Free(doom) of ~~Expression~~

An Analysis of the ECtHR's Application of the ECHR Values and Principles on Case-Law on Freedom of Expression in Türkiye (2003-2022)

Türkü Çebi

Division of Human Rights Studies
Department of History
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Supervisor: Olof Beckman
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Abstract

The issue of freedom of expression in the context of Turkey and the European Court of Human Rights ('ECtHR' or 'the Court') has been widely discussed from legal perspectives. Especially, with the changing political, legal and social dynamics in Turkey within 2003-2022, the case-law of the Court increased by a considerable amount. All the contingencies affecting the argumentative and interpretive aspects of how freedom of expression is interpreted by the Court through its established democratic principles and values are investigated in this study from a social scientific perspective in order to uncover the evolutive aspect of the case law. The investigation is conducted on the nexus between the supranational level (through the Convention values), the domestic level (though the *state of exception*), and the individual level (through the perspectives on *victimhood* as *victim status).* The study finds a paradoxical relationship between how deviations occur within the case law of the Court and how the nexus between the individual, domestic, and supranational levels operate within the deeper dynamics of *democratic* potential and evolutive widening in the horizons of freedom of expression.

Keywords: *European Court of Human Rights, European Convention on Human Rights, freedom of expression, Article 10, victimhood, victim status, state of exception, parrhesia, dissenting opinions, violation, non-violation*

For all silenced human rights defenders. May your voice echo through the loud chambers of international courtrooms, where justice is the never-ending melody.

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1. Introduction

Article 10[1] of the European Convention on Human Rights ('ECHR' or 'the Convention') is regarded as 'Europe's First Amendment' ultimately guaranteeing the freedom of expression and press freedom in Europe under the European Court of Human Rights ('ECtHR' or 'the Court').[2] ECtHR plays a contingent role in creating an added value to effective protection and promotion of human rights while expanding the horizons of freedom of expression through its case-law.[3]

Since the Court's case-law is contingent on expanding the scope of Article 10, the statistics indicate that Turkey[4] had a striking effect on the evolution of the application of Convention values and principles, as the leading violating Member State with 426 violation judgements between 1959-2022.[5] More recently, the 2003-2022 period depicts 402 violation[6] and 18 non-violation judgements regarding Article 10. The 2003-2023 period corresponds to the one leader and one dominant-party system in Turkey.

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

European Convention on Human Rights, Article 10 Freedom of Expression, 4 November 1950, https://www.echr.coe.int/documents/d/echr/convention_ENG

[2] D. Voorhoof, 'Guaranteeing the Freedom and Independence of the Media', pp. 35–57 in Council of Europe (ed.) Media and Democracy. Strasbourg: Council of Europe Publishing, 1998, pp. 35-57

[3] D. Voorhoof, *The Right to Freedom of Expression and Information under the European Human Rights System: Towards a more Transparent Democratic Society,* European University Institute: Robert Schuman Centre for Advanced Studies Centre for Media Pluralism and Media Freedom, 2014, p.2, https://hdl.handle.net/1814/29871 (accessed 5 March 2023).

[4] As of 3 June 2022, Turkey's name changed to *Türkiye* for all international affairs, following its request on 1 June 2022 to the UN. Since this study examines the period within 2003-2022, and the ECtHR case-law utilized in the study cases were published under the name Turkey, the study utilizes *Türkiye's* former name to be able to sustain the cohesion of the paper and not to confuse the reader.

[5] See:European Court of Human Rights 'Violations by Article and by State' https://www.echr.coe.int/Documents/Stats_violation_1959_2022_ENG.pdf (accessed: 10 January 2023)

[6] For Article 10 Violations of Türkiye (2003-2022) distributed by year, see: The Turkish Ministry of Justice. 'Yıllara Göre AİHS 10. Madde İhlalleri', https://inhak.adalet.gov.tr/Resimler/Dokuman/3001202316064719-%20YILLARA%20GÖRE%20AİHS%2010.MADDE%20İHLALLERİ.pdf (accessed 10 January 2023)

In 2002, Erdoğan's Justice and Development Party (‘AKP’) entered parliament, becoming Turkey's Prime Minister in 2003, serving three consecutive terms and becoming the president and head of state in 2014. In 2017, he held and won a constitutional referendum that eliminated the office of prime minister and granted power in all three branches of government to the president.[7] Following the June 2018 elections, he became Turkey's first president under the new executive-style presidential system.[8] He was elected again in the 2023 general presidential elections, securing another five years in power.[9]

The 2003-2022 period in Turkey has reflected political turmoil and a significant diminishing of human rights, escalating after the coup d’état attempt on 15 July 2016[10], and the following state of emergency measures, extended seven times[11], with a rhetoric of saving democracy and fighting against terrorism. In that regard, both the political and legal fluctuations within this period generally, and the effect of the emergency period has raised serious concerns regarding growing restrictions on the exercise of freedom of expression in Turkey.[12]

From the perspective of the ECtHR, the domestic challenges are always scrutinized in a meticulous judicial logic. However, protection of all types of freedom of expression within the Court’s democratic value system, and broad interpretation principles both depend on the democratic times and spaces the judgements decide upon, and also on the Court’s inner process of argumentative and interpretive challenges. The Court’s structural configuration, and argumentative tendencies lie on a three tier paradox which might be able to uncover through a

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[7]S. Cagaptay, ‘The New Sultan and the Crisis of Modern Turkey’,*The International Spectator,* vol. 53, no. 4, 2018, p. 3.
[8]S. Cagaptay, ‘The New Sultan and the Crisis of Modern Turkey’ p. 4.
[9] BBC News, ‘Turkish election victory for Erdogan leaves nation divided’ https://www.bbc.com/news/world-europe-65743031 (accessed: 2 June 2023)
[10] See: S. Cagaptay, ‘The New Sultan and the Crisis of Modern Turkey’, pp. 1-2 & 11.
[11].“The State of Emergency was terminated on 19 July 2018, at the end of the deadline set by the Decision No. 1182. Accordingly, the Government of the Republic of Turkey has decided to withdraw the notice of derogation of Article 10.” See: Council of Europe Treaty Office, ‘Reservations and Declarations for Türkiye’ https://www.coe.int/en/web/conventions/concerning-a-given-state-or-the-european-union-?module=declarations-by-state&codeMatiere=44%2C3&territoires=&codeNature=8&codePays=TUR&numSte=&enVigueur=true&ddateDebut=05-05-1949&ddateStatus=04-01-2023 (accessed: 1 January 2023)
[12] See: S. Cagaptay, ‘The New Sultan and the Crisis of Modern Turkey’ p.8. “According to Freedom House, between 2002 and 2017, Turkey’s ‘press freedom’ score worsened from 58 to 76 (on a scale of 0 to 100, 100 being the worst), and its ‘legal environment’ score, despite yearly fluctuations, decreased from 26 to 27 (on a scale of 0 to 30, 30 being the worst). Furthermore, its ‘political environment’ score worsened from 23 to 33 (on a scale of 0 to 40, 40 being the worst)”.

bare legal approach. Keeping that in mind, how the individual identifies with its own suffering and identity, what kind of pressure is put on their political essence on behalf of saving the nation's essence, and finally how the borders of freedom of expression can spin around rigidity and elasticity depending on the quality level of the Convention values at stake. On that note, the challenges freedom of expression can pose could be a two-way street, where the individual can get stuck in the middle in order to fit and to be fit in *democratic* interpretations. This study finds paradoxical interpretations of freedom of expression by the Court, through a number of theoretical and conceptual lenses, giving mixed signals of evolutive patterns in the case law.

1.1. Aim and Purpose

This study aims to uncover how the turbulent dynamics regarding freedom of expression in Turkey translate into an effective and consistent protection of human rights through application of general and operational Convention values and principles. Within the Court's long standing *democratic* tradition of safeguarding *individual* rights in a progressive manner, the nexus between the individual, domestic and supranational relations not only operate in a judicial manner, but also on a paradoxical cycle depending on the individual's position in certain times and spaces. Therefore, the study takes a multiway approach in analyzing the Court's progress in interpreting freedom of expression through the Convention values within 2003-2022. The study attempts to put a lens towards what can(not) be accomplished by a logic of supranational judicial enforcement in relation to a troubled politico-legal domestic context. In that regard, the purpose of the study lies within the urge to bring legal settings to the social sciences and enhance the academic literature and further knowledge through an untypical manner of analyzing how individual, domestic and the supranational perspectives converge within the Court's case law.

1.2. Research Questions

How has the ECtHR applied the principles and values of the European Convention on ECHR to the argumentative aspects of its judgements on Turkey with regards to the right to freedom of expression (Article 10) within the 2003-2022 period?

In that regard, how do the argumentative contexts of the judgments evolve in sustaining the connection between the individual (victimhood), domestic (exception), and supranational (the Convention values) levels through legal procedural context?

2. Literature Review

This section provides a background of the Court and its added value into the enhancement of democratic values and norms on the right to freedom of expression (Article 10), as well as touching upon Turkey's ongoing challenges with the protection of Article 10. This review of literature discusses the relevant academic framework on the criticism and discontents directed at the Court, and its implications on the institutional, domestic and individual levels.

2.1. Background

The Added Value of the ECtHR

Article 10 serves as a paramount international standard for safeguarding freedom of expression within democratic boundaries[13]. The Court plays a pivotal role in broadening values and norms to effectively protect various categories such as journalism, media, information dissemination, and public discourse.[14] The established case law under Article 10 has mitigated constraints imposed by national sovereignty and domestic limitations on freedom of expression[15]. The Court's added value lies in its meticulous pursuit of equilibrium[16] in advancing *democratic* ideals and public discourse.[17] The Court's dynamic expansion, characterized by entrepreneurial norm

[13] J. Zand, 'The Concept of Democracy and the European Convention on Human Rights' *University of Baltimore Journal of International Law*, vol. 5, no. 2 , art. 3., 2017, p.212 https://scholarworks.law.ubalt.edu/ubjil/vol5/iss2/3, (accessed 5 January 2023); D. Voorhoof, and H. Cannie, 'Freedom of Expression and Information in a Democratic Society: The Added but Fragile Value of the European Convention on Human Rights' *International Communication Gazette*, vol 72, 2010, p.408

[14] Voorhoof and Cannie, 'Freedom of Expression and Information in a Democratic Society' p.408

[15] *Ibid*, p.408

[16] See, e.g, *Vajnai v. Hungary,* App. No. 33629, 8 July 2008, para. 57: "A Legal system which applies restrictions on human rights in order to satisfy the dictates of public feelings – real or imaginary – cannot be regarded as meeting the pressing social needs recognised in democratic society, since the society must remain reasonable in its judgment. To hold otherwise would mean that freedom of speech and opinion is subjected to the heckler's veto."

[17] Voorhoof and Cannie, 'Freedom of Expression and Information in a Democratic Society', pp. 409, 412-414.

creation, designates media professionals, civil society, and NGOs as 'public watchdogs', preserving *democratic* society.[18]

A seminal aspect of the Court's jurisprudential framework extends protection to ideas that may 'offend, shock, or disturb,'[19] broadening Article 10's scope.[20] However, Voorhoof and Cannie underline the Court's vulnerabilities through restrictive trends and inconsistencies in its case-law, concerns often raised by dissenting judges[21]. Regarding permissible limitations[22] such as hate speech[23], separatist propaganda[24], defamation, and responsible journalism, deviations from established case law[25] provoke apprehension due to their departure from *democratic* values, potentially challenging future freedom of speech and press freedom levels in Europe.[26]

While Cannie & Voorhoof present a more optimistic and constructive approach with minor deviations towards the Court's norm and value entrepreneurship, Oster expands upon the Court's role as a norm entrepreneur for freedom of expression, a task he deems unlikely to be fully accomplished.[27] Oster asserts that the Court's norm entrepreneurship on a pan-European level coexists with the concept of margin of appreciation, revealing an inconsistency in the

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[18] *Ibid*, pp. 414-416

[19] See: *Handyside v. The United Kingdom, 7 December 1976*

[20] Voorhoof and Cannie, 'Freedom of Expression and Information in a Democratic Society', p. 418.

[21] *Ibid*, pp. 417-418, 420-421.

[22] See: S. Greer, J. Gerards, and R. Slowe. 'The Case Law of the European Court of Human Rights' in *Human Rights in the Council of Europe and The European Union: Achievements, Trends and Challenges,* UK: Cambridge University Press, 2018, p.174.

[23] See e.g. in Voorhoof, and Cannie, 'Freedom of Expression and Information in a Democratic Society' p.419: "In Gündüz v. Turkey (4 December 2003), it rejected the justification of a criminal conviction because of inciting the people to hatred and hostility. It underlined that merely defending Shari'a (a religious doctrine generally held incompatible with certain fundamental democratic values) during a TV debate, without calling for the use of violence to establish it, cannot be regarded as hate speech". In that, Voorhoof and Cannie add that in many cases against Turkey, the Court found that the convictions for separatist propaganda or incitement to hatred or hostility did violate Article (10), as the impugned statements … did not incite to violence or terrorism" (e.g. ECtHR, *Incal v. Turkey,* 9 June 1998; ECtHR, *Bahceci and Turan v. Turkey,* 16 June 2009). (p.419)

[24] See further in Voorhoof, and Cannie, 'Freedom of Expression and Information in a Democratic Society' p.418: ECtHR, *Zana v. Turkey*, 25 November 1997 and *Karapete v. Turkey,* 31 July 2007. These are non-violation judgements regarding convictions on glorification of and terrorism and incitement to violence.

[25] E.g. in *Lindon a.o.v. France* (22 October 2007), a non-violation judgment regarding the permissible limits of the borders of Criticism of politicians' raised a considerable concern regarding responsible journalism, and the Court's deviation towards non-violation judgements echoed in dissenting opinions as a rupture in meticulous examination of of freedom of expression by the majority. See further; D. Voorhoof, 'The European Convention on Human Rights: The Right to Freedom of Expression and Information Restricted by Duties and Responsibilities in a Democratic Society', *Human Rights,* 2012, vol. 7, no. 2, Summer and Autumn, pp. 11-154.

[26] Voorhoof, and Cannie, 'Freedom of Expression and Information in a Democratic Society' pp. 417-419, 420-421.

[27] J. Oster, 'On "Balancing" and "Social Watchdogs"' in L. C. Bollinger and A. Callamard (eds.), *Regardless of Frontiers: Global Freedom of Expression in a Troubled World,* New York: Columbia University Press, 2021, p.175

breadth of this margin[28]. Despite the Court's tendency to maintain a limited margin concerning expression in the context of public debate, its process of norm creation, preservation, and application in terms of balancing rights and restrictions within democratic contexts raises additional concerns[29]. Although the Court's norms wield significant influence in shaping pan-European standards for freedom of expression, the absence of precise definitions and the ever-evolving scope of these norms suggest potential challenges. These normative parameters evolve through the accumulation of judgments and interpretive facets in individual cases. For instance, the concept of granting "privileged protection" to journalistic media as 'public watchdog' might endanger both conceptual and operational complexities.[30]

While freedom of expression is applicable to all, media freedom pertains exclusively to the privileged acquisition of "media speech privilege" and the "protection of media as an institution"[31]. Although these norms are predominantly progressive and forward-looking, the ultimate success of norm entrepreneurship remains elusive. Consequently, defining the boundaries of what constitutes "media" or a "social watchdog" becomes obscured within the interplay of formal and functional aspects guiding these norms. In this context, establishing clear criteria for inclusion within this category becomes imperative.[32] Furthermore, norms related to online freedom of expression, for instance, are prone to eliciting complaints regarding "collateral censorship", as Member States may act as "antipreneurs" by opposing these norms.[33]

Freedom of Expression on Shaky Ground: The Current State in Turkey

This section provides a brief background on some of the emerging trends and challenges in Turkey concerning freedom of expression, and for the ECtHR within the 2003-2022 period.

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[28] *Ibid,* pp.176-177.

[29] See: S. Greer, J. Gerards, and R. Slowe. 'The Case Law of the European Court of Human Rights' in *Human Rights in the Council of Europe and The European Union: Achievements, Trends and Challenges,* UK: Cambridge University Press, 2018, pp. 177-178. *The boundaries of the right to express critical, satirical or 'obscene' views about a particular religion are challenging to define with certainty. Incitement to religious hatred is not protected by Article 10, notwithstanding the margin of appreciation, there has been a shift in the case law from protecting the sensitivities of religious believers to giving more scope for criticism and satire of religious faith. However, determining whether or not the test has been met can be highly debated and, in some key cases, the Court has been divided over it.*

[30] Oster, 'On "Balancing" and "Social Watchdogs" pp.168-169.

[31] *Ibid*, p.169.

[32] *Ibid,* p.176.

[33] *Ibid*,p.183.

Under the rule of the Justice and Development Party (AKP), new instruments and methods have been utilized to restrict freedom of expression regarding, among others, journalistic freedoms, academic freedoms, online content regulations (blocking online content or websites), criminal investigations and prosecutions.[34] Although Turkey has been following highly restrictive trends in freedom of expression, as one of the biggest contributors to the case-law of the ECtHR,[35] the post-coup period extended the silencing practices as well as its audience, by now addressing human rights defenders, authors, academia, NGOs and more.[36] While the post-coup measures and restrictions created fear, the majority of the issues and restrictions emerging within the post-2016 period regarding freedom of expression have been terrorism related issues (e.g. "disseminating propaganda on behalf of a terrorist organization, publishing content or books or disseminating public messages that incite hatred or hostility, or glorify crime or criminals")[37] and the restriction on public debate.[38] In that regard, the majority of the subject matter of the Article 10 applications before the ECtHR followed this pattern up to 2014, where the leading application reasons were either terrorism or incitement to violence.[39]

Although the multilayered and intensified measures after post-2016 intensified through robust measures on extreme shrinking of freedom of expression[40], the systematic and structural change within the politico-legal arena in the 2003-2016 period added to the equation of the accelerated and vague restrictive interferences with media outlets, investigative journalists, academics and more within the supportive-media wing of terrorist organizations rhetoric.[41] Also, common use of pre-trial detentions and criminal procedures in the post-2016 period seemed to create contingent issues of freedom of expression and individual liberty and security.[42] As

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[34] Y. Akdeniz and K. Altıparmak, Turkey: *Freedom of Expression in Jeopardy: Violations of the rights of authors, publishers and academics under the State of Emergency*, 2018, p.310.
[35] *Ibid,* p.4.
[36] *Ibid,* p.2
[37] *Ibid*, p.4.
[38] pp.4-5
[39] See: *ibid* pp. 4-5 & 13; Y. Akdeniz and K. Altıparmak 'The Silencing Effect on Dissent and Freedom of Expression in Turkey' in *Journalism at Risk: Threats, Challenges and Perspectives, Defending a Favorable Environment for Public Debate.* Council of Europe. 2015, pp. 146-147
[40] Y. Akdeniz and K. Altıparmak, 'Turkey: *Freedom of Expression in Jeopardy'*, p.13.
[41] *Ibid*, pp.34-28; see also pp. 27-38 for the case studies about *writers*.
[42] Akdeniz and Altıparmak, Turkey: *Freedom of Expression in Jeopardy'*, pp.34-28; also see the case studies about writers,: *ibid,* pp. 27-38.

Akdeniz and Altıparmak suggest, these emerging trends coupled with the pre-2016 politico-legal approaches and restrictions laying the foundations of, for example, robust censorship on internet freedom and social media through take-downs of content and websites (Law No. 5651)[43], coupled with application of extensive counter-terrosim and national security measures on traditional journalism, politics, and academia[44] have proved so far that, "as in the case of the Court's jurisprudence, in the absence of implementation or the political will to considerably *amend existing laws*, things will never change. In fact, if the rule of law is not restored in Turkey, the control and censorship machinery … will probably become worse".[45]

Strikingly, the reference to the *amendment of existing laws* and structural problems emphasizes another level of connection with the ECtHR within the context of Article 46, and its rarely invoked function of addressing structural problems on domestic legal frameworks and safeguards that require amending for further protection of freedom of expression and mass applications before the Court[46]. Even though the Court emphasizes respecting the domestic legal systems' good faith attempts to respect the Convention is vital,[47] in specific cases, the Court deviates towards its remedy jurisprudence under Article 46, when an urgent warning sign is required for further prevention of human rights breaches.[48] In that regard, Turkey has represented striking examples within the 2003-2022 period. Although the study delimits itself with Article 10 specific issues, the emerging trends regarding the connection between Article 46 and freedom of expression is worth investigating further. Therefore the reader is encouraged to see Appendix 1 for a detailed investigation on relevant systemic issues Article 46 refers to within the 2003-2022 period in Turkey.

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[43] Akdeniz and Altıparmak, 'The Silencing Effect on Dissent and Freedom of Expression in Turkey', pp. 163-168.
[44] *Ibid*, pp. 161-163.
[45] Akdeniz and Altıparmak, 'The Silencing Effect on Dissent and Freedom of Expression in Turkey', p. 171.
[46] B. Çalı. 'Does the remedy jurisprudence of the Court do enough for media freedom?' in *Journalism at Risk: Threats, Challenges and Perspectives, Defending a favorable environment for public debate.* Council of Europe. pp. 92; See also: A. Mowbray, 'An Examination of the European Court of Human Rights' Indication of Remedial Measures, *Human Rights Law Review*, vol, 17, no. 3, 2017, p.457 & pp. 563-467.
[47] Çalı, 'Does the remedy jurisprudence of the Court do enough for media freedom?' pp. 101-102.
[48] *Ibid*, p. 82.

2.2. Relevant Literature

Criticism on the ECtHR

The topic of ECtHR criticisms is extensive, emerging from a range of sources, including several Council of Europe (CoE) organs and national dialogues. The critiques discussed below are relevant to this study as they reflect the underlying dynamics of the Court's judicial constraints and behavior. This literature review is legal research and discussion heavy, as there is only little established literature from the social sciences and humanities available on the nexus between the individual, domestic and the supranational aspects of the criticisms directed at the Court.

As of yet, there is no consensus whether the Court functions as a political body, or if it should be more or less politically present. On that axis, Gerards and Terlouw[49] have found little support for the Court's excessive interference in democratic processes on national sovereignty.[50] Jannes supports their approach by stating that operating in a political context does not directly mean that the Court itself functions as a 'political body'.[51] Assuringly, Fraser argues that as judicial interpretation is indispensable for the ECtHR for effective and practical protection[52], the judgements it decides on will continue becoming law, irrespective of their interpretations. In that regard, backlash and criticisms from various political spectrums will remain if the Court goes too far, or not far enough, in interfering on domestic matters, yet the Court has a duty to 'walk a fine line' in that regard.[53] Thus, history shows that cases that receive hefty backlash are not mainstream nor landmark cases, guiding future case-law, once critiqued by national authorities.[54]

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[49] See the results of the Amicus Curiae Project published in J. Gerards and A. Terlouw (eds.), *Amici Curiae. Adviezen aan het Europees Hof voor de Rechten van de Mens,* Nijmegen: Wolf Legal Publishers, 2012

[50] J. Gerards and A. Terlouw 'Solutions for the European Court of Justice: The *Amicus Curiae* Project.' in *The European Court of Human Rights and its Discontents: Turning Criticism into Strength,* S.Flogaitis, T. Zwart, J. Fraser (eds.) UK: Edward Elgar, 2013, p. 169.

[51] See, for example: Heleen Janssen, 'Wie geschoren wordt moet stilzitten. Maar hoe luidt het advies aan de kapper?' (Don't try to catch a falling knife – but what should we advise to the ones who dropped the knife?) in J. Gerards and A. Terlouw (eds.), *Amici Curiae. Adviezen aan het Europees Hof voor de Rechten van de Mens,* Nijmegen: Wolf Legal Publishers, 2012, pp. 135–144.; Ivo Opstelten, 'Foreword' in *The European Court of Human Rights and its Discontents: Turning Criticism into Strength,* S.Flogaitis, T.Zwart, J. Fraser (eds.) UK: Edward Elgar, 2013, p. xii.

[52] See, e.g. *Airey v. Ireland, App. No 6289/73 (ECHR 9 October 1979)* para. 24.

[53] J. Fraser. 'Conclusion: The European Court of Human Rights as a common European Endeavour' in *The European Court of Human Rights and its Discontents: Turning Criticism into Strength,* S.Flogaitis, T.Zwart, J. Fraser (eds.) UK: Edward Elgar, 2013, p.202

[54] See. e.g. *Handyside v. The United Kingdom,* App. No. 5493/72 (ECHR 7 December 1976).

In Bossuyts terms, this political aspect represents a 'slippery slope', meaning that the possibility of today's highly critiqued cases might be the orthodox ones guiding tomorrow's case-law.[55] Nonetheless, some scholars[56] are in favor of the indispensability and necessity of politicalness, by stating that "the Court is trying to be too virtuous" compared to the U.S. Supreme Court that has gained legitimacy through political nerves and aspects.[57]

In addition to the case-law, Harmsen suggests that the discussions on politicalness should incorporate the geopolitical aspects in which the Court operates and sustains.[58] Although the geopolitics of structural problems in domestic enforcement and security related concerns will persist, the evolutive character of the Convention system, for most of its Western-European Member States, will remain as the added value pushing the borders of human rights.[59] Harmsen adds to the political discussion by the need for creation of a coherent and relevant jurisprudence balancing the democratic, newly democratic, and undemocratic states, while confronting the situations in which non-democratic rule is sustained or embedded in the Convention system.[60] While these concerns test the borders of the logic of judicial order, and what can be accomplished by it, focusing on the wider political environments in which the Court operates is a necessity.[61]

Another criticism regarding the politicalness comes from the Court's democratic accountability, authority and legitimacy in relation to the backlog of applications.[62] This perspective is paradoxical, since on one hand, the high number of applications to the Court proves that "the people of Europe value the Court and seek to rely on it to protect their rights".[63]

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[55] Fraser. 'Conclusion' pp.201-202; M. Bossuyt, 'Is the European Court of Human Rights on a Slippery Slope?' in *the European Court of Human Rights and its Discontents: Turning Criticism into Strength,* S.Flogaitis, T. Zwart, J. Fraser (eds.) UK: Edward Elgar, 201, pp. 29-31

[56]See, e.g.: R. Fernhout, 'Het Supreme Court als amicus curiae – een paar vergelijkende en relativerende kanttekeningen' (The Supreme Court as amicus curiae – a few comparative remarks to put things in perspective) in J. Gerards and A. Terlouw (eds), *Amici Curiae. Adviezen aan het Europees Hof voor de Rechten van de Mens,* Nijmegen Wolf Legal Publishers, 2012, pp. 67–82

[57] J. Gerards and A. Terlouw 'Solutions for the European Court of Justice: The *Amicus Curiae* Project.' pp. 169-170

[58] R.Harmsen 'The Reform of the The Convention System: Institutional Restructuring and the (Geo-)Politics of Human Rights' in J. Christoffersen and M.R. Madsen (eds.), *The European Court of Human Rights between Law and Politics,* UK: Oxford University Press, 2014, p. 141 & 143

[59] Harmsen 'The Reform of the The Convention System', p. 141

[60] *Ibid*, p. 142

[61] *Ibid.*

[62] Fraser. 'Conclusion', p.197

[63] *Ibid.*

On the other hand, the Court has been criticized for expansive interpretation of the Convention rights "beyond the scope originally contemplated", thus being the reason behind the backlog.[64] The legitimacy in relation to these applications is protected by, among others, the consistency principle.[65] In ensuring consistency in the case-law, the Court should explicitly clarify the logic behind its judgements when deviating from the case-law in evolving circumstances to uphold the conceptualization of the Court as a 'living instrument'.[66] In that, Fraser states that it is unfair to solely blame the judicial activism[67] and inconsistencies due to the workload, without underlining the systemic human rights violation in certain states that increase this backlog.[68] On that note, Wilhaber revolves back to the difficulties in the evolutive interpretation, as the Judges attitudes fluctuate between activism and self-restraint.[69] Due to the multiple ways of protecting rights, differing attitudes produce high numbers of dissenting or concurring opinions. Although approaches diverge, Wilhalber suggests that the Court should set priorities to increase effectivity, as well as a *realistic,* approach to subsidiarity[70] which accepts "in many respects the reality that human rights is and will be decentralized."[71] Similarly, Lester argues that despite the Court's high-quality landmark judgments,[72] there has been an inconsistency in the principles applied to free speech and balancing of the margin of appreciation[73] in connection to subsidiarity. Several

[64] *Ibid.*; See further: Bossuyt, 'Is the European Court of Human Rights on a Slippery Slope?', pp. 29-31

[65] Fraser. 'Conclusion', p.199, See also: K. Dzehtsiarou, 'European Consensus and the Evolutive Interpretation of the European Convention on Human Rights' *German Law Journal*, vol. 12, 2011, pp. 1730-1745.

[66] Fraser. 'Conclusion' p.198. See also: E. Myjer, 'Why Much of the Criticism of the European Court of Human Rights is Unfounded',in *The European Court of Human Rights and its Discontents: Turning Criticism into Strength,* S.Flogaitis, T. Zwart, J. Fraser (eds.) UK: Edward Elgar, 2013, p. 49; K. Dzehtsiarou A. Greene, 'Legitimacy and the Future of the European Court of Human Rights: Critical Perspectives from Academia and Practitioners' (October 30, 2011). *German Law Journal*, Vol. 12, pp. 1707-1715, 2011, p.1708

[67] "Judicial activism refers to the practice of judges making rulings based on their policy views rather than their honest interpretation of the current law". Cornell Law School, 'legal activism' *Legal Information Institute.* [legal encyclopedia], https://www.law.cornell.edu/wex/judicial_activism (accessed: 10 March 2023)

[68] See fn. 42 in J. Fraser. 'Conclusion', p.199: Over 60% of the applications lodged were coming from only 5 of the 47 member states: Russia, Turkey, Italy, Romania and Ukraine.

[69] Wilhaber, 'Rethinking the European Court of Human Rights' in J. Christoffersen and M.R. Madsen (eds.), *The European Court of Human Rights between Law and Politics,* UK: Oxford University Press, 2014, p.212

[70] Subsidiarity refers to the principle that the state should itself decide democratically what it's appropriate for itself. See: R. Clayton and H. Tomlinson *The Law of Human Rights* (1st ed.), UK: Oxford University Press, 2000, p. 285.

[71] Wilhaber, 'Rethinking the European Court of Human Rights', p.212. For further discussion on separate opinions, see e.g.: F. J. Bruinsma, &, M. De Blois 'Rules of Law from Westport to Wladiwostok. Separate Opinions in the European Court of Human Rights'. *Netherlands Quarterly of Human Right*s, vol 15, no 2, 1997, pp.175–186; E. Voeten, 'The Politics of International Judicial Appointments: Evidence from the European Court of Human Rights' *International Organization*, vol, 61, no, 4, pp. 669–701.

[72] For an extensive list of landmark cases, see: fn. 58 in A.Lester, 'European Court of Human Rights after 50 Years' in J. Christoffersen and M.R. Madsen (eds.), *The European Court of Human Rights between Law and Politics,* UK: Oxford University Press, 2014, p. 111.

[73] The term refers to the space for maneuver that the Court is willing to give domestic authorities, in fulfilling their obligations under the Convention. See: S.C. Greer, *The Margin of Appreciation: Interpretation and Discretion*

judgments on political expression did not succeed in balancing the interests at stake[74], while others regarding the doctrine of responsible journalism "are being invoked to police the way in which the press reports on matters of clear public interest".[75]

While the discussions above addressed the flaws of the Convention system from various legal and political viewpoints, the current literature lacks a comprehensive examination of the underlying contingencies of the domestic, individual, and supranational dimensions in a cross-fertilizing manner. Criticisms of the inconsistencies in relation to Article 10 do not generally consider comparative angles on the individual's position within the power nexus between the supranational and national rights protection. In consideration with Turkey's current patterns in freedom of expression and the criticisms directed at the Court shaped this study's starting point in adding new perspectives to contingent challenges from a social sciences perspective.

3. Theoretical Framework

This chapter elaborates on the theoretical approaches and frameworks utilized in this study. The theoretical framework focuses on uncovering how theoretical conceptualizations centering aspects on freedom of expression on the supranational, domestic and individual levels, can be interconnectedly utilized to create a feasible holistic analytical perspective on legal documents. This theoretical framework lays the foundations of the possibilities of analyzing legal contexts in combination with social, philosophical and political perspectives on freedom of expression, resulting in a more inclusive perspective where the legal and the social are brought close together interconnectedly.

Under the European Convention on Human Rights. Human Rights Files No 17. Council of Europe Publishing, 2005, p.5.

[74] For a striking example, see fn.62 regarding *Lindon, Ochtakovsky-Laurens and July v. France,* App. Nos 21279/02, 36447/02 (2007) in A.Lester, 'European Court of Human Rights after 50 Years', p. 112.

[75] *Ibid*, pp. 111-112; See further: D. Voorhoof. 'The European Convention on Human Rights: The Right to Freedom of Expression and Information Restricted by Duties and Responsibilities in a Democratic Society', *Human Rights,* 2012, vol. 7, no. 2, Summer and Autumn, pp. 5-7, 23-27.

Firstly, the Court's *teleological and meta-teleological* interpretive principles in its judgements, and the concept of *parrhesia* by Michel Foucault will be discussed on the supranational level in line with the underlying democratic values of the Convention regarding freedom of expression. Secondly, Giorgio Agamben's approach to *state of exception* and production of a *bare-life* form on the national-supranational nexus, in cases where emergencies are normalized will be put into perspective. Thirdly, theoretical and conceptual approaches to *idealness of victimhood and* victim *status* will be discussed and adapted for application to the individual-supranational nexus.

The Convention Values and Democratic Perspectives

3.1 (Micro-)Teleological and Meta-Teleological Interpretation of Convention Values

In its judgements, the Court assigns particular importance to freedom of expression and its relation to the underlying values (*human dignity, autonomy, democracy,* and *pluralism*)[76], and the spirit (e.g. *justice* and *peace*) of the Convention. Therefore, how this importance translates into interpretive culture and argumentative reasonings of the Court is essential to investigate. Accordingly, *(micro-)teleological* and *meta-teleological* interpretation principles of the Court will be applied as a lens to investigate whether abstraction of the underlying values on a higher level and their holistic application to the judgements on freedom of expression result in argumentative selectivity in decision making through over-emphasis on values.

As a 'living instrument', the Convention requires evolutive interpretation[77] in line with contemporary conditions.[78] In maintenance and effective protection of human rights, the Court applies two convergent principles of interpretation of the Convention. Firstly, the Convention provisions are interpreted according to its object and purpose, and the Vienna Convention on the

[76] J. Gerards, *General Principles of the European Convention of Human Rights,* UK: Cambridge University Press, 2019, p. 61.
[77] Gerards, *General Principles of the European Convention of Human Rights*, p. 52
[78] See, *ibid*, p. 51

Law of Treaties[79]. It refers to (*micro-)teleological interpretation*[80], which is based on the *purpose* of a certain provision. Secondly, the (*micro-)teleological interpretation* is accompanied by the interpretation of the distinguished principles and underlying values of the Convention, which constitute the 'spirit of the Convention' and 'promote the ideals and values of a democratic society'.[81] It refers to the *meta-teleological* [82] interpretation, through which the underlying Convention values are sustained on a higher level of abstraction[83] and applied holistically to the cases, representing the entire context of the legal configuration of the Court.

In the context of freedom of expression, having a clear relation to *democracy*, the Court generally gives an extensive *meta-teleological* interpretation to safeguard the underlying values in its judgements. For instance, in non-violation cases, *democracy* becomes the defining value of the scope of freedom of expression.[84] Hence, it appears as the Court utilizes *democracy* extensively as a guideline since "*democracy* appears to be the only political model contemplated by the Convention and, accordingly, the only one compatible with it".[85] On that note, while judges *justify* their purpose in applying a certain legal provision and how their interpretation is aligned with a particular legal goal or value in the *teleological* approach[86], the *meta-teleological* interpretation appears as a reference point to the underlying values of the systemic contextual ecosystem of the Convention system. Thus, the *meta* level does not necessarily or strictly refer to

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[79] See further: L.A. Sicilianos, 'Interpretation of the European Convention on Human Rights: Remarks on the Court's Approach', 2020, pp. 1-3, https://rm.coe.int/interpretation-of-the-european-convention-on-human-rights-remarks-on-t/1680a05732, (accessed: 10 May 2023)

[80] The micro- level is introduced by M.Lasser, in *Judicial Deliberations: A Comparative Analysis of Transparency and Legitimacy*, Oxford Academic, 2004, https://doi.org/10.1093/acprof:oso/9780199575169.003.0007, (accessed 10 May 2023). Here it must be noted that the (micro-) indicator refers to the specific focus on the special aspects of a particular provision(s) of the Convention, however in other literatures 'teleological' and 'micro-teleological' have been used interchangeably depending on the international Court they refer to. In the case of the Court of Justice of the European Union (CJEU) the two terms are used interchangeably, while in the ECtHR literature utilization of the term 'teleological' usually refers to the 'micro-teleological' interpretation. See, for instance: H. Senden, *Interpretation of Fundamental Rights in a Multilevel Legal System: An Analysis of the European Court of Human Rights and the Court of Justice of the European Union,* UK: Intersentia, 2011, p. 56.
See further: Z. Harasic., 'More about Teleological Argumentation in Law.' *Pravni Vjesnik*, vol.31, no. 3, 2015, p.45 "The teleological method is the most common method of the European Court of Justice concerning interpretation of legal provisions and is as well applied by the European Court of Human Rights."

[81] Gerards, *General Principles of the European Convention of Human Rights*, p. 59 & 61. See: *Soering v. the United Kingdom*, ECtHR 7 July 1989, 14038/88, para. 87

[82] See: Lasser., *Judicial Deliberations*, p. 208

[83] Gerards, *General Principles of the European Convention of Human Rights*, pp. 59 & 60

[84] See, for example, *ibid*, p. 65.

[85] *United Communist Party of Turkey v. Turkey,* ECtHR, 30 January 1988, 19392, para. 45.

[86] Z. Harasic., 'More about Teleological Argumentation in Law., pp. 29-30.

a purpose or justification driven interpretation on the specific Convention provision due to its characteristic of utilizing values for a holistic reference point.[87]

Finally, while the positive aspects of incorporating the *meta-level* interpretation is discussed in the context of CJEU[88], the context of ECtHR is not widely explored, especially regarding both violation and non-violation cases on freedom of expression. Although Gerards, for example, argues that *meta-teleological* interpretation is an aspect that underlines the overall desire to effectively vanguard individual rights at a reasonable minimum level of protection[89], the dangers and risk factors are yet to be discovered.

Henceforth, the *teleological* and the *meta-teleological* interpretation levels will be applied to the analysis under the theme *Argumentative Utilization of the Underlying Values of the Convention* as a lens through which to explore whether feasible balance can be struck between the two levels regarding the Court's argumentative approaches to freedom of expression, and whether there would be any potential negative implications and repercussions of an overall application of the values on the *meta-level.*

3.2 Parrhesia

This section utilizes Foucault's *parrhesia* to analyze how the ECtHR, a supranational justice system, conceptualizes *parrhesia*'s democratic justifiability in its own convention and value system, as it is neither formally nor institutionally codified under the right to freedom of expression. The data will be investigated through the lens of *parrhesia*: (1) Whether

[87] *Ibid,* p.43; M.P. Maduro, 'Interpreting European Law–Judicial Adjudication In a Context of Constitutional Pluralism', IE Law School, 2008, p.3, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1134503 (accessed: 10 May 2023).

[88] See, for example, Z. Harasic. 'More about Teleological Argumentation in Law.' *Pravni Vjesnik*, vol.31, no. 3, 2015; M. P. Madur, 'Interpreting European Law–Judicial Adjudication In a Context of Constitutional Pluralism, IE Law School, WPLS 08-02, 2008, p.10, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1134503 (accessed: 10 May 202); "*The utilization of teleological and meta-teleological interpretation, is argued to be meaningful within a case-law/precedence approach to keep track of the consistency of both purpose oriented provision interpretation and how it is located within the border framework of underlying ECJ values.*; M. Lasser 'The ECJ: The French Bifurcation Reworked' in *Judicial Deliberations: A Comparative Analysis of Transparency and Legitimacy*, Oxford Academic, 2009, https://doi.org/10.1093/acprof:oso/9780199575169.003.0007, (accessed 10 May 2023)

[89] Gerards, '*General Principles of the European Convention of Human Rights', p. 60.*

parrhesiastic acts and pacts (either directly or indirectly) can classify as the Court's interpretation of democratic justifiability and institutional regulability; and (2) If the Court's democratic value system has enough flexibility to protect *parrhesia* as a subjective right, as a surplus of freedom of expression.

Foucault's framework on *parrhesia* sheds light on the democratic borders of free speech and whether *parrhesia,* as an unconventional kind of speech, can be democratically justifiable and institutionally regulatable. *Parrhesia*, meaning "free speech"[90] represents a relationship between speakers and the truth they express in the clearest way possible, without hiding anything.[91] *Parrhesia* is not about fact-checking, but rather expressing truth. Not only do *parrhesiastes*[92] state their opinions directly, but their opinions are also the truth, as they articulate what they know to be true. Thus, "an exact coincidence between belief and truth" is a characteristic of *parrhesia*.[93]

A *parrhesiastic act* is a relationship between the truth, freedom, and duty.[94] It is when a person chooses to tell the truth, even if it puts them in danger, because they feel it is their duty to help others.[95] This act is not based on any pre-existing normative regulations, but rather on the individual's personal relation to truth.[96] What seems to tie truth to any freedom, is a risk factor inherent in *parrhesia.*[97]. As Foucault emphasizes, "*parrhesia* does not produce a codified effect; it opens up an unspecified risk".[98] This risk unlocks an asymmetrical power relation through truth-telling, where the speakers are always in an inferior position to the interlocutor.[99] Whether taking this risk[100], the *parrhesiast*'s subjectivity becomes vulnerable to an unknown reaction in

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[90] M. Foucault, *Discourse and Truth & Parresia.* Henri-Paul Fruchaud and Daniele Lorenzini (eds.), Chicago: University of Chicago Press, 2019, pp.39-40.
[91] *Ibid,* p.40; M. Foucault, *The Courage of the Truth: The Government of Self and Others II. Lectures at the Collège de France* 1983-1984, Palgrave Macmillan, New York, 2011, p.10.
[92] *Parrhesiast* refers to the person who uses *parrhesia*, or tells the truth. See: M. Foucault, *Discourse and Truth & Parresia*, pp.39-40.
[93] *Ibid,* p.42.
[94] *Ibid*; M.Foucault, *Fearless Speech*, J. Pearson (ed.), Semiotext (e), CA, USA, 2001, p.17
[95] M. Foucault, *Discourse and Truth & Parresia.*pp.45-46.
[96] S. Seitz, 'Truth beyond Consensus - Parrhesia, Dissent and Subjectivication'. *EPEKEINA, International Journal of Ontology, History and Critics,* vol. 7, no. 1-2, 2016, p.6.
[97] S. Seitz, 'Truth beyond Consensus - Parrhesia, Dissent and Subjectivication', p.6
[98]M. Foucault, *The Government of Self and Others*, p. 62; M. Foucault, *Fearless Speech*, p.13*; see also,* T. B. Dyrberg, *Foucault on the Politics of Parrhesia,* Palgrave McMillan, 2014, p. 87.
[99] M. Foucault, *Discourse and Truth & Parresia.* pp.42-44.
[100] *Ibid*, p.43.

the face of their truth.[101] The courageous act also sets up a *parrhesiastic pact*, where individuals and the political community connect based on how the individuals relate to the truth.[102] The pact refers to the accountability of a subject who speaks the truth and acts accordingly.[103]

Although *parrhesia* refers to a certain personal relationship with law, it differs from the concept of *isegoria*[104], based on a structure of equality under which the individual has the same part in the freedom, commitment and obligation. Thus, *Isegoria* "designates the legal right given to everyone to speak their own opinion."[105] However, *parrhesia* "represents a *surplus* or *an excess of freedom* which is not definitively regulable within juridical or institutional boundaries."[106] The *surplus* emerges through the personal relationship to the truth since, as Fouacult notes, "there are no formal laws regulating who is able to speak the truth."[107] *Parrhesia*, representing a *surplus* of freedom of expression, cannot represent full institutional regulatability, not only because it is a specific performative emphatic and ethical act but also because it creates asymmetrical relations in the sense of duty, responsibility, obligation, and action-taking capacity by putting oneself in a vulnerable position.[108] Thus, a *parrhesiast* can become a vulnerable subject through risk-taking[109], whose freedom is not regulated institutionally yet is originally embedded in the notion of freedom since it has the power to turn the individual into a subject. Additionally, as Seitz suggests, *parrhesia,* or, risky truth-telling, is already embedded in a (rather subjective) freedom through the other, or otherness, the subject is exposed to.[110]

This study employs this framework in order to add a new perspective on the utilization of *parrhesia.* The data chosen for this study consists of different forms of *parrhesiastic acts*, where first-hand *parrhesiastes* do not have or are deprived of a platform to speak their truth. Those who

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[101] S. Seitz, 'Truth beyond Consensus - Parrhesia, Dissent and Subjectivication' p.6
[102] M. Foucault, *The Government of Self and Others,* p. 87-88.
[103] T. B. Dyrberg, *Foucault on the Politics of Parrhesia,* p. 90. See also: M. Foucault, *The Hermeneutics of the Subject, Lectures at College de France 1981-1982,* New York: Picador, 2005, p. 406.
[104] For a detailed account on *isegoria*, see: M. Foucault, *The Government of Self and Others,* p. 171
[105] S. Seitz, 'Truth beyond Consensus - Parrhesia, Dissent and Subjectivication', p.7.
[106] *Ibid*
[107] M. Foucault, *Fearless Speech*, p.72.
[108] S. Seitz, 'Truth beyond Consensus - Parrhesia, Dissent and Subjectivication'. p.8.
[109] *Ibid,* pp.8-9.
[110] *Ibid,* p.9.

transmit somebody else's truth (*truth-transmitting* hereafter) without necessarily editing or concealing anything, will be evaluated as equally engaging in the first-hand *parrhesiastes*' acts.

Based on this theoretical framework, parrhesiastic acts and pacts can only be a matter of concern if the Court considers the aforementioned inner dynamics through an inclusionary and integral understanding of *parrhesia*. As such, this framework shall be applied to the analysis under the theme *Parrhesiastic Acts and Pacts in a Supranational Human Rights Ecosystem,* where the data will be investigated in whether democratic justifiability of *parrhesia* is applicable to the Court's value system with regards to *democracy,* and the elasticity of its borders.

3.3 State of Exception and Bare Life

This section lays down a theoretical framework to uncover how the potential limits of ECtHR's judicial enforcement logic operate under the *state of exception* in relation to transformation of individuals' politico-legal standing into *bare life* through "inclusive exclusion", [111] before and after the coup d'état attempt on 15 July 2016, in Turkey. Agamben's theoretical approach will be explained and tailored to fit the analytical framework of this study, investigating how *bare life* collides with the cyclical (re)production capacities of the ECtHR regarding a functioning democratic life form within a politico-legal rule in which political rights are sustained. Therefore, a theoretical lens is placed between the domestic and international spheres to discover the operational aspects of democratic and politico-legal transformations.

Agamben discusses the *state of exception* in relation to sovereign power, as a space which is neither inside nor outside the legal order which defines relations between living beings and law[112]. This creates a zone of indistinction where external and internal are intertwined, and not mutually exclusive.[113] Exception does not nullify the norm, as the zone it forms is still relevant to judicial order.[114] The state of exception is not beyond the law but is created through suspending the law, forming a connection with the exception. Thus, the suspension of the law becomes a rule.[115] The validity of the juridico-political order is thus established and defined through the

[111] G. Agamben, *Homo Sacer: Sovereign Power and Bare Life*, D. Heller-Roazen (trans.), Stanford, CA, Stanford University Press, 1998, p.27.
[112] G. Agamben, *State of Exception*, p.23.
[113] G. Agamben, *State of Exception*, K. Attell (trans.), Chicago, IL, University of Chicago Press, 2005, p.2.
[114] *Ibid*, p.23; C. Mills, *The Philosophy of Agamben*, Montreal, McGill-Queen's University Press., 2008, pp. 62-64.
[115] G. Agamben, *Homo Sacer,* p.20,

space it creates.[116] Sovereign power abandons living beings to law, by stripping away political meaning and identification, and producing *bare life* as a form of life.[117] In this cycle, *bare life* becomes a general condition of existence, as the sovereign exception becomes the general norm.[118] Thus, *bare life* enters the political realm under which the lines between inclusion/exclusion, and outside/inside, become indistinguishable.

Agamben argues that in the zone of indistinction, where inclusion and exclusion overlap, *bare life* is produced, and human life is politicized through "abandonment to an unconditional power of death."[119] "Not natural life, but life exposed to death (*bare life*) is the original political element."[120] This relationship is significant in inclusive exclusion mechanisms of life's capturing in a state of exception. *Bare life* is a politicized version of natural life. It is exposed to the law's power in abandonment, culminating in "the sovereign's right to death."[121] This is expressed through the *homo sacer*, or sacred man, who cannot be sacrificed, yet his killing is not considered homicide.[122] Thus, a person can be killed but not sacrificed, which excludes them both from human and divine law. This contradictory status refers to a *bare life* beyond the divine and profane, a life constantly exposed to death.[123]

The right to death implies that life is sacred only when it is taken into the sovereign exception.[124] "When life and politics (…) begin to become one, all life becomes sacred and all politics becomes an exception."[125] Therefore, Agamben rejects the idea that the sacredness of life opposes sovereign power and instead argues that it allows life to be captured by the sovereign exception and bare life to be produced.[126] The sacredness of life, a fundamental right against sovereign power, expresses life's submission to a power over death and its irreparable exposure

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[116] *Ibid,* p.19.; C. Mills, *The Philosophy of Agamben*, p.62.
[117] *Ibid,* p.28.
[118] G. Agamben, *Homo Sacer*, p.9.; C. Mills, *The Philosophy of Agamben*,, p.64-65.
[119] G. Agamben, *Homo Sacer:* p.90.; C. Mills, *The Philosophy of Agamben*, p.64.
[120] G. Agamben, *Homo Sacer:* p.88.; C. Mills, *The Philosophy of Agamben*, p.64-65.
[121] C. Mills, *The Philosophy of Agamben*, p.64.
[122] G. Agamben, *Homo Sacer: Sovereign Power and Bare Life*, trans. Daniel Heller-Roazen . Stanford, CA, Stanford University Press, 1998, p.71.
[123] C. Mills, *The Philosophy of Agamben*, pp. 71-72.
[124] G. Agamben, *Homo Sacer:* p. 85.
[125] *Ibid,* p. 148; J. Lechte and S. Newman, *Agamben and the Politics of Human Rights: Statelessness, Images, Violence*, Edinburgh, Edinburgh University Press, 2013, p.65
[126] C. Mills, *The Philosophy of Agamben*, p.71.

to abandonment.[127] With abandonment, *bare life* is produced as the object of sovereign rule through inclusive exclusion within political elusiveness. Thus, politics becomes a new substructure of a permanent space where bare life is sustained.

That permanent space represents the "camp" which opens "when the state of exception begins to become the rule."[128] Those in the camp inhibit a zone of ambiguity between outside and inside, where concepts of subjective right and juridical protection are no longer meaningful."[129] It is vital to note that Agamben's comprehension of "camp" is based on a "line"[130] separating bare life and political form of life. He puts more emphasis on borders and zones of life forms than the hierarchization and qualification of *bare life.* Specifically, he is "less interested in life than in its "bareness" whereby his framework does not focus on the normalization of life, but on death as the materialization of a borderline."[131] Therefore, Agamben is more engaged in "thanatopolitics"[132] in relation to "camp", than Foucault's understanding of the productive value of populations and its connection to power, but more of a power centered on death and how it is organized around the imperative of life. [133]

Agamben's theoretical emphasis on death, and how it revolved around *bare life* and *state of exception* is a vital aspect for the analytical approach this data analysis utilizes as it is conceptualized on the basis of a *symbolic* form of death, representing the death of the political form of life by getting stuck between different (re)production capacities of the domestic and the supranational. In this way, due to the politico-legal ambiguity, the new *bare life* form of the individual gets bound to under-produce its original/essential human rights bearer and democratic form in the supranational arena, even though it is essential to have a full agency over one's right to freedom of expression, which is essentially a political right.

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[127] G. Agamben, *Homo Sacer*, p. 83.
[128] *Ibid,* pp. 168-169.
[129] *Ibid*, p. 170.
[130] *Ibid,* p. 122.
[131] T. Lemke,' "A Zone of Indistinction": Critique of Giorgio Agamben's Concept of Biopolitics', *Outlines: Critical Practice Studies*, vol. 7, no. 1, 2005, pp. 8-9.
[132] G. Agamben, *Homo Sacer,* p. 122.; *Thanatopolitics* can be defined as politics of death, while necropolitics revolves around the politics of dead bodies. For more information, see: J, Troyer, 'On the Politics of Death', *The MIT Press Reader,* Sep 13, 2021, https://thereader.mitpress.mit.edu/thanatopolitics-on-the-politics-of-death/ , (accessed: 5 May 2023).
[133] For a more detailed account on the differences between Fouault's and Agamben's approach; see: T. Lemke,'A Zone of Indistinction', 2005

Henceforth, the ECtHR's preconceived approach of *state of exception* appears as a temporary process through which the individual's political self stands as a life form is sustained no matter what, bringing about an asymmetry between the bareness of the domestic life form, and the politico-democraticness of the supranational life form. Supranational legal standing appears to be indefinite before the ECtHR's preconceived democratic life form in balancing the vertical and horizontal relations.

Henceforth, Agamben's *state of exception* and *bare life* theories assist the forthcoming analysis by indicating to the dynamics between how the Court sees the indefinite political standing of the life and how the individual-domestic relations are (re)produced through exceptional conditions where the political essence of life gets blurred and under which individuals represent a *symbolic* form of death. Besides unraveling the aforementioned dynamics, his theories will be utilized to examine whether the Court, which puts democratic and political form of life as default, can serve a balanced justice when exception becomes the rule and when the nature of freedom of expression strictly drifts away from political existence.

3.4 The *Ideal* Victim and Victimhood

Victimization and victimhood are widely discussed within the historical, cultural and political realm. To create an inclusive framework for the legal culture of the ECtHR, several theoretical understandings will be utilized, and adapted in parallel with the aim and purpose of this study. When discussing victimhood, this section focuses how the level of individual relationship changes to the supranational law[134] through the perception of victimhood.

This section is conceptualized in a twofold manner. Firstly, the theoretical discussion is centered on how *the ideal victim* is constructed, and whether the ECtHR (re)produces symbolic and ideal types of victim through idealization in order to sustain its framework on Convention values. Therefore, the first aspect creates a lens that channels the supranational into the individual level. Secondly, the theoretical lens gets reversed channeling the individual level to the supranational through a discussion concerning how an individual internalizes victimhood and

[134] See: P. Guibentif. 'Sociology and Legal Subjectivity' in Jiří Přibáň (ed.), *Research Handbook on the Sociology of Law,* Edward Elgar Publishing, 2020, pp.182-187.

the relevant dynamics that come into discussion. In this way, the second part of the discussion continues on the axis of what it might take to turn suffering into victimhood as a *status* category in a theoretical sense, and accordingly how the ECtHR's interpretive culture would approach that dynamic.

The conceptualizations of victimization and victimhood should first be clarified. Eger[135] argues suffering is *universal*, victimhood is *optional* as "victimization comes from the *outside",* stemming from external factors (institutional, personal or structural) over which individuals barely have control. In contrast, "victimhood comes from the *inside*"; victimhood appears when a person chooses to embrace their victimization- by developing "a victim's mind". Jacoby similarly bases her theory of victimhood on a distinction between victimization as a damaging step targeting a person or group, and victimhood as a form of collective identity based on the damage.[136] Although victimization is not desired by anyone, once it is actualized, people generally seek recognition to procure certain values that go along with victimhood in contexts that support rights-based recognition.[137] Although her sequential conceptualization of how victimhood is gained is based on domestic political struggles[138], it is beneficial in understanding how individual domestic understandings of victimhood can act as a strive for recognition under supranational human rights systems.

The first part of the twofold approach provides a lens for conceptualizing how the supranational could (re)produce *ideal* victims. The *Ideal Victim Theory*, conceptualized by Nils Christie (1986), refers to the constructed and selective aspect of victim recognition and strikes attention to the power dynamics that influence the perception of victimhood in society. When individuals or a group are harmed by a crime, some are more effortlessly recognized within a legitimate status of victim through sympathy, support, and acknowledgment by society than others.[139] It underlines the attributes making certain victims more deserving than others, making them fit the *ideal victim* mold.[140] He conceptualizes the *ideal victim* by its resemblance to 'a little

[135] E. E. Eger, *The Choice: Embrace the Possible*, New York, Schribner, 2017, p.24
[136] T. A. Jacoby, 'A Theory of Victimhood: Politics, Conflict and the Construction of Victim-based Identity' *Millennium: Journal of International Studies*, vol. 43, no. 2, 2015, p.513
[137] *Ibid,* p.514
[138] For her conceptualization of the sequence of five stages of recognition as a victim see: *Ibid,* p.513 & pp.517-527
[139] N. Christie, 'The Ideal Victim', in Ezzat A. Fattah (ed.), *From Crime Policy to Victim Policy: Reorienting the Justice System* (1986) p.18.
[140] C. Schwöbel-Patel. 'The 'Ideal' Victim of International Criminal Law', *The European Journal of International Law,* vol. 29, no. 3, 2018, p. 709.

old lady' who, on her way home from caring for her sick sister, gets hit on the head by a big man who robs her. The attributes of the 'ideal' victim appear as: weak, carrying out a respectable project, could not be blamed for where they were, the offender as 'big and bad', and had no personal relationship with the victim.[141]

This study's twofold approach tailors and adapts this theory and the attributes above in order to investigate who 'the little old lady' can be before the ECtHR in line with its *Practical Guideline on the Admissibility Criteria* on victim status (Article 34)[142]. By tailoring *the ideal victim theory* in line with the ECtHR guidelines on victim status, the framework aims for answering whether the Court (re)produces symbolic and ideal types of victim through the constructed features such as weakness, vulnerability, and dependence to be able to sustain its normative framework on Convention values.

The latter part of the twofold approach will proceed with a discussion on how identification with victimhood on the individual level can be conceptualized as a *status* on the supranational level. How much tailoring and competition it takes for the individual to fit in the *ideal* victim mold before the ECtHR's interpretive culture will be touched upon. Thus, the theoretical aspect of *victimhood as status*[143] by Vandermaas-Peeler et. al. is utilized. They provide a valuable insight into how *status* could be conferred to the 'victims', even though they do not generally identify with the characteristics attributed to traditional understandings of power and hierarchy related recognition capacities. They suggest a perspective that "even the weakest members of international society can be conferred status on the basis of their suffering, and this demonstrates how status could depend on perceived powerlessness, and not only strength."[144] Although they do not attempt to theorize victimhood as *status,* their approach to victimhood *status* sheds light on how the victim sits on top of the hierarchical suffering within constructed meanings and significances.

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[141] N. Christie, 'The Ideal Victim', pp.19 & 27

[142] Council of Europe. 'Practical Guideline on the Admissibility Criteria', *European Court of Human Rights,* 2022, pp. 10-19 https://www.echr.coe.int/documents/d/echr/Admissibility_guide_ENG (accessed 10 January 2023); See: *ibid,* para. 19, p. 11 :"The interpretation of the term "victim" is liable to evolve in the light of conditions in contemporary society and it must be applied without excessive formalism." ; A similar approach was followed in Schwöbel-Patel, who adapted Christine's *ideal victim* theory by tailoring it for analyzing how the International Criminal Court produced *the ideal victim* through *weakness, dependence and grotesqueness.* See: C. Schwöbel-Patel, 'The 'Ideal' Victim of International Criminal Law', pp. 709-710.

[143] A. Vandermaas-Peeler, J. Subotic, and M. Barnett. 'Constructing Victims: Suffering and Status in Modern World Order'**,** *Review of International Studies,* 2022.

[144] A. Vandermaas-Peeler, J, Subotic, M. Barnett. 'Constructing Victims: Suffering and Status in Modern World Order',. p.2

Referring to Christie's *ideal victim* theory, they strike attention to international and cultural possibilities of suffering, recognition and being just enough to meet the expectation of being weak, vulnerable, passive and silent on top of the suffering itself.[145] They also add law as a component for the construction of victims since "law has a legitimacy that is important for recognition and *status*". However, they underline that the definitions in the law regarding whose suffering is considered, recognized and worthy does not always align with how the harmed individuals define their suffering.[146] It is also a striking point in Loytomaki, where she underlines how victimhood under law is "constructed through references to human rights categories and criteria" rather than an acquisition on the basis of non-tailored memories of suffering.[147]

In parallel, *status* points to a comparative social ranking of people; it is a cultural indication of shared belief systems regarding "what counts" and "who counts more" according to the standards of the system.[148] Hence, actors would seek status recognition for reasons such as voice, agency, authority, resource and influence generation for their cause, which would not be as strong otherwise. Through that lens, 'victim' can appear as a status category, bringing along common status attributes such as status seeking, status competition, status inconsistency. Namely, status competition is noteworthy here to understand how competition trunks into a strive for proving that an individual's or a group's case is worth more than the others[149] Status competition relates to the theoretical approaches of Competitive Victimhood (CV) , which appears as the tendency to view one's group as having suffered more comparatively to the other group, and competing for claims to victim *status* for their group.[150] Although CV will not be utilized as a main focus lens for the matter of this study,[151] competitiveness is desirable to some extent to be able to reconcile with individual suffering through victim *status* before the ECtHR. Competitiveness could stem from the applicant's identification with the victimhood and suffering in the former case-law on freedom of expression violations. Thus, the individual applicants argue

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[145] *Ibid,* p. 4.
[146] *Ibid.*
[147] S. Loytomaki. 'Law and Memory: The Politics of Victimhood', *Griffith Law Review*, vol 21, no 1, 2012, p.19.
[148] A. Vandermaas-Peeler, J, Subotic, M. Barnett. 'Constructing Victims: Suffering and Status in Modern World Order', p.5.
[149] *Ibid,*p.6.
[150] I.F. Young, and D. Sullivan. 'Competitive Victimhood: A Review of Theoretical and Empirical Literature', *Current Opinion in Psychology,* vol. 11, no. 30, 2016, p.30. See, also *ibid,* for more information on three basic types of intergroup relationships CV is studied in and further literature on CV.
[151] Since CV is widely discussed within intractable conflicts, structural inequality and intra-minority intergroup relations, it will not be utilized as the main focus for a lens for the theoretical assumptions for this study. See, fn. 63.

that their victimhood could be tailored to fit *ideally* enough for a victim *status* as their suffering reflects the underlying principles of the ECtHR guidelines as well as the collective case-law memory of the past sufferings.

Finally, as Vandermaas-Peeler et. al. suggest, victimhood as *status* demonstrates the paradox that power relies on perceived powerlessness", since it can be granted on the grounds of silent resistance, objects of injustice, suffering and more. Victimhood as *status* occurs as a power independent from the destroying capacity of the material power; it comes from the capacity "to exist in spite of it all".[152] Overall, within the individual, domestic and supranational dynamics, legal approaches to suffering and victimhood matter since they give a *status* to the ideal versions cyclically (re)produced by interpretive legal cultures. Still the paradox remains in a world where not everybody's suffering counts; the competition and striving for being 'enough' for a victim *status* introduces opportunities, a form of power which provides agency and social capacity generating rewards and resources[153] more than the others whose sufferings were not *ideal enough* for a status.

Hence, the twofold theoretical lens shall be applied to the forthcoming analysis, to investigate whether the dynamics between how the Court conceptualized an *ideal* victim and how the individuals turn their suffering into victimhood as a *status* category before the Court are aligned with the ECtHR's argumentative judicial interpretations.

4. Methods

This section explains the data collection and delimitation process, justifications for material and case selection, methodological framework utilized for data analysis, and research design. For the purpose of answering the research questions in the highest attainable level, a dynamic approach to Qualitative Content Analysis (QCA) will be followed. The dynamic approach refers to the

[152] A. Vandermaas-Peeler, J, Subotic, M. Barnett. 'Constructing Victims: Suffering and Status in Modern World Order', p.6.
[153] *Ibid*, pp. 17-18.

incorporated logic of Systematic Content Analysis (SCA) approach of Hall and Wright[154], and Argumentation Analysis (AA) approach of Toulmin[155] for increased systematization, comprehensiveness and versatility for this study.

4.1 Data Collection and Material

The primary analysis material consists of violation and non-violation judgements of the ECtHR with regards to freedom of expression (Article 10[156] of the ECHR) between 2003-2022 in Türkiye. The initial data collection step was grounded in the Member State violation statistics of ECHR.[157] The ECtHR case-law statistics on Turkey indicate *at least one violation* in 2,458 judgements, while there were 100 judgements finding *no violation* among the total of 3,900 judgements between 1959-2022.[158] The ECtHR input on Article 10 indicates, out of 1,067 violation cases between 1959-2022; Türkiye has become the leading violating member state with 426 violation judgements.[159] Within the 2003-2022 period, 402 violation[160] and 18 non-violation judgements were recorded under the ECtHR case-law regarding Article 10. These cases were retrieved from the *HUDOC database,* which provides detailed access to the case-law of the Court.[161]

The second step of material collection consisted in finding the related cases in the *HUDOC database* and delimiting the material related to the analytic and operational specifics of the research process. Firstly, the judgments were filtered by the time frame (2003-2023) and language restrictions (only the judgements available in English and Turkish[162]) under Article 10.

[154]M. Salehijam. 'The Value of Systematic Content Analysis in Legal Research', *Tilburg International Law Review X,* vol: 23, no: 1, 2018, p.2. M. A. Hall, and R. F. Wright, 'Systematic Content Analysis of Judicial Opinions', *California Law Review,* vol: 96, no: 1, 2008.

[155] M. Liakopoulos, 'Argumentation Analysis' in *Qualitative Researching with Text, Image and Sound,* M. W. Bauer & G. Gaskel (eds.), SAGE Publications, 2011, p.3.

[156] Council of Europe, *European Convention on Human Rights.* Article 10 (Freedom of Expression), p.12, https://www.echr.coe.int/documents/convention_eng.pdf (accessed: 10 January 2023)

[157] For the full table, see:European Court of Human Rights 'Violations by Article and by State' https://www.echr.coe.int/Documents/Stats_violation_1959_2022_ENG.pdf (accessed: 10 January 2023)

[158] *Ibid.*

[159] *Ibid.*

[160] For Article 10 Violations of Türkiye (2003-2022) distributed by year, see: The Turkish Ministry of Justice. 'Yıllara Göre AİHS 10. Madde İhlalleri', https://inhak.adalet.gov.tr/Resimler/Dokuman/3001202316064719-%20YILLARA%20GÖRE%20AİHS%2010.MADDE%20İHLALLERİ.pdf (accessed 10 January 2023)

[161] European Court of Human Rights, 'HUDOC' [database]: https://hudoc.echr.coe.int/eng#{%22 documentcollectionid 2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22 (accessed 1 January 2023)

[162] The list of the cases translated directly into Turkish from French among the final selection of cases are as follows: *Karatepe v. Turkey* (2007) App. No. 41551/98, *Dink v. Turkey* (2010) App. No(s) 2668/07, 6102/08,

Afterwards, the results were categorized by the importance filter in the database, as: Key cases[163] , level 1[164], level 2[165], and level 3[166]. To delimit the sample size, level 3 judgements were disregarded in the selection process. Accordingly, the rest of the cases were categorized into themes, facts, applicant types, and state of emergency contexts through keyword search functions assigned to Article 10.[167] At this stage, no specific category of expression (e.g. political, academic, journalistic, religious) was filtered, as the research purpose entails a diverse and holistic approach to Article 10. Moreover, judgements including separate opinions (concurring and dissenting) were filtered in the database, and incorporated to capture the nuances and interpretive aspects of judgements in line with the research purposes. The final step focused on dividing the judgements into two categories, before and after June 21, 2016[168] for a balanced distribution ratio of the cases. The final decision was made on 19 cases (illustrated below) among the 402 violations and 18 non-violation judgements recorded between 2003-2022.

30079/08,7072/09, 7124/09, *Gözel a*nd *Özer v. Turkey* (2010) App. No(s). 43453/04 and 31098/05, *Gürbüz and Bayar v. Turkey* (2019) App. No. 8860/13, *Altıntaş v. Turkey* (2020) App. No. 50495/08, *Attila Taş v. Turkey* (2021) App. No. 72/17, *Akdeniz and Others v. Turkey* (2021) App. No(s). 41139/15 and 41146/15, *Taner Kılıç v. Turkey* (No. 2) (2022) App. No. 208/18.

[163] See: European Court of Human Rights, 'HUDOC User Manual' update on October 2022, p.8. https://www.echr.coe.int/Documents/HUDOC_Manual_ENG.PDF (accessed 1 January 2023)
"Judgements delivered since 1998, which have been published or selected for publication in the Court's official Reports of Judgments and Decisions from 1998 to 2015 or, since 2016 selected as key cases"

[164]See: *Ibid* "Judgements not selected as key cases but make a significant contribution to the development, clarification or modification of the Court's case-law, either generally or in relation to a particular State"

[165]See: *Ibid.* "Judgments, which, while not making a significant contribution to the case-law, nevertheless go beyond merely applying existing case-law"

[166] See: *Ibid.* "Judgments, of little legal interest"

[167] E.g. "receive information", "impart information", "duties and responsibilities", "interference", "necessary in a democratic society", "national security", "public safety". For the full list see: Advanced Search in the HUDOC User Manual, pp. 19-20. https://www.echr.coe.int/Documents/HUDOC_Manual_ENG.PDF (accessed 1 January 2023)

[168]The date of derogation under Article 15 of the ECHR following the Coup Attempt which was followed by the declaration of the state of emergency on 20 July 2016."The State of Emergency was terminated on 19 July 2018, at the end of the deadline set by the Decision No. 1182. Accordingly, the Government of the Republic of Turkey has decided to withdraw the notice of derogation."
See: Council of Europe Treaty Office, 'Reservations and Declarations for Türkiye' https://www.coe.int/en/web/conventions/concerning-a-given-state-or-the-european-union-?module=declarations-by-state&codeMatiere=44%2C3&territoires=&codeNature=8&codePays=TUR&numSte=&enVigueur=true&ddateDebut=05-05-1949&ddateStatus=04-01-2023 (accessed: 1 January 2023)

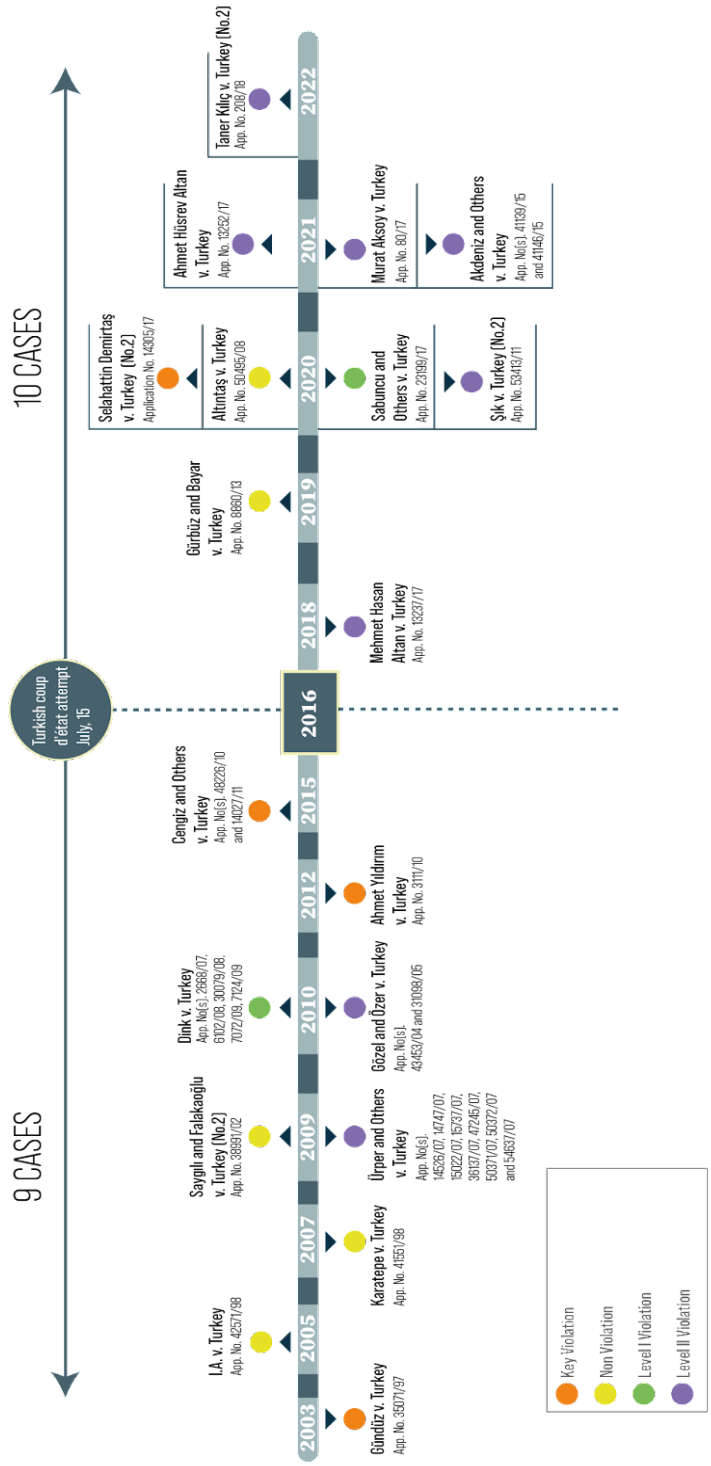

Figure 2. *The selection of ECtHR judgements (illustrated by the Author)*

Justifications for Case Selection and Sample Size

The decision to analyze the cases illustrated above is elaborate. Firstly, balanced distribution was a main concern in terms of the years and importance levels of the cases. Secondly, this study is based on a heterogenous approach as a criteria in terms of including both violation and non-violation cases from different levels, several types of expression (e.g. political, journalistic, religious, academic, human rights activism, blaspheme, and hate speech)[169], various platforms (books, newspapers, websites, broadcasting, public speech, parliament), argumentative approaches of the ECtHR judges (dissenting and concurring opinions), and specific issues (democratic principles, state of emergency, national security, incitement to violence, terrorism). This manifold approach was directed at digging into the underlying dynamics between the level of interference or engagement on the individual, domestic and supranational level through diversity of the sample catalog.

Delimiting the sample size was done neatly; a total of 420 cases were categorized according to the criteria above, focusing on the wider content of the judgements. The individual, governmental and supranational justifications including separate opinions and rare occurrences in the case-law such as invocation of Article 46 (remedy jurisprudence) were taken into account for both violation and non-violation cases in relation to the research questions and aims. Repetitive cases with similar subject matter and judgment style were discarded to keep the diverse approach for high quality output potential for offering new perspectives to answering the research questions. After these steps, the case number was downsized to four cases per year. Keeping a similar ratio before and after the coup d'etat attempt, the most optimal judgements in terms of diverse and elaborate judgements were selected in a cyclical manner in time.

While delimiting the sample size, an *iterative* approach to sampling was applied, enabling expanding and altering of the sample to guide future sampling decisions throughout the process

[169] The defamation cases are disregarded since the subject matter of the cases are mostly based on one-on-one relations on the individual level. See: e.g. *Dickinson v. Turkey*, App.no 25200/11, 02/02/2021, *Vedat Şorli v. Turkey,* App.no 42048/19, 19/12/2021, while all other types of expression cases included in the study have a bigger societal effect in terms of potential collective harm or public disorder.

with newly discovered information.[170] A *purposive* sampling approach was not desirable due to its restricted scope and tendency to pick and keep the same sample size throughout the research.[171] Instead, the *iterative* approach enabled a cyclical process of seeking optimal samples, enriching the initial understanding of the research questions until *saturation* was reached, when no new input challenged the understanding of initial research questions.[172]

Justifications for Material Type

There are several reasons why ECtHR judgements with heavy legal language are chosen as the primary material aligned with the central research aim. Firstly, these judgments are widely analyzed by legal scholars through utilization of legal research methods, but not as deeply and frequently by social sciences or humanities researchers. Even so, the technicalities, legal-operational functionings, and legal argumentative aspects have been excluded from the scope of these researches. This study aims to utilize the ECtHR judgements to show legal spaces are not entirely legal, as they form relations between the individual and social, domestic and supranational, and legal and political. The ECtHR's focus on individual remedies in its judgements does not only give a person a legal personality, but also gives individuals the opportunity to discover where they stand in the social, political, legal, and philosophical relations formed by the Court's judgements. Secondly, in the context of freedom of expression, the richness in the content of the judgements, including interpretive-argumentative aspects, allows for the utilization of QCA to uncover the manifest, and *the contextual and latent content*[173], enabling for following an open-ended and tentative approach in hermeneutic explorations, while still satisfying the research aims in the development of the research design.[174] QCA is adaptable to judicial opinions, as it enables a finer level of understanding of case-law, legal principles and institutions with the objectivity and social scientific epistemological assumptions.[175]

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[170] J. W. Drisko & T. Maschi, 'Qualitative Content Analysis' in *Content Analysis,* Oxford University Press, 2015, pp.97 & 100-101.
[171] *Ibid.*
[172] *Ibid.*
[173] *Ibid,* p.85
[174] K. Krippendorf, *Content Analysis: An Introduction to Its Methodology,* 2018, Los Angeles: SAGE, p.92
[175] Hall, and Wright., 'Systematic Content Analysis of Judicial Opinions' pp. 63, 122; Salehijam 'The Value of Systematic Content Analysis in Legal Research', p.3.

4.2 A Dynamic Approach to Qualitative Content Analysis

For the purpose of this study, a dynamic approach to QCA will be followed. This refers to the incorporated logic and influences of SCA discussed by Hall and Wright[176], and AA by Toulmin[177] for increased systematization, comprehensiveness and versatility for this study. Incorporation of these two approaches does not mean their methodological tools were utilized in the coding process of the sample size; the application of QCA was enriched through the logic of these approaches in capturing the nuances, fluctuations, deviations, interpretive aspects in the wider content and context of legal documents.

QCA is described as incorporating a set of techniques for "the systematic analysis of texts addressing not only manifest content but also the themes and core ideas found in texts as primary content."[178] QCA embodies both contextual information and latent content,[179] the qualitative aspect of "reading between the lines" [180], rather than downsizing content to what is commonly agreed on.[181] Following the aim of this study, QCA is the optimum approach to the data, since it aims at focusing all levels of meaning in a comprehensive manner. Thus, QCA is utilized to expand and elaborate on the data, rather than a reductionist quantitative approach, which might disregard or trivialize critical concepts that appear in low frequencies.[182]

The target of utilizing QCA in this study goes beyond Drisko & Maschi's view of QCA as a description of dataset patterns[183], and rather focuses on theme identification"[184]. Aligned with Sandelowski's approach, the utilization of QCA here is geared towards the interpretive side of the spectrum, due to the effort in comprehending manifest and the latent content in the dataset.[185]

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[176] Hall, and Wright., 'Systematic Content Analysis of Judicial Opinions' ; Salehijam 'The Value of Systematic Content Analysis in Legal Research', p.2.
[177] M. Liakopoulos. 'Argumentation Analysis' p.3.
[178] J. W. Drisko & T. Maschi, 'Qualitative Content Analysis' p.85.
[179] *Ibid.*
[180] K. Krippendorf,. *Content Analysis: An Introduction to Its Methodology*, p.25
[181] *Ibid,* p.26
[182] *Ibid.* p.83,; M. Sandelowski, 'Whatever happened to qualitative description?' *Research in Nursing and Health*, vol: 23, no:4, 2000, p.338.; J. W. Drisko & T. Maschi, 'Qualitative Content Analysis' p.87; M. Schreier, *Qualitative Content Analysis in Practice*, Thousand Oaks, CA:Sage Publications, 2013, p. 7.
[183] J. W. Drisko & T. Maschi, 'Qualitative Content Analysis' p.90
[184] *Ibid,* p.88
[185] M. Sandelowski, 'Whatever happened to qualitative description?', p.338; J. W. Drisko & T. Maschi, 'Qualitative Content Analysis' pp.88-87

Even so, QCA is *the least interpretiv*e among all qualitative research types, "in that there is no mandate to represent the data in any other terms but their own".[186] Thus, this approach also helps balancing the level of interpretation and maximizing researcher impartiality.

Epistemological Framework

By rejecting "the container approach" which depends on a message having only one objective content, the epistemological framework of the research leans towards a constructivist framework under which a suitable environment is constructed throughout the study for the chosen content to make sense, and answer the research questions within interpretations that can be cut down to a feasible amount.[187] The focal point of integrating QCA into this study is to infer elements of unobserved socio-political phenomenal connections from the selected Judgements of the Court to the broader human rights context.[188] Correspondingly, the research aim and purpose requires categorization of interpretive human rights perspectives, related arguments, the horizontal, vertical and cyclical structures in style of reasoning, ascertaining associative aspects of (negative and positive) justifications.

Integrated Perspectives

Systematic Content Analysis (SCA)

The research incorporates SCA as this approach emphasizes the value of using content analysis on judicial analytical aspects as: (1) It does not occupy the epistemological basis as conventional legal analysis, (2) it "holds more promise in the study of the connections between judicial opinions and other parts of the social, political or economic landscape".[189]

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[186]M. Sandelowski, 'Whatever happened to qualitative description?', J. W. Drisko & T. Maschi, 'Qualitative Content Analysis' p.87.
[187] K. Krippendorf,. *Content Analysis: An Introduction to Its Methodology*, pp.28-29.
[188] *Ibid*, p.30.
[189] *Ibid,* p.100

SCA is a systematic technique applied to analyze, among others, case law and legislation.[190] For Hall and Wright, SCA lays out a beneficial approach to analyze the content of judicial opinions in determining the common qualities linking the opinions and reveal their importance, since it enables a finer level of reading and understanding of case-law.[191] They emphasize affirmative suitability and the innovative aspect of CA in evaluating the judicial concerns. SCA applies to questions including, the argumentative, interpretive, or expressive techniques utilized by judges under different circumstances, and the differing meanings of critical concepts their written opinions reflect.[192] Thus the legal logic of SCA, in alignment with the research questions and aims, bringing the logic of SCA into QCA allows for an amplified ability and unique empirical understanding of legal institutions and legally relevant aspects of judicial opinions, the objective methods and epistemological assumptions of a social scientist.[193]

Argumentation Analysis

Toulmin's approach to AA is incorporated into the QCA to capture positive and negative nuances, deviations, flexibilities in interpretation of the ECtHR judgements and separate opinions of individual judges which are rich in argumentation. He focuses on persuasiveness, convincingness and functional aspects of language.[194] Essentially, some aspects of arguments will be field-dependent (e.g. law and politics) due to the characteristics of the argumentative sphere.[195] Thus, clustering of argumentation in the Court's judgments will be analyzed not purely in a legal, but in the triangulation of a political, social and legal paradigm which reflects the context-dependent logic of human rights norms and values in action.

Although the data is rich in argumentation, the reason for not choosing AA instead of QCA is to not downgrade a supranational justice ecosystem into an argumentative arena. The accumulation of dynamics shaping the judgements include complex elements embedded in the

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[190] M. Salehijam. 'The Value of Systematic Content Analysis in Legal Research', p.1.
[191] *Ibid,* p.3; M. A. Hall, and R. F. Wright, 'Systematic Content Analysis of Judicial Opinions', p. 63.
[192] M. A. Hall, and R. F. Wright, 'Systematic Content Analysis of Judicial Opinions', p. 93.
[193] *Ibid ,* p. 122
[194] M. Liakopoulos, 'Argumentation Analysis', p.3.
[195] *Ibid,* p.5.

bigger content of the data between the axis of individual-domestic and supranational. Thus, elaborative results call for QCA.

4.3 Research Design

QCA, with the contribution of SQA and AA made it possible to construct a dynamic research design to make comprehensive levels of unobserved socio-legal and political-legal phenomenal connections between the selected judgements to the broader human rights context. These connections relate to textual nuances and deviations in the operational and procedural application of the freedom of expression norms and underlying argumentative substructures of the Court. Below, the steps within the research design are explained.

Firstly, all selected judgements will be read thoroughly following a specific order (1) whether a specific measure exists, (2) defining the operational and substantive aspects of the case, (3) relevant values and norms regarding Article 10, (4) how the collective judgment and argumentative intensity is structured, and (5) how the separate opinions of the judges (if any) are structured and differ from the majority.

Secondly, a coding framework will be created for analysis through a combination of both inductive (to uncover the latent content), and deductive (to elaborate on manifest content) coding strategies.[196] As a deductive strategy, utilizing sources from the *list of keywords assigned to Article 10 of the HUDOC database*[197] will be utilized as guiding substructure of the initial coding framework, while the subsequent step reveals content driven, inductive codes (e.g. from *national security* as an initial code to, *repression pattern).* Therefore, the research will not only focus on a descriptive approach (QCA is seen as the ideal approach for unraveling the meaning in communication[198]) but also on a conceptual development.[199]

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[196] M. Schreier, *Qualitative Content Analysis in Practice*, p.89

[197] For the full list, see: European Court of Human Rights, 'List of Keywords': https://www.echr.coe.int/Documents/HUDOC_Keywords_ENG.pdf (accessed 10 February 2023).

[198]See, for instance: P. Mayring, 'Qualitative Content Analysis'. *Forum Qualitative Sozialforschung Forum: Qualitative Social Research*, vol. 1, no. 2, 2000; D.L. Morgen, 'Qualitative Content Analysis: A Guide to Paths not Taken'. *Qualitative Health Research*, vol 3, no 1, 1995 pp.112-121.; M. Sandelowski, 'Whatever happened to qualitative description?', Schreier, *Qualitative Content Analysis in Practice*,

[199] J. W. Drisko & T. Maschi, 'Qualitative Content Analysis', p.102; M. Schreier, *Qualitative Content Analysis in Practice*, pp. 84-89.

Lastly, a layered framework for analysis is constructed for discovering how operational and procedural aspects revolve around judgment processes in terms of argumentative and interpretive aspects. A mirroring approach is created while preparing the data for analysis. On one hand, the operational principles, such as remedy jurisprudence (Article 46), admissibility criteria (Article 34), and Article 15 (derogations in case of public emergency)[200], with regards to the Court's subsidiarity to the sovereign were systemized on the individual, domestic, and supranational level. On the other hand, the same three level systematization is applied to the substantive principles including the permissible interferences, the scope of freedom of expression, underlying democratic values of the Convention, were systemized. These two sets of systemized categorization will be cross-fertilized through argumentative divergences, value-based interpretation, and how elastic the borders of freedom of expression gets. Then the emerging inductive codes and categories will be thematized in line with the theoretical framework of the study. Utilizing this approach will benefit the research aims of unraveling not only horizontal or vertical, but also cyclical tendencies of argumentative fluctuation over time.

Ethical Considerations

As the researcher, I applied the highest standards possible to ensure *validity* and *reliability,* and maintain *objectivity.*

To overcome validity related concerns, an *iterative* approach is utilized during the data delimitation and analysis process, increasing the soundness of the output through continual verification of findings, self-reflection, potential bias towards (inclusive or exclusive) any group of applicants mentioned in the data, and the proper application of the theoretical frameworks[201].

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[200] ECHR, Article 15.1 regarding derogations 1. In times of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law". (pp.13-14).

[201] See: L. M. Given, 'Validity' in L. M. Given (ed.), *The SAGE Encyclopedia of Qualitative Research Methods*, Thousand Oak, California, SAGE Publications Inc., Thousand Oaks, CA, 2008b, https://methods.sagepub.com/reference/sage-encyc-qualitative-research-methods, (Accessed 10 May 2021).

The selection of the cases utilized as data were not strictly *purposive* from the beginning, thus it gave me the opportunity of overcoming validity related concerns in time. Validity is ensured through: (1) Elaborate explanation of how the data and the qualified method interacted, (2) transparent research procedure guided by an advanced utilization of the trustworthy legal database of the ECtHR, (3) constant reconsideration of undesired inconsistencies and double checking transparent codes, (4) detailed results aligned with the methodology and theoretical framework, producing coherent and sound conclusions.

Methodological coherence is ensured through a multi-step data collection and delimitation process, a meticulous analysis process through cross-fertilization of the data throughout the analysis, transparent description of all the procedures, subject matter of the data and serving qualified examples throughout the analysis helped me systematize the research process through the lens of reliability and credibility criteria.[202]

Lastly, the objectivity aspect is meticulously taken into consideration[203] due to my Turkish nationality. The potential biases of the research is strictly ensured by the choice of QCA[204], which gives the researcher a limited margin in interpretive aspects in comparison to other qualitative methods. Moreover, utilization of publicly available data from a legal database and inclusion of diverse data from both violation and non-violation cases, including both concurring and dissenting opinions aimed for increasing objectivity and reliability. A final objectivity issue which might occur to the reader could be the translation of some data from Turkish into English. In that regard, I hold a B.A. degree in Translation and Interpreting studies, specializing in *legal translation*. As a certified and trained translator, translation ethics is the vital part of my profession. Thus, the nuances in the legal language were aimed at keeping on the equivalency side, which ensures the transfer of the meaning and style without any loss of content, or nuances abiding by my professional duties and responsibilities, textual meaning and

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[202] L. M. Given, 'Reliability' in L. M. Given (ed.), *The SAGE Encyclopedia of Qualitative Research Methods*, Thousand Oak, California, SAGE Publications Inc., Thousand Oaks, CA, 2008b, https://methods.sagepub.com/reference/sage-encyc-qualitative-research-methods, (Accessed 10 May 2023).
[203] See further: L. M. Given, 'Objectivity' in L. M. Given (ed.), *The SAGE Encyclopedia of Qualitative Research Methods*, Thousand Oak, California,SAGE Publications Inc., Thousand Oaks, CA, 2008b, https://methods.sagepub.com/reference/sage-encyc-qualitative-research-methods, (Accessed 10 May 2023).
[204] See: 'A Dynamic Approach to Qualitative Content Analysis' section above.

function across Turkish-English language pairs and legal cultures were cross-assessed for overall coherency and quality.

5. Analysis

Freedom of Expression in a Democratic Perspective

5.1 Argumentative Utilization of the Underlying Values of the Convention

In terms of the underlying Convention values the Court operates within, several cases indicate generic argumentative references to concepts such as *democracy, pluralism, tolerance, open mindedness,* and *equal dignity,* as well as values referring to the spirit of the Convention, such as *justice* and *peace*. This analysis reveals that the pattern of repetitive generic references in the Court's reasoning seems to create vulnerability to mainstreaming, banalization, and shrinking the foundational democratic framework established by these values. Here, argumentative utilization patterns of the Court pose a challenge to the maintenance of this framework, which holds great potential for fostering deeper elaborative argumentative reasoning in the Court's case law.

Gündüz v. Turkey[205] concerns an Islamic sect leader whose statements on a TV programme incited hatred and hostility based on a distinction founded on religion, according to the domestic judgment.[206] The analysis observed a broad and selective style of argumentation, both in the context and content of the subject matter. Even though *pluralism, tolerance, open-mindedness,* and *equal dignity* were laid out as democratic foundations in contrast to hate speech,[207] the Court also emphasized that democratic values were incompatible with the applicants' conception of Islam.[208] The Court ruled that the content of the speech only demonstrated a "profound dissatisfaction" with contemporary institutions in Turkey, while there

[205] *Gündüz v. Turkey*, no. 35071/97, 4/12/2003
[206] *Ibid,* paras. 13-14 & 46.
[207] *Ibid,* paras. 40-41.
[208] *Ibid,* para. 43.

was *no proof of call to violence or hate based on religious intolerance*;[209] therefore, the domestic measures were not based on "sufficient reasons".[210]

Interestingly, the Court admitted that the applicant's usage of the word "*piç,*"[211] a pejorative term in Turkish, might have made certain Turkish people *legitimately* feel that they have been *attacked in an unwarranted and offensive manner.*[212] However, in a hate speech case, where the democratic values are utilized in the argumentative conceptualizations of the Court, the "pluralistic debate environment" the applicant was taking part in, in addition to his "already known extremist views"[213] seemed to *outweigh the balance of interests, as well as the international norms on free speech and hate speech* in a democratic society, where such democratic values apply to everyone.

This approach was criticized in Judge Türmen's dissenting opinion. Emphasizing the incompatibility with previous case law, he emphasized that where the Court accepts or *at least does not deny* that "piç" is a term within hate speech, s*uch a remark should not have enjoyed protection under Article 10.*[214] He added that there was no discussion regarding whether the word added value to the development of a *democratic discussion environment.*[215] Finally, he underlines that this key violation judgment is against the *letter and the spirit of the Convention* since it did not grant "the same degree of protection to the people having secular values as it does to the religious values."[216] "Rights of others" cannot be restricted under Article 10 (2), solely to protect the rights of religious believers.[217]

Overall, argumentative selectivity in *Gündüz* shows a variety of policy implications in terms of the application of the democratic framework of values that affect who is protected

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[209] *Ibid,* para 46.
[210] *Ibid,* para.52.
[211] See: Dissenting Opinion of Judge Türmen:. "Piç" (translates as: bastards), "a pejorative word meaning illegitimate children, which is a very serious insult". *Ibid,* dis. op. p. 1.
[212] *Ibid,* para. 48.
[213] *Ibid,* para. 51.
[214] *Ibid,* dis. op. p.2.
[215] *Ibid.*
[216] *Ibid,* dis. op. p.3.
[217] *Ibid.*

through democratic values. As the analysis revealed, even though these values were laid out, the majority did not utilize them effectively in judging. This tendency indicates the danger of mainstreaming, banalizing, and shrinking the foundational democratic framework established by these values. Henceforth, deviation from the previous case law validates the challenges posed in maintaining this framework, allowing substantial potential for fostering deeper elaborative argumentative reasoning in the Court's case law.

On the other hand*, I.A. v. Turkey* is the case of the proprietor and managing director of a publishing house, convicted for publishing two thousand copies of a book constituting "blaspheme against religion and vilification of religion." The government justified interference on the ground of "pressing social needs", i.e., an attack on Islam in a country with a majority Muslim population. It constituted an offensive and insulting form of expression since it exceeds the "level of responsibility".[218]

While emphasizing "*pluralism, tolerance, and broadmindedness* as the hallmarks of a democratic society",[219] the Court emphasized that there must exist room for tolerance towards criticism and acceptance of others' denial of people's religious beliefs, even propagation by others of doctrines hostile to their faith.[220] Nevertheless, the Court judged that the domestic measures answered a "pressing social need"; such content exceeded the limits of 'offending, shocking, or a provocative opinion' on the prophet of Islam.[221]

The Joint Dissenting Opinions of Judges Costa, Cabral Barreto and Jungwiert underlined that reproduction and application of freedom of expression norms in connection to the aforementioned democratic values, apply along the lines of the information and ideas that "shock, disturb, and offend".[222] These norms and values, based on the democratic framework of the Court, should not become "an incantatory or ritual phrase," but rather inspire solutions in the case law.[223]

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[218] *I.A. v. Turkey*, no. 42571/98, 13/09/2005, paras. 21-22.
[219] *Ibid,* para. 28.
[220] *Ibid.*
[221] *Ibid,* para 29.
[222] *Ibid, dis. op. para. 1,* See also: *Handyside v. The United Kingdom (p. 23, para.49).*
[223] *Ibid.*

Application of the values creating the democratic framework did not consider the limited impact of the words on the public, as only two thousand copies were published. Although this view may offend or shock much of the population, having no apparent argumentative reasoning regarding imposing sanctions on the publisher of a book in a democratic society would render the effect of the established case law.[224]

The Court's overall judgment deviates from the deeper framework of these democratic values with generic argumentative reasoning. The dissenting judges call for a critical examination of the case-law, by indicating an overemphasis on "conformism" or "uniformity of thought," which might gear towards an overly cautious and timid conception of freedom of expression, as well as "self-censorship" and implicit encouragement of "blacklisting"[225] in connection with the interpretation of democratic values, potentially leading to shrinking and banalization, thereby posing further challenges on the policy endeavors of elaborative argumentative reasonings in the Court's case-law.[226]

Karatepe v. Turkey regards a political figure sentenced to one year imprisonment and a monetary fine following his public speech, which amounted to incitement of hostility and hatred by national authorities.[227] By emphasizing how his public status gains more importance in the context of conflict and tension ,[228] the Court examined his statement in relation to the democratic values such as "plurality" and "tolerance,"[229] and the fundamental values mentioned in the preamble of the ECHR, such as "peace" and "justice".[230] Accordingly, the argumentative approach of the Court concluded that the applicant's statement contradicts the understanding of the values as it calls for holding onto "*rage, grudge and hate"* within a religious value framework.[231] Therefore, the applicant's statement seemingly amounts to the glorification of violence, as certain ideas and information can *"offend", "shock" or "disturb".*[232] In his partly

[224] *Ibid, dis. op.* para 3.
[225] *Ibid,* para 6.
[226] *Ibid,* para 8.
[227] *Karatepe v. Turkey,* no. 41551/98, 31/07/2007, p.2.
[228] *Ibid,* p. 5.
[229] *Ibid*, p. 4.
[230] *Ibid,* p. 5.
[231] *Ibid.*
[232] *Ibid.*

dissenting opinion, Judge Zagrebelsky finds the majority's argumentative judgment pattern based on generic mentions of tolerance, open mindedness, peace and justice, worrying. If these values were invoked, he argues, the applicant should have been able to state his opinions publicly according to "tolerance" and "open mindedness," if these values as a framework were in fact elaborated on in terms of the overall judgment of the Court.[233] Judge Zagrebelsky's concern points out generic argumentative tendencies regarding the danger of a shift towards banalized and frameworks on democratic values under Article 10, as a result undetailed reasoning enriching the argumentative and policy aspects of case law. In addition, Judge Zagrebelsky's interpretation of the case reveals that, in a more engaging perspective utilizing the democratic values, the applicant's "exaggerated" expression exceeds the limits of free speech protected under Article 10. The applicant publicly apologized for his statement afterwards. Thus, considering the previous case law, penal sanctions appear to be neither proportionate nor necessary in a democratic society.[234]

Gürbüz and Bayar v. Turkey concerns two media professionals: (1) a proprietor of a newspaper, and (2) editor-in-chief of the same newspaper. This newspaper published an article regarding the statements of terrorist organizations (PKK and Kongra-Gel), including statements of PKK leader Abdullah Öcalan.[235] The convictions against the applicants came under Counterterrorism Law No. 3713 Article 6 (amended June 29, 2006) Sections 2 and 4, regarding the publication of terrorist statements; the applicants were sentenced to a judicial fine.[236] The sentence of applicant (1) was overruled due to overtime, despite applicant (2)'s sentence being upheld. The Court underlined that the criminal procedures constituted a "deterrence effect" on exercising their freedom of expression.[237]

In terms of democratic values, the Court highlighted its former case law in connection with the importance of examining the content of messages communicated when there is a need to detect whether such messages align with the spirit of *tolerance* as well as the fundamental values

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[233] *Ibid, p. 7.*
[234] *Ibid.*
[235] *Gürbüz and Bayar v. Turkey,* no. 50495/08, 23/07/2019, para.12.
[236] *Ibid,* paras. 13 & 14.
[237] *Ibid,* para, 31.

such as *peace* and *justice* laid out in the Convention's preamble.[238] In examining the content, the court concluded that certain terms utilized in the statements constituted a threat to the government, including giving warnings and orders to PKK members regarding resumption of terrorist actions.[239] Overall, the Court ruled that the applicants opened up a platform for the publication of these expressions, despite having no personal connection to their content.[240]

The dissenting opinion of Judge Pavli underlines that the Court's general argumentative reasoning constitutes a practical problematic aspect regarding the spirit of the values, namely *tolerance.* He criticized the fact that the domestic courts did not examine the content or context of the statements in question in connection to the convention principles. Nevertheless, the Court's generic referencing to these values constitutes a deficient reasoning fifteen years separated from the publication date and content of the statements in question.[241] Judge Pavli stated that in his opinion, this approach reverses the fundamental logic of Article 10. The majority's judgment constitutes theoretical and practical hardships. It may open a platform for domestic courts to make vague references to these values to justify interferences with Article 10, giving leeway to not applying a thorough nor sufficient examination of the content in close connection to Article 10's. principles.[242] Accordingly, Judge Pavli implied that making vague references to democratic value judgments, without intending to detect the risk level of the qualities of the expression, nor focusing on intentions of the applicants and disregarding the scope of media professionals' rights, responsibilities, duties, and their working principles on "working with hard reality and mirroring it to the public in a strict way" would create a paradoxical approach to the borders of democratic frameworks in the context of Article 10.[243]

Finally, regarding democratic values, *Altıntaş v. Turkey* is another non-violation judgment in which the applicant was editor-in-chief of a journal.[244] The domestic criminal procedures initiated against the applicant concerned praising a committed crime and criminals regarding the

[238] *Ibid*, para, 37.
[239] *Ibid,* para 37, 41 & 42.
[240] *Ibid*, para. 44.
[241] *Ibid, dis. op. para, 6.*
[242] *Ibid, dis. op. para,* 7.
[243]*Ibid, dis. op.* paras. 12-13 & 16.
[244] *Altıntaş v. Turkey,* no. 50495/08, 10/03/2020, para. 5.

publishing of an article regarding the anniversary of the Kızıldere incidents of 1972 in Turkey[245], which were, according to the Government, connected to illegal leftist organizations named after THKP/C (Türkiye Halk Kurtuluş Partisi/Cephesi) and THKO (Türk Halk Kurtuluş Ordusu).

Since the reasoning of domestic courts was manifestly ill-founded for the conviction of the media professionals, (as there was no thorough content examination), the Court examined whether the statements constituted hate speech, incitement to violence, or glorification of violence.[246] The Court strictly underlined the foundational democratic framework; statements made, especially those conflicting with *tolerance*, *justice,* and *peace,* would be strictly against the letter and spirit of the Convention, preventing them from protection under Article 10.[247]

In its examination, the Court ruled that domestic interference in the exercise of freedom of expression was proportionate in a democratic society.[248] The publication could give an impression of the necessity and legitimacy of violence to people who share the same political or ideological background.[249] However, while the Court's examination focused on the key factors of political and social contextuality, incitement to violence, and risk of harm,[250] this analysis found that the majority did not have any overt implications regarding the connection of these factors and the aforementioned values, creating the foundations of the democratic framework of the Convention itself. Thus, this negligence, or reluctance to make stronger argumentative connections/elaborations regarding why and how these democratic values are vital for sustaining the foundational democratic framework,[251] seems to create a generic repetition of these values. This tendency, according to the patterns followed in this analysis, points to a risk of turning those concepts into placeholders, blurring the vital foundational connections between argumentative and policy aspects within the functioning of the Court, thus creating a gap between former and future case law.

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[245] For details regarding these incidents, see: *Ibid,* paras. 6-9.
[246] *Ibid*, paras. 29-30.
[247] *Ibid*, para. 30.
[248] *Ibid*, para. 35.
[249] *Ibid* para. 34.
[250] *Ibid*, para 31.
[251] *Ibid*, paras. 32-35.

In their dissenting opinion, Judge Bardsen and Judge Pavli argued that they were in the opinion that Article 10 was violated by domestic authorities, disagreeing with the majority's argumentative reasoning. By accentuating the symbolic value of the incidents for some radical left-wing groups (mentioned in the statements in question), they underlined that this case constituted a judgment that directly connected the spirit of the Convention and *political expression,* among all other types of expression protected under Article 10. In their opinion, this case also requires considering values such as *pluralism, tolerance,* and *open-mindedness,* without which a *democratic society* would not exist.[252]

Overall, they stated that in times when the domestic courts did not seem to be enthusiastic about examining the intentions behind the statements and the qualities of the content and context in depth,[253] the Court might not always be able to come to their rescue. Since the statements in question reference a limited incident, where it can be perceived in a disputable manner, insufficient domestic reasoning should provide enough reason to give a violation judgment.[254] Judge Bardsen and Judge Pavli interpret that the content is disputable and can be interpreted in different ways: (1) political expression or (2) an interpretation of a historical incident. Additionally, despite the statements being selective and unclear, it cannot be concluded that there was a clear element of approval or incitement of violence after a fair examination. Nevertheless, although the dissenting judges emphasized the importance of the aforementioned values for a democratic society, they did not make any conceptual connection or provide guidance as a warning for the importance of future case law. This case also proves the present gap between the argumentative disparities in how democratic values shall survive for each of the existing principles that are applicable to Article 10.

5.2 Parrhesiastic Acts and Pacts in a Supranational Human Rights Ecosystem

[252] *Ibid, dis. op.* para. 3.
[253] *Ibid, dis. op.* para. 8.
[254] *Ibid, dis. op.* para. 11.

Deriving from the theoretical perspectives of Foucault's conceptualization of *parrhesia* and its necessity for democratic conceptualizations, this analysis observes mixed signals of inclusionary and exclusionary undertones of *parrhesiastic* acts, pacts, and possibilities in several Court judgements in a covert and inconsistent manner. As it appears, whether the cases concern direct or indirect parrhesiastic exposition (*truth-transmitting*) through opening an arena for other individuals to utter their truth, there is only a limited space for elasticity to include *parrhesia* as a subjective freedom, considering the dynamics between the Convention's democratic value system and the asymmetrical relations *parrhesia* points out to.

Hence, the Court, on one hand, gives inferential hints of a potential elasticity for inclusion of *parrhesia's* fundamental principles within the democratic human rights ecosystem and its relation to the subjective freedom of parrhesiastic acts and pacts, as well as the ethical and political subjectification process of the individual in its most vulnerable and precarious sense. On the other hand, it follows a relatively rigid and exclusionary approach that underlines the foundational democratic set of values within which the Court operates. This allows for an extremely limited outer pressure (i.e., the concept of *parrhesia* in this case) until they reach their elastic limits. Overall, this analysis reveals that within the democratic values that the Court operates, *parrhesia* constitutes a paradoxical layer between the institutionally and judicially (un)regulable and democratically justifiable. Below, the above-mentioned approaches and interpretations of the ECtHR are discussed and exemplified.

Saygılı and Falakaoğlu v. Turkey (No.2) represents the case of media professionals[255] charged with a monetary fine by domestic courts for publishing the declarations of terrorist organizations, likely to incite violence within the public.[256] The case illustrates an indirect exposition of parrhesiastic acts in such a way that the applicants opened an arena for other individuals to utter their truth. The case concerns "the publication of three declarations regarding a degrading prison system, torture, and anti-democratic laws by detainees who were being kept in several prisons with convictions or charges of having been involved in the activities of left-wing illegal armed organizations".[257] The declarations in question could be seen as

[255] *Saygılı and Falakaoğlu v. Turkey* (no.2), no. 41551/98, 17/02/2009, para. 5.
[256] *Ibid,* paras. 10-17.
[257] *Ibid,* para. 6.

parrhesiastic articulations regarding the prisoners' truth, the subjective freedom where they state their unbearable struggles, and the oppressive and dehumanizing prison regime with examples of "coffin houses" (prisons), "attacks on the people," as well as "to the public" requests regarding the "political freedoms" and "taking action regarding the declarations,"[258] create a truth-based choice of exposition by the prisoners. Strikingly, the parrhesiastic act here is indirect; the truth-telling process places responsibility on the editors and publishers of the newspaper. Therefore, in the sense of the generated asymmetrical relations, the parrhesiastic sense of duty and responsibility to speak, in line with an action taking capacity by putting oneself in a vulnerable and risky position, is shared by, and transferred, to the media professionals.

In that regard, the Court argued that interference in the applicants' rights answers a pressing social need[259] since "the wording of the overall message" was neither *peaceful,* nor can be regarded as a *mere criticism* of the prison system, therefore amounting to "terrorist propaganda".[260] However, their argumentative reasoning did not include a thorough analysis of the content, nor the intentions of the subjects in relation to opening up a space for somebody else's parrhesiastic act.

In this case, the Court seems to interpret the *security concerns* within the realm of the duties and responsibilities of the professional identity of the applicants. Thus, the contextual responsibility of the applicants for *truth-transmitting* was seen as being capable of inciting violence, as it opened an outlet to stir up violence and hatred,[261] making them subject to "duties and responsibilities" in the collection and dissemination of information to the public in cases of violence, security, or such concerns.[262]

Saygılı and Falakaoğlu, as a non-violation case, places a significant emphasis on the transmission of parrhesiastic acts, and how truth-telling (directly or indirectly), as a surplus of freedom of expression, could act only as a limited pressure and not as a form of institutionalized

[258] *Ibid,* paras. 7, 8 & 9.
[259] *Ibid,* para.30.
[260] *Ibid,* paras. 26, 27 & 28.
[261] *Ibid,* paras. 27 & 28.
[262] *Ibid,* para. 29.

or regulable subjective freedom, for the Court's set of democratic values to reach their elastic limit. Within this excessively limited situation, this case proves the point regarding the conceptualization of *parrhesia constituting a paradoxical layer between the institutionally and judicially (un)regulable and democratically justifiable.* This paradoxical relationship can be easily observed between the Court's argumentative reasoning for a conclusion that is laid out above, and the joint dissenting opinion of Judges Power and Gyulumyan below. In their dissenting opinion, they mention press freedom and its critical importance for "maintaining the foundations of democracy," especially in public interest debates.[263] Putting the parrhesiastic act and its transmission to the public as a pact, the dissenting judges strictly underline that the content directly relates to "prisoners' rights and their potential vulnerability".[264] Thus, their voices could only be heard through the press. The dissenting judges vitally state that the general argumentative reasoning of the Court is a dangerous threshold in the context of free speech within democratic values and frameworks, since that interpretation opens up a gateway for lawful suppression of non-peaceful, or beyond-criticism statements,[265] while also minimizing the possibility of including the subjective right of the parrhesiastic *act* and its transmission per se. They carefully state that the press as public watchdogs "are not meant to be peaceful puppies; their function is to bark whenever a menace threatens".[266] Therefore, under-analysis of the content is in line with the freedom of expression within its more elastic capacities which can include parrhesiastic acts and pacts. Thus, the professional duties stemming from the convention require an interference in case of a pressing social need, not merely a "possible" one.[267] The argumentative gap between the majority and the dissenting judges proves the paradoxical relationship. On the one hand, the dissenting opinion underlines the *democratically justifiable* aspect of *parrhesia* through a certain margin of elasticity. On the other hand, the majority's strict and rigid approach to the case, in between violence concerns and the professional duty and responsibility regarding peaceful transmission, underscores the extremely limited space for parrhesia to be institutionally *and judicially regulable* under Conventional free speech concerns.

[263] *Ibid,* dis. op. para. 2.
[264] *Ibid,* dis. op. para. 3.
[265] *Ibid,* dis. op. para. 4.
[266] *Ibid,* dis. op. para. 4.
[267] *Ibid,* dis. op. para. 7.

A striking example of a direct *parrhesiastic act* is *Dink v. Turkey,* regarding Armenian journalist Fırat Dink, convicted of insulting 'Turkishness' after the examination of several passages of his published articles, which made him a target of extremist nationalist groups in Turkey leading to his eventual assassination on 19 January 2007.[268] In its ruling, the Court underlines that the case refers to an intersection point of journalistic and political expression due to utilized terms such as, "venous blood", "arterial blood", and "the noble blood flowing in the veins" in relation to the Armenian and Turkish people.[269] Overall, the Court ruled that the interpretation of the paragraph of his publication in question was open to individual interpretation. 'Turkishness' in the alleged paragraph could be understood as the conception of Turkishness for the Armenian people, as well as the "obsessive quality of the attempts of the Armenian Diaspora of making Turkish people acknowledge that the 1915 incidents were nothing less than a genocide.

By underlining the intense importance of the press within a democratic society and the duty to disseminate issues of public concern, allowing for some degree of *exaggeration* and even *provocation*, the Court interprets that there is no insult or targeting against Turkishness, nor is there prominent hate speech in the applicant's statements.[270] The Court concluded that the criticism of the applicant towards the institutional refusal policies of the Turkish Government regarding the Armenian Genocide was criminalized since the domestic courts equated Turkishness with the State itself and exclusive understanding of minorities.[271] Overall, the Court ruled that the State did not fulfill its positive obligations due to insufficient protection of Dink from extremist national attacks, leading to Dink's assassination.[272] The State did not seem to provide effective protection mechanisms that allowed for easy and effective inclusion of authors and journalists into the sphere of freedom of expression, nor did it secure dissenting views towards mainstream state policies or mainstream public opinion.[273]

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[268] *Dink v. Turkey*, no(s). 2668/07, 6102/08, 30079/08,7072/09, 7124/09, 14/09/2010, pp. 4-5 & 18.
[269] *Ibid,* p. 5 & 23.
[270] *Ibid,* p.23.
[271] *Ibid*, p.24.
[272] *Ibid*, p.25.
[273] *Ibid,* p 25.

The Case of *Dink* indicates that the Court may be more inclusionary and elastic towards hinting that even though the *parrhesiastic acts* conceptually appear to have subjective and asymmetrical qualities*,* they could be *democratically justified* in line with the framework of the Conventional democratic values within which freedom of expression operates. Even though the case once again underlines that *parrhesia* does not seem to be easily regulatable (especially domestically), neither institutionally nor judicially, the general logic of the conventional democratic values–originally–still shall allow for protecting surpluses and subjective rights in choosing to oneself in an extremely vulnerable and risky position (specifically for the public good). As can be seen from this Case, in times where both the individual in question acts with regard to telling their truth and putting themselves in a vulnerable, risky position, as well as the positionality of the problematic approaches of domestic courts to the issue, creates a double paradoxical asymmetry between the vulnerability dynamics, which in this case's specific circumstances led to the assassination of the applicant.

The analysis finds that the Court shows a potential elasticity for including the logic of ethical and political subjectification processes of the individual in its most vulnerable and precarious sense regarding parrhesiastic acts and pacts within the democratic values of the Convention's ecosystem. In this regard, it signals democratically *justifiable* aspects of inclusionary efforts for judicial regulatory powers of international institutional foundations, even if domestic institutions fail to regulate them.

Gürbüz and Bayar v. Turkey, as a non-violation case, could be regarded as an indirect *parrhesiastic act* or as *truth-transmitting* through the channel of the press. Similar to the judgments of *Saygılı and Falakaoğlu (No.2)*, the Court concluded that the applicants opened up an arena for a terrorist leader to transmit and articulate statements consisting of elements amounting to a threat to the government, including giving warnings and orders to PKK members regarding resumption of terrorist actions,[274] even though they had no personal connection to the content of the publications.[275] The dissenting opinion of Judge Pavli criticizes that, not intending to detect the "risk level" of the "qualities" of the expression, nor focusing on "intentions" of the

[274] *Gürbüz and Bayar v. Turkey,* no. 50495/08, 23/07/2019, paras. 37, 41, & 42.
[275] *Ibid,* para. 44.

applicants and disregarding the scope of media professionals' rights, responsibilities and duties and working principles on "working with hard reality and mirroring it to the public in a strict way" would create paradoxical approaches to the scope of the democratic frameworks in the context of Article 10 and *parrhesia.*[276]

Thus, in view of the contrast between the majority and the dissent on account of *parrhesia*, this is yet another case exemplifying the extremely limited matter of rigidity and exclusion regarding the elasticity limit of the Conventional democratic values in terms of freedom of expression and free speech. Even though the vulnerability and risk in parrhesiastic acts and pacts come from a subjective choice, it can still indicate a basis for a legitimate perspective of democratic justifiability for including the parrhesia-specific action-based pact regarding *truth-transmission* to the public by the press. Once again, the possibility of regulating *parrhesia institutionally and judicially* is extremely limited. However, *democratic justifiability* through a meticulous analysis of intentions, qualities, and risk levels of transmitting somebody else's hard truth can indicate that parrhesia as a surplus of freedom of expression can exist in parallel with the improvement potential of elasticity levels of democratic value applications of the Court.

Similarly, *Altıntaş v. Turkey* represents another non-violation case with extremely limited possibilities of including *parrhesiastic understandings* in the Conventional democratic value system. In its examination of the content, the Court ruled that use of words such as "role models of the youth," "persecutions," or "revolutionary youth" in the published article regarding some historical incidents connected to the illegal leftist organizations in question, can give the impression that it may be necessary and legitimate to use violence for the people who share the same political and ideological background.[277]

On the other hand, the dissenting opinions of Judge Bardsen and Judge Pavli emphasized the double-sided expressional value of the article as a "political" one and an "interpretation of a historical incident".[278] They underlined the disputability of the content and selective statements;

[276] *Ibid, dis. op.* paras. 12-13 & 16.
[277] *Altıntaş v. Turkey,* no. 50495/08, 10/03/2020, paras. 33-34.
[278] *Ibid,* dis. op. para. 10.

under the values of the Convention, they disagreed that the media professional's rights in question were not necessary to interfere with, since a fair examination of the statements did not indicate incitement of violence. The pact that is engaged with the transmission of the parrhesiastic sense of truth and the contradictory interpretations of the context reveals that the exclusionary and rigid interpretation of the Conventional values, tightening with the effect of "incitement to violence," and balancing of what is for the public good to impart as information gets paradoxical, (as it is covertly emphasized in the dissenting opinion), reflects the "symbolic value of the incidents for some radical left-wing groups".[279]

Parrhesiastic acts can only be a matter of consideration if the asymmetrical situations created by risky and vulnerable positions individuals put themselves through subject duty to transmit the truth; the ethical and political subjectification that emerges resulting from this process can only be protected by the Court through inclusionary and integral understanding of the democratic dynamic parrhesia calls for. However, institutional and judicial regulabilities may seem difficult. Nonetheless, in a dynamic supranational human rights ecosystem, how elastic and transformative the Conventional norms can become seems to be a matter of more interactive and inclusionary landmark interpretations that overtly underline the possibilities of parrhesiastic acts and pacs under the forward-looking principles of the Court, which may be democratically legitimate. Indeed, the analysis suggests that whether in the majority or in dissenting opinions, covert interpretations and hints are present for inclusionary steps towards discussions and interpretations towards less rigid borders, and a more elastic democratic value system for the Court.

5.3 Exception and National Security

It is observed that while the Court interprets emergency and national security cases (pre- and post-2016 context) with close scrutiny in order to sustain the connection of the individual to political life, the Court does not seem to pass beyond its argumentative inclinations of balancing the vertical and horizontal democratic relations between individuals and the state. However,

[279] *Ibid,* dis. op. para. 3.

drawing from Agamben's conceptualization of the *state of exceptio*n and *bare life,* the Court does not seem to include cyclical (re)production potentials and capacities of *exception,* where it becomes the rule. This situation uncovers the axis between the political and legal ambiguities of the procedural and criminal possibilities that an individual must bear as a *bare life* form**.** Overall, while *bare life* refers to the state under which the individual was abandoned to the law that suspends and sustains itself at the same time in its domestic context, it seems like its political soul, in which supranational freedom of expression was embedded, is rescued by the Court in a parallel reality where exception is only an extension in a limited time and space. Indeed, it seems like a representation of a parallel reality since the individual and societal dangers of the Court's argumentative reasoning regarding the *state of exception* seem to be based on the preconceived assumptions that the domestic politico-legal arena where life itself always sustains its democratic form.

At the supranational level, the assumption that individuals sustain dynamic legal and political standing could be misleading under conditions where exception becomes the rule. The asymmetry between bare life and international legal standing, where individuals appear as right bearers, does not render the Court's reasonings and judgements ineffective, yet it does not save life from bareness in its essence either. In this way, the cyclical tendency of the exception to become the rule/the ordinary creates paradoxical repercussions in terms of the Court's function of interpreting individual circumstances within societal trajectories.

Although the analysis underlines that, despite some deviations in the context of emergency and national security, the Court has been striving to engage effectively in the nexus between the social-legal-political with regard to the individual right to freedom of expression, as well as the right to liberty and security in most cases, it still seems like the Court does not seem to make argumentative functionalities regarding the operational dynamics on the deeper societal level in the supranational arena. The ECtHR's "individual" remedies in its deeper sense, then, does not conceptualize the possibility of the applicant existing in a *bare life* form, where inclusive exclusion does not guarantee subjective protection of freedoms through political ties, but it rather presupposes a democratic life form where the individual can be rescued from the

interferences in freedom of expression through argumentative justification of Convention principles regarding derogations under Article 15 in times of emergency.

Pre-2016 applications to the Court, which relate to the larger context of terrorism, violence, and national security, underline a contingent outlook, with both a precautionary and loose approach in the stance of conceptualizing these cases as exceptional states as the steady background of the post-2016 exceptional state of emergency struggles. This analysis points out two different aspects of the application context before 2016. The first aspect detected in the analysis is that in *Saygılı and Falakaoğlu v. Turkey (No. 2) and Gürbüz and Bayar v. Turkey,* the Court investigates the cases only within the vertical and horizontal dynamics and relationships by putting the individuals' democratic life form as default. Since, in these cases, there is no official state of emergency context, the Court's perspective towards the politico-legal spectrum seems to be slightly more focused on legitimate preservation of the state in the vertical state-society dynamics, giving a scattered impression of how the individual can start becoming vulnerable to the creation of inclusive exclusion, and a state of *bare life.*

As mentioned previously, *Saygılı and Falakaoğlu (No. 2)* refers to a controversial non-violation judgment of the Court regarding the "overall message" of the media professionals' statements being capable of inciting violence since the message was not peaceful, nor a mere critique.[280] Although the Court did not follow a meticulous contextual analysis of the content, even though its context was striving for the prisoner's voices to be heard as a vulnerable social group, its approach to protect the vertical-horizontal security concerns seems to be an insistent reaction. While the Court did not distinguish between the limits of the content regarding freedom of expression, it retrospectively tied the security concerns that emerged in the prison cells two months after publication,[281] finding the media professionals guilty of not fulfilling their responsibilities for journalistic dissemination of information.[282]

The dissenting opinions of Judges Power and Gyulumyan underline that this kind of approach to violence and security concerns gives way to the criminalization of controversial

[280] *Saygılı and Falakaoğlu v. Turkey* (no.2), no. 41551/98, 17/02/2009, paras. 27-28.
[281] *Ibid.*
[282] *Ibid,* para. 29

opinion, which then undermines the "foundations of democracy," through which the individual relates to the freedom of expression and the press. Indeed, they underline that the general judgment puts an irrational emphasis on "peaceful" messages, creating an extreme contrast between peaceful and violent, underlining that it gives leeway for any non-peaceful message, even though it does not have violent undertones, to be condemned or canceled through security concerns. Their rigid approach towards the strict democratic protection over the political value of the freedom of expression is underlined by the press, as public watchdogs are not meant to be "peaceful puppies"; their function is to bark wherever a menace threatens.[283] Finally, the unworkable restriction on the freedom of expression through extreme contrasts between what is peaceful and what is violent through retrospective reasoning,[284] and using possible social needs, not pressing ones,[285] gives an undertone that in case of a state of exception, "possible" needs, rather than the "particularly strong and pressing needs" for security concerns could be legitimate. This gives the assumption of a potential shift in the Court's perspective towards legitimate preservation of the state in the vertical state-society dynamics, giving a scattered impression of how the individual can start becoming vulnerable to the creation of a state of bare life within the inclusive exclusion of its political identity.

Similarly, *Gürbüz and Bayar* illustrated another problematic case in the context of counterterrorism and the dissemination of terrorist propaganda. In this case, in contrast to *Saygılı and Falakaoğlu (No.2)*, the Court made a particular examination of the context and the content, finding that the terms utilized in the statements constitute a threat to the Government, including giving warnings and orders to the PKK members with regard to resuming terroristic actions.[286] In that regard, the Court also invoked the *Council of Europe Convention on the Prevention of Terrorism* with regard to *public invocation to commit a terrorist offense.*[287] The Court underlined that even though media professionals are strictly protected against mechanical state oppression, this case amounts to the dissemination of terrorist propaganda; therefore, the state legitimately interfered with the applicant's freedom of expression. In that regard, both the concurring opinion

[283] *Ibid,* dis. op. paras. 4-5.
[284] *Gürbüz and Bayar v. Turkey,* no. 50495/08, 23/07/2019, para. 8.
[285] *Ibid,* para..
[286] *Ibid,* para. 37.
[287] *Ibid,* paras. 41-42.

of Judge Bardsen[288] and the dissenting opinion of Judge Pavli[289] argued that there was no clear need to invoke another convention since the scope of Article 10 was sufficient to prove a legal point. Judge Pavli added that if the other convention in question was invoked, then the risk level and the intentions of the applicants should have been detected by the court since the *Convention on the Prevention of Terrorism* required the court to detect the seriousness, intentionality, and deliberative qualities of the expression and the applicants. He adds that this case underlines the fact that the Court's disregard of individual action taking intentions undermines the hard reality that media professionals work under to mirror the reality to the public in a strict way.[290]

Moreover, the second aspect relates more to the Court's precautionary warning mechanism through the cases of *Ürper and Others v. Turkey* and *Gözel and Özer v. Turkey,* which stresses that the repercussions of overly broad domestic politico-legal processes regarding counterterrorism leads to unnecessary interferences with the freedom of expression. Although these judgements stem from individual violation cases and long-lasting structural domestic struggles, the Court's input does not go further than a warning for a change in the legislature for the sake of future case law.

Through a call for domestic legal review in *Ürper and Others,* the following references exemplify the content of the warnings: deprivations of value and interest in the expression at stake,[291] unjustifiable restrictions and draconian measures on the freedom of expression,[292] and protection of all matters of, even divisive, public interest in a democratic society in case of security-related issues.[293] In *Gözel and Özer,* there are references to the following: vague interpretations leading to criminalization and mechanical oppression,[294] effective evaluation of the identity of the communicator, the receivers, and the content and context of the statements to

[288] *Ibid, sep. op.* para. 4.
[289] *Ibid,* dis. op. paras. 12-13.
[290] *Ibid,* dis. op. para 16.
[291] *Ürper and Others v. Turkey*, no(s). 14526/07, 14747/07, 15022/07, 15737/07, 36137/07, 47245/07, 50371/07, 50372/07 and 54637/07, 20/10/2009, para. 42.
[292] *Ibid,* paras. 42-44.
[293] *Ibid,* para. 36.
[294] *Gözel and Özel v. Turkey,* no(s). 43453/04 and 31098/05, 06/07/2010, pp. 8-9.

protect the individual from future domestic judgements with an inferential character in the terrorism context.[295]

Considering the examples above, the violence and national security-related cases in the pre-2016 context do not appear as a solid argumentative foundation for the societal and political dynamics that operate under exceptional circumstances. The opportunity missed here is that of a more elaborate protectionist discussion regarding the cyclical tendencies that could emerge when the seeds of long-term normalization of exception are planted in a regime that has been tested by its own democratic process. In those cases, where the applicant is transformed into a *bare life* form, the judicial enforcement logic of the Court regarding the preconceived conceptualization of the individual as a democratic life form, would not always save the individual, since the inclusive exclusion operates within the logic under which the enforcement of subjective protection through politico-legal ties are never guaranteed.

In post-2016 applications, including derogations under Article 15 regarding the state of emergency, it is observed that both the content and the argumentative points of the judgments shift towards the paradox between national security and individual security, and the attempts to secure the individual from getting stuck between being inside and outside of the political simultaneously. The individual, getting pushed towards the margins of the political, yet holding strong connections to the politico-legal environment due to justifications of national security, puts the individual in a *bare life* form in its own context. Although the Court's consistent efforts and emphasis in saving the preconceived democratic life form of the individual through sustaining its healthy connection to freedom of expression and individual security as political rights, the Court's references do not seem to pass beyond its generic legal references to a "chilling effect", "collateral effect," or "a pattern of border repression". Thus, the analysis finds that the Court, acting within its legal capacities, does not seem to refer to the deeper cyclical reproduction capacities of the state of exception in producing the *bare life* form, which can barely hold onto the political bonds that connect the individual to the supranational and national in the context of freedom of expression. Overall, the judgments analyzed below (*Mehmet Hasan Altan v. Turkey, Sabuncu and Others v. Turkey, Şık v. Turkey, Selahattin Demirtaş v. Turkey,*

[295] *Ibid,* pp. 7-8.

Murat Aksoy v. Turkey, Ahmet Hüsrev Altan v. Turkey) prove the paradoxical and entangled dynamics of how the right to freedom of expression becomes stuck between a preconceived supranational democratic life form and a *bare life* form that is both inside and outside the political.

Mehmet Hasan Altan concerns a journalist and academic who was known for his "critical opinions on the government's policies" before the years leading to the attempted coup of 15 July 2016, which was associated with a terrorist organization[296] known as FETÖ/PDY ("Gülenist Terror Organisation/Parallel State Structure").[297] The Court endorsed the Constitutional Court's judgment; the Court stated that the applicant's prolonged pre-trial detention did not meet a "pressing social need" in a democratic society since it was not based on "any concrete evidence other than his professional articles and comments,"[298] even though domestic authorities denied that the proceedings concerned the applicant's journalistic activities.[299]

The government argued that terrorist organizations utilize "democratic opportunities in democratic systems to achieve their aims under the cover of lawfulness and an established media wing to manipulate public opinion."[300] The partly dissenting opinion of Judge Ergül underlined the scale and severity of the threat Turkey was under; a "bloody attempted military coup by members of a sui generis terrorist organization that had infiltrated all areas of society and the State apparatus." There has never been such a serious threat to the life of the nation, democracy, and fundamental rights "in any of the States Party to the European Convention on Human Rights."[301] She stated that the issue was directly linked to the preservation of the state, and thus, the Court should have been more mindful of the derogations the state was operating under.[302]

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[296] *Mehmet Hasan Altan v. Turkey*, no.13237/17, 20/03/2018, paras 12-13.
[297] Following this incident, the government declared a state of emergency on 20 July, 2016. Subsequently, a derogation from Article 15 on 21 July, 2016, was communicated to the Secretary General of the Council of Europe. (paras. 14-18).
[298] *Mehmet Hasan Altan v. Turkey*, no.13237/17, 20/03/2018, para. 207.
[299] *Ibid,* paras. 178-180.
[300] *Ibid,* para. 182..
[301] *Ibid,* dis. op. para. 11.
[302] *Ibid,* dis. op. para. 23.

By acknowledging the attempted coup and terrorist threats that made the country vulnerable, the Court argued that public emergencies shall not be utilized as a pre-test for limiting freedom of expression since the principal characteristic of a "democratic society" is "the possibility it offers of resolving problems through public debate."[303] Nevertheless, the Court underlines that detentions without factual basis create "adverse effects" for the expression of critical views on an individual and a societal level, which inevitably will have a chilling effect on the freedom of expression by intimidating civil society and silencing dissenting voices.[304] Similarly, the Court made extremely similar comments and interpretations regarding the dangers of detaining critical voices in the case of *Murat Aksoy,*[305] who was also put into pre-trial detention based on the same domestic reasoning.[306] By again endorsing the Constitutional Court's ruling on behalf of the applicant,[307] the Court reached the same conclusion regarding the heavy consequences in a democratic society. Again, the Court referred to the "collateral effects" on the full-scale societal aspect. Detaining critical voices creates a "chilling effect" while intimidating civil society and silencing dissenting voices.[308]

The Case of *Ahmet Hüsrev Altan* regards the unlawful pre-trial detention of a journalist on account of "his articles and statements" accused without reasonable suspicion of involvement in and membership of FETÖ/PDY, as well as involvement in the attempted coup of July 15, 2016.[309] In contrast to *Mehmet Hasan Altan*, and *Murat Aksoy,* the Constitutional Court ruled against the applicant this time by concluding that the offense of attempting to overthrow the Government the applicant was charged with, was punishable by aggravated life imprisonment; therefore, no violation of the right to freedom of expression was deemed, as "the applicant's pre-trial detention had been found to be proportionate to the strict exigencies of the situation due to the attempted coup and that his right to liberty and security had not been breached.[310] Nevertheless, the Court again stressed a "chilling effect" scenario, in this case judging that the

[303] *Mehmet Hasan Altan v. Turkey*, no.13237/17, 20/03/2018, para. 210
[304] *Ibid,* para. 212.
[305] *Murat Aksoy v. Turkey*, no. 80/17, 13/04/2021, para. 165.
[306] *Ibid,* paras. 11-16 & 146- 147.
[307] *Ibid,* para. 164.
[308] *Ibid,* paras. 163-165.
[309] *Ahmet Hüsrev Altan v. Turkey* , no. 13252/17, 13/04/2021, paras. 6-52.
[310] *Ibid,* para. 61).

applicant's detention lasting for approximately seventeen months without a reasonable suspicion on account of his articles and statements amounted to an interference with the exercise of his freedom of expression,[311] since his detention was not on "reasonable suspicion."[312]

The dissenting opinion of Judge Yüksel, on the other hand, argues that the measures under Article 10 concerning national security and public safety were necessary in a democratic society for the following reasons:[313] She emphasizes the importance of responsible journalism, since contemporary media does not only inform but also presents the information in the way it is to be assessed by the public.[314] She also underlines that the professional identity of the applicant as a "well-known journalist who has a considerable influence" should be of considerable value for the judgment.[315] Considering the applicant's articles, statements, and his role and capacity as editor-in-chief of a newspaper, she stated her opinion that there was indeed a "reasonable suspicion" since his written articles and statements aimed at manipulating public opinion and his writings had certain similarities with the happenings that occurred shortly after the attempted coup, as well as how his capacities as editor-in-chief determined the newspaper's editorial policy.[316]

Similarly, for *Sabuncu and Others,* the applicants were questioned on the basis of the "editorial stance" of the newspaper they were working under, and if it was aligned with terrorist organizations' stances as it contained "criticisms against political authorities." The applicants argued that their stance was based on the assessment of political events and defense of public freedoms.[317] Still, the Government emphasized the irrelevance of the applicants' "identities" as media professionals, as they were not tried due to their journalistic activities, but for acting criminally in nature in helping terrorist organizations.[318]

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[311] *Ibid,* paras. 219-220.
[312] *Ibid,* para. 224- 225.
[313] *Ibid, dis. op.* para. 12.
[314] *Ibid, dis. op.* para. 16.
[315] *Ibid, dis. op.* para. 17.
[316] *Ibid, dis. op.* Paras. 15-17.
[317] *Sabuncu and Others v. Turkey*, no. 23199/17, 10/11/2020, paras. 15-16.
[318] *Ibid,* paras. 205-206.

In relation to the applicants' professional identities, the Court expanded on their positive duties and "responsibilities." For instance, interference within "political speech of public interest, as well as wider permissible criticism against government actions or omissions should be questioned and closely scrutinized by the public and the press." Additionally, the public has the right to be informed about all different points of view, as well as form an opinion on the ideas and attitudes of their political leader. [319]

The Court again emphasized the "chilling effect" and self-censorship regarding public debate on political matters regarding the freedom of expression in relation to the applicants' detention for excessively long periods of time for very serious crimes by emphasizing that the "offenses are directly related to the applicants' activities and identities as media professionals" and amounted to an effective constraint on exercising freedom of expression.[320] The same references were made in *Şık,* whose applicant was an investigative journalist working for the same newspaper as *Sabuncu and Others*. However, one aspect of the applicant's case differs from *Sabuncu and Others*. As stated in Judge Ergül's partly concurring and somewhat dissenting opinion, the applicant "conducted an interview in the midst of a terrorist operation with one of the hostage takers who then killed the hostage, and conducted interviews with PKK's leaders."[321] She emphasized that although freedom of expression should be extensive in journalistic activities, "responsible journalism" comes with duties and responsibilities under Article 10.[322] Thus, she emphasized that the "danger of providing a forum for leaders of criminal organizations and allowing the dissemination of terrorist propaganda" reasoning led to a judgment for non-violation of Article 10 before, and the judgment in question should have been finalized as a non-violation judgment[323] without creating legal and political deviations, or inconsistencies within the borders of legal capacities in favor of a strive for victimhood.

In *Selahattin Demirtaş (No. 2),* the applicant was a parliamentary member as well as a co-chair of the Peoples' Democratic Party (HDP), a left-wing pro-Kurdish political party.[324] The

[319] *Ibid,* paras. 219-222.
[320] *Ibid,* para. 223.
[321] *Şık v. Turkey* (No. 2), no. 53413/11, 24/11/2020, dis. op. para. 230.
[322] *Ibid*
[323] *Ibid,* para. 231.
[324] *Selahattin Demirtaş v. Turkey* (No. 2), no. 14305/17, 22/12/2020, para. 16.

subject matter of the case focuses on an unforeseeable lifting of the immunity of the applicant as well as his pre-trial detention on terrorist charges for his "political speeches." The Government stated that the applicant's views did not make any contribution to the political debate environment and amounted to incitement of violence and terrorism in its own context.[325] The Constitutional change was aimed at particularly those of the opposition side of the parliament since, according to the Government, some members of the parliament "*[had] made speeches voicing moral support for terrorism", which had "aroused public indignation."*[326] Thus, the Court ruled that the Constitutional change was not prescribed by law with regard to freedom of expression and foreseeability of having Constitutional safeguards in terms of defending a political viewpoint, protection of immunity for political speech, and other constitutional safeguards.[327]

Regarding terrorism-related offenses against the applicant, the Court also underlined that domestic authorities did not assess the "continuity, diversity, and intensity" of the applicant's acts, or the hierarchical structure of the terrorist organization in question. Rather, the political expressions conveyed in opposition to certain government policies were held sufficient to convict him as being capable of establishing an active link with an armed terrorist organization.[328] The Court concluded that broad interpretations of a provision of criminal law, without clear definitions of, for example, "armed organization", "armed group", and "membership to a terrorist organization", cannot be justified where it entails equating the exercise of the right to freedom of expression with belonging to, forming, or leading an armed terrorist organization, in the absence of any concrete evidence for such a link.[329]

The partly concurring and dissenting opinion of Judge Yüksel underlined that it was questionable whether "the majority's conclusion in the present application could be regarded as being mindful of the difficulties linked to terrorism. She stated that the interference was legitimate in combating terrorism and protecting national security and public safety, since it is

[325] *Ibid,* para. 234
[326] *Ibid,* paras. 246 & 269.
[327] *Ibid,* para. 270.
[328] *Ibid,* para. 278.
[329] *Ibid,* para. 277 & 280.

doubtful that the applicant's impugned speeches cannot be viewed as glorifying and praising the use of violence and can be seen as "e*ntirely peaceful and as contributing to a debate in the public interest, regard being had in particular to the tense situation prevailing in the region at the time as a result of the armed clashes between the Turkish security forces and the PKK."*[330]

Conclusively, the judgments and separate opinions are abundant in the severity of the state of exception and how the political rights of the individuals are approached by the Court. It is undeniable that the Court protects its consistency in interpreting exceptional exigencies within the ideals of the preservation of democratic societies and the democratic self of the individual. Legally, even though the Court makes implications of the dangers of a shift towards an operational oppression of individual human rights in the post-2016 period, it still evaluates the individual cases almost for the sake of the ideal democratic self of the individual that was concealed through the normalization of exceptions. Freedom of expression, being an inherently political right, seems to sustain itself in a democratic supranational courthouse. However, while the judgements are sufficient to indicate the need to balance the vertical and horizontal dynamics domestically, the cyclical reproductional power of exceptional states on bare lives indicates that the blurred line between the overly political and non-political leaves the individual with a longing for its lost democratic self, sustained in the (parallel universe of the) ECtHR ecosystem.

5.4 *Ideal* Victimhood? An Acceptable Victim or a Competitive One

Drawing from the twofold theoretical perspective on victimhood, this section of the analysis clusters around two central aims: (1) examining the ECtHR's existing argumentative patterns and deviations on the basis of the construction and (re)production of *the ideal victim* in line with the Convention values; and (2) the conditions of individual identification with victimhood become a status along with the forms and degrees of competitiveness for the ideal; accordingly, the ECtHR's approach to this dynamic.

[330] *Ibid,* dis. op. para. 13.

Adding competitiveness into the framework in approaching the systemic machinery of the transformative aspects of victimhood is critical to clarify how individuals can become stuck between a competition of suffering for victim *status* and the ever-changing argumentative approach of the ECtHR to victim *status.* Competitiveness requires the individual to push their limited legal capacity against the sovereign domestic state through self-identification and branding to become the *ideal* sufferer of a human rights violation, to fit in the supranational *status.* However, one's suffering, which plays out in the axis of domestic-supranational balance, does not always guarantee the subject of a human rights violation a legitimate or feasible victim *status*. The argumentative aspects of the Court play a significant role in the construction and deconstruction of the relationship between the subject and suffering in terms of how *victimhood* develops into a competitive arena between securing the sovereign concerns of the state and the *ideal* suffering status for individuals.

Gündüz v. Turkey, as a key violation case, focuses on the necessity of a democratic society in relation to whether the *content and context* of the applicant's statements amounted to hate speech.[331] The Court's ruling stressed that the applicant as a sect leader was a legitimate victim of domestic interference with Article 10, since the speech only demonstrated a sect leader's "profound dissatisfaction" with contemporary institutions in Turkey, while there was no proof of call to violence or hate based on religious intolerance.[332]

The Court's argumentative approach in constructing the ideal victim in this case appears to be both selective and broad. The operational aspects of argumentative gaps in the context emerge from the omission of the immediate aspect of television broadcasts as windows open to an immediate public reaction. Therefore, the argumentative aspects of the judgment echoed as if it gave an unfair advantage to the applicant regarding the impossibility of "word selection, reformulation, or adjustments in his statements before they were made public."[333] On the other hand, as underlined by Judge Türmen in his dissenting opinion, the Court's refraining from admitting or denying whether the word *"piç" in the applicant's speech constituted hate speech*

[331] *Gündüz v. Turkey*, no. 35071/97, 4/12/2003, para. 42.
[332] *Ibid,* para. 46.
[333] *Ibid,* paras. 46 & 48.

on the basis of democratic and secular values in Turkish society,[334] constitutes a selective and unbalanced approach to the *ideal* victim, suffering and competitiveness.

This judgment uncovers how the Court has a tendency to produce, and (re)produce *idealness* through argumentative justifications of putting the applicant in a weaker and vulnerable *status* than the audience of the applicant's speeches without "balancing the interests of free speech" towards the individuals who are at risk of being affected by the parts of the applicant's statement.[335] In a case where contribution to the public debate environment without using the word *"piç"* was feasible, as Judge Türmen adds, it should not have enjoyed protection under Article 10.[336] Overall, this case reveals that the Court's interpretative culture deviates with regard to the preservation of the ideal victim through selectivity regarding whose potential suffering can be protected between the dynamics of secular values and religious values.

Dink, on the other hand, constitutes a striking example of the vehement degree of preservation of the ideal victim and loose competitiveness in terms of victimhood. Since the subject matter of this case considers assassinated Armenian journalist Fırat Dink (discussed previously),[337] the (re)productive intentions and approaches seem to be stricter and more meticulous. In such a case, Dink ceased to have victim status due to his assassination, shifting the individual identification aspect towards the Court's perspective. Therefore, in this case, the Court appears to apply both the *ideal* victim mold to the case and put itself in the assassinated individual's shoes in terms of how his journey progresses within a position of vulnerability and suffering through identification and competition.

The Court underlined that the applicant's initial victimization was produced by the domestic authorities when he was made a target by becoming a party in the legal proceedings. His conviction under Article 301 of the Criminal Code presented him as though he had insulted everyone who is ethnically Turkish.[338] Secondly, the State did not fulfill its positive obligations

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[334] *Ibid,* para. 49 & dis.op.p. 2.
[335] *Ibid,* dis. op. p. 2-3.
[336] *Ibid,* dis. op. p. 2.
[337] *Dink v. Turkey*, no(s). 2668/07, 6102/08, 30079/08,7072/09, 7124/09, 14/09/2010, p.18 & pp. 4-5.
[338] *Ibid,* p.20.

due to insufficient protection of Dink from extremist national attacks, leading to Dink's assassination.[339]

Overall, the State did not seem to provide effective protection mechanisms that allowed easy, brave, and effective inclusion of authors and journalists into enjoyment of the freedom of expression, nor did it secure dissenting views towards mainstream state policies or mainstream public opinion.[340] This case underlines how victimization from the outside can make a serious target for external attacks without the individual's control over the situation, while the production of the *ideal* victim in the supranational arena refers to the contingency between how the victim should appear and whose suffering is acceptable. In this case, strikingly, the subject could have argued that he identified with victimhood due to the severity of his subject position as a minority, as well as his professional and political identity.[341] With this case laid out before us, victimhood as *status* gains a new perspective where victimhood as *status* occurs as a power coming from the capacity "to exist in spite of it all."[342] The victim's ability to become a party despite his passing uncovers the positive (re)production capacities of *idealness* for the future case law, where the supranational lens relates more to the individual suffering, struggle, and competition that comes along with their identification to victimhood.

In its nature, *Cengiz and Others v. Turkey* differs from the preceding two cases. Since the case concerned blocking access to YouTube for more than two years, where the applicants as users of the platform lodged claims against the measure before a domestic criminal court, it held that applicants did not have standing to challenge such orders.[343] However, the Constitutional Court asserted victim *status* to the applicants since they were academics and actively used the platform to share and carry out research.[344] In this case, the Court strictly underlined its admissibility criteria regarding *actio popularis*[345] where the Convention strictly requires arguable

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[339] *Ibid*, p.25.

[340] *Ibid.*

[341] *Ibid*, p.23.

[342] A. Vandermaas-Peder, J. Subotic, and M. Barnett. 'Constructing Victims: Suffering and Status in Modern World Order', *Review of International Studies. 2022,* p.6 .

[343] *Cengiz and Others v. Turkey*, no. 48226/10 and 14027/11, 01/12/2015, para 7-10.

[344] *Ibid,* para. 26.

[345] Actio popularis refers to bringing cases before the Court "for the interpretation of the rights it contains or permit individuals to complain about a provision of a domestic law simply because they consider, without having been directly affected by it, that it

grounds for the applicant(s) to be considered as the *direct* or *indirect* victim of a violation from an act or omission[346] under Article 34.[347] Although this emphasis refers to opening a legitimate ground for competition for whose victimhood is ideal and acceptable for a *status*, the Court in some cases, as in this one, gears its interpretive approach towards "a need for *flexible application* of victim *status* criteria, although the applicants are not the direct target."[348]

Conclusively, the Court interpreted "active" user experience as hierarchically more valuable than a simple user experience since the applicants were using the platform for academic research purposes,[349] while adding the unique political and social functions of the platform such as allowing for "the emergence of citizen journalism" for the political content ignored by the media.[350] Therefore, this case proves the divergence regarding which cases' competitiveness becomes strict or loose. In this case, the applicant's specific academic purposes and backgrounds supported their identification with victimhood, and their experience, along with the specific functions of the YouTube platform, opened up a wider, yet hierarchical zone of *status*. However, the (re)production capacities of the Court regarding the symbolic and *ideal* types of victim still seem mutually exclusive of the other's suffering who experience significantly similar issues, yet their identification with suffering still does not seem *ideal* enough.

Akdeniz and Others v. Turkey represents another striking example of the competitiveness of victimhood as a legal subject status. The applicants were two academics (Mr Akdeniz and Mr. Altıparmak) and a journalist (Banu Güven). The subject matter of the case concerned a blanket ban on the dissemination of information via any medium of parliamentary inquiry without a legal basis. The injunction constrained the publication of any information, whether damaging or not, on virtually all aspects of the ongoing parliamentary inquiry.[351] In this case, victim *status* was

may contravene the Convention". See: Council Of Europe. European Court of Human Rights. *Practical Guide on Admissibility Criteria*. Updated on 31 August 2022, p.15, para. 39.

[346] In *Tanrıukulu and Others*, readers of a newspaper whose distribution was prohibited did not have a victim status, not in *Akdeniz*, the mere fact that mere users of music-streaming websites who indirectly affected by a blocking order was not sufficient to be acknowledged as a "victim" under Article 34 of the convention. See: *Cengiz and Others v. Turkey*, para.49.

[347] *Ibid.*

[348] *Ibid,* para 55.

[349] *Ibid,* para. 50.

[350] *Ibid,* paras. 51-52.

[351] *Akdeniz and Others v. Turkey*, no. 41139/15 and 41146/15, 04/05/2021, paras. 6-14.

granted to the journalist, yet not to the academics under Article 34. The Court strictly underlined that for the applicants to be admitted under victim *status*, the conditions of the case itself, the scope of the measure, and the consequences are to be examined. In line with this, the applicants are "obliged to prove their victimhood," stating reasonable and persuasive indicators that show that the possibility of interference is on the personal level.[352] In that regard, hypothetical risks regarding the applicant's exposure to a "chilling effect" would not be a sufficient reason for a victim *status*.[353]

In this regard, the justifications of Mr. Akdeniz and Mr. Altıparmak stemmed along the lines of being academics in the human rights field and popular users of social media. Thus, having been indirectly affected by the measure in question was not sufficient to afford them victim *status*.[354] In that regard the Court added that their academic freedom was not infringed upon since the applicants did not specifically complain of having been refused access to any specific information they might have required. On the other hand, under the specific circumstances of the case, the Court granted Ms. Güven victim *status,* emphasizing her professional identity as a journalist, political commentator, and news presenter in which gathering of information was inherent.[355] Thus, the Court ruled that the measure was neither lawful nor foreseeable, since there was no qualified provision laid out permitting a broadcasting ban under criminal proceedings.[356] Therefore, it violated freedom of expression and media. In relation, Ms. Güven was not afforded sufficient protection under the rule of law in a democratic society.[357]

Although the Court states in its judgment that victimhood should be regarded as a concept that should be subject to an interpretation that develops under contemporary conditions and concerns,[358] its approach in granting victim status only to a journalist is striking in terms of shrinking the borders of the ideal victim and the burden of proof and competition with regard to

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[352] *Ibid,* para. 74
[353] *Ibid,* para. 57.
[354] *Ibid,* para. 75
[355] *Ibid,* para. 76.
[356] *Ibid,* paras. 80 & 94.
[357] *Ibid,* paras. 94 & 97.
[358] *Ibid,* para. 56.

laying out that the applicant's (potential) suffering is enough. Whether they are weak or vulnerable enough, it seems that they are under pressure to fit into the ideal victim mold at a certain angle. Otherwise, their claims of suffering against all outer pressures of proof become a pointless competition, where there is no finishing line.

This in mind, the partly dissenting opinion of Judge Kuris is striking. He underlines that the scope of victimhood should have been broad, since it is a vital issue of public concern, as in this case.[359] He elaborates that under the specific circumstances of the case, victim *status* in relation to the right to impart and receive information should not have been dependent on a superficial distinction between the subject status of a journalist and a law professor, since freedom of expression should not be restricted by dissemination of information that is only related to one's profession.[360] Indeed, he states that it is unfortunate and questionable not to give a human rights activist victim *status* since both journalists and human rights defenders should be seen as "watchdogs" of civil society.[361] He highlights that although the case law of the Court is progressive, the case seems to be a step backward as it emphasizes a selective approach to freedom of expression, and even legitimizes this. It is not justifiable, fair, or defendable to attribute more value and protection to the freedom of expression of journalists than to academics under the Convention.[362]

Finally, *Taner Kılıç v. Turkey (No.2)* is concerned with the unlawful and prolonged detention of the Head of the Amnesty International Turkey Branch (a human rights defender), with the suspicion of being a member of FETÖ/PDY. The applicant states that the Government's motives relate to his "status as a director of an NGO and human rights defender," even though the Government strictly rejects the applicant's reasoning and states that suspicion stems from membership to an armed terrorist organization.[363]

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[359] *Ibid, dis. op.* para. 6.
[360] *Ibid, dis. op.* para. 9.
[361] *Ibid, dis. op.* paras. 11-18 & 20.
[362] *Ibid, dis. op.* para. 24.
[363] *Taner Kılıç v. Turkey* (No. 2), no. 208/18, 31/05/2022, paras. 129, 134 & 142.

The Court underlines international documents on the protection of human rights activists and defenders, as well as NGOs, and the special roles they play in the advancement of human rights in Member States.[364] In this regard, it emphasizes the role NGOs play as a 'watchdog,' similar to the importance of press freedom. In consideration of the importance of their activities in the human rights field, the Court stated that the principles applied in the pre-trial detention of media professionals could be comparatively applied to human rights defenders as well.[365]

Regarding the victim *status* under the Convention norms, the Court seems to imply that a *special protection status* could be afforded for human rights defenders, who conduct activities in public concern, in comparison to which media professionals are entitled to considering the importance of their activities.

Indeed, by striking attention to the second criminal proceedings initiated against the applicant, the Court emphasized that the applicant was accused of membership in an armed terrorist group due to his activities as a human rights defender.[366] In this regard, in the overall collection of evidence and suspicion, his detention was prolonged without any selective reasoning between the circumstances leading to his conviction.[367] Regarding victim *status,* the Court argued that the applicant's detention in connection to the above-mentioned domestic reasonings, specifically *in direct relation to his professional identity as a human rights activist,* amounts to an effective intervention into the applicant's right to freedom of expression, thus calling for a victim status.[368]

Overall, *Taner Kılıç v. Turkey (No.2)* uncovers a clear deviation from the approach towards human rights defenders in the *Akdeniz and Others* case. While Mr. Akdeniz and Mr. Altıparmak's identities were put aside with regards to *special protection status,* Taner Kılıç was afforded a *status.* Although one can argue that the subject matters of these two cases diverge, the interpretive logic of the court proves that in addition to a competitive environment created for the proof of victimhood, this deviation also implies a comparative environment for whose suffering,

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[364] *Ibid,* para. 145.
[365] *Ibid,* para. 147.
[366] *Ibid,* para. 149.
[367] *Ibid,* para. 150.
[368] *Ibid,* para. 151.

either potential or not, will be enough. This approach not only increases the burden of proof but also creates the concept of unpredictable *idealness*. In terms of the progression of the Court's case law, victimhood appears in a fluctuating fashion.

Under the overall fluctuation, the analysis strikes attention to the fact that neither the individual who is striving and competing for proving their suffering can anticipate if they are deserving, nor can the Court (re)produce ideal victims. Considering the overall zigzags the Court draws, this analysis reveals that both the suffering and the victim shall be ideal-*er* or ideal-*est* in order to be deserving of a *status arising from powerlessness.*

6. Discussion

This chapter examines the research findings and their relation to the research questions and the wider context of human rights. The results suggest implications and potential repercussions on effective protection of freedom of expression due to the lack of cross-fertilization between supranational, domestic and individual levels. The main findings regarding argumentative applications of general principles and norms gather around the overarching operational context of the Court. Thus, the results reflect both the Court's *democratic* values and how it refers to *democratic* concerns in its case-law on Türkiye. The findings categorized below offer a new perspective to legal textual materials of ECtHR on freedom of expression through the application of a multidisciplinary theoretical framework, and the inclusion of separate opinions and non-violation judgements.

6.1 The Underlying Convention Values and Democratic Perspectives

The findings indicate that the *meta-teleological* level dominated the majority's judgment process by generic references to Convention values and its democratic framework . This revealed the gap

between the *micro* and *meta* levels in freedom of expression cases, showing inconsistencies in the case-law. This pattern was consistent in violation and non-violation cases, regardless of expression type (hate speech, political expression, or press freedom). The separate opinions prove the general pattern by suggesting dissent towards the use of generic references to values without proper *teleological* justification, and how the argumentative reasoning in favor of *democracy* should be interpreted in line with the *micro* aspects. The results suggest that generic references may banalize the link between democratic Convention values and freedom of expression, with potential negative implications. Although the Court's two-level interpretation pattern can deepen argumentative reasonings, unbalanced approaches to *micro* and *meta* levels challenge democratic reliability of justified argumentation, through name-dropping which have become a patternized banalization of the Convention values.

Regarding *democratic* perspectives, the study applied *parrhesia* in a progressive manner, generating a second category of *parrhesia*, through '*truth-transmitting'*. Although the findings indicate that the concept's institutional *regulability* is unlikely, there is a fluctuating pattern of the *democratic justifiability*. The Court's democracy-based value system encourages more elasticity and less rigidity in the interpretation of limits of democratic values regarding expression, but also has narrow and rigid references to democracy regarding the individuals and their vulnerable position. These findings both imply limitations for *democratic* perspectives and suggest a future possibility of more transformative and inclusionary interpretations that recognize the legitimacy of *parrhesiastic acts and pacs,* while broadening the scope of freedom of expression.

6.2 Exception and National Security

The findings reveal a paradox between the Court's pre-conception of a default democratic and political life and the reproduction of individual-domestic relations through exception, where political life is obscured and individuals represent *symbolic* forms of death through *bare life.* Despite warnings of a post-2016 shift towards an operational oppression of freedom of expression, the Court still evaluates cases in favor of the pre-conceived democratic life form,

balancing vertical and horizontal relations between individuals and the state. Although the judgements are legally sufficient in balancing these relations, the cyclical reproductional power of *exception* wedges *bare life* in both political and non-political states. The findings imply that when life is stripped of its domestic politico-legal standing, the Court's interference reinforces the individual's symbolic political standing only in the courtroom, where *democratic* exceptions are possible. Thus, this highlights the paradox of sustaining democratic assumptions between individual and national security, which can become overly political or void of politics when freedom of expression drifts away from political forms of existence.

6.3 The *Ideal* Victim and Victimhood

Regarding the two-fold perspective applied, the findings underline a wide discrepancy between the production of *idealness* and *ideal* ways of suffering in identification with *victimhood*. Although the Court embraces the dynamic and ever-changing nature of victim status under the provisions of Article 34, the findings suggest an inconsistent selectivity pattern that tends to trigger hierarchies and competitiveness in relation to individual identification with victimhood and the burden of proof of suffering as sufficient for the *status*. For the majority of cases, competitiveness and hierarchy become intense under freedom of expression, and only a few cases represent a loose burden of proof for gaining status. The underlying implications lie in the question of whether the suffering itself and the victim shall become *ideal*-er or *ideal*-est in order to deserve a status arising from powerlessness in the face of the argumentative zigzags the court draws. To prevent future dangers of leveled up competitiveness and hierarchies, the Court should carefully consider the direct connection between the supranational and individual levels, while widening its horizons towards emerging trends in victimhood (e.g., human rights defenders and academics in the human rights field), rather than blindly applying its well-established norms (e.g., journalists) to every potential victim striving for that status.

7. Conclusion

Based on the discussion of the findings above, general implications and the significance of the study in the human rights field are discussed below.

In line with the aim and purpose of the study, the ECtHR's application of the Convention values on the general and an operational level underlined various argumentative implications both depending on the structural deviations in the domestic level of interference with Article 10 within 2003-2002, and the Court's deviations from the case-law crating a scattered and inconsistent level of argumentative justifications. The inconsistencies highlighted in the findings reveal that the sustainment of the connection between individual, domestic and the supranational connections are sustained not in an evolutive manner, but in a contradictory manner. The findings on the inconsistencies in the case-law indicates a loosened meticulousness in terms of the application and preservation of form of expression on all levels. Although the answer to the question of what can(not) be accomplished by a logic of supranational judicial enforcement is a paradox in itself, the study proved that the legal paradox requires social, political and philosophical perspectives to clarify underlying systemic and operational issues where the individual, domestic and the supranational perspectives converge. In that regard, this study has taken a step to bring legal settings to the social sciences and enhance the academic literature and further knowledge through an untypical manner of analyzing deviating inclinations of the Court.

On a wider scale the Court's interpretive and argumentative references to the Convention values and *democracy* gets vulnerable to banalization and the Court's *democratic* expectations on the domestic and victim level gets entangled. That said, the findings well prove that the challenge of the Court also comes from the shrinking space in the human rights protection ecosystem of Turkey including counter-terrorism, systemic problems in domestic laws, and censorship being only a number of them. However, the findings support that the court shows neither a consistent pattern of argumentative justifications between violation and non-violation cases, nor proves consistent the argumentative logic behind its judgements. In the bigger international framework where the Court also becomes a political actor in ruling and protecting its norms and values with regard to freedom of expression, the Court is required to cycle back to

its great potential of keeping a more cohesive line in adjudication through better evaluation of the inner politico-legal and individual aspects in norm and value entrepreneurship in safeguarding all levels of freedom of expression on the international arena. Although long criticized, the Court is longer needed in enhancing the wider *democratic* potentials and evolutive widening in the horizons of freedom of expression in favor of all silenced human beings striving to have a voice.

8. Calls for Further Research

Final remarks include potential paths for further research in line with the limitations of the study. The limitations of the study mainly emerge from the limited scope of the master thesis; therefore, the sample size is only representative.

While the thesis mainly focuses on the Court's interpretive and argumentative aspects, further research can focus on comparative perspectives between the narrative of e.g. *national security, victimhood, democratic values*. Although the findings just scratched the surface in those regards, the following aspects below should be further researched in relation to freedom of expression within the social and political realm:

1- Whether the Court's argumentative and interpretive inclinations contribute to the creation of a narrative of new national identity within the politico-legal axis of post-2016 Turkey,

2- Whether the legal object and subject relations deteriorate in between national security and individual security within,

3- Whether positionality of the separate opinions can enrich the Court's legal culture and make impact for less deviations in the case-law on freedom of expression by feeding the gap in how victimhood, emergency and democratic values connect,

4- Finally, *parrhesia* can be a thought-provoking entry point in analyzing how much vulnerable positionality regarding prolonged *pretrial detentions* in relation to freedom of expression would sustain the axis between democratic justifiability and institutional regulability in Turkey.

9. Appendix 1

9.1 Article 46: Remedy Jurisprudence and References to Systematic Problems on a Domestic Level

Here, the Court's interpretive and argumentative tendencies in the application of Article 46 in referencing the structural issues have been analyzed. The data indicates that remedy jurisprudence on the general provision level was utilized twice by the court between 2003-2022. Although the structural issues were mentioned in the context of *Ürper and Others v. Turkey, Gözel and Özer v. Turkey, Ahmet Yıldırım v. Turkey* and *Cengiz and Others v. Turkey,* not all issues relating to the context of serious structural problems directly triggered the application of Article 46, or any warning sign to the domestic authorities. A discussion then follows on the implications of the argumentative tendencies and interpretive aspects on the axis of supranational and domestic dialogue.

The case of *Ürper and Others v. Turkey* entails media professionals associated with four daily newspapers published in Turkey.[369] The publication of those newspapers were suspended pursuant to Article 6(5) of Law No. 3713 (the counter-terrorism law). The publications were regarded as supportive of terrorist organizations (Kurdistan Workers Party, PKK/KONGRA-GEL), as well as the approval of crimes committed by them.[370] The Court considered it unnecessary to examine the publication's content, as the subject matter of the case concerned the "suspension" and "future wholesale publication of newspapers".[371]

In line with the application of its policies promoting essential foundations of *democratic progress* and *self-fulfillment* in the context of the freedom of expression and the press,[372] the Court investigated whether there is a pressing social need with "closest scrutiny", as this may

[369] *Ürper and Others v. Turkey*, no(s). 14526/07, 14747/07, 15022/07, 15737/07, 36137/07, 47245/07, 50371/07, 50372/07 and 54637/07, 20/10/2009, para 5.
[370] *Ibid,* para. 37.
[371] *Ibid,* paras 38 & 42.
[372] *Ibid,* para. 35.

indicate a deprivation of value and interest in the expression at stake.[373] The Court ruled domestic authorities largely overstepped the boundaries of the narrow *margin of appreciation*, through unjustified restraint towards the duties of the press as the public watchdogs in a democratic society.[374] The judgment stated that the *preventive effect* of the "draconian measure" created a discouragement on journalistic activities amounting to censorship. The Court underscored the availability of less "draconian" measures such as confiscation of particular issues, or restriction of specific content.[375] While the Court utilized Article 46 to underscore the *systemic problems* with the measures taken, the application of the law has been increasing the Court's pending caseload since 2006.[376] Therefore, the Court called for a revision of Article 6(5) of Law No. 3713 to ensure that suspending further publications would not happen in the future.[377]

Here, the Court's turn to general measures under Article 46, signifies the undemocratic basis of the counter-terrorism law in relation to "censorship" measures as disqualifying the duties and responsibilities in the field of journalistic freedoms. Indeed, the word selection of the Court and the comparison between the available measures applicable as more or less "draconian" signifies a strong and urgent signal to the Turkish Government for speedy implementation of the Convention principles into the revision request in question.

Furthermore, in *Gözel and Özer v. Turkey,* the Court followed a similar approach under Article 46 regarding the counter-terrorism law. In this case, the media professionals were charged with dissemination of terrorist propaganda under Law No. 3713 Article 6(2), without any domestic examination of the content of the publications.[378] Indeed, the domestic courts interpreted 'terrorist propaganda' vaguely by associating certain publications as terrorist propagandists.[379] In this case, the Court observes that the Article 6(2) of Law No. 3713, not requiring domestic judges to interpret the content and the context of the publications in connection to Article 10 of ECHR, became a *systemic problem* which led to several violation

[373] *Ibid,* para 39.
[374] *Ibid,* para. 43-44.
[375] *Ibid.*
[376] *Ibid,* para. 51.
[377] *Ibid,* para. 51-52.
[378] *Gözel and Özel v. Turkey,* no(s). 43453/04 and 31098/05, 06/07/2010, 7.
[379] *Ibid,* p.9.

judgments before the Court. Even in non-violation judgements under the same provision before the Court, the disputed publications were analyzed in line with *democratic* values to set an example to the domestic authorities. In that, the Court underlines *the wording and the spirit* of the domestic provision did not align with the Convention values as its application automatically led to the conviction of media professionals only on the grounds of publishing statements of a terrorist organization.[380] The provision amounted to semi-censorship and restriction of dissemination of disputed or challenging ideas to the public, which indicated a purposeful oppression of media professionals.[381] Thus, Article 46 was utilized to give strong signals for a revision of the related provision, under which domestic judges would be obliged to scrutinize the content and the context of the publication so as to give judgements regarding "necessity" in a democratic society.[382]

The utilization of Article 46 is in line with *Ürper and Others,* although they diverge in several ways. In *Ürper and Others,* Article 6(5) of the Counter-Terrorism Law signifies a "draconian" overall censorship measure, while *Gözel* signifies a semi-censorship measure, under which contextuality and content need to be accurately scrutinized for proper detection of what amounts to terrorist propaganda in political democracies. In this regard, *Gözel and Özer* underlines not only an urgent message for remedy to prevent future violations, but also an emphasis of a new approach of interpretation in the case-law regarding Turkey, putting domestic authorities under obligations to examine content and contextuality. Indeed, the data indicates that perhaps the content and contextuality of counter-terrorism gives rise to a prominent subsidiarity discussion.

Finally, the two divergence points in the case law, *Cengiz and Others v. Turkey and Ahmet Yıldırım v. Turkey*, respectively, will be elaborated on in line with the similarities and differences from the judgements unfolded above, in terms of argumentative aspects of Article 46 in relation to "censorship" or "semi-censorship". Although both cases are categırized as *key level violations,* the Court's detection of structural problems in the domestic law No. 5651 on

[380] *Ibid.* p. 9.
[381] *Ibid, p.10*
[382] *Ibid*, p.11

regulating Internet publications and combating Internet offenses[383] did not amount to a the application of Article 46.

Ahmet Yıldırım concerns the "wide-scale collateral effect of an overall preventive blocking order for an indeterminate period of time"[384] of Google Sites under Law No: 5651; the applicant's website, where he published academic works and opinion pieces,[385] became inaccessible. The Court held Article 8 of Law No. 5651 did not fulfill the foreseeability criteria since it fell short in providing sufficient protection to the applicant under the rule of law; the measure taken under the provision in question amounted to censorship.[386] In its ruling, the Court observed Law No. 5651 posed risks, *inter alia*, as it assigned an asymmetrical power to the Information Technology Directorate "TİB" for execution and extension of blocking orders.[387] The "wording" of the law did not require domestic courts to examine the necessity of the wholesale blocking.[388] Nevertheless, the Court did not utilize Article 46 in order to give an urgent message to domestic authorities. Contrastingly, Judge Pinto de Albuquerque, in his concurring opinion underlined that, under the domestic courts' severely limited *margin of appreciation*, the lawful form of publication published by the applicant lacked any connection to the reasoning of domestic courts. The insufficient guarantees provided by the Law No. 5651, required the utilization of Article 46 regarding state responsibility to amend legislation in line with the ECtHR principles.[389]

Therefore, *Ahmet Yıldırım* indicates the first deviation in utilizing Article 46, despite striking argumentative similarities with *Ürper and Others,* and *Gözel and Özer* regarding the wording of the law and the dangers of wide-scale censorship. Although the judgment covertly emphasized the vague nature of the execution of the law, namely the alarming nature of the domestic court's reluctance to strike a balance through weighing-up the interests at stake,[390] it did

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[383] See: *Ahmet Yıldırım v. Turkey* (App. no. 3111/10) (18 December 2012) paras. 15-18. & *Cengiz and Others v. Turkey* (App. nos. 48226/10 and 14027/11) (1 December 2015) paras. 20-23.
[384] *Ahmet Yıldırım v. Turkey* (App. no. 3111/10) (18 December 2012) para. 66.
See also: Blocking orders affecting access to the whole content on the whole internet domain for lengthy periods under Section 8 (3) and (4) of Law No. 5651. (e.g. blogspot.com, mysapce.com, blogger.com, Google Groups, youtube.com (para 17).
[385] *Ibid,* para.12.
[386] *Ibid,* para. 67-68.
[387] *Ibid,* para. 63..
[388] *Ibid,* para. 66.
[389] *Ibid, dis. op.* p. 31.
[390] *Ibid,* para. 66.

not come to any strict conclusion regarding how the law itself contradicts the validity of the Convention, nor the insufficient reasoning for the restraint. Despite the collateral effects and the alarming implications on the systemic censorship tendencies Law No. 5651 posed, the Court *chose not to* invoke Article 46 regarding the right to receive and impart information on the internet, which would pose long-term implications for the ECtHR regarding argumentative justifications of the Court where it would create an erratic and contradictory case-law.[391]

Finally, Cengiz and Others v. Turkey[392] is a case concerning the blocking of access to YouTube, executed by TIB under Law No. 5651[393] for more than two years, where the applicants as active users of the platform lodged claims against the measure.[394] In this case, when the court ordered to block all access to YouTube, there was no statutory provision empowering it to do so.[395] Similar to *Ahmet Yıldırım,* the substantial restriction and the collateral effect on inaccessibility to large quantities of information for the internet users was not taken into consideration.[396] Thus, the Court ruled that the interference under Section 8 of Law No. 5651 did not meet the lawfulness criteria, as it did not "afford the degree of protection" to which the applicants were "entitled to in a democratic society".[397]

Regarding the application lodged under Article 46, the Court noted that the violations clearly stemmed from a "structural problem".[398] However, the Court added that after the application on this case was lodged and the order to block access to YouTube without any legal basis was decided, Law No. 5651 was amended, and a provision making "the blocking of access to an entire website" legal if it meets certain criteria.[399] Thereby, the Court underlined it was not its task to analyze *in abstracto* the compatibility with the Convention of the legal provisions in force in Turkey at the material or the present time for blocking access to websites. On the

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[391] *Ibid, dis. op.* p.22.
[392] *Cengiz and Others v. Turkey* (App. nos. 48226/10 and 14027/11) (1 December 2015)
[393] Following the first blocking order of 5 May 2008, access to Youtube had been blocked by TİB, which was prolonged until 30 October 2010.
[394] *Ibid,* paras. 7-10
[395] *Ibid,* para. 6
[396] *Ibid,* para. 54.
The situation in this case is different than *Ahmet Yıldırım* since in that case it was TİB that issued the wholesale blocking order without a court order for such an extensive measure, while in this case it was the the court itself by its own initiative ordered blocking access to all Youtube, which was executed by TİB. p.23, para 3, & fn. 1
[397] *Ibid,* para. 65.
[398] *Ibid,*para. 74.
[399] *Ibid,*. para. 75.

contrary, it must assess *in concreto* what effect the application of the relevant provisions in the present case had on the applicants under Article 10.[400] In contrast, Judge Lemmens underlined in his concurring opinion it was a "missed opportunity" not to analyze the criteria of legitimate aim and proportionality, since the new amendment under Article 8 legitimized blocking access to an entire website, making lawfulness a concern of the past.

Thus, even though the Court was not obliged to rule *in abstracto* on the new section of the domestic law, "even by way of *obiter dictum* on the necessity and legitimate aim of the interference", it could have been an enlightening guidance to the citizens and authorities regarding the *principles* to be observed in the application of blocking overall access both in the existing and the new provision under Article 8 of Law No. 5651.[401]

Overall, despite an amendment in domestic law, *Cengiz and Others* still underlines a deviation and a problematic nature of the utilization of Article 46. Even when the Court was reluctant to invoke the remedy jurisprudence, it could have given a similar warning sign along the lines of the remedy jurisprudence without overstepping the subsidiarity norm, in a case where the new provision having a similar alarming effect given the existing case law on Turkey in relation to domestic interpretation and applications of censorship measures.

To conclude, the Court has a substantial role in both the utilization of Article 46 in highlighting systemic and structural problems as in *Ürper and Others,* and *Gözel and Özer,* but also in providing an effective framework and towards the solution making process regarding violations emerging from freedom of expression and the press.[402] Nonetheless, this study finds that more consistency is required in utilizing Article 46, as selective application of remedy jurisprudence would decrease the case-law consistency and confusion regarding the limits of policy making and policy application in existing case law.

This analysis finds cases requiring the closest scrutiny within the scope of counter-terrorism in line with traditional journalism were given more elaboration and tendency to utilize Article 46, whereas the change in form and type of dissemination towards online

[400] *Ibid.*
[401] *Ibid, dis. op.* p. 22, para 4.
[402] See: B. Çalı. "Does the remedy jurisprudence of the Court do enough for media freedom?" in *Journalism at Risk: Threats, Challenges and Perspectives, Defending a favorable environment for public debate.* Council of Europe, 2015,. p. 101-102.

platforms in relation to the emergence of online citizen journalism, as well as the general conditions regarding domestic regulations, discouraged the Court to invoke a remedy judgment or a similar warning sign regarding the potential future dangers in line with Article 46 and the existing case law. Henceforth, the analysis points out that the inconsistencies may indicate a step backwards in the hopes and ambitions for the Court to take a more proactive stance in "not waiting for hundreds of cases to pile up in its agenda under systemic violations of freedom of expression to be able to utilize Article 46,"[403] as well as taking a "more active and principled approach to journalistic freedoms as a matter of its remedy jurisprudence".[404]

9.2 Reflections

Regarding structural domestic problems, the findings indicate a deviation in utilization of remedy jurisprudence (Article 46). Although remedy jurisprudence Article 46 is rarely utilized due to the Court's operational subsidiarity principle, the rare application pattern fluctuates. The study shows that Article 46 was applied with care and caution in instances related to counter-terrorism and traditional journalism, but key level violations regarding structural problems in online platforms and citizen journalism did not allow the Court to apply Article 46 or provide any warning signs about potential threats to freedom of expression. These results suggest that the Court applies the provisions in a hierarchical and selective manner at the operational level. While the Court seeks to balance its relationships at the domestic level, these deviations add to the complexity of the case-law, raising questions about the Court's intentions to take a more proactive role in utilizing Article 46. As a result, these findings serve as a warning of potential future consequences for the numerous cases that have accumulated before the Court. In future cases, it may be advisable to direct the operational lens towards individuals to ensure a principled approach to balancing the potential influence of domestic restraints. If structural flaws are not addressed through operational considerations, both potential victims of freedom of expression and the Court itself could suffer from the creation of structural problems.

[403] *Ibid.*
[404] *Ibid.*

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