

# Freedom of Expression, Democracy and Challenges\*

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Distinguished participants,

Ladies and gentlemen,

I would like to thank Mr. Jackland, the Secretary General of the Council of Europe, for kindly inviting me to this conference and providing the opportunity to address such eminent participants.

My speech consists of two main parts. In the first part, I will try to answer the question in the subtitle of this conference. The second part of my speech is devoted to a cursory analysis of the Turkish Constitutional Court's(TCC) approach to the freedom of expression.

## **1. Freedom of expression as a precondition for democracy**

An affirmative answer to the question whether freedom of expression is still a precondition for democracy must refer to both instrumental and essential justifications. The freedom of expression is still a precondition of democracy for at least three reasons.

First of all, we must have the right to the freedom of expression because it maintains diversity and plurality, which are requirements of a democratic society. We live in a diverse society in terms of nationality, ethnicity, religion, ideology, life style and so on. Since modern democracy is and must be pluralist, it requires the cohabitation of different and often conflicting ways of life, ideas and ideologies. The freedom of expression is an effective instrument of nurturing and maintaining such a diverse and plural society and politics.

The freedom of expression is the freedom to address others. As a prerequisite of dialogue among individuals, the act of speaking renders us as interlocutors in the community. Therefore, imposing silence on someone deprives him/her of addressing others. In Lyotard's view, death sentence is evidently wrong because at the same time *"it implies the exclusion of*

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*the speaker from the speech community*".<sup>1</sup> In other words, killing means to "*refuse to others the role of interlocutor*."<sup>2</sup>

Lyotard's argument is also applicable to terrorism, which is a serious threat not only to the right to life, but also to the freedom of expression. Terror is an act of violence that excludes people from the speech community. Three days ago, once more Turkey experienced this devastating and agonising affect of terrorism. Two suicide bombers killed at least 97 civilians in Ankara. Those who were killed will never have any chance to address others. Most of them were preparing to participate in a peace rally. Terrorism imposed a dark silence on them. Therefore, combatting terrorism is a precondition of protecting the freedom of expression.

Secondly, democracy requires a free public sphere of exchange in which everybody must be able to participate by expressing their opinions. Only through a free expression of our ideas on certain policies we are able to participate in decision-making process including the process of enacting laws. Therefore, the freedom of expression is of a political value that is "indispensable to the operation of a democratic form of government."<sup>3</sup>

Finally, the freedom of expression is seen not only as a means for realising a democratic society, but also as an end in itself. This essential or constitutive justification of the freedom of expression is related to the moral responsibility of individuals. Individuals as morally responsible agents must be free to receive and express opinions.<sup>4</sup> Therefore an arbitrary restriction on the freedom of expression will violate the radical autonomy of individuals as free moral agents of a democratic society.

We value freedom of expression also because it is the sole instrument of communicating our thoughts. The act of thinking lies at the heart of human existence. Descartes's cogito which is translated as "*I think, therefore I am*" refers to this existential certainty. Long before Descartes, Mawlana Jalaluddin Rumi considered thought as the essence of a human being. He

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<sup>1</sup> Jean-François Lyotard, "The Other's Rights", Stephen Shute and Susan Hurley (eds.), *On Human Rights: The Oxford Amnesty Lectures 1993*, (New York: Basic Books, 1993), p.144.

<sup>2</sup> *Ibid.*, p.147.

<sup>3</sup> Thomas I. Emerson, *Toward A General Theory of the First Amendment*, (New York: A Vintage Books, 1966), p.10

<sup>4</sup> Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution*, (Cambridge, Massachusetts: Harvard University Press, 1996), p. 200.

states that "*man consists of thought, and the rest is nothing but flesh and bone*". As thinking and speaking beings, we need the freedom of expression to fulfil ourselves. The denial of this freedom will therefore infringe the essential nature of human beings.

## **2. Three Challenges for Freedom of Expression**

Although the freedom of expression is a precondition for democracy, it is by no means an absolute freedom. The right to the freedom of expression may be restricted on certain grounds such as the protection of the rights of others, national security and public safety.

The Turkish Constitution also stipulates that the freedom of expression and of the press may be restricted for certain reasons stated in the relevant provisions of the Constitution. In evaluating the restrictions on the freedom of expression, the TCC applies a three-level test. First of all, the Court decides whether the intervention is prescribed by law, that is by an act of parliament. Secondly, the Court examines the existence of a legitimate aim for restricting the freedom. Thirdly, the Court applies the democratic necessity test by referring to the jurisprudence of the European Court of Human Rights. The TCC has consistently pointed out that the freedom of expression constitutes one of the basic pillars of a democratic society. Therefore in order to restrict the freedom of expression, the public authority must prove the existence of a pressing social need, i.e. compelling reasons, for such restrictions.

Today's constitutional courts face three main challenges in adjudicating the freedom of expression. These challenges have been posed by (a) the protection of privacy and reputation, (b) combatting terrorism, and (c) regulating Internet.

### ***2.1 Protection of privacy, honour and reputation***

It is generally accepted that speech acts such as insult, libel, defamation and hate speech are not protected by the free speech provisions of constitutions. There is, however, no global consensus as to the legal sanctions to be imposed on these speech acts. The Turkish Penal Code, for instance, provides imprisonment for insult and defamation, even though in most cases the terms of imprisonment are either postponed or converted to a "judicial fine".

In some admissibility decisions, the TCC has referred to the Parliamentary Assembly's resolutions towards decriminalisation of defamation, and ruled inadmissibility by pointing

out the non-exhaustion of legal remedies. Accordingly, in cases of insult and defamation, civil law remedies must *also* be exhausted before lodging a constitutional complaint.<sup>5</sup>

This is not, however, applicable to cases of "hate speech", such as anti-Semitism and Islamophobia. As Jeremy Waldron put it eloquently, the restriction of hate speech aims to "protect people's dignity against assault", rather than to "prevent people from being offended".<sup>6</sup> The political reason to restrict hate speech is to provide a vulnerable group of people with a certain degree of assurance and security in a democratic society.<sup>7</sup>

The TCC differentiates between insult or defamation and "hate speech". In a recent case, where the applicant claimed that he had been subjected to "hate speech", the Court tried to clarify the boundaries of "hate speech" by referring to various instruments of international human rights law. The Court noted that in cases of "hate speech" the applicant did not have to exhaust the available civil remedies alongside the criminal procedures. However, having applied the principles to the application in question, the Court reached the conclusion that the expressions at issue could not be considered as "hate speech", because those were mere reflections in an ongoing public debate on the ideas and actions of the applicant.<sup>8</sup>

There is no doubt that the freedom of expression largely guarantees the freedom of individual to criticise thoughts and opinions of those using the public authority, who are expected to tolerate even harsh criticisms. In the Court's opinion, the freedom of political expression deserves greater protection, simply because it is "*the core principle of all democratic systems*".<sup>9</sup>

The Court has also taken up the issue of whether the fact that verdict about the applicant was postponed might render the interference as acceptable and proportionate to the legitimate aim pursued. The TCC has responded to this question negatively by stating that the possibility of being subject to sanctions in the future may create a chilling effect on authors who may refrain from expressing their opinions or engage in press activities.<sup>10</sup> The Court has reached

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<sup>5</sup> *Adnan Oktar (2)*, Application No: 2013/514, 2/10/2013, par.35.

<sup>6</sup> Jeremy Waldron, *The Harm in Hate Speech*, (Cambridge, MA: Harvard University Press, 2012), pp.105-106.

<sup>7</sup> *Ibid.*, pp.100-104.

<sup>8</sup> *Fetullah Gülen*, (Plenary), Application No: 2014/12225, 14/7/2015, par. 43-45.

<sup>9</sup> *Bekir Coşkun*, (Plenary), Application No: 2014/12151, 4/6/2015, par. 64.

<sup>10</sup> *Bekir Coşkun*, par. 70.

the conclusion that the restriction on the applicant's freedom of expression and the freedom of the press for the purpose of the "protection of the reputation" is not necessary in a democratic society.

In a recent judgment, the TCC has once again pointed out that the limits of acceptable criticism involving politicians and public officials are wider, such as a metropolitan mayor compared to private individuals.<sup>11</sup> In this case, the applicant as a radiation oncologist had published a press release criticising the quality of the drinking water provided by the Ankara Metropolitan Municipality. In turn, he had been sentenced to pay 750 TL in damages for insulting the metropolitan mayor. According to the first instance court, the applicant's expressions had reached beyond criticism, because there was no scientific certainty as to the quality of drinking water.<sup>12</sup>

The TCC rejected this argument by clarifying that the requirement of scientific certainty as a criterion to participate in a public debate would make such participation impossible. It is therefore incompatible with the requirements of open society.<sup>13</sup>

## ***2.2 Freedom of expression in an age of terrorism***

Terrorism is a most serious threat not only to the right to life, but also to all rights and freedoms, including the freedom of expression. Terrorism imposes silence on people not only by killing them but also by poisoning the democratic environment. Therefore, the expressions that incite and praise violence fall outside the scope of the freedom of expression.

Since the terrorism aims to paralyze the democratic political order and to undermine a pluralistic civil society, we are bound to combat it while protecting the basic values. We must keep in mind the following principle laid down in the Council of Europe's Guideline on Human Rights and the Fight against Terrorism: "*it is not only possible, but also absolutely*

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<sup>11</sup> *Ali Rıza Üçer(2)* (Plenary), Application No: 2013/8598, 2/7/2015, par.61.

<sup>12</sup> *Ali Rıza Üçer(2)*, par. 13, 58.

<sup>13</sup> *Ali Rıza Üçer(2)*, par. 59.

*necessary, to fight terrorism while respecting human rights, the rule of law and, where applicable, international humanitarian law.*"<sup>14</sup>

Bearing this principle in mind, the TCC tries to protect the freedom of expression even in rather difficult cases. For instance, in a constitutional complaint case, the applicant, who was the leader of a terrorist organisation, asserted that his freedom of expression had been violated, because his book had been confiscated and partly destroyed by the state authorities. In its decision, the court of first instance had ruled that the map at the cover page, the identity of the author as the leader of a terrorist organisation, and finally the content of certain pages had indicated that the book had been written to propagate the terrorist organisation in question.<sup>15</sup>

The Turkish Constitutional Court, sitting as the Plenary Court, examined each argument of the confiscation order in details. For the Court, the cover-page, the identity of the writer and certain pages of the book that seemed to incite violence could not be taken in isolation. On the contrary, the message and aim of the book had to be evaluated as a whole. Although, some pages of the book were really disturbing or even shocking to certain part of society, the bulk of the book was about a critical and historical analysis of the so-called "Kurdish problem". The author, among other things, called for a recognition of the "Kurdish reality" and for a peaceful solution of the problem without recourse to armed resistance.

The Court noted that, compared to other means of mass communication, the applicant's book aiming to describe the changing ideology of the terrorist organisation spoke to a limited group of people. It also pointed out that the copies of the book had been destroyed by the authorities in the absence of a judicial decision in that regard. Having emphasized the importance of the freedom of expression and of the press in a democratic society, the Court reached the conclusion that the confiscation of the book at issue was not proportionate with the legitimate aim of protecting national security and public order.<sup>16</sup>

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<sup>14</sup> CE, Committee of Ministers, *Guidelines on Human Rights and the Fight against Terrorism*, H (2002) 4, Strasbourg, July 2002.

<sup>15</sup> *Abdullah Öcalan* (Plenary), Application No: 2013/409, 25/6/2014, par. 14. Full text of the judgment is available in English at [www.anayasa.gov.tr/en](http://www.anayasa.gov.tr/en)

<sup>16</sup> *Abdullah Öcalan*, par. 102, 106, 112.

### *2.3 Freedom of expression in an age of Internet*

In the much-highlighted *Twitter* case, where the applicant lodged an individual application directly to the TCC, the Court first examined the question of admissibility. The Constitution and the Law on the Constitutional Court explicitly provide that all legal remedies must be exhausted before launching a constitutional complaint.

The TCC held that as a rule all legal remedies available must be exhausted before lodging a constitutional complaint. Yet, the Court also clarified that legal remedies must be effective and capable to remove violations of rights. Moreover, under exceptional circumstances where the urgent action was necessary to halt possible breaches of rights and liberties, the individual application could be declared admissible by avoiding the condition of exhaustion of other legal remedies.

The Court then declared the application admissible on the ground that the administrative courts did not provide a reasonable chance of success. On the contrary, the failure and indeed reluctance of the authorities to lift the ban on Twitter despite a stay of execution decision delivered by Ankara Administrative Court was the main reason for the admissibility. The TCC stated that the uncertainty as to the lifting of the ban affected the freedom of expression of millions of people.<sup>17</sup>

As to the merits of the case, the TCC found a violation of the freedom of expression by the public authority insofar as a blanket ban of Twitter was not prescribed by law. The Court clearly indicated that the relevant law did not authorise the administrative body (The Directorate of Telecommunication and Communication) to completely block access to Internet sites like Twitter without a judicial decision.<sup>18</sup>

In its *Youtube* judgment, the Court similarly found a violation of the freedom of expression in the ban for lacking a legal basis. Referring to the judgment of the Strasbourg Court in the case *Yıldırım v. Turkey*, the TCC this time questioned the quality of the law and stated that

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<sup>17</sup> *Yaman Akdeniz and others*, Application No: 2014/3986, 2/4/2014, par.26. Full text of the judgment is available in English at [www.anayasa.gov.tr/en](http://www.anayasa.gov.tr/en)

<sup>18</sup> *Yaman Akdeniz and others*, par.49.

the law constraining rights and liberties had to possess certainty and foreseeability. The Court declared that the relevant provisions of the Internet Law failed to meet this condition.<sup>19</sup>

In both judgments, *Twitter* and *Youtube*, the Court also stated that Internet and social media played a crucial role in democratic societies as widely used and efficient means of the freedom of expression. Given this function of Internet, the Court states that the authorities have to act carefully and responsibly in regulating Internet.<sup>20</sup>

## Conclusion

Using certain facilities provided by Internet, today terrorism poses the most formidable challenge to democracy and the freedom of expression. Perhaps the best response to terrorism is to ensure the cooperation of democratic powers in protecting and promoting the political values that terrorism aims to destroy.

We should therefore agree on the necessity of fighting all forms of terrorism while respecting the freedom of expression as the cornerstone of a democracy. Given the essential role of the freedom of expression in a democratic society, we as the judges of constitutional and supreme courts must be more vigilant against restrictive measures. Those measures may arbitrarily curb the right to the freedom of expression even if they are imposed in the name of fighting terrorism.

The freedom of expression is necessary not only for a pluralist political and civil society, but also a precondition of realising ourselves as moral agents. Let me conclude my speech by citing Rumi's insightful words about free speech. He says: "*As you are not a slave, speak like a Sultan (a King); express your opinions as you wish*".<sup>21</sup>

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<sup>19</sup> *Youtube Llc Corporation Company and others* (Plenary), Application No: 2014/4705, 29/5/2014, par.56-57. Full text of the judgment is available in English at [www.anayasa.gov.tr/en](http://www.anayasa.gov.tr/en).

<sup>20</sup> *Yaman Akdeniz and others*, par. 39; *Youtube Llc*, par.52.

<sup>21</sup> Cited in Ergin Ergül, *Rumi: A Source of Inspiration for Universal Justice and Peace*, (Konya: Konya Metropolitan Municipality, 2014), p.49.