

# **Painting the Steps: A Socio-legal Analysis of the Freedom of the Press in Turkey**

**A thesis submitted for the Degree of Doctor of Philosophy**

**by**

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# **DECLARATION**

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# **ABSTRACT**

Over recent years, censorship of the press in Turkey has been under international scrutiny, having been examined on the basis of recent political developments such as the Justice and Development Party's democratisation promises with the incentive of the EU accession process and the role of the press in Turkey's democratisation. This research aims to widen the terms of reference by providing a unifying framework for the problems posed by political, historical, and legal agents to press freedom, and analysing their interrelation throughout the history of modern Turkey. It seeks to identify the hindrances encountered by the press, which has its roots in the deep-seated State ideology and institutional framework that prioritises state security over individual rights and freedoms. This thesis therefore sets forth the inextricable link between the political history of Turkey and the current application of the law, and presents an in-depth analysis of Turkish political history in relation to press freedom, legal scholarship, and case-law as evidence to demonstrate this.

The analysis of the obstacles to establishing stronger legal protection for the press that would not be affected by political change, is based on doctrinal and socio-legal analysis that investigates the flaws in the Turkish Constitution, Turkish Penal Code and Turkish Anti-Terror Law and questions the judicial approach to the implementation of the right to free expression of the press.

The thesis specifies the loopholes in Turkish legislation that allow insufficient legal protection for freedom of the press and the inefficiency of the judiciary to realise the press's right to free expression. The thesis recommends practical amendments to clarify broadly drawn legal provisions. A reduction in judicial bureaucracy to eliminate political influences on the judiciary. Judicial training for the internalisation of the right to free expression of the press as a human right . All of which would help overcome institutional hindrances based on the perception of a critical press as a threat to state security and national interest.

# DECLARATION

# ABSTRACT

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## **List of Abbreviations**

AA	Anadolu Agency
AHT	Turkish News Agency
AKP	Justice and Development Party
ANAP	Motherland Party
ANKA	Ankara News Agency
AYM	Turkish Constitutional Court
BBC	British Broadcasting Corporation
BIANET	Independent Communication Network
CHP	Republican People's Party
CIHAN	Cihan News Agency
CMK	Code on Criminal Procedure
CNN	Cable News Network
CPJ	Committee to Protect Journalists
DGM	State Security Court
DP	Democrat Party
DSP	Democratic Left Party
DYP	True Path Party
EAJ	European Association of Judges
EC	European Commission
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EEC	European Economic Community
EIHRD	European Initiative for Human Rights and Democracy
EU	European Union
HRW	Human Rights Watch
HSYK	Supreme Board of Judges and Prosecutors
ICCPR	International Covenant of Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
IHA	Ihlas News Agency
IPI	International Press Institute
KCK	Kurdistan Societies Union

MGK	National Security Council
MHP	Nationalist Action Party
MIT	National Intelligence Service
MP	Member of Parliament
MP	Member of Parliament
NGO	Non-governmental Organisation
NSP	National Salvation Party
OSCE	Organisation for Security and Co-operation in Europe
PKK	Kurdistan Workers' Party
PM	Prime Minister
RP	Welfare Party
RSF	Reporters Without Borders
SCF	Liberal Republic Party
TBMM (TGNA)	Turkish Grand National Assembly
TCK	Turkish Penal Code
TESEV	The Turkish Economic and Social Studies Foundation
TGS	Journalists' Union of Turkey
TMK	Law on Fight Against Terrorism in Turkey
TSK	Turkish Armed Forces
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNHRC	United Nations Human Rights Committee
USA	United States of America
WW2	World War 2
YARSAV	Judges and Prosecutors Association

# Chapter 1 - Introduction

“A free press can of course be good or bad, but, most certainly, without freedom it will never be anything but bad.” Albert Camus<sup>1</sup>

Freedom of the press and democracy are inseparable as democracies have become “practically unworkable” without the existence of the former.<sup>2</sup> The role of the press as a Fourth Estate is important to recognise, for the notion of the press as watchdog<sup>3</sup> refers to its function as the guardian of public interest and the democratic process by monitoring the political process.<sup>4</sup> Based on the importance of the press for the functioning of Turkish democracy,<sup>5</sup> a valuable amount of work has been undertaken on the political and communicational aspect of the issue. Hindrances encountered by the press<sup>6</sup> in Turkey<sup>7</sup> are looked at purely from legal or historical perspectives. This research attempts to approach the relationship between press and politics from a socio-legal perspective. Studying the role of the democratisation process in Turkey on the development of the press, in order to make suggestions for establishing stronger legal protection for the press. This will eventually contribute to the democratisation process in the country. As the situation of the press in Turkey has recently been under increasing international scrutiny, this research aspires to provide an up-to-date study that employs substantial theoretical discussions toward producing practical recommendations.

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<sup>1</sup> Albert Camus, *Resistance, Rebellion and Death: Essays* (New York: Alfred A. Knopf, 1961) 102

<sup>2</sup> O'Mahoney, T. P., 'The Press and Democracy' (1974) 63:249 *An Irish Quarterly Review* 47

<sup>3</sup> James Curran and Mihael Gurevitch, *Mass Media and Society* (New York: Oxford University Press 4th ed., 2005)

<sup>4</sup> Denis McQuail, *McQuail's Mass Communication Theory*, (London: Sage, 2010)

<sup>5</sup> Sahin Alpay, 'Two Faces of the Press in Turkey: The Role of the Media in Turkey's Modernisation and Democracy' in (eds.) Celia Kerslake, Kerem Oktem and Philip Robins, *Turkey's Engagement with Modernity - Conflict and Change in the Twentieth Century* (Palgrave Macmillan UK, 2010) 379-387

<sup>6</sup> The focus is on the print press as the traditional link between the print press and political power constitutes the optimum research grounds to question freedom of the press in Turkey in light of the relationship between press and politics.

<sup>7</sup> This author uses “press in Turkey” rather than “the Turkish press” because the research focuses on the press and politics relationship starting from the establishment of the Republic of Turkey, and the history of “the Turkish press” dates back to 1831.

Source: Serif Demir, 'Situation of the government-press relations in Turkey (1918-1960)' (2012) 5:6 *International Journal of Social Science* 19

## **1.1 Scope and Purpose**

Recent problems encountered by the press in Turkey have been debated by various scholars, NGOs, and human rights organisations on political, legal and social grounds. However, censorship of the press has been a long standing issue in the history of the Republic of Turkey. Since the establishment of Modern Turkey, the prohibitory approach taken by governments to freedom of the press have had detrimental effects on Turkey's democratisation process.

This research revolves around the hypothesis that freedom of the press in Turkey has been mostly hindered by political and state interventions that follow a political ideology prioritising state security. This emphasis forms one of the biggest burdens for the application of legal provisions guaranteeing freedom of the press.

In that regard, the main purpose of this thesis is to demonstrate the validity of this hypothesis as a means of making practical recommendations, for counteracting the hindrances encountered by the press in Turkey.

## **1.2 Aim**

This research seeks to explain the current problems of the press, both on a legal and a political basis, by looking at the impact of Turkey's political history on the development of freedom of the press. This approach helps to explain the approach adopted by the current government. It examines the political developments in the country and its impact on the situation of the press starting from the establishment of modern Turkey.

This detailed examination of Turkey's legal, political, and historical framework is informed by theoretical and practical perspectives. The underlying reasons for this research were to locate flaws in the Turkish Penal Code and Anti-Terror Law. To demonstrate the approach of the judiciary (which is challenged in this thesis) and to substantiate the need for urgent reform in order to improve the legal conditions for freedom of the press in Turkey. In order to highlight the present scenario, scholarly discussions, legal amendments initiated by the reform process for EU membership, national and ECtHR jurisprudence, European Commission progress reports, journalists' and NGOs' views are discussed. Therefore, this thesis sets out the hypothesis that the

current application of legal reforms have their roots in the deep-seated political ideology that is embedded in Turkey's institutional framework.

The research uses a socio-legal methodology in order to effectively seek reform by exploring the strong relationship between the press and politics in light of the effects the political ideology has had on this relationship. It therefore aims to analyse the extent to which the political ideology in Turkey has been affecting press freedom. In light of institutional perspectives on press freedom, it will make practical recommendations to eliminate the negative effects on freedom of the press, and assist the internalisation of the right to free expression of the press by the judiciary.

### **1.3 Added Value**

The thesis sets a unifying framework for the problems posed by political, historical, and legal agents by analysing their interrelation throughout the political history of Modern Turkey. This research fills the gap within existing literature where the problems encountered by the press were discussed solely from legal, political or sociological angles. It will do so by interpreting a range of Turkish sources, materials and controversies, allying them to regional and international legal standards. Based on inter-disciplinary research, this thesis therefore elucidates the current situation of freedom of the press in Turkey from a rights-based approach. Adopting a socio-legal approach, it investigates the interactions between historical elements, related legal provisions and politics that served to prevent the emergence of a fourth estate press, in violation of regional and international standards. State intervention into press functioning and the political ideology that prioritises state security over individual rights and freedoms are suggested to be one of the challenges to press freedom in Turkey. Therefore, the research provides an exhaustive analysis based on political history in conjunction with the evolution of the press in Turkey in order to maintain that the state-centric, top-down approach to “change” has not provided a solution to the long-standing hindrances encountered by the press. In light of this analysis, the research provides applicable recommendations for legal amendments in consideration of the institutional mindset toward freedom of the press in Turkey.

Turkey aspires to become a regional role model, combining moderate Islam and democracy.<sup>8</sup> However, the hindrances experienced by the press have negatively affected its democratisation process. Therefore, this research, given its aim to make suggestions for improving the press's freedom, could help Turkey live up to the expectations of its neighbouring countries, that see it as a democratic model.<sup>9</sup>

## 1.4 Structure of the Thesis: a chapter-by-chapter synopsis

This thesis examines the relevant issues in four main chapters (2-5) while Chapter 1 has introduced the general scope of the thesis and its substantial elements as well as the intended contribution of the research as a whole. Chapter 6 concludes by discussing applicable recommendations based on the theoretical and practical discussions that are retrieved from within the main chapters and provides a brief summary of the thesis.

The organisation of the main chapters is as follows:

**Chapter 2** concentrates on the legal framework regulating freedom of the press while locating the loopholes in the main articles of the Turkish Penal Code, Anti-Terror Law, and the Turkish Constitution in question. Comparing and contrasting the language of law before and after the legal reforms. Demonstrating the application of the legislation before the legal reforms, provides the grounds for comparison with the application of the amended versions of the same legislation, in the following chapters. Case examples demonstrate the judicial approach that enables and imposes on the press its stance of following the state's political ideology, rather than supporting its own rights and freedoms. Case analyses indicate the need for improvement in the legal conditions of the press, pinpointing the international obligations of the Turkish state to provide legal reforms, bringing the right to free expression of the press in line with international standards.

**Chapter 3** explores the main factors underpinning the present political approach affecting lawmakers and the judiciary. Analysing the political developments and the substantive relationship

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<sup>8</sup> Meliha Benli Altunisik, 'The Possibilities and Limits of Turkey's Soft Power in the Middle East' (2008) 10:2 Insight Turkey 41-54

<sup>9</sup> M. Hakan Yavuz, *Secularism and Muslim Democracy in Turkey* (Cambridge University Press, 2009) 208  
Matt Cherry, 'When a Muslim Nation Embraces Secularism' (2002) 62:3 Humanist

between the press and politics through the political history of modern Turkey. It traces the evolution of related legislation, while showing the reasons for the deeply ingrained lack of toleration among the government officials of criticism by the press. This chapter demonstrates that censorship of the press in Turkey is a long-standing issue that needs to be solved in order to pursue an effective democratisation process. It does so by providing background information on the formation of the “sensitive subjects such as terrorism and why reporting of these subjects by the press in Turkey is censored . Effects of military interventions on democratic reliability are discussed, in relation to the vulnerability these military interventions imposed on civil governments, vulnerabilities that reflected the governments’ censorship of the press, and judiciary’s approach to the application of the law. Chapter 3 concludes that problems experienced throughout the history of Turkish politics have had negative effects overall on the democratisation process, and in relation to this, freedom of the press. This chapter is significant because the current limitations experienced by the press can only be understood based on the historical experiences that have given rise to them.

**Chapter 4** critically discusses the legal and practical substantiality of the legal reforms undertaken by the AKP government in the EU accession process. Aiming to understand whether Turkey’s candidacy to the EU acts as a catalyst for the improvement of the legal protection of the press and the democratisation of the country. The lack of success in implementing the legal reforms is linked to the government’s lack of toleration of criticism. Demonstrated by the Ergenekon investigation and the Gezi protests. Censorship and self-censorship of the press are correlated with the weakening of the journalists’ unions and the cross-ownership of the media. Such ownership is not subject to legal regulation. This constitutes a source of pressure on the press, for the media owners are in direct business relationships with the government. The chapter explains the current government’s political sensitivities in light of the political and historical discussions that take place in Chapter 3. Focussing attention on politically influenced cases that arguably play a role in censoring the opposition press. Based on these case examples, this chapter paves the way for the following chapter in which judicial independence and impartiality are discussed.

**Chapter 5** identifies the problems arising from the new institutional organisation of the judiciary that became closely attached to the executive power. Undermining its independence and impartiality, contradicting EU conditionality, and casting doubts about the political motivations behind the change of law. The judicial approach to freedom of the press is examined in relation to its long established mindset, prioritising state/national security over individual rights and freedoms. Also examining the relationship between the Turkish courts and the ECtHR. The chapter

investigates the influence of the ECtHR jurisprudence on Turkish Constitutional Court decisions. Based on the 2010 legal reform, allowing individual application to the Turkish Constitutional Court. On the grounds that one of the fundamental rights and freedoms within the scope of the European Convention on Human Rights, guaranteed by the Constitution, has been violated by public authorities.<sup>10</sup> The chapter concludes by stating the need for real transformative reform in the organisation of the judiciary, eliminating the interference of the executive power and by instituting judicial training as a means of internalising human rights reforms.

The thesis concludes with practical recommendations, drawing from the theoretical discussions within the main chapters. Highlighting the importance of substantial legal reform. It is a call to action for the government, to exhibit a genuine will to make amendments to the controversial legal provisions that will improve the legal conditions for the press. Eliminate political intervention into press operations, and install systematic judicial training, designed to transform its approach to jurisprudence.

## **1.5 Research method and methodology**

### **1.5.1 Research methodology: socio-legal methodology**

The thesis seeks to contribute to the development of the law and legal institutions in relation to press freedom, assisting the democratic development of the country in general. It does so using socio-legal and doctrinal methodologies.

Black letter methodology is applied only partly in the present research as an analysis of a number of technical legal provisions that are found in primary sources; the Turkish Constitution, the Turkish Penal Code and the Anti-Terror Law. The aim of this approach is to effectively organise and describe the legal rules as authoritative legal sources, in order to provide an account of their importance in the case law analysis. Also pinpointing the underlying issues in the Turkish legal system that affect the rights and freedoms of the press.

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<sup>10</sup> The Constitution of the Republic of Turkey no. 2709 (7/11/1982) s 3(148)

Because this research partly depends on the broadly drawn legislation such as statutes, case law and academic/legal reviews, it was necessary to use doctrinal methodology in order to look at the law in action. In order to do so, the present study presents findings of analytical and historical doctrinal legal research.<sup>11</sup> Analysis of statutes, legal documents, Turkish and ECtHR jurisprudence. Historical legal research clarifies how the past conditions resulted in the formation of the current law and its application. This involves a systematic analysis of the statutory provisions using doctrinal research and relevant legal concepts. Examining the consistency between the language of law and its application. Further study of Turkish and ECtHR jurisprudence helps to ascertain the failure of the Turkish judiciary to internalise a human rights approach. Challenges to the independence of the judiciary because of its institutional organisation are also identified.

However, law is not an insular discipline,<sup>12</sup> and black letter methodology requires the researcher to focus mainly on the law itself rather than its application.<sup>13</sup> Because the sociological and political implications of freedom of the press in Turkey are at the core of the thesis, socio-legal methodology has been adopted for this research. Reducing the study to a black-letter analysis of law on its own would not be suitable for the selected research. The research aims to discuss the impact of the law in action on the press and politics, while discussing its effects on the judicial approach to press freedom.

This thesis aims to investigate the inconsistencies between the language of law and its application. Socio-legal methodology observes the law in action in order to analyse what constitutes an impediment for socio-political transformation through law.<sup>14</sup> A socio-legal approach is therefore essential to provide a unifying framework for explicating legal and political issues. Issues that have led to the hindrances of today, which have damaged the democratisation process in Turkey. This approach also provides a platform for recommending legal amendments and a change towards a more rights-based enforcement of the law.

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<sup>11</sup> Terry Hutchinson and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17:1 Deakin Law Review

<sup>12</sup> Niklas Luhman, *A Sociological Theory of Law* (New York: Routledge, 2014)

<sup>13</sup> Khushal Vibhute and Filipos Aynalem, *Legal Research Methods* (Justice and Legal System Research Institute, 2009)

<sup>14</sup> Brian Z. Tamanaha, *Realistic Socio-Legal Theory, Pragmatism and Social Theory of Law* (Clarendon Press Oxford, 1997)

### **1.5.2 Research Method**

Addressing the research question entails an evaluation of data pertaining to the right to free expression of the press, political and judicial approaches to press freedom, the right to information, and political history in relation to the evolution of the press in Turkey.

Domestic case law is critically analysed with the aim to gain insight into the ideology of the judiciary and its application of law. This analysis identifies the issues attached to the legislative framework in relation to press freedom in Turkey, in order to make recommendations. For this purpose ECtHR decisions serve as a template for discussing whether Turkish courts have effectively implemented them.

The research aims to fill the gaps within the existing literature by library based research of correlating case law, legal provisions, European Commission Reports, legal and political commentaries, NGO reports, legal and political journals, reports, theses, treaties, and newspaper articles. Together these form the most important evidence for providing a unifying practical and clear framework for the future of the press-politics relationship in Turkey.

### **1.5.3 Advantages and Limitations**

Doctrinal research exposes inconsistencies between the relevant legal provisions through the analysis of the primary source information. This enables the researcher to discuss the loopholes and ambiguities within the statutes, in order to make applicable amendments for the improvement of the language of law. It set a solid basis for theoretical discussions on the relationship between the press and politics, while providing sound ground for analysing the research hypothesis in light of the evolution of related law within the political history in Turkey.

Because the thesis does not adopt a doctrinal approach on its own thereby avoiding a merely theoretical study, its use of a socio-legal approach supports the researcher's perception of the law. Using socio-legal methodology allows the author to analyse the external factors (in this case, political and sociological) affecting the poor implementation of the relevant laws and to evaluate their influence on the judiciary and on the application of relevant legal provisions. Although an empirical study would assist in understanding the sociological factors, such as the awareness of the society of the importance of a free press for democratic governance. This has not been undertaken

because the press is structured according to the political circumstances in which it exists.<sup>15</sup> Understanding the political history of Turkey is key to a systematic approach clarifying the legal conditions of the press in Turkey. Doctrinal and socio-legal research methodologies have complemented each other, paving the way for this author to finalise the thesis with applicable practical recommendations; to improve the legal conditions in which the Turkish press may one day operate.

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<sup>15</sup> Jennifer Ostini and Anthony Y. H. Ostini, 'Beyond Four Theories of the Press: A New Model of National Media Systems' (2002) 5:1 Mass Communication and Society 41-56

## **Chapter 2 - Current Turkish Law and Practice Infringing Freedom of the Press**

### **2.1 Introduction**

This chapter is an attempt to analyse fundamental flaws in the Turkish legal framework, in relation to the freedom of the press. It revolves around the loopholes in the legal regulation that pave the way for heavy restrictions on the freedom of the press. The judicial mentality and the effects of the political ideology on its reasoning. The role of the mainstream press on the censorship of critical or opposition journalism. The NGO reports showing serious concerns on the press in Turkey, and finally European Commission and UN reports highlighting Turkey's international obligations to protect freedom of the press.

In addition to the loopholes in the legal regulations, this chapter also aims to address the disparity between the language of law concerning freedom of the press and associated practices. It does so through a detailed examination of the problems arising from the language of the law itself, for such analysis is important to set the background to the discussions on the social and democratic implications of these legal flaws as investigated in the following chapters. Demonstration of the broadly drawn law with the selection of case examples will assist in testing the hypothesis of the research. Determining the differences between the language of law and its practice as well as seeing the effects of the political ideology on the Turkish court decisions.

### **2.2 The Legal Scope of Press Freedom in Turkey**

This research suggests that the censorship of the press in Turkey is only partly caused by the vague language of the relevant legal provisions. The other reasons include: incoherence between the legal provisions and their application, the problems caused by the ownership of the press, the problems caused by the mentality of the judiciary. The lack of impartiality and independence, finally and mainly the political influence on freedom of the press.

Controversial legal provisions are discussed in this section highlighting the importance of the main research question “how to build higher standards and support a stronger legal protection for the press, that would not be affected by the political changes in Turkey”. Therefore, in order to analyse the reasons for censoring the press mentioned above, it is necessary to draw out the legislative provisions regulating freedom of the press in Turkey. Thus, the gaps in the legislation that weaken press freedom are distinguished, which is followed by selected case examples that demonstrate the difference between the law and its application. Such analysis facilitates the settlement of the main research question.

### **2.2.1 The Constitution of the Republic of Turkey**

The Turkish Constitution<sup>16</sup> provides the principal protection for freedom of expression and for freedom of the press in Turkey. Article 26 regulates freedom of expression and dissemination of thought:

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.<sup>17</sup>

The reflection of this right, which structures the scope of free expression and communication of one’s thought, is seen in Article 28 of the Constitution, which strongly asserts that the press is free and will not be censored. Therefore, freedom of the press and publication are guaranteed under Article 28, which defines freedom of the press accordingly: “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.”<sup>18</sup>

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<sup>16</sup> The Constitution of the Republic of Turkey will be referred to as “the Turkish Constitution” and/or “the Constitution” throughout the thesis.

<sup>17</sup> Turkish Constitution 1982, s 2 (26) (1)

<sup>18</sup> Ibid. s 2 (28) (1)

However, these rights and freedoms, which are clearly set under Article 26 and Article 28, are restricted by the “exceptions and restrictions”. Both Article 26 and 28 come with their clauses of exceptions and restrictions. The following excerpt from Article 26 states the reasons for these restrictions:

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.<sup>19</sup>

Such restrictions on the freedom of expression are reflected in the exception specified in Article 28:

The State shall take the necessary measures to ensure freedom of the press and information. In the limitation of freedom of the press, the provisions of articles 26 and 27 of the Constitution shall apply. 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

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<sup>19</sup> Ibid. s 2 (26) (2)

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.<sup>20</sup>

These exceptions are open to interpretation. Vague terms used in these articles — such as national security, public order, public safety, public moral, safeguarding the basic characteristics of the Republic, indivisible integrity of the State, preventing crime, withholding information duly classified as a state secret, ensuring the proper functioning of the judiciary, news or articles which threaten the internal and external security of the state, tendency to incite offence, riot or insurrection, reference to classified state secrets — in combination with the “crimes” specified in Turkish Penal Code and the Law on Fight Against Terrorism in Turkey, create the causes and effects of the censorship of the press in Turkey. The combination of the vague language in these articles demonstrate the problems caused by the broad definition of each term as well as their controversial interpretation by the judges that can lead to the censorship of the press. The approach to press freedom adopted by the judges will also be discussed in Chapter 5.

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<sup>20</sup> Ibid. s 2 (28) (2)

Freedom of the press is regulated in the Constitution as a “fundamental right of the individuals”. However, this study contends that the right itself is narrowly defined whereas the exceptions to the use of the right are broadly defined. The intention of the lawmaker for such narrow interpretation of the right and broad coding of its exceptions must be discussed separately. Some studies have acknowledged that the term “moral”, conceived as a “general moral” in order to be used to restrict rights and freedom, could easily allow lawmakers and the executive power to limit rights and freedoms arbitrarily.<sup>21</sup> However, this requires detailed analysis of what notions might originally be behind the language of the law.

Nevertheless, it falls under the scope of this research to analyse how the Turkish courts interpret these constitutional provisions that regulate the freedom of the press and the possible role of the judiciary in broadening this definition. Interpreting how it should be protected under the constitutional law and in respect to the international agreements ratified by Turkey.

In addition to the guarantees and exceptions in the Constitution, regrettably, such broad interpretations are still possible despite the direct statement in the Turkish Press Code defining the right to freedom of the press and describing the press as “free”... Yet reiterating the lawmaker’s emphasis on the possible restriction of the press based on national security, public order, and public safety:

The press is free. This freedom includes the right to acquire and disseminate information, and to criticise, interpret and create works. The exercise of this freedom may be restricted in accordance with the requirements of a democratic society, to protect the reputation and rights of others to protect the public health and public morality, to protect the national security, the public order and the public safety. The exercise of this freedom may also be restricted to safeguard the indivisible integrity of the state territory, to prevent crime, to withhold information duly classified as state secrets, and to ensure the authority and impartial functioning of the judiciary.<sup>22</sup>

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<sup>21</sup> Nihat Bulut, ‘Hak ve Özgürlüklerin Sınırlandırılma Nedeni Olarak Genel Ahlak/*General Moral as the Reason to Limit the Fundamental Rights and Freedoms*’, (2000) 4:1-2 *AÜHFD*, 29

<sup>22</sup> Turkish Press Law 2004/5187 s 1(3)

Despite the constitutional endorsement for the rights to free expression and freedom of the press, and the inclusion of press freedom in Turkish Press Code, it is possible to clearly see that they are not put in practice. Based on the language of the Constitution, it is mandatory to ensure the full enjoyment of the right to free expression and freedom of the press. However, as previously argued, the broadly coded exceptions of articles 27 and 28 facilitate the censorship of the press. In practice, the exceptions have been interpreted broadly by the Turkish courts. This paradox is based on the *perception* of the importance given to press freedom amongst the judiciary and the political theory that will be further clarified in the next chapter.

### 2.2.2 Turkish Penal Code

The Turkish Penal Code<sup>23</sup> and the Law on the Fight Against Terrorism in Turkey are the two mostly used laws to restrict free expression of the press in Turkey. The current version of the Turkish Penal Code (TCK) came into force on 1 January 2004 and was highly criticised by various authors and NGOs, as discussed below. It included exceptionally vague terms that allowed its arbitrary use to pressure the press and imprison journalists. The older version of TCK was also predominantly condemned for its Article 159, which regulated “Denigrating Turkishness, the Republic, and the Institutions and Organs of the State.” Article 159 reads as follows:

- (1) A person who publicly denigrates Turkishness, the Republic or the Grand National Assembly of Turkey, shall be punishable by imprisonment of between six months and three years.
- (2) A person who publicly denigrates the Government of the Republic of Turkey, the judicial institutions of the State, the military or security organisations shall be punishable by imprisonment of between six months and two years.
- (3) In cases where denigration of Turkishness is committed by a Turkish citizen in another country the punishment shall be increased by one third.
- (4) Expression of thought intended to criticise shall not constitute crime.<sup>24</sup>

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<sup>23</sup> The Turkish Penal Code will be referred to as “TCK” throughout the thesis.

<sup>24</sup> Turkish Penal Code 1926/765 s 2 (159)

Evidently from the description of the provision above, Article 159 was left open to interpretation and therefore had been amended several times in the past<sup>25</sup> in 1936<sup>26</sup>, 1938<sup>27</sup>, 1946<sup>28</sup>, 1961<sup>29</sup>, 2002<sup>30</sup>, and 2003. In 2002, TCK was amended with the aim to bring the Turkish Penal Code close to the European standards with the will to gain access to EU membership under the adjustment law packages.<sup>31</sup>

Old TCK, which included Article 159, was abolished in 2005.<sup>32</sup> However, the same article was placed with its exact language in the new TCK Article 301. The vague terms of which have been invariably reproached by legal scholars and domestic and international NGOs<sup>33</sup>. This equivocal language allows a broader definition of crimes that results in high imprisonment rates for journalists. TCK Article 301 remained in force until it was amended in 2008 in light of the EU accession process of Turkey and in reaction to adverse ECtHR rulings and practices identified later within this chapter.

Because of the strong pressure from the international legal community, NGOs pressures for the protection of journalists, and finally and most importantly the European Court of Human Rights' decisions highlighting the inadmissibility of TCK Article 301, the article was amended in 2008.<sup>34</sup> The new version of the Article 301, which is still in action, defines an offence of insulting the "Turkish nation" rather than "Turkishness" under Article 301 of the new TCK. It reduces the maximum sentence to two years and first-time offenders are now eligible for suspended sentences.

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<sup>25</sup> Turkan Yalcin Sancar, *Türklüğü, Cumhuriyeti, Meclisi, Hükümeti, Adliyesi, Bakanlıkları, Devletin Askeri veya Emniyet Muhafaza Kuvvetlerini Alenen Tahkir ve Tezyif Suçları (Eski TCK m.159/1- Yeni TCK m.301/1-2)/ Denigrating Turkishness, the Republic, the Assembly, the Government, the Judiciary, the Government Offices, the Military and/or the Police Officers (Old TCK art. 159/1 - New TCK ART.301/1-2* (Seçkin Publications, 2006) 46

<sup>26</sup> Turkish Penal Code 1936/3038 (159)

<sup>27</sup> Turkish Penal Code 1938/3531 (159)

<sup>28</sup> Turkish Penal Code 1946/4956 (159)

<sup>29</sup> Turkish Penal Code 1961/235 (159)

<sup>30</sup> TCK was amended twice in 2002

Turkish Penal Code 2002/4744 (159)

Turkish Penal Code 2002/4771 (159)

<sup>31</sup> Turkan Yalcin Sancar, 'Türk Ceza Kanunu'nun 159. ve 312. Maddelerinde Yapılan Değişikliklerin Anlamı/*The Meaning for the changes of the Turkish Penal Code Articles 159 and 312*' (2003) 52 Ankara University Faculty of Law Journal 88, 89

<sup>32</sup> It was abolished completely in 01/06/2005 with the law number 5252 article 12.

<sup>33</sup> Human Rights Watch, 'Turkey: Government Amendments Will Not Protect Free Speech Article 301 Should Be Abolished' (HRW 16 April 2008) <<https://www.hrw.org/news/2008/04/16/turkey-government-amendments-will-not-protect-free-speech>> accessed 23 May 2012

<sup>34</sup> Turkish Penal Code 2008/5759 s 4(301)

Bulent Arğan argues that the principle of proportionality in the cases against freedom of expression might be fulfilled by such amendment on the limits of punishment.<sup>35</sup>

Finally, but most crucially, with this amendment, the approval of the Minister of Justice is required for the investigation of these offences. The authority given to the Minister of Justice for examining cases related to this article is criticised on the basis that the judicial process is now exposed to political involvement.<sup>36</sup> However, there are also authors who specify that the role of the Minister of Justice is to prevent arbitrary prosecutions by the public prosecutors under the subject article.<sup>37</sup> The implications of the amended Article 301 (4) are discussed in Chapter 4 in order to understand whether such concerns are relevant in point. The amended version of Article 301 follows:

(1)The person who publicly denigrates the Turkish People, the Republic of Turkey or the Turkish Grand National Assembly, the Government of Republic of Turkey and the judicial bodies of the State is penalised with imprisonment for between six months and two years. (2) The person who publicly insults the military organisations or the police organisations of the State is punished according to the first sub-clause. (3) The declarations made with the aim to criticise are not evaluated as crime. (4) Examination related to this article depends on the permission of Minister of Justice.<sup>38</sup>

Although Article 301 is best-known for its role in the lawsuits against Turkish Nobel laureate Orhan Pamuk<sup>39</sup>, the author Elif Safak<sup>40</sup> and the journalist Hrant Dink. Cases<sup>41</sup> publicised

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<sup>35</sup> Bulent Algan, 'The Brand New Version of Article 301 of Turkish Penal Code and the Future of Freedom of Expression Cases in Turkey' (2008) 9:12 German Law Journal 2237, 2244

<sup>36</sup> Miyase Christensen, 'Notes on the public on a national and post national axis: Journalism and freedom of expression in Turkey' (2010) 9:2 Global Media and Communication 177, 183

<sup>37</sup> Bulent Algan, 'The Brand New Version of Article 301 of Turkish Penal Code and the Future of Freedom of Expression Cases in Turkey' (2008) 9:12 German Law Journal 2237, 2241

<sup>38</sup> Turkish Penal Code 2008/5759 s 4 (301)

<sup>39</sup> Orhan Pamuk is one of Turkey's veteran authors, whose books have been published in more than twenty languages worldwide. Pamuk won the 2006 Nobel prize for literature. He was prosecuted based on the interview he had with a Swiss newspaper in February 2005, in which he stated that "Thirty thousand Kurds and a million Armenians were killed in these lands, and nobody but me dares to talk about it." He was tried for insulting "Turkishness" based on Article 301 of Turkish Penal Code (5237). Despite his acquittal, there had been a sharp criticism from the international NGOs and Human Rights bodies such as Human Rights Watch who indicate that "...by signing and ratifying the European Human Rights Convention and the International Covenant on Civil and Political Rights, Turkey has committed itself to break with that tradition. The Sisli prosecutor's decision to open this action defies the decision of the Turkish Grand National Assembly that international human rights law should protect Turkish citizens from prosecution or other sanctions arising from the non-violent expression of their views." Human Rights Watch, 'Turkey: Case Against Novelist

by the international press. In just the first three months of 2007 no less than one thousand people were brought before the courts based on the allegations under Article 301, and more than seven hundred cases under Article 301 were pending.<sup>42</sup> Moreover, between 2005 and 2007, more than one hundred journalists were tried under TCK Article 301.<sup>43</sup> Although the contentious Article 301 was amended in 2008 based on the harmonisation package provided by the EU, which listed its requirements for granting Turkey EU membership. Based on the reforms motivated by the possibility of Turkey's EU membership, the wording of Article 301 was changed. The assassination of Hrant Dink, the prosecution of Ragıp Zarakolu and the upsurge of journalist arrests in 2011 led to continuous strong international criticism of Article 301 and intense pressure for its abolition. Amnesty International cited in its report AI's Europe and Asia director Dalhuisen, as he advocated that "The criminalisation and incarceration of individuals simply for expressing their opinions must not continue. Now is the time for the government to show their commitment to freedom of expression".<sup>44</sup> Andrew Gardner, AI's expert on Turkey, also stated that the "most abusive prosecutions target either individuals' criticism of public officials or their expression of legitimate views on sensitive political issues. The Turkish authorities must accept criticism – and respect the right to freedom of expression".<sup>45</sup> The amendments to Article 301 were criticised by scholars for being only semantic rather than substantive; in other words, the language of the provision did not reflect an actual change in content or policy.<sup>46</sup> Therefore, despite the lawmakers' intention to broaden the limits of freedom of expression by replacing "Turkishness" with "the Turkish Nation"

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Threatens Freedom of Expression' (28 September 2005) <<https://www.hrw.org/news/2005/09/28/turkey-case-against-novelist-threatens-freedom-expression>> accessed 03 February 2012

<sup>40</sup> Elif Safak is a well-known Turkish author, whose books have been translated widely and are being sold worldwide. Safak was tried for comments made by the characters in her work "The Bastard of Istanbul" on the mass killings of Armenians in the final years of the Ottoman Empire in 1915, and despite her acquittal, the accusations of "denigrating Turkish national identity" based on Article 301 attracted international criticism on the application of Article 301 for curtailing freedom of expression, especially considering that among the high number of journalists and authors and academics who were charged under Article 301, it was the first time that it was applied to a fictional work.

<sup>41</sup> Hrant Dink was a Turkish-Armenian journalist in Turkey who had been advocating Turkish-Armenian reconciliation and human and minority rights in Turkey. He was prosecuted under Article 301 and received a six months suspended charge for "denigrating Turkishness" based on one of his articles published in weekly AGOS, which was taken out of its overall context and presented as if Dink was hostile against the Turkish Nation. Detailed information on Hrant Dink is given further in the chapter.

<sup>42</sup> TBMM Tutanak Dergisi/*Turkish Grand National Assembly Account of Proceedings* Period 23 Legislation Year 2 Meeting No.81 (25 March 2008) <<https://www.tbmm.gov.tr/tutanak/donem23/yil2/bas/b081m.htm>> accessed 02 March 2012

<sup>43</sup> Milliyet, '302. Maddeden 3 ayda 22 kişi yargılandı/22 people were tried in 3 months under Article 301' *Millet* (21 October 2007)

<sup>44</sup> Amnesty International 'Turkey: Time to remove the shackles on freedom' (AI, 27 March 2013) <<https://www.amnesty.org/en/latest/news/2013/03/turkey-time-remove-shackles-freedom/>> accessed 12 June 2013

<sup>45</sup> Ibid.

<sup>46</sup> Hakan Hakeri, 'Yeni Ceza Kanunu'nda ve Yargıtay'ın Yeni Kararlarında Düşüncüyü Açıklama Özgürlüğü'ne Aykırılıklar/*Violations to the freedom of expression in the Penal Code and in the Recent Verdicts of the Court of Appeal* (2005) 15 *Hukuk Dünyası* 9, 10

(effectively narrowing the term “Turkishness”, which also covered societies outside Turkey<sup>47</sup> ) Article 301 is still ambiguously open to interpretation, thereby facilitating its prevailing bias against the freedom of expression and enabling the censorship of the press. It is due to the unchanged nature of the provision as discussed by various scholars that both “Turkishness” and the “Turkish Nation” finally have the same meaning.<sup>48</sup> Reasons for this flexible interpretation of the Turkish state institutions are discussed more in depth in Chapter 3 in light of the chronological analysis of the press-politics relationship in Turkey.

Despite the changes to the controversial Article 301 that were simultaneous with the EU accession and its contingent reform packages, the article itself remains to be disputable as stated by Sancar. Vagueness is the common characteristic for the words Turkishness and the Turkish nation.<sup>49</sup> Besides, the application of this article still continues to limit the freedom of the press as demonstrated by the examination of the criminal court verdicts in the present research. The case of Hrant Dink is given as the most applicable example to this later in this chapter. A positive step towards the complete abolishment of the Article is necessary as repetitively agreed by scholars. In this regard, the political aspect of the use of this Article was emphasised by Bayraktar who defines the crimes regulated under the old version of Article 301 (Article 159) as “political crimes”.<sup>50</sup>

While this is a fact, the present author finds it worth mentioning here that this loophole caused by the ambiguity in Article 301, in combination with the exceptions regulated in the Constitution as previously discussed, is one of the main reasons for the arbitrary application of this Article. Another hindrance that stands in the way of the freedom of the press, besides the law written in vague language, is the political ideology followed by the judiciary. As discussed by Onderoglu, Article 301 was used by the judiciary in Turkey as “a political weapon against the freedom of expression”.<sup>51</sup> This statement strongly serves the hypothesis of this thesis, which argues

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<sup>47</sup> The reasons for choosing the word “Turkishness” in the old Article 301 explained by the lawmakers can be found in Turkish Grand National Assembly 22. Period, 2nd Year, Order No. 664

<<https://www.tbmm.gov.tr/sirasayi/donem22/yil01/ss664m.htm>> accessed 12 September 2012

<sup>48</sup> Dogan Soyaslan, *Ceza Hukuku Özel Hukuklar/Penal Law Special Provisions* (Yetkin Yayınevi, 1999) 667  
Turkan Yalcin Sancar, ‘Türk Ceza Kanunu’nun 159. ve 312. Maddelerinde Yapılan Değişikliklerin Anlamı/*The Meaning for the changes of the Turkish Penal Code Articles 159 and 312*’ (2003) 52 Ankara University Faculty of Law Journal 84

<sup>49</sup> Turkan Yalcin Sancar, ‘Türk Ceza Kanunu’nun 159. ve 312. Maddelerinde Yapılan Değişikliklerin Anlamı/*The Meaning for the changes of the Turkish Penal Code Articles 159 and 312*’ (2003) 52 Ankara University Faculty of Law Journal 86

<sup>50</sup> Koksall Bayraktar, *Siyasal Suc/Political Crimes* (Fakulteler Press 1982) 103

<sup>51</sup> Erol Onderoglu, ‘301: Ifade Özgürlüğüne Karşı Yargının Politik Silahı/*The Political Weapon of the Judiciary Against the Freedom of Expression*’ (2007) 65 Ankara Bar Journal 19

that the political ideology is the main burden preventing a free press in Turkey. This argument is supported by Algan who fairly expresses that the application of Article 301 varies enormously according to the political period in which it is used, which also influences the legal interpretations of the provision, in particular the freedom of expression.<sup>52</sup> The present author aims to demonstrate that the legal provisions related to the freedom of the press are closely related to the ideology of the state and how the political rulers approach fundamental rights and freedoms. In this political context, Chapter 3 will shed light on the state ideology that influenced press freedom in Turkey, and Chapter 4 will argue that despite the call of the ECtHR for its abolishment, given that journalists are being frequently convicted based on their critical reporting on sensitive political proceedings, such calls made through the case law of ECtHR are continuously disregarded by the lawmakers the government, and the judiciary.

### **2.2.3 Law on Fight Against Terrorism of Turkey**

In order to fully understand the legal grounds for the censorship of the press, Anti-Terror Law<sup>53</sup> Article 6, Article 7, and Article 8 (even though it was abolished in 2003 under the 6th adjustment package on the accession process to the EU<sup>54</sup>) must be analysed in relation to TCK Article 314 and 220, for the majority of the imprisoned journalists have been convicted based on combined application of these articles as clearly demonstrated in the most recent “updated list of imprisoned journalists in Turkey” prepared by Erol Onderoglu from RSF.<sup>55</sup> According to the report, by July 2015, 21 journalists were convicted based on the controversial articles of TCK and Anti-Terror Law (TMK) mentioned above:

To be exact, Article 6 regulates announcement and publication on terrorist organisation:

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<sup>52</sup> Bulent Algan, ‘The Brand New Version of Article 301 of Turkish Penal Code and the Future of Freedom of Expression Cases in Turkey’ (2008) 9:12 German Law Journal 2237, 2240

<sup>53</sup> Law on Fight Against Terrorism in Turkey will be referred to as “the Anti-Terror Law” and/or “TMK” throughout the thesis.

<sup>54</sup> Meltem Muftuler Bac, ‘Turkey’s Political Reforms and the Impact of the EU’ (2005) 10:1 South European Society and Politics 17, 26

<sup>55</sup> Erol Onderoglu, ‘Table of imprisoned journalists and examples of legislative restrictions on freedom of expression and media freedom in Turkey’ (OSCE, July 2015) <<http://www.osce.org/fom/173036>> accessed 01 November 2015

(1) Those who announce that the crimes of a terrorist organisation are aimed at certain persons, whether or not such persons are named, or who disclose or publish the identity of officials on anti-terrorist duties, or who identify such persons as targets shall be punished with one to three years of imprisonment. (2) Those who print or publish leaflets and declarations of terrorist organisations, which praise or promote the violent methods of these terrorist organisations, shall be punished with one to three years of imprisonment. (3) Those who, in contravention of Article 14 of this law, disclose or publish the identity of informants shall be punished with one to three years of imprisonment. (4) If any of the offences defined above are committed by periodicals, editors in charge of such periodicals shall also be punished with one thousand to five thousand days of pecuniary penalty.<sup>56</sup>

It is necessary to look at the definition of “terrorism” given by TMK in order to understand whether an announcement or a publication falls under Article 6, making it punishable to publish terrorist organisation declarations and rules an additional punishment for editors once it is committed through periodicals. Terrorism is defined under Article 1 of TMK as follows:

Terrorism is any kind of act that constitutes a crime done by one or more persons belonging to an organisation 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.<sup>57</sup>

Self-evident from the wording of TMK Article 1 is that it places the same emphasis that Article 26 (2) of the Constitution does on the unity of the state, possible damage to the internal and external security of the State, and the weakening, destroying, or seizing the authority of the State. However, TMK does not expand on what it means by “*damage*” and what “*pressure*”, “*force*”,

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<sup>56</sup> Anti-Terror Law 1991/3713, s 1(6)

<sup>57</sup> Ibid. s 1(1)

“*violence*”, “*terror*”, “*intimidation*”, “*oppression*”, or “*threat*” involves. In its Progress Report on Turkey in 2012, the European Commission stated that “the application of Articles 6 and 7 of TMK in combination with Articles 220 and 314 of TCK leads to abuses; in short, writing an article or making a speech can still lead to a court case and a long prison sentence for membership or leadership of a terrorist organisation.”<sup>58</sup> Based on this statement in the European Commission’s report, related case examples will be analysed further in the chapter. However, it is necessary to clearly demonstrate the controversial legal provisions mentioned above.

Article 7 of the Anti-Terror Law regulates leading a terrorist organisation and spreading and/or promoting terrorist propaganda:

(1) Whoever founds, leads a terrorist organisation, and becomes member of such an organisation, with purpose to commit a crime, in direction towards objectives prescribed in the Article 1, through methods of pressure, threatening, intimidation, suppression, and menace, by taking advantage of force and violence, shall be punished according to the provisions of the Article 314 of the Turkish Penal Law. Whoever arranges activities of the organisation shall be punished as leader of the organisation. (2) Whoever makes propaganda of the terrorist organisation by promoting violence shall be punished by imprisonment for one to five years. In case of committing this crime through media, the penalty shall be increased by one half. In addition, a judicial fine for one thousand to ten thousand days shall be adjudged for owners and persons in charge of publication, who have any admittance in committing the felony by the media. However, the maximum limit of this penalty for persons in charge of the publication shall be five thousand days. These given acts and behaviours shall too be punished according to provisions of this paragraph: a) fully or partially veiling the face with the purpose to hide personal identity in the course of an assembly and demonstration march, turned into a propaganda of terrorist organisation. b) to carry emblems and signs, shout slogans or announce through audio means, which would show membership or support of the terrorist organisation, or to wear uniforms with emblem and signs

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<sup>58</sup> European Commission, *Turkey 2012 Progress Report* (Com 600 final, 2012) sec.2.2

of the terrorist organisation. (3) If offences prescribed in the second paragraph are committed inside any block, local, bureau or outlying buildings belonging to associations, foundations, political parties, labour and trade unions or their subsidiaries, or inside educational institutions or student hostels or their outlying buildings, then punishment envisaged in this paragraph shall be doubled.<sup>59</sup>

It will be necessary to refer to the language of this article, for the majority of the journalists in Turkey have been investigated or/and convicted based on being a member of a terrorist organisation or committing the crime of making propaganda of a terrorist organisation through the press.<sup>60</sup> TCK Articles 220 and 314 have been used in combination with TMK Articles 6 and 7 in order to penalise the opposition press or the journalists for being a leader of a terrorist organisation, whereas in fact they had merely been investigating and/or commenting on terrorism in Turkey. In addition, TCK Article 220 lays out the criteria for “forming organised groups with the intention of committing a crime”:

(1) Those who form or manage organised groups to execute acts which are defined as offence by the laws, are punished with imprisonment from two years to six years unless this organised group is observed to be qualified to commit offence in view of its structure, quantity of members, tools and equipment held for this purpose. However, at least three members are required for existence of an organised group. (2) Those who become a member of an organised group with the intention of committing crime, are punished with imprisonment from one year to three years. (3) In case the organised criminal group is equipped with arms, the punishment to be imposed according to the above subsections is increased from one fourth to one half. (4) In case of commission of a crime within the frame of activities of a organised group, the offender is additionally punished for this crime. (5) The directors of the organised criminal group are additionally punished for all the offences committed within the frame of activities of the organised

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<sup>59</sup> Anti-Terror Law 1991/3713, s 1 (7)

<sup>60</sup> Erol Onderoglu, ‘Updated List of Imprisoned Journalists in Turkey Including Recent Releases’ (OSCE, 20 June 2012) <[https://www.ecoi.net/file\\_upload/1788\\_1340368562\\_91070.pdf](https://www.ecoi.net/file_upload/1788_1340368562_91070.pdf)> accessed 11 November 2012

Erol Onderoglu, ‘Updated List of Imprisoned Journalists in Turkey Including Recent Releases’ (OSCE, March 2014) <<http://www.osce.org/fom/116291?download=true>> accessed 6 March 2015

Erol Onderoglu, ‘Updated List of Imprisoned Journalists in Turkey Including Recent Releases’ (OSCE, June 2014) <<http://www.osce.org/fom/119921?download=true>> accessed 3 April 2015

Erol Onderoglu, ‘Updated List of Imprisoned Journalists in Turkey Including Recent Releases’ (OSCE, July 2015) <<http://www.osce.org/fom/173036?download=true>> accessed 1 November 2015

group. (6) Any person who commits an offence on behalf of an organised criminal group without being a member of that group is additionally punished for being a member of the organised group. (7) Any person who knowingly and willingly helps an organised criminal group without being part of the hierarchic structure of the group, is punished as if he is a member of the organised group. (8) Any person who makes propaganda by praising the organised criminal group and its object is punished with imprisonment from one year to three years. The punishment to be imposed is increased by one half in case of commission of this offence through press and broadcast organs.<sup>61</sup>

TCK Article 314 refers to “alliance for offences; establishing, commanding or becoming a member of an armed organisation with the aim to committing certain offences”:

(1) If two or more persons make a deal to commit any one of the offences listed in fourth and fifth sections of this chapter<sup>62</sup> by using suitable means, the offenders are sentenced to imprisonment from three years up to twelve years, depending on the quality of offence. (2) No punishment is imposed on the persons who break up the alliance before commission of the offence or commencement of investigation.<sup>63</sup>

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<sup>61</sup> Turkish Penal Code 2008/5237, s 3(220)

<sup>62</sup> Fourth (Offences Against National Security) and the fifth (Offences Against Constitutional Order and Operation of Constitutional Rules) sections mentioned here include the offences of; TCK; Article 302 Breach of national unity and territorial integrity, Article 303 Cooperation with the enemy, Article 304 Provocation of war against the state, Article 305 Movements against basic national interests, Article 306 Recruitment of soldiers against a foreign country, Article 307 Destruction of military grounds and treaties in favour of enemy's military actions, Article 308 Physical and financial assistance to hostile country, Article 309 Violation of the Constitution, Article 310 Assassination of or physical attack upon the President, Article 311 Offences against Legislative organs, Article 312 Offences against the Government, Article 313 Armed revolt against the Government of the Republic of Turkey, Article 314 Armed criminal groups, Article 315 Supply of arms, Article 316 Alliance for offence. Turkish Penal Code 2008/5237, s 4(302-308) s 5(309-316)

<sup>63</sup> Turkish Penal Code 2008/ 5237, s 5(314)

The Anti-Terror Law Article 7(2) makes provisions for the restriction of the press's freedom by regulating the committing of the crime of making propaganda of a terrorist organisation through the use of the media. Increasing the penalty by half in such circumstances, it is silent on what constitutes propaganda. The lack of clarity in this provision results from the amendments made to the Anti-Terror Law in 2006, which omitted the following phrasing from the provision: "in a way that would promote violence or make it appealing to use other methods of terrorism". Academics criticised this amendment as a step backwards for the freedom of the press in Turkey.<sup>64</sup> Hazar argues that the new version of TMK is in contradiction with the ECtHR case law requiring the restriction of the press to being "necessary in a democratic society".<sup>65</sup>

In this context, where the broadly drawn language of law leads to the censorship of the press, this author argues that the Turkish courts have the duty to provide a balance between national security and the freedom of expression, which is discussed separately in Chapter 5. However, it is crucial to state that criticism against the government and government officials is perceived as a threat to the national security and territorial integrity by the Turkish courts. This perception reflects the judiciary's persistence in following the official state and government ideology to reform the Anti-Terror Law. This may be argued as one of the reasons why the reforms being made to the EU accession process have not been implemented, along with the lack of government will as it continues to use the Anti-Terror Law arbitrarily to censor the press. Seemingly a common occurrence throughout the political history of Turkey, which will be examined in detail in Chapter 3.

As a result, both articles of TCK and TMK can be considered as the main problems in the legislation related to the freedom of expression and the press that must be addressed by the legislation. In addition to that, recommendations will be made on the role of the judiciary for the solution of this problem, which is expansively discussed in Chapter 6. However, it is crucial to state that despite the latest developments in the jurisdiction of the Constitutional Court of Turkey in favour of the press,<sup>66</sup> the Turkish lawmakers must boldly demonstrate the will to comply with international standards in a satisfactory manner.

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<sup>64</sup> Yasar Salihpasaoglu, 'Türkiye'de Basın Özgürlüğü/*Freedom of the Press in Turkey*' (Ankara Seckin Yayinlari, 2007) 185

<sup>65</sup> Zeynep Hazar, 'Freedom of Press and National Security' (2013) 17:1-2 Gazi University Law Faculty Journal 1525,1543

<sup>66</sup> Examined thoroughly in Chapter 5.

## 2.3 Examining the Case of Hrant Dink in Light of the Turkish Penal Code and the ECtHR Verdict

In order to highlight the practical implications of the legal provisions of TCK studied above, this section investigates the case of Hrant Dink. The case of Hrant Dink is mainly based in the application of TCK Article 301 and has been chosen to indicate how its vague language has led to a broad interpretation by the Turkish authorities, namely the public prosecutors and the judges, resulting in Dink's conviction. With the investigation of this case, the research aims to propose recommendations for legal amendments designed to prevent the problems encountered by Dink.

### 2.3.1 Hrant Dink v TCK Article 301

Hrant Dink was an outspoken Turkish-Armenian community member, born and educated in Turkey, who served as an editor at the weekly Turkish-Armenian AGOS newspaper for 11 years. He was part of the group of writers, journalists, and scholars who aimed to prepare the first ever conference on the Armenian massacre in Turkey. Dink's ultimate wish was to enable Turkish citizens to search for the truth and to encourage Armenians who were Turkish citizens to feel confident about naming themselves with their identity with no constraints.<sup>67</sup> Dink spoke at many conferences in the USA, Australia, Europe, and Armenia about Armenian identity and the relationship between Turkish and Armenian People Encouraging critical thinking about this relationship within Armenian society and diaspora as well as its historical role.<sup>68</sup>

Dink was first prosecuted based on his statement — “the purified blood that will replace the blood poisoned by the ‘Turk’ can be found in the noble vein linking Armenians to Armenia, provided that the former are aware of it”<sup>69</sup> — taken out of context from his article<sup>70</sup> in AGOS<sup>71</sup>, in

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<sup>67</sup> Maureen Freely, ‘Why they killed Hrant Dink’ (2007), 36:2 Index on Censorship, 15

<sup>68</sup> Hrant Dink Foundation, ‘Biography Hrant Dink (1954-2007)’ <<http://hrantdink.org/?HrantDink=10>> accessed 15 December 2015

<sup>69</sup> Hrant Dink, ‘Ermenistan’la Tanismak/*Meeting Armenia*’ AGOS (13.02.2004)

Hrant Dink, ‘Ermeni Kimligi Uzerine: Ermenistan’la tanismak/*On the Armenian identity: Meeting Ermenistan*’ (Agos 13 February 2004) <<http://baskinoran.com/belge/ErmeniKimligiUzerine-HrantDink.pdf>> accessed 16 December 2015

<sup>70</sup> Ismail Surucuoglu, ‘Hrant Dink Bu Sozu Soyledi Mi? /*Did Hrant Dink use that phrase?*’ (OdaTV, 20 January 2011) <<http://odatv.com/hrant-dink-bu-sozu-soyledi-mi-2001111200.html>> accessed 15 November 2013

<sup>71</sup> Agos was founded in 1996 by Hrant Dink and a group of his friends, in order to report the problems of the Armenians of Turkey to the public. It is the first newspaper in the Republican period to be published in Turkish and Armenian. Agos’ editorial policy focuses on issues such as democratization, minority rights, coming to terms with the past, the protection and development of pluralism in Turkey. As a newspaper that has emerged from within the Armenian community of Turkey, Agos aims to further open its pages to the issues of Turkey and the world. As

which he meant to call diaspora Armenians to dispense with their detestation of “the Turk”.<sup>72</sup> Dink was brought to the court by the public prosecutor’s appointment of criminal proceedings against him, based on a criminal complaint of his being an extreme nationalist.<sup>73</sup> The proceedings against Dink were grounded on denigrating “Turkishness” according to the old TCK Article 301, and despite the expert report received by the court which came to a conclusion that his remarks in the article in question had not included any insult or denigration to anyone<sup>74</sup>, Dink was found guilty in 7 October 2005 for “denigrating Turkishness” by the Sisli Criminal Court in Istanbul.<sup>75</sup> Dink was sentenced to six months imprisonment while the Sisli Criminal Court determined that “the public could not be expected to read the whole series of articles in order to grasp the real meaning of his remarks” as the reason for its decision.<sup>76</sup>

By way of this research it is observed that the Court’s decision could have set an example of tolerance for ideas that differ from the political ideology in the country. Promoting unity among different ethnic backgrounds by taking the expert report as a basis to understand the overall idea of Dink’s article for its judgement. Therefore, the public could be motivated to read the whole series of articles in order to try to understand Dink’s intention for using the words that lead to his conviction. As the political and cultural situation in Turkey suffers from the lack of dissemination of divergent ideas and of toleration towards such ideas, the Courts’ decisions should not be tools that contribute to such hostility between people from different ethnic backgrounds. On the other hand, by not taking the expert report into account, the Court led to the creation of mistrust within society on the impartiality of the judges, as the people suspected the case was politically driven.<sup>77</sup> However, Sisli Criminal Court preferred to use subjective terms to conclude its verdict, which

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independent journalism and freedom of expression face increasing restriction in Turkey, Agos also acts as an independent platform for debate.” (Agos) <<http://www.agos.com.tr/en/home>> accessed 10 December 2015

<sup>72</sup> Maureen Freely, ‘Why they killed Hrant Dink’ (2007), 36:2 Index on Censorship, 16

<sup>73</sup> Istanbul Sisli Public Prosecution Office (27 February 2004) Registration of Complaint

Istanbul Sisli Prosecution Office (16 April 2004) Institution of Legal Proceedings against Hrant Dink TCK (159/1)

<sup>74</sup> “In May 2005 an expert report concluded that Fırat Dink’s remarks had not insulted or denigrated anyone, since what he had described as “poison” was not Turkish blood, but rather Armenians’ obsession with securing recognition that the events of 1915 amounted to genocide.” *Dink v Turkey*, App no 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09 (ECtHR 14 September 2010) para. 21

<sup>75</sup> Istanbul Sisli 2nd Penal Court of First Instance (7/10/2005)

<sup>76</sup> Ibid.

<sup>77</sup> Kaan Tasbasi and Esengul Ayyildiz ‘Toplumsal Hareketler ve Eylem Pratikleri: İletişim Bilimleri Açısından Otorite Mekânlarına Müdahale Olarak Hrant Dink Eylemleri/Social Movement and Protests: Hrant Dink Protests From Communication Science Perspective’ (2014) 21 Galatasaray University Communication Journal

Emine Ozcan, ‘Dink Cinayetine Dört Bir Yandan Protesto/Protesting Dink’s Assassination from All Quarters’ *Bianet* (22 January 2007) <<http://bianet.org/bianet/insan-haklari/90598-dink-cinayetine-dort-bir-yandan-protesto>> accessed 18 January 2015

exposed the ideological sensitivities of the judges in their approach towards the misconstrued sentence from Dink's article;

the judgement stated:

There exists such country whose flag can be turned into a piece of clothing, it would be tolerated. There exists such country that when you touch its cow it leads to a moral outrage. There is such nation that when blood is mentioned it reminds them of their ancestors whose blood is in every inch of these lands... Every single inch of this land is washed with blood.<sup>78</sup>

The Turkish Court's judgement, although containing subjective terms that carried hostile expressions towards Dink was covered without criticising or questioning the subjective terms used by the court.<sup>79</sup> Similar coverage was also evident in the next lawsuit against Dink, who had been the subject of a smear campaign as discussed further in the chapter.

Finally, the verdict was upheld by the Court of Cassation in May 2006 when appealed, and the extraordinary appeal that was made by the Principal State Council was also dismissed by the Court of Cassation. After Hrant Dink's assassination on 19 January 2007, Sisli Penal Court of First Instance ruled for abatement of action on 12 March 2007.<sup>80</sup>

### 2.3.2 Turkey v Article 301: ECtHR decision of *Dink v Turkey*

The decision of the ECtHR in *Dink v Turkey* included the combination of two cases. The first was the decision on Dink's application before his death in 2006, for challenging his conviction under TCK Article 301 for "denigrating Turkish identity" ruled by the Turkish Court, which Dink

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<sup>78</sup> Ozgur Gundem, 'Hukum Aslinda Coktan Verilmisti/*The judgement was already made*' *Ozgur Gundem* (19 January 2015) <<http://www.ozgur-gundem.com/haber/124770/hukum-aslinda-coktan-verilmisti>> 30 June 2015  
Kemal Özmen, 'Kan Dedin mi Akla Ecdat Kanı Gelir.../*When you say blood ancestors' blood comes to mind...*' (*Bianet* 19 October 2005) <<http://eski.bianet.org/2005/10/19/69042.htm>> accessed 19 November 2012 (author's translation)

<sup>79</sup> Ibid.

<sup>80</sup> Istanbul Sisli 2nd Penal Court of First Instance (12 March 2007)

argued to be violating Article 10 of the ECHR (the Convention).<sup>81</sup> The second was the lawsuit brought by Dink's family against Turkey under Article 2 of the ECHR for breaching the guarantee of the right to life. The ECtHR judgement stated that the Turkish court's ruling "made Dink a target for extreme nationalists. The suggestion of the role of the press in making Dink a target for extreme nationalists is discussed in the *"Role of the press in Dink's assassination: A case of "hate speech"'"* in great depth. The Turkish authority, who had been informed of the plot to kill him, had not taken steps to protect him."<sup>82</sup>

The ECtHR found a violation of Article 10 of the ECHR, despite the contestation of the Turkish Government's claim that Dink was finally not convicted at the time of his death and that there was therefore not a breach of Article 10.<sup>83</sup> The present author notes that ECtHR's verdict is of great importance in that it sets a benchmark for the interpretation of the freedom of the press by the Turkish courts, given its ruling that the highest court's judgement upholding Dink's guilty verdict created hatred among the extreme nationalist wing in Turkey. The Turkish authorities' failure to take the necessary steps to protect Dink also lead to an interference with Dink's right to freedom of expression.<sup>84</sup>

### **2.3.2.1 Violation of Article 2: responsibility of the Turkish authorities**

The Turkish authorities' failure to protect Hrant Dink's life, given their lack of success in investigating his assassination, was highlighted by the ECtHR. The ECtHR concluded that Turkey had violated Article 2<sup>85</sup> of the ECHR, based on the consideration that the Turkish security forces had been notified of the nationalist circles' hatred towards Hrant Dink before his assassination and the Istanbul and Trabzon police were informed of the possibility of his assassination, supported by the suspects' identification.<sup>86</sup> The court's decision was based on the claim by an informant confirming that two non-commissioned officers of Trabzon gendarmerie were warned about the

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<sup>81</sup> European Convention On Human Rights will be referred to as "the ECtHR" and/or "the Convention" throughout the thesis.

<sup>82</sup> *Dink v Turkey* App no 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09 (ECHR 14 September 2010) para. 137

<sup>83</sup> Ibid. para. 97

<sup>84</sup> Ibid. para 139

<sup>85</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) Article 2

<sup>86</sup> *Dink v Turkey* App no 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09 (ECHR 14 September 2010) para. 66-67

intention of Dink's assassination by the informant. These officers also claimed that their superiors were informed of the details and received a response ordering them to deny having received such information. Finally, Istanbul's public prosecutor made further investigations into the involvement of Trabzon gendarmerie, and it became clear that Trabzon police officers were negligent in taking any action to prevent Dink's assassination. There was no action taken against the Trabzon police by the Trabzon prosecution authorities based on the defence that the information received by the Trabzon police was not found credible enough to act upon.<sup>87</sup>

It became apparent that the Istanbul authorities were informed of the preparations for Dink's assassination, and as a result Istanbul's provincial governor's office chose to start a criminal proceeding for negligence against a number of Istanbul police members.<sup>88</sup> The attempt was useless because the Istanbul Regional Administrative Court of Appeal overlooked the order requiring the commencement of the criminal proceedings. This reluctance was defended by the Istanbul Regional Administrative Court of Appeal by alleging that the investigation of the case was insufficient.<sup>89</sup> A minimal investigation took place once there was a complaint by the applicant, Rakel Dink (Hrant Dink's wife), based on the heroic picture taken of the assassin while in custody bearing a Turkish flag. Last but not least, except disciplinary action, there was no legal action taken against the police officers concerned based on Samsun's public prosecutor's decision that defending a crime could only be a crime if it took place in public.<sup>90</sup>

In conclusion, the ECtHR considered that the prevention of Hrant Dink's assassination would have been possible, however none of the informed authorities took the necessary actions for its prevention. Even though Dink never requested police protection, the Turkish authorities were responsible for taking necessary actions for his protection; the ECtHR therefore concluded that Article 2 of the Convention was breached both in its substantive and procedural aspects.<sup>91</sup>

The Turkish Court fails to promote a positive duty on the state to provide legal protection to journalists; this failure is based on the lack of the universal application of the law that secures the right to free expression and the freedom of the press. The absence of protection for Dink and of

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<sup>87</sup> Ibid. para. 68-72

<sup>88</sup> Ibid. 82-85

<sup>89</sup> Ibid. para. 86-88

<sup>90</sup> Ibid. para. 50-52

<sup>91</sup> Ibid. para. 64

further investigation into his assassination triggered serious concern among the public.<sup>92</sup> The government's duty to protect threatened journalists must be strictly ensured by the Turkish courts. For the enforcement of the right to free expression of the journalists, it is essential that their right to life is protected, for the absence of such crucial protection creates the atmosphere of self-censorship by the press.

By way of this research it is argued that the responsibility of the press for Dink's assassination does not only belong to the Turkish authorities as suggested by the ECtHR. It is important to look from the perspective of the mainstream press in order to examine whether the press perceived the case from a fourth estate perspective, requiring addressing the state's responsibility for his assassination. Alternatively taking a stance close to the state ideology which leads to a narrow interpretation of press freedom adopted by the Turkish court. Considering the contribution that such discussion would make to the examination of the main research question, the attitude of the press towards Dink's trials will be covered later in this chapter.

#### **2.3.2.2. The ultimate challenge of the press in Turkey: expressions against the political ideology**

The verdict of the first instance court in the case of Hrant Dink appears to be an appropriate example of how the presiding political ideology leads to the censorship of the press and shapes the judicial decisions in Turkey.

By inspecting the Court of Cassation's interpretation of Turkish identity, ECtHR also stated that Dink was indirectly penalised for opposing the Turkish State's denial of events in 1915 that allegedly were in the nature of a genocide.<sup>93</sup> Dink's statements that he had to go through all these trials because he is an Armenian and that he was silenced for exploring issues that challenge the Turkish political ideology<sup>94</sup>, can be considered, to understand how effective the sensitivities were related to the official state ideology, and their impact on the political motivations behind this case.

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<sup>92</sup> Committee to Protect Journalists, 'Further investigation necessary in Hrant Dink Murder' (*CPJ*, 17 January 2012) <<https://cpj.org/2012/01/further-investigation-necessary-in-hrant-dink-murd.php>> accessed 20 January 2014

<sup>93</sup> *Dink v Turkey* App no 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09 (ECHR 14 September 2010) para. 132

<sup>94</sup> Hrant Dink, 'Neden hedef secildim?/Why was I chosen a target?' *Agos* (12 January 2007) <<http://www.agos.com.tr/tr/yazi/14049/agos-un-arsivinden-nicin-hedef-secildim>> accessed 12 May 2015

Considering that Dink was convicted based on his journalistic work, and that his articles were of public interest, the ECtHR's principle on "the limits of acceptable criticism" is of great value. The Court asserts that "Article 10 of the Convention prohibited restrictions on freedom of expression in the sphere of political debate and issues of public interest, and that the limits of acceptable criticism were wider for the Government than for a private individual."<sup>95</sup> This decision by the ECtHR indicates that the judges in Turkey, in press-related cases, must take the ECtHR case-law into consideration. When ECtHR's case-law is considered, there are three ways to interfere with the exercise of free expression to take place; namely, it has to be "prescribed by law, pursued a legitimate aim or/and be regarded as being necessary in a democratic society."<sup>96</sup> However, it is observed that the First Instance Court showed obstinacy and refused to evaluate Dink's statements within their overall context as previously mentioned and the ECtHR ruled that there was no "pressing social need" for Dink's conviction based on denigrating Turkish identity. In light of this context, when Dink's articles are analysed altogether, it is clear that "poison" was not used to describe "Turkish blood" but the "perception of Turkish people" by the Armenians instead.<sup>97</sup> It is fair to argue that Dink was the victim of "the sensitive issues" he expressed that contradicted the present political ideology in the country<sup>98</sup>, built on national and secular ideologies where the protection of the State against communists, Islamists and Kurdish separatists is given utmost importance. Leading to the prioritisation of State interests over people's rights and freedoms.<sup>99</sup>

### 2.3.3 Role of the press in Dink's Assassination: a case of "hate speech"

While Dink was being tried for his statement, he was brought to public attention in the mainstream press (*Hurriyet*) by a column written based on Dink's reporting on Sabiha Gokcen (the first female Turkish military pilot) in which Dink claimed that Gokcen had Armenian roots.<sup>100</sup> More specifically, in 2004, his article was cited in *Hurriyet* by Ersin Kalkan, whose column was written

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<sup>95</sup> *Dink v Turkey* App no 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09 (ECHR 14 September 2010) para. 133

<sup>96</sup> Ibid. para. 112-135

<sup>97</sup> Ibid. para. 24

<sup>98</sup> Ibid. para. 132

<sup>99</sup> Servet Saglam, 'The Turkish High Council of Judges and Prosecutors in the Context of Judicial Independence and Accountability' (2013) 4:2 Law and Justice Review 165, 193

<sup>100</sup> Hrant Dink, 'Neden hedef secildim?/Why was I chosen a target?' *Agos* (12 January 2007)

<<http://www.agos.com.tr/tr/yazi/14049/agos-un-arsivinden-nicin-hedef-secildim>> accessed 12 May 2015

in a neutral style<sup>101</sup> and did not aim to create tension within the society. Nevertheless, the publication of Kalkan's article, despite the writer's sole aim of "making news", portrayed Dink as "hostile towards Turks and Turkey".<sup>102</sup>

As also stated by Dink, his article was important because it highlighted what Armenian people experienced in 1915.<sup>103</sup> This was equally the reason why it disturbed some readers as well as the military. Although Hurriyet supported Dink's report with interviews from witnesses and used a professional tone in covering the news, Hurriyet received negative reactions from the people fuelled by the military declaration, which was released only a day after the news was seen on Hurriyet.<sup>104</sup>

This declaration emphasised two main terms, which require further attention in relation to the research question. For the TSK (Turkish Armed Forces) used "national unity" and "communal peace" as the two notions being threatened by the discussion on a symbolic character like Sabiha Gokcen and openly questioned the quality of Hurriyet's reporting. The statement by TSK is a good example of direct state intervention and will therefore be cited fully:

On 21 February 2004, one newspaper published an allegation under the name of a news item with the title of "80 Years Secret of Sabiha Gokcen". Ataturk's foster daughter, Sabiha Gokcen, whom we lost in 2001 is a great value for the Turkish nation. As the first war pilot of Turkey, she is an honorary member of Turkish Military Aviation.

Sabiha Gökçen also symbolises the valuable and rational position in the society that Ataturk desired for Turkish Women to hold. Allowing such a symbol to be discussed is an approach that does not serve communal peace and national unity, no matter what the intention is.

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<sup>101</sup> Ersin Kalkan, 'Sabiha Gokcen'in 80 Yillik Sirri/80 years secret of Sabiha Gokcen' *Hurriyet* (21 February 2004)

<sup>102</sup> Kemal Goktas, 'Turkiye'de Basinin Kamuoyu Olusturmasi Ornek Olay: Hrant Dink'in Hedef Haline Gelen Bir Siyasi Figure Donusturulmesi/Creation of public opinion by the press in Turkey:Hrant Dink being targeted as a political figure' (Master's thesis, Ankara University 2007) 62

<sup>103</sup> Hrant Dink, 'Neden hedef secildim?/Why was I chosen a target?' *Agos* (12 January 2007)

<<http://www.agos.com.tr/tr/yazi/14049/agos-un-arsivinden-nicin-hedef-secildim>> accessed 12 May 2015

<sup>104</sup> Kemal Goktas, 'Turkiye'de Basinin Kamuoyu Olusturmasi Ornek Olay: Hrant Dink'in Hedef Haline Gelen Bir Siyasi Figure Donusturulmesi/Creation of public opinion by the press in Turkey:Hrant Dink being targeted as a political figure' (Master's thesis, Ankara University 2007) 63

Noble Ataturk defines the Turkish nation as “People of Turkey who established the Republic of Turkey are called Turkish”. Accordingly, Ataturk Nationalism is not based on ethnic and religious grounds. In Article 66 of our Constitution Turkish citizenship is defined as “Everyone bound to the Turkish State through the bond of citizenship is a Turk.” It is not acceptable that an allegation is reported under the name of journalism that abuses national feelings and values.

It is of high concern to follow the unfair and groundless criticism being made against Ataturk nationalism and the nation state structure by one part of the Turkish Media, which, intentionally or unintentionally, irresponsibly features dangerous ideas that aim to deprive Ataturk nationalism.

In such a period that requires a strong national unity, the majority of the Turkish people can understand the intention and follow with apprehension these publications which are against our national unity and national values.

Besides the Turkish Armed Forces, it is also the duty of Turkish people and institutions to defend and claim the unity of the Turkish nation, communal peace, and Ataturk’s ideology and morals.

To this extent, it is expected by the nation that the Turkish media conforms with Ataturk’s morals, ideology, the principal values of the Republic of Turkey, the unity of the people, and revises its publication principles in light of these ideas with sensibility. Kind regards.<sup>105</sup>

Goktas highlights TSK’s expectation from the press; they declare their concern with any news that “intentionally” or “unintentionally” features “dangerous ideas” that could aim to undermining Ataturk nationalism. Therefore, TSK gives a warning to the press not to incorporate any opposing views even if they have news value.<sup>106</sup> This is a damaging example of how TSK directly interfered the Turkish press in order impose its political ideology on their reporting and eliminate any opposing views no matter their news value or importance to society. As further

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<sup>105</sup> TSK, ‘Genelkurmay Başkanlığı Basın Açıklaması/General Staff Press Release’ (No:BA-03/04 22 February 2004) <[www.tsk.mil.tr](http://www.tsk.mil.tr)> accessed 01 November 2015 (author’s translation)

<sup>106</sup> Kemal Goktas, ‘Turkiye’de Basinin Kamuoyu Olusturmasi Ornek Olay: Hrant Dink’in Hedef Haline Gelen Bir Siyasi Figure Donusturulmesi/Creation of public opinion by the press in Turkey:Hrant Dink being targeted as a political figure’ (Master’s thesis, Ankara University 2007) 69

analysed in Chapter 3, the press in Turkey has not adopted the watchdog or the fourth estate role but stood as the spokesman of the State; this is verified by the affirmative reaction of the mainstream press to TSK's declaration.

Goktas concludes that the most important point to consider in the press reaction to this declaration is that there was no anomaly for the press in including TSK's declaration, which consisted of intense criticism towards the coverage of the news on Gokcen. Interfering with the editorial freedom of the press with no focus on the restrictions they received from the military forces on their choice of content. When the press published the declaration of TSK with a critical point of view, the criticism was rather based on how TSK made a tactical mistake by making such a declaration. Goktas' statement that none of the newspapers carrying the declaration on their pages were concerned about their freedom of expression and TSK's intervention in their editorial freedom<sup>107</sup> is an appropriate observation that requires serious consideration.

It is suggested in the present research that the press's reaction to TSK's declaration suggests that press traditions allowed the political ideology<sup>108</sup> to set the rules for the limits of their expression and thus the freedom of the press in Turkey. In this regard, it is possible to argue that the press in Turkey customarily/conventionally accepts the intervention of the State authorities in their editorial freedom. Consequently, the discussion in the news related to the inquiry, whether there was enough evidence to question whether Sabiha Gökçen was Armenian or not had turned into a common opinion. That simply mentioning "Gokcen" and "Armenian" in the same piece constituted a dangerous element for the national security. It is remarkable to see the influences of the political ideology on the assessment and expression of the mainstream press. Also, it is an example of the need for a better understanding of the presence and nature of racism in Turkey as it impacts on freedom of the press. The assassination of Hrant Dink was based on his ethnic origins in combination with the arbitrary use of TCK Article under which his prosecution brought him to the spotlight of the ultra-nationalists. Despite that Turkey had ratified the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) on 16 October 2002. This argument can be supported on the basis of the repeated targeting of the Kurdish journalists and Kurdish newspapers as discussed throughout the thesis.

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<sup>107</sup> Ibid. 73

<sup>108</sup> The formation and transformation of the political ideology and its effects on the press is discussed in depth in Chapter 3.

However, Murat Belge, in his column in Radikal newspaper, criticised TSK, not on their intervention in the press but the mentality that led to discrimination against the minorities (including Armenians) based on the aim to create a “nation-state”. Which he suggested to be the main philosophy during and after the establishment of the republic. He explains why such a report on Sabiha Gokcen is seen as a danger or a threat to the founding principles and values of the Republic of Turkey:

...Let's say that someone proved that she was Armenian. What would happen? Would founding principles and values of the Republic would be in danger? The only logical conclusion after reading TSK's declaration can be that according to them, yes it would be in danger...They perceive Gokcen to be Armenian as a fact that would obliterate the nation, the state, its values, and its principles. I hope and think that the majority of Turkey does not perceive it the same way as TSK does. I don't think that they have to. I don't think that it is a healthy way of thinking that all these tragedies would take place just because it is claimed that Sabiha Gokcen is Armenian.<sup>109</sup>

Kursat Bumin from *Yeni Safak* newspaper was one of the rare columnists who turned the discussion towards the freedom of the press and stated that “Most importantly, it is the journalists and the readers who would decide what could be defined as news, not TSK.”<sup>110</sup> Ekin Turkantos' article, “Gokcen is not Armenian, She is Bosnian”<sup>111</sup> accepts that Gokcen could be from another background than Turkish; however, the overall concern was not that Sabiha Gokcen could be from another nationality or ethnic background but that she “cannot” be Armenian.<sup>112</sup> Indicating the subjectivity of the press when it comes to covering news on minorities in Turkey.

In his research, which focuses directly on the role of the press for building public opinion in Turkey, Goktas uses Hrant Dink as the main example. Based on the information derived from his

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<sup>109</sup> Murat Belge, ‘Asıl endişe kaynağı/The actual reason for concern’ *Radikal* (5 March 2004) (author's translation)

<sup>110</sup> Kürşat Bumin, ‘Açıklama'nın çizdiği 'medya resmi' iyi bir resim değil/The media portrait by the Declaration is not a nice one’ *Yeni Şafak Gazetesi* (25 Şubat 2004)

<sup>111</sup> Ekin Turkantos, ‘Gokcen Ermeni Degil Bosnali/Gokcen is Not Armanian, She is Bosnian’ *Aksam Newspaper* (23 February 2004)

<sup>112</sup> Kemal Goktas, ‘Türkiye’de Basinin Kamuoyu Olusturmasi Ornek Olay: Hrant Dink’in Hedef Haline Gelen Bir Siyasi Figure Donusturulmesi/Creation of public opinion by the press in Turkey: Hrant Dink being targeted as a political figure’ (Master's Thesis, Ankara University 2007) 87

work, it is possible to see the step by step process which is motivated by the press that brought Dink under the spotlight. Making him a target on the basis of TCK Article 301 for his sentence which was taken out of context from Dink's article in weekly magazine Agos. In this setting, Emin Colasan's article from Hurriyet newspaper<sup>113</sup>, Deniz Som's article from Cumhuriyet newspaper<sup>114</sup>, Orhan Kirvelioglu's article in Once Vatan newspaper<sup>115</sup>, Arslan Tekin's article in Yenicag newspaper<sup>116</sup>, Alican Satilmis' article in Ortadogu newspaper<sup>117</sup>, were cited by Goktas. In order to conclude that journalists from the mainstream press which had a heavy impact on the reader, on the assassin of Dink and the judges who conducted Dink's trial under TCK Article 301, were accusing Dink for stating that "Turkish blood was poisonous." Which was only possible by taking Dink's words out of their original context.

The pressure on Dink increased with a high volume of death threats he received from the ultra nationalists and the pressure created by the press. Even though Dink was an admired figure among democratic-minded journalists internationally, who considered him to be a bridge between the Armenian and Turkish people<sup>118</sup>. He was portrayed as a traitor by the mainstream media in Turkey. Dink was accused by the mainstream columnists of insulting the Turkish nation; this riled the nationalist wings, and the negative reactions against Dink based on these accusations lasted until his assassination. In light of this context, this research suggests that the press's role in his murder was significant because the ultranationalist columnists labelled Dink a traitor during his prosecution.

In the case of Dink, the press's reactions suggested that the focus point was not on the freedom of the press or on people's right to information but, was rather limited to what is considered to be "acceptable news" within the lines of the official state ideology and/or national security. In Dink's case, the court's interpretation of Article 301 and TSK's the interpretation of free press were the determinant factors in drawing the lines for the press. The press chose to

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<sup>113</sup> Emin Colasan, 'Ufak ufak, yavas, yavas.../Little by little, slowly...' *Hurriyet* (28 February 2004)

<sup>114</sup> Deniz Som, 'Sabiha Gokcen' *Cumhuriyet* (24 February 2004)

<sup>115</sup> Orhan Kiverlioglu, 'Hrant' in Hirlayisi/*Hrant's Snarl*' *Once Vatan* (26 February 2004)

<sup>116</sup> Arslan Tekin, 'Turk'un zehirli kani ne demek oluyor!/What does Turk's poisonous blood mean!' *Yenicag Gazetesi* (25 February 2004)

<sup>117</sup> Alican Satilmis, 'Masum Azinliklar Canavarlasirken/While the Tyrannised Minorities get Demonised' *Ortadogu Gazetesi* (26 February 2004)

<sup>118</sup> Tuba Candar, *Hrant* (Everest Publishing, Istanbul 2010)

Euronews, 'Hundreds pay tribute to slain Turkish-Armenian journalist Hrant Dink' *Euronews* (19 January 2016)  
<<http://www.euronews.com/2016/01/19/hundreds-pay-tribute-to-slain-turkish-armenian-journalist-hrant-dink/>>  
accessed 25 February 2016

undertake the subject matter within those limits instead of looking at it from the perspective of the rights and freedom of the press. In light of this, the present researcher highlights the importance of making a reformist amendment to Article 301 or completely abolishing it, arguing that it has been used as a legal basis for silencing the views of the opposition press that do not follow the official state ideology.

More importantly, this section concludes that the free public sphere was under the restraint of the broadly drawn legal provisions and the state authorities' approach to press freedom. James Curran and Jean Seaton discuss the importance of the press in a democratic society by identifying four main elements as the responsibility of the press in a democratic system where people can make independent choices: (1) people must be informed of the public and political theories by the media systems, (2) individual and collective approaches must be respected in the delivery of the news in which the articulation of standpoints is the objective, (3) plurality must be respected by the media by providing grounds for pluralist comments, and (4) ideas and discussions as well as diversity in cultural perspectives must be respected with information that is conveyed accurately.<sup>119</sup> Concerning these four main elements, it is fair to conclude that the present political ideology affects the press in Turkey, because it prioritises the state interest rather than individual rights and freedoms. This analysis is supported by the clear apprehension of the rights and limitations to which the Turkish press has become accustomed and acculturated. In relation to this, it is fair to argue that the press did not respect diversity of cultural perspectives or pluralist comments made by Dink and rather supported the state ideology which led to his conviction and facilitated his assassination.

#### **2.3.4 The expectations of “change” after Dink’s assassination**

After Dink’s assassination, PM Erdogan declared that Dink’s death was “a shot against Turkey”<sup>120</sup>. When Turkey’s Foreign Ministry said that while there was a chance of appeal at the ECtHR Grand Chamber against the verdict within three months, the country would not appeal as it “would abide by the ruling and take measures to prevent reoccurrence of such violations.”<sup>121</sup> The

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<sup>119</sup> James Curran and Jean Seaton, *Power Without Responsibility: The Press, Broadcasting and the Internet in Britain* (first published 1981, Routledge, 2010)

<sup>120</sup> Maureen Freely, ‘Why they killed Hrant Dink’ (2007) 36:2 Index on Censorship 15, 19

<sup>121</sup> Huffington Post, ‘Court: Turkey must pay slain to journalist’s family’ *Huffington Post* (14 September 2010) <<http://www.huffingtonpost.com/huff-wires/20100914/eu-turkey-slain-journalist/>> accessed 11 October 2015

Turkish government was expected investigate the real motives behind Dink's assassination and make the necessary legal amendments for the prevention of journalist killings, based on the ideological hostilities emphasised by the application of Article 301. However, in spite of the national and international outrage against Article 301 after Dink's murder, there were no steps taken for the amendment or the abolishment of Article 301, which still stands as a heavy block to Turkey's press freedom records. Discussed by Freedom House, Reporters Without Borders, Committee to Protect Journalists and finally by the EU progression reports on Turkey as examined in the following section.

Even nine years since Dink's assassination, trials for Dink's case are still ongoing. Although actions stated in ECtHR decision in *Dink v Turkey* (as discussed above) were to be enforced within a reasonable time, no actions were taken thereafter to ensure and reveal the actual links behind his assassination and the compliance of the case. In fact, the government officials who were responsible for Dink's assassination were promoted to various higher positions.<sup>122</sup> Only some of these individuals were brought to justice after the enormous efforts of Dink's family based on the ECtHR court decision, which found the Turkish government in violation of its duty to protect Dink's right to life, as discussed above. Therefore, the political alliance among these who silenced Dink, first by convicting him under Article 301, then enabling his assassination, are still of public concern, and justice is still waiting to be served in Dink's case.

Reporters Without Borders (RSF) states that Dink's case is under the risk of manipulation for political purposes, and besides the democratic implications, this is another reason why the case must be finalised without delay. RSF therefore calls for the Turkish judiciary to come to a conclusion on the case of Hrant Dink promptly and without the influence of any political prejudgements. This call is based on the course of political events that have been affecting the independence and impartiality of the judges. The progression in Dink's case has occurred at a time when the political atmosphere in Turkey is undermined by the tense relationship between Erdogan

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<sup>122</sup> Muammer Guler, who was the Istanbul Mayor at the time, was appointed Minister of Interior Affairs. Celalettin Cerrah, who was the Istanbul Chief of Police at the time, was made the Mayor of Osmaniye. Mehmet Nihat Omeroglu, who signed the Court of Appeal's decision was made the first ombudsman of Turkey. Engin Dinc, who was allegedly the first person who received the information on Dink's assassination, became Chief of Police. Ali Fuat Yilmazer who was Chief of Intelligence Istanbul Department, became 1st degree Police Commissioner. One of the people responsible for Dink's assassination, Ercan Demir, who was Chief of Trabzon Intelligence Department, became Cizre Police Commissioner. Police officer Yakup Kurtaran, who was in the picture of Dink's assassin Ogun Samast, became the Chief Officer Assistant of Malatya. Source: Nedim Sener, *Dink Cinayeti ve Devlet Yalanlari/Murder of Dink and the Lies of the State* (Destek Publications Istanbul 2010)

and Gulen,<sup>123</sup> for the judiciary stands on the grounds of the tension between these former allies.<sup>124</sup> As has been noted, “[c]ommon pro-Erdogan narratives hold that the Gulen movement has directly controlled large elements of the criminal justice sector in Turkey for a number of years.”<sup>125</sup> Therefore, the Court has been running an incomplete investigation with political motivations to protect the State. The relationship between the political tension and judicial independence is thoroughly reviewed in Chapter 5 where the profound political influence on the judiciary in Turkey is examined.

Finally, it is suggested in the present research that, if the initiators of Dink’s assassination are never brought to justice, the block to the press and of freedom of expression in Turkey cannot be fully eliminated, specifically as Dink’s case highlights two major setbacks: one being a manifest lack of respect towards pluralism of ideas and expressions and the other being the interpretation of the law by the judges deciding in accordance with the present political ideology. In that regard, Dink’s case is a vivid example of the loopholes in the legal provisions that regulate freedom of the press in Turkey and the political influence on the judiciary. The democratisation process in Turkey can continue its process only when the motives behind the journalist killings are clarified through open and fair trials. During which the public is informed by an uncensored press; because of obstructions by the police authorities, in combination with the intransigence of the judges, justice is still not maintained in Dink’s case.

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<sup>123</sup> It is argued that the Gulenist movement played an important role in AKP’s success in 2002 elections and in return, the AKP government allowed the growing number of Gulen followers ingrain judiciary and the police institution. Gülen, until 2010s has arguably set the political agenda in Turkey with the help of his own AKP supporters through financial institutions such as banks, business organisations, schools, universities, and various associations and foundations. However, as the Gülenist movement is argued to be seeking to not only have influence over the government but actually aim to becoming the government, and therefore since 2013, the mutual hostility between Gulen and Erdogan has been rising. Various factors allegedly including the request of interrogation of the Turkish Intelligence Service’s head- Hakan Fidan by the Gulenist movement, which was perceived as a threat by the former AKP leader Erdogan, are stated to play a role in the hostility between Gulen and Erdogan. Sources: Rachel Sharon-Krespin, ‘Fethullah Gulen’s Grand Ambition’ (2009) 16:1 Middle East Quarterly 55-66 Raziye Akkoc, ‘A parallel state within Turkey? How the country's democracy came under attack from two men's rivalry’ *The Telegraph* (24 February 2015) <<http://www.telegraph.co.uk/news/worldnews/europe/turkey/11397876/A-parallel-state-within-Turkey-How-the-countrys-democracy-came-under-attack-from-two-mens-rivalry.html>> accessed 28 February 2015

<sup>124</sup> Reporters Without Borders ‘Judicial Authorities Urged to Press Ahead with Hrant Dink Murder Case’ (*RSF*, 23 January 2015) <[http://fr.rsf.org/IMG/pdf/hrant\\_dink\\_davasinda\\_yargi\\_i\\_s\\_in\\_sonunu\\_getirmeli-2.pdf](http://fr.rsf.org/IMG/pdf/hrant_dink_davasinda_yargi_i_s_in_sonunu_getirmeli-2.pdf)> accessed 15 October 2015

<sup>125</sup> Strategic Information, Programs and Development, ‘US-Turkey Economic and Political Cooperation Handbook’ (USA: International Business Publications, 2015) 127

## **2.4 Examining the case of Pelin Sener in light of the Anti-Terror Law and the ECtHR verdict**

This section investigates the application of the Anti-Terror Law against the journalists who are involved in political debates that are of public interest but are rather convicted of “spreading terrorist propaganda” or for “being a member of a terrorist organisation”. The courts’ reliance on the broad definition of terrorism in TMK and the interpretation of these legal provisions by the judges against the freedom of expression of the journalists, before the amendment of the law. The case of Pelin Sener under the old law is discussed in this section in order to establish the grounds for comparing the application of the old and the new law and the effects of their application on the censorship of the press. It is also necessary to evaluate whether the legal changes made in light of the legal and judicial reforms motivated by the EU accession process are applied when the freedom of the press is at stake.

Abolished Article 8 of TMK is examined in this chapter under *Sener v Turkey* in order to demonstrate its application before its abolishment and to compare whether there have been any differences after its abolishment of journalists’ imprisonment (Article 8 was intensively used to imprison journalists and publishers). The existence of such a difference will be extensively evaluated in Chapter 4, in which the Ergenekon is the main example to demonstrate the conviction of journalists under the Anti-Terror Law.

### **2.4.1 *Sener v Turkey***

This section includes the ECtHR’s verdict on Sener’s case, which was given before the legal amendments were made to the controversial Anti-Terror Law in 2006. In order to critically discuss whether the changes brought any positive change for the journalists who have been censored under the provisions of TMK, it is interesting to examine Sener’s case because it was concluded by Istanbul State Security Court. Considering that the State Security Courts (DGM), which tried “offences against the indivisible integrity of the State with its territory and nation, the free democratic order, or against the Republic, whose characteristics are defined in the Constitution. Offences directly involving the internal and external security of the State”<sup>126</sup>, were abolished in

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<sup>126</sup> The Constitution of the Republic of Turkey 1982 Article 143

2004<sup>127</sup> for being incompatible with the principles of fair judgement<sup>128</sup> and for lacking independence and impartiality.<sup>129</sup> Exploring Sener's case, which dates back to 1995, finally will give a clear picture of what has been changed since the abolition of the DGMs and after the legal amendments to the Anti-Terror Law based on the legal and judicial reforms on the EU accession process, and what have been the practical implications of these changes on the censorship of the press. The similarities between the recent judgements, which will be discussed in Chapters 4 and 5, and the judgement in Sener's case will be used to verify the hypothesis of the present research. Arguing that the present political ideology and government interference are inhibitors to press freedom in Turkey, despite the loopholes in the legal provisions that enable the censorship of the press.

Sener is the owner and the chief editor of the weekly review *Haberde Yorumda Gerçek/The Truth of News and Comments*, which was seized by Istanbul State Security Court on September 1993 based on an article named *Ayin Itirafı/Confession of the Month*.<sup>130</sup> Allegedly containing

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<sup>127</sup> Ceza Muhakemeleri Usulu Kanununda Degisiklik Yapilmasi ve Devlet Guvenlik Mahkemelerinin Kaldirilmasina Dair Kanun/Law no. 5190 that regulates the changes into the Code of Criminal Procedure and the abolishment of the State Security Courts 2004/5190 <<http://www.mevzuat.gov.tr/MevzuatMetin/1.5.5190.pdf>> accessed 25 October 2012

<sup>128</sup> Ozden Zeynep Oktav, *Turkey in the 21st Century: Quest for a New Foreign Policy* (Ashgate Publishing 2011) 189

<sup>129</sup> Council of Europe, *Parliamentary Assembly Documents:working papers* (Ordinary Session, 4th part, vol.7, September 2002) 280

<sup>130</sup> "We are watching the wholesale extermination of a nation. We are watching a genocide on such a scale that it is not a mistake to call it unprecedented. We are groaning between the cogwheels of a dirty war. We know we should take a stand against the war, but instead of shouting out our anger and smashing the cogwheels, we are groaning. We only wail. We try to praise death in the deathly silence. Fear seeps into our rooms from the whisper of the breeze and the rustle of leaves. Our hearts jump in our throats. We surrender to the State while we praise death in fear of death. We suddenly become quarrelsome during our feverish discussions and while sipping our hot tea in the cool breeze of the air conditioner. We talk about the right to self-determination of nations. We are saying that there should be no impediment to the exercise of this right. We try to explain that recognition of Kurdish reality is an important step. The reason for war in the middle-east is American imperialism and we think that to stand up against this war is a requirement for being a human being. The Namaz mountains, the Tendürek, the Nurhak and many others are being bombed at this moment. Kurdistan is blazing. The genocide pounds on. We watch the terror in Bosnia on our colour TV screens. Suddenly we are full of anger. We become human rights advocates. Chemical weapons are being used on the Nurhak mountains. 'We will not leave a stone standing' says a military authority. Their determination to exterminate a whole nation echoes in our ears. 'Operations will be conducted not only in the south-east but also in the west. We'll deal with the people who help the terrorists' he adds, and of course makes sure to tip off the press. Here we forget that in our own words a dirty war can only end in defeat. We [also] forget the axiom that the only way to oppose a war is to wage a just war. We want to forget it. The bomb falling on Tendürek explodes in our hearts. 'What a pity' says one of us. 'Why shed so much blood? Aren't Kurdish and Turkish nations brothers?' And he begins his usual speech. We seem to have been waiting for that speech all the time, but we were not aware of one another. We each confess our fears as if we are saying different things. We take great care to serve the army officer faultlessly. We chorus that we have never approved of Turkish chauvinism but cannot approve of Kurdish chauvinism either. We turn a blind eye to the fact that an oppressed nation cannot be chauvinistic. We brazenly preach the necessity of trying peaceful methods to resolve the Kurdish problem and discuss what the solution might be. We fill the pages of our newspapers with bogus news of the terrorists' raid on the Sündüz plateau and details of how they killed women and children. Oblivious of the fact that the public at large knows nothing of the briefing given to the press, we democratically explain in our newspaper columns that Kurdish and Turkish citizens have lived together in brotherhood for centuries and that the terrorists' aim is to undermine that brotherhood. And we denigrate the attitude of the Kurdish peasants who started a freedom march. We

separatist propaganda. Sever was charged by Istanbul DGM under TMK 1991 Section 8 for dissemination of propaganda against the indivisibility of the State by publishing the article. Section 8 of the Code regulated the “offence of undermining the territorial integrity of the Republic of Turkey or the indivisible unity of the nation through written and spoken propaganda...”<sup>131</sup>

In that regard, Article 8 of the Anti-Terror Law regulated the offence of undermining the territorial integrity of the Republic of Turkey or the indivisible unity of the nation through written and spoken propaganda, meetings, assemblies and demonstrations, irrespective of the methods used and the intention. Any person who engaged in such an activity could be sentenced to imprisonment or a fine, which for a press editor then could be up to 2 years of imprisonment and a fine of up to three hundred million Turkish lira (based on old currency before 1 January 2005). Sener denied the charges on the basis that the criminal proceedings against her aimed at silencing the review, as the author of the article was not the subject of the proceedings, and argued that her freedom of expression was restricted by the use of TMK 1991. In addition, Sener also claimed that TMK 1991 Section 8 contradicted the Turkish Constitution and ECHR Article 10.<sup>132</sup>

Desmond Fernandes, regarding the amended TMK, states that TMK contradicts Article 13 of the Constitution, which guarantees that limitations on freedoms must be in accordance with the Constitution itself and with the needs of democratic order as well as a secular republic. It contradicts Article 26 of the Constitution, which secures the freedom of expression, and finally Article 90, which states the priority of international conventions signed by Turkey which have been violated in practice<sup>133</sup> by the imprisonment of the journalists under TMK provisions.

However, Sener was sentenced to six months’ imprisonment and penalty, and Istanbul DGM ruled for the seizure of the “offending” publication. The article was found to offend, allegedly for disseminating propaganda against the indivisibility of the State based on the use of the word

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are intellectuals. We shall not give up the democrat’s way of life. But who ever died of a lie? We also make it our rule to serve the State. We consider people stupid. Our many years of ink-licking make us different from them. This is a confession. We are stupid.” The English translation of the article has been retrieved from *Sener v Turkey* App no 26680/95 (ECtHR, 18 July 2000) para. 7

<sup>131</sup> Prevention of Terrorism Act 1991(Anti-Terror Law) 3713/1991 Section 8 regulated the offence of undermining the territorial integrity of the Republic of Turkey or the indivisible unity of the nation through written and spoken propaganda, meeting, assemblies, and demonstrations, irrespective of the methods used and intentions held. Any person who engaged in such an activity could be sentenced to imprisonment or a fine, which for a press editor then could be up to 2 years of imprisonment and a fine up to three hundred million Turkish lira (based on the old currency before 1 January 2005)

<sup>132</sup> *Sener v Turkey* App no 26680/95 (ECtHR, 18 July 2000) para. 9

<sup>133</sup> Desmond Fernandes, ‘Turkey’s US-Backed ‘War on Terror’: A Cause for Concern?’ in *The Third International Conference on the EU, Turkey and The Kurds* (European Parliament, Brussels, 16-17 October 2006) 40-59

“Kurdistan” for a certain part of Turkey Labelling of people living there as Kurdish citizens and use of the word “genocide” for Kurdish nation who was argued by the court to be presented in the subject article as being subject to extermination. Sener’s appeal to the Court of Cassation was dismissed on the same grounds as Istanbul DGM, and Sener’s judgement was upheld. However, following the changes to the 1991 Act made by Law no. 4126 in October 1995, Sener’s case was re-evaluated, and Sener’s application of appeal was reversed by the Court of Cassation which ruled for the suspension with a final sentence to be imposed in the case of the applicant’s conviction of a further intentional offence as an editor within three years of the verdict (based on law no. 4304 of July 1997).<sup>134</sup>

In the relevant sections of the law no. 4304 which allowed the suspension of Sener’s sentence, section 1 follows:

The execution of sentences passed on those who were convicted under the Press Act (Law no. 5680) or other laws as editors for offences committed before 12 July 1997 shall be deferred. The provision in the first paragraph shall also apply to editors who are already serving their sentences. The institution of criminal proceedings or delivery of final judgments shall be deferred where proceedings against the editor have not yet been brought, or where a preliminary investigation has been commenced but criminal proceedings have not been instituted, or where the final judicial investigation has been commenced but judgment has not yet been delivered, or where the judgment has still not become final.

Section 2 of the same law follows:

If an editor who has benefited under the provisions of the first paragraph of section 1 is convicted as an editor for committing an intentional offence within three years of the date of deferment, he must serve the entirety of the suspended sentence. Where there has been a deferment, criminal proceedings shall be instituted or judgment delivered if an editor is convicted as such for committing an intentional offence within three years of the date of deferment. Any conviction

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<sup>134</sup> Law no. 4304 of 14 August 1997 on the deferment of judgment and of executions of sentences in respect of offences committed by editors before 12 July 1997

as an editor for an offence committed before 12 July 1997 shall be deemed a nullity if the aforesaid period of three years expires without any further conviction for an intentional offence. Similarly, if no criminal proceedings have been instituted, it shall no longer be possible to bring any, and, if any have been instituted, they shall be discontinued.

Meanwhile, the author of the article, Erhan Altun, was also found guilty by Istanbul DGM and was sentenced for 1 year 1 month and 10 days of imprisonment with a penalty, which then was suspended on similar grounds as Sener, based on the prospect that he would not commit any further offence.<sup>135</sup> Despite the fact that the cases for both Erhan Altun and Pelin Sener were procedural cases, it is fair to argue that interference with their right to freely express their opinions on a subject, even critical in the circumstances of the South East Turkey, creates pressure on the journalists, leading to self-censorship “by bringing the weight of the criminal law to bear on the media” as discussed by the ECtHR.<sup>136</sup>

Despite the suspension of her sentence, Sener applied to the ECtHR with the alleged violations of Article 10, Article 6, and Article 13 of the ECHR. Owing to the fact that ECHR Article 10 falls within the scope of this research, it is important to look at the Turkish government’s reaction as it defended the domestic court’s decision for being justified under the second paragraph of Article 10. In response, ECtHR found the domestic court’s decision to interfere with Sener’s right to freedom of expression “prescribed by law” under TMK 1991,<sup>137</sup> and found the aim of the interference “legitimate” considering the “sensitivity of the security situation in south East Turkey and to the need for the authorities to be alert of acts capable of fuelling additional violence...”<sup>138</sup> Yet, the ECtHR found a violation of Article 10 despite the justification grounds used by the Turkish government, which stated that the interference was necessary in a democratic society as “the applicant disseminated separatist propaganda since the article in issue encouraged terrorist violence against the State” and “that the imposition of the final sentence on the applicant had been suspended...which aimed at providing for more lenient sanctions for offences committed through the medium of the press.”<sup>139</sup>

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<sup>135</sup> Istanbul State Security Court 17/11/1995

*Sener v Turkey* App no 26680/95 (ECtHR, 18 July 2000) para. 16

<sup>136</sup> *Sener v Turkey* App no 26680/95 (ECtHR, 18 July 2000) para. 42

<sup>137</sup> Ibid. para. 32

<sup>138</sup> Ibid. para. 35

<sup>139</sup> Ibid. para. 37

ECtHR's verdict follows:

...the incriminated publication was an article by an intellectual whose statements contained sharp criticism of the policy and action of Turkey with regard to its population of Kurdish origin. The author expressed his view on the Kurdish question and did not associate himself with the use of violence in the context of the Kurdish separatist movement. In the Commission's view, the measures taken against the applicant amounted to a kind of censorship, which was likely to discourage others from publishing similar opinions in the future.<sup>140</sup>

In addition to ECtHR's statement in *Surek v Turkey* that restrictions on political speech or debate on questions of public interest has little scope under Article 10 section 2, the ECtHR stated that the threshold for allowing criticism towards the government and/or politicians must be higher than criticism aimed at a private citizen.<sup>141</sup>

Referring to the *Lingens v Austria*<sup>142</sup> judgement, the Court stated that Sener's case must also be analysed on the basis of the role of the press; without conflicting with State interests such as national security and territorial integrity. The press is required to convey political news and ideas even if it is disruptive since the people have the right to such information. The ECtHR accepted that the above mentioned article included parts using an aggressive tone; however, when considered as a whole, it did not boost or celebrate violence and rather made an intellectual analysis of the Kurdish issue, which the ECtHR considers to be essential. Consequently, because of these reasons the decision by Istanbul State Security Court to convict Sener was found disproportionate to the aims pursued and "not necessary in a democratic society", and the ECtHR decided that Turkey violated Article 10 of the Convention.<sup>143</sup>

The present author concludes that this case particularly highlights one major drawback of the legislation stated above — the broadly drawn language of TMK itself, which became apparent in the ECtHR's decision that found the interference with Sener's right to freedom of expression

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<sup>140</sup> Ibid. para. 38

<sup>141</sup> *Surek v Turkey* App no 26682/95 (ECtHR, 8 July 1999) para. 61

*Sener v Turkey* App no 26680/95 (ECtHR, 18 July 2000) para. 40

<sup>142</sup> *Lingens v Austria* App no 9815/82 (ECtHR, 8 July 1986) para. 41

*Sener v Turkey* App no 26680/95 (ECtHR, 18 July 2000) para. 41

<sup>143</sup> *Sener v Turkey* App no 26680/95 (ECtHR, 18 July 2000) para. 47

“prescribed by law”,<sup>144</sup> when in fact it is the broad and vague definition of the law that it makes the interference possible. The facts of this case, despite the fact that Sener was tried under the old provisions of the related law before the amendments took place in 2006, reflect the current practice in Turkey as it is possible to observe in Chapter 4, which examines the treatment of the journalists under the amended versions of the broadly drawn legal provisions. It can also be observed from the numbers provided by the OSCE reports<sup>145</sup> that articles 1, 6 and 7 of TMK have been subject to arbitrary judicial interpretation.<sup>146</sup>

Considering that Sener’s case was tried by the DGM, which was abolished in 2004 with the will to fulfil the requirements of the democratisation process in the EU membership process, it is compelling to note the irony that the number of cases brought to the ECtHR under the Anti-Terror law has been increasing,<sup>147</sup> despite the steps taken by the Turkish state by the legal and judicial reform packages. The Turkish Courts are reluctant to take ECtHR case law as a yardstick, disregarding the criteria of “necessity in a democratic society” while restricting freedom of the press. The interpretation of law is narrow when the freedom of the press is the subject matter; this leads to human rights violations in a country that is supposed to be under the guarantee of the Turkish Constitution as well as subject to the international treaties that Turkey obliged to uphold.

## 2.5 Freedom of the press in Turkey from the international perspective

This section concentrates on the international NGO reports such as Freedom House, Journalists Without Borders, Amnesty International, and the Committee to Protect Journalists, European Commission (EC) reports, and UN reports that concern the situation of press freedom in Turkey. The purpose of taking these reports into consideration is to try and locate Turkey’s press

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<sup>144</sup> Ibid. para. 32

<sup>145</sup> Erol Onderoglu, ‘Updated List of Imprisoned Journalists in Turkey Including Recent Releases’ (OSCE, 20 June 2012) <[https://www.ecoi.net/file\\_upload/1788\\_1340368562\\_91070.pdf](https://www.ecoi.net/file_upload/1788_1340368562_91070.pdf)> accessed 11 November 2012

Erol Onderoglu, ‘Updated List of Imprisoned Journalists in Turkey Including Recent Releases’ (OSCE, March 2014) <<http://www.osce.org/fom/116291?download=true>> accessed 6 March 2015

Erol Onderoglu, ‘Updated List of Imprisoned Journalists in Turkey Including Recent Releases’ (OSCE, June 2014) <<http://www.osce.org/fom/119921?download=true>> accessed 3 April 2015

Erol Onderoglu, ‘Updated List of Imprisoned Journalists in Turkey Including Recent Releases’ (OSCE, July 2015) <<http://www.osce.org/fom/173036?download=true>> accessed 1 November 2015

<sup>146</sup> Chapters 3 and 4 discuss the governments’ habit of overlooking this misuse.

<sup>147</sup> Erol Onderoglu, ‘Updated List of Imprisoned Journalists in Turkey Including Recent Releases’ (OSCE, 20 June 2012) <[https://www.ecoi.net/file\\_upload/1788\\_1340368562\\_91070.pdf](https://www.ecoi.net/file_upload/1788_1340368562_91070.pdf)> accessed 11 November 2012

freedom level in order to ensure that the problems experienced by the press are explained not only from a doctrinal perspective but also from a practical point of view. Undertaking such an analysis will demonstrate the differences in the numbers of imprisoned journalists after the reforms that took place under the motivation of EU accession, numbers that have risen significantly. The cases explained above had both been concluded before these reforms<sup>148</sup> and the recent numbers of imprisoned journalists examined in this section are from the recent NGO reports, which implies that Turkey has not been successful in implementing the reforms. The main burden facing the freedom of expression is the political intervention into press operations, which is examined as a tradition in Turkey in the next chapter.

### 2.5.1 NGOs

Between the years of 2002 and 2012, Turkey experienced the most drastic fall of press freedom rankings in its history. In press freedom rankings, according to the study conducted by Reporters Without Borders (RSF). Based on the information obtained from RSF, Turkey held 99th place among 139 countries in the 2002 Press Freedom Index, and after 10 years, in 2012, RSF declared Turkey the “world’s biggest prison for journalists” when Turkey was on the 154th place among 179 countries.<sup>149</sup>

This significant change, which took place during the 10 years of the Justice and Development Party (AKP) government, is shocking. The situation of the imprisoned journalists in 2002, when compared with the present numbers, demonstrates that the reform processes have not been proactive. Presently, according to the Freedom House 2015 report, Turkey, in the last five years, is the country (after Thailand and Ecuador) that had experienced the third fastest decline in freedom of the press.<sup>150</sup> This drastic fall is evidenced by the tens of journalists who were sentenced to imprisonment and who were fired as well as thousands of journalists who faced suits for damages. In his report, Onderoglu (RSF) provides an updated list of imprisoned journalists by July 2015. Based on this report, there were 21 journalists in total who were imprisoned mainly based on the controversial articles of the Turkish Penal Code and Anti-Terror Law. It is striking that more

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<sup>148</sup> See chapter 4 for more details on the reforms.

<sup>149</sup> Reporters Without Borders, ‘Turkey-World’s Biggest Prison for Journalists’ (19 December 2012) <<http://en.rsf.org/turkey-turkey-world-s-biggest-prison-for-19-12-2012,43816.html>> accessed 03 March 2013

<sup>150</sup> Freedom House, ‘Turkey, Freedom of the Press 2015’ (2015) <<https://freedomhouse.org/report/freedom-press/2015/turkey>> accessed November 2015

than 60% of these imprisoned journalists (13 out of 21) are sentenced based on the Articles 5, 7, and 7(2).<sup>151</sup> These numbers and the reasons of their imprisonment demonstrate the misuse of the broadly drawn laws against the pro-Kurdish journalists whose views are generally seen against the state ideology. This brings Turkey to the 149th place among 180 countries based on the Press Freedom Index of RSF in 2015.<sup>152</sup>

When the number of journalists mentioned in Onderoglu's study is compared to the Committee to Protect Journalists' report in 1985, which suggests that the Kurdish journalists were not arrested as "journalists" but "terrorists",<sup>153</sup> it can be argued that there has not been a positive change for the situation of Kurdish journalists since CPJ's 1985 report was published.

The amendments made to the Anti-Terror Law on 29 June 2006 introduced new press offences that are punishable by imprisonment. These amendments led to more media members who reported on military operations or pro-Kurdish demonstrations being prosecuted for collaborating with PKK. Currently, there are 14 journalists in jail, all based on their journalistic work. 11 of these journalists are imprisoned based on the anti-state charges for their reports on sensitive outlawed Kurdistan Workers' Party (PKK) and/or Turkey's security operations taking place in the south. RSF reported their concern on the legal obstacles that the Kurdish press would face by the application of the amended Anti-Terror Law (3713). These legal obstacles were listed to be Article 6 (2), which regulated a 3-year imprisonment for "any dissemination of statements and communiques by terrorist organisations", and Article 7 (2), which stated, "Whoever makes propaganda for a terrorist organisation will be sentenced to five years in prison. If the crime is committed by means of the press, the penalty may be increased by half. Owners and editors will also be sentenced to a heavy fine". The limitations brought by these changes in 2006 were highly criticised based on the vagueness of the terms used such as "terrorist organisation". In its report RSF also suggested that a clear definition of "terrorist organisation" must be made in order to eliminate arbitrary arrests and/or imprisonments.<sup>154</sup> However, the latest legal amendments that took place in 2013 do not narrow down the vague concepts such as "coercion" and "threat", which do not have a clear link to

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<sup>151</sup> Organization for Security and Co-operation in Europe, 'Updated list of imprisoned journalists in Turkey' (OSCE, 16 July 2015) <<http://www.osce.org/fom/173036>> accessed 5 November 2015

<sup>152</sup> Reporters Without Borders, 'Erdogan against the media' (RSF, 2016) <<https://rsf.org/en/turkey>> accessed 5 February 2016

<sup>153</sup> Committee to Protect Journalists, 'Turkey, "Civilized" Censorship under the Sword of Damocles: A Report' (CPJ, November 1985)

<sup>154</sup> Reporters Without Borders, 'Prime Minister Warned that Terror Law Changes Could Impose Censorship of Kurdish Issues' (RSF, 10 July 2006) <<http://en.rsf.org/turkey-prime-minister-warned-that-terror-10-07-2006,18243.html>> accessed 2 July 2012

violence. The present researcher finally argues that, despite the amendments to articles 6 (2) and 7 (2) by the reform package in 2013, Anti-Terror Law in Turkey still falls short of international standards, which stipulate that prosecution should only take place when the statements have an intention to make propaganda for war or advocate violence. Nonetheless, Turkish Anti-Terror Law Article 6(2) provides “printing or publishing of declarations or statements of terrorist organisations” and Article 7(2) provides “making propaganda for a terrorist organisation”.<sup>155</sup> In line with Amnesty International’s criticisms, this research also suggests that the broad and vague coding of Turkish Anti-Terror Law has been in violation of the freedom of the press and lacks international standards for the protection of the right to freedom of expression. Recommendations for the necessary amendments are discussed in Chapter 6.

In a similar vein, the Chair of the Progressive Journalists Association (PJA), Ahmet Akbakay, states that the press in Turkey has been experiencing the heaviest pressure on the freedom of thought and freedom of expression since AKP governance came into power in 2002. Akbakay reports that the press is under intense suppression since AKP came to power, and the AKP government has the worst record for the freedom of the press in the history of modern Turkey: “...at some point there were more than 100 journalists in jail. There are still 23 journalists in jail and 21 of them are imprisoned based on KCK<sup>156</sup> press case due to the Anti-Terror Law, which does not even exist in democratic countries. However, our journalist friends are rather being tried on their journalistic duties.”<sup>157</sup>

Ercan Ipekci, who had been the Chair of the Journalists’ Union of Turkey (TGS) between 2004-2013, states that Turkey has become the biggest threat for the freedom of the press in the World. He highlighted the fact that even though almost 300 journalists have been released, their

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<sup>155</sup> Amnesty International, ‘Turkey: Legal reforms fall short on freedom of expression’ (AI, 30 April 2013) <<https://www.amnesty.org/en/latest/news/2013/04/turkey-legal-reforms-fall-short-freedom-expression/>> accessed 6 August 2014

<sup>156</sup> KCK is defined as the union of local assemblies that deny the nation state model and is based on political, social, economic, cultural, sexual, and ethnic rights and freedoms and due to its connections with PKK (which is a recognised terrorist organisation in Turkey and around the World). Even though the imprisonment of Kurdish journalists in Turkey has been taking place under the name of “terrorism” according to CPJ in 1985, and it is not a recent problem encountered by the Kurdish press in Turkey, since KCK investigation started in April 2009 in Turkey, 48 journalists were detained, 36 of them were jailed, and 22 of them are still in jail for being members of KCK press committee, as according to the indictments, KCK has a press committee that disseminates ideas on the unity of Kurdish nation and ideologies.

<sup>157</sup> Deutsche Welle, ‘Türkiye’nin basın özgürlüğü karnesi düzelmiyor/Turkey’s ranking on press freedom is not getting any better’ (03 March 2015) <<http://www.dw.com/tr/türkiyenin-basın-özgürlüğü-karnesi-düzelmiyor/a-18425450>> accessed 10 June 2015

cases are still pending in the Supreme Court of Appeal; therefore, they are under constant pressure.<sup>158</sup>

### 2.5.2 European Commission reports

The press related legislation and its application in Turkey has been under international scrutiny over recent years for two main reasons. The first reason is the striking number of journalists imprisoned, which was the highest recorded number worldwide in 2012 (as mentioned above), and in the history of modern Turkey, which leads to serious concerns for its democratisation process. The second reason is the close inspection/review of the media - state relationship executed by the European authorities, on the basis of Turkey's EU accession process. It is instructive to look at the freedom of the press in Turkey in light of the suggestions made by the European Commission (EC) reports.

Turkey's accession negotiations to the EU started in December 2005<sup>159</sup>, and based on these negotiations, Turkey was expected to fulfil certain criteria on the freedom of expression as a precondition for its future access to the EU. Throughout the integration process, the European Commission provided progress reports on Turkey, and the most striking EC Progress Report on the freedom of the press in Turkey was published in 2012. Emphasising the number of high-profile cases where human rights defenders faced individual criminal proceedings and investigations based on the vague and broad definition of the Anti-Terror Law.<sup>160</sup> Journalists who encountered unreasonably long pre-trial detention periods were criticised as well as the sensitive subjects such as the Kurdish issue, the Armenian issue, the military's role in governance and any other topic that involved opposition to the government. Based on the vague definition provided by the Anti-Terror Law Article 1, journalists in Turkey can easily fall under the definition of "terrorist"; therefore, they

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<sup>158</sup> Ibid.

<sup>159</sup> European Commission Enlargement 'EU-Turkey Relations' <[http://ec.europa.eu/enlargement/candidate-countries/turkey/eu\\_turkey\\_relations\\_en.htm](http://ec.europa.eu/enlargement/candidate-countries/turkey/eu_turkey_relations_en.htm)> accessed 4 May 2012

<sup>160</sup> See section "Annual Reports of the European Commission on the freedom of the press in Turkey" in this chapter for elaborate discussion of the EC reports on Turkey. See chapter 4 for detailed analysis of the high-profile cases mentioned above.

are censored from reporting on the Kurdish issue, which is critical for improving the kind of dialogue between parties of different ideologies necessary to improve democracy in Turkey.<sup>161</sup>

The Commission states that the increase in the violations of the freedom of the press is alarming; because of the pressure on the press applied by the state officials and the removal of critical journalists (as the press sector concentrated on industrial interest rather than the free circulation of information)<sup>162</sup>, self-censorship of the press case became a common fact in Turkey.<sup>163</sup> As stated by the EC, “High-level government and state officials and the military repeatedly turn publicly against the press and launch court cases. On a number of occasions journalists have been fired after signing articles openly critical of the government.” By way of this research it is observed that in addition to the direct censorship of the press by the government through pressure, the press applies self-censorship not to contradict the government<sup>164</sup> and this remains an issue, which demonstrates that the reforms are not sufficient for the improvement of the press conditions in Turkey.<sup>165</sup>

Similar to the recommendations in the previous reports, the latest EC report in 2015 stresses the need for respect for fundamental freedoms and rights in law and in practice<sup>166</sup> by expressing concerns over the increasing number of journalists who are arrested, encounter detentions, judicial prosecutions, and experience layoffs.<sup>167</sup> However, there are no measures suggested for overcoming the vague language of the law itself or the business relations between the government and the media owners as it is one of the main reasons for journalists layoffs, even though the report suggests that “the lack of transparency on media ownership casts doubts on the independence of editorial

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<sup>161</sup> The Kurdish issue has been and still is one of the most highly debated issues in Turkey in the last few decades. In summary, the Kurdish question emerged when the Turkish government repressively tried to silence the Kurdish minority in Turkey by outlawing their language and prohibiting traditional Kurdish costumes and by oppressing the freedom of expression that could allow the grounds for mutual peaceful discussions between the two parties. However, the Kurdish Worker’s Party (PKK), who define themselves as a Kurdish nationalist group advocating for independence but viewed as a terrorist organisation by Turkey and worldwide, waged a guerrilla insurgency in southeastern Turkey in 1974. In 2013, the Turkish government and PKK announced a bilateral cease-fire and the beginning of “historic” peace talks between the two sides, the aim of which was to end the bloody conflict now lasting for almost three decades which has recently come to an end.

<sup>162</sup> See chapter 4 for elaborate information on media ownership in Turkey.

<sup>163</sup> European Commission, ‘Turkey 2012 Progress Report’ (Com 600 Final, 2012) pages 21, 22

<sup>164</sup> Eugene L. Meyer, *Applying Standards: Media Owners and Journalism Ethics* (Washington: Center for International Media Assistance, 2013) 21

<sup>165</sup> Insufficiency of the reforms are discussed in Chapter 4.

<sup>166</sup> European Commission, ‘Turkey 2015 Progress Report’ (Com 216 Final, 2015) page 55

<sup>167</sup> Ibid. page 56

policies.”<sup>168</sup> The most highlighting recommendation made by the commission was to observe the proportionality principle, as the Penal Code and Anti-Terror Law is considered by the Commission to still be outside the lines of ECtHR case law.<sup>169</sup> The report highlighted the practice of arbitrary interpretation of law in combination with political pressure resulting in the dismissal of journalists or court cases that frequently have to be dealt with by the journalists. The commission observes that this leads to self-censorship of the press.<sup>170</sup> In order to reduce the pressure on the press, if not completely to eliminate self-censorship, this report mentioned recommendations like acting against the intimidation of journalists, taking active measures to prevent attacks on journalists, and investigating threats received by the press. It also suggests that the courts must ensure that defamation laws are not used against the press in order to silence criticisms, be fully aware of ECtHR case law, and not use defamation laws as tools for restricting the press.<sup>171</sup>

Overall, this report suggested changes to be made in the legislation, namely the Constitution, that would extend the protection of the right to free expression and the freedom of the press; however, it contributed little to the solution of the problem of how lawmakers, who are highly influenced by the political agents, would be motivated to change the language of law when trade union rights are insufficient and when journalism is becoming more of an insecure profession due to the low wages and lack of job security.<sup>172</sup>

### 2.5.3 UN Reports

Criticism issued by the United Nations Human Rights Committee (UNHRC) on the use of “vague” Anti-Terrorism Law to prosecute journalists in 2012 states that despite the implementation of the legal reform package in July 2012<sup>173</sup>, the measures were not improved. In its report UNHRC

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<sup>168</sup> The business relationship between the media owners and the current government is discussed in Chapter 4.

<sup>169</sup> European Commission, ‘Turkey 2015 Progress Report’ (Com 216 Final, 2015) page 22

<sup>170</sup> Ibid.

<sup>171</sup> Ibid.

<sup>172</sup> Ibid. page 24

<sup>173</sup> Among the changes was the repeal of article 6, paragraph 5, of the Anti-Terrorism Law, which had allowed prosecutors and the courts to suspend newspapers and magazines accused of offences such as “making terrorist propaganda” for a period of up to 30 days. İnsan Hakları ve İfade Özgürlüğü Bağlamında Bazı Kanunlarda Değişiklik Yapılmasına Dair Kanun 2013/6459/Law regulating amendments to various legislation in relation to human rights and freedom of expression no. 2013/6459 <<http://www.resmigazete.gov.tr/eskiler/2013/04/20130430-1.htm>> accessed 3 July 2014

Human Rights Watch, ‘Turkey: Draft Reform Law Falls Short’ (*Human Rights Watch*, 13 February 2012) accessed 1 June 2013

found several provisions in conflict with the ICCPR and denounced the vague definition of terrorism, the extensive restrictions on the right to due process, and the immense number of journalists who are charged under the Anti-Terror Law for their non-violent discussions on the Kurdish issue.<sup>174</sup>

According to UNHRC, the “widespread use of lengthy pre-trial detention of up to ten years for terrorism-related offences and five years for other offences, including three one-year extensions, largely caused the problem of overcrowding of prisons.”<sup>175</sup> Therefore, this application of Anti-Terror law causes self-censorship of the press on covering the “sensitive topics” such as the Kurdish issue or opposition against the government because by doing so they face accusations of plotting against the government and making terrorist propaganda or being a part of a terrorist organisation. Ergenekon, KCK and Oda Tv cases<sup>176</sup> are recent examples of how the coverage of these sensitive topics by the journalists can lead to accusations of belonging to a terrorist organisation or plotting against the government, and based on these accusations journalists face long pre-trial detentions. In the “Detained Journalists Report” published towards 2012, the number of journalists who are imprisoned in Turkey are recorded to be higher (71 journalists) than the number of journalists in 1980 (31 journalists) when there was a military regime.<sup>177</sup> In the report, these numbers are argued to prove the danger of the current situation in Turkey. According to the report, by the 31st of January 2013, 70% of the detained journalists were Kurdish journalists who were accused of “co-operating with a terrorist organisation” based on their reporting on PKK and KCK. The rest were accused of belonging to outlawed leftist organisations and of being a part of plots against the government.<sup>178</sup> As also highlighted by UNHRC, the common ground for the journalists’ imprisonments were allegations of having connections with a terrorist organisation in relation to TCK and Anti-Terror Law. The evidence for the journalists’ connection with a terrorist organisation was: sharing information of the news with a colleague, sending the reports to be turned into news, and unpublished interviews. It is observed by the present author that most of the detained journalists had

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<sup>174</sup> Human Rights Committee, *Concluding Observations on the Initial Report of Turkey* (Human Rights Committee, 106th Session 15 October to 2 November, 2012) Advanced Unedited Version para. 16

<sup>175</sup> Ibid. para. 17

<sup>176</sup> See Chapter 4 for further information.

<sup>177</sup> CHP ‘Tutuklu Gazeteciler Raporu Dunyanin en buyuk gazeteci cezaevi: Turkiye/*Detained Journalists Report The Biggest Jail in the World: Turkey*’ (PJA, July 2013)

<[http://www.cgd.org.tr/belgeler/CHP\\_tutuklu\\_gazeteci\\_raporu\\_temmuz\\_2013.pdf](http://www.cgd.org.tr/belgeler/CHP_tutuklu_gazeteci_raporu_temmuz_2013.pdf)> accessed 5 January 2014, 15

<sup>178</sup> Ibid. 20

to endure long trials and detention periods<sup>179</sup>, further fuelling censorship and self-censorship of the press.

### 2.5.3.1 An example for convicting journalists based on the KCK operations

Journalists were sentenced for “spreading propaganda in favour of PKK organisation” and/or “collaborating with the Union of Kurdistan Communities (KCK)” based on their journalistic work. Seyithan Akyuz, who is the Southern Turkey representative for *Azadiya Welat* newspaper, which is published in Kurdish, was sentenced for keeping some copies of *Ülkeye Bakis* newspaper (banned in Turkey) and was convicted for selling newspapers in İzmir during “1 May” (MayDay) demonstrations. He was detained on December 7, 2009, arrested on December 10, 2009 and convicted on October 16, 2012. Akyuz was convicted on four different cases and sentenced to 21 years and 9 months of imprisonment by Adana 8th Heavy Penal Court. 12 years of imprisonment was imposed by the Court for “being a member of KCK” and “spreading propaganda” in the name of PKK, despite the fact that the High Criminal Court did not allow him to defend himself in Kurdish and his lawyer was not authorised to inspect his file or the evidence against him because of the Court’s decision of secrecy for one year.

Analysis of Akyuz’s imprisonment under TMK 7(2) and TCK 314 (2) is significant because Akyuz wrote for *Azadiye Welat* newspaper, which holds the highest number of convicted journalists under TMK and TCK. Journalists who belong to *Azadiye Welat* have been under the pressure of censorship, and 8 journalists from *Azadiye Welat* are still under arrest in 2015.<sup>180</sup>

In his article in *Tutuklu Gazete (Arrested Newspaper)*, which was distributed alongside *Birgun*, *Evrensel*, and *Cumhuriyet* newspapers, Akyuz emphasised the political influence of the journalist imprisonments in Ergenekon and KCK cases, under the title, “Nobody can be arrested for opposition”:

Although, in every opportunity, the Prime Minister<sup>181</sup> and government officials declare that we are not journalists, there are almost 70 journalists being jailed for carrying out their journalistic duties. The allegations against these journalists for

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<sup>179</sup> Ibid. 21

<sup>180</sup> Tutuklu Gazeteciler ‘Tutuklu ve Hukumlu Gazetecilerin Listesi/*The list of detained and convicted journalists*’ (TGDP, 9 January 2015) <<http://tutuklugazeteciler.blogspot.co.uk>> accessed 10 February 2015

<sup>181</sup> At the time of the article (2011) the Prime Minister of Turkey was Recep Tayyip Erdogan.

belonging to ‘illegal organisations’ such as Ergenekon or KCK or for making their propaganda, does not change the fact that they have been performing their professions as journalists. Moreover, no system would arrest opposing people based on the justification of them being the opposition. It would find legal frames and would try to make it appear legitimate by people’s perception. What we experience today has nothing else beyond that.<sup>182</sup>

By denying due process rights under 1991 Anti-Terror Law, Turkey is alleged by UNHRC to be going against international law standards, which raises concern about the authoritarian tendencies of the country.<sup>183</sup>

## 2.6 Turkey’s international obligation to protect the freedom of the press

The protection of freedom of expression and press is sustained by three main international agreements that Turkey is a signatory party to. The Universal Declaration of Human Rights accepts the right to freedom of expression and freedom of information as the two fundamental rights that should be exercised by people without fear and constraint. In that respect, Article 19 of the UDHR states that “everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”<sup>184</sup> In that context, UDHR is considered to be a “declaratory of customary international law” by Reisman<sup>185</sup> as it constitutes a basis for “moral, political and legal influence” for human rights; as ECHR and ICCPR also incorporate the right to freedom of expression since UDHR sets the principle foundation of “the post 1945 codification of human

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<sup>182</sup> Bia News Centre, ‘Tutuklu Gazete Tarihe Not Dustu/*Convicted newspaper wrote history*’ (*BiaMag*, 25 July 2011) <<https://bianet.org/biamag/ifade-ozgurlugu/131717-tutuklu-gazete-tarihe-not-dustu>> accessed 9 November 2012

<sup>183</sup> United Nations Human Rights Committee, ‘Concluding observations on the initial report of Turkey adopted by the Committee at its 106th session (15 October-2 November 2012)’ (*UNHRC*, 13 November 2012) <<http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhshMktQJn68GxgXXTdAYdq%2fuKuHnlZeSAm6riCmQa6vtlbHKIbogtDJZeptw7i5KBK45f81nqutF%2bjT0Lw1jBzkZCdXMBj%2ftmhFSUOAEge%2fUQ>> accessed 11 November 2012

<sup>184</sup> UN (1948) The Universal Declaration of Human Rights.

<sup>185</sup> Michael W. Reisman, ‘Sovereignty and Human Rights In Contemporary International Law’ (1990) 84:4 The American Journal of International Law 866, 867

rights” as argued by Hannum.<sup>186</sup> More specifically, Article 10 of ECHR states the right and freedom of expression, with its limitations that are only applicable by the requirement of law.

It can be observed above that the right to free expression is not absolute and can be limited by law if there is a necessity in a democratic society on the basis of the reasons stated in the second paragraph of the article. Although this right is not absolute, according to the ECHR, countries can only abridge this right if the expression falls under one of the categories in the second section of Article. The importance and application of this clause can be observed in the ECtHR verdict of *Sener v Turkey*: “Freedom of expression constitutes one of the essential foundations of a democratic society, one of the basic conditions for its progress and for each individual’s self-fulfilment.”<sup>187</sup>

This research points out that Turkey attempted to use this exception as an excuse for its censorship of the press and argued that the restriction on the freedom of the press by “unity of the Turkish nation and the territorial integrity of the state” falls under the category of “territorial integrity” specified in the second section of ECHR Article 10.<sup>188</sup> Based on the application of Article 301 to curtail freedom of expression in Turkey, Tate states that “Turkey has failed to conform to the Convention even in light of direct orders from the ECHR and the enticement of EU membership in exchange for human rights reforms.”<sup>189</sup> Therefore, in light of the observations above, it is fair to argue that Article 301 conflicts with ECHR Article 10 and that the Turkish Courts have a narrow interpretation of what constitutes criticism and consider the journalists expressions and reporting as denigration.

Prosecutions under Article 301 demonstrate that Turkey does not support a fair balance between the individual’s fundamental right to free expression and its legitimate right to protect itself under Turkey’s human rights obligations under ECHR.<sup>190</sup> ECHR stated that “a state may only restrict free expression under Article 10 section 2 where it can demonstrate a pressing social need which would justify the finding that the interference complained of was proportionate to the legitimate aim pursued.”<sup>191</sup>

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<sup>186</sup> Hurst Hannum, ‘The Status and Future of the Customary International Law of Human Rights’ (1995) 25: 1&2 Georgia Journal of International and Comparative Law 287-397

<sup>187</sup> *Sener v Turkey* App no 26680/95 (ECHR, 18 July 2000)

<sup>188</sup> *Socialist Party and Others v Turkey* App no 20/1997/804/1007 (ECHR, 25 May 1995)

<sup>189</sup> Jahnisa Tate, ‘Turkey’s Article 301: A Legitimate Tool for Maintaining Order or a Threat to Freedom of Expression?’ (2008) 37:181 Ga. J. Int’L & Comp. L. 181, 207

<sup>190</sup> *Zana v. Turkey* App no 69/1996/688/880 (25 December 1997)

<sup>191</sup> *Incal v. Turkey* App no 41/1997/825/1031 (ECHR, 9 June 1998)

Besides, since the EU recognised Turkey as one of its official member candidates, Turkey is expected to comply with international human rights standards and make reforms in order to achieve these standards. One of ECHR's most important concerns is freedom of expression. Turkey needs to comply with its decisions as Turkey is a signatory of ECHR, and this requires respect for human rights which is made a *sine qua non* for the EU candidate countries.<sup>192</sup> However, Turkey has not applied 1,241 verdicts of the ECtHR out of 2,400 under which it was convicted until today. According to these numbers, Turkey holds the second place after Italy in terms of non-compliance with ECtHR decisions.<sup>193</sup> As observed in section 2.3.4 in this chapter, ECtHR's decision on Dink has not been applied; this violates the membership obligations to the European Council, for the European Council member states have the obligation to apply ECtHR verdicts, which are monitored by the Committee of Ministers of the Council of Europe. Consequently, Turkey is under the obligation to settle the amount of compensation, if there is any approved by the ECtHR; to make legal and administrative changes in domestic law in order to prevent similar violations from taking place, and most importantly, to train the government officials who are responsible for applying the ECHR. In the case of non-application of the ECtHR verdicts by the member states, the most extreme measure that can be taken is to suspend the membership to the European Council of that state.<sup>194</sup>

## 2.7 Assessment

In light of the above, this author argues that there is a strong need for a clear distinction between the definition of a journalist and a terrorist. Such a distinction is only possible if TMK goes through a reformist change: therefore, it may be argued that the language of law itself is questionable and is in violation of the Constitution Article 26<sup>195</sup> and 13. More specifically, Article 13 requires any restriction of freedom of expression to conform with the Constitution, democratic and secular order of the Republic:

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<sup>192</sup> William Hale, 'Human Rights, the European Union and the Turkish accession process' (2010) 4(1) Turkish Studies <<http://dx.doi.org/10.1080/714005714>> accessed 25 January 2012, 107, 108

<sup>193</sup> Zeynel Lule 'AIHM'ye uymayan 2. ulkeyiz/We are the country ranking the second for non-compliance to the ECtHR verdicts' *Hurriyet* (5 March 2013) <<http://www.hurriyet.com.tr/aihm-ye-uymayan-2-nci-ulkeyiz-22739708>> accessed 11 October 2015

<sup>194</sup> Jean-François Akandji-Kombe, 'Positive obligations under the European Convention on Human Rights' Human Rights Handbooks no.7 <[http://www.echr.coe.int/LibraryDocs/DG2/HRHAND/DG2-EN-HRHAND-07\(2007\).pdf](http://www.echr.coe.int/LibraryDocs/DG2/HRHAND/DG2-EN-HRHAND-07(2007).pdf)> accessed 11 October 2015

<sup>195</sup> See section "The Constitution of the Republic of Turkey" for full text version of Article 26.

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.<sup>196</sup>

Considering that the broadly drawn TMK allows the punishment of opinions in name of preventing terror, the press expressing contradictory views may be tried for a terrorism offence regulated under TMK. Considering the inconsistency between TMK and the Turkish Constitution, it is possible to argue that TMK violates the Turkish Constitution Article 26 and Article 13. As Lon Fuller suggests, law must be “clear”, “non-contradictory” and “congruence”<sup>197</sup>. Therefore, from the language of the law it must be clear to the citizens what is prohibited, permitted and required by law<sup>198</sup>, law must not prohibit what is permitted by another, and the way law is enforced by the government authorities must be compatible with the language of the law.<sup>199</sup> Based on these criteria, the analysis of TCK Article 301 and the Anti-Terror Law in Turkey, as their arbitrary application, the language of law and its application regulating freedom of the press in Turkey does not enable the press to form reliable expectations<sup>200</sup> of the treatment of their actions.

It is therefore not difficult to imagine in the present circumstances that the practice of silencing the press based on the vague definitions and terms used in the Turkish Penal Code, Anti-Terror-Law, and under the exception clauses of the Constitution, is not unusual for the arbitrary censorship of the press in Turkey. Even though section 4 of Article 301, which regulates the permission of the Minister of Justice to opening proceedings, was put in place to protect the freedom of expression and the press and even though it arguably might provide legal safeguards in theory, it is debatable whether it is sufficient to protect the press against the controversial application of this provision; moreover, as Akcakoca argues, worsening of the relations with the EU would hinder the purpose of such a guarantee.<sup>201</sup> By means of this research it is argued overall that

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<sup>196</sup> The Constitution of the Republic of Turkey no. 2709 (7/11/1982) s 2(13)

<sup>197</sup> Fuller elaborates individually on eight criteria of the rule of law in Lon Fuller, *Morality of Law* (New Haven: Yale University Press 1969) 39

In this section only the relevant requirements of the rule of law specified by Fuller are used.

<sup>198</sup> Colleen Murphy, ‘Lon Fuller and the Moral Value of the Rule of Law’ (2005) 24 *Law and Philosophy* 239,240

<sup>199</sup> Ibid. 239, 241

<sup>200</sup> Ibid. 239, 241

<sup>201</sup> Amanda Akçakoca, ‘EU-Turkey Relations 43 Years on: Train Crash or Temporary Derailment?’ (2006) 50 *European Policy Centre* 13

the interpretation and application of vaguely written legal provisions in relation to the freedom of expression and the press depends on the mentality and approach of the political power in Turkey. In that regard, the current government's lack of toleration to criticism is explained further in this study as the main reason for the increased number of journalists in jail as well as the increasing attitude of self-censorship which has become a tradition in the press in Turkey. The absence of any effective mechanism to ensure the protection of the press from political pressure<sup>202</sup> allows the government to put pressure on the press. Thus it may be argued that the legal provisions examined above are used as mere excuses by the government to silence the press. This is where it is important to consider the implementation of the reforms suggested by the European Commission and various NGOs.

As observed above, most of the legal provisions that allowed censorship of the press were criticised for being too vague and broad. Despite the elaborate recommendations made by the European Commission and the NGOs, there is no movement toward changing the related law to manifest a more precise language that would allow broader press freedom. The constant criticism has not assisted in the improvement of the interpretation of the vaguely written legal provisions; Bulent Algan argues that it cannot be expected from the legislative bodies to write the legal provisions in full clarity, and the broadly or vaguely formulated ones must be interpreted by the judiciary for the protection of the basic human rights.<sup>203</sup> More specifically, Mithat Sancar argues that the legal provisions, if in doubt, must be interpreted in favour of the freedoms (*in dubio pro libertate*), which is inevitable in a democratic system.<sup>204</sup>

This research concludes that these legal provisions need to be amended in order to comply with the international standards of press freedom laid by ECHR and ICCPR. Exhaustive reforms must be made immediately for a preferable interpretation of the constitutional rights; detailed suggestions are made in the recommendations section in Chapter 6. There is no doubt that these shortcomings of the law have a profound effect on the people's right to receive information.<sup>205</sup>

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<sup>202</sup> Discussed thoroughly in Chapter 6.

<sup>203</sup> Bulent Algan, 'The Brand New Version of Article 301 of Turkish Penal Code and the Future of Freedom of Expression Cases in Turkey' (2008) 9:12 German Law Journal 2237, 2247

<sup>204</sup> Mithat Sancar, 'Temel Hakların Yorumu/Interpretation of the Basic Rights' (PhD Thesis, Ankara 1995) 325

<sup>205</sup> Possible remedies will be discussed under the recommendations section in Chapter 6.

## 2.8 Conclusion

By way of this chapter, the researcher concludes that due to the broadly drawn language of TCK and TMK and the exceptions to free expression and press written in vague language in the Turkish Constitution, the legal protection provided to the free expression of the press in the Press Law and the Turkish Constitution falls short in preventing the frequent application of the main problematic Articles of TCK and TMK for silencing the opposition press in Turkey.

Even though the amendments to Article 301 aimed to broaden the limits of press freedom, this author points out the insufficiency of these changes: The Article is still being used as a basis to silence the press. Vagueness is still the common characteristic of both the TCK and TMK's related articles limiting press freedom. This indicates the underlying intention of the lawmakers keeping the Article in place for penalising press opinion that falls outside the official state ideology.

The importance of judicial approach to press freedom plays an important role for the protection of opposing ideas against the threat of being silenced on the basis of state security in order to allow the elimination of TCK and TMK's use for creating political crimes.

The fundamental right of free expression and the freedom of the press, which is incorporated separately and specifically in the Constitution and re-iterated in the Turkish Press Code as well as in the ECtHR case law, do not appear in practice. Today, journalism is more difficult in Turkey, which raises serious concerns about the country's dedication to democracy. This direction clearly lacks respect for free expression of the press, for no concrete change is being made to enable the legal protection of freedom of expression for the press in Turkey: in view of the large numbers of journalists even today jailed under TCK and TMK, the present researcher concludes that, even though Turkey is a signatory party to ICCPR, UDHR and ECHR, internalisation of the right to free expression and press freedom as a human right remains an issue.

The next step in this is a chronological analysis of the relationship between the press and politics in Turkey as an explanation of the arbitrary application of Article 301 of TCK and the Anti-Terror Law to silence the opposition press. The next chapter emphasises the mentality behind the controversial legal provisions in relation to the press, the sensitivities of the current government, and the current worsening situation of the press in Turkey. It is therefore essential to study the position of the press since the beginning of Modern Turkey and the impact of politics on the press

traditions and the freedom of the press. An elaborate analysis of this intense political influence on the press operations in Turkey is carried out in the next chapter.

# Chapter 3 - Historical Development of Press-Politics Relationship in Turkey

## 3.1 Introduction

This chapter explores the relationship between the press and politics throughout Turkey's political history. The chronological order of this study aims to identify state and political intervention as the main burden to the freedom of the press, demonstrating how the press traditions in Turkey developed over time.

Taking into account that Turkey has not been successful in implementing reforms<sup>206</sup>, investigating the reasons for this lack of motivation for their implementation by pinpointing the historical elements that strongly influence the current position of the press in Turkey are instructive for the Turkish legislator who can be inspired to avoid repeating the mistakes of the past. This study is therefore essential, for Turkey is required to understand the importance of giving agency to freedom of the press in order to reach the democratic standards to which it aspires. Thus, to ensure that recommendations can be made and applied to create higher legal standards for the protection of the freedom of expression for the press, different political phases will be explored in relation to the level of censorship with the consideration of the legal provisions effective at each political stage. Differences in the level of press censorship during the tenure of each political party are explored with an extensive literature review on scholarly books and articles in combination with the exploration of prominent cases that hold importance for the positive and negative progress of the press.

Background information on the emergence of the “sensitive subjects” helps clarify why the press in Turkey is restricted to report on certain topics, such as “terrorism”, as specified in the previous chapter. In that regard, gradual legal changes that took place in relation to the rights and freedoms of the press are explored. In addition, the reasons why the law was broadly drawn are explained based on the political ideology that prioritises the protection of the state rather than individual rights and freedoms. In addition to the formation of the law itself, the responsibility of the press to adopt the role of a spokesman of the state rather than a fourth estate is also addressed in this chapter.

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<sup>206</sup> Detailed analysis is made in Chapter 4.

Last but not least, this chapter examines the role of the military's intervention into politics, that also caused the occurrence/formation of the "sensitive subjects" that are restricted from the press coverage (by the natural reaction of the press itself and by the censorship of the press). These analyses are especially relevant when considering the most topical political period for the press in Turkey — namely the AKP period from 2002 until today. AKP's overly suspicious beginning to its political life<sup>207</sup> can only be understood based on the historical experiences, as this chapter also provides background information for the demonstration of the danger that is created by the combination of a press culture/trend that has been operating under censorship without the fulfilment of the fourth estate functions and under a political power (AKP) with a lack of toleration for political criticism.

### 3.2 First years of the Republic: the foundations of the press in Turkey

The link between the press and politics in Turkey is unique in that the press in Turkey was formed differently than the press in Western Europe.<sup>208</sup> While the press emerged as a result of societal and economic developments in Western Europe, the press in Turkey was deliberately used by the government with the intention to control this institution, which was subjected to stronger influence of political powers.<sup>209</sup> In that regard, during the transition into the phase of republic around 1919-1921, when the Independence War was taking place, the Istanbul government under the caliphate intended to use the press to gain support for its own policies, though this was not successful.<sup>210</sup> The press was rather searching the truth during the transition between the Istanbul government<sup>211</sup> and the Independence War.<sup>212</sup> Consequently, the press in Turkey cannot be analysed separately from Turkish political history which began its one-party political period in 1923 that established the Republic of Turkey.

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<sup>207</sup> Examined in Chapter 4.

<sup>208</sup> Turkey's social and political life has always been influenced by Western Europe, which also influenced the operations of the press. This is the reason for the comparison made between the emergence of the press in Turkey and in Western Europe.

<sup>209</sup> Vedat Demir, *Türkiye'de Medya Siyaset İlişkisi/Media Politics Relationship in Turkey* (Beta Yayınları, 2007)

<sup>210</sup> Mustafa Yılmaz and Yasemin Doğaner, *Cumhuriyet Döneminde Sansür (1923-1973)/Censorship During the Period of Republic (1923-1973)* (Ankara: Siyasal Kitabevi, 2007) 5

<sup>211</sup> The newspapers that supported the Istanbul government were mainly Istanbul, Alemdar, and Peyam-i Sabah.

<sup>212</sup> The newspapers that supported the War of Independence were *Ileri (Forward)*, *Yenigün (New Day)*, *Aksam (Evening)* and *Vakit (Time)*.

Ozbudun and Genckaya state that Ataturk and his colleagues on the road to the establishment of the Republic aimed to create a Western and even a European country.<sup>213</sup> In that regard, starting from 1923 until the end of single party period, the press in Turkey was used as a tool for state propaganda in order to establish a Turkish society that would be governed with secularism and the Western values of modernism. The press in this period existed for the advocacy of these values, promoting the interests of the state.<sup>214</sup>

In the process of the evolution into a republic, the founder of the Republic of Turkey and the first president of Turkey, Mustafa Kemal Ataturk valued print press as an important agent in the top-down process of modernisation.<sup>215</sup> On this basis, the *Hakimiye-i Milliye (National Sovereignty) Daily* and *Anatolian News Agency* were founded in 1920 with the purposes of disseminating detailed and factual information to the internal and international public on the Turkish War of Independence<sup>216</sup> for the press operations that took place in Ankara<sup>217</sup> were experiencing problems in the distribution of information. Anatolian News Agency therefore aimed to introduce the Independence War abroad to allow the dissemination of information within the country.<sup>218</sup>

However, in 1924, opposition groups were being formed against Ataturk as well as the newly established government; these were also supported by the opposition press against the establishment of the Republic. There were two groups in opposition to the new government in Ankara; the first group was sceptical about the new government even though it supported the Independence War, and the second group supported conservative values with an attachment to the caliphate.<sup>219</sup> These opposition groups, in particular the second group supporting conservative values with a strong bond to the caliphate and the press who were in favour of the Caliphate was seen as a danger to national security by the founders of the Republic.<sup>220</sup> This author argues that the sensitive

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<sup>213</sup> Ergun Ozbudun and Omer F. Genckaya, *Democratization and the Politics of Constitution-Making in Turkey* (Central European University Press 2009) 81

<sup>214</sup> Kjetil Selvik and Stig Stenslie, *Stability and Change in the Modern Middle East* (Macmillan, 2011) 39

<sup>215</sup> Bunyamin Ayhan, *Ataturk ve Basın/Ataturk and the Press* (Palet Yayinlari, 2009) 149

<sup>216</sup> Douglas Arthur Howard, *The History of Turkey* (Westport: Greenwood, 2001) 14

<sup>217</sup> The press that supported the Turkish War of Independence was based in Ankara.

<sup>218</sup> Orhan Kologlu, *Türk Basını Kuvay-i Milliye'den Günümüze/Turkish Press from Nationalist Forces until Today* (Ankara Kültür Bakanlığı Yayınları, 1993) 61

<sup>219</sup> Serif Demir, 'Situation of the government-press relations in Turkey (1918-1960)' (2012) 5:6 International Journal of Social Science 126

<sup>220</sup> Elise Massicard, *The Alevis in Turkey and Europe: Identity and Managing Territorial Diversity* (Oxon: Routledge, 2013) 91

subjects that restrict the press in Turkey today<sup>221</sup> originate from such conditions. Atatürk controlled the press to create a national unity based on a secularist, nationalist, unified, centralised homogenous nation based on a civic and Turkish identity.<sup>222</sup>

On the other hand, it can be argued that accepting Western values and aiming for Europeanisation with the recognition of secularism, rule of law and equality of the citizens required a top-down revolution, considering that the former authority before the establishment of the Republic ruled by religion on the basis of “imperial-patrimonial monarchy”.<sup>223</sup> This also implies that the state revolution had a top-down approach, which took place on the state level rather than the application of change within the social structure.<sup>224</sup> This research points out that the effects of this lack of involvement of the social integration, which set the foundations of the state in the first years of the Republic,<sup>225</sup> are still observed today as reasons for the censorship of the press.

Despite the number of newspapers that were established in Ankara, Istanbul’s press was still more effective and powerful and able to censor the pro-republican press for being pro-republican.<sup>226</sup> Because of the anti-republicans’<sup>227</sup> efforts to silence the pro-republican press, the “Office of Press and Intelligence Administration”<sup>228</sup> was established to control and censor the press in Istanbul.<sup>229</sup> The present research suggests that such establishment and the censorship of the press in the initial

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<sup>221</sup> See Chapters 2 and 4 for various case analyses.

<sup>222</sup> Svante E. Cornell, ‘The Land of Many Crossroads - The Kurdish Question In Turkish Politics’ (2001) 45:1 *Orbis*

<sup>223</sup> Eric J. Zürcher, *The Young Turk Legacy and Nation Building - From the Ottoman Empire to Atatürk's Turkey* (London and New York: I.B.Tauris & Co Ltd, 2010) 136

<sup>224</sup> Ilkay Sunar and Sabri Sayan, ‘Democracy In Turkey: Problems and Prospects’, in Guillermo O'Donnell, Phillippe C. Schmitter, Neil L. Whitehead (eds.) *Transitions from Authoritarian Rule: Experiences in Southern Europe*, (Johns Hopkins University Press, 1986) 169

<sup>225</sup> Ilkay Sunar and Sabri Sayan, ‘Democracy In Turkey: Problems and Prospects’, in Guillermo O'Donnell, Phillippe C. Schmitter, Neil L. Whitehead (eds.) *Transitions from Authoritarian Rule: Experiences in Southern Europe*, (Johns Hopkins University Press, 1986) 167

Eric J. Zürcher, *The Young Turk Legacy and Nation Building - From the Ottoman Empire to Atatürk's Turkey* (London and New York: I.B.Tauris & Co Ltd., 2010) 144

<sup>226</sup> After the Assembly was attacked in March 1920, the journalists supporting the War of Independence were sent to exile; the Istanbul press became powerful in disseminating information and arguments against the Independence War. Orhan Koloğlu, *Türk Basını Kuvay-i Milliye'den Günümüze/Turkish Press from Nationalist Forces until Today* (Kültür Bakanlığı Yayinlari Ankara 1993) 12

Serif Demir, ‘Situation of the government-press relations in Turkey (1918-1960)’ (2012) 5:6 *International Journal of Social Science* 119, 125

<sup>227</sup> As mentioned in the text previously, two groups opposed the new government in Ankara. One was sceptical about the new government even though it supported the Independence War; the other supported conservative values and the caliphate.

<sup>228</sup> The original name is given here in the researcher’s own translation: Matubat ve Istihbarat Muduriyesi Umumiyesi

<sup>229</sup> Atilla Girgin, *Cumhuriyet Doneminde Türkiye'deki Yerel Basinin Gelismesi/Development of the Domestic Press in Turkey during the Period of Republic*, (Türkiye Gazeteciler Cemiyeti Yayinlari, 1997)

years of the newly established republic, should be interpreted differently than the censorship of the press today. Radical changes were taking place, and the aim of such censorship, according to Kabacali, was to prevent pro-monarchy publications<sup>230</sup> from intervening in the course of independence.<sup>231</sup>

### 3.2.1 Imposition of a pro-government attitude on an ostensibly free press: First steps

After all, structuring a democratic system for the press started in 1923 with the removal of martial law and the censorship of the press. The press in Istanbul was therefore set free as there was no regulation for the press in 1921 Constitution Act, and the new 1924 Constitution Article 77 regulated freedom of the press, stating that “The press is free within the limits of law. The supervision executed before publication is not subject to examination.”<sup>232</sup> Nonetheless, the first intimidation toward the journalists from the new Ankara government was based on the publication of a letter by the opposition press<sup>233</sup>, sent by Indian intellectuals directed at the new government in Ankara advising them not to remove the caliphate. The opposition journalists who published this letter were tried in an Independence Tribunal<sup>234</sup> and they were acquitted.<sup>235</sup> The publication of this letter by the press before it even reached the Prime Minister was not welcomed by the government, and veteran journalists such as Ahmet Cevdet, Hüseyin Cahit, Velit Ebuzziya, and Lutfi Fikri. Even though these journalists were not charged, the court obviously intimidated the press<sup>236</sup> to

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<sup>230</sup> Demir explains that the reason for the prevention of the pro-monarchy publications was of great importance in eliminating any negative influence they could make on the society in Anatolia during the War of Independence. Serif Demir, ‘Situation of the government-press relations in Turkey (1918-1960)’ (2012) 5:6 International Journal of Social Science 119, 125

<sup>231</sup> Alpay Kabacali, *Türk Yayın Tarihi/Turkish Press History* (Gazeteciler Cemiyeti Yayınları, 1987) 108

<sup>232</sup> The Constitution of the Republic of Turkey 1924 s 4(77) Suna Kili and A. Seref Gözübüyük, *Türk Anayasa Metinleri (Sened-i İttifaktan Günümüze)/Turkish Constitution Texts (From Charter of Alliance 1808 Until Today)* (Türkiye İş Bankası Yayınları, 2000) 136

<sup>233</sup> Hifzi Topuz, *100 Soruda Türk Basın Tarihi/Turkish Press History in 100 Questions* (İstanbul, 1973) 136

<sup>234</sup> These tribunals were formed of eight courts during the Turkish War of Independence in order to prosecute or censor the ones who were against the new system that was being formed. They were located in Ankara, Eskişehir, Konya, Isparta, Sivas, Kastamonu, Pozanti and Diyarbakir. Except the Ankara court all the other seven courts were terminated in 1921, after the end of the War. Ankara court was terminated in 1927.

<sup>235</sup> For further information on the Independence Courts see Ergun Aybars, *İstiklal Mahkemeleri/ Independence Tribunals* (İzmir, 1995) 239

<sup>236</sup> Hasan Turker, ‘Türk Devrimi ve Basın 1922-1925/Turkish Revolution and the Press 1922-1925’ (Dokuz Eylül Yayın, 2000) 7

demonstrate how determined the government was to apply the reforms.<sup>237</sup> This author argues that the new government did not solely aim to censor the press due to its lack of toleration to criticism, but for the successful application of the reforms which arguably indicated the sincerity of the government on the application of the reform process.

This section points out that the press was an agent for re-shaping the country whose political system only recently had been transformed into a republic. More than having the role of a watchdog over the government, the press was seen as an effective way to educate, transform and shape the establishment of Modern Turkey which inevitably shaped the approach of the journalists in Turkey to freedom of expression and press freedom. Moreover, the legislation, which prioritised state interest over the rights and freedoms of individuals (in this case journalists) was in conflict with the liberal democratic initiation which aimed to establish a Republic in which the government serves the public.<sup>238</sup> The centralist state properties of Turkey were established during the first years of the Republic due to the motivation of building a new political structure that emphasised the “state” itself instead of “social integration”.<sup>239</sup> The negative effects of this state centred approach in the democratisation process of the country are chronologically analysed throughout the chapter in relation to the missing link between the ruling elite and the people<sup>240</sup> and in light of the legislation regulating press freedom.

### 3.2.2 Single party period and the political stance of the press

The single-party period in Turkey lasted for twenty-seven years until the transition to the multi-party period, which only started in 1950. During this period, CHP was ruling the country with a state-centric ideology with heavy involvement of the Turkish military,<sup>241</sup> bureaucracy, and the

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<sup>237</sup> Serif Demir, ‘Situation of the government-press relations in Turkey (1918-1960)’ (2012) 5:6 International Journal of Social Science 119, 126

<sup>238</sup> Sitki Aydineli, ‘Ataturk’un Kurdugu Cumhuriyeti’in Temel İlkeleri/*The Fundamental Principles of the Republic Established by Ataturk*’ Ministry of the Republic of Turkey Ataturk Research Centre <<http://www.atam.gov.tr/dergi/sayi-27/ataturkun-kurdugu-turkiye-cumhuriyetinin-temel-nitelikleri>> accessed 15 October 2015

<sup>239</sup> Ilkay Sunar and Sabri Sayan, ‘Democracy In Turkey: Problems and Prospects’, in Guillermo O'Donnell, Phillippe C. Schmitter, Neil L. Whitehead (eds.) *Transitions from Authoritarian Rule: Experiences in Southern Europe*, (Johns Hopkins University Press, 1986) 167

<sup>240</sup> Ibid., 172

<sup>241</sup> Feroz Ahmad, *The making of modern Turkey* (London and New York: Routledge, 1993) 62  
Eric J. Zürcher, *Turkey - A Modern History* (London and New York: I.B.Tauris & Co Ltd., 2004) 176

ruling elites. Thus, the military was taking an active part in the political decision making process even though CHP had this responsibility.<sup>242</sup> It is important to recognise the military's role in the early years of the Republic, for the military interventions that took place in 1960, 1971, and 1980 had a negative impact on the freedom of the press.

### 3.2.2.1 Law for the Maintenance of Order

During the single-party period, the Law for the Maintenance of Order<sup>243</sup> (Takrir-i Sukun) that censored the opposition press was passed in 4 March 1925 because the Sheikh Said Riots<sup>244</sup> had put the state and the new regime under a serious threat. This new law brought restrictions on the press and resulted in the closure of five newspapers<sup>245</sup> after the trials that took place in Tribunals of Independence (İstiklal Mahkemeleri).<sup>246</sup> Article 1 of the Maintenance of Order stated that:

All organisations, provocative or incentive enterprises and publications concerning any reaction, uprising or the infringement of the assembly, peace, tranquility, security and the order of the country is subject to be obviated by the government with the approval of the President. The government may entrust those in breach hereby to the Independence Court.<sup>247</sup>

This law was used to limit any publication that seemed to be able to harm the social peace and cause unrest within the society. Meanwhile, Eastern Turkey, which was under Martial Law, was subject to "The Censorship Regulation to be implemented in the Martial Law District on the

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Eric J. Zürcher, *The Young Turk Legacy and Nation Building - From the Ottoman Empire to Atatürk's Turkey* (London and New York: I.B.Tauris & Co Ltd., 2010) 146

<sup>242</sup> Ilkay Sunar and Sabri Sayan, 'Democracy In Turkey: Problems and Prospects', in Guillermo O'Donnell, Phillippe C. Schmitter, Neil L. Whitehead (eds.) *Transitions from Authoritarian Rule: Experiences in Southern Europe*, (Johns Hopkins University Press, 1986) 170

<sup>243</sup> Bulent Gokay, *Soviet Eastern Policy and Turkey, 1920-1991: Soviet Foreign Policy, Turkey and Communism* (Oxon: Routledge, 2006) 41

<sup>244</sup> A group of former Ottoman soldiers, led by Sheikh Said rebelled to retrieve the system of Islamic Caliphate.

<sup>245</sup> Tevhid-i Efkâr, Son Telgraf, İstiklal and Sebilürreşat were shut down on 6 March 1925 and the newspaper of Tanin was shut down on 14th April. Naim Arıkanoglu, 'Democrat Party - Press Relations' (2014) 15:1 IJSBAR 311, 313

<sup>246</sup> Hakan Ozoglu, *From Caliphate to Secular State: Power Struggle in the Early Turkish Republic* (California: Praeger, 2011) 105

<sup>247</sup> Maintenance of Order (4 March 1925) s1(1)

Access to the law: [http://www.tbmm.gov.tr/tutanaklar/KANUNLAR\\_KARARLAR/kanuntbmmc003/kanuntbmmc003/kanuntbmmc00300578.pdf](http://www.tbmm.gov.tr/tutanaklar/KANUNLAR_KARARLAR/kanuntbmmc003/kanuntbmmc003/kanuntbmmc00300578.pdf)

Eastern Vicinity” which led to the trial of a newspaper owner Ahmet Emin and his colleagues by the Independence Courts.<sup>248</sup>

The suppressive Takrir-i Sukun provisions only lasted five years<sup>249</sup>, and no journalists were imprisoned during the reform process, supporting the notion that even if the press was used as a tool to re-shape the system, the initial intention was not to limit the press freedom, but to implement the reforms. Accordingly, the economic support provided to the press by the government in the transition from Arabic to Turkish language<sup>250</sup> can be considered a good example of how the new regime tried to establish standards that would structure the press.

### 3.2.2.2 The 1931 Press Code: the first press law of the Republic of Turkey

During this twenty-seven years of CHP (Republican People’s Party) governance, the press was under the pressure of the state, for the first press law of the Republic of Turkey, enacted in 1931, was based on limitations. According to the 1931 Matbuat Kanunu (The Press Law), it was forbidden to make publications about the caliphate, the Sultanic rule, communism or anarchism (Article 40) as well as publications that are considered libellous against members of parliament, the Council of Ministers, and government officials (Article 30).<sup>251</sup> The government had the authority to close down newspapers that reported against the interest of the state and the nation as sanctioned in Article 50 of The Press Code<sup>252</sup>:

The newspapers and magazines can be closed down on the bases of reporting against the general politics of the country by the Council of Ministers, for a temporary time period (...) The person responsible for the newspaper which has

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<sup>248</sup> Ahmed Emin Yalman, *Gördüklerim ve Geçirdiklerim 1922-1944/What I Saw and Experienced 1922-1944* (3rd ed. İstanbul: Rey Yayinlari, 1970)

<sup>249</sup> Orhan Kologlu, *Türk Basını Kuvay-i Milliye’den Gunumuze/Turkish Press from Nationalist Forces until Today* (Ankara Kultur Bakanligi Yayinlari 1993) 66

<sup>250</sup> Ibid.

<sup>251</sup> Nursen Mazici, ‘1930’a Kadar Basinin Durumu ve 1931 Matbuat Kanunu/*The Situation of the Press Until 1930 and the 1931 Press Code*’ (1998) 18:5 Atatürk Yolu Ankara Üniversitesi Türk İnkılap Tarihi Enstitüsü Journal 131,148

<sup>252</sup> Matbuat Kanunu (The Press Law) 25 July 1931 (1881/1931) s 16(50)

Access to the law:

[https://www.tbmm.gov.tr/tutanaklar/KANUNLAR\\_KARARLAR/kanuntbmmc010/kanuntbmmc010/kanuntbmmc01001881.pdf](https://www.tbmm.gov.tr/tutanaklar/KANUNLAR_KARARLAR/kanuntbmmc010/kanuntbmmc010/kanuntbmmc01001881.pdf)

been closed down based on these reasons cannot start a newspaper under another name during the period this closure.<sup>253</sup>

Article 50 of 1931 Press Code was criticised to be a totalitarian regulation,<sup>254</sup> for “the general politics of the country” was a vague term to define and led to arbitrary interpretation that authorised the government to close down newspapers. Therefore, its application led to self-censorship by the creation of pressure over the press rather than direct censorship.

CHP specially put extreme pressure on the newspapers who supported the Democrat Party toward the end of the single-party period. The most illustrative examples of such restriction on the press took place when the journalists, namely Adnan Duvenci, Mithat Perin, Sevkett Bilgin, and Adnan Bilget, were arrested on the basis of publishing the speech by Democrat Party leader Adnan Menderes criticising the CHP government in *Democrat Izmir* (*Demokrat Izmir*) and *New Century* (*Yeni Asir*) newspapers.<sup>255</sup> On the other hand, based on this application of Article 50, *Ulus* (Nation) newspaper continued its publications as the spokesman of the only political party of the newly established republic: CHP.<sup>256</sup>

The present author concludes that Article 50 of the first press law set the template for balancing protection of the press and the protection of state’s interests and rights, which has been influential until the present day. It accords clear priority to the interests of the state over the freedom of the press. The Minister of Interior Affairs’ approach to freedom during the 1930s, when the press was under the strict control of the single political party<sup>257</sup> (CHP) was that “the best freedom is the freedom that complies with the interest of the country and the character of the nation which protects the rights and interest of the state.”<sup>258</sup> However, despite the vague language of the Press Law 1931, CHP considered it to allow insufficient government control over the press. Consequently, in 1935, General Management of Press and Publication was established, followed by

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<sup>253</sup> Alpay Kabacali, *Baslangictan Gunumuze Turkiye’de Basın Sansuru/Censorship of the Press From the Beginning Until Today* (Gazeteciler Cemiyeti Yayinlari, 1987) 963

<sup>254</sup> Kayahan Icel, *Kitle Haberlesme Hukuku/Mass Communication Law* (Istanbul S. Garan Press 1977) 36

<sup>255</sup> Nuran Yildiz, ‘Demokrat Parti Iktidari (1950-1960) ve Basın/Democrat Party Power (1950-1960 and the Press’ (1960) Ankara University Seminar Paper, Turkey’s Political Problems 481, 483

<sup>256</sup> Serif Demir, ‘Situation of the government-press relations in Turkey (1918-1960)’ (2012) 5:6 International Journal of Social Science 119, 131

<sup>257</sup> Ibid. 119, 129

<sup>258</sup> Hifzi Topuz, *100 Soruda Turk Basın Tarihi/Turkish Press History in 100 Questions* (Istanbul: Gercek Yayınevi, 1973) 154

a new Press Law (Basin Birliği Yasası) in 1938<sup>259</sup>, which allowed the content limitation of the publications and gave total control to the government for publication permits.<sup>260</sup>

### 3.2.2.3. Centrist government means centrist press?

The limitations on the press that were initiated by the two press laws enacted in 1931 and 1938 were tightened even more during the Second World War (WW2), and in 1939 the government took full control of the press<sup>261</sup> and was authorised to close down newspapers via telephone orders as the judicial bodies were edged out during the WW2.<sup>262</sup> Especially during the years between 1939 and 1945, the press in Turkey was under strict control when the political actors even controlled which news would appear on which page of the newspaper with what font size.<sup>263</sup> In summary, the press effectively served as a governmental department.<sup>264</sup>

In light of this information, the present author argues that the press theory in Turkey during the initial years of the Republic and during the single-party period was more in accordance with authoritarian theory as suggested by Siebert et al: in the authoritarian theory of the press the initial idea of the press was to inform the rest of the society about what their rulers wanted them to know as well as what their rulers thought they should support. Unsurprisingly, this approach resulted in giving the press in Turkey a supporting role of the government policies and therefore the press's main function in a democracy as a watchdog was hindered by the government censorship under the name of maintaining social order.<sup>265</sup>

During the single-party phase, modernisation of the nation was the priority, and Kamali suggests that this modernisation process had a nature of an imposition due to its top-down

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<sup>259</sup> Nursen Mazici, '1930'a Kadar Basinin Durumu ve 1931 Matbuat Kanunu/*The Situation of the Press Until 1930 and the 1931 Press Code*' (1998) 18:5 Atatürk Yolu Ankara Üniversitesi Türk İnkılap Tarihi Enstitüsü Journal

<sup>260</sup> Yasar Salihpasaoglu 'Türkiye'de Basın Özgürlüğü/*Freedom of the Press in Turkey*' (PhD Thesis 2007) 152

<sup>261</sup> Serafettin Pektaş, *Millî Şef Döneminde (1938-1950) Cumhuriyet Gazetesi/Cumhuriyet Newspaper During the Period of National Chief İnönü (1938-1950)* (Firat Publications 2013) 27

<sup>262</sup> Hifzi Topuz, *100 Soruda Türk Basın Tarihi/Turkish Press History in 100 Questions* (İstanbul: Gerçek Yayınevi, 1973) 160-162

<sup>263</sup> Fuat Sureyya Oral, *Cumhuriyet Basın Tarihi 1923-1973/Press History of the Republic 1923-1973* (Ankara, 1973)

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<sup>264</sup> Murat Güvenir, 2. *Dünya Savaşında Türk Basını/History of the Turkish Press during the WW2* (Gazeteciler Cemiyeti Yayınları, 1994) 209

<sup>265</sup> Siebert et al., *Four theories of the press* (Urbana: University of Illinois Press, 1956) 13

characteristic,<sup>266</sup> and Mardin argues that “nation state” and “centrist government” ideology has a strong influence on the press operations in Turkey.<sup>267</sup> In a similar vein to Kamali’s ideas, Shaw and Shaw claim that journalists in Turkey were used as tools of the state in order to shape the society according to the Western values and prepare the society for modernisation, but most importantly, secularism. As a result, the role of encouraging the reform plans was given to the press throughout the establishment of the Republic until the end of the single-party phase in Turkey.<sup>268</sup> On another note, Hughes looks at the freedom of the press at the time of the single-party period from the societal perspective and observes that the plans for the Republic and the modernisation process were imposed on society by the use of the press.<sup>269</sup> His view is supported by Bek, who suggests that behind the accusations toward the press of being a propaganda tool<sup>270</sup> is the way it was arranged as the state’s tool for the implementation of its own ideology during the Independence War.<sup>271</sup> Brummet and Crimmins argue that the press was kept under military and/or state control as it was perceived to be of national interest to have a press that followed the ideology of the state.<sup>272</sup> Therefore, this author observes that the ‘nation-state’ structure of the 1920s was used to silence the press on matters that did not follow the state’s official ideology.

On the contrary, Duverger highlights that the single-party system in Turkey was never based on the single party doctrine and never gave way to a formal monopoly of a single party with the aim of abolishing the liberal system.<sup>273</sup> This argument is supported by Catalpas, who suggests that the Anatolian News Agency was established to respect people’s right to accurate information during the

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<sup>266</sup> Masoud Kamali, ‘Multiple Modernities and Mass Communications in Muslim Countries’ (2012) 8:3 Global Media and Communication 246

<sup>267</sup> Serif Mardin, *Türkiye’de Toplum ve Siyaset/Society and Politics in Turkey* (Istanbul: İletişim, 2012) 37

<sup>268</sup> Stanford J. Shaw and Ezel Kural Shaw, *History of the Ottoman Empire and Modern Turkey* (Cambridge University Press, 1977) 375

<sup>269</sup> Edel Hughes, *Turkey’s Accession to the European Union: The Politics of Exclusion?* (New York: Routledge, 2011) 38

<sup>270</sup> Elaborate discussions of the government’s use of the press as its propaganda tool today are made in Chapter 4.

<sup>271</sup> Mine Gencel Bek, ‘Changing Media and Public Sphere in Turkey: The Role of the State. Market and the EU Candidacy’, in Jostein Gripsrud and Lennart Weibull (eds), *Media, Markets & Public Spheres: European Media at the Crossroads* (Bristol: Intellect, 2010) 174

<sup>272</sup> Palmira Brummet, *Image and Imperialism in the Ottoman Revolutionary Press, 1908-1911* (New York: New York State University Press, 2000) 86

Carolyn Crimmins, ‘Within the limits of Law: Press Law 1995-Arafat’s Answer to Freedom of the Press’ in Leo A. Gher and Hussein Y. Amin, (eds) *Civic Discourse and Digital Age Communications in the Middle East* (Stamford: Ablex Publishing, 2000) 209

<sup>273</sup> Ergun Özbudun (tr) of Maurice Duverger, *Siyasi Partiler/Political Parties* (Bilgi Yayınevi, 1992) 360

Independence War and to advance the political reforms taking place for the modernisation of society.<sup>274</sup>

Based on the analysis of the opinions observed above, the researcher concludes that it is fair to argue that the censorship of the press during the first years of the Republic of Turkey and during the single party period must be interpreted differently, for the principal aim of the government was not to apply censorship to the press, but to use the press for the establishment of the new political system and the application of these restrictions were seen necessary as radical changes needed to take place. In that regard, the special circumstances of the time must be taken into consideration before reaching an opinion on the levels of censorship on the press during the first years of the establishment of the Republic in Turkey. One important point to remember here is that the first years of the Turkish Republic set the foundations of the press in Turkey that still affect the freedom of the press today. The founding principles of the Turkish political theory were based on secularism, security of the state, national security, and the protection of the state interests which have been prioritised over individual rights and freedoms. The analysis of the role played by the press in the initial years of the Republic clarifies the grounds/motivations of today's press ethics and operations as further discussed within this chapter and Chapter 4.

### 3.3 Transition to the multi-party period: the emergence of the Democrat Party

There had been various attempts to begin the multi-party democratic system before the Democrat Party (DP) came into the picture. It was a time when the tendency of the press to have a clear political stance and support one or another political party revealed itself. In 1930, when the Liberal Republic Party (Serbest Cumhuriyet Fırkası/SCF) became active, it already had its own supporters; *Last Post*<sup>275</sup> and *Tomorrow*<sup>276</sup> started to support SCF<sup>277</sup> with additional support from *Service*,<sup>278</sup> *Public's Voice*,<sup>279</sup> and *New Century*<sup>280, 281</sup>. As observed by Sapolyo, the newspaper in

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<sup>274</sup> Dilruba Catalbas, 'Freedom of press and broadcasting' in Zehra F. Kabasakal Arat and Richard Falk (eds), *Human Rights in Turkey* (University of Pennsylvania Press, 2007)

<sup>275</sup> Original name: *Son Posta*

<sup>276</sup> Original name: *Yarin*

<sup>277</sup> Nursen Mazici, '1930'a Kadar Basinin Durumu ve 1931 Matbuat Kanunu/*The Situation of the Press Until 1930 and the 1931 Press Code*' (1998) 18:5 Atatürk Yolu Ankara Üniversitesi Türk İnkılap Tarihi Enstitüsü Journal 144

<sup>278</sup> Original name: *Hizmet*

<sup>279</sup> Original name: *Halkın Sesi*

strict opposition to the government, had reached a high<sup>282</sup> circulation,<sup>283</sup> which is a crucial example of how important it was to have an opposition newspaper. The demand by society for alternative news was high. On the other hand, the dichotomy between the newspapers supporting the government (CHP) and the opposition party (SCF) was another example of how the press voluntarily became the spokesman of the political parties, for CHP was supported by *Republic (Cumhuriyet)*, *Evening (Aksam)* and *National Sovereignty (Hakimiyet-i Milliye)*, and SCF was supported by *Last Post (Son Posta)* and *Tomorrow (Yarın)*.<sup>284</sup> Considering the strong attachment the opposition press had with the opposition party, it is fair to argue that once SCF self-revoked, the supporting press concurrently came to an end and *Tomorrow Newspaper* closed down.<sup>285</sup>

However, the most concrete step towards the beginning of the multi-party system took place in 1946 when the Republican People's Party (CHP) allowed the opposition parties to be formed and to compete. As a result of this, Democrat Party (DP) ran the strongest competition against CHP; it was formed by four eminent members from CHP who were in clear opposition on the basis of CHP's strict policies including the uniform economic policies that were based on an interventionist approach rather than liberal policies.<sup>286</sup> As Yilmaz argues, although after the establishment of modern Turkey there has not been an attempt to establish any other economic system than capitalism,<sup>287</sup> the expectations of a liberal economic system which reinforced private sector was not met.<sup>288</sup> Even though the 1946 elections were a success for CHP, DP rose to power in 1950 elections, earning 53% of the overall votes.<sup>289</sup>

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<sup>280</sup> Original name: *Yeni Asir*

<sup>281</sup> Alpay Kabacali, *Baslangictan Gunumuze Turkiye'de Basın Sansuru/Censorship of the Press From the Beginning Until Today* (Gazeteciler Cemiyeti Yayinlari, 1987) 124

<sup>282</sup> As stated by Sapolyo, it was perceived to set a record at the time. See Enver Behnan Sapolyo, *Türk Gazetecilik Tarihi ve Her Yönü ile Basın/History of Turkish Journalism and the Press From All Aspects* (Ankara, 1969) 236

<sup>283</sup> Enver Behnan Sapolyo, *Türk Gazetecilik Tarihi ve Her Yönü ile Basın/History of Turkish Journalism and the Press From All Aspects* (Ankara, 1969) 236

<sup>284</sup> Nursen Mazici, '1930'a Kadar Basının Durumu ve 1931 Matbuat Kanunu/The Situation of the Press Until 1930 and the 1931 Press Code' (1998) 18:5 Atatürk Yolu Ankara Üniversitesi Türk İnkılap Tarihi Enstitüsü Journal 144

<sup>285</sup> Serif Demir, 'Situation of the government-press relations in Turkey (1918-1960)' (2012) 5:6 International Journal of Social Science 119, 129

<sup>286</sup> Frank Tachau, 'Turkish political parties and elections: Half a century of multi-party democracy' 1:1 (2000) Turkish Studies 128, 129

<sup>287</sup> Siir Yilmaz, '1923'ten Bu Yana Ekonomi Politikaları: Devletçilikten Devletin Tasfiyesine/Economy Policies Since 1923: From Statism to the Elimination of the State' (1998) 22:213 Mülkiyeliler Birliği Dergisi/Ankara Journal of Political Science

<sup>288</sup> Abdullah Takim, *Demokrat Parti Doneminde Uygulanan Ekonomi Politikaları ve Sonuçları/Economy Policies and Results Implemented in Democrat Party Era* (2012) 67:2 Ankara University School of Economics and Administrative Sciences Journal 157, 158

<sup>289</sup> Frank Tachau, 'Turkish political parties and elections: Half a century of multi-party democracy' 1:1 (2000) Turkish Studies 128, 130

The 1950 multi-party period is crucial for Turkish democracy because DP came into power differently than did CHP; it received the support of the rural voters, the military bureaucracy and state centrist voters.<sup>290</sup> Scholars argue that before DP, there was an “official” party that prioritised the political control over representing the people; this demonstrates more of a top-down approach to politics.<sup>291</sup> On the other hand, the forming members of DP were from CHP, and they could form an opposition only because they were “allowed” to do so,<sup>292</sup> which is criticised for not constituting a substantial difference than having CHP as the single party in power.<sup>293</sup> Such an approach to the multi-party system took place after WW2, when Turkey, based on its close relations with the USA, was influenced by the multi-party democratic regime of the USA<sup>294</sup> and the United States of America started to request Turkey to establish a democratic structure; this was followed by President Ismet Inonu’s claim to adopt a multi-party system in Turkey in 1945. As a result, DP was established by Celal Bayar by the approval of President Inonu. In light of this background, the transition into the multi-party period was seen by some scholars as the turning point for the Turkish democracy<sup>295</sup> and by some as simply a concession by CHP to take more liberalising measures in order to deal with losing rural votes and the support of the traditional segment of society.<sup>296</sup>

The normalisation of press freedom took place simultaneously with the normalisation of the political sphere. Toward the last years of the single party period, DP (main opposition) and CHP (the first and the only party during the single party phase in Turkey) reached a consensus on the abolishment of the 1931 Press Code Article 50, agreeing that such abolishment would constitute an important step for the democratisation process. As a result, in 1946 Article 50 of the 1931 Press Law, which regulated the government’s authority to temporarily close down newspapers and magazines,<sup>297</sup> was amended, and the closure of newspapers was determined to be prerogative of the

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<sup>290</sup> Ilkay Sunar, ‘State and Society in the Politics of Turkey’s Development’ 377 (1974) Ankara University Faculty of Political Science 77

<sup>291</sup> Sabri Sayari, ‘The Turkish Party System in Transition’ 13:1 (1978) Government and Opposition 40

<sup>292</sup> Naim Arikanoglu, ‘Democrat Party-Press Relations’ 15:1 (2014) IJSBAR 311, 316

<sup>293</sup> Frank Tachau, ‘Turkish political parties and elections: Half a century of multi-party democracy’ 1:1 (2000) Turkish Studies 128, 131

<sup>294</sup> Taner Timur, Türkiye’de Çok Partili Hayata Geçiş/*Transition into Multi-Party Period in Turkey* (Ankara: İmge Kitabevi, 2003)

<sup>295</sup> John M. Vander Lippe, *The Politics of Turkish Democracy — Ismet Inonu and the Formation of the Multi-Party System: 1938-1950* (Albany: State University of New York Press, 2005)

<sup>296</sup> Ilkay Sunar, ‘State and Society in the Politics of Turkey’s Development’ 377 (1974) Ankara University Faculty of Political Science 83

<sup>297</sup> Hifzi Topuz, *100 Soruda Turk Basın Tarihi/Turkish Press History in 100 Questions* (Istanbul:Gercek Yayınevi 1973) 170

courts.<sup>298</sup> However, this amendment did not prevent the arbitrary closures of newspapers. During the 1950 elections, two newspapers, namely *Yeni Sabah* (*New Morning*) and *Gerçek* (*The Truth*) out of three who published Celal Bayar's declaration alleging the CHP government's tampering with elections, were closed by martial law while the CHP supporting *Tanin* newspaper was not.<sup>299</sup>

The same years (1946-1947) also saw the beginning of commentary-based journalism in Turkey. Many attempts were made for the publication of leftist newspapers and magazines by people who had important roles to play in the development of freedom of expression in Turkey. Sabahattin Ali and Aziz Nesin tried to publish newspapers with leftist ideology; however, the government blocked each of their attempts.<sup>300</sup> Sabahattin Ali had been arrested for criticising Atatürk in one of his poems and served his sentence for several months; he was released in 1933 in an amnesty granted to mark the 10th anniversary of the declaration of the Republic of Turkey. He was the owner and editor of the weekly *Marko Paşa* together with Aziz Nesin,. (he was the President of the Turkish Writers Union) who had a socialist stance and was several times imprisoned by the State Security Courts for his criticism of the American invested capital in Turkey as he supported national independence. On the other hand, the government tolerated nationalist newspapers and magazines more willingly. These magazines could show more improvement in their publication history because of less government interference.<sup>301</sup> The Islamic ideology was represented by two magazines that were originally established in 1908 but not published until the government allowed the dissemination of their own ideologies through publication.<sup>302</sup>

1948 was another crucial year in which a newspaper emerged in conjunction with the formation of a new political party; the Millet (National) Party was founded by the parted/dismissed members of DP, on the basis that DP was not sufficient as the opposition to CHP, and stayed active between 1948 and 1954. Fourteen new newspapers came into print with the aim of supporting the development of the newly formed political parties. Therefore, each party had its own newspaper as its public spokesman: *Nation* (*Ulus*) and *Populist* (*Halkçı*) were CHP's key newspaper, and *Zafer*

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<sup>298</sup> Necdet Ekinci, *Türkiye'de Çok Partili Düzene Geçiste Dis Etkenler/Outside Factors in Transition to the Multi-Party System in Turkey* (Toplumsal Donusum Yayinlari, 1997) 319

<sup>299</sup> Nilgun Gurkan, *Türkiye'de Demokrasiye Geçiste Basın/Press in Transition to Democracy in Turkey (1945-1950)* (İletişim Yayinlari, 1998) 378

<sup>300</sup> Fuat Süreyya Oral, *Cumhuriyet Basın Tarihi 1923-1973/Republic's Press History 1923-1973* (Ankara, 1973) 158-162

<sup>301</sup> Ali Gevgilili, *Türkiye Basını/Turkey's Press* (Cumhuriyet Dönemi Türkiye Ansiklopedisi, 1983) 218

<sup>302</sup> Serif Demir, 'Situation of the government-press relations in Turkey (1918-1960)' (2012) 5:6 International Journal of Social Science 132

(Victory) was DP's means of disseminating supporter information.<sup>303</sup> As a result, 1948 became a symbolic year for introducing partisan press.<sup>304</sup> 1948 also witnessed the establishment of the newspaper *Hurriyet (Independence)*. *Hurriyet* symbolised a new press approach based on appealing to a wide range of people and a modern language of communication. The high number of circulation rates of *Hurriyet* demonstrated the society's need for such journalism. *Hurriyet's* success opened the way for modern journalism to target a mass audience and was followed by the establishment of *Milliyet (Nationality)* which adopted the same journalistic approach.<sup>305</sup>

Meanwhile, the democratisation process in Turkey inaugurated the transition to a multi-party system. Political interactions with the European countries had a positive influence on the democratisation process as more emphasis was placed on the people's participation in the country's governance.<sup>306</sup> The most crucial political development that positively influenced the democratic transition of Turkey was the UN agreement signed by Turkey in 1945; it compelled Turkey to follow the democratic rules of the UN.<sup>307</sup> This agreement resulted in the adoption of a multi-party system in Turkey where the Democrat Party won the elections against CHP as mentioned above, gaining 53.3% of the votes.<sup>308</sup> Staying in power until 1960 when the civil governance was interrupted by the Turkish army as Turkish Armed Forces (TSK) took power based on the "concerns about secularism."<sup>309</sup>

Besides the UN agreement, the beginning of closer communication with the European countries and a new emphasis on the people's participation in the governance were also effective in

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<sup>303</sup> Nuran Yildiz, 'Demokrat Parti İktidari (1950-1960) ve Basın/Democrat Party Power (1950-1960 and the Press' (1960) Ankara University Seminar Paper, Turkey's Political Problems 481,486

<sup>304</sup> Fuat Süreyya Oral, *Cumhuriyet Basın Tarihi 1923-1973/Republic's Press History 1923-1973* (Ankara, 1973) 158

<sup>305</sup> Tekin Erer, *Basında Kavgalar/Tension Amongst the Press* (Rek-Tur Kitap, 1965) 23

Enver Behnan Sapolyo, *Türk Gazetecilik Tarihi ve Her Yönü ile Basın/Turkish Journalism History and the Press From All Angles* (Ankara 1969) 242

<sup>306</sup> Fikret Adaman and Murat Arsel, *Environmentalism in Turkey: Between Democracy and Development?* (Aldershot: Ashgate Publishing, 2005)

<sup>307</sup> Behlül Özkan, *From the Abode of Islam to the Turkish Vatan: The Making of a National Homeland in Turkey* (Yale University Press, 2012) 178

<sup>308</sup> Kathleen Malley Morrison, *State Violence and the Right to Peace: Western Europe and North America* (California: Greenwood, 2009) 100

Fazilet Ahi Özmen, 'The Alevi Identity and Civil Rights in the Twenty-First Century', in Rasim Özgür Donmez and Pinar Enneli (eds), *Societal Peace and Ideal Citizenship for Turkey* (Plymouth: Lexington Books, 2011) 78

<sup>309</sup> Dietrich Jung and Wolfango Piccoli, *Turkey at the Crossroads: Ottoman Legacies and a Greater Middle East* (London: Zed Books, 2001)

the transition to a multi-party system,<sup>310</sup> which was the first major step into Turkey's democratisation. The democratic system of Turkey had remained incomplete without the existence of an opposition party against CHP for almost three decades.<sup>311</sup> For that reason, the change of political dynamics with the introduction of an opposition party, namely the Democrat Party is considered to be a turning point for the political history of Turkey by Van der Lippe.<sup>312</sup>

### 3.4 Democrat Party: a new phase for democracy and the press in Turkey

During the elections of 1950, the press was supportive of the Democrat Party with the anticipated establishment of liberal press standards through the amendment of the 1931 Press Code. Such expectations of the press were in response to the repressive approach of the CHP towards the press during the single party period for 27 years until 1950. DP's success was based on the liberal ideas spread by the WW2.<sup>313</sup> Besides, DP had a political agenda of democratisation through the liberation of the press, which gave hope to the journalists who struggled for democratic and liberal rights and freedoms for 27 years under the one-party rule.<sup>314</sup>

The relationship between the press and politics was highly determined by the Istanbul-based press before and during the period of DP power. The majority of the newspaper owners were supportive of DP, and except for a few newspapers, the Istanbul-based press supported DP throughout the elections.<sup>315</sup> Turkey as a whole was under the influence of the press in Istanbul that was ready to glorify the new democratic movement.<sup>316</sup> Karakoyunlu argues that the aim of this support was to start a period of propaganda whereby the relationship between the press and politics were kept in close co-operation.<sup>317</sup> The present researcher points out that the emergence of this

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<sup>310</sup> Murat Aksel, 'Reflexive Developmentalism? Toward and Environmental Critique of Modernisation' in Fikret Adaman and Murat Arsel (eds), *Environmentalism in Turkey: Between Democracy and Development?* (Aldershot: Ashgate Publishing, 2005)

<sup>311</sup> Feroz Ahmad, *The making of modern Turkey* (London and New York: Routledge, 1993) 102

<sup>312</sup> John M. Vander Lippe, *The Politics of Turkish Democracy - Ismet Inonu and the Formation of the Multi-Party System: 1938-1950* (Albany: State University of New York Press, 2005)

<sup>313</sup> Rifki Salim Burcak *Türkiye'de Demokrasiye Gecis/Transition into Democracy in Turkey* (Olgac Yayınevi, 1979)

<sup>314</sup> Ayşe Elif Kaya, 'Demokrat Parti Doneminde Basın - İktidar İlişkileri/Press and Government Relationship in Democrat Party Period' (2010) 39 *İletişim Fakültesi Dergisi* 93

<sup>315</sup> Remzi Balkanlı, *Kanunlarımız Bakiminden Matbuat Hürriyeti/The Fourth Estate Based on Turkish Law* (Yeni Matbuat, 1951) 11, 83

<sup>316</sup> Yılmaz Karakoyunlu, *Yorgun Mayıs Kırakları/Tired May Mares* (Dogan Kitap, 2004) 300

<sup>317</sup> Ibid.

close relationship between the press and the political parties is important to understand the background of today's government's expectations of the press and the hindrances encountered by the press based on these expectations.

### **3.4.1 The liberalisation of the press in parallel to the democratisation process**

In the first years of its power, DP gave priority to the freedom of the press in order to fulfil the democratisation expectations. On 14 May 1950, DP applied remission on all the political offenders and journalists. This was seen as a political purification that DP considered to be necessary after 27 years of CHP rule. Therefore, DP, with the first amnesty law of the multi-party history of the republic, made a clear inception in its political life.<sup>318</sup> This atmosphere of democratic progress initiated by DP during the first years of its political power, instilled the Turkish press with faith in the possibility of a new decree. The abolishment of the 1931 Press Code was realised by DP following the enactment of the new legislation 5680 Press Law on 15 July 1950, which provided liberties to the press.<sup>319</sup>

#### **3.4.1.1 5680 Press Code**

The Law for Governing the Press was abolished, and the new 5680 Press Code embraced the rights and freedoms of the press. Subsequently, the authority once held by the government was abolished, and the newspaper closures were subjected to the court decision. The obligation to receive a license prior to newspaper publication was abolished; however, the responsible manager had to be specified in prior notification to publication. The article that restricted people with bad reputations from engaging in journalism was abolished. Crimes committed in relation to the press were to be tried by special authorised courts called Collective Press Courts (*Toplu Basın*

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<sup>318</sup> Cahide Sinmaz Sonmez, 'Demokrat Parti İktidarının İlk İcraatlarına Bir Örnek: "Bazı Suc ve Cezaların Affi Hakkında Kanun/An Example to the Initial Policies of the Democrat Party: Law Regulating Remission of Some Crimes"' (2012) 10:20 Yönetim Bilimleri Dergisi 111, 111

<sup>319</sup> Alpay Kabacalı, *Baslangictan Gunumuze Turkiye'de Basın Sansuru/Censorship of the Press in Turkey From the Beginning Until Today* (Gazeteciler Cemiyeti Yayınları, 1987) 164

*Mahkemeleri*),<sup>320</sup> designed to extend a legal guarantee to the press.<sup>321</sup> Finally, the 5680 Press Code abolished the criminal liability of the newspaper owners based on the published articles and held the authors or the section editors responsible instead.<sup>322</sup>

#### 3.4.1.2 Law no. 5953

Besides the amendments to the Law for Governing the Press, journalists were also granted some employee personal rights that included the utilisation of social securities, obligation to contract, compensation, and paid leave<sup>323</sup> under the “The Law about the Arrangement of the Relations between the Employees and Employers in Press”, numbered 5953 and dated 13 June 1952. These changes brought by DP for the establishment of freer press regulations in Turkey,<sup>324</sup> faced positive and negative criticisms. The two main newspapers that supported CHP and DP had different views on what these amendments meant for the press. CHP’s supporter *Ulus* newspaper had reservations about the power of these amendments for making a difference and meeting the expectations. On the other hand, DP’s supporter newspaper, *Zafer*, perceived these steps as the right move towards the establishment of the freedom of the press.<sup>325</sup> This law is still in force with amendments that took place in 1954 and 1961.

#### 3.4.2 Media ownership and the effects of economic interests on press freedom

One other distinctive transition during the DP government took place regarding the ownership of the press. Changing trends in the ownership of the press involved a transition from experienced journalists owning newspapers to businessmen intending to hold a respectable position

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<sup>320</sup> Sulhi Donmezer, *Basin Hukuku/Press Law* (Istanbul:Sulhi Garan Matbaasi, 1968)

<sup>321</sup> Nuran Yildiz, ‘Demokrat Parti İktidari (1950-1960) ve Basın/*Democrat Party Power (1950-1960) and the Press*’ 1960) Ankara University Seminar Paper, Turkey’s Political Problems 481, 487

<sup>322</sup> Korkmaz Alemdar, *İletişim ve Tarih/Communication and History* (İmge Yayınevi, 1996) 128

<sup>323</sup> Hifzi Topuz, 2. *Mahmut’tan Holdinglere Türk Basın Tarihi/Turkish Press History From 2. Mahmut to the Holdings* (İstanbul: Remzi Kitabevi, 1972)

<sup>324</sup> Cem Eroğlu, *Demokrat Parti Tarihi ve İdeolojisi/Democrat Party History and Ideology* (İmge Yayınevi, 2003) 61

<sup>325</sup> Ayşe Elif Emre, ‘Demokrat Parti Döneminde Basın-İktidar İlişkileri: Ulus ve Zafer Gazeteleri Üzerine bir İnceleme/*Press-Government Relationship in Democrat Party Period:A Study on Ulus and Zafer Newspapers*’ (2002) 13 İstanbul University Faculty of Communication Journal

as a media owner having significant capital due to their actual professions such as ship ownership, mine ownership, the stock market and trade.<sup>326</sup> This new trend allowed capital owners from other sectors to step into the press world, and these changes reflected a new approach that prioritised the pictures, the commentary, and self-reasoning rather than influencing/orientating the public.<sup>327</sup>

In this economic setting, the fealty between the press and the politics became stronger with the acceleration of newspaper distribution, made easier by government subsidies in the 1950s.<sup>328</sup> Yildiz observes that this financial support to the press lasted until the end of DP power by means of allowing bank credits and building sites, official paid announcements made by the government through newspapers, and the allocation of printing paper.<sup>329</sup> This also allowed the news to reach the readers early in the morning; this impacted on the value of contents as reaching the readers before work became more important than the quality of news.<sup>330</sup>

Based on the enactment of these legal regulations and the democratic atmosphere motivated by DP, the number of newspapers, the scope of the newspaper contents, the number of newspaper readers, and the circulation rate of the newspapers rose remarkably.<sup>331</sup> However, the ten years of DP political power, partly as the capital focused on the press ownership and partly because of the monetary support given by the government to some newspapers while excluding others, led to the polarisation of the press based on their political views. The press that did not support DP encountered surcharges on paper. DP's sanctions on the press took different forms, as a result, surcharges were imposed on the paper needed for the newsier printing. Leading to an increase in newspaper prices impacting on their circulation.<sup>332</sup> The surcharges that were put on the postal payments, which was as high as 300 percent, were conveyed to the readers as "a way to censor the press" by the *Ulus* newspaper on 11 July 1951.

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<sup>326</sup> Nezir Demirkent, *Medya Medya/Media Media* (Dunya Yayinlari, 1995) 20

<sup>327</sup> Ayse Elif Kaya, 'Demokrat Parti Doneminde Basın - İktidar İlişkileri/*Press and Government Relationship in Democrat Party Period*' (2010) 39 İletişim Fakültesi Dergisi 96

<sup>328</sup> Çiler Dursun, 'Türk Basınında Dağıtımın Tarihçesi ve Yapısı/*The History and Structure of Distribution in Turkish Press*' in Korkmaz Alemdar *Medya Gücü ve Demokratik Kurumlar/Power of Media and Democratic Institutions* (İstanbul: Afa Press, 1999)

<sup>329</sup> Nuran Yildiz, 'Demokrat Parti İktidari (1950-1960) ve Basın/*Democrat Party Power (1950-1960) and the Press*' 1960) Ankara University Seminar Paper, Turkey's Political Problems 481, 488

<sup>330</sup> Ayse Elif Kaya, 'Demokrat Parti Doneminde Basın - İktidar İlişkileri/*Press and Government Relationship in Democrat Party Period*' (2010) 39 İletişim Fakültesi Dergisi 96

<sup>331</sup> Fuat Sureyya Oral, *Cumhuriyet Basın Tarihi 1923-1973/Republic's Press History 1923-1973* (Ankara, 1973) 176

<sup>332</sup> Ayse Elif Kaya, 'Demokrat Parti Doneminde Basın - İktidar İlişkileri/*Press and Government Relationship in Democrat Party Period*' (2010) 39 İletişim Fakültesi Dergisi 99

Nevertheless, the biggest financial sanction applied on newspapers by DP was the official announcement policies. The distribution of declarations did not have a pre-set basis, and the newspapers that had close relations with the government could make a high income even though their actual sales were below the average. On the other hand, successful and wide-read newspapers with a high sale figures could not receive official announcements.<sup>333</sup> *Kudret* newspaper is a good example of the effects of the advertisement distribution policies of DP because the government prevented the official announcements from being made through this newspaper, which had to close in 1952.<sup>334</sup> This research observes that such a cooperation between the government and specific press outlets turned into *normal* press practice and tradition over time. As will be demonstrated in the following chapter, these days instead of government subsidies it is the business relations between the media owners and the government which lead to the censorship of critical journalists and self-censorship of the press, owing to the media owners' fear of losing business, should their press outlets contradict the government's policies.

### 3.4.3 Reasons for the tension between the Democrat Party and the press

Despite the wide support DP received from the press since the first day of its opposition to CHP and during its initial years of political rule, tension developed between the press and the new government, due to the secularist' concern about the language of prayers, which used to be Turkish but were shifting to Arabic.<sup>335</sup>

While the government supported the press through the subsidies mentioned above, they protected the pro-government press and excluded the opposition by using the publication of official announcements as a means of imposing pressure on the press.<sup>336</sup> The circulation of given newspapers was highly correlated to the official government announcements. A clear example of this situation is given by Kologlu, who states that the *Millet* newspaper received considerable monetary support from DP government because it supported its power since the beginning of DP

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<sup>333</sup> Ibid.

<sup>334</sup> Osman Bolukbasi, *Türk Siyasetinde Anadolu Fırtınası/Storm of Anatolia in Turkish Politics* (Dogan Kitapcilik, 2005) 136

<sup>335</sup> Nuran Yildiz, 'Demokrat Parti İktidari (1950-1960) ve Basın/Democrat Party Power(1950-1960) and the Press' 1960) Ankara University Seminar Paper, Turkey's Political Problems 481, 487

<sup>336</sup> Ibid. 488-489

opposition.<sup>337</sup> Nevertheless, it was not new for the press to be supported according to political ideology. The *Ulus (Nation)* newspaper received the most support during the single party period from CHP for its pro-CHP publications. DP supporters such as *Triumph*,<sup>338</sup> *Voice of the Turk*,<sup>339</sup> *Latest News*,<sup>340</sup> and *Latest Post*<sup>341</sup> received monetary support once the political power changed hands from CHP to DP.<sup>342</sup> It is observed by the researcher that the parallelism between this press/politics relationship is evident in Turkey during the single party period and continued through DP power; reflecting heavily on press restrictions today with the tendencies of the current government to censor opposition.

#### 3.4.4 Changing Habits of DP towards the press

The press in Turkey, which experienced a great degree of freedom during the first years of the DP government, started to be subjected to censorship because of the changing political climate and the rise of the opposition amongst the society. DP had the impression that the opposition could be controlled by State pressure.

The opposition newspapers, mainly supported CHP and were excluded from DP political party meetings and receptions. *Ulus* newspaper, which was the main opponent of DP and a supporter of CHP, was the most obvious example for such exclusion. The government showed signs of respecting the rights and freedoms of journalists as long as they did not criticise the government. For example, the leading author of *Ulus* newspaper, Huseyin Cahit Yalcin was demoted from his duty of UN Palestine Arbitration Committee because of his critical comments against the government.<sup>343</sup> This political censorship on the press during the period of DP government was based on the idea that the problems in the country were created by the press. This notion led to the government's censorship of the press by prosecuting and imprisoning the journalists. Yusuf Ziya Ademhan, Selami Akpinar, Cuneyt Arcayurek, Cemil Sait Barlas, Beyhan

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<sup>337</sup> Orhan Kologlu, *Osmanli'dan Gunumuze Turkiye'de Basın/Press in Turkey From Ottoman Until Today* (Istanbul İletişim Yayınları, 1992) 70

<sup>338</sup> Original name: Zafer

<sup>339</sup> Original name: Turk Sesi

<sup>340</sup> Original name: Son Havadis

<sup>341</sup> Original name: Son Posta

<sup>342</sup> Nuran Yıldız, 'Demokrat Parti İktidari (1950-1960) ve Basın/Democrat Party Power(1950-1960) and the Press' (1960) Ankara University Seminar Paper, Turkey's Political Problems 481, 489

<sup>343</sup> Ayşe Elif Kaya, 'Demokrat Parti Döneminde Basın - İktidar İlişkileri/Press and Government Relationship in Democrat Party Period' (2010) 39 İletişim Fakültesi Dergisi 97

Cenkci, Bedii Faik, Tarik Halulu, Naim Tirali, Kemal Toker, Cemalettin Unlu, Oktay Verel, and Ahmet Emin Yalman were some of the journalists who were prosecuted and imprisoned based on the allegation of “making publications that harms the national interests”<sup>344</sup> under Article 161 of the Turkish Penal Code:

The person makes publication and disseminates information that is precarious and/or and that could harm the society’s morale or could reduce the strength of the county against the enemies in a way that would lead to excitement and precipitation amongst the society, or the person who acts in any way that could harm the national interests is punished with heavy imprisonment no less than five years.<sup>345</sup>

The reforms came to an impasse with the suppressive actions of the government: specifically the amended 1950 Press Code (1953) created the offence of criticising a minister and regulated that it could be investigated by a public prosecutor without the requirement of a complaint. 1954 amendments and the new law executed alongside “Crimes committed through publication and radio”<sup>346</sup> increased the penalty of imprisonment from six months to three years for publications that question the integrity, individuality, and reputation of one. Monetary penalties were imposed on journalists who committed these crimes through publication. Huseyin Cahit Yalcin’s imprisonment for defamation against the PM, based on this law, is one example of its use.<sup>347</sup> Yalcin received 26 months of imprisonment, which was also approved by the Court of Appeal. However, Yalcin was released after 26 days due to extreme health conditions and as a result of heavy criticism from domestic and international sources.<sup>348</sup> Baban also criticised the legislation and stated that this law was a result of the PM’s temperament that did not easily tolerate views against DP’s operations and aimed to eliminate the critical views that were galvanising before the 1954 elections.<sup>349</sup> These suppressive policies of the government attracted international attention and led to criticism by international bodies such as International Press Institute (IPI),

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<sup>344</sup> Korkmaz Alemdar, *İletişim ve Tarih/Communication and History* (Imge Yayınevi, 1996) 131

<sup>345</sup> Ibid., 65

<sup>346</sup> Crimes committed through publication and radio (Nesir Yoluyla Veya Radyo ile İslenecek Bazı Cürümler Hakkında Kanun) 9 March 1954 Law no. 6334

<sup>347</sup> Yalcin Dogan Çetinkaya, *Modern Türkiye’de Siyasi Düşünce-3: Modernleşme ve Batıcılık/Political Thought in Modern Turkey-3: Modernisation and Westernism* (İstanbul: İletişim Yayınları, 2002)

<sup>348</sup> Nuran Yıldız, ‘Demokrat Parti İktidari (1950-1960) ve Basın/Democrat Party Power(1950-1960) and the Press’ 1960) Ankara University Seminar Paper, Turkey’s Political Problems 481

<sup>349</sup> Cihad Baban, *Politika Galerisi (Bustler ve Portreler)/Galery of Politics(Busts and Portraits)* (Remzi Kitabevi, 1970) 148

which expressed its concerns on the situation of the press freedom in Turkey and urged the government to improve the conditions of journalists.<sup>350</sup> However, such international reaction was seen as a threat to the internal affairs of Turkey by the PM Adnan Menderes.<sup>351</sup> This author observes that democratisation promises that prioritised the freedom of the press when DP first came into power in 1950 show similarities to the way the current Justice and Development Party came into power. Similarly, the sensitivities and undemocratic approaches adopted by the former AKP leader, current President R.T. Erdogan,<sup>352</sup> shows similarities to Menderes' reactions toward the democratic demands of people and the press, representing the typical manner of political approaches to criticism and the extent of political toleration to opposition in Turkey.<sup>353</sup> The present author concludes that the PM Adnan Menderes' dubious approach to criticism and his perception of opposing ideas as a threat to the regime and the political power of his government is based on the political ideology that prioritises the security of the state rather than the individual rights and freedoms. The result of the top-down approach to the democratisation process that could not be internalised by political agents, leading to the censorship and self-censorship of the press.

The 1954 elections, were considered DP's first test after four years of governance. The step taken by PM Menderes to execute this law allowing censorship of the press on reporting against the government, not only led to an escalation of pressure on the press but also caused a controversy within the DP. A group of MPs resigned over this law and formed a new party called the Liberal Party.<sup>354</sup> The main reason for the resolution was the highly disputed proposal of the regulation of the law on the right to prove,<sup>356</sup> which essentially aimed to regulate a journalist's right to prove his/her statement in a case if she/he faced a lawsuit.<sup>357</sup> The actual aim of the amended law was to increase the punishment by one third or half.<sup>358</sup> However, it was described by Menderes as being

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<sup>350</sup> Fuat Sureyya Oral, *Türk Basın Tarihi 1919 -1965/Turkish Press History 1919-1965* (Yeni Adım Matbaası, 1968)

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<sup>351</sup> Ibid.

<sup>352</sup> See Chapter 4 for elaborate analysis.

<sup>353</sup> Recep Tayyip Erogan's reactions to the opposition press is thoroughly examined in Chapter 4.

<sup>354</sup> Original name: Hürriyet Partisi

<sup>355</sup> Tevfik Cavdar, *Türkiye'nin Demokrasi Tarihi 1950-1955/Turkey's History of Democracy 1950-1955* (İmge Kitabevi, 2000) 67

<sup>356</sup> Ayşe Elif Kaya, 'Demokrat Parti Doneminde Basın - İktidar İlişkileri/Press and Government Relationship in Democrat Party Period' (2010) 39 İletişim Fakültesi Dergisi 99

<sup>357</sup> Nuran Yıldız, 'Demokrat Parti İktidarı (1950-1960) ve Basın/Democrat Party Power(1950-1960) and the Press' (1960) Ankara University Seminar Paper, Turkey's Political Problems 481, 493

<sup>358</sup> Cem Eroğlu, *Demokrat Parti Tarihi ve İdeolojisi/Democrat Party and Its Ideology* (İmge Kitabevi, 2003) 61

protective of the citizens' honours, personal rights and freedoms, which were, according to him, violated by the press.<sup>359</sup>

Also, the amended Press Code in 1956 forbade the publication of parliamentary group discussions.<sup>360</sup> Furthermore, persons who had been imprisoned for more than six months could not become newspaper managers, this was clear evidence of the changing habits of the government's approach to the freedom of the press. Opposing views were not only penalised but also forced outside the profession. The government's most appreciated accomplishment by the journalists, whose support was criticised for advancing the party into the multi-party arena, was shaded by the government's intolerance of opponent ideas. The DP put an embargo on reporting the events or protests that took place against the government, and journalists who did not obey the embargo were sent to Ankara high security prison. The same legislation also raised the number of years and the amount of monetary penalties given to journalists who allegedly insulted others' reputation and honour.<sup>361</sup> It is observed by this author that reporting on events and protests against the government is still one of the most censored and silenced subjects. The Gezi protests which are discussed in Chapter 4 are a current example of journalists being imprisoned and sacked for similar reasons as during the DP period in the 1950s / 60s. On both occasions it was the government's ingrained lack of political toleration that is caused by the official state ideology which resulted in severe restrictions being placed on the individual rights and freedoms of journalists.

The course of these events led to the government taking extreme actions toward the press, and in between the years of 1955-1960, 867 journalists were imprisoned as a result of 2300 press trials.<sup>362</sup> Huseyin Cahit Yalcin, who was the first journalist imprisoned, accused for his articles in *Halkci* newspaper in 1954.<sup>363</sup> He was followed by veteran journalists Cemal Saglam, who received a sentence of sixty five months of imprisonment, Nihat Erim, who received a heavy fine of 35,222 Turkish Lira, the owner of *Millet* newspaper Fuat Arna, who was sentenced to eight months of

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<sup>359</sup> Mustafa Tokmak, 'Basin-İktidar İlişkileri Çerçevesinde Demokrat Parti Ve Ankara Radyosu/*Democrat Party and Ankara Radio in Relation to Press and Government Relations*' (Master Thesis, Hacettepe Üniversitesi Atatürk İlkeleri Ve İnkılap Tarihi Enstitüsü, 2007)

<sup>360</sup> Nuran Yildiz, 'Demokrat Parti İktidari (1950-1960) ve Basın/*Democrat Party Power(1950-1960) and the Press*' 1960) Ankara University Seminar Paper, Turkey's Political Problems 481, 494

<sup>361</sup> Cem Erogul, *Demokrat Parti Tarihi ve İdeolojisi/Democrat Party and Its Ideology* (İmge Kitabevi, 2003) 61

<sup>362</sup> Orhan Kologlu, *Osmanlı'dan Günümüz Türkiye'de Basın/Press in Turkey From Ottoman Until Today* (İletişim Yayınları, 1992) 69

<sup>363</sup> Huseyin Cahit Yalcin was a critical journalist, author and politician. He was a member of parliament until 1954; however, his parliamentary immunity was canceled because of his article in *Ulus* newspaper in 1952, and because he published the articles against the policies of DP, he was charged twenty-six months imprisonment for defamation.

imprisonment, and Bedii Faik, Metin Toker, Cuneyt Arcayurek, Nizamettin Nazif, and Orhan Gokce, who were arrested with the allegations of defamation against Mukerrem Sarol who was a minister of state. Because of this extreme situation, Journalists Union held a meeting and suggested that making amendments to the Press Code was a necessity in support of press amnesty. Considering the “possible” effects this declaration could have on the courts where the journalists’ trials were being seen, the government claimed it constituted a crime.<sup>364</sup>

### 3.4.5 Underlying reasons for the DP’s change of attitude towards the press

Apparently, the government, instead of paying attention to the problems of the journalists in search of a solution, chose to strengthen its control over the press in response to other crucial events such as the Cyprus issue<sup>365</sup> and the 6-7 September incidents. The Turkish people were disturbed by the emergence of the Cyprus issue on the international platform, leading to negative reactions against the Greek people living in Turkey/Istanbul. Mass protests took place on the 6th of September 1955 against the news falsely reporting that Ataturk’s house in Selanique was partly harmed by a bombing. These protests turned into attacks against the houses and workplaces of Greek people living in Istanbul; shortly followed by attacks on churches and graveyards. The insufficiency of police interference and the wide social unrest caused by the attacks on the non-Muslim community in the 6-7 September incidents led to a declaration of martial law by the Democrat Party in Istanbul, Izmir, and Ankara, which brought about a phase of prohibitions, and harsh criticism from the opposition for failing to restore order. The newspapers that received embargoes were *Ulus*, *Hurriyet*, *Tercuman*, *Hergun*, *Medeniyet*, *Dunya* and *Vatan* which received daily orders on what to cover. In cases where such orders were considered to be insufficient by the DP, the newspapers were closed down.<sup>366</sup>

However, once the amendments to the press code were revealed, they were severely criticised for leading the country towards a “police state”; nevertheless, Menderes responded to

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<sup>364</sup> Ayse Elif Kaya, ‘Demokrat Parti Doneminde Basın - İktidar İlişkileri/Press and Government Relationship in Democrat Party Period ’ (2010) 39 İletişim Fakültesi Dergisi 101

<sup>365</sup> In 1950 Makarios the 3rd was elected as the Cypriot archbishop, which resulted in the acceleration of ENOSIS plans and the establishment of EOKA by the Greek Cypriots for the activation of ENOSIS. In return, Turkish Cypriots in 1957 formed the Turkish Resistance Organisation.

<sup>366</sup> Ayse Elif Kaya, ‘Demokrat Parti Doneminde Basın - İktidar İlişkileri/Press and Government Relationship in Democrat Party Period ’ (2010) 39 İletişim Fakültesi Dergisi 99

these arguments by defending the changes as being the only way to maintain social order.<sup>367</sup> Various segments of society were criticising the DP government for having authoritarian tendencies despite its success in the 1954 elections in which it won on 57.61% of votes. Its policies were found to be anti-democratic by scholars, journalists, and academics.<sup>368</sup>

### 3.4.6 Legislation no. 6733: “Lost freedom of the press”

At the end of martial law, which lasted for one year in Istanbul, (the base of most of the newspapers) the press faced another barrier to freedom of expression. Legislation no. 6733 included amendments to the previous legislation on “some offences committed through publication and radio” (Legislation no. 6334) and received a new name: “some offences committed through publication, radio or at meetings.”<sup>369</sup> The new law was seen as the abolition of press freedom by the journalists as highlighted by the International Press Institute (IPI), which claimed that such regulations were no different than martial law. Forbidding reporting news that could create panic among the society or any tension that takes place within the political party, giving more responsibilities to the press and imposing heavier punishments.<sup>370</sup>

Amendments regulated the scope of the rights to controvert and rebut, thus meeting the criteria for publishing responses and corrections were made more onerous for the press. It criminalised reporting confidential meetings, decisions made as a result of these meetings, and detailed explanations that could cause excitement in society that would impair moral order. It also compelled the publication of response and readjustment letters.<sup>371</sup> It forbade the publication of notes from confidential meetings, confidential investigation and judicial commentaries on these investigations.<sup>372</sup> Metin Toker, Yusuf Ziya Ademhan, Adnan Duvenci, Ziya Hanhan, Ratio Tahir Burak, Kasin Gulek, Ibrahim Cuceoglu, Sinasi Nahit Berker, and Nihat Subasi were among the

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<sup>367</sup> Mukerrem Sarol, *Bilinmeyen Menderes/The Unknown Side of Menderes* (Istanbul Kervan Press, 1983) 78, 679

<sup>368</sup> Nuran Yildiz, ‘Demokrat Parti Iktidari (1950-1960) ve Basın/Democrat Party Power(1950-1960) and the Press’ 1960) Ankara University Seminar Paper, Turkey’s Political Problems 481, 494

<sup>369</sup> Alpay Kabacali, *Baslangictan gunumuze Turkiye’de Basın Sansuru/Censorship of the Press From the Beginning Until Today* (Gazeteciler Cemiyeti Yayinlari, 1990) 172

<sup>370</sup> Hifzi Topuz, *Türk Basın Tarihi/Turkish Press History* (Istanbul: Gercek Yayınevi, 1972) 188

<sup>371</sup> Mustafa Albayrak, *Türk Siyasi Tarihinde Demokrat Parti (1946-1960)/Democrat Party in Turkish Politics (1946-1960)* (2nd ed. Phoenix Yayıncılık, 2004)

<sup>372</sup> Nuran Yildiz, ‘Demokrat Parti Iktidari (1950-1960) ve Basın/Democrat Party Power(1950-1960) and the Press’ 1960) Ankara University Seminar Paper, Turkey’s Political Problems 481, 498

journalists who were prosecuted in 1956 after the enactment of this law<sup>373</sup> for the “publication of notes taken from confidential meetings and leading to excitement that would disarray the morals and order of the society”. The DP government decided to enact this law after the journalists reported about confidential commission meetings in great detail.<sup>374</sup>

The discussions based on Legislation no. 6733 in the parliament revealed the view of PM Adnan Menderes, who stated that it was a mistake to give freedom to the press when he first came into power in 1950.<sup>375</sup> This declaration supports the previous observation of the present author that the DP allowed the rights and freedoms of the press to be used only in conditions that did not contradict the government and stayed in the borders of non-opposition.

Ahmad and Ahmad discuss the effects of this legislation and the stance of the PM as a solid ground for the self-censorship of the press because journalists avoided expressing their opinions on the matter.<sup>376</sup> Self-censorship was manifested by the journalists upon this legislation which was considered by Turan Gunes as “violent law that transforms the government into a police state.”<sup>377</sup> Another approach toward the journalists’ silence on the legislation came from Muserref Hekimoglu, according to whom the capital position of the press led to a reaction based on self-interest. Hekimoglu, in his criticism, wanted to attract attention to the fact that the newspaper owners were not interested in the rights and freedoms of the press, and therefore by definition not the people’s right to information but only reacted because the new law was against their financial interests. He stated that the newspaper owners could not join forces against the 6733 legislative provisions because they thought that if one newspaper decided to protest by not dispatching newspapers for some days, others would increase their circulation due to the lack of collaboration.<sup>378</sup>

The law about holding meetings and peaceful demonstrations, enacted in 1956, limited the operations of political parties by prohibiting them from holding meetings except during election

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<sup>373</sup> Mustafa Albayrak, *Türk Siyasi Tarihinde Demokrat Parti (1946-1960)/Democrat Party in Turkish Politics (1946-1960)* (Phoneix Yayincilik, 2004) 399

<sup>374</sup> Ayşe Elif Kaya, ‘Demokrat Parti Doneminde Basın - İktidar İlişkileri/Press and Government Relationship in Democrat Party Period’ (2010) 39 İletişim Fakültesi Dergisi 93, 112

<sup>375</sup> Alpay Kabacalı, *Baslangıçtan günümüze Türkiye’de Basın Sansuru/Censorship of the Press in Turkey from the Beginning Until Today* (Gazeteciler Cemiyeti Yayınları, 1990) 172

<sup>376</sup> Feroz Ahmad and Bedia Turgay Ahmad, *Türkiye’de Çok Partili Politikanın Açıklamalı Kronolojisi (1945 - 1971)/Multi Party Politics in Turkey and Its Chronological Analysis* (Bilgi Yayınevi, 1976) 153

<sup>377</sup> Alpay Kabacalı, *Türk Basınında Demokrasi/Democracy in Turkish Press* (Kültür Bakanlığı Milli Kütüphane Basımevi, 1994) 252

<sup>378</sup> Ayşe Elif Kaya, ‘Demokrat Parti Doneminde Basın - İktidar İlişkileri/Press and Government Relationship in Democrat Party Period’ (2010) 39 İletişim Fakültesi Dergisi 103

period<sup>379</sup> and gave police the authority to shoot<sup>380</sup> during the peaceful demonstrations that gathered without any prior permission needed.<sup>381</sup> It was heavily criticised by Osman Bolukbasi, who requested the DP to be honest with its intentions and openly declare the name of the new regime that was being formed<sup>382</sup> by the latest policies of the DP enforced by the controversial legal provisions.

### 3.4.7 Direct impact of the political insecurity on the freedom of the press

In 1957, the DP could not experience similar success as in previous elections. Winning the election, despite losing a considerable percentage of votes and the country's economic problems resulted in a government even more intolerant to criticism. The political insecurity of the DP caused by fear of a possible military intervention and DP's will to keep its political power had a direct impact on the freedom of the press. Throughout 1957, journalists faced physical violence as the police were given authority to cosh protestors including journalists who tried to cover and disseminate the incidents.<sup>383</sup> Sanctions and allowance cuts resulted in even heavier criticism from the opposition press.<sup>384</sup> Clashes between the opposition press and the DP led to an extensive suppressive climate in the country, and by 1957 the pressure on the press had reached its peak. As a result, between 1954 and 1958<sup>385</sup>, 1161 journalists were investigated and 238 of them were convicted.<sup>386</sup> It was forbidden for the press to cover the protests that took place in the country and to criticise the government's violent reactions. Between the years of 1957 and 1960, the DP's attempts

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<sup>379</sup> Toplantı ve Gosteri Yuruyusleri Hakkında Kanun/*Law on Meetings and Peaceful Protests* 1956/no.6761 s 1(2)

<sup>380</sup> Ibid. s 7(13)

<sup>381</sup> The Meeting and Demonstration Law was enacted in 28 June 1956. Accordingly, political parties were banned from holding meetings in the open air with the exception of election periods. Permission was obligatory and it would be received from a civilian authority; the police had the authority to open fire in order to dissolve the meetings.

<sup>382</sup> Osman Bolukbasi, *Türk Siyasetinde Anadolu Fırtınası/Anatolian Storm in Turkish Politics* (Dogan Kitapcilik, 2005) 214-215

<sup>383</sup> After the 1957 elections, Democrat Party and opposition party CHP relationships were tense, while CHP's leader İsmet İnönü joined forces with other opposition parties and led a harsh opposition against DP. As a result, DP enacted various anti-democratic legal regulations in order to silence the opposition and the press. In combination with economic problems within the country, DP adopted a governance, which led to a political crisis, segregation among the people which resulted in the 27 May 1960 military intervention. Sedef Bulut, 'Third Term Democrat Party Government (1957-1960): Political Repression and The Investigation Council' (2009) 2:4 Akademik Bakış 125

<sup>384</sup> Fuat Sureyya Oral, *Cumhuriyet Basın Tarihi 1923-1973/Republic's Press History 1923-1973* (Ankara, 1973) 194  
Hifzi Topuz, *Türk Basın Tarihi/Turkish Press History* (İstanbul: Remzi, 2003) 57

<sup>385</sup> Mustafa Tokmak, 'Basın-İktidar İlişkileri Çerçevesinde Demokrat Parti ve Ankara Radyosu/*Democrat Party and Ankara Radio in Relation to Press and Government Relations*' (Master Thesis, Hacettepe University 2007) 181

<sup>386</sup> Hifzi Topuz, *Türk Basın Tarihi/Turkish Press History* (İstanbul Gerçek Yayınevi, 1972) 194

to silence the opposition caused a greater reaction among the opposition groups, and the majority of the press that supported the DP in the first elections opposed the party during this period.<sup>387</sup> The oppressive behaviour of DP turned into violence toward the end of its third period, between 1957 and 1960, the police used physical violence against journalists, as a result the Union of Journalists was closed for six months for having criticised DP's policies.<sup>388</sup>

Finally, this author argues that DP's aim of democratisation in press functions before it came into power<sup>389</sup> formed suitable grounds for the press to fulfil its two crucial duties; namely, disseminating information and adopting the watchdog role in the initial years of the DP government. However, these roles of the press had started to be seen as a danger/threat toward its political power by the DP, which led to the censorship of the press.

### 3.4.8 The significance of the multi-party period for Turkey's democratisation

The 1950s and the DP period is significant in Turkish political history for being the first multi-party phase of Turkish politics considering that it formed the first step of democratisation in the country. However, the desired means of democracy was not established in the transition to the multi-party democracy, for since the DP was elected as the ruling party in 1950, the CHP used the military and bureaucratic aggression toward the DP, preventing smooth communication between the two parties.<sup>390</sup> DP's lack of toleration towards opposition, which became more apparent after the 1954 elections,<sup>391</sup> and the CHP's use of military power in case of the DP's "activation of

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<sup>387</sup> Sedef Bulut, 'Üçüncü Dönem Demokrat Parti İktidarı (1957-1960): Siyasi Baskılar ve Tahkikat Komisyonu/Third Term Democrat Party Government (1957-1960): Political Repression and The Investigation Council' (2009) 2:4 Akademik Bakış Journal

<sup>388</sup> Nusret Safa Coskun, *1960 Son Meclis ve 1950-1960 Siyasi Olayların İçyüzleri/Last Parliament of 1960 and the Inside Story of 1950-1960 Incidents* (Yeni Savas Matbaası, 1960) 4

<sup>389</sup> Cem Eroglu, *Demokrat Parti Tarihi ve İdeolojisi/Democrat Party and Its Ideology* (Ankara Imge Yayıncılık, 1990) 48

<sup>390</sup> Ilkay Sunar and Sabri Sayan, 'Democracy In Turkey: Problems and Prospects', in Guillermo O'Donnell, Phillippe C. Schmitter, Neil L. Whitehead (eds.) *Transitions from Authoritarian Rule: Experiences in Southern Europe* (Johns Hopkins University Press, 1986) 172

Feroz Ahmad, *The making of modern Turkey* (London and New York: Routledge, 1993) 103

<sup>391</sup> Dietrich Jung, 'Secularism: A Key to Turkish Politics' (2006) 14:2 Intellectual Discourse 129, 136

traditionalism”,<sup>392</sup> hindered democratisation and the establishment of liberal press standards in Turkey.

Finally, an analysis of this period demonstrates the direct effects of politics on freedom of the press in Turkey. The traditions on which the press was based during the formation of the Republic appears to have applied to the political reactions towards the press; despite the efforts of press liberalisation in the initial phases of its power, the DP did not show tolerance to opposition and chose to silence the press through the controversial legal provisions as observed above. The top-down approach of modernisation/democratisation also indicated that one of the fundamental criteria, “freedom of expression”, was not fully internalised even by the DP despite its ostensible democratic agenda and motives for improving the rights and freedoms of the press. However, the question remains whether the DP would cease pressure on the press or impose more challenges to the freedom of expression, without military intervention. Such a possibility is discussed in Chapter 4 based on AKP’s reactions to the press, who had started its political life with similar promises to the DP and made numerous democratic and judicial reforms with the motivation to accelerate the EU accession process. In order to understand fully the current issues experienced by the press in Turkey today, which attracts the attention of the international community, it is necessary to examine the historical elements more extensively. On that account, this chapter will continue exploring the influences of the military interventions on the press, which took place in ten year intervals in 1960, 1971, and 1980.

### **3.5 1960 military coup**

#### **3.5.1 Military pressure on DP**

Despite the liberal ideology DP adopted during the initial years of its power, the DP’s strict course of action in combination with TSK’s secularist concerns formed the grounds<sup>393</sup> for TSK’s

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<sup>392</sup> Ilkay Sunar and Sabri Sayan, ‘Democracy In Turkey: Problems and Prospects’, in Guillermo O'Donnell, Phillippe C. Schmitter, Neil L. Whitehead (eds.) *Transitions from Authoritarian Rule: Experiences in Southern Europe* (Johns Hopkins University Press, 1986) 173

Feroz Ahmad, *The making of modern Turkey* (London and New York: Routledge, 1993) 110

<sup>393</sup> Feroz Ahmad, *The making of modern Turkey* (London and New York: Routledge, 1993) 112

military intervention, which brought the end of the civil governance for a period of three years in Turkey. In relation to the press censorship during the DP government and its effects on the military coup, Arikanoglu suggests that “the first way of oppressing any opposition group was enactment and enforcing it on the press. The tension increased when the same methods were applied continuously and the issue was carried onto the international platform. The miscommunication and lack of mutual consultation resulted in the military coup in 1960.”<sup>394</sup>

The Commission of Inquiry (Tahkikat Komisyonu),<sup>395</sup> established in 1960 by the DP, was authorised to prevent the printing and distribution of newspapers and magazines that did not comply with the government-led embargo. The commission was also able to close down the publications that did not obey these decisions. The newspapers could no longer report on the sessions of parliament after the commission started to operate.<sup>396</sup> The special authority afforded to the commission was perceived by the opposition as pressure to silence the divergent ideas. Closures of the printing houses were used as a means of punishment.<sup>397</sup> The Commission of Inquiry lacked legitimacy because it clearly violated Article 20 of the Constitution, which states that “all sessions of parliament are open sessions.”<sup>398</sup> However, this clause did not prevent the government from interrogating editors, journalists, and the responsible persons of the printing houses with strong views against the government.<sup>399</sup> Through the last elections before the coup d’etat in 1960, when the government was facing rumours of a possible coup. The PM rejected taking steps to put the army out of action, for the high ranking officers<sup>400</sup> repeated their loyalty towards the government.<sup>401</sup> The PM’s rejection of taking action against the army was based on his trust in the credibility of these military officers but most importantly on his faith in the public’s support, which was revealed through the elections in 1950 (55,2%), 1954 (57,61%), and 1957 (47,87%). The PM, based on

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Eric J. Zürcher, *The Young Turk Legacy and Nation Building - From the Ottoman Empire to Atatürk's Turkey* (London and New York: I.B.Tauris & Co Ltd. 2010) 272

<sup>394</sup> Naim Arikanoglu, ‘Democrat Party - Press Relations’ (2014) 15:1 IJSBAR 311, 322

<sup>395</sup> The Commission of Inquiry was established by the Democrat Party on 18 April 1960 to control the opposition and press operations. The commission was authorised to investigate the opposition and the press’s functioning.

<sup>396</sup> Ayşe Elif Kaya, ‘Demokrat Parti Doneminde Basın - İktidar İlişkileri/Press and Government Relationship in Democrat Party Period’ (2010) 39 İletişim Fakültesi Dergisi 107

<sup>397</sup> Zuhtu Arslan, ‘Türk Parlamento Tarihi/Turkish Parliamentary History’ (1957-1960) 156:1 TBMM Kültür, Sanat ve Yayın Kurulu Yayınları

<sup>398</sup> Turkish Constitution 1924, s 2(20)

<sup>399</sup> Alpay Kabacalı, *Türk Basınında Demokrasi/Democracy in Turkish Press* (Kültür Bakanlığı Milli Kütüphane Basımevi, 1994) 167-268

<sup>400</sup> The 1960 military intervention was the first coup in Turkish Republic’s history. It did not follow the chain of command and was initiated and done by lower ranked members of the army.

<sup>401</sup> Mehmet Ali Birand, Bulent Çaplı and Can Dundar, *Demirkırat Bir Demokrasinin Doğusu/Birth of a “Demirkırat” Democracy* (Dogan Kitapçılık, 2005) 101

public's support, rejected the suggestions by the DP's plenary assembly for a revision in the cabinet, the motion given by 90 MPs to abolish the commission of inquiry ;— to call for an early election and to take action against the tension within the army toward the DP.<sup>402</sup> Finally, putting an end to the highly controversial Commission of Inquiry's operations. The government failed to prevent military intervention, which took place on the 27th of May 1960 based on strong secularist concerns. The Turkish army/military removed the DP from power<sup>403</sup> by declaring a coup d'état over the radio made by Alparslan Turkes (who then became the leader of Nationalist Movement Party between 1969-1997).

It is fair to argue that social and economic unrest, which started to take place in 1954, also contributed greatly to the coup d'état in 1960. Internal and external national debt disbursements were delayed, and the DP government had built the economy on the external national debts and credits raised by USA.<sup>404</sup> A group of DP supporters in the army lost enthusiasm for the DP after the government's decision to change the language for the call to prayer from Turkish to Arabic and the harassment of the CHP party leader Ismet Inonu (whom the army held in great esteem) by the Democrat Party members. The army was also nervous about the DP's intention to merge military and civil court authorities (jurisdiction).<sup>405</sup>

Stagnation of manufacturing trade and a foreign exchange shortage, concurrent with the 6-7 September (1955) incident, had an impact on the growing unrest within the government and the country. Another reason put forward by the army to bring the DP down, was the DP's decision to join the Korean War. However, this decision was not opposed by any institution in Turkey except CHP whose objection was based on the fact that it was decided without consulting the parliament.<sup>406</sup> The Prime Minister Adnan Menderes, as a result of these developments and the rising tension within the DP, lost the support of his cabinet. The fear of a military intervention alongside losing the support of his party led the PM to take measures to protect himself and his party's power. This formed one of the reasons why the government, with the addition of two more articles to the 1954 Press Code, aimed to prohibit opponent publications, and as a result journalists such as Mertin

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<sup>402</sup> Cem Eroglu, *Demokrat Parti Tarihi ve Ideolojisi/Democrat Party History and its Ideology* (Imge Kitabevi, 2003) 249

<sup>403</sup> Dietrich Jung and Wolfango Piccoli, *Turkey at the Crossroads: Ottoman Legacies and a Greater Middle East* (London: Zed Books, 2001)

<sup>404</sup> Mehmet Ali Birand, Bulent Capli and Can Dundar, *Demirkirat Bir Demokrasinin Dogusu/Birth of a "Demirkirat" Democracy* (Dogan Kitapcilik, 2005) 74

<sup>405</sup> Ibid., 77

<sup>406</sup> Ibid., 64

Toker, Ulku Arman, and Bethan Cenkci were imprisoned based on their opponent articles in various newspapers.<sup>407</sup>

After the coup, Prime Minister Adnan Menderes, Fatin Rustu Zorlu, and Hasan Polatkan were executed by the military. Their execution was based on Turkish Penal Code Article 146 which regulated high treason<sup>408</sup> by “any person who attempts to change or revoke the Fundamental Organisation Act (the Turkish Constitution) partly or fully, or attempts to dissolve the Turkish Grand National Assembly. Partially or entirely avoids performance of the legislative organs by using force or threat, is punished with the death penalty.”<sup>409</sup> This execution proves the undeveloped democracy in Turkey,<sup>410</sup> for the Court’s decision contradicts the 1924 Turkish Constitution Article 17 that protects the “parliamentary immunity”: “no member of parliament is liable for his/her vote within the Parliament, deliberation and declaration. No member of parliament is liable for proceedings based on his/her deliberation within the Parliament, outside of the Parliament.”<sup>411</sup>

Continuing its role as self-appointed protector of secularism and democracy, the Turkish military once again followed the top-down approach to democratisation, ironically, interfering with democratically elected political party operations. This irony was expressed by Ahmad’s claim that “the army intervened and destroyed democracy in order to save it.”<sup>412</sup>

Heper and Tachau suggest that securing the homogeneity of the population with the focus on protecting “Turkishness” has been the self-appointed duty of the Turkish military (TSK). On these grounds, their political influence is emphatic. Observing the number of convicted journalists who report on the Kurdish issue in Chapter 3, the TSK’s emphasis on “Turkishness” and the civilian governments in the following years of the modern period in Turkey, precipitating the suppression of any other ethnic or otherwise identity,<sup>413</sup> becomes obvious.

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<sup>407</sup> Cem Eroglu, *Demokrat Parti Tarihi ve Ideolojisi/Democrat Party and Its Ideology* (Imge Kitabevi, 2003) 192-193

<sup>408</sup> Turkish Penal Code 1926/no.765 s 2(146)

<sup>409</sup> Zeliha Hacimuratlar, ‘Hukuk Politika Adalet Iliskisi Acisindan Yassiada Yargilamalarina Bir Bakis/An Analysis of Yassiada Trials In Light of Politics and Justice’ (2008) 3 Ankara Barosu Dergisi 82-89

<sup>410</sup> Ertugrul Mavioglu, *Apoletli Adalet-Bir 12 Eylul Hesaplamasi/Democracy of Epaulets-Clearance of 12 September* (Istanbul: Ithaki, 2006) 19

<sup>411</sup> The Constitution of the Republic of Turkey 1924/no.491 s 2(17)

<sup>412</sup> Feroz Ahmad, *The Turkish Experiment in Democracy, 1950-1975* (Boulder, CO: Westview Press, 1977) 118

<sup>413</sup> Frank Tachau and Metin Heper, ‘The State, Politics and the Military in Turkey’, (1983) 16 Comparative Politics, 27

### 3.5.2 Effects of the coup d'état on press freedom

The press, which played a crucial role in DP's accession to power in 1950, was supporting the opposition (CHP) in 1960 through provocative publications against the government.<sup>414</sup> The press did not take a stance against the military intervention but rather supported the coup d'état,<sup>415</sup> because it considered the military coup as a necessity for the improvement of its conditions. The newspapers that criticised the military intervention, however, were censored and closed down.

The 1961 Constitution was enacted as a result of the ruling politicians' will to adopt a democratic political system, a new constitution incorporated individual rights, civil liberties and freedom to form associations.<sup>416</sup> Freedom of the press was regulated by Article 22 accordingly:

The press is free; must not be censored. The state takes the necessary measures to allow the freedom of the press and the right to information. Freedom of the press and the right to information can only be restricted on the basis to protect national security, morals in the society, reputation of individuals, to prevent the provocation to crime and for the appropriate operation of the judiciary, by law. Embargo cannot be brought on the press for the judicial operations unless it is stated by law for the appropriate operations of the judiciary. Suppressing the papers can only be allowed by the Court's decision, based on law which regulated the prevention of crimes stated above. Newspapers and magazines in Turkey can only be ceased based on the conviction of the crimes regulated in the article 57 with the Court's decision.<sup>417</sup>

The most striking freedom endorsed by the 1961 constitution was the freedom held by the leftist groups to be able to form parties, giving way to a different/new political ideology other than the one pre-dominantly applied since the establishment of the Republic.<sup>418</sup> Nevertheless, these legal changes found grounds in practice by the press, and political parties reserved the use of the new

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<sup>414</sup> Umit Ozdag, *Menderes Doneminde Ordu-Siyaset Iliskileri ve 27 Mayıs İhtilali/Military-Politics Relationship During Menderes' Period and 27 May Coup* (Boyut Yayın Grubu, 2004) 144-148

<sup>415</sup> Gurhan Savgi, 'Türkiye'de Askeri Darbeler ve Basının Tavrı (1946-1997)/Military Coups in Turkey and the Reaction of the Press' (Master Thesis, Istanbul University 2006)

<sup>416</sup> Feroz Ahmad, *The making of modern Turkey* (London and New York: Routledge, 1993) 129

<sup>417</sup> Suna Kili and A. Seref Gozubuyuk, *Türk Anayasa Metinleri (Senedi İttifaktan Günümüze)/Turkish Constitution Texts (from the Charter of Alliance Until Today)* (2nd ed. Türkiye İş Bankası Kültür Yayınları, 2000) 179

<sup>418</sup> Feroz Ahmad, *Turkey - The Quest for Identity* (Oxford: Oneworld Publications, 2003) 127

civil rights and liberties for the benefit of their governments or the state.<sup>419</sup> Yet again indicating the harm caused by the mindset that prioritises the state interests rather than the protection and promotion of individuals rights and freedoms, to benefit society and the inconsistency between the language of law and its application.

On another note, it is important to discuss the role of the press owners on the censorship of the press due to the monopolisation within the press sector, given that newspapers were owned no longer by journalist families but by business monopolies. A most telling example of this is the “nine boss incident” that took place in 1961 after the Law no. 212 on Opinion Workers<sup>420</sup> had been passed. It is possible to see from this example that as the law enlarged the limits of press freedom, the press owners were not satisfied with the new regulations and therefore decided not to publish their newspapers for three days. Law no. 212 was enacted on 10 January 1961, which regulated the journalists’ rights as “workers of ideas” with amendments and additions to the Law no. 5953 regulating “The relations between the ones who work for press and the owners.” Newspaper owners protested the law and tried to prevent its enactment. On the 10th of January 1961, the newspapers *Akşam*, *Cumhuriyet*, *Dünya*, *Hürriyet*, *Milliyet*, *Tercüman*, *Vatan*, *Yeni İstanbul*, and *Yeni Sabah* published a common declaration stating that the newspapers will be closed for three days. In opposition to this, Istanbul Journalists Federation started publishing a newspaper called “The Press” in order to communicate to readers the message that they did not agree with this closure. “The Press” was published between 11 January to 14 January with the message: “freedom to the press”, which follows:

The newspaper owners who did not decide to close down their newspapers even during the dark days where our basic rights and freedoms are seriously restricted will not be remembered well in history for closing down for three days as a reaction to the legal provisions in question.<sup>421</sup>

The disagreement between the press owners and press workers and the different focus points of their reactions (press owners prioritising their interests rather than the rights and freedoms

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<sup>419</sup> Ilkay Sunar and Sabri Sayan, ‘Democracy In Turkey: Problems and Prospects’, in Guillermo O'Donnell, Phillippe C. Schmitter, Neil L. Whitehead (eds.) *Transitions from Authoritarian Rule: Experiences in Southern Europe*, (Johns Hopkins University Press, 1986) 176

<sup>420</sup> Original name: Fikir Iscileri Kanunu

<sup>421</sup> Hifzi Topuz, 2. Mahmut'tan Holdinglere Türk Basın Tarihi/*Turkish Press History From 2. Mahmut to the Holdings* (Remzi Press, 2003) 232

of the press workers), sets in relief the importance given to the ethics and people's right to information. This also appears to become one of the main problems facing the press in Turkey. Since the media ownership has seemed solely based on making business, the journalistic concerns have been sidelined. This has had profound negative effects on the democratisation process of the country because the press owners were not willing to protect their workers' and people's right to information as much as they did their own economic interests.

However, the press owners were under strict control of the government as their paper allocation were decided by the DP. The government halved the paper allocation of *Hurriyet*<sup>422</sup> for reasons such as tension between the owner of the newspaper and the government.<sup>423</sup> These politically driven decisions and limitations created an economic burden on the owners, who were left with no choice but to support the government, or at least not to oppose its policies. The approach of the press that was desired by the government was summarised by the Manisa MP of DP, Sezai Akdag: "it was unacceptable that even the newspapers such as *Izmir*, *Hurriyet* and *Cumhuriyet*, who were given tons of paper and ink and advertisements were strongly criticising the government."<sup>424</sup>

### **3.6 Political and ideological changes before, during and after 1971: the second military intervention into politics**

The transition to civilian rule after the 1960 military intervention into politics changed the shape of politics in Turkey.<sup>425</sup> Such intention revealed itself clearly in the 1960s and 1970s when Turkish politics experienced a shift from the dominance of two political parties into a multi-party coalition period.<sup>426</sup>

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<sup>422</sup> Irem Barutcu, *Babiali Tanriları. Simavi Ailesi/Gods of Babiali Simavi Family* (Agora Kitaplığı, 2004) 63

<sup>423</sup> Cihad Baban, *Politika Galerisi (Bustler ve Portreler)/Gallery of Politics (Busts and Portraits)* (Remzi Kitabevi, 1970) 311

<sup>424</sup> Mustafa Albayrak, *Türk Siyasi Tarihinde Demokrat Parti (1946-1960)/Democrat Party in the Turkish Politics (1946-1960)* (Phoneix Yayınevi, 2004) 401-402

<sup>425</sup> Frank Tachau, 'Turkish Political Parties and Elections: Half a Century of Multi Party Elections' 1:1 (2000) *Turkish Studies* 128, 134

<sup>426</sup> *Ibid.* 128, 135

In the 1961 elections, notwithstanding that the military preferred the CHP as the only party, the CHP had to form a coalition with the DP's successor, namely the Justice Party (AP).<sup>427</sup> Needless to say, the TSK was not satisfied with this result and maintained heavy control of the politics. Constitutional changes allowed military officers to be in close communication with civilian rulers under the aegis of the National Security Council, which was formed to put the civilian politician under the responsibility of taking the military commanders' views on security matters into consideration when making decisions. As the broad definition of "security" included possible domestic and international threats, it is fair to argue that the commanders had control over a wide range of political and social issues.<sup>428</sup>

TSK's control over politics became apparent when "the military ultimatum", widely known as 12 March Memorandum (coup by memorandum) was declared. This declaration was justified by the military based on the fact that democracy was disrupted by the problems in forming the government,<sup>429</sup> as Demirel's (AP) and Ecevit's (CHP) refusal to cooperate, fuelled partisanship among the masses.<sup>430</sup> More crucially, the left-right wing student clashes, which took a violent turn, could not be combatted by PM Demirel, and were even worsened by his government's inefficiency.<sup>431</sup> The political pressure Suleyman Demirel felt was based on the 1960 coup that took down the previous prime minister Adnan Menderes, who chose to deal with student clashes roughly.<sup>432</sup> The TSK argued that the intervention was necessary for the protection of ideological integrity within the country.<sup>433</sup> As a result, the second military intervention, which was designed to defeat the leftist movement, once more reversed the democratisation process in the country. The 1961 Constitution was amended, on the basis that the civil and political freedoms it embraced could not effectively be 'controlled' by the political elites.

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<sup>427</sup> George S. Harris, 'Military Coups and Turkish Democracy, 1960-1980 (2011) 12:2 Turkish Studies 203, 205

<sup>428</sup> Ibid. 203, 205

<sup>429</sup> Ilkay Sunar and Sabri Sayan, 'Democracy In Turkey: Problems and Prospects', in Guillermo O'Donnell, Phillippe C. Schmitter, Neil L. Whitehead (eds.) *Transitions from Authoritarian Rule: Experiences in Southern Europe* (Johns Hopkins University Press, 1986) 179

<sup>430</sup> Frank Tachau, 'Turkish Political Parties and Elections: Half a Century of Multi Party Elections' 1:1 (2000) Turkish Studies 128, 137

<sup>431</sup> Feroz Ahmad, *Turkey - The Quest for Identity* (Oxford: Oneworld Publications, 2003) 132

<sup>432</sup> Muhsin Batur, *Anılar ve Gorusler: Uc Donemin Perde Arkasi/Memories and Commentaries: Inside Story of the Three Period* (Istanbul: Milliyet Yayinlari, 1985) 183-185

<sup>433</sup> Feroz Ahmad, *The making of modern Turkey* (London and New York: Routledge, 1993) 148

Ergun Ozbudun and Omer F. Genckaya, *Democratization and the Politics of Constitution-Making in Turkey* (Central European University Press, 2009) 18

The changes made to Article 22 of the 1961 Constitution introduced broad and vague terms that related to the restriction of the press. The changes regulated that “the press and the right to information can only be restricted by law in order to protect the integrity of the country, the nation, public peace, morals, national security, privacy, and to prevent defamation against one’s personal rights and freedoms. Also, to prevent encouragement of crime and to ensure the effective functioning of the judiciary.”<sup>434</sup>

1971 saw changes to the 5th and the 6th clauses of Article 22 allowing the seizure of newspapers and magazines as well as their closure on the authority of a court’s decision. A decision based on the determination of a perceived threat to the integrity of the country and the nation, public peace and order, and general moral and national security.<sup>435</sup>

These changes restricted the 1961 Constitution’s press-related articles which were argued to involve one of the most detailed and liberal regulations on freedom of the press in the world.<sup>436</sup> The 1961 Constitution Article 22 regulated that the press and the right to information could not be restricted even by law and no embargo (unless exceptions are clearly specified) could be put on publications, newspapers and magazines could not be seized in principle.<sup>437</sup>

As a result of the 12 March military memorandum, Demirel resigned and military rule continued until the 1973 elections during which Demirel’s party (AP) was not prevented by the military from joining.<sup>438</sup> Following that, between 1973 and 1977, Turkey was run by coalition politics; the Justice Party (AP), under the leadership of Demirel, lost support, and despite the majority of the votes earned by the CHP in 1977, it continued its opposition role as it experienced difficulty finding a coalition party, while the AP formed a coalition with the right wing parties<sup>439</sup>, lasting for three years.<sup>440</sup> While there was a clear divergence between the AP and CHP in terms of right and left ideologies, two new parties from the right emerged, namely Nationalist Action Party (MHP) and the National Salvation Party (NSP). Although the majority of the voters supported the

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<sup>434</sup> Law no. 1488 (20/09/1971) that changed 1961 Constitution Article 22/3

<sup>435</sup> Law no. 1488 (20/09/1971) that changed 1961 Constitution Article 22/5

Law no. 1488 (20/09/1971) that changed 1961 Constitution Article 22/6

<sup>436</sup> Sulhi Donmezer and Koksall Bayraktar, *Basin Hukuku/Press Law* (Istanbul Beta Yayinlari, 2013) 201

<sup>437</sup> Ibid. 202-203

<sup>438</sup> George S. Harris, ‘Military Coups and Turkish Democracy, 1960-1980 (2011) 12:2 Turkish Studies 203, 206

<sup>439</sup> Frank Tachau, ‘Turkish Political Parties and Elections: Half a Century of Multi Party Elections’ 1:1 (2000) Turkish Studies 128, 135

<sup>440</sup> Ali Carkoglu, ‘The Turkish Party System in Transition: Party Performance and Agenda Change’ (1998) XLVI Special Issue Political Studies 544-571

CHP and AP, political and ideological polarisation in the country led to clashes between the extreme left and extreme right ideologies towards the end of the 1970s.<sup>441</sup> The execution of Deniz Gezmiş, Hüseyin İnan and Yusuf Aslan (prominent left-wing political figures who were committed Marxist-Leninists and enjoyed widespread support among students and other members of society) in 1972, indicated the anti-leftist intentions of the 1971 military intervention.<sup>442</sup>

Tachau explains the background of the 1980 military coup by highlighting the escalated tension between the CHP and AP under the leadership of Bülent Ecevit and Süleyman Demirel. The reflection of this ideological division between these two leaders and/or parties, and the mounting tensions in the streets based on ethnic (Turkish-Kurdish), religious (Alevi-Sunni) and ideological differences (extreme left and right) that could not be effectively dealt with by the government.<sup>443</sup>

### 3.7 1980 Military Coup

Despite the civil violence, economic breakdown, and high rate of political killings (as high as twenty killing per day during the first half of 1980<sup>444</sup>), the military intervention took place based on TSK's secularist concerns. The National Salvation Party was considered to be a clear threat to the secular movement and the aim of democratisation in Turkey,<sup>445</sup> especially after the party organised a politically provocative gathering during which brimless headgear, which was forbidden, was worn and participants refused to sing the national anthem. What precipitated the 1980 Military Coup was the failure of the coalition regimes. However, the National Salvation Party, which had religious orientations under the leadership of Necmettin Erbakan, was one of the main concerns of the Generals. This concern was based on NSP's success in the political arena in the 1970s as it formed the coalition with a number of governments during this period. The party under the leadership of Erbakan received the support of mostly conservative business people because it emphasised industrialisation as well as providing voters from poorer backgrounds with an assurance

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<sup>441</sup> Frank Tachau, 'Turkish Political Parties and Elections: Half a Century of Multi Party Elections' 1:1 (2000) Turkish Studies 128, 136

<sup>442</sup> Michael M. Gunter, 'The Kurdish Problem in Turkey' (1988) 42:3 The Middle East Journal 389, 393

<sup>443</sup> Frank Tachau, 'Turkish Political Parties and Elections: Half a Century of Multi Party Elections' 1:1 (2000) Turkish Studies 137-138

<sup>444</sup> Frank Tachau and Metin Heper, 'The State, Politics and the Military in Turkey' (1983) 16:1 Comparative Politics 17, 25

<sup>445</sup> Feroz Ahmad, *The making of modern Turkey* (London and New York: Routledge, 1993) 181

of social welfare by cutting down inflation.<sup>446</sup> The dangers that, according to the Generals' view, were threatening Atatürk's principles were NSP's potential to shape education and foreign policy with a religious agenda that seemed against secular national and state interests.<sup>447</sup> These concerns, combined with the ineffective policies of the government to disentangle the violence in Southeastern Turkey, created the impression among the senior military officers that the civil governance was unable to sustain order<sup>448</sup>. The armed radical right and leftist groups and the conflicts between them were seen as a threat to Turkey's territorial integrity that needed to be combatted.<sup>449</sup> These were considered to be sufficient reasons for the 1980 military coup to take place. Most importantly, the military officers did not consider the government authority sufficient due to the 1961 Constitution, which lacked efficiency in terms of providing authority to the governments despite the amendments in 1971<sup>450</sup>. As discussed by Tachau and Heper, Governmental authority was of great importance to Turkey's political culture.<sup>451</sup> Finally, NSP were closed as a result of the military intervention.<sup>452</sup>

It was the longest period of military rule, for after the coup the military stayed in power for three years until Kenan Evren was "elected" president for seven years during which he was authorised extensive political powers, which could not be subject to any judiciary action.<sup>453</sup> This allowed the strengthening of executive powers against the judiciary. Accordingly, the new Constitution adopted in 1982 included Article 15, which stated that "no allegation of unconstitutionality can be made in respect of laws, law-amending ordinances and act and decisions taken in accordance with the law numbered 2324 on the law of the constitutional order."<sup>454</sup>

The most crucial difference between the 1980 military coup and the 1960 and 1971 military interventions is the intention of the military to maintain its power; this was based on the intention to change the attitudes that caused the perceived climate of anarchy that dominated the country in the

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<sup>446</sup> Binnaz Toprak, 'Secularism and Islam: The Building of Modern Turkey' (2005) 15 *Macalester International* 27, 38

<sup>447</sup> George S. Harris, 'Military Coups and Turkish Democracy, 1960-1980 (2011) 12:2 *Turkish Studies* 203, 209

<sup>448</sup> Ibid.

<sup>449</sup> Eric J. Zürcher, *Turkey - A Modern History* (London and New York: I.B.Tauris & Co Ltd., 2004) 263

Eric J. Zürcher, *The Young Turk Legacy and Nation Building - From the Ottoman Empire to Atatürk's Turkey* (London and New York: I.B.Tauris & Co Ltd., 2010) 280

<sup>450</sup> Frank Tachau and Metin Heper, 'The State, Politics and the Military in Turkey' (1983) 16:1 *Comparative Politics* 17, 26

<sup>451</sup> Ibid.

<sup>452</sup> Binnaz Toprak, 'Secularism and Islam: The Building of Modern Turkey' (2005) 15 *Macalester International* 27, 38

<sup>453</sup> Eric J. Zürcher, *Turkey - A Modern History* (London and New York: I.B.Tauris & Co Ltd., 2004) 281

<sup>454</sup> Republic of Turkey Constitutional Court 1982 s 2(15)

late 1970s. In light of this context, it is possible to argue that as opposed to the 1960 military intervention, the 1980 military coup brought about a state-centric ideology with heavy political controls which meant reverting to the centralisation of power.<sup>455</sup> The 1980 coup established a period of demanding obedience — the consequence of rewritten political rules, a new constitution, new Political Parties Act and a new election law.

One of the initial actions was to make changes in the Martial Law, authorising Martial Law commanders to apply heavy restrictions on the press Article 3(c) allowed military officers to control any sort of publication made by any means; they could limit, seize, censor, or close the publication, including any sort of magazine, newspapers and books.<sup>456</sup> In 1982, amendments made to the same law enacted an additional requirement of permission for the publication of magazines and newspapers.<sup>457</sup>

The country was under the governance of the Chief of the General Staff General Kenan Evren, who became the Chief of State as head of the National Security Council with expanded powers, and the Navy Chief Bulend Ulusu who was appointed Prime Minister. As the military took control, all political activity was forbidden and the political party leaders were put under restraint. The 1982 constitution allegedly aimed to give the electorate freedom of expression.<sup>458</sup> Ironically, it was the 1982 Constitution that set the 10% threshold (in European countries such threshold changes between 0% and 5%) that blocks the minor parties from gaining seats in parliament. In practice, the first time this threshold was not applied, was during the elections of 1 November 2015.

The Turkish constitution that is in force today was drafted and implemented in 1982, and was written under the directions of military officials based on the intentions explained above. It therefore differed significantly from the 1961 Constitution, which was based on liberal ideas.<sup>459</sup> Similarly, the 1950 Press Code was amended, collective press courts were abolished, and foreign publications were subject to stricter restrictions under the inspection of the Council of Ministers.<sup>460</sup>

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<sup>455</sup> Ilkay Sunar and Sabri Sayan, 'Democracy In Turkey: Problems and Prospects', in Guillermo O'Donnell, Phillippe C. Schmitter, Neil L. Whitehead (eds.) *Transitions from Authoritarian Rule: Experiences in Southern Europe* (Johns Hopkins University Press, 1986) 184

<sup>456</sup> Martial Law no. 1402/1980 Official register Vol. 17112 (21/09/1980)

<sup>457</sup> Martial Law no. 1402 Official register Vol. 17914 (31/12/1982)

<sup>458</sup> George S. Harris, 'Military Coups and Turkish Democracy, 1960-1980 (2011) 12:2 Turkish Studies 203, 210

<sup>459</sup> The current version of 1982 Constitution and its press related articles are studied in depth in Chapter 2.

<sup>460</sup> Hifzi Topuz, Hifzi Topuz, 2. Mahmut'tan Holdinglere Turk Basın Tarihi/*Turkish Press History From 2. Mahmut to the Holdings* (Remzi Press, 2003) 262

In light of this context, the 1982 Constitution was accepted in a popular referendum, including extensive powers to the National Security Council, meaning the military. On that basis, Article 118 of the 1982 Constitution regulated the obligations of the council of ministers as follows: “the council of ministers are obliged to prioritise the decisions of the National Security Council concerning necessary measures for the protection of the existence and independence of the State, the unity and indivisibility of the country and the security and peace of the society.”<sup>461</sup> On the other hand, Article 103 of the Constitution gave extensive powers to President Kenan Evren. These powers included safeguarding the security and integrity of the country, the indivisibility and integrity of the nation, the rule of law, the unconditional sovereignty of the people, and finally the secular Republic, which was built on the foundations of Atatürk’s principles, as well as public welfare and human rights.<sup>462</sup>

Nevertheless, the 1982 Constitution, despite the secularist concerns of TSK, included Article 24, which promoted religious instruction and moral education in primary and secondary schools with the aim of fighting the emergence of anti-systemic ideologies such as Marxism-Leninism and fascism.<sup>463</sup> This represented the birth of Turkish-Islamic synthesis in Turkey, which profoundly affected political ideologies. Tanel Demirel argues that the military promoted Islam as an antidote against communism,<sup>464</sup> which the TSK deemed to be one of the biggest threats to the well-being of the Turkish state.

Overall, these changes gave rise to the legal system which brought heavy limitations to the press in combination with the Turkish Penal Code, which was based on the outmoded Italian Penal Code of 1889. In that regard, by way of this research it is observed that the 1982 Turkish Constitution, which remains in force,<sup>465</sup> incorporates reflections from a past that was encoded with the military mindset after the coup d’etat. Prioritising state interests and Kemalist ideology,<sup>466</sup> resulting in limitations on the freedom of expression and of the press, enforced by the state.

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<sup>461</sup> The Constitution of the Republic of Turkey 1982 Article 118

<sup>462</sup> Ibid. Article 103

<sup>463</sup> Hugh Poulton, ‘The Turkish State and Democracy’ (1999) 34:1 *The International Spectator: Italian Journal of International Affairs* 47, 50

<sup>464</sup> Tanel Demirel, ‘Soldiers and civilians: the dilemma of Turkish democracy’ (2004) 40:1 *Middle Eastern Studies* 127, 136

<sup>465</sup> Since 2000, a Constitution Committee, in cooperation with an Inter Party Conciliation Committee, has worked on the possible amendments on the Turkish Constitution on the basis of the democratisation process. European Commission, *Regular Report from the Commission on Turkey's Progress towards Accession* (SEC 1412, 2002)

<sup>466</sup> Christopher Panico, *Turkey: Violations of Free Expression In Turkey* (New York: Human Rights Watch, 1999) 3

The press was used as a propaganda tool by the state to prepare society for a possible intervention into civil governance. On that note, it is possible to argue that the press before and during the 1980 coup was supportive of the coup, mainstream newspapers such as *Hurriyet*, *Milliyet*, *Cumhuriyet*, and *Tercuman* followed the same pattern, including headlines emphasising chaos in the country that could not be controlled by the civil governments.<sup>467</sup> Accordingly, newspaper headlines followed a similar pattern by giving the number of losses during the clashes between the right and left wing; *Milliyet*'s suggests that 25 people were killed by anarchist incidents and published a report on the last 8 months of the Demirel government stating that ten people lost their lives every day,<sup>468</sup> *Cumhuriyet* suggests this was due to the inefficiency of the government.<sup>469</sup> This style of reporting continued throughout the post-coup period when the press were making publications supporting the military intervention. *Hürriyet* newspaper reported the coup with the headline, "The result of terror: the rule is in the hands of the National Security Council - Carrying on the road of Atatürk."<sup>470</sup> The ideology enforced by the military rule did not allow opposing commentary in the news. The magazines and newspapers that disagreed with the military intervention were being seized and closed based on the changes that provided extensive authority to the commanders. Newspapers such as *Democrat* (*Democrat*), *Hergun* (*Every Day*) and *Aydinlik* (*The Light*) were closed down. Newspapers such as *Cumhuriyet*, *Tercuman*, *Gunaydin*, *Gunes*, *Milliyet*, and *Hurriyet* were seized many times with a number of journalists being detained and imprisoned for making publications in opposition to the military power; the duration of their imprisonment equaled 316 years.<sup>471</sup>

Given this background of TSK's intentions for the coups, there is a recurring argument stating that throughout the political history of Turkey, none of the military interventions explained above aimed to establish a military regime that would be permanent. The military interventions were meant to protect the state and the nation based on the Kemalist ideology and to support the "democratic order." This common pattern is justified by the fact that none of the military

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<sup>467</sup> Evin Katurman, '12 Eylül Askeri Darbesi ve Basın/12 September Military Coup and the Press' *Bianet* (10 March 2007) <<http://bianet.org/bianet/toplum/93099-12-eylul-askeri-darbesi-ve-basin>> accessed 22 April 2014

<sup>468</sup> *Milliyet*, 'Anarşik olaylarda 25 kişi öldü/25 people died during the incidents of anarchy' *Milliyet* (27 August 1980)

<sup>469</sup> *Cumhuriyet*, 'Demirel'in 170 günlük iktidarında 1361 kişi öldü/1361 people died in Demirel's 170 days government' *Cumhuriyet* (12 Mayıs 1980)

<sup>470</sup> *Hurriyet*, 'Terörün sonucu: Yönetim Milli Güvenlik Konseyi'nde - Atatürk yolunda devam/The result of terror: the rule is in the hands of the National Security Council - Carrying on the road of Atatürk' *Hurriyet* (13 September 1980)

<sup>471</sup> Evin Katurman, '12 Eylül Askeri Darbesi ve Basın/12 September Military Coup and the Press' *Bianet* (10 March 2007) <<http://bianet.org/bianet/toplum/93099-12-eylul-askeri-darbesi-ve-basin>> accessed 22 April 2014

Hifzi Topuz, Hifzi Topuz, 2. Mahmut'tan Holdinglere Türk Basın Tarihi/*Turkish Press History From 2. Mahmut to the Holdings* (Remzi Press, 2003) 258

interventions lasted long, and power was returned to the civil governments once the perceived threat was eliminated.<sup>472</sup> The literature unanimously agrees that protecting the secularity of the nation and sustaining the Kemalist democracy have always been the ultimate reason for all Turkish military interventions. The Turkish military has acted as a modernising entity, having carried this duty since the transition from the Ottoman Empire to the Republic of Turkey. Promoting civil governance prevents the TSK from being like any other military interventions such as the ones that took place in South America, the Middle East or North Africa.<sup>473</sup> However, Harris, in opposition with scholars who suggest that the Turkish military did not intend to maintain power after the 1960 military coup, argues that the constitutional and legal amendments were put in place in 1960 by the generals to reinforce their political power. He supports his idea suggesting that thirty-five articles of the constitution (and its additional nine temporary articles) enabled ongoing supervision of the civilian government by the military on the grounds of safeguarding public order, national unity and security, and increased the freedom of self-rule of the military.<sup>474</sup> This author concludes that the danger of the emphasis put on national security and unity was visible through the restrictions on the press: the leftist ideologies and groups were the ones being accused of threatening national security. These groups were censored and self-censored with the fear of being tried/sentenced for infringing national security. This is where the closest link between the political sensitivities are proven to play an important role in the suppression of the press because these amendments gave autonomous power to the military.

### 3.8 Assessment

The Turkish military did not find the civilian governments' implementations effective during the major internal events in the 1950s (when the Islamist fundamentalism was escalating), in the 1960s (when the right and the left ideologies in the country were in violent clashes as ideological polarisation was increasing), and in the 1970s (when terrorism in South East Turkey

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<sup>472</sup> James Brown, 'The Military and Politics In Turkey (1987) 13:2 Armed Forces & Society

William Hale, *Turkish Politics and the Military* (London: Routledge, 1994)

Eric J. Zürcher, *Turkey - A Modern History* (London and New York: I.B.Tauris & Co Ltd., 2004)

<sup>473</sup> Metin Heper, 'Conclusion - The Consolidation of Democracy versus Democratization in Turkey' (2002) 3:1 Turkish Studies 38, 139

Tanel Demirel, 'Lessons of Military Regimes and Democracy: The Turkish case in a Comparative Perspective' (2005) 31:2 Armed Forces and Society

<sup>474</sup> George S. Harris, 'Military Coups and Turkish Democracy, 1960-1980 (2011) 12:2 Turkish Studies 203, 206

was escalating). TSK, whose ideology was based on secular philosophy, found itself as the only effective power to settle the issues that the civilian governments were considered insufficient to resolve.<sup>475</sup>

On the other hand, the press perceived military rule as a viable and legitimate option by showing support to the military intervention in 1960 and 1980, despite the consequences of these interventions being negative for the democratic regime that the society and the military or/and the state were aiming to create. As Demirel suggests, “the perception of military rule as a success or failure might have a crucial impact on the stability of the democratic regime, as illustrated in the discussion of the Turkish example”<sup>476</sup>; she discusses that the military regimes were not seen as a repressive measure or perceived to be a political failure, even by the political agents.<sup>477</sup> It is fair to argue that the lack of effective internalisation of democracy by both the political agents and the press could be the reasons for such reactions towards the military rule in the country. Therefore, it is possible to conclude that allowing the military power to intervene in politics as a solution to political or economic problems within the country was acceptable for the political agents and the press even though doing so meant renouncing democracy.<sup>478</sup>

Eventually, it was necessary to make an in depth analysis of the reasons which led to the military interventions, the reactions they created in society and politics and the general stance taken by the press in support of the military; in order to understand the sensitivities of the current government. Under the current government, the press experience the worst period since the establishment of Modern Turkey, even when compared to the coup periods. It was also crucial to make this examination to see the grounds on which the press in Turkey have built its traditions.

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<sup>475</sup> For further reading on the political ideology during the Coup D’etat periods in Turkey, see: Umit Cizre Sakallioğlu, ‘The Anatomy of the Turkish Military’s Political Autonomy’ (1997) 29:2 Comparative Politics Feroz Ahmad, ‘Military Intervention and the Crisis in Turkey’ (1981) 93:93 MERIP Reports Ismet Bozdağ, *Bir Darbenin Anatomisi: Celal Bayar Anlatıyor/The Anatomy of a Coup:Told by Celal Bayar* (Emre Yayinlari, 2006)

<sup>476</sup> Tanel Demirel, ‘Lessons of Military Regimes and Democracy: The Turkish Case in a Comparative Perspective’ (2005) 31:2 Armed Forces and Society 245, 264

<sup>477</sup> Ibid.

<sup>478</sup> Tanel Demirel, ‘Lessons of Military Regimes and Democracy: The Turkish Case in a Comparative Perspective’ (2005) 31:2 Armed Forces and Society 245, 246

However, it is observed in Chapter 4, where the press and AKP relations are analysed, that the press this time showed support to the civil government which aimed to eliminate the power of the military rule. Based on the analysis made in this chapter, Chapter 4 will eventually question whether the elimination of the military power is sufficient to promote democratic values.

### 3.9 Motherland Party: effects of democratisation and economic liberalisation process on the freedom of the press

In a political environment where the military maintained power (President Kenan Evren indicated that the control might be taken back if required)<sup>479</sup> political parties were banned, and the president had the power to veto the formation of new parties,<sup>480</sup> the Motherland Party (ANAP)<sup>481</sup> successfully came to power in 1983 under the leadership of Turgut Ozal despite the open declaration of Kenan Evren supporting the Nationalist Democracy Party, which was led by a former general.<sup>482</sup> ANAP came with promises to advance democratic and economic liberalisation policies. The military regime between 1980 and 1983 was criticised by both centre left and centre right political wings for being destructive of democracy,<sup>483</sup> especially for persons who experienced hardship under the military regime.<sup>484</sup> Liberation of economic life and the will to establish an open economy in concert with the conservative cultural values of society was ANAP's political agenda,<sup>485</sup> with a strong will to attain EEC membership, which had not been progressing because of the ongoing military influences on politics.<sup>486</sup>

Such liberal approaches guided the system into a free-market economy<sup>487</sup> that impacted the media sector in which press ownership passed from “journalist families”’ hands into the hands of “big companies” — in other words, holdings.<sup>488</sup> This transition meant the adoption of a different approach to the censorship of the press, which was no longer under the direct influence of the state and politics but the media owners who carried out their media ownership functions alongside other businesses, namely infrastructure and construction.<sup>489</sup> The economic growth alongside these

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<sup>479</sup> Kenan Evren, *Kenan Evren'in Anıları/Memoirs of Kenan Evren* (İstanbul: Milliyet, 1992) 290

<sup>480</sup> Feroz Ahmad, *The making of modern Turkey* (London and New York: Routledge, 1993) 187

<sup>481</sup> Original name: Anavatan Partisi

<sup>482</sup> George S. Harris, ‘Military Coups and Turkish Democracy, 1960-1980 (2011) 12:2 Turkish Studies 203, 211

<sup>483</sup> Tanel Demirel, ‘Soldiers and civilians: the dilemma of Turkish democracy’ (2004) 40:1 Middle Eastern Studies 127, 136

<sup>484</sup> B. Toprak, ‘Civil Society in Turkey’, in A.R. Norton (ed.), *Civil Society in the Middle East* (1996) 2 Leiden: Brill 95

<sup>485</sup> Eric J. Zürcher, *Turkey - A Modern History* (London and New York: I.B.Tauris & Co Ltd. 2004) 283

<sup>486</sup> Ihsan Dagi, ‘Human rights and democratization: Turkish politics in the European context’ (2001) 1:3 Southeast European and Black Sea Studies 51, 54

<sup>487</sup> Serife Sezen, ‘International versus domestic explanations of administrative reforms: the case of Turkey’ (2011) 77:2 International Review of Administrative Sciences 322, 329

<sup>488</sup> Zeki Duman, *Türkiye’de Liberal-Muhafazakar Siyaset ve Turgut Özal/Liberal-Conservative Politics in Turkey and Turgut Ozal* (Ankara: Kadim, 2010) 33

<sup>489</sup> Asli Tunc, ‘Pushing the Limits of Tolerance: Functions of Political Cartoonists in the Democratization Process: The Case of Turkey’ (2002) 64:1 Gazette: The International Journal for Communication Studies 47, 50

changes in media sector ownership led to broader discussions on the objectivity of the press as well as press censorship by the media owners.<sup>490</sup> In order to continue doing business with the government, the news media was using its commercial power, which Nohl and Algan argue caused the press to lose its control on politics and the appropriate dissemination of ideas and news.<sup>491</sup> This shift which had started during the DP period, found more favourable economic conditions under the Motherland Party government. The interlaced relationship of the press with economic and political power today with the tabloidisation of the news, are highly influenced by the transition of the press ownership to holdings' which began after 1980.<sup>492</sup>

Economic changes and liberal ideas had positive influences such as the Ozal government's removal of the restriction on the use of the Kurdish language in everyday life.<sup>493</sup> Similarly, Harris observes that the transition to civilian rule was governed well by Ozal, who rejected granting amnesty to those who were jailed for spreading violence while the military ruled, this provided an assurance for the military that the civil government did not adopt a revanchist approach.<sup>494</sup>

However, it is not convincing to argue that the liberalist approach to everyday life and economy had the same impact on the freedom of the press as the neoliberal political and economic policies, for the press shifted away from the "social responsibility concept" it once followed.<sup>495</sup> It is fair to argue that the transformation from the social state to a free market economy made it inevitable that the press would operate within a liberal market economy as a tool of a commercial institution whose initial aim was to make profit. This turning point for the press in Turkey allowed political opinion and analysis to have a place only in magazine journalism rather than in daily newspapers.<sup>496</sup> Newspaper owners during the 1960s and 70s had formed into organisations that were mainly owned by commercial holdings.<sup>497</sup> The most remarkable phenomenon during this

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<sup>490</sup> Ceren Sozeri and Zeynep Guney, *Türkiye'de Medyanın Ekonomi Politikası/Media's Economic Policy in Turkey* (Istanbul: TESEV, 2011)

<sup>491</sup> Ece Algan 'Privatisation of Radio and Media Hegemony in Turkey' in Lee Artz and Yahya R. Kamalipour (eds), *The Globalization of Corporate Media Hegemony* (New York State University Press, 2003) 170  
Rand-Michael Nohl, 'Cosmopolitanization and social location: Generational differences within the Turkish audience of the BBC World Service' (2011) 14:3 *European Journal of Cultural Studies* 321, 327

<sup>492</sup> See Chapter 3 for further information on the transition of the press ownership to holdings' control in the 1980s.

<sup>493</sup> Sarah Wilson Sokhey and A. Kadir Yildirim, 'Economic liberalization and political moderation: The case of anti-system Parties' (2012) 19:2 *Party Politics*

<sup>494</sup> George S. Harris, 'Military Coups and Turkish Democracy, 1960-1980 (2011) 12:2 *Turkish Studies* 203, 211

<sup>495</sup> Murat Ozgen, '1980 Sonrası Türk Medyasında Gelişmeler ve Magazinleşme Olgusu/ Post 1980 Developments of the Turkish Media and the Concept of Magazination' *Istanbul University* 465

<sup>496</sup> *Ibid.* 465, 468

<sup>497</sup> Orhan Kologlu *Medya-Devlet ve Sermaye/Media-State and Capital* (Birikim Press, 1999) 75

period was the transition from family-based press businesses into press with foreign based capital. After the assassination of *Milliyet*'s owner Abdi Ipekci in 1979 (who defended freedom of journalists from pressure groups, and felt that newspapers must have separate editorial and ownership departments),<sup>498</sup> Aydin Dogan (who then became the owner of the biggest media monopoly by owning the 43% of the newspaper sales by 2003)<sup>499</sup> purchased *Milliyet*, and Asil Nadir whose capital was based abroad, purchased *Gunaydin*, *Tan*, *Ulus*, *Sakarya*.<sup>500</sup> In this chapter the present author argues that the situation of today's press does not differ from the press in Ozal's period regarding the quality of news and ethical issues, yet is worse in terms of government through nepotistic business relationships with media owners and controversial legal provisions.

The big holding ownership of the press during the ANAP period placed increased pressure on the socialist press, and editors were under the censorship of the 1984 Press Code as it involved, "responsible editors" would hold the legal responsibility for the content of publications. Therefore, it is possible that Ozal chose not to censor the press directly but through other means.

Finally, it is possible to argue that the foundations of the current media sector, which are controlled by holdings, echo the system that was established in the 1980s, which also affected the employee rights of journalists through legal applications that took place after 1980. This was followed by the weakening of journalists' unions due to the intervention of media barons.<sup>501</sup> Ozge states that this was caused by Ozal's application of neoliberal politics that supported a free market economy designed to distract society from politics.<sup>502</sup>

### 3.10 "The lost decade": political and social crises and the press in Turkey

Sustaining this materialist approach, the newspapers during the first half of the 1990s were involved heavily in promotions aimed at selling more newspapers and increasing their

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<sup>498</sup> Ferhat Yildiz, 'Turk Anayasa Hukukunda Anayasa Ozgurlugu/*Freedom of the Press in the Turkish Constitution*' (Master Thesis Ankara University 2012) 99

<sup>499</sup> Hifzi Topuz, Hifzi Topuz, Hifzi Topuz, 2. Mahmut'tan Holdinglere Turk Basın Tarihi/*Turkish Press History From 2. Mahmut to the Holdings* (Remzi Press, 2003) 334

<sup>500</sup> Murat Ozgen, '1980 Sonrasi Turk Medyasinda Gelismeler ve Magazinsizlesme Olgusu/ Post 1980 Developments of the Turkish Media and the Concept of Magazination' Istanbul University 465, 471

<sup>501</sup> Ibid. 465, 476

<sup>502</sup> Ibid. 465, 476

circulation<sup>503</sup>; this led to a fall in the conscious reader potential<sup>504</sup> and the creation of mass popular journalism that generated today's interest-based press, which is part of big holdings. Starting in the 1990s, the media owners became involved in both the production of the media and in other business sectors alongside various media fields, leading to cross-ownership.<sup>505</sup> Ozgen suggests that this is why the conscious readers have moved away from the press.<sup>506</sup> It is therefore fair to argue that during the 1990s the press lost its credibility as an independent institution and harmed its reputation based on the close relationship it established with the governments and the holding owners.<sup>507</sup> The present author believes that this also reflects society's disengagement from politics based on a perceived lack of trust in the press's integrity. The press's social responsibility has vanished under the control of the governments and the media owners because it acts as the spokesman of the government rather than disseminating information. The Gezi protests in 2013 were the biggest social uprising in the history of Modern Turkey and serve as the most applicable example of irresponsibility. In order to understand the problems journalists in Turkey encounter today and their effects on the democratisation process, it is important to understand the strong and close relations built between the press, the economic powers, and the governments founded in the 1980s and established in the 1990s.

However, this period is critically important also because of the social, political, and security incidents that led to the strict censorship of the press — namely terrorism and security issues in South East Turkey,<sup>508</sup> that resulted in thousands of anonymous killings and tens of assassinated journalists. Because of the danger these events posed to the integrity and the security of the state,

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<sup>503</sup> Ates Vuran, *Medyada Promosyon/Promotion in Media* (Istanbul TGC Press, 1996)

<sup>504</sup> 86% of newspaper readers stated that they do not trust and respect the press in a study conducted by group Akademedya from Istanbul University Faculty of Communication, which took place in 1995. See Halik Nebiler, *Medyanin Ekonomi Politigi/Media's Politics of Economy* (Istanbul Sarmal Press, 1995) 112

<sup>505</sup> Gulseren Adakli Aksop, *Turkiye'de medya endustrisi: Neoliberalizm çağında mulkiyet ve kontrol ilişkileri/Media Industry in Turkey: Relationship of Ownership and Control During the Age of Neoliberalism* (Ankara: Utopya, 2006) 40

For vertical and horizontal media ownership, see: Gabriele Sigert and Bjorn von Rimscha, 'Economic Bases of Communication' in Paul Copley and Peter J. Schulz (eds) *Theories and Models of Communication* (Berlin: Gruyter Mouton, 2013) 123-146. For cross media ownership, see: Jonathan Hardy, *Western Media Systems* (Oxon: Routledge, 2008), and Eli Noam, *Media Ownership and Concentration in America* (Oxford: Oxford University Press, 2009)

<sup>506</sup> Murat Ozgen, '1980 Sonrasi Turk Medyasinda Gelismeler ve Magazinslesme Olgusu/Post 1980 Developments of the Turkish Media and the Concept of Magazination' Istanbul University 465, 473

<sup>507</sup> Ibid. 465, 474

<sup>508</sup> Ali Carkoglu, 'Turkey's November 2002 Elections: A New Beginning' (2002) 6:4 Middle East Review of International Affairs

the Turkish state applied strict censorship on reporting the Kurdish issue.<sup>509</sup> Separatist terrorism and opposition to the state's policies became one of the sensitive subjects that received rigorous censorship from the state.<sup>510</sup> In light of this context, the Anti-Terror Law, which was enacted in 1991, was used (and still is being used) to silence, censor, and imprison journalists who report on the Kurdish issue even if their reporting involves non-violent expression.<sup>511</sup> Torture was a method of interrogating for cases in connection with this law. Arbitrary arrests, physical violence, unknown assailants, disappearances and murder took place based on the expression of restricted ( "sensitive") subjects in Turkey during the "lost decade". Forty journalists were killed during the 1990s including: Ugur Mumcu (*Cumhuriyet/Republic* Newspaper), who was an investigative journalist working on PKK's links with National Intelligence Service (MIT) and assassinated on 24 January 1993, Metin Goktepe (*Evrensel/Universal* Newspaper), who was a Kurdish journalist working for the Kurdish newspaper *Haberde Yorumda Gercek/Truth in News and Comments* and killed by police torture on 8 January 1996,<sup>512</sup> and Ahmet Taner Kislali (*Cumhuriyet* Newspaper), who was a journalist, lawyer and an intellectual writing articles defending Kemalism, secularism democracy, and human rights, killed on 21 October 1999 by a car bomb.<sup>513</sup>

The case of *Ozgur Gundem v Turkey* demonstrates the main issues encountered by the Kurdish journalists and the journalists who raised concerns or reported on the Kurdish issue during the 1990s. *Ozgur Gundem* was a pro-Kurdish newspaper that experienced a high number of journalist killings based on differences in opinion, starting from the 1990s. In 1992, which is defined as the "dark year" of press history, fourteen journalists were killed in Turkey; four of them were from *Ozgur Gundem*, and seven of its journalists were killed in total throughout the 1990s, which "was the subject of serious attacks and harassment which forced its eventual closure and for which the Turkish authorities are directly or indirectly responsible."<sup>514</sup>

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<sup>509</sup> Meltem Muftuler Bac, 'The Never-Ending Story: Turkey and the European Union' (1998) 34:4 Middle Eastern Studies 240-258

<sup>510</sup> Aslan Gunduz, 'Human Rights and Turkey's Future In Europe' (2001) 45 Orbls 15, 27

<sup>511</sup> Human Rights Watch, 'Report on Violations on Free Expression In Turkey' (February 1999) <<http://www.hrw.org/reports/1999/turkey/>> accessed 13 May 2012

<sup>512</sup> Kollektif, *Metin Goktepe:Gazeteciyim/Metin Goktepe:I am a journalist* (Evrensel Press, 1997)

<sup>513</sup> Elif Ince, "Ozgur Basın" in Tutsak Yillari/ "Detained Years of the "Free Press" *Bianet* (18 December 2014) <<http://bianet.org/bianet/medya/160894-ozgur-basin-in-tutsak-yillari>> accessed 25 December 2014

<sup>514</sup> *Ozgur Gundem v Turkey* App no 23144/93 (ECtHR, 16 March 2000) para. 10

More specifically, Ozgur Gundem faced violent attacks and seven of its journalists were shot dead; when the government was informed of these attacks and threats, it did not respond.<sup>515</sup> In addition, various branches of the newspaper were searched by the police, and documents such as articles written on PKK leader Ocalan and other books constituted evidence for their later conviction of “being a member of PKK and making propaganda of terrorist organisation” by Istanbul DGM.<sup>516</sup> The newspaper was seized and closed down several times while its journalists were sentenced to 147 years of imprisonment,<sup>517</sup> based on allegations of making publications that defamed the Turkish nation, the Republic, and/or government officials. Incited hatred based on race, religion and class, issued propaganda of discrimination, identified government officials’ names fighting against terrorism, and disseminated reports of terrorist organisations.<sup>518</sup> On that basis, the applicants made an application to the ECtHR with an alleged violation of Article 10 of ECHR stating that the threats, attacks, and measures taken against the newspaper finally led to its closure.<sup>519</sup> Therefore, the applicants alleged that the Turkish government had not fulfilled its responsibility under Article 10 of the ECHR by not preventing the deadly attacks towards the newspaper. Not affording protection for the journalists who were openly threatened and who asked for protection from the government officials, by not effectively investigating the journalist killings, and finally by directly or indirectly causing the closure of the newspaper.<sup>520</sup>

Based on the reports provided by both parties, ECtHR concluded that despite the significant number of complaints raised by Ozgur Gundem members, the government had tolerated the violent campaign against the newspaper by failing to take protective measures. ECtHR also recalled that the effective application of the democratic freedom of expression does not only require the states to abstain from interference but also to take effective measures to prevent criminal activities against the press (even if the newspaper — as in this case — was alleged by the Turkish government to support terrorist organisation, PKK).<sup>521</sup> In relation to the 1991 Anti-Terror Law, the ECtHR stated that even though the language of law is broad and vague, the intervention of the government were defined by law to protect the integrity of the country’s territories and national security.<sup>522</sup> The Court

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<sup>515</sup> Ibid. para. 11-14

<sup>516</sup> Ibid. para. 18-19

<sup>517</sup> Ibid. para. 20-23

<sup>518</sup> 1926 Turkish Penal Code No. 765 Articles, 159, 311, and 312

1991 Anti-Terror Law No. 3713 Articles 6 and 8

<sup>519</sup> *Ozgur Gundem v Turkey* App no 23144/93 (ECtHR, 16 March 2000) para 37

<sup>520</sup> Ibid. para. 38

<sup>521</sup> Ibid. para. 41, 44, 45

<sup>522</sup> Ibid. para. 56

was consistent in following previous case law based on *Surek v Turkey* in which the court decided that the measures taken by the Turkish government were defined by law and legitimate for the prevention of crime.<sup>523</sup> However, the ECtHR concluded that the measures taken against Ozgur Gundem by the Turkish government were not necessary in a democratic society because the government officials must realise their dominant positions and must not use criminal cases against journalists. According to ECtHR, Ozgur Gundem's articles (including PKK establishments' declarations and reports, an interview with PKK leader Abdullah Ocalan, a declaration of PKK European representative, an interview with PKK's commander Osman Ocalan, a declaration of Giant-Left/*Dev Sol* by its European branch and an interview with PKK commander Cemil Bayik) were provocative but still remained within the limits of critical observations.<sup>524</sup> According to the Court, even if the subject matter of interviews and articles were of the terrorist organisation and its members, this was not a sufficient reason for the censorship of the press. In conclusion the ECtHR approved that the Turkish state had violated Article 10 of the ECHR by not taking effective measures for the protection of the journalists' right to free expression and in taking disproportionate action against the members of Ozgur Gundem by convicting them under numerous cases without legitimate reasoning.<sup>525</sup>

This ECtHR verdict once again shows that the official state ideology which considers Kurdish separatism as a threat to the integrity of the country had in the name of national security, once more unduly prioritised the state interests over the right to free expression of the press, resulting in disproportionate measures against freedom of the press.

Most trials concerning freedom of expression in Turkey were heard by the State Security Courts (DGMs), which were constituted in accordance with Article 143 of the Constitution "to deal with offences against the indivisible integrity of the State and its territory and nation, offences against the Republic which are contrary to the democratic order enunciated in the Constitution, and offences which undermine the internal or external security of the State." Thus the DGMs had jurisdiction over Articles 125, 172, and 312 of the Turkish Penal Code and Articles 6 to 8 of the Law to Fight Terrorism. There were eight DGM precincts (Ankara, Istanbul, Izmir, Konya, Kayseri, Erzincan, Diyarbakir and Malatya) and 17 tribunals, five of which are in Istanbul. The DGMs comprise three members, one of whom is a military judge. Article 7(a), annexed to the Law on

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<sup>523</sup> *Surek v Turkey* App no 26682/95 (ECtHR, 8 July 1999) para 52

<sup>524</sup> *Ozgur Gundem v Turkey* App no 23144/93 (ECtHR, 16 March 2000) para. 60, 62

<sup>525</sup> *Ibid.* para. 63, 70, 71

Military Judges, makes eligibility for promotion, seniority in grade, and salary increments of military judges serving in DGMs dependent on “the first hierarchical competent superior”. The presence of a military judge answerable to his military superiors in the judging of civilians has given rise to doubts of judicial independence, and the ECtHR condemned the DGMs for being partial.<sup>526</sup>

On that note, it is important to draw attention to the important role the civil society played in the freedom of the press during the 1990s when there was a civil disobedience campaign<sup>527</sup> carried out by writers and intellectuals. A bold stance against Yasar Kemal’s trial (started on 23 January 1995 by the State Security Court) based on his article, published in a German magazine (*Der Spiegel*), that purportedly endorsed “separatist propaganda” and “provoked hatred and hostility among the people”. Kemal’s article emphasised the Kurdish issue and Human Rights in Turkey harshly criticising the Turkish state, saying that:

“Since the establishment of the Republic in 29 October 1923, Turkey is made a system based on restrictions and persecution... Such suppression on the Anatolian people of the Republic made people long for the authority of the Ottoman Empire... Then something unexpected happened; while Turkish people continued their life oppressed under heavy authority, Kurdish people stood up as they were the ones who received the most cruel suppression, whose language was forbidden, their identities were banned under the name “mountain Turks” given, and they were the ones facing ethnic massacres... To my knowledge the number of Kurds who wants an independent state in Turkey is not much. However, is it not their right to do so?... ”<sup>528</sup>

In reaction to his trial process, Turkish intellectuals started a civil disobedience movement and ten articles (which were accused on similar grounds with Kemal’s work) were collected in one book titled “Freedom to Thought”. These academics collected 1,080 signatures, which initiated a

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<sup>526</sup> *Incal v. Turkey* App no 41/1997/825/1031 (ECtHR, 9 June 1998)

<sup>527</sup> Human Rights Watch, *Human Rights Watch World Report 1998 Turkey Human Rights Developments* (Human Rights Watch, 1998) <[https://www.hrw.org/legacy/worldreport/Helsinki-23.htm#P1117\\_264948](https://www.hrw.org/legacy/worldreport/Helsinki-23.htm#P1117_264948)> accessed 10 October 2012

<sup>528</sup> Yasar Kemal, ‘Feldzug der Lügen/Journey of Lies’ *Der Spiegel* (09 January 1995) <<http://www.spiegel.de/spiegel/print/d-9159918.html>> 12 December 2012

publication called “Freedom of Expression” asking for the prosecutor of the State Security Court to be tried with the same charges as Yasar Kemal.<sup>529</sup> Finally, Yasar Kemal was acquitted.

In the first 10 months of 1996, 1,024 people were in custody and 1,943 people were sentenced based on the 1991 Law to Fight Terrorism, 530 of whom were accused of helping or being a member of the terrorist organisation - PKK. Scholars acknowledge that the prevalent use of the 1991 Law to Fight Terrorism, to curtail freedom of expression was facilitated by its vague and broad definition of terrorism, which can easily make anyone an offender under its definition. Specifically, Article 6 includes writing and reporting ideas as methods of “pressure” prescribed under Article 1 if the government deems them to threaten the state on a number of grounds, including damaging the “indivisible unity of the State” or endangering “the existence of the Turkish State and Republic”. Article 8, amended in October 1995, still prohibits written and oral propaganda, assemblies, meetings and demonstrations “aimed at damaging the indivisible unity of the State . . . regardless of method, intention, and ideas behind them” and in which there is an element of incitement to violence.

Freedom of the press was strictly and negatively influenced by the security concerns of the government, raised by the Kurdish issue, and terrorism formed a major factor for the pressure on the press.<sup>531</sup> It was forbidden to use any terminology that could express support for separatism or terrorism or separatist propaganda based on the Kurdish issue. This decision made by the Ministry of Interior in 1999 led to a significant increase in imprisoned journalists who reported on the sensitive subjects<sup>532</sup> on the basis of Articles 7 and 8 of the Anti-Terror Law as well as Articles 159 and 169 of the Turkish Penal Code, for the Ministry of Interior Affairs had the power to prohibit the circulation of a publication in six regions in South East Turkey. The power to close down a printing press for thirty days did not have a location restriction, the only condition was to give prior warning to the publisher or the proprietor of the publication.<sup>533</sup>

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<sup>529</sup> Hugh Poulton, ‘The Turkish State and Democracy’ (1999) 34:1 *The International Spectator: Italian Journal of International Affairs* 47,56

530 US Department of State, “Turkey”, *Country Reports on Human Rights Practices for 1996* (Bureau of Democracy, Human Rights and Labor February 1997) 1161

<sup>531</sup> Kemal Kirisci, (2004) ‘The Kurdish Question and Turkish Foreign Policy’ in Lenore G. Martin, Dimitris Keridis (eds.) *The Future of Turkish Foreign Policy*, (Cambridge: The MIT Press, 2004) 275

<sup>532</sup> European Commission, *Regular Report from the Commission on Turkey's Progress towards Accession* (1412 Final 700 final, 2002) 28

<sup>533</sup> These restrictions against the press were regulated with the Under Decree with the Force of Law no. 430

The circulation of political news was put restricted based on these legal regulations, which did not meet the international standards for the protection of press freedom. The state's perception of the minority groups as a danger was clear from its failure to distinguish between the terrorist group PKK and the Kurdish minority who discussed that the State's failure to protect their rights and freedoms contradicted with Turkey's international obligations.<sup>534</sup> This contradiction was emphasised by the 1999 European Commission Report on freedom of expression, which emphasised the inconsistency between the positive steps taken by the Turkish authorities for the improvement of free expression and the patterns of violating free expression that remained unchanged.<sup>535</sup>

In conclusion, this author observes that the state's approach to the Kurdish issue (seeing it as a threat to secular Kemalist ideology) hindered Turkey's democratisation process<sup>536</sup> and allowed military presence in politics<sup>537</sup>. As Poulton has stated, the problem was caused by the unitary nation state model that brought pressure on groups who expressed their own identities and did not adopt the state approved Turkish model.<sup>538</sup>

### 3.10.1 Post-modern military coup: the fall of Welfare Party and the rise of AKP

In the troubled phase of Turkey's political life in the 1990s, the rise of the pro-Islamist and ultra-nationalist parties<sup>539</sup> were considered a threat to secularism in the country. The Welfare Party (RP), the largest political party within the Turkish Grand National Assembly, formed a coalition

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<sup>534</sup> Turkey's international obligations were stated in Chapter 2.

<sup>535</sup> European Commission, *Regular Report from the Commission on Turkey's Progress towards Accession* (513, 1999)

<sup>536</sup> Ergun Ozbudun and Omer F. Genckaya, *Democratization and the Politics of Constitution-Making in Turkey* (Central European University Press, 2009) 25

<sup>537</sup> Pinar Bilgin, 'Turkey's changing security discourses: The challenge of globalisation' (2005) 44 *European Journal of Political Research* 175, 188

Senem Aydin and Fuat E. Keyman, (2004) 'European Integration and the Transformation of Turkish Democracy' (2004) No:2 *Centre for European Policy Studies EU- Turkey Working Papers* 1, 19

Natalie Tocci, (2001) '21st Century Kemalism Redefining Turkey-EU Relations in the Post-Helsinki Era' (2001) No.170 *Centre for European Policy Studies EU-Turkey Working Document* 22

<sup>538</sup> Hugh Poulton, 'The Turkish State and Democracy' (1999) 34:1 *The International Spectator: Italian Journal of International Affairs* 47, 49

<sup>539</sup> Ali Carkoglu, 'Turkey's November 2002 Elections: A New Beginning' (2002) 6:4 *Middle East Review of International Affairs*

with the True Path Party (DYP) in 1996.<sup>540</sup> Islam was politicised by RP in the early 1990s. The party's inclination towards the non-secularisation of education and its investments in religious institutions as well as its strong Islamic roots led to secularist concerns. RP's rejection of Kemalist ideology<sup>541</sup> and its anti-secular statements and actions led to a "post-modern"<sup>542</sup> military intervention resulting in the government's dissolution and the forced resignation of RP leader Necmettin Erbakan.<sup>543</sup>

One of the reasons why the military chose not to prepare a traditional coup, it could be argued, was the "Turkish-Islamic Synthesis"<sup>544</sup> strategy that TSK adopted during the Cold War Era to protect the nation's unity using religion where a civil uprising could have been inevitable.<sup>545</sup> The military's avoidance of a traditional coup was also due to its will not to harm the modernisation process of Turkey that was highly motivated by the EEC accession process.<sup>546</sup>

However, the Constitutional Court approved the closure of the Welfare Party based on being the "focus point of anti-secular ideologies."<sup>547</sup> According to the Turkish Army, the secular state was under threat from the Islamist Welfare Party. The military's attempt of another coup caused mainstream media once more to support it based on the national security concerns. Dogan and Bilgin Media groups were disseminating news based on the threat against the secularity of the

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<sup>540</sup> Eric J. Zürcher, *Turkey - A Modern History* (London and New York: I.B.Tauris & Co Ltd., 2004) 290

<sup>541</sup> Ibid.

<sup>542</sup> The military did not directly intervened into politics by taking the power. It manipulated public opinion on the basis of secular concerns, in opposition of the government, stating that it was necessary to regain the order of a secular democracy. Ertan Aydin, 'The tension between secularism and democracy In Turkey: Early origins, currency legacy' (2007) 6:1 *European View* 11, 18

<sup>543</sup> David Greenwood, 'Turkish Civil-Military Relations and the EU: Preparing for Continuing Convergence - Final Expert Report on an International Task Force' in Sami Faltas and Sander Jansen (eds.) *Governance and the military: perspectives for change in Turkey*, (2006) Centre for European Studies (CESS) and the Istanbul Policy Centre 21, 39

<sup>544</sup> Turkish-Islamic Synthesis was born in mid 1970s in Turkey as a right wing ideology which argued that Turkishness and Islam have a natural bond originally and that Turkish identity cannot be without this bond. Bang Eligur, *The mobilization of political Islam in Turkey* (Cambridge University Press, 2004) 65

<sup>545</sup> Stephen Kinzer, 'Defending Secularism, Turkey's Military Warns Islamic Leaders' (*New York Times*, 2 March 1997) <<http://www.nytimes.com/1997/03/02/world/in-defense-of-secularism-turkish-army-warns-rulers.html>> accessed on 8 May 2014

Metin Heper and Aylin Guney, 'The Military and the Consolidation of Democracy: The Recent Turkish Experience' (2000) 26:4 *Armed Forces & Society*, 647

<sup>546</sup> Changes experienced in Turkey throughout the accession process are discussed in Chapter 4.

<sup>547</sup> Selin Ozoguz Bolgi, 'Islamisation: A Challenge to Turkey's Secular Democracy?' in Ebru Canan Sokullu (eds), *Debating Security in Turkey: Challenges and Changes in the Twenty-First Century* (Plymouth: Lexington Books, 2013) 97

state.<sup>548</sup> In the process of the military coup attempt and the closure of the Welfare Party, journalists with Islamic backgrounds were imprisoned.<sup>549</sup>

The Kurdish issue continued to be sensitive during the last years of the 1990s. Islam was a threat to the secularist state of Turkey, and the Kurdish issue was seen as a threat to national security and to the Turkish nation. Thus, journalists who wrote heavily about Kurdish rights such as M.A. Brand and C. Candar were fired and jailed with allegations of belonging to a terrorist organisation or making PKK's propaganda.<sup>550</sup> Such censorship is found to be strongly influenced by the media owners who after the transition to the free market economy during Turgut Ozal's leadership under ANAP, were able to do business with the government alongside their media ownership,<sup>551</sup> which did not allow them to resist state pressure.<sup>552</sup>

The current AKP government was formed after the unsuccessful attempt to form a coalition government (DSP-MHP-ANAP) in 2002. Meanwhile, the legal structure of human rights was set in 2000 by the ratification of ICCPR and ICESCR (International Covenant on Economic, Social and Cultural Rights) before AKP came into power. Despite becoming a party to these human rights agreements, Turkey was still internationally criticised for failing to implement the reforms, and for this this reason Turkey was argued to have only the basics of democracy<sup>553</sup> — insufficient scaffolding for advancing a full-fledged democratisation process. Soon after the 2001 European Commission, report, Articles 13 and 14 of the Constitution were amended for the elimination of restrictions on the freedom of expression with the addition of the “proportionality” principle that regulated the limitations applied on expressions.<sup>554</sup> Besides, the constitutional changes, the Kurdish minority was given educational and cultural rights including the right to broadcast in the Kurdish language.<sup>555</sup> Nevertheless, despite the constitutional changes, in 2001 more than eighty journalists were in prison on the basis of “insulting the judiciary”, “insulting the Republic”, and “dissemination

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<sup>548</sup> Zafer Ozcan, *Arz Ederim: 28 Subat 1997-12 Eylul 2010 Basin Sendromu/I Propose:Press Syndrome of 28 February 1997-12 September 2010* (Istanbul: Kaynak, 2010) 72

<sup>549</sup> Ibid.

<sup>550</sup> HRW, ‘Turkey: Violations of Free Expression in Turkey’ (Brussels: Human Rights Watch 1999)

<<https://www.hrw.org/reports/1999/turkey/>> accessed 9 March 2012, 34

<sup>551</sup> Similar economic obligations of the media owners towards the government are discussed in great detail in Chapter 4 in relation to the restrictions on the freedom of the press.

<sup>552</sup> Nuraydin Arıkan, *28 Subat Surecinde Medya/Media During the 28 February Process* (Istanbul: Okur Kitaplığı, 2011) 144

<sup>553</sup> European Commission, *Regular Report from the Commission on Turkey's Progress towards Accession* (2000)

<sup>554</sup> European Commission, *Regular Report from the Commission on Turkey's Progress towards Accession* (1726/2001)

<sup>555</sup> Dogu Ergil, ‘Aspects of the Kurdish problem in Turkey’ in Debbie Lovatt (ed.), *Turkey since 1970: Politics, Economics and Society* (New York: Palgrave Publishers, 2001)

of terrorist propaganda” as regulated in Articles 159 and 312 of the Penal code and in the Anti-Terror Law.<sup>556</sup>

Finally, given this background, it is possible to argue that AKP, when it first entered the political scene, was criticised on the same grounds as the Welfare Party, because of its Islamist background.<sup>557</sup> However, AKP's promotion of a democratic political agenda, its willingness to accelerate the EU accession process, and its promises to improve Human Rights<sup>558</sup> resulted in its success, for the liberal wings and opinion leaders were supportive of the party in the general elections in 2002.<sup>559</sup> Based on this support, AKP declared its will to establish governance based on guarantees of freedom of expression (they stated that they accept this as a fundamental right in democracies), rule of law, and, an impartial and independent judiciary. In order to achieve these principles, AKP, in its 2002 party programme, made promises of legal amendments for the guarantee of freedom of expression and press as well as necessary constitutional amendments to achieve that purpose;<sup>560</sup> these are discussed in the following chapter.

### 3.11 Discussions and conclusion

This chapter demonstrates that, despite the differences in the political phases, the censorship of the press was caused by the highly influential national state ideology emphasising a “centrist government”, which Mardin argues had an impact on the decision-making process because its ideology causes political parties to act *for* the people, in other words, they make decisions on behalf of the people.<sup>561</sup> In relation to this idea, Kamali suggests that the first attempt of modernisation in Turkey entailed authoritative modernisation rather than building a Westernised democracy by

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<sup>556</sup> European Commission, *Regular Report from the Commission on Turkey's Progress towards Accession* (1756/2001) 24

<sup>557</sup> Further discussed in Chapter 4.

<sup>558</sup> Dietrich Jung, “Secularism”: A Key to Turkish Politics” (2006) 14:2 Intellectual Discourse 14/2: 129, 130

<sup>559</sup> Menderes Cinar, ‘Explaining the Popular Appeal and Durability of the Justice and Development Party’ in Elise Massicard and Nicole F. Watts (eds), *Negotiating Political Power in Turkey: Breaking up the Party* (Oxon: Routledge, 2013) 43

<sup>560</sup> Justice and Development Party, ‘AKP 2002 Party Programme’ (AKP,2002)

<<http://www.akparti.org.tr/english/akparti/parti-programme>> accessed 13 August 2013

<sup>561</sup> Serif Mardin *Türkiye’de Toplum ve Siyaset/Society and Politics in Turkey* (Istanbul: İletişim 2012) 37

which he means “combined socioeconomic and cultural modernisation with political dictatorship.”<sup>562</sup>

Turkish politics was highly influenced by the militarist traditions based on the coups which took place in 1960, 1971, 1980 and finally the postmodern coup in 1997,<sup>563</sup> which negatively impacted on the freedom of the press. Looking at DP’s treatment of journalists and the press during the multi-party period, it is possible to see the practical application of the hegemonic state ideology that led to the primacy of the state interests rather than the people.<sup>564</sup> As this is the foundation of the press from the early days of modern Turkey, it is possible to understand the link it has with today’s mentality of the press, taking a stance as the spokesman of the state, as seen in the case of Hrant Dink in Chapter 2 rather than functioning as a watchdog.

In that regard, it is observed that the transition from authoritarian press theory into libertarian press theory could not take place in Turkey despite the transition into free market economy. ‘Free market of ideas’ promoted by the Libertarian press theory was not adopted because of the military interventions into politics that did not allow the press to embrace the role of a fourth estate.<sup>565</sup> Finally, the ‘free market’ was only applicable to the media ownership which is explained in Chapter 4 as leading to the control of the press by big holdings, that does not promote keeping the government’s pressure over the press at minimum levels based on the business relationship between the media owners and the government. Chomsky has further elaborated arguing that “while Westerners usually equate the marketplace with freedom of opinion, the hidden hand of the market can be almost as potent an instrument of control as the iron fist of the state.”<sup>566</sup>

Generally, the literature discusses the role of the press on the democratisation process in Turkey; However, this chapter adopts a different approach to this issue and by questioning the effects of politics and the democratisation process on the freedom of the press, illustrating the relationship between the press, politics, and democratisation (which are closely linked to the current

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<sup>562</sup> Masoud Kamali, ‘Multiple Modernities and Mass Communications in Muslim Countries’ (2012) 8:3 Global Media and Communication 243, 246

<sup>563</sup> Sevilay Z. Aksoy, ‘The Prospect of Turkey’s EU Membership as Represented in the British Newspapers The Times and The Guardian, 2002–2005’ (2009) 39:4 Journal of European Studies 469, 483

<sup>564</sup> Rasim Ozgur Donmez, ‘Coup D’Etats and the Masculine Turkish Political Sphere: Modernization without Strong Democratisation’ in Rasin Ozgur Donmez Fazilet Ahu Ozmen (eds), *Gendered Identities: Criticizing Patriarchy in Turkey* (Plymouth: Lexington Books, 2013) 14

<sup>565</sup> Siebert et al., *Four Theories of the Press* (Urbana: University of Illinois, Press) 53

<sup>566</sup> Noam Chomsky, *Necessary Illusions, Thought Control in Democratic Societies* (London: Pluto Press, 1989) 7

debates on the freedom of the press). The socio-political context — from the single-party period, multi-party period, to the political stages of the military coups — were investigated to show how.

As observed, the governments in different democratic stages and the military after the coup d'états had a strong will to take control of the press and manipulate news in order to shape the public opinion for their own vested interests.<sup>567</sup> In addition, the support the press gave to the military intervention is another example of the deeply ingrained state ideology that prioritised state security against the threat of political parties with Islamic roots or policies that threaten the secular structure of the country. However, the constant military intervention into civil governance and the backsliding of democracy did not allow a critical press tradition to evolve. Keeping the restrictive legal measures as a means to silence the opposition press in the name of protecting the integrity of the country and national security (as observed in *Ozgur Gundem v Turkey*) which are still the grounds (TCK and TMK) to silence opposition journalism today. However, the changing needs of society, observed in the next chapter (Gezi protests), require genuine amendments to be made in the TMK and TCK that include broadly drawn articles being used to silence the press.

Moreover, problems experienced throughout the history of Turkish politics had negative effects overall on the democratisation process and, in relation to this, the freedom of the press. This information is applied in Chapter 6 as a basis for legal recommendations designed to create stronger legal protection for the press in Turkey that will minimise the political influence on the freedom of the press, if not completely eliminate it.

Finally, based on the ECHR statement that an effective political democracy is a requirement for the protection of human rights and fundamental freedoms,<sup>568</sup> the next chapter will discuss whether a lack of political democracy leads to the censorship of the press as a burden to the democratisation process in Turkey. The evaluation of these political, social, and democratic practices will be extended in the next chapter to analyse the current legal problems encountered by the press under the AKP government in light of the recent uprising in Turkey — the Gezi protests.

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<sup>567</sup> Cimen Gunay Erkol, 'Issues of Ideology and Identity in Turkish Literature during the Cold War' in Cangul Ornek and Cagdas Ungor (eds), *Turkey in the Cold War: Ideology and Culture* (New York: Palgrave Macmillan, 2013) 124

<sup>568</sup> Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms 1950

# **Chapter 4 - Freedom of the Press in Turkey under the AKP Government: A Critical Analysis of the Political Influences on the Law and its Application**

## **4.1 Introduction**

In this chapter, the reasons why the press experienced one of the worst periods in the history of the Republic of Turkey during the rule of the Justice and Development Party (AKP) will be explored in light of the NGO reports suggesting that the press in Turkey was “not free”<sup>569</sup>, once the biggest crackdown on journalists started to take place with the governance of AKP. This situation will be critically analysed in light of the legal reforms undertaken by the state in the EU accession process, the loopholes in the legal provisions regulating freedom of expression, and the press, and the negative effects of the business relationship between AKP and media owners. In addition, the tendencies of the government to silence the opposition press will be explored in light of the historical experiences encountered by the political parties that were examined in the previous chapter, for the current political influences on the press cannot be separated from the historical elements that have had a direct impact on the mentality of political agents. In order to reach a detailed understanding of the problems encountered by the press during the AKP government, with the aim to make recommendations towards a solution. Jailed journalists and heavy fines incurred by the media outlets will be discussed within the chapter.

## **4.2 The rise of AKP**

European principles and democratic consolidation played an important role during the early years of the AKP governance because the EU accession process required democratic and legal reforms.<sup>570</sup> In that regard, AKP declared its will to establish a governance based on guarantees of freedom of expression (having stated that they accept this as a fundamental right in democracies),

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<sup>569</sup> Freedom House, ‘Freedom of the Press 2015: Turkey’ (*Freedom House*, 2015)  
<<https://freedomhouse.org/report/freedom-press/2015/turkey>> accessed 11 December 2015

<sup>570</sup> Ziya Onis and Fuat Keyman, ‘A New Path Emerges’ (2003) 14:2 *Journal of Democracy*

rule of law, and an impartial and independent judiciary.<sup>571</sup> In order to achieve these principles, AKP, in its 2002 party programme, made promises of legal amendments for the guarantee of freedom of expression and press as well as necessary constitutional amendments to achieve that purpose.<sup>572</sup>

AKP came to power in the 2002 elections gaining 34% of the votes.<sup>573</sup> Columnist Tarhan Erdem from *Radikal* (*Radical*) newspaper suggests that the percentage was a combination of the voters who previously voted for other parties such as the Welfare Party (*Refah Partisi*), the National Action Party (*Milliyetçi Hareket Partisi*), the Motherland Party (*Anavatan Partisi*), the True Path Party (*Dogruyol Partisi*), and the Democratic Left Party (*Demokrat Sol Parti*), which attracted voters from different segments of the society. Considering that AKP received 69% of Virtue Party's votes, 38% of the National Action Party's votes, and 28% of Motherland Party's votes, it seemed to have been supported mainly by the conservative right in the 2002 general elections.<sup>574</sup> On the other hand, *Milliyet* columnist Taha Akyol, in his article analysing the reasons behind AKP's success in the 2002 elections, argued that AKP's voters were mainly from the indigent and repressed part of society.<sup>575</sup> Dagi, however, emphasises that the Welfare Party under the leadership of Erbakan, which is based on the "National View (Milli Gorus)" ideology,<sup>576</sup> received only 2% in the 2002 general elections because it lost support from the Islamic groups. He attributes this loss to the setback the Islamic political movement received when it was at its most popular during the mid 1990s; under the influence of the military, the opinion took hold that policies openly based on political Islam were not suitable for the prevailing social and economic conditions. By contrast, AKP chose to define itself as "conservative-democrat" to distinguish itself from the Islamist political parties.<sup>577</sup>

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<sup>571</sup> The issue of how realistic these promises were will be discussed in depth further within the current chapter.

<sup>572</sup> Justice and Development Party, 'AKP 2002 Party Programme' (AKP, 2002)

<<http://www.akparti.org.tr/english/akpartil/parti-programme>> accessed 13 August 2013

<sup>573</sup> Election Results, '2002 Election Results' (2002) <<http://www.secim-sonuclari.com/2002>> accessed 29 August 2012

<sup>574</sup> Tarhan Erdem, 'İki Parti Secmeni AKP'ye gitti/Two Parties' Voters Choose AKP' (*Radikal*, 6 November 2002)

<<http://www.radikal.com.tr/haber.php?haberno=55571>> accessed 7 February 2015

<sup>575</sup> Taha Akyol, 'AKP'nin arkasında ne var?/What's behind AKP's success?' (*Milliyet*, 4 October 2002)

<<http://www.milliyet.com.tr/2002/10/04/yazar/akyol.html>> accessed 7 February 2015

<sup>576</sup> National View started as a political wave in 1969 with Necmettin Erbakan. It believes that Turkey can be stronger if it depends on its own workers and economic power by protecting its traditions and values. Therefore it is strictly against Westernisation.

<sup>577</sup> İhsan D. Dagi, 'The Justice and Development Party: Identity, Politics, and Discourse of Human Rights in the Search for Security and Legitimacy' in H. Yavuz, *The Emergence of a New Turkey: Democracy and the AK Parti* (Utah University Press, 2006) 94

Nevertheless, AKP's Islamic identity was highlighted by the party leader Erdogan in various forums such as the Symposium for International Conservatism and Democracy<sup>578</sup>: his speeches before his Prime Ministry, which were being circulated by social media channels, were leading to heavy criticism of his Islamic background as well as creating suspicion of a secret Islamic agenda that AKP allegedly had since its establishment. In this context, Dagi considers AKP's self-definition — Muslim democrat — as an “invention” that was used by the party to escape the classifications based on social or political stigma.<sup>579</sup>

#### 4.2.1 AKP's early years: initial democratic approaches of AKP

In this political setting, AKP's party programme before the elections reflected its “democrat” side with an emphasis on human rights and democracy. AKP claimed to be sensitive most importantly to the individual happiness of the citizens, that would be satisfied by the application of rights and freedoms through the establishment and application of legal guarantees of human rights.<sup>580</sup> In relation to Dagi's suggestions as observed above, it is possible to argue that AKP was forming legitimate grounds for its political existence (far from the previous parties that had Islamic roots who were unable to avoid the secular concerns of the Turkish Armed Forces (TSK) and society's strong links with secularism). Prioritising human rights and democracy rather than conservatism. The Conservative-democrat label was only a definition for the party, not its ultimate aim, as portrayed by AKP in its initial years on the political arena. Abdullah Gul (President of Turkey between 2007-2014) defended this ideology by stating that “We had put in front of us a mission to accomplish: We were to prove that a Muslim society is capable of changing and renovating itself, attaining contemporary standards, while preserving its values, traditions and identity.”<sup>581</sup>

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<sup>578</sup> AKP, ‘International Conservatism and Democracy’ (2004) <<http://www.akparti.org.tr/site/haberler/muhafazakarlik-ve-demokrasi-sempozyumu-basbakan-erdogan-ak-parti-siyaseti-t/3173#1>> accessed 23 January 2014  
Yalcin Akdogan, *Muhafazakar Demokrasi/Conservative Democracy* (Ankara AKP Press 2003)

<sup>579</sup> Ihsan D. Dagi, ‘The Justice and Development Party: Identity, Politics, and Discourse of Human Rights in the Search for Security and Legitimacy’ in Hakan Yavuz, *The Emergence of a New Turkey: Democracy and the AK Parti* (Utah University Press, 2006) 94

<sup>580</sup> AKP, ‘Party Programme’ AKP <<https://www.akparti.org.tr/site/akparti/parti-programi>> accessed 14 January 2012

<sup>581</sup> Hurriyet Daily News ‘Turkey to prove a Muslim society is capable of attaining contemporary standards’ (*Hurriyet Daily News* (31 July 2003) <<http://www.hurriyetdailynews.com/turkey-to-prove-a-muslim-society-is-capable-of-attaining-contemporary-standards.aspx?pageID=438&n=turkey-to-prove-a-muslim-society-is-capable-of-attaining-contemporary-standards-2003-07-31>> accessed 28 December 2012

Kaya and Cakmur, argue that a liberal market economy was identified as one of AKP's primary aims which resulted in support by the big business owners (holdings) and the attention of the mainstream media; AKP marketed itself as the one and only party that could make the EU accession process possible by enacting the necessary reforms that could also provide stability to the business sector.<sup>582</sup> Therefore, AKP, despite its conservative background, was economically more promising than the other political alternatives for the "big bosses" in Turkey. In that regard, as Finkel suggests, it can be argued that AKP's success could result from the inefficiency of the previous governments, for it was the first time in Turkey's political history that a party with a religious background came into power with 34% of the votes; its power increased in the elections of 2007<sup>583</sup> (46%).<sup>584</sup>

Another important point to remember is that AKP's party policy based on democracy, human rights, and the rule of law, as argued by Dagi, allowed them to reach the liberal/democratic groups in the country and internationally, protecting the party from the dominant secular centre in the meantime.<sup>585</sup> It is submitted by this author that, in order to appeal to a broader background of voters, governments in Turkey, rather than choosing to restrict the press for the elimination of opposition, should favour a freer press. The case of AKP clearly shows that democratic expressions incorporating human rights and the rule of law appeal to a broad segment of the society. Parallel to the fact that such liberalisation promises can lead to securing almost 50% in elections, lack of its implementation results in mass reaction within society, regardless of political background, as will be discussed regarding the protests of Gezi Park later in this chapter.

Given its background emphasis on democracy and human rights, and its consideration of the danger of the secular political atmosphere in the country, the AKP was following an original pattern. A different path from the previous political parties who openly declared their Islamic roots in order to receive the support of the pro-Islamic groups; yet failed to survive the political challenges, especially in the mid to late 1990s. More specifically, Duran discusses that the EU accession motivations of AKP were based on the intention to successfully stand in the secular dominated political arena, so individual rights and freedoms as well as the rule of law were

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<sup>582</sup> Rasit Kaya and Baris Cakmur, 'Politics and the Mass Media in Turkey' (2010) 11:4 Turkish Studies 521, 523

<sup>583</sup> Andrew Finkel, 'Turkey: torn between God and state' (2007) *Le monde diplomatique*

<sup>584</sup> Election Results, '2002 Election Results' (2007) <<http://www.secim-sonuclari.com/2007>> accessed 29 August 2012

<sup>585</sup> Ihsan D. Dagi, 'Rethinking Human Rights, Democracy, and the West: Post-Islamist Intellectuals in Turkey' (2004) 13 Critique: Critical Middle Eastern Studies 135-151

highlighted in order to “survive” such secular challenges.<sup>586</sup> Saatchioglu, in concert with Duran, states that “the Europeanisation agenda would lend legitimacy to the AKP’s disputed ‘conservative democracy’ ideology by proving its compatibility with European liberal democratic values. Consequently, all else being equal on the domestic economic front Europeanisation would allow the AKP to expand its electoral support base towards the centre and thus improve its vote share.”<sup>587</sup> This implied that the rise of AKP and its will to accelerate the EU accession process fell appropriately within the party’s concept of “liberalisation”, which also secured its political positioning within the dominant secular ideology; Saatchioglu argues that “the EU emerged as a strategic ally for the AKP in that liberalising democratic reforms needed for membership promised to make the rigid Kemalist model of secularism ‘less repressive and more inclusive’ and neutralise the secular state bureaucracy.”<sup>588</sup>

#### 4.2.2 Turkey’s candidacy to the EU: catalyst for democratisation?

The European Union accession process is argued to have a great impact on the freedom of expression in relation to Turkey’s democratisation process.<sup>589</sup> In this section, the impact of the EU accession process on domestic changes in Turkey is discussed in light of the reforms made on the laws regulating the freedom of expression.

To start with, it is essential to look at the democratic principles that form the basis of EU membership. Turkey’s application to become an associate member of the EU in 1959 is considered to be the continuation of its modernisation process.<sup>590</sup> During the Motherland Party government, the modernisation process entered a different stage in 1987 when Turkey made the first membership application to the European Community,<sup>591</sup> and finally in 1996 Turkey joined the customs union.<sup>592</sup>

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<sup>586</sup> Burhanettin Duran, ‘JDP and foreign policy as an agent of transformation’, in Hakan Yavuz (ed.) *The Emergence of a New Turkey: Democracy and the AK Parti* (University of Utah Press, 2006) 284

<sup>587</sup> Beken Saatchioglu, ‘AKP’s Europeanisation in Civilisation, Rule of Law and Fundamental Freedoms: The Primacy of Domestic Politics’ 16:1 *Journal of Balkan and Near Eastern Studies* (2014) 86, 91

<sup>588</sup> Ibid.

<sup>589</sup> Meltem Muftuler and Lauren McLaren, ‘Enlargement Preferences and Policy Making in the European Union: Impacts on Turkey’, (2003) 25:1 *Journal of European Integration* 17, 18

<sup>590</sup> Esra Ozyurek, *Nostalgia for the Modern: State Secularism and Everyday Politics in Turkey* (USA: Duke University Press, 2006) 13

<sup>591</sup> Turkey’s application to European Community in 1987 was rejected on the basis of Turkey’s insufficient democratic credit.

<sup>592</sup> Aswini K. Mohapatra, ‘Turkey’s Transition to Liberal Democracy and the Issue of its EU Membership’ (2011) 67:2 *India Quarterly: A Journal of International Affairs* 149, 157

The EU in 1999 accepted Turkey's candidacy for membership, which Mohapatra defines as "the second historic transition of Turkish polity" after it accepted the transition to the multi-party system in 1946.<sup>593</sup>

In the 1970s, the reference point for democratisation was the EEC as suggested by Pridham. It was argued to have a strong impact on the democratisation processes among the countries who aimed to become a part of it.<sup>594</sup> In addition, the European Convention on Human Rights and Fundamental Freedoms was based on the Universal Declaration of Human Rights (UDHR), which accepted the superiority of peace, justice, and a democratic political system<sup>595</sup> in parallel to the UDHR, which prioritised freedom of thought, opinion, and expression.<sup>596</sup>

Finally, in 2001, the democratic principles of the EU were brought closer in sync with UN standards with the new strategy offered by the Commission based on the advancement of the democratisation process through the application of human rights.<sup>597</sup> More specifically for the protection of freedom of expression as a fundamental human right, the European Initiative for Human Rights and Democracy (EIDHR) aspired to promote a pluralistic civil society, which was a critical step in Turkey's promotion of improved citizen-government dialogue.<sup>598</sup> Overall, these democratic principles formed the basis of the EU-Turkey relationship after the Helsinki Summit in 1999 when Turkey gained candidacy status to the EU, and membership negotiations that commenced in 2004 were perceived to be AKP's international success<sup>599</sup>, because they catalysed new legislation improving freedom of expression and press.

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<sup>593</sup> Ibid. 149

<sup>594</sup> Geoffrey Pridham, 'The European Union, Democratic Conditionality and Transnational Party Linkages - The case of Eastern Europe' in Jeal Grugel (ed.) *Democracy Without Borders*, London: Routledge, 1999) 59, 62

<sup>595</sup> Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms 1950

<sup>596</sup> UN The Universal Declaration of Human Rights 1948

<sup>597</sup> European Union, *European Union Observations on an Evolving EU Human Rights Policy* (2001)

<sup>598</sup> European Commission, *Commission Decision on the Annual Action Programme 2009 for the European Instrument for the Promotion of Democracy and the Human Rights* (C 7082, 2009)

<sup>599</sup> Ralph Negrine, 'Imagining Turkey: British press coverage of Turkey's bid for accession to the European Union in 2004' (2008) 9:5 Journalism 624, 629

### 4.3 Setting the legal background: legal reforms in relation to the freedom of the press

Turkey was required to fulfil the Copenhagen Criteria<sup>600</sup> in order to have accession to EU membership, the requirements specifically highlighted the importance of the human rights, market economy, and democratic politics.<sup>601</sup> The latter was considered to be crucial for Turkey because the state was given the responsibility for endorsing a democratic government.<sup>602</sup> Turkey was expected by the EC to adopt the Copenhagen criteria in order to make reforms especially to improve the conditions of free expression in accordance with ECHR Article 10.<sup>603</sup> The impact of these criteria on the improvement of freedom of the press is examined below with respect to the legal reforms that took place from 2002 under the AKP government. The exposition of the AKP government's legal reforms in this chapter recapitulates some of the articles of TCK and TMK examined in Chapter 2, so as to provide integrity to the explanation of these reforms within the current chapter. Such an analysis is useful for a deeper understanding of the inconsistency between the language of law and its application despite the legal reforms that took place in light of the European criteria.

Based on the Europeanisation process in Turkey, the European Commission report in 2001 advised that:

The basic features of a democratic system exist but Turkey is slow in implementing the institutional reforms needed to guarantee democracy and the rule of law. Changes in the executive have taken place with respect to EU-Turkey relations but a number of basic institutional issues, such as civilian control over the military, remain to be addressed....Despite a number of constitutional,

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<sup>600</sup> The European Council (Copenhagen June 1993) <[http://aei.pitt.edu/1443/1/Copenhagen\\_june\\_1993.pdf](http://aei.pitt.edu/1443/1/Copenhagen_june_1993.pdf)> accessed 19 September 2015

<sup>601</sup> Mine Eder, 'Implementing the Economic Criteria of EU Membership: How Difficult is it for Turkey?' (2003) 4:1 Turkish Studies 221, 232

<sup>602</sup> Ziya Onis, 'Turkey, Europe, and Paradoxes of Identity: Perspectives on the International Context of Democratization' (1999) 10:3 Mediterranean Quarterly 107, 109

<sup>603</sup> European Commission, *Regular Report from the Commission on Turkey's Progress Towards Accession* (Brussels 10 November 2003)

legislative and administrative changes, the actual human rights situation as it affects individuals in Turkey needs improvement.<sup>604</sup>

Following the European Commission's report, the Constitutional Reform Package that was adopted in October 2001 led to legislative amendments on August 2003. Reducing the role of the National Security Council (MGK) from a position in which it had a direct influence on politics to an advisory position. This step abolished the previous practice under which the MGK recommendation had effectively been binding on the government.<sup>605</sup>

#### **4.3.1 Changes in the Turkish Penal Code in relation to freedom of expression and the press**

The first harmonisation package on 19 February 2002 reduced the punishment under old TCK no. 765 Article 159<sup>606</sup> from 1 to 6 years to 1 to 3 years of imprisonment.<sup>607</sup> With the same package, Article 312 of TCK no. 765 was amended, and the monetary fines included in the article were removed.<sup>608</sup> Therefore, Article 312 (Threat with the intention of causing fear and panic among people), which holds crucial importance for drawing the limits of freedom of expression, was initially drawn as:

Any person who openly praises an offence or the person committing the offences is punished with imprisonment from six months to two years and monetary fine from 2 thousand lira to ten thousand lira.

Any person who openly provokes a group of people belonging to different social class, religion, race, sect, or coming from another origin, to be rancorous or hostile against another group, is punished with imprisonment from one year to three years and a monetary fine from three thousand liras to twelve thousand liras.

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<sup>604</sup> European Commission, *Regular Report from the Commission on Turkey's Progress Towards Accession* (Brussels 1756/2001) 13, 21

<sup>605</sup> Beken Saatcioglu, 'AKP's Europeanisation in Civilisation, Rule of Law and Fundamental Freedoms: The Primacy of Domestic Politics' 16:1 *Journal of Balkan and Near Eastern Studies* (2014) 86, 91

<sup>606</sup> See Chapter 2 and 3 for the previous regulation of TCK Article 159.

<sup>607</sup> Law regulating amendments in various laws no. 4744 (06/02/2002)

<sup>608</sup> Ibid.

Punishment to be increased by one third in cases where the offence is committed in a way that can cause danger to public security.

If the above offences are committed through the means of mass communication the punishment would be increased by one as much again.<sup>609</sup>

The amended<sup>610</sup> version of the Article was:

Any person who openly praises an offence or the person committing the offences is punished with imprisonment from six months to two years.

Any person who openly provokes a group of people belonging to different social class, religion, race, sect, or coming from another origin, to be rancorous or hostile against another group, in a way that could be dangerous for public order is punished with imprisonment from one year to three years.

Any person who openly humiliates another person just because he belongs to different social class, religion, race, sect, or comes from another origin, is punished with imprisonment from six months to two years.

Punishment to be increased by one third in cases where the offence is committed in a way that can cause danger to public security. If the above offences are committed through the means of mass communication the punishment would be increased by one as much again.

TCK no. 765 having been abolished in 2004, Article 312 was included in the new Penal Code under Articles 215 and 216: “any person who openly praises an offence or the person committing the offences, in a way that could be dangerous for public order, is punished with imprisonment for up to two years”<sup>611</sup> and “Any person who openly provokes a group of people belonging to different social class, religion, race, sect, or coming from another origin, to be rancorous or hostile against another group, in a way that could be dangerous for public order is

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<sup>609</sup> The Republic of Turkey Prime Ministry, ‘European Union Harmonisation Packages’ (Ankara 2007) 148

<sup>610</sup> Law regulating the amendment of various articles of the Constitution No. 4709 (3 October 2001)

<sup>611</sup> Turkish Penal Code 5237 (12/10/2004) s 5(215)

punished with imprisonment from one year to three years.”<sup>612</sup> These articles continue to be used to censor the press. With the second harmonisation package, Article 159 of TCK no. 765 was amended by an additional clause stating that “expression of thought intended to criticise shall not constitute a crime.”<sup>613</sup>

On 19 July 2003 (6th harmonisation package) Article 159 of TCK no. 765 was once more amended, reducing the minimum penalty for denigrating Turkishness, the State of the Turkish Republic, the Grand Assembly of Turkey, the Ministry, the Judicial institutions of the State, the military, and police organisations of the State from one year to six months. The clause specifying that “expression of thought intended to criticise shall not constitute crime”<sup>614</sup> was also added to the Article.<sup>615</sup> However, with the adoption of the new Penal Code, old Article 159 was added to the new Penal Code under the highly controversial Article 301<sup>616</sup>, in which the language of the law remained the same.<sup>617</sup>

With the seventh harmonisation package, Article 159 of TCK no. 765 was amended<sup>618</sup> and the minimum imprisonment for “publicly denigrating the Turkish state” was changed from one year to six months, and the activities specified in the Article were accepted not to constitute crime on condition that they took place with the aim to criticise only.<sup>619</sup>

In 2004, Article 126, which regulated “provoking people to be rancorous and hostile” by stating that “any person who openly provokes a group of people belonging to different social class, religion, race, sect, or coming from another origin, to be rancorous or hostile against another group is punished with imprisonment from one year to three years in case of such act causes risk to public safety”, was amended, and the last criteria specifying penalisation only if the individual’s

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<sup>612</sup> Ibid. s 5(216)

<sup>613</sup> Law regulating the amendments in various laws no. 4771 (03/08/2002)  
For the full version of Article 159, see Chapter 2 section “Turkish Penal Code”.

<sup>614</sup> Turkish Penal Code 1926/765 s 2 (159)

<sup>615</sup> The Republic of Turkey Prime Ministry, ‘European Union Harmonisation Packages’ (Ankara 2007) 145

<sup>616</sup> Turkish Penal Code no.5237 (26/9/2004)

<sup>617</sup> See Chapter 2 for the full article (TCK 301) under section “Turkish Penal Code”.

<sup>618</sup> Law regulating the amendments of various laws no. 4963 (30/07/2003)

<sup>619</sup> Zeki Yildirim, ‘Turkiye’de Ifade ve Basın Özgürlüğü Sorunu; Avrupa Birliği Uyum Sürecinde Ifade ve Basın Özgürlüğü Alanında Yapılan Çalışmalar/*The Problem of Freedom of Expression and the Press in Turkey: Developments in Freedom of Expression and the Press During the Harmonisation with the European Union*’ (2012) 16:1-2 EUFHD 53, 69

“incitement to enmity and hatred” constituted a “clear and close danger” was added.<sup>620</sup> This was considered to be a positive step toward narrowing the scope of expressions that were previously subjected to penalisation even if they included non-violent opinions.<sup>621</sup>

In 2005, in light of the ECtHR’s verdicts against Turkey and in accordance with the international agreements to which Turkey is committed, international human rights organisation observations, and the European Commission’s reports on the problems of press freedom in Turkey due to the application of the Turkish Penal Code, various amendments were made in the Turkish Penal Code.<sup>622</sup> On that basis Article 301 of TCK no. 5237 which regulated “denigrating Turkishness, the Republic and the State organs”, which was restrictive of freedom of expression and the press as it created ambiguity in terms of language and its application was amended.<sup>623</sup> The amendment brought the requirement of the Minister of Justice’s approval for the investigation of these offences.<sup>624</sup> However, the European Commission in its 2005 report stated that, even though the positive impact of the accession process is undeniable, the legal amendments undertaken until now still do not ameliorate or resolve controversial articles that continue to endanger freedom of the press, owing to their vague definitions of “criticising symbols of state sovereignty, reputation of the state and state organs, state security, national security and terrorism.” The European Commission’s report went on to observe that “the Turkish Courts continue to widely use Article 301 and the Anti-Terror Law to convict journalists.”<sup>625</sup>

Again, with the purpose of broadening the scope of press freedom, Articles 285 and 288 of TCK no. 5237, which regulate violating the confidentiality of investigations and the attempt to influence a fair trial, were amended as the press had been facing investigations and prosecutions because what constituted a crime was not clear under these articles.<sup>626</sup> The amendments aimed at

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<sup>620</sup> Turkish Penal Code no. 5237 (26/9/2004) s 5(216)

<sup>621</sup> Beken Saatcioglu, ‘AKP’s Europeanisation in Civilisation, Rule of Law and Fundamental Freedoms: The Primacy of Domestic Politics’ 16:1 Journal of Balkan and Near Eastern Studies (2014) 86,91

<sup>622</sup> Zeki Yildirim, ‘Türkiye’de Ifade ve Basın Özgürlüğü Sorunu; Avrupa Birliği Uyum Surecinde Ifade ve Basın Özgürlüğü Alanında Yapılan Çalışmalar/*The Problem of Freedom of Expression and the Press in Turkey: Developments in Freedom of Expression and the Press During the Harmonisation with the European Union*’ (2012) 16:1-2 EUFHD 53, 74

<sup>623</sup> Turkan Yalcin Sancar, ‘Yine Düşünce Özgürlüğü, Yine 301. Madde/ Again Freedom of Thought, Again Article 301’ in *Ifade Özgürlüğü İlkeler ve Türkiye/Freedom of Expression Principles and Turkey* (İletişim Yayınları, 2007) 115-141

<sup>624</sup> See Chapter 2 for scholarly comments on the changes.

<sup>625</sup> European Commission, *Turkey 2005 Progress Report* (1426, 561 Final/2005)

<sup>626</sup> Zeki Yildirim, ‘Türkiye’de Ifade ve Basın Özgürlüğü Sorunu; Avrupa Birliği Uyum Surecinde Ifade ve Basın Özgürlüğü Alanında Yapılan Çalışmalar/*The Problem of Freedom of Expression and the Press in Turkey*:

eliminating journalist detainment on the basis of expressing their views or simply disseminating information about a case.

Praising the offence and the offender is another crime restricting journalists. Therefore, Article 215 of TCK no. 5237 was changed from “any person who openly praises an offence or the person committing the offences is punished with imprisonment up to two years” to “any person who openly praises an offence or the person committing the offences is punished with imprisonment up to two years, in a case which creates open and direct danger to the public order”.<sup>627</sup> As a result of this amendment, the expression of thought is no longer sufficient on its own for the crime to take place; such expression must be examined in order to determine that it creates an open danger to public order. This amendment is arguably a positive change towards improving freedom of expression, for ECtHR criteria also suggest that praising an offence or the offender could only be penalised where that behaviour leads to endangering the public peace.<sup>628</sup>

Finally, Article 220 (7), which provided that “any person who knowingly and willingly helps an organised criminal group although not takes place within the hierarchic structure of the group, is punished as if he is a member of the organised groups”, was amended by the 3rd harmonisation package and “the penalty for being a member of organised criminal group can be reduced down to one third, depending on the nature of help”<sup>629</sup> was added to the clause in the amended version. Karakaya and Ozhabebe observe that this amendment only provides judicial discretion, it still penalises helping an organised criminal group on the same grounds as actually being a member of the organised criminal group.<sup>630</sup> Considering that these types of crime are different, both the crime and the penalty must be provided under a separate title.<sup>631</sup>

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*Developments in Freedom of Expression and the Press During the Harmonisation with the European Union* (2012) 16:1-2 EUFHD 53, 76

<sup>627</sup> Turkish Penal Code 2004/2537 s 5(215)

<sup>628</sup> Naim Karakaya and Hande Ozhabebe, ‘Yargi Paketleri: Hak ve Ozgurlukler Acisindan Bir Degerlendirme/Judicial Packages: An Evaluation on Rights and Freedoms’ (TESEV, 2013) 1, 13

<sup>629</sup> Turkish Penal Code 2004/2537 s 5(220)

<sup>630</sup> See section “Nedim Sener & Ahmet Sik” for the application of Article 220 (7).

<sup>631</sup> Naim Karakaya and Hande Ozhabebe, ‘Yargi Paketleri: Hak ve Ozgurlukler Acisindan Bir Degerlendirme/Judicial Packages: An Evaluation on Rights and Freedoms’ (TESEV, 2013) 1, 14

### 4.3.2 Changes in the Anti-Terror Law

With the first harmonisation package, Article 7 of the Anti-Terror Law no. 3713 was amended,<sup>632</sup> specifying that only propaganda that promotes terror would constitute a crime. This amendment broadened the limits of freedom of expression because the designation of the crime was made difficult compared to the previous version of the Article.<sup>633</sup>

On 19 July 2003 (6th harmonisation package), with the intention of broadening the limits of free expression, Article 8 of the Anti-Terror Law no. 3713, which defined the offence of making propaganda against the indivisible unity of the state, was abolished.<sup>634</sup> Article 1 (Definition of terrorism) of the Anti-Terror Law<sup>635</sup> was also amended;<sup>636</sup> the previous version of Article 1 before the amendment was:

Terrorism is an act done by one or more persons belonging to an organisation 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, threat, oppression and intimidation.

In relation to the definition of terrorism, the amendment introduced the criteria of force and violence, highlighting that only acts that constituted a crime would constitute the offence of terrorism.<sup>637</sup>

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<sup>632</sup> Law regulating amendments to various laws no. 4744 (06/02/2002)

<sup>633</sup> Zeki Yildirim, 'Türkiye'de Ifade ve Basın Özgürlüğü Sorunu; Avrupa Birliği Uyum Sürecinde Ifade ve Basın Özgürlüğü Alanında Yapılan Çalışmalar/*The Problem of Freedom of Expression and the Press in Turkey: Developments in Freedom of Expression and the Press During the Harmonisation with the European Union*' (2012) 16:1-2 EUFHD 53, 64

<sup>634</sup> See the original version of the article and its application in Chapter 2 under section "Sener v Turkey".

<sup>635</sup> See the amended version of the Anti-Terror Law Article 1 in Chapter 2 under section "Law on Fight Against Terrorism of Turkey".

<sup>636</sup> Turkish Republic Prime Ministry, 'Political Reform in Turkey' (Ankara 2007) 17

<sup>637</sup> Law regulating amendments in various laws no. 4928 (15/07/2003)

With the seventh harmonisation package on 7 August 2003 (7th harmonisation package), Article 7 (Terrorist organisations) of the Anti-Terror Law no. 3713 was amended.<sup>638</sup> “Promoting violence” was added to the text as a criterion for the propaganda to constitute a crime, for the older version read: “whoever helps the members of a terrorist organisation or makes propaganda of the terrorist organisation shall be punished by imprisonment for one to five years and a monetary fine from five hundred lira to one thousand lira.”<sup>639</sup> This amendment was designed to meet the criteria of ECtHR.<sup>640</sup>

Similarly, to the changes made in TCK, the Anti-Terror Law was also subject to various amendments after 2004 in order to eliminate the limitations experienced by journalists through the arbitrary use of legal provisions based on their vague language. Article 13 of TMK no. 3713, which regulated that no penalty given for crimes committed under TMK could be turned into monetary fines or preliminary injunctions or suspended, was abolished.<sup>641</sup> With similar purposes, (5) of the same law, which regulated prosecutors and the courts’ authority to suspend newspapers and magazines accused of offences of “making terrorist propaganda” for up to 30 days, which ECtHR found to violate the right to free expression of the press was abolished. In 2013, two of the most controversial articles of TMK, Article 6 and 7 were amended. Article 6 regulated “those who print or publish declarations or announcements of terrorist organisations shall be punished with imprisonment from one to three years”; after the changes it regulated that “Those who print or publish declarations or announcements of terrorist organisations, which praise or promote the violent methods of these terrorist organisations, shall be punished with imprisonment from one to three years.”<sup>642</sup> Article 7 (propaganda of terrorist organisation) of the same law added a similar criterion for terrorist organisation propaganda to be considered as a crime by regulating that “Whoever makes propaganda of the terrorist organisation by promoting violence shall be punished by imprisonment for one to five years.”<sup>643</sup>

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<sup>638</sup> Law regulating amendments to various laws no. 4963 (30/07/2003)

<sup>639</sup> The Republic of Turkey Prime Ministry, ‘European Union Harmonisation Packages’ (Ankara, 2007) 141-143

<sup>640</sup> Turkish Republic Prime Ministry, ‘Political Reform in Turkey’ (Ankara, 2007) 18

Zeki Yildirim, ‘Türkiye’de Ifade ve Basın Özgürlüğü Sorunu; Avrupa Birliği Uyum Sürecinde Ifade ve Basın Özgürlüğü Alanında Yapılan Çalışmalar/*The Problem of Freedom of Expression and the Press in Turkey: Developments in Freedom of Expression and the Press During the Harmonisation with the European Union*’ (2012) 16:1-2 EUFHD 53, 71

<sup>641</sup> Law that regulates amendments to various laws in order to activate judiciary duties and suspension of the cases and penalties of the crimes committed through the press no. 6352 (02/07/2012)

<sup>642</sup> Law regulating amendments to various laws in relation to human rights and freedom of expression no. 6459 (11/4/2013)

<sup>643</sup> Ibid.

### 4.3.3 Changes in the Turkish Press Code

With the second harmonisation package, Press Code no. 5680 was amended, and the prevention of dissemination and the seizure of publications was made subject to a Court's decision.<sup>644</sup>

With the third harmonisation package, Press Code no. 5680 was amended, exchanging punishment of imprisonment for monetary fines, and in the fourth harmonisation package, the same law Article 15 was amended,<sup>645</sup> accepting that the press cannot be forced to declare its sources of information in accordance with ECtHR case law, stating that the role of the press in a democratic society is disseminating information and that the people have the right to information.<sup>646</sup>

The Seventh harmonisation package included the enactment of a new press code, thereby abolishing Press Code no. 5680.<sup>647</sup> Press Code no. 5187 was accepted, for revisions to the previous code resulted in the deterioration of rights and freedoms. The goal was to conform with the international agreements.<sup>648</sup> Therefore, the new press code was prepared in order to comply with ECHR Article 10 and the case law of the ECtHR on the freedom of the press with the aim to strengthen press freedom.<sup>649</sup>

In 2012, Article 19 of the Press Code no. 5187 was abolished; it regulated “influencing the judiciary” and was found to thwart freedom of the press as the press faced monetary fines for influencing judiciary's decisions during the investigation and prosecution process.<sup>650</sup>

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<sup>644</sup> Law regulating amendments to various laws no. 4748 (26/03/2002)

<sup>645</sup> Law regulating amendments to various laws no.4778 (02/01/2003)

<sup>646</sup> Zeki Yildirim, ‘Türkiye’de Ifade ve Basın Özgürlüğü Sorunu; Avrupa Birliği Uyum Sürecinde Ifade ve Basın Özgürlüğü Alanında Yapılan Çalışmalar/*The Problem of Freedom of Expression and the Press in Turkey: Developments in Freedom of Expression and the Press During the Harmonisation with the European Union*’ (2012) 16:1-2 EUFHD 53, 67

Turkish Republic Prime Ministry, ‘Political Reform in Turkey’ (Ankara, 2007) 13-14

<sup>647</sup> Turkish Press Code 5680 and various amendments to the code are examined in Chapter 3. It is the code that was accepted during Democrat Party period in 1950 with the aim to serve the needs of the multi-party political era.

<sup>648</sup> Zeki Yildirim, ‘Türkiye’de Ifade ve Basın Özgürlüğü Sorunu; Avrupa Birliği Uyum Sürecinde Ifade ve Basın Özgürlüğü Alanında Yapılan Çalışmalar/*The Problem of Freedom of Expression and the Press in Turkey: Developments in Freedom of Expression and the Press During the Harmonisation with the European Union*’ (2012) 16:1-2 EUFHD 53, 72

<sup>649</sup> Turkish Republic Prime Ministry, ‘Political Reform in Turkey’ (Ankara, 2007) 23

<sup>650</sup> Law that regulates amendments in various laws in order to activate judiciary duties and suspension of the cases and penalties of the crimes committed through the press no. 6352 (02/07/2012)

#### 4.3.4 Changes in the Constitution

On 7 May 2004, Article 30 of the Constitution, which regulated the “protection of the printing facilities”, was amended, specifying that “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”<sup>651</sup>; AKP argued that this strengthened the legal protection of the freedom of the press.<sup>652</sup>

One of the most crucial legal amendments for securing the freedom of the press was made in May 2004 with the acceptance of the supremacy of international law over domestic law. In cases of conflict between principles of both laws relating to basic rights and liberties, international law must be taken as a basis for judgement by the Turkish courts as stated by the Constitution Article 90 (5):

International agreements duly put into effect have the force of law. No appeal to the Constitutional Court shall be made with regard to these agreements, on the grounds that they are unconstitutional. (Sentence added on May 7, 2004; Act No. 5170) In the case of a conflict between international agreements, duly put into effect, concerning fundamental rights and freedoms and the laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail.<sup>653</sup>

It is observed by the present author that despite AKP’s steps to amend the legal provisions to improve the individual rights and freedom in relation to press freedom, the 1982 Constitution which was adopted under military rule of the 1982 coup remains restrictive in spirit, for it still prioritises nationalism and conservatism in Article 26 (2) and 28 (2).<sup>654</sup> Its effects on the law regulating the exceptions to press freedom are observed in Article 3 of the Turkish Press Law which follows as:

The press is free. This freedom includes the right to acquire and disseminate information, and to criticise, interpret and create works.

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<sup>651</sup> The Constitution of the Republic of Turkey 1982 s 2(30)

<sup>652</sup> Turkish Republic Prime Ministry, ‘Political Reform in Turkey’ (Ankara, 2007) 4

<sup>653</sup> Constitution of the Republic of Turkey 1982 s3 (90) Ratification of international treaties

<sup>654</sup> See chapter 2 for further discussion of the broad language of the constitution that allows restrictions on the freedom of expression and the press.

The exercise of this freedom may be restricted in accordance with the requirements of a democratic society to protect the reputation and rights of others as well as public health and public morality, national security, and public order and public safety; to safeguard the indivisible integrity of the state's territory; to prevent crime; to withhold information duly classified as state secrets; and to ensure the authority and impartial functioning of the judiciary.<sup>655</sup>

## 4.4 Assessment

### 4.4.1 Law on the Books

The legal changes designed to improve freedom of expression and the press, in concert with the Turkish state's attempt to align its legal provisions with the European Union in order to fulfil the Copenhagen criteria, suggests that a more democratic approach has been adopted<sup>656</sup> in theory. However, it is suggested by way of this research that looking closely at the nature of these changes it is also possible to see that the changes, especially in TCK and Anti-Terror Law, have been mostly cosmetic. Article 312 of old TCK no. 765 was amended, and the monetary fines included in the article were removed. The term “in a way that could be dangerous for public order” lacked objective and solid grounds, which opened the way for its arbitrary application to limit the freedom of the press.

This author points out that considering the importance of Article 312 for defining the limits of freedom of expression, the intention of Turkish lawmakers for its amendment is important to analyse. As observed in Chapter 3, the transformation into a secular and modern social structure was made through legal reforms. A similar approach is still used today, for the lawmaker found the solution to limitations experienced by the use of Article 312, again, in the change of law.<sup>657</sup> This indicates the consistent approaches to legal positivism followed by the Turkish lawmaker. This

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<sup>655</sup> Turkish Press Law 2004/5187 s1(3) Freedom of the press

<sup>656</sup> Ayşe Asker, ‘Avrupa Birliği’ne Uyum Sürecinde (1999-2005) Türkiye’nin Değişen İletişim Politikaları/*Turkey’s Changing Communication Policies in the Harmonisation Process with the EU (1999-2005)*(2010) 1:1 Global Media Journal 1

<sup>657</sup> Fazıl Husnu Erdem, ‘TCK’nun 312. Maddesinde Gerçekleştirilen Son Değişiklik Üzerine Genel Bir Değerlendirme/*An Analysis of the latest amendments made to TCK Article 312*’ (2002) Vol.2 Electronic Journal of Social Sciences

approach to ‘change’ in combination with the state centrist approach of governance<sup>658</sup> continues to result in limitations to free expression, because the normative regulation of law is considered separately from the application. Possible solutions to hindrances encountered by the press due to the application of Article 312, were found in the normative legal changes in line with the first harmonisation package. Nevertheless, the legal amendments can only change the language of law but not its application. This also implies that, without internalisation and implementation of universal legal principles that incorporate human rights, the establishment or improvement of a democratic state would be hard.<sup>659</sup> However, this research concludes that the actual reasons for amending Article 312 were not to improve the conditions of free expression but to regulate free expression of ideas that would stay within the lines of the deeply ingrained political ideology.

When both the older version and the amended version of Article 312 are compared, it is possible to determine that the word “danger”, which was added to the amended article and also transferred to the new Penal Code under articles 215 and 216, remains a burden for a clear understanding of the provision. Considering that the reason for reforms in general and the amendment of Article 312 specifically was based on the aim to set a legal basis that is clear and precise in its meaning and that would limit arbitrary interpretation by judges, it is fair to argue that the amendment did not manifest this intent. The reason why the reform packages could not go beyond cosmetic changes and various legal provisions (some discussed above were simply transferred into the new Penal Code 5237) is because conventionally, law is applied for the protection of the state interest rather than the public order. This leads to charges being brought against the journalists who do not follow the political ideology<sup>660</sup>, or the government’s approach.

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<sup>658</sup> Elaborate examination of the state centrist governance of Turkey can be found in Chapter 3.

<sup>659</sup> Ozan Erozdin, ‘Yargisal Dugum: Turkiye’de Anayasa Reformina Iliskin Degerlendirme ve Oneriler/*Judicial Knot: Analysis and Suggestions on the Constitutional Reform in Turkey*’ TESEV Demokratiklesme Programi Siyasal Raporlari Serisi Yargi Reformu1 page 10

<sup>660</sup> Fazil Husnu Erdem, ‘TCK’nun 312. Maddesinde Gerçekleştirilen Son Değişiklik Üzerine Genel Bir Değerlendirme/*An Analysis of the latest amendments made to TCK Article 312*’ (2002) Vol.2 Electronic Journal of Social Sciences

Similarly, even though Press Code protects journalists' rights to protect their sources, it does not embrace "a strong public interest for the protection of journalists" themselves.<sup>661</sup> Based on this argument, it is appropriate to reference articles that regulate the criminal responsibility of the owners of publications and their editors — namely those stipulating that "the owner of the publication is responsible for the crimes committed through publication."<sup>662</sup> Even though the press crimes specified under the Press Code mostly provide monetary fines and regulate that monetary fines cannot be turned into imprisonment unless not paid, Turkish legal scholars generally accept<sup>663</sup> that there is no separate group of crimes designated specifically as "press crimes" but rather "the crimes committed through the press", that are provided in the Penal Code and essentially do not change the properties of the committed crime<sup>664</sup> but rather impose a heavier fine once it is committed.

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<sup>661</sup> Thomas Hammarberg, 'Freedom of Expression and Media Freedom in Turkey' (Council of Europe Report, 12 July 2011) <<https://wcd.coe.int/ViewDoc.jsp?p=&id=1814085&direct=true>> accessed 5 April 2013

<sup>662</sup> Turkish Press Code 5187 (9/6/2004) Article 11 Penal Liability

Crimes committed via printed matter occur upon their publication.

The owner of the publication shall be held responsible for crimes committed through periodicals and non-periodicals.

If the owner of a periodical is not specified or he/she does not hold penal liability during the publication or he/she cannot be tried by Turkish courts due to he/she being abroad during the publication process or if the punishment to be imposed does not influence another punishment previously imposed due to other crimes he/she committed, the responsible editor and the editor working beneath him/her, editor-in-chief, editor, press advisor shall be held responsible. However, if the publication is published despite the objection of the responsible editor and the editor working beneath him/her, the responsibility shall fall on the person who made the matter published.

If the owner of a non-periodical is not specified or he/she does not hold penal liability during the publication or cannot be tried by the Turkish courts or he/she is abroad during the publication process or if the punishment to be imposed upon him/her does not affect another punishment he/she was given due to other crimes committed, the publisher shall be held responsible. If the publisher is not specified or if he/she does not have penal liability during the printing if he/she cannot be tried in Turkey due to he/she being abroad during the publishing, then the printer shall be held responsible.

The above provisions shall also be applied to all publications which violate the provisions related to periodicals and non-periodicals.

<sup>663</sup> Cetin Ozek, *Türk Basın Hukuku/Turkish Press Code* (Istanbul Fakulteler Matbaası, 1978) 523

<sup>664</sup> Berrin Bozdoğan Akbulut, 'Basın Sucu ve Ceza Sorumluluğu/Press Crime and Criminal Responsibility' (2000) 1:3 Selcuk Iletisim 86, 87

Crimes under the Turkish Press Code specified by Articles 20 (Encouraging Sexual Assault, Murder or Suicide),<sup>665</sup> 21 (Illicit Disclosure of Identities)<sup>666</sup> and 24 (Re-publication)<sup>667</sup> provide only monetary fines. However, even though Article 19, which regulated influencing the judiciary and provides a minimum 20.000 lira monetary fine, was abolished in 2012, journalists are still imprisoned under the Penal Code that regulates influencing the judiciary under Article 277. In addition, Article 125, which regulated defamation and provided a heavier prison sentence in the cases where defamation took place through the press, was abolished in 2005.<sup>668</sup> However, the current clause 4 of this article provides that “the punishment is increased by one sixth in case of performance of defamation act openly,”<sup>669</sup> which brings a heavier penalty than its previous version, which provided that “if the offence is committed through press and use of any one of publication organs, then the punishment is increased up to one third.”<sup>670</sup> As a result, this clause can still be applied to defamation through the press as the press indicates only the means of committing the crime but does not change the nature of it.<sup>671</sup>

It is submitted that, even though the Press Code itself does not impose a penalty of imprisonment, the Turkish Penal Code in effect carries a heavy prison sentence, regulating that the punishment would be increased when the crime is committed through the press. In that regard,

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<sup>665</sup> Turkish Press Code 5287 (9/6/2004)  
Article 20

Those who publish articles and images which can encourage sexual assault, murder or suicide beyond the limits of furnishing information on such activities shall be sentenced to pay a major fine ranging from 1 thousand to 20 thousand TL. This fine cannot total less than 2 thousand TL for regional periodicals and 10 thousand TL for nationwide periodicals.

<sup>666</sup> Turkish Press Code 5287 (9/6/2004)

Article 21 In periodicals, persons who disclose the identities of the following individuals shall be sentenced to pay a major fine ranging from 1 thousand to 20 thousand TL (not less than 2 thousand TL for regional periodicals and 10 thousand TL for nationwide periodicals):

- a) News about sexual acts between individuals prohibited from marrying under Turkish Civil Code No. 4721 dated 22.11.2001.
- b) Victims who appear in the news regarding crimes mentioned in Articles 414, 415, 416, 421, 423, 429, 430, 435 and 436 of Turkish Penal Code No. 765 dated 01.03.1926.
- c) Victims or perpetrators of crimes under the age of 18.

<sup>667</sup> Turkish Press Code 5287 (9/6/2004)

Article 24 Individuals who re-publish news, articles or photographs previously printed in a periodical without disclosing their source shall be sentenced to pay a major fine ranging from 5 thousand to 10 thousand TL. Even though the right to re-publish is reserved, those who publish such printed matter without providing due acknowledgement of the owner of the periodical shall be sentenced to pay a major fine ranging from 20 thousand to 40 thousand TL.

<sup>668</sup> Law regulating the amendments in the Turkish Penal Code no 5377 (8/7/2005)

<sup>669</sup> Turkish Penal Code 5237 (26/9/2014) s 8(125)

<sup>670</sup> Tugrul Katoglu, ‘Concept of Defamation Trough the Medium of the Press and the Problem of Material Jurisdiction’ (2013) 19:2 Marmara University Faculty of Law Research Journal 736, 737

<sup>671</sup> Durmus Tezcan, Mustafa Ruhan Erdem and R. Murat Onok, *Teorik ve Pratik Ozel Ceza Hukuku/Theoretical and Practical Criminal Law* (Ankara Seckin Press, 2012) 473

Turkish Penal Code Articles 132 (Violation of Communicational Secrecy),<sup>672</sup> 133 (Tapping and recording of conversations between the individuals),<sup>673</sup> 134 (Violation of Privacy),<sup>674</sup> 217 (Provoking people not to obey the laws), and 218 (Joint provision) increase the punishment imposed by one half.<sup>675</sup> Articles 220 (Forming organised groups with the intention of committing crime), 226 (Indecency),<sup>676</sup> and 318 (Discouraging people from enlisting in armed forces)<sup>677</sup> all

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<sup>672</sup> Turkish Penal Code 5237 (26/9/2014) s 9(132)

- (1) Any person who violates secrecy of communication between the parties is punished with imprisonment from one year to three years. If violation of secrecy is realised by recording of contents of communication, the sentence is increased by one.
- (2) Any person who unlawfully publicises the contents of communication between the persons is punished with imprisonment from two years to five years.
- (3) Any person who openly discloses the content of the communication between himself and others without obtaining their consent, is punished with imprisonment from one year to two three years.
- (4) The punishment determined for this offence stays the same in case of disclosure of contents of communication between the individuals through press and broadcast.

<sup>673</sup> Turkish Penal Code 5237 (26/9/2014) s 9(133)

- (1) Any person who listens non general conversations between the individuals without the consent of any one of the parties or records these conversations by use of a recorder, is punished with imprisonment from two years to five years.
- (2) Any person who records a conversation in a meeting not open to public without the consent of the participants by use of recorder, is punished with imprisonment from six months to two years.
- (3) Any person who derives benefit from disclosure of information obtained unlawfully as declared above, or allowing others to obtain information in this manner, is punished with imprisonment from two years to five years, or imposed punitive fine up to four thousand days. The punishment determined for this offence stays the same if the /disclosure of these data is made through the press.

<sup>674</sup> Turkish Penal Code 5237 (26/9/2014) s 9(134)

- (1) Any person who violates secrecy of private life, is punished with imprisonment from one year to three years. In case of violation of privacy by use of audio-visual recording devices, the sentence is increased by one.
- (2) Any person who discloses audio-visual recordings relating to private life of individuals are sentenced to imprisonment from two years to five years. In case of commission of this offence through press and broadcast, the punishment stays the same.

<sup>675</sup> Turkish Penal Code 5237 (26/9/2014) s 5(217)

Any person who openly provokes people not to obey the laws is punished with imprisonment from six months to two years, or imposed punitive fine, if such act causes potential for public peace.

Turkish Penal Code 5237 (26/9/2014) s 5(218)

Punishment to be imposed is increased by one half in case of commission of above listed offences through press and broadcast. However, expression of thought that does not cross the limits of dissemination of news and take place with the aim of criticism do not constitute a crime.

<sup>676</sup> Turkish Penal Code 5237 (26/9/2014) s 7(226)

- 1) Any person who involves in an unlawful act;
  - a) By allowing a child to watch indecent scene or a product, or to or hear shameful words,
  - b) By displaying these products at places easy to reach by children, or reading the contents of these products, or letting other to speak about them,
  - c) By selling or leasing these product in such a way open for public review,
  - d) By selling, offering or leasing these products at places other than the markets nominated for sale of these product,
  - e) By gratuitously supplying or distributing these products along with other goods or services,
  - f) By making advertisement of these products, is punished with imprisonment from six months to two years.
- (2) The persons who publicise indecent scenes, words or articles through press and broadcast organs or act as intermediary in publication of the same is punished with imprisonment from six months to three years.

<sup>677</sup> Turkish Penal Code 5237 (26/9/2014) s 5(318)

- (1) Those who try to persuade or instigate people not to enlist armed forces or making propaganda with this intention, are punished with imprisonment from six months to two years.
- (2) The punishment to be imposed is increased by one half in case of commission of this offence through press and broadcast organs.

provide imprisonment as a penalty and an increase in the penalty if the crime is committed through the press.

#### 4.4.2 Law in Practice

Hoffman and Werz argue that when the AKP held power, there was a significant decline in the number of journalists killed after 2003. They argue that the polarisation of the Turkish society 2000 was the reason for such killings,<sup>678</sup> considering the high number of journalists targeted or killed by ultra-nationalists, Islamists, or PKK members during the 1990s.<sup>679</sup> However, Hoffman and Werz recognise the assassination of Hrant Dink<sup>680</sup> as evidence of continuing traditional repressive attitude to the freedom of expression.<sup>681</sup> The European Commission echoed Hoffman and Werz in its 2009 report that there was no longer a systematic use of TCK's Article 301 and that the amendment made to the article reduced the number of journalist prosecutions in comparison with previous years. The Commission, on the other hand, criticised the Turkish legal system for its broad interpretation of the legal provisions in relation to the freedom of the press and stated that "this legal uncertainty puts journalists, writers, publishers, politicians, academics and others at risk of investigation, prosecution, conviction and imprisonment and could therefore result in self-censorship."<sup>682</sup>

Throughout the mid-2000s, which was after the beginning of the acceleration of the Europeanisation process under AKP rule and despite this process motivating the Turkish state to undertake democratic reforms, the economic crisis of the European Union and the lack of political support (EU countries) for Turkey's EU accession led to a decrease in the possibility of an EU prospect for Turkey. It resulted in the AKP government slowing down the reform process and

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<sup>678</sup> Max Hoffman and Michael Werz, 'Freedom of the Press and Expression in Turkey' (*Center for American Progress*, 14 May 2013) <<https://www.americanprogress.org/issues/security/report/2013/05/14/63159/freedom-of-the-press-and-expression-in-turkey/>> accessed 16 May 2014, 2

<sup>679</sup> Elaborate information on the situation of journalists in Turkey in the 1990s is in Chapter 3.

<sup>680</sup> See Chapter 2 for detailed information on the assassination and the case of Hrant Dink.

<sup>681</sup> Max Hoffman and Michael Werz, 'Freedom of the Press and Expression in Turkey' (*Center for American Progress*, 14 May 2013) <<https://www.americanprogress.org/issues/security/report/2013/05/14/63159/freedom-of-the-press-and-expression-in-turkey/>> accessed 16 May 2014, 2

<sup>682</sup> European Commission, *Turkey 2009 Progress Report* (Com 533 Sec 1334, 2009) 17-18

losing the impetus for its implementation.<sup>683</sup> Therefore, this author points out that in its second term the AKP asserted pressure on the opposition press to secure its control. Based on the political history in relation to the press examined in the previous chapter, and considering that the new governments (even the military officers who took power in the political history of Turkey) were eager to take control of the press in order to allow the dissemination of information in favour of their own agendas. It is not surprising that AKP followed this same trend as soon as it secured its power after its first successful election results in 2002 and started to openly interfere in journalistic practices after its second term.

The present researcher observes that although during the EU accession process the Turkish state undertook various legal and constitutional reforms, the Turkish Penal Code and the Anti-Terror Law still remain the biggest restriction for freedom of the press. Therefore, as Hammarberg suggests, this legislation is “are the origin of the vast majority of freedom of expression cases against Turkey brought to the European Court of Human Rights.”<sup>684</sup>

The 2015 Report of Freedom House, argues that the 2008 amendments to Penal Code Article 301 “were largely cosmetic” despite amendments such as reducing the maximum prison sentence and adding the requirement of the Ministry of Justice’s approval for its use; the expensive and time consuming trials still lead to self-censorship of the press. Penal Code Article 216 continues to threaten the freedom of the press because it is intensively used against journalists; similarly Article 301 causes self-censorship of the press because it permits imprisonment of up to three years for “incitement to hatred.”<sup>685</sup> In addition, Articles 215, 216, and 301 are merely reworded versions of the older provisions 312, 159, and 155 of the previous Penal Code.<sup>686</sup> Because the reform packages did not touch TCK Articles 125, 301 and 314,<sup>687</sup> despite the other press-related amendments made in the reform packages, the vaguely drawn language of TCK and TMK still

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<sup>683</sup> Max Hoffman and Michael Werz, ‘Freedom of the Press and Expression in Turkey’ (*Center for American Progress*, 14 May 2013) <<https://www.americanprogress.org/issues/security/report/2013/05/14/63159/freedom-of-the-press-and-expression-in-turkey/>> accessed 16 May 2014, 7

<sup>684</sup> Thomas Hammarberg, ‘Freedom of Expression and Media Freedom in Turkey’ (Council of Europe Report, 12 July 2011) <<https://wcd.coe.int/ViewDoc.jsp?p=&id=1814085&direct=true>> accessed 5 April 2013

<sup>685</sup> Freedom House, ‘Freedom of the Press 2015 Turkey’ (*Freedom House*, 2015) <<https://freedomhouse.org/report/freedom-press/2015/turkey>> accessed 11 December 2015, 5

<sup>686</sup> See Chapter 2 section “Turkish Penal Code” and Chapter 4 section “Setting the legal background: legal reforms in relation to the freedom of the press” for the actual language of Articles 215, 216, 301 (new TCK) and 312, 159, 155 (old TCK)

<sup>687</sup> See Chapter 2 section “Turkish Penal Code” and Chapter 4 section “Setting the legal background: legal reforms in relation to the freedom of the press” for the actual language of Articles 125, 301 and 314 of TCK.

continues be used to allow journalist imprisonments.<sup>688</sup> In that regard, OSCE states that in 2014 most of the 22 imprisoned journalists in 2014 were charged and/or found guilty under Penal Code Article 314, which led to imprisonments of a minimum of seven-and-a-half years.<sup>689</sup>

Despite the amendments to TMK Articles 6(2) and 7(2) through the process of harmonisation with the EU, both articles still restrict the press and remain the biggest burdens to their freedom, especially given the increase of the sentence by half if the crime in 7(2) is committed through the press.<sup>690</sup> Chapter 3 shows how the courts have used the Anti-Terror Law to prosecute Kurdish and pro-Kurdish journalists who cover the armed conflict between the Turkish military and the PKK; criticise the Turkish military for their operations, express pro-Kurdish political viewpoints, cover pro-Kurdish demonstrations, interview leaders of the PKK and/or quote them in their reports, especially throughout the 1990s. Despite the legal amendments and the AKP's promises of reforms, the 1991 Anti-Terror Law is still being used to censor Kurdish or pro-Kurdish journalists. Even though the AKP initiated the "democratic opening" in 2009, based on reforms aimed to provide Kurds with their political and cultural rights, it could not be completed because of the resurgence of armed conflicts between PKK and the TSK.<sup>691</sup> Soon after, between 2009 and 2011, large numbers of journalists were arrested and charged on the alleged basis of being linked to the KCK, which is considered to be a part of PKK.<sup>692</sup> The US Department of State suggests that by 2011, "authorities were continuing to prosecute more than 4,000 cases against Kurdish politicians at year's end. Most members were investigated and prosecuted for alleged ties to the KCK or for making statements critical of the government or in support of the PKK or its leader, Abdullah Ocalan."<sup>693</sup> According to the BIANET Report of 2011, 36 journalists were arrested on the basis of KCK and PKK membership as well as making terrorist propaganda.<sup>694</sup> On that basis, CPJ reports that journalists who only carry out journalistic activities such as gathering data or making interviews can be interpreted as committing crimes on behalf of a terrorist organisation based on

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<sup>688</sup> See section "Jailing journalists on political grounds: Ergenekon case" for the case of "Mustafa Balbay"

<sup>689</sup> Erol Onderoglu, 'Updated List of Imprisoned Journalists in Turkey Including Recent Releases' (OSCE, June 2014) <<http://www.osce.org/fom/119921?download=true>> accessed 1 November 2015

<sup>690</sup> Dilek Kurban and Ceren Sozeri, 'Caught in the Wheels of Power' (2012) TESEV 1, 40

<sup>691</sup> Bilge Yesil, 'Press Censorship in Turkey: Networks of State Power, Commercial Pressures, and Self-Censorship' (2014) 7 Communication, Culture and Critique 154, 163

<sup>692</sup> Michael M. Gunter, *Historical Dictionary of the Kurds* (Maryland: Scarecrow, 2010) 81

<sup>693</sup> U.S. Department of State, 'Human rights country report: Turkey' (U.S. Department of State, 2011) <<http://www.state.gov/documents/organization/186624.pdf>> accessed 4 December 2014

<sup>694</sup> BIANET, 'Gazeteciler Tutuklandi/Journalists have been arrested' (Bianet, 24 December 2011) <<http://bianet.org/bianet/ifade-ozgurlugu/135009-gazeteciler-tutuklandi>> accessed 26 April 2014

Articles 2, 6, and 7 of the Anti-Terror Law and Penal Code Article 216.<sup>695</sup> As discussed in Chapter 3, *Ozgur Gundem* newspaper was closed down in the 1990s several times, and journalists who worked for *Ozgur Gundem* were killed. In 2012, under the KCK operations,<sup>696</sup> the newspaper was closed down once more, and in 2011 eight of its journalists were imprisoned.

Bilge Yesil discusses that journalist arrests under the KCK operations/case affected critical reporting on the Kurdish issue as the journalists were discouraged from covering it. Ertugrul Mavioglu from *Radikal* newspaper, Ece Temelkuran from *Haberturk* newspaper, and Yildirim Turkey from *Radikal* newspaper were, in order, prosecuted, dismissed, and forced to resign on the basis of “their sharp criticism of the AKP’s Kurdish policy. This stands as an example of how police, judicial, and economic pressures symbolically work to subvert the media’s watchdog role regarding the Kurdish issue, ethnic minority rights, and democratisation.”<sup>697</sup>

It is possible to see the implications of the broadly drawn Anti-Terror Law, for as of 2012, 51 journalists out of 72 in prison who were Kurdish and were accused under the Anti-Terror Law on the basis of allegedly spreading Kurdish propaganda with the aim of harming national security and territorial integrity. These journalists, were accused of insulting state institutions, inciting hatred, and attempting to overthrow AKP (“the government” as the law provides).<sup>698</sup> Yesil argues that, this also implies that “by widening the definition of anti-state crimes, the courts and government agencies use the country’s political dynamics as an excuse to justify their surveillance, criminalisation, and censorship practices—all in the name of protecting the nation from external and internal threats.”<sup>699</sup> Mahoney, in that regard, states that Erdoğan and AKP have been appropriating the tactics previously used by nationalists, namely employing the broadly drawn defamation laws and Anti-Terror Law to silence the opposition press as well as the Kurdish journalists.<sup>700</sup>

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<sup>695</sup> Committee to Protect Journalists, ‘Turkey’s press freedom crisis: The dark days of jailing journalists and criminalizing dissent’ (*CPJ*, October 2012) <<https://cpj.org/reports/turkey2012-english.pdf>> accessed 11 February 2013

<sup>696</sup> See Chapter 2 section “Freedom of the press in Turkey from the international perspective” for information on KCK.

<sup>697</sup> Bilge Yesil, ‘Press Censorship in Turkey: Networks of State Power, Commercial Pressures, and Self-Censorship’ (2014) 7 *Communication, Culture and Critique* 154, 164

<sup>698</sup> Emel Gulcan, ‘BIA Medya Gozlem 2012 Tam Metin/*BIA Media Observation 2012 Full Text*’ (BIANET, 28 January 2013) <<http://bianet.org/bianet/ifade-ozgurlugu/143889-bia-medya-gozlem-2012-tam-metin>> 26 February 2014

<sup>699</sup> Bilge Yesil, ‘Press Censorship in Turkey: Networks of State Power, Commercial Pressures, and Self-Censorship’ (2014) 7 *Communication, Culture and Critique* 154, 157

<sup>700</sup> Robert Mahoney, ‘Mission Journal: Media under growing pressure in Turkey’ (*Committee to Protect Journalists*, 27 July 2011) <<https://cpj.org/blog/2011/07/mission-journal-media-under-growing-pressure-in-tu.php>> accessed 30 October 2012

According to the numbers given by Senem Aydin and Fuat Keyman, 15 journalists were in prison in June 2009, 57 in 2010, 68 in 2011 and 95 in 2012;<sup>701</sup> these numbers resulted in Turkey holding the highest number of imprisoned journalists in the world including China, Eritrea and Iran.<sup>702</sup> Freedom House confirmed the numbers of imprisoned journalists by pointing out that the number of ones prosecuted under the Anti-Terror Law increased to 150 in 2010 six times more than in 2009; it also reported that in most of the cases the alleged crime consisted of the expression of political opinion.<sup>703</sup> As a result, in its 2013 report, Freedom House categorised Turkey “partly free” emphasising that the country’s civil liberties were at risk.<sup>704</sup> Soon after, the European Commission, stated that “self-censorship had become a common phenomenon” in the press in Turkey.<sup>705</sup> It can therefore be argued that the lack of any resolution on the Kurdish issue continues to form one of the biggest burdens of the freedom of the press in Turkey.<sup>706</sup> However, the reasons behind the high number of incarcerated journalists in 2012 (this year in which the highest number of journalists were in jail) and the motives of their prosecutions prove that political intolerance is also one of the main causes of the censorship of the press in Turkey today. As the accusations and convictions are still justified under the two broadly drawn legal codes, namely the Turkish Penal Code and Anti-Terror Law<sup>707</sup> it is important to discuss together the dangerous combination of broadly defined legal provisions (based on national security and territorial integrity for the imprisonment of the Kurdish journalists), the monetary sanctions the government imposed on the media owners to silence the opposition press, and the strict authoritarian tendencies of the former PM Erdogan.

The Freedom House Report of 2015, which classifies Turkey’s press “not free”,<sup>708</sup> reveals that despite the democratic steps AKP started to take during the initial years of its governance, freedom of the press has taken a wrong turn due to legal and political restrictions and the economic interests of the media owners who depend on their close relations with the government. Besides,

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<sup>701</sup> Senem Aydin and Fuat Keyman, ‘EU–Turkey relations and the stagnation of Turkish democracy’, Working Paper No. 2, Global Turkey in Europe Istanbul Policy Center, 2013, 9

<sup>702</sup> Stephen Franklin, ‘Where truth is a hard cell’, (Columbia Journalism Review, 2 January 2013)

<[http://www.cjr.org/feature/where\\_truth\\_is\\_a\\_hard\\_cell.php?page1/4all&print 1/4 true](http://www.cjr.org/feature/where_truth_is_a_hard_cell.php?page1/4all&print 1/4 true)> accessed 3 November 2013

<sup>703</sup> Freedom House, ‘Turkey Freedom of the Press 2011’ (*Freedom House*, 2011)

<<https://freedomhouse.org/report/freedom-press/2011/turkey>> accessed 16 October 2014

<sup>704</sup> Freedom House, ‘Freedom in the World 2013: Democratic Breakthroughs in the Balance’ (*Freedom House*, 2013)

<<http://www.freedomhouse.org/sites/default/files/FIW%202013%20Booklet.pdf>> accessed 15 July 2014

<sup>705</sup> European Commission, Turkey 2012 Progress Report, COM (2012) 600 final, Brussels, 2012, 22

<sup>706</sup> Cengiz Gunes and Welat Zeydanlioglu, *The Kurdish Question in Turkey: New Perspectives on Violence, Representation and Reconciliation* (Oxon: Routledge, 2013)

<sup>707</sup> Details of the language of law in Chapter 2.

<sup>708</sup> Freedom House, ‘Freedom of the Press 2015 Turkey’ (*Freedom House*, 2015)

<<https://freedomhouse.org/report/freedom-press/2015/turkey>> accessed 11 December 2015

this author observes that Erdogan's reactions to the people's demand for improvement during the Gezi protests arguably provoked a new polarisation of society in the way he politically categorised people (discussed later in this chapter) as well as political sensitivities of the party which is based on the experiences of previous Islamic rooted political parties.

#### 4.5 Jailing journalists on political grounds: the Ergenekon case

The Ergenekon organisation was allegedly a military-rooted organisation that aimed to overthrow the AKP government with a coup that was planned to take place in 2003-2004. Ergenekon was also allegedly held responsible for the racist killings that took place in Turkey<sup>709</sup> over the last 25 years. Gareth Jenkins argues that the military coups in 1960, 1971, 1980, and 1997 (discussed in Chapter 3) suggest that there was widespread faith among Ergenekon's followers to overthrow the government.<sup>710</sup> Its operations were initially supported by many newspapers and "liberal" intellectuals, who saw the process as a positive step that should have been taken a long time ago in order to bring an end to the military rule over politics and provide transparency in state affairs by disclosing the deep state relationships in Turkey.<sup>711</sup> However, the lack of transparency and due process under the law when it came to prosecuting journalists led to extreme long periods of pretrial detention; their release on bail was uneven and unpredictable, and defendants' complaints of a lack of access to evidence led to domestic and international questioning of the legitimacy of the case and suspicions of its political motivations.

Hoffman and Werz emphasise the number of coups that took place in the political history of Turkey and the conspiratorial fear that was created within society and among politicians. They argue that the military interventions, the closure of the Welfare Party by the Constitutional Court in

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<sup>709</sup> See Chapter 3 for further details.

<sup>710</sup> Gareth Jenkins, 'The devil in the detail: Turkey's Ergenekon investigation enters fourth year' (2010) 3 Turkey Analyst <<http://www.turkeyanalyst.org/publications/turkey-analyst-articles/item/219-the-devil-in-the-detail-turkeys-ergenekon-investigation-enters-a-fourth-year.html>> 18 May 2014

<sup>711</sup> Dogan Emrah Zircan, 'Ergenekon'a Aykiri Bir Bakis/A Diverge Look at Ergenekon (BIANET, 7 July 2008) <<http://bianet.org/bianet/siyaset/108154-ergenekon-a-aykiri-bir-bakis>> accessed 14 July 2012  
Ahmet Hakan, 'Derin devlet ile hesaplasma koca bir yalandi/Clearing the deep state was a big lie' *Hurriyet* (11 March 2015)

1997,<sup>712</sup> and the attempt to close down AKP in 2008 caused the AKP to minimise the military influence on politics. The present research argues that this might be another reason why opposition journalists as well as journalists with strong secular backgrounds were imprisoned through the Ergenekon trials. Therefore, despite its success in the 2002 elections, the support it received from different political backgrounds, and its strong party policies based on democracy, human rights, and EU accession, the AKP remained a target for secularist opposition by CHP, the military, and the civil groups who suspected AKP of having a secret Islamic agenda to roll back the secularist reforms in the country.<sup>713</sup> AKP's links with the previously closed down parties (arguably continuing to pose a legitimacy problem),<sup>714</sup> and the experiences of the Islamic rooted parties in the political history of Turkey fuelled the motivations to silence the opposition through the Ergenekon trials. The attempt to close AKP in its initial years also added to the reasons why AKP felt threatened by the military officers and the secularists. It is suggested by Harris that because the Turkish military removed legitimately elected civilian governments repeatedly in the past, yet the politicians in Turkey, as witnessed in the Ergenekon case, fear that the military can intervene again with secularists concerns. This mentality therefore has an influence on the political attitudes against strong opposition.<sup>715</sup>

Because the Ergenekon case consisted of a long, complicated, and highly disputed trial process, it is unrealistic to fully cover all its steps. Therefore, this section focuses on unfair procedures and excessive detention periods veteran journalists faced, which aroused indignation within the domestic and international society and journalist's unions. This section also seeks to demonstrate that the attempt to reduce the military's role in Turkish politics, which the Ergenekon affaire represents, does not constitute a "sufficient guarantee of democratic value change".<sup>716</sup>

The Ergenekon case started in 2008, and journalist Mustafa Balbay was arrested. In 2010, which was called "the second wave" of the Ergenekon operations, the owner of *Oda Tv*,

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<sup>712</sup> Max Hoffman and Michael Werz, 'Freedom of the Press and Expression in Turkey' (*Center for American Progress*, 14 May 2013) <<https://www.americanprogress.org/issues/security/report/2013/05/14/63159/freedom-of-the-press-and-expression-in-turkey/>> accessed 16 May 2014, 3

<sup>713</sup> Menderes Cinar, 'Explaining the Popular Appeal and Durability of the Justice and Development Party' in Elise Massicard and Nicole Watts, *Negotiating Political Power in Turkey: Breaking up the Party* (Oxon: Routledge, 2013) 37, 43

<sup>714</sup> Ihsan D. Dagi, 'The Justice and Development Party: Identity, Politics, and Discourse of Human Rights in the Search for Security and Legitimacy' in H. Yavuz, *The Emergence of a New Turkey: Democracy and the AK Parti* (Utah University Press, 2006) 89

<sup>715</sup> George S. Harris, 'Military Coups and Turkish Democracy, 1960-1980' 12:2 *Turkish Studies* 203, 212

<sup>716</sup> Tanel Demirel, 'Lessons of Military Regimes and Democracy: The Turkish Case in a Comparative Perspective' (2005) 31:2 *Armed Forces and Society* 245, 265

investigative journalist Soner Yalcin, was arrested. Finally, in the third wave of the operations, in 2011, internationally recognised journalists Ahmet Sik and Nedim Sener were arrested, creating an international outcry concerning the freedom of the press in Turkey.

#### 4.5.1 Mustafa Balbay

Mustafa Balbay was a journalist/columnist for *Cumhuriyet* newspaper and is a member of parliament. He was accused and detained with allegations of attempting to destroy the government and the Parliament of the Republic of Turkey,<sup>717</sup> attempting to dissolve the Government of the Turkish Republic,<sup>718</sup> provoking the citizens to rise in revolt against the Government of the Turkish Republic,<sup>719</sup> forming organised groups to commit offences against state security and the constitutional order,<sup>720</sup> destroying documents and certificates relating to state security,<sup>721</sup> accessing

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<sup>717</sup> Turkish Penal Code 5237 (26/9/2004) s 5(311) Offences against the Legislative Organ

(1) Any person who attempts to dissolve Turkish Grand National Assembly, or partially or entirely avoids performance of the legislative organs by using force or threat, is punished with heavy life imprisonment.

(2) Precautions specific to legal entities are imposed in case of commission of the offences defined in this article by corporation.

<sup>718</sup> Turkish Penal Code 5237 (26/9/2004) s 5(312) Offences against Government

(1) Any person who attempts to dissolve Government of Turkish Republic, or partially or entirely avoids its performance by using force or threat, is punished with heavy life imprisonment.

(2) Precautions specific to legal entities are imposed in case of commission of the offences defined in this article by corporation.

<sup>719</sup> Turkish Penal Code 5237 (26/9/2004) s 5(313) Armed revolt against the Government of Turkish Republic

1) Any person who provokes the citizens to rise an armed revolt against Government of Turkish Republic, is punished with imprisonment from fifteen years to twenty years. If succeeded in rising of a revolt, the provoker is punished with imprisonment from twenty years to twenty-five years.

(2) Any person who commands an armed revolt against the Government of Turkish Republic is punished with heavy life imprisonment. Other persons who participate in the revolt are sentenced to imprisonment from six years to ten years.

(3) In case of commission of these offences mentioned in the first and second subsection at the time of the war by taking advantage of the its negative affects on the State, the offender is punished with heavy life imprisonment.

(4) In case of commission of other offences along with this offences mentioned in the first and seconds subsection, the offender is additionally punished according to the provisions relating to these offences.

<sup>720</sup> Turkish Penal Code 5237 (26/9/2004) s 5(314) Armed organised criminal groups

(1) Any person(s) who forms organised criminal groups to commit the offences listed in fourth and fifth sections of this chapter, and commands these groups, is punished with imprisonment from ten years to fifteen years.

(2) Those who enlist to the organised criminal group defined in the first subsection is sentenced to imprisonment from five years to ten years.

(3) Other provisions relating to the offence committed by forming organised criminal groups are applied exactly the same for this offence.

<sup>721</sup> Turkish Penal Code 5237 (26/9/2004) s 7(326) Documents relating to State Security

(1) Any person who partially or entirely destroys documents and certificates relating to Public security or domestic and foreign political relations, or counterfeits the same, or illegally acquires or steals or uses these documents beyond its purpose, is punished with imprisonment from eight years to twelve years.

the restricted information related to state security,<sup>722</sup> and disclosing of restricted information about state security<sup>723</sup> under TCK Articles 311, 312, 313, 314, 326, 327, and 334.

Balbay was detained under these serious accusation on 6 March 2009 and was kept in detention for nine months based on his news coverage and alleged relations with the military before his first trial.<sup>724</sup> The evidence used against Balbay was documents retrieved from his home and office, the news stories covered by him with journalistic purposes, and wiretapped telephone conversations, which were used for the allegations of his relations with the military officers with the intention of preparing a coup against AKP.<sup>725</sup> The evidence against Balbay also included notes that were allegedly claimed to be his; however, they were eventually found to be “not original”, indicating they were fabricated by external means; the expert report prepared by the Bogazici University Computer Engineering Department stated that the notes purportedly covering the years 1998 to 2006 were prepared altogether at the same time in 3.5 minutes.<sup>726</sup>

Despite this report and Balbay’s testimony during the trials, based on Istanbul 13th High Criminal Court’s verdict, Balbay remained in detention for more than four years. The prosecutors had not provided any evidence based on this accusation under TCK 313, and Balbay was not interrogated based on this accusation.<sup>727</sup> Balbay throughout this process criticised the allegations and the case for being highly “political”, and that it aimed to silence the opposition press.<sup>728</sup>

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(2) If the offence is committed during war, or puts the war preparations, or fighting power, or military movements of the Government in jeopardy, the offender is punished with life imprisonment.

<sup>722</sup> Turkish Penal Code 5237 (26/9/2004) s 7(327) Retrieving information relating to State Security

(1) Any person who tries to retrieve confidential information, especially about the state security or domestic and foreign political interest of the State with the intention of spying on political and military affairs, is sentenced to imprisonment from three years to eight years (2) In the offence is committed to serve the interest of a country at war with Turkey, or during war by putting the war preparations of the Government, or fighting power, or military movements in jeopardy, the offender is sentenced to heavy life imprisonment.

<sup>723</sup> Turkish Penal Code 5237 (26/9/2004) s 7(334) Disclosure of confidential information

(1) Any person who discloses confidential information, especially about the Public security or domestic and foreign political interest of the State, is sentenced to imprisonment from one year to three years (2) If the offence is committed during war time, or puts the war preparations, or fighting power, or military movements of the Government in jeopardy, the offender is punished with imprisonment from five years to ten years.

<sup>724</sup> OSCE, ‘Annex to the statement of the OSCE representative on freedom of the media and imprisoned journalists in Turkey’ (OSCE, 29 July 2010) <<http://www.osce.org/fom/76373?download=true>> accessed 28 May 2013

<sup>725</sup> Committee to Protect Journalists, ‘Turkey’s Press Freedom Crisis’ (CPJ, 22 October 2012) <<https://www.cpj.org/reports/2012/10/turkeys-press-freedom-crisis-appendix-i-journalists-in-prison.php>> accessed on 2 June 2013

<sup>726</sup> Nurettin Demir, Veli Agbaba and Ozgur Ozel, ‘CHP Tutuklu Gazeteciler Raporu/CHP Report of Detained Journalists’ (2013) 1, 23

<sup>727</sup> Nurettin Demir, Veli Agbaba and Ozgur Ozel, ‘CHP Tutuklu Gazeteciler Raporu/CHP Report of Detained Journalists’ (2013) 1, 24

<sup>728</sup> Ibid.

Regarding the government's accusations and his journalistic documents that were introduced as evidence, he stated that "if you try to produce a crime from an archive belonging to a journalist, you can declare everyone as guilty."<sup>729</sup>

In the final verdict by the court on 5 August 2013, 34 years and 8 months imprisonment was ruled for Balbay. After almost 5 years of detention, Balbay was acquitted by the same court based on the Constitutional Court's decision in 2013. The Constitutional Court's verdict stated that Balbay's detention lacked legitimate grounds because it did not incorporate solid collaborating evidence that could warrant his imprisonment and it surpassed acceptable limits. On this basis, the Constitutional Court decided that Article 19(7) which states that "persons under detention shall have the right to request trial within a reasonable time and to be released during investigation or prosecution. Release may be conditioned by a guarantee as to ensure the presence of the person at the trial proceedings or the execution of the court sentence", was violated and that 5.000 Turkish Lira must be paid to Balbay for general damages.<sup>730</sup>

#### 4.5.2 Soner Yalcin

In 2010, in the second wave of the Ergenekon investigation, investigative journalist Soner Yalcin, owner of the Odatv website was arrested on 18 February 2011, with the allegations of "collaborating with the Ergenekon organisation", "incitement to hatred and hostility", and "obtaining secret documents relating to state security" under TCK Articles 314<sup>731</sup> and 216<sup>732</sup> which specifies "provoking people to be malicious and hostile".<sup>733</sup> The investigation against Yalcin was

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<sup>729</sup> Organisation for Security and Co-operation in Europe, 'Main findings and table on imprisoned journals in Turkey' (OSCE, 2 April 2012) <<http://www.osce.org/fom/89371>> accessed 29 May 2013

<sup>730</sup> Turkish Constitutional Court E. 2012/1272 K.T. 4/12/2013 available at <http://www.resmigazete.gov.tr/eskiler/2013/12/20131213-10.pdf>

<sup>731</sup> See under the section "Mustafa Balbay".

<sup>732</sup> See section "Changes in the Turkish Penal Code in relation to freedom of expression and the press" for discussions on TCK Article 216.

<sup>733</sup> Turkish Penal Code 5237 (26/9/2004) s 5(216) Provoking people to be malicious and hostile

(1) Any person who openly provokes a group of people belonging to different social class, religion, race, sect, or coming from another origin, to be rancorous or hostile against another group, is punished with imprisonment from one year to three years in case of such act causes risk from the aspect of public safety

(2) Any person who openly humiliates another person just because he belongs to different social class, religion, race, sect, or comes from another origin, is punished with imprisonment from six months to one year (3) Any person who openly disrespects the religious belief of group is punished with imprisonment from six months to one year if such act causes potential risk for public peace.

based on the allegations that Odatv, and therefore its owner Yalcin and fourteen other people including journalists<sup>734</sup> were disseminating information in support of the Ergenekon organisation with an aim to overthrow the AKP government and to shape public opinion in that direction.<sup>735</sup> The evidence presented in the indictment of Yalcin's arrest was documents relating to his journalistic work found in his home and office, including news articles, interviews, and books.<sup>736</sup> Three expert reports from universities in Istanbul and Ankara found the computer files, including "documents" collected at Odatv offices, to have been fabricated externally by computer malware. However, Yalcin's request to have the case invalidated based on these reports was rejected by the court because it did not take them into consideration.<sup>737</sup> The lack of evidence justifying Yalcin's detention violates Turkish Criminal Procedural Law Article 205 stating that "after the accused has been interrogated presentation of evidence shall start."<sup>738</sup>

Despite the fact that no evidence included in the Odatv indictment had any direct and clear indication to the alleged crime, Yalcin, who was arrested on 18 February 2011, had his first trial on 27 December 2011, which was a violation of due process as regulated by Turkish Constitution Article 141 ("it is the duty of the judiciary to conclude trials as quickly as possible"<sup>739</sup>) and ECHR Article 5 ("Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful").<sup>740</sup>

Odatv because of its tradition of including opposition journalists criticising AKP's policies and because of the political motivations behind the Ergenekon investigation, brought the issue of press censorship in Turkey to international attention, especially given that the indictment, consisting of 145 pages,<sup>741</sup> used the terms "news" 361 times, "book" 280 times, "interview" 26 times and

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<sup>734</sup> Others were Yalçın Küçük, Soner Yalçın, Barış Terkoğlu, Barış Pehlivan, Doğan Yurdakul, Müyesser Yıldız, Coşkun Musluk, Mehmet Sait Çakır, Ahmet Şık, Hanefi Avcı, Nedim Şener, Kaşif Kozinoğlu, Ahmet Mümtaz İdil, and İklim Ayfer Kaleli.

<sup>735</sup> Indictment no. 2011/425 Proceeding no. 2011/605 Investigation no. 2011/1657, 5

<sup>736</sup> Ibid. 5-15

<sup>737</sup> Istanbul 16th High Criminal Court E. 2011/14 (27/12/2012)

<sup>738</sup> Turkish Criminal Procedure Law 5271 (4/12/2004) s 4(206)

<sup>739</sup> The Constitution of the Republic of Turkey 1982 s 3(141)

<sup>740</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 5

<sup>741</sup> Odatv Indictment no. 2011/425 Proceeding no. 2011/605 Investigation no. 2011/1657

“article” 5 times.<sup>742</sup> While the indictment itself was a clear indication that the journalists were arrested based on their professional practices in order to silence their opposition, the international press rights’ defenders condemned the case overall for the arbitrary detentions and “the repressive judicial practices and culture.”<sup>743</sup>

Influenced by the domestic and international outcry against Odatv trials, Yalcin was released on parole (imposing a ban on leaving the country) on 27 December 2012 by Istanbul 16th High Criminal Court considering the time he spent in detention and the availability and sufficiency of other protective measures.<sup>744</sup>

#### 4.5.3 Nedim Sener & Ahmet Sik

Finally, investigative journalists Nedim Sener<sup>745</sup> and Ahmet Sik were arrested on 6 March 2011 in the third wave of the Ergenekon investigation for allegedly “being a member of a terrorist organisation” as provided in TCK 314/2, 314/3<sup>746</sup>, and 220(7) and Article 5 of TMK.<sup>747</sup> Similar to Soner Yalcin, evidence against Sener and Sik consisted of fabricated documents found on various computers named “Nedim” and “Ahmet” which allegedly included assistance to the Ergenekon organisation.<sup>748</sup> Journalistic documents such as notes taken for book preparations and interview notes and Sik’s unpublished book called “Imam’s Army”, which was claimed to have been created in collaboration with the Ergenekon organisation in order to overthrow the AKP government. Sik

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<sup>742</sup> Nurettin Demir, Veli Agbaba and Ozgur Ozel, ‘CHP Tutuklu Gazeteciler Raporu/CHP Report of Detained Journalists’ (2013) 1, 26

<sup>743</sup> Reporters Without Borders, ‘Judicial system presses on with absurd trial of Oda TV journalists’ (*RSF*, 6 January 2012) <<https://rsf.org/en/news/judicial-system-presses-absurd-trial-oda-tv-journalists>> accessed 16 August 2014

<sup>744</sup> Istanbul 16th High Criminal Court 2011/14 (12/3/2012)

<sup>745</sup> “Nedim Sener was declared a World Press Freedom Hero in June 2010 following the publication of his book on the murder of fellow Turkish journalist Hrant Dink” International Press Institute, ‘Symbols of courage in global journalism’ (*IPJ*) <<http://www.freemedia.at/awards/press-freedom-heroes.html>> accessed 12 January 2015

<sup>746</sup> For the full text of Article 312, see section “Mustafa Balbay”.

<sup>747</sup> Law on Fight Against Terrorism 3713 (12/4/1991) s 1(5) Increase of sentences

Penalties of imprisonment and fines imposed according to the respective laws for those committing crimes as described in Articles 3 and 4 above shall be increased by one half. In doing so the penalties may exceed the maximum penalty for that or any other crime. However, instead of lifetime imprisonment, the crime is subjected to heavy lifetime imprisonment.

<sup>748</sup> Indictment no. 2011/425 Proceeding no. 2011/605 Investigation no. 2011/1657, 113

was alleged to have been writing the book with Sener's assistance, thereby allegedly facilitating the Ergenekon plot.<sup>749</sup>

Despite both journalists' defence stating that they did not know the names they were claimed to be in co-operation with, Sik's book was banned and confiscated<sup>750</sup> and declared as being as dangerous as a bomb by then PM Erdogan.<sup>751</sup> Because "Imam's Army" exposed the religious community of the Gulenist Movement (Fethullah Gulen), and its relations with the AKP government (the book details the establishment of the Gülen community members into the Turkish bureaucracy), it raised suspicion that his arrest was a result of the book's content rather than his involvement in the alleged Ergenekon organization<sup>752</sup>, which he has worked on only as a journalist to analyse and expose.

Sener's arrest was criticised by the domestic and the international community<sup>753</sup>, for his arrest was considered to depend on his investigative work and the book he had released in 2009 implicating the responsibility of the police officers in Hrant Dink's murder and the lack of transparency in Dink's assassination.<sup>754</sup>

Nevertheless, Nedim Sener and Ahmet Sik were detained for more than one year despite the fabricated evidence used against them (files found on their computer were reported to have been transferred via a virus<sup>755</sup>), and were released by Istanbul 16th High Court Decision taking into consideration the time they had spent on detention.<sup>756</sup>

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<sup>749</sup> Ibid. 39

<sup>750</sup> Istanbul 12th High Criminal Court Investigation no. 2010/857 K. 23/03/2011 (Confiscation 2011/397)

<sup>751</sup> Bianet, 'Erdogan Sik'in kitabini bombaya benzetti/Erdogan Compared Sik's Book to a Bomb' (Bianet, 13 April 2011) <<https://bianet.org/bianet/ifade-ozgurlugu/129240-erdogan-sik-in-kitabini-bombaya-benzetti>> accessed 18 May 2012

<sup>752</sup> Vatan newspaper, 'Imam'in Ordusu Operasyonu/Operation of Imam's Army' Vatan (25 March 2011) <<http://www.gazetevatan.com/-imamin-ordusu--operasyonu--367087-gundem/>> accessed 14 May 2012

<sup>753</sup> Hurriyet Daily News, 'Journalists Protest Arrest of Colleagues' Hurriyet Daily News (18 September 2011) <<http://www.hurriyetdailynews.com/default.aspx?pageid=438&n=journalists-protest-arrest-of-colleagues-2011-09-18>> accessed 29 May 2012

Reporters Without Borders, 'Two journalists in Oda TV case still held after colleagues freed' (RSF, 17 September 2012) <<https://rsf.org/en/news/two-journalists-oda-tv-case-still-held-after-colleagues-freed>> accessed 29 May 2012

<sup>754</sup> Nedim Sener, Dink Cinayeti ve Istihbarat Yalanlari/The Dink Murder and Intelligence Lies (Guncel Press 2009)

<sup>755</sup> Istanbul 13th High Criminal Court E. 2009/191 K. 2013/95

Reporters Without Borders, 'Judicial system presses on with absurd trial of Oda TV journalists' (RSF, 6 January 2012) <<https://rsf.org/en/news/judicial-system-presses-absurd-trial-oda-tv-journalists>> accessed 16 August 2014

<sup>756</sup> Istanbul 16th High Criminal Court E. 2011/14 K. 27/12/2012

The Political motivations behind the Oda TV case were discussed by Sener and Sik in an interview by CPJ in which Sik states:

The Ergenekon investigations have been turned into a tool to suppress the opposition.... Criticizing the government and drawing attention to the dangerous network of people in the police and judiciary who are members of the Gülen community is enough in today's Turkey to become an Ergenekon suspect... When you consider the reason for my arrest was a book which featured journalistic work, of course this is censorship.<sup>757</sup>

Similarly, Sener highlights the partiality of the judiciary in order to explain the political motivation of the case:

We are under arrest as a result of the coordinated stance of the police and the judiciary. Zekeriya Öz, the prosecutor who had us arrested said after the reaction (to our arrest): “These journalists were not arrested because of the stories, books and articles they have written but because of some secret evidence which I cannot reveal now.” Almost five months passed since then, no such evidence was revealed. Actually, there was no such evidence.<sup>758</sup>

The journalists’ cases reveal that there was a lack or no evidence to justify their detentions and imprisonments. Besides violating Article 206 of the Turkish Criminal Procedure Law as stated previously, this also breaches ECHR Article 5, which provides the “right to liberty and security”.<sup>759</sup> In that regard, Sener and Sik’s appeal to the ECtHR was approved by the court on the basis that the pre-detention period for both investigative journalists, each lasting over one year, breached the Convention Articles 5 (3),<sup>760</sup> 5(4),<sup>761</sup> and Article 10.<sup>762</sup> The court stated that the reasons for its

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<sup>757</sup> Committee to Protect Journalists, ‘Q&A: Two of Turkey's leading journalists speak from jail’ (*CPJ*, 1 August 2011) <<https://www.cpj.org/blog/2011/08/qa-two-of-turkeys-leading-journalists-speak-from-j.php>> accessed 22 January 2012

<sup>758</sup> Ibid.

<sup>759</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 5

<sup>760</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 5

Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

detention was neither “relevant” nor “sufficient” to justify the detention.<sup>763</sup> In relation to the detention period the court also acknowledged the breach of Article 10, reasoning that without sufficient and relevant grounds keeping the applicant for a long period of time under detention created a chilling effect on Sik’s willingness to expressing his views on similar topics that are for public interest. The judges’ decision to keep Sik in detention would also lead to self-censorship of the other investigative journalists who report on related issues such as the government’s policies and operations.<sup>764</sup>

#### 4.5.4 Assessment: political motivations of the case

As one of the most disputed investigations in Modern Turkish history, the Ergenekon investigation was seen as a test for the judicial system. Hundreds of suspects were given arbitrary detentions and the investigation produced millions of documents, which raised questions regarding the integrity of the investigation by the judiciary; this led to criticisms about whether an objective critical analysis of the case was even possible.<sup>765</sup> Another aspect of the criticisms against the lack of judicial impartiality was the way the Ergenekon investigation was handled by the judiciary with disregard for due process, a lack of substantial evidence supporting serious accusations of the suspects possible affiliations with any terrorist or other type of organisation, and the lengthy detention periods with no formal charges made. Finally, and most importantly, doubts were created among society about the strong political motives behind the case.<sup>766</sup>

The long duration of the investigation, was seen as a way to silence criticism against the government and create an atmosphere of self-censorship among the press as journalists faced 4091 investigations against them on the basis of “attempting to influence a fair trial” by reporting on

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<sup>761</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 5

Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

<sup>762</sup> *Sik v Turkey* App no 53413/11 (ECtHR 8 July 2014) para. 38

<sup>763</sup> Ibid. para. 109

<sup>764</sup> Ibid. para. 111

<sup>765</sup> Gareth Jenkins, ‘Between Fact and Fantasy: Turkey’s Ergenekon Investigation’ (2009) Silk Road Paper 1,78

<sup>766</sup> Ibid.

Erenekon.<sup>767</sup> Self-censorship was also based on fear caused by the imprisonment of veteran journalists who seemed to have been a part of the Ergenekon investigation simply because they opposed the government or because of their secular backgrounds, for the ones who criticised the investigation were brought into the spotlight by the pro-AKP newspapers as well as arrested on the charges of being a part of Ergenekon themselves. In the Ergenekon investigation, the common facts among almost all the journalists under suspicion was their clear opposition to AKP, which resulted in the opposition groups' accusation of the Ergenekon investigation as being an act of revenge by AKP for the closure case against it in 2008.<sup>768</sup> As Akalin and Eral suggest, the legitimacy of the case has also been hindered by the pro-AKP press, which regularly frightened the opposition press by illegally publishing evidence from the investigation.<sup>769</sup> This took place in the form of making allegations in the indictment of the case as if they were the absolute facts of the case, leaking information to the pro-AKP press from the indictment throughout the process of its preparation, and specifying the allegations that were to be made by the prosecutor before the interrogation of the suspects started.<sup>770</sup> As a result, by declaring the Ergenekon plot as a "terror organisation" before the trials were concluded, the journalists' right to a presumption of innocence which is guaranteed under the Turkish Constitution<sup>771</sup> was violated.

Therefore, in summary, the Ergenekon spread fear among the anti-AKP segments of society as well as the ones against Islamic conservatism.<sup>772</sup> In general, it can be argued that the Ergenekon investigation, which effectively was a deep-state investigation, was used as a justification for prosecuting the opposition journalists while the media owners' pressure led to opposition press's self-censorship.

The secularists found AKP's efforts to strengthen civilian control to be a threat to the military's power status, which is seen as the protector of the Turkish state. Because of the

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<sup>767</sup> Berk Esen and Sebnem Gumuscu, 'Rising competitive authoritarianism in Turkey' (2016) *Third World Quarterly* 1, 11

<sup>768</sup> Gareth Jenkins, 'Between Fact and Fantasy: Turkey's Ergenekon Investigation' (2009) *Silk Road Paper* 46-47

<sup>769</sup> Cuneit Akalin and Elif Eray, 'Ergenekon Davasinda Basinin Oynadigi Rol/Press' *Role in the Case of Ergenekon* (*Dagarcik Turkiye* (1 August 2013) <<http://www.dagarcikturkiye.com/ergenekon-davasinda-basinin-oynadigi-rol-yd-812.html>> 11 October 2013

<sup>770</sup> Radikal, 'Mensuplari TSK Kokenli Ilgeal Orgut Desifre Olmays Basladi/TSK Derived Illegal Organisation Coming to the Fore' *Radikal* (24 January 2008)

Milliyet, 'Erkenekon Ses Getirecek Eylem Pesindeydi/Ergenekon Was Planning Sensational Activities' *Milliyet* (24 January 2008)

Yeni Safak 'Kaos ve Darbe Planlari Yatti/Unsuccessful Plans for Chaos and Coup' *Yeni Safak* (24 January 2008)

Sabah, 'Hedef Darbeydi/Coup D'etat Was the Aim' *Sabah* (24 Ocak 2008)

<sup>771</sup> The Constitution of the Republic of Turkey 1982 s 2(38)

<sup>772</sup> Gareth Jenkins, 'Between Fact and Fantasy: Turkey's Ergenekon Investigation' (2009) *Silk Road Paper* 1, 7

correlative paranoia between the Islamist/conservative AKP and secular Kemalists,<sup>773</sup> the press was divided into two main groups — as pro-and-anti AKP — and the fear and suspicion of the presence of an Islamist/conservative settlement and manipulation in the judiciary<sup>774</sup> led to mistrust in the Ergenekon investigation of journalists. On the other hand, further in the chapter it is observed that AKP continues to act upon the fears of the deep state military power and international plots that are seen as the ultimate threat to its very existence.

Last but not least, the Ergenekon investigation forms a clear example of how the Turkish judiciary has moved from following the state ideology under the military since the establishment of the Republic, into a politically-driven estate that raises serious concerns regarding its impartiality. Jenkins argues the following about this shift:

The politicisation of the Turkish judicial system is nothing new. In the past, the system was frequently abused to suppress what were perceived as ideological threats to the Turkish state; such as leftists, Islamists and Kurdish nationalists. Similarly, for most of the last 50 years, a system of military tutelage has served as a constraint on the development of a fully functioning pluralistic democracy. However, the Ergenekon case and its affiliated investigations suggest that, under the AKP, Turkey has been swapping one form of authoritarianism for another; and that the judicial system continues to operate not according to proof, due process or even the truth, but political and ideological affiliation.<sup>775</sup>

In conclusion, this author argues that the Ergenekon investigation proves the inherited inclination toward conspiracy theories that directed the political phases discussed in Chapter 3 and motivated the judicial decisions rather than the language of law on the basis of evidence. Alternatively, AKP is observed to have been “using” the sensitivities in its past almost with the intention to retaliate for the experience of the political parties with Islamic roots, such as the Welfare Party from whose ashes AKP was born. AKP’s motivations have affected the freedom of

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<sup>773</sup> Max Hoffman and Michael Werz, ‘Freedom of the Press and Expression in Turkey’ (*Center for American Progress*, 14 May 2013) <<https://www.americanprogress.org/issues/security/report/2013/05/14/63159/freedom-of-the-press-and-expression-in-turkey/>> accessed 16 May 2014, 5

<sup>774</sup> Elaborate examination of the politicisation of the Turkish judicial system is made in Chapter 5.

<sup>775</sup> Gareth Jenkins, ‘The devil in the detail: Turkey’s Ergenekon investigation enters fourth year’ (2010) 3 *Turkey Analyst* <<http://www.turkeyanalyst.org/publications/turkey-analyst-articles/item/219-the-devil-in-the-detail-turkeys-ergenekon-investigation-enters-a-fourth-year.html>> accessed 18 May 2014

the press and the democratisation process in Turkey negatively, as seen in the Ergenekon case. The legal rights and freedoms of the journalists had been violated under the name of “democratisation” as the Ergenekon investigation aimed to inspect the deep-state relations within the country. This raises concerns on the future application of law for judicial censorship of the press, supported by strong political motives. In light of this context, it is fair to attribute the impetus behind the Ergenekon case as being the will to control press institutions rather than to facilitate democratisation.

## **4.6 Media ownership and the freedom of the press**

### **4.6.1 Legal grounds for media ownership and the cross-ownership of the media by large corporations**

During the AKP government, censorship of the press mostly took place via the direct control of the news through the media owners; the cross ownership of the media by large corporations,<sup>776</sup> which are in a business relationship with the government, explains this collusion.<sup>777</sup> In Turkish Law there are no legal regulations which restrict the ownership of the press. Only the Press Law Article 7 requires all print media to be registered:

The declaration submitted bearing the signature of the owner of the publication and the representative of the owner if he/she is below 18 or a corporate body and the responsible editor shall include the following information: the name of the publication and its contents; in which periods it shall be published; the headquarters of the management; and the names and addresses of the owner, the representative if he/she exists, responsible editor, and the assistant editor if he/she exists; and the form of the publication.

If the owner of the publication is a corporate body, documents which demonstrate that the conditions laid down in Articles 5 and 6 exist and one copy of the regulations or principle agreement or the settlement deed shall be added to the

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<sup>776</sup> Christian Christensen, ‘Concentration of ownership, the fall of unions and government legislation in Turkey’ (2007) 3:2 *Global Media and Communication*, 179, 186

<sup>777</sup> Jeffrey Haynes, ‘The AKP Government in Turkey: Politics, Democracy and the Media’ in Lee Marsden and Heather Savigny (eds), *Media Religion and Conflict* (2009)145, 108

declaration. Upon receipt of the declaration and its additions, the Office of the Chief Prosecutor shall present a notice of delivery to the publication.<sup>778</sup>

This lack of legal regulation is one of the main factors thwarting pluralism of ideas in the press despite the fact that 3,100 newspapers operate (15% being published every day<sup>779</sup>) in Turkey.<sup>780</sup> Even though free market values advocate that anyone could set up media/communication organisations, it must be taken into consideration that it is the capital among the economic elites that actually dominates news reporting. Directly affecting the quality as well as the diversity of the information received by readers.<sup>781</sup> According to Ansah, “anyone” who is financially powerful enough to own a newspaper, is allowed by the “free market”, which means that those with solid economic grounds, will be the ones controlling the press and the capacity of the press to improve democracy will be weakened.<sup>782</sup> As Kalyango and Eckler suggest, the fourth-estate role of the press, which is considered to be fundamental for democracies, can be fulfilled when media ownership allows editorial liberty<sup>783</sup> — unimpeded by governmental and political intervention.<sup>784</sup> Therefore it is possible to argue that the large number of newspapers in operation does not necessarily reflect a high degree of press freedom in Turkey, nor a contribution of the press to the enhancement of democracy through disseminating pluralist opinions.<sup>785</sup>

The media in Turkey belongs to a small number of private companies, which earn mainly from outside the media sector,<sup>786</sup> namely energy, telecommunication, banking, and construction;<sup>787</sup>

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<sup>778</sup> Turkish Press Law 2004/5187 s 1(7)

<sup>779</sup> Freedom House, ‘Freedom of the Press 2015 Turkey’ (*Freedom House*, 2015)  
<<https://freedomhouse.org/report/freedom-press/2015/turkey>> accessed 11 December 2015, 12

<sup>780</sup> Turkish statistical Institute, ‘Print Media Statistics, 2014’ (*TUIK*, 29 July 2015)  
<<http://www.turkstat.gov.tr/PreHaberBultenleri.do?id=18523>> accessed 12 December 2012

<sup>781</sup> Kari Karpinen, ‘Media and the Paradoxes of Pluralism’ in David Hesmondhalgh and Jason Toynbee (eds) *The Media and Social Theory* (Oxon: Routledge, 2008) 27, 30

Ekmel Gecer, ‘Media and Democracy in Turkey: The Kurdish Issue’ (PhD Thesis, Loughborough University 2014) 28

<sup>782</sup> Paul A.V. Ansah ‘The Legal and Political Framework for a Pluralistic Press in Africa’ Working Document Prepared for the United Nations and UNESCO Seminar on Promoting an Independent and Pluralistic African Press (Namibia, 1991) 18 <<http://unesdoc.unesco.org/images/0009/000903/090356eb.pdf>> accessed 2 September 2013

<sup>783</sup> Yusuf Jr. Kalyango and Petya Eckler, ‘Media performance, Agenda Building and Democratisation in East Africa’ in Charles T. Salmon, *Communication Yearbook 34* (New York: Routledge, 2010) 3

<sup>784</sup> Yusuf Kalyango and Petya Eckler, ‘Media performance, Agenda Building and Democratisation in East Africa’ in Charles T. Salmon (eds) *Communication Yearbook 34* (New York: Routledge, 2010) 355-390

<sup>785</sup> Lilia Raycheva, ‘The Challenge of ICT to Media Pluralism’ in Andrea Czeppek, Melanie Hellwig and Eva Nowak, (eds) *Press Freedom and Pluralism in Europe: Concepts and Conditions* (Bristol: Intellect Books, 2009) 83

<sup>786</sup> Freedom House, ‘Freedom of the Press 2015 Turkey’ (*Freedom House*, 2015)  
<<https://freedomhouse.org/report/freedom-press/2015/turkey>> accessed 11 December 2015, 13

this monopoly hinders freedom of the press because the investments of the media owners outside the media sector are bound by government regulations and contracts that would force journalists to follow the government<sup>788</sup> prerogative or else be silenced or even forced to resign.<sup>789</sup>

Even though the press was in support of AKP during the first general elections in 2002, the press seized support from the government, and *Dogan Media Group*, which held the largest media group in Turkey, expressed disapproval of AKP's policies and reform packages. More specifically, after the parliament approved the constitutional amendment permitting the use of headscarves at universities,<sup>790</sup> *Hurriyet newspaper* (Dogan Media Group) proclaimed this as the beginning of a chaos period — “411 hands rose to chaos”, referring to the members of parliament who voted in favour of this change.<sup>791</sup> This was one example of *Hurriyet's* opposition coverage of the AKP government among the other reports that aimed to shape public opinion against the government based on secularist concerns. Therefore, the heavy tax fine (2.5 billion US dollars) against *Dogan Media Group* levied by the government in 2009 was widely seen as a political reaction, for only weeks before the fine was sanctioned against the Group, PM Erdogan made an open declaration against the opposition media stating that such newspapers must not be supported<sup>792</sup> because they were full of lies expressed with offensive language.<sup>793</sup>

The European Commission Report suggested that “the high fines imposed by the revenue authority potentially undermine the economic viability of the Group and therefore affect *freedom of the press* in practice.”<sup>794</sup> This situation is suggested by John Street as a way of governments' restriction of press freedom by the use of lawsuits for the punishment of media organisations.<sup>795</sup>

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<sup>787</sup> Yavuz Baydar, ‘In Turkey, Media Bosses are Undermining Democracy’ *The New York Times* (19 July 2013) <<http://www.nytimes.com/2013/07/21/opinion/sunday/in-turkey-media-bosses-are-undermining-democracy.html>> accessed 9 September 2013

<sup>788</sup> Ayse Oncu, ‘Television and Media’ in Metin Haper and Sabri Sayari (eds) *The Routledge Handbook of Modern Turkey* (London: Routledge, 2012) 129

<sup>789</sup> Rethink Institute, ‘Diminishing Press Freedom in Turkey’ (2014) 18 Rethink Paper Rethink Institute Washington 1

<sup>790</sup> Law regulating the amendments on various legal provisions of the Constitution of the Republic of Turkey 5735 (9/2/2008)

<sup>791</sup> Dilek Kurban and Ceren Sozeri, ‘Caught in the Wheels of Power’ (2012) TESEV 1, 50

<sup>792</sup> *Hurriyet Daily News*, ‘EC progress report questions cord tax fine imposed on Dogan Media Group’ *Hurriyet Daily News* (10 August 2009) <<http://www.hurriyetdailynews.com/default.aspx?pageid=438&n=ec-progress-report-questions-record-tax-fine-imposed-dogan-media-group-2009-10-08>> accessed 13 April 2012

European Commission, *Turkey 2009 Progress Report* (SEC(2009) 1334 COM(2009) 533) 18

<sup>793</sup> Max Hoffman and Michael Werz, ‘Freedom of the Press and Expression in Turkey’ (*Center for American Progress*, 14 May 2013) <<https://www.americanprogress.org/issues/security/report/2013/05/14/63159/freedom-of-the-press-and-expression-in-turkey/>> accessed 16 May 2014, 11

<sup>794</sup> European Commission, *Turkey 2009 Progress Report* (SEC(2009) 1334 COM(2009) 533) 18

<sup>795</sup> John Street, *Mass Media, Politics and Democracy* (New York, Palgrave Macmillan, 2011)

This research observes that, the reasons for the AKP's increasing lack of tolerance of the press, lies in the historical and current political sensitivities of the party. Looking at the initial process of EU membership, it is possible to see its positive influence on the legal reforms improving the legal framework<sup>796</sup> despite the lack of a genuine intention to change the broadly drawn articles of the Turkish Penal Code and the Anti-Terror Law. However, the government's willingness to accelerate the accession process between 2002 and 2007 was followed by a loss of motivation stemming from the government's foreign policy shifting toward the Middle East,<sup>797</sup> the commencement of "Euroscepticism" as suggested by Gulmez<sup>798</sup> a lack of political toleration to opposition, and the fear of military threat against AKP — all of which resulted in restrictions on the press. The approval of headscarves being worn at the universities, *Hurriyet's* sensational report on the issue, the appeal of the chief Prosecutor of the Court of Appeals to close down AKP on the basis of it being the "centre for anti-secular activities"<sup>799</sup> (resulting in cuts in treasury grants to the party<sup>800</sup>) were all seen as a personal attack by Erdogan and as a threat to his party, resulting in his lack of toleration for opposition.<sup>801</sup>

It is necessary now to understand the changing trends of media ownership since the AKP government took power. When compared with the previous government's will to control the press,<sup>802</sup> Rethink Institute Washington's study suggests the extent of AKP's use of the tools for such control is similar to the one/single-party period. Left-centrist mainstream media<sup>803</sup>, which used to criticise the religious motivations of the government, deliberately toned down its rhetoric and ceased critical commentary against the AKP government after 2009<sup>804</sup> (see Dogan Media Group above).

<sup>796</sup> For more details see section "Setting the legal background: legal reforms in relation to the freedom of the press".

<sup>797</sup> Kemal Kirisci, 'The Arab Spring and regional integration: can the European Union and Turkey co-operate?' in Firat Cengiz and Lars Hoofmann, *Turkey and the European Union - facing new challenges and opportunities* (Routledge, 2014)

<sup>798</sup> Seckin Baris Gulmez, 'Explaining the Rise of Euroscepticism in the Turkish Political Elite' in Firat Cengiz and Lars Hoofmann, *Turkey and the European Union - facing new challenges and opportunities* (Routledge, 2014)

<sup>799</sup> BBC Turkish, 'Move to ban ruling Turkish Party' *BBC Turkish* (14 March 2008) <<http://news.bbc.co.uk/1/hi/world/europe/7297390.stm>> accessed 12 June 2015

<sup>800</sup> AYM, E. 2008/1, K. 2008/2, K.T. 30.7.2008

<sup>801</sup> Eylem Yanardagolu, 'Elusive Citizenship: Media, Minorities and Freedom of Communication in Turkey in the Last Decade' (2013) 19 *Iletisim Journal* 96

<sup>802</sup> Cross-ownership of the media starts from 1980s as discussed in Chapter 3.

<sup>803</sup> For the political orientation of the daily newspapers in Turkey, see Ekmel Gecer, 'Ekmel Gecer, 'Media and Democracy in Turkey: The Kurdish Issue' (PhD Thesis, Loughborough University 2014) 104

<sup>804</sup> Rethink Institute, 'Diminishing Press Freedom in Turkey' (2014) 18 Rethink Paper Rethink Institute Washington 1, 5

The government's creation of its own media started with *Star Daily* (Uzan Group), and was followed by the sale of Star to Ethem Sancak (Sancak Media Group), who is known to have close links with the former AKP leader and Prime Minister Erdogan<sup>805</sup>, who later sold the majority of his shares to former AKP member Tevhid Karakaya, whose partner Fettah Tamince sold his shares to Murat Sancak,<sup>806</sup> nephew of Ethem Sancak.<sup>807</sup> In like manner, Sabah-ATV Media Group — which before its sale dominated the media in Turkey with Dogan Group holding 70% of broadcast and print media together — was first sold to Calik Group, which held strong ties with the government, and then to Kalyon Group<sup>808</sup> who prevailed in the public sector for constructing the third airport in Istanbul.<sup>809</sup> Finally, today, the press in Turkey is in the hands of a small group of media owners, namely Dogan, Turkuvaz, Ciner Cukurova, Dogus, and Feza, who have their holdings in energy, transportation, tourism, mining, transportation construction, insurance, and banking.<sup>810</sup>

Regarding the monopolies in the private sector of media ownership, Penman discusses that even though as a part of the EU harmonisation process, Competition Law in Turkey was enacted in 1994,<sup>811</sup> it was not applied to the media sector until 2000.<sup>812</sup> The 4th, 6th, and 7th articles of the Competition Law no. 4054 regulate the contracts, actions, and decisions that restrict competition, abuse of the dominant state of competition, mergers and acquisitions. The unsanctioned breaches of Competition Law, according to Kurban and Sozeri, play a debilitating role in promoting pluralism

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<sup>805</sup> Cumhuriyet Newspaper, 'Iste Sancak'ın Erdogan'a ana,baba, ve çocuklarını feda etmek istemesinin nedeni/Here is the reasons why Sancak said he could sacrifice his mother,father and children for Erdogan' Cumhuriyet (12 May 2015) <[http://www.cumhuriyet.com.tr/haber/turkiye/274573/iste\\_Sancak\\_in\\_Erdogan\\_a\\_ana\\_baba\\_ve\\_cocuklarini\\_feda\\_et\\_mesinin\\_nedeni.html](http://www.cumhuriyet.com.tr/haber/turkiye/274573/iste_Sancak_in_Erdogan_a_ana_baba_ve_cocuklarini_feda_et_mesinin_nedeni.html)> accessed 10 June 2015

<sup>806</sup> Hurriyet Newspaper, 'Star'da Ortaklık Yine Degisti/Partnership in Star Changes Again' Hurriyet (10 February 2014) <<http://www.hurriyet.com.tr/starda-ortaklik-yine-degisti-27316114>> accessed 10 June 2015

<sup>807</sup> Rethink Institute, 'Diminishing Press Freedom in Turkey' (2014) 18 Rethink Paper Rethink Institute Washington 1, 6

<sup>808</sup> Christian Christensen, 'Breaking the news: Concentration of ownership, the fall of unions and government legislation in Turkey' (2007) 3:2 Global Media and Communication 179, 188

Mehul Srivastava, Benjamin Harvey and Ercan Ersoy, 'Erdogan's Media Grab Stymies Expansion by Murdoch, Time Warner' *Bloomberg* (3 March 2014) <<http://www.bloomberg.com/news/articles/2014-03-03/erdogan-thwarts-murdoch-as-graft-probe-reveals-turkey-media-grab>> accessed 22 July 2014

<sup>809</sup> Ugur Emek and Muhittin Acar, 'Public Procurement in Infrastructure: The Case of Turkey' in Alina Mungiu-Pippidi (ed.) *Government Favouritism in Europe, The Anticorruption Report 3* (Barbara Budrich Publishers, 2015) 91

Rethink Institute, 'Diminishing Press Freedom in Turkey' (2014) 18 Rethink Paper Rethink Institute Washington 1, 6

<sup>810</sup> Bilge Yesil, 'Press Censorship in Turkey: Networks of State Power, Commercial Pressures, and Self-Censorship' (2014) 7 Communication, Culture and Critique 154, 158

<sup>811</sup> Law Regulating the Protection of Competition no. 4054 (13/12/1994)

<sup>812</sup> Cem Pekman, 'Audiovisual Policy on the Way to the EU: The Turkish Case' (2002) in Peter G. Xuereb (ed.) *The Mediterranean's European Challenge: Euro-Mediterranean Integration* (European Documentation and Research Centre University of Malta) 346

among small press owners. This also puts the Competition Authority under the subjection of the executive power, thereby losing its autonomy and independence.<sup>813</sup>

As the economic alliances among media owners allowed greater control of the press, the government became more reluctant to implement reforms concerning freedom of expression and the press. The reforms undertaken during AKP's first term in government were abandoned, exemplifying the control wielded by former Prime Minister Erdogan on media owners and the extent to which media owners were willing to follow his directions: in the October 2011, Erdogan directed Anadolu Agency (AA), Ankara News Agency (ANKA), Cihan News Agency (CIHAN), Ihlas News Agency (IHA), and Turkish News Agency (AHT) to be cautious when covering the news related to terrorism and violence, it was only the next day when a common announcement was made by these companies that they agreed to cover the news accordingly.<sup>814</sup> In order to explain their will to comply with the PM's orders, the news agency owners justified their decision on the basis of "taking account of public order, keeping a distance from interpretations that encourage fear, chaos hostility, panic or intimidation, not including propaganda for illegal organisations."<sup>815</sup> This was seen as a threat to press freedom by RSF, which criticised the government and the media owners: "We had hoped that the era of government directives telling the media how to cover the most sensitive subjects was long over in Turkey. The very vaguely formulated undertaking by the leading news agencies to toe the official line now poses a serious threat to freedom of information."<sup>816</sup>

As a result of this agreement and the economic interests of the media owners, the people's right to information was highly affected<sup>817</sup>; this is especially evident in the Roboski/Uludere massacre, which took place in the South East part of Turkey where 34 Kurdish civilians were bombed by Turkish military jets due to an alleged misunderstanding as the villagers, who were engaged in cross-border smuggling were mistaken for members of PKK terrorist organisation and killed. The mainstream press was silent on the issue until the government's official press statement. This was the first big incident before the Gezi protests where the people could hear about an event

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<sup>813</sup> Dilek Kurban and Ceren Sozeri, 'Caught in the Wheels of Power' (*TESEV*, 2012) 1, 27

<sup>814</sup> Ayca Soylemez 'We will Comply with Official Publication Bans...' (*Bianet*, 24 October 2011)

<<http://bianet.org/english/freedom-of-expression/133600-we-will-comply-with-official-publication-bans>> accessed 2 March 2013

<sup>815</sup> Ibid.

<sup>816</sup> Reporters Without Borders, 'Journalists under attack as government pursues military offensive against PKK' (*RSF*, 26 October 2011) <<http://en.rsf.org/turkey-journalists-under-pressure-as-26-10-2011,41282.html>> accessed 4 March 2015

<sup>817</sup> Robert W. McChesney, *Rich Media Poor Democracy* (USA: University of Illinois Press, 1999)

only from social media sources, mainly Twitter, and was the first occasion when the people proclaimed their right to information had been infringed.<sup>818</sup> Trust in the accurate dissemination of news was hindered after the censorship of the Uludere/Roboski bombing.

As previously discussed in Chapter 3, the Kurdish issue has been one of the major factors shaping the political policies that impact on Turkey's press freedom. The Kurdish people's demand for democratic rights in the face of repression is still ongoing, and the Turkish nationalists, with their strong Kemalist ideology, still put pressure on the current government not to make concession on the issue. Even though the issue is more openly discussed in parliament, journalists still face a moratorium on covering it as well as the PKK.<sup>819</sup>

Besides the direct censorship of journalists through imprisonment, the AKP government is argued to use their business relations with media owners as an indirect way to silence opposition journalists, for the economic interests of the companies depend on business contracts with the government. This collusion restricts the expression of journalists who work within the media sector of these companies because the government can require the owners to apply pressure on the opposition. Media owners who prioritise their economic interests over the people's right to accurate and non-biased information or the journalists' right to free expression limit content of severe political criticism. The mainstream press therefore faces extreme pressure from media owners based on the owners' direct business links with the government — links which render their economic interests dependant on maintaining their relationship with the government.<sup>820</sup>

Yanardagoglu states that the press is in a worse situation than it was in the 1990s because of the special "AKP media" that only covers what the prime minister finds permissible. As a result, the significant fear and pressure experienced by the press during the AKP period<sup>821</sup> demonstrates the sincerity of the issues that the press has encountered in the last decade. Ogun supports this

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<sup>818</sup> Dilek Kurban and Ceren Sozeri, 'Caught in the Wheels of Power' (*TESEV*, 2012) 1, 51

Haber Sol, 'Katliamin ardindan gazete mansetleri/*Newspaper covers after the massacre*' (*Haber Sol*, 30 December 2011) <<http://haber.sol.org.tr/medya/katliamin-ardindan-gazete-mansetleri-haberi-49916>> accessed 18 July 2014

<sup>819</sup> Max Hoffman and Michael Werz, 'Freedom of the Press and Expression in Turkey' (*Center for American Progress*, 14 May 2013) <<https://www.americanprogress.org/issues/security/report/2013/05/14/63159/freedom-of-the-press-and-expression-in-turkey/>> accessed 16 May 2014, 5

<sup>820</sup> Max Hoffman and Michael Werz, 'Freedom of the Press and Expression in Turkey' (*Center for American Progress*, 14 May 2013) <<https://www.americanprogress.org/issues/security/report/2013/05/14/63159/freedom-of-the-press-and-expression-in-turkey/>> accessed 16 May 2014, 10

<sup>821</sup> Eylem Yanardagoglu, 'Elusive Citizenship: Media, Minorities and Freedom of Communication in Turkey in the Last Decade' (2013) 19 *Iletisim* 98

statement, suggesting that “in the political environment supported by AKP, the media, therefore, journalism in Turkey have been divided into two groups, namely, the ones who are in support of AKP and its policies and the ones who are against it. In result of such division, the media who do not support the AKP principles have been excluded from access to information”,<sup>822</sup> such as when the opposition newspapers were not given accreditation for joining AKP congress.<sup>823</sup>

This is why the terms “political parallelism”<sup>824</sup> and/or “partisan media”<sup>825</sup> are used to define the situation of the media in Turkey today. In that regard, political parallelism is defined by Hallin and Mancini as “media content”,<sup>826</sup> and it also includes the reader’s political choices as well as a journalist’s personal affiliations as Yesil argues. In that regard, Yesil categorises the Turkish newspapers as pro-or-anti-AKP, namely *Cumhuriyet*, *Sozcu*, and *Taraf* being anti-AKP, *Zaman*, *Sabah*, *Star*, *Bugun*, *Yeni Safak*, and *Yeni Akit* being pro-AKP, and *Haberturk*, *Hurriyet*, *Milliyet*, *Radikal* and *Vatan* being the mainstream newspapers that have a degree of critical content.<sup>827</sup> The media is therefore argued to have been divided into two camps — the mainstream press in one, which is mostly focused on their economic interests through high circulation and the pro-government group in the other, which is categorised as the Islamist press and more interested in spreading its own ideologies.<sup>828</sup> Baydar suggests that when the government creates its own media group and applies pressure on the other groups that do not conform with its policies, fired or imprisoned journalists is the inevitable result.<sup>829</sup>

In that regard, as it is also observed by Kaya and Cakmur, even the transition into the liberal economy in 1980 and the privatisation of press ownership did not bring an end to the government control over the press and rather fortified political parallelism making the press a tool for the

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<sup>822</sup> Nukte Ogun, ‘Voiding of scrutiny and accountability in Turkey: Media and Journalism under the Justice and Development Party’ (2009) 3:2 Media Journal-Australian Edition, 1

<sup>823</sup> Evrensel, ‘AKP Kongresinde muhalif gazetelere akreditasyon yok/No accreditation given to opposition newspapers for AKP congress’ *Evrensel* (27 August 2014) <<http://www.evrensel.net/haber/90703/akp-kongresinde-muhelif-gazetelere-akreditasyon-yok>> accessed 2 October 2014

<sup>824</sup> Raşit Kaya and Barış Çakmur, ‘Politics and the Mass Media in Turkey’ (2010) 11:4 Turkish Studies 521-537  
Bilge Yesil, ‘Press Censorship in Turkey: Networks of State Power, Commercial Pressures, and Self-Censorship’ (2014) 7 Communication, Culture and Critique 154, 158

<sup>825</sup> Ali Çarkoğlu and Gözde Yavuz, ‘Press-party Parallelism in Turkey: An Individual Level Interpretation’ (2010) 11:4 Turkish Studies 613-624

<sup>826</sup> Daniel C. Hallin and Paolo Mancini, *Comparing Media Systems: Three Models of Media and Politics* (Cambridge: Cambridge University Press, 2004) 28

<sup>827</sup> Bilge Yesil, ‘Press Censorship in Turkey: Networks of State Power, Commercial Pressures, and Self-Censorship’ (2014) 7 Communication, Culture and Critique 154, 170

<sup>828</sup> Raşit Kaya and Barış Çakmur, ‘Politics and the Mass Media in Turkey’ (2010) 11:4 Turkish Studies 521, 533

<sup>829</sup> Yavuz Baydar ‘Turkey’s Media: A Polluted Landscape’ (2013) 44:2 Index on Censorship 140

fulfilment of holdings' interests.<sup>830</sup> This allows the categorisation of the press in Turkey within the Polarised Pluralist Model<sup>831</sup> that embodies the dominant role of the government and the state as well as political parallelism,<sup>832</sup> where the media assets of media owners are used in addition to their close relationship with the government as a means to acquire business contracts with the government.<sup>833</sup> Mutually, having business relations with the media owners, the governments can also influence the content of the news and censor the press through economic pressure on the media owners<sup>834</sup> as by way of this research observed to be the current practice in Turkey.

In light of media ownership and political parallelism in Turkey Duran argues that the press has been relocated from a position in which it protected and stood for the military to a position in which stands with the government.<sup>835</sup> It is therefore possible to argue that, as Peterson suggests, no matter what press theory is adopted within the country, the press covers and reflects the politically and culturally dominant ideologies.<sup>836</sup> Similarly, Kaya and Cakmur argue that political subservience is distinctively present in Turkey based on the character of former PM Erdogan, who “could not refrain himself from threatening the journalists in his public addresses several times. His recent call for media bosses to fire the columnists who failed to toe the line was a worrying illustration of the tendency.”<sup>837</sup> Because of the political parallelism in Turkey it can be questioned whether a true democracy is being settled, or it merely experiences a shift from military tutelage to civilian tutelage.<sup>838</sup> Referring back to Chapter 3 where DP government's promises of democratisation in its initials years shows similarities with the AKP government's, the present author argues that the diminishing democratisation promises followed a similar pattern in Turkey due to the lack of political toleration of press criticism, which finally resulted in changing attitudes of the governments towards the press as soon as the press started to hold an opposing position.

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<sup>830</sup> Raşit Kaya and Barış Çakmur, 'Politics and the Mass Media in Turkey' (2010) 11:4 Turkish Studies 521, 523

<sup>831</sup> Daniel C. Hallin and Paolo Mancini, *Comparing Media Systems: Three Models of Media and Politics* (Cambridge: Cambridge University Press, 2004) 21

<sup>832</sup> Ibid. 522

<sup>833</sup> Bilge Yesil, 'Press Censorship in Turkey: Networks of State Power, Commercial Pressures, and Self-Censorship' (2014) 7 Communication, Culture and Critique 154, 158

<sup>834</sup> Eric Barendt, *Freedom of speech*. New York (NY: Oxford University Press, 2007)

John Street, *Mass media, politics and democracy* (New York, NY: Palgrave Macmillan, 2011)

<sup>835</sup> Ragip Duran, 'Hakiydi Yesil Oldu Egemen Medya/Dominant Media Turned Green From Khaki' (Apoletli Medya, 1 Nemeber 2011) <<http://apoletlimedya.blogspot.co.uk/2011/11/hakiydi-yesil-oldu-egemen-medya.html>> accessed 21 May 2014

<sup>836</sup> Theodore Peterson, 'Why the Mass Media are that Way' in Francis H. Voelker and L. Voelker (eds.), *Mass Media: Forces in our Society*. (New York: Harcourt Brace Jovanovich Inc, 1978) 5-16

<sup>837</sup> Raşit Kaya and Barış Çakmur, 'Politics and the Mass Media in Turkey' (2010) 11:4 Turkish Studies 521, 537

<sup>838</sup> Ibid. 521, 534

#### 4.6.2 Censorship and self-censorship of the press

According to Arsan, during AKP's rule, the percentage of journalists who were concerned about the censorship and the self-censorship of the press were high; his interviewees reported that they feared being sued by the government officials and felt threatened by governmental and economic pressures coming from the media owners they worked with.<sup>839</sup> Journalists express that they receive pressure from the media owners not to go against the government, this leads to self-censorship due to fear of redundancy.<sup>840</sup> According to Kurban and Sozeri, this situation is related to the pressure of advertisements covering government corruption, politically motivated journalists' layoffs, or any sort of demonstration that would contravene the interests of the big holdings, which simultaneously hold the media sector in hand.<sup>841</sup> The media monopolies attempt to prevent critical reporting that opposes the government policies and apply censorship on the journalists challenging the ruling power.<sup>842</sup>

Hasan Cemal constitutes an appropriate example of this situation, for he was dismissed from *Milliyet* newspaper for supporting the sensational news covering the meeting between the Peace and Democracy Party (pro Kurdish party) representatives and the head of the terrorist organisation PKK<sup>843</sup> in his column in *Milliyet*.<sup>844</sup> More specifically, Namik Durukan's report on the minutes from Imrali, which was seen as a journalistic success by many,<sup>845</sup> was harshly criticised by the former PM Erdogan for harming the democratic opening process between the State and the Kurdish minority. Cemal's supportive articles after Erdogan's reaction toward the report were condemned

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<sup>839</sup> Esra Arsan, 'Gazeteci Gözüyle Sansür ve Otosansür 2011/*Censorship and Self-censorship from Journalists 2011*' *Perspective* (2011) 67 Yapı Kredi Press Cogito 56-67

<sup>840</sup> Eugene L. Meyer, *Applying Standards: Media Owners and Journalism Ethics* (Washington: Center for International Media Assistance, 2013)

<sup>841</sup> Dilek Kurban and Ceren Sozeri, 'Caught in the Wheels of Power' (*TESEV*, 2012) 1, 51

<sup>842</sup> Ben H. Bagdikian, *The media monopoly* (Boston, MA: Beacon Press, 2004)

Robert W McChesney, *The political economy of media: Enduring issues, emerging dilemmas* (New York, NY: Monthly Review Press, 2008)

<sup>843</sup> Namik Durukan, 'Imrali Zabıtları/*Minutes of the Imrali Meeting*' *Milliyet* (28 February 2013)

<sup>844</sup> Hasan Cemal, 'Barış olgunlaşmış durumda, resmin bütünü sakın ola gözden kaçmasın!/*Peace is mature now, let's not overlook the big picture*' *Milliyet* (1 March 2013) <<http://www.milliyet.com.tr/baris-olgunlasmis-durumda-resmin-butunu-sakin-ola-gozden-kacmasin-/siyaset/siyasetyazardetay/01.03.2013/1674795/default.htm>> 1 May 2013

<sup>845</sup> Radikal 'Namik Durukan Imrali Tutanakları'ni Anlattı/*Namik Durukan Told About the Imrali Minutes*' *Radikal* (10 April 2013) <<http://www.radikal.com.tr/turkiye/namik-durukan-imrali-tutanaklarini-anlatti-1129035/>> accessed 2 May 2013

Milliyet, 'Abdi İpekçi Odulu Namik Durukan'a/*Abdi İpekçi Prize Goes to Namik Durukan*' *Milliyet* (25 April 2014) <<http://www.milliyet.com.tr/abdi-ipekci-odulu-namik-durukan-a/gundem/detay/1698031/default.htm>> accessed 3 May 2013

by Erdogan in his public declaration stating that “if this is journalism, down with it!”.<sup>846</sup> This was received as a clear message by the newspaper (*Milliyet*) owner, who first censored Cemal’s latest articles, and finally Cemal was fired.

In its report Bianet states that, as a result of Erdogan’s pressure on the mainstream media, the executive branch’s interference in the editorial design, and the publication style media owners accordingly adopted, 339 journalists, authors and media workers were fired or pressured to resign in 2014.<sup>847</sup> In the study undertaken by Gecer, who asked 51 elites (consisting of members of mainstream media groups, NGOs, academics and members of parliament) whether there exists governmental pressure on the media in Turkey, 70% of the participants confirmed that there is and 30% of them stated that there was none.<sup>848</sup> Strikingly, most of the interviewees with closer ties to the government belonged to the 30%, and most of the leftists, nationalists and liberals claimed that governmental pressure on the media did exist.<sup>849</sup> Moreover, such interference, even if it was thoroughly denied by Erdogan and the executive branch, was made public by the leaked wiretaps in 2013 and 2014, demonstrating the government’s endeavours to create a media wing that would follow its policies and make news in support of its decisions.<sup>850</sup> Fatih Sarac, who is in the executive board of *Haberturk Daily* that belongs to *Ciner Group*, was contacted by Erdogan who ordered the censorship of various media coverage that opposed him.<sup>851</sup>

It is discussed in Chapter 3 that the press in Turkey, especially in the initial years of its democratic governance, could not adopt the role of a watchdog but rather followed the political ideology of the ruling elites. This prevented it from allowing the free market of ideas to be established. It is observed in this chapter that despite the legal reforms and the changing structure of the military-civil government power relations, due to the private ownership of the press turning into a profit-run business, contradicting journalism ethics, political patronage of the press prevailed in

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<sup>846</sup> Derya Sazak, *Batsin Boyle Gazetecilik/Down With This Journalism* (Boyut Press 2014)

<sup>847</sup> Bianet, ‘Medyanin 3 Yili Grafik Ozet/Last three years of the media: graphical summary’ (*Bianet*, 4 March 2015) <<http://bianet.org/bianet/medya/162748-medyanin-3-yili-grafik-ozet>> accessed 6 December 2015

<sup>848</sup> Ekmel Gecer, ‘Ekmel Gecer, ‘Media and Democracy in Turkey: The Kurdish Issue’ (PhD Thesis, Loughborough University 2014) 100, 124, 125

<sup>849</sup> Ibid.

<sup>850</sup> Ugur Emek and Muhittin Acar, ‘Public Procurement in Infrastructure: The Case of Turkey’ in Alina Mungiu-Pippidi (ed.) *Government Favouritism in Europe, The Anticorruption Report 3* (Barbara Budrich Publishers, 2015) 91  
Freedom House, ‘Freedom of the Press 2015 Turkey’ (*Freedom House*, 2015)

<<https://freedomhouse.org/report/freedom-press/2015/turkey>> accessed 11 December 2015, 9

<sup>851</sup> Rethink Institute, ‘Diminishing Press Freedom in Turkey’ (2014) 18 Rethink Paper Rethink Institute Washington 1, 7-8

Turkey. The press's role (irresponsibility) resulting in partisan press or political patronage is expressed by Yin as:

Another form of press irresponsibility is the partisan press or political patronage of the press, in which case some press allows itself to be used as political tools especially when the democratic system is still young. With a political power vacuum as a result of the dismantling of control mechanisms; political families, parties, or organisations often take the rush to take the control of the media and use the media to advance their particular agendas, often employing such tactics as personal attacks or smear campaigns. Such a press tends to exist in free but less developed media markets as political patronage provides much needed financial support for the media.<sup>852</sup>

Even though libertarian and social-responsibility theories of the press suggest that private ownership of the press is necessary in order to allow the free circulation of information where there is no abuse of state power with the involvement of the government control,<sup>853</sup> Baran and Davis argue that “an unregulated media inevitably serves the interests of large socially dominant groups”,<sup>854</sup> observable from the discussions above on media ownership in Turkey. Croteau and Hoynes suggest that free-market ideology of the Western doctrines pave the way for the existence of media possessors and monopolies who mostly hold the power of manipulation. Croteau and Haynes therefore suggest that media being owned by private actors could lead to giving the control of society's way of thinking to a certain group of people who finally become media empires which antagonises the idea of a pluralistic press. Then, one can ask whether having media monopolies controlling the thoughts of society, and having control of manipulation is any different from government authoritarianism.<sup>855</sup> In that regard, Hachten suggests Western media being controlled by a small group of elite, drawing upon “capitalism” and “free market.”<sup>856</sup> Finally, it is possible to argue that newspapers should have independent financial grounds as well as independent

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<sup>852</sup> Jiafei Yin, ‘Beyond the Four Theories of the Press: A New Model for the Asian & the World Press’ (2008) The Association for Education in Journalism and Mass Communication 51

<sup>853</sup> Siebert et al., *Four Theories of the Press* (Urbana: University of Illinois Press, 1956) 100

<sup>854</sup> Stanley J. Baran and Dennis K. Davis, *Mass Communication Theory: Foundations, Ferment and Future* (Wadsworth Cengage Learning, 2003) 109

<sup>855</sup> David Croteau and William Hoynes, *Media/Society* (Thousand Oaks: Fine Forge Press, 2002)

<sup>856</sup> William A. Hachten and Harva Hachten, *The World News Prism: Changing Media, Clashing Media of International Communication* (IA: Iowa State University Press, 1992) 36

journalists, in order to support the multi-party democratic system,<sup>857</sup> especially when its ability to shape public opinion,<sup>858</sup> with the necessity of a public sphere to exist for the functioning of democracy is taken into consideration.<sup>859</sup>

#### 4.6.2.1 Self-censorship of the press as a result of the governmental pressure

Based on the relationships of economic interest explained above, the press in Turkey adopted self-censorship as a part of its everyday practice in which critical reporting and coverage of sensitive issues such as the minority issues resulted in politically motivated lay-offs.<sup>860</sup> This author argues that the lack of journalistic professionalism of the media owners inhibits their ability to help develop a critical approach towards the official state ideology and to allow the minority or opposition groups to shape or influence public opinion.<sup>861</sup> The danger this situation creates is undeniable as the political pressure on the press is added to the professional journalistic culture which leads to self-censorship increasingly becoming the normal code of conduct for editors and journalists who work under the pressure of the governments.<sup>862</sup>

Taking a journalistic approach, Soner Yalcin classifies journalism in Turkey first by journalists who make news by following the interest of the government and the media owners (which he calls “the central media”), secondly by journalists who, regardless of the implications, defend the right to information and expression and make the truth available to the public. He states that only the latter serves the people, who are in search of the truth, which governments and the media owners find rather intimidating. According to Yalcin, the truth is beyond the restrictions and

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<sup>857</sup> John Keane, *The Media and Democracy* (London: Polity Press, 1991) 175

<sup>858</sup> Denise M. Walsh, *Women's Rights in Democratizing States* (Cambridge: Cambridge University Press, 2011) 47

<sup>859</sup> Lou Rutigliano, ‘Emergent Communication Networks as Civic Journalism’ in Mark Tremayne (eds.) *Bloggging, Citizenship, and the Future of Media* (New York: Taylor and Francis, 2007) 227

<sup>860</sup> Freedom House, ‘Freedom of the Press 2015 Turkey’ (*Freedom House*, 2015)

<<https://freedomhouse.org/report/freedom-press/2015/turkey>> accessed 11 December 2015, 11

<sup>861</sup> John Parkinson, ‘Using the Media in Deliberative Democracy’ (2006) 36:1 *British Journal of Political Science* 175

<sup>862</sup> Francis L. F. Lee and Angel M.Y. Lin, ‘Newspaper editorial discourse and the politics of self-censorship in Hong Kong’ (2006) 17:3 *Discourse&Society* 331-358

the pressure put on journalists', and if journalists yield to such pressure, the truth cannot be reached.<sup>863</sup>

Based on Yalcin's argument, one can discuss the role of journalistic ethics in the self-censorship of the press, therefore, it is necessary to examine Turkey's code of ethics for the journalists, which is predominantly set by the Journalists Association of Turkey under the 1998 Right and Responsibilities Declaration:

Journalists' rights are the foundations of people's right to information and freedom of expression. Professional ethics is the basis of honest and true communication. Journalists use freedom of the press in an honest manner that serves the people's right to receive unbiased information. For this aim journalists should resist any sort of censorship and self-censorship and should also direct the society towards that purpose. Journalists' responsibility towards the society comes before any responsibility including the ones towards their managers and media owners as well as public authorities. Journalists take their contracts with their workplace as the main border of requests. Therefore journalists have the right to reject any other order or requests outside that border. Journalists cannot be pressured to defend an idea they do not believe or undertake a mission that is against their professional ethics. In regard to the right to information of the society, whatever the implications, journalists must respect the truth and comply with it. Journalists, no matter the implications, defend the right to receive information and news, freedom of criticism. Journalists prioritise and defend peace, democracy, human rights, universal values of humanity, plurality and defends respect to differences without any discrimination of nationality, race, ethnicity, gender, language, religion, class and philosophical belief. Journalists recognises all nations' and individuals' rights and reputations. Journalists abstain from publications that trigger hatred and enmity between people, societies and nations, and cannot make one nation's or a society's cultural values and beliefs (or no beliefs) a target for assault. Journalists cannot make publications that promote or encourage violence and cannot misinterpret journalism with re-advertising,

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<sup>863</sup> Soner Yalcin, 'Cemaat Ergenekon Kilicini AKP'ye Saplamistir/*Cemaat Stabs AKP with the Sword of Ergenekon*' (*Oda TV*, 11 August 2011) <<http://odatv.com/cemaat-ergenekon-kilicini-akpye-saplamistir-1108131200.html>> accessed 2 July 2014

public relations or propaganda. Journalists must obey the law, however must reject any sort of government or alike interference. Journalists only take their colleagues' comments and judicial verdicts. Journalists must not become a side to a law case and must not declare the accused guilty until the case is finalised, and must not make news reflecting the accused as guilty.<sup>864</sup>

Based on the journalistic ethics that journalists in Turkey must follow, it is fair to conclude that the government or the media owners cannot always be held liable for the self-censorship of the press. Former columnist at *Vatan (Nation)* newspaper, of which she was one of the founders, Ruhat Mengi placed the responsibility on the journalists under the title of "free media and government's media" by stating:

As you all know, Turkish media is now in the hands of the ones who are "very close" to the government. There is no necessity to do research on that as it is enough to take a look at the way the news is written by checking the columnists articles and the newspaper covers. In Turkey, there is a situation in which journalists support the government as if it was a football team, which you would not be able to observe in another country. It requires a strong will and character to choose the country's benefit when their own is on the other side of the equilibrium and as you can guess, it does not appear in all journalists. In that regard, the "honest and unbiased journalism" and "checking on government on behalf of the people" which falls under the duty of the fourth estate of the press disappeared, which is the "actual" role of the press. This is unfortunately the overall picture for the majority of the press in Turkey.<sup>865</sup>

From a journalist's own view, Mengi suggests that the press denied its role as the fourth estate, for it no longer produces news that is accurate and unbiased. Mengi, after the sale of her newspaper to Demiroren Media Group was fired from *Vatan* and expressed her grief for the press and democracy in Turkey, proclaiming that the "Prime Minister or the President must not state that there is a free press or democracy in Turkey. Can there be a democracy without a free press? They say that there is no freedom in Egypt, Irak or Syria, however they motivate firing of the opposition

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<sup>864</sup> Journalists Association of Turkey, '1998 Declaration of Rights and Responsibilities' <<http://www.tgc.org.tr/bildirge.asp>> accessed 2 August 2012 (author's translation)

<sup>865</sup> Ruhat Mengi, 'Ozgur medya ve iktidar medyasi/*Free media and government's media*' (*Vatan newspaper*, 12 June 2008) <<http://www.gazetevatan.com/ruhat-mengi-183790-yazar-yazisi-ozgur-medya-ve-iktidar-medyasi/>> accessed 18 November 2014

columnists. Apart from the government pressure on the press, it also must be highlighted that the will of businessmen to become media bosses hurt this country. They must let this desire go.”<sup>866</sup>

This author argues that balancing business and ethics might be the core issue/critical problem to touch on in order to allow the free flow of information as well as protecting the society’s right to information as the media owners and the chief editors apply censorship on the newspaper journalist, in order to prevent the government from exercising power on the newspaper owners who risk losing their newspapers or other businesses that are not in direct contact with the press.

Considering that the government in power has always had an influence on the situation of the freedom of the press as well as the tendencies to self-censorship in Turkey, this author argues that self-censorship of the press depends on the sensitive issues of the governments. Therefore, the analysis of the political history in relation to the transition of the press in Turkey is of great importance. This forms a good example of Ying’s statement suggesting that “self-censorship is probably a perfect form of political control.”<sup>867</sup>

However, the role of the press as the fourth estate<sup>868</sup> cannot be perceived separately from the economic conditions in which journalists work; this will be discussed in the following section.

#### 4.6.2.2 Working conditions of the press

Working conditions are regulated under “the relations between the ones who work for press and the owners Law no. 5953.” However, despite journalists being entitled under this law to receive social security,<sup>869</sup> because they were rather employed under the Labour Law,<sup>870</sup> they have not received the social security were entitled to. Tilic observes that the emergence of the new media owners, starting in the 1990s, caused journalists to lose their jobs if they become labour union

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<sup>866</sup> Aydinlik Newspaper, ‘Gungor ve Ruhat Mengi Vatan’dan Kovuldu/*Gungor and Ruhat Mengi Fired From Vatan*’ *Aydinlik* (6 December 2013) <<http://www.aydinlikgazete.com/medyanin-halleri/gungor-ve-ruhat-mengi-vatandan-kovuldu-h29660.html>> 19 November 2014

<sup>867</sup> Jiafei Yin, ‘Beyond the Four Theories of the Press: A New Model for the Asian & the World Press’ (2008) The Association for Education in Journalism and Mass Communication

<sup>868</sup> Matthew Kieran, *Media Ethics: A Philosophical Approach* (Westport: Praeger Publishers, 1997) 25

<sup>869</sup> Law regulating the relations between the ones who work for press and the owners no. 5953 (13/6/1952) Article 14 “Payment” provides that “it is obligatory to pay the press workers’ social security.”

<sup>870</sup> Labour Law 4857 (22/5/2003)

Dilek Kurban and Ceren Sozeri, ‘Caught in the Wheels of Power’ (*TESEV*, 2012) 1, 54

members.<sup>871</sup> The former general manager of the Journalists' Union of Turkey, along the same line as Tilic's statement, argued that there are legal and practical barriers against the journalists' freedom of association. The legal formation set by the 1982 Constitution permits the arbitrary use of labour law among media owners, who perceive being a member of a union a sufficient reason to fire journalists. On the other hand, the effects of the 1990s, during which journalists were forced out of unions with threats and pressure, can still be seen in the journalists' reservations toward becoming a union member in the 2000s<sup>872</sup> even though it is a right protected under the Turkish Constitution Article 51 regulating "the right to organise unions":

Employees and employers have the right to form unions and higher organisations, without prior permission, and they also possess the right to become a member of a union and to freely withdraw from membership, in order to safeguard and develop their economic and social rights and the interests of their members in their labour relations. No one shall be forced to become a member of a union or to withdraw from membership.<sup>873</sup>

Moreover, the "gentlemen's agreement" among media owners led to a wider application of self-censorship; based on this agreement, media owners agree that any journalist who quits their employment for any reason would not be employed by another media owner.<sup>874</sup> Ahmet Sik is an appropriate example of this situation because he was dismissed from *Radikal* newspaper (Dogan Media Group) in 2005 for his active membership in the journalists' union. Sik, who sued Dogan Media Group for failing to pay overtime wages and lowering the actual payment amounts on the pay sheets, was fired from *Radikal* and was threatened by being told he will never be reemployed by any other media owners.<sup>875</sup>

The present author therefore argues that journalists are vulnerable under these conditions, which prevent them from following the professional ethics; they lack the legal security to resist the

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<sup>871</sup> Dogan Tiliç, *Utaniyorum Ama Gazeteciylim/I am Ashamed to be but I am a Journalist* (Iletisim Press, 2000)

<sup>872</sup> Ziya Sonay, 'Basinda Sendikal Orgutlenme/Unionist Organisation in the Press' Local Media Training Seminar (Journalists' Union of Turkey, 2000) <<http://www.tgc.org.tr/ybs/19-07.htm>> accessed 25 November 2014

<sup>873</sup> The Constitution of the Republic of Turkey 2709 (7/11/1982) s 3(51)

<sup>874</sup> L. Dogan Tilic, *Utaniyorum Ama Gazeteciylim: Turkiye ve Yunanistan'da Gazetecilik/I am Ashamed to be but I am a Journalist: Journalism in Turkey and Greece* (Istanbul Iletisim Press, 1998) 138

<sup>875</sup> Sendika Org, 'Gazeteci Ahmet Şık, Hak Arama Mücadelesi Yüzünden Radikal'den Atıldı/Journalist Ahmet Sik Got Fired For Seeking Justice' (Sendika Org 3 May 2005) <<http://sendika10.org/2005/05/gazeteci-ahmet-sik-hak-arama-mucadelesi-yuzunden-radikalden-atildi/>> accessed 22 July 2013

Dilek Kurban and Ceren Sozeri, 'Caught in the Wheels of Power' (TESEV, 2012) 1, 51

economic pressures exerted by media owners, who are also under economic pressure from their business relations with the government. This domino effect stagnates editorial freedom and interferes with the people's right to information.

## 4.7 Gezi Park Protests

The Gezi Park protests is a relevant and practical example of the reaction of the government toward the democratic demands of the people and of the censorship and the self-censorship of the press in relation to the biggest civil uprising in modern Turkey.

Months before the Gezi protests started, Taksim Square and the park were closed with no prior public declaration, and there was no clear explanation from the authorities. The historical events leading to the protests started on the 27th May 2013 when the trees in Gezi Park were being felled, and a group of young people who saw the demolishing of the trees decided to stay in the park and called for more people who stayed with them in tents until the 31st of May. The police attacks against the peaceful protestors in the park came on the dawn of the 31st of May with tear gas, and water cannons, and burning of the tents. The young people in Gezi were non-political but well-educated peaceful protestors who were mainly from the middle-class.<sup>876</sup> Pictures and videos of the police's disproportionate attack spread quickly on social media, which finally led to the biggest social unrest in modern Turkey. The reaction of the government toward a group of peaceful young people, whose only aim was to protect the last trees left in one of the most commercial areas in Istanbul, tested the patience levels of citizens, already highly concerned with the attitude of the government, mainly the former prime minister, now president Erdogan.

In that regard, the Gezi protests initially started as a challenge to the transformation of the park into a shopping mall that architecturally would reflect Islamic identity, which is mostly found in Gulf Arab cities. Participants felt this represented the loss of Istanbul's original identity<sup>877</sup> and felt excluded from any decision-making process about their cities. Ors argues that Gezi was a creative

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<sup>876</sup> Esra Ercan Bilgic and Zehra Kafkasli, 'Gencim, Ozgurlukcuym, Ne Istiyorum?/I am Young, I am for Freedom, What do I want?' Gezi Parki Survey Report (Istanbul Bilgi University Press, 12 June 2013) <<http://www.bilgiyay.com/Content/files/DIRENGEZI.pdf>> accessed 28 August 2013

<sup>877</sup> Seyla Benhabib, 'Gezi Parki Protestolari: Kuresel Baglam ve Turkiye'de Siyasetin Gelecegi/Gezi Park Protests: Global Context and Political Future in Turkey' (Konusa Konusa, 2013) <<http://konusakonusa.org/2013/08/25/seyla-benhabib-ile-turkiyenin-demokrasi-yolculugu-ve-gezi-olaylari-uzerine-konustuk/>> accessed 2 September 2013

engagement of people with democracy because they were openly expressing how they desire to be governed, specifically by having a voice regarding how their city should look.<sup>878</sup> Benhabib submits that such urban consciousness therefore connected and consolidated the groups that were excluded from everyday politics such as the environmentalists, feminist groups, LGBT members, and Kurdish groups.<sup>879</sup>

Ozbudun argues that “obviously, the Gezi Park events cannot be reduced to pure and simple environmentalist concerns. Rather, they were the spontaneous explosion of accumulated anxieties resulting from what was perceived as the government’s increasing interference with the secular way of life and the arena of personal choice.”<sup>880</sup> Such an approach to democracy that excludes (in other words, ignores) the will and demands of the citizens who did not vote for AKP, are reflected in Erdogan’s reactions to the Gezi protesters, whom he saw as “the others” who unlawfully demonstrated against him. In return, the protesters saw the only way to be heard was to peacefully protest against the policies of the government and its interference in everyday life, by using their democratic right of demonstration endorsed by Article 34 in the Constitution; “Everyone has the right to hold unarmed and peaceful meetings and demonstration marches without prior permission.”<sup>881</sup>

The violent police reaction toward the peaceful protesters led to larger groups populating the street, but while international channels such as CNN-Turk instead aired a penguin documentary,<sup>882</sup> which led to the emergence of the penguin as an important symbol for the protesters regarding the subordination and silencing of the Turkish mainstream press. This was, however, just a larger-scale result of the media owners’ government business connections, the lack of legal protection for the unions, and the censorship and self-censorship of the media due to the repressive legal provisions.<sup>883</sup>

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<sup>878</sup> Ilay Romain Ors, ‘Genie in the bottle: Gezi Park, Taksim Square, and the realignment of democracy and space in Turkey’ (2014) *Philosophy and Social Criticism* 1, 8

<sup>879</sup> Seyla Benhabib, ‘Gezi Parki Protestolari: Kuresel Baglam ve Turkiye’de Siyasetin Gelecegi/*Gezi Park Protests: Global Context and Political Future in Turkey*’ (Konusa Konusa, 2013) <<http://konusakonusa.org/2013/08/25/seyla-benhabib-ile-turkiyenin-demokrasi-yolculugu-ve-gezi-olaylari-uzerine-konustuk/>> accessed 2 September 2013

<sup>880</sup> Ergun Ozbudun, ‘AKP at the crossroads: Erdogan’s majoritarian drift’ (2014) 19:2 *South European Society and Politics* 155, 157

<sup>881</sup> The Constitution of the Republic of Turkey 1982 s 2(34)

<sup>882</sup> Cooper Fleishman, ‘CNN-Turk airs penguin documentary during Istanbul riots’ *The Daily Dot* (2 June 2013) <<http://www.dailydot.com/news/cnn-turk-istanbul-riots-penguin-doc-social-media/>> accessed 12 June 2013

<sup>883</sup> Asli Tunc, ‘Can Pomegranates Replace Penguins? Social Media and the Rise of Citizen Journalism in Turkey’ (*A Struggle For Turkey’s Internet*, 2014) <<http://denieuwereporter.nl/www.freedomhouse.org/sites/default/files/Can%20Pomegranates%20Replace%20Penguins>

#### 4.7.1 The government's attitude toward political criticism

Tugal posits that the Gezi protests were born in a class-blind manner without a leader,<sup>884</sup> which allowed them to stay peaceful despite the police intervention throughout. Nevertheless, the exclusive approach of AKP and the PM to everyday politics is reflected on the Gezi protests in the same manner. The peacefully expressed democratic demands of people on the streets were continuously ignored by the PM throughout the month of June 2013 when he claimed that protests were a plot prepared by internal and international groups who aimed to overthrow his government, based on interest-rate lobbies and foreign hostilities. The PM alleged the media, which extensively covered the events during the Gezi protests, were the ones who originally organised and controlled the turmoil in Turkey.<sup>885</sup> By way of this research it is submitted that, Erdogan's reaction shows similarities with that of Adnan Menderes, who also saw international bodies' reactions against their approach to the press as a "threat against the internal affairs" of the state.<sup>886</sup> The way both Menderes and Erdogan received high public support and still consider any opposition and/or public protest as a threat, indicates the lack of broadmindedness and tolerance of criticism, requiring a change of approach towards a more practically liberal stance that regards such negative reactions as an opportunity to be turned into a positive step towards democratisation.

However, the PM preferred to assemble his supporters in order to strengthen his confirmed/core allegiances,<sup>887</sup> rather than listen to the demands of "the others". Dagi argues that, when compared with AKP's political agenda — which heavily depended on EU membership, the improvement of human rights conditions, the democratisation process in Turkey in 2002, and the undemocratic turn it took before and during the Gezi protests with its reactions toward democratic demands of the people. AKP's failure to internalise human rights and democracy cannot be evaluated separately from the insecurity it felt in response to the strong secular political establishment in Turkey. This is especially the case considering that AKP's recent history involves party closure risk by the constitutional court on the basis of secular concerns<sup>888</sup> and that the Welfare

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%20-%20Social%20Media%20and%20the%20Rise%20of%20Citizen%20Journalism%20in%20Turkey.pdf> accessed 2 June 2014

<sup>884</sup> Cihan Tugal, "Resistence Everywhere": the Gezi Revolt in Global Perspective' (2013) 49 *New Perspectives on Turkey* 157-172

<sup>885</sup> Freedom House, 'Freedom of the Press 2015 Turkey' (*Freedom House*, 2015)

<<https://freedomhouse.org/report/freedom-press/2015/turkey>> accessed 11 December 2015, 3

<sup>886</sup> See Chapter 3, section "Democrat Party: a new phase for democracy and the press in Turkey".

<sup>887</sup> Ergun Ozbudun, 'AKP at the crossroads: Erdogan's majoritarian drift' (2014) 19:2 *South European Society and Politics* 155, 158

<sup>888</sup> See section "Media ownership and the freedom of the press".

Party, the precursor of AKP, followed the National View.<sup>889</sup> Considering Western values to be evil. In that regard, Dagi suggests that AKP used the notion of embracing human rights as merely political leverage — a means of “instrumentalisation of human rights” rather than internalisation.<sup>890</sup> The present author concludes that despite the incontrovertible effects that political history has on the former AKP leader, current President Erdogan, and the AKP government, it is vital to include the effects of the rising authoritarian tendencies in Turkey on the censorship of the press; these effects can be explained by shifts in what is considered to be “sensitive subjects”. It is submitted that this moving of goalposts signals the government’s continual use of national security as an excuse to silence the opposition journalists, whereby changes to legal provisions in the controversial Penal Code and Anti-Terror Law are effectively cosmetic. However, it is noted that even though the military’s role in politics or the Kurdish issue is more openly disputed in the parliament, the government’s use of its conservative policies puts pressure on media professionals,<sup>891</sup> for opposition on any grounds against the government, but especially against the PM himself, dominates the new sensitive subjects that cannot be openly debated by the press.<sup>892</sup> The number of people investigated on the basis of defamation against Erdogan, of which 50 out of 460 are journalists, is an appropriate indication of the extent of the intolerance toward opposition.<sup>893</sup> This shift can be defined on the theoretical basis of “competitive authoritarianism” as suggested by Esen and Gumuscu, who argue that civil liberties in Turkey have been under systematic violation.<sup>894</sup> Competitive authoritarianism defines a political atmosphere in which “government critics are threatened, harassed and, occasionally, prosecuted” leading to an uneven political arena between the government and the opposition.<sup>895</sup>

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<sup>889</sup> For the definition of “national view” see section “The Rise of AKP”.

<sup>890</sup> Ihsan D. Dagi, *Kimlik, Soylem ve Siyaset: Dogu-Bati Ayriminda Refah Partisi Gelenegi/Identity, Expression and Politics: Refah Party Tradition in the Separation of East and West* (Ankara: Imge Press, 1999)

<sup>891</sup> Taner Akan, ‘The Political Economy of Turkish Conservative Democracy as a Governmental Strategy of Industrial Relations between Islamism, Neoliberalism and Social Democracy’ (2013) 33:2 *Economic and Industrial Democracy*, 317, 318

<sup>892</sup> Ihsan D. Dagi, ‘The justice and Development Party: Identity, Politics, and Discourse of Human Rights in the Search for Security and Legitimacy’ in M. Hakan Yavuz, *The Emergence of New Turkey: Democracy and AK Parti* (Utah University Press, 2006) 89

<sup>893</sup> Berk Esen and Sebnem Gumuscu, ‘Rising competitive authoritarianism in Turkey’ (2016) *Third World Quarterly* 1, 13

<sup>894</sup> *Ibid.*, 1-26

<sup>895</sup> Berk Esen and Sebnem Gumuscu, ‘Rising competitive authoritarianism in Turkey’ (2016) *Third World Quarterly* 1, 2

Susan Corke, Andrew Finkel, David J. Kramer, Carla Anne Robbins, and Nate Schenkkan, ‘Democracy in Crisis: Corruption, Power and Media’ (*Freedom House*, 2014)

<<https://freedomhouse.org/sites/default/files/Turkey%20Report%20-%20202-3-14.pdf>> accessed 22 November 2015

This author concludes that the Gezi protests could be used as a positive change toward eliminating the stigma of following the political ideology — one has gradually formed throughout Turkey’s political history — and the polarisation amongst the society during the AKP government due to the segregated social and political groups. During the protests, groups belonging to opposing political ideologies such as extreme right and left, Kurdish groups, and Kemalists, were together protesting against the policies of the current government; the protests therefore had the potential power to form a turning point for the general atmosphere of the country. The left and the right could communicate with the will and intention to understand each other rather than to impose its ideas. However, this potential for democracy was diminished by disproportionate police interventions,<sup>896</sup> which resulted in seven deaths and thousands of injured people, deepening the polarisation between the religious groups, pro-AKP groups, and the secularists (anti-AKP groups).<sup>897</sup>

#### 4.7.2 Gezi as a practical example for censorship and the censorship of the press

The PM adopted the approach of criminalising Gezi by claiming that it was organised by the “high interest-rate lobby” and asked his voters to support him against this lobby; the mainstream media, which did not want to seem to be supporting an international plot,<sup>898</sup> therefore fired or forced their journalists to resign.<sup>899</sup>

Gezi was a missed chance for the press to finally play its watchdog role. The press could serve as a power that unifies people from different political backgrounds in the country by the language it uses to disseminate the truth from all angles, providing a platform for beginning democratic and pluralistic discussions across political spectrum. However, once again, political pressure, media owners’ dictates on journalists, and the journalists’ choice to assume the role of the

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<sup>896</sup> Malcolm B. Russell, *The Middle East and South Asia 2013* (Lanham: Rowman & Littlefield Publishing, 2013)

<sup>897</sup> Ergun Ozbudun, ‘AKP at the crossroads: Erdogan’s majoritarian drift’ (2014) 19:2 *South European Society and Politics* 155, 158

Sebnem Yardimci Geyikci, ‘Gezi Park Protests in Turkey: A Party Politics View’ (2014) 85:4 *The Political Quarterly* 445-453

<sup>898</sup> Malcolm B. Russell, *The Middle East and South Asia 2013* (Lanham: Rowman & Littlefield Publishing, 2013) 183

<sup>899</sup> Kadri Gursel, ‘Turkey Pulse’ (*Al Monitor*, 26 July 2013) <<http://www.al-monitor.com/pulse/originals/2013/07/turkey-journalists-censorship-press-freedom-erdogan.html#>> accessed 2 August 2013

David Gardner, ‘Erdogan is eroding the freedom of the media’ *Financial Times* (5 August 2013) <<http://www.ft.com/cms/s/0/6f70100a-fdba-11e2-a5b1-00144feabdc0.html#axzz44ZhCmXhz>> accessed 3 September 2013

government's spokesman resulted in biased news. Rather than respecting the people's right to information, the press instead remained subservient to economic interests formed by the close relations between media owners and the government. Turkey's international reputation as a democratic country with a Muslim majority, which could have been a model for the region of the Arab Spring, was irrevocably damaged.<sup>900</sup>

While the mainstream media preferred not to cover the protests in order to secure a smoother relationship with the government, during the Gezi protests in 2013 alone, 143 journalists were forced to resign or fired<sup>901</sup> of which at least 59 resulted from reporting the Gezi Park protests.<sup>902</sup> Meanwhile, between 27-30 September 2013, 153 journalists were battered and 39 were taken into custody.<sup>903</sup> Journalist Tugce Tatari, who worked for *Aksam* newspaper for six years, was fired for contradicting Erdogan's claim that Gezi was an international plot to topple him as well as criticising him for not understanding the needs of the new generation.<sup>904</sup>

In conclusion, the treatment of the journalists and the clear political stance of the media owners during the Gezi protests, once more demonstrate the strong need in Turkey for professional news rather than politically driven dissemination of information. The importance of the journalists' will, to resist government pressure and the legal security of the journalists through union membership and legal protection against forced lay-offs.

## 4.8 Conclusion

Even though AKP has played an important role in democratic consolidation — with the reforms adopted for the improvement of the freedom of the press in Turkey regardless of its pro-

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<sup>900</sup> Ergun Ozbudun, 'AKP at the crossroads: Erdogan's majoritarian drift' (2014) 19:2 South European Society and Politics 155, 158

<sup>901</sup> Berk Esen and Sebnem Gumuscu, 'Rising competitive authoritarianism in Turkey' (2016) Third World Quarterly 1, 11

<sup>902</sup> Susan Corke, Andrew Finkel, David J. Kramer, Carla Anne Robbins and Nate Schenkkan, 'Democracy in Crisis: Corruption, Power and Media' (*Freedom House*, 2014) <<https://freedomhouse.org/sites/default/files/Turkey%20Report%20-%202-3-14.pdf>> accessed 22 November 2015

<sup>903</sup> Erol Onderoglu, 'Medyanin 3 Yili: Grafik Ozet/3 Years of the Media: Graphic Summary' (*BIANET*, 4 March 2015) <<http://bianet.org/bianet/medya/162748-medyanin-3-yili-grafik-ozet>> accessed 9 March 2015

<sup>904</sup> Gazeteciler, Tugce Tatari Aksam'a Bu Yazıyla Veda Etti/*Tugce Tatari Part Ways With Aksam On This Article* (*Gazeteciler*, 29 June 2013) <<http://www.gazeteciler.com/gundem/tugce-tatari-aksama-bu-yaziyla-veda-etti-67948h.html>> accessed 1 August 2013

Islamic and anti-Western roots, this democratic consolidation would only be accurate if a genuine internalisation of human rights had taken place during the AKP period of governance. Yet the cosmetic changes made to the legal provisions related to the freedom of expression and the press, as well as their controversial application toward press censorship, demonstrate that these reforms do not carry the revolutionary impetus necessary to advance press conditions.<sup>905</sup> It is fair to argue that the limits of freedom of expression and the press have not been extended as a result of these reforms (especially given that the press in Turkey is classified to be “not free” by international NGOs<sup>906</sup>) and the political intolerance of the PM towards criticism.

The legal reforms discussed within the chapter can be seen as the second most fundamental codification of the law in Turkey after the law reforms of the early years of the Republic. Freedom of expression and the press specifically were the two areas targeted for improvement with these changes; nevertheless, the-top-to-bottom approach employed during the modernisation reforms 80 years ago, were applied in a similar manner. The EU, “an external actor on democratic consolidation in Turkey”<sup>907</sup>, could not bring the level of free expression of the press to a satisfying level as agreed with international agreements Turkey is a party to. When considering the situation of the press in Turkey today, this demonstrates a continuing resistance to the internalisation of human rights and freedoms for one of the most fundamental pillars of democracy, freedom of the press.

When compared with the previous government’s attitude in light of the discussions in Chapter 3, no other government chose to build business connections to the extent of those built by the AKP government. Such networks allowed government authorities and the PM to give directions to the media owners on the fate of the opposition journalists, leading to increasing rates of censorship and self-censorship. During this period, economic sanctions emerged as a way to censor the press while allowing pro-AKP businessmen to own the media entities.

Finally, the role of politics in censoring the press, evident in the Ergenekon case, the Turkish Penal Code, and the Anti-Terror Law, are still being used by the government through the judiciary’s broad interpretation of these legislations, thereby putting the independency and impartiality of the judiciary into question. Therefore, the next chapter will examine (1) the

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<sup>905</sup> Turkish Republic Prime Ministry, ‘Political Reform in Turkey’ (Ankara, 2007) 31

<sup>906</sup> Freedom House, ‘Turkey Freedom of the Press 2015’ (*Freedom House*, 2015)

<<https://freedomhouse.org/report/freedom-press/2015/turkey>> accessed 11 December 2015

<sup>907</sup> Siret Hursoy, ‘The Paradox of Modernity in Turkey’ (2012) 68:1 *India Quarterly* 49, 61

correlation between the common political ideology within the judiciary and its effects on the freedom of the press, and (2) the effects of political interference on judicial autonomy and impartiality.

# Chapter 5 -Turkey's Judicial Approach to Press Freedom in Comparison with the ECtHR and its Political Intervention in the Independence and Impartiality of the Judiciary

## 5.1 Introduction

Political interference in the press operations, both towards journalists and media owners, is discussed in detail in the previous chapter. In this chapter, such interference and its impact on the judiciary will be discussed in light of the problems experienced due to the legal status of the judiciary, specifically the effects of these problems on its impartiality and independence. In addition to such interference, the difference between the mindset of the Turkish courts and the ECtHR will be discussed with reference to selected court decisions on the freedom of the press in order to understand the judiciary's approach to the press as a key agent in a democratic society.

As Howard and Carey suggest, even though free media is necessary for democratisation besides the political parties and NGOs, the existence of an independent judiciary is vitally important in a political system in order to provide guarantees for the protection of individual rights against any political/governmental pressure;<sup>908</sup> both the press and the judiciary's role in a democratic society is undeniable, especially when the government is inclined to use its power arbitrarily, as it is in the case of Turkey. Because an independent judiciary is a must for the protection of the individual rights of citizens<sup>909</sup> — and under the scope of this research especially the political rights of the press — this chapter begins by exploring the situation of judicial independence in Turkey considering that it is a necessity for the press to use its constitutional rights and freedoms to investigate government actions, whose power is based on the majority's votes that leaves less space for the anti-government voices to express themselves.

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<sup>908</sup> Robert M. Howard and Henry F. Carey, 'Is an Independent Judiciary Necessary for Democracy?' (2004) 87:6 *Judicature* 284

<sup>909</sup> Peter Russell and David O'Brien, *Judicial Independence In the Age of Democracy, Critical Perspectives from around the World* (Charlottesville and London, University Press of Virginia, 2001)

## 5.2 Judicial independence in Turkey

Judicial independence and impartiality are guaranteed in various articles under the Turkish Constitution. Article 9 regulates that “Judicial power shall be exercised by independent courts on behalf of the Turkish Nation”,<sup>910</sup> Article 40 provides protection of fundamental rights and freedoms (stating that “Everyone whose constitutional rights and freedoms have been violated has the right to request prompt access to the competent authorities”),<sup>911</sup> and finally, Article 138 guarantees the independence of the courts:

Judges shall be independent in the discharge of their duties; they shall give judgment in accordance with the Constitution, laws, and their personal conviction conforming with the law.

No organ, authority, office or individual may give orders or instructions to courts or judges relating to the exercise of judicial power, send them circulars, or make recommendations or suggestions.

No questions shall be asked, debates held, or statements made in the Legislative Assembly relating to the exercise of judicial power concerning a case under trial.

Legislative and executive organs and the administration shall comply with court decisions; these organs and the administration shall neither alter them in any respect, nor delay their execution.<sup>912</sup>

Turkish Constitution Article 36 provides that “Everyone has the right of litigation either as plaintiff or defendant and the right to a fair trial before the courts through legitimate means and procedures.”<sup>913</sup> Turkey is also party to international agreements, such as: UDHR (Article 10 states that “everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charges against him”),<sup>914</sup> ICCPR (Article 14 provides that “in the determination of any criminal charges against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and

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<sup>910</sup> The Constitution of the Republic of Turkey 1982 (2709 7/11/1982) s 1(9)

<sup>911</sup> Ibid. s 2(40)

<sup>912</sup> Ibid. s 3(138)

<sup>913</sup> Constitution of the Republic of Turkey 1982 s 2(36) Freedom to claim rights

<sup>914</sup> The Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) art 10.

public hearing by a competent, independent, and impartial tribunal established by law”),<sup>915</sup> and finally ECHR (Article 6 sets that “in determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and an impartial tribunal established by law”).<sup>916</sup> Together this legislation reveals that justice can only be served when individuals are tried under an independent and impartial court through a fair trial. Even though these international and regional Human Rights treaties do not provide a clear definition on what the key principles/elements of judicial independence are, they recognise judicial independence and set universal guidelines for judicial independence.<sup>917</sup>

The Independence of judges is a specific determinant for the independence of the judiciary as stated by Ozek.<sup>918</sup> On that basis, Erdogan argues that judicial independence should be understood in the sense that no governmental body, authority, or an individual should be allowed to interfere or influence the judges for the use of their judicial adjudicatory power.<sup>919</sup> According to Kuru, independence of judges means that judges are uncommitted to or not dependent on the legislative or executive power and also that none of these powers can give orders or give instructions to the judges.<sup>920</sup> Finally, Ozen states that besides taking no orders and instructions except the law itself, judges must be free in decision making, must be non-labile for their judgements, and be committed to law.<sup>921</sup>

Turkey is defined as a “state of law”; in other words, the state is governed by the rule of law in Turkish Constitution Article 2, which defines the Republic as: “a democratic, secular and social state governed by rule of law, within the notions of public peace, national solidarity and justice, respecting human rights, loyal to the nationalism of Atatürk, and based on the fundamental tenets

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<sup>915</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 14.

<sup>916</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 6

<sup>917</sup> Violaine Autheman, ‘Global Best Practices: Judicial Integrity Standards and Consensus Principles’ (2004) IFES Rule of Law White Paper Series No.1 <<https://www.ciaonet.org/attachments/10149/uploads>> accessed 14 September 2013

<sup>918</sup> Cetin Özek, (1979–81), ‘Yargının İdari Denetimi/Judiciary’s Control by the Executive’ (1979-1981) 45-47 İstanbul University Law Faculty Journal 915, 917 (1980)

<sup>919</sup> A. Erdoğan, ‘Yargı Bağımsızlığı Güncelleştii/Judicial Independence Updated’ (1998) 6:60 Çağdaş Hukuk 4, 7

<sup>920</sup> Baki Kuru, ‘Hakim ve Savcıların Bağımsızlığı ve Teminatı/Independency of Judges and Prosecutors and the Warranty of Their Independency’ (1966) Ankara University Law Faculty Journal 53

For a similar definition of judicial independency, see Metin Gunday, *Idare Hukuku/Administrative Law* (Imaj Press, 2004) 46

<sup>921</sup> Muharrem Ozen, *Hakimlerin Cezai Sorumluluğu/Criminal Liability of the Judges* (Ankara, 2004) 68

set forth in the preamble.”<sup>922</sup> In light of this definition, in order to meet the standards of a state that is governed by the rule of law, the application of the law must be consistent with its language. Therefore, the judiciary must operate on independent grounds without facing any political pressure, to allow the law to apply equally to each and every citizen and to promote their rights and freedoms by sustaining the legal security of the individuals.<sup>923</sup> As the advancement of the rule of law can be argued to be one of the fundamental cornerstones of democracy, and because the judiciary is supposed to be an unbiased and objective institution, in its application of the rule of law, Tiede suggests that the judiciary is therefore a benchmark for measuring a democratic society governed by the rule of law.<sup>924</sup>

This is the point where the separation of legislative, executive, and judicial powers play a crucial role in protecting rights and freedoms while delineating the power of the ruling government,<sup>925</sup> which must not intervene in judicial operations. The judiciary must be independent of any exterior order or pressure as it must only be governed by the rule of law.<sup>926</sup> In that regard, any judiciary that is subject even possibly to any control, direction, pressure or influence by any power, including the legislative and executive powers, cannot be considered independent.<sup>927</sup> Therefore, the complete independence and impartiality of the judiciary sets the foundation of democracies that respect human rights<sup>928</sup>.

Considering that separation of powers is one of the fundamentals of democracies, it is a common argument that the judiciary must be objective and should not follow the political ideology of the governments; otherwise, as Sayan suggests, it must be following a specific political ideology,

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<sup>922</sup> The Constitution of the Republic of Turkey s 1(2) Characteristics of the Republic

<sup>923</sup> Yuksel Metin, ‘Türkiye’de Yargı Bağımsızlığına İlişkin Kimi Sorunlar ve Çözüm Önerileri/*Problems About the Judicial Independence in Turkey and Recommendations*’ (2010) 27 *Anayasa Yargisi* 217

<sup>924</sup> Lydia Brashear Tiede, ‘Judicial independence: often cited, rarely understood’ (2006) 15 *Journal of Contemporary Legal Issues* 129

<sup>925</sup> Mustafa Erdoğan, *Anayasa Hukuku/Constitutional Law* (Ankara Orion Yayınevi, 2005) 80

Mustafa Kutlu, *Kuvvetler Ayrılığı/Separation of Powers* (Seçkin Yayınları, Ankara 2001) 198

<sup>926</sup> AYM E. 1992/37, K. 1993/18 (27/04/1993)

<sup>927</sup> AYM E. 1992/37, K. 1993/18 (27/04/1993)

Muharrem Ozen, *Hakimin Cezai Sorumluluğu/Criminal Liability of the Judges* (Ankara, Seckin Yayıncılık Hukuk Dizisi, 2004) 48

Thomas Giegerich, ‘Yargının Bağımsızlığı: Kavramsal Çerçeve, Tarihsel, Tarafsızlıkla İlişkisi ve Türkiye Üzerine Gözlemler/*Independence of the Judiciary: Observations on Turkey in Relation to Contextual Frame, History and its Relations with Independency* in Ahmet Taskin (eds) *Yargının Bağımsızlığı, Tarafsızlığı ve Etkililiği/Independence, Impartiality and Effectiveness of the Judiciary* (Ankara, Türkiye Adalet Akademisi Yayınları, 2009) 21

<sup>928</sup> Ergun Ozbudun, ‘HSYK Uzerinde Ideolojik Kavga/*Ideological Fight on the HSYK*’ *Star Newspaper* (19 April 2010)

which only exists in totalitarian regimes.<sup>929</sup> However, in the judicial history of Turkey, the legislative power especially has had the intention to control the judiciary or to weaken its monitoring power, which as a result had endangered judicial independence and, correspondingly fundamental rights and freedoms.<sup>930</sup>

Even though the first Constitution of Turkey in 1921 adopted unity of powers (the Turkish Grand National Assembly (TBMM) possessed absolute rule during the Independence War), it is argued that the judiciary nevertheless sustained its independence.<sup>931</sup> The judiciary's autonomy as a separate power in the Turkish Constitution was introduced with the adoption of the 1924 Constitution, which still gave the authority to the TBMM to use the judicial power whenever necessary.<sup>932</sup> As seen in Chapter 3, under the single-party period, even though the constitution stated that the judiciary was independent, the powers were consolidated into the single party regime.<sup>933</sup> Therefore, it is fair to argue that in the initial years of the Republic, there was a dominant state tradition and authority<sup>934</sup> whereby the judiciary was following the Kemalist ideology as well as the ruling elites such as the military officers. Who altogether had self-attained the role of protecting the state and national interests and security.<sup>935</sup>

It is only with the adoption of the 1961 Constitution Article 132 that judicial authority was accepted as the third power alongside the legislative and executive power. This manoeuvre resulted from the 1960 coup (explained in Chapter 3) in which the military deemed the Democrat Party incapable of following Kemalist ideology.<sup>936</sup> Therefore, in the 1961 Constitution, the judiciary emphasised its role as the Republic's guardian against the threats from the government.<sup>937</sup> As a result, judicial independence was strengthened and brought under legal protection:

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<sup>929</sup> Ipek Ozkal Sayan, 'The Problems of Judicial Independence in Turkey' (2008) 4:2 Ekonomik ve Sosyal Araştırmalar Dergisi 44, 47

<sup>930</sup> Hasan Dursun, 'Erkler Ayrılığı ve Yargı Bagimsizliği/*Separation of Powers and Independency of the Judges*' (2009) 80 TBB Dergisi 44

<sup>931</sup> Ipek Ozkal Sayan, 'The Problem of Judicial Independence in Turkey' (2008) 4:2 Ekonomik ve Sosyal Araştırmalar Dergisi 44, 48

<sup>932</sup> Turkish Constitution 1924 Article 54, Author's translation.

<sup>933</sup> Mustafa Kalemli, 'Siyaset Adamları ve Yargı Reformu/*Political Actors and Judicial Reform*' (1996) 2:10 Yeni Türkiye Dergisi- Yargı Reformu Özel Sayısı 9-16

<sup>934</sup> Ergun Özbudun, 'State Elites and Democratic Political Culture In Turkey' Larry Diamond (ed.) *Political Culture and Democracy in Developing Countries* (London and Boulder: Lynne Rienner Publishers, 1994) 247-268

<sup>935</sup> Ibid. 197

<sup>936</sup> Feroz Ahmad, *The Turkish Experiment in Democracy : 1950-75* (London and Boulder: Westview Press for the Royal Institute of International Affairs, 1977) 163

<sup>937</sup> Guliz Sutcu, 'Revising the Turkish Judiciary's Role Through a New Constitution' (2011) Near East Quarterly 1, 2

Judges are independent; they judge on the basis of the Constitution, the statutes, law and their conscience contention. No position, authority or person can give orders, send notice, give advice, make suggestions to the courts and judges on how to use the judiciary power. In the legislative assemblies, no question can be asked on the use of the judiciary power, hold meetings or make statements on an ongoing trial. Legislative branch, executive authority and administration must obey court verdicts. These authorities and the administration cannot amend court verdicts in any condition and delay their implementation.<sup>938</sup>

With the 1982 Turkish Constitution, which is still in effect, the independence of the judiciary is the same as it was in 1961. However, in light of the information given in Chapter 3, explaining the reasons for the military coup in 1980,<sup>939</sup> it is possible to argue that the judiciary was expected to monitor political agents on their competency to make policies and act according to the Kemalist ideology, which prioritises secularism. This imposed role and its emphasis revealed itself in the party closure decisions of the Turkish Constitutional Court, and the 1982 Constitution provided that judges and public prosecutors could not be dismissed, contingent upon the Ministry of Justice. The most crucial difference, however, is that the inspection of judges was made by an inspector judge authorised by, High Judges Commission in the 1961 Constitution. These are now being done by justice inspectors authorised by the Ministry of Justice in the 1982 Constitution. Last but not least, when the 1961 and 1982 Constitutions are compared, it is apparent that the 1961 Constitution (in combination with Supreme Board of Judges Law no. 45) regulated that the chair of the Board is elected from among the members, and the Minister of Justice cannot vote in such elections. On the other hand, in the 1982 Constitution, which initiated the formation of the highly disputed HSYK with the purpose of improving the independence of the judiciary, the Minister of Justice is the chair of the board, and legal action cannot be taken against the Board's decisions.<sup>940</sup>

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Rona Aybay, 'Some contemporary constitutional problems in Turkey' (1977) 4:1 British Society for Middle Eastern Studies 21, 24

<sup>938</sup> The Constitution of the Republic of Turkey 1961 Article 132

<sup>939</sup> See Chapter 3 for details on how the military considered the political parties and state institutions not competent enough to defend and secure the state and national interests.

<sup>940</sup> Ipek Ozkal Sayan, 'The Problems of Judicial Independence in Turkey' (2008) 4:2 Ekonomik ve Sosyal Araştırmalar Dergisi 44, 63

### 5.2.1 Judiciary under the influence of the political ideology in Turkey

Despite the fact that the Turkish Constitution guarantees the independence and the impartiality of the judiciary, Sayan suggests that it lacks independence because of the economic conditions of the judges, the press-judiciary relationship, and most crucially the fact that judges and public prosecutors are under the authority of HSYK (Supreme Board of Judges and Prosecutors) for regulations related to their appointments, promotion and registration.<sup>941</sup> Therefore, this section will discuss how and why the practice of impartiality and independency of the judiciary does not operate the way it was guaranteed in the Constitution.

Selcuk suggests that HSYK has operated under the direction of the Ministry of Justice since its first establishment, which actually hinders judicial independence.<sup>942</sup> Since then it has been the target of discussions questioning the independence of the judiciary. Given the judiciary's theoretical regulation under Turkish law, it is crucial to discuss the effect of its actual status on the press since the practicality of its independence has been weak.

To begin, in light of the political stages and the political ideology examined in Chapter 3, it is possible to argue that since the beginning of the Republic, Turkey had an official state ideology, namely nationalism and secularism, wherein the judiciary was given the role to “protect the state power.”<sup>943</sup> Based on Dink's case which was discussed in Chapter 2, it is possible to argue that the press can influence the judiciary as well as politics, as the press during Dink's trial fostered a strong public opinion by intensively examining the critical elements of the case and thereby created a strong public opinion against Dink. This negative publicity put pressure on the judiciary that highly affected its impartiality. As Ozen suggests in order to secure justice, judges must make judgements irrespective of exterior influence, making it necessary to guarantee the judges' independence from the media in addition to state powers.<sup>944</sup> Therefore, there is a fallacious interaction between the politics, press and the judiciary for these three institutions, are thoroughly interrelated in Turkey.

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<sup>941</sup> Ibid., 44-45

<sup>942</sup> Sami Selçuk, ‘Yargı Bağımsızlığı/*Judicial Independence*’ (1997) 2 Türkiye Barolar Birliği Dergisi <<http://tbbdergisi.barobirlik.org.tr/m1997-19972-903>> accessed 3 January 2015

<sup>943</sup> Servet Sağlam, ‘The Turkish High Council of Judges and Prosecutors in the Context of Judicial Independence and Accountability’ (2013) 4:2 Law and Justice Review 165, 193

<sup>944</sup> Muharrem Ozen, ‘Yargı Bağımsızlığını Zedeleyen Düzenleme, Uygulamalar ve Bağımsızlığı Sağlamaya Yönelik Çözüm Önerileri/*Regulations and Applications that Harm the Judicial Independence and Suggestions for Securing the Independence*’ (2010) 68:1 Ankara Bar Association Journal 31, 33

It is necessary now to acknowledge/contemplate the role that the state ideology plays on the decisions made by Turkish courts. Looking at the Islamic-based party closures by the Constitutional Court, on the basis of constitutionality (as seen in Chapter 3 Constitutional Court decided the closure of the democratically-elected governments on the basis of nonconformity with secularism and national unity), it is possible to argue that Kemalism has been heavily influencing both the Turkish Constitution itself and the political system in Turkey, as the official ideology. In that regard, Arslan suggests that the Turkish Constitutional Court's (AYM) approach can be defined more as an "ideology-oriented" approach rather than "rights-oriented."<sup>945</sup>

It is generally accepted that judges must adopt objectivity as one of the principal criteria when applying the law; in other words, judges must set aside their personal ideological preferences when making deliberations. However, Erozdin discusses the impossibility for judges to be completely purified from their political ideologies or world views. The interpretation of the law is inevitably an explication informed and shaped by the perspectives held by the judges on the purposes of the specific law. This is the outcome of an approach to law that correlates the sub-culture of the judiciary and a constitutional state<sup>946</sup>; accordingly, legal reforms made in Turkey lack genuine implementation because of the absence of a judicial sensibility based on a democratic system that follows universal legal principles and respects and prioritises human rights. However, Sancar suggests that the political ideology followed by Turkish judges indicates that a statist approach dominates with an insufficient understanding and knowledge of ECtHR decisions (therefore universal human rights principles).<sup>947</sup>

Recent criminal cases against journalists elicit discussions of the judiciary's lack of respect accorded to the rule of law and fundamental freedoms, especially since the independence of the judiciary has been undermined since 2014. In that regard, Keong argues that when the judiciary is not independent, it will fail to fulfil the necessities of democracy such as the rule of law, and if there is no rule of law the judiciary cannot be expected to have independence. To protect civil and

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<sup>945</sup> Zuhtu Arslan, 'Conflicting Paradigms: Political Rights in the Turkish Constitutional Court' (2002) 11:1 Critique: Critical Middle Eastern Studies 9-25

<sup>946</sup> Ozan Erozdin, Umit Kardas, Ergun Ozbudun and Serap Yazici, 'Yargisal Dugum: Turkiye'de Anayasa Reformuna Iliskin Degerlendirme ve Oneriler/Judicial Knot: Evaluation and Suggestions on the Constitutional Reform in Turkey' (TESEV, 2015) Demokratiklesme Programi Siyasal Raporlari Serisi Yargi Reformu <[http://tesev.org.tr/wp-content/uploads/2015/11/Yargisal\\_Dugum\\_Turkiyede\\_Anayasal\\_Reforma\\_Iliskin\\_Degerlendirme\\_Ve\\_Oneriler.pdf](http://tesev.org.tr/wp-content/uploads/2015/11/Yargisal_Dugum_Turkiyede_Anayasal_Reforma_Iliskin_Degerlendirme_Ve_Oneriler.pdf)> accessed 4 February 2015, 9

<sup>947</sup> Mithat Sancar and Eylem Ümit Atılgan, *Adalet Biraz Es Geçiliyor-Demokratiklesme Surecinde Hakimler ve Savcilar/Justice is Skipped-Judges and Prosecutors During the Democratisation Process* (TESEV, 2009)

political rights and to establish law and order, an independent judiciary must obey the rule of law, and rule of law must exist to protect the independence of judiciary.<sup>948</sup>

Considering the rule of law and the independence of judiciary as the two main pillars of democracies,<sup>949</sup> law no. 6524, which re-structured the High Council of Judges Prosecutors in Turkey and was signed by President Gul, is highly criticised for threatening the independence of the judiciary. Yengisu states that “The latest bill now signed into law by the President strikes at the principle of judicial independence at its core... In short, you have the minister of justice – a member of the executive assuming control over an institution whose role is among other things, to regulate the judicial branch.”<sup>950</sup>

The appointment of the judges must be used as a tool to sustain the independence of the judiciary. Nevertheless, when their appointment is dependent solely on the executive branch, the impartiality of their decisions cannot be fully trusted.<sup>951</sup> The appointment of judges must be independent of the government, but their control by the Ministry of Justice with the latest HSYK changes, is an open threat to judicial independence. The fault in the judiciary system is stated by the former chairman of AYM, Hasim Kilic, who argues that judges that cannot sustain their impartiality due to the fear of being arbitrarily relocated. Similarly, Sami Selcuk, Supreme Court of Appeals president, states that he is “disturbed by the existence of such a judicial system. We are approaching the Turkish Republic’s 100th anniversary, but we have still not established a proper judiciary in the country.”<sup>952</sup>

Referring back to Arslan’s suggestion, which is that AYM has more of an ideology-based rather than rights-oriented approach, and considering the party closure decisions it has given so far,

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<sup>948</sup> Chan S. Keong, ‘Securing and maintaining the Independence of the court in judicial proceedings’ (2010) 24 Singapore Academy of Law Journal 29-251

For similar discussions on the subject see:

Adel Omar Sherif and Nathan J. Brown, ‘Judicial Independence in the Arab World’ (2002) A Study Presented to the Program of Arab Governance of the National Nations Development Programme <<ftp://undp-pogar.org/LocalUser/pogarp/judiciary/sherif/jud-independence.pdf>> accessed 8 January 2015

Beverley McLachlin, ‘Judicial Independence: A Functional Perspective’ in Mads Andenas and Duncan Fairgrieve, *Tom Bingham and the Transformation of the Law: A Liber Amicorum* (Oxford University Press, 2009) 276

<sup>949</sup> Colleen Murphy, ‘Lon Fuller and the Moral Values of the Rule of Law’ (2005) 24 Law and Philosophy 239-262

<sup>950</sup> Daniel Dombay, ‘Turkish law strikes at judicial independence’ *Financial Times* (26 February 2014) <<http://www.ft.com/cms/s/0/83b3a3d2-9f05-11e3-a48e-00144feab7de.html#axzz3zqYEFBjY>> accessed 3 August 2015

<sup>951</sup> European Commission, *Turkey 2015 Report* (216 Final, 2015) 15

<sup>952</sup> Faizan Mustafa, ‘Judicial independence -- what Turkey must learn from India’ *Today’s Zaman* (17 November 2015) <[http://www.todayszaman.com/op-ed\\_judicial-independence-what-turkey-must-learn-from-india\\_404521.html](http://www.todayszaman.com/op-ed_judicial-independence-what-turkey-must-learn-from-india_404521.html)> accessed 2 December 2015

it is possible to argue that AYM has upheld its function of protecting the state's two main principles, namely, secularism and Turkish nationalism. The following examples show that unless the judiciary is equipped with a perspective that prioritises the universal legal principles of human rights as well as the superiority of the fundamental rights and freedoms, a constitutional guarantee of judicial independence and impartiality cannot be sustained.

### 5.3 Judicial reforms in Turkey

In order to situate judicial independence in line with EU principles and practices, Turkey undertook judicial reforms on the basis of the EU harmonisation packages, for the Copenhagen criteria require the rule of law and a guarantee of democracy by sustaining the stability of institutions.<sup>953</sup> To comply with the universal norms discussed in the first section, the judicial reforms (called 'legal reforms' in Chapter 4) took place to align the level of independence and impartiality of the judiciary with these norms. However, even though the reforms aspired to reduce or eliminate the number of cases brought to the ECtHR (between 1995-2010, the ECtHR ruled no less than 2573 times against Turkey — the highest number among the European Council member countries),<sup>954</sup> after they became law, such expectations were not satisfied.<sup>955</sup>

Karakaya and Ozhabebes suggest that the revelation of the reform packages to public was met with a dissatisfied sense that they fell behind the changes within the society. Legal provisions regarding organised crime in the Turkish Penal Code are typical examples that, criminal organization are convicted under the same legal provisions as the actual members of the organisations despite the main principle of the law being that "criminal responsibility is personal and no one can be kept responsible from another's act"<sup>956</sup> and despite the Constitution's statement that "criminal responsibility shall be personal."<sup>957</sup> Nevertheless, the reform packages only suggest an option for the judges to abate; this does not eliminate the problem itself. Moreover, amendments

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<sup>953</sup> European Council, *Presidency Conclusions* Copenhagen European Council (12-13 December 2002) <[http://www.cvce.eu/content/publication/2004/4/20/ff7ff228-fa3b-4f89-b552-808f7eb2c5b3/publishable\\_en.pdf](http://www.cvce.eu/content/publication/2004/4/20/ff7ff228-fa3b-4f89-b552-808f7eb2c5b3/publishable_en.pdf)> accessed 6 December 2015

<sup>954</sup> European Court of Human Rights, *Annual Report 2010* (Strasbourg 2010) <[http://www.echr.coe.int/Documents/Annual\\_report\\_2010\\_ENG.pdf](http://www.echr.coe.int/Documents/Annual_report_2010_ENG.pdf)> accessed 11 November 2012

<sup>955</sup> See Chapter 4, section "Setting the legal background: legal reforms in relation to the freedom of the press", for detailed information on the legal changes made to the most controversial legislations (namely the Turkish Penal Code and Anti-Terror Law) and critical comments on their substantiality.

<sup>956</sup> Turkish Penal Code no 5237 (26/9/2004) s 2(20)

<sup>957</sup> The Constitution of the Republic of Turkey 1982 no 2709 (7/11/1982) s 2(38)

to the Anti-Terror Law provide only partial improvements and therefore perpetuate unfair treatment of those convicted.<sup>958</sup>

It is accepted that the functioning of the judiciary is only partly related to its organisational structure and the legislation to which it is bound because the judicial approach is at least of the same importance. ‘Mentality’ refers to the intuition to protect the state rather than individuals — the disposition that guided the creation of the 1982 Constitution. This mentality is at the centre of the problems experienced by the application of legal provisions despite their amendments after the reform packages. Therefore, judicial independence that is required for the fair application of the law will be examined in this section in order to fully demonstrate the reasons for the application of the legal provisions that already thwart press freedom.<sup>959</sup>

### 5.3.1 2010 Constitutional Amendment Package

In 2010, Articles 146 and 148 of the Turkish Constitution were amended.<sup>960</sup> These amendments changed the structure and organisation of the Turkish Constitutional Court (AYM)<sup>961</sup> a great deal. Article 146, which regulates the formation of the Constitutional Court, provided that AYM was to be formed of eleven members; eight of them were nominated by the President based on the names suggested mainly by the higher courts, and three of them were nominated by the President directly. After the 2010 amendments, AYM is now formed of seventeen members: “The Grand National Assembly of Turkey shall elect, by secret ballot, two members from among three candidates to be nominated by, and from among the president and members of the Court of Accounts, for each vacant position, and one member from among three candidates nominated by the heads of the bar associations from among self-employed lawyers.”<sup>962</sup> More specifically, three of its members are appointed by the Turkish Grand National Assembly (TGNA), and fourteen of them are

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<sup>958</sup> Naim Karakaya and Hande Ozhabebes, ‘Yargi Paketleri: Hak ve Ozgurlukler Acisindan Bir Degerlendirme/Judicial Packages: An Evaluation on Rights and Freedoms’ (TESEV, 2013) 35-37

<sup>959</sup> Ibid.

<sup>960</sup> Law regulating some amendments made on the Constitution of the Republic of Turkey no. 5982 (7/5/2010)

<sup>961</sup> Turkish Constitutional Court will be referred to as AYM throughout the chapter.

<sup>962</sup> The Constitution of the Republic of Turkey 1982 (2709 7/11/1982) s 3(146)

appointed by the President. As observed above, the selection of the Grand National Assembly of Turkey is rather symbolic,<sup>963</sup> whereas the President still plays an active role in the appointments.<sup>964</sup>

Onar suggests that when the parliament has the authority to directly appoint members, it highly politicises AYM. Therefore, it is a more desirable option to allow the parliament to choose from candidates that are nominated by others from different posts. Besides, the number of candidates that can be selected by the parliament is another way of reducing the politicisation of AYM.<sup>965</sup>

Nevertheless, Taskin, in opposition argues that when the methods of the parliament for appointing judges are analysed, the current regulation for the appointments fall behind the regulations made in the 1961 Constitution, whereby the parliament would directly appoint five members out of fifteen (one third) to AYM; however, the current regulation allows less than one third of the AYM members to be selected by the parliament on the basis of others' nominations, thereby limiting the discretionary power of the parliament which Taskin argues to be faulty, for the 1961 regulations would provide a more legitimate and democratic system of appointment.<sup>966</sup>

On the basis of the 2010 changes, the other fourteen members of the AYM will be appointed by the President.<sup>967</sup> Considering that before the Constitutional amendments the President could appoint eleven members, it is possible to argue that the new regulation strengthens the power of the President over AYM, and according to Kaboglu, this new regulation allows the President and the executive power to shape the membership of AYM in line with the political disposition of the majority within the parliament.<sup>968</sup> Kaboglu interprets these Constitutional changes together with the 2007 Presidential elections, which for the first time took place by a referendum. He highlights that when the President (who is elected by the people) appoints fourteen of AYM members; this is an

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<sup>963</sup> S. Cankat Taskin, '2010 Anayasa Değişikliklerinden Sonra Türk Anayasa Mahkemesinin Yapılanması/*Structure of the Turkish Constitutional Court after the 2010 Constitutional Amendments*' (2011) 97 *Journal of the Turkish Bar Association* 171, 191

<sup>964</sup> Ibrahim O. Kaboglu, 'Halk Neyi Oylayacak? Degisiklikler Isiginda 1982 Anayasasi /*What will the people vote for? 1982 Constitution In Light of the Recent Changes*' (Istanbul: Imge Kitabevi, 2010) 206

<sup>965</sup> Erdal Onar, 'Sunulan Raporlar Kapsamında Türk Anayasa Mahkemesi'nin Sorunlarının Tartışılması/*Discussing the Problems of the Turkish Constitutional Court on the Basis of the Presented Reports*' (2004) 21 *Journal of Constitution* 26

<sup>966</sup> S. Cankat Taskin, '2010 Anayasa Değişikliklerinden Sonra Türk Anayasa Mahkemesinin Yapılanması/*Structure of the Turkish Constitutional Court after the 2010 Constitutional Amendments*' (2011) 97 *Journal of the Turkish Bar Association* 171, 196

<sup>967</sup> The Constitution of the Republic of Turkey 1982 no 2709 (7/11/1982) s 3(146)

<sup>968</sup> Ibrahim O. Kaboglu, 'Halk Neyi Oylayacak? Degisiklikler Isiginda 1982 Anayasasi /*What will the people vote for? 1982 Constitution In Light of the Recent Changes*' (Istanbul: Imge Kitabevi, 2010) 207

indication to the Constitution will indicate a presidency system.<sup>969</sup> Taskin approves Kaboglu's statements regarding the new regulations in the Constitution and argues that giving the President the authority to appoint fourteen members to AYM only means politically strengthening the position of the President — even beyond his already strong authority; next political phase Turkey chooses, is a presidency system in which AYM will be highly politicised.<sup>970</sup> Finally, the 2010 changes faced strong debates because they were initiated by a specific political inclination for specific purposes.<sup>971</sup> On the other hand, direct individual application to the Court was not accepted before the constitutional changes in 2010, which allowed citizens to do so. Thus, citizens were given the right to make direct application to the Court after they had exhausted all other regular remedies. If they consider their fundamental rights and freedoms are violated by a newly drafted law. In its 2010 review of independence Turkey, OSCE concluded that this system established after 2010 is similar to what was in place between 1961 until the coup in 1980.<sup>972</sup> It therefore argues that the Constitutional Court, which has the power and the duty to overturn any law if found in violation of the Constitution, has a wider representation and legitimacy as well as democratic grounds given that individuals have the right to direct application. Ozbudun also states that the Constitutional Court, after the constitutional reforms in 2010, took a democratic turn with its new structure that adopted a more pluralistic shape by allowing individual application for constitutional complaints. He gives the Court's decision on HSYK law, which is discussed in detail under the next section, as an example of this democratic turn.<sup>973</sup>

### 5.3.2 HSYK: its legal setting before and after 2014

The High Council of Judges was formed by the will of the military elites after the 1960 military coup with the aim to eliminate governmental power abuses and give the Minister of Justice

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<sup>969</sup> Ibid. 209

<sup>970</sup> S. Cankat Taskin, '2010 Anayasa Değişikliklerinden Sonra Türk Anayasa Mahkemesinin Yapılanması/*Structure of the Turkish Constitutional Court after the 2010 Constitutional Amendments*' (2011) 97 *Journal of the Turkish Bar Association* 171, 222

<sup>971</sup> S. Cankat Taskin, '2010 Anayasa Değişikliklerinden Sonra Türk Anayasa Mahkemesinin Yapılanması/*Structure of the Turkish Constitutional Court after the 2010 Constitutional Amendments*' (2011) 97 *Journal of the Turkish Bar Association* 171, 224

<sup>972</sup> 2010 OSCE Review Conference Independence of the judiciary in Turkey: new composition of the Constitutional Court and of the High Council of Judges and Prosecutors (HSYK)

<sup>973</sup> Ergun Ozbudun, *Turkey's Judiciary and the Drift Toward Competitive Authoritarianism* (2015) 50:2 *The International Spectator* 42, 53

the right to attend the sessions but not to vote.<sup>974</sup> Its structure was revised in 1971 (post-modern coup) in order to retain the power that was given to the judges and prosecutors to determine their own representatives,<sup>975</sup> create the High Council of Prosecutors, and give the Minister of Justice the right to vote.<sup>976</sup> Finally, once the military took power in 1982, the High Council of Judges and Prosecutors was created by combining the High Council of Judges and High Council of Prosecutors.<sup>977</sup> Differently from the 1961 and 1971 structures of the Council, which had given the Ministry of Justice the role of an *ex-officio*,<sup>978</sup> the 1982 changes made the Minister of Justice the President of the Council.<sup>979</sup> However, the structure of HSYK was highly criticised on the basis of independency and impartiality<sup>980</sup> because the HSYK, which had the responsibility of appointing, promoting, and dismissing judges and prosecutors, could not be judicially reviewed, and it was subject to the secretariat services of the Ministry of Justice, whereby the Ministry had superiority over the Inspection Board that supervised the judges and prosecutors.<sup>981</sup>

In 2010, with the constitutional amendments mentioned in the previous section, based on the EU accession process and the European Commission's criticism in its progress reports<sup>982</sup> the structure of the HSYK was changed; because the judiciary was seen as one of the agents to protect state interest and security based on the political ideology that prioritised nationalism and secularism,<sup>983</sup> HSYK's independence and impartiality was questioned because it was considered to be serving the tutelary regime, especially during the military coup periods.<sup>984</sup> Furthermore, HSYK belonged to the exceptional institutions whose decisions could not be appealed, for the 1982

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<sup>974</sup> High Council of Judges and Prosecutors, 'HSYK Strategic Plan 2012-2016'

<<http://www.hsyk.gov.tr/dosyalar/2012-2016-stratejik-plan-Eng.pdf>> accessed 2 February 2016, 28

<sup>975</sup> Servet Sağlam, 'The Turkish High Council of Judges and Prosecutors in the Context of Judicial Independence and Accountability' (2013) 4:2 Law and Justice Review 165, 218

<sup>976</sup> High Council of Judges and Prosecutors, 'HSYK Strategic Plan 2012-2016'

<<http://www.hsyk.gov.tr/dosyalar/2012-2016-stratejik-plan-Eng.pdf>> accessed 2 February 2016, 28

<sup>977</sup> Ibid.

<sup>978</sup> Servet Sağlam, 'The Turkish High Council of Judges and Prosecutors in the Context of Judicial Independence and Accountability' (2013) 4:2 Law and Justice Review 165, 218

<sup>979</sup> High Council of Judges and Prosecutors, 'HSYK Strategic Plan 2012-2016'

<<http://www.hsyk.gov.tr/dosyalar/2012-2016-stratejik-plan-Eng.pdf>> accessed 2 February 2016 28

<sup>980</sup> Servet Sağlam, 'The Turkish High Council of Judges and Prosecutors in the Context of Judicial Independence and Accountability' (2013) 4:2 Law and Justice Review 165, 192

<sup>981</sup> High Council of Judges and Prosecutors, 'HSYK Strategic Plan 2012-2016'

<<http://www.hsyk.gov.tr/dosyalar/2012-2016-stratejik-plan-Eng.pdf>> accessed 2 February 2016

<sup>982</sup> Vahap Coşkun, 'Turkey's Illiberal Judiciary: Cases and Decisions' (2010) 12:4 Insight Turkey

<[http://file.insightturkey.com/Files/Pdf/insight\\_turkey\\_vol\\_12\\_no\\_4\\_2010\\_coskun.pdf](http://file.insightturkey.com/Files/Pdf/insight_turkey_vol_12_no_4_2010_coskun.pdf)> accessed 17 August 2015, 48

<sup>983</sup> Ibid.

<sup>984</sup> Servet Sağlam, 'The Turkish High Council of Judges and Prosecutors in the Context of Judicial Independence and Accountability' (2013) 4:2 Law and Justice Review 165, 193

Constitution was drafted under the military regime.<sup>985</sup> Bacik and Salur use the Ergenekon case as an applicable example of HSYK's lack of impartiality; the HSYK sought to reuse initiating prosecutors and the judges of the Ergenekon investigation but was prevented by the absence of Minister of Justice whose presence was necessary for such a decision to be made.<sup>986</sup>

With the 2010 changes, HSYK was given administrative and financial independence as well as a separate secretariat. The Inspection Board was also attached to the Board of the Council rather than the Minister of Justice. The changes in 2010 transformed HSYK into a completely separate, independent and autonomous institution from the Ministry of Justice.<sup>987</sup>

The structure of HSYK was changed by the bill approved by the Turkish Grand National Assembly in February 2014. With this new legislation, the Minister of Justice is given the power to issue decrees on behalf of HSYK in a unilateral manner. With the recently approved bill, the Minister of Justice also has the power to organise the agendas for the meetings of the board and commence disciplinary action against judiciary members.<sup>988</sup> After the restructuring of HSYK with the 2014 law no. 6524 and with the stronger and wider roles given to the Minister of Justice, the Minister of Justice appointed judges, and commenced judicial disciplinary investigations, and selected HSYK members and judicial trainers. Ozbudun describes these powers as AKP's attempt to manipulate the judiciary.<sup>989</sup> His statement was supported after 15 seats were gained by the pro-government figures in the 22-member board after the HSYK elections in October 2014. The recently formed board, consisting of a majority of pro-government figures, then passed a judicial package that reduced the judiciary's independence.

The Turkish Constitutional Court's decision on April 2014 stated that the new provisions of Law no. 6524 regulating HSYK violated Constitution Article 159, which regulates the independence of the HSYK ("The High Council of Judges and Prosecutors shall be established and

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<sup>985</sup> Levent Gönenç, '2010 Proposed Constitutional Amendments to the 1982 Constitution of Turkey' (2010) TEPAV Evaluation Note <[http://www.tepav.org.tr/upload/files/1284468699-0.2010\\_Proposed\\_Constitutional\\_Amendments\\_to\\_the\\_1982\\_Constitution\\_of\\_Turkey.pdf](http://www.tepav.org.tr/upload/files/1284468699-0.2010_Proposed_Constitutional_Amendments_to_the_1982_Constitution_of_Turkey.pdf)> accessed 19 August 2015 1, 4

<sup>986</sup> Gokhan Bacik and Sammas Salur, 'Coup-Proofing in Turkey' (2010) 2 European Journal of Economic and Political Studies <<http://www.ejeps.com/index.php/ejeps/article/view/59/59>> accessed 29 December 2014

<sup>987</sup> High Council of Judges and Prosecutors Law no. 6087 (11/12/2010) <<http://www.resmigazete.gov.tr/eskiler/2010/12/20101218-1.htm>> accessed 15 July 2015

<sup>988</sup> Law regulating some amendments on various laws no. 6524 (15/2/2014) <<http://www.resmigazete.gov.tr/eskiler/2014/02/20140227M1-1.htm>> accessed 16 July 2015

<sup>989</sup> Ergun Ozbudun, 'Turkey's Judiciary and the Drift Toward Competitive Authoritarianism' (2015) 50:2 The International Spectator 42

shall exercise its functions in accordance with the principles of the independence of the courts and the security of the tenure of judges”<sup>990</sup>); because the recently adopted provisions gave extra powers to the Minister of Justice, AYM concluded that judicial independence was reduced. AYM clearly expressed that prior to the changes, HSYK members were appointed by the Plenary of the Council, but the new provision afforded this power instead to the Minister of Justice,<sup>991</sup> making the HSYK highly dependent on the Ministry of Justice. As a result, the Minister of Justice had extensive influence on HSYK’s reorganisation.<sup>992</sup> On that basis, the Constitutional Court determined that the new provisions of Law no. 6524 needed to be revised within three months.<sup>993</sup> Nevertheless, the provisions of Law no. 6524 were accepted as they were initially drawn and the dismissed members of staff were never re-appointed, once replaced.

The changes to the selection of the board members and the new structure of the board itself led to heavy criticism among the opposition from the judicial and political arena and from the international legal arena considering the unconstitutionality of the reforms, and both national and international NGOs emphasised the negative effects a pro-government judicial body (in this case, HSYK) will have on Turkey. More specifically, Amnesty International argues that the independence and impartiality of the judiciary is under threat by expressing that Turkish authorities must “withdraw the amendments granting additional decision making powers and powers of appointment to the Minister of Justice which threaten the actual and perceived independence and impartiality of the judiciary in Turkey and the right to a fair trial.”<sup>994</sup> Similarly, Freedom House criticises the law, stating that “Turkey’s ruling AK Party’s newly proposed changes to the judicial system are an attempt to limit corruption investigations<sup>995</sup> and would damage the country’s democracy.”<sup>996</sup> In relation to that, the Venice Commission of the Council of Europe, in its

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<sup>990</sup> Constitution of the Republic of Turkey 1982 s 3(159) High Council of Judges and Prosecutors

<sup>991</sup> Ergun Ozbudun, ‘Turkey’s Judiciary and the Drift Toward Competitive Authoritarianism’ (2015) 50:2 The International Spectator 42, 47

<sup>992</sup> Law regulating some amendments on various laws no. 6524 (15/2/2014)  
Provisional Article 4

With the entry into force of this Law, the positions of the Secretary General, Assistant Secretaries General, the Chairman of the Board of Inspectors and the Vice-Chairmen, Council inspectors, reporting judges, and the administrative personnel shall be terminated.

Available at: <<http://www.resmigazete.gov.tr/eskiler/2014/02/20140227M1-1.htm>> accessed 12 November 2015

<sup>993</sup> AYM E. 2014/57, K. 2014/81 (14 May 2014)

<sup>994</sup> Amnesty International, ‘Independence and Impartiality of Judiciary under threat in Turkey’ (AI, 24 February 2014) <<http://humanrightsturkey.org/2014/02/24/amnesty-independence-and-impartiality-of-judiciary-under-threat-in-turkey/>> accessed 2 February 2015

<sup>995</sup> See section “Political motivations behind the change of law: 17-25 December operations”

<sup>996</sup> Freedom House, ‘Turkey’s Judicial “Reform” will Undermine Democracy’ (Freedom House, 13 January 2014) <<https://freedomhouse.org/article/turkeys-judicial-reform-will-undermine-democracy>> accessed 12 February 2015

“Declaration on Interference with Judicial Independence in Turkey”, criticised the new provisions for handing outstanding powers to the Minister of Justice. The commission noted that the amendment, which took place on 15th of February 2014, strengthened the powers held by the Minister of Justice within HSYK and thereby negatively affected the 2010 constitutional reform which was a positive attainment toward the independence and impartiality of the judiciary.<sup>997</sup> Referring to the AYM’s decision of unconstitutionality<sup>998</sup> discussed above, the Venice Commission highlighted the fact that the Minister of Justice was authorised to replace key administrative members in HSYK as well as appoint members of HSYK to other chambers at the very point when the AYM was taking the decision about the unconstitutionality of the amendments. However, AYM’s judgement had no retroactive effect and its decisions were not reversed. As a result, the Venice Commission advised revising the amendments in order to lessen HSYK’s executive power.<sup>999</sup>

Despite that Turkey is defined by its Constitution to have a modern and democratic system, with a society exhibiting the same features,<sup>1000</sup> the problem Turkey experiences with the freedom of expression and the press already raises concerns about its democratic consolidation. In such a system and society, it is only when legal security is provided to the press that the opposition press can find the grounds to discuss the government actions and policies, thereby allowing a more pluralistic public debate given that the main duty of the press is to investigate the government’s actions and to prevent bias through critical reporting.<sup>1001</sup>

Touraine’s emphasis on the press’s role of inspection is worth evaluation here; he suggests that once a political power is elected, an economically and politically free press and independent judicial system are the two main elements for the prevention of power abuses.<sup>1002</sup> For the ideal conditions of democracy to be fulfilled, the people must reach unbiased and impartial information on all parties and be allowed to make decisions based on such information; the state must be

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<sup>997</sup> The Venice Commission, *Venice Commission Declaration on Interference with Judicial Independence in Turkey* (Venice, 20 June 2015)

<sup>998</sup> AYM E. 2014/57 K. 2014/81 (10/4/2014)

<sup>999</sup> The Venice Commission, *Venice Commission Declaration on Interference with Judicial Independence in Turkey* (Venice, 20 June 2015)

<sup>1000</sup> The Constitution of the Republic of Turkey 1982 law no. 2709 (7/11/1982)

<sup>1001</sup> Kayıhan İçel and Yener Ünver, *Kitle Haberleşme Hukuku/Mass Communication Law* (7th ed., Beta Yayınevi 2007)

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<sup>1002</sup> Alain Touraine, *Demokrasi Nedir?/What is democracy?* (Yapi Kredi Yayinlari 2011) 98

governed by the rule of law.<sup>1003</sup> This trinity of contingencies shows the close interrelation between the state governed by law, democracy and freedom of the press.<sup>1004</sup> In cases such as Turkey, where the right to free expression and freedom of the press is obstructed, the right to information is hindered as a result, which finally distresses one of the founding pillars of democracy. This is where the importance of an impartial and an independent judiciary reveals itself. Therefore, the executive's power and authority to appoint judicial members must not be tolerated for it results in a lack of confidence by the public toward the judiciary, accepting that its legitimacy lays on the society's trust in the impartiality and independence of the courts.

In this context, it is possible to argue that the judges' impartiality is overshadowed by the distress they experience due to the government's power to appoint, transfer, and arrest judges, especially when considering that the judiciary was already criticised for following the state ideology<sup>1005</sup> before the new regulations gave such dominance to the pro-AKP political authority.

### **5.3.3 EU conditionality: controversies of the new judicial system with the EU conditions**

Positive influences of the EU accession process on the legal reforms have been previously discussed. However, the 2010 judicial reform, despite the improvements provided on the more "rights based" verdicts of the AYM, has been overshadowed by the restructuring of HSYK that resulted in its political dependency. Whether the EU conditions could assist in eliminating this issue requires further and deeper examination; however, it is important to discuss the grounds on which the Turkish state is criticised by the EU bodies for contradicting EU demands and ECHR provisions.

As part of the ECHR Turkey is required to comply with ECHR principles and the EU's demands toward completing the EU accessing process. However, Maja Kocijancic, the EU commissioner Johannes Hahn's spokeswoman, states that the independence of the judiciary must be

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<sup>1003</sup> Yuksel Kocak, 'Turkiye'de Hukuk Devletin Gelisminde Yarginin Yeri/*Role of the judiciary for the development of the rule of law in Turkey*' (2014) 9:2 Turkish Studies - International Periodical For The Languages, Literature and History of Turkish or Turkic 961, 972

<sup>1004</sup> A. Seref Gozubuyuk, *Yonetim Hukuku/Administrative Law* (Ankara Turhan Kitabevi, 2004) 29

<sup>1005</sup> Vahap Coşkun, 'Turkey's Illiberal Judiciary: Cases and Decisions' (2010) 12:4 Insight Turkey  
<[http://file.insightturkey.com/Files/Pdf/insight\\_turkey\\_vol\\_12\\_no\\_4\\_2010\\_coskun.pdf](http://file.insightturkey.com/Files/Pdf/insight_turkey_vol_12_no_4_2010_coskun.pdf)> accessed 17 August 2015, 1, 48

respected as the fundamental value of the EU and the emerging democracies.<sup>1006</sup> Furthermore, the Council of Europe, in its 2010 recommendations, highlighted the importance of judicial independence and efficiency. In order to gain EU membership, Turkey must also guarantee the democratic conditions within the country that required it to internalise Article 6 of the ECHR, respect ECtHR's case law on Article 6 of the Convention, and to fully implement the legal provisions, namely Article 138 and 139 of the Turkish Constitution.<sup>1007</sup>

Finally, it is important to discuss the 2015 European Commission report, which found the latest changes to HSYK regulations daunting for judicial independence and reported that Turkey, since 2014, has been experiencing a decline in judicial independence due to the dominant and role of the Minister of Justice in the HSYK. In that regard the European Commission states that:

the strong role of representatives of the executive in the HSYK raises concerns about the Council's independence. Decisions to launch disciplinary proceedings against judges and public prosecutors, as well as the annual routine inspection schemes, require approval by the Minister of Justice who, as *ex officio* president of the Council, supervises the inspection board. The Minister's power, again as *ex officio* president of the Council, to appoint the personnel of the Council secretariat also undermines the Council's independence. There are important limitations to the principle of immovability of judges. Accusations of conspiracy by the executive in the fight against the 'parallel structure' led to a high number of judges being transferred against their will in the past two years. With the exception of dismissals, HSYK decisions such as transfers of judges against their will are not open to judicial review. A number of disciplinary and criminal cases against judges and prosecutors have lacked due process, and in some instances have been based on their rulings. This contradicted basic principles of the rule of law and considerably undermined the independence of the judiciary.<sup>1008</sup>

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<sup>1006</sup> Roberto Frifrini, 'Turkey's imperiled rule of law and judicial independence' *Sunday's Zaman* (13 May 2015) <[http://www.todayszaman.com/op-ed\\_turkeys-imperiled-rule-of-law-and-judicial-independence\\_380616.html](http://www.todayszaman.com/op-ed_turkeys-imperiled-rule-of-law-and-judicial-independence_380616.html)> accessed 5 July 2015

<sup>1007</sup> European Commission, *Turkey 2010 Progress Report*, (COM 2010/660) para. 4.23

<sup>1008</sup> European Commission, *Turkey 2015 Report*, (SDW 2015/216 final) 15

In sum, the EU's main criticism of Turkish judiciary's independence and impartiality has been its institutional structure and procedures<sup>1009</sup>: "to an unacceptable degree, judicial Independence in Turkey appears to be threatened by potential interference of the Ministry of Justice despite the various constitutional guarantees."<sup>1010</sup>

#### **5.3.4 Political motivations behind the change of law: 17-25 December Operations**

Fairness of trials in Turkey has been a long standing concern of Amnesty International. Journalists reporting in opposition to the government or commenting on sensitive subject have been under particular observation. On that basis, Amnesty International argues that the highly debated new legislation on the restructuring of HSYK was rapidly approved by the Parliament after the corruption investigation of bribery and corruption that targeted public officials including government ministers and their sons (a total of 50 people who are close to the government), business people such as the head of a bank, and close family members of Erdogan who was a Prime Minister at the time.<sup>1011</sup> A retired public prosecutor of the Supreme Court of Appeals, Ahmet Gundel, criticised the change, stating that "the government wants to create a HSYK that it will like with this new law. It wants to appoint judges and prosecutors close to the government in key posts, and it has already begun doing so with the latest appointments and reassignments in the judiciary. The main objective is to sweep the corruption and bribery investigation under the carpet and prevent similar investigations from being launched in the future."<sup>1012</sup>

During the investigation, four ministers resigned, and a new wave of investigation pointing at the Prime Minister's son was hindered by the removal of the prosecutor who directed the investigation. Soon after, on 21 December 2013, the police officers dealing with the investigation and a number of prosecutors were either moved to a lower rank or dismissed on the basis of the

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<sup>1009</sup> Fusun Turkmen, 'The European Union and Democratization In Turkey: The Role of the Elites' (2008) 30:1 Human Rights Quarterly 146, 155

<sup>1010</sup> Kjell Björnberg and Ross Cranston, 'The Functioning of the Judicial System In the Republic of Turkey: Report of an Advisory Visit' (European Commission, 13-22 June 2005)

<sup>1011</sup> Amnesty International, 'Independence and Impartiality of Judiciary under threat in Turkey' (AI, 24 February 2014) <<http://humanrightsturkey.org/2014/02/24/amnesty-independence-and-impartiality-of-judiciary-under-threat-in-turkey/>> accessed 2 February 2015

<sup>1012</sup> Today's Zaman 'Judiciary even weaker than in coup times with new HSYK law' *Today's Zaman* (16 February 2014) <[http://www.todayszaman.com/national\\_judiciary-even-weaker-than-in-coup-times-with-new-hsyk-law\\_339610.html](http://www.todayszaman.com/national_judiciary-even-weaker-than-in-coup-times-with-new-hsyk-law_339610.html)> 5 February 2015

changes to “the Judicial Police Code.”<sup>1013</sup> According to this regulation, the police force were required to promptly inform the relevant administration of any criminal investigation underway (amended Article 5c).<sup>1014</sup> Such a change implied that the government was finally able to learn about any investigation, including confidential ones, and therefore was able to react as it did in this case by demoting and reassigning the police officers involved.<sup>1015</sup>

However, the government’s reaction to the issue was characterised by any doubts or discussions of transparency. It rather dismissed any sort of corruption allegations, claiming that a conspiracy controlled by Fettullah Gulen, a Sunni cleric who is a former ally but current enemy of Erdogan living in the US, was taking place involving international agents aiming to overthrow Erdogan. The government argued that the plot against AKP was devised by the members of judiciary in coordination with the police officers who were claimed to be “Gulenists”, which is a movement that is argued to have much appeal among the police force, the judiciary, education sector, media, and business.<sup>1016</sup> The 17-25 December operations revealed the conflict when the government issued the change in the Judicial Police Code and dispersed hundreds of police officers based on the fact that the government was ‘uninformed’ about the investigation prior to its commencement — as well as when the police were reluctant to effectuate prosecutors’ orders on arrests. Moreover, the chief prosecutor who ordered the 17-25 December Operations was appointed to another city alongside nineteen prosecutors and judges who carried out the investigation.<sup>1017</sup>

Erdogan labelled the judiciary as “traitors” and “rascals” for continuing the judicial process against the government officials on the alleged corruption and bribery charges and deemed the judicial members as “appointed civil servants.”<sup>1018</sup> Also, in reaction to HSYK members who expressed their disapproval of the amendments made in the Judicial Police Code for being

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<sup>1013</sup> Law Regulating the Amendments On the Judicial Police Code Law no. 28858 (21/12/2013) <<http://www.resmigazete.gov.tr/eskiler/2013/12/20131221.pdf>> accessed 8 October 2014

<sup>1014</sup> Law Regulating the Amendments On the Judicial Police Code Law no. 28858 (21/12/2013) <<http://www.resmigazete.gov.tr/eskiler/2013/12/20131221.pdf>> accessed 8 October 2014

Article 2 - 5(c) Highest rank police officer is obliged to inform immediately about the forensic incidents to the local authority who is responsible for preventing crimes and sustaining the public order and security.

<sup>1015</sup> Ergun Ozbudun, Turkey’s Judiciary and the Drift Toward Competitive Authoritarianism’ (2015) 50:2 The International Spectator 42, 46

<sup>1016</sup> M. Hakan Yavuz and John L. Esposito, *Turkish Islam and the Secular State - The Gulen Movement* (New York, Syracuse University Press, 2003)

<sup>1017</sup> Al Jazeera Turk ‘Kronoloji: Yolsuzluk ve rüşvet operasyonu/Chronology: Corruption and Bribery Operation’ *Al Jazeera Turk* (21 March 2014) <<http://www.aljazeera.com.tr/kronoloji/kronoloji-yolsuzluk-ve-rusvet-operasyonu>> accessed 25 January 2015

<sup>1018</sup> Mumtazer Turkone, ‘The judiciary is no longer independent’ (*Facts on Turkey*, 10 February 2015) <<http://factsonTurkey.org/16023/judiciary-no-longer-independent/>> accessed 7 December 2015

unconstitutional and for forming a barrier against the investigations,<sup>1019</sup> Erdogan indicated that the impending changes regulating the structure of HSYK “followed what democracy requires and eliminated the authority held by the Ministry of Justice on HSYK. We obviously made a mistake there, as soon as we have the power to change the constitution we have to make another change and bring a system that can inspect HSYK.”<sup>1020</sup> In his clear statement, Erdogan points to the existence of deep state control, by which he means the Gulenist movement, over the judiciary. He demonstrates “the deep state/parallel control” over the judiciary as the initial and overall aim of the 2014 changes. The government therefore officially included fight against the ‘parallel structure’ in National Security Council’s program.<sup>1021</sup>

On this crucial point it is necessary to refer back to the discussion in the section titled “Judicial Independence in Turkey”, in which the independence of the judiciary is argued to be hindered even by the possibility of political intervention;<sup>1022</sup> that was clearly the case when the Prime Minister openly insulted the judiciary (for investigating a corruption and bribery allegation) and the judges and prosecutors in the high council court (for criticising any disturbance that could hinder this investigation). Kunter et al<sup>1023</sup> and Dursun suggest that judges as well as not being put under pressure should also face with no possibility for such pressure as it otherwise hinders independency of judges.<sup>1024</sup> Executive power, namely the role of the Minister of Justice, must be eliminated from the HSYK, and there must be a strict application of separation of powers in order to limit the government’s power on the legislature in Turkey.<sup>1025</sup> The shift of “judiciary control” from one hand to another in 2014 appears to be just another legal change resulting from an ostensible ‘plot’ by Gulen movement against the AKP government.

Turkish columnist Kadri Gursel summarises the effects of the power war in Turkey on legal grounds: “Turkey’s precious institutions are the victims of this fighting...The ruling power

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<sup>1019</sup> High Council of Judges and Prosecutors (HSYK, 26 December 2013)

<<http://www.hsyk.gov.tr/duyurular/2013/aramlik/basin-aciklamasi-26-12-2013.pdf>> accessed 17 July 2015

<sup>1020</sup> Hurriyet, ‘Erdogan: “Orada bir yanlislik yaptik”/Erdogan: “We made a mistake there”’ *Hurriyet* (29 December 2013) <<http://www.hurriyet.com.tr/erdogan-orada-bir-yanlis-yaptik-25465765>> accessed 2 July 2015

<sup>1021</sup> European Commission, *Turkey 2015 Report* (SWD (2015) 216 Final) 9

<sup>1022</sup> Muharrem Ozen, *Hakimin Cezai Sorumlulugu/Criminal Liability of the Judges* (Ankara, Seckin Yayıncılık Hukuk Dizisi, 2004) 48

<sup>1023</sup> Nurullah Kunter, Feridun Yenisey and Ayse Nuhoglu, *Muhakeme Hukuku Dalı Olarak Ceza Muhakemesi Hukuku/Law on Criminal Procedure* (Beta Yayınları, 2010)

<sup>1024</sup> Hasan Dursun, ‘Erkler Ayrılığı ve Yargıç Bağımsızlığı/Separation of Powers and Judicial Independence’ (2009)

80 Union of Turkish Bar Association Journal 44

<sup>1025</sup> Mustafa Erdoğan, *Anayasa Hukuku/Constitutional Law* (Ankara Orion Yayınevi, 2005) 80

Mustafa Kutlu, *Kuvvetler Ayrılığı/Separation of Powers* (Seçkin Yayınları, Ankara 2001) 198

coalition has collapsed and is sucking many things down with it”, namely “constitutional order, the state of law, legitimacy, the EU process, and the judiciary.”<sup>1026</sup> The media crackdown that resulted in the prosecution of two judges in 2014 is a vivid example of Gursel’s statement; based on the power conflict between the former allies, namely Erdogan and Gulen, the press that was aligned to the Gulenist movement was under the target of an investigation that aimed to silence government opposition. Accordingly, the following section demonstrates how the political intervention in the judiciary and the lack of independence and impartiality caused by this affects the freedom of the press.

### 5.3.5 Politically driven imprisonment of judges

On 13 December 2014, a year after the 17-25 December operations, 31 people were detained with a warrant issued by an Istanbul judge with the allegation of forming an organisation that “through lies, depriving people of their liberty and falsifying documents”, established an organisation that “by pressure, intimidation and threats attempted to seize state power.” Ekrem Dumanli, who is the general editor of *Zaman* newspaper, a *Zaman* columnist, a *Bugun* newspaper journalist, and head of Samanyolu Broadcasting group was detained with another three Samanyolu media workers allegedly being a part of the parallel structure/the Gulenist movement and facing charges for ‘affiliation to the Fethullah Terror Organisation’.<sup>1027</sup> Both the legality and proportionality of the media operations against pro-Gulenist media are found ‘seriously concerning’ by the European Commission.<sup>1028</sup>

Human Right Watch highlighted the timing of the operations, which was only a year after the corruption operations that started on 17 December the previous year. The focus on Gulen’s media group, namely *Zaman* newspaper and Samanyolu media group, for the detainments is expounded by Sinclair Webb suggesting “an effort to discredit and intimidate Gülenist media.” Sinclair Webb, referring to the alleged reasons for the journalists’ detainments, also suggested that

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<sup>1026</sup> Daniel Dombay, ‘Turkish law strikes at judicial independence’ *Financial Times* (26 February 2014) <<http://www.ft.com/cms/s/0/83b3a3d2-9f05-11e3-a48e-00144feab7de.html#axzz3zqYEfBjY>> accessed 3 August 2015

<sup>1027</sup> European Commission, *Turkey 2015 Report* (SWD (2015) 216 Final) 64

<sup>1028</sup> Ibid.

the pattern of the arrests was based on the allegations for illegal organisation membership, which is one of the most frequently used reasons to silence the opposition press.<sup>1029</sup>

Erdogan's allegations that the 17-25 December operations was Gulen's and therefore, the "parallel structures" attempt to overthrow AKP government, the journalists' arrests (alongside the senior police officers arrests during the 2014 media crackdown) points to Erdogan's will to emasculate the Gulenist movement. Webb argues that the political motivations behind what is called a "media crackdown" render the media as once again a target in Erdoğan's political fight with his former Gülenist allies."<sup>1030</sup> This is why the press is defined as the fourth estate in its function as a watchdog for the government — making government abuses public<sup>1031</sup> and serving as an investigatory estate over the government. In addition to this function, the press is also expected to criticise judicial decisions with the aim to make such decisions available to the public. This role of the press becomes essential when the executive power strictly influences the judicial power. However, as the interest driven holdings in Turkey dismiss journalists because of their critical comments on the government or opposition of their policies, it may be argued that, when under the pressure of the media owners, the press can be misleading with its information. However, the political polarisation revealed itself also among the journalists, for the mainstream press once more approached the issue from a political point of view rather than on the basis of the rights and freedoms of the journalists and the press in general.<sup>1032</sup>

What is striking in terms of the measures taken against the judiciary in 2014 is the purely politically motivated detention and imprisonment of the judges who were involved in the anti-corruption investigations.<sup>1033</sup> In that regard, Metin Ozcelik, who is a judge in the Istanbul 29th Court of First Instance, and Mustafa Baser, who is a judge in the Istanbul 32nd Court of First Instance, gave the release order of the police officers and journalists who were in provisional

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<sup>1029</sup> Human Rights Watch, 'Turkey: Crackdown on Opposition Media. Arrests Damage Press Freedom' (19 December 2014) <<https://www.hrw.org/news/2014/12/19/turkey-crackdown-opposition-media>> accessed 8 March 2015

<sup>1030</sup> Ibid.

<sup>1031</sup> Jr. Lucas A. Powe, *The Fourth Estate and the Constitution* (Los Angeles: University of California Press 1991) 234

<sup>1032</sup> Sozcu, 'Kayyum sansuru gazete masetlerinde/Censorship of trustee on newspaper covers' *Sozcu* (29 October 2015) <<http://www.sozcu.com.tr/2015/gundem/kayyum-sansuru-gazete-masetlerinde-971948/21/>> accessed 2 December 2015

<sup>1033</sup> European Commission, *Turkey 2015 Report* (SWD (2015) 216 Final) 57

detention for six months. However, the state prosecutor who was in charge of signing the release orders refused to do so on the basis of the Deputy Attorney General's instruction.<sup>1034</sup>

Metin Ozcelik and Mustafa Baser were severely criticised in *Yeni Akit* newspaper, known for its close ties to the government, for their judgement of the release orders,<sup>1035</sup> which was then followed by the criticism of the former Minister of Justice on the same basis. Besides, the president of the HSYK declared an apology to the former Prime Minister Erdogan, who openly expressed his disappointment in the HSYK for not having intervened after such a release order was made by two judges. Soon after, the two judges were suspended and their verdict was declared invalid.<sup>1036</sup>

This positioned them as the figures representing the loss of judicial independence in Turkey. Despite that their release orders were legal and valid and the ECtHR case law was referred by the judges in their verdict (the suspects' detention was not lawful as it was four days after the custody time prescribed by law had expired as seen in *Zeynep Avci v Turkey*,<sup>1037</sup> and the detention lacked "strong suspicion" that a crime was committed as seen in *Neumeister v Austria*<sup>1038</sup>), their suspension by the HSYK on 27 April 2015 and the authorisation of their arrest could not be prevented.<sup>1039</sup>

The two judges were imprisoned by Bakirkoy 2nd High Criminal Court, allegedly based on "attempting to overthrow the government and preventing the government to operate partly or fully" (TCK Article 312) and for "being an armed organisation member" (TCK Article 314). Moreover, 2,500 judiciary members, including the Ankara chief prosecutor and chief prosecutors in Anatolia, were replaced via a government decree.<sup>1040</sup>

On 16 May 2015, the European Association of Judges (EAJ) issued a statement condemning the unfair and illegal imprisonment of the judges, stating that "any attempt to undermine the freedom of a judge to establish facts and apply the law in a particular case constitutes a clear breach of judicial independence. EAJ condemns the arrest and detention of any judge on the basis of a

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<sup>1034</sup> European Association of Judges 'The European Association of Judges Demands Immediate Release from Detention of Two Turkish Judges' (*European Association of Judges*, 29 May 2015) <[http://www.ekou.ee/doc/2015-05-29\\_EAJ-pressrelease-Turkey.pdf](http://www.ekou.ee/doc/2015-05-29_EAJ-pressrelease-Turkey.pdf)> accessed 2 December 2015

<sup>1035</sup> *Yeni Akit*, 'Atin Bu Hainleri/Remove these traitors' *Yeni Akit* (27 April 2015)

<sup>1036</sup> European Association of Judges 'The European Association of Judges Demands Immediate Release from Detention of Two Turkish Judges' (*European Association of Judges*, 29 May 2015) <[http://www.ekou.ee/doc/2015-05-29\\_EAJ-pressrelease-Turkey.pdf](http://www.ekou.ee/doc/2015-05-29_EAJ-pressrelease-Turkey.pdf)> accessed 2 December 2015

<sup>1037</sup> *Avci v Turkey* App no. 37021/97 (ECtHR, 9 July 2003)

<sup>1038</sup> *Neumeister v Austria* App no. 1936/63 (ECtHR, 27 June 1968)

<sup>1039</sup> The Venice Commission, *Venice Commission Declaration on Interference with Judicial Independence in Turkey* (Venice, 20 June 2015)

<sup>1040</sup> Bakırköy 2. High Criminal Court E.2015/301, K.2015/207 (18/11/2015)

decision taken in the exercise of the judge's judicial functions and calls for the immediate release of the judges Metin Özcelik and Mustafa Baser.”<sup>1041</sup> Similarly, The Judges and Prosecutors Association (YARSAV) in Turkey issued a statement discussing the political motivation behind the imprisonment of the judges and argued that the government aimed to send a clear message in order to threaten the judges.<sup>1042</sup> Finally, former Minister of Justice in Turkey, Hikmet Sami Türk, argued that the judges' imprisonment “shows that Turkey has entered a period during which judges will no longer be able to give verdicts independently in line with the Turkish Constitution, the law and their personal conviction. No judge can be arrested, and they should not have been arrested for the verdicts they gave.”<sup>1043</sup>

When examined in the context of the Turkish legal system, the violation of judicial rules becomes apparent, for the Code on Criminal Procedure (CMK) regulates that First Instance Criminal Courts' decision can solely be objected by the Office of The Chief Prosecutor and/or the Criminal Judges of Peace by lodging an appeal to a higher court.<sup>1044</sup> The lack of an independence guarantee for the judiciary becomes clear when the unfair and illegal treatment of the judges is taken into account. The illegal procedure followed for their removal from office and imprisonment is a clear proof of the dangerous intervention of the legislative power into the judicial power whose independence and impartiality is ostensibly protected by Turkish Constitution Article 138.

The Venice Commission stated that the decision to remove and imprison judges must not be made without the existence of adequate evidence; however, the rule of law was contradicted by HSYK, and the intervention into the judicial process is in clear infringement with European and universal standards because the judges were arbitrarily removed or transferred and imprisoned on the basis of their verdicts. The immediate reaction of the HSYK to the judges based solely on their verdicts greatly concerns the Venice Commission.<sup>1045</sup> Finally, in its 2015 report, the European Commission stated that safety measures against HSYK's interference in judicial proceedings must

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<sup>1041</sup> European Association of Judges ‘The European Association of Judges Demands Immediate Release from Detention of Two Turkish Judges’ (*European Association of Judges*, 29 May 2015) <[http://www.ekou.ee/doc/2015-05-29\\_EAJ-pressrelease-Turkey.pdf](http://www.ekou.ee/doc/2015-05-29_EAJ-pressrelease-Turkey.pdf)> accessed 2 December 2015

<sup>1042</sup> YARSAV, ‘Yargic tutuklamalari hakkinda aciklama/Declaration on the detainment of the judges’ (YARSAV 2 May 2015) <<http://yarsav.org.tr/index.php?p=364#.VsnbLMd0PBI>> accessed 6 October 2015

<sup>1043</sup> Faizan Mustafa, ‘Judicial independence -- what Turkey must learn from India’ *Today's Zaman* (17 November 2015) <[http://www.todayszaman.com/op-ed\\_judicial-independence-what-turkey-must-learn-from-india\\_404521.html](http://www.todayszaman.com/op-ed_judicial-independence-what-turkey-must-learn-from-india_404521.html)> accessed 2 December 2015

<sup>1044</sup> Turkish Criminal Procedure Law no. 5271 (4/12/2004) s 2(268)

<sup>1045</sup> The Venice Commission, *Venice Commission Declaration on Interference with Judicial Independence in Turkey* (Venice, 20 June 2015)

be taken in addition to legal and constitutional safeguards in order to prevent the transfer of the judges/prosecutors without their consent.<sup>1046</sup>

It is fair to argue that, despite the guarantees provided in the Constitution for the independency and impartiality of the judiciary, these provisions are challenged by the strong affiliation between the executive and the judiciary.<sup>1047</sup> As observed from the above example, this strong bond between the executive and the judiciary; hinders the impartiality of the judiciary, this corruption within the judiciary and the government also makes it impractical to implement the reforms, which Aydin and Keyman suggests leads to political partiality.<sup>1048</sup>

## 5.4 Judicial interpretation of press freedom

The Independence of the judiciary has been analysed throughout the previous sections with the detailed examination of the the 2010 constitutional changes that resulted in changes in the Turkish Constitutional Court. This section revolves around the importance of a free press for a democratic society and how the courts' approach to freedom of the press influences the legal security of the press. In order to make such an analysis, Turkish Court decisions before and after the legal amendments (2010) as well as the ECtHR case law will be discussed. The manner in which press freedom is regulated under the Turkish Constitution ("fundamental right of the individuals") was discussed in Chapter 2. In light of this information, this section will analyse the Turkish courts' interpretation of the constitutional provisions regulating freedom of the press and the exceptions of the right that can be applied to restrict freedom of the press.<sup>1049</sup>

In its 2015 report, the ECtHR identifies Turkey as possessing the second highest number of cases on violation of the right to free expression. In addition, Turkey is specified as the country that violates the right to fair trial the most.<sup>1050</sup> In combination, these rankings are the result of the

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<sup>1046</sup> European Commission, *Turkey 2015 Report* (SWD (2015) 216 Final) 57

<sup>1047</sup> Senem Aydin and Fuat E. Keyman, 'European Integration and the Transformation of Turkish Democracy' (2004) 2 Centre for European Policy Studies EU- Turkey Working Papers 1, 42

<sup>1048</sup> Ibid.

<sup>1049</sup> The Constitution of the Republic of Turkey 1982 no. (2709) s 2(26) and (28)

<sup>1050</sup> European Court of Human Rights, 'Annual Report 2015' (Strasbourg, 2016)

<[http://www.echr.coe.int/Documents/Annual\\_Report\\_2015\\_ENG.pdf](http://www.echr.coe.int/Documents/Annual_Report_2015_ENG.pdf)> accessed 12 February 2016 5,199

pressure put on the press by the politics and the disputed Turkish court decisions based on their controversial approach to press freedom. In cases where the journalists are defined as “terrorists” based on the broad exceptions regulated in the Constitution and the vague definitions included in the Anti-Terror Law,<sup>1051</sup> and where the government argues that journalists have rather been imprisoned for their non-journalistic activities as ruled by an independent judiciary,<sup>1052</sup> the interpretation of law by the judges plays a crucial role in the legal protection of the press.

This section examines in detail the Turkish Courts’ approach to freedom of the press in light of the Turkish Constitutional Court’s approach in comparison with the ECtHR case law on press freedom. Considering the recent legal amendments to the Turkish Constitution that took place in 2010<sup>1053</sup> — changing Article 148 with the additional clause stating that “Everyone may apply to the Constitutional Court on the grounds that one of the fundamental rights and freedoms within the scope of the European Convention on Human Rights which are guaranteed by the Constitution has been violated by public authorities”<sup>1054</sup> and that it attributes importance to ECHR and ECtHR case law on freedom of the press — it is also necessary to analyse the effects of the ECtHR’s approach to press freedom on the Turkish Constitutional Court’s decisions.

#### 5.4.1 First Instance and Constitutional Court approach to freedom of the press

The Turkish Constitutional Court (AYM) was highly criticised before 2010 for various verdicts such as party closure decisions, stating that constitutional amendments made to provisions regulating the use of headscarfs was unconstitutional,<sup>1055</sup> and making arbitrary judgements during the 1961 and 1982 Constitutions that included using the same reasoning for concluding with different verdicts within a period of severe months.<sup>1056</sup> In that regard, AYM was criticised for lacking legitimacy on the basis of its decisions related to fundamental rights and freedoms.<sup>1057</sup>

<sup>1051</sup> See Chapter 2 for a thorough examination of these legal regulations.

<sup>1052</sup> Egemen Bagis, ‘Gercegi Ortaya Koymak: Turkiye’de Basin Ozgurlugu/*Revealing the Truth: Press Freedom in Turkey*’ (The Republic of Turkey Prime Ministry, 2011) <[http://www.ab.gov.tr/files/haberler/2011/gercegi\\_ortaya\\_koymak.pdf](http://www.ab.gov.tr/files/haberler/2011/gercegi_ortaya_koymak.pdf)> accessed 15 March 2015

<sup>1053</sup> Law regulating some amendments on the Constitution of the Republic of Turkey no. 5982 (7/5/2010)

<sup>1054</sup> The Constitution of the Republic of Turkey 1982 no. 2709 (7/11/1982) s 3(148)

<sup>1055</sup> Tolga Sirin, ‘Ucuncu Yilda Bir Bilanco: Turkiye Anayasa Mahkemesi’nin Bireysel Basvuru (Anayasa Sikayeti) Usulunun ve Kararlarinin Degerlendirilmesi/*Balance Sheet in the third year: Evaluation of individual application to the Turkish Constitutional Court procedures and decisions*’ Marmara University Law Faculty 1

<sup>1056</sup> Ibid. 3

#### 5.4.1.1 Turkish Constitutional Court Decisions on press freedom before 2010

In order to be able to demonstrate the improvement to the interpretation of free press by AYM over time, especially with the commencement of direct application to the Constitutional Court on the grounds that the right to free expression through press within the scope of the European Convention on Human Rights had been violated, it is necessary to start by analysing the approach taken by the Court to the essence of press freedom.

The inconsistent approach taken by the Court to specifying the nature of freedom of the press can be seen in two different judgements given during the 1961 Constitution and 1982 Constitution<sup>1058</sup> whereby the Court had agreed in 1979 that if the restriction of the press is made through the application of restrictions on the means of publication, it would not strain the core of press freedom and freedom of expression would therefore not be violated.<sup>1059</sup> On the other hand, when the Court had to deal with a statute that did not restrict freedom of thought but the means of dissemination of thought, in its verdict in 1993, the court ruled on the case stating that it was an open violation of freedom of the press.<sup>1060</sup> When examined exhaustively, it is possible to observe that AYM experienced difficulties in making consistent decisions on what constitutes the core of press freedom and what sort of imitations would hinder the use of this right.<sup>1061</sup>

More specifically regarding the AYM judgements, in one of its 1997 judgements, the Court highlighted the importance of the right to information by specifying that in order to fully enjoy the right to information, the protection of press freedom must also cover the duration that is needed for printing the publication until it reaches the readers. According to the Court, any publication that is prevented from reaching the readers would violate freedom of the press because it would breach the readers' right to information even for a limited period of time, and restricting individuals' right to information would not comply with the requirements of a democratic society.<sup>1062</sup> Therefore AYM in its judgment stated that no statute can include a criterion for the restriction of the press unless it is

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For more examples on the Turkish Constitutional Court verdicts that contradict each other, see Kemal Gözler, *Türk Anayasa Hukuku/Turkish Constitutional Law* (Ekin Kitabevi, 2000) 910 and 932

<sup>1057</sup> Ece Göztepe and Aykut Celebi, *Demokratik Anayasa: Görüşler ve Öneriler/Democratic Constitution: Reviews and Suggestions* (Istanbul: Metis Yayınları, 2012) 387-418

<sup>1058</sup> Ferhat Yıldız, 'Türk Anayasa Hukukunda Anayasa Özgürlüğü/Freedom of the Press in the Turkish Constitution' (Master Thesis Ankara University 2012) 122

<sup>1059</sup> AYM, E.1987/54, K.1979/9, K.T. 08/02/1979

<sup>1060</sup> AYM, E.1992/36, 1993/4, K.T. 20/01/1993

<sup>1061</sup> Yasar Salihpaşaoğlu, 'Türkiye'de Basın Özgürlüğü/Freedom of the Press in Turkey' (Ankara: Seckin Yayınları, 2007) 122

<sup>1062</sup> AYM, E. 1996/70, E.1997/53, K.T. 05/06/1997

specified in the Constitution; accordingly, the right and freedom of dissemination cannot be restricted because it would violate the freedom of the press.

Nevertheless, in another judgement in 1997, when the abolishment of an amendment made to the article of the Consumer Protection Law was requested based on the authorisation given to the executive to apply high monetary fines, opposing this would lead to a negative effect on freedom of the press, AYM took a different stance when compared with the previous case.<sup>1063</sup> AYM in its verdict stated that freedom of the press did not only comprise the ones who worked within the sector but it is a right that is applicable to everyone because it is a vital freedom. Even though it is one of the duties of the lawmaker to prepare the ground to enter the sector by creating and sustaining a suitable atmosphere for competition, AYM argued that the lawmaker also had the duty to prevent the press from deviating from its actual aim (disseminating news and information) by coalescing with purely commercial activities. On this basis, AYM rejected the application for the cassation of the amendment that authorised the executive power to apply high monetary fines on the basis that “the amendments that regulate the penalty which would be applied to the ones who not comply with the prohibition of disseminating consumer goods that fall under the scope of commercial activities.”<sup>1064</sup>

In a more recent example, which is important to analyse in order to understand AYM’s stance on the significance of the balance between freedom of the press and national and state security, AYM. With the purpose of specifying the limits for restricting freedom of the press on the basis of national and state security, rejected the appeal to reverse the amendments made to Anti-Terror Law Articles 6 and 7<sup>1065</sup> that allegedly violated Constitution Articles 13,<sup>1066</sup> 26,<sup>1067</sup> 28,<sup>1068</sup> and 38, which state that “no one shall be punished for any act which does not constitute a criminal offence under the law in force at the time committed. No one shall be given a heavier penalty for an offence other than the penalty applicable at the time when the offence was committed.”<sup>1069</sup> Specifically, the amendment to Article 6 of the Anti-Terror Law stated that “If any of the offences indicated in the

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<sup>1063</sup> Ferhat Yildiz, ‘Turk Anayasa Hukukunda Anayasa Ozgurlugu/*Freedom of the Press in the Turkish Constitution*’ (Master Thesis Ankara University 2012) 123

<sup>1064</sup> AYM, E. 1997/19, K. 1997/66, K.T. 23/10/1997

<sup>1065</sup> Law regulating amendments on the Anti-Terror Law no. 5532 (29/6/2006)

<sup>1066</sup> See full text article under section “Turkish Constitutional Court Decision on press freedom after 2010.”

<sup>1067</sup> See full text article in Chapter 2, under section “The Constitution of the Republic of Turkey.”

<sup>1068</sup> See full text article in Chapter 2, under section “The Constitution of the Republic of Turkey.”

<sup>1069</sup> The Constitution of the Republic of Turkey 1982 no. 2709 (7/11/1982) s 2(38)

AYM, E.2006/121, K.2009/90 K.T. 18/06/2009 <<http://www.kararlaryeni.anayasa.gov.tr/Karar/Content/f9278543-3b68-4eeb-899c-ed8998f85c8c?excludeGerekce=False&wordsOnly=False>> accessed 23 January 2015

paragraphs above are committed by means of mass media, editors-in-chief who have not participated in the perpetration of the crime shall be punished with a judicial fine from one thousand to fifteen thousand days' rates. However, the upper limit of this sentence for editors-in-chief is five thousand days' rates", and the amendment to Article 7 of the same law stated that "editors-in-chief who have not participated in the perpetration of the crime shall be punished with a judicial fine from one thousand to fifteen thousand days' rates. However, the upper limit of this sentence for editors-in-chief is five thousand days' rates."<sup>1070</sup> The former President of Turkey, Ahmet Necdet Sezer, appealed for the changes made to the Anti-Terror Law in 2006, which violated various articles of the Turkish Constitution by allowing the penalisation of the individuals (the owner of the publication and the chief editor) who do not have complicity in the crimes specified.<sup>1071</sup> Contradicting the principle that "criminal responsibility shall be personal",<sup>1072</sup> these changes were rejected by the court, which stated that "the articles under subjected to appeal are legitimate as they are necessary for the protection of the state and national security, territorial security and public order when the terror experienced in the South East Turkey as well as its extend and the use of means to carry out the terrorist activities are taken into consideration, especially as observed that appealed legal amendments do not obstruct the core of the rights and the use of guaranteed under the Constitution Articles 26 and 28."<sup>1073</sup> With this verdict, AYM clearly prioritised national and state security over the fundamental right and freedom of the press, which also distinctively supports the state ideology that was observed under the case examples of Hrant Dink and Pelin Sener analysed in Chapter 2.

The balance that needs to be sustained between freedoms and societal order reveals itself as one of the biggest problems for human rights in Turkey,<sup>1074</sup> especially regarding freedom of expression. However, as Hazar suggests, freedom of expression is not the one and only value that needs to be protected within society; therefore, in cases where it collides with public order and national security, a compromised balance in between must be achieved.<sup>1075</sup> Besides forming a legal concept, national security also has a political nature because it lacks a clear definition and therefore

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<sup>1070</sup> AYM, E. 2006/121 K. 2009/90 K.T. 18/06/2009 <<http://www.kararlaryeni.anayasa.gov.tr/Karar/Content/f9278543-3b68-4eeb-899c-ed8998f85c8c?excludeGerekce=False&wordsOnly=False>> accessed 23 January 2015

<sup>1071</sup> Ferhat Yildiz, 'Turk Anayasa Hukukunda Anayasa Ozgurlugu/*Freedom of the Press in the Turkish Constitution*' (Master Thesis Ankara University 2012) 160,161

<sup>1072</sup> The Constitution of the Republic of Turkey 1982 no. 2907 (7/11/1982) s 2(38)

<sup>1073</sup> AYM, E. 2006/121 K. 2009/90 K.T. 18/06/2009 <<http://www.kararlaryeni.anayasa.gov.tr/Karar/Content/f9278543-3b68-4eeb-899c-ed8998f85c8c?excludeGerekce=False&wordsOnly=False>> accessed 23 January 2015

<sup>1074</sup> Anil Cecen, *İnsan Hakları/Human Rights* (Ankara: Savaş Yayınevi 3rd ed., 2000) 38

<sup>1075</sup> Zeynep Hazar, 'Freedom of Press and National Security' (2013) 17:1-2 Gazi University Law Faculty Journal 1525, 1532

shows differences of application in each country according to its present political condition.<sup>1076</sup> This is where the judiciary plays an important role in determining of the limits of national security as a legal and political concept in order to protect the right to free expression and press.

Therefore, it is fair to argue that the effectiveness of Turkey's justice system depends on achieving a balance between national security and the protection of free expression of the press; and this can be achieved by changing the the judiciary's prioritisation of the state security and interest over individual rights and freedoms.

Despite that freedom of the press is provided and guaranteed as a fundamental right on its own under the Turkish Constitution, AYM perceives press freedom as a right and freedom that supplements freedom of thought and expression. Therefore, it is possible to argue that the court's approach to press freedom plays an important role in its application, and it is fair to conclude that improving of the Court's approach would result in the further enjoyment and use of the right to free expression by the press.

#### **5.4.1.2 Turkish Constitutional Court Decision on press freedom after 2010**

A more positive approach to the 2010 judiciary reform was adopted by scholars who discussed that such an amendment is crucial to re-establish AYM's legitimacy.<sup>1077</sup> More specifically, according to Arslan, after the acceptance of individual application to AYM, the Court would start basing its judgements on the rights and freedoms rather than principles.<sup>1078</sup> In parallel to Arslan, Cerar argues that it is thanks to the individual application to the Constitutional Courts that

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<sup>1076</sup> Ibid. 1525

<sup>1077</sup> Zuhtu Aslan, *Anayasa Teorisi/Theory of Constitution* (Seckin Yayıncılık, 2008) 258

Ibrahim O. Kaboğlu, *Anayasa Yargısı/Constitutional Jurisdiction* (İmge Kitabevi, 1997) 241

Mehmet Turhan and Hikmet Tulen, 'Anayasa Yargısı İncelemeleri 1/*Analysis of Constitutional Jurisdiction I*' (Ankara: Anayasa Mahkemesi Yayınları, 2006) 62

<sup>1078</sup> Ibid. 259

Tolga Sirin, 'Üçüncü Yılda Bir Bilanço: Türkiye Anayasa Mahkemesi'nin Bireysel Başvuru (Anayasa Şikayeti) Usulünün ve Kararlarının Değerlendirilmesi/*Balance Sheet in the third year: Evaluation of individual application to the Turkish Constitutional Court procedures and decisions*' Marmara University Law Faculty 1, 2

the monopoly of statism can be eliminated in constitutionality controls and that citizens can have a share in the operations of the executive, legislative, and judicial mechanisms.<sup>1079</sup>

Starting with the 2010 judicial reform, Turkish Constitutional Court decisions on the freedom of the press fell more along the lines of ECtHR case law; these decisions were made on the basis of the amendment of the Turkish Constitution Article 148 that allowed individual applications to the Court.

In the cases where AYM decides regardless of ECHR, such decisions could be brought to ECtHR in which case it might find violations of rights stated in the ECHR. Therefore, after this legal change, AYM has been motivated to give more weight to the case law of ECtHR.<sup>1080</sup> Therefore, because the procedures before and after 2010 for ECtHR application were different, AYM's approach after 2010 is analysed here in order to demonstrate the changes in the approach to a free press when ECtHR is taken as a benchmark. In light of this context, two main cases, *Ilhan Cihaner* and *Bekir Coskun*, will be discussed in which the Court (AYM) decided along the lines of the ECtHR case law and decided for the benefit of the press.

In the case of *Ilhan Cihaner*, the applicant is a former chief prosecutor and identifies a newspaper article as the basis for his application, claiming that his individual rights were violated because the article, which was directed to the applicant, is titled "The Prosecutor is Drawn Up to the Neck":<sup>1081</sup>

The Chief Prosecutor Osman Sanal, who has been removed from the office due to the judicial coup against HSYK has found shocking information about Ilhan Cihaner, who has been accused and detained for being an Ergenekon member. Gendarmerie and MIT officers had a meeting under the direction of Cihaner for a plot against the 'cemaat'.<sup>1082</sup>

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<sup>1079</sup> Miro Cerar, 'Slovenia's Constitutional Court within the Separation of Power' in Wojciech Sadurski, *Constitutional Justice, East and West Democratic Legitimacy and Constitutional Courts in Post-Communist Europe in a Comparative Perspective* (New York: Kluwer Law International, 2003) 220

<sup>1080</sup> Peri Uran, 'The Approach of the European Court of Human Rights and the Turkish Constitutional Court to Freedom of Press' (2015) 120 Turkish Bar Association Journal 87, 114

<sup>1081</sup> AYM, E. 2013/57754, K.T. 30.06.2014

<sup>1082</sup> Cemaat indicates to the Gulenist movement.

A full page newspaper article, Cihaner was accused of having meetings with high ranking officials in order to prepare a plot against the Gulen group and AKP under the alleged Ergenekon organisation. On that basis, Cihaner's cases in the Civil Court of the First Instance and the Court of Appeal were rejected on the following basis:

The guarantee for the freedom of the press that is regulated by the Turkish Constitution Article 28 and Turkish Press Law no. 5187 article 1 and 3 aims for the establishment and the protection of a healthy society, living in peace and happiness. It also aims to reach these standards by respecting the right to freedom of the press to disseminate information that interests the society and which is about the incidents that take place within the society and all around the world. Therefore, the press has the right and the responsibility to watch, investigate, evaluate and disseminate the information that concerns the society. However, as the freedom of the press is not absolute, in cases where freedom of the press, Fundamental Rights and Freedoms in the Constitution and the Turkish Civil Law Articles 24 and 25 are in conflict, the public interest must be the criteria to provide a balance between the rights in conflict. In such evaluation of balance, the reality of the publication, the existence of the common good, the existence of the public interest, the current interest towards the subject matter must be taken into account and the press must not be held responsible for the publication of the news that subsequently turn out to be untrue. When the title and the sub title of the subject article which are "The Prosecutor is Drown Up to the Neck", "Breakfast on coup plans with Colonel Cicek" and "He Gave It a Start After the Breakfast with Cicek" are examined altogether with the content of the news, it is concluded that the limits of press freedom, which is guaranteed under the Article 28 of the Turkish Constitution and the The Turkish Press Law Article 1 and 3 is not exceeded as with the publication of the news, the press used its duty to generate public opinion, used its right to public criticism and the news were in accordance with the apparent reality, news were made in a lawful manner and the expressions used in the title and the content of the news did not violate the applicant's individual rights. As a conclusion the court gives the judgment of non-suit.<sup>1083</sup>

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<sup>1083</sup> AYM, E. 2013/57754, K.T. 30.06.2014 para. 13 (author's translation)

As a result, Cihaner applied to AYM with the allegation of the violation of his individual rights under the Constitution Article 17, which regulates that “Everyone has the right to life and the right to protect and improve his/her corporeal and spiritual existence.”<sup>1084</sup> He asserted that the news reported in Yeni Safak was based on a smear campaign, for during his duty as a chief prosecutor, he opened a judicial inquiry against the owners of the newspaper; therefore, he claimed that the article aimed to manipulate the Ergenekon investigation, by putting pressure on the judiciary.<sup>1085</sup>

AYM decided that the newspaper article, which covered an alleged meeting of the applicant with high ranking military officers for planning an alleged possible coup against the government before he was arrested under the Ergenekon investigation, might have violated Cihaner’s right to protect his individual right of reputation.<sup>1086</sup> However, the Court, by taking the Turkish Press Law Article 3 into account, based its final judgement on the balance<sup>1087</sup> between the rights regulated in Articles 17<sup>1088</sup> and 26 and 28 of the Constitution<sup>1089</sup>. Where the court stated that contribution of the news to the public interest, level of recognition of the subject individual and the content of the news or the article, previous attitudes of the subject person, the type, content and conclusions of the publication and the conditions in which the news or the article has been published are the criteria that must be taken into account when a balance needs to be sustained between freedom of expression and the press and the right to respect one’s honour and reputation.<sup>1090</sup> The Court also referred to ECtHR case law and mentioned the *Handyside v UK* verdict, which states as follows:

Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10 (art. 10-2), it is applicable not only to “information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that

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<sup>1084</sup> The Constitution of the Republic of Turkey 1982 no. 2709 (7/11/1982) s 2(17)

<sup>1085</sup> AYM, E. 2013/57754, K.T. 30.06.2014 para. 38

<sup>1086</sup> Ibid. para. 48

<sup>1087</sup> Ibid. para. 65-73

For similar judgements on sustaining balance between rights see:

*Minelli v Switzerland* 14991/02 14/06/2005 for flexibility for the protection of publicly known individuals

*Von Hannover v Germany* 59320 24/09/004 para 63 for news that would benefit democratic public discussion

<sup>1088</sup> The Constitution of the Republic of Turkey 1982 no. 2709 (7/11/1982) s 2(17)

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

<sup>1089</sup> AYM, E. 2013/57754, K.T. 30.06.2014 para 49

<sup>1090</sup> Ibid. para. 55

pluralism, tolerance and broadmindedness without which there is no “democratic society”. This means, amongst other things, that every “formality”, “condition”, “restriction” or “penalty” imposed in this sphere must be proportionate to the legitimate aim pursued.<sup>1091</sup>

Considering the people’s right to information, the court highlighted the importance of a free press in a democratic society, affirming the requirement of pluralism of ideas in a democracy, where in the press must disseminate all sorts of information that would interest the public.<sup>1092</sup> It also concluded that freedom of expression and the press is of vital importance for democratic action; therefore the government must be under the inspection of the public and the press.<sup>1093</sup> In that regard, the Court refers to ECtHR decisions on *Bladet Tromso and Stensaas v Norway* (“in order to determine whether the interference was based on sufficient reasons which rendered it “necessary”, regard must be had to the public-interest aspect of the case”)<sup>1094</sup> and *Pedersen and Baadgaard v Denmark* (“the national margin of appreciation is circumscribed by the interest of democratic society in enabling the press to exercise its vital role of “public watchdog” in imparting information of serious public concern.”)<sup>1095</sup>

In considering the public interest in the subject matter (Ergenekon), the people’s right to information on the issue covered in the newspaper appealed by the applicant, and the acceptable level of exaggeration included in the subject article, the Court judged that the applicant was not criticised because of his judicial duties because of the trial process. The Court stated that the news article does not promote violence against him or prevent his public prosecutor responsibilities, and, based on these reasons, decided that there is no violation of his individual rights under Article 17 of the Turkish Constitution.<sup>1096</sup>

AYM’s use of ECtHR case law in this case, which constitutes the main and most important difference between the way AYM operated before 2010 and the AYM decisions during 1961 and 1982 underscore how much AYM has changed considering that it now values more carefully ECtHR case law. Nevertheless, Sirin argues that AYM does not have to justify all of its verdicts

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<sup>1091</sup> *Handyside v UK* App no. 5493/72 (ECtHR, 7 December 1976) para. 49

<sup>1092</sup> For similar judgement see *Bladet Tromso and Stensaas v Norway* 21980/93 (ECtHR, 20 May 1999) para 62

<sup>1093</sup> AYM, E. 2013/57754, K.T. 30.06.2014 56-58

<sup>1094</sup> *Bladet Tromso and Stensaas v Norway* App no. 21980/93 (ECtHR, 20 May 1999) para 59

<sup>1095</sup> *Pedersen and Baadgaard v Denmark* App no. 49017/99 (ECtHR, 17 December 2004) para 71

<sup>1096</sup> AYM, E. 2013/57754, K.T. 30.06.2014 para. 81, 86, 88, and 89

with reference to ECtHR case law. Stating that AYM lacks consistency when it digresses from ECtHR case law.<sup>1097</sup> This raises questions regarding the sustainability of the consistency of its verdicts with respect to the freedom of the press.

However, individual application to the AYM has improved the inconsistency as AYM aims to apply its own case law, which is influenced by ECtHR decisions. AYM's inconsistent reasoning could be overcome by the establishment of a "chain novel" described by Dworkin: "in this enterprise a group of novelists writes a novel seriatim; each novelist in the chain interprets the chapter he has been given in order to write a new chapter, which is then added to what the next novelist receives, and so on."<sup>1098</sup> In that regard, according to Dworkin's definition of the "chain novel", AYM must likewise ensure that each judgement would form a part of the chain that would add to the overall consistency and flow of the novel.<sup>1099</sup>

The second recent case was related to the journalist/columnist, Bekir Coskun, who writes daily in *Cumhuriyet* (Republic) newspaper. The article refers to the colourful stairs that were being painted as a reaction mainly to environmental issues but also to the expressions of the AKP government's policies that took place in 2013 during and after the Gezi protests. The article, titled "Painted Stairs", presents the following extended metaphor:

My stairs are painted...Red...Blue...Yellow...Actually, feet should be painted...Wherever you go, there will be colours...Maybe this was the reason of conflict: the fights between colourful and colourless<sup>1100</sup>...For example dance is pink...Raki<sup>1101</sup> is white...Love is red...Trees are green...Lakes are blue...Yellow and navy blue<sup>1102</sup>, yellow and red<sup>1103</sup>, black and white<sup>1104</sup>...They put a giant poster of our lion on the wall; with his blue eyes and golden hair<sup>1105</sup>...They still

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<sup>1097</sup> Tolga Sirin, 'Ucuncu Yilda Bir Bilanco: Turkiye Anayasa Mahkemesi'nin Bireysel Basvuru (Anayasa Sikayeti) Usulunun ve Kararlarinin Degerlendirilmesi/*Balance Sheet in the third year: Evaluation of individual application to the Turkish Constitutional Court procedures and decisions*' Marmara University Law Faculty 1, 4

<sup>1098</sup> Ronald Dworkin, *Law's Empire* (The Belknap Press of Harvard University Press, 1986) 229

<sup>1099</sup> Ibid. 228

<sup>1100</sup> Coskun refers to the young and peaceful protesters in Gezi and the ones against this outrage who support the government, including the pro-government groups and the police.

<sup>1101</sup> Raki is a traditional Turkish alcoholic drink.

<sup>1102</sup> Coskun refers to one of the three biggest football teams in Turkey; namely, Fenerbahce.

<sup>1103</sup> Coskun refers to one of the three biggest football teams in Turkey; namely, Galatasaray.

<sup>1104</sup> Coskun refers to one of the three biggest football teams in Turkey; namely, Besiktas.

<sup>1105</sup> Coskun refers to Ataturk.

say that “they have 44% of the votes”...After all the chaos, scandals, and outrage...So do you think only 6% understood what really happened in Turkey? Whereas they look at the colour tv...Are you colour blind my friend? War is black, peace is snow white...Republic is white and red...Secularism we call a rainbow...They do not like colours...They decided that the members of parliament fight a lot due to the orange colour of their seats as it makes them angry...So it seems that they attack when they see red...”Meeaammbers”<sup>1106</sup> of parliament...Paint...Take the brushes, paint whatever you want; sidewalks, roads, walls, stones, floors and the sky...This is not the bow of a softa (a religious student in Turkey)...It is a rainbow...White...Red...Blue...Yellow...<sup>1107</sup>

The case is based on the criminal complaint made by the three members of parliament from AKP who alleged that Coskun’s article included defamation<sup>1108</sup> against government officials and “provoking a group of people belonging to different social class, religion, race, sect, or coming from another origin, to be rancorous or hostile against another group” (TCK 216). Based on these complaints, Istanbul Attorney’s General Office brought a lawsuit for the public prosecution of Bekir Coskun, and Istanbul Second Criminal Court of First Instance decided that Coskun has committed defamation against a public officer based on his duties through the use of the press and convicted Coskun for one year two months, and seventeen days of imprisonment, which concluded with deferment of the ruling<sup>1109</sup> on the basis that:

The press can discuss and criticise politicians’ political or any expressions that is of public interest. The columnist while featuring the members of parliament in his article could not clearly explain what expression or public actions he based his ideas on...the sole purpose of the expressions he uses is observed to be humiliating the members of parliament. The columnist exceeded lawful levels of criticism by attacking the complainants’ reputation and public respectability. Based on the reasons explained above and because his expressions include disparaging value judgement, it is decided that Coskun has committed defamation

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<sup>1106</sup> Coskun refers to bulls as they attack when they see the colour red.

<sup>1107</sup> Bekir Coskun, ‘Boyali Merdivenler/*Painted Stairs*’ *Cumhuriyet* (4 September 2013) <[http://www.cumhuriyet.com.tr/haber/turkiye/10307/Boyali\\_Merdivenler\\_.html](http://www.cumhuriyet.com.tr/haber/turkiye/10307/Boyali_Merdivenler_.html)> accessed 2 May 2015 (author’s translation)

<sup>1108</sup> Turkish Penal Code Law no. 5237 s 8(125) Defamation

<sup>1109</sup> Turkish Criminal Procedure Law no. 5271 s 2(231) Pronouncement of the judgment and delaying the pronouncement of the judgment

of public officers working as a committee to perform a duty through the use of the press.<sup>1110</sup>

Coskun appealed to AYM claiming that his right to free expression and freedom of the press were violated. AYM evaluated his application considering that in order to reach public and political pluralism, all sorts of ideas must be expressed freely in a peaceful manner. The Court also suggested that individual fulfilment is only possible when one can freely express and discuss one's ideas.<sup>1111</sup> The court referred to its previous decision to explain that freedom of expression is a value that is necessary to define ones own self and others as well as understand and communicate with one another.<sup>1112</sup>

The Court acknowledged that limiting press freedom must also have a limitation, for when restricting the fundamental rights and freedoms, the criteria in Article 13 of the Constitution must be taken in to account. Therefore, the control over the limitations on the freedom of the press must be made in accordance with the criteria provided in Article 13 of the Constitution, which states that “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 the secular republic and the principle of proportionality.”<sup>1113</sup>

The Court identifies “proportionality”, regulated under Article 13 of the Constitution, as another legal security against the limitations of rights and freedoms. By referring to a previous judgement,<sup>1114</sup> it considers the criterion of proportionality as the initial examination that needs to be considered when dealing with applications that involve the limitation of rights and freedoms. This has to be evaluated on the basis that, even though the two criteria — necessity in a democratic society and proportionality — are provided as two separate criteria in Constitution Article 13, there is a strong link between both. Therefore, before the decision can be made to restrict fundamental rights and freedoms, these two criteria must be considered jointly in order to apply the least possible

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<sup>1110</sup> Istanbul 2nd Criminal Court of First Instance K.T. 29/4/2014 (author’s translation)

<sup>1111</sup> AYM, E.2014/12151, K.T. 04/06/2015 para. 35

<sup>1112</sup> Ibid. para. 35

<sup>1113</sup> The Constitution of the Republic of Turkey 1982 no. 2709 (11/7/1982) s 2(13)  
AYM, E.2014/12151, K.T. 04/06/2015 para 41

<sup>1114</sup> AYM, E.2007/4, K.2007/81, K.T. 18/10/2007

restriction over rights and freedoms.<sup>1115</sup> This criterion of proportionality was applied by the Court in Coskun's case wherein the Court highlighted the "public observer" (used in place of the "watchdog") role of the press. In light of this, the Court stated that, the grounds for restricting Coskun's expressions as a journalist against the politicians and government policies, must be persuasive, reasonable and adequate in order for the penal sanctions to be considered as proportionate.<sup>1116</sup>

In that regard, Coskun was considered to be a well-known columnist in Turkey, and the expressions in his article were evaluated within the specific period of time and under special circumstances (Gezi Park protests) during which a number of stairs was painted in different parts of Turkey; these were called the "rainbow protests" with the aim of increasing awareness on environmental issues in the country. Some municipalities were against the painted stairs and repainted them in grey, this precipitated a political discussion as a part of the other political issues arising from the Gezi Park protests.<sup>1117</sup> Taking these circumstances into account, the Court agreed that by Coskun's actions of calling the AKP voters "colourblind", criticising that the government receives 44% of the votes "no matter what they do"<sup>1118</sup>, and describing the members of parliament as "attacking when they see the colour red" must be interpreted with the rest of the article in order to make an overall evaluation.<sup>1119</sup>

Last but not least, on the basis of ECtHR *Lingens v Austria* decision,<sup>1120</sup> the Court defines freedom of expression as a concept that mostly aims to secure the freedom of criticism. According to the Court, rigorous expressions used to disseminate ideas and expression of thought must be tolerated. Besides, the Court refers to ECtHR case law, which states that freedom of political discussions form "the fundamental principle of all democratic systems", in order to explain why political expressions must be handled differently than other expressions.<sup>1121</sup> Indeed ECtHR case law highlights that defending the right to political discussions is a principal criterion in a democratic

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<sup>1115</sup> AYM, E.2014/12151, K.T. 04/06/2015 para. 53

<sup>1116</sup> Ibid. para. 58

<sup>1117</sup> Ibid. para. 59

<sup>1118</sup> Ibid. para. 60

<sup>1119</sup> AYM, E. 2014/12151, K.T. 04/06/2015 para. 62

<sup>1120</sup> *Lingens/Avusturya* App no. 9815/82 (ECtHR, 8 July 1986) para. 41-42

<sup>1121</sup> AYM, E. 2014/12151, K.T. 04/06/2015 para. 64

society as observed in *Feldek v Slovakia*;<sup>1122</sup> the ECtHR, judges that unless there are mandatory circumstances and/or reasons, political expressions must not be restricted.

Finally, despite that the First Instance Court decision to defer the verdict, Coskun had still been sentenced for more than one year of imprisonment, which put him under five years of probation, that threatens Coskun as he is a columnist/journalist with the possible execution of his punishment. Therefore, because of the threat he would feel, Coskun is at risk of abstaining from expressing his ideas, and it has to be accepted this naturally leads to the risk his self-censorship.<sup>1123</sup> The Court judged that Coskun's right to freedom of the press regulated by Articles 26 (1) and 28 (1) of the Constitution had been violated.<sup>1124</sup>

#### 5.4.2 Assessment

It is observed that before the acceptance of individual applications to AYM, AYM defined freedom of the press as a right under the general title of 'freedom of expression' rather than providing a separate right, and in 1963 the circumstances for its restrictions were prioritised over the circumstances that could allow the enjoyment of freedom.<sup>1125</sup>

Press freedom that completes and allows the use of the freedom of expression, is not absolute just like the freedom of expression. Freedom of the press, which creates public opinion and which has a strong effect on people's thoughts and ideas, does not mean that expressions and/or writings which disturb the society's peace and welfare and put the state's security in danger will not be punished, it only means that the press cannot be subject to any prior restrictions. In order to fulfil its social duties, besides the requirement of freedom, the press must act with consciousness of responsibility. A press that lack of such responsibility, as any irresponsible power, would finally degenerate and become a power that creates danger for national security and weaken public and social order. However, the

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<sup>1122</sup> *Feldek/Slovakya* App no. 29032/95 (ECtHR, 12 July 2001) para. 83

<sup>1123</sup> AYM, E. 2014/12151, K.T. 04/06/2015 para. 70

<sup>1124</sup> Ibid. para. 72

<sup>1125</sup> Peri Uran, 'The Approach of the European Court of Human Rights and the Turkish Constitutional Court to Freedom of Press' (2015) 120 Turkish Bar Association Journal 87, 105

freedom of thought and press is sacred, the lawmaker in any case as states above has the obligation to protect the public order and national security by taking the necessary precautions.<sup>1126</sup>

However, AYM's verdict on Coskun's case shows how the Court now indicate the positive and negative responsibilities of the state for the protection of the freedom of expression generally and the freedom of the press specifically in this case. Therefore, public authorities are expected not to limit or prohibit the expression and dissemination of thought or apply sanctions unless it is necessary under their negative responsibility.<sup>1127</sup> For the positive responsibility of the state, the Court refers to the ECtHR decision in *Ozgur Gundem v Turkey* to express that the state must take the necessary precautions for the real and effective protection of free expression and the press.<sup>1128</sup> The Court follows ECtHR's *Handyside v UK* decision explaining that "necessity in a democratic society" requires the limitations on the freedom of expression and press by repressive or temporary injunction to be the last resort. Therefore, if the repressive measures do not fulfil a public necessity, or are not a last resort, they cannot be considered "necessary in a democratic society."<sup>1129</sup> Following ECtHR's *Handyside v UK* judgement, the Court states that as a result of the previous statement, it is possible to argue that freedom of expression, which is one of the founding pillars of a democratic society, is applicable not only to those expressions that are harmless but also to those that criticise a part of the society or the state — freedom to express striking and disturbing commentary is a requirement of democratic society that incorporates pluralism, toleration, and broadmindedness.<sup>1130</sup>

Cihaner and Coskun's cases show the lack of toleration for political criticism: in the First Instance Court's verdict (as in Cihaner's case, in where the court judged for the protection of the free expression of the press) and in Coskun's case, where despite the obvious conditions that allowed a wider margin of criticism (Gezi protests and the current interest of the society in the issue), the court ruled for the conviction of Coskun. The First Instance Court decision is ironic when considering that the subject matter is criticism towards the government.

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<sup>1126</sup> AYM, E. 1963/16, K. 1963/83, K.T. 08.04.1963 Author's translation.

<sup>1127</sup> AYM, E.2014/12151, K.T. 04/06/2015 para. 46

<sup>1128</sup> Ibid.

*Ozgur Gundem v Turkey* App no. 23144/93 (ECtHR, 16 March 2000) para. 43

<sup>1129</sup> AYM, E.2014/12151, K.T. 04/06/2015 para. 51

*Handyside/United Kingdom* App no. 5493/72 (ECtHR, 7 December 1976) para. 48

<sup>1130</sup> AYM, E.2014/12151, K.T. 04/06/2015 para. 52

*Handyside/United Kingdom* App no. 5493/72 (ECtHR, 7 December 1976) para. 49

However, since 2010, when judicial reform, acceptance of the direct application to AYM, and having to go through AYM to exhaust the ordinary legal remedies before application to ECtHR had commenced. The Court's approach freedom of the press has been improving; this can be observed in the two recent cases examined above, where the Court took ECtHR case law as a benchmark. It is possible to argue that since the acceptance of individual application, AYM has been more "rights" oriented,<sup>1131</sup> and despite the previous decisions, which failed to follow any international institutions' decisions, there is improvement given that AYM has started to deal with individual applications. Nevertheless, Sirin argues that AYM case law still lacks substantial knowledge of human rights institutions, especially on United Nations mechanisms, despite AYM following more ECtHR decisions since 2010.<sup>1132</sup>

Similar to Sirin's statement, it is fair to argue that the positive changes only took place on the Constitutional Court level, for the First Instance Courts continue to convict journalists on the basis of the arbitrary use of TCK and TMK as there is no binding legal provision that prevents the First Instance Courts from non-compliance with ECtHR jurisprudence. This demonstrates the need for a regulation for the First Instance Courts to follow in order to ensure coherence.

#### 5.4.3 ECtHR approach to freedom of the press

The most important feature of the ECHR is the control mechanism that it brings alongside the rights that are provided by the convention. ECtHR is one of the crucial mechanisms that would sustain such a control. ECtHR accepts individual applications provided within the framework of the ECHR. This is of great importance when it is considered that ECHR is given the priority against the domestic law in Turkey by the Turkish Constitution: "In the case of a conflict between international agreements, duly put into effect, concerning fundamental rights and freedoms and the laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail."<sup>1133</sup> Therefore, being the judicial authority of the ECHR, ECtHR's case law is of utmost importance for the law and its application in Turkey.

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<sup>1131</sup> Ergun Özbudun, *Türkiye'de Demokratikleşme Süreci: Anayasa Yapımı ve Anayasa Yargısı/Democratisation Process in Turkey: Making of the Constitution and Constitutional Jurisdiction* (İstanbul: İstanbul Bilgi Üniversitesi Yayınları, 2014) 188

<sup>1132</sup> Tolga Sirin, 'Ucuncu Yılda Bir Bilanco: Türkiye Anayasa Mahkemesi'nin Bireysel Basvuru (Anayasa Sikayeti) Usulunun ve Kararlarının Değerlendirilmesi/Balance Sheet in the third year: Evaluation of Individual Application to the Turkish Constitutional Court Procedures and Decisions) Marmara University Law Faculty 1, 3

<sup>1133</sup> The Constitution of the Republic of Turkey 1982 no. 2709 (11/7/1982) s 3(90)

As opposed to the Turkish courts, ECtHR shows a consistent approach toward cases in relation to freedom of the press versus national security, and political toleration towards opposition. Salihpasaoglu argues that these antagonistic forces are the main reasons why Turkey restricts freedom of the press, especially when looking at the legal restrictions imposed on press freedom specified under Turkish Constitution Articles 26 and 28 as well as Article 10 of the ECHR.<sup>1134</sup> It is essential to analyse the view taken by the judiciary on this subject. On this basis, the current section aims to demonstrate the application of the above mentioned broadly drawn laws by the First Instance Courts and the Turkish Constitutional Court against the press. It observes the different approaches among the First Instance Courts, the Constitutional Court and the ECtHR's to press freedom in Turkey.

In cases where disturbing public expressions do not promote armed insurgency or revolt, but are nevertheless censored under the exception of “national security”, ECtHR found Turkey in violation of Article 10 as observed in *Sener v Turkey*<sup>1135</sup>, in which ECtHR states that despite the acceptance of the aggressive phrases, the subject article when analysed as a whole does not promote or motivate to violence or does not encourage to hatred, revenge or armed resistance. In its verdict, ECtHR highlights that the article instead analyses the Kurdish problem from an intellectual point of view that promotes the settlement of the long standing armed conflict.<sup>1136</sup> Istanbul State Security Court's reasons for convicting Sener were found insufficient by the ECtHR; Sener was convicted for disseminating separatist propaganda only for claiming that Kurdish origin citizens in the South East Turkey (which was defined as “Kurdistan” in the article) were under oppression. Therefore, the interference to her right to free expression by the Turkish court was found disproportionate by the ECtHR. ECtHR highlighted that the people were deprived of their right to information because of the censorship of a different perspective regarding the South East Turkey.<sup>1137</sup> By looking at Sener's case from her point of view, ECtHR states that despite her suspended sentence, because the national authorities had not provided a remedy or acknowledged the breach of the Convention,<sup>1138</sup> and because she continued to feel threatened by a heavy penalty<sup>1139</sup> (the Istanbul State Security Court stipulated that she would not commit any further offence within the next three years and

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<sup>1134</sup> Yaşar Salihpaşaoğlu, *Türkiye’de Basın Özgürlüğü/Freedom of the Press in Turkey* (Seçkin Yayınevi 2007) 44

<sup>1135</sup> For the details of the case see Chapter 2.

<sup>1136</sup> *Sener v Turkey* Application no. 26680/95 (ECHR, 18 July 2000) para. 45

<sup>1137</sup> *Ibid.* para. 45

<sup>1138</sup> For similar judgement see *Öztürk v. Turkey* no. 22479/93 (ECtHR, 28 September 1999) para. 73

<sup>1139</sup> For similar judgement see *Erdoğan and İnce v. Turkey* App no. 25067/94 and 25068/94 (ECtHR, 8 July 1999) para. 53

suspended the imposition of the final sentence), Sener was limited in her potential to further discuss an alternative view that could benefit Turkey.<sup>1140</sup> In Sener's case, ECtHR finally decided that there was a lack of proportionality in Sener's conviction and a violation of Article 10.<sup>1141</sup>

A similar verdict is observed in *Ceylan v. Turkey* where ECtHR states that “the applicant was writing in his capacity as a trade-union leader, a player on the Turkish political scene, and that the article in question, despite its virulence, does not encourage the use of violence or armed resistance or insurrection. In the Court's view, this is a factor which it is essential to take into consideration,”<sup>1142</sup> for Ceylan was convicted under Turkish Penal Code 311 (2)<sup>1143</sup> and 312<sup>1144</sup> on the basis of his article, titled “The time has come for the workers to speak out – tomorrow it will be too late” in the issue of *Yeni Ulke* (New Country), stating that State terrorism is intensifying in the South East Turkey and that “anyone who examines the Prevention of Terrorism Act closely can easily see that it is aimed at crushing not only the struggle of the Kurdish people, but the struggle of the whole working class and proletariat for subsistence, for freedom and for democracy.” Ceylan therefore argues that the proletariat class must react against this restrictive law and State terrorism.<sup>1145</sup>

ECtHR followed a similar approach in its verdict in *Erdogdu and Ince v Turkey* whereby the applicants were charged with disseminating propaganda under Article 8 of the Anti-Terror Law<sup>1146</sup> by the Istanbul National Security Court on the basis of carrying out an interview that included discussions for the “Kurdish reality” and of using the term ‘Kurdistan’ in its argument that the

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<sup>1140</sup> *Sener v Turkey* Application no. 26680/95 (ECHR, 18 July 2000) para. 46

<sup>1141</sup> *Ibid.* para. 47

<sup>1142</sup> *Ceylan v Turkey* Application no. 23556/94 (ECHR, 8 July 1999) para. 36

<sup>1143</sup> Public indictment to commit an offence:

Where incitement to commit an offence is done by means of mass communication, of whatever type – whether by tape recordings, gramophone records, newspapers, press publications or other published material – by the circulation or distribution of printed papers or by the placing of placards or posters in public places, the terms of imprisonment to which convicted persons are liable shall be doubled.

<sup>1144</sup> Non-public incitement to commit an offence:

A person who expressly praises or condones an act punishable by law as an offence or incites the population to break the law shall, on conviction, be liable to between six months' and two years' imprisonment and a heavy fine of from six thousand to thirty thousand Turkish liras.

A person who incites the people to hatred or hostility on the basis of a distinction between social classes, races, religions, denominations or regions, shall, on conviction, be liable to between one and three years' imprisonment and a fine of from nine thousand to thirty-six thousand liras. If this incitement endangers public safety, the sentence shall be increased by one-third to one-half.

The penalties to be imposed on those who have committed the offences defined in the previous paragraph shall be doubled when they have done so by the means listed in Article 311 (2).

<sup>1145</sup> *Ceylan v Turkey* Application no. 23556/94 (ECHR, 8 July 1999) para. 8

<sup>1146</sup> For full text article see Chapter 2.

withdrawal of Turkish soldiers from South East Turkey meant the formation of a new state.<sup>1147</sup> The court highlighted the importance of the right to information in relation to freedom of the press and ruled that government cannot use criminal law to censor the press with the aim to protect national security and territorial integrity.<sup>1148</sup>

ECtHR consistently emphasises the importance of the freedom of the press in a democratic society as a condition for democratic progress as well as the self-fulfilment of the individuals.<sup>1149</sup> The ECtHR's embodiment of press freedom as it established its case law, despite the fact that ECHR does not regulate press freedom in a separate article as the Turkish Constitution does, is astonishing. ECtHR states that the exceptions to Article 10's second clause must be applied "strictly" and "convincingly" in consideration of pluralism, tolerance, and broadmindedness as foundations of democracy, which consequently will allow not only inoffensive expressions but also the ones that "shock", "offend", and/or "disturb."<sup>1150</sup> ECtHR also rules that such restrictions, despite the "margin of appreciation" held by the contracting states must be "necessary" determined by "pressing social need". Case law on the restriction of the press/free expression also includes the criterion of "proportionality", which must be evaluated based on the overall circumstances taken into account.<sup>1151</sup>

More specifically, *Karatas v Turkey* is based on a poem published by Karatas that includes expressions such as "let us go...children of the unyielding...we have heard there is a rebellion in the mountains...can we hear and do nothing?...to the majestic mountains that will lead us to freedom..in these mountains...freedom is blessed with death, I invite you to die."<sup>1152</sup> Istanbul National Security Court based its judgement of Karatas' conviction under the Anti-Terror Law Article 8 for disseminating propaganda "against the indivisible unity of the State."<sup>1153</sup> ECtHR considered the circumstances that require the government to act accordingly in order to prevent terrorism, which has been ongoing in Turkey for the last three decades, and stated that "it takes note of the Turkish authorities' concern about the dissemination of views which they consider might

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<sup>1147</sup> *Erdoğdu and İnce v. Turkey* App no. 25067/94 para. 9

<sup>1148</sup> *Erdoğdu and İnce v. Turkey* App no. 25067/94 and 25068/94 (ECtHR, 8 July 1999) para. 54

<sup>1149</sup> *Zana v Turkey* App no. 69/1996/688/880 (25 November 1997) para. 51

For similar judgement see *Surek v Turkey* App no. 26682/95 (ECtHR, 8 July 1999) paras. 39 and 58

<sup>1150</sup> *Zana v Turkey* App no. 69/1996/688/880 (25 November 1997) para. 51

For similar judgement see *Surek v Turkey* App no. 26682/95 (ECtHR, 8 July 1999) paras. 39 and 58

<sup>1151</sup> *Ceylan v. Turkey* App no. 23556/94 (ECtHR, 8 July 1999) para. 49

<sup>1152</sup> *Karatas v Turkey* App no. 23168/94 (ECtHR, 8 July 1999) para. 10

<sup>1153</sup> For full text article see Chapter 2.

*Karatas v Turkey* App no. 23168/94 (ECtHR, 8 July 1999) para. 10

exacerbate the serious disturbances that have been going on in Turkey.”<sup>1154</sup> Even though the poem include aggressive expressions, the ECtHR determined that the small audience the publication was addressing and the poem’s artistic tone was more of “an expression of deep distress in the face of a difficult political situation” than a call for violence.<sup>1155</sup> Therefore ECtHR found Karakas’ conviction disproportionate and not “necessary in a democratic society,” and found in violation of Article 10 of the ECHR.<sup>1156</sup>

In *Lingens v Austria*, ECtHR emphasises the limits imposed on the press to criticise politicians stating that the press — despite its responsibility to act according to the state interests and security — encompasses the role of informing the society on the government affairs, the actions political leaders and other government officials. Therefore, the press is entitled to disseminate information, specially on the political issues even if disharmonious.<sup>1157</sup> This is where the ECtHR points out the “watchdog” role of the press for the first time: “the press performs its task as purveyor of information and public watchdog.”<sup>1158</sup> It is through this kind of information that the press can serve the proper functioning of democracy.<sup>1159</sup> The dissemination of such information enables the public to form opinions and take active part in the decision-making process. ECtHR rules that governments must be more tolerant towards criticism as political processes and expressions are of public interest as democratic systems require close investigation of government actions.<sup>1160</sup> In that regard, the ECtHR in *Lingens v Austria* emphasises the limits of prohibitive criticism against politicians:

Freedom of the press furthermore affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders. More generally, freedom of political debate is at the very core of the concept of a democratic society which prevails throughout the Convention. The limits of acceptable criticism are accordingly wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and

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<sup>1154</sup> *Karatas v Turkey* App no. 23168/94 (ECtHR, 8 July 1999) para. 51

<sup>1155</sup> *Ibid.* para. 52

<sup>1156</sup> *Ibid.* para. 54

<sup>1157</sup> *Lingens v Austria* App no. 9815/82 (ECtHR, 8 July 1986) para. 41-42

*Sener v Turkey* Application no. 26680/95 (ECHR, 18 July 2000) para. 41

<sup>1158</sup> *Lingens v Austria* App no. 9815/82 (ECtHR, 8 July 1986) para. 44

<sup>1159</sup> *Ibid.* para. 41

<sup>1160</sup> *Lingens v Austria* App no. 9815/82 (ECtHR, 8 July 1986) para. 42

For similar judgement see *Surek v Turkey* App no. 26682/95 (ECtHR, 8 July 1999) para. 61

knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance.<sup>1161</sup>

The ECtHR's verdict in *Incal v Turkey* demonstrates that criticism of the government and politicians must be handled by the governments in an appropriate manner whereby the reaction does not exceed the expression made by the individuals; governments should use other means than criminal proceedings to deal with opposing ideas and expressions that do not comply with their own.<sup>1162</sup> A similar decision was made by ECtHR in *Thoma v Luxembourg* where the court stated that, based on the establishment of "pluralism, tolerance and broadmindedness", Article 10 (2) of the ECHR was applicable to "information" or "ideas" that "offend, shock and disturb" in order to reach the levels of a "democratic society."<sup>1163</sup>

Based on the information provided in Chapter 4 that Erdogan and the AKP government perceive criticism as a "personal attack", that during his duty as a prime minister (then as a president) he led the biggest censorship on the press in modern Turkish history,<sup>1164</sup> it is important to examine ECtHR case law, specifically its limits on criticising politicians, and analyse what sort of hierarchy is followed by the court for the levels of criticisms toward political figures and the government.

In that regard, in *Castells v Spain* ECtHR states that the permissible limits for criticising the government are wider than the limits for criticising private individuals.<sup>1165</sup> This statement is repeated in *Surek v Turkey*<sup>1166</sup> and in *Lingens v Austria*: "the limits of acceptable criticism are accordingly wider as regards to a politician rather than a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and act by

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<sup>1161</sup> *Lingens v Austria* App no. 9815/82 (ECtHR, 8 July 1986) para. 42

<sup>1162</sup> *Incal v. Turkey* App no. 41/1997/825/1031 (ECtHR, 9 June 1998) para. 54

<sup>1163</sup> *Thoma v Luxembourg* App no. 38432/97 (ECtHR, 29 June 2001) para. 44

<sup>1164</sup> Gazeteciler, 'Basbakan gazetecilere 5 yilda kac dava acti?/How many lawsuits were brought by the prime minister against the journalists in the last 5 years? gazeteciler.com (1 November 201) <<http://www.gazeteciler.com/gundem/basbakan-5-yilda-gazetecilere-kac-dava-acti-58234h.html>> accessed on 12 December 2013

<sup>1165</sup> *Castells v Spain* App no. 11798/85 (ECtHR, 23 April 1992) para. 46

<sup>1166</sup> *Surek and Ozdemir v Turkey* App no. 23027/94 and 24277/94 (ECtHR, 8 July 1999) para. 60

both journalists and the public at large, and he must consequently display a greater degree of tolerance.”<sup>1167</sup>

The specific example of Erdogan’s lack of toleration for critical comments is observed in *Tusalp v Turkey*. Erbil Tusalp, a journalist/author who had been sued for damages by Erdogan for his two articles (namely “Consistency” and “Get well soon” in 2005 and 2006 during which Erdogan was the prime minister) with the allegation that they violate Erdogan’s individual rights. The Turkish Courts decided that “permissible levels of criticism” were exceeded and convicted Tusalp for 10.000 Turkish Lira to be paid to Erdogan. In its judgement, ECtHR stated the wider margin of toleration that the politicians should have and highlighted the importance of the press in a democratic society, whose expressions of “exaggeration and provocation” are protected. Therefore, the ECtHR, based on its case law stated above, rejected the Turkish Court’s allegation of Tusalp’s violation of a “permissible level of criticism.”<sup>1168</sup> ECtHR stated that ECHR Article 10 includes outrageous, shocking, and disturbing expressions, which are the requirements of the pluralism, tolerance and broadmindedness, necessary in a democratic society.<sup>1169</sup>

The exceptions stated in Article 10 of the ECHR which were conceived in generic terms give the ECtHR a great deal of judicial discretion. This allows the ECtHR to specify the reasons for restricting freedom of the press depending on the circumstances of the cases, which attributes significant importance to its case law that finally sets the principles for the basis of restrictions. When compared with Turkey’s judicial approach to freedom of expression, it is observed that ECtHR’s use of exceptions for the restriction of the press depend on a narrow interpretation and these restrictions leaving no room for doubt on the impartiality of the ECtHR. Because the press is given the watchdog role, the exceptions provided in Article 10 of the ECHR are being applied with utmost scrutiny in order to respect the right to free expression of the press as well as the right to information. Therefore, the ECtHR holds the final judgement on whether the rights of the press have been restricted in proportionality and with a legitimate aim and whether the restrictions to freedom of the press comply with the protection provided in the ECHR Article 10.

On the other hand, the notion of judicial independence and impartiality has been shaped under the military mindset of the 1982 Constitutions (leading to the continuous application of non-

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<sup>1167</sup> *Lingens v Austria* App no. 9815/82 (ECtHR, 8 July 1986) para. 42

<sup>1168</sup> *Tusalp v Turkey* App no. 32131/08 and 41617/08 (ECtHR, 21 May 2012) paras. 44-45

<sup>1169</sup> *Ibid.* para. 48

justifiable decisions of judges in Turkey under the influence of the political ideology prioritising state and national security), which led to the acceptance of juristocracy<sup>1170</sup> in Turkey.<sup>1171</sup> This resulted in an ideological and political impetus to govern the judicial decisions that do not comply with ECtHR case law as well as the failure to comply with the ECtHR verdicts on Turkey.

Finally, analysis of the hindrances experienced by the press in Turkey due to the issues in judicial independence, assists understanding the importance of looking at the situation of the press in Turkey through the role political changes play on the development of the press, rather than questioning the democratic situation of Turkey by examining the role of the press in its democratisation. According to Jiafei Yin:

The media systems in transition reflect the problems of those societies undergoing major transformations - rough politics in the fight for the power vacuum, partisan press, intense competition because of the new freedom, corruption or lack of a strong and independent judiciary system, weak financial foundation for the media, and lack of training of the journalists. Democracy is still young in these societies; it will take time for a democratic system to mature.<sup>1172</sup>

Yin's argument supports the need to improve the democratic conditions in order to improve the conditions of the press, and a strong judicial system based on impartiality and independence is key for its achievement.

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<sup>1170</sup> George I. Lovell and Scott E. Lemieux, 'Assessing Juristocracy: Are Judges Rules or Agents' (2006) 65:100 Maryland Law Review 100-114

<sup>1171</sup> Ozan Erozdin, Umit Kardas, Ergun Ozbudun and Serap Yazici, 'Yargisal Dugum: Turkiye'de Anayasa Reformuna Iliskin Degerlendirme ve Oneriler/*Judicial Knot: Evaluation and Suggestions on the Constitutional Reform in Turkey*' (TESEV, 2015) Demokratiklesme Programi Siyasal Raporlari Serisi Yargi Reformu <[http://tesev.org.tr/wp-content/uploads/2015/11/Yargisal\\_Dugum\\_Turkiyede\\_Anayasal\\_Reforma\\_Iliskin\\_Degerlendirme\\_Ve\\_Oneriler.pdf](http://tesev.org.tr/wp-content/uploads/2015/11/Yargisal_Dugum_Turkiyede_Anayasal_Reforma_Iliskin_Degerlendirme_Ve_Oneriler.pdf)> accessed 4 February 2015, 30

<sup>1172</sup> Jiafei Yin, 'Beyond the Four Theories of the Press: A New Model for the Asian & the World Press' (2008) The Association for Education in Journalism and Mass Communication 20

## 5.5 Conclusion

Impartiality and independence of the judiciary is necessary for it to fulfil its role in a democratic society.<sup>1173</sup> Recent legal regulations in Turkish judiciary's independence have become controversial; the inconsistency of judgements on politically influenced cases also casts gloomy shadow on the judiciary's impartiality when compared with the ECtHR jurisprudence, which provides consistency unlike the Turkish courts' decisions.

The organisation of the judiciary therefore has a direct effect on the application of the statutes, which are written in vague language. Unless there is a transformative reform on the organisation of the judiciary, legal amendments that are made in accordance with the reform process in Turkey, there will be no grounds for the reliable applicability of these changes. In that regard, HSYK holds a critical position for the independence of the judiciary as well as the application of legal reforms.

Arbitrary judgements for detentions — even in situations where the law does not oblige the judges — and the vague application of the Turkish Penal Code and the Anti-Terror Law by the Turkish courts (failing to comply with the ECtHR case law), are the kinds of problems that cannot be solved only by making amendments to legislations. The judiciary must be strengthened, independence of the judges and prosecutors must be ensured, but most crucially, the mentality of the judges that prioritise the security and interest of the state rather than individual rights and freedoms and their approach towards the importance of a free press in a democratic society must change. Finally, it is observed by this chapter that freedom of the press needs highlighting and the perspective of the judges in Turkey must change in favour of human rights and freedoms that protect the individuals rather than the state.

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<sup>1173</sup> Christopher M Larkins, 'Judicial Independence and Democratisation: A Theoretical and Conceptual Analysis' (1996) 44 *The American Journal of Comparative Law* 606

## Chapter 6 - Recommendations and Conclusion

### 6.1 Introduction

By examining the legislation limiting freedom of the press in Turkey — through a historical analysis of the deeply ingrained political ideology's role in affecting the long-standing problems encountered by the press — the thesis has addressed two main research questions: (1) what is the role of politics on the censorship of the press in Turkey? and (2) what legal and organisational changes are required for the legal protection of the press from political intervention? The answer to the first question is based on the socio-legal approach to providing a unifying framework of the legal and political issues hindering freedom of the press in Turkey that reviews the political history of Turkey and the evolution of related legislation that together reflect the political changes affecting the present situation. The answer to the second question is based on the use of a doctrinal methodology, focusing on primary sources in a detailed analysis of the law in action and its evolution over time. Therefore, as well as concentrating on the current issues and debates, the thesis aims to provide a historical account of the changes that gave rise to them.

This research has brought to light the most frequently used legislation for censoring the press, the gaps in the Turkish Penal Code and Anti-Terror Law (in relation to the Turkish courts' application of these controversial legislative provisions and approach to freedom of the press), and the problems encountered by the press based on the broadly drawn statutes mentioned above. The thesis has highlighted the urgent need for the government to undertake immediate reforms. For changes to the Turkish Penal Code and Anti-Terror Law have been mostly cosmetic and based on the government's will to continue using national security as one of the main reasons for censoring the opposition press — driven by its lack of toleration to criticism.

By way of this research, foreign/external solutions, such as the changes contingent on Turkey's EU membership process, have been demonstrated to be positive yet altogether insufficient for the improvement of press freedom in the country. Internalisation of human rights and a change in the prioritisation of individual rights and freedoms over state security must be prioritised. Even though eminent authors, human rights organisations, and scholars have suggested recommendations, the recommendations provided herein are practical and workable on the basis of this research. Therefore, this research has highlighted the necessity for legal, political, and judicial changes to take place concomitantly.

## 6.2 Need for amendments to the Constitution

This research recommends that — to correct the interrelated problems experienced in the domain of human rights in Turkey and specifically to resolve the problems experienced by the press — the constitution that is being drafted by the government<sup>1174</sup> must be freed from the mindset of the military regimes and must be prepared in a manner that respects and prioritises the protection of the free expression of the minority, and in this case, journalists of minority groups. In the *Introduction* section of the new Constitution, the government should explicitly recognise press freedom as an indispensable human right that is a must for a functioning democracy. Because legal positivism is commonly applicable among the Turkish courts, the establishment and sustainment of freedom of the press as a legal right in the Constitution may be a way for the judges to be legally bound to apply it in its interpretation of press related cases.

Broadly drawn exceptions to freedom of expression and the press in Articles 26 and 28 must be amended with the provision of more precise definitions to freedom of expression and the press.

## 6.3 Need for amendments to the Turkish Penal Code

Articles 125, 135, 214, 215, 220, 226, 285, 299, 314, and 318 of the Turkish Penal Code must be amended in light of the ECtHR judgements and on the basis of universal standards of free expression in a manner that would restrict the arbitrary use of these provisions for the censorship of the press.

Article 288 of the Turkish Penal Code must be amended — a definition of what the article means by “influencing the prosecutors and judges” and a clause protecting the free expression of the press by disseminating information that is of public interest must be added in order to prevent restrictions to the people’s right to information by silencing the press through penalisation for attempts to influence a fair trial.

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<sup>1174</sup> Anadolu Agency, ‘Turkish PM reveals timeframe for new draft constitution’ *Anadolu Agency* (15/4/20016) <<http://aa.com.tr/en/turkey/turkish-pm-reveals-timeframe-for-new-draft-constitution/555839>> accessed 17 April 2016

Article 216 of the Turkish Penal Code which brings the criteria of forming “an open and clear threat for public security” for penalisation of provoking a group of people be rancorous or hostile in its first clause, must be included as a clear cut standard for the whole article including its second clause, which specifies “openly humiliating another person”. This is one of the articles that requires a clear definition of the crime as it is intensively used for criminalising journalists.

Despite human rights organisations’ suggestions to provide appropriate training to prosecutors and judges for the application of Article 301 in compliance with the ECtHR case law, based on the case examples analysed in Chapter 2 and Chapter 4, the amendment to TCK Article 301 was not an effective solution, for the journalists are still being arrested mostly based on this article<sup>1175</sup> and the broadly drawn Anti-Terror Law. Therefore, this research recommends that the article must be abolished altogether, and training programs for prosecutors and judges must address a specific understanding of freedom of expression and the press in compliance with ECHR principles.

## **6.4 Need for Amendment to the Anti-Terror Law**

The Anti-Terror Law must not be used generously by the judges to silence the opposition press. Even after the amendments that took place under the name of democratic reform packages during the EU membership process, the Anti-Terror Law has experienced only cosmetic changes because of the government’s lack of genuine commitment to internalising human rights. The changes are merely theoretical where its practical application has been overlooked. As a result, its broadly drawn language has been a tool to censor the press. Because the limited steps do not provide a resolution to the elemental problems occurring from a Constitutional and judicial system that allows the political abuse of the statute, one can argue that the long standing Anti-Terror Legislation written in vague language should be abolished altogether. However, considering the negative repercussions such a move may have on the protection of national and state security. Giving the continual security problems experienced in the South East of Turkey, this study suggests that the definition of “terrorism” must be clearly made, in a way that would not create any doubt whether a given action falls within the limits of its definition. Rather than broadly drawn legislative provisions that allow a great deal of interpretation by the judges, which is the current state of the

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<sup>1175</sup> Jahnisa Tate, ‘Turkey’s Article 301: A Legitimate Tool for Maintaining Order to a Threat to Freedom of Expression?’ (2008) 37:1 Georgia Journal Of International and Comparative Law 181-218

Turkish Penal Code and Anti-Terror Law, clear and explicit codification in these legislations would limit the arbitrary judiciary decision-making.

## 6.5 Judicial training

The judicial approach to press freedom in the name of state security has been demonstrated as one of the most controversial reasons for failure of the reforms. Considering that judges receive no specific training for dealing with cases of human and fundamental rights and freedoms, there is an urgent need to provide intense and continuous training on how to approach violations of freedom of expression of the press. Specific training on freedom of expression and the press must be provided to the judges in the Turkish Constitutional Court in order to allow the implementation of the universal criteria for protecting freedom of expression and the press in their judgements. The training of the first instance judges should be updated every year in light of the recent ECtHR jurisprudence and AYM case law take place on periodic basis in order to bring coherence to the first instance court rulings based on ECtHR and AYM case law rather than the political affiliations of the case. The training must prepare the judges to internalise the criteria of the ECtHR, namely “necessity in a democratic society” and “existence of a legitimate aim”. Their opinions should be based on the principles set forth in the ECHR. Judges should be trained to take these criteria into consideration in each and every single case on the basis of the unique characteristic of the case and to respect the suspects’ right to be released pending a trial. Internalisation of the ECtHR case law must take place both in the First Instance and the Constitutional Courts; restrictions to press freedom should be applied as an exception, not as a rule on its own. Fundamentally, judges must be trained to approach opposition not as a threat but a necessity in a democratic society: therefore judges must be trained specially to aim for a “rights based” approach in their rulings. Besides, the “positivist legal perspective” that is used in human rights training may be switched to a human rights training that is mostly based on the philosophical foundations of human rights.

Law faculties in general should have obligatory “natural law”<sup>1176</sup> modules where the concept of human rights is examined from a philosophical angle with the aim of forming the basis for the acceptance of freedom of expression and press as a fundamental right for the improvement of society. This may positively shape the judicial approach by valuing human rights in general and

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<sup>1176</sup> John Finnis, *Natural Law and Natural Rights* (Oxford University Press 2nd ed., 2011)

freedom of the press specifically rather than perpetuating the general judicial approach that has been shaped by 1961 and 1982 military mindset. A clear realisation, must occur in the judges and prosecutors on the drawbacks brought by the political ideology that prioritises state security and interest over individual rights and freedoms. In that regard, intensive and continuous human rights training must be provided for judges and prosecutors that specifically concerns the importance and role of a free press in a democratic society. In this way, rule of law may be respected and ideological motivations may hold less space in judicial decisions in general. An underlying reason for this recommendation is the will to propose a change in legal education that will allow the creation of a judicial mindset that respects human rights before any other political motivations — such a paradigm shift would finally restore faith in a judiciary that has been weakened by recent cases (i.e. Ergenekon) and assist in eliminating the Turkish “Juristocracy”.<sup>1177</sup>

## 6.6 Improving judicial independence and impartiality

The absence of assurance for judicial independence against the legislative, executive, and media powers and the reflection of this problem in judicial decisions may be settled by the reorganisation of the HSYK. Therefore, this thesis recommends that the formation of the HSYK must be reorganised in a manner that curbs its duties and authorities away from political influences. This may be achieved by removing of the Minister of Justice and Undersecretary of the Ministry of Justice from the Board in order to minimise the risk of political control of the Board. In addition to that, removing the authority of direct or indirect election of the Board members by the legislative or executive power — in this case the President — might also assist in the eliminating political effects on the judiciary.

In addition to institutional changes, creating an awareness among the public of the importance of an independent and impartial judiciary for the protection of their individual rights and freedoms would also benefit one of the pillars of democracy — freedom of expression and the press.<sup>1178</sup> This may be possible by providing education in schools on what the universal norms of judicial independence involve. Teaching the importance of state and national security and judicial protection of the individual rights and freedoms working together to promote freedom. In sum, it is

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<sup>1177</sup> George I. Lovell and Scott E. Lemieux, ‘Assessing Juristocracy: Are Judges Rules or Agents?’ (2006) 65:100 Maryland Law Review 100 - 114

<sup>1178</sup> Judith Lichtenberg, *Democracy and the Mass Media* (Cambridge Studies in Philosophy and Public Policy, 1990)

recommended by this research that Ministry of Justice should not be able to direct the judiciary altogether.

It is also recommended by this thesis that the Turkish Constitutional Court must continue using ECtHR case law as its benchmark specially on press-related issues; however, in order to create more coherence in its judgements. The Turkish Constitutional Court must internalise universal human rights standards and take a stance in favour of press freedom based on a genuine appreciation of the role of a free press in a democratic society. In this way, impartiality of the judges may be sustained in politically motivated cases against the press.

## **6.7 Faithful Implementation of ECtHR judgements**

This research does not find that legal reforms adopted during the EU accession process have been fully implemented. Because the courts play one of the most fundamental roles in implementing the reforms, it is necessary to make the necessary legal changes for complying with ECtHR judgements. Because there are no legal provisions in Turkish law that regulate non-compliance with the ECtHR judgements, this thesis recommends that there should be a clear and coherent legislation that would oblige the courts to following ECtHR judgements consistently. In short, failure to follow ECtHR jurisprudence, is not an offence. Therefore, making clear legislation regulating non-compliance with ECtHR decisions and ensuring the country-wide application of this legislation is essential to safeguarding the rights of the journalists and thereby ensuring and sustaining the freedom of the press.

There should be willingness on the part of the government to ensure the country-wide application of this law and the willingness of the Turkish courts to interpret the law coherently; this of course depends on a coherent law conducive to the courts' interpretation. Therefore, it is recommended here that Turkish court jurisprudence should adapt Article 10 of the ECHR in its interpretations.

## **6.8 Reducing political interference into press operations**

Political interference in the functioning of the press has been restricting freedom of the press and has resulted in its political polarisation and use as a vehicle for advancing personal political interests.

The media holdings' involvement in other businesses results in their vulnerability to government pressure because of the economic reliance of these businesses on the government; media owners therefore choose to avoid oppositional coverage of news against the government<sup>1179</sup>, which mostly results in censorship and self censorship of the press. It is recommended by this research that in order to lessen (if not completely eliminate) the impact of political pressure resulting from media owners-government business relationship and causing forced resignation and the layoffs of journalists. Media ownership may be subject to legal regulation which may prevent direct or indirect government interference in press operations.

Increased awareness might lead to public demand for a freer press and protection of their right to information, by creating pressure on the media owners to provide the type of news they would like to receive which would be less politically motivated and more information oriented.

## **6.9 Strengthening journalists' unions**

There should be legal regulations for strengthening journalists' rights to become a member of the union they choose without any pressure from media owners.

It is recommended that journalists should unite in order to demand reinstatement of their union rights. Thereby establishing and sustaining their strength to resist any sort of pressure that may come from government officials, politicians or the media owners. Strengthening journalists' unions may strengthen the legal position of the journalists against forced resignation or lay offs based on their union membership.

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<sup>1179</sup> Robert W. McChesney, *The Political Economy of the Media: Enduring Issues, Emerging Dilemmas* (New York: Monthly Review Press, 2008)

## 6.10 Preventing the authoritarian tendencies of the government

Ideally, in order to improve Turkey's democratisation process, a political culture that is tolerant to criticism and opposition must be established. In order to allow the emergence of such a culture, government officials and the politicians must understand that criticism most of the time is by its very nature severe, offending, and inciting. However, they must adapt and be able to tolerate opposition rather than perceiving it as a threat that has to be suppressed and silenced. This study suggests that this is only possible through society's clear and insistent/continuous demand for democratic criteria to be established and through the increased awareness of the press's role in the formation of an arena where the public views on any topic, especially political discussions, can take place. One of the key features in an organised civil society is pluralism,<sup>1180</sup> therefore, society must be well informed by NGOs of the importance of demanding a free press, the right to information, and their democratic right to peacefully protest against the unfair treatment of journalists. Considering the positive effects of national and international political pressure on the release of imprisoned journalists, NGOs must keep monitoring the hindrances to the press in Turkey and provide support for the journalists against the pressure placed on them. Therefore, civil society and NGOs must be responsible and play a constructive role from the beginning of the process (law making process, pressure for amendments) to the end, and the emphasis must be on increasing public awareness, for the freedom of the press is closely linked to the people's right to information in a democratic society.

In that regard, it is submitted that the legal culture, specifically, the Turkish courts also play a crucial role in paving the way for the individual rights and freedoms that have been obstructed. This may be possible by switching the judicial frame of mind in Turkey, as suggested above, from prioritising state interest into aiming to protect individual rights and freedoms, which could finally limit the use of legal provisions by the government authorities and politicians to censor the press. Judges can start using their judicial discretion for the protection of human rights as well as broadening their limits. In order to do so, this research recommends the judge's use of teleological interpretation,<sup>1181</sup> which will allow them to interpret the law on the basis of what the law itself aims to regulate as well as how it will conform with the needs of time and the society. This is obviously only possible where judicial independence can be established — this is where the interlink among

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<sup>1180</sup> Siret Hursoy, 'The Paradox of Modernity in Turkey, Issues in the Transformation of a State' (2012) 68:1 *India Quarterly* 49, 62

<sup>1181</sup> Thomas Zurek and Michal Araszewicz, 'Modeling teleological interpretation' (2013) 13 *ICAIL*

the recommendations is more apparent, for no recommendation can find practical efficiency without the balanced weight of another one.

Also national legislators should take proactive steps towards making substantial changes in the legal statutes that can provide a clear definition of the broadly drawn legal provisions and provide a balance between national security and press freedom. This balance should be continuously applied by the judges, especially in cases related to the journalists' right to criticise government officials and politicians. This might lead to a political atmosphere where the press enjoys the legal protection to disseminate information freely as well as comment on government affairs, thereby serving an objective source of public opinion.

## **6.11 Role of the EU**

The EU accession process assisted legal reforms in the initial years of the AKP government, but these reforms came to a halt due to the reasons previously discussed in the scope of this thesis. Considering the EU being a catalyst in Turkey's democratisation process, the harmonisation process must be re-activated and the EU should work closely with the Turkish government in order to encourage reforms in relation to freedom of the press. This will provide the government with an incentive to carry on with the reforms, which would be supported by the public, as recommended above, as a result of creating awareness on the importance of a free press among the public.

## **6.12 Conclusion**

A balance between national security and press freedom is vital to allowing a free environment for political discussions in Turkey. This balance needs to be established through legislation that clarifies the concept of national security and judicial practice that applies this concept toward the protection of individual rights and freedoms of journalists, when in conflict with the interest of the state. Accordingly, a reduction in judicial bureaucracy would further provide judicial independence. The continual conflict in South-East Turkey arguably necessitates the continuation of the application of the Turkish Penal Code and Anti-Terror Law for limiting provocative expressions; however, this legislation is instead being used as an excuse to silence the opposition press which results in non-implementation of the legal reforms. Therefore, lawmakers

must strive for balance between freedom of the press and national security regulations, exhibiting a genuine will to take proactive steps towards improving press conditions in Turkey. This thesis focuses on the negative effects of the political ideology on the restriction of the press. Locating the source of the problem from a historical and practical angle by examining the possible ways to minimise such effects if not eliminate them.

This research concludes that because the press has been seen and used as a tool to shape society since the beginning of modern Turkey, and because of the dominant role the press played during the military intervention in support of the political ideology, the government has labelled the opposition press as a threat based on a political legacy throughout Turkish political history of perpetual press suppression. Therefore, the thesis concludes that free circulation of ideas, through a free press, is possible by seizing the political pressure of the press.

The research therefore recommends that international human rights standards must be the yard-post for devising and interpreting the law. Training programmes are therefore necessary for broadening the judiciary's approach, acknowledging the need for a free press in a democracy society and governance that facilitates pluralistic discussions and create awareness of politically important issues that affect the decision-making process of the people. This approach might also promote a toleration among the members of extreme opposite ideologies by acquainting them with each other's ideas through a free press that can serve the peace-making process rather than allowing the political ideology to suppress the opposition or minority groups. This may also allow a deeper understanding of the reasons for the inconsistencies in the application of the law and contribute to appropriate solutions.

### **6.13 Suggestions for further study**

Economic theories and aspects of the issues related to media ownership could not be elaborately discussed due to subject limitations. This generates new research questions such as: what economic regulations could be made in order to prevent political intervention by media ownership, that controls the news content in relation to the legal loopholes discussed in this thesis. Proposing a means of regulating press ownership that would eliminate its political pressure and intervention into press functioning, necessitates of an extensive research into the possibility of

making legal limitations for such ownership, considering that Turkey operates as a free market economy.

To be able to look deeper into the democratisation issue related to the freedom of the press, legal problems encountered by minority groups could be analysed starting from the establishment of the Republic in order to discuss the societal and judicial approach to the balance between the right to free expression of the journalists from minority groups and the mainstream press. Such research could allow a clearer interpretation of national security as a legal concept and might provide legal amendments that specifically target the protection of minority groups who face the most suppression.

In addition to print media, which was a focus of this thesis, further research could include other types of media, most importantly television channels in Turkey as they were observed not to have covered the biggest uprising in the modern history of Turkey, the Gezi protests. Legal restrictions on the mainstream TV coverage of issues that are of public interest could be analysed in terms of the grounds of limitations in order to see whether there are similar issues encountered by the media in Turkey overall, or if the type of restrictions are applied according to the type of information included in each media type.

Based on the censorship and self-censorship applied to the print press, further research could be made on how such restriction diverts journalists toward social media, in search of a freer platform for disseminating information. On this basis, it could be investigated whether legal limitations on journalists who operate on social media platforms take place on similar grounds; function in the same way as those imposed on print journalists.

Finally, empirical research could be undertaken whereby government officials, lawmakers, journalists, legal scholars, and media owners might be questioned on the extent to which they think political ideology to be one of the fundamental reasons for press censorship.

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