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PRINTED PRESS FREEDOM IN THE JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS CASE LAW: AN EXAMINATION ON TURKEY(*)(**)

Av. **Hilal KALYONCU KOÇ**(***)

Abstract: The press plays a significant role in the creation, explanation, and dissemination of ideas. The importance of press freedom has been stated in the provisions concerning freedom of expression in many international human rights instruments. Article 10 of the European Convention on Human Rights protects the right to hold opinions without interference, seek and receive information, and the right to impart information and ideas. Significantly, the right to seek and receive information is fundamental to press freedom. In this way, the press plays a public watchdog role by helping the public seek and receive information. In this framework, this article first examined the concept of the freedom of expression as a universal human right and explored the international human rights instruments, then discussed the European Court of Human Right's approach on freedom of expression and printed press freedom, especially in Turkey.

Keywords: Freedom of Expression, Printed Press Freedom, Human Rights, Turkey, European Convention on Human Rights.

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(***) Avukat, İstanbul Barosu;
Galatasaray Üniversitesi, Kamu Hukuku, Doktora Programı Öğrencisi
(ORCID no: 0000-0002-1187-4251; *hilalkalyoncukoc@gmail.com*).

İNSAN HAKLARI AVRUPA MAHKEMESİ İÇTİHATLARINDA YAZILI BASIN ÖZGÜRLÜĞÜ: TÜRKİYE ÜZERİNE BİR İNCELEME

Öz: Basın, fikirlerin oluşturulması, açıklanması ve yayılmasında önemli bir rol oynar. Basın özgürlüğünün önemi, birçok uluslararası insan hakları belgesinde ifade özgürlüğü hakkına ilişkin hükümlerde belirtilmiştir. İnsan Hakları Avrupa Sözleşmesi'nin 10. maddesi, müdahale olmaksızın fikir sahibi olma hakkını, bilgi arama ve alma hakkını ve bilgi ve fikir verme hakkını korur. Özellikle bilgi arama ve alma hakkı basın özgürlüğü için çok önemlidir. Bu şekilde basın, halkın bilgi aramasına ve almasına yardımcı olarak halkın bekçisi rolü oynar. Bu çerçevede, bu makale önce evrensel bir insan hakkı olarak ifade özgürlüğü kavramını uluslararası insan hakları belgeleri çerçevesinde incelemiş, ardından, başta Türkiye'de olmak üzere İnsan Hakları Avrupa Mahkemesi'nin ifade özgürlüğü ve yazılı basın özgürlüğünü yaklaşımını tartışmıştır.

Anahtar Kelimeler: İfade Özgürlüğü, Yazılı Basın Özgürlüğü, İnsan Hakları, Avrupa İnsan Hakları Sözleşmesi.

INTRODUCTION

Freedom of the press is one of the non-absolute human rights in the context of the right to freedom of expression. The European Court of Human Rights (ECtHR) notes that the press plays an essential role in a democratic society.[1] Freedom of the press is an integral part of freedom of expression.[2] This freedom includes the means of publishing and distributing newspapers, magazines, and books, and the means of explaining and interpreting thoughts and opinions, information, news, and criticisms, and so on. The right may be subject to interference by states for certain conditions, which are consisted under human rights documents. According to the ECtHR case law, this freedom is regulated in the framework of the right to freedom of expression, proclaimed under Article 10 of the European Convention on Human Rights (ECHR). The Convention has not given a specific provision to press freedom. But it can be understood from the ECtHR case law, freedom of the press is proclaimed under the right to freedom of expression.

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1 De Haes and Gijsels v. Belgium, Appl. No 19983/92, 24 February 1997, § 37.

2 TEZCAN Durmuş / ERDEM Mustafa Ruhan / SANCAKDAR Oğuz, et al., **İnsan Hakları El Kitabı,** 9 edn, Seçkin, Ankara, 2021, p. 613.

Freedom of expression and freedom of the press in Turkey has been a highly debated issue. In the context of these rights, there are many applications to the ECtHR by journalists, politicians, writers, and publishing organizations that have been arrested and detained media workers, press members against Turkey. Particularly, many journalists have been detained and arrested under legal regulations in Turkey. Notwithstanding, 3742 of the applications against Turkey to the Court between 1959 and 2020 concluded, 387 were on the right to freedom of expression.[3] In Turkey, many of the violations regarding freedom of expression and freedom of the press are based on national security, territorial integrity, or for the protection of the reputation or rights of others that are regulated under the Constitution of the Republic of Turkey (1982). In addition to these, the Turkish Press Law, Turkish Penal Code, and Anti-Terror Law all have restrictive measures regarding freedom of expression and press freedom. Especially with the implementation of the state of emergency declared after the July 15 coup attempt, restrictions on freedom of expression and freedom of the press have increased.

The ECtHR has on various occasions highlighted the fundamental role played by the press for ensuring the proper functioning of democracy.[4] Furthermore, the Court has regularly underlined the crucial role of freedom of expression in a democratic society, particularly where, through the press, it serves to convey information and ideas of general interest, which the public is moreover entitled to receive.[5] Although Turkish political authorities draw attention to the fact that arrested journalists are tried by an independent judiciary for crimes unrelated to the profession of journalism,[6] Turkey got only one point out of four for the freedom of expression in the Freedom House Report 2020.[7] According to Freedom House 2021 data, Turkey is among the not-free countries.[8] The Country was also ranked 153th

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3 https://www.echr.coe.int/Documents/Stats_violation_1959_2020_ENG.pdf (Date Accessed: 26.03.2021).

4 https://www.echr.coe.int/Documents/Research_report_safety_journalists_ENG.PDF (Date Accessed: 26.03.2021).

5 Ibid.

6 https://www.ab.gov.tr/files/haberler/2011/gercegi_ortaya_koymak.pdf (Date Accessed: 27.09.2021).

7 https://freedomhouse.org/country/turkey/freedom-world/2020 (Date Accessed: 22.02.2021).

8 https://freedomhouse.org/country/turkey/freedom-world/2021 (Date Accessed: 07.11.2021).

out of 180 countries in the 2020 World Press Freedom Index[9] It was also ranked 157th in the report in 2019, and the ranking score has been around 150 for the last seven years.[10]

In this study, Turkey's printed press freedom will be assessed in Article 10 of the ECHR framework. In this regard, the ECtHR's current case law on Turkey will be the basic element for criticizing the importance of printed press freedom. Therefore, this article first examined the concept of the freedom of expression in the framework of international human rights instruments, then discussed the freedom of expression and printed press freedom on the ECtHR case law in Turkey.

I. FREEDOM OF EXPRESSION AS A UNIVERSAL HUMAN RIGHT

Freedom of expression is one of the fundamental human rights declared both in regional and international human rights documents for an independent and democratic society.[11] The right is called the *"cornerstone"*[12] for the enjoyment of other human rights and fundamental freedoms such as the right to freedom of thought, religion or belief, and the right to vote.[13] Freedom of expression is essential for both individuals and the public. In the context of this right, an individual freely express his/her views without any intervention or punishment by the government.[14]

Freedom of expression consists of the freedom to seek, receive, and impart information and ideas of all kinds. Freedom to seek information is comprehensible *"as active and investigative reporting, and freedom to receive information is explained as the purpose of informing public and liability of mass media to raise awareness of public by giving information. "*[15] Freedom to impart and receive information enables the public to express all manner of knowledge and opinion through oral, written, printed, artistic,

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9 https://rsf.org/en/ranking/2021# (Date Accessed: 22.02.2021).

10 Ibid.

11 https://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf (Date Accessed: 17 July 2017).

12 Ibid.

13 https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/142549.pdf (Date Accessed: 17 July 2017).

14 MOECKLI Daniel / SHAH Sangeeta / SIVAKUMARAN Sandesh, **International Human Rights Law,** 2edn, Oxford University Press, Great Britain, 2014, p. 226.

15 Ibid.

and any other media tools."[16] Freedom of expression encompasses many forms of expression such as oral or written expression, artistic expression, personal appearance or image preference, right of assembly, and right of organization.[17] Not only writing and publishing books and articles, but also drawing a picture or sculpture, staging a play, or establishing an association and community are examples of freedom of personal or communal expression.[18] In addition to these, political expression is the most protected form of expression, because the ECtHR recognizes such expression as a crucial part of any effective pluralist democracy, to provide respect for human rights.[19]

As stated above, the right to freedom of expression, as it is the cornerstone for many rights, it plays an important role both in international and regional human rights instruments for a democratic society. The ECtHR indicates that this freedom *"constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfillment."*[20] Robert Dahl, a political scientist, has indicated that one of the main factors for a democratic society is the right to freedom of expression.[21] The right is one of the *sine qua non* of a democratic country. In *Ali Rıza Üçer* case, The Turkish Constitutional Court indicates, for a healthy democracy, both judiciary and other actors, non-governmental organizations, media, and press or political parties should control the government bodies that exercise public power.[22]

Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, Advisory Opinion, Inter-American Court of Human Rights, OC-5/85, 13 November 1985 states that *"freedom of expression is a cornerstone upon which the very existence of a democratic society rests. It is indispensable for the formation of public opinion. It is also a sine qua non*

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16 International Covenant on Civil and Political Rights 1966, s. 19/2.

17 ERDOĞAN Mustafa, "Demokratik Toplumda İfade Özgürlüğü: Özgürlükçü Bir Perspektif", **Liberal Düşünce,** s. 24, 2001, p. 8-13.

18 Ibid.

19 https://scholarworks.law.ubalt.edu/cgi/viewcontent.cgi?article=1058&context=ubjil (Date Accessed: 30.09.2021).

20 Cumhuriyet Vakfı and Others v. Turkey, Appl. No. 28255/07, 8 October 2013, para. 56.

21 LIJPHART Arend, **Demokrasi Modelleri,** (çev. G. Ayas / U. U. Bulsun), 2 edn, İthaki, İstanbul, 2016, p. 74.

22 Tezcan / et al, p. 616.

for the development of political parties, trade unions, scientific and cultural societies, and, in general, those who wish to influence the public. It represents, in short, the means that enable the community, when exercising its options, to be sufficiently informed. Consequently, it can be said that a society that is not well informed is not a society that is truly free."[23]

Considering certain important human rights documents relating to the right to freedom of expression is enshrined in the Universal Declaration of Human Rights 1948 (UDHR), Article 19 and International Covenant on Civil and Political Rights 1966 (ICCPR), Article 19. Both Article 19 of the ICCPR and Article 19 of the UDHR, include reasoning and certain restrictions for the right to freedom of expression. Given ICCPR Article 19, the European Union Council emphasizes that freedom of expression should apply to all people without any discrimination. Paragraph 2 of the ICCPR also protects all forms of expression and the resources of their dissemination. Such forms include *"spoken, written and sign language and such non-verbal expression as images and objects of art. Means of expression include books, newspapers, pamphlets, posters, banners, dress, and legal submissions. They include all forms of audio-visual as well as electronic and internet-based modes of expression."*[24] In this regard, freedom of expression is considered a universal right for all other human rights. ICCPR Article 19 gives much more detail on states' duties. For instance, states should have legislative, judicial, and administrative protections and promotions to apply this right effectively in their domestic law. United Nations, Human Rights Committee General Comment No. 34 mentioned the right's boundary and states' obligation, "*The obligation to respect freedoms of opinion and expression is binding on every State party as a whole. All branches of the State (executive, legislative and judicial) and other public or governmental authorities, at whatever level - national, regional or local - are in a position to engage the responsibility of the State party."*[25]

Besides the instruments mentioned above, freedom of expression has also been recognized in other United Nations' highest-ranked ratified international human rights documents. For instance, the Convention on the

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[23] https://www.corteidh.or.cr/docs/opiniones/seriea_05_ing.pdf (Date Accessed 24.03. 2021).

[24] https://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf (Date Accessed: 17 July 2017).

[25] Ibid.

Rights of the Child 1989 (CRC), Article 13, regulates the child's freedom of expression. The International Convention on the Protection of All Migrant Workers of their Families 2003 (ICMW), International Convention on the Elimination of all Forms of Racial Discrimination 1965 (ICERD), and the Convention on the Rights of Persons with Disabilities 2006 (CRPD) also has provisions for the right of the freedom of expression. Through ratification, the countries have become contracting parties to those human rights documents and agree to be bound in international law in the context of *pacta sunt servanda*. In addition, freedom of expression is also included in regional human rights documents such as Article 9 of the African Charter on Human and Peoples' Rights, Article 13 of the American Convention on Human Rights (ACHR), and Article 10 of the ECHR.

II. PROTECTING FREEDOM OF EXPRESSION UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS

1. The General Scope of the Right

The ECHR is one of the essential international human rights documents that contain both civil and political rights. It was signed on 4 November 1950, and it entered into force on 3 September 1953.[26] The Convention now has 47 state parties and it also plays a binding role for its state parties; namely, state parties are responsible for enforcing their domestic law under the control of the ECtHR. According to Article 46 of the Convention, state parties are responsible for enforcing their domestic law under the ECtHR control.[27]

The right to freedom of expression was first recognized in the ECHR as a regional human rights instrument. *De Becker v. Belgium* was the first case in which Article 10 of the Convention was implemented.[28] In this case, the Court examined whether freedom of expression and freedom of the press were subject to the limitations of the life expectancy of a sentence of imprisonment under the justifications listed in Article 10 of the Convention.[29] However, because of an alteration to Belgian Law in 1961,

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[26] Ibid.

[27] GOMIEN Donna, **Short guide to the European Convention on Human Rights,** 3 edn, Council of Europe, Strasbourg, 2005, p. 6.

[28] OETHEIMER Mario, **Freedom of Expression in Europe,** Council of Europe, Strasbourg, 2007, p. 11.

[29] Ibid.

the Court dropped the case.[30] The ECHR emphasizes that the right to freedom of expression plays a crucial role in the protection and promotion of other rights that are covered in the Convention,[31] and Article 10 is considered bilateral. Firstly, freedom of expression is recognized as an *"individual right"*,[32] namely, it includes both the freedom to hold opinions and to receive and impart information, and ideas. Secondly, freedom of expression is considered a *"social right"*[33] to promote free debate for a democratic society. Article 10 of the Convention indicates,

> *"1. Everyone has the right to freedom of expression. The right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licencing of broadcasting, television or cinema enterprises.*
>
> *2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."*[34]

The right to hold opinions is under *"absolute protection"*[35] by Article 10 of the Convention. The Committee of Ministers states *"any restrictions to this right will be inconsistent with the nature of a democratic society."*[36] Secondly, the right to seek and receive information is very important especially on freedom of the press. In this way, the press plays a *"public watchdog"*[37] role by helping the public to seek and receive information. Finally, the right to impart

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30 Ibid.

31 MACOVEI Monica, **Freedom of Expression,** 2 edn, Council of Europe, Strasbourg, 2004, p. 6.

32 https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1401&context=hrbrief (Date Accessed: 4 July 2017).

33 Ibid.

34 European Convention on Human Rights s 10.

35 MACOVEI, p. 10.

36 Ibid.

37 Lingens v. Austria App no 9815/82 (ECtHR, 8 July 1986) § 42.

information and ideas may contain many freedoms such as freedom of the press and freedom of assembly, freedom to demonstrate and march.

Article 10 of the Convention is set out according to the following regulations,

- The first paragraph defines the freedoms protected.
- The second paragraph stipulates the circumstances in which a state may legitimately interfere with the exercise of the right.[38]

While the first paragraph of Article 10 of the ECHR protects the right to freedom of expression, the second paragraph regulates how and for what legitimate reasons this right may be restricted. The second paragraph of Article 10 sets out the conditions for the restriction of the freedom of expression and the use of freedom recognized in the first paragraph. The states may have certain restrictions within the three-part test for the use of freedom of expression as long as the Convention gives permission. In this regard, it appears that freedom of expression is not an absolute right. However, there is no limitation to the content of freedom of expression in the Convention, all kinds of expressions such as political, academic, artistic, commercial, and religious are included in the ECtHR case law. Nonetheless, fascism, racism, discrimination, war propaganda, and hatred expressions are not accepted as freedom of expression in the context of human rights law.[39]

2. Admissible Restrictions According to Article 10/2 of the European Convention on Human Rights; A Three-part Test

Freedom of expression and freedom of the press may be subject to restrictions set out in Article 10/2. The Convention includes many grounds for restrictions of the right to freedom of expression. The Court, in assessing the extent of the interference with the freedom of expression, uses a three-part test, which is also used in cases concerning Articles 8, 9, and 11 of the Convention.[40] The legitimacy of limitations is established based on a three-part test; prescribed by law, pursuing a legitimate aim, and necessary in a

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[38] MACOVEI, p. 7.

[39] Karan Ulaş, **İnsan Hakları Avrupa Sözleşmesi ve Anayasa**, (Ed. Sibel İnceoğlu), Beta, İstanbul, 2013, p. 358.

[40] BYCHAWSKA-SINIARSKA Dominika, **Protecting the Right to Freedom of Expression Under the European Convention on Human Rights**, Council of Europe, Strasbourg, 2017, p. 32.

democratic society. The same test is typically applied to all rights with a limitation clause. Moreover, the Convention has more limitations than other human rights documents.[41] The Court indicates the necessity of restrictions on Article 10 of the Convention to be put into practice must be made convincingly. In *Dilipak v. Turkey*, the Court stated that the interference must be explained by an *"overriding social need"* relating to the legitimate aims.[42]

Firstly, restrictions on freedom of expression should be prescribed by law, namely, it must be *"adequately accessible and foreseeable."*[43] Moreover, the restriction does not have to take place in codified law; common law is also sufficient to permit restrictions.[44] The ECtHR states the law which applies to the case should be accessible and compatible with the rule of law.[45] The criterion of being prescribed by law, which is expressed in the case law of the ECtHR, includes three basic principles in itself.[46] First of all, the action that constitutes an intervention should be based on regulation in the legislation.[47] Secondly, this regulation does not necessarily have to be made by law in the formal sense, the aforementioned condition should be understood as the existence of a legal rule that authorizes the state to intervene in fundamental rights and freedoms.[48] Likewise, the regulation that forms the basis of the intervention should be sufficiently accessible to the person concerned.[49] Finally, the regulation in question should be clear enough to direct the behavior of the people to whom it is addressed and to foresee the consequences that may occur as a result of their actions under certain conditions.[50]

Secondly, the restriction must pursue a legitimate aim. In other words, the restriction should be based on legitimate aims which are enshrined in Article

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41 https://news.uchicago.edu/story/what-role-free-speech-democratic-society' (Date Accessed: 30 June 2017).

42 *Dilipak v. Turkey*, Appl. No 29680/05, 15 September 2015, § 63.

43 COLIVER Sandra (Editor), **Article 19 Report Press law and practice: a comparative study of press freedom in European and other democracies**, United Nations Educational, Scientific, and Cultural Organization, London, 1993, p. 219.

44 Ibid.

45 Ekin Association v. France, Appl. No 392288/98, 17 July 2001, § 44.

46 E. 2013/7666, KT. 10/12/2015, https://kararlarbilgibankasi.anayasa.gov.tr/BB/2013/7666.

47 Ibid.

48 Ibid.

49 Ibid.

50 Ibid.

10/2 of the Convention. These legitimate purposes are limited and it is impossible to extend them. In Turkey, many of the violations regarding Article 10 of the Convention are based on national security, territorial integrity, or the protection of the reputation or rights of others that are regulated under the Constitution of the Republic of Turkey (1982). The most controversial legitimate purpose in the Convention is protecting morality. The fact that the margin of appreciation of the state parties for the protection of morality is excessive is because there is no consensus in Europe.[51] The state parties are more likely considered as decision-makers than the ECtHR to decide the necessity of interference for protecting morality.[52] Nevertheless, this area of appreciation is not unlimited and is under ECtHR supervision.[53]

Thirdly, the restriction must be necessary for a democratic society. One of the fundamental pillars of a democratic society, as well as one of the main criteria for its advancement and each individual's self-fulfillment, is freedom of expression.[54] Within the context of Article 10/2, the term necessary denotes the presence of a pressing societal need.[55] The Contracting States have a margin of appreciation in determining whether such a need exists, but it must be accompanied by European oversight, which encompasses both the law and the decisions that implement it, including those made by an independent court.[56] As a result, the Court has the authority to decide whether a restriction is compatible with the right to freedom of expression guaranteed by the Convention.[57]

The state's intervention will be regarded as legal if the ECtHR concludes that all three prerequisites are met. The state bears the burden of proving that all three standards are met. Once the Court determines that the state has failed to meet one of the three standards, it will not examine the case more and rule that the respective interference was unjustified, thereby violating Article 10/2 of the Convention.[58]

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51 İNCEOĞLU, p. 370.

52 Ibid.

53 Ibid., 371.

54 Morice v. France, Appl No. 29369/10, 23 April 2015, § 124.

55 Ibid.

56 Ibid.

57 Ibid.

58 https://www.article19.org/data/files/pdfs/publications/secrets-spies-and-whistleblowers.pdf (Date Accessed: 11.10.2021):

III. THE RELATIONSHIP BETWEEN THE RIGHT TO FREEDOM OF EXPRESSION AND FREEDOM OF THE PRESS

Freedom of expression is the most popular human right since the twentieth century.[59] After dealing with press relations in a democratic society in the 20th century, the freedom of the press has begun to be considered a part of freedom of expression, and the principle of protecting the press and taking the disclosures within the scope of freedom of expression.[60] More importantly, when it comes to recent periods, it is emphasized that freedom of the press has a privileged place in democratic life, especially in certain human rights court decisions.[61] This situation has resulted in freedom of the press as an arrangement more important than freedom of expression. Freedom of the press is now considered a more privileged, more specific area. The primary reason behind the idea of making this privileged space is the same: in a democratic social structure, the press is now regarded as a force, and it is perceived as a force that is effective in the formation of the legislative and judicial system.[62] This perception makes the press one of the indispensable elements of democratic life.[63]

Freedom of expression in the press has an important place for both journalists and citizens. The right to freedom of the press applies not only to writers, editors, and publishers but also to readers.[64] Because the right is not only about imparting, but also receiving information. Printed press has many obligations to the public such as public informing, public educating, journalistic investigating. However, journalists are exposed to many human rights violations such as the right to life, the right to liberty and security, and the right to freedom of expression. The Inter-American Court of Human Rights mentioned in a case: *"When freedom of expression is violated... it is not only the right of that individual (journalist) that is being violated, but also the right of all others to receive information and ideas"*.[65] Looking at

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59 BORA Tanıl (Editor), **İfade Özgürlüğü**, İletişim, İstanbul, 2007, p. 226.

60 Ibid.

61 Ibid.

62 Ibid.

63 Ibid.

64 CARVER Richard, **Freedom of Expression, Media Law and Defamation,** International Press Institute (IPI) Media Legal Defence Initiative (MLDI), United Kingdom, 2015, p.13.

65 Ibid., p. 10.

the importance of freedom of expression in the press relating to Europe, there are many significant cases in the ECtHR concerning freedom of expression and freedom of the press. In its all case law on freedom of the press, the Court states that freedom of expression is one of the fundamental foundations of a democratic society and its development.[66] In the cases of *Lingens, Oberschlick, Spycatcher, Sunday Times, and Thorgeir Thorgeirson*, the applicants were *"a journalist or a newspaper."*[67] *The Sunday Times v. The UK* is the first case that the ECtHR examined concerning freedom of expression in the press in 1979. The case was about an application for suspension of the publication of an article relating to a medicine that was causing babies to be disabled.[68] The Court ruled a violation of Article 10 ECHR that the precept was not necessary for a democratic society.

The press plays dual roles such as a *"purveyor of information"*[69] and a *"public watchdog."*[70] First of all, the ECtHR states that information collecting is an important part of journalism's preparation and a protected aspect of press freedom,[71] and plays a watchdog role by informing the public. The watchdog role of the press makes a significant impression on the relationship between the press organs and the Government.[72] The Court has an extensive point of view on the use of the right to freedom of expression through the press. That is why the press is described as a *"public watchdog,*[73] and a necessary element of a democratic society.

The ECtHR also has focused on the importance of journalistic sources. Protection of journalistic sources is one of the cornerstones of freedom of the press.[74] The absence of such protection can discourage journalistic sources from helping the press to inform the public about public interest issues.[75] As a result, the press may be less likely to play the inevitable role

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66 *Castells v. Spain*, Appl. No 11798/85, 23 April 1992, § 42.

67 COLIVER, p.221.

68 Ibid.

69 Lingens v. Austria, Appl. No 9815/82, 8 July 1986, § 44.

70 Ibid.

71 Guseva v. Bulgaria, Appl No 6987/07, 17 February 2015, § 37.

72 https://reutersinstitute.politics.ox.ac.uk/our-research/watchdog-journalism-satisfactory-journalism-cross-national-study-public-satisfaction (Date Accessed: 25.08.2017).

73 Lingens v. Austria, Appl. No 9815/82, 8 July 1986, § 42.

74 Görmüş and Others v. Turkey, Appl. No 49085/07, 19 January 2016, § 44.

75 Ibid.

of a watchdog, and the media's ability to provide accurate and reliable information to the public may be adversely affected.[76] The Court's approach to the journalistic source is any person who provides information to a journalist. The principle of protection of journalistic sources are evaluated under Article 10 of the ECHR. Namely, when the protection of journalistic sources is interpreted under ECtHR case law, it provides an additional guarantee for the right to freedom of expression. In *Goodwin v. the UK*, the Court noted that the protection of journalistic sources is one of the basic conditions of freedom of the press in a democratic society: *"Protection of journalistic sources is one of the basic conditions for press freedom, as is reflected in the laws and the professional codes of conduct in a number of Contracting States and is affirmed in several international instruments on journalistic freedoms. Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result, the vital public-watchdog role of the press may be undermined, and the ability of the press to provide accurate and reliable information may be adversely affected. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest."*[77] The Court also comprises all stages of journalism within the process of restriction: *"The Court considers not only that restrictions on freedom of the press concerning a preparatory step prior to publication fell within the Court's supervision, but that a journalist's research and investigative activities."*[78]

The ECtHR assigns duties and responsibilities to everyone who uses freedom of expression, even if they are journalists.[79] The scope of these roles and responsibilities depends on the situation of the person concerned and the method used.[80] The Court also dwelled on roles of the press in the framework of public interest, and the importance and characteristic of the press regarding freedom of expression, and also noted the guarantees of

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76 Ibid.

77 Goodwin v. The UK, Appl No 17488/90, 27 March 1966, § 39.

78 The Sunday Times v. The UK (No. 2), Appl. No 13166/87, 26 November 1991, § 51.

79 Görmüş and Others v. Turkey, Appl. No 49085/07, 19 January 2016, § 43.

80 Ibid.

freedom of the press and that this freedom could involve a certain amount of exaggeration and even provocation,[81] *"Although the press must not overstep certain bounds, in particular in respect of the prevention of disorder and the protection of the reputation of others, its duty is nevertheless to impart - in a manner consistent with its obligations and responsibilities - information and ideas on all matters of public interest, including those relating to the administration of justice. Not only does the press have the task of imparting such information and ideas, but the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of public watchdog. Journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation."*[82]

IV. THE EUROPEAN COURT OF HUMAN RIGHTS CASE LAW ON PRINTED PRESS FREEDOM REGARDING ON TURKEY

1. The Binding Force of the Court

While the United Nations (1948), which was formed after World War II, aimed to respect human rights at a universal level, the Council of Europe (1950), which was established right after it, focused on protecting human rights at the regional level.[83] The ECHR, have been put into effect in the regional plan by the Council of Europe.[84] The Convention is the most powerful human rights instrument ever devised.[85] In the preamble of the Convention, a reference is made to the UDHR, and it is aimed to ensure the universal and effective provision of the declared rights in this declaration; it has been stated that the protection and further development of human rights and fundamental freedoms are among the aims of the Council of Europe.[86] It is very important to establish a human rights court where individuals can apply directly (within Protocol No.11).[87] The ECtHR is an international court established in 1959 under the Council of Europe.[88] The Court is a judicial authority that individuals,

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81 Dilipak v. Turkey, Appl. No 29680/05, 15 September 2015, § 61.

82 Sabuncu and Others v. Turkey, Appl. No 23199/17, 10 November 2020, § 220.

83 YÜZBAŞIOĞLU Necmi, **Anayasa Hukukuna Giriş**, Beta, İstanbul, 2017, p. 211.

84 Ibid.

85 https://scholarworks.law.ubalt.edu/cgi/viewcontent.cgi?article=1058&context=ubjil (Date Accessed: 30.09.2021).

86 AYBAY Rona, **Uluslararası Yargı**, Alfa, İstanbul, 2013, p. 133.

87 Ibid.

88 TEZCAN, p. 956.

communities, legal entities, and other states can apply within certain procedures and rules in case of violation of fundamental rights guaranteed by the ECHR and its additional protocols.[89] Article 1 of Convention recognizes the obligation of the state parties to provide *"everyone within their jurisdiction"* with the rights and freedoms set outlined in the convention and its additional protocols. The Court was also established to oversee the fulfillment of this obligation through the judiciary.[90]

Turkey has been a party of the ECHR since 1954, and the ECtHR, starting from 1990, is a regional human rights court that regularly receives applications from Turkey.[91] According to Article 90/5 of the Constitution of the Republic of Turkey (1982), the ECHR and the ECtHR comprise fundamental rights and freedoms, they are placed above the Turkish laws in the hierarchy of norms.[92] In addition, according to Article 46 of the Convention: *"The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties"*[93] A state against which a decision of violation has been issued is obliged to enforce the decision by compensating the damage suffered by the applicant and by eliminating as far as possible the consequences of the violation. The state should also prevent other individuals from being subjected to a similar breach. In practice, this is usually done through legislative changes.[94] A case must meet four principles before bringing an application before the ECtHR:

- The applicant must have exhausted all domestic legal remedies,
- The application must file the case within six months after the final national court decision (As of 01.02.2022, the application period will be 4 months.),
- The complaint must be against a state party to the ECHR,
- Applicants must have suffered a significant disadvantage in the violation of their rights.

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89 Ibid.

90 AYBAY, p. 137.

91 https://insanhaklariokulu.org/calisma-metinleri-no-24/ (Date Accessed: 20.03.2021).

92 YÜZBAŞIOĞLU, p. 213.

93 European Convention on Human Rights s. 46.

94 https://www.echr.coe.int/Documents/Convention_Instrument_TUR.pdf (Date Accessed: 20.03.2021).

The ECHR, in which the decisions of the Court are binding on the Contracting States, is stated in a manner that avoids doubts and distortions under Article 46 of the Convention.[95] Being a state party to the Convention requires recognizing the compulsory jurisdiction of the Court and taking the corrective measures required by the violation decisions made as a result of the exercise of this judicial power.[96] The ECHR system is based on goodwill and confidence that the decisions of the ECtHR are not open to discussion for the states that have been violated and that the necessary measures will be taken to fulfill the necessary measures.[97] The state party that fails to comply with the judgments of the Court becomes a state that resists acting in violation of human rights.[98] If this situation persists, its membership may be suspended by the Committee of Ministers of the Council of Europe and requested to withdraw from the Council, under Article 8 of the Council of Europe Statute on the protection of human rights.[99] If the party concerned does not comply with this request, the Committee of Ministers may decide the state party's membership has ended in the Council.[100] With the Constitutional amendments adopted by the Referendum dated 12 September 2010 and the law numbered 5982, an individual application to the Turkish Constitutional Court was opened in 2012 in terms of fundamental rights that are common only in the ECHR and the Constitution of the Republic of Turkey (1982) to protect. In addition, the only human rights convention that the Constitution directly refers to is the ECHR.[101] However, 3742 of the applications against Turkey to the ECtHR between 1959 and 2020 have been concluded and 387 were the right to freedom of expression.[102]

2. European Court of Human Rights and the Constitutional Court of Turkey's approach to Freedom of the Press in Turkey

Mass communication has a great impact on many different and important areas of social life, such as the formation and regulation of public

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95 https://insanhaklariokulu.org/calisma-metinleri-no-24/ (Date Accessed: 20.03.2021).

96 Ibid.

97 Ibid.

98 YÜZBAŞIOĞLU, p. 222.

99 Ibid.

100 Ibid.

101 https://insanhaklariokulu.org/calisma-metinleri-no-24/ (Date Accessed: 20.03.2021).

102 https://www.echr.coe.int/Documents/Stats_violation_1959_2020_ENG.pdf (Date Accessed: 26.03.2021).

opinion, the determination of interstate relations and the execution of foreign policy, and meeting the entertainment needs of the people. For this reason, the fact that freedom of expression is guaranteed through mass media should be considered the basic criterion of a democratic, modern state of the law today.[103] The Constitutional Court of Turkey indicated that the press is one of the mass media, but it is specially protected by separating it from other mass media.[104] Freedom of the press includes the right to express and interpret thoughts and opinions, to publish and distribute information, news, and criticism, through media such as newspapers, magazines, and books.[105] Freedom of the press ensures the transmission and circulation of thought and informs the individual and society.[106] Expressing opinions by all means, including those opposed to the majority, providing stakeholders for the expressed opinion, realizing the idea, and convincing it to be realized are among the requirements of a pluralist democratic order.[107] In this respect, freedom of expression and dissemination of thought, and freedom of the press are vital for the functioning of democracy.[108] In a democratic system, the actions and transactions of the state should be under the control of the press and the public as well as the judicial and administrative authorities.[109] Written, audio or visual media ensures the healthy functioning of democracy and the self-realization of individuals by subjecting the political decisions, actions, and omissions of organs that use public power to strict control and facilitate the participation of citizens in decision-making processes.[110]

Restrictions on freedom of expression and freedom of the press in Turkey are made within the framework of the criteria in Articles 13, 26, and 28 of the Constitution of the Republic of Turkey (1982). As long as the restriction on freedom of expression and freedom of the press does not comply with the conditions outlined in Article 13 of the Constitution of the Republic of Turkey, it will constitute a violation of Articles 26 and 28 of the

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[103] TEZCAN, p. 614.

[104] Ibid.

[105] E. 2013/1461, KT., 12/11/2014, https://kararlarbilgibankasi.anayasa.gov.tr/BB/2013/1461?KelimeAra%5B0%5D=ya&page=704.

[106] Ibid.

[107] Ibid.

[108] Ibid.

[109] E. 2013/409, KT. 25/6/2014, https://kararlarbilgibankasi.anayasa.gov.tr/BB/2013/409?Dil=tr.

[110] Ibid.

Constitution. Article 26 of the Constitution of the Republic of Turkey is a regulation in line with Article 10 of ECHR. Article 10 of the ECHR protects not only the content of thoughts and opinions, but also the way they are conveyed.[111] Nevertheless, journalists, writers, politicians, and human rights activists are prosecuted following the Turkish Penal Code and the Anti-Terror Law for their statements shared through the press, and in this context, violations take place. In particular, the allegation that the offense of insulting the President, which is regulated in the Turkish Penal Code, is committed, causes a violation of the freedom of press and expression in Turkey. However, the limits of permissible criticism are wider about the Government than concerning a private citizen, or even a politician. Under a democratic system, the Government's actions or omissions must be scrutinized not only by the authorities of the legislature and the judiciary but also by the press and public opinion. The Government is in a dominant position because it is the one with the most power. The Government must show restraint when using criminal proceedings because other options are available to respond to these attacks.[112] As the ECtHR noted, the actions and behavior of politicians are inevitably and consciously subject to strict scrutiny by citizens as well as journalists. A politician should be more tolerant, especially when he makes public speeches that may lead to criticism.[113] The ECtHR protects freedom of expression for politicians more broadly.[114] Bekir Coşkun is a journalist who was sentenced to prison for insulting deputies for his words in an article he wrote in a newspaper. In this case, the Constitutional Court of Turkey stated that the expression of dissenting opinions, by all means, provides stakeholders for the expressed thought, and efforts to persuade others to realize and realize the idea is among the requirements of a pluralist democratic order. In this respect, the Court stated that freedom of expression and dissemination of thought, and freedom of the press are of vital importance for the functioning of democracy.[115] However, the limits of acceptable criticism are accordingly wider as regards a politician as such

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[111] E. 2013/7363, KT. 16/4/2015, https://kararlarbilgibankasi.anayasa.gov.tr/BB/2013/7363.

[112] Castells v. Spain, Appl. No. 11798/85, 23 April 1992, § 46.

[113] https://hudoc.echr.coe.int/tur#{%22fulltext%22:[%22artun%20g%C3%BCvener%22],%22display%22:[2],%22languageisocode%22:[%22TUR%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-125885%22]} (Date Accessed: 08.11.2021).

[114] Gerger v. Turkey, Appl. No. 24919/94, 8 July 1999, § 48.

[115] E. 2014/12151, KT. 4/6/2015, https://kararlarbilgibankasi.anayasa.gov.tr/BB/2014/12151.

than as regards a private individual because a politician is a public figure and as such, they are open to more criticism.[116] Indeed, the ECtHR, in the case of *Vedat Şorli v. Turkey* stated that the offense of insulting the president of Turkey, regulated in the Turkish penal code, did not comply with the spirit of the Convention.[117]

The freedom of the press allows everyone to participate in the free political discussion that is at the heart of the democratic society notion.[118] Ensuring social and political pluralism depends on the peaceful and free expression of all kinds of thoughts.[119] Therefore, the ECtHR indicates that detention orders directly related to journalistic activities constitute breaches of the right to free expression.[120] The Court further emphasizes that the recurrent criminal prosecutions against newspaper and magazine owners, publishers, and editorial staff may have the chilling effect of partially censuring press professionals and limiting their ability openly to voice an opinion that has a place in the public discourse.[121] The Constitutional Court of Turkey underlined that journalist' imprisonment could have had a chilling effect on freedom of expression and freedom of the press because it was not based on any concrete evidence other than his writings and opinions.[122] Such an arrest is not a necessary and proportionate interference in a democratic society.[123] In an individual application to the Constitutional Court of Turkey, it was concluded that the applicant, who was at the scene to report on a demonstration, was prevented by the police and used physical force on him, thereby interfering with the applicant's freedom of expression and press.[124]

To the comparative analysis of the ECHR and the Constitutional Court of Turkey, there are considerable differences between the ECHR and Turkey regarding the legal regulation of press freedom and freedom of expression.

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[116] Lingens v. Austria, Appl No. 9815/82, 8 July 1986, § 42.

[117] https://bianet.org/bianet/insan-haklari/252037-aihm-in-ilk-cumhurbaskanina-hakaret-kararindan-ihlal-cikti (Date Accessed: 08.11.2021).

[118] Sabuncu and Others v. Turkey, Appl. No 23199/17, 10 November 2020, § 219.

[119] E. 2014/12151, KT. 4/6/2015, https://kararlarbilgibankasi.anayasa.gov.tr/BB/2014/12151.

[120] https://www.dw.com/tr/sabuncu-aihm-siyasi-k%C3%B6rl%C3%BCk-yapt%C4%B1/a-55555774 (Date Accessed: 22 March 2021).

[121] Ali Gürbüz v. Turkey, Appl. No 52497/08, 12 March 2019, § 77.

[122] Mehmet Hasan Altan v. Turkey, Appl. No 13237/17, 20/03/2018, § 38.

[123] Ibid.

[124] E. 2016/10643, KT. 8/6/2021, https://kararlarbilgibankasi.anayasa.gov.tr/BB/2016/10643.

The Constitution Court of Turkey limits freedom of expression and freedom of the press broader than the ECHR. The Constitutional Court of Turkey has ruled extensive restrictions on these rights especially based on national security, territorial integrity, or for the protection of the reputation or rights of others. Freedom of expression is subject to certain restrictions, which must be properly defined, and the need for such limits must be convincingly shown.[125] Furthermore, a recurring theme in the Court's case law is the need of a freedom of press in supporting the smooth functioning of a democratic society.[126] Regarding freedom of expression and freedom of the press, Turkey has legal regulations not only in the Constitution of the Republic of Turkey (1982) but also in the Turkish Press Code and Turkish Penal Code, Turkish Anti-Terror Law. However, as demonstrated above, the provisions and restrictions regarding the Turkish domestic law on freedom of the press are not sufficiently free and respectful for the development of human rights as the ECtHR case law and the ECHR provisions have. Therefore, the number of individual applications to the ECtHR from Turkey has not decreased sufficiently.

In the light of the information given above, in a democratic society, according to the ECtHR, interference with rights or freedoms must be made only in response to a compelling social need, and there should be a proportionate relationship between the legitimate aim to be achieved. Because legal regulations and sanctions change according to the State's political agenda, disputes on freedom of expression and freedom of the press have not decreased in Turkey. Therefore, the Constitutional Court of Turkey could not create a constant attitude when deciding on its case law. In this way, human rights violations and the importance of the press are discussed in Turkey every time. With the recognition of the individual application to the Constitutional Court of Turkey, the State targeted to be more respectful to human rights and democratic state's necessities. Looking to the last case law of the Constitutional Court of Turkey, the Court started to emphasize the importance of democracy and freedom of expression through the press by mentioning the ECtHR's approach on freedom of expression. In this way, the Court's judgments started to be more compatible with international human rights and freedoms. However, many journalists are still convicted

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[125] Pedersen and Baadsgaard v. Denmark, Appl. No 49017/99, 19.6.2003 § 71.

[126] Ibid.

and exposed to attacks, threats, and defamation in Turkey. As a result, it can be understood that legal regulations should be reformulated to be more democratic and open to the different points of view of freedom of expression by the State. Secondly, when the Constitutional Court of Turkey decides on individual applications, the ECtHR should take more into account. The Court should favor a tolerant and libertarian approach to the press freedom of the ECtHR. In this way, individual application numbers to the ECtHR may reduce through individual application to the Constitutional Court of Turkey, and Turkey may achieve to be more democratic without the interference of the international arena.

CONCLUSION

Freedom of expression and freedom of the press plays a significant role in the enjoyment and development of human rights for all members of society. Freedom of the press is one of the main debates that Turkey deals with in the Turkish political process every time. It is a very controversial issue and the issue has kept its popularity termly. However, the Constitution of the Republic of Turkey (1982), Turkish Press Law, Turkish Penal Code, and Anti-Terror Law have provisions relating to the freedom of expression and press freedom. It is also a considerable development for Turkey that, although the ECHR has not given any privilege to press freedom directly, Turkey provided additional protections in its domestic law through these regulations. However, violations of freedom of the press have been increasing day by day in Turkey, especially for people who are journalists, politicians, authors, and so on. Indeed, although freedom of the press has been a right in our law since the Ottoman-Turkish constitutional past, it still has not had sufficient guarantees. In international law, this freedom is a condition sine qua non for a democratic society, and it is regulated both in many international and regional human rights documents, such as the UDHR, ICCPR, ECHR.

Although the importance of o freedom of expression and freedom of the press is emphasized in many cases of the ECtHR regarding Article 10 of the Convention, the violations of Turkey have not decreased, especially based on the restriction of national security and territorial integrity, and the protection of the reputation or rights of others. Nonetheless, the Court indicates that the reasons for restricting freedom of the press are not proportional in Turkey in general. The ECtHR also stressed that Turkey

should be more tolerant of criticisms against the government and its practices. However, Turkish political authorities draw attention to the fact that arrested journalists are tried by an independent judiciary for crimes unrelated to the profession of journalism. Even so, Turkey is one of the countries with the most violations of freedom of expression under Article 10 of the Convention. Investigations against journalists are often based on terrorism-related issues or insulting the politicians. Especially the developments after the 2016 coup attempt and the numerous applications for violations of rights made to the ECtHR in this context have made the issue even more important in recent years.[127] Turkey, which is far ahead of other Council of Europe countries in terms of violation of freedom of expression, has become the country with the highest number of violations of freedom of expression in 2019, after 2017 and 2018, according to ECtHR data.[128] In Turkey's adventure of freedom of the press, it can be seen in retrospect, Turkey's freedom of the press has been stated to be partially free in some processes, and not free in some processes between 2010 and 2014.[129] In 2017, according to the Freedom House Reports as Turkey's freedom of the press was recognized as not free. Turkey should take steps to increase its reputation in the international arena for freedom of the press.[130]

In Turkey, interference with freedom of expression and freedom of the press takes place in all areas of the press. Social media users, journalists, authors, politicians and human rights activists face sanctions targeting freedom of expression and freedom of the press, especially in parallel with the political situation in Turkey. As a requirement of pluralism, although every segment of society has the freedom to express their thoughts freely through the press, many people deprive themselves of this right and apply a kind of self-censorship. The most important reason for this, as stated in Freedom House data, is the limitation of freedom of the press in Turkey in recent years and the decrease in society's trust in the rule of law, executive, legislative and judicial organs. Even if individuals who are aware of the

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[127] https://expressioninterrupted.com/tr/ifade-ozgurlugu-ve-turkiye-aihm-kararlarinin-uygulanmasi-raporumuz-yayimlandi/, 2020, (Date Accessed 07.11.2021).

[128] Ibid.

[129] <https://freedomhouse.org/report/freedom-press/2015/turkey> (Date Accessed: 8 September 2017).

[130] <https://freedomhouse.org/report/freedom-world/2017/turkey> (Date Accessed: 8 September 2017).

right to seek justice somehow bring these violations to the ECtHR and issue a decision of violation in Turkey, the psychology of being a minority in the society causes individuals to prefer self-censorship instead of exercising their rights. More importantly, when it comes to political and public news and debates that affect public opinion, freedom of expression and freedom of the press should be interpreted to provide freedom further. In order to regain the right to freedom of the press as it should be in Turkey, first of all, the conditions of the rule of law and democratic state must be fulfilled. For this, legal regulations should be aligned with the case-law of the ECtHR, monopolization of the press should be prevented and all political parties should be given the right to make propaganda on state television channels at the same time during the election periods. As a matter of fact, due to the importance of the press in public life and the place of pluralistic thought in society, the state can take measures to prevent monopolization in the press. In conclusion, integrating the relevant standards of the ECHR with the Turkish legal system in order to reduce human rights violations in Turkey is essential not only for the right to freedom of the press, but also for all the rights guaranteed in the Convention. Because of social and political polarization, monopolization in the press, political pressure, and legal regulations freedom of the press cannot be used effectively. The Country has been ranked 153th out of 180 countries in the 2021 World Press Freedom Index, and the ranking score has been around 150 for the last seven years. Turkey falls short of fulfilling its international obligations to guarantee fundamental rights regarding freedom of expression and freedom of the press.

ABBREVIATION LIST

CRC : Convention on the Rights of the Child

CRPD : Convention on the Rights of Persons with Disabilities

ECHR : European Convention on Human Rights

ECtHR : European Court of Human Rights

ICCPR : International Covenant on Civil and Political Rights

ICERD : International Convention on the Elimination of All Forms of Racial Discrimination

ICMW : The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families

UDHR : Universal Declaration of Human Rights

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