THEORETICAL FRAMEWORK TO INTERFERE FREE SPEECH AND TURKISH CONSTITUTIONAL LAW PRACTICE*

İfade Özgürlüğünün Kısıtlanmasının Teorik Çerçevesi ve Türk Anayasa Hukukundaki Uygulaması

İlyas Fırat CENGİZ**

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ABSTRACT

The right to free speech is an indispensable part of human rights which promotes the values such as democracy, self-fulfilment, the marketplace for ideas/search for truth, tolerance, and pluralism. These values reflect the interrelation between the right to free speech and other rights. Speech act has a consequentialist nature and might create harm to or conflict with the rights of others. This means the right to free speech is a qualified right rather than an absolute one. The process of limiting free speech is not well defined and tends to bear different meanings and necessities based on the situation, time, and place. The consequentialist nature of the speech act is subject to intervention. There are various theoretical justifications for why and how to make legitimate interventions on the right to free speech. Thus, harm, danger, threat, or crime caused by speech can be prevented based on theoretical justifications such as the militant democracy, the conflict of liberties, the true threat test, the clear and present danger test, the harm principle, and criminalising speech. First, these justifications will be evaluated. Following, Turkish jurisdiction is assessed as a case considering these justifications and to analyse how Turkish constitutional law justifies restricting the right to free speech.

Key Words: Freedom of Speech, Justifications to Interfere, Turkish Constitutional Law

ÖZET

İfade özgürlüğü diğer hakların uygulanmasının ayrılmaz bir parçası olarak demokrasi, bireyin kendini gerçekleştirmesi, fikirler piyasası/doğrunun arayışı, tolerans ve çoğulculuk gibi değerlerin gerçekleşmesini sağlamaktadır. Bu değerler ifade özgürlüğü ve diğer hakların karşılıklı ilişkisini yansıtması açısından çok önemlidir. Gerek bu ilişki gerekse de ifadelerin sonuçsal doğası sebebiyle ifadeler zarar, tehlike, tehdit, suç

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** Asst. Prof., Yalova University, Faculty of Law, e-mail: ilyasfiratcengiz@hotmail.com, https://orcid.org/0000-0001-5367-8112.

veya diğer haklarla bir çatışma doğurabilmektedir. Bunun anlamı ifade özgürlüğünün mutlak bir hak olmaktan ziyade kısıtlı/şartlı bir hak olması anlamına gelmektedir. Bu minvalde meşru bir kısıtlamanın yapılabilmesi için farklı yargı sistemlerince teorik gerekçeler geliştirilmiştir. İfade özgürlüğünün sınırlandırılma süreci yer, zaman, ve durum gibi unsurlara bağlı olarak farklı anlam ve bağlamda kullanılabilmektedir. İfadelerin sonuçsal doğası gereği sınırlandırılabilir olduğu bir gerçekliktir. Tüm bu nedenlerle, ifadelerin zarar, tehlike, tehdit veya suç oluşturmaları halinde nasıl sınırlanabileceği sorunsalı militan demokrasi, özgürlükler arası çatışma, açık ve mevcut tehlike testi, gerçek tehlike testi ve zarar prensibi gibi prensipler/gerekçeler ile değerlendirilmiştir. Ayrıca Türk Anayasa hukuku bir olay çalışması olarak, tarihsel olarak öne çıkan bu prensipler/gerekçeler dikkate alınarak değerlendirilmektedir. Turk hukuk sisteminin ifade özgürlüğünü hangi teorik gerekçelere dayandırdığı ele alınması gereken bir husutur.

Anahtar Kelimeler: İfade Özgürlüğü, Kısıtlama Gerekçeleri, Türk Anayasa Hukuku

INTRODUCTION

The right to free speech is a highly valuable human right due to being a necessity of many values such as democracy, self-fulfilment, the marketplace for ideas/search for truth and tolerance, and pluralism. These are the justifications for the right to free speech and reflect the interrelation between the right to free speech and other rights such as freedom of thought, conscience, religion and association and assembly. Free speech produces individual and social good by contributing to these values. But, consequences of speech acts are not always good or positive as they might create harm, danger, threat, or crime conflicting with the rights and interests of others. Thus, free speech should be balanced against the rights and benefits of others. This means the right to free speech is a qualified right rather than an absolute one. For this reason, the right to free speech can be exceptionally limited to protect the rights of others or to resolve the conflict between the rights. There are various theoretical justifications for why and how to make legitimate interventions on the right to free speech. For instance, many jurisdictions have never considered obscenity, child pornography, hate speech and incitement to terrorism and violence as free speech due to their conflict with other rights. So *"speech ... is never a value in and of itself but is always produced within the precincts of some assumed conception of the good to which it must yield in the event of a conflict."*[1] Thus, the jurisdictions have developed prominent justifications to interfere with the right to free speech to prevent harm, danger, threat, or crime that undermines the rights of others. The US, the Council of Europe (the European Court of Human Rights), and Turkey, with their legal doctrine, have developed and used

[1] Fish, S., There's No Such Thing as Free Speech…and it's a good thing too. (New York: Oxford University Press 1994) 104

these prominent justifications even though they are not well defined and tend to bear different meanings and necessities based on the conditions, time, and place. Here the question appears to be how the right to free speech is restricted based on these theoretical frameworks and how these frameworks influence Turkish Constitutional law and justice.

This paper starts by explaining the definition of speech act and highlights its consequentialist nature, which is subject to intervention. This reveals that speech acts might cause harm, danger, threat, or crime, and the right to free speech can be restricted based on theoretical justifications such as the militant democracy, the conflict of liberties, the true threat test, the clear and present danger test, the harm principle, and criminalising speech. Both legal scholars and judges develop these theoretical justifications. In the last part of this paper, Turkish Constitutional law will be evaluated as a case study based on these theoretical justifications.

A. The Nature of Speech Act

The subject of law is the act which may cause disputes with others. Speech is one of the acts that humans conduct for many reasons to produce consequences and outcomes. Austin classifies speech acts into three categories; 1) locutionary act means saying words in the normal sense, and speech is delivered; 2) illocutionary act covers that saying words explains `the meaning of the word` on the way we use the locution; the words are used on occasion. The illocutionary act comes forward with locutionary act itself; 3) perlocutionary act is that saying words produces consequences on feelings, thoughts or actions of the listeners or the speakers with or without the intention of speakers.[2] These three acts show that using language is not only about producing meaningful sounds but also individuals can produce consequences from speech. Thus, the extent of the philosophical, societal, political, or legal meaning of free speech relies on the analysis of this act to define its scope.

Austin`s categorisation of speech act is based on a narrow sense but exchanging ideas and opinions as a communication act does not mean only words spoken and written; it is broader than words - `what is being said through behaviour`.[3] Scanlon considers the scope of speech acts comprehensively, including displays of symbols, demonstrations, musical performances and even some bombings and assassinations. In short, any attempt to propose or behave is regarded as an act of expression.[4] From the perspective of the self-expressive

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2 Austin J. L., How to Do Things with Words (OUP, 1962) 101-6.

3 Trager R. and Dickerson D.L., Freedom of Expression in the 21st Century (Pine Forge Press 1999) 18.

4 Scanlon Thomas, 'A Theory of Freedom of Expression' (1972) 1 Philosophy & Public Affairs 204-226, 206.

aspect of communication, occupation, preference, residence, hobbies, other recreations, and so on can all be considered acts of speech.[5] As a result of such a broad definition of speech act, the law on free speech appears with unclear and vague boundaries; for example, if bombings and assassinations are subject to the law on free speech, governments commit to broadly restrict freedom of speech with criminal law or anti-terror law justifications.[6]

In this matter, the principle of free speech is the core element to drive the boundaries of the meaning of the speech act. Here, the meaning of speech act adopted by jurisprudence and constitutional philosophy determines what to include in the term 'speech act' by using a categorical definition, deciding case by case, or combining both methods.[7] This determination process draws the extent of the definition of a speech act; a doctrine of freedom of speech decides to what extent a speech act can be defined in a broader or narrower sense.[8]

Also, speech acts can be categorised by the law as protected (for instance, political, artistic, commercial speech etc.) or unprotected (incitement to violence and terrorism and hate speech etc.).[9] Inciting speech, for example, is in the classification of the perlocutionary act due to its possible convincing nature. Here, the success of inciting speech depends not only on the speaker but also on the listener.[10] The speaker's intention is not core for the consequence; it may occur without the intention of the speaker or listener. In a perlocutionary act, there must be persuading and persuaded persons, and the success of the persuasion process.[11] Those elements are enough to constitute a perlocutionary act. Likewise, 'by doing x, I was doing y',[12] - persuading or convincing others by speaking. The condition for such influence/convince is the success of incitement to be a perlocutionary act; if there is no success, incitement will be an illocutionary act. Thus, the consequentialist nature of speech acts reveals that free speech can be restricted to prevent harm/crime to others.

B. Rationales to Interfere Free Speech

Generally, if an action is deemed harmful or potentially harmful, this is the most fundamental reason to restrict such action.[13] For instance, "driving

5 Schauer, Frederick, 'Must Speech Be Special' (1983) 78 Northwestern University Law Review 1284-1306, 1291.
6 Barendt Eric, Freedom of Speech (UOP, second Ed, 2005) 79.
7 Trager (n 3) 28.
8 Barendt (n 6) 2.
9 Scanlon (n 4) 207.
10 Kurzon Dennis, 'The Speech Act Status of Incitement: Perlocutionary Acts Revisited' (1998) 29 Journal of Pragmatics 571-591, 574.
11 Ibid, 576.
12 Austin (n 2) 107.
13 Greenawalt Kent, Speech, Crime, and the Uses of Language (OUP, 1989) 9.

a car 100 miles per hour is forbidden because people are likely to get hurt."[14] Therefore, freedom of action can be legitimately restricted for individual or social good. As in the case of freedom of action, freedom of speech can be restricted for legitimate reasons.[15] Here, it is essential to indicate Mill`s opinion about the limitation of freedom of action; there is a limit for any action if there is justifiable cause such as `harm to others`, `unfavourable sentiments` and being a nuisance to other people.[16] Mill justifies the limits of free speech by giving a famous example in his work `On Liberty` is:

> *"No one pretends that actions should be as free as opinions. On the contrary, even opinions lose their immunity when the circumstances in which they are expressed such as to constitute their expression a positive instigation to some mischievous act. An opinion that corn-dealers are starvers of the poor, or that private property is robbery, ought to be unmolested when simply circulated through the press but may justly incur punishment when delivered orally to an excited mob assembled before the house of a corn dealer, or when handed about among the same mob in the form of a placard."*[17]

The limits of freedom of expression are predominantly justified because speech might cause harm rather than realising democracy, self-fulfilment, tolerance, or pluralism.[18] Harmful speech, as Mill claims in his example, should be criminalised.

Justice Holmes uses the example of *"falsely shouting fire in a theatre and causing a panic"* demonstrates the potential of a speech act in the case of harm to others. A real incident occurred with the same effect: an unknown agitator shouted fire at a Christmas party by striking workers for their kids. The panic at the party caused the death of sixty-two children and eleven adults in 1913.[19] This instance shows that speech may have a consequence demonstrated by the likelihood of a casual or intended relationship between the speech and the action. Some speech content may provide a legitimate reason for restricting

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14 Ibid

15 McCloskey H.J, 'Liberty of Expression: Its Ground and Limits (I)' (1970) 13 Inquiry 219-237, 220.

16 Mill J.M., On Liberty (fist published 1859, Batoch Books 2001) 52.

17 Ibid

18 Feinberg, J., Freedom and Fulfilment: Philosophical Essays – The Moral Limits of the Criminal Law (Princeton University Press 1992) 128.

19 Schenck v. United States, 249 U.S. 47, 52 (1919), 5; Philip S. Foner, History of the Labour Movement in the United States (New World Paperbacks 1980) 221-22; Vernon H. Jensen, Heritage of Conflict (Cornell University Press 1950) 285-86; Baker C. Edwin, `Harm, Liberty, and Free Speech` (1979) 70 Southern California Law Review 979-1020, 982-3.

speech, and it is agreed by most liberal scholars that there must be protection against such harmful speech.[20] The free speech clauses of any legal code or constitution never provide protection which covers all speech. For instance, speech such as fighting words, obscenity, child pornography, incitement, and hate speech is not protected by law.

Furthermore, the law requires restrictions on speech to prevent harm in order to promote and ensure the justifications of free speech. These aims have been clearly shown `by a twofold dictum: do not harm others; promote respect for others`.[21] Speech content requires respecting others` beliefs and ideas to deserve the same respect from others. Interfering free speech has been justified by *"the probability of serious harm of injustices, or lack of respect for persons, their happiness, and welfare, or of loss of progress, e.g."*[22] The restrictions on free speech can be determined depending on the necessity, desirability and legitimacy of the circumstance in which speech is made. For instance, if the speech instils a specific idea in others, causes panic, breaches the peace, or incites crime or violence, then such speech would be restricted. The legitimate aim is to prevent such harm by using criminal law. In this case, anyone who counsels, commands, encourages or incites other(s) to commit a crime will be subject to criminal law or will be guilty if the person is an integral and essential part of the commission of a crime.[23] While limiting free speech, the importance of social good is achieved by restriction, or in other saying, the relation between restriction and achievement is essential for legitimating the limitation.[24] So, a legitimate reason is essential to limit speech to prevent harm, danger or threat caused by speech. There are plenty of formulations to justify interfering with free speech in different jurisdictions.

C. Theoretical Justifications to Interfere the Right to Free Speech

Various justifications to interfere with rights have emerged through historical and philosophical differences between legal traditions and jurisdictions.[25] Certain types of speech have been excluded from legal protection based on different theoretical justifications, such as the militant democracy, the harm principle, the clear and present danger test, the true threat test, the conflict of liberties, and the criminalisation of speech. These justifications are not

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20 McCloskey (n 15) 221.

21 Cohen-Almagor Raphael, Liberal Democracy and the Limits of Tolerance: Essays in Honour and Memory of Yitzhak Rabin (The University of Michigan Press, 2000) 2.

22 McCloskey (n 15) 227.

23 Feinberg, (n 18) 141.

24 Sadurski Wojciech, Freedom of Speech and Its Limits (Kluwer Academic Publishers 2001) 38-39.

25 Sottiaux Stefan, Terrorism and the Limitations of Rights: the ECHR and the US Constitution (Hart Publishing 2008) 20.

independent of political theory or jurisprudence.[26] For instance, drafting the Bill of Rights was prompted by apprehension about the federal government abusing its powers.[27] The Council of Europe prompted the European Convention on Human Rights as a reaction against European totalitarianism and the horror of the Second World War. The objective of the Council was to develop and guarantee democracy and fundamental rights in every Member State.[28] The US Constitution formulates freedom of speech standards as an absolute right with no responsibilities.[29] The European Convention is based on a political tradition that balances individual and public interests to guarantee all citizens' equality and dignity and maintain the features of democratic government.[30] Due to this, the European tradition is more interventionist than the US tradition. The European Convention would limit liberties by using the reasonings of national security and public order. Restriction clauses of the Convention are outlined not only by limitation and derogation clauses but also by Article 17 of the Convention, which prohibits the abuse of rights and represents the militant democracy approach.[31]

The European Convention generously defines its approach to freedom of speech by giving the scope of freedom of speech in Article 10 (1). At the same time, Article 10 (2) of the Convention highlights that free speech is not an absolute right by carrying duties and responsibilities. The Convention provides a clear mechanism restricting the right to free speech. In contrast, the First Amendment uses absolute terms: "Congress shall make no law (…) abridging the freedom of speech or the press". Some Supreme Court Judges stated that the Supreme Court should read the law literally and regard freedom of speech as an absolute right, but most other judges did not consider free

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26 Feinberg, (n 18) 128.

27 John E Nowak and Ronald D Rotunda, Constitutional Law (St Paul, West Group, 2000) 339–46; Geoffrey R Stone, Louis M Seidman, Cass R Sunstein and Mark V Tushnet, `Constitutional Law` (New York, Aspen Law & Business, 1996) 1–23.

28 Robertson AH., Human Rights in Europe (Manchester University Press, 1963) 1; Pierre-Henri Teitgen, 'Introduction to the European Convention on Human Rights' in RStJ Macdonald, F Matscher and H Petzold, The European System for the Protection of Human Rights (Leiden/Boston, Martinus Nijhoff, 1993) 3

29 Glendon Mary Ann, Rights Talk: The Impoverishment of Political Discourse (Northampton, The Free Press, 1991) 34, Birks Peter (ed), Pressing Problems in the Law, vol 1 (OUP 1995) 109, 125, 149; David Feldman, 'Content Neutrality' in Loveland I (ed), Importing the First Amendment: Freedom of Expression in American, English and European Law (Hart Publishing, 1998) 139; Aernout Niewenhuis, 'Freedom of Speech: USA vs Germany and Europe' (2000) 18 Netherlands Quarterly of Human Rights 195.

30 Claire L'Heureux-Dube, 'The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court' (1998) 34 Tulsa Law Journal 15-40, 35, see also Sottiaux (n 25) 21.

31 Sottiaux (n 25) 22.

speech absolute.[32] A majority of Supreme Court Judges have accepted that all speech is not protected under First Amendment despite the absence of a limitation clause.[33] These two jurisdictions have sought to balance free speech and other conflicting rights and interests. Free speech is directly concerned with the political background formed by a military coup in Turkey in 1980. With an evolving process, Turkish jurisdiction has erased such guardianship relying on more systematic and legitimate justifications to interfere with free speech. The following theoretical justifications have been developed based on their conditions and context in their time and places. This means these are not the final and best practice of such justifications, even some are depreciated and outdated, but others might become on the front, and new justifications can be developed.

1. The Militant Democracy

The modern democratic states are designed by the experience of the totalitarian and inter-war periods. Democracy is an indispensable vehicle for the enjoyment and development of fundamental rights.[34] It is an essential system for guaranteeing rights and liberties but can be abused and deteriorated by anti-democratic sets.[35] This approach is a process to decide which sorts of speech, associations or political ideas are compatible with democracy. If political activity or speech is not compatible with democracy, then it does not deserve protection under the democratic system. If yes, they would be guaranteed by law and the government. The militant democracy is based on an active stance to prevent anti-democratic actors from using rights as the principal values of democracy before "the Trojan Horse by which the enemy enters the city".[36] The militant democracy approach prefers to dissolve political parties which are extreme and contrary to the state system to prevent the destruction of democracy. To protect democratic principles, militant democracy is to restrict the freedom of speech and association of groups and individuals based on the threat of destruction of democracy.[37] The Militant democracy is a type of

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32 Ibid 71. see also, for absolutist approach; Justice Black in Koningsberg v. State Bar, 366 US 36 (1961) at 61, see also, Hugo L Black, A Constitutional Faith (New York, Knopf, 1968) 45 ('I simply believe that "Congress shall make no law" means Congress shall make no law.'), for non-absolutist position; Alexander Meiklejohn, 'The First Amendment is an Absolute' (1961) Supreme Court Review 245-266, 253

33 Sottiaux (n 25) 72.

34 Ibid 6.

35 See more, Communist Party of Germany (KPD Case), the Commission approved of the prohibiting of the Communist Party in the Federal Republic of Germany.

36 Loewenstein Karl, 'Militant Democracy and Fundamental Rights' (1937) 31 the American Political Science Review 417-432, 424.

37 Karagoz Kasım, 'The Dissolution of Political Parties Under the Jurisdiction of The European Court of Human Rights and Examining the Case of Welfare Party According to

constitutional democracy pre-emptively limiting the rights to protect political and civil freedoms for democracy.[38] The provisions related to anti-terror, association (expressly political parties), assembly, or hate-speech laws, are used by this approach to prevent anti-democratic sets.[39] The European Court of Human Rights interpreted the European Convention as a militant democracy tool to prevent the political parties that run counter to the Convention's values and democracy.[40] The state has positive obligations to protect individual freedoms before such an anti-democratic political party gets hold of power.[41] For instance, in the case of the German Communist Party, which aimed to establish a totalitarian regime and advocate an anti-democratic regime, The European Court decided its closure was compatible with the Convention as an application of Article 17.

2. Conflict of Liberties

Free speech might conflict with other rights even though rights are clearly defined; they might be in conflict because their outer boundaries are not stable.[42] Restricting free speech can be a solution to end such conflict and injury to the rights of others.[43] Speech might violate personal security, liberty, privacy, reputation, citizenship, and equality by producing harm and injustice to these rights. It may also conflict with self-fulfilment, such as happiness, moral development, values, and moral rights, by insulting and harassing them.[44] Yet, the law sets the balance between these rights to secure fundamental rights reasonably. For instance, the aim of the US Supreme Court is not to maximise free speech at all costs but to balance the rights and harmonise free speech with other rights.[45] Free speech promotes the good of society and individuals,[46] but other rights such as personal security, privacy, and reputation also promote the good of society and individuals. It is because a society or an individual can't enjoy the good of all rights at an unlimited level. One will be sacrificed for another to attain the good of one of these rights.[47] Human rights are not arrayed

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the Venice Commission Reports' (2006) 1 Gazi Üniversitesi Hukuk Fakültesi Dergisi 311-348, 322.

38 Loewenstein (n 36) 424.

39 Macklem Patrick, 'Militant Democracy, Legal Pluralism, and the Paradox of Self-determination' (2006) 4 International Journal of Constitutional Law 488-516, 488-9.

40 Ibid 507.

41 The classic "militant democracy" case under the ECHR is Communist Party (KPD) v. the Federal Republic of Germany at 101-103

42 Jeremy Waldron, Liberal Rights; Collected Papers 1981-1991 (CUP 1993) 203-224.

43 Heyman J. Steven, Free Speech and Human Dignity (Yale University Press 2008) 70.

44 McCloskey (n 15) 47.

45 Heyman (n 43) 77.

46 Ibid 80. See also, Abrams v. United States, 250 U.S. 616, 630 (1919)

47 Heyman (n 43) 80.

vertically in constitutional law; thus, there is no basis for defining which right is more important than the other.[48]

When the rights conflict with each other, judicial bodies have difficulty determining which right deserves more protection than the other.[49] Several criteria have been developed by the European Court of Human Rights to decide which right will be weighed or limited after considering all the circumstances of a particular case.[50] Firstly, the 'impact criterion' is used to restrict the rights which produce harmful impact or infringement on the rights of others. In other words, it is better to protect the right Y, whose exercise is less harmful than the right X, leading to severe impairment.[51] It is about preferring/protecting the less harmful exercise of the right between the conflicting ones. Secondly, the `core/periphery criterion` determines which right has a core aspect of deserving more protection than the other. The third one is the `additional rights criterion`, assessing the conflict between more than two rights. When the right Y of person A and additional right Z of person A is violated by exercising right X of person B, the right Y of person A will be weighed against the right X of person B.[52] The fourth criterion is the `general interest criterion`. Here general interest or public good play a significant role in determining which right will deserve more protection. The fifth one is the `purpose criterion`. When the exercise of a particular right depends on the exercise of another`s right, the Court requests the individual to exercise a certain right to protect the right of another.[53] Lastly, the `responsibility criterion` dictates that one exercises his right because of the responsibility to exercise the right.[54]

These criteria provide specific guidelines while determining which right will be weighed in the case of a conflict of rights. The conflict between freedom of speech and other rights has been solved by using these criteria. For instance, the dispute between free speech and the right to reputation can often be resolved by impact criterion. This is because individuals are responsible for protecting the reputation of others. Here, the conflict is easily resolved by preserving the right of reputation because the duties and responsibilities for the right of a reputation, as stated in 10(2) ECHR, allow restricting speech to protect the reputation of others. In the case of incitement to terrorism and violence, the conflict between free speech and the right to life, personal security, property

48 Bork H. Robert, 'Neutral Principles and Some First Amendment Problems' (1971) 47 Indiana Law Journal 1-35, 11-12.

49 Smet Stijn, 'Freedom of Expression and the Right to Reputation: Human Rights in Conflict' (2010) 26 American University International Law Review 183-236, 189.

50 Ibid

51 Ibid

52 Ibid 190.

53 Ibid

54 Ibid 191.

etc., can be solved by using these criteria because each criterion provides a different viewpoint while solving the conflict. The conflict between inciting speech and other rights may require using more than one of these criteria. There could be a comprehensive and fair determination for the right that deserves to be protected against other rights.

Speech might threaten the rights of others and their exercise due to its harmful consequences. For instance, hate speech might produce emotional distress and psychological harm to others. Even such speech might establish an environment which creates physical threats by inciting hatred between individuals and among society. Likewise, incitement to terrorism creates disorder and national security problems by producing violence and oppression of individuals to affect its political will. As a result, such speech could be restricted to protect the right of others. In this sense, national and personal security is essential for individuals to express themselves freely. Free speech and other rights may not be valid or indicated within this environment when faced with the absence of security. For that reason, when speech incites insecure social and political intentions, it could be restricted to protect human rights in general.[55] However, if the restriction on free speech does not rely on reliable and well-founded criteria, the restriction itself will harm these rights and values. Hence, the purpose of the restrictions should be in line with the consequence of the restrictions.

Indeed, there can be no clear answer while weighing one right against the other; it is a many-sided procedure. In some cases, the answer is simple because the threat and danger caused by speech are imminent and clear, but in other cases, deciding which right will be weighted is complicated.[56] Thus, balancing rights or solving conflicts must concentrate on significant issues, such as different forms of liberties and their relative values, which should be considered.[57] There is an attempt to draw the boundaries of free speech from time to time, and this time process changes the limits of freedom of speech. It is because; the restriction on free speech is a reality but the extent of limits of free speech is not clear and is based upon the needs of the time.[58] This criticism leads to the debate to what extent free speech is limited as a subject to politics, law, economy, sociology, etc.

3. The True Threat Test

Some speech content can produce threats based on its possible influence to cause physical force or violence to the chosen victims or those related to

55 Heyman (n 43) 72.
56 Ibid 73.
57 Ibid
58 McCloskey (n 15) 221.

the victims and property.[59] Determining the potential consequences of speech acts is an essential criterion to define a true threat. A threat to someone means a psychological fear in the person and people around him (family or relatives etc.). Those under the fear could have a myriad of psychological and health problems, such as nightmares, heart problems, inability to work, loss of appetite, and insomnia.[60] Such psychological problems disrupt the victim, his circle and the general public.[61] Therefore, free speech regulations aim to limit threatening speech in individual and public spheres by criminalising such speech.[62] The regulation of free speech is necessary because firstly, to secure people from fear of violence; secondly, to prevent the conditions which cause panic, threat, and scare; thirdly, to imprison individuals who threaten to commit a crime before they have a chance to commit the crime; and fourthly, to protect people from being forced to do something that is against their self-control.[63] The law should identify such a threat, and be sanctioned before the threat is committed as a crime. Limiting speech crime can be defined as `pre-crime` or early prevention of crime, which requires more surveillance of speakers. Legal institutions are willing to reduce the possibility of crime by interfering with a crime in its very early stage to fulfil the necessity of their own free speech regulations and criminal laws.[64]

4. The Clear and Present Danger Test

Justice Holmes established the clear and present danger test in Schenck v. United States, which was about anti-war propaganda by the general secretary of the Socialist Party. He attempted to mail fifteen thousand leaflets to the men enrolled for military service to get involved in the First World War. As a result, he was convicted under the 1917 Espionage Act for discouraging the recruitment of soldiers and causing disobedience in the army by distributing these leaflets.[65] The conviction of Schenck was affirmed based on Holmes` test:

> *"is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring*

59 Greenawalt (n 13) 111.

60 Arne Ohman, `Fear and Anxiety as Emotional Phenomena: Clinical Phenomenology, Evolutionary Perspectives, and Information-Processing Mechanisms, in Handbook of Emotions` (Michael Lewis & Jeanette M. Haviland, 1993) 512-14; see also Rotiman Jennifer E., 'Freedom of Speech and True Threats' (2011-2012) 25 Harvard Journal of Law and Public Policy 283-367, 291.

61 Greenawalt (n 13) 290.

62 Ibid

63 Rotiman Jennifer E., 'Freedom of Speech and True Threats' (2011-2012) 25 Harvard Journal of Law and Public Policy 283-367, 290.

64 Zedner Lucia, 'Pre-crime and Post Criminology' (2007) 11 Theoretical Criminology 261-281, 265.

65 Schenck v. United Stated, 249 US at 48-49 (1919)

about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree".[66]

This test is to define whether speech is likely to cause unlawful action. If the tendency and purpose of the speech act constitute a clear and present danger, the speech will be perceived as a cause for the criminal act.[67] In contrast, Justice Hand criticised the degree and proximity approach, and he came up with the `direct incitement` standard, which was constituted in the case of Masses v. Patten.[68] Direct incitement test focuses on the examination of the actual words of the speaker, not on the possible consequence of the speech.[69] The clear and present danger test focuses on the probable consequence of the speech, valid only as a post hoc description of unlawful speech. Still, this standard does not draw the prospective direction for the line between lawful and unlawful speech.[70]

It should be borne in mind that the clear and present danger test has two sets of problems which emerged in the decisions issued. Firstly the test is strictly consequentialist based on the result produced by the speech and absent of consideration of the speaker`s intent.[71] Another problem is that the consequence is regarded as adequate justification for the suppression of speech, and the test needs a precise definition for the clarity and presentness of the danger.[72] Likewise, Hand exaggerated his alternative `direct incitement test` because it is also based on the consequentialist approach, which allows the Court to restrict speech when it encourages others to break the law.[73] It seems the criminalisation of the `direct incitement` test considers the speaker's intent as a part of the test process. Brandenburg is another relevant case to the clear present danger test; the Court limited the test to `advocacy of the use of force or law violation` unless the advocacy has caused imminent lawless action.[74]

Only where the 'clear and present danger test' aims to minimise the potentially harmful consequence of speech.[75] Yet, in the case of Dennis, Justice Douglas stated that the Communist Party`s activities in the US created consequences

66 Ibid
67 Ibid
68 Kretzmer David and Hazan F. K., Freedom of Speech and incitement Against Democracy (Kluwer Law International, 2000) 16.
69 Ibid
70 Ibid 17.
71 Ibid 20.
72 Ibid
73 Ibid
74 Brandenburg v. Ohio, 395 U.S. 447, see also Hans Linde, 'Clear and Present Danger Re-examined: Dissonance in the Brandenburg Concerto' (1970) 22 Stan. L. Rev. 1163-1186, 1163.
75 Kretzmer (n 68) 22.

but no real danger to the government.[76] Here, the Court defined unwanted ideas rather than that speech is likely to cause unlawful action. Thus, when the court evaluates harmful consequences, it should be aware of subjectivity. The court can reach a more objective evaluation by not making a general illustration of long-standing harm but specific illustrations of imminent harm. In the case of Dennis, the danger test construed the harm in a broad sense.[77] But, the clear and present danger test and the direct incitement tests were the attempts to describe the proper limits of the criminalisation of speech and to prevent the commission of a crime.[78]

5. Harm Principle

The harm principle is also based on the consequentialist approach that speech may harm other rights and interests. Speech is harmless or less harmful than other acts because speech act is possibly harmless in a physical way: speech cannot directly create physical harm to someone, except for high volume sound. Yet, speech act might cause harm, or it may constitute the conditions of harmful actions: "sticks and stones can break my bones, but words ..."?[79] Speech causes or is to likely cause harm if we extend the definition of harm in cover indirect physical or no-physical harm. The life, body, property, health and personal integrity of others could be harmed by an act of a person.[80] In this sense, harm means `set back of a person's interests`, which consists of two components: first, it must create a sort of unfavourable influence or danger on its victim`s interests; second, it must be caused wrongfully in violation of the victim`s freedom.[81] This definition contributes to regulating certain speech content, which harms the exercise of liberties. The harm principle provides legitimate and relevant reasons for panel legislation while limiting liberties. This legitimate reasoning comes with the principle that,

> *"(1) it is necessary to prevent hurt or offence (as opposed to injury or harm) to others (the offense principle); (2) it is necessary to prevent harm to the very person it prohibits from acting, as opposed to "others" (legal paternalism); (3) it is necessary to prevent inherently immoral conduct whether or not such conduct is harmful or offensive to anyone (legal moralism)."*[82]

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76 Dennis v. United Stated 341 U.S. 495 (1951)
77 Kretzmer (n 68) 23.
78 Ibid 24.
79 Baker (n 19) 987
80 Persak Nina, Criminalising Harmful Conduct the Harm Principle, its Limits and Continental Counterparts (Springer 2007) 48.
81 Feinberg, (n 18) 3-4.
82 Feinberg, J., Offence to Others: The Moral limits of Criminal Law (OUP, 1985) IX.

In this case, speech can be subject to criminal prohibitions in a legitimate and reasonable sense.

Therefore, the harm principle is one of the reasons to justify limiting free speech. Here, interference with free speech is to prevent the harm produced by speech to other individuals and the public interest. Similarly, Joel Feinberg asserts that,

> *"[i]t is always a good reason in support of penal legislation that it would be effective in preventing (eliminating, reducing) harm to persons other than the actor (the one prohibited from acting) and there is no other means that is equally effective at no greater cost to other values*".[83]

Hence, insulting, offensive or inciting speech may increase the possibility of harmful conduct such as assault, murder, or terror.[84] When the speech causes pain, injury, or a severe setback of interest, such harmful speech will be regulated.[85]

The seriousness of the harmful conduct is a core factor in determining which conduct can be criminalised. The harm principle must provide a criterion to determine the seriousness of harm to overcome the challenge of establishing legal limits on harmful speech. Feinberg determines the seriousness of harm by knowing,

> *"(1) the intensity and durability of the repugnance produced, and the extent to which repugnance could be anticipated to be the general reaction to the conduct that produced it ... (2) the ease with which unwilling witnesses can avoid the offensive displays; and (3) whether or not the witnesses have willingly assumed the risk of being offended either through curiosity or the anticipation of pleasure."*[86]

These criteria do not give a specific answer to the questions of "How is the seriousness of harm defined?" and "What harm does it do?".[87]

Furthermore, likelihood is the primary determinant in the harm principle. Here, harm depends on the extent to which the speech increases the probability of harm. And this focuses on the determination of the seriousness of the harm. Likelihood entails that an act is likely to cause harm. Hence cause is vital to

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83 Feinberg, J., Harmless Wrongdoing – The Moral Limits of the Criminal Law (Oxford University Press, 1988) xix.

84 Kretzmer (n 68) 48.

85 Baker (n 19) 987

86 Feinberg, (n 82) 26.

87 Dudley R., 'A Reformulation of the Harm Principle' (1978) 6 Political Theory 233-246, 245.

understand harm and criminalisation of speech; it is a precondition to creating guilt and crime.[88] When the person`s conduct generates a likelihood of harm, he is responsible for that act. This gives rise to the question of what constitutes likelihood. The answer might be based on the chosen theory of causality relying on the philosophy of fair imputation of criminal responsibility rather than mechanical and physical causation.[89] It is unclear what sort of likelihood or dangerousness (enough to cause harm) is considered harmful, which is legitimately criminalised under the harm principle.[90] It is important to note that direct physical harm is easy to count as harm under the harm principle. Yet, a qualification of indirect non-physical harm is unclear under the same principle. What sort of harm is to be considered under the harm principle? and which interest may be set back by harm?[91], these questions are at the heart of the debate on the harm principle.

`Probabilistic conception`[92] is crucial to clarify the link between the likelihood of harm and speech. If the speech causes harm to the targeted person, the harm will be limited to only the targeted person. In contrast, if the speech affects many people, then there will be many harmful acts such as disorder, terrorism, or riot. If the right to free speech regulations protects such harmful speech, fear, scare and panic will spread in a larger space and affect more of the population.[93] Peaceful life of the population and personal security will be threatened, and the standards of democracy will be damaged by such terrorism and violent acts. Therefore, the law should prevent harm and crime in its early formation process. The role of law is to ensure public peace, security, and fundamental rights.

6. The Criminalising Speech

Criminal law has its own methods to determine the crime, but how about when it comes to the liability of the speaker in terms of free speech? There are some problematic areas in the coverage of the use of criminal sanctions and the boundaries of reasonable legislative accommodation.[94] For instance, the men's rea of the speaker is one of the criminal elements in weighing freedom of speech against competing interests and the speaker`s culpability.[95] As a result, several legislative positions could be related to pure solicitation, which

88 Mueller, G.O.W. (ed.), Essays in Criminal Science (Sweet & Maxwell Ltd 1961) 185. see also, Persak (n 80) 41.
89 Persak (n 80) 41.
90 Ibid 43-4.
91 Ibid
92 Kretzmer (n 68) 49.
93 Ibid 117.
94 Greenawalt (n 13) 110.
95 Kretzmer (n 68) 32.

explains the relationship between crime and speech acts. Greenawalt states the following five positions:[96] First, if a jurisdiction finds the justification is adequate to prohibit criminal solicitation, and if encouragement to commit a crime is serious, then illegal solicitation can be punished. Punishing unlawful solicitation could deter people from pursuing someone with an expressed criminal will. This is the way to make such a speech ineffectual.[97] Secondly, pure solicitations can be defined as a legal action, not an unlawful act. Yet, an expression encouraging and promoting a crime will be legally persuasive among others. This can be afforded by criminal law at an acceptable price. Yet, it is not certain what acceptable price is paid for drawing the boundaries of such speech in the context of criminal law. It could be said that the stretch of criminal law should not go too far.[98] Thirdly, pure solicitation could be punished in the event of its success. In this case, many serious encouragements can be punished after the crime occurs. Still, a law might need to regulate other sorts of solicitations which have not successfully caused the crime.[99] Fourthly, if the solicitation is about felonies, its criminality can be limited as it was under traditional English common law.[100] Fifthly, a solicitation could be formed where there is a high possibility of achieving crime and where the relations among people involved increase the influence of solicitation. Only pure encouragement of crime should be prevented, especially when they are the subject of serious crimes and have a substantial likelihood of success.[101]

Criminals are prosecuted after committing a crime, meaning individual and public interests are already harmed. In many cases, the needs of criminal laws are satisfied by the prosecution of persons who commit a crime, but speech is not the crime but advocates the crime.[102] So, harm caused by speech also means that criminal law should be able to prevent crime or minimise the damage of any violence before the crime is committed. In other words, criminal law persecutes an inciter who does not commit a crime but incites a crime. Thus, the law requires punishing such persons to ensure justice and peace. Criminal law minimises the culture of violence by punishing the person responsible for advocacy.[103] For instance, the inciter of terrorism and violence is the 'spiritual father' of the criminal acts, and an instigator is the `spiritual father` of the

96 Greenawalt (n 13) 112.
97 Greenawalt (n 13) 112.
98 Greenawalt (n 13) 112.
99 Greenawalt (n 13) 112.
100 Greenawalt (n 13) 112., Greenawalt, Kent, 'Speech and Crime' (1980) 5(4) American Bar Foundation Research Journal 645–785, 656-7.
101 Greenawalt (n 13) 112.
102 Cohen-Almagor (n 21) 75.
103 Ibid

criminal offence.[104] Instigation is the subject of criminal law after the crime is successfully committed.[105] In the case of instigation, the relation between the instigator and instigate is clear, but a listener of incitement is not identified; this can be a small or large number of people.[106] For that reason, it is nearly impossible to determine the audience of inciters. In other words, it is difficult to know who will be encouraged by the inciter as a criminal. But in both cases of incitement and instigation, the spirit of speech plays the leading role when the commitment of the criminal act is in the process.

Incitement and encouragement should be prosecuted when they meet with three factors: (1) the publicness of the encouragement, (2) the nature of its appeal, and (3) the mood of the audience.[107] These aspects of incitement/encouragement might influence both the crime's success and seriousness. It is important to note that the speaker might play a significant role while creating criminal acts. If the criminal law can prevent the one who incites/encourages the crime, the criminal law may not need to engage with the one who will commit a crime due to encouragement. By doing this, criminal law might prevent crime before its occurrence and stop the harmful consequence of crime on individuals and society.

However, the distinction between hyperbolic speech and incitement/punishable political expression is difficult to identify in the sense of conductive speech; the boundaries of these two sorts of speech are hard to draw.[108] Kalven warns the governments and courts not to use the power of criminal law to suppress radical critiques.[109] It is crucial to note that such 'critiques' helps to make democracy a reality rather than an illusion in a society. In a non-democratic society, criminal law represses such speech to protect the government or non-democratic institutions rather than individuals' rights. Criminal law is to detect, prevent and persecute harmful speech rather than suppressing hyperbolic political speech, radical critiques, or free speech in general. Besides this, the open-ended definition of the harm principle makes criminal law unclear while drawing the boundary of criminalisation.[110] Such tendency will stretch the harm principle making the criminal act a vague action in the legal context. This impels individuals to fear not acting in a permitted and socially acceptable way because they are unsure whether their actions

104 Kretzmer (n 68) 162.
105 Ibid 161-2.
106 Ibid 161.
107 Greenawalt (n 13) 115.
108 Kretzmer (n 68) 32.
109 Kalven Harry, A Worthy Tradition: Freedom of Speech in America (New York: Harper and Row, 1987) 119-120.
110 Persak (n 80) 87.

are the subject of criminal prohibition.[111] A vague definition of criminal acts impedes enjoying fundamental rights.

D. Turkey's Justification to Interfere the Right to Free Speech

The right to free speech plays a crucial role in practising and implementing many values, such as democracy, self-fulfilment, the marketplace for ideas/search for truth and tolerance, and pluralism. Thus, the right to free speech is essential to build a democratic and human rights-respecting country. Thus, the right to freedom of speech is restricted exceptionally with a theoretical basis. So, it is worth asking how the Turkish legal system restricts the right to free speech with any theoretical basis. This is directly associated with implementing these values and having a narrow or broader scope of the right to free speech in the country.

Turkish Constitution guarantees the right to free speech in Article 26 with limitation clauses as a qualified right rather than an absolute one. This presents an evolution from a highly restrictive practice to a more liberal stance. Interfering with the right to free speech is directly concerned with the political setting formed by military coups d'état in 1960 and 1980 and the military interventions in 1971 and 1997.[112] The military coups d'état have been the most challenging and devastating reason in the Turkish political realm that totalitarian tendencies emerged. In particular, the military coup d'état on 12 September 1980 designed the constitution and obtained the authoritarian nature of the system. The legal system was formatted to defend and protect the 'unalterable core' of the Constitution through the legal doctrine.[113] These military coups d'état was made to preserve the military tutelage through constitutional settings and without concern regarding human rights to protect official ideology.[114] So, the

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111 Kretzmer (n 68) 153.

112 Despite the lack of evidence about the role of NATO and the US in military coups d'état in Turkey throughout the Cold War, NATO and the US got involved in these military coups d'état to reorient Turkey into NATO-US-centric policies. Especially the US took a significant role in such an oppressive political and legal environment in Turkey by supporting the plotters. See for instance, Kasapsaraçoğlu Murat, 'Soğuk Savaş Döneminde Türkiye'de Yapılan Askeri Darbeler ve ABD' (2020) 19(3) Gaziantep University Journal of Social Sciences 1342-1356; Bakan, S. ve Çimen, H. 'Türkiye'de Askeri Darbe Statükosunun Kurulmasi' (2017) 6(2) İnönü Üniversitesi Uluslararası Sosyal Bilimler Dergisi 1-15.

113 Thiel Markus, The `Militant Democracy` Principle in Modern Democracies (Ashgate, 2009) 264.

114 Özbudun Ergun, 'Türk Anayasa Mahkemesinin Yargısal Aktivizmi ve Siyasal Elitlerin Tepkisi' (2007) 63 Ankara Üniversitesi SBF Dergisi, 257-268, 265, see also Özbudun Ergun, 'State Elites and Democratic Political Culture in Turkey' in ed. Larry Diamond, Political Culture and Democracy in Developing Countries (Lynne Rienner Publishers, 1993) 247-68.

state was treated not as a civil institution that served the country's people.[115] Indeed, these coups have deteriorated democracy and the rule of law at most in Turkey by totalitarianism which posed severe limitations and restrictions on the right to freedom of expression.[116] Terrorism has been another long-lasting and major problem challenging and deteriorating Turkey's practice of human rights and free speech. Since the 1980s, the Kurdish Worker's Party (PKK) has been responsible for escalating terrorism in Turkey.[117] Due to the political instabilities in Syria and Iraq, the other terrorist organisations Al-Qaida, ISIS (DAESH), and PYD (the Democratic Union Party-PKK's branch in Syria) have also committed terrorist attacks against Turkey. Terrorism in Turkey since the 1980s has led the legal system to take restrictive measures on the right to free speech.

Turkish legal doctrine was formed to interfere with ideologicalism, such as political speech advocating 'communism/bolshevism', 'socialism', 'anarchism', 'fascism', 'racism', or 'authoritarianism', 'promoting Islamism', and 'anti-secularism (irtica)'.[118] These were perceived as a risk to the integrity and security of the Turkish State. Here, the speech was restricted without reasonable and moderate justification and prosecuted if it was perceived as "weakening and destroying feelings of being a nation", "destroying the secular system", or "establishing a theocratic system".[119] Interestingly, the national courts regarded these ideologies as identical to the advocacy of political violence without addressing any actual link between speech and violence/terrorism.[120] The national courts considered such speech undermining or contradicting official ideology and justified their restrictions based on being inherently 'destructive', 'separatist', 'reactionary', 'dangerous', 'violent', 'insurgent' or 'revolutionary'.[121]

Turkiye Büyük Millet Meclisi (TBMM) aimed to broaden the realm of freedom by making legal reforms through amendments to the constitution,

115 Coşkun Vahap, 'Turkey`s Illiberal Judiciary: Cases and Decisions' (2010) 12 Insight Turkey 43-67, 48

116 Özhan H.Ali, and Özipek B.Berat, Yargıtay Kararlarında İfade Özgürlüğü (LDT, 2003) 4.

117 Mango Andrew, Turkey and the War on Terror: For Forty Years We Fought Alone (London: Routledge, 2005) 31-57.

118 Cengiz İlyas Fırat, Legal Responses to 'Terroristic Speech': An Evaluation of The Turkey's Law in The Light of ECtHR And UNHRC Standards (Adalet Yayınevi, 2022) 144.

119 Acar Bulent, 'Hukuk Düzenimizde Düsüncenin Acıklanmasının Cezalandırılması ve Cezalandırmanın Sınırı' (1995) 3 Ankara Barosu Dergisi 14-45, 32.

120 Cengiz İlyas Fırat, Legal Responses to 'Terroristic Speech': An Evaluation of The Turkey's Law in The Light of ECtHR And UNHRC Standards (Adalet Yayınevi, 2022) 45.

121 Alacakaptan Uğur, 'Demokratik Anayasa ve Ceza Kanunu`nun 141 ve 142`inci Maddeleri' (1966) 1 Ankara Hukuk Fakultesi Dergisi 3-20, 9; Tanör Bülent, Siyasi Düşünce Hürriyeti ve 1961 Türk Anaysası (Phd Thesis, Oncu Kitabevi, 1969) 100; Özhan (n 100) 4; See also, Turkish Constitutional Court, Judgment No. E.1963/173 K.1965/40, 26/09/1965.

criminal law, and anti-terror law to promote and protect the right to freedom of speech.[122] There are various restrictive clauses in Article 13,[123] 14[124] and 26[125] of the Turkish Constitution, which authorises limiting freedom of expression. Before the amendment in 2001, there were much more subjective and general restrictions clauses in Article 13 such as 'national security', 'public order', 'general order', 'public good', 'public morals', 'public health', 'indivisible integrity of the State with its territory and nation' and 'protecting the republic' to preserve state ideology. Article 14 is kept as a militant democracy formulation which does not allow any rights listed in the Constitution to be used to destroy fundamental rights and freedoms. The Constitutional Court has interpreted these articles without effective and efficient theoretical formulation in terms of promoting the right to free speech for a long time.[126]

All provisions (criminal, anti-terror, media, assembly, association, political party laws etc.) regarding free speech were implemented with the concept of militant democracy set forth under the Constitution. These constitutional

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122 TBMM Tutanak Dergisi, 106. Birleşim, 11/04/1991 p.233-4, 236; TBMM Tutanak Dergisi, Dönem 21/3, 132. Birleşim, 25.9.2001, p.70-83

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

124 Article 14 of the Constitution prohibits using rights and freedoms in the Constitution against "… the indivisible integrity of the state with its territory and nation and endangering the existence of the democratic and secular order of the Turkish Republic based upon human rights."

125 Article 26 of Turkish Constitution: "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. (As amended on October 3, 2001; Act No. 4709) The exercise of these freedoms may be restricted for the purposes of national security, public order, public safety, safeguarding the basic characteristics of the Republic and the indivisible integrity of the State with its territory and nation, preventing crime, punishing offenders, withholding information duly classified as a state secret, protecting the reputation or rights and private and family life of others, or protecting professional secrets as prescribed by law, or ensuring the proper functioning of the judiciary. (Repealed on October 3, 2001; Act No. 4709) Regulatory provisions concerning the use of means to disseminate information and thoughts shall not be deemed as the restriction of freedom of expression and dissemination of thoughts as long as the transmission of information and thoughts is not prevented. (Paragraph added on October 3, 2001; Act No. 4709) The formalities, conditions and procedures to be applied in exercising the freedom of expression and dissemination of thought shall be prescribed by law."

126 Turhan Mehmet, 'Düşünce Özgürlüğü ve 1982 Anayasası' 1988 4(4) Dicle Üniversitesi Hukuk Fakültesi Dergisi 87-117, 105

clauses through criminal law led to significant restrictions on freedom of expression in Turkey, especially before 1990. These were the limitation clauses under the offences of the Turkish Panel Code (1926) (TPC): the offence of domination of one social class over other social classes under Article 141, the offence of propaganda under Article 142 and the offence of indoctrination under Article 163 and the offence of incites hatred and animosity under Article 312 of TPC, which represent how Turkish legal system under the effects of the military tutelage.[127] These articles of the Turkish Criminal Code (1926) were essentially treated as 'thought crimes' to suppress dissenting political speech with unclear legal boundaries. These articles were the provisions used at most to interfere with the right to free speech until 1991.[128] These criminal provisions were used to suppress organised or individual political dissents. The Military Martial Law Courts formed by the coup plotters implemented these provisions to interfere with political dissents.[129] In this regard, the courts did not develop any justification (such as a clear and present danger test) while implementing these criminal provisions, which caused interference of a wide range of speech with general restrictions.[130]

Democratic struggles started right after the transition of the constitutional system in 1982 to defeat the totalitarian nature of the system and flourish democracy and the rule of law in Turkey. TBMM introduced many amendments to the first form of the Constitution (formed by the military plotters in 1982) three times in the 1980s, almost every year in the 2000s, and another three times in the 2010s. This shows that the Turkish people have demanded more freedom and liberties through constitutional revisions. There were plenty of amendments promoting the right to free speech and press. Firstly, the Constitutional Amendment ended the state's radio and television broadcasting monopoly in 1993.[131] The most important constitutional amendment about the right to free speech was made in 2001, which softened the militant nature of the Turkish Constitution; Preamble consists of *"That no protection shall be accorded to thoughts and opinions contrary to Turkish national interests..."* and replaced the phrase *"thoughts and opinions"* with the word '*activity'*. With the same amendment, the limitation clauses were added specificaly for

127 See, Örnek Cangül 'Türk Ceza Kanunu'nun 141 ve 142. Maddelerine İlişkin Tartışmalarda Devlet ve Sınıflar' (2014) 69(1) Ankara Üniversitesi SBF Dergisi 109-139

128 Arslan Zühtü, 'Türkiye'de İstisna Hâli, Terör Ve İfade Özgürlüğü' (2007)71 Tbb Dergisi 201-226, 204.

129 Örnek Cangül, Turk Ceza Kanunu'nun 141 ve 142. Maddelerine İlişkin Tartisşmalarda Devlet ve Siniflar Ankara Üniversitesi (2014) 69(1) SBF Dergisi, 109-139, 133

130 Paçaçı İrfan, '1982 Anayasası Mayınlı Alanı: Düşünce Özgürlüğü, Anayasa MAdde 25 ve 26'nın Analz ve Yorumu' (1995-1996) 21(17-18) TODAIE İnsan Hakları Yıllığı 127-149, 141

131 The Law on the Amendment of Article 133 of the Constitution of the Republic of Turkey No: 3913 Official Gazette Date: 10.7.1993 – Issue:21633

the Freedom of Expression and Dissemination of Thought in Article 26.[132] The freedom of association in Article 33 was amended in 1995 and 2001 to abolish the ban on the political activities of associations and their collaborations with political parties.[133] Article 34 of the Right to Hold Meetings and Demonstration Marches was also amended in 2001 by abolishing the wide range of discretion given to the government and bringing limitation clauses like the right to free speech.[134] The Constitutional Amendment in 2004 regarding the freedom of the press was made as "*a printing press or its annexes duly established as a publishing house under law shall not be seized, confiscated, or barred …*".[135] Another striking Constitutional Amendment in 2004 puts an international agreement regarding fundamental freedoms and liberties, duly into effect, in case of conflict with domestic laws.[136]

This was important for the European Convention on Human Rights to become binding in Turkish jurisdiction. Another milestone Constitutional amendment introduced in 2010 and enacted in 2012 is the Constitutional Court individual application right.[137] This right is guaranteed by the Constitution for anyone who claims that their right/s set forth under the Constitution and the ECHR were violated by public power. By this procedure, the Constitutional Court interprets the implementation of the rights considering the case law of the European Court with the liberal prospect. For instance, the Turkish Constitutional Court changed its understanding of a "strict interpretation of laicism" to a "libertarian interpretation of laicism" in 2012.[138] The Turkish legal system with the constitutional basis was oppressive against a wide range of expression, especially before 2001.

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132 The Law on the Amendment of Some Articles of the Constitution of the Republic of Turkey, No: 4709 Official Gazette Date: 22.10.2001 – Issue: 2456

133 The Law on the Amendment of the Preamble and Some Articles of the Constitution of the Republic of Turkey No: 4121 Official Gazette Date: 26.07.1995 – Issue:22355; The Law on the Amendment of Some Articles of the Constitution of the Republic of Turkey, No: 4709 Official Gazette Date: 22.10.2001 – Issue: 2456

134 The Law on the Amendment of Some Articles of the Constitution of the Republic of Turkey, No: 4709 Official Gazette Date: 22.10.2001 – Issue: 2456

135 The Law on the Amendment of Some Articles of the Constitution of the Republic of Turkey, No: 5170 Official Gazette Date: 22.5.2004 – Issue: 25469

136 The Law on the Amendment of the Preamble and Some Articles of the Constitution of the Republic of Turkey No: 4121 Official Gazette Date: 26.07.1995 – Issue:22355; The Law on the Amendment of Some Articles of the Constitution of the Republic of Turkey, No: 4709 Official Gazette Date: 22.10.2001 – Issue: 2456

137 The Law on the Amendment of Some Articles of the Constitution of the Republic of Turkey, No: 5982 Official Gazette Date: 7.5.2010 – Issue: 27659

138 Turkish Constitutional Court, Judgment No. E.2012/65 K.2012/128, 20.09.2012; see more in Karaoğlu Ali Osman, 'Margin of Appreciation as a Hindrance to Transformative Impact of International Law: Change in Interpretation of Laicism by Turkish Constitutional Court' (2020) 20 Law & Justice Review, 163-193.

Indeed, there are many other improvements in the criminal law doctrine, particularly after the collapse of the Soviet Union. This collapse made Turkish legal doctrine perceive communism as a minor danger. Therefore, Articles 141, 142 and 163 of the Turkish Criminal Code (1926) were repealed in 1991 to provide more space for the right to free speech. Yet, the repealed articles were effectively retained under the offence 'incitement to hatred and animosity' of Article 312[139] of the TPC.[140] Since the escalation of terrorism in the 1980s, in addition to Article 312, Anti-terror law was introduced in 1991 and brought offences of 'propaganda' for, 'disclosure' and 'publication' of, 'inciting', 'justifying', and 'praising' terrorism under Articles 6, 7 and 8 (article 8 was repealed in 2003) of the anti-terror law. Similar prosecutions of Article 312 were brought with these offences under the Anti-terror law. At the ECtHR level regarding Turkey, the European Court found numerous freedom of expression violations due to these articles under TPC and Anti-terror law.[141]

Since the late 1990s, the Anti-terror law (1991) had several amendments, and TPC (1926) was renewed with a new TPC (2004), which moderated the impact of its restrictive approach to freedom of speech. TPC (2004), for instance, highlights its objective "to protect individual rights and freedoms, public order and security, the rule of law, peace in the community, public health and the environment and to prevent the commission of offences."[142] To achieve this objective, "clear and present danger" criteria has been used to determine the offences under Article 216 and 312 of TPC. This is a formulation to make these sorts of offences concrete danger crimes rather than abstract. This means speech can be restricted if it causes clear and present danger. Yet, this criterion is not alone adequate to prevent illegitimate restrictions on free speech due to discretion given to the Judges who decide what a clear and present danger is. For instance, Yargıtay explained that a clear and present danger exists when concrete facts and evidence prove an act causes danger.[143] Here, Yargıtay seeks the answer to whether the concrete facts and evidence in relation to speech create a clear and present danger. This is a matter of defining 'proximity and degree' of harm. In Addition to this criterion, the Constitutional Court and Yargıtay set a principle to construe the link between speech and violence by evaluating the aim of speech, the content of speech, the context in which the

139 Article 312 of 765 TPC (revealed TPC), "(1) Any person who openly incites hatred and animosity between people belonging to different social class, religion, race, sect, or coming from another origin …in case that such act causes danger to public order."

140 Alemdar Zeynep, ''Modelling' for Democracy? Turkey's Historical Issues with Freedom of Speech' (2014) 50 Middle Eastern Studies 568-588, 574

141 Arslan (n 128) 207.

142 Article 1 of 5237 TPC

143 Yargıtay Assembly of Criminal Chamber 2004/8-130 E., 2004/206 K., 23/11/2004; Yargıtay Assembly of Criminal Chamber 2007/8-244 E, 2008/92 K. 29/04/2008

speech was made, and the measure taken against the speech.[144] This content-context-based assessment provides a potential objective evaluation process for Turkish courts to determine the probability and temporal proximity of harm, danger or crime to prevent. Since the 1990s, Turkey has gradually completed a bunch of legal amendments to erase the effects of military domination in its legal doctrine and to provide more space for the right to free speech through legal criteria and principles.

However, Turkish jurisdiction requires much more developed theoretical justifications to interfere with freedom of speech. As mentioned above, various theoretical justifications have been developed by Western jurisdictions to bring reasonable and legitimate restrictions on freedom of expression. Without such justifications, free speech restrictions became arbitrary and subjective. Turkey's endeavour in this regard is significant, but more political-legal reforms and changes are needed to promote the right to free speech. Turkish legal circles should develop consistent, liberal, and Turkey-oriented justifications to restrict free speech with a broader spectrum for the right to free speech.

CONCLUSION

Freedom of speech is essential to democracy, self-fulfilment, the marketplace for ideas/the search for truth, tolerance, and pluralism. But speech act has a consequentialist nature which means speech might cause harm, danger, threat, or crime contrary to the rights of others. Thus, free speech is not an absolute right with exceptional and conditional limitations. It is easy to argue that sticks and stones can hurt people, but it is equally easy to see that words might cause harm and crime. There are prominent justifications for interfering with the right to free speech; the militant democracy, the conflict of liberties, the true threat test, the clear and present danger test, the harm principle, and criminalising speech. The review of these justifications reveals to what extent the speech is limited. These justifications are set to draw the boundary of free speech.

Each of these justifications brings limitation sets by focusing on different angles that consider how speech may cause harm, danger, threat, or crime. The militant democracy is a justification for preventing anti-democratic actors from using their rights to overcome democracy. The Militant democracy relies on a type of constitutional democracy authorised to protect political and civil freedoms by pre-emptively limiting freedoms through political party law, criminal law, and anti-terror law. The European Court of Human Rights interpreted Article 17 of the Convention as a legal basis for militant democracy to protect European democracies from anti-democratic ideological

[144] The Constitutional Court, Judgment No. 2013/2602, 23/01/2014; Yargıtay, 9. Criminal Chamber, E.2010 / 4243 K.2012 / 1683, 08.02.2012; 8. Criminal Chamber, E.2012/882 K.2012/6067, 10.05.2012; 8. Criminal Chamber, E. 2009/13825, K. 2012/23385, 04.07.2012; 8. Criminal Chamber, E.2013/1567 K.2013/5627, 15.02.2013

speech and organisations. Another rationale, the US Supreme Court balanced free speech with other rights, such as personal security, privacy, and reputation, to promote the good of society and individuals. The true threat test determines future consequences of speech that may create psychological fear (nightmares, heart problems, inability to work, loss of appetite, insomnia etc.) in the person and people around him. Thus, free speech regulations should limit such speech through the criminalisation of speech. The clear and present danger test determines speech that brings substantive evils. The danger relies on the question of proximity and degree and then to prevent. The harm principle is another justification to restrict free speech that relies on the logic of "sticks and stones can break my bones, but words ..."? Here, harm is simply defined as `set back of a person's interests` meaning a sort of unfavourable influence or danger on its victim`s interests and a violation of the victim`s freedom. In this case, speech can be subject to criminal prohibitions in a legitimate and reasonable sense. Criminalising speech through criminal law also minimises the danger of advocacy. Here, criminal law is satisfied when prosecuting persons who commit a crime, but still, in the case of speech acts (propaganda, incitement, encouragement, or glorification), the satisfaction of criminal law is not adequate because there is someone who advocates the crime, not commits the crime. For instance, the inciter of terrorism and violence is the `spiritual father` of the criminal acts, as an instigator is the `spiritual father` of the criminal offence. The relation between the instigator and instigate is clear but a listener of incitement needs to be identified. But in both cases, the spirit of speech plays the main role. So, speech like incitement can be restricted due to being the 'spiritual father' of the criminal acts.

Returning to the relationship between these theoretical justifications and Turkey's interference with the right to free speech, Turkey struggles to remove the military domination in its jurisdiction through legal reforms and amendments, which suggest an evolution departing from highly restrictive practice to a more liberal stance. Indeed, the military coups d'état have had challenging and devastating effects on the right to free speech practice. The constitutional, criminal, and anti-terror laws amendments have played a major role in this shift. As a result, the military tutelage has been weakened over the jurisdiction and within the Turkish legal doctrine, and then the clear and present danger test and content-context-based assessment have been set through case law.

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