu Paketi: AİHM Yolunda Bir Yeni Engel, November 2019, p. 3. Access address: https://ifade.org.tr/reports/IFOD_Yargi_Reformu_Degerlendirmesi.pdf

8 IFÖD, Artun and Güvener Case Group 9/2 Presentation, https://ifade.org.tr/reports/rule9/IFOD_Rule9_Akcam_Group_Submission_3_TR.pdf

journalists, and artists, but has become a threat to the general public. Messages and even likes seen by a very small segment of social media users can become subject to criminal law (*Melike v. Turkey*, no. 35786/19, 15.06.2021).

Furthermore, claiming that the attack on freedom of expression is carried out solely through criminal law does not accurately reflect the scale of the problem. The new system that stifles freedom of expression has critical actors and methods outside the judiciary as well. For example, decisions to block access to websites and social media accounts and to remove content are among the most significant symbols of the new era.⁹ Millions of pieces of content are banned and made invisible without proper judicial oversight. Moreover, entire media outlets (*Özgür Gündem v. Turkey*, no. 23144/93, 16/3/2000) and even social media platforms can be blocked due to a single content (*Yaman Akdeniz and Others*, B. No. 2014/3986, 03.04.2014; *Youtube LLC Corporation Service Company and Others*, B. No: 2014/4705, 29.05.2014; *Wikimedia Foundation INC. and Others* [GK], B. No: 2017/22355, 26.12.2019).

Likewise, failing to consider Radio and Television Supreme Council (RTÜK), which constantly restricts radio and television broadcasting, may result in attacks on freedom of expression being overlooked. The same can be said of institutions such as the Presidency of Communications and the Press Advertising Agency. Rather than ensuring the equal and fair expression of free speech, these institutions are engaged in systematic efforts aimed at suppressing the expression of different views and opinions.

However, it is inaccurate to attribute all constraints on freedom of expression solely to institutions directly concerned with expression. A comprehensive censorship network exists, extending from SLAPP lawsuits initiated by major corporations and politicians against journalists and citizens, to university administrations scrutinizing academics and students,¹⁰ thereby disseminating systematic pressure across various sectors.

In this sense, when we evaluate the new era of censorship by considering the new world context, new types of authoritarianism, and new technologies, it would not be wrong to conclude that Turkey's traditional problem of freedom of expression has now taken on a new form.

This new problem necessitates new analyses and perspectives. Undoubtedly, this multidimensional attack on freedom of expression has been examined and criticized in detail, both as a whole and in parts. However, it can be observed that the majority of these studies have concentrated on examining the foundations of regulations that limit freedom of expression. By this, we mean that most of the studies and criticisms have been aimed at determining what should be prohibited and what should be free.

However, the question of "how" this multidimensional, multi-actor, and multi-tool censorship mechanism determines "what" should be banned is generally overlooked. Yet, as is well known, judicial authorities and judicial instruments are at the centre of the aforementioned network of pressure. There is widespread criticism that, while judicial authorities approve prohibitions, they completely deviate from

⁹ Yaman Akdeniz & Ozan Güven, "EngelliWeb 2024: Dijital Kafeste Kafkaesk Sansür: Yargı Eliyle Gerçeğin Susturulması", available at: https://ifade.org.tr/reports/EngelliWeb_2024.pdf

¹⁰ The term SLAPP is an acronym for Strategic Lawsuits Against Public Participation. It is used to describe lawsuits involving high-value damages that are filed to deter journalists from reporting.

fundamental principles of adjudication in cases involving freedom of expression, rendering guarantees of a fair trial meaningless.¹¹ Judicial authorities do not conduct genuine trials, which leads to arbitrary and unpredictable outcomes. These outcomes completely undermine the rule of law, particularly the principle of legality of crimes and punishments.

Taking this background into account, the focus of this study is on the procedural safeguards of freedom of expression, which have been largely neglected until now. It seeks to determine what the procedural safeguards are in freedom of expression cases and why these safeguards have been eliminated.

This study has been prompted by more than just our observations regarding Turkey. The developments in international human rights law, and particularly in the context of the European Convention on Human Rights (ECHR), also necessitate a closer scrutiny of procedural safeguards. As we will explain in more detail below, the pressures on the ECHR and the European Court of Human Rights (ECtHR) are also promoting a trend towards implementing the Convention system more through domestic legal mechanisms. Therefore, the national courts' obligation to apply procedural safeguards is now more critical than ever.

The study aims to discuss how procedural safeguards developed in international human rights law are observed in Turkey. To this end, all sections of the study will first identify these standards and then discuss how problems related to deviations from them arise in different areas of law.

This study will primarily focus on the discussion of safeguards relating to freedom of expression in criminal cases. The first three sections of the study, following the introduction, will therefore address procedural safeguards in criminal law. The first section, will examine those related to investigation, the second those related to prosecution, and finally, in the third section, those related to adjudication, along with the problems encountered in their application.

However, as stated above, it would be insufficient to assess the pressure on freedom of expression and procedural obligations solely in the context of criminal law. The concluding section of this study will address procedural obligations within the framework of administrative law.

Nevertheless, before engaging in these discussions, it is necessary to summarize what is meant by procedural obligations in the context of freedom of expression cases in light of developments related to the ECHR. This concept will be elaborated on in more detail in the second section of the introduction.

A. THE MEANING OF PROCEDURAL SAFEGUARDS RELATED TO FREEDOM OF EXPRESSION

The importance and legal framework of freedom of expression in international human rights law, particularly in the case law of the European Court of Human Rights (ECtHR), has been largely clarified. Accordingly, freedom of expression constitutes one

¹¹ MLSA, Journalism and Freedom of Expression Cases Case Monitoring Report <https://www.mlsaturkey.com/images/2025/AnnualReport2025/TURKCE%20DAVA%20IZLEME%20RAPORU-1.pdf>

of the fundamental pillars of a democratic society and one of the basic conditions for its progress and the fulfilment of every individual. This freedom, subject to paragraph 2 of Article 10, applies not only to “information” or “ideas” that are favourably received, harmless, or indifferent, but also to those that are offensive, shocking, or disturbing. This is a requirement of pluralism, tolerance, and broadmindedness, without which there can be no “democratic society” (*Handyside v. the United Kingdom*, no. 5493/72, 07.12.1976, § 49; *Axel Springer AG v. Germany*, no. 39954/08, 07.02.2012, § 78).

The right to freedom of expression and press freedom, as guaranteed by Article 10 of the ECHR, may only be restricted within the scope of Article 10/2 of the ECHR, for limited reasons and legitimate purposes provided for by law, with due regard to the requirements of a democratic society and with a view to striking a fair balance between the aim of the restriction and the means employed, without undermining the essence of the right.

A freedom of expression is a right that can be restricted, any such restrictions must comply with the Convention and the ECtHR case law. When establishing the extent of countries’ obligations under the Convention, as well as the extent of ECtHR supervision, it is helpful to consider some fundamental principles of interpretation.

1. The Principle of Subsidiarity and Its Meaning in Terms of Procedural Obligations

With its *Handyside* decision, the ECtHR included the doctrine of national *margin of appreciation* for qualified rights among the methods for interpreting the Convention (*Handyside v. the United Kingdom*, no. 5493/72, 07.12.1976, § 48). The margin of appreciation doctrine is essentially based on two arguments. The first is the principle of *subsidiarity*. The second is the “better placed” argument, which asserts that national authorities are generally better placed than supranational courts to assess the need for restrictions on rights in a concrete context, given their proximity to events and knowledge of the issues.

In accordance with the principle of national discretion prevailing in the Court’s case law, the Contracting Parties have a certain degree of discretion in fulfilling their obligations under the Convention. As the standards of the Convention become more explicit and stricter, the discretion of the Contracting Parties diminishes. In other words, the margin of appreciation of the Contracting Parties narrows in areas where a common European standard has been established and expands to a certain extent in areas where there is no consensus and where different philosophical and ethical approaches exist. With regard to freedom of expression, margin of appreciation means that states have a certain scope of action in terms of the extent and proportionality of their power to impose restrictions. The margin of appreciation of the contracting parties also narrows when it comes to the fundamental values protected by the Convention. For example, open-mindedness and negotiation are indispensable conditions for democracy. Therefore, when it comes to political debates concerning the public interest, the scope for intervention by the contracting parties is significantly narrowed. Consequently, the further one moves away from the political centre, the less

necessary it is for the Court to apply strict controls in favour of freedom of expression in order to protect and develop political democracy. For example, if a statement concerns a politician's private life rather than their political activities of public interest, the state has greater scope to intervene. On the other hand, as the Court's duty to protect the privacy of personal life intensifies, the state's discretion narrows.

The principle of subsidiarity has become increasingly emphasised, particularly during the Court's recent reform period, due to political pressure from governments that the Court has "overstepped its authority" on the one hand, and the inevitable increase in its workload on the other. The principle of subsidiarity has gained strength in recent years, particularly in connection with the legitimacy allegations directed at the Court by many states, including older members such as the United Kingdom.¹²

Indeed, the emphasis on the principle of subsidiarity has progressed in tandem with demands for the internalization of the ECHR in domestic law. The principle of subsidiarity may be understood as comprising two distinct facets. **First**, this principle states that primary responsibility for the application of the rights under the Convention lies with national law and national courts. The application of this principle depends on the proper implementation of the Convention at the national level and is not entirely independent of the Court's review. **The second dimension** is that, to the extent that the Contracting parties apply the principles of the Convention in their domestic law, the supervision of the ECtHR becomes more formal, and the ECtHR refrains from interfering with the case law of the domestic courts of the Contracting parties. These two dimensions of the principle of subsidiarity have been termed "positive" and "negative" subsidiarity.¹³ Thus, the positive dimension of the principle of subsidiarity emphasises that the Contracting parties should become more active in protecting the rights under the Convention. The negative dimension of the principle, on the other hand, points to the weakening of the supervision of the ECtHR. Brems defines the duty imposed on states by the principle of subsidiarity as the positive dimension of subsidiarity in the face of the negativity of the limitation of the ECHR's powers.¹⁴

The growing importance of the principle of subsidiarity led Robert Spano, former President of the ECtHR, to describe the period following Protocol 14 and the Interlaken Conference as the "Age of Subsidiarity."¹⁵ In this sense, the principle of subsidiarity gives priority to national courts. The more national judicial authorities in a country comply with the principles of the Convention and try to align their decisions with the case law of the ECtHR, the more the ECtHR's supervision takes on a procedural nature. In other words, with regard to qualified rights, the supervision of the ECtHR will not be substantive in this case; it will only supervise whether the national authorities comply with the principles and procedures developed in the case law of the ECtHR.

12 Ed Bates, "UK Withdrawal from the ECHR ("BrECHRit"): From Taboo to Tenable?" (2024) 5(1) *European Convention on Human Rights Law Review* 24; M.R. Madsen, "The Challenging Authority of the European Court of Human Rights: From Cold War Legal Diplomacy to the Brighton Declaration and Backlash" (2016) 79 *Law and Contemporary Problems* 141, 170.

13 Thomas Hochmann, "Judge Yuksel's way: bad-faith regimes and the dangers of subsidiarity", *European Human Rights Law Review*, 2025, (4), 426-446.

14 Eva Brems, "Positive Subsidiarity and its Implications for the Margin of Appreciation Doctrine" (February 2, 2019). *Netherlands Quarterly of Human Rights*, 2019, Available at SSRN: <https://ssrn.com/abstract=3431162>

15 Robert Spano, "Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity," *Human Rights Law Review*, Volume 14, Issue 3, September 2014, Pages 487-502.

The concept of the “Procedural Turn” emphasised by Judge Spano and some other authors¹⁶ will only be meaningful in cases where domestic courts demonstrate a strong commitment to compliance with the Convention. In other words, the principle of subsidiarity will only be functional if the contracting parties demonstrate good faith in their efforts to protect the rights under the Convention. If the contracting parties act in bad faith, invoking the principle of subsidiarity would mean leaving the rights under the Convention unprotected.¹⁷

The principles of subsidiarity and margin of appreciation became part of the Convention in its introductory section with Protocol 15. The text of the Convention, as adapted by Protocol 15, states in its introductory section: “Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this.”

In light of the rationale for introducing the principle of subsidiarity, it is important to note that this concept incorporates a dimension that restricts the jurisdiction of the ECtHR (negative subsidiarity). Equally, attention must be paid to its positive aspect, which imposes an obligation on Contracting Parties to address matters arising under the Convention through their national authorities, in accordance with the Court’s established case law. The phrase indicates that the ECtHR will monitor whether national authorities have fulfilled their primary responsibility. Indeed, the Copenhagen Declaration defines this aspect of the principle of subsidiarity as *shared responsibility*. Indeed, according to the Declaration:

“Reiterates that strengthening the principle of subsidiarity is not intended to limit or weaken human rights protection, but to underline the responsibility of national authorities to guarantee the rights and freedoms set out in the Convention. Notes, in this regard, that the most effective means of dealing with human rights violations is at the national level, and that encouraging rights-holders and decision-makers at national level to take the lead in upholding Convention standards will increase ownership of and support for human rights.” (§10)

The Copenhagen Declaration emphasises that contracting parties have a certain degree of discretion in applying the principles of the Convention at the local level, depending on the specific circumstances of the case. It states that if the standards of the Convention are applied by the contracting parties, the supervision of the European Court of Human Rights (ECtHR) will take on a formal nature, and the ECtHR will not substitute its own assessment for that of the local authorities. However, it is accepted that this approach is not rigid and absolute in the ECtHR’s case law, and that some exceptional circumstances may arise: “*Where a balancing exercise has been undertaken at the national level in conformity with the criteria laid down in the Court’s*

16 Oddný Mjöll Arnardóttir, “The ‘procedural turn’ under the European Convention on Human Rights and presumptions of Convention compliance,” *International Journal of Constitutional Law*, Volume 15, Issue 1, January 1, 2017, pp. 9–35.

17 Hochmann, 427.

jurisprudence, the Court has generally indicated that it will not substitute its own assessment for that of the domestic courts, **unless there are strong reasons for doing so.**" (§28/c).

This exception implies that procedural review is not absolute and that the ECtHR may also examine the content of the domestic courts' assessment if there are strong reasons to do so. However, these strong reasons need to be clarified. As explained above, there is no doubt that the failure of the authorities of the contracting parties to act in good faith is undoubtedly one of the strong reasons. If local authorities do not act in good faith in applying the principles of the Convention, the ECtHR will not refrain from applying these principles to the case in question.

Indeed, former President Spano emphasised that "States that do not respect the rule of law [...] and do not ensure the impartiality and independence of their judicial systems, oppress political opponents or mask prejudice and hostilities towards vulnerable groups or minorities, cannot expect to be afforded deference under process-based review."¹⁸ Of course, it is possible that the ECtHR's case law may be used cosmetically by domestic courts, merely to legitimize the decision without affecting its content. In such cases, to protect the rights under the Convention, it is imperative that the ECtHR go beyond process-based review, apply its own criteria directly to the specific case, and, if it reaches a different conclusion from the domestic courts, decide in accordance with its own assessment.

However, for the ECtHR, as an international court, it is difficult to determine that a State party has acted in bad faith. Such a finding is not only legally difficult but may also expose the Court to criticism from a political perspective. Applying one standard for states acting in good faith and another for states acting in bad faith would also expose the Court to criticism that it applies double standards.¹⁹ However, it would be inconsistent with the very purpose of a court such as the ECtHR, which has the final say on the protection of human rights in Europe, to leave individuals whose fundamental rights and freedoms are arbitrarily violated by authoritarian regimes unprotected. Therefore, the limits of the procedural review principle must be clearly defined, and the Court must not turn a blind eye to authoritarian regimes violating fundamental rights by hiding behind the principle of subsidiarity. This is also required by the "effective interpretation" method, one of the most important methods of interpretation used by the Court.²⁰

Essentially, the ECtHR's practice largely demonstrates that supervision is not limited to procedural supervision. Indeed, this is the real reason behind the ECtHR's decision to find violations in many applications that have been reviewed by the Turkish Constitutional Court and found not to be in violation. The *Cumhuriyet* case (*Murat Sabuncu and others*), *Ahmet Şık*, *Deniz Yücel*, *Murat Aksoy*, *Atilla Taş*, *Ahmet Hüsrev Altan*, *Nazlı Ilıcak*, *Ali Bulaç*, and *Atilla Taş* applications are just a few examples. Until recently,

¹⁸ Robert Spano, "The Future of the European Court of Human Rights—Subsidiarity, Process-Based Review and the Rule of Law" (2018) 18(3) *H.R.L.R.* 493.

¹⁹ For this dual scrutiny finding and recommendation, see Başak Çalı (2018) 'Coping with Crisis: Whither the Variable Geometry in the Jurisprudence of the European Court of Human Rights', 35(2) *Wisconsin International Law Journal* 237 276. For possible risks, see Hochmann, 445.

²⁰ Georgios A. Serghides, "The Principle of Effectiveness in the European Convention on Human Rights, in Particular its Relationship to the other Convention Principles," *Hague Yearbook of International Law / Annuaire de La Haye de droit international*, Vol. 30 (2017)

the ECtHR insisted on waiting for the Constitutional Court to rule on applications from Turkey. However, this stance changed for the first time in the *Selahattin Demirtaş* (4) judgment (no. 13609/20, 08.07.2025). In the application of *Keskin Kalem Yayıncılık ve Ticaret ve A.Ş* (no. 3013/23), the Court decided to notify the government of the application after the Constitutional Court failed to rule on 32 different applications for a long time.

It may be asserted that, in this case, the ECtHR engaged in more than just substantive review across three distinct scenarios. The first scenario is the failure of the Constitutional Court to examine the application for a long time. For example, *Selahattin Demirtaş* and *Sırrı Süreyya Önder* were tried under the same case and punished under Article 7/2 of the Anti-Terrorism Law. The Constitutional Court examined *Sırrı Süreyya Önder*'s application and found a violation (*Sırrı Süreyya Önder* [GK], B. No: 2018/38143, 3/10/2019). It did not examine *Demirtaş*'s application and later ruled it inadmissible on the grounds that the appeal route had been opened at the Court of Cassation through a legislative amendment and that the avenues of appeal had not been exhausted. Meanwhile, the sentence imposed on *Demirtaş* has been fully served. The second situation is where national authorities fail to conduct a procedural review in line with ECtHR case law (*Alparslan Altan v. Turkey*, no. 12778/17, 16.4.2019; *Tercan v. Turkey*, no. 6158/18, 29.6.2021). The third situation is where a trial has been conducted in accordance with the procedure developed by the ECtHR, but the outcome clearly violates the values of the Convention (*Kemal Kılıçdaroğlu v. Turkey*, no. 16558/18, 27.10.2020).

2. The Positive Dimension of Subsidiarity in Freedom of Expression Cases

Given this framework, it is important to clarify how subsidiarity and shared responsibility apply in cases involving freedom of expression.

In this context, it is necessary to recall another principle that governs case law. According to the ECtHR, “It is of crucial importance that the Convention be interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory.” For this to be possible, national authorities must resolve cases in accordance with ECtHR case law.

The State's obligations under Article 10 of the Convention can be divided into three separate categories: negative obligations, positive obligations, and procedural obligations.

Negative obligations mean that the state has a duty not to interfere with individuals' freedom of expression. In this context, any interference by the state with freedom of expression constitutes a form of restriction. Such interference must comply with the safeguards provided for in the Convention.

Positive obligations, on the other hand, mean that the state must provide safeguards against interference with freedom of expression by third parties and must make decisions in accordance with freedom of expression standards when resolving

disputes between private individuals. The Court considers pluralism of opinion and expression so essential to the functioning of democracy that it has ruled that States have positive obligations to ensure that a wide range of opinions is presented to society. The ECtHR emphasises that “ *Given the importance of what is at stake under Article 10, the State must be the ultimate guarantor of pluralism*” (*Manole and Others v. Moldova*, no. 13936/02, 17.11.2009). The Court has stated that in a sensitive sector such as audiovisual media, in addition to the State’s obligation not to interfere, it has a positive obligation to put in place an appropriate legal and administrative framework to ensure effective pluralism. (*Centro Europa 7 S.r.l. and Di Stefano v. Italy* [GC], no. 38433/09, 07.06.2012, § 134).

Procedural obligations, on the other hand, mean that state organs (legislative, executive, judicial) are obliged to act in accordance with procedural safeguards when interfering with freedom of expression. The procedural obligations of states under the Convention are not limited to the scope of the right to a fair trial. On the contrary, each substantive right also imposes certain procedural duties on the Contracting Parties, and failure to comply with these duties results in the violation of substantive rights. In the Court’s case law, procedural obligations are of great importance in relation to fundamental rights such as the right to life and the prohibition of torture. However, the importance of procedural obligations cannot be denied in relation to other substantive rights, such as freedom of expression, within this framework. Procedural obligations are also important in terms of revealing whether negative and positive obligations are being properly fulfilled. In other words, whether the state has violated its negative obligation through an intervention can only be determined through a proper trial.

This also makes it mandatory for the Contracting parties to their own organs to follow the case law of the European Court of Human Rights more closely and to act in accordance with that case law to protect the rights guaranteed by the Convention.

B. PROCEDURAL OBLIGATIONS

Procedural obligations require national authorities to conduct proceedings in accordance with ECHR standards in the cases brought before them. These obligations can be divided into three types. 1. Procedural obligations relating to the administrative and lawmaking process; 2. Procedural obligations relating to the correct identification and application of ECtHR and Constitutional Court case law; 3. The application of procedural obligations relating to fair trial in freedom of expression cases.

The first obligation is to determine whether the legislature, in establishing a general rule, has remained within the margin of appreciation by taking into account the case law of the ECtHR. The ECtHR has determined in certain cases that legislative debates met the necessary procedural standards.²¹

²¹ Peter Cumper and Tom Lewis (2019), “Blanket Bans, Subsidiarity, and the Procedural Turn of the European Court of Human Rights”, 68 ICLQ 611

The obligation in the second group is the obligation to act in accordance with the guidance of the ECtHR case law on how the trial should be conducted. The most typical example of this is determining whether the trial conducted in cases of defamation, where personal rights conflict with freedom of expression, was conducted in accordance with the criteria developed in the case law. Here, the ECtHR focuses on the reasoning behind the decisions of domestic courts, examining whether the decision is justified within the framework of ECtHR case law.²²

The third group of obligations consists of duties arising from the adaptation of fair trial principles to freedom of expression cases. This duty is related to the first duty but is specifically a continuation of the second type of obligation. For example, in a defamation case, the obligation to consider the context includes the obligation to investigate the context in which the statement was made, to consider the relevant allegations, to hear the arguments accordingly, to comply with the rights of defence and the principles of adversarial proceedings, and ultimately to write a reasoned decision. Rendering a decision without allowing the defendant and the defence counsel to present their defence against the prosecution's opinion, for example, is a clear procedural violation (*Cemal Yıldırım [2nd Chamber]*, Case No: 2022/66222, 7/17/2025). Similarly, failing to allow the presentation of counterevidence that refutes the prosecution's evidence constitutes a violation of procedural obligations.

1. Procedural Obligations Regarding Administrative and Lawmaking Processes

When examining whether interference based directly on a law affecting a right is necessary in a democratic society, the ECtHR also considers the extent to which the legislative process by which the authorising law was adopted in Parliament was democratic. This is particularly relevant in the context of reviewing the legitimacy of interventions in areas where common European standards have not been established and where there are differences in moral and philosophical approaches between countries. For example, in a case concerning a French law prohibiting the wearing of full-face veils (*burqas*) in public spaces, the ECtHR emphasised that there is no consensus in Europe on prohibiting the wearing of face-covering garments in public spaces. In this context, taking into account the debates that took place when the law was enacted, the court noted that the French approach, which considers the visibility of the face to be important for social interaction and that social interaction is one of the minimum conditions for living together, is the choice of society and was decided in a democratic process, and stated that the French state has broad discretion in this area. (*S. A. S./ France*, [GC], no. 43835/11, 01.07.2014). Therefore, the Court gave precedence to the democratic choice of the French people and exercised its supervisory power with restraint. In reaching this conclusion, the Court provided a detailed account of the debates held in parliament and elsewhere during the legislative process in the factual part of the judgment.

²² *Öğrü v. Turkey*, nos. 60087/10, 12461/11, and 48219/11, 19.12.2017, § 66; *Kaos GL v. Turkey*, no. 4982/07, 22.11.2016, § 57.

In the *Hirst No. 2* case concerning the deprivation of prisoners' voting rights, the Court emphasised that Parliament had not conducted a serious examination of the balancing of conflicting interests, particularly that no debate had been held taking into account modern approaches to criminal law, and thus concluded that there had been a violation (*Hirst v. the United Kingdom (No. 2)* [GC], no. 74025/00, § 79, 06.10.2005). Conversely, in the *Animal Defenders International* case, the ECtHR emphasised that when assessing the proportionality of a measure, it would take into account the reasons behind the legislature's enactment of the measure in question. In this context, the Court stated that the quality of the legislative and judicial review of the necessity of the measure was of particular importance. In this specific case, the legislature conducted comprehensive reviews taking into account the case law of the Strasbourg Court during the legislative process. Domestic courts also conducted in-depth analyses regarding the compatibility of the measure with the Convention. Therefore, the majority of the Court ruled that there was no violation. (*Animal Defenders International v. the United Kingdom* [GC], no. 48876/08, 22.04.2013, §§ 108-115).²³

The ECtHR similarly takes the view that administrative decision-making processes must also incorporate certain procedural safeguards. When exercising its supervisory jurisdiction, the Court states that its role is not to take the place of the competent national authorities, but to review the decisions taken by those authorities in accordance with their discretionary powers in light of Article 10 of the Convention. In this context, in the *Kula v. Turkey* application concerning the refusal to allow an academic to participate in a TV program and the subsequent disciplinary sanction imposed on the academic for leaving the city where he worked without permission in order to participate in the program, the ECtHR stated that the administrative authorities had not sufficiently explained and justified why they did not allow the applicant academic to participate in the TV program (*Kula v. Turkey*, no. 20233/06, 19.06.2018, § 48).

This does not mean that the review is limited to determining whether the respondent State exercised its discretion reasonably, carefully, and in good faith: The Court must examine the case as a whole to determine whether the interference in question is "proportionate to the legitimate aim pursued" and whether the reasons put forward by the national authorities to justify that interference are "relevant and sufficient." In conducting this examination, the Court must be satisfied that the national authorities applied rules consistent with the principles set out in Article 10 of the Convention and even based their assessment on an acceptable evaluation of the facts at issue (*Bédat v. Switzerland* [GC], no. 56925/08, 29.03.2016, § 48).

The Court also considers that, when assessing the proportionality of an interference with the exercise of the freedom of expression guaranteed by Article 10 of the Convention, the fairness of the proceedings and the degree of compliance with procedural safeguards are factors to be taken into account (*Baka v. Hungary* [GC], no. 20261/12, 23.06.2016, § 161).

In this context, the Court noted that the absence of effective judicial review, taking into account that the applicant was not informed of the situation and was not

²³ For assessments on this issue, see Robert Spano, "Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity" (2014) 14(3) *H.R.L.R.* 498.

allowed to defend himself when the administrative decision was taken, could constitute a violation of Article 10 of the Convention (*Lombardi Vallauri v. Italy*, no. 39128/05, 20.10.2009, §§ 45-56). Indeed, the Court has stated in relation to this provision that “the quality of the (...) judicial review of the necessity of the measure is of particular importance in this respect, including to the operation of the relevant margin of appreciation” (*Animal Defenders International v. the United Kingdom* [GC], no. 48876/08, 22.04.2013, § 108).

In the *Mándli and Others v. Hungary* decision, concerning the suspension of journalists’ parliamentary accreditation for interviewing and recording Members of Parliament outside designated areas, the Court found that parliaments have a margin of appreciation to regulate conduct in parliamentary buildings in order to prevent disruption of parliamentary proceedings (§§ 68-70). However, the absence of sufficient procedural safeguards, namely the impossibility of participating in the decision-making process, the lack of clarity regarding the duration of the restriction, and the absence of an effective means of challenging the contested decision, led the Court to conclude that there had been a violation of Article 10 of the Convention (§§ 72-78).

Similarly, the Court held that, given the vital importance for press freedom of protecting news sources and information that could lead to their identification, any interference with the right to protect such sources must be subject to legal procedural safeguards proportionate to the importance of that principle (*Sanoma Uitgevers B.V. v. the Netherlands* [GC], no. 38224/03, 14.09.2010, § 88; *Big Brother Watch and Others v. the United Kingdom* [GC], nos. 58170/13, 62322/14, 24960/15, 25.05.2021, § 444). The first and most important of these safeguards is the guarantee of review by a judge or other independent and impartial decision-making body. This review must be carried out by a body independent of the executive and other interested parties, and that body must have the authority to determine whether there is a public interest requirement that overrides the principle of protecting journalistic sources prior to the delivery of the material in question and, if not, to prevent unnecessary access to information that could reveal the identity of the sources (*Sanoma Uitgevers B.V. v. Netherlands* [GC], § 90). Subsequent disclosure of material that could reveal such sources would undermine the essence of the right to confidentiality (*ibid.*, § 91; see also *Telegraaf Media Nederland Landelijke Media B.V. and Others v. the Netherlands*, no. 39315/06, 22.11.2012, § 98).

As all this case law demonstrates, procedural safeguards provided in a decision-making procedure must also be taken into account when assessing the proportionality of the interference. At the same time, the scope of these safeguards may vary depending on the context of a particular case. The Court has held, in particular, that in the context of national security, which traditionally forms part of the inner core of State sovereignty, the authorities cannot be expected to provide as much reasoning detail as they would in ordinary civil or administrative proceedings. Providing detailed justifications for refusing to declassify highly confidential documents could undermine the very purpose for which such information was classified in the first place (*Šeks v. Croatia*, no. 39325/20, 03.02.2022, § 71). On the other hand, since access to accurate and reliable information on the management of radioactive waste, a project posing a major environmental risk, is of particular importance, it is essential that decisions taken by the competent authorities in a contentious procedure are

detailed and well-reasoned (*BURESTOP 55 and Others Association v. France*, no. 56176/18, 01.07.2021, § 115).

In one case, the applicant claimed that his removal from judicial office was due to certain statements he made to the media during an election campaign. In this case, the Court observed that the applicant had not been afforded significant procedural safeguards in the context of the disciplinary investigation and that the sanction imposed on him was disproportionately severe and could have a “deterrent effect” on judges wishing to participate in public debates on the effectiveness of judicial institutions (*Kudeshkina v. Russia*, no. 29492/05, 26.02.2009, §§ 97-99). Furthermore, in numerous applications concerning members of the judiciary who were subjected to various disciplinary sanctions for exercising their freedom of expression, the ECtHR has referred to procedural safeguards in disciplinary proceedings (see *Kövesi v. Romania*, no. 3594/19, 05.05.2020, §§ 205-208; *Eminağaoğlu v. Turkey* no. 76521/12, 09.03.2021; *Kozan v. Turkey*, no. 16695/19, 01.03.2021, §§ 64-70).

Furthermore, the principle of procedural justice and procedural safeguards also apply in the context of the refusal to grant a broadcasting license on grounds of national security and the refusal to disclose the reasons for this decision (*Aydoğan and Dara Radio Television Broadcasting Inc. v. Turkey*, no. 12261/06, 13.02.2018, § 43).

As can be seen, in the above-mentioned cases, the ECtHR emphasises that certain procedural safeguards must be in place when administrative actions that interfere with freedom of expression are taken. The fact that procedural deficiencies in the process of taking the administrative decision were not remedied during the trial plays an important role in finding a violation of freedom of expression.

2. Procedural Obligations Regarding the Correct Identification and Application of ECtHR and Constitutional Court Case Law

As mentioned above, in accordance with the principle of subsidiarity, it is the obligation of the Contracting Parties to ensure the rights guaranteed by the Convention to everyone within their jurisdiction. This obligation is also clearly regulated in Article 1 of the Convention. Consequently, the legislative, executive, and judicial organs of the Contracting Parties are under an obligation to respect and protect the rights guaranteed by the Convention. In this context, courts adjudicating freedom of expression cases must first consider the obligations arising from the Convention. Since the final authority to interpret the Convention lies with the ECtHR, local authorities must take into account the ECtHR case law when restricting freedom of expression.

As mentioned above, when reviewing the compatibility of interventions in freedom of expression with the Convention, the ECtHR conducts a three-stage review. First, it examines whether the interference has a legal basis and, if so, whether the regulation in question is foreseeable and contains safeguards to prevent arbitrary interference. In the second stage, it examines whether the interference has a legitimate aim. The third stage involves examining whether the interference is necessary in a democratic society. When examining whether interference with freedom of expression is necessary in a democratic society, the ECtHR has developed certain

criteria, taking into account the purpose of the interference. Domestic courts must make an assessment based on these criteria when resolving freedom of expression cases. The ECtHR considers the failure to make an assessment based on the criteria it has developed to be a violation in itself. It states that such decisions do not contain “relevant and sufficient reasoning.” If domestic courts have discussed ECtHR standards in their own decisions, the ECtHR generally makes its own assessment and examines whether the conclusion reached by the domestic courts is consistent with its own conclusion.

The above-mentioned return to procedure approach is also relevant here. Those who argue that the ECtHR should only conduct a procedural review maintain that the ECtHR should limit its review to whether the domestic courts have taken ECtHR standards into account and that, if the domestic courts have taken these standards into account, the outcome should not be subject to further review by the ECtHR. However, as discussed above, this view has not been fully adopted in ECtHR practice.²⁴ In fact, there is a possibility that the states acting in bad faith could exploit this approach.

The point to be considered here is that local authorities, especially judicial authorities, are under an obligation to make an assessment in line with the case law of the ECtHR in their actions that constitute interference with the rights under the Convention. If domestic courts do not justify their decisions within the framework of the principles of the ECtHR, the ECtHR will rule that there has been a violation on the grounds that the local authorities have not provided relevant and sufficient justification for their interference.

The Constitutional Court has also adopted this approach of the ECtHR and, particularly in freedom of expression applications, examines whether the decisions of domestic courts contain relevant and sufficient reasoning when reaching a violation finding. In this regard, the Constitutional Court has stated in numerous decisions that interventions in freedom of expression without justification or with justification that does not meet the criteria set forth by the Constitutional Court violate Article 26 of the Constitution (*Kemal Kılıçdaroğlu*, § 58; *Bekir Coşkun*, § 56; *Tansel Çölaşan*, § 56; *Zübeyde Füsün Üstel and others*, § 120). In this context, the Constitutional Court takes into account whether the reasoning of the court of first instance “assessed whether the expression at issue was made for a reason, whether the words used had a background, whether the complainant should have tolerated the words directed at him due to his previous behaviour, whether the discussion in question contributed to a public interest, and whether the complainant had the opportunity to respond to the applicant’s words that caused them distress.” The Constitutional Court has accepted as a violation the fact that the court of first instance, based solely on an abstract assessment and referring to a decision previously made by the regional court of appeal and accepted as defamatory, ruled that the applicant should be convicted (*Cemal Yıldırım* [2.B.], B. No: 2022/66222, 7/17/2025, § 22).

As will be discussed in detail below, “**relevant and sufficient reasoning**” is a broader concept than the “**right to a reasoned decision.**” **A reasoned decision** means

²⁴ Oddný Mjöll Arnardóttir, “The ‘procedural turn’ under the European Convention on Human Rights and presumptions of Convention compliance”, *International Journal of Constitutional Law*, Volume 15, Issue 1, January 1, 2017, Pages 9–35.

that the court legitimizes its conclusion by explaining all material and procedural issues that will affect the outcome of the case. **Relevant and sufficient reasoning**, on the other hand, means that courts legitimize their decisions within the framework of the principles established by the ECtHR and the Constitutional Court. Even if they are justified in terms of substantive and procedural law principles, decisions that do not account for human rights principles cannot be regarded as containing relevant and sufficient reasoning.

3. Procedural Obligations within the Scope of the Right to a Fair Trial and the Interaction between Articles 6 and 10 of the Convention

The procedural safeguards that must be provided during the conduct of proceedings are regulated under Article 6 of the Convention as part of the right to a fair trial. However, the ECtHR has ruled that the substantive rights guaranteed under other articles of the Convention also have a procedural dimension and that failure to comply with the relevant safeguards constitutes a violation of the right in question. The doctrine of procedural obligations, first developed in the ECtHR's case law in relation to the right to life and the prohibition of torture, has gradually found application in relation to other rights as well. In this context, the Court has established that freedom of expression also has a procedural dimension.

There are numerous court decisions that refer to procedural obligations in case law. In the case of *Cumhuriyet Vakfı and Others v. Turkey*, the Court emphasised that it must also closely examine **the procedural safeguards** in the system to prevent arbitrary interference with freedom of expression and examined the scope and duration of the interim measure, its reasoning, and the possibility of appealing the decision before the measure was taken (§§ 61-74).

In its judgment in *Steel and Morris v. the United Kingdom* (no. 68416/01, ECHR 2002-III), the Court found that the applicants' freedom of expression had been violated due to procedural unfairness in defamation lawsuits brought against them by a large company (McDonald's). Denied legal aid and facing an army of lawyers hired by the plaintiff, the applicants encountered enormous difficulties in proving the truth of the serious allegations based on factual evidence they had made against the plaintiff during the protracted proceedings. "Given the enormity and complexity of that undertaking" the Court concluded that it could not be said that a fair balance had been struck between the conflicting interests. The Court's finding of a violation followed a separate finding of a violation of Article 6 of the Convention in the same application, due to the striking inequality of arms between the applicant and the applicants who were not represented by counsel for the greater part of the proceedings.

In the *McVicar v. United Kingdom* decision, the Court found no procedural violation in the application concerning the trial of allegations that an athlete had won competitions by using doping, nor did it find a violation of freedom of expression (*McVicar v. United Kingdom*, no. 46311/99, 07.05.2022).

The applicants may allege a violation of both Article 6 and Article 10 due to interference with their freedom of expression. Interference with freedom of expression,

whether through civil or criminal proceedings, administrative proceedings and lawsuits, or through precautionary measures, access restrictions, or restrictions on access to written and visual publications in prisons, mostly arises as a result of contentious proceedings. The applicants' complaints regarding procedural issues in these administrative and judicial processes arise in the form of allegations of violations of both Article 6 and Article 10. The Court's approach could be to respond to the more serious allegations under the Convention and find it not necessary to address the others. Alternatively, as in the *Steel and Morris*, and *McVicar* cases, it could conclude that both claims must be examined separately on their merits in light of their interconnection. The Court decides whether to focus on Article 10 or the complaint under Article 6.

The Court generally addresses procedural issues in freedom of expression applications within the context of Article 10. It examines procedural issues in the context of proportionality, taking into account the necessity of the interference in a democratic society and its deterrent effect. Therefore, while a procedural issue alone does not constitute a violation under Article 6, it may constitute a violation under Article 10 in the context of the necessity of the interference in a democratic society and its proportionality. In such cases, the Court conducts its examination under Article 10 and does not separately examine the complaint under Article 6. For example, the Court ruled that Article 10 had been violated due to procedural issues relating to the interim measure decision in the *Cumhuriyet Foundation* application (*Cumhuriyet Foundation and Others v. Turkey*, no. 28255/07, 08.10.2013). In the same case, the applicants alleged that the interim measure decision was taken in their absence, without proper examination of documentary evidence and without any justification, and that the publication ban remained in force for a long period of time. They claimed that this violated their right to a fair trial under Article 6 of the Convention and that there was no effective domestic remedy available to challenge the interim measure decision. They also alleged that this violated their right to an effective remedy under Article 13 of the Convention.

The Court stated that there were no circumstances requiring the complaints to be declared inadmissible, recalled the circumstances of the case and its finding of a violation of Article 10 of the Convention, noted that it had examined the fundamental legal issue raised in the present application, and therefore found it unnecessary to give a separate decision on the other complaints.

However, in the case of *Kövesi v. Romania* (no. 3594/19, 05.05.2020), following its criticism of legal reforms, the Court ruled that the restrictions imposed by the domestic courts on the review of the prosecutor's dismissal were contrary to Article 6 (§§ 157-158). In its examination of Article 10 of the Convention, the Court emphasised that the dismissal of a chief prosecutor constituted a serious interference affecting the independence of the judiciary and had a deterrent effect preventing all members of the judiciary from participating in public debate. It also noted that the absence of a judicial remedy against the removal constituted a violation, as the restrictions on the applicant's freedom of expression were not accompanied by effective and sufficient safeguards against abuse (§ 210). Similarly, in an application concerning the imposition of disciplinary sanctions on a judge for his statements, the ECtHR found

that both Article 6 and Article 10 had been violated because there was no judicial remedy against the disciplinary decisions of the HSK in Turkey (*Eminağaoğlu v. Turkey*, no. 76521/12, 09.03.2021). In another judgment, it found that Article 13, as well as Article 10, had been violated for the same reason (*Kozan v. Turkey*, no. 16695/19, 01.03.2022).

There does not seem to be an established objective standard for determining when a procedural issue amounts to a problem under Articles 6 or 13, as well as Article 10. However, the Court also examines Article 6 or Article 13 in cases where it is satisfied that the procedural issue has a dimension that goes beyond the context of freedom of expression.

For example, in *Bulgakov v. Russia* (no. 20159/15, 23.06.2020), the Court noted that the complaint under Article 13, alleging a violation of the right to an effective remedy because the appeal court had failed to examine the complaint that the differences between blocking access to a website and blocking access to a web page (URL) had not been taken into account, stemmed from the same facts as those examined when considering the complaint under Article 10. However, recalling that there is a difference between the nature of the interests protected by Article 13 of the Convention and those protected by Article 10, the Court noted that Article 13 guarantees a procedural right, namely “the right to an effective remedy,” while the procedural requirements in Article 10 serve a broader purpose of ensuring respect for the right to freedom of expression. Considering the difference in purpose between the guarantees provided by the two articles, the Court considered it appropriate to examine the same series of events under both provisions in the present case (§ 46).

The Constitutional Court generally tends to examine all complaints in applications concerning freedom of expression under the right to freedom of expression. As a general formula, the Court states that it is not bound by the legal characterisation of the events by the applicants and that it will determine the legal characterization of the events and facts itself, deciding that the applicants’ other complaints must also be examined under the freedom of expression provided for in Article 26 of the Constitution (See *Hayko Bağdat* [1. B.], B. No: 2016/256, 28/11/2019, § 28; *Keskin Kalem Yayıncılık ve Ticaret A.Ş. and others* [GK], B. No: 2018/14884, 27/10/2021, § 76; *Keskin Kalem Yayıncılık ve Ticaret A.Ş. and Ali Ergin Demirhan* [2nd B.], B. No: 2019/20812, 11/12/2024, § 12).

In fact, the Constitutional Court refrains from examining complaints of a fair trial, even in applications involving very clear procedural violations. For example, in the application of *Cemal Yıldırım*, the applicant’s lawyer submitted an excuse at the final hearing of the criminal case brought against the applicant for insult. The applicant did not attend the hearing because he was excused from it. The court, without considering the lawyer’s excuse, accepted the opinion of the public prosecutor and, without granting the right to defend against the opinion, handed down a conviction in the same session and definitively imposed a judicial fine. In his application to the Constitutional Court, the applicant claimed that, in addition to his freedom of expression, his defence was not heard in person during the prosecution phase but was questioned through a letter of request, and that his response to the public prosecutor’s opinion requesting a conviction was not sought without even a decision being

made on the valid excuse submitted for the second hearing, that no additional time was granted for defence against the opinion, and that the trial was thus concluded with a conviction, thereby violating the right to a fair trial (*Cemal Yıldırım* [2nd B.], B. No: 2022/66222, 7/17/2025, § 10). Although the applicant’s complaint was quite significant in terms of the right to equality of arms and adversarial proceedings, the Constitutional Court merely stated that all complaints would be examined under Article 26 without providing any explanation (§ 12). Furthermore, the Constitutional Court did not assess this complaint under the procedural dimension of freedom of expression but only referred to this issue in the context of whether the context of the words was examined within the scope of the balancing test. Paragraph 21 of the decision reads as follows: “However, it appears that the applicant’s defence, which would be in the best position to explain the context in question, was not taken directly by the Court, and that in the defence obtained through subpoena, the applicant was not asked about the context of his words (see § 4). Moreover, it appears that the trial proceeded without any interim decision being made regarding the applicant’s defence counsel’s excuse for not attending the hearing, and that the trial ended with a conviction without the defence being granted the time requested to respond to the prosecutor’s opinion on the merits (see §§ 5-6). In this case, it cannot be said that the court of first instance made sufficient efforts to determine the context of the words used by the applicant and, consequently, whether they constituted an arbitrary attack that was groundless and solely intended to insult.

As seen in this example, the Constitutional Court exercises its power to classify complaints in a highly arbitrary manner and leaves some of the significant rights violations of the applicants unanswered. This situation causes a problem that goes beyond the question of whether procedural issues should be examined in the context of procedural rights or under the procedural dimension of substantive rights. Essentially, the Constitutional Court avoids examining the case under the guise of exercising its power of classification. However, according to Article 36 of the Constitution, no court may refuse to hear a case within its jurisdiction and authority.

For those practising human rights law, it is necessary to raise any procedural issues arising in each case as grounds for violation both under Article 10 and Article 6, which provides procedural safeguards, and, if necessary, Article 13 of the Convention.

C. RESOLVING PROCEDURAL OBLIGATIONS IN FREEDOM OF EXPRESSION CASES

As can be seen, the trend towards proceduralism in human rights law and the tendency to deviate from the rule of law in Turkey are parallel developments. This has led to an interesting paradox. While the obligations of national judicial authorities to implement international human rights standards have increased, the judicial processes themselves have simultaneously become instruments of authoritarianism.

Turkey is one of the first countries that springs to mind when discussing concepts such as authoritarian legalism,²⁵ the transformation of the judiciary into a weapon of

25 Kim Lane Scheppele, “Autocratic Legalism,” *The University of Chicago Law Review* (2018) Vol. 85/2, pp. 545–584

war (*lawfare*),²⁶ and legal dualism²⁷. These concepts are used to explain the instrumentalization of law by authoritarian regimes. This observation necessitates a more careful analysis and elaboration of procedural issues in judicial processes.

Indeed, as we will detail in the following sections, the correlation between deviations from procedural safeguards and authoritarianism is undeniable. In fact, the most fundamental tool of legal authoritarianism is the creating an image that the judicial organs are conducting a “fair trial process,” when in reality they are conducting a process that lacks the elements a trial should materially possess. However, this deviation can only be exposed through a detailed mapping of procedural safeguards.

This detailed mapping is necessary in order to understand the different systems of adjudication that have become commonplace in freedom of expression cases in Turkey. The other sections of this study will discuss the most frequently encountered procedural issues in criminal and administrative judicial proceedings.

The procedural issues identified in this study were determined based on the authors’ case law review and the common types of problems raised by lawyers in workshops held in six different provinces as part of this project.

26 John Carlson and Neville Yeomans, “Whither Goeth the Law - Humanity or Barbarity,” 2013, <https://www.laceweb.org.au/whi.htm>; Narek Abgaryan, “Lawfare: The Mortal Kombat of Jurisprudence,” *Völkerrechtsblog*, March 17, 2025, doi: 10.17176/20250318-000805-0.

27 Kathryn Hendley, “Legal Dualism as a Framework for Analyzing the Role of Law under Authoritarianism” *Annu. Rev. Law Soc. Sci.* 2022. 18:211–26



INVESTIGATION PHASE

In Turkey, many people are subject to criminal investigations due to a large number of posts and other expressions. Issues arising in criminal investigations involving freedom of expression may be analysed under three principal categories. A significant portion of the issues relates to the initiation of the investigation.

Naturally, procedural errors that occur during the investigation phase can impact later stages of the criminal process as well. However, even in cases that do not result in criminal prosecution, arbitrariness during the investigation stage may be sufficient to conclude that freedom of expression has been violated. Therefore, the investigation stage must be examined carefully, both independently and in relation to the entire criminal proceedings.

Indeed, the ECtHR had previously ruled that certain conditions having a deterrent effect on freedom of expression entitle individuals who have not been convicted by a final judgment to the status of victims due to an interference with that freedom (*Financial Times Ltd and Others v. the United Kingdom*, no. 821/03, 15.12.2009, § 56). In the case of *Taner Akçam v. Turkey*, an investigation was opened against the applicant under Article 301 of the Turkish Penal Code because a nationalist individual had filed a complaint against him. The applicant gave a statement to the prosecutor, but the prosecutor did not bring charges, stating that the applicant's statement fell within the scope of Article 10 of the Convention. However, taking into account the *Hrant Dink v. Turkey* case (nos. 2668/07, 6102/08, 30079/08, 7072/09, and 7124/09, §107, ECHR 2010), noted that persons subject to such investigations were branded as insulting

Turkishness, as “traitors” and “agents,” and that in the Dink case, the applicant was even killed by ultra-nationalists for this reason. Therefore, in this context, the Court noted that although no prosecution was initiated against the applicant under Article 301 and he was not found guilty, the criminal complaints filed against him by extremists due to his views on Armenians turned into a campaign of harassment and that, under this provision, the applicant was forced to respond to the allegations. It acknowledged that, although the contested provision was not applied against the applicant, the possibility of future investigations against him would cause him stress, anxiety, and fear of prosecution. (§75)

In the *Dilipak v. Turkey* judgment, the case against the applicant was also dismissed due to the statute of limitations. The ECtHR ruled that the applicant, who had appealed to the ECtHR before the case was concluded, had suffered harm, stating that: “Nevertheless, it is true, first of all, that criminal charges were pending against the applicant for a considerable, indeed excessive length of time ... and, secondly, that the applicant could not be sure that he would not, either during those criminal proceedings or at any future stage, face further legal consequences if he, as a journalist and political columnist, wrote further articles on matters relating to links between the armed forces and the country’s general politics” despite the applicant not having been convicted (*Dilipak v. Turkey*, no. 29680/05, 15.9.2015, §49).

Therefore, the mere existence of the investigation may constitute an interference with freedom of expression. It is possible to contend that conducting arbitrary investigations involving tens of thousands of individuals may exert a deterrent effect at both the individual and collective levels.

However, this deterrent effect is not limited to the arbitrariness of the investigation. The manner in which the investigation is conducted is also critical. Restrictions on other rights and freedoms of the person, such as freedom of expression, as well as unlawful arrest and detention measures, can have serious consequences for freedom of expression. Therefore, procedural obligations relating to the investigation process must also be closely examined.

Finally, if the investigation process results against the person making the statement, an indictment is prepared. The quality of indictments also seriously affects the prosecution phase. This is because during the trial, the prosecution often does not make any new requests, but simply repeats the statements in the indictment, changing the term “suspect” to “defendant.” Therefore, the quality of the indictment determines not only the limits of the investigation phase but also those of the prosecution.

A. ISSUES RELATED TO CRIME DETECTION AND REPORTING

1. Virtual Patrol

A significant portion of criminal investigations relating to freedom of expression begin with an investigation called “virtual patrol”. The concept of virtual patrol is a concept developed by analogy to the patrol activities physically carried out by law enforcement. Just as administrative law enforcement, while conducting routine

patrols, encounters a crime and collects evidence related to that crime and informs the public prosecutor, the same would apply to law enforcement encountering a crime while browsing the Internet.

However, a distinction must be made here between judicial law enforcement and administrative law enforcement. It is one thing for law enforcement to encounter a crime during administrative law enforcement activities carried out to maintain public order and security, and quite another for them to initiate a criminal investigation on their own initiative without instructions from the prosecutor's office. In practice, the latter is what is mostly done.

Indeed, in practice, law enforcement officers often prepare investigation reports on social media accounts with very few followers, which are not shared or interacted with, and claims that this was discovered during virtual patrols. Millions of social media posts are made every day in Turkey.²⁸ Prosecutors do not question how content with very few followers, which would be impossible to detect unless specifically looked for, ends up being caught in virtual patrols. However, as might be expected, these accounts are not accessed by chance; law enforcement identifies accounts it considers criminal based on subjective criteria as part of its judicial police activities and prepares investigation reports on these individuals. Prosecutors then use these reports as the basis for formal charges.

The Constitutional Court of the Republic of Turkey (AYM) found this atypical investigation method to be unconstitutional. The Constitutional Court annulled the eighteenth paragraph added to Article 6 of the Additional Provisions of Law No. 2559, which regulates virtual patrol activities within the scope of judicial police duties, on the grounds that it constituted interference with personal data and was not necessary in a democratic society (AYM 2018/91 E., 2020/10 K., 19/2/2020). In its decision, the Constitutional Court clearly stated that law enforcement cannot conduct such investigations and that they are under the obligation to immediately report any possible crime to the Public Prosecutor's Office:

"101. Accordingly, determining the competent public prosecutor's office to conduct criminal investigations, including crimes committed in the virtual environment, and resolving disputes related to this matter remain within the scope of the duties of the judicial authorities. It is seen that the Law also grants judicial authorities the power to access information related to criminal investigations, including information that may enable them to perform the aforementioned duty. Therefore, it has been concluded that granting the authority specified in the rule to law enforcement solely for the purpose of determining the competent public prosecutor's office, thereby limiting the right to request the protection of personal data, does not correspond to a necessary social need and, in this respect, the restriction imposed by the rule in question is not in line with the requirements of a democratic society.

²⁸ It has been reported that the number of users on social media sites bare as follows: Instagram (58.4 million), YouTube (57.5 million), TikTok (40.2 million), Facebook (34.8 million), and X (9.7 million). Users spend an average of 32 hours and 36 minutes per month on Instagram, 26 hours and 26 minutes on TikTok, 23 hours and 31 minutes on YouTube, 45 minutes on Facebook, and 5 hours and 4 minutes on X. <https://www.aa.com.tr/tr/gundem/sosyal-medya-kullanicisi-sayisi-58-5-milyona-ulasti/3560857#>, See Digital 2025 Turkey Report, <https://wearesocial.com/uk/blog/2025/02/digital-2025-the-essential-guide-to-the-global-state-of-digital/>

Article 7 of the same Law also regulates virtual patrol activities carried out within the scope of administrative law enforcement. The provision reads as follows: “The police shall take preventive and protective measures concerning the indivisible unity of the State and its people, the constitutional order, and general security, and shall conduct intelligence activities at the national level and in the virtual environment to ensure public safety and security. To this end, it shall collect and evaluate information and transmit it to the competent authorities or areas of use. It cooperates with other intelligence agencies of the State.”

However, this provision does not apply to judicial police, and no judicial investigation can be conducted based on this provision. For example, based on this provision, a person’s profile cannot be searched retroactively, a crime allegedly committed in the past cannot be identified, and an investigation report cannot be established. It may be considered within this scope for law enforcement to inform the necessary units when encountering content on a popular account that could disrupt public order. However, it is not within this scope for law enforcement to thoroughly search the profile of a person they suspect, prepare a file on them, and then submit it to the prosecutor’s office. The Constitutional Court’s annulment decision relates precisely to this.

Secondly, Article 7 of the Law on Police Duties and Responsibilities regulates intelligence activities in virtual environments “to take preventive and protective measures regarding the indivisible unity of the state and its people, its constitutional order, and its general security, and to ensure public safety and security.” Within this scope, as stated in the second paragraph of the regulation, law enforcement activities are limited to the crimes listed in paragraphs a, b, and c of Article 250 of the Criminal Procedure Code, excluding espionage. Intelligence activities cannot be carried out in the virtual environment under Annex 7 for crimes other than these. A court order is required to carry out this activity in relation to crimes covered by the regulation; although it is stated that designated persons may issue written orders in cases where delay would be detrimental, it is stipulated that written orders must be submitted to a judge for approval within 24 hours.

However, in practice, it has been observed that investigations are initiated based on investigation reports prepared as a result of virtual patrols for all crimes not covered by Annex 7, such as TPC 216, 217/a, and 299, and that indictments are drawn up based on evidence obtained unlawfully as a result of these investigations.

However, if a crime covered by Annex 7 is actually detected as a result of a virtual patrol, the police must immediately report the situation to the prosecutor’s office and carry out judicial police activities such as preparing an investigation report in accordance with the instructions received. In practice, this has been reversed. The police decide what constitutes a crime and prepare all the documents, but only after this stage does the prosecutor’s office formally become involved. Even after the prosecutor’s office becomes involved, the police still carry out the main procedures, and, as will be detailed below, how the statement is taken is entirely left to the discretion of the police.

Therefore, indictments based on investigation reports prepared using data collected through virtual patrols during the investigation phase are unlawful.

On the other hand, another method used to initiate investigations is based on anonymous emails or tip-off calls where the identity of the informant is unknown. The legality of investigations opened based on such abstract and vague reports stating that “ person X made criminal posts from his/her account” is also questionable. There is a high possibility that such reports are used to circumvent the ban on virtual patrols.

2. Ex Officio Investigation of Complaint-Based Crimes

One of the most significant types of crimes threatening freedom of expression in Turkey is the crime of insulting the President and public officials. It is known that hundreds of thousands of people have been investigated and tens of thousands convicted for the crime of insulting the President alone. The introduction highlighted the increase in investigations and prosecutions under Article 299 of the Turkish Penal Code (TPC) following Recep Tayyip Erdoğan’s election as President. Similarly, criticism directed at elected politicians is being investigated *ex officio* and prosecuted on the grounds that it constitutes insulting a public official.

The ECtHR has ruled that the application of both Article 299 of the Turkish Penal Code, on the crime of insulting the President, and Article 125/3-a of the Turkish Penal Code, on the crime of insulting a public official in connection with their duties, to elected politicians is contrary to the Convention. In this case, pursuant to Article 90 of the Constitution, these provisions have lost their applicability.

The case law of the ECtHR on this matter is deliberately ignored by all Turkish judicial bodies, including the Constitutional Court. The ECtHR has consistently held that protecting heads of state with different criminal law provisions than other individuals is contrary to the Convention. (*Colombani v. France*, no. 51279/99, 25.6.2002, § 68-69; *Otegi Mondragon v. Spain*, no. 2034/07, 15.03.2011, § 55, 56; *Artun and Güvener v. Turkey*, no. 75510/01, 26.6.2007, § 31; *Önal v. Turkey (2)*, no. 44982/07, 02.07.2019, § 35; *Vedat Şorli v. Turkey*, no. 42048/19, 19.10.2021, § 54.) According to the ECtHR, no privileged protection should be afforded to heads of state, prime ministers, ministers, or other high-ranking politicians. (*Tuşalp v. Turkey*, no. 32131/08, 21.2.2012, §48.) This is because the state’s interest in protecting the reputation of the head of state cannot justify granting that person a privileged status or special protection against the dissemination of information and opinions about him or her. (*Vedat Şorli v. Turkey*, § 43.) Consequently, the ECtHR case law finds, without any doubt, that protecting heads of state with criminal law provisions that differ from those applicable to other persons is contrary to the Convention. (*Colombani v. France*, no. 51279/99, 25.6.2002, §§ 68-69; *Otegi Mondragon v. Spain*, no. 2034/07, 15.03.2011, §§ 55, 56; *Artun and Güvener v. Turkey*, no. 75510/01, 26.6.2007, §31; *Önal v. Turkey (2)*, no. 44982/07, 02.07.2019, § 35; *Vedat Şorli v. Turkey*, no. 42048/19, 19.10.2021, §54.)

Moreover, even in cases where the protection of heads of state is considered legitimate, the ECtHR has stated that authorities must exercise restraint in resorting to criminal proceedings, taking into account the dominant position of high-level politicians. (*Otegi Mondragon*, §58; *Dickinson v. Turkey*, no. 25200/11, 02.02.2021, § 56.)

Indeed, looking at the case law of the ECtHR, expressions used against politicians, especially Prime Ministers and Heads of State, such as “common opportunist,” “immoral” and “dishonourable”; “idiot”; “with a fascist past,” “F*** off, moron” have been assessed as harsh criticism of a political nature. (*Lingens v. Austria*, no. 9815/82, 08.07.1986, *Oberschlick v. Austria*, no. 11662/85, 23.05.1991, *Feldek v. Slovakia*, no. 29032/95, 12.07.2001, § 86, 90, *Eon v. France*, no. 26118/10, 14.03.2013, §59.)

As is well known, the ECtHR has issued numerous judgments finding violations against Turkey in relation to the offence of insulting the President. (*Artun and Güvener v. Turkey*, no. 75510/01, 26.06.2007, *Önal v. Turkey (no. 2)*, no. 44982/07, 02.07.2019, *Vedat Şorli v. Turkey*, no. 42048/19, 19.10.2021).

The ECtHR, in its most recent decision dated October 19, 2021, in the case of *Vedat Şorli v. Turkey*, ruled that the applicant’s conviction for insulting the President for sharing a cartoon and a collage of images with highly critical content on his social media account constituted a violation of freedom of expression. The ECtHR stated in its judgment that the violation stemmed from Article 299 of the Turkish Penal Code (TPC) and its application. According to the Court, providing special protection to the Head of State through a special law is not in line with the spirit of the Convention, and the benefit of protecting the Head of State’s personal rights cannot justify granting that person privilege or special protection against statements directed at him or her. Accordingly, since the source of the problem and the violation is the wording and application of Article 299 of the Turkish Penal Code, there is an obligation to bring domestic law into line with the standards of the Convention, in accordance with Article 46 of the Convention. In the *Vedat Şorli* judgment, the ECtHR stated, within the framework of Article 46 of the Convention, that the violation stemmed directly from Article 299 of the Turkish Penal Code and that the appropriate remedy for the violation was to bring this provision, which grants privileges to the President, into line with the Convention.

In its decision of June 15, 2021, in *Ersoy v. Turkey*, the ECtHR made a harsh criticism regarding the detention of students who reacted during President Erdoğan’s visit to METU when he was still Prime Minister, stating that “...this is a second slap in response to his attack on the students like a dog mad with revenge...” In this context, the ECtHR noted that, given his position and responsibilities as Prime Minister at the time, Erdoğan had a high obligation to tolerate criticism; ruled that Article 125/3 of the Turkish Penal Code, which defines criticism of elected politicians as a crime under a special provision, is incompatible with the Convention (*Ersoy v. Turkey*, no. 19165/19, 15.06.2021).

One of the fundamental principles of criminal law is the principle of legality of crimes and punishments, guaranteed by Article 38 of the Constitution (Article 7 of the ECHR). According to Article 2 of the Turkish Penal Code, no one may be punished for an act that is not expressly defined as a crime by law. As is known, the ECtHR’s decision in the case of *Ömür Çağdaş Ersoy* established that Article 125/3 of the Turkish Penal Code conflicts with Article 10 of the ECHR. In this case, pursuant to Article 90/5 of the Constitution and in accordance with the jurisprudence of the Constitutional Court, Article 125/3 of the TPC has been implicitly repealed and has lost its applicability. Therefore, no one can be punished based on this rule. However, the courts of first

instance have not taken this into account in any way. However, imposing punishment based on this provision would violate the principle that there can be no crime or punishment without a law, as explained in detail below.

On June 15, 2021, the ECtHR published its decision in the case of *Ömür Çağdaş Ersoy v. Turkey*. In this decision, the ECtHR made the following findings regarding Article 125/3 of the Turkish Penal Code:

“The Court notes that the domestic courts convicted the applicant based on Article 125(3)(a) of the Turkish Penal Code. This provision provides a higher level of protection for public officials than for ordinary individuals protected by the general regime of insult provided for in Article 125(1) of the Turkish Penal Code in relation to the disclosure of information or opinions concerning them. Indeed, the provision in question provides for the possibility of initiating prosecution against the person who uttered the words and imposing heavier penalties on the person concerned, even if the victim targeted by the words does not file a criminal complaint. As established in the present case, it is understood from the practice of the national authorities that Article 125(3)(a) of the Turkish Penal Code also applies when insulting words are directed at elected politicians who hold positions of responsibility, such as a prime minister, who are considered public officials within the meaning of this provision. The Court first notes that this application does not appear to be consistent with its previously cited case law. According to this case law, the limits of acceptable criticism are broader for public officials targeted in their capacity as politicians than for ordinary citizens. In this context, the Court recalls that it has previously held that enhanced protection against insults by special legislation is, in principle, incompatible with the spirit of the Convention (*Colombani and Others v. France*, no. 51279/99, § 69, ECHR 2002-V, *Otegi Mondragon v. Spain*, § 55, and *Önal v. Turkey* (no. 2), no. 44982/07, § 40, 02.07.2019). Furthermore, while it is entirely legitimate for persons representing state institutions to be protected by the competent authorities as guarantors of the institutional public order, the Court recalls that the dominant position occupied by these institutions requires restraint on the part of the authorities in the use of criminal proceedings (*Otegi Mondragon v. Spain*, § 58). (*Ömür Çağdaş Ersoy v. Turkey*, no. 19165/19, 15.6.2021, § 58).

Investigations into offences of insulting the President and insulting a public official are initiated without a complaint from the person concerned. The only legal outcome of the *Vedat Şorli* and *Ömür Çağdaş Ersoy* decisions does not concern substantive law. Following these decisions, the initiation of an investigation *ex officio* without a complaint is unlawful because it is done in the absence of a complaint, which is a condition for a lawsuit.

Within the framework of the ECtHR’s findings, the offense of insulting a public official, which is regulated in Article 125/3 of the Turkish Penal Code, which provides for a more severe penalty, to criticism directed at public officials in their capacity as guarantors of institutional public order or in relation to their politically motivated statements, creates a conflict with the principle of enhanced protection for politicians and/or politically motivated expression under the Constitution and the ECHR. The ECtHR has explicitly stated that, even if the protection of public officials is legitimate under certain conditions, extending this protection to politicians would be contrary to freedom of expression. In light of these statements, Article 125/3 of the Turkish Penal Code cannot be applied to high-level politicians under Article 90 of the

Constitution. This is because, according to Article 90 of the Constitution, “In the event of a conflict arising from different provisions in international agreements and laws concerning fundamental rights and freedoms that have been duly enacted, the provisions of the international agreement shall prevail.”

According to the Constitutional Court, “Pursuant to the fifth paragraph of Article 90 of the Constitution, treaties are part of our legal system and are enforceable like laws. Again, according to the same paragraph, in the event of a conflict between a provision of law and the provisions of a treaty relating to fundamental rights and freedoms, the provisions of the treaty must be applied. This rule is an implied repeal rule, eliminating the applicability of legal provisions that conflict with treaty provisions relating to fundamental rights and freedoms” (*Sevim Akat Eşki*, B. No. 2013/2187, 19.12.2013, §45; *Neşe Aslanbay Akbıyık*, B. No. 2014/5836, 16.04.2015, § 45; *Gülsim Genç*, B. No. 2013/4439, 06.03.2014, § 41).

Indeed, in its examination of the use of a married woman’s maiden name, the Constitutional Court found that Article 187 of the Civil Code No. 4721 and concluded that the rule to be applied pursuant to Article 90 of the Constitution is the provisions of the international treaty. It ruled that the interference with the applicants’ rights lacked legal basis (*Sevim Akat Eşki*, § 47; *Neşe Aslanbay Akbıyık*, § 47; *Gülsim Genç*, § 42).

As clearly stated by the ECtHR in its *Vedat Şorli* and *Ömür Çağdaş Ersoy* judgments, if Article 125/3 and Article 299 of the Turkish Penal Code are applied in a manner that grant privileges to politicians, the clear principle that politicians should be more open to criticism will be violated, and the provision will conflict with Article 10 of the ECHR. Therefore, the application of Articles 125/3 and 299 of the Turkish Penal Code, particularly with regard to politicians in power, is not possible under Article 90 of the Constitution and the jurisprudence of the Constitutional Court. In this case, imposing a penalty on the suspect based on an implicitly repealed rule would violate the principle that there can be no crime or punishment without a law.

The purpose of the provision in Article 125/3 of the Turkish Penal Code is to protect persons performing public duties from attacks specifically related to their service. However, evaluating every statement directed at a person because they are a public official as falling under the scope of Article 125/3-a would render this provision meaningless. As stated by the Constitutional Court, “for an offence of insult against a public official to be considered a qualified case, the offense of insult must be committed because of the public official’s duties.” (AYM, 2012/78 E, 2012/111 K, 12.09.2012) Therefore, the purpose of this provision is to protect the proper functioning of public services, i.e., the public interest, rather than public officials themselves. Accepting the contrary would mean that public officials have a more privileged position than other citizens, which clearly violates the principle of equality established in Article 10 of the Constitution. To be more specific, for example, the legislator wanted to impose a heavier penalty on someone who insults a land registry official while they are performing their duties, i.e., due to their public activity. The inability of individuals who may encounter such behaviour on a daily basis to perform their duties properly due to these insults will affect not only them but also the common good of the public. Therefore, unlike general offences of insult, the sole legal interest protected in

offences of insult against public officials due to their duties is not only the honour and dignity of the individual but also the proper performance of public service.

In practice, these issues, which are very clearly regulated in human rights law, are completely ignored. When one citizen insults another, under the newly enacted rules of procedure, the offender is invited to make an advance payment²⁹ and, upon payment of a nominal sum, a decision is issued that there are no grounds for prosecution. However, the provisions on advance payment are not applied to persons who insult the President; instead, investigations and lawsuits are initiated *ex officio*, suspects are arrested in some cases, and prison sentences are imposed. The offence of insult has been added to Article 75 of the Turkish Penal Code, which regulates preliminary payment, but the offence of insulting a public official has been excluded from this scope.

In other words, Articles 125 and 299, as well as Article 75, clearly regulate the exact opposite of the ECtHR case law. As a result, a different regime has been established between all persons living in the Republic of Turkey and the President and high-level politicians, contrary to the spirit of the ECHR. However, according to Article 90 of the Constitution, this privilege is unlawful and cannot be applied, including during the investigation phase. Therefore, opening an investigation without a complaint from the President and public officials constitutes a procedural violation of freedom of expression, and the failure to apply the institution of advance payment for these individuals also constitutes a procedural violation of freedom of expression.

3. Violations Related to Investigation and Prosecution Authorisation Procedures

For the reasons explained above, proceedings cannot be initiated without a complaint pursuant to Article 299 of the Turkish Penal Code, nor is it possible to apply Article 299 in principle. However, even if this were deemed appropriate for a moment, any investigation or prosecution pursuant to Articles 299 and 301 of the Turkish Penal Code, which regulate the crime of publicly insulting the Turkish Nation, the Republic of Turkey, the Grand National Assembly of Turkey, the Government of the Republic of Turkey, and the judicial organs of the State, is subject to the permission of the Minister of Justice. Upon examination of the Circular No. 18/1 of the General Directorate of Criminal Affairs of the Ministry of Justice dated 09.05.2008, it is clear that the purpose of establishing the permission system is not for the Ministry of Justice to automatically grant permission for prosecution for every investigation brought before it on the grounds of alleged insult to the President. On the contrary, the purpose of introducing a permission institution is to prevent unlawful prosecutions. Nevertheless, permission letters issued without any justification will also bring about arbitrary behaviour.

The situation is similar with regard to Article 301 of the Turkish Penal Code. Indeed, when informing the Council of Europe about the *Taner Akçam* decision, the government stated that this offence was subject to investigation permission and that

²⁹ The Constitutional Court has annulled the regulation subjecting defamation offenses to advance payment on other grounds. (AYM, E.2024/197, K.2025/86, 03/27/2025). However, the offense of defamation under Article 125 of the Turkish Penal Code (TPC) is still applicable in all its forms.

such permission was granted proportionally rarely. However, the increase in the number of permissions granted demonstrates that this claim is not substantiated. In 2018, public prosecutors initiated 9,555 investigations under Article 301, compared to 1,983 in 2014. Following the 2012 ruling in the Akçam case, a total of 29,695 investigations have been initiated under Article 301, and only 12,005 investigations have resulted in a decision that “there are no grounds for prosecution.” Furthermore, while only 207 prosecutions took place in 2014, 915 prosecutions were carried out in 2018, a figure that has nearly quadrupled in four years. Conviction rates have also increased significantly. In 2014, only 16 people were convicted, and 22 others were given suspension of the pronouncement of the verdict. In 2018, 216 people were convicted, and 256 others were given suspension of the pronouncement of the verdict.³⁰

The relevant Circular defines the requirements under Article 301 of the Turkish Penal Code as follows:

“2- All judicial proceedings before and after the investigation phase must be conducted by the chief public prosecutor or a public prosecutor appointed by him/her.

3- The defence of persons accused of a crime shall not be heard before the investigation permit is granted.

4- If, at the end of the investigation conducted before permission is obtained during the investigation phase, the evidence gathered raises sufficient suspicion that a crime has been committed to warrant a request for investigation permission, the documents to be prepared shall include: **The report, which includes the manner in which the crime attributed to the suspect was committed and the words used, as well as the public prosecutor’s reasoned opinion on granting the investigation permit,** shall be sent to the Ministry of Justice’s General Directorate of Criminal Affairs **through the chief public prosecutor of the assize court.** Otherwise, the legal requirements shall be determined and fulfilled locally without sending the investigation documents.

As is evident, both Article 299 of the Turkish Penal Code on prosecution permission and Article 301 on investigation permission delineate the procedure, stipulating that even the suspect’s statement cannot be obtained without permission in terms of Article 301. The prosecuting authority must state in writing which statement is alleged to be a crime and justify the need for permission. Simply submitting a statement to the Ministry and asking for approval will not satisfy this requirement. As will be explained in detail in the sections on prosecution and decision, the true meaning of a statement can only be understood within the context in which it is used. Consequently, the prosecuting authority requesting such authorization is also required to explain the circumstances in which the statement in question is considered to be a criminal act.

Furthermore, the ambiguous nature of charges in cases involving freedom of expression poses challenges for obtaining permission. Initially, an act may be identified as a particular offense, only for the classification to later be revised and deemed to constitute a different type of crime. For instance, a statement that is alleged to be

³⁰ Freedom of Expression Association, Akçam Case Group Rule 9/2 Submission, https://ifade.org.tr/reports/rule9/IFOD_Rule9_Akcam_Group_Submission_TR.pdf

propaganda under Article 7/2 of the Anti-Terrorism Law is subsequently asserted during the prosecution phase to constitute the crime of publicly insulting the state's military or security forces under Article 301 of the Turkish Penal Code. If an investigation begins under Article 301 of the Turkish Penal Code, permission from the Ministry of Justice must be obtained first. However, if this situation is noticed during the prosecution phase, the prosecution is suspended until permission is obtained from the Ministry. It is crucial to recognise the significant distinction between a person not even being under investigation and that person being charged as a defendant. The purpose of making the investigation subject to permission is to prevent the arbitrary restriction of freedom of expression. Therefore, if a case is brought under the wrong criminal provision, the case should be dismissed due to the change in the nature of the crime. The file should then be referred to the Chief Public Prosecutor's Office for review, and a decision should be made on whether to request permission for a new investigation. Conversely, the continuation of the prosecution and waiting for a response from the Ministry represents a contravention of the law and constitutes an excessive interference with freedom of expression.

4. Collective Complaints and Targeting

Particularly in cases involving crimes related to freedom of expression, such as Article 216 of the Turkish Penal Code and Article 7 of the Anti-Terrorism Law, one way to make a criminal complaint is to launch a social media campaign or to collect signatures for a petition. Especially in cases involving charges under Article 216 of the Turkish Penal Code, the collection of a large number of signatures is presented as part of the act of disrupting public order.

In cases of insult to religion, the Court of Cassation has ruled that complainants who do not directly suffer harm cannot legally join public prosecutions, and that participation decisions made by courts of first instance lack legal basis. Indeed, the Court of Cassation has determined that in such cases, these persons do not have the right to appeal because they do not have the status of being harmed by the crime, and that the court granting them the status of participant does not change this situation (Court of Cassation 8th Criminal Chamber, E. 2014/35434, K. 2015/22535, k.t. 12.10.2015).

However, it is observed that collective complaints filed by persons deemed not to have suffered harm from the crime are considered when determining whether the material elements of the crime have been established. However, the fact that a large number of people express discomfort with an action does not indicate a disruption of public order. The essence of this view is that if the majority of society is uncomfortable with an issue, it is legitimate to impose criminal penalties for discussing it. However, this approach clearly paves the way for a one-sided discussion of social issues. Indeed, the mere fact that society finds an opinion offensive or repugnant is not a sufficient reason to ban that opinion; quite the contrary, this constitutes the justification for its protection (*FCC v. Pacifica Foundation* (1978), 438 US 726, 745. Smolla, p. 93). The ECtHR has emphasised this feature in its now standard *Handyside* decision as follows: “Freedom of expression ... subject to paragraph 2 of Article 10 (art. 10-2), 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.” (*Handyside v. the United Kingdom*, Series A No. 24, § 49). As stated in a more recent judgment, complaints by persons offended by views expressed in a television program do not constitute sufficient grounds for restricting freedom of expression. (*Monnat v. Switzerland*, no. 73604/01, 21.9.2006, § 63. Cf. *Otto-Preminger-Institut v. Austria*, §52). It is also known that the Court of Cassation has accepted this standard as a principle. (YCGK E. 2001/9-132, K. 2001/155, T. 3.7.2001)

Moreover, someone with a political view may resort to exaggeration, slander, or misinformation in order to persuade others. (*Cantwell v. Connecticut* (1940), 310 U.S. 296, 310. Regarding journalists’ ability to exaggerate and provoke, see ECtHR *Prager and Oberschlick v. Austria*, 26.4.2995, Series A. No. 313, § 38). The Court of Cassation also accepts that the harshness inherent in criticism does not constitute a crime, and since criticism is not praise, it is natural for it to be harsh, offensive, and hurtful. According to the US Supreme Court, “Accordingly a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.”³¹ In this case, it should not be considered normal to restrict an opinion because it angers those who oppose it. (*Texas v. Johnson* (1989), 491 US 397, 409. (Flag burning case))

But the public order argument has a much more serious flaw. This argument assumes that the person using free speech is the one disrupting public order. Undoubtedly, no one can be forced to listen to something they do not want to hear, whether it is sacred or not. When the subject in question is values that a person considers sacred, the resulting discomfort will undoubtedly be more intense. For instance, in a compulsory course, the instructor’s use of profanity against values that students consider sacred could be subject to sanctions.

However, the discomfort accepted in practice does not stem from forcing a person to hear content they do not want to hear. The views of most of those who make statements against sacred values can only be accessed through special effort. In other words, a person who claims that their sacred values have been violated can easily choose not to hear or listen to such statements (*Cohen v. California* (1971), 403 US 15, 21). Hrant Dink published the article that led to the notoriety of Article 301 of the Turkish Penal Code and later to the murder of its author in the AGOS newspaper, which had a circulation of 5,000. As can be understood from many decisions of the European Court of Human Rights, the courts in Turkey do not take into account either the person who speaks or the means of communication that conveys the information (*Özgür Gündem v. Turkey*, no. 23144/93, 16. 3. 2000, §§. 38-46. See *mutatis mutandis*, *Plattform “Ärzte für das Leben” v. Austria*, Series A No. 139, 21.6.1988). Recent investigations initiated under Article 216 of the Turkish Penal Code indicate that individuals are informed about content they find objectionable through others who have identified or reported such material, rather than by directly witnessing it themselves.

31 *Terminiello v. Chicago* (1948), 337 US 1, 5. In this case, it should be noted that the defendant made very harsh criticisms of certain political and ethnic groups in a speech protesting at the door of an angry crowd, and that various disturbances occurred despite police measures, but the Supreme Court still found the defendant’s conviction unconstitutional.

People who are disturbed by a certain opinion could simply avoid listening to it without any effort, but instead, they resort to verbal and sometimes even physical violence against the person expressing that opinion. In this case, it is not the person expressing the opinion that disturbs public order, but the person attacking them. Thinking the opposite could lead to the following result: Brothers who are very angry that their adult sister is having sexual relations with someone else, in accordance with their customs, punish their sisters' behaviour to prevent these emotional fluctuations.

There is no doubt that this would mean that those who raise their voices the loudest would decide who can speak and who cannot. Far from permitting such behaviour, the state has a positive duty to prevent those who resort to such violence, thereby enabling the minority to freely express its views. The state's role is not to eliminate tension by suppressing pluralism, but to ensure that conflicting groups treat each other with tolerance. (*Sherif v. Greece*, no. 38178/97, 14.12.1999, §53). The expression is far removed from any disruption of public order, whereas those who cannot tolerate opinions and seek to silence them are the ones directly disrupting public order.³²

Rules prohibiting hate speech consider it legitimate to ban the statements of individuals who use such language when their statements target other segments of society. To speak of hate speech, the person using hate speech must incite the group they represent or belong to violence against another group. Therefore, the characteristic of hate speech is not the concern of the incited party but the danger of the incited party attacking the other group.

Indeed, in an application where the applicant was detained under Article 216/1 of the Turkish Penal Code (*Hakan Aygün*, B. No: 2020/13412, 12/1/2021 § 60), the Constitutional Court made the following findings:

- “iii. The incitement constituting the crime must be objectively conducive to causing hostile attitudes towards a segment of the public or reinforcing such attitudes, beyond abstract disrespect and rejection. In this context, merely turning away, engaging in behaviour that expresses abstract rejection or disrespect, or uttering words to that effect is not sufficient for the crime to be committed.
- iv. For the act to constitute a crime, there must be incitement to hatred and hostility in a severe and intense manner beyond these. In other words, it must contain an effective call for violence or hate speech. The perpetrator's act must have an effect on the formation of feelings of hatred and hostility or the reinforcement of existing feelings among an unspecified segment of society in terms of the number and individuals.
- v. Hatred and hostility can be described as a psychological state that forms the basis for actions designed to cause harm to the subject of animosity and to feel hatred to the extent of requiring revenge. Given the definitions of 'hatred' and 'hostility', only incitement involving or advocating violence can be considered under this article..

³² For a rather atypical application of what is stated here, see *Village of Skokie v. National Socialist Party* (1978), 373 N.E.2d 21, 26.

- vi. The incitement constituting the subject of the crime must be based on at least one of the differences in social class, race, religion, sect, or region and must be carried out with the aim of pitting these groups against each other.”

As can be seen, for hate speech to occur, the persons affected by the speaker must show hatred and violence towards the other group. Here, the speaker and the group directed by the speaker share the same opinion. Hate speech does not occur if a large group feels anger towards the speaker. To put it more concretely, hate speech occurs when a racist speaker targets foreigners in the country, and this speech has the potential to incite those listening to take action. However, if a foreigner’s speech greatly upsets racists in that country, this crime does not occur.

In Turkey, this balance has been reversed. For example, if a cartoon upsets religious groups and these groups express their feelings in large numbers, this is considered sufficient for the crime to be committed. Therefore, these individuals go and submit collective petitions to prove that the crime has been committed. However, interpreting the complaints of a large number of people as constituting the elements of a crime and proceeding with an investigation accordingly is contrary to the law. The fact that many people are offended does not mean that a statement constitutes hate speech. Hate speech comes into being when a group under the influence of hate speech shows a tendency to target the object of their hatred.

5. Presumption of Innocence and Targeting High-Level Individuals

In Turkey, politicians’ statements about the parties to the case in freedom of expression lawsuits seriously threaten the presumption of innocence.

As stated in many decisions of the Constitutional Court, the guarantee provided by the presumption of innocence, which is an element of the right to a fair trial, has two dimensions. The first dimension of the guarantee relates to the period until the conclusion of the criminal proceedings against the person, in other words, the period during which the person is accused of a crime punishable by law and prohibits early statements about the person’s guilt and actions until a verdict of guilt is established. The scope of this dimension of the guarantee is not limited to the court conducting the criminal proceedings. The guarantee also requires all other administrative and judicial authorities to refrain from making any statements or implications suggesting that the person is guilty until their guilt has been established by a final judgment. Therefore, a violation of the presumption of innocence may occur not only in the context of criminal proceedings concerning the alleged crime but also in other legal processes and proceedings conducted concurrently with criminal proceedings (such as administrative, civil, or disciplinary proceedings) (*Galip Şahin*, B. No: 2015/6075, 11/6/2018, § 40; *Hasan Çölgeçen*, B. No: 2016/392, 2/12/2020, § 59).

In fact, if these statements influence the investigating and prosecuting authorities, this also constitutes a violation of Article 18 of the ECHR:

“229. It is also significant that those charges were brought following the speeches given by the President of the Republic on 21 November and 3 December 2018. On 21 November 2018 the President stated: “Someone financed terrorists in the context of the Gezi events. This man is now behind bars. And who is behind him? The famous Hungarian Jew G.S. This is a man who encourages people to divide and to shatter nations. G.S. has huge amounts of money and he spends it in this way. His representative in Turkey is the man of whom I am speaking, who inherited wealth from his father and who then used his financial resources to destroy this country. It is this man who provides all manner of support for these acts of terror...” On 3 December 2018 the President openly cited the applicant’s name and stated as follows: “I have already disclosed the names of those behind Gezi. I said that its external pillar was G.S., and the national pillar was Kavala. Those who send money to Kavala are well known ...” The Court cannot overlook the fact that when these two speeches were given, the applicant, who had been held in pre-trial detention for more than a year, had still not been officially charged by the prosecutor’s office. In addition, it can only be noted that there is a correlation between, on the one hand, the accusations made openly against the applicant in these two public speeches and, on the other, the wording of the charges in the bill of indictment, filed about three months after the speeches in question (see, a contrario, *Merabishvili*, cited above, § 324, and *Tchankotadze v. Georgia*, no. 15256/05, § 114, 21 June 2016).

230. In the Court’s opinion, the various points examined above, taken together with the speeches by the country’s highest-ranking official (quoted above), could corroborate the applicant’s argument that his initial and continued detention pursued an ulterior purpose, namely to reduce him to silence as a human-rights defender. Moreover, the fact that the prosecutor’s office referred in the bill of indictment to the activities of NGOs and their financing by legal means, without however indicating in what way this was relevant to the accusations it was bringing, is also such as to support that assertion. The Court is also aware of the concerns expressed by the Commissioner for Human Rights and the third-party interveners, who consider that the applicant’s detention is part of a wider campaign of repression of human-rights defenders in Turkey.”

Such statements by high-level politicians not only violate the presumption of innocence and the prohibition on abuse of the state’s power to impose restrictions but also lead to the application of unnecessary protective measures against individuals, the issuance of arrest warrants based on forced accusations, and the deprivation of individuals’ liberty.

Recently, the Minister of Justice and the Minister of the Interior announced on their social media accounts that individuals accused based on their statements would not go unpunished³³ and, furthermore, the Minister of the Interior published images of these individuals in custody.³⁴ These opinions which advocate the convic-

³³ For example, regarding a cartoon published in *Leman Magazine*, the Minister of Justice posted the following on his social media (X) account: “Disrespect for our beliefs is never acceptable. The Istanbul Chief Public Prosecutor’s Office has launched a criminal investigation into the cartoon of the Prophet drawn by a satirical magazine, pursuant to Article 216 of the Turkish Penal Code, for the crime of ‘publicly insulting religious values’. No freedom grants the right to make a mockery of the sacred tenets of a faith in a vulgar manner. The depiction of the Prophet Muhammad or any attempt to represent him visually harms not only our religious values but also social peace. Necessary legal steps will be taken without delay against this provocative attempt that disregards the beliefs of millions of Muslims.” (<https://x.com/yilmaztunc/status/1939747554822123933>)

³⁴ The Minister of the Interior shared the images of the arrest of *Leman Magazine* cartoonist D. P. with the following statement: “I once again condemn those who sow seeds of discord by drawing caricatures of our Prophet

tion of individuals before they have undergone any legal proceedings, clearly violate the presumption of innocence.

B. ISSUES RELATED TO THE INVESTIGATION PROCESS

1. Unjust Arrest and Detention

Not only are there serious problems at the beginning of freedom of expression investigations, but there are also problems during the process. Crimes allegedly committed through the exercise of freedom of expression are crimes that carry relatively light penalties under the Turkish Penal Code. The alleged act has been committed and completed, and in most cases, there is no issue of gathering evidence. However, the observations we made above regarding the initiation of the investigation lead to the use of arrest and detention measures even though the conditions for them do not exist. A segment of society is first provoked by official authorities or trolls, and then the individual expressing opinion is deprived of his/her freedom to calm this reaction.

After establishing the principle that everyone has the right to personal liberty and security in the first paragraph of Article 19 of the Constitution, the second and third paragraphs list the limited circumstances in which individuals may be deprived of their liberty, provided that the form and conditions are specified by law. Paragraphs four, five, six, seven, and eight of this article contain provisions regarding the guarantees granted to persons whose right to liberty and security of person has been interfered with (*Safkan Aydođdu*, B. No: 2014/7498, 5/4/2017, § 43).

When the second and third paragraphs of Article 19 of the Constitution are considered as a whole, it is understood that a person may be deprived of their liberty by public authorities through arrest or detention in connection with a criminal charge. The concept of arrest referred to in the aforementioned paragraphs has an autonomous meaning and has a broader content than the institution of arrest regulated in Law No. 5271. In constitutional terms, arrest based on criminal charges covers the entire process from the moment the person is deprived of their physical liberty until they are arrested or released without arrest. In this context, it can be said that the institution of arrest regulated in Article 19 of the Constitution also covers detention under Law No. 5271. (*Hasan Akbođa* [GK], B. No: 2016/10380, 27/3/2019, § 49).

Interference with the right to liberty and security of the person through arrest shall constitute a violation of Article 19 of the Constitution unless it complies with the conditions set forth in Article 13 of the Constitution, which establishes the criteria for restricting fundamental rights and freedoms. Therefore, it must be determined whether the restriction complies with the conditions set forth in Article 13 of the Constitution, namely, that it is prescribed by law, based on one or more of the legitimate reasons specified in the relevant articles of the Constitution, and does not violate the principle of proportionality (*Hasan Akbođa*, § 50).

(S.A.V). The individual named D.P., who created this despicable drawing, has been apprehended and taken into custody. I reiterate once more: These shameless individuals will be held accountable before the law.”
(<https://x.com/AliYerlikaya/status/1939773771822366734>)

The requirement of legality, as set out in Article 13 of the Constitution with regard to the restriction of all fundamental rights and freedoms, is also specified in Article 19 with respect to the right to liberty and security of the person. In this context, the Articles 13 and 19 of the Constitution are consistent with each other and stipulate that there must be a legal basis for any intervention in personal liberty, such as an arrest.

There is no explicit provision in Article 19 or any other article of the Constitution regarding the grounds on which an arrest based on a criminal charge may be made. However, as this type of arrest can only be carried out based on a criminal charge, it is understood that its legitimate purpose is to ensure the conduct of investigation proceedings and, ultimately, to bring the person suspected of committing a crime before the competent judge. In this case, a person may be arrested to ensure that they appear before a judge and that the investigation is carried out in cases where there are concrete indications that a crime has been committed (*Hasan Akboğa*, § 53; *Hülya Kar [GK]*, B. No: 2015/20360, 27/2/2019, § 20 (*Ali Duran*, B. No: 2016/10381, 10/12/2019, § 33). In this context, only actions ordered by the prosecutor's office count as investigative measures related to criminal accusations, while actions to prevent or stop a crime are excluded.

The last sentence of the third paragraph of Article 19 of the Constitution states that "Arrest without a court order may only be made in *flagrante delicto* or in cases where delay would cause harm; the conditions for this are specified by law." Accordingly, the arrest decision must, as a rule, be based on a court order. However, in *flagrante delicto* or in cases where delay would cause harm, it is possible to arrest a person without a judge's decision, provided that the conditions specified by law are met. (*Hasan Akboğa*, § 54).

For an arrest measure to be constitutional, it must have a legal basis and be based on a legitimate purpose. It must also be proportionate. The principle of proportionality consists of three sub-principles: appropriateness, necessity, and proportionality. Appropriateness means that the intervention envisaged is appropriate for achieving the desired purpose; necessity means that the intervention is mandatory in terms of the desired purpose, i.e., it is not possible to achieve the same purpose with a less severe intervention; proportionality means that a reasonable balance must be maintained between the intervention in the individual's rights and the desired purpose. (AYM, E.2016/13, K.2016/127, 22/6/2016, § 18; *Mehmet Akdoğan and others*, B. No: 2013/817, 19/12/2013, § 38).

In light of this information, the following must be assessed separately in relation to the arrest of a person accused of a crime: i. Whether there is a legal basis for the arrest, ii. Whether there is a legitimate reason for the arrest, iii. Whether the arrest was proportionate.

In view of these explanations, it is necessary to assess separately whether the arrest complies with Articles 90 and 98 of the Criminal Procedure Code (CCP).

The first sentence of Article 98/1 of the CCP, titled "Arrest Warrant and Reasons" states: "During the investigation phase, if a suspect fails to appear when summoned or cannot be summoned, an arrest warrant may be issued by the magistrate at the request of the public prosecutor." According to this provision, the suspect must first be summoned by invitation in order for their statement to be taken. An arrest

warrant may only be issued if the suspect fails to appear when summoned or if it is impossible to summon them.

Even if Article 98 of the Criminal Procedure Code is applied, an arrest warrant cannot be issued for crimes against freedom of expression. The fact that the person is in the act at that moment should also be considered in this context.

In many of its decisions, the Constitutional Court has ruled that membership of an armed terrorist organization, knowingly aiding the organization, terrorist propaganda are the types of crimes subject to severe criminal penalties under the Turkish legal system, and the severity of the penalty prescribed by law for the alleged crime is one of the circumstances indicating a risk of flight. The Court has stated that the condition of urgency for arrest without a court order may be accepted for these crimes. (*Hasan Akboğa*, § 61; *Burhan Gülseven*, B. No: 2019/41753, 5/10/2022, § 36).

As stated above, it is clear that the legitimate purpose of arrest based on criminal allegations is to ensure the conduct of investigation proceedings and, ultimately, to bring the person suspected of committing the crime before the competent judge.

In other words, as clearly stated in the decisions of the Constitutional Court, an arrest made in accordance with Article 19/3 of the Constitution must be related to the conduct of investigation proceedings. An arrest for the purpose of preventing a peaceful action does not fall within this scope, nor can the prevention of the commission of a crime be evaluated within this scope.

There should be no doubt that the purpose of apprehending the person concerned is to ensure that the investigation procedures relating to the suspicion of this crime are carried out and that the material truth is revealed (*Hülya Kar [GK]*, B. No: 2015/20360, 27/2/2019, § 20).

In recent years, a new practice has emerged whereby individuals are taken from their homes in the early morning and taken to the police station. Footage of their arrest is shared in the media and on social media, but they are released after giving statements, on the basis that no detention order has been issued.³⁵ Clearly, this practice has no legal basis and is intended to deter members of the press.

The prescribed penalties for crimes related to freedom of expression are very short. As mentioned above, there is no possibility of evidence being destroyed in these crimes. Therefore, arrest and detention measures are disproportionate in these cases, except in very exceptional circumstances.

However, in practice, it is seen that the main purpose of the judicial police measures applied in relation to these crimes is to send a message. This practice serves as a warning not only to the suspect but also to others who may engage in similar behaviour. There can be two reasons for this method of “early punishment.” The first is to punish everyone who shares similar views through one person. This motivation is particularly strong in arrests made on charges such as insulting the President or insulting religion. The second important motivation is to prevent the spread of protest-like behaviour. Following the arrest of Istanbul Metropolitan Mayor Ekrem İmamoğlu

³⁵ Journalists Ruşen Çakır, Yavuz Oğhan, Aslı Aydıntaşbaş, Soner Yalçın, Batuhan Çolak, and Şaban Sevinç have been summoned for questioning by the Istanbul Chief Public Prosecutor’s Office as part of the İmamoğlu investigation, and some of them were taken from their homes in the early morning by law enforcement and brought to the General Directorate of Security. See: <https://www.bbc.com/turkce/articles/cvg7vqvmyqjo>

on March 19, 2025, 20 different individuals were subject to arrest, judicial control, and detention measures due to their social media posts, and criminal proceedings were subsequently initiated against them under Article 216/1 of the Turkish Penal Code. The arrest of these individuals for posts inviting protest had a deterrent effect on others who might be likely to make similar posts.

A common scenario in legal practice is the use of statements as grounds for accusations under more serious offenses, primarily to enable the application of protective measures such as detention. For example, it is a common situation that an investigation is opened and conducted under Article 216/1 in order to issue an arrest warrant for a statement that could be evaluated under Articles 216/2 or 216/3 of the Turkish Penal Code.³⁶

Clearly, all these examples fall under the category of procedural violations of freedom of expression and are tools used for political motives.

2. Right to be Informed of the Charges

According to Article 160 of the Criminal Procedure Code No. 5271, which regulates the duties of prosecutors, “Upon learning of a situation that gives the impression that a crime has been committed, either through a report or by other means, the public prosecutor shall immediately begin investigating the facts of the case in order to decide whether there are grounds for initiating a public prosecution” and “is obliged to collect and preserve evidence both for and against the suspect in order to investigate the material truth and ensure a fair trial, and to protect the rights of the suspect.”

Once this evidence has been gathered, if it creates sufficient suspicion that a crime has been committed, the public prosecutor will draw up an indictment (CPC 170/2).

Article 170/5 of the CPC stipulates that, as a result of the prosecutor’s obligation to investigate the facts, “The conclusion of the indictment shall include not only the matters against the suspect but also those in his favour.”

As stated in Article 6(3)(a) of the European Convention on Human Rights, the suspect has the right to be “informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him. A defence may only be formulated after the specifics of the accusation have been clearly identified. An effective defence is contingent upon the suspect or defendant being informed of the charges against them. Accordingly, the “right to defence” as enshrined in Article

³⁶ Many examples can be given in this context. For example, despite allegations that a cartoon published in *Leman Magazine* insulted the prophet, an investigation was launched without inciting hatred and animosity among one segment of the public against another, and the magazine’s employees were arrested. See <https://www.indyturk.com/node/761202/haber/leman-%C3%A7al%C4%B1%C5%9Fanlar%C4%B1-tutukland%C4%B1>. Similarly, the *Soğuk Savaş* team was arrested for a joke allegedly targeting the Prophet. See <https://www.aa.com.tr/tr/gundem/soguk-savas-programina-yonelik-baslatilan-sorusturmada-2-supheli-tutuklandi/3696345>; in a similar incident, *Flu TV* founder İlker Canikligil was arrested and later sentenced. See <https://bianet.org/haber/ilker-canikligil-e-26-ay-hapis-cezasi-313855>; In another incident, singer Gülşen was arrested for making a joke about her employee during a concert, allegedly referring to the fact that the employee was a graduate of an Imam Hatip High School. See <https://www.bbc.com/turkce/articles/cl57y4qg714o>

36 of the Constitution is understood to encompass the right to be made aware of the charges (the indictment).³⁷

Indeed, Article 19, paragraph 5 of the Constitution states that “Persons who are arrested or detained shall be informed immediately, in writing or, if this is not immediately possible, orally, of the reasons for their arrest or detention and of the allegations against them; in cases of collective crimes, this shall be done at the latest before they are brought before a judge.”

The Constitutional Court also considers the right to know the charges as part of the right to a fair trial. According to the Constitutional Court, the right to know the charges is a substantive right, not a formal one. The Court defines this right as follows:

[...] the right to defence must be provided to the person under criminal accusation in a real sense, not just formally. For this purpose, the accusation must be communicated to the person under criminal accusation so that they can prepare their defence, present it before the court, and thus influence the outcome of the trial. It is not possible for someone who does not know the accusation against them to defend themselves. The charge is communicated so that the defendant can defend themselves. For this purpose, the communication must explain what act the defendant is accused of and what crime they committed. In other words, the defendant must be informed of the reason for and nature of the charge. The act committed by the defendant, where and when it was committed (the incident/incidents constituting the alleged crime) form the basis of the charge. These must be explained in sufficient detail and at a level sufficient for the defendant to prepare a defence, rather than in abstract terms. In this way, the defendant will know where and when they are accused of committing the act in question and will be able to prepare their defence accordingly. The legal characterisation of the act is the nature of the charge. Information about the nature of the charge must also be sufficient to enable a defence, and the notification must specify which norm the act the defendant is accused of committing violated. If the legal nature of the act changes during the trial, the defendant must also be informed of this change. This ensures the fairness of the trial in accordance with the principles of equality of arms and adversarial proceedings (Ali Kemal Tekin, B. No: 2014/875, 2/2/2017, §§ 40-43).

The ECtHR has examined what the criterion of being “detailed information” about the charges means under the Convention:

“ While the extent of the “detailed” information referred to in this provision varies depending on the particular circumstances of each case, the accused must at any rate be provided with sufficient information as is necessary to understand fully the extent of the charges against him with a view to preparing an adequate defence. In this respect, the adequacy of the information must be assessed in relation to sub-paragraph (b) of paragraph 3 of Article 6, which confers on everyone the right to have adequate time and facilities for the preparation of their defence, and in the light of the more general right to a fair hearing embodied in paragraph 1 of Article 6.” (*Mattoccia v. Italy*, no. 23969/94, 25.7.2000, §60).

³⁷ Akif Yıldırım (2022), “The Right to Know the Charges Against You within the Framework of the Constitution and the European Convention on Human Rights,” 10(2) *Criminal Law and Criminology Journal* 537, 541

However, it appears that these fundamental principles are not observed in cases involving crimes against freedom of expression. In practice, statements are generally taken at the police station, and the prosecution document sent to the police does not explain exactly what the person is accused of. Law enforcement personnel, who have no knowledge of the matter, are either unable to explain the charges or attempt to explain them in their own way. For this reason, general statements such as “make your defence regarding the investigation numbered...” are used when taking statements. The lawyer’s intervention in the statement from this perspective is considered an intervention in the suspect’s statement, and attempts are made to prevent it. However, in this case, no valid accusation is brought against the suspect. When the public prosecutor’s office does not provide definitive information on which statements constitute which crime, the right to know the charges is violated. In such cases, the situation must be recorded in the minutes. Furthermore, since it is not possible to defend oneself in such a situation, the suspect should be allowed to exercise their right to remain silent until the charges are specified.

If it becomes necessary to take the suspect’s statement a second time in relation to the same incident, this procedure can only be carried out by the public prosecutor; the police or gendarmerie cannot take statements (CPC m.148/5).

C. EVIDENCE AND THE NATURE OF THE INDICTMENT

Article 160 of the Criminal Procedure Code No. 5271 lists the duties of the prosecutor, stating that “the public prosecutor shall, as soon as he/she learns of a situation that gives the impression that a crime has been committed, either through a report or by other means, immediately begin investigating the facts of the case to decide whether there are grounds for initiating a public prosecution” and “is obliged to collect and preserve evidence both for and against the suspect in order to investigate the material truth and ensure a fair trial, and to protect the rights of the suspect.” Once this evidence has been gathered, if it creates sufficient suspicion that a crime has been committed, the public prosecutor will draw up an indictment (CPC 170/2). Provision 170/5 of the CPC regulates the outcome of the prosecutor’s obligation to investigate the facts, stating that “The conclusion of the indictment shall include not only the facts against the suspect but also those in his favour.”

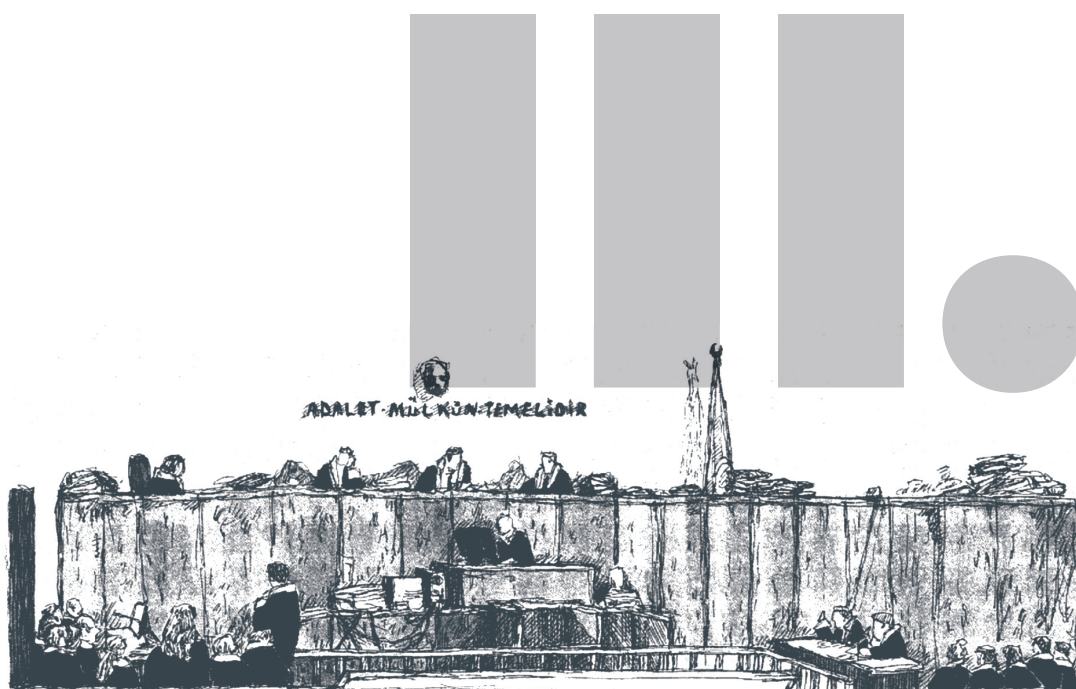
The Court of Cassation’s jurisprudence is also in the same direction, as stated in the Criminal Chamber’s decision numbered 2016/16989 E. and 2016/18968 K.: “According to Article 170/2 of the Criminal Procedure Code, the court shall order the seizure of the defendant’s property if the defendant is unable to pay the fine imposed.” Criminal Chamber, in its decision numbered 2016/16989 E. and 2016/18968 K., states: “According to Article 170/2 of the Criminal Procedure Code, for a public prosecution to be initiated, there must be sufficient suspicion that a crime has been committed based on the evidence gathered during the investigation phase. The public prosecutor, who has the obligation and authority to reach the material truth by conducting an investigation through a crime report or complaint, will assess the evidence obtained as a result of the investigation and determine whether there is sufficient

suspicion to warrant the initiation of public prosecution. This situation requires an evaluation of the evidence. In other words, if the public prosecutor concludes that the evidence obtained is sufficient to initiate a public prosecution, he or she will initiate the case; otherwise, he or she will issue a decision not to prosecute. Therefore, the prosecutor has the authority to evaluate the evidence. To do otherwise would require the public prosecutor to initiate a public prosecution upon every report or complaint, leaving the assessment of evidence to the court. This would be incompatible with the right not to be defamed and would not be in line with the spirit of the law.

Therefore, when preparing the indictment, the prosecutor has an obligation to collect evidence in favour of the suspect, particularly within the framework of the right not to be defamed. This obligation becomes even more significant in cases where there are restrictions on freedom of expression. Indeed, national authorities must make an assessment in accordance with case law on freedom of expression in cases concerning this freedom (*Cumhuriyet Vakfı v. Turkey*, no. 28255/07, 08.10.2013, §59).

In practice, particularly in crimes involving freedom of expression, it is observed that a summary of the police report is converted into an indictment, the statements constituting the crime are not generally explained in the indictment, the reason why the suspect's defence is not taken into account, and the problems mentioned above in gathering evidence are not evaluated in terms of legality. Furthermore, to establish sufficient suspicion, prosecutors in freedom of expression cases must evaluate the statements in question within the framework of the case law of the Constitutional Court and the European Court of Human Rights and include in the indictment an explanation of why the statements in question cannot be considered within the scope of freedom of expression.

Otherwise, the lawsuit itself, filed without justification, will constitute an interference with freedom of expression due to its deterrent effect.



PROCEDURAL OBLIGATIONS REGARDING THE PROSECUTION STAGE

The prosecution stage is the stage at which the trial takes place. As a dialectical process, the prosecution and defence must be able to present their arguments on equal terms during the thesis and antithesis stages of the trial, and the judge or court panel must be able to manage this process impartially. Therefore, the sound conduct of this process depends on the provision of procedural safeguards.

There have been serious criticisms, particularly recently, regarding the independence of the judiciary in Turkey. Practical problems have been observed, particularly in criminal trials and cases involving the examination of statements. Some of these problems relate to the subjects of the trial, particularly the impartiality and independence of the court. A second major group of problems consists of the failure to respect guarantees related to the trial process. Serious issues arise in areas such as the right to know the charges, which should not normally be an issue during the trial process; the principles of an adversarial trial and equality of arms; the collection of evidence, and the hearing and questioning of witnesses.

A. RIGHT TO A FAIR TRIAL BY AN IMPARTIAL AND INDEPENDENT COURT

Article 6 of the ECHR explicitly stipulates the right to have one's case heard by an impartial and independent court as an element of the right to a fair trial. In the case law of the European Court of Human Rights, impartiality generally means the

absence of prejudice or bias (*Piersack v. Belgium*, no. 8692/79, 1/10/1982, § 30). According to established case law, the existence of impartiality is determined based on subjective and objective methods. The subjective method involves considering personal opinion and the behaviour of a particular judge, in other words, determining whether the judge has a personal bias in a particular case; the objective method involves determining whether the composition of the court provides sufficient guarantees to eliminate any legitimate doubt as to impartiality (*Fey v. Austria*, B. No: 14396/88, 24.02.1993, § 28). In other words, the existence of impartiality is determined by a subjective test, which is an attempt to determine the personal opinions of a particular judge in a case, and an objective test, which is a determination of whether there are sufficient guarantees to prevent reasonable doubt about a judge's impartiality (*De Cubber v. Belgium*, no. 9186/80, 26.10.1984, § 24).

The boundary between objective and subjective impartiality is not absolute. In some cases where it may be difficult to provide evidence to refute the presumption of the judge's subjective impartiality, the requirement of objective impartiality offers an important additional safeguard. Indeed, the objective method was used in the vast majority of applications where impartiality was at issue (*Micallef v. Malta* [GC], no. 17056/06, 15.10.2009, § 95).

With regard to the subjective test, a judge's personal impartiality is presumed in all cases unless there is evidence to the contrary. In terms of the objective test, it must be determined whether there are specific facts that raise doubts about the judge's impartiality, as opposed to his or her personal attitude. At this point, it is important to determine whether sufficient guarantees are provided to dispel any legitimate concerns or fears regarding the judge's impartiality. The ECtHR case law emphasizes that even the appearance of impartiality may be important, in other words, that justice must not only be done but also be seen to be done, and that courts in a democratic society must inspire confidence in those seeking justice (*Micallef v. Malta*, §§ 94, 97, 98).

In this context, a judge who has a legitimate reason to fear that he or she is not impartial must withdraw from the case. This situation suggests that the defendant's perspective is important but not decisive when determining whether there is a legitimate reason to fear that a judge is not impartial in a particular case. The decisive factor is whether this concern can be objectively justified. This depends on the circumstances of each case (*Hauschildt v. Denmark*, no. 10486/83, May 24, 1989, §§ 47-49).

The Constitutional Court also emphasises that one of the elements of the right to a fair trial guaranteed by Article 36 of the Constitution is the right to be tried by an impartial and independent court. The jurisprudence of the Constitutional Court is also parallel to that of the ECtHR. Accordingly, impartiality generally means that no prejudice, partiality, or interest would affect the outcome of the case, and that there is no opinion or interest in favour of or against the parties to the case (*Tahir Gökatalay*, B. No: 2013/1780, 20/3/2014, § 61; *Serkan Şeker*, B. No: 2017/15118, 2/6/2020, § 34).

The concept of judicial impartiality is reflected in both the institutional structure of the court and the attitude of the judge assigned to hear a particular case. According to the Constitutional Court, impartiality has two dimensions: subjective and objective. The judge's personal impartiality as an individual in the case at hand is referred

to as subjective impartiality, while the impression of impartiality that the court as an institution leaves on individuals is objective impartiality. Although Article 36 of the Constitution does not explicitly mention the judicial impartiality of courts, according to the jurisprudence of the Constitutional Court, the right to be tried by an impartial court is also an implicit element of the right to a fair trial. Furthermore, considering that the impartiality and independence of courts are two complementary elements, in accordance with the principle of the integrity of the Constitution, Articles 138, 139, and 140 of the Constitution must also be considered when assessing the right to be tried by an impartial court (*Tahir Gökatalay*, § 60; *Serkan Şeker*, § 35).

Legal and administrative regulations concerning the establishment and organisation of courts should not create the impression that the court is not objectively impartial. In essence, institutional impartiality is linked to the independence of judiciary. For impartiality, independence must first be a prerequisite, and, in addition, there should be no structure that gives the appearance of bias from an institutional perspective (AYM, E.2014/164, K.2015/12, 14/1/2015). Furthermore, the judicial authority must provide sufficient guarantees to dispel any legitimate concerns or fears regarding its impartiality (*Tahir Gökatalay*, § 62; *Serkan Şeker*, § 36).

Subjective impartiality, on the other hand, concerns the subjective attitudes of judges towards the case to be heard. The judge hearing the case must be equal, impartial, and unbiased towards the parties to the case and must decide according to his or her conscience within the framework of the rules of law, without being subject to any persuasion or pressure. This is what is expected of judges under the Constitution and the laws (Constitutional Court, E.2014/164, K.2015/12, 14/1/2015). Even if judges possess all the high qualities required for the judiciary, they must avoid any arrangements that could raise doubts in the public conscience about their impartiality (AYM, E.2013/82, K.2014/100, 4/6/2014).

The existence of a close material or moral connection between the members of the court conducting the trial and one of the parties or the subject matter of the dispute, or the expression of opinions during the trial process that give rise to a legitimate belief that they cannot be impartial, as well as being in a position directly connected to the case before the trial, may also violate impartiality. However, unless there is evidence showing that a judge presiding over a particular dispute has a prejudiced and biased attitude towards one of the parties, a personal opinion or interest, or personal partiality in this context, and unless this is proven, it must be presumed as a rule that the judge is impartial. (*Tahir Gökatalay*, § 62). In other words, a judge must be presumed to be personally impartial until evidence to the contrary is found.

In this context, Turkish law accepts that a judge cannot remain impartial or that there may be doubts about their impartiality, and that the judge cannot hear or may refuse to hear a specific case that falls within the jurisdiction and duties of their court. The institutions of disqualification and recusal of judges are aimed at ensuring the impartiality of judges in the cases they hear and are related to the fundamental right to a fair trial (AYM, E.2011/142, K.2013/52, 3/4/2013).

In freedom of expression cases, a situation that raises doubts about the objective impartiality of the judiciary is when courts initiate evidence collection on their own

initiative. Turkish Criminal Procedure Law accepts the accusatory system, not the inquisitorial system. In other words, courts cannot conduct “*ex officio* investigations” or collect evidence during the prosecution phase. According to Article 160 of the Code of Criminal Procedure, public prosecutors are responsible for evidence. However, under Article 237/3 of the previous Code of Criminal Procedure courts were permitted to gather evidence on their own initiative. Article 177 of the new Code of Criminal Procedure No. 5271, on the other hand, does not grant the court the authority to collect evidence directly but rather grants the defendant and their defence counsel the right to present evidence and request the court to collect such evidence. This is limited to the preparatory phase of the trial and before the trial has begun. However, Article 207 states that late notification of evidence and facts is not sufficient grounds for rejecting a request to present of such evidence and facts.

In criminal procedure law, therefore, the power to collect evidence belongs to the prosecution and defence, and the court should not gather evidence on its own initiative. Evidence gathering by the court could raise doubts about its objective impartiality, and it should be avoided. In practice, however, courts commonly proceed to collect evidence on their own initiative. It has even been observed that courts of appeal and the Court of Cassation have issued reversal decisions on the grounds of insufficient examination, despite the parties did not request the collection of evidence. However, such a reason for reversal means that the court is being forced to perform an act that undermines its objective impartiality. Moreover, as the court of first instance cannot challenge the decisions and rulings of the regional court of appeal (CPC, Art. 284), a court whose decision is overturned for this reason cannot continue to assert its position on the basis of the right to a fair trial.

The principle of *ex officio* investigation is not accepted in criminal proceedings in order to ensure the impartiality of the court, with the task of gathering evidence being assigned to the prosecutor’s office. During the investigation phase, the prosecutor’s office is authorised to gather any evidence necessary to establish the material truth. During the prosecution phase, it may also request that the court obtain the evidence it wishes to gather. Similarly, the defence is also granted the authority to present evidence and request the court to collect the necessary evidence.

Indeed, examining the structure of the law makes it clear that the court should neither provide nor discuss evidence during the hearing. Article 216 of the Criminal Procedure Code states the following:

“Discussion of Evidence

Article 216 – (1) In the discussion of the evidence presented, the floor shall be given, in turn, to the participant or their representative, the public prosecutor, the defendant, and the defence counsel or legal representative.

(2) The public prosecutor, the participant or their representative, the defendant, the defence counsel, or the legal representative may respond to the statements made by the public prosecutor, the participant, or their representative; the defendant and the defence counsel or legal representative may also respond to the statements made by the public prosecutor, the participant, or their representative.

- (3) Before the verdict is pronounced, the defendant present in court is given the last word. (Additional sentence: 15/8/2017-KHK-694/148; Accepted as is: 1/2/2018-7078/143) At this stage, the absence of the mandatory defence counsel does not prevent the verdict from being pronounced.”

As is apparent, given that the Court’s role is not to discuss the evidence but to decide on it after it has been presented, it should not be involved in the discussion of the evidence during the hearing. It is within the scope of the judge’s authority to request a detailed presentation of the evidence in order to ascertain the material truth. Therefore, even if not explicitly stated, it is possible for the judge to question the witness and the expert. (CPC Articles 58, 59, and 62). However, it is one thing for the court to clarify the evidence presented before it, and quite another for the court to find and present evidence on its own, discussing it as if it were a party to the case.

In criminal proceedings, unlike civil proceedings, it is necessary to investigate the material truth rather than settle for the formal truth. However, this does not mean that the material truth must be investigated at any cost. In a state governed by the rule of law, criminal investigations must be conducted with respect for human rights and in accordance with the principles of fair trial. In this context, legal limits cannot be exceeded when gathering evidence. Evidence obtained unlawfully cannot be used in proceedings. Similarly, actions that undermine the impartiality of the court must be avoided. The argument that the principle of *ex officio* investigation will also reveal evidence in favour of the defendant is unacceptable. This is because, in accordance with the fundamental principle of criminal law that “*in dubio pro reo*” (the benefit of the doubt goes to the defendant) a conviction cannot be handed down in a criminal trial unless it is established beyond any doubt that the crime was committed by the defendant. In other words, in order to convict the defendant, their guilt must be proven beyond a reasonable doubt. Otherwise, the defendant must be acquitted due to insufficient evidence. Therefore, there is no legal basis for applying the principle of *ex officio* investigation in criminal proceedings, nor is there any reasonable justification for it. On the contrary, it violates the right to a fair trial. It should be noted that in cases where such a practice occurs, the procedural aspect of freedom of expression is violated.

However, in practice, this system has been completely reversed. Particularly in many types of crimes affecting freedom of expression, it is observed that the prosecution does not make any requests during long hearings, all correspondence is conducted by the court, and all evidence is collected by the court.

This has become so common in trials involving charges of membership in an organisation that courts often request all documents they have prepared for all trials, sometimes with a decision of approval and sometimes between sessions, without consulting the parties. As these charges aim to demonstrate an individual’s profound, multifaceted, and ongoing relationship with the organization, the courts once again hear witnesses by instruction, and after the testimony is taken, the parties are asked whether they wish to comment on the testimony of the witnesses heard by instruction. Clearly this commonplace practice is entirely contrary to the law.

More interestingly, in some cases, witnesses are heard by the court in the absence of the parties involved. According to Article 58, paragraph 3 of the Criminal Procedure Code, “If hearing the witness in the presence of those present poses a serious danger to the witness, which cannot be prevented in any other way, or if it would hinder the discovery of the truth, the judge may hear the witness without those who have the right to be present. Audio and video recordings are made during the hearing of the witness. The right to ask questions is reserved.” However, in practice, it has been observed that in some cases this provision is implemented without the witness being seen at all and without the possibility of questioning.

All this practice is a result of the principle of *ex officio* investigation being deeply internalised by the judicial authorities.

Another factor affecting the objective impartiality of the court is the relationship between the judge or court and the prosecution, as well as their attitude during the hearing. The court panel tends to view the prosecutor part of the court, rather than as a party to the case, and treats accordingly. The design of courtrooms allows the prosecutor to communicate closely and constantly with the judge or panel. Although the ECtHR previously ruled in *Diriöz v. Turkey* that the seating arrangement in the courtroom, which physically gave the public prosecutor a privileged position, did not violate the principle of equality of arms as it did not place the applicant at a disadvantage when defending his/her interests during the hearing, and therefore found the application inadmissible (*Diriöz v. Turkey*, no. 38560/04, 31.05.2012, §25) it is clear that this practice leads to violations of the principle of equality of arms. Indeed, it is common to encounter situations during the trial where verbal communication or written note exchanges take place between the prosecutor and the judge or court members in a manner that the defendant and defence counsel cannot hear. The defendant and defence counsel cannot know whether such communication is related to the trial, and even if it is, they have no opportunity to respond. Such practices provide sufficient grounds to question the impartiality of the court. Furthermore, this type of communication violates the principles of equality of arms and the adversarial nature of the trial.

Most of the time, the court panel conducts its deliberations in the presence of the prosecutor. At the end of the trial, the panel empties the courtroom for deliberation, while the prosecution remains inside. This situation is clearly contrary to the law. According to Article 227 of the Code of Criminal Procedure, only the judges who will participate in the decision-making process may be present during deliberations. Moreover, this situation poses significant challenges in freedom of expression cases. In cases involving crimes against freedom of expression where the victim or party is the state or its officials, doubts are raised about the court’s objective impartiality when the prosecutor, acting on behalf of the state, is in constant dialogue and interaction with the court.

On the other hand, one of the fundamental principles of fair trial is judicial independence. Judicial independence means that courts and judges have the ability to make decisions without being subject to any extra-legal influence or pressure. As a requirement of the principle of separation of powers, the judiciary must have a secure institutional framework against the influence of the legislature and, in

particular, the executive. Problems related to judicial independence in our country are becoming increasingly serious.

Since the adoption of 1961 Constitution, Turkey has established an independent constitutional body to manage and supervise the judiciary in order to guarantee judicial independence, in line with the tradition in southern European countries. This body is known as the High Council of Judges and Prosecutors (HSYK). Its name and structure were changed with the 2017 constitutional amendment (Law No. 6771), and the procedure for electing members was completely abolished. The new 13-member body was renamed the Council of Judges and Prosecutors (HSK), with the word “high” removed from its name. Six members of the Council are appointed directly by the President, while seven members are elected by the Grand National Assembly of Turkey.

In the new system, considering that the President is a member of a political party and even the party leader, it is highly likely that the parliamentary majority will consist of deputies belonging to the President’s party. In this case, all members of the council will inevitably be appointed under political influence. Indeed, all international observers evaluating the 2017 constitutional amendments have warned that the new structure will undermine, or even eliminate, judicial independence. The Venice Commission has stated that the proposed structure seriously jeopardises judicial independence.³⁸ The Council of Europe Commissioner for Human Rights also stated that the structure resulting from the 2017 constitutional amendments posed a very serious problem, which took precedence over all other issues. *The Commissioner stated that “The new composition of the HSK allows for all the members of the HSK to be appointed either by the President of the Republic or the Parliament, without a procedure guaranteeing the involvement of all political parties and interests. This means that no member of the HSK is elected by their peers, in clear contradiction with European standards which foresee that at least half of the members of judicial councils that are in charge of overseeing the professional conduct of judges and prosecutors (including appointments, promotions, transfers, disciplinary measures and dismissals of judges and public prosecutors) should be elected by judges among their peers from all levels of the judiciary and with respect for pluralism inside the judiciary.”*³⁹

The Venice Commission recently issued a comprehensive opinion on the structure and powers of the HSK, detailing how the current structure of the Council is susceptible to executive influence.⁴⁰ The Commission’s opinion highlights the following assessments:

- First, the Commission recalled that following the coup attempt in 2016, the 2017 constitutional amendments changed Turkey’s system of government, adopting a presidential system and merging the roles of head of the executive

38 Venice Commission, “Opinion on the Constitutional Amendment Approved by the Grand National Assembly of Turkey on January 21, 2017, and Submitted to a Referendum on April 16, 2017,” adopted at the session held on March 10-11, 2017, Doc. CDLAD(2017)005-e, §.119, [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=cdl-ad\(2017\)005-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=cdl-ad(2017)005-e);

39 CoE Human Rights Commissioner Dunja Mijatovic, Turkey Visit Report, CommDH(2020)1, February 19, 2020, §14, <https://rm.coe.int/report-on-the-visit-to-turkey-by-dunja-mijatovic-council-of-europe-com/168099823e>

40 Venice Commission, Opinion on the Composition and Selection of Members of the Council of Judges and Prosecutors, CDL-AD(2024)41, <https://www.coe.int/en/web/venice-commission/-/cdl-ad-2024-041-e>

branch and head of state in the President. The broad powers granted to the President under these amendments were highlighted, and it was emphasised that the President is permitted to be a member of a political party. In this context, it was noted that changes were made to the structure of the HSK and that the President has the authority to directly appoint six members of the Council, emphasising that the President, who is no longer an impartial authority, would make political appointments to the Council. Furthermore, it was stated that since the President is the party leader and parliamentary elections and presidential elections are held simultaneously, the President could also have control over the parliamentary majority, and it was emphasised that the President would also have the power to determine the members of the Council elected by Parliament.⁴¹

- The findings of other international organisations regarding the problems created by Turkey's new government system in terms of the separation of powers and judicial independence were also included.⁴²
- Attention is drawn to the role of political considerations in the dismissals, transfers, promotions, and appointments that took place following the 2016 coup attempt. It is noted that these events created a climate of fear among members of the judiciary. It is also stated that the number of judges and prosecutors has reached 25,000 with new recruitments to the profession. The majority of these new appointees are young and inexperienced, which has resulted in a dramatic decline in public confidence in the judiciary.⁴³
- According to European standards, at least half of the members of judicial councils must be elected by their peers. Judges at all levels should participate in this election, and the Council should be pluralistic, reflecting social diversity, including gender, in a proportionate manner. This election method aims to protect judicial elements from political interference. Judicial members of the judicial council should only represent the perspective of the community of judges and prosecutors. On the other hand, the purpose of electing non-judge members to the judicial council is to strengthen the council's external legitimacy and reduce the negative effects of institutional interests (co-optation). Non-judge members may be selected from among lawyers, academics, notaries, and civil society representatives. Non-judge members of the Council should also have the same guarantees as judge members.⁴⁴
- Although eight members of the HSK are judges or prosecutors, these members are not elected by their colleagues but are either appointed by the executive branch or elected by parliament. The Constitution and the Law provide for the

41 Ibid., § 10.

42 Ibid., §§ 13-17.

43 Ibid., § 19.

44 Ibid., § 29.

appointment of four members by the President without specifying any criteria other than membership in a particular category. Due to the political nature of these appointments, the four HSK members appointed by the President cannot be considered “judicial members” according to international standards. Furthermore, given the President’s influence over the parliamentary majority as the leader of a political party, it is highly likely that the seven members elected by parliament are close to the President’s political views. This creates a strong political influence over the judiciary.⁴⁵

- The Commission emphasised that the HSK does not comply with European standards in terms of this selection method and, taking into account objections to internal judicial elections, reiterated its view that at least half of the members should be elected by their colleagues within the judiciary.⁴⁶

However, despite these findings by the Council of Europe bodies, the ECtHR has refrained from examining complaints regarding the lack of independence of the judiciary in applications filed against Turkey.⁴⁷ To date, it has only ruled that the State Security Courts are not independent because they include military members (*İncal v. Turkey*, no. 22678/93, 09.06.1998). However, the Court has indirectly addressed issues of judicial independence in some of its decisions.

In its *Selahattin Demirtaş v. Turkey (2)* judgment, the Grand Chamber of the European Court of Human Rights found a violation of Article 18 of the Convention, concluding that the judiciary acted for political purposes, while also taking into account the current structure of the HSK. (*Selahattin Demirtaş v. Turkey (2)* [GC], no. 14305/17, 22.12.2020, § 434). The Court recalled that controlling the HSK amounts to controlling the judiciary, referring to the Venice Commission’s findings regarding the role played by the President in HSK elections and the absence of his impartiality in the new constitutional system, as he can also control the parliamentary majority as a political party leader, and that this situation threatens the independence of the judiciary. It also stated that in a country where the dismissal of judges and prosecutors is common, the structure of the HSK could influence judicial decisions. Furthermore, when finding a violation of Article 18 in both the *Kavala* and *Demirtaş* cases, the Court noted significant parallels between the President’s statements and the stance and actions of prosecutors and judicial bodies (*Selahattin Demirtaş v. Turkey (2)* [GC], § 433; *Kavala v. Turkey*, no. 28749/18, 11.07.2022, § 229).

Issues concerning judicial independence are of particular importance, especially in cases involving freedom of expression. This is because, in such cases, the victims

⁴⁵ Ibid., §§ 32-34.

⁴⁶ Ibid., §§ 36-41.

⁴⁷ Although the ECtHR generally refers to the decisions of other Council bodies when examining individual applications, it cannot be said that it always issues parallel decisions with other Council bodies. For example, in an opinion published in 2016, the Venice Commission concluded that the Criminal Peace Judges were highly controversial. However, in the *Baş v. Turkey* application, where the ECtHR examined allegations that the magistrates’ courts issuing detention orders were not independent, it referred to the Venice Commission’s opinion and other international reports. Nevertheless, it concluded that, given Turkey’s legal and constitutional safeguards, it could not be determined that the judges presiding over the specific case were not independent. (*Baş v. Turkey*, no. 66448/17, §§ 265-289, 03.03.2020)

of the crime may sometimes be members of the executive branch (TPC Art. 125/3-a, 299), or the defendants may be rivals or opponents of those holding executive power. Therefore, the independence of the judges hearing such cases is of particular importance in terms of reaching a fair decision.

B. RIGHT TO KNOW THE CHARGES

As discussed in detail in the investigation phase, the right to learn the details of the charges is a prerequisite for the right to defence and is one of the fundamental elements of a fair trial.

While it is a legal requirement for the indictment to clearly define the crime attributed to the defendant, in practice, in freedom of expression cases, it is often alleged that the defendant committed the crime by referring to a long speech or written text, and punishment is demanded. In such accusations, the context and location of the relevant speech are not discussed, or only the section alleged to be criminal is quoted, rather than the entire article that is the subject of the accusation. Even in cases where a person has shared another person's social media post without comment, it is alleged that the sharing of another person's opinion constitutes a crime, without any explanation as to why. While such indictments should be dismissed, they are often accepted by the courts and prosecutions are initiated.

When faced with such an indictment, the court should be asked to substantiate the charges. In most cases, judges state that the indictment has been accepted and ask the defendant to present their defence. Rather than explicitly stating the nature of the crime, the prosecution continues to rely on the ambiguity of the charge, which was not clarified during the investigative phase and continues during the prosecution phase in the form of questions such as, 'Yes, you have read the indictment', or 'What do you have to say about the charges?' 'What do you have to say about the charges?' and "You are charged with crime X. What do you have to say?"

However, it is impossible to defend oneself when the charges are unclear. For the trial to proceed in a fair manner, both the court and the defendant must understand what the charge is. In this case, it can be assumed that the court accepting the indictment has understood the charge. The court questioning the defendant is therefore expected to ask questions based on its understanding of the charge. However, if this is not the case and the indictment has been accepted for formal reasons, but the court has doubts about the charge, the prosecution must clarify the statement that constitutes the offence and explain why it constitutes an offence according to the criteria set out in case law from the Constitutional Court and the European Court of Human Rights.

Similarly, if the defendant and/or defence counsel request clarification of the charge, the court must explain what it understands by the charge and the scope of the trial; if the court is also uncertain, this clarification must be requested from the prosecution.

Otherwise, the burden of proof shifts, and the obligation of the prosecution to prove the defendant's guilt is reversed, becoming the defendant's obligation to prove his innocence.

According to Article 160 of the Criminal Procedure Code No. 5271, which regulates the duties of the prosecutor, “The public prosecutor shall, as soon as he/she learns of a situation that gives the impression that a crime has been committed, either through a report or by other means, immediately begin to investigate the facts of the case in order to decide whether there are grounds for bringing a public prosecution” and “is obliged to collect and preserve evidence both for and against the suspect in order to investigate the material truth and ensure a fair trial, and to protect the rights of the suspect.” Once this evidence has been gathered, if it creates sufficient suspicion that a crime has been committed, the public prosecutor will draw up an indictment (CPC 170/2). Article 170/5 of the CPC stipulates that, as a result of the prosecutor’s obligation to investigate the facts, “The conclusion of the indictment shall include not only the matters against the suspect but also the matters in his favour.”

The Court of Cassation’s opinion is also in the same direction, and in its decision numbered 2016/16989 E., 2016/18968 K., the 18th Criminal Chamber of the Court of Cassation stated: “According to Article 170/2 of the CPC, in order for a public prosecution to be initiated, there must be sufficient suspicion that the crime was committed based on the evidence gathered during the investigation phase. The public prosecutor, who has the obligation and authority to reach the material truth by conducting an investigation through a crime report or complaint, will assess the evidence obtained as a result of the investigation and determine whether there is sufficient suspicion to warrant the initiation of public prosecution. This situation requires the evaluation of evidence. In other words, if the public prosecutor concludes that the evidence obtained is sufficient to initiate a public prosecution, he or she will initiate the case; otherwise, he or she will issue a decision of non-prosecution. Therefore, the prosecutor has the authority to evaluate the evidence. Accepting the opposite would require the public prosecutor to initiate a public prosecution upon every report or complaint, leaving the assessment of evidence to the court, which would be incompatible with the right not to be tarnished and would not be in line with the spirit of the law.

Therefore, when preparing the indictment, the prosecutor has an obligation to collect evidence in favour of the suspect, evaluate the evidence in light of all the circumstances of the case, and, in particular, act within the framework of the right not to be defamed. This obligation becomes even more onerous in cases where freedom of expression is restricted. Indeed, national authorities must make an assessment in accordance with the case law on freedom of expression in cases concerning this freedom (*Cumhuriyet Vakfı v. Turkey*, no. 28255/07, § 59).

The prosecution often copies a long text verbatim into the indictment but fails to indicate which statements in that text constitute criminal elements, who wrote the text, or the connection between the text and the defendant. However, in order to assess the alleged crime, it is necessary to evaluate matters such as the context in which the alleged words were spoken, who said them to whom, when, where, and how.

Therefore, the indictment must respect the defendant’s right not to be defamed, establish the material and moral elements of the alleged crime with evidence, and not force the defendant to prove their innocence. This is because, in cases where

freedom of expression is restricted, the procedural safeguards set out in Article 36 of the Constitution and Article 6 of the ECHR take on particular importance and apply during the investigation phase as well. Article 6 of the Convention covers everyone charged with a criminal offense without exception and applies at every stage of criminal proceedings. Therefore, this right is also guaranteed in relation to proceedings conducted during the investigation phase (ECtHR, *Imbrioscia v. Switzerland*, no. 13972/88, 24/11/1993, § 33; Constitutional Court *Bedri Balaban*, B. No: 2013/3168, 21/1/2015, § 75, *Erol Aydeđer*, B. No: 2013/4784, 7/3/2014, § 40).

All these explanations are also necessary for the effective use of the defence. A quality defence can only be made against a quality accusation. As explained above, one aspect of the problem is the failure to fully understand the charges. However, another aspect is that the defendant cannot clarify his or her behaviour before the court because the prosecution has not clearly presented the crime, making it impossible to know which statement is considered a crime and in what context.

This problem creates serious difficulties even in cases where a single statement is the subject of the indictment. However, it becomes even more complex when multiple actions of a person are brought up in the context of crimes such as membership in an organization (TPC 314) or aiding an organization (220/7). The vagueness of the charges in such cases makes the prosecution process highly uncertain and makes it very difficult, if not impossible, to mount a defense.

Indeed, in such cases, the defendant's participation in meetings on different dates, social media posts, books found in their home, and slogans chanted at meetings they attended are listed one after another, and it is demanded that these actions, taken as a whole, be considered evidence that the defendant surrendered their will to the terrorist organization. Two fundamental problems are encountered with this method of listing. First, actions that are not crimes individually are listed and considered crimes.

In the *Metin Birdal* case ([GK], B. No: 2014/15440, 22/5/2019) and subsequent cases, the Constitutional Court ruled that using individuals' activities, which fall within the scope of constitutional rights and freedoms, as evidence in convictions for membership of a terrorist organisation would have a deterrent effect on fundamental rights. The Court emphasised that a fair balance must be struck between the individual's right to live in an environment free from terrorism and their fundamental rights which may potentially be affected in this process, as a result of the state's positive obligation to protect society against the activities of terrorist organizations. To achieve this balance, the courts of first instance must demonstrate that the use of individuals' activities falling within the scope of constitutional rights and freedoms as evidence in convictions for membership of a terrorist organization is a necessary requirement. (*Cihat Aydođmuş* [1st B.], B. No: 2019/3078, 3/11/2022, § 13) Indeed, in the *Cihat Aydođmuş* application, the Constitutional Court ruled that the freedom of association had been violated for the following reason:

"The Constitutional Court carefully examined the application file. The courts of first instance did not consider the news published on the Association's website, press releases, and articles expressing opinions and comments on specific issues, activities

such as organizing charity bazaars or reciting the Mevlid on religious holidays, or communication records mostly found between members of the same Association, which were used as evidence to prove the applicant's alleged crime, as criminal organizational activities. Neither has it been alleged that the materials seized during searches of the applicant's home and the Association's premises contained any criminal elements, nor has the mere possession of the books seized from the applicant been deemed a crime, nor have the courts accepted this argument. (§ 19)

Another consequence of listing a series of legal activities as criminal acts without clarifying the reasoning behind this is that the defendant is acquitted of the main charge but convicted on another charge. For example, a person may be accused of membership in an organization due to meetings they attended, statements they made, social media posts, and other actions, but these actions cannot be proven as “continuous, varied, and intense” actions required by the Supreme Court's jurisprudence for membership in an organization. (For an example where the ECtHR found that Article 314 of the Turkish Penal Code had become unpredictable in a similar charge of, see *Selahattin Demirtaş v. Turkey* (no. 2), [GC] no. 14305/17, 22.12.2020, § 271 et seq). In this case, the court acquits the person of the charge of membership in an organization but punishes them for the crime of propaganda in relation to one or more of their posts.

Since no proper charge was made from the outset of the prosecution, and the person was not informed of the conditions under which they would be found guilty of the crime or the consequences, they are convicted of the propaganda charge without being able to respond properly. However, if it becomes clear that the charges against a person do not constitute membership in an organization, then if there is a charge of propaganda or another charge, this possibility should be clearly stated, the claims and evidence of the parties should be heard in relation to that charge, and a decision should be made accordingly.

Article 226 of the Criminal Procedure Code also requires this. According to the first paragraph of the article, “The defendant cannot be convicted under any law other than the one referred to in the indictment, unless he/she was notified of the change in the legal nature of the crime and was given the opportunity to defend himself/herself.” According to the third paragraph of the article, “In cases requiring additional defence, the defendant shall be given time to prepare his/her additional defence upon request.”

This provision essentially takes into account situations where the legal provision applicable to the same act may change. For example, in practice, it is often initiated under the first paragraph of Article 216 of the Turkish Penal Code “publicly inciting hatred and hostility among a segment of the public with different characteristics in terms of social class, race, religion, sect, or region against another segment” are later converted into the crime of publicly insulting the religious values embraced by a segment of the public, as regulated in the third paragraph of the same article. Even in such cases, there are examples where the additional defence has not been used, but there is no doubt that this situation falls under Article 226 of the Criminal Procedure Code.

However, in cases where multiple acts are listed one after another, if the element of “continuous, varied, and intense” activity for membership in an organization is not present, and if the acts independently constitute another crime, it is clear that this must be explicitly stated in a separate indictment. However, in cases where the charge has been changed from membership in an organization to propaganda, this has not been done, and the statement alleged to constitute propaganda has not been discussed again during the trial process.

Consequently, if an indictment does not clearly and explicitly state the charges, the court should be requested to clarify the charges and promptly acquit the defendant. In addition, if it is considered that the actions constituting the crime of membership in an organization constitute a separate crime, additional defence should be requested in this case as well, and failure to allow additional defence should be considered a ground for reversal in itself.

C. EQUALITY OF ARMS AND THE RIGHT TO AN ADVERSARIAL TRIAL

In order to effectively protect the rights enshrined in the Constitution, the courts hearing the case have a duty, under Article 36 of the Constitution, to “effectively examine the arguments, claims, and evidence of the parties.” According to the case law of the ECtHR, if a court’s approach to a case result in it avoiding responding to the applicants’ claims and examining their fundamental complaints, Article 6 of the Convention is violated in terms of the right to a proper examination of the case. (*Dulaurans v. France*, no. 34553/97, 21/3/2000, § 33; *Kuznetsov v. Russia*, no. 184/02, 11/4/2007, §§ 84-85).

The principle of “equality of arms,” one of the fundamental elements of the right to a fair trial, requires that the prosecution’s witnesses or experts and the defendant’s witnesses and experts be treated equally in court proceedings (see *Bönisch v. Austria*, no. 8658/79, 6/5/1985, §§ 32-33).

Applicable in both criminal and non-criminal proceedings, the principle of equality of arms requires that the parties be given a reasonable opportunity to present their arguments and explanations without being disadvantaged in relation to the other party (*Kress v. France*, no. 39594/98, 7/6/2001, § 72). As a consequence of this requirement, although there is no specific provision in the ECHR concerning the hearing of experts before the court, the ECtHR has assessed the institution of expert testimony by linking it to the “principle of equality of arms” (see *Bönisch v. Austria*, no. 8658/79, 6/5/1985, § 32; *Brandstetter v. Austria*, no. 11170/84, 12876/87, 13468/87, 28/8/1991, § 42).

The Constitutional Court also interprets the principles of equality of arms and adversarial proceedings in line with the case law of the ECtHR. Accordingly, the fundamental purpose of criminal proceedings is to establish the material truth in a manner consistent with fundamental rights and freedoms and the procedure prescribed by law. In line with this purpose, the evidence presented to the court and the charges based on it must be debated in accordance with the principle of adversarial proceedings (*Yankı Bağcıoğlu and Others [GC]*, B. No: 2014/253, 9/1/2015, § 62).

As a fundamental element of a fair trial in criminal cases, the principle of equality of arms ensures that the prosecution and the defence have equal opportunities in the trial proceedings. Since the prosecution has the entire state apparatus behind it in criminal proceedings, equality of arms is a fundamental guarantee of the defendant's right to defence. As a matter of principle, the defence and the prosecution should have the same opportunities to prepare and present their cases under equal conditions. In criminal proceedings, the principle of equality of arms requires, at a minimum, that the material information obtained and presented by the prosecution be disclosed and that no distinction be made between the prosecution and the defence in terms of examining the case file (*Yankı Bağcıoğlu and Others* [GC], § 63).

Under the principle of equality of arms, complete equality must be ensured between the parties to the case in terms of their rights and obligations during the trial proceedings before the court, and this equality must continue throughout the trial. All procedural actions taken during the trial process, such as the presentation of evidence and counterevidence, and the presentation of claims and counter-claims, must also be carried out in accordance with the principle of equality of arms. The principle of equality of arms also encompasses the avoidance of creating a legal situation that is detrimental to the defendant in criminal proceedings.

The examination of documents submitted to the case file and the taking of copies of these documents, access to expert reports on which the court's decision is based and the opportunity to obtain them, as well as the right to object to the evidence and documents presented by one of the parties to the trial, expressing opinions and refuting this evidence, as well as the right to present counter-evidence, are requirements of the principle of equality of arms.

The key factor in monitoring equality of arms is the importance of the procedure subject to equality review in the proceedings. When examining whether the principle of equality of arms has been complied with, the ECtHR looks at whether the alleged inequality in the specific case actually and genuinely rendered the proceedings unfair (see *Kremzov v. Austria*, no. 12350/86, 21/9/1993, § 75). If one party to the case is denied the opportunity to present evidence that is the basis of its defence against the other party's allegations, this may constitute a violation of the principle of equality of arms (see *De Haes and Gijssels v. Belgium*, no. 19983/92, 24/2/1997, § 58).

In freedom of expression cases, it may be necessary to request the court to gather evidence to prove that the statements alleged to constitute a crime fall within the scope of freedom of expression in accordance with the case law of the Constitutional Court and the European Court of Human Rights. It may sometimes be necessary to request the court to gather evidence in order to prove matters such as the content of the expression, its context, its addressee, the position of the speaker and the addressee, and the addressee's previous actions. In such cases, the request to the court must be accompanied by reasons explaining why the evidence in question is necessary. This evidence may be written or digital documents held by official institutions, or it may require the hearing of witnesses or an expert examination.

The prosecution phase may begin long after the statement is used. Particularly in the case of social media posts, once an allegation is made that a person has committed a crime, the prosecutor requests that law enforcement bodies examine the

person's social media account, and law enforcement prepares a report called an "investigation report." This report includes posts made years prior to the report date, based on the law enforcement agency's own subjective assessment. An indictment may be prepared for some of these reported posts, but this indictment does not discuss the context, location, or reason for the post made years ago. In such a case, it is clear that during the prosecution phase, the context must be discussed in detail, the prosecution must be invited to make findings, and the defence's views on the matter must be heard. Furthermore, if there is any doubt on the matter, the parties must be allowed to present evidence regarding the context in which the statement was used.

Since a large number of posts that should not be subject to litigation in Turkey have become subject to litigation, this type of investigation is seen as a burden during the prosecution phase due to the workload. However, if this investigation is not carried out and the views and evidence of the parties are not examined, all that remains is a highly subjective tool, such as what the court feels about the post. Considering that a post made five or sometimes ten years before the decision date is ruled on without taking into account the atmosphere at that time, it becomes clear how much value judgments can change over time.

On the other hand, a different type of problem arises when the expression in question is not a written text but a speech or action. When individuals are prosecuted for slogans shouted at meetings and demonstrations, which are a special type of expression, or under Law No. 2911 on Meetings and Demonstrations, the indictment is drawn up entirely on the basis of a police report. In essence, law enforcement is a party to the case because complaints are often against them for ill-treatment during the same incident. Even when a speech is alleged to constitute a crime, the prosecution relies on the police report instead of listening to or watching the speech itself.

In trials conducted on the basis of indictments prepared in this manner, the discussion of this evidence during the prosecution phase is of particular importance. However, in practice, it is often seen that either only the report prepared by the police is relied upon, or a new expert report is prepared. These expert reports are also frequently prepared by police officers who are still on duty or retired.

This practice is primarily contrary to the principle of directness of the trial, which governs criminal proceedings. The General Assembly of the Criminal Chambers of the Court of Cassation has defined this principle as follows:

"In our criminal procedure law, the principles of directness (face-to-face) and oral proceedings are fundamental. The judge presiding over the case will confront the defendant and witnesses directly, hearing statements and reading documentary evidence without intermediaries. Thus, in accordance with the aforementioned principles, the fundamental requirements of the 'right to a fair trial set forth in Article 6 of the European Convention on Human Rights, and Article 217 of the Criminal Procedure Code, the judge may only base his or her decision on evidence presented at the hearing and discussed in his or her presence. Therefore, as a general rule, the defendant, witnesses, or experts shall be heard in the court, and the reading of minutes or written statements prepared during previous hearings shall not replace this." (Decision dated 18/2/2014 and numbered E.2013/4-242, K.2014/79. See also *Erdal Sonduk* [GK], B. No: 2020/23093, 15/2/2024)

On the other hand, this type of trial also violates the principles of equality of arms and adversarial proceedings. The person can only attempt to defend a speech they made or a slogan they chanted years ago as it is conveyed in a report, and they do not have the opportunity to see how the incident actually unfolded and discuss it before the court. Although the individuals represented by defence counsel may be able to obtain these images from the court clerk and view them externally, it is not possible to show the images again in the courtroom due to the technical inadequacy and workload of the courtrooms. It can be seen that this practice is also contrary to the principles of fair trial and makes it impossible to reach the material truth.

If the aforementioned requests are not met, the importance of these requests for the outcome of the case should be highlighted, and reliance on these points should not be neglected when resorting to legal remedies.

In terms of the adversarial trial principle, one of the most important issues is that the prosecution's opinion simply repeats the indictment without assessing the admissibility of the evidence discussed at the hearing. In this case, it is not possible to speak of an adversarial trial. This is because a proper final defence cannot be conducted if arguments regarding the admissibility of evidence and whether the evidence proves the charges are not clearly presented in the opinion. However, if the opinion contains proper arguments, these can be refuted with counterarguments, and the trial can be considered adversarial. Otherwise, the prosecution is deemed to have failed to meet the burden of proof. Furthermore, the fundamental difference between the investigation phase and the prosecution phase is that evidence is debated under equal conditions before the court during the latter. Although there is an obligation to collect favourable evidence during the investigation phase, no one expects the prosecution to engage in a dialectical debate. However, the court will make a decision after the parties have debated the evidence at the hearing. If this is not done, the claims are not proven, the court must acquit the defendant. Otherwise, the burden of proof is reversed, and the defendant is required to prove their innocence, which clearly violates the presumption of innocence.

Therefore, in cases concerning freedom of expression, if the opinion does not include an assessment within the framework of the ECtHR and AYM standards, this issue must be raised in the defence against the opinion, and an acquittal must be requested by stating that the opinion is contrary to the right to adversarial proceedings.

1. Providing an Opportunity to Raise Objections Regarding the Authenticity and Reliability of Evidence

The principle of adversarial proceedings is one of the elements of the right to a fair trial. It requires that the parties be granted the right to be informed about and comment on the case file and, therefore, be given the opportunity to actively participate in the proceedings. Consequently, the court fails to hear the parties and provide them with the opportunity to challenge the evidence, the trial may be deemed unfair. In criminal cases, therefore, the defendant must be given the opportunity to be

informed of any opinions or evidence submitted to the file that may influence the court's decision and must be given the opportunity to effectively challenge them.

The purpose of adversarial proceedings is not limited to ensuring that an opinion/request is included in the case file, but also to ensure that it is taken into account by the court in reaching a conclusion. The principle of adversarial proceedings requires that evidence against the defendant be presented to the court through adversarial proceedings and that not only witnesses, but also other evidence, be discussed. This allows applicants to express their claims and objections regarding the credibility of the evidence by assessing its relevance and weight to the case.

In a case where the applicant's demand to undergo an alcohol test at the hospital, arguing that the breathalyzer gave an incorrect reading, was denied on the grounds of the Governorate's circular, the Constitutional Court stated that the applicant was not provided with reasonable opportunities to refute the evidence that he could not obtain himself and was placed at a disadvantage in terms of procedural opportunities. The Court ruled that the principles of equality of arms and adversarial proceedings in the trial had been violated (Murat Ergan, B. No: 2020/2395, 1/2/2023, § 18).

Similarly, in the *Hatice Çoban* application, the ECtHR ruled that the applicant's freedom of expression had been violated because her request to call witnesses to resolve a contradiction between the police report on the content of her speech and the news reports by news agencies had not been accepted (*Hatice Çoban v. Turkey*, no. 36226/1, §§ 32-40, 29.10.2019). The Court found that the domestic courts had failed to fulfil their duty to strike a fair balance between the different interests at stake in the present case within the meaning of Article 10 of the Convention, as they had not responded to the relevant allegations made by the applicant concerning the reliability and accuracy of the content of the main evidence relied upon to convict the person concerned. (§ 40).

A similar situation arises in cases where a person is accused of possessing publications that are allegedly prohibited. Decisions rendered without discussing whether the publications in question are prohibited or constitute a crime, let alone whether a person's possession of a prohibited publication constitutes a crime, would be contrary to the principle of fair trial. The objections of the defendant and his defence counsel on this matter must be examined.

D. COURT EXAMINATION/EVALUATION OF EVIDENCE PRESENTED BY THE DEFENCE

The principle of equality of arms means that the parties to the case are subject to the same conditions in terms of procedural rights and that each party has the opportunity to reasonably present their claims and defence before the court without being placed in a weaker position than the other party. This procedural guarantee includes allowing both parties to the dispute the opportunity to present the evidence that forms the basis of their defence.

In general, for a fair trial to be conducted, it is essential that the parties be provided with adequate opportunities to present their claims in light of the principles of

equality of arms and adversarial proceedings. The parties must also be given adequate opportunities to present and examine their evidence, including witness testimony.

The Constitutional Court ruled that the right to equality of arms and adversarial proceedings had been violated because the appellate court had rejected the appeal based on an expert report submitted during the appeal phase without notifying the defendant and without holding a hearing. (Özkan Sarı, B. No: 2020/5353, 19/1/2023, § 32). Similarly, it ruled that the right to equality of arms and adversarial trial had been violated because the request for an expert examination of the technical data related to ByLock, which formed the basis of the applicant's conviction, was not accepted (Esra Saraç Arslan [GK], B. No: 2019/10514, 28/12/2022, § 58-59).

In another case, the Constitutional Court ruled that the principles of equality of arms and adversarial trial had been violated due to the unjustified rejection of the request to hear as witnesses the persons whose statements had led to the imposition of disciplinary sanctions on the applicant (Sözdar Oral, B. No. 2018/21028, 13/9/2022, § 57).

As explained above, it is common in cases involving membership of an organization for witnesses to be heard by instruction and in the absence of the parties. Although the Constitutional Court seeks the presence of other elements to decide that the right to a fair trial has been violated in these routine practices (Atila Oğuz Boyalı [2nd B.], B. No: 2013/99, 20/3/2014, §§ 34-56; Selçuk Demir [2nd Chamber], B. No. 2014/9783, 22/1/2015, §§ 27-46; AZ. M. [2nd Chamber], B. No. 2013/560, 16/4/2015, §§ 45-67; Baran Karadağ [2nd Chamber], B. No: 2014/12906, 7/5/2015, §§ 49-76; Orhan Güteryüz [1st Chamber], B. No: 2019/30221, 28/12/2021, §§ 33-42; Abdurrahim Balur [2nd Chamber], B. No. 2013/5467, 7/1/2016, § 80; Onur Urbay [1st Chamber], B. No. 2014/6222, 6/3/2019, §§ 36, 40; Zekeriya Sevim [2nd Chamber], B. No. 2018/18989, 16/6/2021, §§ 44, 51; Metin Akdemir (2) [1st Chamber], B. No. 2020/3964, 21/9/2022, § 36; Uğur Özcan [1st Chamber], B. No. 2021/12137, 26/7/2022, § 40), in our opinion, the defendant's opportunity to question witnesses should not be restricted except in very exceptional circumstances.

In cases concerning freedom of expression, witness statements cover many aspects, such as what a person said, under what circumstances they said it, and what happened before and after. Therefore, as determined in Constitutional Court decisions, if the defendant is unable to cross-examine or have a witness cross-examined, there is a high probability that the statement given by that witness will be the sole or decisive evidence on which the conviction is based. In such cases, it is not possible to provide sufficient counterbalancing safeguards to compensate for the difficulties faced by the defence when the witness cannot be questioned by the defendant and their defence counsel. Therefore, in cases concerning freedom of expression, obtaining a witness's statement by instruction or relying on secret witness statements would violate the right to a fair trial.

A violation of any of the rights granted to the defendant during the prosecution phase will also result in a procedural violation in freedom of expression cases. For instance, failing to provide legal counsel or an interpreter if the defendant does not understand the language of the proceedings constitutes a violation of both the right to a fair trial and freedom of expression. In the *Steel and Morris v. the United Kingdom* case, the ECtHR ruled that freedom of expression had been violated because the applicants' requests for access to free legal aid to defend themselves against a very

powerful company in a civil case were not granted (*Steel and Morris v. the United Kingdom*, no. 68416/0, 15.02.2005).

E. BURDEN OF PROOF IN PRESS FREEDOM CASES

The press plays an important role as the public watchdog within a functioning of a democratic system. For the press to properly fulfil this role, the press must have certain guarantees. In this context, the ECtHR has recognised the rights of the press, such as the right of access to information and the right to protection of news sources and has referred to the positive obligations of the state. For this reason, the Court has consistently emphasised the fundamental role played by the media in facilitating and developing the public's right to receive and impart information and ideas. The Court has ruled that journalists must benefit from comprehensive protection, including a series of freedoms functionally related to their activities, such as protection during the gathering of information, protection of confidential news sources, protection against searches of their workplaces and private residences and seizure of materials, and the protection of editorial and publishing autonomy. Both professional and non-professional journalists benefit from this high level of protection afforded by the Convention.

However, the protection afforded to journalists by Article 10 of the Convention is subject to the condition that journalists act in good faith to provide accurate and reliable information in accordance with the principles of responsible journalism. The concept of responsible journalism also encompasses the legality of the journalist's conduct, and while a journalist's violation of the law is not decisive in determining whether they acted responsibly, it is a relevant factor. (*Bédat v. Switzerland* [GC], no. 56925/08, 29.03.2016, §§ 48-54; *Thomaidis v. Greece*, no. 28345/16, 07.05.2024, § 27).

In this context, it is necessary to determine the extent to which journalists are obliged to verify the accuracy of the news they report. In this regard, the first issue to be addressed is whether the content of the news constitutes a statement of fact or a value judgment. This is because facts can be proven, whereas value judgements cannot. To demand proof of value judgements would itself violate freedom of expression. (*Morice v. France*, [GC], no. 29369/10, 23.04.2015, § 126). However, even if a statement is a value judgment, there must be a sufficient factual basis to support it; otherwise, the statement would be excessive (*Pedersen and Baadsgaard v. Denmark* [GC], no. 49017/99, 17.12.2004, § 76).

In cases concerning press freedom, it is of great importance to determine the scope of journalists' obligations regarding the accuracy of their reporting. In the *Bozhkov v. Bulgaria* case, the Court noted that if national courts adopt an excessively strict approach when assessing journalists' professional conduct, this could have an excessively deterrent effect on journalists' ability to fulfil their duty to inform the public. Therefore, courts should consider the potential impact their decisions may have not only on the individual cases before them but also on the media in general (*Bozhkov v. Bulgaria*, no. 3316/04, 19.04.2011, § 51).

Consequently, in the context of defamation cases of a civil law nature, the Court

has found that the requirement to prove that the allegations in a newspaper article are “substantially true on the balance of probabilities” constitutes a justified restriction on freedom of expression under Article 10 § 2 of the Convention (*McVicar v. the United Kingdom*, §§ 84-87). However, the existence of procedural safeguards in favour of the defendant in defamation cases is one of the factors to be taken into account when assessing the proportionality of the interference under Article 10. In particular, the defendant must be given a realistic opportunity to prove that his allegations have a sufficient factual basis (*Morice v. France* [GC], § 155).

The Court considers that allegations appearing in the press cannot be equated with those brought in criminal proceedings. Therefore, courts hearing defamation cases cannot expect defendants in defamation cases to act like prosecutors, nor can they make the defendants’ fate dependent on whether the prosecuting authorities will bring criminal proceedings against the person against whom the allegations are made and whether they will secure that person’s conviction (*Kasabova v. Bulgaria*, no. 22385/03, 09.04.2011, § 62). In this context, stating that journalists can only report on events whose accuracy they have conclusively proven could make the profession of journalism extremely costly and impossible. The Court has held that journalists may be exempt from the obligation to prove the accuracy of the facts they allege in their publications, and may be able to avoid conviction by demonstrating that they acted fairly and responsibly (*Wall Street Journal Europe Sprl and Others v. the United Kingdom* (decision of inadmissibility), no. 28577/05, 10.02.2009; *Radio France and Others v. France*, no. 53984/00, 30.03.2004, § 24).

The ECtHR also recognizes that there is a difference between journalists reporting allegations made by others and journalists making allegations themselves. While journalists have no obligation to investigate the accuracy of claims made by others when reporting on them with a degree of distance, they do have an obligation to investigate the accuracy of claims made by themselves (*Rumyana Ivanova v. Bulgaria*, no. 36207/03, 14.02.2008, § 62). Similarly, if a journalist bases their report on an official document, they will benefit from the presumption of the accuracy of the official document. The Constitutional Court has emphasised that in cases where the press bases its news on official records, it is no longer necessary to conduct separate research to verify the accuracy of the content (*Kasım İlimoğlu Application (2)*, B. No: 2015/14545, 29/11/2018, §§ 35-36). Accordingly, if the opinions or ideas quoted or referenced in news reports and commentaries in the press are based on official records, reports, or data prepared or commissioned by public authorities, the press is not required to conduct additional research to verify the accuracy of such opinions or ideas. (*Mustafa Kemal Çelik* [2nd B.], B. No: 2015/20153, 10/10/2018, § 57). On the other hand, journalists are responsible for the information and documents available at the time the news was reported, especially on issues of public interest (*Erla Hlynisdottir v. Iceland* (no. 2), no. 54125/10, 21.10.2014, § 75).

The right of journalists to prove their allegations must also be taken into account. In defamation cases, defendants must have reasonable means to prove their allegations (*Morice v. France* [GC], § 155). However, the documents submitted as evidence must be directly relevant to the allegations made. Furthermore, the fact that journalists may be compelled to disclose their sources of information when asked to prove

their claims is also a matter that must be taken into account. Journalists cannot be compelled to disclose their news sources (*Sanoma Uitgevers B.V. v. the Netherlands* [GC], no. 38224/03, 14.09.2010, § 90).

Finally, in press cases, it is often seen that not only the journalist who wrote the news story but also the editor-in-chief is tried, contrary to the Law. Pursuant to Article 2(c) of Press Law No. 5187, *printed works such as newspapers and magazines published at regular intervals, along with news agency publications and internet news sites, are considered periodicals and are subject to the Press Law. Article 11 of the Law, which regulates criminal liability for crimes committed through the press, reads as follows:*

“The author is liable for crimes committed through periodical and non-periodical publications. In cases where **the author of a periodical publication is unknown**, or where the author does not have criminal capacity at the time of publication, or where the author is abroad and therefore cannot be tried in Turkey, or where the penalty to be imposed would not affect the penalty imposed on the author for another crime for which he or she has been convicted, the responsible manager and the editor-in-chief, the general editor, the editor, the press advisor, or other responsible manager to whom the responsible manager reports shall be liable. However, if the work is published despite the objection of the responsible manager and the authority to which the responsible manager is subordinate, the responsibility arising therefrom shall belong to the publisher.”

Unlike Law No. 5680, Law No. 5187 has shifted from a “legal liability system” to a “tiered liability” system.⁴⁸ The legislator explained the rationale for this change as follows:

“The article also determines the persons liable for crimes committed through periodical and non-periodical publications. Unlike Law No. 5680, the author is primarily held liable in order to avoid liability for the acts of others and objective liability, or to minimize such liability. However, in cases where the author is unknown or does not have criminal capacity at the time of publication or is located abroad and cannot be tried in Turkish courts, or where the author has been convicted of another crime with a final judgment that does not affect the punishment, and therefore punishing the author would be ineffective, the responsible editor or assistant editor is held liable for periodical publications, and in the case of non-periodical publications, the publisher is held liable. In crimes committed through printed works, the seller and distributor are not held liable.”

The Court of Cassation has also determined, without any doubt, that even in cases where the author of the work is identified later, the editor-in-chief cannot be held criminally liable if the author is known:

“...Article 11 of Press Law No. 5187 states, ‘The author is liable for crimes committed through periodical and non-periodical publications. In the event that the author of a periodical publication is unknown, or does not have criminal capacity at the time of publication, or is located abroad and cannot be tried in Turkey, or the penalty to be

⁴⁸ For the concept, see Hakan Gündüz, “Criminal Liability in Press Offenses,” *Ankara University Law Faculty Journal*, 71 (1) 2022: 349-385, pp. 360-361

imposed does not affect the penalty imposed on the author for another crime, the responsible manager and the publishing manager, general publishing manager, editor, press advisor, or other authorized person to whom the responsible manager reports shall be held responsible.' Pursuant to this regulation, although a case was filed against 'the defendant ..., who was the responsible managing editor of the newspaper in which the news item in question was published, without the author being identified during the investigation phase, given that the author was identified during the trial phase and a case was duly filed against the author, the defendant ... is not criminally liable for the alleged offense'" (Y. 12. CD, E. 2013/12380, K. 2014/4502, 24.02.2014).

That being the case, lawsuits are also filed against publishers who probably have no opportunity to see or examine the tens of thousands of pieces of content uploaded to websites every year and even social media posts, and no credence is given to defences made in this regard. This situation not only violates the right to a fair trial but also raises a very serious issue, namely, leading to objective liability in criminal law.

Therefore, in freedom of expression cases where journalists are tried, these issues related to the burden of proof must be taken into account, and defence attorneys must effectively advance these defences.



PROCEDURAL OBLIGATIONS REGARDING THE DECISION

In the preceding section, an attempt was made to discuss the principles, rights, and issues in the prosecution process. It can be posited that the problems observed in that section also directly impact the decision stage. It is posited that it is unnecessary to elaborate on the fact that it is highly improbable to reach a sound conclusion as a result of trial processes where evidence is not properly collected and discussions are not conducted in a satisfactory manner.

The trial process is dialectical. The thesis and antithesis stages of this process are the investigation and, essentially, the prosecution stages. In this process, opposing arguments must be presented under equal conditions. The decision is the synthesis stage of the trial process. In other words, the decision must clearly state which arguments presented during the trial process were accepted or rejected and why, thereby establishing the legitimacy of the court's conclusion. The legitimacy of the decision can only be established with sound justification. A reasoned decision is an obligation for courts and the state, and a right for the parties to the case. Therefore, the requirement for a reasoned decision is a fundamental procedural obligation.

Another procedural obligation regarding the decision is the obligation of transparency of decisions. It is generally expected that there will be no problem with the publicity of the decision. However, it should be emphasised that there are significant problems regarding the publicity of the decision in some freedom of expression decisions issued by the Constitutional Court itself (*Abbas Yalçın and others*, B. No: 2014/8146, 29/3/2023).

A. THE RIGHT TO A REASONED DECISION AND THE OBLIGATION OF “RELEVANT AND SUFFICIENT REASONS”

The first paragraph of Article 36 of the Constitution states that everyone has the right to a fair trial. The justification for adding the phrase “...and a fair trial” to Article 36 of the Constitution emphasises that the right to a fair trial, which is also guaranteed by international treaties to which Turkey is a party, has been included in the text of the article. Numerous decisions of the European Court of Human Rights have emphasised that the right to a reasoned decision is included within the scope of the right to a fair trial under Article 6(1) of the Convention. Furthermore, Article 141 of the Constitution emphasises that all decisions of all courts must be reasoned. Therefore, when Article 36 of the Constitution is interpreted in conjunction with Article 141, it is clear that the right to a fair trial also includes the guarantee of the right to a reasoned decision (*Abdullah Topçu*, B. No: 2014/8868, 19/4/2017, § 75).

The right to a reasoned decision aims to ensure and monitor the fair trial of individuals. This right is also necessary for the parties to know whether the claims they put forward during the proceedings have been examined in accordance with the rules and for the public to learn the reasons for the judicial decisions rendered in their name in a democratic society (*Sencer Başat and others [GK]*, B. No: 2013/7800, 6/18/2014, §§ 31, 34).

Although the courts’ obligation cannot be understood as requiring a detailed response in the reasoning for the decision to every claim and defence put forward during the trial, it must be understood from the reasoned decision that the main issues of the case have been examined (*Yasemin Ekşi*, B. No: 2013/5486, 4/12/2013, § 56).

The specific elements that must be included in a decision depend on the nature and circumstances of the case. Where the allegations and defences raised clearly and concretely during the proceedings are relevant to the outcome of the case, in other words, where they are capable of changing the outcome of the case, the courts must respond to these issues, which are directly relevant to the case, with a reasonable justification (*Sencer Başat and others*, § 35). Conversely, the court’s failure to provide a *relevant and adequate* response to an issue that it has accepted as having an impact on the outcome of the case or its failure to respond to procedural or substantive claims that require a response will result in a violation of rights (*Sencer Başat and others*, § 39).

If the court of first instance fails to address substantive claims in its decision or fails to respond to these claims with reasonable grounds, the appellate court reviewing the case will not have a first instance court assessment to refer to regarding the relevant claims, even if the same claims are raised before it. In this case, it is a constitutional obligation for the appellate court to assess these issues directly related to the case separately and respond with a reasonable justification (*Ümmügülsüm Salgar*, B. No:2016/12847, 21/10/2021, § 69).

The ECtHR has determined that, in terms of the assessment of the appeal, the decision must address the appellant’s main arguments (*Buzescu v. Romania*, no. 61302/00, 24.5.2005, § 67; *Donadze v. Georgia*, no. 74644/01, 07.03.2006, § 35), and that complaints alleging violations of the Convention and its Additional Protocols must be examined with care and diligence (*Wagner and J.M.W.L. v. Luxembourg*, no. 76240/01, 28.06.2007, § 96).

Failure by the appeal or review authorities to respond to procedural or substantive claims requiring a separate and explicit response during the appeal or review process may constitute a violation of the right to a reasoned decision (*Caner Kandırmaz*, B. No: 2013/3672, 30/12/2014, § 31). Where the appeal authority has not carefully chosen the wording to indicate what it has or has not taken into account in its grounds for rejection, or where it has made an assessment that gives rise to doubts that the file has not been examined, the Constitutional Court will rule that the right to a reasoned decision has been violated (*Gökhan Ayhan*, B. No: 2015/3041, 19/4/2018, § 28).

In this context, any arguments put forward by the parties during the proceedings that are relevant to the outcome must be addressed in the decision. In freedom of expression cases, it is generally observed that the indictment, defence, and opinion are listed one after another, and then a decision is made without explaining why and on what grounds one was preferred over the other. Sometimes, the decision even repeats the statements in the indictment verbatim. It is, of course, impossible to say that this type of decision complies with the principle of reasoned decisions.

However, in freedom of expression cases, it is not sufficient for the decision to be reasoned; relevant and sufficient justification for restricting freedom of expression must also be provided. As explained in the introduction, the first issue examined by the ECtHR and the Constitutional Court in freedom of expression cases is whether the domestic courts have provided “relevant and sufficient justification” for the necessity of the interference with freedom of expression. Again, as explained in the introduction, the concept of “relevant and sufficient justification” is broader than a reasoned decision and implies that domestic courts must assess within the framework of the standards of the Constitutional Court and the ECtHR in their decisions. Therefore, the obligation to provide relevant and sufficient justification essentially requires an assessment of the merits of the interference. In other words, this procedural obligation is fundamentally linked to the substantive obligation. For this reason, the application of the criteria developed by the ECtHR and the Constitutional Court will be examined for each type of interference.

Consequently, whether the criteria developed based on the reason for the intervention are used by domestic courts is primarily a procedural issue. In instances where the Constitutional Court and the European Court of Human Rights do not observe such an effort, they regard this as a violation in itself and issue a violation decision on the grounds that there is no relevant or sufficient justification. When the criteria of the Constitutional Court and the ECtHR are applied by domestic courts, the Constitutional Court and the ECtHR make their own assessment. Should they reach a different conclusion from the domestic courts, they again rule that there has been a violation. In its violation decisions over the past five or six years, if the Constitutional Court has not identified a problem regarding the legality of the intervention, i.e., if it has determined the violation based on the necessity in a democratic society criterion, it ultimately states that no relevant and sufficient justification has been provided by the domestic courts regarding the intervention in freedom of expression (*Gökhan Baba* [2nd Chamber], B. No: 2022/45768, 17/9/2025, § 21; *Nağihan Toğyuner* [1st Chamber], B. No: 2023/47839, 16/9/2025, § 27). Similarly, if the ECtHR concludes, after examining the necessity in a democratic society criterion, that the local authorities have provided

relevant and sufficient justification for the interference with freedom of expression, it rules that freedom of expression has not been violated; otherwise, it rules that it has been violated (*Azadlıq Newspaper v. Azerbaijan*, no. 12708/13, 25.11.2025; *Stanev and Bulgarian Helsinki Committee v. Bulgaria*, no. 50756/17, 18.11.2025)

In this regard, it is necessary to briefly examine the criteria developed by the ECtHR and the Constitutional Court regarding different reasons for interference with freedom of expression. Interference with freedom of expression may be based on specific legal reasons aimed at protecting the rights and freedoms of others, such as personal rights, or on public reasons such as national security, public safety, public morality, and the protection of public health. In each of these cases, the criteria regarding the necessity of the interference in a democratic society contain some differences depending on the nature of the legal value in conflict with freedom of expression.

1. Interventions Aimed at Protecting Personal Rights

Where freedom of expression conflicts with personal rights entitled to by virtue of one's personhood, a fair balance must be struck between the two rights. The criteria to be taken into account in this balancing exercise have been developed by the ECtHR and are also applied by the Constitutional Court. In its *Orhan Aydın* decision, the Constitutional Court summarised these criteria as follows: "... A fair balance must be struck between the freedom of expression of one party and the right of the other party to the protection of their honour and reputation. The criteria to be used when balancing conflicting rights are generally as follows:

i. Who made the statements (Kemal Kılıçdaroğlu, B. No: 2014/1577, 25/10/2017, § 59; Nihat Zeybekci, B. No: 2015/5633, 8/5/2019, § 29)

ii. Who the target person is, their degree of fame and previous behavior, and whether the limits of acceptable criticism they must tolerate are broader than those of an ordinary citizen (for decisions containing assessments made because the target person is an official exercising public authority, see İlhan Cihaner (2), B. No: 2013/5574, 30/6/2014, § 82; Nilgün Halloran, B. No: 2012/1184, 16/7/2014, § 45; Kadir Sağdıç [GK], B. No: 2013/6617, 8/4/2015, §§ 60-66; Ali Suat Ertosun (7), B. No: 2014/1416, 15/10/2015, § 36; Zübeyde Füsün Üstel and others [GK], B. No: 2018/17635, 26/7/2019, §§ 128, 129; for decisions containing assessments made due to the targeted person being a politician, see Bekir Coşkun, §§ 66, 67; Ergün Poyraz (2) [GK], B. No: 2013/8503, 27/10/2015, § 56; Kemal Kılıçdaroğlu, §§ 59-61)

iii. Whether the statements contribute to a debate in the public interest, the weight of the rights of the public and other persons to express their opinions (Bekir Coşkun, § 69; Çetin Doğan (2) [GK], B. No: 2014/3494, 27/2/2019, § 62; Ergün Poyraz (2), § 56; Kadir Sağdıç, §§ 60-66; İlhan Cihaner (2), §§ 66-73; Nihat Zeybekci, § 32)

iv. The value of informing the public, the existence of public interest, and whether the subject is current (İbrahim Okur (2), Case No: 2018/12363, 5/26/2021, § 28; Seray Şahiner Özkan, B. No: 2016/6439, 9/6/2021, § 44)

v. Whether the complainant has the opportunity to respond to the statements directed at them (Temel Coşkun, B. No: 2017/1632, 29/1/2020, § 33; Şaban Sevinç (2), Case No. 2016/36777, 26/5/2021, § 42; Nihat Zeybekci, § 39)

vi. The impact of the statements on the life of the targeted person (Ali Suat Ertoşun (2), B. No: 2013/1592, 20/5/2015, § 33; Hüseyin Kocabıyık, B. No: 2020/15593, 22/11/2022, § 24)

vii. Whether the statements subject to punishment were taken out of context (Nilgün Halloran, § 52; Bekir Coşkun, §§ 62, 63; Önder Balıkçı, B. No: 2014/6009, 15/2/2017, § 45, Nihat Zeybekci, § 36)

viii. Whether the applicant's fear of being punished will have a deterrent effect on them (for similar assessments, see Ergün Poyraz (2), § 79; Kemal Kılıçdaroğlu and the Republican People's Party, B. No: 2014/12482, 8/5/2019, § 46)

ix. Whether the statements at issue can be characterized as a statement of fact or a value judgment (Deniz Karadeniz and Others [GK], B. No: 2014/18001, 6/2/2020, §§ 48, 49; Durmuş Fikri Sağlar (2) [GK], B. No: 2017/29735, 17/3/2021, § 50)

Therefore, in criminal cases brought under Articles 125 and 299, and even Article 301, of the Turkish Penal Code, the decisions rendered by the courts must be made in accordance with these criteria. In each case, the criteria applicable to the specific case must be evaluated by the court when reaching a decision, and the results of this evaluation must be reflected in the decision. If the decision does not include an assessment based on the criteria set out here, there will be a violation of procedural obligations. These criteria are, of course, applicable not only to defamation cases but also to other types of crimes that protect personal rights (e.g., crimes related to interference with private life under Article 134 of the Turkish Penal Code or crimes related to the acquisition of personal data under Article 136 of the Turkish Penal Code, etc.).

Since the Constitutional Court has expanded the criterion developed by the ECtHR and currently lists nine different elements, it cannot be expected that all nine elements will be addressed in every decision. However, in each case, the prominent issues regarding the two competing rights must be evaluated. In this regard, it is particularly useful to emphasise two prominent errors in the evaluation of the restriction of freedom of expression.

One of the problems frequently encountered in practice is that a word has previously been assessed as insulting in a Court of Cassation or Regional Court of Appeals decision. However, the meaning of a word cannot be assessed independently of the context in which it is used. The Constitutional Court has identified this error, which is frequently made in court decisions, as follows:

“Furthermore, the fact that the expression used by the applicant was previously the subject of a Court of Cassation decision in another case, in which it was accepted as defamatory cannot be considered a binding precedent in the Court's assessment within the scope of the aforementioned criteria. This is because each expression, by its nature, must be considered in its own context and circumstances. In other words, any statement that the Court of Cassation has deemed defamatory within the context of a particular case cannot automatically be considered defamatory in every case, even if it

is identical. For this, a new and renewed legal assessment must be made within the subjective conditions of the case, which is served by the balancing criteria mentioned above. However, in the present case, the Court did not attempt to strike a balance between the applicant's freedom of expression and the complainant's right to protection of honor and reputation by considering the entirety of the events between the parties and the sharing that took place; it accepted that the statement in question constituted the offense of insult without making an assessment according to the aforementioned criteria. (Fatih Altaylı [1st Chamber], B. No: 2022/109322, 18/12/2024, § 17. See also (Cemal Yıldırım [2nd Chamber], B. No: 2022/66222, 17/7/2025, § 23)

Therefore, even if the assessment made in the decision does not take all nine elements into account, it is clear that it must conduct an inquiry that reveals the meaning of the expression within the context in which it was used. In its decisions on *Çağrı Yılmaz*, *Eyüp Hanoğlu*, and *Sinan Baran*, the Constitutional Court determined that ruling on cases involving interference with freedom of expression “without considering the circumstances and background of the incident, the context of the expression, the manner and reason for its utterance, whether the words spoken had any background, and whether they took place within the framework of a public debate” constitutes a violation of freedom of expression. *Çağrı Yılmaz*, B. No: 2017/34463, 13.02.2020, § 39; *Eyüp Hanoğlu* B. No: 2015/13431, 23/5/2018, §§ 46,47; *Sinan Baran*, B. No: 2015/11494, 11/6/2018, § 44). According to these decisions, it is mandatory to evaluate the background and context of a statement.

In this context, one of the most common problems encountered in freedom of expression cases is the disregard of the principle and decisions that politicians must be much more open to criticism when statements directed at them are subject to criminal or civil liability. In these cases, even if other elements are not considered, the identity of the addressee as a politician must be evaluated, and the reasoning must explain why it is necessary to restrict freedom of expression. According to the case law of the Constitutional Court and the European Court of Human Rights, restricting statements directed at high-level politicians can only be considered legitimate in very exceptional circumstances.

With regard to statements directed at politicians, it has been established by the case law of the Constitutional Court and the ECtHR that, because these individuals have exposed themselves to the public, the limits of acceptable criticism are much broader than for ordinary citizens, and they must tolerate a higher level of criticism commensurate with the public power they wield (*Emin Aydın*, B. No: 2013/2602, 23.01.2014; *Tuşalp v. Turkey*, no:32131/08 and 41617/08, 21.02.2012, *Lingens v. Austria*, no. 9815/82, 08.07.1986, *Oberschlick v. Austria*, no. 11662/85, 23.05.1991; *Eon v. France*, no. 26118/10, 14.03. 2013; *Mladina D.D. Ljubljana v. Slovenia*, no: 20981/10, 17.04.2014). All these decisions guarantee the freedom of political debate (*Lingens v. Austria*, no. 9815/82, 08.07.1986), which lies at the very heart of the concept of a democratic society, and, in this context, the right to criticise politicians in the strongest terms and the effective scrutiny by citizens of the actions of those in power in the political arena.

The Constitutional Court has once again emphasised in its recent rulings that the limits of acceptable criticism for politicians are broader than those for ordinary

citizens, and therefore more tolerance should be shown towards criticism directed at politicians than towards ordinary people. In this context, regarding expressions such as “disrespectful,” “bandit,” and “you are not a man” directed at politicians, it has stated that the limits of freedom of expression that politicians, who have a heavy obligation to tolerate criticism, should benefit from should be correspondingly broad. (Eyüp Hanoğlu, B. No: 2015/13431, 23.05.2018, § 44; Hayko Bağdat, B. No: 2016/256, 28.11.2019, § 45; Turgut Altınok, B. No: 2017/36724, 29.01.2020, § 31, Mehmet Özhasaki, B. No: 2015/4972, 08.05.2019, § 23).

In ECtHR judgments, the terms “basest opportunism,” “immoral,” and “undignified” are used in particular against politicians, especially Prime Ministers and Presidents (*Lingens v. Austria*, no. 9815/82, 08.07.1986). “retarded” (*Oberschlick v. Austria*, no. 11662/85, 23.05.1991), “with a fascist past” (*Feldek v. Slovakia*, no. 29032/95, §§ 86, 90), “Get lost, you sad prick” (*Eon v. France*, no. 26118/10, 14.03.2013, § 59) as harsh criticism of a political nature. In the aforementioned *Önal v. Turkey (2)* judgment, the ECtHR also noted that the applicant’s accusations against then-President Süleyman Demirel of “drug trafficking, managing the mafia within the state, gaining advantage from the war against the Kurds, attempting to eliminate former President Turgut Özal, and legitimizing murders committed by the state” as politically motivated harsh criticism, but ruled that these statements were protected under the Convention. In the *Vedat Şorli v. Turkey* judgment, the Court also characterised the punishment imposed on the applicant for sharing a cartoon and a collage with highly critical content on social media as a violation of the Convention. Similarly, in the *Ersoy v. Turkey* judgment, the Court considered the punishment of the applicant under Article 125(3) of the Turkish Penal Code for making a harsh criticism on his social media account about a current political event while President Erdoğan was still serving as Prime Minister, stating “...this is a second slap in response to his attack on students like a dog mad with revenge...” as a violation of freedom of expression. In this context, the ECtHR stated that Erdoğan, who was Prime Minister at the time, had a high obligation to tolerate criticism due to his position and responsibilities; ruled that Article 125/3 of the Turkish Penal Code, which defines criticism of elected politicians as a crime under a special provision, is incompatible with the Convention (*Ersoy v. Turkey*, no. 19165/19, 15.06.2021).

In recent Court of Cassation decisions, acquittals were upheld in trials concerning extremely harsh statements made against former Ankara Mayor Melih Gökçek, such as “you rude bastard,” “you ill-mannered bastard,” and “you son of a bitch Melih Gökçek, did you get that information from your grandmother... You bastard called our founder uncircumcised... Did you sleep with him, you... bastard?” The affirmation decisions issued by the 4th and 18th Criminal Chambers of the Court of Cassation stated that “it is natural for those who hold or seek public office to be subject to harsher criticism than others.”⁴⁹ In its previous decisions, the Court of Cassation used similar reasoning regarding politicians, stating that “fascist” and “megalomaniac” (Court of Cassation 8th Criminal Chamber, 2015/5105 E., 2017/9614 K., 26.09.2017), “bigot,” “ignorant,” “fanatic,” “apostate” (Court of Cassation General Assembly of Civil Chambers, 27.09.2006, E:

⁴⁹ <http://www.diken.com.tr/yargitay-karari-edepsiz-melih-gokcek-demek-hakaret-degil-estiri/>; <http://www.cumhuriyet.com.tr/haber/yargitay-onadi-melih-gokceke-o-cocugu-diyen-sanik-beraat-etti-729627>

2006/4-550 K: 2006/570), “making low-level statements”, “making immoral attacks”, “being in a state of negligence and betrayal”, “engaging in dirty politics” (Court of Cassation General Assembly of Civil Chambers, 05.02.2014, E: 2013/4-205 K: 2014/56), “imposing,” “religious profiteer,” “fake secularist,” “puppet of others,” “manipulated by others” (Court of Cassation, 4th Civil Chamber, 17.11.2005, E: 2004/15600, K: 2005/12337), “indecent,” “draft,” “disgraceful,” “having lost his mind and reason” (Court of Cassation, 4th Civil Chamber, 17.04.2014, E:2014/3761 K:2014/6519) and “spineless” (Court of Cassation, 4th Civil Chamber, 18.06.2007, E:2006/9641, K:2007/8260) have been deemed lawful because the addressee of the statement was a politician.

For these reasons, it is necessary to clarify why a person using expressions directed at politicians should not benefit from this broad freedom, especially when it comes to expressions directed at politicians.

Furthermore, within this scope, it is expected that the decision will clarify the difference in assessment between value judgments and factual statements, particularly in cases where journalists have been penalised. It has been determined that statements containing factual information can be proven, but that requiring proof of statements based on value judgments would constitute a violation of freedom of opinion (*Tuşalp v. Turkey* no: 32131/08 and 41617/08, 21.02.2012 §. 43).

Therefore, it has been deemed sufficient for the statement to have a factual basis in terms of value judgments. Consequently, statements with a factual basis cannot be characterised as an attack on personal rights simply because they are harsh, crude or aggressive. Even if these statements are shocking, they can be evaluated within the scope of the right to criticism and freedom of expression (*Tuşalp v. Turkey*, nos. 32131/08 and 41617/08, 21.02.2012 § 49.48; *Hriko v. Slovakia*, B. No. 49418/99, 20.10.2004, § 40, 45; *Jerusalem v. Austria*, B. No. 26958/95; 27.02.2001, § 44). According to the Constitutional Court, “freedom of expression largely aims to guarantee freedom of criticism. Therefore, the use of harsh language in the expression and dissemination of ideas should be considered natural” (*Bekir Coşkun* [GK], B.No 2014/12151, 4/6/2015, § 64). In one of its decisions, the Constitutional Court has determined that even if not supported by factual claims, the excessiveness of value judgments is an acceptable situation (*Ergün Poyraz (2)*, B. No: 2013/8503, 27.10.2015 §. 75, *Jerusalem v. Austria*, B. No: 26958/95, 27/2/2001, § 43.)

In the *Deniz Karadeniz and Others* ([GK], B. No: 2014/18001, 6/2/2020) application, the Constitutional Court made assessments regarding whether the words “Thief Murderer AKP” on a banner displayed in a party building during an election rally organized by the ruling party could benefit from freedom of expression protection. In its decision, the Constitutional Court stated that the words on the banner were value judgments directed at the AK Party, not individuals, and then examined the words separately and concluded that they should benefit from freedom of expression protection. (See also *Ayhan Algül and others* [2nd Chamber], Case No. 2016/5921, 16/3/2022)

Therefore, it is necessary to clarify in the decisions why value judgments used by journalists in their opinion pieces on current events do not fall within the scope of freedom of expression.

2. Interventions Aimed at Protecting National Security and Public Order

In interventions made on the grounds of national security and public order, the balance that must be struck between freedom of expression and public order should be assessed through the three-part test established by the ECtHR's 1999 Turkey decisions and subsequent case law. The ECtHR has developed a three-part test similar to the US Supreme Court's "clear and present danger" criterion. Accordingly, an assessment must be made taking into account: **i)** who said what and by what means, **ii)** whether it incites violence, and **iii)** whether the statement is likely to lead to violence.

For crimes involving violence (Anti Terror Law Art. 7/2, 6/2; Turkish Penal Code Art. 215, 216, 220/6, 220/7, 300, 301, and even 314/2, 302, 309, 312) the above-mentioned test must be applied. The unpredictable interpretation and application of terrorism legislation in Turkey has become a systemic problem. Many people have been tried, detained, and punished under Articles 302, 309, and 312 of the TPC, which carry the penalty of aggravated life imprisonment, for a tweet, an article, or an interview. (Kobane case, Cumhuriyet case, Sözcü case, FETÖ cases in which journalists were tried, Mehmet Hasan Altan, Ali Bulaç, Şahin Alpay, Murat Aksoy, Atilla Taş, Mümtazer Türköne, Nazlı Ilıcak, Ahmet Hüsrev Altan, etc.).

In all cases where the ECtHR ruled that the freedom of expression of those investigated and prosecuted under Article 301 of the Turkish Penal Code (or Article 158 of the old TPC) had been violated, it concluded that the expression did not contain "any call for the use of violence, armed resistance, or insurrection, and that these texts did not constitute hate speech," thus finding that Article 10 of the Convention had been violated. (*Surat v. Turkey*, § 39; *Çamyar v. Turkey*, § 69; *Balbal v. Turkey*, § 32; *Yurtsever v. Turkey*, § 32; *Özer v. Turkey*, § 28; *Çamyar v. Turkey*, § 29).

In its judgment in *Özer v. Turkey* (3) (no. 69270/12, 11.02.2020), the ECtHR explained the method of examination it applies in propaganda cases. Accordingly, in cases concerning criminal proceedings initiated on the basis of Article 7(2) of the Anti-Terror Law, it generally conducted two types of examination, concluding that Article 10 of the Convention had been violated on the grounds that the interference in question was not necessary in a democratic society. In some cases, the Court examined the disputed writings and statements that formed the basis for the conviction of the persons concerned, as well as other actions alleged against the applicants. In these cases, the Court stated that, even if the writings, statements, and actions in question, taken as a whole, were sometimes hostile and contained views that could be considered harsh criticism of state authorities or favourable to certain illegal organizations, their leaders, or members, they cannot be considered to contain incitement to violence, armed resistance, or rebellion, or to constitute hate speech, and that they are important elements to be taken into account in its view. However, it concluded that they could not incite violence by instilling deep and irrational hatred towards specific individuals. (*Ayhan v. Turkey* (no. 1), no. 45585/99, 10.11.2004; *Gül and Others v. Turkey*, no. 4870/02, 08.06.2010; *Çamyar and Berktaş v. Turkey*, no. 41959/02, 15.02.2011; *Yavuz and Yaylalı v. Turkey*; *Faruk Temel v. Turkey*; *Öner and Türk v. Turkey*; *Belge v. Turkey*; *Fatih Taş v. Turkey* (no. 2), no. 6813/09, 10.10. 2017; *Selahattin Demirtaş v. Turkey*; *Bayar v. Turkey* [Committee], no. 24548/10, 19.06.2018; *Sarıtaş and Geyik v. Turkey*

[Committee], no. 70107/11, 19.06.2018, *Arslan and Others v. Turkey* [Committee], no. 3752/11, 10.07.2018; *Dündar and Aydınkaya v. Turkey* [Committee], no. 37091/11, 10.07.2018; *Polat and Tali v. Turkey* [Committee], no. 5782/10, 25.09.2018).

In contrast, in some other cases, the Court did not examine the disputed writings, statements, or actions that led to the applicants' conviction by the domestic courts but rather conducted a procedural review of the grounds relied upon by the domestic courts in their judgments to convict the persons concerned. The Court has resorted to this method of examination, in particular where it was not clear and obvious that the disputed writings, statements or acts could not be regarded as containing a call for the use of violence, armed resistance or uprising, or as constituting hate speech, and where that question required, in particular, an examination of the content of the writings, statements or acts in question, the context in which they were made, their capacity to cause harm and the circumstances of the case, in accordance with the principles established in its case law under Article 10 of the Convention concerning verbal or written statements presented as fuelling or justifying violence, hatred or intolerance.

The Court also found that, in this second group of cases, the national authorities had failed to provide satisfactory reasoning or relevant and sufficient grounds to justify the applicants' convictions, and in particular had failed to assess whether the disputed writings, statements, or actions, in terms of their content, the context in which they were written, and their potential to cause harm, as constituting a call for violence, armed resistance, or insurrection, or as hate speech; the national authorities did not conduct an adequate examination in light of all the criteria reported and applied by the Court in cases concerning freedom of expression, or failed to strike a fair balance between the applicant's right to freedom of expression and the legitimate aims pursued, in accordance with the criteria established in its case law. (*Halis v. Turkey*, no. 30007/96, 11.01.2005; *Menteş v. Turkey (no. 2)*, no. 33347/04, 25.01.2011, *Fatih Taş v. Turkey (no. 4)*, no. 51511/08, 24.04.2018; *Mart and Others v. Turkey*, no. 57031/10, 19.03.2019; *Yigin v. Turkey* [Committee], no. 36643/09, 30.01. 2018; *Zengin and Çakır v. Turkey* [Committee], no. 57069/09, 13.02.2018)

In such cases, it is necessary to clarify in the judgment how the expression in question was characterised as incitement to violence and/or hate speech in all cases where it was alleged to threaten national security and public order.

On the other hand, in the case of *Hatice Çoban v. Turkey* (no. 36226/11, 29.10. 2019), the Court held that when assessing the proportionality of an interference with the exercise of freedom of expression guaranteed by Article 10 of the Convention, the procedural safeguards that must be taken into account, the national courts failed to fulfil their duty under Article 10 of the Convention to strike a fair balance between the different interests involved, because they did not respond to the applicant's relevant arguments concerning the reliability and accuracy of the main evidence relied upon by the courts as the basis for convicting the applicant (§§ 38-40). As can be seen, the reason for the violation in *Hatice Çoban* application is directly a procedural deficiency, namely, the failure to accept requests to hear witnesses to determine the content of the speech because the content of the police report on the applicant's speech did not match the content of the published press releases. Although the applicant also

claimed a violation of Article 6 in this application, the Court did not deem it necessary to conduct a separate examination under this article. It merely decided that this procedural deficiency violated freedom of expression.

3. Interventions Aimed at Protecting Public Health and Morals

It is generally accepted that the state has broader discretion in interventions targeting freedom of expression for the purpose of protecting public health and public morals. In this context, it is accepted that the protection of religious beliefs may be considered within the scope of the legitimate aim of protecting morals, depending on the specific circumstances of each Contracting State (*Sekmadienis Ltd. v. Lithuania*, § 69). As there is no common understanding among European countries regarding attacks on religious beliefs and sanctions related to the protection of the rights of others, the Contracting parties' margin of appreciation is broadened when regulating freedom of expression in areas that may offend personal beliefs on matters of morality or religion (*Aydın Tatlav v. Turkey*, § 24; *Rabczewska v. Poland*, § 52).

When assessing the necessity of interventions in freedom of expression in a democratic society for the purpose of protecting public health and morals, the Court takes into account the nature and content of the expression, its impact, and the severity of the sanction.

a) Conflict between Freedom of Religion and Freedom of Expression

The contribution of expressions to public debate, regardless of the purpose of the intervention, limits the State's discretion to intervene. With regard to expressions concerning religion, the Court has stated that it is necessary to determine whether the expressions are insulting in tone, whether they directly target persons belonging to the faith in question, or whether they constitute an attack on sacred symbols. Therefore, those who choose to exercise their freedom to express their religion cannot naturally expect to be free from any criticism and must tolerate and accept the rejection of their religious beliefs by others and even the dissemination of doctrines contrary to their own beliefs by others (*Otto-Preminger-Institut v. Austria*, § 47). The Court is of the opinion that presenting elements of religious worship in a provocative manner that could hurt the feelings of persons belonging to a religion could be seen as a malicious violation of the spirit of tolerance, which is one of the foundations of democratic societies (*E.S. v. Austria*, § 53). In this context, the ECtHR ruled that the conviction of a speaker who accused the Prophet of Islam of paedophilia in a speech did not constitute a violation of Article 10 of the Convention, as his malicious attacks could cause prejudice and jeopardise religious peace (§§ 57-58).

On the other hand, in the application concerning the punishment of the applicant who published a book containing a critical interpretation of the Quran, the Court concluded that, although Muslims might be offended by sarcastic comments about their religion when reading the book, the comments did not contain a tone of insult

directed specifically at believers or malicious attacks on sacred symbols, and therefore the interference was disproportionate (*Aydın Tatlav v. Turkey*, §§ 26-31).

Since it is inconceivable for the state to protect a religion within a secular legal system, the legitimate reason for restricting freedom of expression is not religion but the protection of the rights of those who believe in that religion. Therefore, although there is a strong, albeit controversial, tendency to punish *religious hatred* speech, there is widespread acceptance in liberal democracies that crimes aimed at insulting religion and religious feelings (*blasphemy, religious insult*) should not be punished.

According to the 2008 report of the Venice Commission, while blasphemy is a crime in only seven Council of Europe member states, *religious insult* is a crime in half of the member states. In the same report, the Venice Commission explicitly stated: “The crime of blasphemy should be abolished in all member states. Insulting religious feelings should also be decriminalised in cases where incitement to hatred is not a constituent element.”⁵⁰

The Human Rights Committee, the monitoring body of the International Covenant on Civil and Political Rights, to which Turkey is a party, stated in its 2011 General Comment on Freedom of Opinion and Expression that “prohibiting disrespect for a religion or belief system would be contrary to the Covenant.”⁵¹

Therefore, it should be noted that the value conflicting with freedom of expression is not religion itself but the rights of those who believe in that religion, and the balancing test should be conducted accordingly. In other words, direct criticism of a religion or belief system should not be subject to restriction; rather, hate speech targeting those who believe in that religion should be restricted.

For example, there is not a single example in the case law of the ECtHR where a person has been legitimately punished for speaking ill of a religious official, a religious scholar, or even the general worldview of the church. In the *Giniewski v. France* case, the applicant accused the Catholic Church of laying the foundations for the Holocaust. The applicant wrote: “Many Christians have acknowledged that scriptural anti-Judaism and the doctrine of the ‘fulfilment’ [accomplissement] of the Old Covenant in the New led to anti-Semitism and prepared the ground in which the idea and implementation [accomplissement] of Auschwitz took seed. “ The applicant was tried and convicted on the grounds that this statement constituted an insult to the Christian community. The ECtHR ruled that this punishment violated the Convention. The Court found that, even if the statements shocked listeners, they did not constitute hatred or disrespect and fell within the scope of freedom of expression. (*Giniewski v. France*, no. 64016/00, 31.01.2006, § 52).

As in the *Giniewski v. France* case, a criminal investigation was launched against the applicant in the *Klein v. Slovakia* case following a complaint by religious associations. Klein was tried for insulting the nation, race, and religion. In his article, in which he criticised the Slovak Church in very harsh terms and mocked it, Klein also

50 European Commission for Democracy through Law (Venice Commission), Report on the relationship between freedom of expression and freedom of religion: the issue of regulation and prosecution of blasphemy, religious insult and incitement to religious hatred, October 17-18, 2008, Doc. No. CDL-AD(2008)026

51 General Comment No. 34, Article 19: Freedoms of opinion and expression, CCPR/C/GC/34, September 12, 2011, § 48

stated, “ I do not understand at all why decent Catholics do not leave the organisation which is headed by such an ogre.” The ECtHR ruled that the article in question did not affect believers’ ability to fulfil their religious obligations and did not constitute contempt for the content of religious belief, therefore finding that the applicant’s freedom of expression had been violated. (*Klein v. Slovakia*, no. 72208/0131.10.2006, § 52).

The exercise of the right to manifest one’s religion as provided for in Article 9 of the Convention does not mean that a person is immune from criticism of that belief, regardless of whether they belong to the majority or minority religion. Believers must tolerate both the rejection of their religious beliefs by others and the propaganda of opposing views (*Otto-Preminger-Institut v. Austria*, no. 13470/87, 20.09.1994, § 47; *I.A.v. Turkey*, no. 42571/98, 13.09.2005, § 28; *Aydın Tatlav v. Turkey*, no. 50692/99, 02.05.2006, § 27). The Court emphasized that religious groups must tolerate the rejection or denial of their religious feelings and beliefs by others, and even the propagation of views that are contrary or diametrically opposed to their beliefs, provided that this does not amount to incitement to hatred or religious intolerance (*E.S v. Austria*, no. 38450/12, 25.10.2018, § 52).

On the other hand, the fact that the majority holds a certain belief does not make that belief more deserving of protection. The ECtHR has stated that the argument of majority discomfort would imply that the exercise of the minority’s rights protected by the Convention is subject to the consent of the majority, which would be contrary to the fundamental principles of the Convention, and that it is unacceptable for individuals expressing their religious beliefs in a pluralistic democracy to expect to be exempt from any criticism. In a democratic society, believers must accept and tolerate the rejection of their beliefs by others and even the expression of hostile views against the beliefs of others. (*Sekmadienis Ltd v. Lithuania*, no. 69317/14, 30.1.2018, §§ 79-82).

Recently, there has been an increase in prosecutions in Turkey on the grounds of insulting religion.⁵² Even though the conditions are not met, some of these prosecutions are being conducted under Article 216/1 of the Turkish Penal Code, which regulates the crime of “publicly inciting hatred and hostility against a segment of the population with different characteristics in terms of social class, race, religion, sect, or region.” (*Hakan Aygün* [1st Chamber], B. No: 2020/13412, 12/1/2021, in particular § 60). The prosecution of singer Gülşen for a statement she made at a concert to imam hatip graduates,⁵³ the criminalization of a quote by Fazıl Say from Hayyam,⁵⁴ or the prosecution of both the cartoonist and magazine staff for a cartoon published in *LeMan Magazine*, are among the first examples that come to mind in this context.

One of the problems encountered in the decision-making process in these cases is the references made to ECtHR rulings. In most of its recent rulings in this area, the ECtHR has explained in a reasoned manner that freedom of expression outweighs

⁵² Independent Türkçe, Indictment filed against *LeMan* magazine editors with up to 4 years and 6 months in prison, <https://www.indyturk.com/node/764373/haber/leman-dergisi-y%C3%B6neticileri-hakk%C4%B1nda-4-y%C4%B1l-6-aya-kadar-hapis-istemiyle-iddianame>

⁵³ BBC, Gülşen sentenced to 10 months in prison, sentencing postponed <https://www.bbc.com/turkce/articles/clm9g1pjl0o>; AA, Decision announced in singer Gülşen’s trial <https://www.aa.com.tr/tr/gundem/sarkici-gulsenin-yargilandigi-davada-karar-aciklandi/2887655>

⁵⁴ BBC, Fazıl Say sentenced to 10 months in prison for Hayyam tweet, https://www.bbc.com/turkce/haberler/2013/04/130415_fazil_say_karar

freedom of religion. However, even in its older rulings where it considered restrictions on freedom of expression to be legitimate, it did not accept that individuals should be deprived of their liberty because of their statements. For example, in the *Otto Preminger Institute v. Austria* (no. 13470/87, 20.09.1984) case, the subject of the application was the seizure of a film shown by the association, which the ECtHR considered a proportionate intervention. However, in an application made by a legal entity, the parties concerned were not subject to imprisonment.

In the case of *I.A. v. Turkey* (no. 42571/98, 13.09.2005), which involved very harsh statements about the Prophet of Islam, the ECtHR also found no violation by a majority of 4 to 3. However, in reaching this conclusion, it is clear that the Court took into account the proportionality of the sanction. The applicant was fined 3,291.00 TL at the time of the trial. At that time, this fine was equivalent to approximately 16 US Dollars. In determining that this fine was proportionate, the ECtHR used the following statements: “As to the proportionality of the impugned measure, the Court is mindful of the fact that the domestic courts did not decide to seize the book and accordingly considers that the insignificant fine imposed was proportionate to the aims pursued (§32).”

As can be understood from this, it will be accepted that penalties imposed based on Article 216 of the Turkish Penal Code are based on relevant and sufficient grounds in very exceptional cases, and that if a severe penalty such as imprisonment is imposed, the grounds for this must be clearly stated.

In practice, it has been observed that these matters are not being taken into account.

b) Morality and Public Health

In examining the justification for an intervention pursuing the legitimate aim of protecting moral values and public health, the vulnerability of individuals in society who have access to the material in question is an important criterion in measuring its impact on society.

The vulnerability of the audience to whom the statements are addressed has been used to justify the legitimacy of the intervention, given that the content alleged to be obscene in the *Handyside v. United Kingdom* case targeted children aged 12-18 within the general moral context. This justification also applies to the protection of health. The Court emphasised that the impact of the message on this group must be taken into account, given that the majority of readers of a magazine containing articles that could encourage the use of tobacco products are young people, who are more vulnerable. Consequently, in one case, the Court ruled that the fact that the incriminated publications could be seen as encouraging people, especially young people, to consume tobacco products constituted a relevant and sufficient reason to justify the intervention (*Société de conception de presse et d'édition and Ponson v. France*, no. 26935/05, 05.03.2009, §§ 58-60).

On the other hand, the fact that the messages are particularly accessible to vulnerable groups such as children is not sufficient to justify State intervention if messages are not aggressive, sexually explicit, or do not encourage specific sexual

behaviour, and that ideas of diversity, equality, and tolerance are presented to minors, (*Bayev and Others v. Russia*, no. 67667/09, 20.06.2017, § 82).

Another criterion for the necessity of intervention in a democratic society is that the sanction applied must be proportionate. If the lightest sanction necessary to achieve the legitimate aim is not applied, the sanction cannot be said to be proportionate. For example, the Court held that a blanket restriction on providing information about abortion facilities abroad to pregnant women, regardless of their age, state of health, or reasons for seeking advice on termination of pregnancy, was too broad and therefore disproportionate to the aims pursued (*Open Door and Dublin Well Woman v. Ireland*, nos. 14234/88 and 14235/88, 29.10.1992, §§ 73-80).

Similarly, the Court found that the seizure of all copies of a magazine by the local authorities was disproportionate, even though other suitable alternatives were available (*Kaos GL v. Turkey*, no. 4982/07, 22.11.2016, §§ 61 and 63).

As a matter of principle, the Court considers that peaceful and non-violent forms of expression should not be subject to the threat of imprisonment (*Murat Vural v. Turkey*, no. 9540/07, 21.10.2014, § 66). In an application concerning an applicant, a feminist activist, who was convicted of “indecent exposure” and given a one-month suspended prison sentence in connection with a demonstration in which she simulated an abortion topless in a church in Paris to protest the Catholic Church’s stance on abortion, the Court found the penalty imposed on the applicant to be excessive. The Court noted that, given the public interest nature of the applicant’s expression, the State’s margin of appreciation was narrow and that, consequently, a prison sentence, even if suspended, could only be justified in exceptional circumstances (*Bouton v. France*, no. 22636/19, 13.10.2022, §§ 48-54). A prison sentence can only be considered legitimate in response to serious statements, such as hate speech, which violate another right. However, this principle does not apply to expressions that are not in the public interest, such as commercial advertising (*Perrin v. United Kingdom*, no. 5446/03, 18.10.2005).

Furthermore, when assessing the proportionality of imposing a fine or awarding damages, the individual circumstances of the person responsible for the speech in question, and in particular their ability to pay the amounts in question, must be taken into account. In a case where publishers of criminal material were ordered to pay “significant” sums in fines and damages, the Court ruled that, when examining the severity of the sanction, it must be compared to the income generated by a high-circulation magazine (*Société de conception de presse et d’édition and Ponson v. France*, § 62).

According to the Court, the legitimacy of a measure or sanction must also be examined in light of the overall impact of the expression in question on the freedom of expression of its author. Therefore, the Court considered that banning the association itself or its website could be disproportionate, but that limiting the scope of the restriction to the display of posters in public places was a way of ensuring that the applicant association’s rights were infringed to the minimum extent possible (*Mouvement Raëlien Suisse v. Switzerland [GC]*, no. 16354/06, 13.07.2012, § 75).

In Turkey, just as statements about religion are frequently the subject of criminal proceedings, pressure regarding sexual orientation is also seen to be increasing. Media outlets close to the government and even high-level politicians constantly label LGBT+ individuals as “deviant” and demand increased measures against them. This

recent trend has also been instrumental in the initiation of a criminal investigation against singer Mabel Matiz.⁵⁵

In such cases, it is clear that decisions cannot be made based solely on the discomfort experienced by a segment of society. As the text of the article makes clear, incitement alone is not sufficient to establish a crime. At the same time, the act in question must create a clear and imminent danger to public safety or have the potential to disrupt public order. The danger must arise from the expression itself; in other words, there must be a causal link between the danger that arises and the expression. The existence of this danger must be concretely established, and it must also be demonstrated that the damage arising from it is highly likely to occur if immediate measures are not taken. Again, for this act to be punishable, the expression must be “suited for disturbing public peace.” According to Court of Cassation decisions, merely turning away, engaging in behaviour that expresses abstract rejection or disrespect, or uttering words to that effect is not considered sufficient for the crime to be committed (Court of Cassation, the General Assembly of Criminal Chambers, E:2007/244, K:2008/92, 28.04.2008).

As stated in the investigation section, the absence of a group that dislikes LGBT+ individuals does not prove that this element has been fulfilled. It must be demonstrated that a post about LGBT+ individuals contains a threat to restrict the rights and freedoms of others. If the decision is based solely on the argument that the majority is offended, without discussing this element, it must be concluded that the right to a reasoned decision has been violated.

In trials concerning crimes under Articles 216/3, 225, 226, 190/2, etc. of the Turkish Penal Code, criminal courts must conduct an examination and assessment within the framework of the principles explained above. If the decision does not include an assessment based on these criteria, the Constitutional Court and the European Court of Human Rights may rule that freedom of expression has been violated due to the lack of relevant and sufficient justification.

4. Criteria for Evaluating Hate Speech

There is no universally accepted definition of hate speech in international law. This lack of common understanding and consensus on the meaning of the term makes the term “hate speech” susceptible to abuse for the purpose of suppressing speech within the scope of freedom of expression.

The 1997 Council of Europe recommendation on hate speech states that the term “**hate** speech” should be understood as “*covering all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin.*”⁵⁶ The European Court of Human Rights qualifies as hate speech only those

⁵⁵ BBC, Mabel Matiz faces up to three years in prison on charges of ‘obscurity’, <https://www.bbc.com/turkce/articles/cj4yeke1502o>

⁵⁶ Council of Europe, Committee of Ministers, Recommendation R (97) 20 (1997).

forms of expression that incite, provoke, encourage, or legitimise hatred based on intolerance (including religious intolerance) that incite a certain level of violence. Article 20(2) of the International Covenant on Civil and Political Rights defines prohibited speech as “any advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility, or violence”. The United Nations Human Rights Committee ruled that the prohibition of such “hate speech” propaganda must be subject to all restrictions under Article 19.3 of the ICCPR and must comply with strict necessity and proportionality tests.⁵⁷

To clarify the distinction between different definitions, and to clarify the difference between hate speech to be prohibited and, for example, legally permissible expressions that are offensive, shocking, or disturbing, the UN Rabat Action Plan has developed a six-element test for prohibiting advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility, or violence.

- 1. Context of the expression:** Context is of great importance in assessing whether specific expressions incite discrimination, hostility, or violence against a target group. The expression must be assessed within the prevailing social and political conditions in which it is used.
- 2. Author of the statement:** The position of the author of the statement in society, particularly in relation to the audience to which the statement is directed, should be taken into account.
- 3. Intent:** Article 20 of the UN International Covenant on Civil and Political Rights distinguishes between statements used negligently or carelessly and statements that constitute advocacy and incitement that should be prohibited. The term advocacy should be understood as requiring the intent to openly promote hatred towards the target group, while incitement should be understood as statements that pose an imminent risk of discrimination, hostility, or violence against persons belonging to national, racial, or religious groups.
- 4. Content and form:** In addition to the degree to which the expression used is inflammatory and direct, the form, style, nature, or balance of the arguments used should be taken into account.
- 5. Scope of the statement:** Elements to be considered in terms of scope include the sphere of influence of the statement, whether the statement is public,

⁵⁷ UN Human Rights Committee, General Comment No. 34, UN Doc. CCPR/C/GC/34, 12.09.2011, § 50.

See also: The European Commission against Racism and Intolerance (ECRI) offers the following definition of hate speech: “the advocacy, promotion or incitement, in any form, of the denigration, hatred or vilification of a person or group of persons, as well as any harassment, insult, negative stereotyping, stigmatization or threat in respect of such a person or group of persons and the justification of all the preceding types of expression, on the ground of “race”,¹ colour, descent, national or ethnic origin, age, disability, language, religion or belief, sex, gender, gender identity, sexual orientation and other personal characteristics or status; Recognising that hate speech may take the form of the public denial, trivialisation, justification or condonation of crimes of genocide, crimes against humanity or war crimes which have been found by courts to have occurred, and of the glorification of persons convicted for having committed such crimes.”

which dissemination tools are used, and the size of the audience reached by the statement.

- 6. Probability of the danger occurring:** This is assessed by determining whether there is a reasonable possibility that the statement will encourage the incited action against the targeted group, and whether there is a sufficiently direct causal link between the statement and the possibility of danger.

The UN Strategy and Action Plan on Hate Speech⁵⁸ has adopted a comprehensive approach to respond to hate speech once it has been identified as such, defining expressions as unlawful and lawful at three levels. At the highest level, hate speech that is prohibited by international law and meets the “Rabat Threshold Test” requires criminal sanctions. At the intermediate level, certain forms of hate speech may be prohibited only if restrictions are provided for by law, pursue a legitimate aim, and are necessary and proportionate. These less severe forms of hate speech should be subject to civil or administrative law restrictions or public policy. At the lowest level, there should be no legal restrictions on the dissemination of aggressive, shocking, or disturbing but lawful expressions.

In the Council of Europe region, any restriction on expression and other forms of expression on the internet must meet the strict criteria set out in Article 10 of the European Convention on Human Rights. According to the case law of the European Court of Human Rights, any content-based restriction or interference must be provided for by law, pursue a legitimate aim, and the interference must satisfy the necessity and proportionality tests in a democratic society.

The ECtHR has adopted two different approaches to hate speech, depending on the nature of the speech. First, the ECtHR has addressed hate speech that excludes the fundamental values embraced by the Convention or aims to destroy the democratic order envisaged by the Convention under Article 17 of the Convention, entitled “Prohibition of abuse of rights,” and has excluded it from the protection of the Convention (*Communist Party of Germany v. Federal Republic of Germany*, no. 250/57, 20/7/1957; *Nachtmann v. Austria*, no. 36773/97, 9/9/1998; *Garaudy v. France*, no. 65831/01, 24/6/2003; *Norwood v. the United Kingdom*, no. 23131/03, 16/11/2004)

ECtHR has assessed statements containing ethnic, religious, and racial hatred that incite violence, support terrorist activities (*Roj TV A/S v. Denmark*, No. 24683/14, 17/04/2018), deny the Holocaust, or legitimise a pro-Nazi policy (*Williamson v. Germany*, no. 64496/17, 08.01.2019) within this scope. For example, statements denying the Jews the right to national dignity (*Pavel Ivanov v. Russia*, 35222/04, 20.2.2007), “racist political views advocating the expulsion of Surinamese, Turks, and other migrant workers from the Netherlands” (*Glimmerveen and Hagenbeek v. the Netherlands*, no. 8348/78, 11.10.1979) and views linking an entire religious group to a serious terrorist act (*Norwood v. the United Kingdom*, no. 23131/03, 16.11.2004). It has been determined that such views do not benefit from the protection of the Convention under Article 17 of the ECHR.

⁵⁸ United Nations, Strategy and Plan of Action on Hate Speech, Detailed Guidance on Implementation for UN Field Personnel, September 2020, p. 10, https://www.un.org/en/genocideprevention/documents/UN%20Strategy%20and%20PoA%20on%20Hate%20Speech_Guidance%20on%20Addressing%20in%20field.pdf

The ECtHR examined the statements in question, which it assessed as amounting to “hate speech” insofar as they did not aim to destroy fundamental rights or eliminate the rights guaranteed by the Convention, taking into account the conditions for restricting freedom of expression as set out in Article 10(2) of the Convention.

In this context, it was determined that, first and foremost, not only the text or content of the speech but also the context in which it was made must be taken into account, and that many factors must be evaluated, including who made the speech, where and when it was made, the target audience, and whether there was a real and imminent danger that the expression would lead to violence, hatred, or intolerance. The ECtHR emphasized that national courts must consider the context of the case, the public interest, and whether the author’s or speaker’s intent, to some extent, justified the use of provocation or exaggeration. It found that, in the absence of an assessment based on these criteria, the interference with freedom of expression violated Article 10 of the Convention. (*Tagiyev and Huseynov v. Azerbaijan*, no. 13274/08, 05.12.2019, § 46, 48).

As a result of this examination, the ECtHR assessed statements that incite or encourage violence, hatred, or hateful acts, or that glorify or legitimize violence, as “hate speech” and stated that the interference with the applicants’ freedom of expression was in accordance with Article 10 (*Sürek v. Turkey* (No. 1) [GC], no. 26682/95, 08.07/1999, §§ 61, 62; *Gündüz v. Turkey*, no. 59745/00, 13.11.2003; *Leroy v. France*, no. 36109/03, 02.10.2008, § 45; *Le Pen v. France*, no. 18788/09, 20.4.2010). As can be seen, in these applications, the ECtHR did not reject the application outright as an abuse of rights under Article 17 of the Convention, but examined these on their merits and ruled that freedom of expression had not been violated on the grounds that the intervention was justified.

Indeed, in the *Soulas and Others v. France* decision, the Court noted that the domestic courts, in convicting the applicants, had emphasized that the terms used in the book were intended to provoke feelings of rejection and hostility among readers towards the communities portrayed as the main enemy, that the use of military language intensified this, and that the book directed its readers towards the solution proposed by the author, namely to share in a renewed ethnic conquest war. It classified the expressions at issue as “hate speech” and found the interference with freedom of expression justified (*Soulas and Others v. France*, no. 15948/03, 10.7.2008, § 43).

In the *Balsytė-Lideikienė v. Lithuania* case, the applicant defended aggressive nationalism and xenophobia (“The Lithuanian nation will survive only as a nationalist nation—there is no other way!”), and repeatedly accused the Jewish community of committing war crimes and genocide against Lithuanians and used the same language against the Polish people. The ECtHR assessed that these statements constituted “a biased and one-sided portrayal of relations among nations hindered the consolidation of civil society and promoted national hatred [and] could be attributed to an “ideology of extreme nationalism”, which promoted national hatred, xenophobia and territorial claims” and therefore concluded that the authorities did not exceed their discretion in considering that there was a social need compelling them to take measures against the applicant (*Balsytė-Lideikienė v. Lithuania*, no. 72596/01, 04.11.2008, § 79).

In the *Féret/Belgium* case, it was acknowledged that the slogans “Stand up against the Islamization of Belgium,” “Stop the fake integration policy,” and “Send non-European job seekers back home” could provoke feelings of distrust, rejection, and even hatred towards foreigners, particularly among the less educated segments of society (*Féret/Belgium*, no. 15615/07, 16.7.2009, § 71; see also *Le Pen v. France* (dec.), no. 18788/09, 20.4.2010; *Atamanchuk v. Russia*, no. 4493/11, 11.02.2020).

As can be seen, in all these cases where the ECtHR did not find a violation under Article 10, the applicants’ statements clearly expressed hatred towards a specific group. However, what distinguishes these cases from those it found unacceptable without examining them under Article 17 is that the statements at issue in these cases did not directly incite violence, punishment, or discrimination.

Therefore, in cases involving hate speech within this scope, it is first necessary to determine which category the hate speech falls into. If the speech falls into the first category, it must be punished, and applications related to such speech will be rejected as they are not considered to fall within the scope of freedom of expression. If the speech falls into the second category, the application will be examined on its merits, and it will be necessary to discuss whether the restriction of the expression is necessary in a democratic society.

B. PUBLICITY OF DECISIONS

Article 6 of the Convention guarantees that judgments shall be pronounced publicly. However, the Court has not adopted an absolute literal interpretation of the phrase “pronounced publicly.” (*Sutter v. Switzerland*, 1984, § 33; *Campbell and Fell v. the United Kingdom*, 1984, § 91). Although the wording of the Convention suggests that the decision must be read out in court, making a decision public in other ways may satisfy the requirements of the Convention. As a general rule, the manner of publication of the “judgment” under the domestic law of the respondent State must be assessed in light of the particularities of the proceedings in question and the purpose pursued by Article 6 § 1 in this context, namely to ensure that the administration of justice is subject to public scrutiny to safeguard the right to a fair trial. In making this assessment, the proceedings as a whole must be taken into account (*Welke and Białek v. Poland*, 2011, § 8). Therefore, the recording of the decision in the court register and its publication in official collections may satisfy the requirement of public announcement (*Sutter v. Switzerland*, no. 8209/78, 22.02.1984, § 34).

The complete concealment of a judicial decision from the public cannot be justified. Where legitimate security concerns are at stake, recourse may be had to specific techniques, such as concealing only those parts of judicial decisions that would jeopardize national security or the security of others (*Raza v. Bulgaria*, no. 31465/08, 11.02.2010, § 53; *Fazliyski v. Bulgaria*, no. 40908/05, 16.04.2013, §§ 67-68).

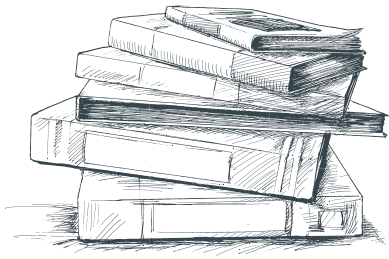
The right to a public hearing and the right to have the decision announced publicly are two separate rights under Article 6. The fact that one of these rights has not been violated does not in itself mean that the other right has not been violated. In other words, the public announcement of the judgment cannot compensate for the

unjustified secrecy of the hearings (*Artemov v. Russia*, no. 14945/03, 03.04.2014, § 109).

In Turkey, there are generally no issues regarding the publication of judicial decisions, particularly criminal ones. However, there are serious problems with statistics on recent decisions. In particular, the statistics on the number of investigations and prosecutions initiated for crimes related to freedom of expression, as well as the decisions rendered and their content, are heavily censored by the Ministry of Justice and are disclosed by grouping many crimes together. This practice makes reporting on freedom of expression issues quite difficult.

Another issue concerns the decisions issued by the Constitutional Court after consolidating cases. The Constitutional Court has been closing cases by merging numerous applications and issuing a single procedural violation decision. It has recently begun applying this practice, previously used for applications regarding reasonable time limits, to applications concerning freedom of expression as well. As it does with applications concerning access blocking, it has also begun to examine applications concerning criminal cases where a decision to postpone the announcement of the verdict has been issued by consolidating them. The number of applications merged in relation to suspended sentences has exceeded 3,500. However, in the files decided upon through consolidation, the decision contains no information about the consolidated files, the parties to the files, or the subjects of the files. It is known that most of these applications consist of cases essentially related to freedom of expression, such as defamation, insulting the president, terrorist propaganda, and inciting the public to hatred and hostility. These decisions only refer to an attached list, but this attached list is not published in the Official Gazette or on the Constitutional Court's website. Even the applicants cannot see the entire list; only an Excel list containing their names and applications is sent to the parties as an annex to the decision. (*Atila Yazar and others* ([GK], B. No: 2016/1635, 5/7/2022; *Abbas Yalçın and others*, B. No: 2014/8146, 29/3/2023 (608 applications); *Ahmet Alphan Sabancı and others* (62 applications); *Abdullah Kaya and Others* (503 applications)).

Decisions made this way effectively amount to censorship of freedom of expression. In this respect, this practice also violates the principle of publicity of the decision. Moreover, substantial difficulties are experienced during the execution of such decisions, and the violation decision yields no outcomes. Since the violation decision was issued due to procedural issues related to suspended sentences, when the courts of first instance conduct a retrial, they issue decisions that are identical to the previous one or result in harsher consequences. The fact that the decision is not made public also causes problems in terms of ECtHR applications. Individuals applying to the ECtHR face great difficulties even in proving that the Constitutional Court decision is relevant to them.



PROCEDURAL OBLIGATIONS IN ADMINISTRATIVE LAW

Although procedural obligations relating to freedom of expression are mainly discussed in the context of criminal cases, many forms of expression that do not constitute a crime are restricted through administrative sanctions. In addition to administrative appeal channels against these sanctions, procedural obligations to protect freedom of expression may also arise in administrative judicial proceedings.

Although administrative interventions in expression take many different forms, this study will examine a few of the most common topics. i. Freedom of Expression of Public Officials; ii. Administrative Intervention in the Freedom of Expression of Persons Other than Public Officials; iii. Administrative Measures Related to Press and Publication Activities; iv. Issues Related to Administrative Justice

However, before moving on to these topics, it is necessary to recall some basic principles regarding procedure in administrative processes.

A. GENERAL PROCEDURAL PRINCIPLES IN ADMINISTRATIVE PROCEEDINGS

As in criminal proceedings, certain procedural safeguards must be provided in administrative proceedings to ensure that interventions in freedom of expression are fair and proportionate. In an application concerning a disciplinary sanction imposed on a university lecturer (*Kula v. Turkey*, no. 20233/06, 19.06.2018, § 46), the ECtHR made the following observation:

*“ The Court further reiterates that the fairness of proceedings and the procedural guarantees afforded to the applicant are factors to be taken into account when assessing the proportionality of an interference with the freedom of expression guaranteed by Article 10 (see *Baka v. Hungary* [GC], no. 20261/12, § 161, 23 June 2016, and the case-law cited therein). The Court has already found that the absence of an effective judicial review may support the finding of a violation of Article 10 (see, in particular, *Lombardi Vallauri*, cited above, §§ 45-56; see also, with regard to academic freedom, *Mustafa Erdoğan and Others v. Turkey*, nos. 346/04 and 39779/04, § 40, 27 May 2014). As it has found previously in the context of Article 10, “the quality of the ... judicial review of the necessity of the measure is of particular importance in this respect, including to the operation of the relevant margin of appreciation” (see *Animal Defenders International v. the United Kingdom* [GC], no. 48876/08, § 108, ECHR 2013 (extracts)) “*

In the *Kula* case, the ECtHR examined the national court decisions rendered in the specific case and found that it was not possible to determine from these decisions whether the penalty imposed on the applicant was necessary in light of the legitimate aim pursued by the authorities. The applicant left the province where he worked without permission in order to participate in a television program. The administrative court’s decision was based solely on an examination of the applicant’s unauthorised departure from the province where he resided, and it did not present any elements that would suggest that it had taken care to examine the necessity of this penalty in the specific circumstances of the case in terms of academic freedom, as clearly argued by the applicant before the court. The absence of this examination is sufficient for the ECtHR to find a violation.

In particular, in cases where freedom of expression is restricted for reasons of national security, it must also be examined whether the decision-making process includes sufficient safeguards. *Šeks v. Croatia*, no. 39325/20, 3.2.2022, § 61).

One of the typical administrative problems related to freedom of expression arises in requests for access to confidential documents. In the case of *Yuriy Chumak v. Ukraine* (no. 23897/10, 18.3.2021, § 47), where national courts had based their decision on a brief statement stating that the information requested did not concern the applicant personally and was confidential, without addressing the applicant’s arguments or providing any other justification for this conclusion. The Court found that the national courts had failed to apply the procedural standards set out in Article 10 of the Convention and that they had fulfilled their obligation to provide “relevant and sufficient” reasons justifying the interference in question.

As seen in the case of *Yuriy Chumak/Ukraine*, the issue of legality in administrative proceedings, and in particular the foreseeability and details of legal provisions, is closely linked to broader issues such as whether the interference is necessary and proportionate in a democratic society (§ 47). Therefore, the principle of legality, another important aspect of administrative procedure, must also be examined.

1. The Principle of Legality

The principle of legality is a fundamental principle in a state governed by the rule of law, particularly in terms of the predictability of crimes and punishments in the context of criminal law. Indeed, according to Article 15 of the Constitution and the ECHR, it is not possible to derogate from this principle even in times of emergency or war. The Constitutional Court has accepted that the principle can be applied more flexibly when it comes to administrative offences and penalties (*Seyit Cingöz (2)*, B. No: 2019/2314, 11/5/2023, § 13). However, even in the case of administrative offenses, it is not sufficient for the text of the law to refer to offences and penalties in general terms; the content of the relevant regulations must also be suitable for achieving the specific purpose. In this respect, the law must be of such a nature as to enable individuals to foresee with a certain degree of clarity and certainty which legal sanction or consequence is attached to which specific act or fact (*AYM, E.2014/100, K.2015/6, 14/1/2015*). Granting the executive branch the authority to determine details requiring expertise or relating to technical matters through a legal regulation possessing these qualities does not constitute a violation of the principle of legal regulation. In other words, the framework of disciplinary offences and penalties must also be determined by law, and the law must be clear and precise for individuals (*Tuncer Yiğci, B. No: 2015/5402, 6/2/2019, § 47; AYM, E.2018/110, K.2018/99, 17/10/2018; Kardelen Hasret Kaygusuz, B. No: 2017/38607, 18/5/2021, § 44*).

In its decision on *İsmail Karaca* (B. No: 2017/26460, 21/4/2021), the Constitutional Court stated that the legal provision stipulating that disciplinary offences be determined by regulation refers to the regulation with an abstract and general criteria. The Court also found that the regulation does not determine which actions are subject to sanctions at a legal level, nor does it provide relevant persons — members of the security forces — with sufficient clarity and certainty as to which specific act or circumstance is linked to which legal sanction or consequence. The Court concluded that the intervention based on the regulation in question lacks a legal basis (*AYM, E.2015/85, K.2016/3, 13/1/2016*).

In its decision of 29/6/2022, the Constitutional Court examined the disciplinary penalty imposed on academics for peace in the case of *Deniz Pelin Dinçer Akan and others* (B. No: 2017/30653, 29.06.2022), the Constitutional Court assessed whether the provisions of the Civil Servants Law No. 657 dated July 14, 1965, relating to discipline could be applied to the academic applicants. In the aforementioned decision, the Constitutional Court annulled the legal provision stating that disciplinary proceedings against academic staff could be regulated by the Higher Education Council, as set out in the General Assembly decision E.2014/100, K.2015/6, published in the Official Gazette on January 7, 2016. However, the Court emphasised that a legal vacuum existed between the relevant dates due to the legislature's failure to enact a new law by December 2, 2016. In this context, it was stated that the legislator had made a choice by not enacting a new law and that that the legal gap in question cannot be considered predictable and definitive for the applicants in light of the qualifications of teaching staff, the mandatory provisions of the Constitution, and the relevant provisions of the law. It was therefore concluded that the disciplinary sanctions imposed

on the applicants violated their freedom of expression. (See also *Ayten Alkan*, B. No: 2018/34421, 12/1/2023).

In applications concerning administrative proceedings for the expulsion of students from student dormitories due to disciplinary penalties, Law No. 351, which was cited as the basis for these proceedings, was examined. It was concluded that the principle of legality had been violated because there was no rule with at least a defined framework and a certain degree of clarity regarding the acts of students residing in student dormitories that warrant disciplinary penalties and the disciplinary penalties prescribed in return for these acts (*Kardelen Hasret Kaygusuz*, B. No: 2018/34421, 12/1/2023) and it was concluded that the principle of legality had been violated (*Kardelen Hasret Kaygusuz*, B. No: 2017/38607, 18/5/2021).

2. Application of the Necessity Test in a Democratic Society

As with criminal sanctions, in administrative proceedings, it must be demonstrated that the action or act restricting freedom of expression is necessary in a democratic society and that this is demonstrated with relevant and sufficient reasons.

The Constitutional Court has stated in numerous decisions that interventions in freedom of expression without justification or with a justification that does not meet the criteria set forth by the Constitutional Court violate Article 26 of the Constitution. For an intervention in freedom of expression to be considered compatible with the requirements of a democratic society, the reasons put forward by public authorities must be relevant and sufficient (*Cenk Balcıođlu (2)*, B. No: 2019/6390, 4/10/2023; *Yılmaz Aksu (2)*, B. No: 2017/28375, 8/6/2023; *Ayfer Kılıçaslan*, B. No: 2018/25090, 16/11/2022; *Serdar Topal*, B. No: 2018/23179, 16/11/2022).

The Constitutional Court has stated in numerous decisions that interventions in freedom of expression without justification or based on grounds that do not meet the criteria it has established violate Article 26 of the Constitution. For an interference with freedom of expression to be considered compatible with the requirements of a democratic society, the reasons put forward by the public authorities must be relevant and sufficient (see, among others, *Kemal Kılıçdarođlu*, B. No: 2014/1577, 25/10/2017, § 58; *Bekir Coşkun*, § 56; *Tansel Çölaşan*, B. No: 2014/6128, 7/7/2015, § 56; *Zübeyde Füsün Üstel and others [GK]*, B. No: 2018/17635, 26/7/2019, § 120).

In the *Hasan Mor* case, in which a faculty member was disciplined for statements made in class, the Constitutional Court ruled that the faculty member's statements had prevented the proper conduct of the class. The Court also ruled that in cases where intervention was deemed necessary, public authorities and courts of appeal should at least make the following assessments:

- What the general subject, scope, procedures and principles for conducting the course are,
- The motive behind the statements and their connection to the subjects covered in the course or during the course hours,

- The effects of the statements on the conduct of the course must be presented in a clear, specific, and singular manner. (*Hasan Mor*, B. No: 2019/20996, 25/5/2022, § 32)

If disciplinary action is taken without this assessment, it will be concluded that procedural safeguards have been violated.

Clearly, this assessment does not only apply to the academic freedom of teaching staff. In other administrative proceedings that restrict freedom of expression, a “relevant and sufficient” justification must also be presented. In cases concerning the punishment of university students for putting up posters, the Constitutional Court emphasised this point as follows:

“Article 5 of Regulation 41 stipulates that the act of putting up posters without permission within a higher education institution shall be punished with disciplinary sanctions. When examining the legal situation resulting from the application of this rule, an assessment must be made within the context of the Constitution. Namely, it is clear that the review of the intervention in freedom of expression within the framework of the provisions of the regulation does not constitute a constitutional review, but rather means a judicial review limited to whether the provisions of the regulation have been correctly applied. In this context, the provision of the Regulation issued based on the authority granted by Law No. 2547 must be considered together with the legitimate purpose pursued in the specific case.

42. [...] When the investigation report and the decisions of the courts of first instance are considered, it is seen that no assessment was made regarding the extent to which the poster in question actually affected the order at the University, how it disrupted it, or whether it posed a risk of disruption. In contrast, it is understood that both the investigation report and the decisions of the courts of first instance merely limited themselves to examining whether the act subject to punishment was committed by the applicant. Furthermore, neither the administration nor the courts of appeal found that the poster caused any visual or environmental pollution, apart from the temporary use of the University wall to publicise the commemoration” (*Cebrail Padak*, B. No: 2019/41543, 15/6/2022, § 42).

B. FREEDOM OF EXPRESSION OF PUBLIC OFFICIALS

Public officials, like other individuals, express their opinions on various topics and platforms. However, the freedom of expression of public officials may be subject to greater restrictions due to the impartiality and loyalty to the state expected of them. For this restriction to be proportionate, many factors must be taken into account, such as the relationship of the expression to the duty, the role of the public official using the expression, the potential impact on the rights and freedoms of others, and the connection between the public duty performed and the use of freedom of expression.

However, before addressing human rights standards in this regard, it is necessary to determine the context in which public officials’ freedom of expression is protected. Public officials, like other workers, have the right to association. If public officials are

subject to sanctions for participating in their unions' calls, not only freedom of expression but also trade union freedoms come into play. In this case, it is important to assess freedom of expression in the context of the freedom to which it belongs. This is because public authorities have much less discretion to restrict public officials' expression when they participate in collective trade union actions. This distinction will therefore be examined first, followed by a discussion of the fundamental principles regarding the freedom of expression of public officials.

1. The distinction between trade union freedom and freedom of expression

The Constitutional Court appears to have adopted a narrow interpretation regarding the union activities of public officials. According to the Court, the participation of a public official in an action or statement at the invitation of the union of which he or she is a member does not automatically place that action and expression within the scope of union freedoms. The Constitutional Court has divided union activities into two categories: those aimed at protecting the professional interests of members and those arising from the union's function as a pressure group. Accordingly, unions' activities include expressing opinions on issues related to the working conditions, obligations, occupational safety, and health conditions of public officials; conducting studies to be submitted to the competent authorities; conducting joint studies with employers, providing legal support to its members, and organizing meetings such as courses and seminars aimed at improving the professional competence of its members, solving their problems, and developing their union activities. Interventions against public servants engaged in activities within the core area under the union umbrella must be examined within the scope of the right to unionise (*Ahmet Parmaksız*, §§ 50-62; *Ayfer Altuntaş and İkbal Ünzile Gürsoy*, B. No: 2018/24874, 31/3/2022, §§ 26-36).

However, union activities outside of the core area defined by the Constitutional Court are not considered to be within the scope of union rights. According to the Court, trade union actions taken by public servants in relation to the core area in question are, by their nature, directed at the administration in its position as employer and/or at the political authority due to its policy-making function. This creates a certain degree of tension with the status law, which requires public servants to remain politically neutral when expressing their opinions. Therefore, not all expression of opinion or actions by trade unions can automatically be considered within the scope of trade union rights. Consequently, when public servants are involved, it is crucial that there be an *objective and foreseeable* relationship between the action and the professional interests of the public servant for the action to be examined within the scope of union rights (*İdris Gürkan* [1st Chamber], Case No: 2018/24432, 7/6/2023, § 22).

Expressions and actions not falling under the scope of trade union rights will be examined under the scope of freedom of expression (*Elif Özkan*, B. No: 2018/7757, 8/6/2021, §§ 18-21). In this case, when it comes to civil servants, it is stated that whether they express their opinions in a balanced and politically impartial manner, whether they display personal attitudes, and whether their impartiality is guaranteed will be assessed in the freedom of expression review (*Hasan Güngör*, B. No: 2013/6152, 24/2/2016,

§ 49; Zeki Çınar, B. No: 2016/3585, 12/6/2019, § 34; Ömer Yalçın, B. No: 2017/30798, 29/9/2020, § 26). Therefore, it is important to consider whether the examination is conducted within the scope of freedom of expression or trade union freedom.

2. The Fundamental Test for Freedom of Expression for Public Officials

Once it has been established that the expression does not constitute a trade union right, the limits of the public servant's freedom of expression must be determined in accordance with the nature of the public service. According to the Constitutional Court, public servants, like everyone else, are entitled to have an opinion on any matter and to express it within the scope of freedom of expression. However, it should be remembered that when it comes to civil servants, whether they express their views in a balanced and politically impartial manner, whether they display personal attitudes, and whether their impartiality is guaranteed are also matters to be assessed in the examination of freedom of expression (*Hasan Güngör*, B. No: 2013/6152, 24/2/2016, § 49; Zeki Çınar, B. No: 2016/3585, 12/6/2019, § 34; Ömer Yalçın, B. No: 2017/30798, 29/9/2020, § 26).

While the ECtHR recognises the legitimacy of granting discretionary powers to officials based on their status, the public officials are individuals and therefore benefit from the protection of Article 10 of the Convention (*Vogt v. Germany*, 26.9.1995, Series A no. 323 § 53, and *Guja v. Moldova* [GC], no. 14277/04, ECHR 2008 § 70). It is therefore for the Court to determine, taking into account the circumstances of each case, whether a fair balance has been struck between the individual's fundamental right to freedom of expression and the legitimate interest of a democratic State in ensuring that the objectives listed in Article 10 § 2 are properly achieved. In conducting this examination, the Court notes that, where the right to freedom of expression of a public official is at issue, the "duties and responsibilities" referred to in Article 10 § 2 take on particular importance and that this justifies leaving national authorities a certain margin of appreciation in determining whether the interference in question is proportionate to the above-mentioned aim (*Vogt*, § 53; *Albayrak v. Turkey*, no. 38406/97, 31.01.2008, § 41).

According to the Constitutional Court, neither the constitutional legislator nor the legislative legislator desires that public services be carried out by public officials who act contrary to the duty of loyalty to the Constitution and the obligation of impartiality, or who give rise to a reasonable and objective belief that they may act contrary to these obligations (*Şah İsmail Harmanlı*, B. No: 2018/15359, 17/11/2021, § 40). As a result of this desire, the legislature aimed to make public officials appear apolitical, limited to their professional lives, and thus sought to prevent officials exercising public power from taking part in political polarisation, thereby granting the administration a neutral position. (*Levent Tunçel*, B. No: 2017/34185, 16/3/2022, § 44).

Accordingly, public officials will be subject to greater restrictions than ordinary individuals in the area of fundamental rights and freedoms, particularly freedom of expression, as expected by the Constitution and the legislator. By voluntarily entering public service, a person is deemed to have accepted the privileges and burdens

required by this status; the specific characteristics of public service necessitate these advantages and limitations (*İhsan Asutay*, B. No: 2012/606, 20/2/2014, § 38; *Cem Özyay-dın*, B. No: 2017/26800, 13/1/2022, § 36; *Elif Güneysu*, B. No: 2017/31733, 7/10/2021, § 42).

However, the Constitutional Court has determined that the restriction of public officials' freedom of expression by administrative bodies and administrative courts without relevant and sufficient justification constitutes a procedural violation of freedom of expression:

"31. The reasons given by the administration that penalised the applicant and the regional administrative court that issued the final decision have been carefully examined. Accordingly, it is clear that neither the administration nor the regional administrative court made any of the above-listed assessments envisaged by the Constitutional Court for such an intervention into a public official's the freedom of expression, other than stating that the posts in question were incompatible with of the applicant's the official duties and undermined public confidence.

32. In numerous decisions, the Constitutional Court has stated that interventions in freedom of expression without justification or with a justification that does not meet the criteria set forth by the Constitutional Court violate Article 26 of the Constitution. For an interference with freedom of expression to be considered compatible with the requirements of a democratic society, the reasons put forward by the public authorities must be relevant and sufficient (see, among others, *Kemal Kılıçdaroğlu*, § 58; *Bekir Coşkun*, § 56; *Tansel Çölaşan*, § 56; *Zübeyde Füsün Üstel and Others [GK]*, B. No: 2018/17635, 26/7/2019, § 120). (*Serdar Topal*, B. No: 2018/23179, 16/11/2022)"

In its decision on *Evrım Sönmez* (B. No: 2019/2241, 12.07.2023) emphasised that the discretionary power of administrations is not unlimited in restricting the freedom of expression of public officials, summarized the criteria it has developed in its case law, and determined that the following points must be taken into account when establishing administrative decisions restricting the freedom of expression of a public official:

"i. Since freedom of expression is at issue, it should not be overlooked that civil servants are also individuals and have rights such as holding political views, taking an interest in national issues, and making choices (*Hasan Güngör*, B. No: 2013/6152, 24/2/2016, § 49; *Ömer Yalçın*, B. No: 2017/30798, 29/9/2020, § 27; *Zeki Çınar*, B. No: 2016/3585, 12/6/2019, §§ 34, 35).

ii. Considering that public officials are individuals with social aspects, not all of their expressions of opinion by public officials should be considered propaganda, but only those that can be regarded as attempts to persuade others in favour of or against political parties. In this context, for the expression of an opinion by a public official or the uncommented sharing of an opinion expressed by others to be considered an attempt to persuade others in favour of or against political parties, it is not sufficient for the expression to be related to political parties or political issues alone.

- When evaluating the content of the statement conjunction with the position of the public officials and their state duties, it must be demonstrated that, given the circumstances in which it was made, the statement is suitable for characterizing it as an attempt to persuade others in favour of or against political parties.

- In the specific circumstances of the case, if the public official made the statement using any opportunity afforded by their public office status and the field in which they work, including their title, this must be demonstrated. (Regarding the nature of public office, see Adem Talas [GK], B. No: 2014/12143, 16/11/2017, § 47).

iii. Additionally, it must be determined whether the expression of opinion has caused political polarization, undermined the public official's apolitical image or made the public official part of political polarisation. Furthermore, it must be established how these factors have affected the continuity, effectiveness, efficiency, or proper performance of public services and what consequences have resulted from the disruption of the state organisation or the inability to perform services that necessitate punishment. Such consequences include disruption of order within the state organization and an inability to perform services. (Regarding the requirement to demonstrate that the actions of public officials affect their employment in order for them to be punished with disciplinary penalties, see Yasin Agin and others, [GK], B. No: 2017/32534, 21/1/2021, §§ 61, 63; Levent Tunçel, §§ 42, 44; for the purposes of disciplinary law, see Ayfer Altuntaş and İkbâl Ünzile Gürsoy, § 53).

iv. In all cases, the degree of duty and responsibility of the public official must be determined in connection with their position and area of work (Hikmet Aslan, B. No: 2014/11036, 16/6/2016, § 55; Hasan Güngör, § 48).

v. It must be demonstrated that the disciplinary penalty imposed achieves an objective of public importance (see § 33), in other words, that the punishment of the public official meets a necessary social need; The disciplinary penalty imposed must be proportionate to the degree to which the expression of opinion affected the public service (Mehmet Alanç and others, § 45; Şah İsmail Harmancı, § 37; Ayfer Altuntaş and İkbâl Ünzile Gürsoy, § 45).

vi. Assessments must be made in a clear, specific, and individual manner (regarding the requirement for individualized assessment, see Şah İsmail Harmancı, § 41).

The Constitutional Court found that the administrative authorities failed to assess the circumstances of the case in question — timing, lack of information and psychological factors — when describing the public officials' posts in an abstract manner and stating that the act had been committed. The authorities also failed to explain how the posts violated the public official's obligations regarding terrorist propaganda—praise, support and glorification.— and did not establish that the language used by the applicant was politically biased or that there was an objective and valid relationship between the statements and the obligations imposed by the status law to which the applicant was subject. To the extent that intervention was required, the Court concluded that freedom of expression had been violated in terms of procedure.

In such cases, failure by administrative authorities to conduct an assessment in accordance with the principles expected by the Constitutional Court to be applied in interventions targeting the freedom of expression of public officials will constitute a procedural violation of freedom of expression.

For example, in an application where a public official faced administrative sanctions for making political posts (Ayfer Kılıçaslan, B. No: 2018/25090, 16/11/2022, §30),

the Constitutional Court noted that the administration that punished the applicant and the Regional Administrative Court that issued the final decision on “*engaging in activities for or against a political party*.” According to the Constitutional Court, the Regional Administrative Court made subjective interpretations that attributed indirect meanings to the expression of opinion in a manner exceeding the provisions of the law in this case.

The ECtHR has ruled that the procedural dimension of freedom of expression has been violated in cases where it applied similar criteria. The ECtHR has stated that it is legitimate for the state to impose a duty of loyalty on civil servants working in the public service and to impose duties and responsibilities on them, given their status. However, it has also stated that public officials are individuals who have social aspects such as political opinions, concern for national issues, and preferences, and that there is no doubt that they benefit from Articles 10 and 11 of the European Convention on Human Rights in this regard. It added that national authorities have a margin of discretion in determining the degree of duties and responsibilities in relation to the position and field of work of a civil servant (*Ismail Sezer v. Turkey*, no. 36807/07, 24/3/2015, §§ 52-54; *Vogt v. Germany* [GC], no. 17851/91, 26/9/1995, §§ 51-53; *Ahmed and Others v. the United Kingdom*, no. 22954/93, 2/9/1998, §§ 53, 54; *Otto v. Germany* (dec.), no. 27574/02, 24/11/2005).

In the landmark case of *Vogt v. Germany*, the ECtHR stated: “These principles apply also to civil servants. Although it is legitimate for a State to impose on civil servants, on account of their status, a duty of discretion, civil servants are individuals and, as such, qualify for the protection of Article 10 (art. 10) of the Convention. It therefore falls to the Court, having regard to the circumstances of each case, to determine whether a fair balance has been struck between the fundamental right of the individual to freedom of expression and the legitimate interest of a democratic State in ensuring that its civil service properly furthers the purposes enumerated in Article 10 para. 2 (art. 10-2). In carrying out this review, the Court will bear in mind that whenever civil servants’ right to freedom of expression is in issue the “duties and responsibilities” referred to in Article 10 para. 2 (art. 10-2) assume a special significance, which justifies leaving to the national authorities a certain margin of appreciation in determining whether the impugned interference is proportionate to the above aim.”

In the *Guja v. Moldova* application ([ECHR] no. 14277/04, 12.2.2008), the applicant was the head of the Press Unit at the Moldovan Prosecutor General’s Office at the time of the events. The applicant leaked two letters sent to the Prosecutor General’s Office, one from the Deputy Speaker of Parliament and the other from the Deputy Minister of Internal Affairs to the press. The contents of these letters were subsequently published in a national newspaper. The first letter requested leniency for police officers accused of ill-treatment in custody. The applicant was dismissed when it was discovered that he had leaked the letters. In its Grand Chamber judgment, the ECtHR summarised the general principles of the right to freedom of expression in the context of public officials disclosing information obtained in the course of their duties and how the freedom of expression of public officials should be regulated in administrative proceedings:

“71. Since the mission of civil servants in a democratic society is to assist the government in discharging its functions and since the public has a right to expect that they will help and not hinder the democratically elected government, the duty of loyalty and reserve assumes special significance for them (see, *mutatis mutandis*, *Ahmed and Others*, cited above, § 53.) In addition, in view of the very nature of their position, civil servants often have access to information which the government, for various legitimate reasons, may have an interest in keeping confidential or secret. Therefore, the duty of discretion owed by civil servants will also generally be a strong one.
[...]

73. In the light of the duty of discretion referred to above, disclosure should be made in the first place to the person’s superior or other competent authority or body. It is only where this is clearly impracticable that the information could, as a last resort, be disclosed to the public (see, *mutatis mutandis*, *Haseldine*, cited above). In assessing whether the restriction on freedom of expression was proportionate, therefore, the Court must take into account whether there was available to the applicant any other effective means of remedying the wrongdoing which he intended to uncover.

74. In determining the proportionality of an interference with a civil servant’s freedom of expression in such a case, the Court must also have regard to a number of other factors. In the first place, particular attention shall be paid to the public interest involved in the disclosed information. The Court reiterates that there is little scope under Article 10 § 2 of the Convention for restrictions on debate on questions of public interest (see, among other authorities, *Sürek v. Turkey* (no. 1) [GC], no. 26682/95, § 61, ECHR 1999-IV). In a democratic system, the acts or omissions of government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of the media and public opinion. The interest which the public may have in particular information can sometimes be so strong as to override even a legally imposed duty of confidence (see *Fressoz and Roire v. France* [GC], no. 29183/95, ECHR 1999-I, and *Radio Twist, a.s. v. Slovakia*, no. 62202/00, ECHR 2006-XV).

75. The second factor relevant to this balancing exercise is the authenticity of the information disclosed. It is open to the competent State authorities to adopt measures intended to react appropriately and without excess to defamatory accusations devoid of foundation or formulated in bad faith (see *Castells v. Spain*, 23 April 1992, § 46, Series A no. 236). Moreover, freedom of expression carries with it duties and responsibilities and any person who chooses to disclose information must carefully verify, to the extent permitted by the circumstances, that it is accurate and reliable (see, *mutatis mutandis*, *Morissens v. Belgium*, no. 11389/85, Commission decision of 3 May 1988, DR 56, p. 127, and *Bladet Tromsø and Stensaas v. Norway* [GC], no. 21980/93, § 65, ECHR 1999-III).

76. On the other side of the scales, the Court must weigh the damage, if any, suffered by the public authority as a result of the disclosure in question and assess whether such damage outweighed the interest of the public in having the information revealed (see, *mutatis mutandis*, *Hadjianastassiou v. Greece*, 16 December 1992, § 45, Series A no. 252, and *Stoll*, cited above, § 130). In this connection, the subject matter of the disclosure and the nature of the administrative authority concerned may be relevant (see *Haseldine*, cited above).

77. The reason behind the actions of the reporting employee is another determinant factor in deciding whether a particular disclosure should be protected or not. For

instance, an act motivated by a personal grievance or a personal antagonism or the expectation of personal advantage, including pecuniary gain, would not justify a particularly strong level of protection (ibid.). It is important to establish that, in making the disclosure, the individual acted in good faith and in the belief that the information was true, that it was in the public interest to disclose it and that no other, more discreet, means of remedying the wrongdoing was available to him or her.”

Applying these principles to the specific case, the ECtHR found that politicians’ attempts to exert pressure on the judiciary were of great public interest and that the applicant’s leaking of these letters to the press was legitimate, given that this issue had not been raised by his superiors. The ECtHR also concluded that freedom of expression had been violated in the case of the same applicant who was dismissed from office for a second time, reiterating the principles. (*Guja v. Moldova* (2), no. 1085/10, 27.02.2018) For similar reasons, the ECtHR also concluded that there had been a violation of freedom of expression in the case of a public official who disclosed the Romanian Intelligence Service’s illegal wiretapping to the public (*Bucur and Toma v. Romania*, no. 40238/02, 08.01.2013).

In the application of *Matúz v. Hungary* (no. 73571/10, 21.10.2014), the applicant was dismissed from his job for publishing a book about censorship at a public broadcaster, and the Court also concluded that the applicant’s freedom of expression had been violated. However, it should be emphasised that in this application, the fact that the author was a public official as well as a journalist was also a factor.

C. THE IMPACT OF THE PUBLIC OFFICIAL’S SERVICE ON FREEDOM OF EXPRESSION

It can be posited that the principles elucidated thus far pertain to general principles applicable to all public officials. However, the nature of the public service performed is also taken into account in limiting the expression used by the public official. Factors such as the impact of the expression on the recipients of the service, the impartiality of the service, and the fact that the service itself relates to freedom of expression must be taken into account in this context.

1. Teachers

Teachers are the first group that comes to mind among public officials in the context of freedom of expression.

The ECtHR has stated that, while the specific circumstances of the state in question may be considered concerning the duty of loyalty of public officials to the state, the nature of the official’s duties must also be considered. In its decision on an application concerning a disciplinary sanction imposed on a teacher who actively participated in the actions of the Communist Party, it accepted that, given the fact that teachers represent an authority in relation to their students, their duties and responsibilities continue to a certain extent outside their working lives (*Vogt v. Germany*, §§ 59, 60).

In *Mahi v. Belgium* case (no. 57462/19, 3/9/2020, § 32), the ECtHR also considered that, given that teachers are figures of authority over their students, it is necessary for them to continue their duties and obligations to a certain extent outside of school (§ 28).

In the aforementioned judgment, the ECtHR examined whether transferring the applicant, who responded with a letter to reports by some media outlets that he was responsible for incidents that occurred at the school where he worked as a teacher after the *Charlie Hebdo* attack, violated his freedom of expression due to the use of discriminatory and violence-justifying statements in the letter. The Court held that the statement was not based on verbal communication or a spontaneous reaction. Rather it was widely publicized and therefore accessible to all in written. The Court found that it was legitimate to consider the expression to be contrary to the duty of common sense/caution imposed on the applicant in terms of timing and, taking into account the potential impact of the applicant's comments on students, decided that the applicant's transfer to another institution was not disproportionate (*Mahi v. Belgium*, §§ 34, 36, 37).

However, in the *Melike v. Turkey* case, where the applicant, a cleaning worker, received disciplinary punishment for liking a post on social media, the ECtHR took into account that, unlike teachers, the applicant had no influence over students: "The Court also notes that given the nature of the applicant's job, the person concerned may have limited prestige and representational power at work and that his activities on Facebook cannot have a decisive influence on students, parents, teachers, and other employees. The national authorities, on the other hand, did not attempt to determine whether the persons concerned had access to the applicant's Facebook account or the disputed 'Likes' by taking into account the parameters, connections, and popularity of the person's profile on this social network in their decisions" (no. 35786/19, 15.06.2021, § 51). The ECtHR considered the failure to take this matter into account as a violation of the obligation to provide effective and sufficient reasoning.

In line with the case law of the European Court of Human Rights, the Constitutional Court has also determined that, the influence and impact of teachers on students must be taken into account in freedom of expression cases. Therefore, teachers are expected to exercise caution with their statements both during and outside of working hours. In many of its decisions, the Constitutional Court has emphasised the unique position of the teaching profession in society compared to other public officials and citizens, stating that teachers' statements on social issues have a greater impact on society. However, the court has also underscored that the duties and obligations to which teachers are subject are not limited to the school environment, and that, given their role as authority figures, teachers must continue to fulfil their professional duties and obligations to a certain extent even outside of school (*Elif Güneysu*, B. No: 2017/31733, 7/10/2021, § 54; *Cem Özyayın*, B. No: 2017/26800, 13/1/2022, § 42; *Hatice Deniz Aktaş and Education and Science Workers' Union*, B. No: 2019/18481, 23/11/2022, § 41).

In the case of *Hüseyin Şen* (Case No. 2017/6883, 18/10/2023, § 22), the Constitutional Court ruled that although some of the applicant's posts (regarding rotation and disciplinary investigation) focused on the functioning of the administration, particularly in the parts directed at the political authority and the President (see § 21), the

disciplinary penalty imposed was proportionate because the applicant shared his statements with his followers using a *rigid and unconditionally* accusatory language without any context or scope. According to the Court, it should be accepted that the applicant's post—when the sphere of influence of the teaching profession is considered—created the risk of instilling ideas that were *one-sided, inappropriate, and likely to have a severe impact* on others who expected him to behave objectively, primarily his students.

This approach of the Constitutional Court may lead to the sanctioning of certain cases of clear freedom of expression. In the application of *Kadriye Karabiber* (B. No: 2018/18181, 8/2/2023), the applicant received the Prime Ministry circular dated 17/2/2016 and numbered 2016/4, entitled “*Public Employees Associated with Organisations and Structures Threatening National Security*” (Circular), with a note added at the request of Eđitim-Sen, of which she was a member. The note in question reads as follows:

“This Circular violates the principle of ‘legality of Crimes and Punishments’ stipulated in Article 38 of the Constitution, which states that no one can be punished for an act that is not specified as a crime in the law, nor anyone can be given a punishment that is not provided for in the law. It also violates the rule set out in Article 128 of the Constitution that the rights and obligations of civil servants must be regulated by law. I am also concerned that the Circular portrays any kind of democratic mass organisation, such as a movement, group, association, or union, as dangerous, thereby violating the right to freedom of association.”

The Constitutional Court did not consider the impact of the aforementioned comment on the service or on students. It concluded that, in light of both the applicant's position and the importance of the Circular, the action was of a nature that would diminish the objective effect of the Circular and therefore that the applicant had acted in a manner that could interfere with the proper performance of public service, and thus that the disciplinary penalty imposed on the applicant did not violate freedom of expression.

Conversely, it has been noted that the Constitutional Court has ruled that freedom of expression should be interpreted more broadly with regard to teachers' criticisms concerning education and teaching. In the application of *Hikmet Korkmaz and the Education and Science Workers' Union* (B. No: 2019/380, 11/5/2023, § 17-18) the Constitutional Court recalled that teachers, like everyone else, are entitled to hold and express their opinions on any event within the scope of freedom of expression. It noted that the applicant's statements reflected in the news article referred to the impact of the events on education and teaching activities and on students, rather than on curfews or operations against terrorism. It emphasised that the applicant's statements did not contain any political undertones or accusatory language, and that it was not possible to accept that the statements created a risk of instilling ideas that could have a one-sided, inappropriate, and violent effect on others, primarily students, who were expected to behave objectively. Given this situation, it was determined that the administration and judicial authorities imposed disciplinary sanctions without providing any explanation as to how they reached the aforementioned conclusions,

other than stating that the statements used conveyed veiled political messages, that the terrorist organisation was not criticised in the statement, and that the tone of the statements was unbecoming of a teacher. It was concluded that the teacher's freedom of expression had been violated.

2. Judges

Judges and prosecutors are public officials with a particularly intense obligation of political impartiality. Judges must refrain from using expressions that could cast doubt on their impartiality. This is a legitimate expectation in order to guarantee the right to a fair trial. However, judges being subject to arbitrary investigations can also threaten the independence of the judiciary. Therefore, the question of the subjects on which judges can express their opinions and the limit of such expression is an important matter of debate.

The general principles on this matter are set out in the ECtHR's *Baka v. Hungary* judgment (no. 20261/12, 23.06.2016). András Baka served as a judge at the ECtHR for seventeen years (1991–2008), after which he was elected President of the Supreme Court by the Hungarian Parliament on 22 June 2009 for a six-year term ending on 22 June 2015. He publicly criticised various aspects of the comprehensive constitutional and legal reforms initiated by the second government of Hungarian Prime Minister Orbán that directly affected the judiciary, particularly the reduction of the mandatory retirement age for judges from 70 to 62.

In April 2011, Parliament adopted the new Fundamental Law of Hungary, which replaced the 1949 Constitution and entered into force on January 1, 2012. Article 25 of the Fundamental Law declares Kúria to be the country's highest judicial body. In December 2011, Parliament approved several Transitional Provisions of the Fundamental Law, ruling that the Kúria would be the legal successor to the Supreme Court and that the term of office of the President of the Supreme Court would end with the entry into force of the Fundamental Law. Furthermore, the new Law on the Organization and Administration of Courts introduced a new criterion for the election of the new president of the Kúria, stipulating that persons without at least five years of judicial experience in Hungary could not be elected. The combination of these provisions led to the end of Baka's term of office and his ineligibility for re-election for a new term, as well as the loss of his relevant salary and social rights.

The ECtHR ruled that the early termination of Baka's term of office constituted an interference with his right to freedom of expression, as it stemmed from the opinions and criticisms, he had publicly expressed in his professional capacity on matters of public interest concerning the judiciary. According to the Grand Chamber of the ECtHR, the decision not only deterred Baka but also other judges and court presidents, preventing them from participating in public debates on legislative reforms affecting the courts and issues related to the independence of the judiciary in the future. Procedurally, the restrictions imposed on the right to freedom of expression were not supported by effective and sufficient safeguards against abuse. The ECtHR made the following observations on this matter:

“ 165. At the same time, the Court has also stressed that having regard in particular to the growing importance attached to the separation of powers and the importance of safeguarding the independence of the judiciary, any interference with the freedom of expression of a judge in a position such as the applicant's calls for close scrutiny on the part of the Court (see *Harabin (dec.) 2004*, cited above; see also *Wille*, cited above, § 64). Furthermore, questions concerning the functioning of the justice system fall within the public interest, the debate of which generally enjoys a high degree of protection under Article 10 (see *Kudeshkina*, § 86, and *Morice*, § 128, both cited above). Even if an issue under debate has political implications, this is not in itself sufficient to prevent a judge from making a statement on the matter (see *Wille*, cited above, § 67). Issues relating to the separation of powers can involve very important matters in a democratic society which the public has a legitimate interest in being informed about and which fall within the scope of political debate (see *Guja*, cited above, § 88).”

As can be understood from these principles, while it is dangerous for judges to express their views on general political issues in terms of impartiality, it is equally important for judges to express their views on judicial policy and reforms for a well-functioning democracy. Recent ECtHR decisions on Turkey also confirm this point.

In the case of *Sarısu Pehlivan v. Turkey* (no. 63029/19, 06.06.2023, § 49), where the applicant was disciplined for giving an interview to the *Evrensel* newspaper in her capacity as President of the Judges' Union regarding the 2017 Constitutional Amendment, the HSK noted that the applicant used expressions in the interview that undermined the respectability of the judiciary in society and suggested that the institution as a whole was ineffective and unreliable, and that the applicant's statements, considering the social atmosphere created by the referendum on the constitutional amendment, appeared to be politically biased. However, the ECtHR found that this reasoning, as it stands, does not contain any assessment capable of striking a fair balance between the applicant's right to freedom of expression and her duty of caution and restraint as a judge, in accordance with the criteria developed in *Baka* and ECtHR case law. None of the HSK's decisions specified any particular passages or statements in the disputed interview that were considered to have damaged the dignity of the judiciary and to be politically biased, taking into account, on the one hand, her status as a judge and her role as Secretary General of the Judges' Union and, on the other hand, the context surrounding these statements. In other words, the ECtHR concluded that the HSK had violated procedural safeguards.

In the *Eminağoğlu v. Turkey* case, the applicant, who was the President of YARSAV (Association of Judges and Prosecutors), made statements about the Ergenekon trial and other judicial processes, As a result of the disciplinary investigation launched against him, the Second Chamber of the HSYK decided by a majority vote to impose a transfer penalty on the applicant pursuant to Article 68(2)(a) of Law No. 2802, on the grounds that his statements to the media had caused him to lose the honour and prestige of his profession and his personal honor and dignity. The ECtHR ruled that the applicant's inability to appeal the HSYK's decision violated his right to a fair trial and that the HSYK's failure to examine the case in light of the applicant's freedom of expression also constituted a violation of that freedom:

“150. It must be emphasised that the role of the courts in a democratic State is to guarantee the very existence of the rule of law. When disciplinary proceedings are brought against a judge, public confidence in the functioning of the justice system is at stake. The Court is of the view that any judge and prosecutor who face disciplinary proceedings must be afforded safeguards against arbitrariness. He or she must in particular be able to have the measure in question scrutinised by an independent and impartial body competent to review all the relevant questions of fact and law, in order to determine the lawfulness of the measure and censure a possible abuse by the authorities. Before that review body the person concerned must have the benefit of adversarial proceedings in order to present his or her views and counter the arguments of the authorities (see paragraph 124 above and, for a recapitulation of the relevant principles, Ramos Nunes de Carvalho e Sá, cited above, §§ 176-86). (...).

151. In addition, it should be observed that in the present case the HSYK gave its decision without seeing fit to address the arguments of the applicant, who was relying on the protection of Article 10 of the Convention. In that connection, even though the Government’s considerations about the duty of discretion of members of judiciary may be found relevant in the present case, the Court observes that the HSYK failed to weigh in the balance the applicant’s right to freedom of expression, in an appropriate manner and in accordance with the above-mentioned relevant criteria. In those circumstances, the Court is not persuaded that sufficient grounds have been put forward in the present case in order to justify the impugned measure. Moreover, the same shortcomings and the same lack of any judicial review prevent the Court from effectively exercising its European scrutiny as to the question whether the national authorities applied the established norms in its case-law concerning the weighing-up of the various interests at stake.”

The only area in which judges and prosecutors enjoy broad freedom of expression is not limited to matters of judicial policy and practice. The expression they use in the course of performing their duties should also only be subject to administrative sanctions in very exceptional circumstances.

In the *Kayasu v. Turkey* case (no. 64119/00, 13.11.2008), the applicant, who was a prosecutor at the time of the events, first submitted a petition to the Ankara State Security Court Prosecutor’s Office for the punishment of the generals who carried out the September 12 military coup, and then drafted an indictment against Kenan Evren himself. The applicant was reprimanded for his first action. Criminal proceedings were initiated for his second action, and the applicant was dismissed from his position. The applicant was also convicted of both insult and abuse of office. The ECtHR found that the reprimand and punishment for abuse of office imposed on the applicant fell within the government’s discretionary power. However, considering that the penalties for insulting military personnel and removal from office would have a deterrent effect not only on the applicant but on all judicial personnel, the Court found them disproportionate and concluded that Article 10 of the Convention had been violated (§ 109).

In the *Albayrak v. Turkey* case, where it was alleged that the applicant judge read the *Özgür Gündem* newspaper and watched Med TV, the ECtHR noted that the HSYK, which imposed the penalty on the applicant, did not discuss how these allegations were connected to the applicant’s service:

“46. The Court finds no reference in the case file to any known incident which would suggest that the applicant’s impugned conduct, including that of following PKK-related media, had a bearing on his performance as a judge and, particularly, during any previous, pending or imminent proceedings (see, Wille, § 69, cited above). It also notes that no evidence was adduced by the Government to demonstrate that the applicant had overtly associated himself with the PKK or behaved in a way which could call into question his capacity to deal impartially with related cases coming before him. In the Court’s view, these are the essential factors in assessing the necessity of the measure taken by the authorities.”

Stating that the HSYK failed to fulfil its procedural obligations, the ECtHR ruled that the applicant’s freedom of expression had been violated.

Although judges and prosecutors have an obligation of impartiality, if administrative proceedings are initiated against them without establishing a connection between this obligation and their duties, the procedural obligation will have been violated.

3. Academics

Academics, unlike other public officials, enjoy freedom of expression to a greater extent. As a result of their work, teaching staff are expected to discover the truth and arrive at scientific reality. In this sense, the same loyalty to the state that is expected of civil servants cannot be expected of academics. This difference in nature also means that university staff be granted a different sphere of freedom. Indeed, the Constitution regulates freedom of science and art separately from freedom of expression. According to Article 27 of the Constitution, “Everyone has the right to freely learn and teach science and art, to explain and disseminate them, and to conduct all kinds of research in these fields.” For this reason, the general grounds for restriction listed in other articles of the Constitution are not listed in Article 27.

It is impossible to consider the situation of academics independently of the special meaning given to universities in the Constitution. Indeed, the Constitutional Court has defined the status of universities and faculty members as follows: “In the Constitution, universities are defined as institutions where scientific work is carried out and science is taught, and they are granted scientific and administrative autonomy, thus being treated differently from other public institutions. and faculty members, while being public servants, are given a separate place within the general classification, indicating that they constitute a professional class with its own importance and value” (AYM, T.16.7.2010 E. 2010/29, K. 2010/90).

The European Court of Human Rights also makes the following observations regarding the scope of academic freedom:

“In this connection, academic freedom in research and in training should guarantee freedom of expression and of action, freedom to disseminate information and freedom to conduct research and distribute knowledge and truth without restriction (see Recommendation 1762 (2006) of the Parliamentary Assembly of the Council of Europe). It is therefore consistent with the Court’s case-law to submit to careful scrutiny

any restrictions on the freedom of academics to carry out research and to publish their findings (*Mustafa Erdoğan v. Turkey* (B. No: 346/04, 39779/04, 27/5/2014 § 40).

Academics' freedom of expression shall primarily apply to the expressions they use in scientific work and lectures (*Hasan Mor*, B. No: 2019/20996, 25/5/2022, § 32; *Sorguç v. Turkey*, B. No: 17089/03, 23/6/2009).

Nevertheless, it would be erroneous to evaluate statements that have not been employed by an academic in an academic journal or at a conference, or works that have not been composed in a highly formal manner, outside the scope of academic freedom. For example, in the case of *Mustafa Erdoğan v. Turkey*, the applicant, a professor of constitutional law, wrote an article titled "Turkey's Constitutional Court Problem in Light of the Decision to Close the Virtue Party" in an issue of the Liberal Thought Journal in 2001 and criticized the Court and its members in very harsh terms. All members of the Constitutional Court filed a lawsuit against the applicant on the grounds that the article contained insults and violated their personal rights, and they won the case. The ECtHR concluded that the article was written by an academic, that academic freedom is not limited to academic or scientific research, but also includes the free expression of opinions by academics according to their expertise and competence, and that the subject of the article concerned a matter of public interest, and therefore found that the applicant's freedom of expression, protected under Article 10, had been violated. (*Mustafa Erdoğan and others v. Turkey* no: 346/04, 39779/04, 27/5/2014, § 40)

In its decision in the case of *Zübeyde Füsün Üstel and Others* ([GK], B. No: 2018/17635, 26/7/2019, § 110-113) that the text "We Will Not Be Complicit in This Crime," signed by 2,200 academics, was not an academic work but was nonetheless connected to academic freedom.

Since investigating academics for their opinions would constitute arbitrary interference with academic freedom, the status of academics contributing to public debate must also be taken into account. Failure to consider this aspect in the assessment would constitute a procedural violation of freedom of expression.

D. PROCEDURAL OBLIGATIONS OF ADMINISTRATIVE INSTITUTIONS REGARDING FREEDOM OF EXPRESSION

Since freedom of expression may be at stake in all administrative decisions, it is clear that all administrative units must take procedural obligations into account. However, it should be noted that the procedural duties of certain administrative units are more specific in nature, as all the decisions taken by these units are related to freedom of expression and the press.

In Turkey, the Radio and Television Supreme Council, the Press Advertising Agency (BİK), and the Information Technologies and Communications Authority (BTK) are at the forefront of these institutions.

The Constitutional Court has issued pioneering decisions regarding the procedural obligations of these institutions in relation to the administrative sanctions they impose.

The Press Advertising Agency (BİK) is an administrative body which is a public legal entity established by Law No. 195 on the Establishment of the Press Advertising Agency dated 2/1/1961. According to Article 95 of Law No. 195, BİK may impose sanctions by *suspending official announcements and advertisements*, either upon complaint or on its own initiative, against newspapers that violate press ethics principles. There have been frequent complaints that the institution uses this authority against opposition media outlets.

The Constitutional Court, in its pilot decision regarding *Yeni Gün Haber Ajansı Basın ve Yayıncılık A.Ş. and others* ([GK], Case No: 2016/5903, 10/3/2022, §102), recalled its previous jurisprudence on the matter and established the procedural criteria to be considered in the application of such sanctions:

“102. [...] The Constitutional Court has repeatedly reiterated the scope of the balancing criteria in order to guide the lower courts in their applications, seeking to demonstrate how these criteria should be applied in the context of the specific case. To achieve a balance between conflicting rights, the Constitutional Court requires that:

- Who made the statements in the news report or article,
- Who the targeted person is, their degree of public recognition, their previous behaviour, whether they are subject to strict press scrutiny, and whether the limits of acceptable criticism they must tolerate are broader than those of an ordinary citizen,
- The subject matter of the news report or article, the type of statements used therein, the content, form, and consequences of the publication,
- The conditions under which the news or article was published,
- Whether the publication is in the public interest, whether it contributes to a debate on the public interest, the weight of the rights of the public and other individuals to express their opinions,
- The value of informing the public, the existence of social interest, and whether the subject is current,
- Whether the statements in the news or article are based on factual grounds, whether the controversial statement is sufficiently supported by concrete elements,
- In situations where there is a possibility of damage to the reputation and rights of others, whether the press members have acted in accordance with the mandatory limits, duties, and responsibilities that they must comply with on their own initiative, including respecting professional ethics, acting in good faith, and providing accurate and reliable information,
- Whether there is an opportunity to respond to the opinions expressed in the news or article,
- The impact of the news or article on the lives of the individuals targeted must be assessed by the Press Advertising Agency (BİK) in accordance with these criteria, to the extent that it corresponds to the specific case. In this regard, it is expected that the

district courts of first instance, which are the appeal authorities against BİK decisions, will first examine whether BİK has made an assessment in line with the specified criteria and, if so, remedy any deficiencies. In addition, it stated that the district courts of first instance must establish a proportionality between the severity of the news in question and the penalty imposed. (Uğurlu Gazetecilik Basın Yayın Mat. Rek. Ltd. Şti. (3), §§ 48-50; Uğurlu Gazetecilik Basın Yayın Mat. Rek. Ltd. Şti. (4), §§ 39-41; Estetik Yayıncılık Anonim Şirketi, §§ 46-48).

105. In all the applications submitted to the Constitutional Court and consolidated in this case, the content subject to punishment relates to news items published in the print editions or on the websites of newspapers with national circulation. It has been repeatedly emphasised that the BİK and, subsequently, the civil courts of first instance must apply the balancing criteria very strictly and consider the aforementioned form of intervention as a last resort. (Uğurlu Gazetecilik Basın Yayın Mat. Rek. Ltd. Şti. (3), § 51; Uğurlu Gazetecilik Basın Yayın Mat. Rek. Ltd. Şti. (4), § 42; Estetik Yayıncılık Anonim Şirketi, § 49).

The Constitutional Court has issued a similar principal decision regarding radio and television broadcasting. Radio and television broadcasting in Turkey is regulated by Law No. 6112 on the Establishment and Broadcasting Services of Radio and Television dated 15/2/2011. According to the transitional Article 4 of Law No. 6112, RTÜK must carry out frequency planning in the field of radio and television within one year from the date the Law enters into force. In its decision on *Bizim FM Radio Broadcasting and Advertising Inc.* ([GK], B. No: 2014/11028, 10/18/2017), the Constitutional Court found that, despite the mandatory provisions of the repealed Law No. 3984 and Law No. 6112, which replaced it, no ranking tender had been conducted by the administration. Consequently, radio stations currently broadcasting terrestrially in Turkey consist of those that began broadcasting before 1995 and those that began broadcasting after that date pursuant to administrative or court decisions.

Notwithstanding its decisions in this regard, the Constitutional Court noted that, despite the mandatory provisions of Law No. 6112, the Radio and Television Supreme Council (RTÜK), which is tasked with granting broadcasting permits and licenses to applicant organizations that have fulfilled the prerequisites, failed to conduct a proper ranking tender within the specified time frame and allocate channels or frequencies, due to the failure to take the necessary steps, in its ruling on *İyi Haber Yayın Organizasyon Ticaret A.Ş. and others* ([GK], B. No: 2018/10782, 11/1/2024, § 71). The court decided to forward the case to the Grand National Assembly of Turkey in order to eliminate legal uncertainty in the field of terrestrial radio broadcasting, thereby remedying the violation and its consequences and preventing similar new violations.

The Constitutional Court, in its decision regarding *Birgün İletişim ve Yayıncılık Ticaret A.Ş.* ([GK], Case No: 2015/18936, 22.05.2019, § 74), made general assessments regarding Article 8/A of Law No. 5651, titled “Removal of content and/or blocking of access in cases where *delay would cause harm.*” Pursuant to this article, the decision to remove content and/or block access issued by the BTK President at the request of the Presidency or the relevant Ministries is submitted by the President to the approval of the magistrate within twenty-four hours. According to the Constitutional Court, the following points must be taken into account in content removal and access blocking decisions issued in this manner:

“i. The existence of a situation where delay would be detrimental must be established by administrative and/or judicial authorities in order for a decision to block access to Internet content to be issued.

ii. Considering that situations where delay would be detrimental may arise for one or more reasons, such as the protection of the right to life, the protection of the life and property of individuals, the protection of national security and public order, the prevention of crime, or the protection of public health, the relationship between the content of the publication and these reasons must be clearly demonstrated.

iii. In order to carry out such an analysis, if the publication in question has a connection with terrorist organisations or the legitimization of terrorist activities, a balance must be struck between freedom of expression and the legitimate right of a democratic society to protect itself against the activities of terrorist organizations.

iv. In order to achieve the aforementioned balance:

- It must be determined whether the publication subject to intervention, when considered as a whole, targets a specific individual, public officials, a specific segment of the public, or the state, and whether it incites violence against them.
- Whether individuals are exposed to the threat of physical violence, whether it incites hatred against individuals,
- Whether the message conveyed in the publication asserts that resorting to violence is a necessary and justified measure,
- Whether violence is glorified, inciting individuals to hatred, revenge, or armed resistance,
- Whether it will cause more violence in part or all of the country by making accusations or inciting hatred,
- Whether it contains false and misleading information that could cause panic among individuals or organizations, or statements that constitute threats and insults,
- Whether the intensity of the conflicts in part or all of the country on the date of publication and the level of tension in the country influenced the decision to block access to the publication,
- Whether the restrictive measure subject to the decision is aimed at meeting a compelling social need in a democratic society, and whether the measure is the last resort,
- Finally, whether the restriction constitutes a proportionate limitation that interferes as little as possible with freedom of expression in order to achieve the public interest objective pursued.

must be assessed together with the content of the publication.”

BTK decisions that do not conform to these principles will violate freedom of expression in terms of procedure.

E. PROCEDURAL ISSUES AFFECTING FREEDOM OF EXPRESSION IN ADMINISTRATIVE PROCEEDINGS

In addition to procedural issues affecting freedom of expression by the administration in Turkey, it is also necessary to highlight administrative judicial issues arising from the law or its application.

1. Principle of Ex Officio Investigation

Pursuant to Article 20 of the Administrative Proceedings Law No. 2577, “The Council of State, regional administrative courts, and administrative and tax courts shall conduct all kinds of investigations pertaining to the cases they are hearing on their own initiative.” This is referred to as the principle of *ex officio* investigation. The reason for accepting this principle in administrative justice is the principle of the rule of law, which requires the administration to act in accordance with the law. Accordingly, the actions and transactions of the administration must comply with the law. The administration cannot exercise authority that is not based on the law and must exercise its powers in accordance with the law.

Although administrative acts benefit from the presumption of legality, when a lawsuit is filed regarding an act, it is incumbent upon the defendant administration to explain the reason for the act. Administrative acts must be based on a reason. Acts that are not based on a reason or whose reason is not explained constitute arbitrary use of authority and violate the rule of law. The reason may be a legal fact (administrative act) or a material or factual event that prompted the administration to perform the act in question. As required by the principle of the rule of law, the administration must explain the reasons on which the act is based to demonstrate its legality. This requirement normally necessitates that the reasons be stated at the time the act is performed. However, in the Turkish legal system, the obligation to explain the reasons for administrative acts is not regulated by law. In such cases, when the unlawfulness of the act is raised before the court, the court has the obligation to ask the administration for the reason for the act, and the administration has the obligation to provide the reason for the act. However, even if the administrative act is established with reasons, the administrative court will investigate *ex officio* whether the stated reason is genuine and of a nature that would produce that result. As a rule, the administration must prove that the reason for the action is genuine and lawful by submitting information and documents to the court that will prove that the administrative action in question is lawful. In this respect, it is irrelevant that administrative actions benefit from the presumption of legality.

However, the judicial authorities cannot subsequently determine a legal or factual situation that the administration did not consider as a reason at the time the action was taken through *ex officio* investigation. In other words, the duty of the administrative court is limited to determining whether the elements of the action existed at the time the action was taken. If the causal element of the action was not present at the time the action was taken, this deficiency cannot be remedied later by the judicial authority using the method of *ex officio* investigation.

As stated in the decision of the General Assembly of the Administrative Chambers of the Council of State dated 30/9/1994 and numbered E.1993/247, K.1994/559, “...According to the principles of Administrative Law, when annulment cases are examined, the situation at the time the action sought to be annulled was established is judged, and the annulment decision abolishes the administrative action from the date it was established. “ (For decisions emphasizing that the judicial review of administrative acts established by the administration in annulment cases must be

conducted based on the legal situation at the time they were established, see Council of State, General Assembly of Administrative Chambers E.2006/1009, K.2009/2822, 10/12/2009; Council of State, General Assembly of Administrative Chambers E.2006/1876, K.2010/549, 8/4/2010).

Taking this precedent into account, the Constitutional Court General Assembly made the following assessment in its B.A.Y decision: “As stated in the relevant court decisions (see §§ 37,38), in annulment cases, the judicial review of the legality of administrative actions is, as a rule, conducted based on the situation at the time the actions were taken.” (B.A.Y. [GK], Case No: 2019/19788, 5/7/2022, § 66)

In practice, however, particularly with regard to freedom of expression in dismissal decisions based on decrees with the force of law, the principle of *ex officio* investigation has become a method whereby courts subsequently create grounds based on issues that did not exist at the time of the action and were not even considered by the administration that carried it out.

According to Article 125 of the Constitution, “Judicial authority is limited to the review of the legality of administrative actions and proceedings and cannot be exercised in any way as a review of appropriateness. No judicial decision may be issued that would restrict the execution of executive duties in accordance with the forms and principles set forth in the laws, or that would have the nature of an administrative action or procedure or would remove discretionary authority.”

This rule is primarily a consequence of the principle of separation of powers. However, it should also be understood as a guarantee of individuals’ fundamental rights and duties. Courts should not retroactively apply measures restricting fundamental rights to individuals by acting in place of the administration.

However, in cases related to dismissal of public officials after the coup attempt, courts issue interim decisions, write to many different administrative bodies other than the one that carried out the procedure, make decisions based on information received from these institutions, and find the procedure against the relevant public official to be lawful based on information not included in the decision of the administrative body that carried out the procedure. Clearly, this practice deviates from the purpose of the principle of *ex officio* investigation and threatens legal certainty.

2. Application of Substitution of Reason

The situation described above cannot be considered separately from the concept of “substitution of reason.” In annulment cases, if the court finds another reason for illegality or legality during the examination of the file, the resolution of the dispute based on this reason other than the reason or motive put forward by the administration is referred to as the principle of ‘substitution of reason’ in administrative law, even if the reason relied upon by the administration in establishing an administrative act that is understood to be lawful in terms of authority and form is found to be lawful or unlawful. However, for substitution of reason to be possible, there must first be an applicable reason for the case. Secondly, if a substitution of reason has been made, the parties to the case must be given the right to speak on this matter.

The Constitutional Court has defined the requirements for fair trial in accordance with the principle of equality of arms when administrative courts substitute the reason as follows:

“In the event that administrative courts substitute the reason, within the framework of the principle of adversarial proceedings, the parties must be informed of the new situation, their opinions and objections must be heard, and sufficient opportunity for discussion must be provided. Alternatively, if the reason is substituted by the court of first instance at the decision stage, the parties must be given the opportunity to apply for effective and resultful legal remedies against the decision, ensuring that sufficient objections regarding the new cause are presented. If the appeals court evaluates the parties’ effective claims regarding the outcome of the dispute raised against this new reason, the requirements of the adversarial principle can be fulfilled.” (Koray Erdoğan [1st B.], B. No: 2013/1989, 10/3/2016, § 40)

Taking into account the specific nature of dismissal cases, the Council of State ruled on evidence submitted to the file after the dismissal as follows: “Although the actions in question were ‘extraordinary measures’ taken to eliminate the threat facing the country and to urgently restore public order, the defendant administration identified these contested measures after they were taken and submitted them to be included in the file. These pieces of evidence are past events and facts that demonstrate membership of, affiliation with, or connection to terrorist organizations or structures deemed to be engaged in activities against national security. They also indicate a loss of loyalty to the constitutional order. It is natural that they may be taken into account in the judicial review of the legality of the actions in question.” (Council of State 5th Chamber 2016/38273 E., 2022/1720 K.)

However, in practice, the substitution of reason method is not applied to evidence that existed prior to the action but was added to the file later. In the dismissal cases related to Academics for Peace, social media posts made by dismissed academics years after their dismissal and meetings they attended were also evaluated in terms of the person’s affiliation and connection. In fact, this evidence sometimes emerged 8-9 years after the dismissal and was accepted as a basis for the proceedings.

Evidently, this practice as a whole constitutes a procedural violation of freedom of expression.

3. Failure to Notify Interim Decision Responses and Request Responses

The failure of courts issuing interim decisions for ex officio investigation to send these decisions and the responses to the plaintiff for their opinion, makes the principles of ex officio investigation and substitution of reason an even more serious procedural problem. This method effectively makes administrative courts both prosecutor and judge, and worse still, it prevents the person concerned from exercising their right to defend themselves.

This practice results in the claims and evidence of administrations that are not parties to the case taking the place of the parties to the case, and since no

opportunity is given to respond to these claims, it eliminates the principles of adversarial proceedings and equality of arms.

Thus, when *ex officio* investigation, the problematic application of the principle of substitution of reason as described above, and the practice of not sending the results of interim decisions to the plaintiff are combined, it results in persons subject to severe administrative sanctions, particularly due to their statements, being completely deprived of procedural safeguards.

4. Problems Regarding Hearings and Witnesses in Administrative Courts

Procedural safeguards not listed in Article 31 of the Administrative Trial Procedure Law, are not applied in administrative trials because there is no reference to them in the relevant article, which regulates the cases in which the Civil Procedure Law and the Tax Procedure Law shall apply. The most critical issue in this regard concerns the hearing of witnesses in administrative trials.

One of the most important safeguards for individuals facing administrative sanctions due to their statements is that the person who witnessed the incident is to be heard by the court. However, this evidence cannot be heard before the court.

In administrative law, the question of whether the scope of judicial review provided for appeals against administrative decisions is “sufficient” depends not only on the discretionary or technical nature of the decision appealed and the central issue that the appellant wishes to raise as a central issue before the courts, but also depend on the nature of the “civil rights and obligations” in question and the nature of the policy objective pursued by the relevant domestic law (*Fazia Ali v. the United Kingdom*, no. 40378/10, 20.10.2015, § 84).

In this case, applications to the administrative courts should be categorised as either cases where the facts need to be re-examined or cases where they do not. In many cases, the judicial review may be limited to examining the legality of the decision taken after the review. However, in some cases, the administrative court must also clarify the facts.

Holding a hearing and discussing evidence to clarify the facts at this hearing is an important tool for the administrative court to clarify the facts. Firstly, the ECtHR first notes that the right to an oral hearing is not only about witnesses giving oral testimony during the proceedings. In this context, the right of applicants to present their case orally before the national courts is also protected. Therefore, the right to an oral hearing is one of the elements that generally supports the principle of equality between the parties to the proceedings (*Margaretić v. Croatia*, no. 16115/13, 05.06.2014, §§ 127-28; *Ramos Nunes de Carvalho e Sá v. Portugal*, §187).

The ECtHR has stated that in administrative proceedings, a hearing is necessary to clarify the facts. A hearing must be held, and evidence must be discussed in the following situations:

- (a) Where it is necessary to assess whether the authorities correctly established the facts (see *Malhous v. Czech Republic* [GC], no. 33071/96, 12.07.2001, § 60);
- (b) where the circumstances require the court to form its own impression of the

applicants by allowing them to explain their personal circumstances in person or through a representative (see *Göç v. Turkey*, § 51; *Andersson v. Sweden*, no. 17202/04, 7.12.2010, § 57);

(c) where the court needs to obtain explanations on certain matters, inter alia, through a hearing (see *Fredin v. Sweden (no. 2)*, 23.02. 1994, § 22, Series A no. 283-A and *Lundevall v. Sweden*, no. 38629/97, 12.11.2002, § 39).

On the other hand, the Convention does not regulate the right to examine witnesses independently in terms of civil rights and obligations. However, when requests to hear witnesses are made, courts must respond by explaining why it is not considered necessary to hear them. (*Carmel Saliba v. Malta*, no. 24221/13, 29.11.2016, § 77). Similarly, the court must explain why the witness evidence is irrelevant (§ 69-70). Hearing the witness of one party while not hearing the witnesses of the other party also violates the principle of equality of arms (*Ankerl v. Switzerland*, no. 17748/91, 23.10.1996, § 38).

In the case of *Dilek Genç v. Turkey* (no. 74601/14, 21.01.2025), the applicant sought to have witnesses heard against the police reports in order to challenge the administrative fine imposed on her, but claimed that she was unable to effectively challenge the findings in the police reports because her request to have witnesses heard was not taken into account, and therefore applied to the ECtHR. The ECtHR ruled that Article 6 of the Convention had been violated, stating:

“85. In view of the foregoing, the Court concludes that the domestic proceedings in the present case fell short of the requirements of the right to a fair trial, which deprived the applicant of the possibility to effectively challenge the police reports which were the sole, if not decisive, evidence forming the basis of the fines imposed on her. This was because the applicable legal framework and the case-law of the domestic courts did not permit the applicant to have her witnesses heard before the İzmir Administrative Court and the prejudice she had sustained on that account was not remedied by that court, which failed to state the grounds on which it decided to attach more weight to the reports drawn up by the police as opposed to her defence submissions. Nor did that shortcoming was remedied by the Constitutional Court.”

Following the *Dilek Genç* judgment, it is considered that witnesses must be heard, particularly involving freedom of expression, to prevent procedural violations under Article 90 of the Constitution.

Finally, unlike civil and criminal proceedings, no minutes are taken during hearings in administrative courts. Although the principle of written proceedings generally applies in administrative courts, if the parties' arguments clash before the panel during the hearing, it is clear that the way in which claims are presented and refuted is very important. However, as no hearing minutes are taken during the hearing, the parties are deprived of the opportunity to discuss how the debate is reflected in the decision. It is crucial to acknowledge that this issue is problematic in terms of procedural safeguards.



CONCLUSION

As was explained in the introduction, it is not possible to consider the restriction of freedom of expression independently of the elimination of the guarantees of the rule of law. However, it would also be misleading to think that cases where legal foresight has been undermined are only those that have become politically controversial. The new type of authoritarianism is meticulously crafting and spreading a network of laws and courts that will silence anyone who is or could be an opponent. Thus, all segments of society can be affected by judicial harassment of freedom of expression. This is why tens of thousands of people in Turkey face the risk of punishment every year for exercising their freedom of expression. Enabling such widespread oppression requires many actors, many tools, and many methods. As demonstrated in this report, it is imperative that this control network, which extends from the prosecution to the police, from the courts to the administrative units, demonstrates that all its activities are carried out within the law.

Conversely, as demonstrated in this report, the implementation of this network of pressure through legal tools and methods is also a conscious choice. It is therefore no coincidence that senior politicians and officials, most notably the Minister of Justice, present each measure taken to eradicate freedom of expression in Turkey as a necessity of the 'rule of law'. One of the most typical manifestations of authoritarian legalism is the claim and presentation by judicial authorities that they are silencing certain views not for political purposes and motives, but as a requirement of the law. Modern autocracies rely on bureaucratic violence based on legal legitimacy rather

than naked violence whose legitimacy is questioned. This violence appears to be in line with international law and human rights ideals on paper, while also providing those who support the autocratic regime with a moral line of defence. For this reason, declaring a statement unlawful after a legal process has become a much more effective method than punishing people without question.

Undoubtedly, the primary requirement for this method is the abundance and vagueness of the definition of crimes and other types of unlawful behaviour. As many rules as exist to prohibit expression, and as vague as these rules are, it becomes that much easier to silence differing opinions. As has been articulated in the introductory section and throughout the course of this study, there are numerous such regulations in Turkey, both within the criminal law and the public law framework in general. Nevertheless, it is insufficient to determine the prohibited items in this manner. How the prohibition is applied is just as critical as what is prohibited. Otherwise, there is a risk that unwanted ideas will also become entangled in this arbitrary web of law. The 'how' of restricting freedom is directly linked to the procedural safeguards examined in this report.

The purpose of criminal proceedings is to establish the material truth. In cases involving freedom of expression, this purpose will aim to reveal "who said what, in what context, for what purpose, and in what manner." This will make it possible to determine whether the statement in question is legitimate criticism that should be protected under freedom of expression, a shocking or controversial idea for a segment of society, news intended to serve the public interest, etc., or whether it is a statement that should be restricted to protect the rights of third parties, public order, public safety, public health, and public morals. As demonstrated in the report, procedural rules that are systematically and deliberately disregarded from the investigation stage to the decision stage in freedom of expression cases make it impossible to provide a sound answer to this question. This allows the feelings of the decision-makers regarding the expression to take precedence over the material truth. This sentiment consequently prompts judicial officials, who are entirely lacking in procedural safeguards, to make choices that will not displease those in power..

This study endeavours to reveal how procedural safeguards are rendered ineffective in the criminal justice process under three sections and in administrative law under one section. Judicial processes that have become commonplace for all practitioners and that render ineffective the procedural safeguards developed in legislation and human rights law have made Turkey one of the most significant models of legal authoritarianism. It is evident that the fundamental criteria developed in the case law of the Constitutional Court and the European Court of Human Rights are not taken into account by the courts, whether in criminal or administrative proceedings.

An inevitable consequence of this practice is a serious narrowing of the scope of freedom at the national level. However, this practice should not be overlooked from the perspective of international human rights law either. In the introduction, it was posited that one of the most significant outcomes of the reform process, which commenced in the 2010s and has persistently exerted pressure on the ECtHR, is the principle of 'return to procedure'. The principle of return to procedure is intended to guarantee that the principles established by the ECtHR are adhered to by national

courts and that international supervision is restricted, as far as possible, to monitoring the application of these principles.

Another outcome of this study is that the practice in Turkey, which has the highest number of applications to the ECtHR, necessitates questioning the 'return to procedure' method. The assumption of the return to procedure is that the State party and judicial authorities will, as a rule, apply these criteria. However, this principle has not adopted an emergency measure method for situations where procedural principles are systematically and deliberately disregarded. As a result, individuals whose rights have been violated are condemned to waste time in national mechanisms that completely disregard procedural safeguards for very long periods, and by the time the ECtHR finally issues a decision, the ban and censorship have already produced all their consequences. Therefore, this study should also be considered in terms of the principle of return to procedure.

As with any human rights study, this study will also make some recommendations and suggestions to its addressees following these two fundamental findings. As stated throughout the study, it would be misleading to think that the widespread practice of violating procedural safeguards in Turkey stems from coincidence or workload. Only political decision-makers can comprehensively resolve these systemic and structural problems. In the near term, this possibility does not appear likely.

However, legal professionals and human rights defenders have a duty to relentlessly demand that members of the judiciary apply each and every procedural rule. Judges, prosecutors, and administrative authorities involved in decision-making at every stage of judicial proceedings and prior to them have an obligation to avert the procedural violations discussed in this study at every stage.

Lawyers and victims also do not have the luxury of accepting and tolerating procedural violations. Effective means of objection should be used against these violations, and the violations should be systematically reported. Courtrooms are, in practice, closed and poorly monitored spaces, even if trials are conducted publicly on paper and decisions are announced publicly. Therefore, monitoring and reporting procedural violations is of critical importance.

Human rights organisations conducting this reporting more systematically will increase the visibility of violations and strengthen the fight against them. However, such monitoring should cover all processes and be carried out using well-prepared checklists. This study can serve as a starting guide in this regard.

The fundamental aim of interventions against freedom of expression in authoritarian regimes is to silence the entire society, to deter and intimidate those who express critical views. Therefore, turning investigations and prosecutions related to the exercise of freedom of expression into a public spectacle, subjecting suspects and defendants to lynch campaigns, and extensively displaying protective measures such as arrests and detentions in pro-government media are all part of the mechanism to intimidate the public. It is mostly procedural violations by the investigating and prosecuting authorities that enable this media harassment. Therefore, the defence of freedom of expression should not be seen as merely defending the content of the expression; every procedural violation must be identified, exposed, and strongly defended against.

Lastly, it is critical that human rights monitoring mechanisms, particularly the Constitutional Court and the European Court of Human Rights, review their case law concerning systematic and widespread procedural violations. In legal systems where procedural safeguards are systematically violated and such practices are widespread, the application of the principle of procedural turn produces results that are the exact opposite of what is intended. Therefore, in regimes dominated by authoritarian legalism, it is necessary to consider alternative methods that allow for the systematic implementation of substantive review.

When faced with such regimes, oversight mechanisms tend to back down either to avoid excessive workloads or out of a reflex to protect themselves. This encourages the regimes and leads to the proliferation of rights violations. As a result, protection mechanisms also become ineffective. Therefore, protection mechanisms must develop strategies to detect violations at the earliest stage and prevent their spread. In this context, applying a pilot decision procedure in the very first cases where there is a possibility of systematic violations can serve an important function. Failure to do so, by turning a blind eye to violations at the initial stage and leaving victims at the mercy of local authorities, means opening the door to hundreds of thousands of rights violations over the years. Once hundreds of thousands of people have been subjected to serious violations, managing the resulting situation often becomes impossible from the perspective of protection mechanisms.



Clearly, freedom of expression in Turkey is under multifaceted and multidimensional pressure, and the spaces and opportunities for expression are steadily shrinking. The restriction of freedom of expression cannot be considered in isolation from the dismantling of safeguards for the rule of law. However, it would be misleading to assume that cases of vanished legal predictability are limited to those that have come to the fore for political reasons. A new form of authoritarianism is meticulously establishing a legal and judicial network designed to silence any potential dissenter. While one pillar of the censorship mechanism consists of prohibitive norms, the other is the judiciary, which interprets these norms in a highly flexible and unpredictable manner. The judiciary plays a dual role in enforcing pressures against freedom of expression.

On the one hand, it becomes a censorship tool through the application of criminal law. On the other hand, by failing to fulfil its protective function in administrative and civil proceedings, it effectively becomes a tool for censorship. This is made possible by decisions being issued based on ambiguous interpretations of norms, largely achieved through violations of procedural safeguards. All sections of society can be affected by this judicial harassment of freedom of expression. This is also why tens of thousands of people in Turkey face punishment every year simply for exercising their right to freedom of expression. Enabling such widespread repression requires multiple actors, tools, and methods. It is of the utmost importance to demonstrate that this network of control, which extends from the prosecution service and the police to the courts and administrative bodies, carries out all its activities under the guise of the law.

The primary aim of interventions targeting freedom of expression in authoritarian regimes is to silence society as a whole in the face of current events, deter people from expressing critical views and instil fear. Consequently, the transformation of investigations and prosecutions concerning freedom of expression into public spectacles, the witch-hunting of suspects and defendants, and the public disclosure of protective measures such as arrest and detention in the media are all part of the mechanism designed to intimidate the public. These media harassment tactics are largely made possible by procedural violations committed by the authorities conducting the investigations and prosecutions. Therefore, defending freedom of expression requires more than defending the content of the expression itself; every procedural violation must be identified and exposed, and robust defences must be mounted against such unlawful practices.

ISBN
978-625-90146-0-9



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