A Comparative Analysis of the Recent Issues regarding the Freedom of the Press and Freedom of Expression in Turkey: Supremacy of the Turkish Constitution or Criminal Law?

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A Comparative Analysis of the Recent Issues regarding the Freedom of the Press and Freedom of Expression in Turkey: Supremacy of the Turkish Constitution or Criminal Law?

Introduction

Recent developments in Turkey have created legal criticism and constitutional questions about the scope and implementation of the freedom of expression and the press. Most recently, the secularist Cumhuriyet (“Republic”) newspaper, after the infamous and deadly attack on the French satirical newspaper Charlie Hebdo, decided to publish cartoons from the latest edition of the Charlie Hebdo to protest this violent terrorist attack. The Istanbul Chief Public Prosecutor’s Office launched an investigation into the Cumhuriyet daily for reprinting a selection of cartoons from the latest issue of Charlie Hebdo that is said to insult Muslims. As soon as the January 14 edition of the Cumhuriyet hit the press, the government sent police “to disrupt the paper's distribution” and some columnists were interrogated.\(^1\)

In December 2013, a corruption investigation encircled the Turkish government including Recep Tayyip Erdogan himself who was the Prime Minister of Turkey at that time. Three top ministers whose sons have been implicated abruptly resigned and one of them, on his resignation, said that “Erdogan should step down as well.”\(^2\) These corruption allegations have caused Erdogan both to silence the press and intervene with the judiciary. By labeling the corruption operation as “an international plot to overthrow his elected government,” he has accused his onetime ally, Gulen, who’s lived in Pennsylvania since 1999, of creating a “parallel organization” within the state. Whether these alleged accusations have reasonable grounds in political and criminal law terms fall beyond the scope of this article. This article aims to focus on the major effects of such recent developments on the freedom of expression and freedom of the press in Turkey. These terrorism accusations by the government against its former ally have had deep impacts on the press and freedom of expression in Turkey. Editors and columnists of a daily gazette published by the Gulenists under a particular ideology were detained and some are still remain imprisoned.\(^3\) Some workers of a Turkish TV network

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owned by Gulenists, have been in prison since 2015 and *screenwriters* of this TV network were detained on the terrorism accusations. After the attempted military coup in 15th July 2016 which has had “strong” links to the Gulenists in the Turkish army, the pressures and deep impacts by the government on the freedom of expression and freedom of the press have enormously increased.

In 2013, anti-government protests led by the *Gezi Movement* resulted in attacks and lawsuits against journalists and restrictions on the internet by the government^4*. These restrictions have caused Turkey’s press and speech freedom ratings to decline very sharply by falling from ‘Partly Free’ to ‘Not Free,’ and unfortunately Turkey still holds the same unpleasant level to the date^5*. According to the World Press Freedom Index approximately 60 journalists were in detention at the end of 2013, including at least 28 held in connection with their *work*. This dramatic fact has made Turkey “one of the world’s biggest prisons for media personnel^6*”. Despite questionability of provisional detention in the Turkish criminal law and international law, journalists often spend months if not years in prison even before being tried^7*. As a result, *Reporters without Borders* ranked Turkey 155th out of 180 countries in its 2017 World Press Freedom Index^8*.

In addition to these three major developments, there is a long list of events creating limits on the freedom of the press and freedom of expression in Turkey. This research aims to discuss the relevant issues by focusing on the relevant Turkish court cases for each type of the freedoms. In order to analyze these recent events more adequately, I suggest looking at the Expression and Press clauses embedded in the Turkish Constitution first. In this article, I suggest that there is a strong link between the way the clauses embedded and inadequate implementation of the freedoms in Turkey. *This article avoids political discussions as much as possible by mainly analyzing the issues from the perspective of the constitutional law while providing some solutions to ensure these fundamental freedoms in Turkey from a constitutional law perspective.*

This research will take the recent events to analyze both roots and impacts of the constitutional issues in Turkey. The article uses a *comparative* constitutional law approach by analyzing relevant US courts decisions in comparison to the recent Turkish cases. I will use

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^6*“The government, using enhanced powers under a *state of emergency*, carried out a massive purge of media outlets accused of links to an attempted military coup in July, 2016. Authorities seized control of some outlets, forcibly closed or blocked dozens of others, and detained scores of journalists.”*

^7*Ahmet SIK case is just one example of such unfortunate detentions among many see more details at [http://www.theguardian.com/world/2011/apr/05/turkey-censorship-ahmet-sik-perrier](http://www.theguardian.com/world/2011/apr/05/turkey-censorship-ahmet-sik-perrier) (accessed 3/12/2015).*

both Turkish Court of Appeal and Turkish Constitutional Court’s approaches that interpret the press and speech clauses to discuss the problematic sides of these constitutional clauses and their inadequate implementations in Turkey.

I aim to discuss and analyze each of these fundamental rights under the Section I. In this section the readers will find textual analysis of these separate provisions and my criticism regarding the vague exceptions in the Turkish Constitution to limit these freedoms such as “public order” and “public moral”. I argue that such exceptions are very broad, vague and easily manipulated by the government. The fact that Turkish public is mostly consisting of Muslims even makes these vague exceptions more problematic. Both “public order” exception of the Article 26/2 and “public moral” exception of the Article 28/8 in the Turkish Constitution are applicable to the freedom of press. I will try to analyze these vague exceptions from a comparative legal standpoint to indicate how they can affect both speech and the press freedoms in the light of recent issues in Turkey.

Under the Section II, as a primary and permanent solution, I believe that a shorter version of the provisions with less broad exceptions is required through a constitutional amendment to get rid of such problematic and detailed stipulation left from the military regime of the 1980 coup. I also contend that these vague exceptions have been applied broadly and such broad applications are not consistent with the Article 13 of the Turkish Constitution\(^9\) restricting the constitutional limits and exceptions on the fundamental rights. This fallback protection and crucial article has been mostly ignored by the courts in the recent cases but it should be considered more. More crucially, this article suggests that Turkish citizens need to place faith in the necessity of a free press and importance of speech liberty in a democratic society to fulfill their duties as watchdogs over the government acts.

\section{The Freedoms of Expression and the Press in Turkey: A Comparative Analysis}

\subsection{General}

In its Boy Scouts of America v. Dale\(^10\) decision, the US Supreme Court emphasized that the well established principle of “freedom to think as you will and to speak as you think” is indispensable to the “discovery and spread of the truth”. Although freedom of speech, the

\footnotesize{\begin{itemize}
  \item \(^9\) Restriction of fundamental rights and freedoms
  
  \textbf{ARTICLE 13}- (As amended on October 3, 2001; Act No. 4709):
  
  Fundamental rights and freedoms may be restricted only by law and in conformity with the reasons mentioned in the relevant articles of the Constitution without infringing upon their essence.
  
  These restrictions shall not be contrary to the letter and spirit of the Constitution and the requirements of the democratic order of the society and the secular republic and the principle of proportionality.

  \item \(^10\) Boy Scouts of America v. Dale, 120 S. Ct. 2446 (2000).
\end{itemize}}
press and religion are stipulated in the short text of the US Constitution and the freedom of thought is not; this crucial decision shows that the US Supreme Court has inclined to associate the freedom of thought with the freedom of speech. In its similar decisions analyzing the speech clause cases, the US Supreme Court talked about invasion of the “right to freedom of thought and freedom of speech protected by the Constitution.”

Still a curious mind may wonder: Why does the article 25 of the Turkish Constitution protect non-vocalized or yet-not-expressed thought? Is there a constitutional reasoning or this is just constitutional redundancy due to overregulated constitution?

I agree with the US Supreme Court’s Chief Justice John Marshall’s admonition that “it cannot be presumed that any clause in the Constitution is intended to be without effect” and therefore such clause in the Turkish Constitution cannot be considered as constitutional redundancy. I assert that there are possibly two main constitutional grounds for such stipulation.

First; Turkey, a country arguably struggling to be member of the European Union (“EU”), has been influenced by the positive law of the EU significantly. It is not coincidence to see that the Article 9 of the European Convention on Human Rights regulates “freedom of thought, conscience and religion.” In one of its prominent cases regarding Turkish citizens, the European Court of Human Rights (“the ECHR”) asserted that a political ideology such as communism will also be in scope of freedom of thought and needs protection.

Freedom of thought is usually and naturally associated with the freedom of expression by the ECHR too, as well as by the US Supreme Court. For this reasoning of the ECHR, value systems such as atheism, veganism, communism etc. are clearly encompassed by the freedom of thought under the article 25 of the Turkish Constitution. However, as the ECHR emphasized, it is important to note that “interferences with the voicing of thoughts or the expression of conscience will often be treated as giving rise to issues arising within the scope of Article 10’s guarantee of freedom of expression.” It is possible to argue that the freedom of thought protects one’s freedom to contemplate as she wills, whereas the freedom of speech protects one’s constitutional right to speak or disseminate as she thinks. Under this analysis,

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13 Article 9 of the European Convention on Human Rights: Freedom of thought, conscience and religion: 1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance. 2. Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.
14 Hazar, Hazar and Acik v. Turkey (16311/90).
15 Vogt v. Germany (17851/91).
an atheist citizen cannot be forced to accept the religious ideas or a communist person cannot be compelled to internalize the common and dominant views of even the most homogenous society.

In the sole dissent, Justice YILDIRIM of the Turkish Constitutional Court argued that the understanding of only one legitimate opinion or approach about symbols including national flag is not consistent with the freedom of thought. He argued that the “national flag also symbolizes constitutional values protecting freedom of thought of citizens criticizing the flag itself” whether orally or in other ways. Leaving the national security concerns aside, I agree that the freedom of thought does not only protect value systems but also protects the implications or acts upon such contemplations. Therefore any statutes prohibiting or limiting the constitutional freedom to be part of any ideology or thought should be deemed unconstitutional.

Second reasoning may be found in the second part of the Article 25 stating that “no one shall be compelled to reveal his/her thoughts and opinions for any reason or purpose.” In addition to protecting the value systems, which may even seem marginal or unacceptable to the majority, and implications of such value systems (Zoroastrian exercises, a religious person worshipping fire for instance); the freedom of thought also protects the people from being compelled to reveal their thoughts. Article 15 of the Turkish Constitution protects this freedom even during the times of war or state of emergency. The article stipulates that no one shall be compelled to neither “reveal his/her … thought or opinion, nor be accused on account of her opinions” even in case of emergencies. In other words, the Turkish Constitution is to protect people from being subject to involuntary revelation of their thoughts due to pressure by the government or other groups directly or indirectly. This negative duty imposed by the freedom of thought is constitutionally a reasonable ground for its separate stipulation in the Turkish Constitution.

17 See also West Virginia v Barnette, 319 U.S. 624, 642 (1943):
In this case the US Supreme Court restrained enforcement of a regulation requiring children in public schools to salute the American flag. According to the Court, compelling the national flag salute is against the spirit of the First Amendment.
This case is helpful to interpret the “compulsion” embedded in the Turkish Constitution’s Article 25/p.2.
18 ARTICLE 15:
In times of war, mobilization, martial law, or a state of emergency, the exercise of fundamental rights and freedoms may be partially or entirely suspended, or measures derogating the guarantees embodied in the Constitution may be taken to the extent required by the exigencies of the situation, as long as obligations under international law are not violated. (As amended on May 7, 2004; Act No. 5170)
Even under the circumstances indicated in the first paragraph, the individual’s right to life, the integrity of his/her corporeal and spiritual existence shall be inviolable except where death occurs through acts in conformity with law of war; no one shall be compelled to reveal his/her religion, conscience, thought or opinion, nor be accused on account of them; offences and penalties shall not be made retroactive; nor shall anyone be held guilty until so proven by a court ruling.
I think these two constitutional purposes are enough to save the freedom of thought from being constitutional redundancy. Freedom of thought helps citizens achieve more protections under a distinct article when properly applied by an independent judiciary.

**B. Freedom of Expression and Dissemination of Thought (Article 26)**

1. **What is the Freedom of Expression?**

If a person voluntarily discloses or disseminates her thoughts, then the freedom of expression awakens to protect such freedom. Legal issues mostly arise when a thought within the scope of article 25 turns into a speech or an expression. I will try to discuss some recent cases in Turkey under the freedom of expression in the following chapter. Thoughts that are in a frozen form in the electorate’s minds do not usually frighten the rulers or dominant ideology of the majority. However when such thought awakens and is disseminated, then such dissemination of thought is usually unwanted and suppressed by the ruler especially when such thoughts are deemed to be critical, provocative and disturbing.

It is argued that the First Amendment in general was “undoubtedly a reaction against the suppression of speech and of the press” that existed in English society. This is a reasonable reaction especially due to “government-granted licensing” requirements for publication which continued until 1694 and restrictions on the speech by the law of seditious libel that made “criticizing government a crime.”

The speech freedom embedded in the constitutions aims to protect citizens from being subject to criminal investigations when they express criticism especially against public officials or offices of the governments. Reaction against the British law of seditious libel that resulted in the stipulation of the speech clause in the US Constitution is a strong indication that the main function of such constitutional protection is to forbid the government from enacting such arbitrary statutes for their own protection and avoiding criticism by the ruled.

In contrast to what the US Supreme Court’s Chief Justice Holt wrote in 1704, the argument that “the people need to have a good opinion” of their government otherwise “the government cannot survive” is not a valid argument today. As it is rightly argued, freedom of speech should be a constitutionally protected fundamental right today due to its crucial role in “self-governance within democracy, discovering truth, advancing individual autonomy, promoting

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20 Id. at 1197-1198.
21 Id. at 1198
tolerance.” Although these principles are not without problems and mutually exclusive, they are very crucial in understanding why freedom of speech is needed.

Despite such contributions of the free speech, it is not reasonable to prevent free exercise of the freedom of expression based on assumption that government will not survive if people have bad opinion of their government. On the contrary, people who are not content with the certain policies of their government should be free to criticize the governmental authorities and public officials. Therefore the survival of the government does not rely on the good opinion of its people but indeed, on diverse criticism that keeps the government alive and controlled.

When and how the freedom of expression can be limited are very fragile questions that need to be carefully examined by the independent courts. I will try to analyze this issue below in light of the recent developments and court cases in Turkey. First I will elaborate how the freedom of expression is regulated in the Turkish Constitution and then, analyze the general problems with the vague constitutional exceptions limiting the freedom of speech.

2. Regulation of the Freedom of Expression in the Turkish Constitution

I will begin with a note that my article uses freedom of expression and freedom speech interchangeably. Although the Turkish Constitution prefers a longer headline (“Freedom of Expression and Dissemination of Thought”) under the article 26, this long expression also falls under the freedom of expression which includes dissemination process.

Article 26/1 of the Turkish Constitution reads as follows:

“Everyone has the right to express and disseminate his/her thoughts and opinions by speech, in writing or in pictures or through other media, individually or collectively. This freedom includes the liberty of receiving or imparting information or ideas without interference by official authorities. This provision shall not preclude subjecting transmission by radio, television, cinema, or similar means to a system of licensing.”

The terms “other media” should be understood as including Twitter, Facebook, YouTube, bloggers and any other media platforms created by technological improvements. As I emphasized above, freedom of thought is meaningless and incomplete without a

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22 Id. at 1199-1203.
23 Id. at 1204.
constitutionally well-protected and encouraged *freedom of expression*. It will be absurd to claim that Turkish citizens have freedom of thought while enjoining them from disseminating their thoughts to the public through practical or legal obstacles.

Recent cases unfortunately have proven that Turkey, in spite of stipulating such constitutional protections regarding freedom of thought and expression in its constitution, has still lack of compliance with the proper understanding of these constitutional provisions. To analyze this problem more adequately my research contends that freedom of expression in general is at stake in Turkey *not because* there is not any constitutional protection but mostly because *exceptions to the freedom of expression* are extremely vague and broadly applied by the legislative and executive branches\(^{24}\). In my opinion, vague exceptions such as “public safety, public order, public moral, preventing crime etc.” are constitutionally problematic and not consistent with *general framework* character of a constitution. Analysis of all exceptions is not possible\(^{25}\) but I will try to analyze the main exceptions in general, in the light of some recent cases below.

### 3. Freedom of Expression: “Of course you can talk but do not criticize!”

#### i. Criticism of the Government

Freedom of expression is associated with the freedom of the press. First, I will try to analyze some constitutional problems that *non-journalist* citizens have been facing due to vague exceptions of the Article 26/2 in Turkey. As I argued above, the First Amendment in general was a legitimate reaction against restrictions on the speech by the law of seditious libel that made “criticizing government a crime”\(^{26}\). Especially in democratic system where the government is selected for a period of time until next election, the electorate opposing certain activities of the elected government that they deem to be unjust will have nothing but freedom of expression to check upon the government that they did not vote for. This is why being able to “criticize government” without being subjected to a criminal conviction becomes vital for a workable democracy.

A 16-year-old Turkish teenager defending secularism and the principles of Ataturk, the founder of the Turkish Republic, has been accused for his read-out-statement in which he allegedly criticized the ruling of the government and the president Erdogan personally by

\(^{24}\) **Article 26/2:**

(As amended on October 3, 2001; Act No. 4709) The exercise of these freedoms may be restricted for the purposes of national security, *public order, public safety*, safeguarding the basic characteristics of the Republic and the indivisible integrity of the State with its territory and nation, *preventing crime, punishing offenders*, withholding information duly classified as a state secret, protecting the reputation or rights and private and family life of others, or protecting professional secrets as prescribed by law, or ensuring the proper functioning of the judiciary.

\(^{25}\) See all exceptions to the Freedom of Expression at supra footnote 37.

\(^{26}\) See supra note 32.
mentioning corruption allegations\(^{27}\). Similarly, a few also were detained due to such criticism and libel against Erdogan\(^{28}\). A former model and Miss Turkey of 2006 is said to face up to two years for a satirical poem she shared on her Instagram account that prosecutors have deemed to be critical of President Erdogan\(^{29}\). According to a report by the Istanbul Bar Association’s lawyers, at least 84 people have been investigated due to libel against the President under the Turkish Penal Code’s article 299, not counting other cases brought by the President as individual under the article 125 headlined “insult”\(^{30}\). A recent BBC report asserted that only between August 2014 and March 2015, 236 people investigated for "insulting the head of state"; 105 indicted; eight formally arrested\(^{31}\).

Current Prime Minister of Turkey, Davutoglu, defended the arrests and investigations by claiming that “the presidential office needs to be shown respect”\(^{32}\). The question Turkey needs to address is a very critical one: Can a constitutional freedom be limited due to criticism of president or “the presidential office” which is forbidden by a statute? In other words; one needs to pay attention to the fact that a critical freedom in the Constitution has been widely and easily limited by a Penal Code article in order to “protect” a state official.

In addition to the vague exceptions of the article 26/2 of the Turkish Constitution, the Turkish Penal Code’s Article 299 compelling people to respect the presidential office under the Turkish Penal Code is not “constitutionally” reasonable. That is ironic because historically the aim of Constitutions is to protect citizens’ right against state officials and government, not to protect the state officials against the governed\(^{33}\). The Turkish Penal Code broadens the constitutional exceptions and includes a newly-created-statutory-exception outside of the Turkish Constitution. Turkish people who criticize the President have been easily prosecuted under this article of the Turkish Penal Code. This does not make any sense because freedom


The problematic article 299 of the Turkish Penal Code reads as follow:

**ARTICLE 299**

- **(1)** Any person who casts aspersion upon President is punished with imprisonment from one year to four years.
- **(2)** The punishment to be imposed is increased by one sixth in case of commission of this offense publicly


\(^{33}\) I personally believe that such ironic approach may have its roots in the historical understanding of Turkish people giving high importance to the leaders or state itself rather than focusing on state’s duties for its citizens. This understanding can be seen very clearly in Turkish history including Ottoman Empire period, unfortunately such analysis will go beyond the scope of this article.
of speech is granted to the Turkish people by the Turkish Constitution directly, whereas the protections are granted to the President merely by the Turkish Penal Code. Criminal laws are products of the legislator and it is easy for the legislator to create a crime under the libel or defamation argument and punish everyone even slightly criticizing the President. Such understanding is not consistent with the supremacy of the Turkish Constitution and undermines the constitutional rights of the Turkish people.

Protecting presidential office’s or other governmental offices’ reputation should not be used as an excuse to limit the freedom of expression. In The New York Times v. Sullivan case, the US Supreme Court held that “criticism of official conduct of government officials does not lose its constitutional protections for speech...merely because it is effective criticism and hence diminishes their official reputations.” The Supreme Court further argues that the constitutional guarantees require an understanding that prevents “a public official from recovering damages for a defamatory falsehood relating to his official conduct” unless the official proves that the statement was made with “actual malice” that is, with knowledge that it was false or with reckless disregard of whether it was false or not. It is not wrong to argue that speech criticizing government officials is given more protection than speech criticizing private individuals under the US Law.

This article suggests that all state officials including the President of Turkey himself should be freely criticized since protections granted to the Presidency by a statute cannot triumph the rights granted to the Turkish people by the Turkish Constitution. In my opinion, the best solution is to strike down the Turkish Penal Code’s Article 299 entirely and leave extreme cases to the high court i.e. Constitutional Court. For a country as Turkey which stipulates the freedom of expression in its constitution explicitly, having such manipulative protection for the President does not make sense at all. If such a criminal provision will not be struck down, then I strongly suggest that Turkey needs to redraft the provision. As the Sullivan case, adding that “the government official needs to prove that the statement was made with actual malice” to the Turkish Penal Code’s Article 299 will definitely provide a workable and administrable solution to the issue. My solution is workable because public officials

35 Id.
36 In my opinion, Article 299 of the Turkish Penal Code can be redrafted as following (by adding a third paragraph):

Aspersion against the President
ARTICLE 299-(1) any person who casts aspersion upon President is punished with imprisonment from one year to four years.
(2) The punishment to be imposed is increased by one sixth in case of commission of this offense publicly

... 3. However critics of President shall not be subjected to the above criminal charges for a defamatory speech or publication relating to his official conduct” unless the President proves that the statement was made with
including the President of Turkey himself have greater access to the media and non-media sources to prove that the allegations are not true. On the other hand, an ordinary citizen criticizing the President of Turkey indeed does not have equal access to such sources to prove that the allegations are true. That is why my article argues that the current provision both constitutionally and logically does not make sense. More dramatically, the current article 299 of the Turkish Penal Code does not even burden the criticizing citizen with an opportunity to prove that allegations are indeed true. It finds existence of “aspersion upon President” enough to imprison a Turkish citizen for using her constitutionally protected freedom of expression to criticize the President of Turkey.

To understand the constitutional problem here, focusing on the corruption allegations discussed above will be very helpful. The corruption allegations against high ranking Turkish officials have been very serious and taken place in both domestic and international media. The accused state officials have never tried to prove that they were innocent or that all allegations were just “defamatory falsehood with or without actual malice.” Instead, the accused government of Erdogan has systematically struggled to silence any dissemination of corruption allegations and further criticism. Whether such allegations are true or not is irrelevant with respect to freedom of speech and thought because the Turkish people should not be required to be sure that the allegations circulated by the Press or internet are completely true in order to criticize a state official. Such requirement would render the freedom of speech practically impossible. This is why the US Supreme Court rightly burdens the criticized official with proof, not even criticizing people.

On the other hand, the application in Turkey is not consistent with the guarantees granted by the Turkish Constitution. Because holding a person liable upon the mere fact that she criticized the President without requiring the President to prove the allegations to be false has no constitutional ground. In constitutional sense; even if the allegations are fake, there is nothing more natural than a citizen criticizing the alleged official conduct of the state officials since the allegations have not been proven completely false before an independent judiciary by the officials themselves. Therefore any Turkish critics reminding of these “old” accusations of alleged corruption against Erdogan, who is now President, may easily find themselves in prison due the Turkish Penal Code’s Article 299 which compels the Turkish people to respect the presidential office. To conclude, this provision must be struck down entirely or redrafted the way I suggested since it is unconstitutional and illogical.

“actual malice that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

37 See supra Introduction.
ii. Religious Criticism by Individuals in Turkey

a) Broad Exceptions to the Freedom of Expression

There are many concerns about the vague exceptions in the article 26/2 of the Turkish Constitution: The government may easily suggest that the exercise of the freedom of expression is restricted for the “purposes of…preventing crime or punishing offenders…”38 Due to such vague exceptions; the legislation and executive, that are enormously interdependent in the Turkish parliamentary system, may easily enact a statute creating “crime” and “offender.” Such vague exceptions give legislation enormous and ill-defined power to limit the constitutional freedoms and dramatically, even the constitution itself may not protect the freedoms if a statute is cleverly and inconspicuously drafted. Similarly the Turkish legislative body upon the request by the government may easily enact a statute that provides imprisonment for those who criticize the religious values and “allegedly” disrupt public order or public safety etc.

Preventing crime or punishing offenders, public morals, public safety and public order are the main vague exceptions that pose enormous threat to the proper functioning and protection of the freedom of expression in Turkey. Nedim Gursel and Fazil Say cases have remarked the problematic side of the constitutional stipulation of such vague exceptions in Turkey.

b) Books: Nedim GURSEL Case

Gursel who faced prosecution 35 years ago for “morally offending the public” is accused of insulting Islam and “public morals” with his book titled “The Daughters of Allah.” In this novel, he describes the advent of Islam in the sixth century. The writer said that it’s just a “work of fiction” and he didn’t mean to offend anyone39.

On May 26, 2009; the Turkish court case began against Nedim Gursel for his description of Prophet Muhammad and his family in his book which is alleged to insult religion and incite hatred. He was acquitted in June 2009 after the publication of the book. The case was decided at the trial court in favor of Gursel, however it was appealed to the Turkish Court of Appeal Penal Chamber. Nedim Gursel’s lawyer said that she is sure the case will be dropped: “The basic argument that we put forward is that no one can hold a monopoly on the interpretation of religion.”

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38 Article 26/2 of the Turkish Constitution:
The exercise of these freedoms may be restricted for the purposes of national security, public order, public safety, safeguarding the basic characteristics of the Republic and the indivisible integrity of the State with its territory and nation, preventing crime, punishing offenders, withholding information duly classified as a state secret, protecting the reputation or rights and private and family life of others, or protecting professional secrets as prescribed by law, or ensuring the proper functioning of the judiciary.
Thoughts: Fazil SAY Case

On June 1, 2012, Turkish authorities charged Fazil Say, an atheist and world-renowned classical and jazz pianist, with insulting Islamic values by his twitter messages. The cited message echoed the words of famous 11th-century Persian poet, Omar Khayyam, poking fun at afterlife beliefs.\(^{40}\) Despite the fact that Say denied the charge but still he was given a suspended 10-month jail term on 15 April 2013. This case also has not reached final decision due to appeal process. The sentence was suspended for five years upon the condition that the pianist will not be sent to prison unless he is convicted of re-offending same “crime” within that period.

Interestingly, the poem was sent to Say from another user and he retweeted it. In another personal Twitter post, he joked about the rapid call to prayer at a nearby mosque, questioning whether “the muezzin who made the call wanted to get away quickly for a drink?\(^{41}\)

iii. Analysis of the GURSEL and SAY Cases: Supremacy of the Criminal Law or of the Constitution?

These cases have controversial issues regarding freedom of thought and expression. I contend that these cases deserve more attention than they received. The underlying ground for both cases was article 216/3 of the Turkish Penal Code which, under the title of provoking people to be rancorous and hostile, states that:

Any person who openly disrespects the religious belief of a group in society is punished with imprisonment from six months to one year if such act causes potential risk for public peace.

I cannot emphasize enough on the fact that vague exceptions in the article 26/2 of the Turkish Constitution give the legislative body enormous and ill-defined power to limit the freedoms easily. More dramatically, even the Turkish Constitution itself may not protect the freedoms due to existence of such exceptions. The Turkish Constitution’s article 26/2 stipulates that freedom of expression can be limited due to “public order” or “preventing crime” etc. Under such broad constitutional exceptions, the Grand National Assembly of Turkey, as legislative body, easily enacted the Turkish Penal Code’s article 216/3 that creates a “crime” and “offender” for breaking the “public peace” due religious criticism. It will be hard to criticize the Turkish legislative body for enacting such a law, because at least on the face such a

\(^{40}\) Omar Khayyam criticizes the notion of promised Houri/Virgins for the believers in afterlife by asking if heaven is “a pleasure house.” He is the writer of Rubaiyat. To find some poems see (https://www.goodreads.com/author/quotes/2742325.Omar_Khayyam).

limitation on the freedom of expression is in conformity with the constitution. The proponents of the limitation will argue that such limitation is made “by law” and in conformity with the constitutional exceptions such as “preventing crime” or establishing “public order”. In other words, the limit is created by the legislative body of the Turkish government through the Turkish Penal Code’s Article 216/3, not by an executive act and it is done under the constitutional exceptions (“preventing crime, punishing offenders, public order” under the Article 26/2).

If we accept this approach or reasoning by the Turkish government, then we will easily replace the well-established principle of supremacy of the constitution with the supremacy of the criminal law. Such replacement will undermine the basic principles of the constitutional law and therefore, a balanced approach is required for limiting the fundamental freedoms. The basic understanding of the constitutional freedoms sometimes requires us to protect citizens even against the law itself.

“Public order” exception of the Turkish Constitution by itself is a very broad, vague and easily manipulated exception. It is one of the exceptions that encourage the Turkish Assembly to legislate the Turkish Penal Code’s article 216/3 to punish people who wish to criticize religion through their freedom of expression. One question remains still essential in this constitutional dilemma: How can the freedom of expression be protected constitutionally, despite the existence of such vague Constitutional exceptions that encourage the government to limit the freedoms?

To solve this problem, the only constitutional provision that the Turkish Constitutional Court can rely on is the Article 13 of the Turkish Constitution. This provision requires the government to limit the freedoms only by laws in a proportional way without infringing upon their essence. Such principles also give the Turkish Constitutional Court discretion to strike down a law partially or completely due to breach of such constitutional principles of limitations. In my opinion, the article 216/3 of the Turkish Penal Code violates the principle of “non-infringement upon the essence” by embedding broad exceptions that make the religious criticism practically impossible in Turkey.

Statutory exceptions such as “potential risk for public peace” and “disrespecting the religious belief of a group in society” are also too vague for a statute and they infringe upon “essence”

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42 Restriction of fundamental rights and freedoms

**ARTICLE 13** (As amended on October 3, 2001; Act No. 4709)

Fundamental rights and freedoms may be restricted only by law and in conformity with the reasons mentioned in the relevant articles of the Constitution without infringing upon their essence. These restrictions shall not be contrary to the letter and spirit of the Constitution and the requirements of the democratic order of the society and the secular republic and the principle of proportionality.
of the freedom of expression. The fact that Turkish public is enormously consisting of Muslims even makes this broad statutory exception more problematic. Anything regarding religious criticism in Turkey may easily fall within the category of distorting “public peace” since it is “disrespecting religious values” of a large group in Turkey, namely Muslims.

Laws that regulate or relate to speech should be challenged as facially unconstitutional on the grounds that they are “unduly vague and overbroad” in the US Law.\textsuperscript{43} Turkish Constitutional Court has not declared the article 216/3 unconstitutional or provided what “public peace” means exactly. To illustrate the constitutional problem here suppose that an atheist, as Say did, states that “there is no such thing as afterlife and religion is like opium killing followers’ ability to think and question the dogmatic values.” Such an expression, which is very reasonable and understandable from atheist point of the view, should not provoke me as a Muslim to be “rancorous and hostile” at all. The problem is that the executive branch or state officials may easily assume so due to broad exception because there will be many Muslims “offended” by such a statement and getting their support is politically desirable.

I believe that an atheist may easily assert and share his opinions with public and such dissemination must be constitutionally protected under the freedom of expression even if the majority may find such criticism “offending”. If an atheist mocks religion without attacking a religious person individually; still under these vague exceptions of the Turkish Constitution and encouraged legislative’s limiting statutes, I am afraid that the freedoms of thought and speech loose both their essences and meanings in a constitutional sense. The line between the justifiable religious criticism and extremely disrespectful attack on individual’s religious values should be carefully drawn by an independent judiciary through a balanced approach. Neither the government nor majority believers should be given power to draw such an eloquent line. If an atheist director makes a religious movie criticizing Prophet Jesus or Prophet Mohammed for “lying and tricking people into believing”, this will be offending to many believers. However, “being offended” does not necessarily mean that any “religious criticism” is constitutionally unjustified. If such subjective criterion is adopted by the courts, then I am afraid that we will see many suits that will be filed locally and internationally on behalf of billions of believers\textsuperscript{44}.

During 7\textsuperscript{th} century, Prophet Mohammed himself was being accused frequently and extremely by his non-believers of being “magician, liar etc.” just like other Prophets throughout the

\textsuperscript{43} \textit{Chemerinsky}, at 1235.

\textsuperscript{44} Khalid Abdullah Tariq Al Mansour Faissal Fahd Al Talal v Fanning, 506 F.Supp. 186, 187 (N.D. Cal. 1980): The plaintiff brought a class action on the behalf of some 600 million Muslims alleging that the film “Death of a Princess” was defamatory to all Muslims because it depicts the public execution of a Saudi Arabian princess for adultery. The court denied the remedy noting that to permit an action to lie for the defamation of such a multitiduous group, we would render meaningless the rights guaranteed by the First Amendment to explore issues of public import.
history. Yet He did not punish those extremely criticizing and even physically attacking Him. It is quite ironic and shocking to me as a Muslim to see how “contemporary” Muslims struggle to “protect” the Creator and Prophet Mohammed against even constitutionally justifiable religious criticism, instead of living His universally accepted principles such as tolerance against the severe criticism. The Prophet himself even did not attempt to silence criticism or suspicions regarding His prophecy or Islam in contrary to today’s Muslims’ reactions towards even slightest criticism.

The article 216/3 of the Turkish Penal Code must be redrafted in a way that, at least, it should require intent, threat or malice for blasphemy on the defendant’s part. “Openly disrespecting religious values” is not a constitutionally proper criterion to punish defendant since it is extremely vague, broad and subjective. As all fundamental freedoms do, of course freedom of speech also has its limits. However, limiting a fundamental freedom under such vague terms by a statute is not constitutionally sound. Therefore this provision either must be invalidated entirely or redrafted. Disrespecting the religious belief of a group in society without harm, threat or malice should not be criminally actionable. Any religious criticism that falls within the category of free speech may be easily treated as “open disrespect” or “blasphemy” by Muslim majority in Turkey. This thin line between legitimate criticism of religion and damaging blasphemy should be drawn very carefully by independent judiciary.

The purpose of free speech is to enrich public debate and expose people to new ideas including disturbing ones. A person who is afraid of listening to others’ challenging ideas or of being criticized, whether religiously or politically, is the one who has not in fact internalized and believed what he assumes he has. As I strongly argue below in the Press Freedom discussion, one should realize that constitution exists to protect the fundamental freedoms, not some subjective values accepted by the majority including Islamic values.

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45 Quran, 3:159, Surat ‘Āli ‘Imrān (Family of Imran):
So by mercy from Allah, [O Muhammad], you were lenient with them. And if you had been rude [in speech] and harsh in heart, they would have disbanded from about you. So pardon them and ask forgiveness for them and consult them in the matter...

46 Turkish Constitution
VI. Freedom of religion and conscience
ARTICLE 24-
Everyone has the freedom of conscience, religious belief and conviction.
Acts of worship, religious rites and ceremonies shall be conducted freely, as long as they do not violate the provisions of Article 14.
No one shall be compelled to worship, or to participate in religious rites and ceremonies, or to reveal religious beliefs and convictions, or be blamed or accused because of his religious beliefs and convictions.
Religious and moral education and instruction shall be conducted under state supervision and control. Instruction in religious culture and morals shall be one of the compulsory lessons in the curricula of primary and secondary schools. Other religious education and instruction shall be subject to the individual’s own desire, and in the case of minors, to the request of their legal representatives.
No one shall be allowed to exploit or abuse religion or religious feelings, or things held sacred by religion, in any manner whatsoever, for the purpose of personal or political interest or influence, or for even partially basing the fundamental, social, economic, political, and legal order of the State on religious tenets.
atheist’s right to criticize religious values needs to be protected by the constitution, not the beliefs or values of a religious group that were allegedly attacked by the atheist. On the other hand, if an atheist person or government physically or indirectly makes it impossible for a Muslim to exercise her religion, then the Turkish Constitution shall protect the attacked person’s freedom to exercise her religion. In my opinion, there is a huge difference between protection of religious freedom and protection of religious values that the freedom encompasses. Constitution does not and should not aim to protect religious or non-religious values, because the Constitution is more than that. Sometimes it is, constitutionally, more justifiable and reasonable to protect only one atheist’s constitutional freedom of expression against the expectation of billions of believers for not being disturbed.

C. Freedom of the Press

1. General Analysis of the Press Freedom and Limitations in the Turkish Constitution

As I mentioned earlier in this article, the Turkish Constitution regulates freedom of press separately from freedom of speech in a more detailed way in contrast with the First Amendment of the US Constitution. Article 28/1 reads as follow:

The press is free, and shall not be censored. The establishment of a printing house shall not be subject to prior permission or the deposit of a financial guarantee.

This general introduction is important for making “censorship” forbidden and allowing anyone to establish a printing house for the purpose of press works without being subject to permissions or any other financial guarantees. Of course, this does not mean that establishing a press facility will be totally free from legislation and executive acts. For instance Article 7/1 of the Turkish Press Law\(^47\) requires that to have periodical press, the owner of the printing house needs to provide a declaration to the chief public prosecutor's office where the printing facility will be located. Article 5 of the Turkish Press Law also requires various conditions for nominating managing director of the periodical press. If a non-citizen person wants to be in charge of a periodical, article 5/2(f) requires reciprocity with this person’s country in that regard. Printing houses and facilities also enjoy other constitutional protections\(^48\).

Article 28/2 of the Turkish Constitution obliges the state to take all necessary measures to “ensure the freedom of press and gathering information.” At first it seems like, the framers of the constitution wanted to make a distinction between freedom of press and freedom of

\(^{47}\) Press Law numbered 5187 accepted at 26 June 2004 (Official Gazette promulgation date/no: 26 June 2004/25504.

\(^{48}\) Article 30 of the Turkish Constitution: A printing house and its annexes, duly established as a press enterprise under law, and press equipment shall not be seized, confiscated, or barred from operation on the grounds of having been used in a crime.
gathering information but I do not think this is the case. I do not want to assert that last expression in this sentence is constitutional redundancy. However I think, as it is very common in continental law systems, the framers wanted to emphasize the common feature of the press which is to gather information through investigative reporting. Press freedom, as term, already encompasses gathering information and such gathering constitutes a great deal of press freedom.

In addition to a separate broad limitation grounds under the article 28/4, article 28/3 makes such limitation even broader by stating that the exceptions in the article 26/2 of the Turkish Constitution discussed above shall also apply to the freedom of the press. I already mention that “public order, preventing crimes, punishing offenders” exceptions of the article 26/2 are very broad, vague and easily manipulated. Additionally broader and vague exceptions make the press freedom fade away by absorbing its essence.

One can more easily understand the first exception under the article 28/4 that requires anyone writing news or articles which “threaten the internal or external security of the State or the indivisible integrity of the State with its territory and nation…” to be held responsible under the law relevant to these offences, namely under the Turkish Penal Code. The authority preventing the distribution is required to notify a competent judge of its decision within twenty-four hours at the latest and needs to get approval by judge within forty-eight hours at the latest.

49 Article 28/3: “In the limitation of freedom of the press, the provisions of articles 26 and 27 of the Constitution shall apply.”

50 Article 28 of the Turkish Constitution: …

Anyone who writes any news or articles which threaten the internal or external security of the State or the indivisible integrity of the State with its territory and nation, which tend to incite offence, riot or insurrection, or which refer to classified state secrets or has them printed, and anyone who prints or transmits such news or articles to others for the purposes above, shall be held responsible under the law relevant to these offences. Distribution may be prevented as a precautionary measure by the decision of a judge, or in case delay is deemed prejudicial, by the competent authority explicitly designated by law. The authority preventing the distribution shall notify a competent judge of its decision within twenty-four hours at the latest. The order preventing distribution shall become null and void unless upheld by a competent judge within forty-eight hours at the latest.

No ban shall be placed on the reporting of events, except by the decision of judge issued within the limits specified by law, to ensure proper functioning of the judiciary.

Periodical and non-periodical publications may be seized by a decision of a judge in cases of ongoing investigation or prosecution of crimes specified by law; or by order of the competent authority explicitly designated by law, in situations where delay may constitute a prejudice with respect to the protection of the indivisible integrity of the State with its territory and nation, national security, public order or public morals and for the prevention of crime. The competent authority issuing the order to seize shall notify a competent judge of its decision within twenty-four hours at the latest; the order to seize shall become null and void unless upheld by a judge within forty-eight hours at the latest.

General provisions shall apply when seizing and confiscating periodicals and non-periodicals for reasons of criminal investigation and prosecution.

Periodicals published in Turkey may be temporarily suspended by court ruling if found to contain material which contravenes the indivisible integrity of the State with its territory and nation, the fundamental principles of the Republic, national security and public morals. Any publication which clearly bears the characteristics of being a continuation of a suspended periodical is prohibited; and shall be seized by decision of a judge.
This requirement seems to provide additional protection for the press however, unfortunately, in reality getting such approval is not that hard. Exceptions as the name suggests should be narrowly applied and framers of the Constitution eradicated the essence of the press freedom by stipulating so many vague exceptions that may give legislation uncontrolled discretionary power to limit the press freedom the way they desire by enacting statutes. Due to such broad exceptions, “seizing and confiscating periodicals and non-periodicals for reasons of criminal investigation and prosecution” become more and more problematic by disregarding constitutional protections for the press.

To illustrate my point more clearly, we need to look at article 28/8 stating that “periodicals published in Turkey may be temporarily suspended by court ruling if found to contain material which contravenes …public morals.” I am asking similar question that I put to the “public order” exception above: What do we need to understand from “public morals”?

I will try to analyze these vague exceptions from a legal standpoint to indicate how they have affected interpretation and implementation of the press freedom in Turkey. Broad implementation of these “constitutional” exceptions reverses the basic rule that freedom is essential whereas exception should be construed very narrowly. But first, since these constitutional privileges are attached to press status, we need to look at who the press is in Turkey.

2. Defining the Press in Turkey: Who is who?

In the American Law it is argued that freedom of the press is enumerated as a distinct right from freedom of speech due to reflecting the crucial and unique role of informing the electorate and “thereby checking government.” However, under the US Law the question of whether this freedom is right of every individual or press institution still is very controversial.

The Turkish Constitution regulates freedom of press separately from freedom of speech in a more detailed way compared to the First Amendment. Both freedoms are regulated under Part Two: Fundamental Rights and Duties- Chapter Two: Rights and Duties of the Individual.

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“In 1768, the Boston Gazette, the leading organ of radicalism in Massachusetts, accused the royal governor of misrepresenting the position of the Massachusetts House to the British secretary of state. The Royal Council condemned the article as a seditious libel, and Governor Bernard asked the House to turn the matter over to a grand jury for prosecution. The House, dominated by the radical leader Sam Adams, refused to do so and instead adopted a resolution stating: “The Liberty of the Press is a great Bulwark of the Liberty of the People: It is, therefore, the incumbent Duty of those who are constituted the Guardians of the People's Rights to defend and maintain it.”

the Turkish Constitution. Such systematic drafting of the freedom of the Press is crucial because it highlights the fact that freedom of thought, speech and press are indeed fundamental and individual rights. Therefore this article argues that press freedom, at least in Turkey, is not considered as an “institutional” but rather an individual right.

So far I have established that freedom of press is a separate clause from freedom of speech and they both are fundamental and individual freedoms under the Turkish Constitution but I still need to define what the press is. Definitions are not easy because we may come up with a definition that is either over-conclusive or inconclusive. How do we know whether a person is acting as member of press who enjoys separate constitutional protections in addition to ordinary citizens’ freedom of speech? How can we draw a line between an ordinary commentator and a journalist when both are using the same media i.e. twitter?

According to the Turkish Law on the Regulating Relationship between the Employers and Employees of the Press Occupation53, employees dealing with literary and artistic works in return of wages are defined as “journalists”. One should not confuse this limited definition with the definition of the press. “Journalism” is just a general function of the press and does not encompass definition of the press.54

Additionally, the title as “…of the Press Occupation” is misleading because I think the press constitutionally should not be limited to a paid job or occupation by the power of the legislator. I agree that journalism or the press in general is not an “occupation like medicine or law” and being paid should not make someone automatically journalist55. Under the Regulation of Press Pass56, Turkish press members are provided with the pass which provides some facilities for the member. Based on these regulations, I think it is possible to argue that not only journalism but the press in general is at least intended to be a “licensed profession” in Turkey whereas under the US Law journalism is an unlicensed activity57.

Additionally, just because someone has journalism education or claims to be a journalist does not make her a member of the press automatically. Many law and other area graduates are subject to Journalism Law58 because they are dealing with journalism in return of wages by their employers in Turkey. Licensing and narrowing the definition of the press as much as possible, limits the constitutional protections attached to the press eventually and therefore such questionable inclination of the legislator should not be ignored by the courts.

53 Turkish Law on the Regulating Relationship between the Employers and Employees of the Press Occupation numbered 5953, Promulgating Official Gazette Date/No: 20.06.1952/ 8140.
57 See Calvert at 432.
58 See supra note 47.
I believe *what the press does* should determine who the press member is. Although the positive law in Turkey defines who the *journalist* is very narrowly, neither the Turkish Law nor the Turkish Constitutional Court have established what the press is and when a press member is acting in her capacity as the press. To me, while determining whether a person claiming to be the press is indeed press or not, the courts should look at what this person does rather than his press permits or passes, payroll, her education or the institution he is affiliated with. I do not contend that such indications are not determinative. On the contrary, such qualities are very helpful to determine if someone *acts* as the press. However if we let the legislation and executive branches of the government to regulate the scope and the definition of the Press through legislative acts and administrative regulations, I am afraid that there will not be such thing as the press freedom under the Turkish Constitution. Therefore, a *functional approach* towards what the press does is indeed more adequate and helpful for the Turkish courts to determine whether a person acts as the press in *a certain circumstance*.

3. **Struggle to Define the Indefinable: What is the Press Activity?**

Under the Turkish Law, although I believe it is problematic, it is easier to say whether a person is *journalist*, thanks to the Turkish journalism law criticized above. On the other hand, journalists constitute just a small part of the Press which is hardly definable. Despite the definition of journalist, one needs to know whether a journalist acts as the press or ordinary citizen in a particular circumstance. A *columnist* at a Turkish daily, who is clearly a journalist, does not always act as the press in her daily life. On the other hand, a *blogger* may act as the press and may fulfill all the functions imposed on the press by the constitution more significantly than a journalist. Due to such practicality concern, I think a functional approach to define press based on what the press actually does is constitutionally more adequate.

It is rightly argued that we need to make a distinction between “press-like public commentators” and the Press itself\(^{59}\). As in *The Occupy Wall Street Movement, Gezi Movement* in Turkey also sparked similar concerns about the freedom of the press as West discusses in her article\(^{60}\). In spite of public interest in being informed and high level of newsworthiness, many reporters encountered with not only roadblocks but also aggressive detentions by the police while gathering news during the movement. Among detainees, there were both local and foreign journalists despite displaying their press credentials\(^{61}\). In its


\(^{60}\) Id. at 2434-2435: “Yet despite the high level of newsworthiness, many reporters who attempted to cover the protests faced significant roadblocks. Some were denied access to protest sites. Others were arrested, even when they could and did display press credentials.”

public statement, the Turkish Association of Journalist declared that eight journalist were
taken into custody during the movement. The police did not accept the cards shown by the
press agency and required many to display government-approved passes by stating that
institutional ones are “invalid”\textsuperscript{62}.

Whether the police was right to detain the journalists is not issue for this paper. However, it is
clear that there have been \textit{practical} violations of the press freedom under the constitutional
law during the protests. We need to look at, irrespective of reasons \textit{absent clear criminal acts},
whether the press can be detained or forbidden from the scene during the investigatory
reporting from a constitutional law standpoint. This is why I believe a distinction between a
“press-like public commentators” and “press” itself is very crucial. As I expressed my
concerns above, carrying passes approved by the government is constitutionally problematic
to be considered as the press. Additionally requiring the press to carry these passes all the
time to prove that they are indeed members of the press does not comply with the nature of
the reporting because a newsworthy thing may happen any time and any place.

The US Court of \textit{In re Madden}\textsuperscript{63} held that an individual claiming the journalist's privilege had
to satisfy three elements: (1) the claimant was engaged in \textit{investigative reporting}; (2) the
claimant was \textit{gathering news}; and 3) the claimant possessed \textit{the intent at the inception of the}
newsgathering process to \textit{disseminate} the news to the public. In my opinion such functional
approach can be applied in Turkey, to determine who the press is as well.

A demonstrator who uses her \textit{twitter} to warn her fellow demonstrators about a tear-gassed
road controlled by the police is a public commentator, whereas a CNN journalist who wants
to \textit{broadcast} such live demonstrations \textit{via twitter} to the readers or followers is present as a
press member. \textit{Dissemination intent} requirement, which is an essential element in \textit{Madden
test}, is crucial to distinguish journalist from a public commentator but it is not enough in my
opinion. A demonstrator using her twitter to disseminate news about tear-gassed road to a
huge crowd of demonstrators is also fulfilling this criterion. But it is hard to claim that such
person has done \textit{investigative reporting} through \textit{confidential sources} and \textit{intent to disseminate}
to public in general. Emergence of new media makes such distinctions even more ambiguous
and harder. Courts need to carry out a very careful assessment to decide whether a person acts
as press or just a general public commentator on a case-by-case basis.


\textsuperscript{63} \textit{In re Madden}, 151 F.3d 125, 3rd Cir. (Pa.1998). The court held that Mark Madden who has journalism as
bachelor degree is not entitled to claim a journalist's privilege due to non-concurrence of the three elements.
If the police take a journalist among protesters into custody and interrogate him in order to make sure that he is indeed a journalist, such postponement due the detainment will damage public interest in receiving such news adequately and as soon as possible. Therefore instead of looking for a sole method to define what the press activity is, I suggest to rely on other indications such as journalist passes, affiliations etc. in addition to the general functions of the press all together on a case by case basis. Focusing solely on a few elements, especially on legislator’s press definition is not reasonable approach so concurrence of all these elements needs be considered. Therefore, this article asserts that a broad definition of the Press based on a functional approach and case-by-case analysis by taking all relevant elements into account will be more adequate for Turkey.

4. Press as an Elitist Group or Watchdog for the Government Acts?

The press has been usually accused of creating an “elitist” and “untouchable” group which criticizes the government intensively by the high ranking officials in Turkey. In many official statements, the president of Turkey has criticized both judiciary and the press for slowing down the executive projects. For instance; the president and other high-rank officials rely on this argument to defend the “presidency system” as an “acceleration method” for executing projects. They accordingly criticize both judiciary and the press to get out of the way of the “democratic will” of the people by referring to the “majority-voters”. The discussion regarding presidency is not part of this research. However, I will try to analyze this problematic and dangerous understanding of the press as an elitist group from a constitutional perspective. The Human Rights Watch argued that such “autocratic” reactions have been “dangerous experiment of undermining basic rights and the rule of law as constraints on majoritarian rule in Turkey.”

The press law scholars in US also use “elite” but only to describe the distinct and protected character of this group by the Constitution. The Press can be considered as elite in the sense that it is afforded distinct rights compared to that of an ordinary citizen, not because it is untouchable for criticizing government. I think, West wisely chooses the expression of “press exceptionalism” instead of “press elitism” in her article.

It is clear that this elitism argument is mainly used as an excuse to suppress press freedom through various non-constitutional acts by such criticizing governments. However the constitutional problem still remains unsolved: Even if we accept that press freedom somehow creates an “elitist” or more properly an “exceptional” group, is this really a bad thing? Just

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65 Calvert, at 413.
66 See supra note 59.
because judiciary has a distinct role protected by the constitution for instance, does that make the judiciary an elitist group that needs to be controlled by the government? Do we need to take away the constitutional privileges from the judiciary or press for such elitism concern and causing the execution of the political will slow down?

Of course not, such distinct and exceptional protections are stipulated in the constitution for a reason and they are not constitutional redundancy. Constitutionally-protected press does not create an elitist group but indeed serves a primary and crucial role to check on “the most elite members of our society, high-ranking government officials and private but powerful figures” by gathering and supplying the general public with critical information about their activities. By determining what is newsworthy, the press plays a unique role by investigating and disseminating news to the people both locally and worldwide to create a well informed public and electorate to criticize these hidden elite groups more properly.

Both judiciary and the press play a vital role in a democratic society to check on and limit the arbitrary power of the government. By doing so, the constitution aims to protect the non-supporters of the government while helping all public gain critical information about governmental acts. Especially when the government enjoys high percentage of the popular support from the ruled, the press’s involvement and investigatory role will be more desperately needed. As rightly put by the US Supreme Court, “failure of political will” does not justify unconstitutional remedies or limitations. The elected officials do not have constitutional basis for arguing that the press and judiciary slow them down and cause the improper functioning of the political will.

I believe Turkey’s recent problems should be read from this constitutional perspective. Gezi Movement which was initially launched to oppose Erdogan’s plan “to build a shopping center at the site of one of central Istanbul's last parks” has sparked many disputes. The government first argued that since it represents the “political will of its electorate”, both judiciary and the press should step aside by letting them to do what they are elected for. What if building of the shopping center is indeed not proper both legally and practically; then, should the press and judiciary step aside by giving up their tasks and rights afforded by the Turkish Constitution?

From the US Law perspective, the functional role provided by the press focuses on its role as “watchdog of the powerful and as conduit of newsworthy and critical information.” In addition to the three branches of the government, the Press is considered as a Fourth Estate.

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67 Supra West, note 59 at 2451.
69 Supra West, note 59 at 2451.
that is “autonomous, functioning as watchdog on the government, publicizing abuses, and, one hopes, arousing the citizenry.”

One needs to be mindful that the Press has duty to criticize and investigate judiciary as well by elaborating and breaking down the detailed and confusing judicial decisions to the public. Especially when judiciary is heavily controlled by a certain group or influenced by the government, the fourth estate function of the press becomes more valuable. Whether we like it or not, despite our desire to place the press in an impartial place in our minds, we need to accept the fact that the press is not free from ideologies, monetary concerns etc. The Human Rights Watch rightly has emphasized that Turkey's mainstream media is largely owned by “conglomerates that are very vulnerable to economic retaliation and political pressure by the government and therefore are all too ready to dismiss journalists and columnists who criticize Erdogan” and other high-ranking officials. During the Gezi Movement, the Turkish media was suppressed for not to cover the protests and preferred to air a nature show about penguins which later has become “symbol” when media condones crucial issues and shows something irrelevant.

This article agrees that the US interpretation of the Press as watchdog upon the government will benefit Turkey too. Such watchdog function of the Press should be also considered alongside with other functions such as informing public etc. by the Turkish courts. To conclude this part; if the government feels irritated by the criticism coming from the press, then the whole electorate can take a deep breath because that means the press is fulfilling its duty under the Turkish constitution. On the other hand, if there is no one in the way of the government executing “political will of the majority electorate” then the ruled need to be afraid. Because that means the press is pressed to shut up and the judiciary is heavily controlled.

The argument that “the press and judiciary slow the government down and prevent acceleration of projects to improve Turkey” does not have any constitutional basis and indeed, is a very dangerous thought. If ninety-nine percent of the Turkish people elect and support the government, still an independent judiciary and the Press need to function properly according to their duties and privileges granted by the Turkish Constitution to protect the remaining public. “Failure of political will” or “deceleration of the executive projects” does not justify unconstitutional remedies or limitations upon the press or judiciary. On the other hand; assumption that “a public vote can justify undermining basic rights by suppressing public

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71 Supra note 64.
protest and criticism, censoring the media, and interfering with judicial independence” does not have any constitutional justification. On the contrary, in such cases the Press functions as watchdog over the government acts by disseminating newsworthy information to the Turkish public.

5. Analysis of Recent Cases in Turkey from the Perspective of Press Freedom

i. General Issues Regarding the Freedom of the Press

As I greatly emphasized so far, both “public order” exception of the article 26/2 and “public moral” exception of the article 28/8 are applicable to limit freedom of press under the Turkish Constitution. These vague exceptions affect press freedom enormously and such effect can be seen more clearly in the light of recent issues in Turkey.

Investigative reporter Ahmet SIK’s book “The Army of the Imam” dramatically has been censored and the scripts were collected by the authorities when the book was almost ready to be published while the writer was imprisoned. In December 2013, a corruption investigation has encircled the Turkish government including Erdogan and three top ministers. These allegations have caused Erdogan to suppress the press as well as the judiciary. Leaving aside the political discussions and speculative conspiracies arisen from this issue, many problems have resulted regarding the press freedom in Turkey due to Erdogan’s furious reactions in order to protect him against these allegations.

The government’s pressure on the media has caused the Turkish people to use the social media more enormously to learn about the leaks and allegations. The tapes were posted on YouTube and disseminated via Twitter, where critics of the government wrote freely about the corruption allegations. Erdogan's response was to shut down access to both sites, “only reluctantly reopening Twitter access after the Constitutional Court ordered it and after his party had convincingly won pivotal local elections in March. Meanwhile, the AKP (Justice and Development Party)-dominated parliament adopted a new intelligence law that criminalizes “not only the leaking of secret official information but also its publication, punishable by a prison term of up to nine years. The Vienna-based International Press Institute (IPI) saw the such arrests as “part of a trend by Turkey’s government in recent years to use terrorism accusations to bring its critics to heel.”

74 See supra, http://www.theguardian.com/world/2011/apr/05/turkey-censorship-ahmet-sik-perrier
76 Id.
77 Id.
78 Id.
More dramatically, it is argued that many journalists were notified by Twitter that a Turkish court had issued an order for their tweets to be removed after a judge's complaint called the tweets *defamatory*\(^79\). Some Twitter accounts of critical reporters were canceled directly and many were given “censorship warning” by the Twitter. Professor Akdeniz, who filed the complaint to the Turkish Constitutional Court to uplift the ban on Twitter, sent a written notice to Twitter to abandon such “content-hiding policy” but Twitter has remained silent to comment on this crucial issue\(^80\). Although social media companies don’t break down their data on withheld content showing *whether journalists are specifically targeted by government removal requests* but the present warnings point to “wider evidence that journalists are experiencing censorship on social media\(^81\). These restrictions have caused Turkey’s press freedom score to decline very sharply by falling from ‘Partly Free’ to ‘Not Free’ and Turkey still holds the same level of the freedoms to the date\(^82\). According to the World Press Freedom Index approximately 60 journalists were in detention at the end of 2013, including at least 28 held in connection with their work, making Turkey “one of the world’s biggest prisons for media personnel\(^83\)”. These critical issues point to Turkey’s desperate need for establishing protections for the freedom of the press. I will analyze some recent cases to illustrate if the Turkish Constitution can be solution to such violations by the government or if the Constitution itself is not sufficient, even if properly applied, due its ambiguous and broad restrictions that encourage the government to limit the freedom enormously and courageously.

### ii. Newsworthiness and Unwanted Publicity in Turkey: Constitutional Analysis of Charlie Hebdo Case

Who should decide on what to be published by the press? In Turkey, this question has become more crucial as part of press freedom in the recent events discussed above. Both public order and public moral exceptions under the Turkish Constitution give government arbitrary power to limit the press freedom through many non-constitutional and usually unconstitutional instruments. The deadly attack at the Charlie Hebdo and Cumhuriyet newspaper’s desire to cover the issue as a protest are good examples to see *newsworthiness* and *unwanted publication* issues in Turkey.

\(^79\) Catherine Stupp, “How reporters are experiencing censorship on social media - From Turkey to Russia, journalists have been asked to remove content” Columbia Journalism Review, Feb 3\(^\text{rd}\) 2015, archived at [http://m.cjr.org/303546/show/46ec4f8eca4961f8fd9be122112a7794/\(^?\)](http://m.cjr.org/303546/show/46ec4f8eca4961f8fd9be122112a7794/\(^?\)).


\(^81\) See supra note 82.


Secularist Cumhuriyet (“Republic”) newspaper, after the infamous and deadly attack on the French satirical newspaper Charlie Hebdo, has decided to publish cartoons from the latest edition of the Charlie Hebdo to protest this violent terrorist attack. The Istanbul Chief Public Prosecutor’s Office has launched an investigation into the Cumhuriyet daily for reprinting a selection of cartoons from the latest issue of Charlie Hebdo. As soon as the January 14 edition of Cumhuriyet hit the press, the government sent police “to disrupt the paper's distribution”

Amnesty International’s officials criticized the attack on the newspaper stating that “raiding a printing press or launching criminal investigations into journalists because of what a newspaper has published are a drastic limitation on freedom of expression and amount to state censorship.”

Hikmet Çetinkaya and Ceyda Karan of the daily Cumhuriyet, who have received many threats on social media due to publication, could face up to a year in prison if convicted. Access to web pages featuring the Charlie Hebdo cover has been banned from within Turkey following a court order from the Diyarbakir Magistrates’ Court on 14 January 2015.

Turkey’s Prime Minister Ahmet Davutoğlu in his speech clearly stated that they have warned the Cumhuriyet daily about the “sensitivities” of publishing the Charlie Hebdo cartoons.

Turkey's Prime Minister called the reproduction of the cartoons a “grave provocation” stating that “the freedom of expression does not mean the freedom to insult.”

Turkish Prime Minister, who joined a march in Paris with other world leaders in solidarity with Charlie Hebdo, has criticized Cumhuriyet for publishing the cover by arguing that “freedom of press does not cover insulting the Prophet.” He argued that since Turkey has such sensitivity regarding the Prophet, “publishing a cartoon that aims to insult the prophet is a clear act of incitement.”

iii. Newsworthiness in Turkey “How, When and What to Publish”: Analysis of Court Decisions

a) Press’s Autonomy to Publish v. Popular Discontent with News

“Public moral” and “public order” exceptions of the Turkish Constitution are already vague and broad. Additionally putting “not amounting to the freedom of insult” principle created by the government to these exceptions indeed makes this vague exceptions even more

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84 Links, supra note 1.
88 Supra note 88.
89 Supra note 89.
problematic. Yet such criticisms demand a more concise analysis from the Constitutional Law perspective based on following questions: Is it constitutionally valid argument that, as the Prime Minister argues, the freedom of expression or press does not mean “the freedom to insult?” What should the constitutional line between the freedom of press and “insulting religious values” be? Is there any hierarchy if these two conflict?

To tell the press what to publish or not to publish has been a serious problem that the framers of the US constitution wanted to avoid. In my opinion, even the courts including Turkish Constitutional Court should not interfere with the press freedom by defining newsworthiness. We need to make a distinction between “telling the press what is publishable” and “judging press for its tortuous publications” i.e. defamatory publication. In latter, the court is interpreting and applying the law to the actions of the press taken on its initiative, whereas in the former the courts intrude what is left to the press by the constitution. The Press should be free to publish what it considers to be newsworthy for the public’s best interest. Therefore, in my opinion, government should be forbidden from directly or indirectly interfering with the press’s autonomy to decide on what to publish. As I contend, governments should not have such arbitrary power especially where even the courts’ involvement is not justifiable.

b) Freedom to “Insult” as part of Freedom of Expression and the Press

Many state officials and courts, as in Say case, ignore the basic fact that freedom to satire or freedom of “insult” has been and always will be part of freedom of expression and the Press under both the Turkish constitutional law and international human rights law. Referring to the leading decisions of the ECHR, Turkish Constitutional Court rightly held that the freedom of expression includes not only “inoffensive or generally accepted ideas” but also “insulting, shocking and worrying” ideas and news. Freedom of expression and press are strongly required to ensure the basic ideals such as “pluralism, tolerance and openness to criticism” of the democratic society. The Turkish Constitutional Court also emphasized that the press should be able to publish news “contrary to beliefs or opinions of the majority” as well.

The Amnesty International is unfortunately correct for its argument that Turkish courts and government have treated democratic criticism as “insult.” This wrong assumption has resulted in many criminal convictions which violate the freedom of expression and the press. If there are any complaints of defamation or insult against individuals, there are many available civil remedies including compensation under the Turkish Civil Code and Code of Obligations.

91 Turkish Supreme Court Application No: 2013/5574 Decision Date: 30/6/2014, paragraph 55 (CIHANER Case).
92 Id. paragraph 56.
93 See supra note 88.
Over-criminalization of insulting ideas and news by the legislation violates the essence of these freedoms which is explicitly condemned by the Article 13 of the Turkish Constitution. Otherwise we will have a practical and newly-created supremacy of the criminal law instead of supremacy of the Constitution.

Turkey is a Muslim-majority country, so anything criticizing the Islam religion or Prophet can easily be considered as “insulting” or against “public morals.” If we apply such exceptions very broadly as in Say case, then we ignore the essence of the freedom itself. An atheism-based newspaper or a secular newspaper criticizing Islamic values or publishing anti-religion ideas in general may easily be considered as violating public moral, public order or religious values of the “public”, namely majority. I think the distinction that most courts and state officials miss here is that the Constitution exists to protect individuals’ freedom to exercise the religion, not to protect religious values. Protecting certain religious values under the “insult” or “public moral” doctrine is not consistent with the Turkish Constitution which explicitly claims to be secular.

It is not the duty of the constitution to protect public morals. Today’s morals, sensitivities or majority will change in time due to demographic and social changes, but the need to protect the freedoms constitutionally will always be needed. If Turkey was a non-Muslim country with only five percent of Muslim population, the Prime Minister would certainly react differently because the understanding of public moral or public order would be different. An atheist newspaper can criticize all religious belief as it desires because this is its and its readers’ idea about the religion. If a Muslim butcher a cow just for a nice dinner, is this not “insulting” religious beliefs of Hindu people in Turkey irrespective of their number? If an atheist argues in a column of secular newspaper that God’s existence is ridiculous and those who believe do not use their minds to question” or make fun of the Prophet, does such publication require imprisonment for violating public morals and insulting religious values?

Cartoon crisis at the Cumhuriyet newspaper is not the only one giving rise to the constitutional debate between religious values and freedoms. In 2005, Danish newspaper Jyllands/Posten published some “allegedly offending” caricatures which unfortunately led to some infamous violent acts by the religious protesters from all around the world. The demonstrators wanted a “formal apology” from the newspaper. The newspaper refused and also, Danish Prime Minister Anders Fogh Rasmussen declined to meet ambassadors from Muslim countries to discuss “issue” by emphasizing the democracy and freedom of press and expression in his country. I believe, by putting the international politics and diplomacy

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concerns aside, requiring a foreign Prime Minister to press his own citizens who have used their constitutional rights to abandon such insulting act does not make any sense. Let alone pressuring other country’s citizens, I contend that the Turkish Constitution does not undertake to protect such religious values by disregarding other people’s right to criticize general values even in Turkey. It goes without saying that Denmark has hold “free” status and the best freedom rating by the Freedom House to date.\(^95\)

It is naturally desirable for all of us to live in a world without any insults whatsoever. However if there are only two people on the earth, there will be still conflict between freedom of expression of one and “not to be insulted” of another. There had been and always will be unwanted, irritating and insulting publicity. Below, I will analyze high courts’ approaches towards such inevitable issue briefly.

c) **Turkish Court of Appeal Approach**

Turkish Court of Appeal has decided on many cases where fundamental rights collide with the freedom of the press. In one of its primary cases, a district governor brought a suit against a newspaper which indirectly accused him of embezzlement. According to the court, if the press freedom and individual right to privacy collide, the criterion to declare one more important over another should be the public’s interest.\(^96\) The court emphasized on the truthfulness of the information and required the public officials to be more open to heavy criticism due to their official works. Since the embezzlement was “true and topic of another pending case,” the Turkish Court of Appeal held that the local public had superior right to know truth in a “striking and eye catching headline” than the individual right of the governor for not being insulted. The court decided that press has such freedom and there was not any attack on the governor’s personal rights. Even if there is, it needs to be outweighed by the higher interest of the public in being informed.

State officials usually use “not to be insulted or defamed” as a mechanism to argue that their right to privacy and personal rights are breached by the Press. Balancing the individual’s right to privacy with the public’s right to newsworthy information requires careful assessment. The Turkish Court of Appeal has continually accepted the “distinct role” of the press for its role of public interest criterion.\(^97\) As long as news is “proper to apparent truth”, there is not any violation of privacy rights.\(^98\) Compared to the complete truthfulness criterion, “properness to the apparent truth” criterion seems in favor of the press.

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\(^96\) The Turkish Court of Appeal 4 HD, E: 2012/17427 K: 2013/16725 (Kazanci Cases- Database).

\(^97\) The Turkish Court of Appeal 4 HD, E: 2013/13931 K: 2013/17419 (Kazanci Cases- Database); The Turkish Court of Appeal 4 HD, E: 2008/8907, K: 2008/11665 (Kazanci Cases- Database).

\(^98\) The Turkish Court of Appeal 4 HD, E: 2001/10293, K: 2002/1611 (Kazanci Cases- Database).
If a daily newspaper disseminates news stating that the minister is said to involve in an embezzlement of 3 million dollars but the real amount is later found to be 10,000 USD, still the essence of the news is true and the news is suitable to the apparent truth. One can argue that, the Turkish Court of Appeal is creating a newsworthiness criterion by providing such principle. However, I think we need to look at this principle as a principle of judicial analysis by the court rather than as establishing what news is.

d) **The European Court of Human Rights Approach**

ECHR has emphasized that it is not courts’ duty to act as press and determine “what to publish and how to publish it” in a certain circumstance. Similarly the governments should not interfere with the freedom of the press. The Court, in its primary cases has held that protecting freedoms of minority groups such as Alevi, Atheist citizens etc. indeed a constitutional duty of the governments.

In *Mansur Yalçin and Other v. Turkey* case, the ECHR has required Turkey to go through a religious reform by allowing teaching “in conformity with plaintiffs’ own religious and philosophical convictions”. The applicants, who were adherents of the Alevi faith, complained before the Court that the way in which the religion and ethics class, which is based on Sunni religious values and a compulsory subject in primary and secondary public education, violates the Turkish Constitution and relevant Protocols. The Court recalls the positive State duty under Article 2 Protocol No.1 to, when including religious instruction in the curriculum, to the extent possible, avoid situations where pupils face such a conflict between the religious education at school and the religious or philosophical convictions of their parents. The ECHR’s decision has shown the properness of this article’s contention that the Turkish Constitution should protect the freedom of the Alevi adherents even if this belief and its follower’s ideas insult certain values of the Sunni-Muslim majority in Turkey.

e) **Turkish Constitutional Court Approach**

Turkish Constitutional Court in its primary Cihaner Case emphasized that the less informative press is the more individual rights of attacked person will be protected. In this crucial case Ilhan Cihaner, who was chief public prosecutor at an eastern city of Turkey, sought a relief by using his individual application right against a national newspaper which used “exaggerated” headlines to emphasize his alleged involvement in “terrorist organization named Ergenekon.”

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100 ECHR, Mansur Yalçın and Other v. Turkey, Application No: 21163/11.
102 Supra note 94, paragraph 74 (CIHANER case).
As Turkish Court of Appeal, the Turkish Constitutional Court rejected the “insult” claim and concluded that since the news were based on real events being discussed in a separate criminal investigation by a “special court” since 2007; the “exaggerated” headlines were “suitable to the apparent truth.” The importance of this case is that one of the grounds for the application was the violation of the Article 17 of the Turkish Constitution. By rejecting the individual right violation claim, the court accepted that even though the press exaggerated its headline to criticize the prosecutor, the newspaper was fulfilling its right and duty under the Article 28 of the Turkish Constitution.

Based on these three approaches and the court decisions abovementioned, I think it is possible to argue that all courts have favored the press as to the question what, when and how to publish. Although I am afraid that “suitable to the apparent truth” principle, when used excessively by the courts, may interfere with the press’s autonomy of determination what is newsworthy, I still consider it is an applicable standard to determine if the press exceeds its duty in defamation cases. I believe that freedom of speech and the press encompass the freedom to satire as well. Stating otherwise will have no constitutional basis as three approaches abovementioned have shown. Despite these beneficial interpretations, there is a flow of cases against the press and critics resulting in imprisonment due to ill-defined protections and legislator’s acts.

iv. **When does a Journalist become a Terrorist?**

Cumhuriyet, Hürriyet and Posta Dailies have been recently investigated under the Turkey’s Counterterrorism Law numbered 3713. The dailies have been accused of promoting propaganda for terrorist organizations which is punishable for 1.5 to 5.5 years under the article 7 of the Turkish Counterterrorism Law. The terrorism investigation launched against the dailies for having published a photo in which a terrorist puts a gun to the head of a public prosecutor taken hostage. The photo was also shown at international media and social media too. As I have discussed above, many journalists have been subjected to the criminal investigations under the Turkish Counterterrorism Law due to their alleged participations in terrorism activities.

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103. **ARTICLE 17**

“Everyone has the right to life and the right to protect and improve his/her corporeal and spiritual existence.”


Turkey’s Counterterrorism Law numbered 3713 has extremely broad definition of terrorism.\textsuperscript{106} The law was introduced in 1991 to counter an insurgency by the Kurdistan Workers Party (or PKK), a terrorist organization that has threatened Turkey’s both internal and international security. However recently, legitimate concerns have been growing since Turkish Counterterrorism Law has been increasingly used to target critics of the government including both journalists and non-journalists. “Weakening or destroying or seizing the authority of the State” has been easily manipulated to punish journalists for doing their investigatory works. While looking at terrorism accusations against the journalists in Turkey, one needs to keep such extremely vague and broad definition of terrorism to get the full picture. Turkish Counterterrorism Law needs to be redrafted in a way that it does not infringe upon fundamental freedoms protected by the Turkish Constitution. Otherwise today’s punishers always continue to be tomorrow’s victims based on similar terrorism accusations.\textsuperscript{107} The current Counterterrorism Law of Turkey lacks balance between protecting state against the terrorism and constitutional rights. The current language gives broad power to the executive to use this law as an excuse or instrument to silence opponents and criticisms. My article contends that Turkish Counterterrorism Law is in a desperate need of significant reform to establish such balance. Otherwise, if Turkish government today promises to cease to violate the press freedom, the issue will be still there unless a line is drawn between terrorism

\textsuperscript{106} Definition of Terrorism:

Article 1. (1) Terrorism is any kind of act done by one or more persons belonging to an organization with the aim of changing the characteristics of the Republic as specified in the Constitution, its political, legal, social, secular and economic system, damaging the indivisible unity of the State with its territory and nation, endangering the existence of the Turkish State and Republic, weakening or destroying or seizing the authority of the State, eliminating fundamental rights and freedoms, or damaging the internal and external security of the State, public order or general health by means of pressure, force and violence, terror, intimidation, oppression or threat. (2) An organization for the purposes of this Law is constituted by two or more persons coming together for a common purpose. (3) The term “organization” also includes formations, associations, armed associations, gangs or armed gangs as described in the Turkish Penal Code and in the provisions of special laws.

Terrorist Offenders:

Article 2. (1) Any member of an organization, founded to attain the aims defined in Article 1, who commits a crime in furtherance of these aims, individually or in concert with others, or any member of such an organization, even if he does not commit such a crime, shall be deemed to be a terrorist offender. (2) Persons who are not members of a terrorist organization but commit a crime in the name of the organization, are also deemed to be terrorist offenders and shall be subject to the same punishment as members of such organizations…

\textsuperscript{107} It is quiet ironic fact that in Turkey, powerful authorities including some media organizations such as Gulenists are suffering from the similar terrorism accusations that they used to assert to silence others just a few years ago. It seems like whoever wants to silence the criticism or punish his opponents seems to rely on such broad definition of terrorism in Turkey. Time and actors change, yet the game remains same. As long as Turkey keeps such vague exceptions, today’s leaders who largely rely on the Turkish Counterterrorism Law to silence any criticisms against themselves will be subjected to the similar accusations in the near future. Due to such ill-drafting and Turkish history, one does not need to be fortune teller to reach such conclusion. Gulenist media that currently suffers from terrorism accusations by Erdogan’s government in Turkey used to be an ally of Erdogan’s government to silence secularist media (above-mentioned Ahmet SIK case, etc.) and military under highly criticized and allegedly “fictional” terrorist organizations such as ERGENEKON, BALYOZ cases etc. Therefore I think that such broad definition will be used as an excuse to silence “new” critics or punish current punishers in the future as well. Turkey needs to invalidate such vague laws and redraft them in a more constitution-friendly way \textit{in order to avoid such vicious cycle}. 

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and journalism. This is crucial because punishing journalists based on terrorism allegations is an exception, whereas investigatory journalism is protected as a fundamental right under the Turkish Constitution.

II. Solutions to Deal with the Broad and Vague Exceptions in the Turkish Constitution

A. General Rule for Interpreting the Constitutional Exceptions and Need for a Constitutional Amendment

My article has established so far that especially these three statutes have very problematic aspects in constitutional sense. Therefore they need to be invalidated entirely or redrafted in a more constitution-friendly way. However I still need to find a way to deal with such violations, since currently these problematic statutes are in effect in Turkey.

It is a well-established and reasonable principle that exceptions need to be interpreted narrowly. For instance, US Supreme Court explicitly held that “fighting words” is an exceptional category of speech unprotected by the First Amendment\textsuperscript{108}. However the US Supreme Court subsequently held narrow interpretation by stating that there is a “small class of fighting words” which may require the limits on such fundamental freedom\textsuperscript{109}.

The Turkish Constitutional Law has this long-established principle as well. A constitutional provision can only be limited by another constitutional provision\textsuperscript{110} or by a constitutional amendment. It is a general principle that constitutional exceptions shall be interpreted very narrowly\textsuperscript{111}.

As this article discusses so far, the Turkish Constitution has vague exceptions that can be easily manipulated by the government to limit freedom of expression and the press. Recent issues in Turkey have shown how such vague exceptions can be used by the government, by relying on majority support, to suppress religious criticism and prevent the Press from covering newsworthy allegations. This article argues that there is a significant link between the improper understandings of the fundamental freedoms in Turkey and ill-stipulation of the over-detailed articles embedded in the Turkish Constitution.

\textsuperscript{108} Chaplinsky v. New Hampshire, 315 U.S. 568 (1942); Chemerinsky, at 1339.
\textsuperscript{109} Chemerinsky, at 1340-1350.
\textsuperscript{110} Kemal Gözler, “ Cumhurbaşkanı Abdullah Gül’ün Görev Süresi Ne Kadardır ve Bu Görev Süresi Kanunla Belirlenebilir mi?”, Terazi Aylık Hukuk Dergisi, Yılı 7, Sayı 66, Şubat 2012, s.36-50 (www.anayasa.gen.tr/gorev-suresi.htm). This article of Professor GOZLER analyzes if the presidency-period of the Turkish Constitution can be determined by a statute rather than constitution itself.
\textsuperscript{111} Id.
In order to avoid such constitutional ambiguity that encourages the Turkish Grand Assembly to limit the fundamental freedoms easily through statutes and is a product of the military regime of 1980, I think Turkey is in a desperate need to significantly *amend* these *highly detailed* provisions with *vague* exceptions as a primary solution. A briefer article with less detailed text and less ambiguous exceptions will be more adequate for the Turkish Constitution. Such stipulation will provide the judiciary with more flexibility, whereas it will decrease the currently uncontrollable effect of the legislative/executive bodies of the Turkish government on shaping the constitutional freedoms.

**B. Article 13 of the Turkish Constitution as a Fallback Protection: Limiting the Limits on the Constitutional Freedoms**

Article 13 requires that a limit on the freedoms must be “proportional”, have a constitutional ground, and not violate the “essence” of the affected right while observing other limits imposed by character of the Republic and text of the Turkish Constitution.\(^{112}\)

As I greatly emphasized throughout this article, the vague and broad exceptions remained from military regime of 1980 have created and will continue to create serious problems for both interpretation and implementation of the freedoms in Turkey. I personally see a significant link between the improper understandings of the fundamental freedoms and ill-stipulation of the over-detailed articles.

Article 13 has been brought in accordance with the endeavors to comply with EU Law under 2001 Amendments and many considered this amendment to be “breakthrough\(^ {113}\).” To me, not touching the *essence of the affected freedom* is the most essential element to protect a freedom from arbitrary restrictions. However, the problem is to determine this “untouchable core or essence\(^ {114}\).” The drafters of the Turkish Constitution and scholars accept that the essence varies from one freedom to another and Turkish Constitutional Court shall decide on a case-by-case basis. The Turkish Constitutional Court has struggled in time to reach a formula to fulfill its duty to define the “essence.” The Court has determined that if a restriction makes *the exercise of freedom in accordance with its purpose* directly or indirectly impossible or

\(^{112}\) Restriction of fundamental rights and freedoms

ARTICLE 13- (As amended on October 3, 2001; Act No. 4709):
Fundamental rights and freedoms may be restricted only by law and in conformity with the reasons mentioned in the relevant articles of the Constitution *without infringing upon their essence*. These restrictions shall not be contrary to the letter and spirit of the Constitution and the requirements of the democratic order of the society and the secular republic and *the principle of proportionality*.

\(^{113}\) Zühtü Arslan, “Restriction of fundamental rights and freedoms Some Thoughts on the Article 13” Constitutional Jurisdiction 139- 155 (2002), p. 139

\(^{114}\) *Id.* at 143.
extremely obstructed, then the essence is violated. Therefore, such absolute core provides the individual with a minimum protection which cannot be limited any more.

Under this article; I think it is possible to argue that the Turkish Penal Code’s Article 216/3, at least in practice, violated the fundamental rights of SAY and others discussed above. Over-criminalization can amount to creating practical obstacle forbidding the use of the freedom and prevent it achieving its purpose. Requiring a newspaper to stop publishing newsworthy information or punishing an atheist for criticizing religious values due to generally accepted values of the majority impose a substantial risk to the essence of the freedom of speech and the press. I agree that in addition to textual importance, the Turkish Constitutional Court’s jurisdiction will play enormous role in shaping the boundaries of such limits. Despite the importance of this fallback protection article, the Turkish Constitutional Court has been reluctant to rely on this hardly-definable expression of “essence”.

**Conclusion**

Law is a creation of human beings and has changing content. Among the law, constitutions are only documents that may be promising to protect “others” against the majority and arbitrary acts of the government encouraged by the majority support.

Turkish Constitution has vague exceptions that can be easily manipulated through a broad interpretation to limit freedom of expression and the press. Recent issues in Turkey have shown how such vague exceptions can be used by the governments relying on majority support to suppress different views on religious and other social matters. This paper argues that there is a significant link between the improper understandings of the fundamental freedoms in Turkey and ill-stipulation of the over-detailed articles as the recent cases have shown.

Turkish Counterterrorism Law, Article 299 of the Turkish Penal Code and Article 2613/3 of the Turkish Penal Code have been used enormously by the Turkish government to silence both media and non-media opponents. These all three statutes have problematic features in constitutional sense. Therefore they need to be struck down or redrafted.

In order to avoid such constitutional ambiguity remaining from the military regime of 1980, I think Turkey is in a desperate need to amend these highly detailed provisions with vague exceptions. A briefer article with less detailed text and less ambiguous exceptions will be more adequately.

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116 Arslan, at 145.
117 Id. at 154.
Until then, as a second solution, the courts need to interpret such exceptions very narrowly without infringing the “essence” principle stipulated in the fallback protection of the Article 13. Turkish Constitutional Court needs to rely more on this fallback protection limiting the limits on the fundamental freedoms, especially when the exceptions are that vague and many.

Freedom of the press and expression provide plurality, tolerance, richness and openness to debate within a workable democracy. Constitution exists to protect the fundamental freedoms in a more balanced way, not some certain values accepted by the majority. Freedom of press and expression involve certain and inevitable degree of satire, criticism, unwanted and disturbing publicity but these aspects essentially give the press and people opportunity to disseminate their opinions to public. Expecting press and minority people not to insult generally accepted religious and social values do not help improve freedoms but indeed such actions eradicates the essence of each freedom. Not only suppressed citizens but also majority supporting the government need to place faith in importance of an independent media. Otherwise, the press will never fulfill its constitutional duty and minorities will never enjoy their constitutional rights properly.