WHAT IS WRONG WITH HATE SPEECH: REFLECTIONS ON POLITICAL THEORY, LEGAL REGULATIONS AND TURKISH CASE

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ABSTRACT

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Hate speech has become common and ordinary in our daily life. We can face expressions based on hate speech in the social media and in the mainstream media; also this kind of expressions can be stated by the politicians. The aim of this study is to discuss theoretical arguments concerning why hate speech is harmful and shouldn't be evaluated within the boundaries of freedom of expression. Moreover, in this study, it is aimed to present the regulations and conventions concerning limitation of freedom in the case of hate speech at an international level and examine the situation in Turkey about hate speech. In this context, in the first chapter, political theories of John Stuart Mill and Hannah Arendt with respect to the boundaries of freedom of expression and reflections of their theories to the debate on hate speech are discussed. In the second chapter, I try to demonstrate to what extent international human rights norms limit freedom of expression so as to combat hate speech. At this point, international regulations, conventions, organizations and criminal laws of certain countries are examined. In the last chapter, Turkish case in terms of the existing situation about freedom of expression, legal regulations and articles in Turkish Penal Code related with hate speech and Court's decisions concerning

freedom of expression and hate speech are analyzed. In this part, the case of Hrant Dink who was murdered as a result of systematic hate speech was also presented so as to show the relationship between hate speech and hate crime.

Keywords: Hate Speech, Hate Crime, Hannah Arendt, Freedom of Expression, Hrant Dink

ÖZ

NEFRET SÖYLEMİNDE SORUN NEDİR:
SİYASET KURAMI, HUKUKİ DÜZENLEMELER VE TÜRKİYE ÖRNEĞİ
ÜZERİNE TARTIŞMALAR

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Nefret söylemi günlük yaşamımızda sıkça karşılaştığımız bir ifade biçimi haline gelmiştir. Nefret söylemine dayalı ifadelere sosyal medyada ve ana akım medyada sıklıkla rastlayabiliyoruz, ayrıca bu tür ifadeler politikacılar tarafından da rahatlıkla kullanılıyor. Bu çalışmanın amacı nefret söyleminin neden sorunlu olduğu ve ifade özgürlüğü sınırları içerisinde değerlendirilmemesi gerektiğine dair kuramsal tartışmaları ele almaktır. Ayrıca, bu çalışma ile nefret söylemi söz konusu olduğunda uluslararası düzeyde ifade özgürlüğünü kısıtlayan düzenlemeleri ve sözleşmeleri göstermek ve Türkiye'de nefret söylemi ile ilgili durumu incelemek hedeflenmiştir. Bu bağlamda, ilk bölümde, ifade özgürlüğünün sınırları ve geliştirdikleri siyaset kuramlarının nefret söylemi tartışmasına yansımaları bağlamında John Stuart Mill ve Hannah Arendt'in siyaset felsefeleri tartışılmıştır. İkinci bölümde, uluslararası insan hakları standartlarının nefret söylemi ile mücadele etmek için ifade özgürlüğünü ne ölçüde kısıtladığını göstermek amaçlanmıştır. Bu bağlamda, uluslarası düzenlemeler, sözleşmeler, kuruluşlar ve belirli ülkelerin ceza hukukları incelenmiştir. Son bölümde, Türkiye'de ifade özgürlüğü ile ilgili mevcut durum, nefret söylemi ile ilgili

hukuki düzenlemer, ifade özgürlüğü ve nefret söylemi ile ilgili mahkeme kararları bağlamında Türkiye örneği analiz edilmiştir. Bu bölümde ayrıca sistematik nefret söylemi sonucunda öldürülen Hrant Dink'in ele alındığı örneğe nefret söylemi ile nefret suçu arasındaki ilişkiyi göstermek amacıyla başvurulmuştur.

Anahtar Kelimeler: Nefret Söylemi, Nefret Suçu, Hannah Arendt, İfade Özgürlüğü, Hrant Dink

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LIST OF ABBREVIATIONS

CE	Council of Europe
EC	European Commission
ECHR	European Court of Human Rights
ECHR	European Convention on Human Rights
ECRI	European Commission against Racism and Intolerance
ICCPR	International Convention on Civil and Political Rights
UN	United Nations
UNHR	Universal Declaration of Human Rights
UNHR C	United Nations Human Rights Commitee

CHAPTER 1

INTRODUCTION

My interest in debate on hate speech debate began with an interest in power of speech. In daily life, we can face expressions that discriminate or insult one particular group on the basis of their characteristics such as ethnicity, religion, gender or sexual orientation. People can use the words such as Kurd, Armenian, Gypsy or homosexual for insulting "the other". I realized that discriminatory statements are common in our daily language. I started to think about if one person is subject to this kind of discriminatory statements, how she/he can respond them and to what extent public communication and a pluralistic public realm are possible. The murder of Hrant Dink, Armenian journalist living in Turkey, has been a turning point for those who are interested in hate speech. This event also made me think about hate speech and the boundaries of freedom of expression. Most of us probably remember the process of Hrant Dink murder, though nobody couldn't estimate that, that would have happened to Dink. However, his murder showed the destructive power of speech to the extent that speech which targets someone can kill her/him.

In light of these concerns, I think the subject-matter of hate speech is worth studying in two respects. First, hate speech became common and ordinary in our daily lives; it is widely used in the social media, in the mainstream media and sometimes used by politicians. I think the fact that hate speech become ordinary is a dangerous situation and I want to discuss theoretical arguments concerning why hate speech is harmful and should not be thought in the borders of freedom of expression. Secondly, when I made literature review, I realized that there is a tendency to study hate crime rather than hate speech. Moreover, in Turkey, I have realized that there are only few studies about hate speech. This subject is generally studied within media and communication studies, especially in representation of hate speech in

media. This thesis is supposed to contribute to the debate on hate speech in Turkey- a country where there is an attempt for acknowledging hate speech as crime in law.

Before presenting the details of this study, I want to concentrate what is understood from hate speech. According to Cortese, until the 1980s, hate refers to "any intense dislike or hostility whatever its object" (2006:3). However, this term gained social meaning since the mid-1980s. After this period, the term of hate has begun to be used to explain the comments that "characterize an individual's negative beliefs and especially feelings about the members of some other category of people based on their ethnicity, race, gender, sexual orientation, religion age, or physical or mental disability" (Cortese, 2006: 3).

Although there is a diversity of definitions of hate speech, the Council of Europe's Committee of Ministers defined hate speech in its recommendation in 1997 as follows:

> The term 'hate speech' shall be understood as covering all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin[1].

Briefly, hate speech can be described as expression that abuses or insults individuals on the basis of characteristics such as race, religion and gender (Heyman, 2008: 164). According to Weber, the concept of hate speech consists of a multiplicity of circumstances which refers to racial hatred based, hatred on religious and other forms of hatred based on intolerance reflected by nationalism and ethnocentrism. She adds that, also homophobic speech falls under hate speech category (2009:4).

In the recommendation of the Council of Europe's Committee of Ministers, it was stated that all forms of expressions which "incite racial hatred, Xenophobia, anti- Semitism and all forms of expressions" endanger democratic society, pluralism and cultural diversity[2]. While destruction of democratic society, pluralism and

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[1] Available from http://www.coe.int/t/dghl/standardsetting/hrpolicy/other_committees/dh-lgbt_docs/CM_Rec(97)20_en.pdf

[2] Available from http://www.coe.int/t/dghl/standardsetting/hrpolicy/other_committees/dh-lgbt_docs/CM_Rec(97)20_en.pdf

cultural diversity can be seen as harms of hate speech at social level, its harms can also be directly detected at an individual level. According to Gelber, the specific effects of hate speech are "a limiting of victims' personal liberty, the internalization of discriminatory messages, such that the hearer begins to believe the claims of appropriate inequality, the perpetuation of further acts of subordination and silencing" (2002: 83). It is widely accepted that the most important effect of hate speech is to make its victim silent (Gelber, 2002: 83, Alğan & Şensever, 2006: 16; İnceoğlu & Sözeri, 2012: 24). This claim is crucial for this study to understand what is wrong with hate speech. Delgado also supports this assertion by suggesting that hate speech is "rarely an invitation to a dialogue" (2006: x). Rather, it silences and marginalizes the victim, and discourages targeting group to proclaim its voice. In other words, it prevents diversity of ideas (Delgado, 2006: xii).

I want to remind that it may seem difficult to draw the line between toleration, defamation and hate speech, and to determine the boundaries of hate speech. It may be hard to answer which speech fits into category of hate speech or whether an individual was targeted because of her/his collective identity or not. At this point, hate speech can be regarded as discursive, performative and rhetorical. Proponents of this kind of reading of hate speech approach skeptically to legal regulations and restriction on hate speech[3]. However, in this study, in order to avoid relativism and highly disputable aspects, and show the core of the debate on hate speech, I follow the commonly agreed definition of hate speech. Keeping in mind this debate, let me present the content of this study.

The study consists of three chapters. In the first chapter, I will examine political theories of John Stuart Mill and Hannah Arendt. Hate speech debate is related with freedom of expression and its limitation because prevention of hate speech requires limitation of one of the most important liberties; freedom of expression. My motivation behind applying Mill's political theory is based on his emphasis on freedom of expression. He is widely known as a representative of classical liberal view of freedom and freedom of expression is one of the most

[3] Judith Butler's book of *"Excitable Speech: A Politics of Performative"* is an example of alternative reading of hate speech. She suggests that hate speech is constituted through discursive means (1997: 19) and she opposes to provide a rationale for the regulation of hate speech (1997: 73).

important liberties for him. However, liberties including freedom of expression are not absolute and subjected to limitations. In this respect, I will refer to his concept of "harm principle" as a minimal restriction of freedoms. I want to explore how harm principle applies to limitation of freedom of expression, what is the legitimacy of limitation of freedom of expression and whether hate speech can be seen as a base for the limitation of this freedom for Mill.

Following Mill, Arendt's theoretical framework will be discussed with respect to her conceptualizations, especially the principle of publicness and public sphere. Although Arendt does not study on hate speech, I will try to indicate what can be derived from her theory in concern with hate speech. In addition to principle of publicness and public sphere, the concepts referred by Arendt such as "public use of one's reason", "judgment", "enlarged mentality", "communicability", *"sensus communis"* and "truth claim" are expected to help combining her theory with hate speech debate.

According to her, the principle of publicness determines how public sphere should be, which ideas can be brought to public sphere and which cannot. This principle assumes "visibility" in public sphere; in other words, "being seen and heard by everybody" is the condition for the principle of publicness (Arendt, 1958: 50). I will try to examine what can be deduced from the principle of publicness for debate on hate speech. In the light of her political theory, I will try to present and discuss whether hate speech destroys pluralistic and egalitarian public realm, what happens to publicness, visibility in public realm and speech in the case of hate speech. I will also question whether hate speech is an obstacle to being active citizen in public realm or not. I will also try to demonstrate the losses we experience as citizens when hate speech enters public debate.

The importance of Arendt for this study is also related with her emphasis on speech. According to her, speech is a precondition for being a part of political life, without speech, individual cannot be political being. Thanks to this discussion, I will try to find ground for restriction of hate speech with respect to Arendt's theory. I will try to show what can be derived from her theory about hate speech and find clues about normative criteria for the wrongness of hate speech and the need for the

restriction of freedom of expression. This chapter will try to provide theoretical framework for hate speech debate.

In the second chapter, I will concentrate on legal discourse and regulations concerning limitation of freedom of expression. I will try to demonstrate to what extent international legal norms and criminal laws in certain countries limit freedom of expression so as to combat hate speech. At this point, international human rights standards represented by Universal Declaration of Human Rights, International Covenant on Civil and Political Rights and European Convention on Human Rights, and international organizations, including Committee of Ministers of the Council of Europe, United Nations Human Rights Committee, European Commission against Racism and Intolerance, European Court of the Human Rights will be examined to show how they approach the debate on the boundaries of freedom of expression. In this chapter, I will try to demonstrate whether criminal laws of specific countries, namely Canada, Denmark, Germany and United States prohibit hate speech or not. Examining criminal laws of these countries, I will try to present two models approaching the limitation of hate speech in different ways. These two models will be called Continental model represented by Canada, Denmark and Germany and American model represented by United States. In the light of this modeling, I will discuss whether Turkish case is closer to Continental model which prohibits hate speech by law or American model which gives priority to freedom of expression over other rights in the last chapter.

In the last chapter, in order to determine whether Turkey is in accord with Continental model or American model, the legal norms, regulations, articles and their implementations concerning freedom of expression will be analyzed. In this respect, the questions that what kind of the legal bases are there for the restriction of freedom of expression, whether hate speech is a criterion for restriction of this freedom, how domestic courts implement certain articles related with limitation of freedom of expression will be discussed.

In order to explain the situation in Turkey about hate speech, I will present and discuss Hrant Dink case. The murder of Hrant Dink was a hate crime resulted from being a target of hate speech campaign. Hrant Dink case was not a unique example; however, his murder was a turning point for hate speech debate in Turkey.

Indeed, the reason why I chose this case is twofold. First, this case clearly demonstrates the power of speech and shows relationship between hate speech and hate crime to the extent that all hate speech has a potential to turn into hate crime. Second, his murder creates a serious shock in society and attention and awareness to hate speech debate increased after this event. In the last chapter, as a part of debate concerning Turkish case, I will analyze the process that made Dink the target of hate speech and discuss what can be inferred from Hrant Dink case about the theoretical frameworks of Mill and Arendt.

The aim of this study is to contribute discussions on hate speech. I think adding political theory will enrich debate concerning hate speech while legal framework will present the existing criteria for the restriction of freedom of expression and case law regarding hate speech both in international level and in Turkey. The case of Hrant Dink will show us the reflections of hate speech in Turkish case and indicate certain peculiarities of Turkish juridical mentality, i.e., a nationalist bias in evaluating the cases on hate speech.

CHAPTER 2

HATE SPEECH FROM THE ANGLE OF POLITICAL THEORY: VIEWS OF MILL AND ARENDT

In this chapter, I aim to constitute theoretical framework for the legitimacy of restriction of freedom of expression to prevent hate speech. Political theories of John Stuart Mill and Hannah Arendt are presented and discussed with respect to the boundaries of freedom of expression. Mill is seen relevant to this study because hate speech is about what kinds of expressions should be prohibited by law; in other words, hate speech debate is highly related with the limitation of freedom of expression. I want to examine what are the limits of freedom of expression according to Mill who puts great emphasis on freedom of expression as one of the most important individual liberties. Hate speech debate also regards which ideas can be brought to public sphere, which cannot. In this respect, I refer to Arendt's conceptualizations to find a ground for possible harms of hate speech and to show the losses we experience in public sphere in the case of hate speech in the context of public sphere, publicness and her emphasis on speech.

2.1. Hate Speech from the Perspective of Mill's Reflections on Liberty and Its Restriction

In this part, I aim to present and discuss main ideas of John Stuart Mill as an important British philosopher of the 19th century and the relevance of his theory with hate speech debates of our times. The debate on hate speech is closely related with freedom of expression and its limitation. Hate speech regulation needs defining hate speech as a crime in the law and requires limitation of freedom of expression. His idea on liberty has been valid even today and the constitutions of many democratic countries have been inspired by his reflections on liberty. I want to look at the way he defines liberty and the way he determines when one's liberty can be restricted.

2.1.1. Mill and the Utilitarian Thought

John Stuart Mill is widely known as utilitarian thinker inspired by Bentham. In the book of *Utilitarianism,* Mill suggests that "actions are right in proportion as they tend to promote happiness, wrong as they tend to promote the reverse of happiness. By happiness is intended pleasure and the absence of pain; by unhappiness, pain, and the privation of pleasure" (Kuusela, 2011: 147). The criterion for the rightness and wrongness of one's actions is whether they tend to promote happiness or not (Kuusela, 2011: 148). Mill believes that action which tended to increase happiness and diminish misery is a morally right action (Scarre, 2007: 2). In the book of *Utilitarianism,* he defines "Greatest Happiness Principle" by suggesting that "actions are right in proportion as they tend to promote happiness, wrong as they tend to produce the reverse of happiness. By happiness intended pleasure and the absence of pain; by unhappiness, pain and privation of pleasure" (Scarre, 2007: 3).

This principle is also known as the "greatest happiness of the greatest number". In *On Liberty,* Mill claims that his defense of liberty relies on the claims about the happiness of people as progressive beings (Brink, 2001: 123). He sees utility "as the ultimate appeal on all ethical questions; but it must be utility in the largest sense, grounded on the permanent interests of man as a progressive being" (1956: 14). In this respect, Mill regards individuals as progressive and rational beings. Moreover, one may assume that according to Mill, there is a great utility to bring all views and opinions in discussion because excluding one's idea in a discussion may destroy general welfare. Because individuals are progressive beings and introducing all ideas and opinions into discussion brings great utility and serves general welfare, limitation of one's freedom of expression even it contains hate seems problematic for Mill. In order to focus on this argument, we can look at his ideas on liberty of thought and speech which are discussed in his book *On Liberty* (1956).

2.1.2. Mill's View on Freedom

John Stuart Mill's *On Liberty* offers the classic defense of freedom of expression and other liberties against governmental interference (Brink: 120). He wants to protect

the individual both from the excessive power of government and majority of people or “tyranny of the majority” (Mill, 1956: 7).

For him, even if government is accountable to the people, the limitation of government’s power over individuals is centrally important. Moreover, he also warns that society can try to impose its own rules and customs over individuals. There is a need of protection against the “tyranny of the prevailing opinion and feelings, against the tendency of society to impose its own ideas and practices as rules of conduct who dissent from them” (1956: 7). Therefore, he sees individual independence from society’s coercion as a necessary condition of human affairs (1956: 7).

His theory is based on the ground of individuality (1956: 67) which refers to the “right of each individual to act, in things different, as seem good to his own judgment and inclinations” (Ten, 2008: 8). For him, “free development of individuality” is one of the leading essentials of well being. It is also necessary part of civilization, culture and education (1956, pp. 68-9). Today, he argues that the danger which threatens human nature is deficiency of individuality (1956:74). At this point, he approaches critically to the majority and masses to the extent that individual can be overwhelmed by them (1956: 69). He also criticizes the dominance of custom, which is an obstacle to human advancement and individuality (1956:85) because individual feels to obligate it that can prevent individual to act according to her/his own way (1959:71). For him, today, there is a tendency to command general rules of conduct and seek to make everyone conform to the approved standard (1959: 84-5). In that respect, individuals should be encouraged in acting differently from the masses and customs (1956:81). To this purpose, he aims to find an adjustment between “individual independence and social control”. If individuality is valued, the boundary between individuality and social control can be easily drawn (1956: 69).

2.1.3. Conditions of Limitation of Freedom

In order to draw the line between individuality and social control, there can also be need of restrains upon the actions of other people. Mill explains when there emerges such a necessity as follows:

> The object of this essay is to assert one very simple principle, as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control, whether the means used be physical force in the form

> of legal penalties, or the moral coercion of public opinion. That principle is that the sole end for which mankind are warranted, individually or collectively in interfering with the liberty of action of any of their number, is *self-protection*. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others (1956: 13).

Now, we come to the core of Mill's understanding. For him, there is a distinction between the part of person's life that concerns only herself/ himself and that which concerns others (1956:97). When the consequences of one's action only affect herself/himself, there is no way to interfere her/him (1956:13). In other words, when a person's conducts affect the interests of no person except herself/himself, there should be perfect freedom to do the action and stand the consequences (1956:92). Individuals are also free to act according to their opinions as long as it is at their own risk and damage (1956: 67). Mill explains this assertion by suggestion that "in the part which merely concerns him, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign" (1956: 13).

There, we can see that Mill links liberty with individuality. For him, "the only freedom which deserves the name, is that of pursuing our own good in our own way, as long as we do not deprive others of theirs, or impede their efforts to obtain it " (Ten, 2008: 2).We can see that while people are free to pursue their own good, there is also limitation of individual liberty; not making deprived of others to pursue their own good.

For Mill, the question of "where does the authority of society begin" is an important question that should be asked (1956: 91). For him, no form of civilized life is possible without the enforcement of some restrains on people's conduct (Ten, 2008: 2). In society, everyone who receives the protection of society has obligation to others living in society. This obligation refers to not violation of interests of other people, which are thought as the rights of others (1956:91). If the consequences of one's conduct affect other people, she/he is responsible to the rest of society and the prevention of harm to others is the major issue at this point.

This brings us to Mill's harm principle that applies when conducts with other people is the case. He regards prevention of harm to others as the only legitimate way for coercive interference with the conduct of people (Ten, 2008: 10). To prevent harm to other people, exercising society's power is legitimate. In other words, in

order to prevent harm, society can exercise power over individual (Mill, 1956: 13). In this respect, prevention of harm to others is the only purpose for which the liberty of one person can be limited (West, 2008:14). The liberty of individual must be limited if her/his acts do harm to other people (1956:68). Whenever there is a definite damage or possibility of damage to the individual or to the public, the case is taken out of the scope of liberty and placed in the scope of law or morality (1956:100). Mill also states that this restriction may also include legal punishment because if individual's action is damaging to the interests of others, the individual is accountable and can be subjected to social or legal punishment (1956:114). Compulsion can never be a mean to justify individuals own good; however, it is justifiable only for the security of others. Punishing someone by law or disapprobation is the case when anyone acts harmful to others (1956: 14). At this point, he places great emphasis on liberty which is not absolute and subject to certain limitations.

2.1.4. The Distinction between Public and Private Spheres in Mill's Thought

We have seen that there is a distinction between the part of person's life that concerns only herself/ himself and that which also interests others. This distinction can be evaluated as the distinction between public sphere and private sphere for Mill. In the situation that one's action only interests her/him refers to one's private sphere. However, when one's conduct affects others, this means that you are acting in public sphere. As Shouler states, what you do in the "public sphere" is subject to restriction but what you do in private is your own business (Shouler, 2012). About this private sphere Mill writes:

> There is a sphere of action in which society, as distinguished from the individual, has, if any, only an indirect interest; comprehending all that portion of a person's life and conduct which affects only himself, or, if it also affects others, only with their free, voluntary, and undeceived consent and participation. When I say only himself, I mean directly, and in the first instance … This, then, is the appropriate region of human liberty. It comprises, first, the inward domain of consciousness; demanding liberty of conscience, in the most comprehensive sense; liberty of thought and feeling; absolute freedom of opinion and sentiment on all subjects, practical or speculative, scientific, moral, or theological. The liberty of expressing and publishing opinions may seem to fall under a different principle, since it

> belongs to that part of the conduct of an individual which concerns other people (1956:16).

In this quotation, we can see that there is a sphere of action which concerns only individual herself/himself and it is the place of absolute liberty which refers to private sphere. However, because liberty of "expressing and publishing" opinions is related to the sphere of conduct that affects other people, it is not in the scope of absolute liberty; in other words, it can be evaluated as belonging to the public sphere which is open to the restrictions.

2.1.5. Importance of Liberty of Expression and Discussion

We have seen that freedom of expression is a part of public sphere and fits into sphere of conduct which influences other people. Although this liberty may be open to some restrictions, Mill sees this freedom as one of the most important individual liberties. Herein, it is important to remember that Mill's defense of free expression of opinion can be seen as his most significant contribution (Scarre, 2007: 36). His chapter, '*Of the Liberty of Thought and Discussion,*' in *On Liberty* can be seen as "the authoritative statement of a liberal view of free speech" (Soutphommasane,2006).

For Mill, humans should be free to form opinions and to express their opinions without reserve (1956: 67). Freedom of thought and discussion is also necessary for flourishing individuality (Ten, 2008: 2). He criticizes restriction of these liberties by authority and he esteems diversity of opinions and sees restriction on them as evil. Suppressing minority opinions does not only violate the liberty of those who hold them, it is also wrong for utilitarian reason (Scarre, 2007: 37). In his own words, he asserts that "the peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it" (1956: 21).

Brink states that for Mill, sharing thought and discussion with others, especially about important matters, improves one's deliberations. It enlarges the diversity of opinions, by identifying new options worth consideration, and helps one to better assess the merits of these options, by forcing one's attention to look at new considerations and arguments about the comparative merits of the options. In these

ways, open and vigorous discussion with diverse interlocutors improves the quality of one's deliberations (2001: 125)

Mill declares that even if one person thinks very differently, it is wrong to silence her/him. It is the "duty of government and individual to form the truest opinions they can; but they should never impose them upon others; therefore, everyone should be free to form their opinions and act according to her/his opinions (1956: 23). Everyone should have the liberty of contradicting our opinions and disproving them (1956: 24). Freedom of thinking is not only required for great thinkers, but also needed for enabling ordinary human beings to acquire mental strength that they are capable of. Without this freedom, there cannot be intellectually active people (1956: 42).

In a free and open society, diverse and conflicting views are encouraged to assert their opinions and debate with others in Mill's view (Ten, 2008: 5). Discussion makes diversity of opinions (1956: 55) which enables different modes of life (1956:68). In the absence of discussion, the meaning of opinion is also lost (1956:48).All opinions should be expressed equally. Even the opinions in minority need to be approved and supported (1956: 58).Free comparison of different opinions is desirable. In that respect, instead of individual's own ideas, diversity of opinions and their discussion are important. Individuals have a right to hold different opinions according to their own viewpoints (1956:68).

Mill proposes that there is a need of discussion of any opinion regardless of its truth or not. Even if one person is sure about truth of her/his ideas, she/he shouldn't escape from its discussion (1956: 43). He states that if the suppressed opinion is true, then we are deprived of opportunity of the replacing error with the truth of the silenced opinion. However, if the suppressed opinion is false, we would lose the benefit of having the clearer perception and livelier impression of truth (1956:21). At this point, discussing all ideas regardless of it is wrongness or not is necessary for diversity of opinions and this discussion of all views and opinions would bring utility because no one is excluded from the discussion.

Mill's argument is that freedom of thought and discussion are necessary conditions for fulfilling our natures as progressive beings (Brink, 2001: 122). He states that freedom of opinion and freedom of expression is necessary for mental

wellbeing of humans because of four reasons. First, to make any opinion silent prevents any opportunity of carrying truth for this opinion. Second, even if silenced opinion is false, it contains a portion of truth. In order to reach whole truth, it is necessary to realize collision of adverse opinions. Third, it is wrong to assume any truth as unchangeable; it is open to change from time to time, from place to place. Even if its accuracy is undeniable, it should be open to discussion. Lastly, these freedoms are necessary for preventing any truth to be transformed into dogma because unchallenged opinions lose its meaning and tend to be dogmatic (1956: 64). In brief, Mill sees discussion of all ideas necessary for testing their truth and regards essential for developing individual liberty and progressiveness. Mill does not question the content of opinion whether it defends racist ideas, insults or targets anybody. On the contrary, he calls for testifying all opinions and he does not assume the suppression of any idea regardless of its content.

2.1.6. Restriction on Freedom of Speech and Expression

We have seen the importance of free expression for Mill. However, it is also important to ask what the limit of free expression is in Mill's thought. As Scarre suggests, the problem is to establish reasonable limits to expression that provide protections in line with harm principle while free expression is not restricted more than the most minimal degree necessary for expressing one's opinions (2007: 39) .

There are different tendencies to evaluate the approach of Mill towards the restriction of freedom of expression. One of these tendencies assumes that Mill does not accept restriction of freedom of expression in any circumstances. The other interpretation supposes that there is a base for restriction of freedom of expression in Mill's thought.

Brink evaluates these two tendencies and suggests that one may conclude that Mill proposes that speech can never be harmful so he is a "free speech absolutist" who believes that restriction is never desirable. However, Mill recognizes that speech can be also harmful and harm principle can also be applied to speech (Brink, 2008: 52). When we look at his understanding of liberty in relation with liberty of thought and expression, Mill sees the liberty of expressing and publishing opinions as belonging to individual's conduct that concerns other people (1956: 16).

As Lacewing suggests, for Mill, freedom of thought and expression are distinct, because while thought is self-regarding without exception, expression of one's thoughts clearly has consequences for other people (2008).

In this respect, Mill's conceptualization of freedom of expression is not absolute and subject to certain limitations. For him, it is true that "free expression of all opinions should be permitted on the condition the manner be temperate, and do not pass the bounds of fair discussion" (1956: 64). Being temperate and being inside the boundaries of fair discussion is seen as a precondition for freedom of expression which shows us in which conditions this freedom can be limited. According to Mill, if one opinion encourages to mischievous act, it is possible to restrict this opinion (1956: 67). Moreover, because the usage of intemperate opinion that contains violence precludes us from expressing and listening different ideas, this kind of opinions can be restricted (1956:66-7). Therefore, we can conclude that it is important to restrain the kind of language which makes other individuals silent and prevent them to express their own ideas. Thus, Mill's account of limitation on liberty does not give us free speech absolutism.

Riley suggests that "Mill is not committed to any view that speakers must have rights to speak as they please, choosing whatever time, place, manner, and content of speech seem best in terms of their own judgment and inclinations. Rather, society has authority to consider regulating any act of expression to protect others from suffering harm. Society may legitimately consider whether to establish and enforce rules that restrict not only the time, place, and manner but also the content of expression" (2007, pp.67-8). In this respect, the legitimate base for restricting freedom of expression can be detected in Mill's theory. Now, it is crucial to analyze whether hate speech can be appropriate reason for limitation of this freedom.

2.1.7. Concluding Remarks on Mill's Liberal Defense of Freedom of Thought and Expression and Their Limits

After evaluating Mill's view on liberty and its limitations, it is important to ask what can be said about the regulation of hate speech from his perspective. It is questionable whether or not restriction on speech for the regulation of hate speech is

possible for Mill. I also want to question whether restriction of freedom of speech in the case of hate speech can be justified by harm principle formulated by Mill.

It can be suggested that there are two readings of Mill's approach to restriction of freedom of expression in the case of hate speech. One may assume that restriction of freedom of expression is necessary to prevent hate speech according to Mill's view. As we have seen in Mill's thought, freedom of expression is not absolute. Free expression of all opinions shouldn't exceed the boundaries of fair discussion. As Brink states, Mill argues that effective deliberation requires reflective consideration and assessment of alternatives, and this requires an open-minded discussion of diverse viewpoints. In that respect, the proper representation and evaluation of diverse viewpoints require a background culture of mutual respect among members of the deliberative community. But hate speech destroys the ground of mutual respect and discourage participation in the deliberative community (2001:140).For this reason, hate speech contributes to a hostile environment which undermines the culture of mutual respect necessary for effective expression and fair consideration of diverse points of view (Brink, 2001:141).

Moreover, For Mill, the language that calls violence precludes from expressing and listening different ideas and this kind of language is needed to be restricted. At this point, it is important to remember that hate speech is a reflection of intolerance and impatience which pave the way for hate crime (İnceoğlu& Sözeri, 2012: 24). There is a close connection between hate speech and hate crime which calls for violence. In this respect, it can be assumed that hate speech harbors potential violence (Alğan & Şensever, 2010: 17). Because hate speech includes potential of violence, we can suggest that Mill would not evaluate this kind of language within the borders of freedom of expression.

This is one way of reading how hate speech can be seen from the perspective of Mill's thought. However, we can also find clues about the claim that it is not desirable to restrict one's freedom of expression in order to prevent hate speech. According to Ten, Mill defends the freedom to express all opinions irrespective of their content or intrinsic nature (Ten, 2008: 3).Everyone should be open to all arguments for and against them. At this point, we should require freedom not only for ourselves, but also for others who want to challenge prevailing views in Mill's

thought (2008:5). Following Ten's interpretation, there should be fullest liberty of discussing opinions however immoral it may be considered. In that respect, Mill condemns the imposition of sanctions against those who assert views which society regards as immoral (Ten, 2008: 5). Therefore, one can assume that for Mill, all views should be debated and none of the views can be assumed as wrong before debating. Even if opinion contains hate speech expression, it can be assumed that let's discuss and then see how wrong these types of opinions are. This brings us to an ambivalent position in Mill's thought, there is no consistent answer whether he is defending prohibition on hate speech or not.

According to Mill, even if one's opinion is immoral and disrespectful, it should be listened and allowed to express itself. It is then highly questionable whether hate speech can be evaluated as immoral and disrespectful, but it can be suggested that perhaps we should listen what the speaker of hate speech suggests.

For Mill, in order to be sure of truth, its discussion should be allowed; in other words, before debating something, we cannot assume it as wrong initially (1956: 26).Moreover, in order to evaluate an opinion as wrong, opinion should have the opportunity of defending itself (1956: 27). In that respect, it can be questioned that in order to be sure of wrongness of hate speech, there is a need to discuss it because we cannot assume the content of hate speech as wrong before debating it and hate speech expression should be seen as those expressions that should have opportunity to be defended among other opinions.

We can also debate hate speech from Mill's formulation of harm principle. If governments are to intervene, then they should only do so when speech is likely to result in the direct infliction of harm upon others which appeals to the Mill's harm principle. Intervention is strictly limited to those cases where speech directly produces action resulting in harm (Soutphommasane, 2006). With respect to harm principle, freedom of expression can be limited if it tends to cause harm to others. As Brink suggests, Mill accepts restrictions on liberty designed to prevent harm to others, and this might seem to make room for restrictions on speech (2008:120). For Mill, there may be restrictions of freedom of expression, because expressions of opinion and feeling are actions that affect others, therefore, may also harm them. It is

possible, therefore, that expression could cause harm to others, and in such cases, could legitimately be regulated. (Lacewing, 2008).

When we think hate speech in our contemporary reality, we can suggest that it gives direct harm to its victims. It makes its victims speechless, excludes them from society and at the extreme point, it can target them to be killed by hateful attacks. As Gelber suggets, one of the prominent effects of hate-speech-act can be identified as "inflicting significant harm on individuals and groups" (2002: 86). In this context, we can deduce that because hate speech gives direct harm to its victims, Mill's harm principle can be applied and restriction on freedom of expression is accepted by Mill when hate speech is the case.

However, the situation seems more complicated because there is no consensus about whether hate speech gives direct harm or it is just offensive speech. Brink warns that interpretation of harm principle is open to negotiation to the extent that drawing the line between harm and offense is difficult (2008: 51). The distinction between them is important because for Mill the mere offensiveness does not constitute harm (Lacewing, 2008: Brink, 2008:21). Mill accepts that opinions that include offense prevents others to express and listen contrary opinions (1956, pg.66). However, he adds that law and authority have no business with restraining this kind of opinions (1956, pg. 66). According to Mill, those expressions of offensive opinion that do not cause harm and thus, they should not be restricted under any circumstances (Lacewing, 2008).

Ten also agrees with other authors that offensiveness is not enough for the restriction of speech for Mill. Ten suggests that interference is justified with reference to circumstances of its expression rather the content of the opinion. Where the clear intention is to provoke people to engage in harmful, illegal acts against others, legitimacy of prohibiting the expression is unquestionable. In that respect, the dominator is whether it clearly provokes a harmful, illegal act. This means that no punishment is to be directed at the expression of "any doctrine, however immoral it may be considered." The intrinsic nature and offensiveness of the opinion stated are not appropriate reason for punishment. (Ten, 2008: 6).

While harm principle is easily applicable to one's action, it is questionable when speech is the case because we see that Mill gives more free space for speech than action. As Riley states, he draws distinction between speech and actions. In *On Liberty*, he suggests that individuals should be completely free to form and discuss any opinions they wish. He calls "complete liberty of contradicting and disproving" our opinion" .By implication, this frame can be evaluated as "individuals should be at liberty to express even racist or blasphemous opinions that others may reasonably be expected to find offensive and demeaning. Offense and disgust are disagreeable feelings, Mill suggests, but such feelings do not amount to perceptible injury or harm" (Brink, 2008: 62-3). In that point, as Lacewing suggets, if there is no clear connection between expression of opinion and action that harm others, society only should seek to prevent harmful action, not its expression (2008).

Soutphommasane suggests that Mill's understanding of harm principle rejects the harm caused by speech that is offensive to particular cultural groups. Therefore, it underestimates the real threat of offensive speech on the grounds of culture and race or religion (2006).He warns that we should be aware of the potentially significant harms of offensive speech and its capacity to cause some members of society to suffer from real damage and distortion (2006).

On the other hand, Scarre suggests that Mill's harm principle is not sufficient to set limits on freedom of expression of opinions. The case that expression of one's opinion may cause harm is not always enough for its suppression. Scarre gives example that in the long run, Hitler's *Mein Kampf* gave more damage than any other speech. This was not thought by Mill. However, he believes that Mill wouldn't have approved the prohibition of Hitler's book. Although the ideas of *Mein Kampf* are repulsive, Mill would assume that bad ideas need to be talked rather than repressed so that their deficiencies can be exposed in a process of open discussion (2007:39-40).

On this side of comments made on Mill's thought which do not rely on the need for restriction, Riley argues that freedom of expression can harm others without their consent so it is not purely self-regarding conduct. At this point, Mill follows a general policy of "laissez-faire" which refers to "not interfering with expression except in situations where it directly and immediately inflicts grievous harm on

others without their consent". There is complete liberty of thought and discussion in Mill's thought, but coercive measures may be adopted against types of expression which inflict grievous harm on others, and which do not count as discussion. For Riley, racist opinions produce disagreeable offensive feelings but they don't give to perceptible harm. Therefore, this kind of opinions cannot provide for restricting speech for Mill. (2008: 15: 66).

According to Mill, discussion should exclude all types of expression which cannot be heard or viewed without forcing the consumer or third parties to endure a risk of direct and immediate harm. However, discussion still includes expression that may be very upsetting and offensive to others even though it causes them no direct and immediate perceptible damage without their consent. It includes personal insults, for instance, as well as ethnic or racial indignity or blasphemy (Scarre, 2007:74). Therefore, such kinds of expressions may not be seen as those which prevent discussion.

We can say that if we could clearly draw a line between hate speech and hate crime which is defined as "crimes motivated by intolerance towards certain groups in society" by the Organization for Security and Cooperation in Europe (OSCE, 2009:8), the argument about whether hate speech gives direct harm or not would be meaningful. It is debated that while hate speech includes hatred based expression and bias towards certain groups, hate crimes are the crimes motivated by hatred based intolerance. If hate crime is the case which directly cause to physical attacks, threat of violence, harassment or damaging of property (Alğan & Şensever, 2010: 7), there wouldn't be any problem because there is direct harm to its victims so Mill would clearly oppose hate crime. However, when speech is the case, it becomes dubious whether hate speech causes to direct harm or not.

Soutphommasane views the distinction between action and speech in Mill's thought as unsatisfactory. According to him, the connection between speech and harm "lies exclusively in the actions that may occur as a result of speech, that speech itself can never itself constitute the harm. Where harm does occur, it does so because the expression of an idea or opinion is ultimately superseded by the judgment of the listener when the listener acts according to it" (2006).We can remember that the distinction between hate speech and hate crime is very blurred. The important point

for hate speech is that it doesn't remain in speech; it promotes action and it can easily turn to the hate crime (Alğan & Şensever, 2010: 16).

To conclude, we can make certain inferences about what is wrong with hate speech. We have seen that hate speech may preclude fair discussion and destroy diversity of opinions necessary for deliberative community. Moreover, it has a potential to turn into hate crime which harbors potential violence .Therefore restriction of freedom of expression in the case of hate speech seems legitimate from the perspective of Mill's thought. Moreover, harm principle that is formulated by Mill shows that because hate speech gives harm to its victims, the liberty of individual can be legitimately restricted. However, this issue is not indisputable. Mill's defense of freedom of expression irrespective of its nature and his escape from absolute liberty leads us to question the conditions of the restriction of freedom of expression. Hate speech can be also evaluated as offensive speech; in that respect, harm principle cannot apply to this situation so one's freedom of expression cannot be restricted. However, as it has been stated, if we reject clear distinction between hate speech and hate crime and accept that all hate speeches have a potential to turn hate crime, the discussion whether hate speech gives harm or it is offensive speech seems unimportant. However, Mill's theoretical framework presents a strict distinction between speech and hate crime and/or speech and action which prevents us to see the power of speech. The criteria of harm principle also does not provide us legitimate base for restriction of hate speech although it offers minimal limitation and gives some clues about its wrongness. In brief, we can suggest that Mill's political theory remains ambivalent with respect to limitation of freedom of expression and with respect to hate speech.

2.2. Examining Hate Speech from the Perspective of Arendt's Political Theory

My aim in this part is to discuss what will happen when hate speech enters; what will happen to public discussion, equality, publicity when hate speech is the case. I want to debate whether hate speech is an act that absorbs politics or not. Whether hate speech is an obstacle to being active citizen in public realm or not is another important question to be asked in this framework. I hope Arendt's conceptions would help me when answering these questions. I also will attempt to discuss what is wrong with hate speech by reference to certain major concepts of Arendt; namely judgment, publicness, enlarged mentality, faculty of speech, public realm and truth. By

discussing these concepts, I will try to find ground for restriction of hate speech. It is known that liberal tradition opposes restriction of freedom of expression. However, I want to look at this subject from the perspective of publicness, boundaries of public sphere and politics, and discussion opportunities. I want to discuss what the losses are we experience as citizens when hate speech enters public sphere and to what extent hate speech absorbs politics. Therefore, I will refer to Arendtian political philosophy to answer these questions.

2.2.1. Introducing Arendt's Political Thought

Arendt is widely accepted as one of the most original and influential thinkers of the 20th century (Villa,2002:1). *Lectures on Kant's Political Philosophy*[4], *The Human Condition, The Origins of Totalitarianism* and *Eichmann in Jerusalem: A Report on the Banaliy of Evil* are some of her most important works. As d'Entréves suggests, she dealt with most important political events of our century and tried to comprehend their meaning by explicating their impacts on how they affect our categories of moral and political judgment (1994:1). Because she has generated an enormous literature, I will limit my scope with her concepts that can be related with the debates concerning hate speech.

2.2.1.1. Kant and the public use of reason

In order to understand Arendt's philosophy, it seems necessary to turn back Kant whose influence on her is obvious. For Kant, enlightenment is "man's release from his self-incurred tutelage" which refers to "man's inability to make use of his understanding without direction from another" (Kant, 1963: 3). In other words, enlightenment for Kant is freedom from all tutelages and freedom from all

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[4] The Lectures on Kant's Political Philosophy is an explanation of Kant's aesthetic and political writings. In this work, Arendt attempts to show that Kant's book of Critique of Judgment contains the outlines of a powerful and important political philosophy while Kant himself did not develop such a philosophy explicitly (Beiner, 1992: vii). According to Arendt, the first part of the "Critique of Aesthetic Judgment "includes the "greatest and most original aspect of Kant's political philosophy" because of its emphasis on "analytic of the beautiful from the view point of judging spectator" (1961: 219).

necessities. It is thinking and acting without master and taking responsibility from what we are doing; in other words, taking responsibility of our freedom. Arendt evaluates Kant's understanding of enlightenment as "liberation from prejudice and from authorities" (1992b: 31). For Arendt, "to think, according to Kant's understanding of enlightenment, means *Selbstdenken,* to think for oneself, 'which is the maxim of a never-passive reason. To be given to such passivity is called prejudice,' and enlightenment is, first of all, liberation from prejudice" (1992b:45).

Moreover, Kant emphasizes the importance of using one's own reason. "Have courage to use your own reason" is the slogan of enlightenment and this can be seen as the major declaration of modern thinking. For Arendt, this declaration means that reason is not something that should be evaluated in isolation but rather it is meaningful to get in community with others (1992: 40).

As Arendt interprets Kant, the age of enlightenment is "the age of criticism" whose result is using one's own mind. At this point, "critique" which is taken from the age of enlightenment refers to the attempt to discover "reason's 'sources and limits'" (1992b: 32). In that respect, Kant is seen as the "greatest representative" of "critical thinking" (Arendt, 1992b: 42) which overcomes the dichotomy between dogmatism and skepticism (Arendt, 1992b: 32). For Kant, critical thinking reveals itself thanks to the "free and open examination" which means participation of more people into the process of thinking is better (Arendt, 1992b: 39).

Kant assumes that there can be people who can save freedom from tutelage; however, individual enlightenment is not enough; enlightenment of public is more possible than enlightenment of individual one by one (1963:4). Thus, the role of public in attaining enlightenment is much more critical for Kant. Also, what is required for enlightenment is freedom. Kant's emphasis on freedom, as opposed to nature, is important to the extent that it refers to self determination and making "public use of one's reason at every point"(Kant, 1963: 5). In other words, freedom is necessary to make public use of one's reason and restriction on freedom is an obstacle to enlightenment. The public use of one's reason must "be free, and it can bring about enlightenment among men" (Kant, 1963: 5). Kant believes that faculty of thinking depends on its public use because opinion formation is dependent on "the

test of free and open examination" which is possible only by public use of one's reason (Arendt, 1992b: 40).

Beiner explains the importance of public use of one's reason with respect to private use of one's reason:

> The use of reason in addressing a domestic or private gathering is dispensable to freedom, whereas the right to publicity, the right freely to submit one's judgments for public testing before "a society of world citizens," is not dispensable but is utterly necessary for freedom, progress, and enlightenment (1992: 123).

Arendt suggests that the age of Enlightenment for Kant is the age of "the public use of one's reason" which shows us that most important freedom for him is the freedom to speak and publish (Arendt, 1992b: 39). In that respect, although freedom has many meanings in Kant, political freedom is defined by reference to public use of one reason. Kant also emphasized the importance of sharing scholar's comments freely and publicly through writing (Kant, 1963: 6). At this point, freedom of speech and thought are defined by him as "the right of an individual to express himself and his opinion in order to be able to persuade others to share his views" (Arendt, 1992b: 32). In this context, the public use of one's reason complies with freedom of the press in the Age of Enlightenment (Beiner, 1992: 122).

Arendt quotes Kant's sentence that "by the public use of one's reason I understand the use which a person makes of it as a scholar before the reading public" and she suggests that his usage of "scholar" is not coincidence. Kant indeed refers to "a society of world citizens" addressing public, not the citizen. This kind of public use of reason needs freedom of speech and thought to express her/his ideas in order to able to create public contact (Arendt, 1992b: 39).

2.2.2. Arendt on Judgment

Arendt's theory of judgment plays a central role for understanding how she approaches to the concepts such as publicness, enlarged mentality and speech. Therefore, I prefer to start from her theory of judgment. She suggests that the faculty of judgment became a major topic of thinkers thanks to the Kant's Critique of Judgment. The turning point in Kant's life was his discovery of the "human mind's cognitive faculties and their limitations" (1992b:10). Especially after 1770, instead of

taste, Kant focuses on a new human faculty, which is judgment that will decide about the beautiful and the ugly; however, it is still the reason that decides about what is wrong and right. For him, "it is now more than taste that will decide about the beautiful and the ugly; but the question of right and wrong is to be decided by neither taste nor judgment but by reason alone" (Arendt, 1992b:10).

Arendt goes a step further and suggests that judgment is "the ability to tell right from wrong, beautiful from ugly" (1978: 193). She suggest that the faculty of judgment is the "most political of man's mental abilities" (1971: 46), and judgment must be free and the ability to think is the condition of its autonomy (Beiner, 1992: 101).

According to Arendt, in Kant, judgment is "a peculiar talent which can only be practiced and cannot be taught". In that respect, reason "with its regulative ideas" helps judgment (1992c: 4). For Kant, judgment must be public which means that it must address itself to all men and should be concerned with those public things that appear before and are visible to all men (Beiner, 1992: 123).

For Arendt, power of judgments rests on anticipated agreements with others (Arendt, 1968: 220). However, people cannot be forced to reach an agreement. She suggests that "one can never compel anyone to agree with one's judgment. One can only 'woo' or 'court' the agreement of everybody else" (Arendt, 1992b: 72).

In the *Life of the Mind*, Arendt talks about three human faculties: willing, thinking and judging. Unfortunately, she couldn't finish his work on judging because of her unexpected death in 1975 but she left many clues and reflections about this faculty in her previous writings (d'Entréves, 1994: 102). For Arendt, thinking, willing and judging are three basic[5] mental activities. She sees willing and judging as the ones that "deal with particulars, and in this respect are much closer to the world of appearances" while thinking is related with "invisibles in all experiences and always tend to generalize (Arendt, 1992c: 3). For her, although willing deals with

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[5] She calls these mental activities basic because she thinks that they are "autonomous and each of them obeys the laws inherent in the activity itself (1978: 70)

particulars, it has no capacity to bring freedom (Arendt, 1992c: 4). She also sees thinking and judging as interrelated despite their differences:

> The faculty of judging particulars (as Kant discovered it), the ability to say, "that is wrong", "that is beautiful" etc., is not the same as the faculty of thinking. Thinking deals with invisibles, with representations of things that are absent; judging always concerns particulars and things close at hand. But two are interrelated to the way consciousness and conscience are interconnected (1971: 446).

Arendt sees judging as the faculty that brings thinking and willing together (d'Entréves, 1994: 102). According to Beiner, Arendt hopes to solve perplexities of thinking and willing by the help of our capacity for judging (1992: 89) and she takes Kant as her guide to the faculty of judgment (1992: 91). However, Arendt cannot develop a systematic theory of judgment. Her writing represents two distinct models; on the one hand, the model is based on the "stand point of spectator" in which there is a privilege of non-participating spectator, on the other hand, the one that is based on the "standpoint of actor", in which judgment is the faculty of political actors acting in public sphere (d'Entréves, 1994: 103) . When Arendt defines judgment as "one of the fundamental abilities of man as a political being in so far as it enables him to orient himself in public realm, in the common world", she associates judgment with *phronesis,* the concept that turned back to ancient Greek city states (Arendt, 1968: 221). In that conceptualization, judgment is identified with political action (d'Entréves, 1994: 122) and it is considered as political faculty that can be exercised and tested in public with free and open exchange of opinions (d'Entréves, 1994: 124).

In her earlier writings, Arendt introduced the notion of judgment to ground her conception of political action as a plurality of actors acting in concert in a public space. Humans can "act as political beings because they can enter into the potential standpoints of others; they can share the world with others through judging what is held in common, and the objects of their judgments as political beings are the words and deeds that illuminate the space of appearances" (Beiner, 1992: 93). Since the essay written in 1971, "*Thinking and Moral Consideration,* judgment is considered from the point of view of the life of the mind. The emphasis shifts from "the representative thought and enlarged mentality of political agents to the spectatorship and retrospective judgment of historians and storytellers" (1992: 91). For example in

the essay of "Truth and Politics" written in 1967, Arendt doesn't see the faculty of judgment as a distinct mental activity. In later stages, she began to see this faculty as an autonomous mental activity, as distinct from thinking and willing (Beiner, 1992: 92).

By perceiving judgment from the point of impartiality and disinterestedness (d'Entréves, 1994: 116), it is clearly shown that Arendt agrees with Kant about the standpoint of spectator and approves the impartiality of actor (1992b: 77).

However, when we turn to her earlier work, Arendt criticizes that with modernity vita comtemplativa- philosophical way of life- become more important than *vita activa*- the life of politics or political life (1958: 14); in other words, *vita activa* and *bios politicos*[6] were made servants of vita comtemplativa (Arendt, 1958: 21). She also emphasizes on the importance of action by suggesting that "what makes man a political being is his faculty of action; it enables him to get together with his peers" (Arendt, 1972: 179). Here, for d'Entréves, judgment is located in the sphere of the vita comtemplativa. In this formulation, judging is no longer the feature of political life exercised by actors in public sphere (1994: 103). Although it is expected that Arendt advocates the superiority of actor over spectator, at least in political realm, her approval the superiority of spectator over actor shows certain perplexities in her theory (Deveci, 2007:123).

Benhabib criticizes Arendt because of her separation of morality from politics and she makes an evaluation about her conceptualization of judgment in the following passage:

> Arendt's reflections on judgment do not only vacillate between judgment as a moral faculty, guiding action versus judgment as a retrospective faculty, guiding the spectator or the storyteller. There is an even deeper philosophical perplexity about the status of judgment in her work. This concerns her attempt to bring together the Aristotelian conception of judgment as an aspect of phronesis-that refers to "the principle virtue or excellence of statesman in distinct from the wisdom of philosopher (Beiner, 1992: 140)- with the Kantian understanding of judgment as the faculty of 'enlarged thought' and 'representative thinking[7] (Benhabib, 1992: 123).

[6] That is described as a life devoted to public-political matters (Arendt, 1958: 12)

[7] This concepts will be detailly discussed

In order to understand the arguments of Arendt on judgment, it is important to look at what she writes on totalitarianism and trial of Eichmann (d'Entréves, 1994: 107). According to Beiner, her work on the rise of totalitarianism takes her attention to the complexities of human judgment and her presence at the trial of Adolf Eichmann in Jerusalem in 1961 plays an important role for theorizing the nature of judgment (1992: 97).

The most remarkable characteristic of Eichmann was "not stupidity or wickedness or depravity" but it was "thoughtlessness". (Benhabib, 1992: 122). In this trial, in addition to thoughtlessness, Eichmann cannot use his faculty of judgment. She explains that there is an "inability of Eichmann himself to think and to judge—to tell right from wrong, beautiful from ugly—in the critical political situation in which he was involved" (Beiner, 1992: 100). For Arendt, if people don't think and judge, every regime, including the most barbarian one can continue its existence. The position of escaping judgment doesn't always mean approval. Actually, it usually refers to disinterestedness which implies being compatible with a system in the last instance (Kılınç, 2006).

At this point, Arendt questions whether there is "an independent human faculty, unsupported by law and public opinion which judges a new in full spontaneity every deed and intent whenever the occasion arises." She examines whether we posses such a faculty whenever we act. She claims that this "touches upon one of the central moral questions of all time, namely upon the nature and function of human judgment." What had been demanded in both the Eichmann and Nuremberg trials was that:

> Human beings be capable of telling right from wrong even when all they have to guide them is their own judgment, which, moreover, happens to be completely at odds with what they must regard as the unanimous opinion of all those around them.... Those few who were still able to tell right from wrong went really only by their own judgments, and they did so freely; there were no rules to be abided…They had to decide each instance as it arose, because no rules existed for the unprecedented (Beiner, 1992: 98).

d'Entréves suggests that Eichmann's guilt for Arendt represents "his banal thoughtlessness and his failure to engage in responsible judgment when confronted with Hitler's orders" (1994). However, there were also those who reject to fulfill orders and Arendt says for them:

> Those few who were still able to tell right from wrong went really only by their own judgment, and they did so freely; there was no rules to be abided by, under which the particular cases with which they were confronted could be subsumed. They had to decide each instance as it arose, because no rules existed for the unprecedented (1965: 294).

It can be debated whether Arendt has two theories of judgments; one from the perspective of *vita activa* in which judgment is conceptualized as an ability of man as a political being in public sphere and the other from the *vita contemplativa* in which judgment is seen as intellectual faculty. It can be also discussed whether we encounter such problems because of her reference to Kant as the source of the conceptualization of judgment which is the judgment of spectator. It can be also debated whether Arendt have difficulty about manifestation of political character of judgment. In this work, I want to leave behind these questions and focus on important aspect of judgment which appeals to publicness related with politics and public sphere.

2.2.3. *Sine Qua Non* of Judgment: The Principle of Publicness[8]

I want to recall that the faculty which faces particular cases peculiar to politics and that enable political acting is judgment and it includes binding political principle that also has moral implication. We have also seen that it is the faculty that makes human beings political and gives clues about the characteristics of public sphere. For that reason, judgment is the most political faculty of human beings and publicness is important to the extent that it is a medium of judgment.

The important point is that judgment is inspired by publicness (d'Entréves, 1994: 120). The principle of judgment that enables political reasoning is publicness. Only the principle of publicness can enable togetherness of politics and morality. It is also the one that we have to obey when we evaluate political events as true, wrong, right or unjust. It has also an important contribution to draw a distinction between the political and non- political (Deveci, 2007, pp. 111-2).

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[8] Arendt also uses the term of "publicity" interchangeably with publicness. Especially, in *Human Condition,* she prefers to use publicity instead of publicness. However, there are important clues on her interpretation of publicness especially in *Lectures on Kant's Political Philosophy.*

Kant has an important influence on Arendt about the conceptualization of publicness. In Kant's moral philosophy, publicness is the "criteria of rightness" (Arendt, 1992b: 49). For Kant, publicness is the "transcendental principle" that should rule all action (Arendt, 1992b: 60). For him, it is submitting one's judgment for public testing (Beiner, 1992: 123). All actions connected with the right of other men are unjust if their maxims are inconsistent with the principle of publicness. The maxim which cannot be clarified publicly means that its purpose remains secret and loses its publicity (Arendt, 1992b: 48). Kant makes a comment that "evil thoughts are secret by definition" (Arendt, 1992b: 18). In this claim, he opposes to secrecy and defends openness. The publicness is the criteria of rightness in Kant. Arendt goes a step further and she links publicness with politics. She suggests that the principle of publicness rules all political actions. For Kant, it is necessary for enlightenment and freedom (Beiner, 1992: 123) and Arendt follows Kant to the extent that publicness is necessary for political freedom. It is also important for people to participate in a democratic politics (d'Entréves, 1994: 152). Moreover, she also uses this principle in order to explain that why judgment of non-participant is superior to the participant: "the reason why you should not engage in what, if successful, you would applaud is the "transcendental principle of publicness" (1992b: 48).

According to Arendt, without publicness, people cannot test their ideas that arises from contact with other people's thinking (Arendt, 1992b: 42). In *Human Condition,* she defines this principle as "being seen and being heard" (1958: 71). She suggests that "everything that appears in public can be seen and heard by everybody" is the condition for the principle of publicness (1958: 50). At this point, it is the "publicity of public realm" in which everything appears in public domain and everybody is seen and heard by others (Arendt, 1958: 55).

The principle of publicness is also related with political dimension of public realm. It explains us how public realm should be. In that respect, Birmingham defines the principle of publicness as the right to belong to a public sphere (2006: 59). It determines how individuals should conduct in public sphere, how people can be its part, what should be excluded in public realm.

Arendt thinks that restriction and destruction of publicness is one of the sources of totalitarianism. Isolated individuals that lost their publicness can easily be

part of totalitarianism (Arendt, 1966: 474). “Uprootedness”- which means “to have no place in the world, recognized and guaranteed by others- and “superfluousness” - not to belong to world at all- have become the characteristics of modern masses since the industrial revolution and totalitarianism have been grounded in these feelings (Arendt, 1966: 475). At this point, the way of totalitarianism is opened by destruction of publicness and public sphere (Arendt, 1966: 474). In other words, totalitarianism emerges when the space of political is no longer regulated by the principle of publicness (Birmingham, 1994, s. 31). As Arendt puts it:

> “Totalitarian government, like all tyrannies, certainly could not exist without destroying the public realm of life, that is, without destroying, by isolating them, their political capacities” (1966:475).

2.2.4. Locating Oneself in the Place of Everyone: The Enlarged Mentality

For Arendt, the power of judgment depends on a potential agreement with others and thinking process which is active in judging. It calls a dialogue with others with whom there is a need to come to some agreement in anticipated communication. Arendt goes on:

> From this potential agreement judgment derives its specific validity. This means, on the other hand, such judgment must liberate itself from the ‘subjective private conditions’… This enlarged way of thinking, which as judgment knows how to transcend its individual limitations, cannot function in strict isolation or solitude; it needs the presence of others, ‘in whose place’ it must think, whose perspective it must take into consideration, and without whom it never has the opportunity to operate at all (Arendt, 1961, pp. 220-1).

This quotation implies that judgment needs communication with others which means judgment exceeds private conditions of individuals; actually, this communication calls validity in public realm. This brings us to the connection of judgment and enlarged mentality whose maxim is “put oneself in thought in the place of everyone else” (Arendt, 1992b: 71)

To make explicit the meaning of enlarged mentality for Arendt, Beiner refers to her assumption that:

> The more people's standpoints I have present in my mind while I am pondering a given issue, and the better I can imagine how would feel and think if I were in their place, the stronger will be my capacity for representative thinking and the more valid my final conclusions, my opinion.

I am pondering a given issue, and the better I can imagine how I would feel and think if I were in their place, the stronger will be my capacity for representative thinking and the more valid my final conclusions, my opinion (1992: 107).

Benhabib warns us that ability for enlarged thought is different from empathy because it doesn't refer to assuming or accepting the point of view of the other. Enlarged thought signifies "merely making present to oneself what the perspectives of others involved are or could be, and whether I could 'woo their consent' in acting the way I do" (Benhabib, 1992: 137). Arendt also explains this point by suggesting that:

> I form an opinion by considering a given issue from different viewpoints, by making present to my mind the standpoints of those who are absent; that is, I represent them. This process of representation does not blindly adopt the actual views of those who stand somewhere else, and hence look upon the world from a different perspective; this is a question neither of empathy, as though I tried to be or to feel like somebody else, nor of counting noses and joining majority but of being and thinking in my own identity where actually I am not (Arendt, 1967:9).

Arendt calls the capacity for representatively thinking or to put oneself in the place of everyone else as "the Kantian enlarged mentality" which is the basis for man's ability to judge (Beiner, 1992:10: d'Entréves, 1994:111). She states that in *Critique of Judgment,* Kant mentions different way of thinking in which agreement with one's own self is not enough; in this way of thinking, one must be able to "think in the place of everybody else" which Kant calls "enlarged mentality" (Arendt, 1961: 220) to characterize aesthetic judgment (d'Entréves, 1994: 112) . She states that in the *Critique of Judgment,* for Kant "enlarged mentality" is seen as the "condition *sine qua non* of right judgment; one's community sense makes it possible to enlarge one's mentality" which refers to one's ability to abstract from private conditions and circumstances (Arendt, 1992b: 73). Kant observes that we designate someone as a "man of *enlarged mind*... if he detaches from the subjective personal conditions of his judgment, which cramp the minds of so many others, and reflects upon his own judgment from a universal standpoint (Beiner, 1992: 122).

Arendt adds that the acquisition of enlarged mentality is the *sine qua non* of political judgment (d'Entréves, 1994: 13). Taking the viewpoints of others into

account implies impartiality that is necessary for reflective judgment. Therefore, we can see that enlarged mentality is necessary for judgment (Arendt, 1992: 42).

In that respect, we can say that while enlarged mentality is related with morality in Kant with his emphasis on “right judgment”, Arendt draws this term to political area, in which enlarged mentality is related with “political judgment” and “public sphere”. As d’Entréves suggests, Arendt sees enlarged way of thinking as the one that could be obtained in public thanks to the anticipated communication with the standpoints and perspectives of others. In that respect, it is important to see that for Arendt political opinions can never be formed in private, they are constituted, tested and enlarged within a public context of argumentation and debate (1994: 13).

We have seen that for enlarged mentality, there is a need communication with others. In enlarged mentality, there is an emphasis on communication as somehow, spontaneous outcome of enlarged mentality and we have seen that enlarged mentality can only be acquired through communication. In that respect, the term “communication” or “communicability” gains importance for Arendt’s thought.

2.2.4.1. Communicability

For Arendt, the necessary maxim that enables the publicness is the “communicability principle” which makes the actions moral and which is also essential for true politics (Üstüner, 2006: 35). For her, communicability obviously implies a community of human who can be addressed and who are listening and can be listened to (Arendt, 1992b: 40).

For her, communicability can also be seen as the test of one’s ability to adapt an enlarged mentality (Cascardi, 1997: 115). It is also the necessity of presenting the interests of a community to public in a way that is communicable for others, introducing within the borders of communicability, and defending it regardless of how much limited support it will receive Inevitably, making one interest, idea or purpose communicable assumes a process of transformation: transformation of something particular to generalizable language in which public can understand, discuss, compare and judge (Deveci, 2007: 118).

We can see that in *Lectures on Kant's Political Philosophy*, Arendt mentions communicability and refers to Kant who suggests that communicability is "the need of men to communicate, and publicity, the public freedom not just to think but to publish—the 'freedom of the pen'" (Arendt, 1992b: 19). For him, it is necessary for humans to communicate and speak one's mind, especially in all matters concerning human as such (Arendt, 1992b: 40). She also links communicability with enlarged mentality that "communicability obviously depends on the enlarged mentality; one can communicate only if one is able to think from the other person's standpoint; otherwise one will never meet him, never speak in such a way that he understands" (Arendt, 1992b: 75).

From the perspective of publicness, communicability enables self-interested ideas and actions to gain political character. Actions that fit communicability also act according to publicness and *sensus communis*. An idea or action that we cannot take trouble for making communicable is not suitable for publicness; therefore, they don't deserve to become political. In that respect, we can see that this notion of communicability is necessary for publicness and politics.

2.2.5. *Sensus Communis:* "Idea of Public Sense"

In the discussion about communicability, we have seen that from the perspective of publicness, communicability enables self-centered, fragmented and unwillingly grounded ideas and actions to acquire political character. The important point is that they gain political character by attending "*sensus communis*". The concept of *sensus communis* is borrowed from Kant who links it with both judgment and enlarged mentality:

> By the name *sensus communis* is to be understood the idea of public sense, i.e. critical faculty which in its reflective acts takes account of the mode of representation of everyone else, in order to weigh its judgment with the collective reason of mankind…This is accomplished by weighing the judgments of others, and by putting ourselves in the position of everyone else (Kant, 1952: 151).

For Kant, sensus communis refers to a "community sense" which shows needing each other's company even for thinking (Arendt, 1992b: 27). Sensus communis is different from common sense. Arendt states that the term "common

sense" for Kant meant “a sense like our other senses—the same for everyone in his very privacy. By using the Latin term, Kant indicates something different: “an extra sense—like an extra mental capability (German: *Menschenverstand)*—that fits us into a community” (Arendt, 1992b: 70). In that sense, it can be said that this term is used by Kant to indicate special sense that fits us into a human community. It is seen as a “community sense” because of dependence of communication and speech on it (d'Entréves, 1994: 118).

Arendt stresses that in Kant *sensus communis* is different from *sensus privatus* that everyone with her/his singularity possesses. This *sensus communis* is defined as “what judgment appeals to everyone, and it is this possible appeal that gives judgments their special validity” (Arendt, 1992b: 72). In contrast to *sensus privatus, sensus communis* depends upon the fact that it represents and makes reference to objects that are open for all (Cascardi, 1997: 113). Whenever sensus privatus takes priority, using the faculty of judgment becomes problematic (d'Entréves, 1994: 118). Arendt supports this idea by referring to Kant’s phrase that “the only general symptom of insanity is the loss of the sensus communis and the logical stubbornness in insisting on one’s own sense (sensus privatus)” (Arendt, 1992b: 70). She also explains their differences as follows:

> Common sense in its very special Kantian meaning, according to which common sense is community sense, *sensus communis,* as distinguished from *sensus privatus.* This *sensus communis* is what judgment appeals to in everyone and it is this possible appeal that gives judgments their special validity. It… is actually rooted in this community sense and is therefore open to communication once it has been transformed by reflection, which takes all others and their feelings into account (Arendt, 1992b: 72).

For Arendt, *sensus communis* also gives judgment a specific validity (Arendt, 1992b: 72). The criterion for judgment is communicability while the standard for deciding whether our judgments are communicable is to see whether they are consistent with sensus communis (d'Entréves, 1994: 118). For Arendt, every action is judged according to sensus communis which is the community of meanings (Kılınç, 2006).

We have seen that the point of judgment for Arendt is the standpoint of spectator. The faculty that spectator appeals when judging is sensus communis because for our judgments to be publicly recognized and accepted, there is a need to

transcend private or subjective conditions in favor of public and intersubjective one which can be achieved by appealing to sensus communis (d'Entréves, 1994, pp. 117-8). In that respect, spectator as the subject of judgment is subject to sensus communis.

For Arendt, all non political actions and movements see themselves above public and don't respect judgments with their equals. They don't exist in public because what they do is obviously opposite to morality or they believe that sensus communis would not give approve what they are doing (Deveci, 2007: 120). In that respect, for an action or movement that can be part of public realm, it should behave so as to accord itself to sensus communis and shouldn't see itself above public.

2.2.6. Speech and Speechlesness

One of the central concerns of Arendt for publicness, communicability, sociability and critical thinking is that they are in need of speech. Without speech, none of them is possible. In *Human Condition*, she dignifies the experience of polis because of being "most talkative of all bodies politics" (1958:26). The fact that everything was decided through words and persuasion means to be political in ancient city states[9] (Arendt, 1958: 48); at this point, she sees speech as the precondition for being political. Villa explains why Arendt refers to Greek city states in her prioritization of speech: "she appeals to the experience of fifth century BC polis politics…(Because) Athenian political life was a politics of talk and opinion, one which gave a central place to the human plurality and equality between citizens" (2002: 9).

Speech is the "decisive distinction between human and animal life" (Arendt, 1958: 205). It corresponds to the "fact of distinctness and is the actualization of the human condition of plurality, that is, of living as a distinct and unique being among equals" (1958: 178). Benhabib explains the importance of speech for Arendt:

> Speech differentiates action from mere behavior; the one who speaks is also the one who thinks, feels and experience in a certain way. The individualization of human self is simultaneously the process whereby this self becomes capable of action and of expressing the subjectivity of the doer (Benhabib, 1992: 126).

[9] She states that with the rise of social- that will be dsicussed later- speech lost its qualty in modern world (Arendt, 1958: 48)

Only speech has a capacity to show distinctness of individuals (Benhabib, 1992: 126). What speech enables is "plurality" of individuals. Human plurality is the basic condition of speech and it assumes equality and distinction (Arendt, 1958: 175). It is by the virtue of plurality "that each of us is capable of acting and relating to others in ways that are unique and distinctive" (d'Entréves, 1994: 71). The plurality of individuals is rooted in human equality which refers to "equality of unequals who stand in need of being equalized in certain respects and specific purposes" (Arendt, 1958: 215). She explains the importance of equality and distinctness:

> If men were not equal, they could neither understand each other and those who came before them nor plan for the future and foresee the needs of those who will come after them. If men were not distinct, each human being distinguished from any other who is, was, or will ever be, they would need neither speech nor action to make them understood. Signs and sounds to communicate immediate, identical needs and wants would be enough (Arendt, 1958, pp. 175-6).

For Arendt, speech is *sine quo non* of action[10], which is the most political human activity (Üstüner, 2006: 31). Action corresponds to the "human condition of plurality, to the fact that men, not Man, live on the earth and inhabit the world" and such plurality is the condition of all political life (1958: 7). Action has the highest connection with human condition of natality and with speech, action articulates natality which refers to capacity for new beginnings (1958: 9). Action and speech are constitutive of *bios politikos* (Arendt, 1958: 25). They together "constitute the fabric of human relationships and affairs. Their reality depends upon human plurality, upon the constant presence of others who can see and hear and therefore testify to their existence" (1958: 95).

For her, action cannot be performed without speech. She says that "without the accompaniment of speech, action would lose its subject, which means that there would be no longer actor. Then, speechless action "would no longer be action because there would no longer be an actor, and the actor, the doer of deeds, is

[10] Action is one of the fundamental human activities in addition to labor and work. For her, labor is the "activity which corresponds to biological process of human body" (Arendt, 1958: 7)and it refers to humanity as *animal laborans* (Arendt, 1958: 22). On the other hand, Works is the activity which corresponds to the "unnaturalness of human activities" and it provides "artfical world of things" (Arendt, 1958: 7) and it refers to humanity as "homo faber" (1958: 22).

possible only if he is at the same time the speaker of the words" (Arendt, 1958, pp. 178-9).

d'Entréves explains the interrelation of speech and action that action entails speech which means that by the means of language we can articulate the meaning of our actions. On the other hand, speech also requires action because action can be seen as the means whereby we check the sincerity of the speaker. (d'Entréves, 1994: 71). In that respect, only through action and speech, individuals can show that they are and can affirm their unique identities (d'Entréves, 1994: 73).

Human togetherness, in which people are with others, is necessary to disclose the quality of action and speech (Arendt, 1958: 180). Speech is the capacity that inserts us into human world; in other words, human beings insert themselves into public realm through speech (Arendt, 1958: 200). In that respect, the peculiarity of public realm depends on the power of action and speech (Arendt,1958). Public sphere is constituted as the political space by distinct and equal individuals through speech and action. These results make it necessary to look at public sphere in Arendtian sense.

2.2.7. Public Sphere: A Sphere of Equal and Distinct Citizens

In *Human Condition*, Arendt explains the changing face of public sphere from ancient Greek to modern world. In Greek city states, there was a clear distinction between *oikos*- the private realm of the household- and *polis* -the public realm of the political community. With the rise of city states, individual "receives besides his private life a sort of second life, *bios politicos*" (Arendt, 1958: 24) and foundation of city states enables humans to spend their lives in political realm that was constituted by "equals" (Arendt, 1958: 25-32). She adds that the equality of public realm meant in city state "to live among and to have to deal only with one's peers" and equality was the essence of freedom which refers to the situation in which neither rule nor being ruled existed (Arendt, 1958: 32-3)

However, the rise of the social realm, "which is neither private nor public", leads to blur this distinction (Arendt, 1958: 28) and results in shrinkage of the public realm (1958: 257: 1972: 178). With the rise of society -"the rise of housekeeping, its activities, problems and organizational devices" (1958: 38)-, political sphere lost its

intrinsic dignity and lost its character of being arena in which people maintain and protect their shared world (Villa, 2002: 6).

For Arendt the public sphere consists of two "distinct but interrelated" dimensions. The first is the *space of appearance,* in which "everything that appears in public can be seen and heard by everybody and has the widest possible publicity" (1958: 50). In this conceptualization, public sphere is seen "as a space of political freedom and equality" (d'Entréves, 1994: 15). Being seen and being heard by others means that everybody sees and hears from different perspectives which is the meaning of public life (1958: 57). The second meaning of public sphere refers to *common world* to the extent that "it is common to all of us and distinguished from our privately owned place" (1958: 52). It refers to a shared and public world of human artifacts, institutions and settings that separates us from nature and that provides a relatively permanent and durable context for our activities" (d'Entréves, 1994: 15). For Arendt, this common world is only possible by its transcendence into immortality; common world is what we enter by born and what we leave behind by death; it transcends our life span into past and future. The only way of surviving common world is "coming and going of generations only to the extent that it appears in public". At this point, this meaning of public sphere refers to the "publicity of public realm" (1958: 55).

As we can interfere from the example of ancient city states that the ideal of public sphere is constituted by free and equal citizens (d'Entréves, 1994: 76); at this point, the principle of political equality among citizens is important for Arendt. Political equality for Arendt is not something natural, nor is it based on theory of natural rights; rather, it is an attitude that can be acquired through entering the public realm (d'Entréves, 1994: 145).

2.2.8. Truth and Opinion

In the article titled "*Truth and Politics",* Arendt clearly distinguishes opinion -*doxa*- and truth and supports opinion contrary to truth. She rejects the idea that opinions should be evaluated by the standard of truth or scientific standards of validity. From her perspective, truth belongs to the realm of cognition and it carries an element of coercion. Contrary to the plurality of opinions, truth has a despotic character to the

extent that it forces universal assent, leaves little freedom of movement, eliminates the diversity of opinions. This shows us that truth is anti-political because by elimination of debate and diversity, it suppresses the principles of political life (d'Entréves, 1994: 125-6).She also distinguishes truth from the knowledge to the extent that knowledge develops out of the "collective deliberation of citizens" and requires "the use of imagination and the capacity to think 'representatively' (d'Entréves, 1994: 128). Opinions are also comprised of free agreement and consent; they are the consequences of discursive, representative thinking and they are communicated by means of persuasion and dissuasion (Arendt, 1968: 247). At this point, she debates that the claim that "all men are created by equal" is a matter of opinion, not of truth because this claim is not self evident and cannot be proved. The reason of defending this claim is that freedom is possible only among equals and we reach this statement by consent and agreement. At this point, equality is a "matter of opinion, not 'the truth'" (Arendt, 1967:10). d'Entréves explains affirmation of opinion by Arendt as follows:

> Arendt's defense of opinion is motivated by not just her belief that truth leaves no room for debate or dissent, or for the acknowledgement of difference, but also by her conviction that our reasoning faculties can only flourish in a dialogue or communicative context (d'Entréves, 1994: 127).

D'Entreves warns that it is wrong to assume that truth in Arendt's thought has no legitimate role in politics or in sphere of human affairs (d'Entréves, 1994: 128). Although she suggests that all truths "oppose to opinion in their mode of asserting validity because they carry a certain degree of oppression", she distinguishes factual truth from rational truth (Arendt,1967: 2). Although most relevant truths in terms of politics are factual, the conflict between truth and politics was discovered and articulated with respect to rational truth (Arendt, 1967: 3). According to her, "the shift from rational truth to opinion implies a shift from man in the singular to men in the plural" (1967: 4). In that respect, she is actually interested in negative consequences of rational truth and she mentions the importance of factual truth, which is "political by nature" (d'Entréves, 1994: 128). She explains this:

> Factual truth, on the contrary, is always related to other people: it concerns events and circumstances in which many are involved; it is established by witnesses and depends upon testimony; it exists only to the extent that it is spoken about, even if it occurs in the domain of privacy. It is political by nature. Facts and opinions, though they must be kept apart, are not

antagonistic to each other; they belong to the same realm (Arendt, Truth and Politics, 1967: 6).

d'Entréves suggests while rational truth doesn't allow for "debate and dissent", opinion opens a way to debate and dissent. In that respect, Arendt's defense of opinion should be seen as a defense of "political deliberation, and of the role that persuasion and dissuasion play in all matters affecting the political community" and should be evaluated as a defense of politics which admits differences and plurality of opinions (d'Entréves, 1994: 130).

Keeping this distinction in mind, Arendt's claim on truth and opinion is important to understand its relevance with hate speech. According to her, the modes of thought and communication that deal with truth are necessarily "domineering" which means that they don't take into account other people's opinions which is the hallmark of all strictly political thinking (1967: 8-9). Arendt has never seen truthfulness as one of political virtues, because it has not real capacity to contribute to that changing the world and of circumstances which is among the most legitimate political activities (1967, pp. 12-3). In that respect, to look at politics from the "perspective of truth", for her, means to "take one's standpoint outside the political realm" which refers to being "outside the community to which we belong and the company of our peers" as one of the characteristics of the various modes of being alone (Arendt, 1967: 16).

2.2.9. Conclusion: What is wrong with Hate Speech from the Perspective of Arendt's Thought?

In so far, I have presented the major concepts of Hannah Arendt that is relevant to discussion of hate speech. In the light of these conceptualizations, I aim to discuss what is wrong with hate speech and whether Arendt's political philosophy gives us moral and philosophical clues for a criticism of hate speech. In that respect, I want to begin this debate with Kant's enlightenment thinking and public use of one's reason. If we look at Kant, he describes enlightenment as "liberation from prejudice". However, one of the most important determiners of hate speech is that it is based on prejudice (Alğan & Şensever, 2010: 15). Those who speak from hate speech cannot liberate herself / himself from prejudices and she/he is far from enlightenment thinking in Kant's thought. Moreover, speaking from hate speech means that speaker

talks from partial standpoint whereas public use of one's reason excludes such particularity because it searches for public good and it should encompass everyone. Because of its exclusion of such particularity, public use of one's reason doesn't allow hate speech in Kantian thought. Public use of one's reason also means that her/his ideas are open to examination; however, claims based on hate speech are not open to examination; in other words these claims are not open to public testing. At this point, public use of one's reason is excluded when hate speech is the case with respect to Kant's conceptualization of public use of reason. Arendt attempts to overcome the problem with partialities to the extent that standpoint of politics is partial and politics derive from individual's partial standpoints and views. Therefore, it is debatable whether we can reach the same conclusion about the interpretation of public use of reason in Arendt's thought when compared with Kantian understanding.

As we have seen before, judgment depends on dialogue with others with whom there is an expectation to come some agreement in anticipated communication with the standpoints and perspectives of others. When hate speech is the case, how can we expect dialogue? If someone begins to talk with hate speech claims towards others, ways of dialogue are closed. Moreover, in judgment there is an expectation of agreement even if this agreement is not sine qua non. However, it is difficult to assume anticipated agreement among the victim of hate speech and its speaker. At this point, can we say that hate speech destroys our faculty of judgment? If the answer to this question is yes, it opens a path for totalitarian regimes that relies on the complete ignorance of individuals' judgments.

We can derive important interferences from the principle of publicness for hate speech debate. This principle refers to the condition of being political in public sphere; it is about how political sphere should be regulated and it is related with the question which ideas, actions or interests can come to public sphere and which cannot. It is possible to advocate that hate speech is not something that can fully exist in a genuine and pluralistic public realm. Firstly, it does not come from public use of one's reason and it also closes the means of communication and public examination. Hate speech also harms general equality principle of publicness because some people are discriminated because of their so-called distinct characteristics. We also see that

most important aspect of publicness is being seen and heard by others, related with publicity- which is also characteristic of space of appearances and meaning of public life. But when hate speech enters, when one is discriminated because of her/his characteristics, one becomes really suspicious about how these different perspectives can survive together.

We said that publicness shapes how public sphere should be. In that respect, I want to remind that for Arendt, ideal public realm is constituted by equal and distinct citizens. Equality[11] is the most important aspect of public realm. However, victims of hate speech are represented as being no longer equal citizens in public sphere. Living as distinct and unique being among equals is also important, yet when hate speech is the case, how one can protect its distinctness, how can one see herself/ himself as equals with others and how plurality can be protected arise as serious questions. At this point, egalitarian understanding of public sphere is also damaged with hate speech[12].

We can also say that with the destruction of publicness and equality, hate speech aims to destroy individual's potential for being political; it becomes difficult to live in a *bios politicos*- life devoted to public political matters (Arendt, 1958: 12). With these destructions, we can also say that victims of hate speech can be easily excluded from public sphere-the situation that Kant describes as "evil"- and their capacity for being political is also diminished. Therefore, we can say that they are forced to live in private realm which Arendt defines as being deprived of truly human life (1958:58). In that respect, hate speech destroys uniqueness and plurality which are necessary conditions for public realm. Hearers of hate speech are intended to be excluded from public sphere and they are forced to live in a "deprived" life. Victims of hate speech are more vulnerable to being deprived of essential things

[11] I want to remind that one of the important reason why she approves city states is that in this city states, public realm was constituted by equals. ; she also approaches critically to mass society because such an understanding of equality id replaced by sameness.

[12] Distinctiveness in public sphere may stem from characteristics of individuals and sympathy and antipathy towards these characteristics. However, in the case of hate speech what makes an individual target is his collective identity. One may argue that neither hate speech occurs in public realm nor public sphere is constituted by "equal and distinct citizens". I thank to Erdoğan Yıldırım for drawing my attention to this problem.

necessary for human life and necessary relationship with other, and deprived of possibility of achieving immortality.

We have seen that the principle of publicness is the only one that can enable togetherness of politics and morality. By aiming the destruction of publicness at least for some sections, we can also suggest that association of politics and morality in modern society is also destroyed. We have also mentioned that destruction of publicness is one of the reasons of totalitarianism. We can reach to the conclusion same as the conclusion drawn from the perspective of judgment. Hate speech aims to destroy the publicness because, as we have debated, hate speech intends to destruct general equality principle of publicness, spirit off different perspectives, close ways of public deliberation, and destroy people's capacity for being political beings which leads its victims to withdraw from public sphere. We have also mentioned that destruction of publicness is one of the main reasons of totalitarianism; it gives way to the totalitarian regimes. Publicness can be thought as a barrier to totalitarianism. It prevents individuals to be part of totalitarian regimes. In that respect, hate speech again confront us as something which pave way for totalitarianism by destruction of publicness.

This is one way of reading hate speech from the angle of the principle of publicness. However, it is also possible to make another reading. The principle of publicness assumes that all opinions should come to public realm. In other words, as Deveci states, there is no any view that public sphere could legitimately exclude and suppose any candidate as wrong before that view comes to public (2007: 116). This aspect of publicness shows us another interpretation. When we say that hate speech destroys publicness and egalitarian sprit of public sphere, we assume that there is no place for hate speech in public realm which supposes that hate speech should be excluded before coming to public. However, this inclusive aspect shows that there is no any criterion to be used for exclusion before coming to public. In that respect, it can be suggested that the opinion, even if it contains hatred based expression cannot be marginalized before arguing in public. Moreover, prevention of expression of hate speech before coming to public may lead to disciplined, domestic, sterilized public sphere which destroys visibility and spontaneity aspects of public sphere. From this perspective, restriction on hate speech seems not desirable for Arendt. Therefore, we

can say that the principle of publicness gives us twofold reading about the hate speech.

If we look at those who speak from hate speech, it is questionable whether they use, or are ready to become part of their enlarged mentality. If they put themselves in the place of victims, they wouldn't engage in speech that discriminates others because of their ethnicity, gender, race or etc. It can be suggested that those speaking from hate speech cannot abstract themselves from private conditions and circumstances- which is necessary for enlarged mentality- They remain in the level of private conditions; they cannot rise to public level so they cannot use their political judgment.

For enlarged mentality/enlarged way of thinking, there is a need of presence of others, as we discussed earlier, and there is a need to take into consideration the perspectives of other. However, with hate speech, this otherness is also destroyed and there is no longer a perspective of others, so there is no need to think. With destruction of other and her/his opinion, the opportunity for enlarged mentality is also destroyed by hate speech.

When we come to communicability, we have argued that it is the necessity for both enlarged mentality and publicness. In *Lectures on Kant's Political Philosophy*, Arendt quotes from Kant on communicability:

> "How much and how correctly would we think if we did not think in community with others to whom we communicate our thoughts and who communicate theirs to us! Hence, we may safely state that the external power which deprives man of the freedom to communicate his thoughts publicly also takes away his freedom to think…" (Arendt, 1992b: 41).

At this point, hate speech can be seen as "external power" which deprives humans of the freedom to communicate their opinions publicly and deprives them of thinking freely[13]. While hate speech destroys communicability of its victims, it can also be suggested that those who apply to hate speech are generally far away from communication; they also destroy their own communicability. It is debatable whether those who speak from hate speech do or do not feel responsible for explaining

[13] As it will be mentioned in the case of Hrant Dink, the victims of hate speech lose their chance to express themselves and communicate his thought with others publicly.

themselves in public. Therefore their actions may or may not fit to communicability principle because this principle needs to explain individual's opinion in public realm whereas public speaker may be way from explaining herself/himself to others.

Mentality of hate speech is totally opposed to the idea that 'the more people participate in it, the better' which is necessary for critical thinking. While critical thinking makes the others visible, what hate speech does is opposite; making others invisible. We can see that those who apply to hate speech cannot think critically and make tagets of hate speech deprived of using their critical thinking. This is because it seems extremely difficult to respond to hate speech within confirms of critical thinking and enlarged mentality. In that respect, we can place critical thinking and hate speech in opposite directions. It is also important to ask how victims of hate speech can respond hate speech act and what the ways of coping with hate speech are. Being silent seems one way of responding hate speech. However, victims of hate speech can also apply to hate speech act, they may choose to get involved in this way of speaking. At this point, a full response or an answer to hate speech may itself turn into another hate speech which is the end of critical thinking and publicness. Targets of hate speech can be also politicized with reference to their otherness; however, this kind of politization itself can turn to something that destroys publicness. Therefore, response to hate speech may also be problematic. If target of hate speech who is supporter of publicness wants to insist on the principle of publicness, she/he needs to tramp to hate speaker. In other way, victims of hate speech may be forced to be silent or they may response hate speech act by applying counter hate speech.

We have seen that *sensus communis* is a sense that "fits us into community"; without it, we don't feel belonging to any community. It shows that people need community that appeal to everyone. For Kılınç, *sensus communis* should be understood as "public sense idea" and it develops as if it carries common mind of all people (2006). However, when hate speech is the case, hearers of hate speech cannot probably feel belonging to any community; on the contrary, they feel excluded from the community. At this point, hate speech deprives its victims of belonging a community and it destroys *sensus communis* whose loss is defined as a disaster for Kant and "symptom of insanity" for Arendt.

Now, I want to discuss whether hate speech can be seen as "truth claim" in Arendtian sense, i.e., as claim intervening into the realm of opinions. We have discussed that for Arendt, opinions are consisted of free agreement and consent; they are the results of discursive, representative thinking and they are communicated by the means of persuasion and discussion. However, hate speech is not a communicative practice and it is not a consequence of communication or deliberation. It cannot flourish from communicative action; moreover, we cannot talk about free agreement and consent, either. Hate speech has a potential for bearing a factor of cohesion, it may be "domineering", it tends to repress other people's opinions and ignores the opponent, even it intends to suppress the other. What we specify as the characteristics of hate speech is also same with particularities of truth. In that respect, hate speech can be evaluated as truth claim that aims to absorb politics and eliminates the plurality of opinions and such elimination for Arendt clearly prepares the public for totalitarian regime.

Now, I want to come one of the most debatable issues with respect to hate speech; Arendt's concern for speech. As mentioned before, for Arendt, speech corresponds to "the fact of distinctness and is the actualization of the human condition of plurality, that is, of living as a distinct and unique being among equals" (1958:18). Humans insert themselves in public realm through speech and it is the complement of action which makes human political being. Before discussing what will happen if this speech includes hate, I want to begin with what the reflections are of hate speech to the victims.

As it has been discussed, one of the important effects of hate speech is silencing; in other words, to make its victim silent (Gelber, 2002; Alğan & Şensever, 2006; İnceoğlu& Sözeri, 2012). It has been also examined that plurality and the condition of political life are provided by the speech. In this point, with making them speechless, plurality of human beings is also destroyed. With the destruction of speech, individual's potential for being political is also destructed. If hate speech deprives someone of using speech, she/he also deprives of being part of public realm, too. We also saw that for Arendt, life without speech equals to being dead and it ceases to be human life. The fact that hate speech makes its hearers speechless means

that victims of hate speech no longer pursue a goal of human life; they are like dead, because their ability to speech is destroyed.

Arendt herself makes an important comment on the speechless through violence. According to her, "violence makes mute" (Arendt, 1958: 26) ; in other words, violence is the "acting without argument or speech" (Arendt, 1972: 161). In that respect, violence can be seen as speechless and incapable of speech (Cocks, 1995: 229); in other saying, violence is speechless in the sense that violence may begin only when speech ends. Violence and speech refer to different ways of lives; the latter is political, the other is non-political (Dossa, 1989: 102). The claim that hate speech makes speechless can be evaluated as hate speech can be seen as a form of violence that Arendt obviously oppose in Origins of Totalitarianism. For Arendt, violence is instrumental by nature and it cannot be evaluated as irrational; "it is rational to the extent that it is effective in reaching the end that must justify it" (1972: 176). For her, violence can be justifiable, but it can never be legitimate (1972: 151). Violence is the main characteristic of totalitarian regimes. In *On Violence*, she criticizes normalization of violence in our century and she also attacks thinkers who affirm the role of violence. It is possible to suggest that because Arendt clearly develops attitude against violence, she would disapprove hate speech because, I think the consequences of violence and hate speech are the same. In *On Violence*, she admits that "racism is fraught with violence by definition because it objects to natural organic facts- a white or black skin- which no persuasion or power could change" (1972: 173). We see that she accepts that racism is loaded by violence. She also opposes racism because it attracts characteristics that come from birth and cannot be changed. We know that racism is a form of hate speech. In that respect, we expect from Arendt to oppose hate speech, as she objects racism. Moreover, because all hate speeches include potential violence (Alğan& Şensever, 2010:17), we can anticipate from Arendt to object hate speech. However, prevention of hate speech means restriction of someone's speech. Arendt has no claim about restriction of speech; on the contrary she sees restriction of freedom of expression and speech as characteristic of totalitarian regime. She states that freedom of speech and thought is "the right of an individual to express himself and his opinion in order to be able to persuade others to share his viewpoint" (1992: 39). Therefore, restriction on hatred based speech can be evaluated as destruction of individual's plurality, capacity for action and political

being. In that respect, it is difficult to deduce about how hate speech can be restricted. Arendt also mentions that one's ethnic, religious or racial identity is irrelevant to one's identity as citizens that they should never be basis of membership in political community (d'Entréves, 1994: 145). We also know that she sees these identities as particular attachments; politics based on these partial identities is not actually political for her. But, what if people are discriminated through speech because of these kinds of identities, what would she say? Unfortunately, I don't have accurate answer to this question; she can oppose this in the same way she opposes racism or she can say that they should exceed this particular and partial identities and see them as part of humanity[14].

So far, hate speech have been evaluated from Arendt's perspective. We assume that hate speech has destructive impacts on judgment, enlarged mentality, communicability, sociability and egalitarian understanding of public sphere. We see that hate speech claim shows the similar characteristics with truth claims. We also realize that the principle of publicness has twofold impact on hate speech; on the one hand, it destroys egalitarian spirit of publicness; on the other hand, claims even contains hatred based expressions cannot be excluded before coming to public. In that respect, it is questionable whether the principle of publicness is enough to restrain hate speech. We also hesitate about impact of hate speech on speech. On the one hand, it makes its victims speechless; on the other hand, restriction of speech is not acceptable for Arendt. What I induce from this chapter is that Arendt's conceptual framework gives us certain clues about what is wrong with hate speech and it displays a minimal philosophical criticism of hate speech. However, her theory does not provide consistent theoretical criticism of hate speech.

2.3. Conclusion

In this chapter, philosophical frameworks of Mill and Arendt have been discussed. Mill refers to harm principle to determine the borders of freedoms and this principle offers a minimal limitation for freedoms including freedom of expression. On the other hand, Mill's theory is based on the assumption that there is a distinction between speech and action. While action can harbor violence and give direct harm,

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[14] It is important to remember that hate speech is a relatively new phenomenon. This issue was not debated in years which Arendt lived.

speech has not such capacity. This distinction hinders to see the relationship between hate speech and hate crime. On the other hand, Arendt's conceptualization of principle of publicness also gives clues about wrongness of hate speech to the extent that hate speech may destroy visibility of its victim and destroy diversity of opinions in public realm which is supposed to be pluralistic and egalitarian. Although we can find clues about the wrongness of hate speech from the reflections of both thinkers, Mill's theory remains somehow idealist and it doesn't give powerful criticism of hate speech. However, the question "what is wrong with hate speech" can be responded to some extent with reference to Arendt's political theory. In this respect, her political theory contributes to develop a minimal philosophical criticism of hate speech. It is known that she is interested in politics and she doesn't regard law as a tool for protecting pluralistic democracy. However, the need for restriction in the case of hate speech can be derived from her theory; in other words, the content of legal regulations on hate speech can be specified with reference to Arendt's political theory. At this respect, it can be concluded that Arendt's political theory shows the ways of protecting democratic polity and provides normative background for legal restriction on hate speech.

After evaluating philosophical views on hate speech with particular focus on Mill and Arendt, I also want to look at legal restrictions on hate speech; the questions of how it is restricted by law, what are the conventions that include restriction of freedom of expression, especially when speech embraces hate, and what countries do for prevention of hate speech gain importance for debates of hate speech.

CHAPTER 3

LEGAL RESTRICTIONS ON FREEDOM OF EXPRESSION: CONVENTIONS, REGULATIONS AND IMPLEMENTATIONS

After the discussion of Mill's and Arendt's political philosophy with respect to the boundaries of freedom of expression and the impacts of hate speech, it is important to look at how and to what extent freedom of expression is limited in international legal norms and criminal law in certain countries. From the perspective of Mill, the debate on hate speech is not crucial because speech cannot give direct harm to others, only action has a potential to give harm. Arendt's conceptualization of publicness goes a step further and gives clues about the possible harms of hate speech in the context of equality in public realm, public discussion and public use of one's reason. It seems that examining hate speech merely from the perspective of political philosophy would remain at the level of moral precautions. For this reason, I want to look at legal regulations concerning hate speech.

International human rights standards are important to shape the effective policies against hate speech. They provide a normative framework which states should consider about the manifestations of hate expressions. At the same time, international organizations, including UN bodies and regional bodies such as the Council of Europe play an active role in monitoring intolerance and discrimination. They also try to formulate how to reduce the expression of hate speech and what are the effective ways of preventing speech that promotes racial, gender or sexual discrimination (Boyle, 2010, p 64).

At this point, I want to look at how Universal Declaration of Human Rights has restricted freedom of expression and to examine specific articles of European Convention on Human Rights. Then, regulations on hate speech can show us what has been done to limit freedom of expression if hate speech is the case. In that

respect, it would also be helpful to look at how and to what extent certain countries restrict freedom of expression in their juridical system to prevent hate speech.

3.1. Limitation of Freedom of Expression in the Universal Declaration of Human Rights

I have mentioned that freedom of expression is not absolute and it is subjected to certain limitations in democratic, pluralistic societies. Conventions are important guides for us to see how international law applies such restrictions. The Universal Declaration of Human Rights, adopted by the UN General Assembly in 1948, is generally treated to be one of the most important resources of international law. Article 19 of Universal Declaration of Human Rights (UNHR) guarantees freedom of expression by stating that:

> Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers[15].

While the right to freedom of expression is one of the fundamental rights in UNHR , this freedom is not absolute. Article 29/2 expresses under which conditions freedom of expression can be restricted. This article[16] states that:

> In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare of a democratic society.

In The Universal Declaration of Human Rights, it is stated that individuals are subject to limitations for the purpose of securing recognition for the rights and freedoms of others, this right cannot be used for the destruction of any rights and freedoms of others. Moreover, this limitation is also necessary for meeting the requirements of general welfare of democratic society.

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[15] Available from http://www.un.org/en/documents/udhr/#atop

[16] Available from http://www.un.org/en/documents/udhr/#atop

3.2. Freedom of Expression and Its Limitations in the European Convention on Human Rights

Another important source of international human rights is the European Convention on Human Rights (ECHR), adopted by Council of Europe in 1950, entered into force in 1953. Domestic law of all Council of Europe's member states is expected to conform to the Convention[17]. With this convention, the member states promise to protect fundamental rights and freedoms of everyone within jurisdiction of member states. Article 10/1 of the European Convention on Human Rights[18] guarantees freedom of expression by stating that:

> 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…

As it is the case in UDHR, there are limitations on right to freedom of expression in ECHR, too. Freedom of expression is limited as stated in Article 10/2 of European Convention on Human Rights;

> The exercise of these freedoms (freedom of expression), 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.

It is clear that both UNHR and ECHR protect freedom of expression; however, they indicate that this freedom can be restricted. It is true that they don't specifically refer to hate speech. However, because the protection of rights of others is one of the conditions for restriction of freedom of expression, protecting people from discrimination can be evaluated within this framework and such duty to protect can be assumed as the criterion for restriction of freedom of expression.

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[17] At this point, it is important to remember that Turkey is one of the Council of Europe member states and and party to the Convention.

[18] Council of Europe, 2010, Available from http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/CONVENTION_ENG_WEB.pdf

3.3. Precedents of European Court of the Human Rights

We can see that freedom of expression can be limited to prevent abuse of rights of others and to protect public safety. In order to see how this convention has been implemented, one should look at decisions of the European Court of the Human Rights (ECHR). ECHR established in 1959 while the Court delivered its first judgment in 1960. It rules on the applications asserting violations of the civil and political rights set out in the European Convention on Human Rights[19]. Judgments of the Court are binding on the member countries and have led governments to alter their legislation and administrative practice in many areas. The Court's case-law makes the Convention an effective instrument for meeting new challenges arising from domestic law of the member countries[20]. In order to understand international norms on boundaries of freedom of expression, examining certain cases of European Court of Human Rights is important.

The European Court of Human Rights has approved the importance of freedom of expression guaranteed under article 10 of the European Convention on Human Rights. In its decisions, the Court stated that, "freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man[21]."

The freedom of expression is not regarded as an absolute freedom by the European Court of Human Rights. As Weber states, the exercise of this freedom necessitates certain duties and responsibilities and is subjected to certain restrictions as indicated in article 10/2 of the ECHR, especially when the protection of the rights of others is case. Decisions of the Court aim to prevent and sanction all forms of expression which spread, incite, promote or justify hatred based expressions (Weber, 2009: 1-2). At this point, where exercising this freedom is used to incite hatred and shows the characteristics of "hate speech", there is a conflict between freedom of speech and prevention of discriminatory statements (Weber, 2009: 2). At this respect, prevention of all forms of discriminatory expressions is prior to freedom of

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[19] Available from http://www.echr.coe.int/Documents/Court_in_brief_ENG.pdf

[20] Available from http://www.echr.coe.int/Documents/Court_in_brief_ENG.pdf

[21] Handyside v. United Kingdom, ECHR 7 December 1976

expression; therefore, to limit freedom of expression in the case of hate speech seems legitimate from the viewpoint of ECHR.

In its decisions, the Court doesn't directly define the term of hate speech; however "all forms of expressions which spread, incite, promote or justify hatred based on intolerance" is used in Court's judgments. In Gündüz versus Turkey[22] decision, the Court states that:

> Tolerance and respect for the equal dignity of all human beings constitute the foundations of a democratic, pluralistic society. ...In certain democratic societies to sanction or even prevent all forms of expression which spread, incite, promote or justify hatred based on intolerance , provided that any "formalities", "conditions", "restrictions" or "penalties" imposed are proportionate to the legitimate aim pursued[23].

At this point, the Court also emphasizes that expressions constituting hate speech, which may be insulting to particular individuals or groups, are not regarded within the scope of Article 10 of the Convention[24], as mentioned above.

According to Court's judgments, whether expressions constitute "hate speech or not is an essential element to determine the right of freedom of expression in a democratic society[25]. Weber explains the determinant role of hate speech to decide whether expressions are legitimate by suggesting that:

> The concept of 'hate speech' therefore allows to draw a dividing line between those expressions that are excluded from Article 10 of the ECHR and are not covered by freedom of expression or are not justified with regard to the second paragraph of Article 10, and those which, as they are not considered as constituting "hate speech", consequently can be tolerated in a democratic society (Weber, 2009: 4)

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[22] Müslüm Gündüz, the leader of Aczmendi Islamic sect, participated in television program. In this program, he blamed secular institutions for being irreligious and criticized democracy and secularism. Turkish domestic court sentenced Gündüz because of inciting population to hostility and hatred. However, the Court decided that there has been a violation of freedom of expression in the case of Gündüz, for more information please look at http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61522

[23] Gündüz v Turkey (App 35071/97) ECHR,para.40, 4 December 2003, from http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61522

[24] Gündüz v Turkey (App 35071/97) ECHR, 4 para. 41. December 2003, from http://hudoc.echr.coe.int/sites/eng /pages/search.aspx?i=001-61522

[25] Ergin v. Turkey (No. 6), No. 47533/99, para. 34, 4 May 2006, from http://hudoc.echr.coe.int/sites/eng/pages/ search.aspx?i=001-75327

The Court decides condemnation of hate speech by reference to Article 17 of ECHR named “prohibition of abuse of rights”. In other words, The European Court refers to Article 17 when the right to freedom of expression was used for inciting hatred based expression (Weber, 2009: 26). In this article, it is stated that:

> Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention[26].

In that respect, expressions that lead to hate speech are understood as an abuse of rights of freedoms by the Court. Statement that constitutes an incitement to hatred is not accepted within the scope of freedom of expression as can be understood in mentioned decisions of the Court.

In order to determine whether an expression can be considered as constituting hate speech, the European Court examines the purpose of the applicant, the content of the expression and the context in which it was used (Weber, 2009:33). Weber explains the role of the purpose of the applicant as one of the criteria of Court, by asserting that:

> The fundamental question the Court asks is whether the applicant intended to disseminate racist ideas and opinions through the use of “hate speech” or whether he was trying to inform the public on a public interest matter (2009: 33).

The answer of this question enables to distinguish the expressions that are protected by Article 10, and expressions, which cannot be tolerated in a democratic society (Weber,2009:33). For example in the case of Gündüz versus Turkey[27], the Court decides that:

> The Court further notes that the format of the programme was designed to encourage an exchange of views or even an argument, in such a way that the opinions expressed would counterbalance each other and the debate would hold the viewers' attention. …It gave the impression of seeking to inform the public about a matter of great interest to Turkish society. It further points out that the applicant's conviction resulted not from his participation in a public

[26] Available from http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61522

[27] Gündüz v Turkey,2003, para. 44, available from http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i= 001-61522

discussion, but from comments which the domestic courts regarded as "hate speech" beyond the limits of acceptable criticism.

When the political debate is the case, the Court is more sensitive to support to restriction of freedom of expression. The Court attaches the highest importance to freedom of expression in the context of political debate and considers that political discourse should not be restricted without important reasons[28]. While the Court doesn't easily decide to restrict freedom of expression in political debate, it is also careful about the statement of the politicians because of their power to impress other people. The court emphasized that, as the fight against any form of intolerance is an integral part of the protection of human rights, politicians should avoid disseminating comments in their public speeches which are likely to foster intolerance[29]. In this respect, the Court insists on politicians' special responsibility in the fight against intolerance (Weber, 2009: 37).

While the Court's decisions are clear that the right to freedom of expression doesn't cover expressions that initiate hate speech, it has emphasized that freedom of expression must extend to the ideas that offend, shock and disturb society. Drawing a distinction is not always easy but speech which intentionally encourages hatred violence or discrimination should be punished by law. States should adopt legislation prohibiting any advocacy of national, racial or religious hatred which constitute incitement to discrimination, hostility or violence from the view point of the Court (Boyle, 2010: 69).

3.4. European Commission against Racism and Intolerance

It would be beneficial also to look at international mechanisms to combat hate speech. The European Commission against Racism and Intolerance (ECRI) is one of the important foundations to draw the boundaries of freedom of expression. Council of Europe has established the ECRI to "combat racism, intolerance, all forms of discrimination on grounds of ethnic origin, citizenship, colour, religion and language,

[28] Erbakan v Turkey, 2006, from http://www.yargitay.gov.tr/aihm/upload/59405_00.pdf

[29] Erbakan v Turkey, 2006,para. 64, from http://www.yargitay.gov.tr/aihm/upload/59405_00.pdf

xenophobia and anti-Semitism from the perspective of human rights in the light of European Convention of Human Rights"[30].

Fundamental aims of the ECRI are to review member state's policies and legislations to combat discrimination and racism, to examine the situation of each member state of the Council of Europe, prepare reports and formulate recommendation to them[31].

General Policy Recommendation of ECRI No. 7 on "National Legislation to Combat Racism and Racial Discrimination" calls to member states of the Council of Europe to adopt "effective legal measures aimed at combating racism and racial discrimination" and implement national legislation and administrative measures that prohibit racial discrimination in all spheres of public life[32]. It is also important to remember that "racism" shouldn't be understood merely as discrimination based on race. In this recommendation, "racism" should rather be understood in a broad sense, including phenomena such as xenophobia, anti-Semitism and intolerance and this term also covers discrimination based on people's distinctiveness, such as race, colour or ethnicity. In this respect, the Commission does not only emphasize racial discrimination, but also other forms of discrimination such as those based on gender, sexual orientation, disability, political or other opinion are also mentioned (2003: 12)[33].

ECRI recommends the "integral approach" by suggesting that appropriate legislation to combat racism and racial discrimination should include provisions in all branches of the law including constitutional, civil, and administrative and criminal law (2003: 12). ECRI also mentions the role of constitutions to cope with discrimination. As stated in ECRI Recommendation no. 7, the constitution is

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[30] 2002(8), Statue of the European Commission against Racism and Intolerance ,available from http://www.coe.int/t/dghl/monitoring/ecri/about/Res(2002)8%20-%20Statute%20ECRI%20 eng.pdf

[31] Statue of the European Commission against Racism and Intolerance, 2002: 2-4, available from http://www.coe.int/t/dghl/monitoring/ecri/about/Res(2002)8%20-%20Statute%20ECRI%20 eng.pdf

[32] ECRI General Policy Recommendation No. 7,2003: 3, available from http://www.coe.int/t/dghl/monitoring/ ecri/activities/gpr/en/recommendation_n7/ecri03 8%20recommendation%20nr%207.pdf

[33] ECRI General Policy Recommendation No. 7,2003: 3, available from http://www.coe.int/t/dghl/monitoring/ecri/activities/gpr/en/recommendation_n7/ecri03-8%20recommendation%20nr%207.pdf

expected to promote the principle of equal treatment, the commitment of the State to promote equality as well as the right of individuals to be free from discrimination on grounds such as race, colour, language, religion, nationality or national or ethnic origin (2003:5).The Commission also accepts that there can be restrictions on freedom of expression to prevent discriminatory statements. Expressions that concern public incitement to violence, hatred or discrimination, public insults and defamation or threats against a person or a group of persons on the grounds of their race, colour, language, religion, nationality, or national or ethnic origin should be punished by law according to this recommendation (Weber, 2009: 12).

According to the Commission, Criminal law has a symbolic effect which raises the awareness of society concerning seriousness of racism and racial discrimination (2002: 11). ECRI also guides how to prevent hate speech by criminal law. ECRI counts the acts that should be penalized by the law:

> "Public incitement to violence, hatred or discrimination, public insults and defamation against a person or a grouping of persons on the grounds of their race, colour, language, religion, nationality, or national or ethnic origin;
>
> the public expression, with a racist aim, of an ideology which claims the superiority of, or which depreciates or denigrates, a grouping of persons on the grounds of their race, colour, language, religion, nationality, or national or ethnic origin" (2002: 7)

ECRI mentions that exercising the right of freedom of expression should be restricted in order to combat racism with the aim to protect human dignity. These restrictions should respect the conditions set out in Article 10 of the European Convention on Human Rights as interpreted by the European Court of Human Rights (Weber, 2009:13). In the light of these, we can see that, public incitement to hatred based expressions on the grounds of people's characteristics should be punished by law and defining hate speech as crime in criminal law is important tool to combat hate speech.

3.5. International Covenant on Civil and Political Rights

We have seen that international human rights law both at United Nations level and European level play an active role in the prevention of expressions that introduce hate speech (Boyle, 2010: 64). At this point, I want to look at International Convention on Civil and Political Rights (ICCPR), adopted by General Assembly of

United Nation in 1966 and entered into force in 1976. This covenant is expected to be in accordance with the Universal Declaration of Human Rights. It underlines the importance of freedom of expression and its boundaries. Paragraph 2 of the article 19 of ICCPR explains the importance of freedom of expression by asserting that "everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice[34]"

However, this covenant emphasizes that the use of this right is subject to some restrictions. If "respect of the rights or reputations of others" and "protection of national security or of public order or of public health or morals" is the case, restriction of the right to freedom of expression is necessary[35].

More importantly, this covenant shows that any expressions that constitute hate speech are not protected by freedom of expression. Paragraph 2 of Article 20 of ICCPR prohibits the advocacy of national, racial or religious hatred. This article requires states to prohibit hate speech by stating that "any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law[36]"

3.6. United Nations Human Rights Committee

One of the important mechanisms to fight with hate speech is United Nations Human Rights Commitee (UNHRC) which monitors the implementation of the International Covenant on Civil and Political Rights by its State parties[37]. Human Rights Committee accepts that freedom of expression is subjected to certain limitations. According to this committee, because the exercise of the right to freedom of expression carries special duties and responsibilities and use of this right violates the

[34] Availeble from http://www2.ohchr.org/english/law/ccpr.htm

[35] Available from http://www2.ohchr.org/english/law/ccpr.htm

[36] Available from http://www2.ohchr.org/english/law/ccpr.htm

[37] OHCHR,1996-2010, available from http://www2.ohchr.org/english/bodies/hrc/

interests of other persons or to those of the community as a whole, certain restrictions on this right are permitted from the perspective of UNHRC[38].

The UNHRC has stated that there is no contradiction between the duty to adopt domestic legislation which prohibits hatred based expressions and the right to freedom of expression by suggesting that:

> Article 20 of the Covenant states that any propaganda for war and any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law. In the opinion of the Committee, these required prohibitions are fully compatible with the right of freedom of expression as contained in article 19, the exercise of which carries with it special duties and responsibilities[39].

If we look at specific cases, we can understand the tendency of Commitee more clearly. In August 2000, a group known as the "Bootboys" organized and participated in a march in commemoration of the Nazi leader Rudolf Hess in Askim, near Oslo.In this march, a speech towards crowd was made:

> We are gathered here to honour our great hero, Rudolf Hess, for his brave attempt to save Germany and Europe from Bolshevism and Jewry during the Second World War. While we stand here, over 15,000 Communists and Jew-lovers are gathered at Youngsroget in a demonstration against freedom of speech and the white race. Every day immigrants rob, rape and kill Norwegians, every day our people and country are being plundered and destroyed by the Jews, who suck our country empty of wealth and replace it with immoral and un-Norwegian thoughts. We were prohibited from marching in Oslo three times, whilst the Communists did not even need to ask. Is this freedom of speech? Is this democracy?[40]

In the case of *Jewish Community of Oslo et al. v Norway,* the Committee decides that "the prohibition of all ideas based upon racial superiority or hatred is compatible with the right to freedom of opinion and expression with respect to the speech given during a march in commemoration of the Nazi leader Rudolf Hess". The Committee considers these statements to contain ideas based on racial

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[38] Para. 4 of Article 19, adopted 29 June 1983, Human Rights Committee, General Comment No. 10, available from http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/2bb2f14bf558182ac12563ed0048df17?Opendocument

[39] Para. 2 of the Article, adopted 29 June 1983, Human Rights Committee, General Comment No. 11, available from http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/60dcfa23f32d3feac12563ed00491355?Opendocument

[40] Available from http://www1.umn.edu/humanrts/country/decisions/30-2003.html

superiority or hatred; reference to Hitler and his principles and "footsteps" is thought as incitement to racial discrimination[41].Therefore, decisions of the Committee clearly provide bases for restriction of freedom of speech in the case of hate speech.

3.7. Recommendations of the Committee of Ministers of the Council of Europe

The Committee of Ministers is the decision making body of Council of Europe. This committee makes recommendations to member states on matters for which the Committee has agreed as a common policy and it might recommend to the states to adopt norms in their legal systems which are inspired by the common rules in line with their recommendations.

On 30 October 1997 at the 607th meeting of the Ministers' Deputies, Committee of Ministers adopted Recommendation No. 20 of the Committee of Ministers to Member States on Hate Speech. The Council reminds the concern about "the reemerge of racism, xenophobia and anti-Semitism and the development of a climate of intolerance, and contained an undertaking to combat all ideologies, policies and practices constituting an incitement to racial hatred, violence and discrimination, as well as any action or language likely to strengthen fears and tensions between groups from different racial, ethnic, national, religious or social backgrounds[42]". In addition, the Commitee mentioned that it condems "all forms of expression which incite racial hatred, xenophobia, anti-Semitism and all forms of intolerance" which destroys democratic, pluralistic society[43]. The Commitee gives clues about how they concetualize hate speech and it warns about the intolerance and hostility developed towards some part of the society. With paralell to them, the Commitee makes recommedations to cope with hate speech. At this point, establishing a legal framwork plays a key role to combact with hate speech. In the Recommendation on hate speech, the Committee of Ministers suggests that:

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[41] Committee on the Elimination of Racial Discrimination, *Jewish Community of Oslo et al. v Norway*, Communication No. 30/2003, 15 August 2005, para. 10.5., stated in Selected Decisions of the Commitee on the Elimination of Racial Discrimination, 2012: 107, avaliable from http://www.ohchr.org/Documents/Publications/CERDSelectedDecisionsVolume1.pdf

[42] Available from http://www.coe.int/t/dghl/standardsetting/hrpolicy/other_committees/dh-lgbt_docs/CM_Rec(97)20_en.pdf

[43] Available from http://www.coe.int/t/dghl/standardsetting/hrpolicy/other_committees/dh-lgbt_docs/CM_Rec(97)20_en.pdf

> The governments of the member states should establish or maintain a sound legal framework consisting of civil, criminal and administrative law provisions on hate speech which enable administrative and judicial authorities to reconcile in each case respect for freedom of expression with respect for human dignity and the protection of the reputation or rights of others[44].

Declaration of the Committee of Ministers on freedom of political debate in the media, adopted on 12 February 2004, emphasizes that freedom of political debate does not include freedom to express racist opinions or opinions which are an incitement to hatred, xenophobia, anti-Semitism and all forms of intolerance (Weber,2009: 10).

Recommendations of the Committee show that there is a need to implement legislation to combat hate speech and restriction of freedom of expression is legitimate in the case of hate speech.

3.8. How Different Countries Treat Hate Speech?

After evaluating prohibition of hate speech with reference to conventions, regulations and recommendations, I want to examine implementation of law in different countries concerning the problem.

It can be argued that there are two different tendencies towards the restriction of freedom of expression. First one, that can be called as "Continental model" accepts that speech itself has a power on its own and it is subjected to certain limitations. Especially when the insulting member of groups because of their characteristic is the case, this kind of expression is not thought within the scope of freedom of expression. In that respect, limitation of freedom of expression is legitimate in the case of hate speech. Sweden, Norway Canada, Holland, Denmark, United Kingdom, New Zealand, Australia and Netherlands are the countries which reflect Continental model. However, another tendency represents the attitude that only "action" can give harm, speech doesn't have capacity to give harm. As parallel to this idea, freedom of expression is not limited in case of hate speech. This view gives priority to the freedom of expression over the rights of other individuals.

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[44] Adopted by the Committee of Ministers on 30 October 1997 at the 607th meeting of the Ministers' Deputies, Reccommendation No. R (97) 20, available from http://www.coe.int/t/dghl/standardsetting/hrpolicy/other_committees/dh-lgbt_docs/CM_Rec(97)20_en.pdf

We can look at Germany, Denmark and Canada as countries which prohibit hate speech by law. In these countries, hate speech is punishable under criminal law. On the other hand, as Brugger suggests, there are countries which prioritize freedom of expression over protection of rights of others even the speech is filled with hatred (2003:2). The most important representative of this approach is United States, the country in which restriction of freedom of expression is not approved even in the case of hate speech.

Germany is an important example for the prohibition of hate speech. The most important reason behind sensitiveness to hate speech in this country is that these kinds of speech are identified with the denial of holocaust. It is important to remember that the legal bases in Germany has been constructed to take measures for eradicating ideology of Nazism and racial prejudice of the Holocaust (Timofeeva,2003:260). Timofeeva finds German case interesting because while Germany expressed its commitment to the ideals of democratic society including the right to freedom of expression, it has one of the strictest attitudes towards any kinds of hate speech including racist one (2003: 260).

There are several provisions in German Penal Code which specifically target hate speech and criminalize incitement to hatred against any part of the population and attacks on the human dignity (Timofeeva, 2003: 261). German Penal Code's section on "Threats to the Democratic Constitutional State" [45] (section 84 to 91) contains provisions forbidding the dissemination and propaganda of National Socialist organizations. Using flags, symbols, insignia, uniforms, slogans of National Socialist Organizations are subjected to punishment in Article 86 of German Penal Code. These prohibitions include, for instance, displaying National Socialist "flags, badges, uniform parts, passwords, and salutes" (section 86/2) particularly the Nazi salute and the swastika, the images of Adolf Hitler and copies of *Mein Kampf*. These are all symbolic acts of hate speech punishable under criminal law (Brugger,2003: 16). In addition, in its section on "Crimes Against the Public Peace" (section 123 to 145), section 130, named "Incitement to Hatred", proclaims punishment of incitement to hatred and violence against minority groups by offering that:

[45] Available from http://www.gesetze-im-internet.de/englisch_stgb/index.html

> Whoever, in a manner that is capable of disturbing the public peace, incites hatred against segments of the population or calls for violent or arbitrary measures against them; assaults the human dignity of others by insulting, maliciously maligning, or defaming segments of the population, shall be punished with imprisonment from three months to five years[46]

Paragraph 2 of the section 130 of German Penal Code states that "whoever display, publish or make publicly accessible the materials which incite hatred against segments of the population or a national, racial or religious group, or one characterized by its folk customs, which call for violent or arbitrary measures against them, or which assault the human dignity of others by insulting, maliciously maligning or defaming segments of the population or a previously indicated group shall be punished with imprisonment for not more than three years or a fine[47]".

According to Brugger, these provisions in the Penal Code leads to "the criminalization of hate speech that is directed against individuals and groups and that is further secured by norms protecting public peace and the constitutional order" (2003:17). These types of laws used both against Nazi and anti-Semitic propaganda and hate speech in Germany.

The prohibition of hate speech also affects other branches of law. For example, German broadcasting law, which regulates the legal status of public and private radio and television companies, prohibits racial expressions or hate speech. For example, Article 3of the 1991 Broadcasting Interstate Agreement as amended by all federal states concerned, prohibits programs "which incite hatred against parts of the population or against a group which is determined by nationality, race, religion, or ethnic origin, or which propagate violence and discrimination against such parts or groups, or which attack the human dignity of others by insulting, maliciously ridiculing or defaming parts of the population." (Brugger, 2003:18). Moreover, in trade and industry law, hate speech and racial discrimination in a commercial enterprise may lead to the suspension of its business license (Brugger,2003:18).

As we have seen Germany punishes all expressions that constitute hate towards different strata of the society and hate speech is seen harmful to the conditions of democratic society. In that respect, it is important to remember the well

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[46] Available from http://www.gesetze-im-internet.de/englisch_stgb/index.html

[47] Available from http://www.gesetze-im-internet.de/englisch_stgb/index.html

known slogan in Germany, “Never Again” which is used not only for the condemnation of Nazi Regime but also to convict hate speech in a broader sense (Brugger, 2003: 40).

One of the countries which prohibit hate speech by law is Denmark. In Denmark, prohibition of hate speech is legitimate and hate speaker is subjected to punishment. Although Danish Constitution guarantees the freedom of expression for all, prohibition against hate speech is one of the main reasons for the limitation of this freedom (Badse & Officer, 2006: 7). According to the section 77 of Danish Constitution, publishing one’s ideas in print, in writing and in speech, is subjected to the Courts; therefore, the fright to freedom of expression is not absolute (Badse & Officer, 2006:7).

One of the important tools to fight against hate speech is identifying hate speech as a crime in Criminal Code. We can see that Denmark follows this mentality and suggests punishment to hate speech in its Criminal Code. 266/b of Danish Criminal Code which states that:

> Whoever publicly, or with intention to disseminating in a larger circle makes statements or other pronouncement, by which a group of persons is threatened, derided or degraded because of their race, colour of skin, national or ethnic background, faith or sexual orientation, will be punished by fine or imprisonment for up to 2 years (Badse & Officer, 2006:7).

Moreover, the conducts considered as propaganda of the conducts stated in article 266/b leads to the aggravation of punishment. This shows us that Danish Criminal Code prohibits the dissemination of statements and propaganda that humiliate one person because of its characteristics such as race, nationality, sex or sexual orientation.

According to Badse and Officer, the terms of "statement" and "other information" used in Article 266/b of the Criminal Code refers to written as well as oral means of expression that are made publicly or with the intention of dissemination. If these conducts are made for the aim of propaganda, which is understood as “systematic, intensive or continuous efforts with a view to influencing opinion formation”, the maximum penalty for violation of this section increases (2006:7).

Another important country which is sensitive to hate speech is Canada. Although Canada is a polity which appreciates diversity of opinions and views, it is clear that restriction of freedom of expression is legitimate in the case of hate speech which is regulated in Criminal Code. "Hate" is defined as a crime in section 319 of Canada's Criminal Code under "Hate Propaganda". In this section, it is stated that those who promote hate against target group is subjected to punishment by suggesting that:

> Everyone who, by communicating statements in any public place, incites hatred against any identifiable group where such incitement is likely to lead to a breach of the peace is guilty of an indictable offence and is liable to imprisonment for a term not exceeding two years; or an offence punishable on summary conviction[48].

The emphasis on "public sphere" in Canadian Criminal Code is important because it shows that people are responsible from their statements and expressions in public places. We can also see this tendency in Second Paragraph of the same article which states that:

> Everyone who, by communicating statements, other than in private conversation, willfully promotes hatred against any identifiable group is guilty of an indictable offence and is liable to imprisonment for a term not exceeding two years; or an offence punishable on summary conviction[49].

In Canadian Criminal Code, definitions of terms that are used in section are explained. In this section, "identifiable group" means "any section of the public distinguished by colour, race, religion, ethnic origin or sexual orientation" and 'public place' refers to "any place to which the public have access as of right or by invitation, express or implied[50]".

In Canada, what can be inferred from the Court's decisions about hate speech is that hate speech including racist opinions have a power to influence majority's ideas and to lead them to treat the target group differently and act towards its members in a discriminatory or violent way. At this point, hate speech gives damages

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[48] Available from http://laws-lois.justice.gc.ca/eng/acts/C-46/page-153.html#h-92

[49] Available from http://laws-lois.justice.gc.ca/eng/acts/C-46/page-153.html#h-92

[50] Available from http://laws-lois.justice.gc.ca/eng/acts/C-46/page-153.html#h-92

to the group's position in the community because it affects the way that members of the dominant group think about the target group and its members (Moon,2008: 82).

Moon expresses the treatment of Canadian Courts by suggesting that:

> The courts in Canada have sought to reconcile the regulation of hate speech with the constitutional commitment to freedom of expression, first by requiring that the restricted speech be shown to cause harm—to generate hatred in the community—and second by limiting the scope of the restriction to a narrow category of extreme or hateful speech (2008: 83).

Indeed, it may be argued that Supreme Court decisions in Canada challenge Mill's distinction on speech and act. Although speech doesn't give "direct "harm, if its "effect" leads to violent act or harm to others, then it is seen necessary to restrict these kinds of speech (Moon,2008: 84).

In order to show that restriction on freedom of expression to prevent hate speech is compatible with Canadian Constitution which protects freedom of expression, Court states in decision that prohibition of hate propaganda is an important tool for protecting target group members and fostering harmonious social relations in a community dedicated to equality and multiculturalism. Canadian Supreme Court also defends section 319/2 as a mean "by which the values beneficial to a free and democratic society in particular, the value of equality and the worth and dignity of each human person can be publicized[51]".In other words, as Moon suggests, restrictions of expression of hate speech is justified in Canada because it is believed that expression of hate speech promotes the spread of hatred in society. This kind of expression may lead others to act towards members of target groups in a violent or discriminatory way. In other words, internalization of message of hate speech by target group and damaging their self esteem is another important reason why hate speech is restricted in Canada (Moon, 2008: 87).

Examining a specific case in Canada can be helpful to understand how Canada react hate speech. I want to look at the accusation of high school teacher, James Keegstra, who was charged under 319(2) of the Criminal Code in 1990 with willfully promoting hatred against an identifiable group by communicating anti-semitic statements to his students. It was asserted that he used hateful expression towards Jews

[51] Available from http://scc.lexum.org/decisia-scc-csc/scc-csc/scc-csc/en/item/695/index.do

in his lessons. Therefore, he was charged under section 319(2) of the Criminal Code with willfully promoting hatred. Teacher challenged the constitutionality of section 319/2 by arguing that it violated his freedom of expression under the Charter of Rights and Freedoms and he applied to Supreme Court. In its decisions, Court referred to Section 319(2) of the Code constitutes a reasonable limit upon freedom of expression to the extent that communications which willfully promote hatred against an identifiable group are not protected within the scope of freedom of expression. The Court recalls the importance of value of equality, multiculturalism, international agreements that Canada signed and Court justifies its decision by suggesting that:

> Parliament has recognized the substantial harm that can flow from hate propaganda and, in trying to prevent the pain suffered by target group members and to reduce racial, ethnic and religious tension and perhaps even violence in Canada, has decided to suppress the willful promotion of hatred against identifiable group[52].

From the viewpoint of Canadian Court, two kinds of injury caused by hate propaganda are defined. First one is psychological harm caused by words to the members of target groups. In this respect, the Court reminds that a person's sense of human dignity and belonging to the community is closely linked to "the concern and respect accorded the groups to which he or she belongs". Hate propaganda destructs this belonging and have a severely negative impact on "the individual's sense of self-worth and acceptance". Therefore, the Court warns that this can cause to withdraw into target group's shell and leads to giving damage to the relations between target groups and majority in a serious manner[53].

The second harmful effect of hate propaganda, according to Canadian Supreme Court is the harm that hate speech gives" society at large". Society at large is affected by hate speech to the extent that the inferiority which hate propaganda promotes can influence society, prejudiced messages can gain importance. If the members of larger community believe in the message of hate speech, it can lead to provoke violent and discriminatory acts towards target group members.

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[52] Available from http://scc.lexum.org/decisia-scc-csc/scc-csc/scc-csc/en/item/695/index.do

[53] Available from http://scc.lexum.org/decisia-scc-csc/scc-csc/scc-csc/en/item/695/index.do

We can understand that Canadian case represents a significant challenge to the priority of freedom of expression over other rights (Moon, 2008:79). We have called this model as "Continental model" which is also represented by Germany and Denmark within the scope of this work. This model shows fundamental challenge to "conventional freedom of expression theory" represented by American case which avoids restriction of the freedom of expression. In this context, we can see two major approaches towards freedom of expression. Contrary to Continental model where the spread of hateful speech are needed to be prevented and subjected to punishment, US Case is compatible with "commitment to freedom of expression" (Moon, 2008:79) and restriction on freedom of expression is legitimate only if there is a direct harm of the speech towards others. As Schauer suggests, this situation reflects a deeper division between the United States and the rest of the world on the issues concerning freedom of expression (2005:9). At this point, the United States of America represents the unique position. Karan expresses this by suggesting that:

> In some countries, expressions that fall under the hate speech category are not considered crimes and are considered as part of, and protected by freedom of speech. USA is one of the countries in which freedom of expression is superior than protection of individuals from hatred based expressions. In this country, even in cases where racist ideas are defended, the people defending them are protected by the freedom of speech. When there is a tension between the racist and discriminatory speech and freedom of expression, the latter has the precedence over the former (2010: 58).

As we can understand Karan's statement, the United States of America is the country that tolerates hate speech for the sake of right to freedom of expression (Timofeeva, 2003: 269) and it is regarded as the representative of "free speech culture" (Shauer,2005: 27). One of the most important reasons behind USA's approach is the assumption that state can abuse its power to restrict freedom of expression, therefore there should be little or no restriction on any kind of speech (Boyle, 2010: 67) . At this point, government in USA is not permitted to intervene into the boundaries of freedom of expression (Schauer, 2005: 9).

Regulations of freedom of expressions in United States are based on interpretation of First Amendment. As Schauer proposes, the First Amendment remains as an outline to international understanding of what the freedom of expression is (2005: 2). While European Convention on Human Rights lists a number of circumstances in which freedom of expression might be restricted, the First

Amendment lists none. At this point, Constrain on freedom of expression does not have constitutional recognition in USA (Shauer, 2005: 21). At this point, we can see that USA adopts an understanding of negative freedom with avoiding state/ government intervention to the use of right to freedom of expression. As Shauer suggests, First Amendment shows the skepticism about the ability of government to distinguish wrong from right, good from bad. Parallel to this understanding, neither the Court nor the government can decide which ideas are bad for society or which expressions may be limited. Therefore when the Supreme Court declares in its decisions most generally " under the First Amendment there is no such thing as a false idea" , it shows the political background of First Amendment which emerged from "libertarianism, laissez-faire, and distrust of government" (2005: 24).

It is important to discuss whether hate speech fits a category of "speech protected by First Amendment" in USA. The Supreme Court of United States places hate speech into protected category (Timofeeva, 2003: 271) and they only adopt "clear and present danger" approach. The criterion of the Court is whether the remark in question shows a clear and present danger. Therefore, an expression can only be excluded from free speech only if it indicates "a clear and present danger" (Karan,2010: 57-58). In other words, state can restrict right to freedom of expression when the speech involves "the incitement or threat of imminent violence" (Boyle, 2010: 67). At this point, hate speech is not considered as an expression which initiates violence. While speech that calls hateful attitudes is acceptable, hate crime motivated by hateful attitudes is subjected to punishment, therefore it is assumed that clear boundaries between hate speech and hate crime could be drawn. However, we have seen in previous chapter that it is not easy or always possible to draw this line between speech and crime, because all hate speech has a potential to turn into hate crime. At this point, this understanding embedded in U.S. model seems problematic.

It is important to remember Schauer's statement that proposes "Le Pen could not be sanctioned in the United States, as he was in France, for accusing Jews of exaggerating the Holocaust" (2005: 11). There is a basis of this assumption. For example, in USA, in 1977 the National Socialist Party of America decided to organize a march in ethnically Jewish town of Skokie in Chicago where some of the families that had survived the Holocaust have lived. Both the state and federal courts

made clear that under the First Amendment, there was no plausible cause for prohibiting the march[54] .Recent cases including racial discrimination, membership to racist groups and restriction on any kind of hate speech shows that US's position has not changed over years and it continues to treat hate speech as mere offensiveness (Schauer, 2005: 12). In that respect, Supreme Court still defends that just the ideas are themselves offensive are not enough for prohibition of these ideas[55].

3.9. Concluding Remarks

To discuss the approaches of the countries towards freedom of expression, it would be helpful to remember the debate in political philosophy mentioned in previous chapter. To understand USA's position clearly, looking at the discussion on Mill would help us. What USA applies in its law is closer to Mill's understanding of freedom. We have seen that for Mill, the only legitimate way of restricting one's freedom including freedom of expression is the avoidance of harm. In other words, freedom of expression can be limited only if it tends to lead harm to others. In USA, restriction of freedom of expression is legitimate only if expression of this speech leads to direct harm, as it is the case in Mill's thought. In other words, if an expression doesn't give direct harm to other, this kind of speech cannot be restricted for the protection of the target group. Mill's and USA's position also share the common idea that just offensiveness is not enough to restrict one's freedom of expression. For Mill, being offensive is not enough to limit its expression and any expression of offensive opinion that do not cause harm should not be restricted. Both USA's position and Mill's approach treat hate speech as distinguished from hate crime and evaluate within the borders of offensiveness that can be tolerated. USA shares basic assumption of Mill which accepts strict distinction between action and speech. Treating hate speech as harmless and drawing clear line between hate speech and hate crime are based on this distinction accepted by Mill. For him, individuals have complete liberty of expressing their ideas. However, if one's actions affect others and give them harm, this kind of action is subjected to limitation, as discussed before.

[54] National Socialist Party v. Skokie, 1977, available from Schauer, 2005: 11

[55] Bachellar v. Maryland, 1970, available from Timofeeva, 2003:71

We have seen that international human rights law including the Universal Declaration of Human Rights, the European Convention on Human Rights, convention such as International Covenant on Civil and Political Rights, international organizations including European Commission against Racism and Intolerance and United Nations Human Rights Committee, and lastly decisions of European Court of the Human Rights show that right to freedom of expression is not absolute and it is subjected to the limitation in the circumstance of hate speech. Parallel to this approach, we have also examined those countries, which are taken into category of "Continental model" such as Germany, Denmark and Canada prohibit hate speech by law under their criminal law.

In the light of this debate, in the next chapter I also want to discuss whether Turkey fits into Continental model or American model. Are there legal and political bases of restriction of hate speech in Turkey? Does any law which prohibits hate speech exist? Is hate speech thought as a crime? How does civil society respond hate speech? or Is the protection of freedom of expression enabling in Turkey? These are important questions to be asked in Turkish case. I also believe that examining Turkish case would be explanatory to see how society is affected by hate speech and effects of hate speech, especially by mentioning Hrant Dink case.

CHAPTER 4

TURKISH CASE: LEGAL REGULATIONS, PRACTICES AND CASES CONCERNING HATE SPEECH

In the previous chapter, we have seen that there are two major tendencies towards understanding and limiting freedom of expression. One of these tendencies, called Continental model, represents the tendency that freedom of expression is not absolute and it is subjected to certain limitations. These limitations cover all forms of statements which express hatred against particular groups. In the case of insulting member of certain groups, because of their characteristics such as gender or ethnicity, freedom of expression is limited by the law. In this model, hate speech is regarded as problematic and subjected to punishment. The other model gives reference to "direct harm" which means that only the speech which gives harm directly can be limited. Otherwise, limitation of freedom of expression is not legitimate. In this model, hate speech is protected for the sake of freedom of expression which has the highest priority over other rights.

In this chapter, I want to look at what is the situation in Turkey about the hate speech. First, I want to discuss the position of Turkey with respect to these two models; is Turkey closer to Continental model or USA's model of "free speech culture"? Moreover, I want to examine the legal bases for preventing hate speech in Turkish case; are there any laws or regulations which punish expressions based on hate? If exist, how are these laws enforced and are they adequate to prevent hate speech? After debating these issues, examining Hrant Dink case will show us the reflections of hate speech more clearly in Turkish polity.

4.1. Freedom of Expression in Turkey

In Turkey, freedom of expression is protected by the Constitution. According to the Article 26 of the Constitution, "everyone has the right to express and disseminate his thoughts and opinions by speech, in writing or in pictures or through other media, individually or collectively. This right includes the freedom to receive and impart information and ideas without interference from official authorities[56]". However, the Constitution underlines that this freedom is subjected to certain limitations. For purpose of "protection of national security, public order and public safety, the basic characteristics of the Republic and safeguarding the indivisible integrity of the State with its territory and nation", freedom of expression can be limited, which can be found in the same article[57]. While international legal norms limits the freedom of expression in case of propaganda of hate or advocacy of hatred that constitutes incitement to discrimination, hostility or violence, Turkish Constitution does not refer to any dissemination of speech advocating hate which creates a disassociation between the international legal standards and Turkish Constitution in the name of limitation of freedom of expression.

Although the Constitution emphasizes the importance of freedom of expression, it also expresses in which circumstances this freedom can be restricted. In Turkish constitution, we can see the sensitivity to basic characteristics of Republic which are national security, integrity and the unity of the state. Limitation of freedom of expression because of reasons such as national security, integrity and unity of the state seems problematic; in other words, the interpretation of freedom of expression in the light of such reasons for limitation is disputable. As Uygun suggests, one of the main problems of Turkey is the lack of universal standards for the protection of freedom of expression (2009: 19). For many years, Turkey has been accused of violating its citizens' right to freedom of expression. The report of Amnesty International, published in 2013, expresses the attack to freedom of expression in

[56] Available from http://www.anayasa.gov.tr/images/loaded/pdf_dosyalari/THE_CONSTITUTION_OF_THE_REPUBLIC_OF_TURKEY.pdf

[57] Available from http://www.anayasa.gov.tr/images/loaded/pdf_dosyalari/THE_CONSTITUTION_OF_THE_REPUBLIC_OF_TURKEY.pdf

Turkey. Political activists, human rights defenders, journalists, lawyers, who "criticize the state or who express opinions contrary to official positions on sensitive issues" are subjected to prosecutions which constitute one of the basic human rights problems in Turkey (2013:5). This situation can also be seen in the decisions of European Court of Human Rights (ECHR) which was established in 1959. Turkey gave its citizens right to apply the court in 1987 whereas Turkey accepted that the decisions of the court are binding in 1990. According to the statistics of the court, the highest number of violations of right to freedom of expression belongs to Turkey until 2012. In other words, Turkey is in the first rank in terms of the violation of freedom of expression[58]. ECHR decided that Turkey violated its citizens' right to freedom of expression 215 times while the second country in the rank, Austria, has the 33 violations[59]. This shows the gap between Turkey and other members of ECHR concerning the freedom of expression.

As many have also argued, one of the most important obstacles to freedom of expression in Turkey is the Article 301 of Penal Code, named "Denigrating the Turkish Nation, the State of the Turkish Republic, the Institutions and Organs of the State". According to this article:

> A person who publicly denigrates Turkish Nation, the State of Republic of Turkey, the Grand National Assembly of Turkey, Government of the Republic of Turkey or the judicial bodies of the State shall be sentenced a penalty of imprisonment for a term of six months to three years.
>
> A person who publicly denigrates the military or security structures shall be punishable according to first paragraph.
>
> Expressions of thought intended to criticize shall not constitute a crime[60].

When we read this article, the distinction in the article between the terms of "denigrate" and "criticize" draws our attention. Although, the concepts used in the law should be defined clearly, it seems that deciding which kinds of speech is within

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[58] Available from http://echr.coe.int/Documents/Stats_violation_1959_2012_ENG.pdf

[59] Available from http://echr.coe.int/Documents/Stats_violation_1959_2012_ENG.pdf

[60] In Turkish: "Türk milletini, Türkiye Cumhuriyeti Devletini, Türkiye Büyük Millet Meclisini, Türkiye Cumhuriyeti hükümetini ve yargı organlarını alenen aşağılayan kişi, altı aydan üç yıla kadar hapis cezası ile cezalandırılır. Askerî veya emniyet teşkilatını alenen aşağılayan kişi ilk paragrafa göre cezalandırılır. Eleştiri amacıyla yapılan düşünce açıklamaları suç oluşturmaz"

the boundary of criticism or denigration depends on the individual discretion of the judges. I will discuss this matter in detail in what follows.

I want to remind that the first formulation of the article has been changed in 2008; with the amendments, judging suspects became to be dependent on the permission of Ministry of Justice. Moreover, after the amendments, humiliation of "Turkishness" and "Republic" was replaced by "Turkish nation" and "Turkish Republic" respectively in 2008. In former version of article 301, the legislative intention of the law makers states that:

> What is meant by the term "Turkishness" in the article is, a common entity which has come into being as a result of the common culture peculiar to the Turks living anywhere around the world. This entity is wider than the term "Turkish Nation" and it encompasses the societies who live outside Turkey and who are participants of the same culture. What is meant by the term Republic is, the State of the Republic of Turkey[61].

When we read this explanation, describing "Turkishness" as an "entity" draws our attention. The term of entity in the article is described as a common culture which is shared by all Turks living all around the world. The term of the "entity" which fixes the meaning of the word reminds us extreme nationalist ideologies and description of Turkishness, in that respect, seems heavily ideological, rather than an impartial legal term.

Although the article has been amended because of criticisms, it seems this amendment was not satisfactory. For example, Algan argues that this amendment shows changes only in wording, not in the content. In this respect, it does not promote expanding the enjoyment of freedom of expression (2008: 6). In this respect, the sprit that shapes former version of article 301 hasn't changed. The report of International Amnesty also supports this claim and suggests that the change in the article does not introduce a significant change and does not contribute to the widening of the protection of the right to freedom of expression and it still constitutes an effective limitation to the freedom of expression despite the reform made in the article in 2008 (2013: 10-11).

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[61] TBMM, 22. Semester, Legislative Year 2,Numbe 664, 688., stated in Algan,2008, available from http://www.germanlawjournal.com/pdfs/Vol09No12/PDF_Vol_09_No_12_2237-2252_Developments_Algan.pdf

Even if it can be supposed that Turkish nation refers to all ethnic groups living in Turkey, this article never applies to those who humiliate ethnic or racial groups other than Turks. Legal authorities in Turkey also evaluate the terms of "Turkish Nation" and "Turkishness" in the same manner. In the case of Hrant Dink, Yargıtay (Turkish Supreme Court of Appeals) explains what they understand from Turkish nation:

> The term 'Turkishness' is related to a component of the state, namely the people, and, what is meant with this term is the Turkish Nation. Turkishness means humanitarian, religious and historical values constituting the Turkish nation and an entirety of national and moral values composed of national language, national feelings and customs[62].

At this point, we can see the article is not to be applied to punish the contempt for people who have non-Turkish ethnic origin (Karan, 2010: 237). There is an extensive dignification of "Turkishness" and other ethnic origins are not protected by the law. In addition to protection of only Turkish ethnic origin, identification of Turkishness with specific values is a clear reflection of nationalist bias which can be seen in the decisions of the Courts. In its decision, Yargıtay, one of the most authorized Courts in judiciary system, refers to nationalist discourse. In this respect, we can see the impact of Turkish nationalism in the decisions of the Courts, constitution, law and legislative intention of law makers. At this point, we can suggest that nationalism as comprehensive doctrine has been incorporated into Turkish juridical mentality, which is very problematic for a sense of justice and impartiality of the Court with respect to Rawls's conceptualization of justice.

The nationalist bias in the judiciary reminds Rawls's claims on justice. He seeks for a liberal political conception of justice. According to Rawls, the conception of justice should be distant from all philosophical and religious doctrines that citizens assert and it should be independent of all comprehensive philosophical and moral doctrines (1996: 9). Rawls defines comprehensive doctrine as a conception which covers all recognized values and virtues within one articulated system (1996: 13). According to him, comprehensive doctrines belong to "'background culture' of civil society which is the culture of the social, not the political, which refers to culture of daily life" (1996: 14). What Rawls indicates is that the perspective of political justice

[62] Yargıtay Ceza Genel Kurulu, E.2006/9-169, K.2006/184, 11 Temmuz 2006, avaliable from http://www.yargitay.gov.tr/aihm/upload/27520-07.pdf, para. 45

and the law should avoid imposing any comprehensive doctrine and justice in pluralistic societies is secured by abstaining from comprehensive doctrines. In Turkish case, it is the case that nationalism itself has become the comprehensive doctrine in the decisions of the judiciary, in laws, articles, as the case of article 301. Rawls also mentions the importance of the neutrality and impartiality of the judiciary by avoiding adapting any comprehensive doctrine (1996: 16). In Turkish case, nationalist bias jeopardizes the impartiality of the Court and constitutes a sharp contrast with Rawls's sensibility of impartiality because nationalism has been normalized in the wording of Article 301. The necessity that Courts and juridical system should be distant from any comprehensive doctrine is not valid in Turkish case because of adopting a protective outlook to the members of polity who are assumed to share nationalist doctrine.

Another important problem with the article is ambiguous meaning of the word of "denigrate" which is mentioned before. The criterion is dependent on the evaluation of public prosecutors and judges of Turkish Criminal Codes and it blurred the distinction between "criticism as an integral part of freedom of expression" and a violation of that right (Algan, 2008: 9-10). In this respect, it is important to give examples concerning how the line between denigration and criticism is drawn. For example, Temel Demirel, academician and author, prosecuted because of violation of Article 301 and he was not acquitted in the prosecution. In his speech made in 2007, he said that "Hrant sadece Ermeni olduğu için değil, bu ülkede soykırım olduğu gerçeğini ifade ettiği için katledildi. Evet, bu ülkede Ermeni soykırımı olmuştur[63]". His prosecution lasted five years and at the end of this prosecution, the Court decided to postpone announcing the decision which means that Demirel has not been found innocent. We can see this display of nationalist bias most explicitly in the decisions of cases related with Article 301. Especially, the Courts are very sensitive to statements concerning Armenian genocide. Now, I want to analyze other examples. Elif Şafak, famous novelist, was also prosecuted by the accusation of Article 301. In her book "*Baba ve Piç*", she described the situation which Armenians experience during First World War. Prosecutor evaluated her statements as denigration to

[63] In English it means "Hrant was murdered not only due to his Armenian etnicity but also due to the fact that he declared the Armenian genocide. Yes, the Armenian Genocide was carried out in this country, available at http://www.bianet.org/bianet/diger/136229-demirer-301-davasinda-uc-yargic-eskittim

"Turkishness". The Court decided that Şafak was innocent. Although she was not found guilty, carrying prosecutions so easily because of "denigration to Turkishness" shows how this article blurred the distinction between criticism and denigration. Olli Rehn, vice president of European Commission made a statement with reference to decision on Şafak case that there is a need to change the articles which are written in ambiguous language[64]. Elif Şafak case is was not an exception in Turkey. For example, Orhan Pamuk has also been prosecuted because of his interview made in the Swedish radio. In his speech, he stated that ""Bu topraklarda 1 milyon Ermeni 30 bin de Kürt öldürüldü[65]". His prosecution was rejected and Pamuk was not subjected to punishment. However, both these cases show that evaluation of denigration is dependent on the viewpoints of prosecutors and judges. These cases demonstrate the need to clearly define what is meant by "denigrate", what is meant by "criticize" stated in Article 301.

It is important to remind that certain journalists and authors were prosecuted because of the accusation of the violation of the Article 301. Elif Şafak, Orhan Pamuk and Hrant Dink[66] are important figures who were prosecuted because of violation of this article. In order to see to what extent decisions of Turkish Criminal Courts are contrary to the decisions of ECHR, it would be helpful to examine Taner Akçam's case. Taner Akçam, history professor, has been prosecuted because of his opinions on the "Armenian genocide" in 1915. Although he was not subjected to punishment, he applied to ECHR because he suggested that the Article 301 threatens his academic researches. Instead of his punishment, the prosecution itself was regarded as problematic for ECHR:

> In the Court's opinion, while the legislator's aim of protecting and preserving values and State institutions from public denigration can be accepted to a certain extent, the scope of the terms under Article 301 of the Criminal Code, as interpreted by the judiciary, is too wide and vague and thus the provision constitutes a continuing threat to the exercise of the right to freedom of expression. In other words, the wording of the provision does not enable individuals to regulate their conduct or to foresee the consequences of their acts. ..Any opinion or idea that is regarded as offensive, shocking or

[64] Available from http://www.elifsafak.us/haberler.asp?islem=haber&id=32

[65] In English, it means "One million Armenian and three thousand Kurds were killed in this territory", available from http://www.radikal.com.tr/haber.php?haberno=176501

[66] The case of Hrant Dink will be examined in detail

disturbing can easily be the subject of a criminal investigation by public prosecutors[67].

The fact that humiliation of Turkish nation and Turkish republic is subjected to punishment means that freedom of expression can be more easily restricted in the case of criticism of practices, ideas, the authority of Turkish state or government and even of values which are regarded as constitutive of Turkish nation and Turkish way of life. At this point, it is helpful to remember that ECHR mentions the need of space for political criticism. As Uygun suggests, the protection of freedom of expression is the most important in case of political issues for ECHR. The most significant contradiction between Turkish legal system and ECHR law emerges from this difference. In Turkish legal system, criticism on specific political issues are discouraged and criticism towards Turkish state, government and some public institutions are restricted whereas in decisions of ECHR, restrictions on criticism towards state, government, politicians or state institutions are not legitimate anyway[68] (2009: 45).

We can see that Turkey can easily restrict the freedom of expression especially when some figures or institutions explicate a suspicion that there is a "threat" to the "unity" of the state, "security" or "territorial integrity". The right to freedom of expression can be easily violated in the case of Kurdish question. The expressions which explicate the contradiction with official discourse is subjected to punishment by the Courts. For example, the article which express the ideas about the Kurdish question by stating "We are watching the wholesale extermination of a nation. We are watching genocide on such a scale that it is not a mistake to call it unprecedented[69]" is evaluated as a treat to unity and territorial integrity of the state. The domestic court in Turkey found that the editor disseminated separatist propaganda against the indivisibility of the State by publishing this article. ECHR decides that there is a violation of freedom of expression and in its decision, it suggests that:

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[67] http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-107206, PARA 93

[68] For more information, İncal v Turkey, ECHR, 09.06.1998, available from http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58197

[69] Şener v Turkey, 2000, available from http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58753 para 6

> Since the applicant was convicted of disseminating separatist propaganda through the review of which she was the editor, the impugned interference must also be seen in the context of the essential role of the press in ensuring the proper functioning of a political democracy. While the press must not overstep the bounds set, inter alia, for the protection of vital State interests, such as national security or territorial integrity, against the threat of violence or the prevention of disorder or crime, it is nevertheless incumbent on the press to impart information and ideas on political issues, including divisive ones. Not only has the press the task of imparting such information and ideas, the public has a right to receive them[70].

It is vitally important to underline that general tendency of the Courts in Turkey to limit freedom of expression concerns cases and subject matters which they find contrary to the dominant official ideas whose substantial element is Turkish nationalism. We have mentioned that the violation of freedom of expression is widely seen in the case of issues related with Kurdish question. This is also case for the judgments related with Kurdish media whose statements do not conform to state's approach to Kurdish question. For example, in the case of *Özgür Gündem* vs Turkey, ECHR decides that Turkey violates the freedom of expression by closing *Özgür Gündem* which appeals to Turkish citizens of Kurdish origin. This newspaper started to publication in 1992. In 1993, the police launched an investigation and employees were taken into custody. Its successor, *Özgür Ülke,* started to publication in 1994; however, its three offices were bombed. After that, in 1995, *Yeni Politika,* as another successor, was closed after 4 months after the date of publishing. Between 1996 and 1999*, Özgür Gündem* was published in different names but in this period, these were closed by Court's decisions many times because of the news and articles in the newspaper concerning the Kurdish questions[71]. As many claimed, especially, between 1992 and 1994, some journalist of the newspaper were killed or attacked. In 2010, ECHR decides that there is a violation of Article 10, namely, freedom of expression. In its decision, the Court mentions the importance of freedom of expression as a precondition of democracy[72]. The ECHR's decision shows that the boundary of freedom of expression is broader than the boundary in the mentality of

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[70] Şener v Turkey, 2000, available from http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58753 para 41

[71] For more information, İlkiz & Önderoğlu, 2011, İfade Özgürlüğünün On Yılı, IPS İletişim Vakfı: İstanbul

[72] Özgür Gündem v Turkey, 16.03.2010, available from http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58508

Turkish authorities who cultivate very high sensitivity to state's unity, divinity, authority and territorial integrity. For example the usage of "Kurdistan" was punished in domestic court in the case of *Özgür Gündem*; however, ECHR states that although this term can refer to territory separate from Turkey and it can be "provocative" to authorities, it should still be evaluated within the boundary of freedom of expression. The ECHR concludes that:

> The public has the right to be informed of different perspectives on the situation in south-east Turkey, irrespective of how unpalatable those perspectives appear to the authorities… While several of the articles were highly critical of the authorities and attributed unlawful conduct to the security forces, sometimes in colorful and derogatory terms, the Court nonetheless finds that they cannot be reasonably regarded as advocating or inciting the use of violence[73].

In this case, the ECHR recalls that state's duty cannot only be fulfilled by not to interfere, this duty also requires positive steps for the protection of freedom of expression[74]. In that respect, ECHR decided that the state couldn't take adequate measures to protect freedom of expression of *Özgür Gündem.* In addition to the lack of protective measures, the articles in questions published in *Özgür Gündem* were evaluated within the boundary of freedom of expression and ceasing of its publication was evaluated as a breach of freedom of expression[75]. In the case of *Özgür Gündem,* nationalist bias which shapes juridical system in Turkey reveals itself. One again, we can see that in the decisions related with this case, this nationalist outlook which constitutes a comprehensive doctrine prevents judges to decide in conformity with international legal norms.

We can argue that the predominant tendency in Turkish polity is willingness and readiness to restrict freedom of expression, instead of enlarging the scope of protective measures. In order to understand Turkey's position with respect to Continental model and free speech model, it would be helpful to examine the attitude

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[73] Özgür Gündem v Turkey, 16.03.2010, available from http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58508

[74] Özgür Gündem v Turkey, 16.03.2010, available from http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58508

[75] Özgür Gündem v Turkey, 16.03.2010, available from http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58508

of Turkey towards hate speech. Now, it is valuable to examine whether freedom of expression can be easily restricted in the case of hate speech in Turkey. In that respect, it would be helpful to look at the legal bases for restriction of freedom of expression concerning hate speech and then I want to examine what is practiced in legal cases in this scope.

4.2. Legal Norms Concerning Hate Speech in Turkey

In order to deter hate speech directed towards vulnerable parts of society, it is vital to remember the central role of legal constraints on such kind of speech. At this point, defining hate speech as a crime in penal code serves a function in coping with hate speech. In order to understand Turkey's position with respect to Continental and American model, let me focus on the articles in Turkish criminal law.

As Uygun suggests, Article 216 of Criminal Law is an important provision to punish hate speech in Turkish legal system (2009:28). First paragraph of Article 216 states that "anyone who openly incites sections of the population to enmity or hatred towards another group on the basis of social class, race, religion, or sectarian or regional difference, in a manner which may present a clear and imminent danger in terms of public safety shall be sentenced to imprisonment from one to three years[76]". Second paragraph of the same article goes on by suggesting that "Any person who openly humiliates another person just because he belongs to different social class, religion, race, sect, or comes from another origin, is punished with imprisonment from six months to one year[77]".

From the perspective of this article, one can argue that there is an adequate legal regulation to prevent hate speech; however, it is crucial to note that in order to punish incitement of some part of the population towards another section, there is a need of "clear and imminent" danger which reminds us American model. According

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[76] In Turkish, it refers to "Halkın sosyal sınıf, ırk, din, mezhep veya bölge bakımından farklı özelliklere sahip bir kesimini, diğer bir kesimi aleyhine kin ve düşmanlığa alenen tahrik eden kimse, bu nedenle kamu güvenliği açısından açık ve yakın bir tehlikenin ortaya çıkması halinde, bir yıldan üç yıla kadar hapis cezası ile cezalandırılır", avaliable from http://www.tbmm.gov.tr/kanunlar/k5237.html. 24.03.2012

[77] In Turkish, it refers to "Halkın bir kesimini, sosyal sınıf, ırk, din, mezhep, cinsiyet veya bölge farklılığına dayanarak alenen aşağılayan kişi, altı aydan bir yıla kadar hapis cezası ile cezalandırılır", avaliable from http://www.tbmm.gov.tr/kanunlar/k5237.html. 24.03.2012

to Uygun, this paragraph does not conform to international legal norms because the limitation of expression only in the case of clear treat to public safety does not limit all kinds of hateful expression (2009: 28). Karan also suggests that this article cannot work effectively to punish hate speech because it is hard to catch clear and present danger to public safety in every case. Therefore, this article is regarded as inadequate to protect certain groups from hate speech (2010: 235). On the other hand, Article 216/2 is more explicit to punish hate speech by suggesting penalty to anyone who insults the other because of belonging to different social, sexual, religious or ethnic groups and this regulation is more proper to international norms on hate speech. According to Uygun, the critical point in this article is that individual is not starting point; instead, this provision is regulated under the "Offences under the Public Peace". Instead of evaluating under the protection of rights and freedoms, protecting public peace is aimed which makes protection of individual from discrimination secondary (Uygun, 2009: 28). At this point, we can notice that the Article 216 of Turkish Criminal Code can be used as a tool for deterring hate speech. Although first paragraph implies the criteria of clear and present danger to public safety as a criterion, second paragraph of the same article clearly punishes the expression which distinguishes and humiliates people because of their characteristics. In that respect, it would be wrong to suggest that there is no legal base for punishing hate speech even if the related article contains deficiencies.

4.3. The Practices Concerning Regulations on Hate Speech

Although there is a legal base for punishing expressions which constitute hate despite its deficiencies, its implementation to lawsuits is crucial as much as the wording of legal norms. As the report of Amnesty International explains, Article 216 is used to prosecute opponent sections of society instead of punishing those who initiate hate towards some parts of society and it is not used to prosecute actual incitement to violence or discrimination against subordinate groups (2013: 16). Now, we should look at the way the regulations and articles are applied in the case of hate speech.

In order to understand how legal norms are interpreted and applied in hate speech. Karan explains the attitude of judges of Criminal Courts by stating that "the judicial bodies' approach to hate speech and hate crime is usually not in favor of

protecting minority groups, but to limit statements in favor of protecting minority identities, therefore limiting freedom of speech" (2010: 240).

Şahin also attempts to examine the attitude of the decision maker in judiciary. He explains the discriminatory approach of the judiciary system by suggesting that instead of punishing those who commit discrimination, hate speech and crimes, the arrangements are applied to those who are fighting against them. As a result, perception among the members of the judiciary reproduce discrimination between individuals based on race, ethnic or religious origin, sexual identity, sexual orientation, political preferences, religion and language (2010: 247-8). Implying that by not protecting minority and vulnerable groups from discrimination and not applying legal norms in favor of these groups, the judges of the courts may play a role in reproduction of discrimination is a proper criticism because the tendency of not to punish discriminative statements or attitude encourages hate speech claims which dissuade those who object hate speech and discrimination. However, in Turkey, discrimination between individuals based on ethnic origin seems more relevant if we recall nationalist bias in the context of freedom of speech. Of course, discrimination based on characteristics rather than ethnic origin can be detectable in the perception among the members of judiciary but discrimination based on ethnicity is more dominant in judiciary because of the nationalist bias prevalent not only in norms, but also in Turkish courts' decisions.

To be more precise about the attitude of judiciary towards hate speech case, we can look at certain decisions. For example, in İzmir, petition named "Kürt Nüfus Artışını Durdurun[78]" started in 2006 by extreme nationalist organization. In this petition, it was stated that "Ey Türk kadını ve erkeği! Türkçülük için bir çocuk daha yap. Hainler, kapkaççılar, uyuşturucu satıcıları çoğalıyor. Kürt ve Çingene çetelerine ve yobazlara hak ettiği cevabı vereceğiz[79]". The president of the organization is accused of violation of the Article 216 of Turkish Penal Code, inciting the population to enmity or hatred. However, the Court evaluates these statements within the boundary of freedom of expression. Such decision seems to be really shocking to

[78] In English, it means "Stop the Increasing of Kurdish Population"

[79] In English, it means "Turkish women and men! Make one more child for Turkishness. Traitors, muggers, drug traffickers are growing. We will give to Kurdish and Gypsies what they deserve", available from http://www.mesop.net/osd/?app=izctrl&archiv=61&izseq=izartikel&artid=186

anyone who is against or perhaps even only critical of hate speech. Although it is clear that some part of the population is discriminated and humiliated because of their ethnic origins or social backgrounds, there was no punishment for those who expressed these ideas[80]. In the decision, we may witness a nationalistic bias which jeopardizes impartiality of the court and hence diminishes the expectation for political justice.

In this case, the legal norm has not been applied in favor of target group of hate speech or protecting them from discrimination. Instead of being a tool for deterring hate speech, the relevant articles are used to punish opponent groups in Turkey. In order to understand the practices concerning hate speech, it is also crucial to look at political atmosphere that affects hate speech cases.

In Turkey, speaking from discriminatory discourse is widespread in political discourse. In order to analyze political discourse which normalizes hate speech, I want to examine the demonstration in which Istanbul Governor and the Minister of Internal Affairs participated and made a speech to memorialize Azeri people killed in Hocalı town in Azerbaijan. In this demonstration, which has taken place in İstanbul in February 2012, there were banners whose slogans were "Madem Ermenisiniz, Hocalı'nın hesabını vermelisiniz[81]", "Bugün Taksim, yarın Erivan, bir gece ansızın gelebiliriz[82]","İşgalcisiniz,Katilsiniz,Hepiniz Ermenisiniz[83]. After the demonstration, the group in demonstration wanted to march to in front of the *Agos* newspaper which is the symbolic place in Hrant Dink's murder. Against the slogan used after Dink's murder that "All of us are Armenians", in this demonstration, there was a banner "Hepiniz Ermenisiniz, hepiniz piçsiniz[84]". It is obvious that the banners clearly

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[80] for more information please look at http://www.radikal.com.tr/Radikal.aspx?aType=RadikalDetayV3&ArticleID=1119555&CategoryID=77

[81]In English, Now that you are Armenian, you have to give an account of the incidents occurred in Hocalı"avaliable from http://fotogaleri.hurriyet.com.tr/galeridetay.aspx?cid=54187&rid=2&p=1

[82] In English "Today Taksim, tomorrow Erivan, we can come suddenly in one night", available from http://fotogaleri.hurriyet.com.tr/GaleriDetay.aspx?cid=54187&rid=2&p=7

[83] In Turkish "You are occupant, you are killer, all of you are Armenians" avaliable from http://marksist.org/haberler/6451

[84] In English, " All of you are Armenians, all of you are bastards", avaliable from http://marksist.org/haberler/6451

expressed hate speech by making the Armenians a target and hate speakers expressed their ideas publicly in front of the minister and the governor. After the demonstration, an important Armenian author, Yetvart Danzikyan, wrote his concerns. In his article, he states that the demonstration attacked all Armenians living in Turkey and made Armenian community feel irritated[85]. At this point, it is also vital to look at reactions of the politicians to this event. Instead of calling for prosecution, Prime Minister clarified that this demonstration cannot be condemned just because of "a few marginal and singular banners[86]". We can see that even the Prime Minister evaluates this publicly expressed hate speech as insignificant. In this respect, such political acceptance by very crucial authorities normalizes hate speech. After one and a half month from the demonstration, prosecution started for 9 people[87]. In March 2013, the decision was made; six of them were found guilty on the violation of Article 216/ 2 of Turkish Penal Code[88]. Although there are limited cases in which expressions that initiates or promote hate is subjected to punishment, this decision seems important to see a kind of improvement in Turkey with respect to legal outlook to hate speech. This decision can be seen as a starting point for punishing hate speech cases.

4.4. The Case of Hrant Dink: The Power of Hate Speech

Let me examine the murder of Hrant Dink, Turkish journalist of Armenian origin who was killed after a serious hate speech campaign against him. We can see that there are many cases which can be evaluated within the scope of this work but the murdering of Hrant Dink was a peak point for the debate on hate speech. His murder created awareness and after his death many authors, journalists, academics have paid more attention to hate speech debate and the studies related to hate speech have

[85] 27.02.2012,İstanbul'da Tedirgin bir Pazar", Radikal, available from http://www.radikal.com.tr/Radikal.aspx?aType=RadikalYazar&ArticleID=1079978&Yazar=YETVART-DANZIKYAN&CategoryID=97

[86] Avaliable from http://www.radikal.com.tr/Radikal.aspx?aType=RadikalDetayV3&ArticleID=1080154&CategoryID=78

[87] Avaliable from http://bianet.org/bianet/diger/137695-irkci-doviz-tasiyan-dokuz-kisi-serbest

[88] Avaliable from http://www.ntvmsnbc.com/id/25409291/

increased. After his killing, Hrant Dink foundation was also established to monitor hate speech in the media and publish books and articles concerning hate speech.

Hrant Dink was an editor in chief and author of the Armenian newspaper named *Agos*. The main aim of this newspaper was to provide solidarity with Armenians in Turkey, to express the problems of Armenians living in Turkey and to share Armenian culture with Turkish people[89]. The figure of Dink, influential figure in the public sphere as an Armenian identity, is important for this thesis to show how one person has become the target of hate speech and how being the target of hate speech resulted in his murder.

The way that leads to killing of Dink starts with the attention of media to his articles and his accusation because of violation of Article 301 of Turkish Penal Code. In *Agos*, Dink made news on Sabiha Gökçen, step daughter of Mustafa Kemal Atatürk. In February 2004, Dink made news on the suggestion that Gökçen was an Armenian girl living in the orphanage[90] and *Hürriyet,* one of the mostly read newspaper, quoted this news[91]. According to Göktaş, this news was a starting point of becoming a target and representation of Hrant Dink as an enemy of Turks and Turkey (2009:31). After that, *Genelkurmay Başkanlığı* (Presidency of General Staff) issued a press release that such kinds of news are harmful to "our country and nation" and opening the symbol of Sabiha Gökçen for discussion is not served to "national unity" and "public peace". Then Dink was called to İstanbul Governorship and was warned not to make such news[92]. Not only public agencies but also columnists attacked Dink during this process. For example, İlhan Selçuk, columnist in *Cumhuriyet* newspaper, evaluated the news in *Agos* and suggested that in order to share and divide Turkey, external powers provoke media. After this evaluation he stated that in Turkey, there are an increasing number of enemies of Turkey and Turkish Republic[93]. Identification of Dink with internal enemy implies that his news

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[89] http://www.hrantdink.org/?HrantDink=10

[90] http://www.hrantdink.org/?HrantDink=10

[91] http://webarsiv.hurriyet.com.tr/2004/02/21/416401.asp

[92] For more information, please look at http://www.marksist.org/tarihte-bugun/3272-22-mart-1913-gercekte-bir-ermeni-yetimi-olan-sabiha-gokcen-dogdu

[93] "Sabiha Gökçen ve Techir", 25.02.2004, *Cumhuriyet* newpaper, Göktaş, 2009: 46

serves to the external power. The identification of Sabiha Gökçen with Armenian origin was evaluated as hostility to Turkishness and Turkish Republic. Because Hrant Dink was an Armenian, this news generally evaluated as a tool of "external power". We can add other important columnists who write in well known newspapers to those who blame Hrant Dink because of his assertion on Sabiha Gökçen. For example, Emin Çölaşan, the columnist in *Hürriyet* newspaper writes in his column:

> İstanbul'da bir Ermeni gazetesinde Sabiha Gökçen için yayın yapılmış. Ermeni imiş! (…)… Bir gün onun sırtından böyle oyunlar oynanacağı ve Ermeni ilan edileceği hiç aklımıza gelmezdi. Ölmüş insanlar yalanlara, iftiralara yanıt veremez. Onların üzerinden oyun oynamak en kolay yoldur….Sabiha Gökçen'in aziz manevi varlığından özür diliyorum[94].

In his article, Dink's claim that Sabiha Gökçen is an Armenian was seen as a slander and by suggesting that he insults being an Armenian. Moreover, he addresses that the newspaper which publish this article is an Armenian which makes *Agos* the target. I also want to review the column of Hasan Pulur in *Milliyet* newspaper. In his column, he states that:

> HRANT Dink'i kaç kişi tanırdı, bir kaç televizyon programında görünse bile…İstanbul'da *Agos* adında Ermenice bir gazette çıktığını ve O'nun bu gazetenin yanın yönetmeni olduğunu kaç kişi bilirdi? Ama şimdi O'nu da gazetesini de çok daha fazla kişi tanıyor. ERMENİSTAN'dan Türkiye'ye hizmetçilik yapmak için gelen bir Ermeni kadının 'Atatürk'ün manevi kızı Sabiha Gökçen Ermeniydi' laflarını gazetesinde yayımlamasından, ipe sapa gelmez bu lafların üzerine de, bazı 'sazanlar'ın balıklama atlamasından sonra Hrant Dink'ten de, gazetesinin mevcudiyetinden de, çok kişi haberdar oldu… Türkçe'yi iyi bildiği anlaşılan Hrant Dink, acaba 'Aba altından sopa göstermek' deyimini de hiç duymuş mu? [95]

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[94] In English, it means "An Armenian Journal based in Istanbul declared in an news that Sabiha Gökçen was Armenian! I would never think that one day they would pull such a stunt on her and she would be alleged to be Armenian. Deceased cannot answer the lies and slander about them. Playing tricks on them is the easiest way…. I apologize on behalf of them with all my respect to her honorable and sacred memory.", Çölaşan, "Ermeni imiş!!!", *Hürriyet* newspaper, 24. 02.2004, available from http://hurarsiv.hurriyet.com.tr/goster/ShowNew.aspx?id=204854

[95] In English, it means that How many people knew that a man named HRANT Dink existed even if he appeared in a number of TV shows earlier? How many people knew that a journal titled *Agos* based in Istanbul was published in Armenian and he was the chief editor of this journal? However, a great number of people know him and his journal very well now. Even more people have heard about him and his journal when he published an article in his journal about a woman who had come from Armenia to work as a maid in Turkey and alleged that Sabiha Gökçen, adopted child of Atatürk, was Armenian and following this, some sinister rose to a bite… Hrant Dink seems to speak Turkish quite well and I wonder if he has heard such an idiom as "Speak softly and carry a big stick"?

When we read Pulur's statements, we can feel the threat to Dink because of his Armenian identity and his news on Gökçen. Göktaş suggests that Pulur's column addresses racist and xenophobic perception of the readers. Pulur introduces Dink as an Armenian who is the enemy of Turkish Republic and by the last sentence he implies Dink threats Turks. According to Göktaş, Pulur regards Dink as a stranger and ignores his Turkish citizenship by his statements that Dink knows Turkish well (2009: 60). These were some of the examples from well known newspapers in Turkey. However, it is necessary to add that columns in extreme right wing newspaper are more shocking in terms of insulting Dink because of his claims concerning Gökçen. The important point in all these is that these columns made Dink target in the media and in the public opinion by representing him as an opponent to Turks[96].

Another turning point for Hrant Dink case was his prosecution because of violating the Article 301. He was prosecuted because of his article named "*On Armenian Identity*". In the article, he writes " Türk'ten boşalacak o zehirli kanın yerini dolduracak temiz kan, Ermeni'nin Ermenistan ile kuracağı asil damarında mevcuttur[97]" While in the whole article, he tries to establish an healty relationship between Turks and Armenians and he recalls the responsibilities of government in Armenia and criticizes Armenian Diaspora, only one sentence has been chosen and focused on this one. In order to understand what Dink meant, we can look at Çetin's statements. According to her, by poisoned blood Dink means the perception of Turks by Armenians and the fact that Armenians were obsessed with the genocide in 1915 (2012: 128). However, after this article, again, many columnists wrote articles in which Dink was accused by being a traitor. Deniz Som, the columnist in *Cumhuriyet* newspaper, evaluates Dink's statements as racism and according to author, Dink's words are worse than Adolf Hitler's ideas[98]. Especially, *Ortadoğu, Önce Vatan* and *Yeniçağ,* which are extreme right wing nationalist newspapers, made provocative

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[96] Because of the scope of thesis it is not preferred to detailly debate what the columnists say about the news. However, for acquiring more information, the book of Kemal Göktaş, "Hrant Dink Cinayeti: Medya, Yargı, Devlet" can be reviewed. In this book, how Dink become the target in the media is detailly showed.

[97] In English, it means ""the purified blood that will replace the blood poisoned by the 'Turk' can be found in the noble vein linking the Armenians to Armenia"

[98] "Sabiha Gökçen-, Cumhuriyet, 24.02.2004 in Göktaş, 2009: 63

news and headlines which insulted Hrant Dink. “Kovun Bunları” (Expel them), “ Ermeni’ye bak” (Look at the Armenian), “Hrant kaşınıyor” (Hrant scratches), “Agos’un sesi kısılacak” (Agos’s Voice will be turned down) were some of the example of such headlines[99]. After these developments, extreme nationalist groups, *Ülkü Ocakları* and *İşçi Partisi,* organized a protest in front of *Agos* in 26 February 2004. In this protest, it was stated that Hrant Dink tries to destroy public order and the group shouted slogans “Ya sev ya terket” (Love or Leave), “Bir gece ansızın gelebiliriz” (We can come one night suddenly).

The last point was his condemnation because of the violation of Article 301, to denigrate Turkishness in April 2004. It is important to note that because of the statements in his article “the purified blood that will replace the blood poisoned by the ‘Turk’ can be found in the noble vein linking the Armenians to Armenia”, Criminal Court found Dink guilty and sentenced him to six months imprisonment in October 2005. However, the more crucial dimension of the incident was lawsuit process. During the lawsuit, Hrant Dink and even his lawyers were attacked and this process turned to lynch campaign against Dink. In all trials, Dink was mugged and there were no sanctions for attackers. The hostility towards Dink can also be found in the decision of Court. According to president of the Court, Dink has seen Turkish blood as poisonous which represents disrespect to Turkish ancestors, martyrs and values which constitute the nation. His statements were also found insulting and impolite. In the explanation of court’s decision, the statements of Mustafa Kemal were often repeated and the sources of Turkish nationalism were emphasized[100]. It is also important to note that the *Yargıtay* (Court of Appeals) also approved the decision of First Instance Court in 2006. As Göktaş suggests, sentence to Hrant Dink in the name of violation of Article 301 is related to his emphasis on Armenian identity. The perception of Dink that was created by nationalist media have played a central role for being a target (2009: 98). Hrant Dink himself had also questioned why he was sentenced to punishment while other suspects of Article 301, like Orhan Pamuk and Elif Şafak, have not been found guilty. According to Dink, the main

[99] For more information please look at İnceoğlu & Sözeri,Nefret Söylemi ve Nefret Suçları, 2012 and Göktaş,Hrant Dink,2009

[100] Şişli Court of First Instance, 07.10.2005, decesion no: 2005/1082, in Göktaş, 2009: 116

reason behind his sentence was to make him silent and was tied to the fact that he is Armenian (2007).

It is necessary to remind that although Hrant Dink was found guilty because of denigrating Turkish identity and Court of Appeal approve this decision, ECHR decided that there had been a violation of Article 10 of ECHR; freedom of expression. In its decision, the Court states that:

> There had therefore been interference with the exercise of Fırat Dink's right to freedom of expression…the Court concluded that, in reality, it had indirectly punished Fırat Dink for criticizing the State institutions' denial of the view that the events of 1915 amounted to genocide. The Court reiterated that Article 10 of the Convention prohibited restrictions on freedom of expression in the sphere of political debate and issues of public interest, and that the limits of acceptable criticism were wider for the Government than for a private individual. It further observed that the author had been writing in his capacity as a journalist on an issue of public concern. Lastly, it reiterated that it was an integral part of freedom of expression to seek historical truth. The Court therefore concluded that Fırat Dink's conviction for denigrating Turkish identity had not answered any "pressing social need". The Court also stressed that States were required to create a favorable environment for participation in public debate by all the persons concerned, enabling them to express their opinions and ideas without fear. In a case like the present one, the State must not just refrain from any interference with the individual's freedom of expression, but was also under a "positive obligation "to protect his or her right to freedom of expression against attack, including by private individuals[101].

If we look at Dink's case, it shows us the power of hate speech. It seems that being target of hate speech has a relation to being a murder of hate crime to the extent that the former have an impact on the latter in Dink's case. By accusation of being enemy to Turkishness in the media after the news on Sabiha Gökçen and articles on "On Armenian Identity", the process that made Dink target of hate speech started. There is a very striking point at this juncture. The murderer of Dink accused Hurriyet newspaper in the court and he suggested that instead of him, the headlines which showed Dink as a traitor is guilty. He added that "Ben Agos'u bilmezdim. Dink'i hain ilan edenler nerede? O manşeti atanlar nerede[102]?"

[101] Dink v Turkey, 14.09.2010, available from http://hudoc.echr.coe.int/sites/eng-press/pages/search.aspx#{"display":["1"],"dmdocnumber":["873693"]}

[102] In English "I had not known Agos. Where are those who announced Dink traitor?Where are those who captioned these headlines?", available from http://www.dunyabulteni.net/?aType=haberYazdir&ArticleID=154173&tip=haber

The explanation of the murderer of Dink is very notable to understand how headlines and news which expresses hate speech to Dink might be responsible to his murder. In this respect, Dink case clearly shows how hate speech can easily turn to hate crime. As Çetin suggets, killing of Hrant Dink was a typical hate crime which was caused by intensive discrimination, hostility and hate speech (2012: 126). Hrant Dink's wife, Rakel Dink also approve this statement by stating that Hrant Dink became a target of conscious and planned hate speech and then he was killed because of this process (2010:1). The relationship between this conscious and planned hate speech and hate crime draws attention. However, the Court which prosecuted Dink's murderer never questioned this relationship and the Court didn't investigate the responsibilities of columnists who accused Dink of being a instrument of external powers and enemy to Turkishness. In other words, public preparation of a hate crime in the name of Dink murder is never taken into account by the Court.

This case is a good example of the blurred distinction between speech and act. This case also points that, contrary to American model and the way Mill understands freedom of expression, speech and action cannot easily be distinguished from each other. Let me go back to Mill's understanding of freedom. As we have mentioned, he sees human as a progressive being and he believes in free development of individuality which can be achieved by being independent from the interference. The only legitimate way of limitation of one's freedom is to prevent harm to others. According to him, if one's act harms other people, there is a need of limitation of freedom. To understand his emphasis on freedom, it is helpful to look at his ideas on freedom of expression. Mill sees freedom of expression as a precondition for individuality. Freedom of expression can be limited only if it has a potential to give harm to others. Otherwise, the limitation of freedom of expression is not legitimate. In this respect, he draws distinction between act and opinion by implying only act can give harm to others. However, Dink case shows us that we cannot easily draw a clear line between speech and action. It shows that it is wrong to assume that speech has no power to harm; and only action can give harm as it is assumed in the case in American model which is a representative of free speech culture.

It can be deduced that Mill's progressive understanding may not be valid in daily life; instead, there is a need of the principle of publicness realized and protected in public sphere. Now, we can remember discussion on Arendt. According to her, the pluralistic public realm can be achieved by the principle of publicness which is about how public sphere be shaped. For her, the ideas that come to public sphere shouldn't destroy the equality principle of publicness and equality in public realm. One of the most important contributions of Arendt is her idea that speech itself is an act. According to her, speech corresponds to the distinctive characteristic of human beings; it is a necessity for plurality. Human can exist in public realm by the speech and it is a complement of the action; not distinct from act. Hrant Dink case also demonstrates the appropriate approach of Arendt by rejecting distinction between speech and action and it testifies the validity of Continental model which realizes the importance of pluralistic public realm and investigates the damage of hateful speech.

4.5. Conclusion

In this chapter, it is aimed to debate whether Turkey is closer to American free speech model or Continental model. It can be seen that Turkish model is not in accord with neither of them; there is no normative framework for freedom of expression in Turkey. Rather the approach to freedom of expression is understood in a pragmatic vision. At this point, the underlying reason behind this pragmatism is nationalist comprehensive doctrine which is adopted by judiciary. In Turkish debate, an interesting case has occurred which is not predicted by neither Arendt nor Mill. Nationalist comprehensive doctrine prevents Turkey to be compatible with neither American model nor with Continental model. The intention behind law making process is affected by this comprehensive doctrine and also members of judiciary decide by bearing in mind of this doctrine. As a result, a freedom of expression in Turkey is carried out in a pragmatic way so as to enhance the given nationalist doctrine. Nationalism as a comprehensive doctrine is adapted by the law which alienates us from the sense of justice and impartiality of Courts. Therefore, nationalism, unity of state and "indivisible entity of Turkish state with its nation and territory" seems to be prior to freedom of expression in Turkish case. We can see the reflection of nationalism on hate speech debate. Because the articles in law protect Turkish ethnic origin, hate speech towards other minority groups is not generally

punished. As we have seen, the Courts in Turkey refer to Turkishness in their explanations of the decisions. Therefore, in Turkey, freedom of speech is conceived within the boundary of nationalist comprehensive doctrine and all ideas contrary to this doctrine is restricted which is the case especially in Kurdish question.

It is widely known that ECHR has accused Turkey in many cases because of violating the right to freedom of expression. The Courts in Turkey has a tendency not to punish those who express hate speech in so far as that speech is in conformity with the nationalist doctrine. In this respect, both the legal regulations and political culture which normalizes hate speech is distant from Continental model. This does not mean that Turkey is closer to American model which gives priority to right to freedom of expression over other rights and focuses on the principle of harm. In Turkey, one's freedom of expression can be easily restricted if threat to state's security or national unity is perceived. The criticism towards government and characteristics of Turkish state is not evaluated within the boundary of freedom of expression. Sanctity of the state is generally emphasized in the decisions of the Courts. Turkishness, religion, nation are evaluated within the boundary of sanctity of the state and criticism towards these values are not tolerated in the exercise of juridical power.

We have mentioned that Article 216 of Turkish Penal Code could and can still play a role to cope with hate speech. However, instead of being a tool for deterrence against hate speech, the relevant articles are generally used to punish opponent or minority groups. One may argue that instead of legal regulations, there is a need of more effective implementation of existing laws. In implementation, hate speech is generally understood as insult to Turkishness and Turkish state, and freedom of expression is limited in the case of insulting the values related with them. At this point, "Turkishness" dominates the public sphere which diminishes other identities or viewpoints. If we think with Arendt's perspective we might argue that pluralistic public realm is destroyed by the dominance of Turkishness because an essentialism, rather than open-ended realm is supported. As a result, normative framework that includes the principle of publicness remains secondary to the concern for the unity of state.

In Turkey, Jews, Armenians, Kurds, Greeks, Alevis, LGBT individuals (Lesbian, Gay, Bisexual, Transgender) are mainly target groups of hate speech (Gelişli&

Kapril,2012:6) . Parallel to this, there are systematic attacks to these groups in Turkey; in other words, hate crimes against people belonging to these groups have widely prevailed[103]. Murders of clergy Santoro in Trabzon, murder of Geske, Aydın and Yüksel in Zirve Publishing House in Malatya and Murder of Sevag Balıkçı in military on the day of Armenian Genocide in 1915 were recent hate crimes which have probably flourished from the atmosphere that legitimize hate speech. Also, despite the crime committed, insensitivity to the crime is widespread in certain sections of the media and society. The important aspect in these crimes is that in Turkish legal system, they are not evaluated as "hate crime"; generally, they are seen as ordinary murders. Even these killings are not judged as hate crime; in addition, murderers are not sentenced to disincentive punishment. For example, the Court decides that murder of Sevag Balıkçı who is a Turkish citizen of Armenian origin is seen as an accident[104]. Like Dink's case, none of these murders have been evaluated as hate crime. In Dink's case, the court which judged murderers of Hrant Dink decided that there is no "organization" behind this murder; so it is not organized crime which makes decision of the Court disputable. Therefore, suspects are not subjected to maximum punishment[105]. *Yargıtay* (Court of Appeals) made its decision on Hrant Dink's murder on May 15 2013. It was decided that those who killed Hrant Dink were organized so there was an organization behind Dink's murder. This organization is accepted as an organization established for committing a crime (*suç işlemek amacıyla oluşturulan örgüt*), not armed terrorist organization[106]. Accepting that murder of Dink was organized crime is a positive development; however, rejecting this organization as an armed terrorist organization prevents the suspects from being charged by maximum punishment.

Before finishing the debate on Turkish case, it is inevitable to mention that in civil society, there is a pressure to make a regulation on hate speech and hate crime.

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[103] The killing of Armenian journalist is not coincidence while the main target of hate speech is Armenians.

[104] Available from http://www.radikal.com.tr/radikal.aspx?atype=radikaldetayv3&articleid=1126762&categoryid=77

[105] Available from http://www.radikal.com.tr/radikal.aspx?atype=radikaldetayv3&articleid=1079665&categoryid=77

[106] Available from http://www.radikal.com.tr/turkiye/yargitay_siyasi_olmasi_teror_icin_yeterli_degil-1133797

To achieve this, legislative company for hate crime and platform named "I Demand Hate Crime Legislation" made pressure to authorities to make a law for increasing the awareness to hate speech and hate crime and punishing hate crimes more effectively. The Platform has been established in 2012 and it has over 60 participating civil society organizations including human rights organizations, women organizations, and organizations of LGBT individuals, Alevis organization, Hrant Dink Foundation, International Amnesty Organization and trade unions. The platform demands legal arrangements fulfilling the international human rights standards in Turkey[107] and they also prepared a draft law on hate crime. In this law draft, it is demanded that if a crime is committed by the incentive of hate, the punishment should be increased[108]. This platform is important because it shows that there is a consciousness in society about hate speech and hate crime and many different organizations demand regulation and law concerning hate speech. This enables us to have a positive outlook to the future about the possibility to apply relevant articles to hate speech cases and make new, more satisfactory regulations on hate speech and hate crime.

In this chapter, legal regulations and articles, their practices, decisions of the Courts on the lawsuits and certain cases concerning hate speech have been discussed. However, the case of Hrant Dink, Turkish journalist of Armenian origin was specifically examined because this case gives significant clues to show how one person was killed by being a target of hate speech. Another reason behind selecting Hrant Dink case is that his killing creates a serious shock in society and it increases awareness of the fact that hate speech can create hate crime. Although Dink was sentenced to punishment because of denigrating Turkisness, there was no decision to punish those who makes him target, treat and insult him and all Turkish citizens of Armenian origin in the name of him. The case of Hrant Dink shows that speech has a power to affect action and all hate speech has a potential to be hate crime. In that respect, we should be aware of the effects of the hate speech. If there had been legal protection against hate speech, maybe Hrant Dink would have lived now. Turkey can start from giving up sensitivity to Turkishness and leaving nationalist bias behind

[107] Available from http://nefretme.net/page/i-demand-hate-crime-legislation

[108] Available from http://www.sosyaldegisim.org/wp-content/uploads/2012/11/yasa-taslagi.pdf

and can seriously protect all groups living in Turkey from discrimination. Making Article 216 of Penal Code applicable and imposing sanctions to all kinds of expression that initiate hate against particular sections of society can play a very important role to fight against hate speech which would make Turkey closer to Continental model.

CHAPTER 5

CONCLUSION

This study has been an attempt to examine hate speech in three respects. First, political theories of John Stuart Mill and Hannah Arendt with respect to the boundaries of freedom of expression and reflections of hate speech were discussed. Second, I examined and discussed legal restrictions on the freedom of expression to prevent hate speech. International conventions and establishments, criminal laws of specific countries and their implementations are addressed in this context. Lastly, Turkish case in terms of the existing situation about freedom of expression, legal regulations, the articles of Penal Code, Court's decisions concerning hate speech in Turkey were analyzed. In that chapter, the case of Hrant Dink who was murdered as a result of systematic hate speech was presented so as to show the relationship between hate speech and hate crime.

The debate on the freedom of expression and its limitations has taken an important place in political philosophy and legal theory. This theoretical debate is meaningful for this study because of its relation with the hate speech. The discussion on hate speech is about which ideas can be brought to public sphere and what kind of expressions should be limited by the law. At this point, I referred to philosophical frameworks of John Stuart Mill and Hannah Arendt. Mill is an important philosopher for the debate concerning freedom and its boundaries. Mill is known as a utilitarian thinker whose motto is "greatest happiness of the greatest number". He represents a classical liberal view because of his emphasis on individuality and liberty which is exempt from interference of government and society. In more specific, he always emphasizes the importance of the liberty of expression and discussion to the extent that diverse and conflicting views are the precondition for free society. However, for Mill, the freedom including the freedom of expression is not absolute. He uses the

concept of "harm principle" to determine the boundaries of freedom and suggests that the actions of individuals can be only limited when they tend to give harm to other people. In other words, for Mill, preventing harm to other is the only legitimate way of restriction of one's liberty.

The important point in Mill's view for the debate of hate speech is that his theoretical framework assumes a possible distinction between action and speech. While action gives direct harm to others, speech has not this potential. This brings us to accept the distinction between hate speech and hate crime. However, if we recall the ongoing contemporary view that it is difficult to distinguish hate speech and hate crime because hate speech is the motivation behind the hate crimes promoted by intolerance and bias towards certain groups in society. In this respect, breaking the relation between action and speech implies a kind of ignorance or a naivety concerning the relationship between hate speech and hate crime which is unrealistic for current reality of complex societies.

In this study, it is also aimed to show what was derived from Arendt's political theory with respect to the question of "what is wrong with hate speech". For this purpose, certain concepts of Arendt were presented and their reflections on hate speech debate were discussed. One of the most important concepts of Arendt referred in this study is judgment. Judgment calls for dialogue with others and creates an expectation to come a minimum agreement in communication thanks to different standpoints and perspectives of other individuals. However, hate speech can easily close the ways of dialogue and preclude an expectation of agreement based on communication. In this respect, it can be proposed that hate speech destroys our faculty of judgment. Moreover, hate speech also destroys communicability because it eradicates the opportunity to express individual's opinion in public realm and destructs the imagination of community in which individuals are listening and can be listened. While evaluating hate speech with respect to Arendt's theory, the concept of *"sensus communis"* was also referred. This concept refers to a sense which enables individuals to feel belonging to any community. The victim of hate speech probably feels excluded from community instead of being its part, which shows that hate speech destructs the idea of public sense. Another important discussion is whether hate speech can be seen as "truth claim" in Arendtian sense. Hate speech is

evaluated as a truth claim in this study to the extent that hate speech excludes free agreement and deliberation, closes means of persuasion, has a potential for bearing a factor of cohesion and represses the opponent opinions.

If we look at the debate on hate speech from Arendt's conceptualization of public sphere, we can assert that hate speech may destroy a genuine and pluralistic public realm which is consisted of equal and distinct citizens. Also, hate speech is not in accord with egalitarian understanding of public sphere because some people are discriminated because of their distinct characteristics. It was also realized that two inferences from the principle of publicness on hate speech could be made. The most important aspect of publicness is being seen and heard by others, related with publicity- which is also characteristic of space of appearances and meaning of public life. However, when hate speech is the case, the existence of different perspectives that is precondition for the principle of publicness becomes problematic. Moreover, for the targets of hate speech, it is difficult to being seen and heard by others. From this kind of reading, restriction of freedom of expression seems necessary to enable visibility and protect different views, perspectives in public sphere. On the other hand, the principle of publicness may assume that the claim which contains even hatred based expressions cannot be excluded before coming to public. From this perspective, one may assume that hate speech shouldn't be limited because there is a need to debate all kinds of expressions in public life. At this point, although Arendt's conceptualization of publicness gives normative criteria and provides theoretical framework for need of restriction of freedom of expression in the case of hate speech, her reflection remains ambivalent which encourages examining legal framework including regulations, articles of penal codes of specific countries and their implementations concerning hate speech.

One of the most important conceptualizations of Arendt for this study is speech which is necessary for unique and distinct equals. Moreover, speech and action complement each other; without one of them, the other cannot be performed. If we think about hate speech, we may assume that because hate speech may reduce its victims to silence, hate speech may lead to destroy plurality, individual distinctiveness, and one's potential to be political. While from the perspective of Mill, the debate on hate speech is not very meaningful, because only action can give

direct harm to others, not speech, Arendt's political theory goes a step further and gives clues about the possible harms of hate speech in the context of her conceptualizations such as egalitarian public realm and the principle of publicness.

After examining hate speech from the perspective of political philosophy, it is important to look at how and to what extent freedom of expression is limited by reference to hate speech in international legal norms and criminal law in certain countries. In this respect, international human rights standards represented by Universal Declaration of Human Rights, International Covenant on Civil and Political Rights and European Convention on Human Rights, and international organizations, including Committee of Ministers of the Council of Europe, United Nations Human Rights Committee, European Commission against Racism and Intolerance, European Court of the Human Rights were examined. Their common point is that while they clearly recognize the importance of freedom of expression in democratic, pluralistic societies, they stress that this freedom is subjected to the limitation in the circumstance of expressions which initiate, promote or justify hate towards individuals, minorities or some part of society. By reference to them, it was realized that they provided the legitimate bases for the restriction of freedom of expression in the case of hate speech.

In this chapter, I also looked at criminal laws of specific countries namely Germany, Denmark, Canada and United States and it was seen that that there are two major tendencies towards the limitation of freedom of expression. Germany, Denmark and Canada represent "Continental model" which shows the tendency that freedom of expression is not absolute and it is subjected to certain restrictions. These countries prohibit hate speech by law and their attitude towards hate speech is in accord with international human rights standards. The other model represented by US somehow challenges the Continental model. In US case, freedom of expression has a priority over other rights and this freedom cannot be limited to protect anybody from discrimination; only the speech which gives direct harm can be limited which reminds us Mill's conceptualization of harm principle. In this model, for the sake of the right to freedom of expression, hate speech is not subjected to any punishment. It was discussed that USA represents the unique position on freedom of expression. International human rights norms, international conventions and many countries in

Continental Europe have a tendency to restrict freedom of expression in the case of hate speech.

If we evaluate these two chapters together, we can see that from Mill to Arendt, understanding of liberties has changed. International human rights norms reject Mill's understanding of freedom to the extent that democracy is not understood as avoiding any kind of interferences anymore. On the contrary, democracy is seen as a regime need for interference for protecting individuals and their liberties. International conventions, legal regulations and criminal laws of certain countries also show that restriction is a part of democratic polity. For example, the decisions of ECHR, especially in the case of *Özgür Gündem* shows that "not to interfere" is not enough for fulfilling duty of state, in fact, there is a need to protect different opinions, views or cultural groups. As examined under the "Continental model", certain countries also restrict freedom of expression in hate speech case in their criminal laws. Contemporary approach to democracy accepts the restrictions on freedoms which can be derived from Arendt's political theory. It is important to remember that freedom of expression is indispensible for democracy; however, democracy also needs protecting individuals from discrimination which necessitates restriction of freedoms including freedom of expression.

Lastly, after examining the legitimacy of limitation of freedom of expression in international conjecture, I wanted to look the situation in Turkey about hate speech. In this respect, legal regulations and articles, their practices, specific decisions of the Courts and certain cases concerning hate speech were discussed in the last chapter. I started from whether Turkey fits into Continental model or American model in the light of two different models on freedom of expression. Before answering this question, I reviewed the legal practices concerning freedom of expression in Turkey. Although freedom of expression is guaranteed by the constitution, it can be limited in the case of threats to its "national security", "integrity of the State with its territory and nation", and "public order". I stated that Turkey is deprived of universal standards for the protection of freedom of expression. It was reminded that Turkey is in the first rank in terms of violating its citizens' right to freedom of expression according to decisions of ECHR and cases related with Kurdish problem constitutes considerable part of these violations. It is

inevitable to mention the Article 301 of Turkish Penal Code, "Denigrating the Turkish Nation, the State of the Turkish Republic, the Institutions and Organs of the State" which seems one of the main obstacles to freedom of expression in Turkey. It was realized that with reference to this article, "Turkishness" describes as an entity and it is understood within a divine meaning. Article 301 and its implementation are distant from protecting all ethnic and minorities groups in Turkey. Extensive emphasis on Turkishness and not protecting other groups from discrimination shows a strong nationalist bias which is dominant in the intention of law making and decisions of jurisdiction in Turkish case. In this regard, Rawls's claim on justice can be emphasized. According to him, comprehensive doctrines can survive in civil society; however, justice can only be secured by avoiding imposing any comprehensive doctrine into the law and state. By adopting nationalist doctrine into law, it was suggested that the impartiality of Courts and the sensibility to justice are diminished if we apply Rawls's principle of justice as fairness.

If we turn to the debate about Turkey's position with respect to Continental and American model, it was stated that Turkish model is not in conformity with neither of them. It is not closer to Continental model because hate speech is not a criterion for the restriction of freedom of expression; in other words, legal regulations in Turkey avoids any reference to any dissemination of speech advocating hate as a reason for limiting freedom of expression. On the other hand, Turkish case does not conform with American model either, because the courts and legal norms can easily restrict one's freedom of expression if it cultivates threats to its "national security", "integrity of the State with its territory and nation"," and "public order", as stated in Turkish constitution. It was suggested that there is no consistent normative framework for freedom of expression; rather this freedom is received in a pragmatic vision whose main concern is to protect nationalist doctrine in Turkey. We proposed that nationalist comprehensive doctrine blocs to discuss issues concerning freedom of expression in a reasonable way and it prevents Turkish case to be compatible neither American model nor Continental model.

It is important to evoke that the Article 216 of Turkish Penal Code can be used as an effective instrument to punish hate speech in Turkey. However, as I tried to demonstrate, this article is generally used to punish opponent or minority groups.

Unfortunately, hate speech is generally regarded as insulting "Turkishness", values that have constituted the Turkish nation and Turkish state. In this respect, the expressions which fall into hate speech category, but which do not carry any insult to "Turkishness", or the nation are not subjected to punishment. Moreover, atmosphere which legitimizes hate speech can easily produce hate crimes towards certain individuals or minority groups in Turkey.

In order to make subject more explicit, I chose Hrant Dink, Armenian journalist living in Turkey, who was murdered as a result of systematic hate speech. Hrant Dink case was selected because of two reasons. First, his murder creates a serious shock in society and it increases awareness to the issues related with hate speech and hate crime. Second, this case is a good example to show how one person becomes a victim of hate crime by being a target of conscious and planned hate speech. Being a target of hate speech campaign started with his news in *Agos* and continued with his prosecution because of the violation of Article 301. During this process, many columnists targeted Dink and represented him as an enemy to "Turkishness" and a tool of external power because of his Armenian identity. His murder was not evaluated as a hate crime and his murderer was not subject to maximum punishment. Moreover, public preparation of a hate crime by publishing articles which accused Dink was not considered by the Court within the scope of instigation. Hrant Dink case is important to show that it is difficult to draw a line between speech and action with reference to blurred distinction between speech and crime. In this respect, this case indicated the appropriate approach of Arendt by rejecting distinction between speech and action and the validity of Continental model which accepts the importance of pluralistic public realm and realizes the damage of hateful speech.

We can suggest that there is a need to apply relevant articles to lawsuits concerning hate speech and to impose sanctions to all kinds of expression that initiate hate against minority or vulnerable groups, and particular sections of society. It is crucial for the adaptation of human rights in full sense in Turkey to loosen sensitivity to "Turkishness" and give up nationalist bias which as a comprehensive doctrine threatens impartiality of Courts and sensibility to justice. Only by this way, all

groups living in Turkey can be protected from discrimination and Turkey can catch up with international human rights standards.

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APPENDICES

APPENDIX A

TEZ FOTOKOPİSİ İZİN FORMU

ENSTİTÜ

Fen Bilimleri Enstitüsü	☐
Sosyal Bilimler Enstitüsü	☑
Uygulamalı Matematik Enstitüsü	☐
Enformatik Enstitüsü	☐
Deniz Bilimleri Enstitüsü	☐

YAZARIN

Soyadı : Binbuğa Kınık
Adı : Burcu Nur
Bölümü : Siyaset Bilimi ve Kamu Yönetimi

TEZİN ADI (İngilizce) : What is Wrong with Hate Speech: Reflections on Political Theory, Legal Regulations and Turkish Case

TEZİN TÜRÜ : Yüksek Lisans ☑ Doktora ☐

1. Tezimin tamamından kaynak gösterilmek şartıyla fotokopi alınabilir. ☑
2. Tezimin içindekiler sayfası, özet, indeks sayfalarından ve/veya bir bölümünden kaynak gösterilmek şartıyla fotokopi alınabilir. ☐
3. Tezimden bir (1) yıl süreyle fotokopi alınamaz. ☐

TEZİN KÜTÜPHANEYE TESLİM TARİHİ: