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Freedom of Expression and Its Restriction in Audio Visual Media

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Abstract**—**Audio visual communication is a type of collective expression. Due to inform the masses, give direction to opinions, and establish public opinion, audio visual communication must be subjected to special restrictions. This has been stipulated in both the Constitution and the European Human Rights Agreement. This paper aims to review freedom of expression and its restriction in audio visual media. For this purpose, the authorization of the Radio and Television Supreme Council to impose sanctions as an independent administrative authority empowered to regulate the field of audio visual communication has been reviewed with regard to freedom of expression and its limits.

Keywords**—**Audio visual media, freedom of expression, its limits, Radio and Television Supreme Council.

I. Introduction

FREEDOM of expression, considered the most blessed and the most important one of the basic human rights, holds a privileged place in many national and international documents. As a proof of the importance it attaches to the freedom of expression, the European Court of Human Rights has made its first resolution on the subject of the freedom of expression. Obviously, the most important reason why so much emphasis is placed on the freedom of expression is that it ensures the operation of democratic regime and it clearly distinguishes this regime from the others. A pluralist discussion environment will develop by means of the free expression of different opinions, a free public opinion will be established, all opinions will discussed to find out the most beneficial one and finally the "common good" for the society will be determined. After all, it is beyond dispute that one of the most important elements of a democratic society is pluralism and the most important prerequisite for pluralism is the freedom of expression [3].

Besides being the most blessed one among the basic human rights, the freedom of expression is also characterized as the source right for many of the rights that have been regulated by the Constitution. Freedom of communication, freedom of science and arts, freedom of thought and faith and freedom of the press are all based on freedom of expression. Freedom of mass communication is also based on freedom of expression. Freedom of mass communication can be defined as the free receipt and transmittance of news, opinions and beliefs by means of mass media including press, radio television, cinema and internet. Freedom of mass communication branches into subsections of freedom such as freedom of the channel through which the opinion, belief, or news is being transmitted. For example, it is called freedom of audio visual communication if the opinion, belief or news is being transmitted through radio-television, and freedom of the press if through printed media. Naturally, the prerequisite and source for these types of freedom is the freedom of expression [4].

In its classic sense, freedom of expression has an individual characteristic. However, according to the prevailing opinion, the freedom of expression exercised by means of mass media is defined as a collective right and this understanding constitutes the foundation for the legal and international regulations governing audio visual companies in particular. The understanding of freedom of collective expression sees audio visual communication as a type of collective expression. Expression moves from being an individual activity and acquires collective nature. Audio visual communication must be subjected to restrictions. The most prominent of restrictions is the permission regime being envisaged for entrance into audio visual field zones [3].

Since audio visual communication has been subjected to some special restrictions and principles as discussed above, classical requirements of the freedom of expression are different in this field. While avoidance of government interference with the field of freedom of individual expression has been accepted (negative character of the freedom of expression), there is agreement to government interference in the field of audio visual communication and government is even expected to take some measures for improvement and encouragement in this field. The purpose of these measures is to ensure that masses are informed correctly and that a sound pluralistic discussion environment is established and therefore to contribute to the development of democracy [1].

It has been agreed that the freedom of expression in the audio visual field is restricted due to the nature of this field. It has been stated in paragraph 1 of article 10 of the European Human Rights Agreement and in paragraph 1 of article 26 of the Constitution that the principles mentioned in these paragraphs will be in compliance with release. However, it should be accepted that the reasons for restriction listed in paragraph 2 of article 26 of the Constitution and in paragraph 2 of article 10 of the European Human Rights Agreement will be observed by the administration when giving release and that release may be withheld on the same grounds. In our country the authorization to regulate the audio visual communication field has been vested in the Radio and Television Supreme Council as an independent administrative

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authority. RTSC has become a constitutional institution with the inclusion of an additional paragraph inserted into article 133 of the Constitution by means of the Law no 5370. Authorized by the Law no 6112 on the Establishment and Broadcasting of Radio and Television Companies to release the broadcasting companies, to inspect the organizations and to impose sanctions in cases of violation of the provisions, the decisions of RTSC are subject to judicial review. On the other hand, paragraph 1 of article 8 titled "Broadcasting Service Principles" of the Law no 6112 includes a provision saying,

> "Media service providers provide their broadcasting services according to the principles in this paragraph with responsibility for the public".

In the said law, broadcasting activity is not considered as a public service and freedom of expression is recognized as a value on its own but it is also stated that broadcasting activity should be carried out according to the understanding of responsibility for the public in consideration of the social influences of radio and television.

Article 1 of the Law no 6112 includes a provision saying,

> "This law aims to define the methods and principles for regulating and inspecting radio, television and optional broadcasting services, ensuring the freedom of expression and information, administrative, financial and technical structures and responsibilities of media service providers and the establishment, organization, duties, authorizations and responsibilities of Radio and Television Supreme Council."

It is very significant that securing the freedom of expression has been recognized among the aims of the Law no 6112. Freedom of expression has been considered as a value on its own in this Law. Therefore, it can be said that Radio and Television Supreme Council carries out its duties based on the purpose of ensuring freedom of expression and imposing intervening measures in exceptional cases. Another issue worth noting is that the aims of the law include ensuring freedom of information along with freedom of expression. Freedom of information is one of the three elements of the freedom of mass media which is the reflection of the freedom of expression in the field of mass media. The government has been authorized to ensure the freedom of communication with the provision in paragraph 2 in article 28 of the Constitution saying,

> "The government takes measures to ensure freedom of the press and information."

And Radio and Television Supreme Council shall fulfill the requirements of this authorization in accordance with article 1 of the Law no 6112 in line with the constitutional regulation with regard to radio and television. The fact that ensuring the freedom of information has been recognized as a purpose may mean that freedom of expression appears to be a collective right in the audio visual field. The article titled "Public Access to Important Events" accommodated in article 17 of the Law no 6112 has the nature of ensuring the right to information.

II. Interference with the Freedom of Expression

Freedoms have been subjected to certain interventions in all documents where they are being regulated. In order for an individual to exercise a freedom, such freedom must be regulated, defined in terms of its limitations, in other words its boundaries must be drawn. In such cases, the important thing is how and in what manner freedom has been interfered with.

In modern democracies, freedoms can be legally interfered with by means of legislative organs. In general, freedoms are rules and interference is exceptional. Lawmakers may limit freedom under certain conditions and for certain purposes [2].

We are faced with the conflict between freedom and authority in interference with freedom of expression, as in interference with other types of freedom. Indeed, the boundaries of the freedom of expression will be determined by the balance between the importance and benefits of the freedom of expression for the individual and the society on one hand and the establishment of social order on the other. Balancing of these different benefits which seem to be in contrast at the first glance is important with regard to the limits of freedom of expression. Such a balance shall both prevent the abuse of this freedom and help everyone make use of this freedom. Therefore, the freedom of expression should be limited as a mandatory and exceptional precaution. That is, the government must be able to use its authorization for restriction in cases of violation of benefits which are important for the individual and the society but are also limited in number [5]. However, even when interfering in this manner, the restrictions that may be brought to freedom of expression must be related to how the opinion was declared. A restriction as to the content of the opinion will force the different opinions in the society to approximate to the permitted content and prevent the expression of different opinions in a society. And, the existence of such a restriction does not agree with democratic social order.

When reviewing the applications related to violation claims, European Court of Human Rights first checks whether the event that is claimed to be the subject of violation is related to the agreement article which is thought to have been violated. If a relation is found out, then it is checked whether the procedure is an interference with rights or freedoms, and if there is interference, whether the reasons for interference listed in paragraph 2 of article 10 in the agreement justify the interference in the application for freedom of expression. In order to be justified, interference must satisfy three conditions. These are the interference being determined by law, having a legitimate purpose and being necessary in a democratic society [1], [2].

The government bears the burden of proving that all three conditions have been satisfied. ECHR reviews the presence of the three conditions in the above given order. When it rules that one of these conditions have not been fulfilled, it stops reviewing the file and resolves that the said interference is unfair and therefore the freedom of expression has been violated. National courts also have to check for these three conditions when reviewing and making resolutions in all lawsuits related to the problem of freedom of expression. The

primary purpose of ECHR system is to ensure that ECHR text is implemented by countries' courts on the basis of ECHR court practices. ECHR must be the last resort as an authority.

III. Radio Television Supreme Council as the Restriction Authority

In the original, unlamented text of article 133 of 1982 Constitution, it was suggested that radio and television administrations may only be established by the government and their management may be organized as an independent public entity. This governmental monopoly that continued in our country in the field of broadcasting from 1968 to 1990 was actually overcome on 1 October 1990 when the first private television channel Magic Box started broadcasting. With the provision stating, "It is allowed to establish and operate radio and television channels within the defined legal framework", which became effective on 10 July 1993 upon an amendment in article 133 of the Constitution, legalization period started for the radio and television institutions doing broadcasting [4].

Since the influence of audio-visual media on the society is highly powerful, there was a need to inspect and regulate the organizations that were involved in this field. Therefore, Radio and Television Supreme Council was founded on 20 April 1994 based on "the Law on the Establishment and Broadcasting of Radio and Television Companies".

Radio and Television Supreme Council is an autonomous and independent public entity. The lawmaker uses the concept of autonomy and the discipline uses the concept of independence. Radio and Television Supreme Council was made into a constitutional organization upon the addition by means of "the Law on the Amendment of One Article in the Constitution of the Republic of Turkey" to article 133 of the Constitution. In paragraph 2 of article 133 there is a provision saying,

> "Established in order to regulate and inspect radio and television activities, Radio and Television Supreme Council consists of nine members. The members are selected by the General Council of the Turkish Grand National Assembly, based on the number of members from each political party, from among the members nominated by political party groups in numbers equal to twice the number of members which is determined as a proportion of the political party group members. The establishment, duties and responsibilities, member qualifications, selection methods and periods of duty for the Radio and Television Supreme Council is regulated by law."

Even though the autonomy and independence of RTSC is not secured by constitution, it is stated in article 34 of the Law no 6112 that this is an "autonomous and impartial public institution". In short, the independent administrative authority RTSC is considered as a public institution and therefore an organization of management from the service place. However, while the definition of RTSC in article 5 of the Law no 3984 as an "autonomous and impartial public institution" is supportive of the belief that it is an organization of management from the service place, article 34 of the Law no 6112 qualifies RTSC as an "impartial public entity".

IV. Evaluation of RTSC's Authority to Impose Sanctions in Terms of Freedom of Expression

When freedom of expression is concerned, the administration's imposing sanctions has become very controversial. In audio visual field, there is an administrative order relation between RTSC and private radio and television organizations. Release regime is a compelling tool for the broadcasting company to carry out certain duties. Release regime influences the direction and content that the private radio and television organization will follow during the broadcasting activity, the broadcasting being done according to legal principles and the identified obligations being observed. Therefore, it is not an accurate approach to accept that release regime will be sufficient to establish a private administrative order between RTSC and private radio television organizations and to defend that the above mentioned facts that are aimed by release regime should be handled in the order protected by criminal law. It is natural for the administration having release authority to determine whether the broadcasters fulfill the obligations stipulated by laws and regulations and to be able to impose sanctions when necessary. As mentioned before, freedom of expression in audio visual field is, by nature, already restricted and managed. At that point, the important thing is having legal and administrative regulations in place that will require restriction of freedom of expression in mandatory cases. Since the path preferred in the dilemma between the basic philosophy adapted by laws and freedom-authority will play a key role in restricting the freedom of expression and in the existence of cases which require interpretation; the problem of the kind of order in which freedom of expression should be handled should not be of importance in that situation. In an atmosphere where laws do not provide much guarantee for the protection of freedom of expression; it will not be important whether the freedom of expression is handled in administrative order or in an order protected by criminal law. Therefore, it is not a proper approach to accept in advance that the freedom of expression will be more secure in an order protected by criminal law. Moreover, even if it is handled in an order protected by criminal law; it should definitely be more restricted than printed media due to the nature of audio visual field. There are suggestions as to considering an action as crime or free action when freedom of thought, belief, expression, or the like is concerned and that administration should not interfere with the field of criminal law and it is stated that expression activity should not be subjected to any inspection for violation of law other than criminal law. However, the orders protected by criminal law and administrative sanctions are totally different. An action may be of violating nature for administrative order while not constituting crime in terms of criminal law. In audio visual field, private radio television activities are dealt with not only as commercial activities but also as cultural activities as well and require a special administrative order. Particularly in our

country public opinions polls demonstrate that radio and television broadcasts are significantly effective on masses, the subjects addressed in the programs are strongly reflected to daily lives, for example the characters in TV series are internalized. Even this is enough to stipulate that audio visual broadcasting, as an activity with psychological, sociologic and cultural dimensions, is addressed in an order other than the one protected by criminal law. Thus, the administration will inevitably interfere with the editorial independence of broadcaster. Freedom of expression certainly makes up the most important part of individual basic rights and freedoms. On the other hand, for example, freedom of expression must be interfered with for the sake of social or individual benefits in case programs that may adversely affect the physical, psychological, and sexual development of children and adolescents are broadcast during the hours that they may be watching television or in case an individual's self-respect and dignity is violated. However, it must be kept in mind that this interference should be done only when necessary, freedom of expression must be considered as the principle and restriction as the exception, and administration must impose sanctions in the presence of facts that seriously disturb the administrative order [4].

If the broadcast bans suggested in the Law no 6112 also constitute a crime under the criminal law, RTSC's imposing sanctions may be justified by the principle of independence of judicial and administrative penalties. For example; if the publication violates the indivisible integrity of the state with its territory and nation; RTSC will impose sanctions on the legal person which is the private radio and television organization and the person in charge will be punished under the provisions of the criminal law. Since the orders protected by administrative sanctions and legal sanctions are different, in cases when legal sanctions are not required, administrative sanctions may be necessary on the grounds that administrative order has been violated. However, since material facts are investigated in criminal procedures, the determination of criminal court as to whether the material facts have actually occurred or not shall be binding for the administrative authority as well.

V. Conclusion

The first stage of the freedom of expression as a basic human right is the freedom of information. Today information of societies is performed through mass media. Among mass media, radio and television is very important with regard to freedom of information because it is accessible for larger masses as compared to other mass communication and because of its influential power.

With accurate information of masses and ensuring the formation of sound public opinion, it is accepted that freedom of expression is limited in audio visual field. While individual freedom of expression is defined as a negative right, freedom of expression in audio visual field is handled as a positive right that requires the state to interfere with this field and to take encouraging measures. Thus obligations for the sake of public benefit are imposed on radio television organisations and through related arrangements freedom of massed to be informed is transformed into the right of information. Individual freedom of expression originates from the subject in the expression and freedom is addressed and defined in terms of this subject. However, when freedom of expression in audio visual field is concerned; the right of masses to be informed gains more importance than the expression of the producer, speaker, etc.

The fact that in article 1 of the Law no 6112 one of the aims of the law is defined as "ensuring the freedom of expression and information" obviously means that freedom of expression is a value that must be taken care of in its own right. Replacing the provision stating that broadcasting will be done within the framework of public service perspective with the provision that it will be done according to public responsibility perspective does not make a difference in the method by which freedom of expression in the audio visual field is addressed. Freedom of expression is again considered as a collective right. Defining the aim of the Law no 6112 as "ensuring the freedom of expression and information" shows that freedom of information in this field is transformed into right of masses to be informed. On the other hand, in contrast to the concept in the Law no 3984, freedom of expression is not addressed within the framework of public service perspective, is not shaped in line with the principle of public benefit nor allocated to a definite purpose, and appears to be a value that must be protected and taken care of. Again in article 37 of the Law no 6112, the inclusion of "the protection of the freedom of expression and information in the field of broadcasting services" among the duties and authorizations of Radio and Television Supreme Council leads to the conclusion that the basic philosophy adopted by the Law no 6112 in freedom-authority dilemma is freedom. Another practice that may contribute to the development of a more equitable way in restricting freedom of expression is to define the requirements and to concretize the content of some concepts mentioned in the Law no 6112 such as national security, general ethics and national moral values of the society. In the restrictions to the freedom of expression made in the audio visual media, the fact that some resolutions that determine the requirements of these concepts are made by the Radio Television Supreme Council can be considered as an extension of the Council's duty to regulate the audio visual field.

An important consideration in the restriction of the freedom of expression is the nature of the law of restriction. When the basic philosophy adopted by the law of restriction in freedom-authority dilemma and the prevailing understanding in the entire law is freedom, this will be reflected to the regulations based on the said law.

It has been stated in the European Human Rights Agreement that release system may be suggested by the governments in entering the audio visual field. Paragraph 2 in article 26 of the Constitution forms the constitutional basis of release. Since classical freedom of expression requires that expressions must be freely uttered, release system is in clear conflict with this requirement. However, in the freedom of expression understanding which is managed and limited in

audio visual field, release system is a tool for the broadcaster to fulfill certain obligations. Also as mentioned above, the fact that freedom of expression is limited and managed in the audio visual field accounts for the existence of release system. Legal regulations regarding release system are highly significant in terms of freedom of expression. That is; the cases in which release request of a private radio and television organization will be rejected must be defined with such clarity that needs no interpretation. Because since rejection of a release request by the administration is similar to preventing an expression before it is voiced, that is censorship; freedom of expression can be better guaranteed through regulations allowing for the rejection of release request when factors exist which give censorship a legal sense.

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