

DANGEROUSNESS AND CRIMINAL JUSTICE

A Dialogue Between Italy and Türkiye

Edited by Valentina Bonini, Rahime Erbaş and Selin Türkoğlu

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P. IVA 00286820501 · Codice Fiscale 80003670504

Tel. +39 050 2212056 · Fax +39 050 2212945

E-mail press@unipi.it · PEC cidic@pec.unipi.it

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Bypassing Criminal Law Through the Concept of Dangerousness: Turkish Sample Under Post-15/7 State of Emergency Law

*Erdem İzzet Külçür**

1. Introduction

As is commonly the case in most jurisdictions, the Turkish legal system follows the traditional division of tasks between administrative law and criminal law. In a substantial sense, while administrative law (police law) concerns itself with averting danger (*Gefahrenabwehr*), threat or risk, and thus, preventing future wrongdoings (mostly harm), criminal law, on the other hand, deals with sanctioning bad behaviour/wrongfulness by suppressing past wrongdoings.¹ This division of tasks is likewise reflected in the procedural area. While concrete initial suspicion or reasonable suspicion on an individual is the pass code for resorting to procedural measures in criminal law, the presence of concrete or abstract danger or probable cause gives preventive measures the green light in administrative (police) law.²

* Ass. Prof. Dr., Ibn Haldun University, Law Faculty, Department of Criminal Law, Istanbul, Türkiye; Visiting Scholar at the Franz von Liszt Institute for International Criminal Justice (Prof. F. Jeßberger), Humboldt-Universität zu Berlin, Germany.

1. See Matthias Bäcker, *Handbuch des Polizeirechts*, ed. by Erhard Denninger, Frederik Rajor, 7. Auflage, München, Beck, 2021, p. 236, mn. 3, 5. Günther Jakobs, *Staatliche Strafe*, Padernborn, Brill, 2004, p. 31.

2. See Wolf-Rüdiger Schenke, *Polizei- und Ordnungsrecht*, 11. Auflage, Heidelberg, C.F. Müller, 2021, p. 5, mn. 11., Bäcker, *PolR-HdB*, p. 237, mn. 9; p. 243, mn. 28., Henrik Ahlers, *Grenzbereich zwischen Gefahrenabwehr und Strafverfolgung*, Frankfurt am Main, Peter Lang, 1998, p. 207.

As is known, criminal punishment is established on the guiltiness (*Schuld*) of offender, whereas security measures are on the social dangerousness of person.³ Due to these fundamental distinctions, administrative law is equipped with preventive measures which play a warning role on people in order to avoid creating danger, whereas criminal law imposes sanctions of punitive, deterrent and stigmatizing character which are then denounced in the criminal record of offenders.⁴ As a result of their divergent features, different bodies of state are authorized to deal with these various kinds of wrongdoings. Administrative wrongdoings are dealt with by law enforcement authorities under administration/executive, whereas criminal wrongdoings by the prosecutor and court under judiciary. Similarly, their legal remedies differ from administrative to criminal courts accordingly.⁵ This is particularly important due to the significant legal consequences, including, but not limited to, fewer procedural safeguards in administrative courts in comparison to those in criminal courts. So indeed, in administrative courts, judicial reviews are mostly conducted on the basis of a written examination, which barely enables a witness hearing. Examples can be populated.

As roughly presented above that the fields of criminal and administrative law have distinct parameters, dealing with a wrongdoing in one of these fields of law makes a considerable difference regarding the legal responses individuals may have to face. Likewise, it shows the importance of the choice of field. However, the relationships between these two categories of law are not always that clear; in fact, they have already become blurred for a long time.⁶

2. Factual Background: The Danger

The precursor event to the legal bypassing in Türkiye was the armed coup d'Etat attempt against the government on the night of 15th July 2016.⁷ It was a widespread air and ground attack by the junta against the public

3. Gerhard van Gemmeren, *Münchener Kommentar Strafgesetzbuch*, ed. by Volker Erb, Jürgen Schäfer, 4. Auflage, München, C.F. Beck, 2020, § 61 mn. 1.

4. Ulrich Sieber, *Administrative Sanction Law in Germany*, in *The Limits of Criminal Law*, ed. by Matthew Dyson, Benjamin Vogel, Cambridge, Intersentia, 2018, pp. 303-304.

5. Ahlers, *Grenzbereich zwischen Gefahrenabwehr und Strafverfolgung*, pp. 30, 47.

6. Bäcker, PolR-HdB, p. 333, rn. 333., Ulrich Sieber, *The New Architecture of Security Law: Crime Control in the Global Risk Society*, in *Alternative Systems of Crime Control*, ed. by Sieber/Mitsilegas/Mylonopoulos/Billis/Knust, Berlin, Duncker&Humboldt, 2018, p. 3.

7. ECtHR, *Ozdil and Others v. Moldova*, 11.06.2019, No: 42305/18, para. 8., Turkish Constitutional Court, *Aydın Yavuz and Others*, 20.06.2017, No: 2016/22169, para. 12-20.

buildings, including the Turkish Parliament, Presidential Palace, General Directorate of Security, Special Military Forces, and National Intelligence Agency as well as against civilians. To accomplish its mission, the junta besieged the strategic spots, including the airports and bridges, with armed military vehicles, took the Chief Commander of the Armed Forces hostage, and attempted to assassinate the State President.⁸

According to the General Staff, over 8.000 members of the armed forces were involved in the coup d'état attempt, deploying 35 jets, 37 helicopters, 74 tanks, and three armed ships. The coup d'état attempt was restrained on the same night by the official military and other security forces as well as by public resistance, ending up with 251 fatalities and 2.194 injuries while inflicting \$14 billion in direct public damage. Following the extraordinary summit of the Turkish National Security Council on 20th July 2016, it was declared that the coup d'état attempt was organized and conducted by the affiliates of the *Fethullahist Terror Organization* (FETÖ).⁹

FETÖ is named after Fethullah Gülen, the cleric leader of the Islamist Gülenist Movement, an O(cto)pus Dei look-alike scheme,¹⁰ who has been living in a self-exile in the USA for over 20 years and is believed to be Messiah by his followers. The dangerousness that FETÖ poses is depicted by the highest judicial authorities in Türkiye as being that of a sophisticated, self-consecrated, clandestine organization, structured on a cell system based on obedience and devotion, having infiltrated any public institution, using cryptonyms, secret communication tools, and money of unknown origin comparable to that of intelligence agencies.¹¹ The aim of FETÖ is to establish

8. ECtHR, *Ipek v. Türkiye*, 21.09.2021, No: 4158/19, para. 3-4.

9. See Decision of Council of Ministers of 20.07.2016, No: 2016/9064, para 1.

10. Maximilian Popp, *Der Pate*, in «Spiegel Spezial», 1, 2016, p. 113. For the structure, aim, strategy, and modus operandi of FETÖ, see Report of the Turkish Parliamentary Investigation on FETÖ, May 2017, pp. 66-116. For the group dynamics of FETÖ, see Yasemin Abayhan, *Bir "Cemaat" Terör Örgütüne Nasıl Dönüştü? Gülen Cemaati'nin Eski Grup Üyelerinin Anlatımına Dayalı Değerlendirilmesi* [How was a Sect Turned into a Terror Organization? An Evaluation Based on the Narrations of Ex-Group Members of Gülen Sect], in «Liberal Düşünce Dergisi», vol. 22(87), 2017, pp. 8 ff.

11. Turkish Constitutional Court, *Tamer Mahmutoglu*, 23.07.2020, No. 2017/38953, para. 14; Court of Appeal General Assembly of Criminal Matters, 26.09.2017, No. E.2017/16.MD-956, K.2017/370.

a new political, economic, and social order by infiltrating its affiliates, aka the “Golden Generation”, into powerful positions in the state.¹² To achieve their ultimate goal, FETÖ affiliates were notorious for a wide range of heinous crimes, including, *inter alia*, manipulating entry exams to various public institutions, plotting against opponents through defamation, smear campaigns, fabrication of incriminating evidence, mobbing, dismissal, communication tapping, illegal search of properties, forging documents, illegally capturing personal data, plotting murders, and divulging state secrets.¹³

On the other hand, the infiltration of, tolerance for, or even support for FET in public and private institutions was a well-known fact prior to the coup attempt.¹⁴ This was also evident from the immediate arrival of prohibition lists by Turkish intelligence agencies of FETÖ affiliated persons and institutions following the coup attempt.¹⁵ However, concrete steps against FETÖ were not taken until a set of conflicts of interest took place with the government.¹⁶

12. Court of Appeal 16. Criminal Chamber, of 06.11.2019, No. E. 2019/1582 K. 2019/6838.

13. Yeşim Arat, Şevket Pamuk, *Türkiye between Democracy and Authoritarianism*, Cambridge, Cambridge University Press, 2019, p. 119., Fatma Gülhan Abushanab, *A Muslim Realist*, London, Rowman & Littlefield, 2023, p. 111.

14. See Report of the Undersecretariat of National Intelligence Agency (MIT) on the connections between Fethullah Gülen and CIA, of 03.04.1991, No. 41.04.000/9007-54206. Also see the Annex-A to the advisory decision of the Turkish National Security Council on the necessary measures to be taken against reactionary anti-regime activities, of 28.02.1997, no. 406, para. 2, 6, 8, 9. For the criminal prosecution against Gülen due to alleged crimes of abolishing the laicist order, sedition with religious motive for establishing a religious state as well as a terror organization, see Ankara Second Chamber of State Security Court, No. E.2000/124. For the indictment, access <https://file.io/ecCQluRBGUJN>. Yet, he was acquitted due to the amendment adding the element of violent act to the definition of terror in 2006. Also see the advisory decision of the Turkish National Security Council on the Gülenist Activities in Türkiye, of 25.08.2004, no. 481, para. 2. However, the latter decision calling for measures against FETÖ seriously infiltrated in the State was not enforced by the government at the time. See Kadri Gürsel, *Erdogan getting hit in AKP-'Cemaat' war*, *Al-Monitor*, 08.12.2013. <https://www.al-monitor.com/originals/2013/12/Turkiye-akp-cemaat-gulen.html> (accessed at 13.02.2023). For the restatement of the threat as Parallel Structure to State (Paralel Devlet Yapılanması), see the advisory decision of the Turkish National Security Council, 30.10.2014, para. A. For the classification of PDY as a terror organization, see the advisory decision of the Turkish National Security Council, of 26.05.2016, para. 1.

15. See Annexes of respective Decree-Laws. Also see the activities of intelligence and security agencies in above footnote.

16. See a statement by the deputy of the governing party through <https://tinyurl.com/msamzu7z> (accessed at 13.02.2023).

3. Legal Response: Averting the Danger

After the proclamation of a state of emergency by the Council of Ministers at that summit, the Turkish government enacted 37 decree-laws within a 2-year-old state of emergency period, for whose justification the need for an effective response to threats against democracy, the rule of law, basic rights and freedoms, and national security was invoked upon.¹⁷ The core objective of these decree-laws is to set down the substantial and formal conditions of the measures that may be taken in the scope of the fight against the coup attempt and terrorism.¹⁸ According to the Commission of State of Emergency's report, 131.922 individual security measures have been imposed through the decree-laws during this period.

To serve as a legal basis for imposing security measures, dangerousness was defined as «(whoever or whatever is) considered to be a member of, or have relation, connection with terrorist organizations, structure, formation, or groups ascertained by the National Security Council as posing threat against the national security».¹⁹ Accordingly, the Islamist Gülenist Movement was recognized as a terrorist organization by the acronym FETÖ/PDY.²⁰

The very first crackdown took place on the private organizations allegedly serving as financial and propaganda tools of FETÖ. In this regard, 2.761 legal entities, listed to be associated with FETÖ according to intelligence reports, including hospitals, universities, colleges, student dormitories, the press, broadcast, radio-TV channels, and news agencies, newspapers, associations and foundations, trade unions, etc., were immediately disincorporated²¹ and their assets

17. See Decree Law 667, art. 2(1). Also see Decree-Law no. 667, art. 2.

18. Decree Law 667, art. 1.

19. See Decree Law 667, art. 2(3).

20. Decree Law 667, art. 2(1); Decree Law 668, art. 2(1); Decree Law 669, art. 2(1); Decree Law 670, art. 2(1); etc. For the abbreviation of PDY, see above fn. 14.

21. Decree Law 667, art. 2(1): «a) Private health institutions and organizations listed in the Annex I, b) Private education institutions and organizations as well as private dormitories and lodgings for students listed in the Annex II, c) Foundations and associations and their commercial enterprises listed in the Annex III, c) Foundation-run higher education institutions listed in the Article IV, d) Unions, federations and confederations listed in the Article V, which belong to, connect to, or contact with the Fetullahist Terrorist Organization (FETÖ/PDY), established posing a threat to the national security, have been found to exist, have been closed down». Art. 2(3): «Private and foundation-run health institutions and organizations, private education institutions and

were confiscated²² to public treasury without any judicial decision.²³ Earlier administration of affiliated companies and holdings by the trustees appointed by the judiciary was left to the governmental asset recovery institution.²⁴ In addition to the financial measures, those who were listed as affiliates of FETÖ

organizations as well as private dormitories and lodgings for students, foundations, associations, foundation-run higher education institutions, unions, federations and confederations that have been found to be a member of structure/entities, organizations or groups, or terrorist organizations, which are found established to pose a threat to the national security, or whose connection or contact with them have been found to exist and which are not listed in the Annexes shall be closed down upon the proposal of the commission to be established by the minister in the relevant ministries and with the approval of the Minister». Decree Law 668, art. 2(1): «b) Private radio and television organizations listed in Annex (2) have been closed down. c) Newspapers and periodicals listed in Annex (3) and their publication and distribution channels have been closed down». Art. 2(4): «Private radio and television organizations, newspapers and periodicals, publication and distribution channels that have been found to be a member of structure/entities, organizations or groups, or terrorist organizations, which are found established to pose a threat to the national security, or whose connection or contact with them have been found to exist and which are not listed in Annexes (2) and (3), shall be closed down upon the proposal of the commission to be established by the minister in the relevant ministries and with the approval of the Minister».

22. Decree Law 667, art. 2(2): «All movables and real estate as well as all assets, receivables and rights, and all documents and papers of foundations closed down... Health application and research centers that belong to the foundation-run higher education institutions closed down, and all movable properties as well as all assets, receivables and rights and all documents and papers that belong to other institutions and organizations closed down shall be deemed to have been transferred to the Treasury without cost, and all real estate that belong to them shall directly be registered, free and clear of any restrictions and encumbrances on the immovables, in the name of the Treasury in the land registry». Art. 2(3): «... Provisions of paragraph 2 shall apply to institutions and organizations closed down under this paragraph». For those institutions, see above fn. 21. For a similar measure imposed on the FETÖ affiliated newspapers, periodicals, publishing houses and private radio and television organizations, see Decree Law 668, art. 2(3), 2(4).

23. According to FATF Report, total assets of IGM confiscated by decree-laws in Türkiye are around €10 billion. See FATF, Anti-Money Laundering and Counter-Terrorist Financing Measures – Türkiye, Fourth Round Mutual Evaluation Report, Paris: 2019, p. 7, 44. The estimated financial assets of IGM in total are around \$150 billion.

24. See Decree Law 674, art. 19(1): «Powers of the trustees who have been serving in companies in respect of which it was decided that a trustee be appointed under Article 133 of Criminal Procedure Code 5271, of 04.12.2004) on account of their membership, affiliation or connection to terrorist organizations prior to the date of entry into force of this Article shall be transferred by a judge or a court to the Savings Deposit Insurance Fund, and with such transfer, powers of those trustees shall be terminated». Art. 19(2): Following the date of entry into force of this Article and during the period of the state of emergency, in the event that it is decided that a trustee be appointed to a company under Article 133 of the Criminal Procedure Code on account of its membership, affiliation or connection to terrorist organizations or that it is decided that a trustee be appointed shall be the Savings Deposit Insurance Fund».

according to police intelligence reports were disqualified from their positions on private boards²⁵ as well as from participating in public tenders,²⁶ scholarship, and funding programs.²⁷

Furthermore, over 150.000 public officials, including military officers, judges, teachers, academicians, and others, are dismissed from public service,²⁸ evicted from public housing²⁹ as well as military and police officers are stripped of their ranks.³⁰

25. Decree Law 667, art. 4(2); Decree Law 668, art. 2(2) and Decree Law 669, art. 2(2): «... any membership and other assignments they hold in board of trustees, committee, commission, board of management, supervisory board, liquidation board are deemed to be terminated».

26. See Public Tender Act 4734 [*Kamu İhale Kanunu*] of 04.01.2002, art. 11 amended through Decree Law 678, art. 30 and Decree Law 684, art. 3: «Those cited below may not participate in tenders directly or indirectly or as sub-contractor on its own or on behalf of others: g) those private of legal persons who are reported as being in adhesion or connection with terror organizations by the General Directorate of Security as well as those connected with abroad by the National Intelligence Agency».

27. Although it is not prescribed in any Decree Law, see e.g. a call for scientific funds by The Scientific and Technological Research Council of Türkiye (TÜBİTAK), requirement 3.1.11. https://tubitak.gov.tr/sites/default/files/18842/2236_call_text_2020.pdf.

28. Decree Law 667, art. 4(1): «Persons considered as belonging, affiliated or linked to terrorist organizations or structures, formations or groups which the National Security Council has determined are involved in activities prejudicial to the national security of the State»... (g): «personnel employed in all kinds of posts, positions and status (including workers) in institutions affiliated or related to a ministry, are dismissed from the civil service upon the proposal of the head of unit, with the approval of the director of the recruitment department». (2): «Persons dismissed in accordance with the first paragraph cannot be employed in the civil service again, and may not be assigned such duties either directly or indirectly...» For a similar measure imposed on the FETÖ affiliated members of armed forces, see Decree Law 668, art. 2(2); Decree Law 669, art. 2(1), 2(2).

29. Decree Law 667, art. 3(1), 4(3); Decree Law 668, art. 2(2) and Decree Law 669, art. 2(2): «Fire-arms licenses and green passports of those whose dismissal from the profession is decided shall be cancelled and they shall be evicted from publicly-owned houses or houses owned by a foundation in which they live within fifteen days». Also see Decree Law 375, provisional Article 35/A.

30. Decree Law 668, art. 2(2): «Regardless of a criminal conviction ruled, the military personnel discharged from the Turkish Armed Forces pursuant to subparagraph (a) of paragraph 1 shall be deprived of their military ranks and public official status and such persons shall not be readmitted to the Turkish Armed Forces». Decree Law 669, art. 2(2): «Regardless of a criminal conviction ruled, those listed under the first paragraph shall be deprived of their military ranks and public official status and such persons shall not be readmitted to the Turkish Armed Forces and the Gendarmerie General Command...» Decree Law 686, art. 2(2): «Regardless of a criminal conviction ruled, those who are discharged from public service pursuant to paragraph 1 shall be deprived of their ranks and/or public official status and such persons shall not be readmitted to the respective institutions». Also see Decree Law 375, provisional Article 35/A. For special provisions regarding ambassador, governor, undersecretary, etc., see Decree Law 672, art. 2(3).

Moreover, 234.419 passports,³¹ as well as a large number of firearm licenses,³² pilot and sea captain licenses³³ are rendered invalid. Last but not least, deprivation of citizenship was provided for those who are subject to criminal proceedings due to crimes against state security and constitutional order.³⁴

The respective security measures on FETÖ affiliates were either directly pronounced by the Decree Laws based on the intelligence reports³⁵ or taken by the administrative self-investigation commissions³⁶ founded within the bodies of public institutions. In the first way, to support the intelligence agencies, a denunciation campaign was launched by the State President, requesting information from even natural persons about FETÖ affiliates.³⁷ In the second way, the aim was to conduct disciplinary investigations and impose certain security measures accordingly, as well as collect intelligence-based evidence for criminal prosecutions. Furthermore, to consolidate the objec-

31. See above fn. 29. Also see Decree Law 667, art. 5(1).

32. See above fn. 29.

33. Decree Law 679, art. 1(2); Decree Law 697, art. 1(2): «Seaman's documents and pilot licenses of those whose dismissal from the public service is decided pursuant to paragraph 1 shall be cancelled». Also see Decree Law 667, art. 4(3); Decree Law 668, art. 2(2); Decree Law 669, art. 2(2) as well as Law 6755, art. 2(2).

34. Decree Law 680, art. 75(2): «Those who are subject to criminal investigation or proceedings pursuant to art. 302, 309, 310, 311, 313, 314 and 315 of the Turkish Penal Code and are not reachable because of being abroad are reported to the Ministry for the purpose of deprivation of citizenship within a month upon the knowledge of this situation by the prosecutor in investigation phase or by the court in prosecution phase. They may be deprived of their citizenship by the Council of Ministers upon offer by the Ministry in case they have not returned to country within three months upon the announcement in the official gazette by the Ministry». Even though a list of 130 key FETÖ affiliated people including the leader Gülen was announced in the official gazette, it has not been approved by the Council of Ministers (nor by the State President currently authorized). For the list, see Official Gazette of 05.06.2017 (<https://www.resmigazete.gov.tr/ilanlar/eskiilanlar/2017/06/20170605-4.htm#%C3%8707>).

35. <https://www.mit.gov.tr/basin60.html>. In this regard, also see Mehmet Arslan, Erdem İzzet Külçür, *Grundzüge der inneren Sicherheitsarchitektur in der Türkei: Insbesondere die Verbrechensbekämpfung durch die Nachrichtendienste*, in *Verbrechensbekämpfung durch Nachrichtendienste*, Ettenheim, Stückle Verlag, 2021, p. 249.

36. Decree Law 667, art. 2(3), 3(1), 4(1)e, 4(1)f; Decree Law 668, art. 2(4). Ulrich Sieber, *The Paradigm Shift in the Global Risk Society: from Criminal Law to Global Security Law – An Analysis of the Changing Limits of Crime Control*, in «Journal of Eastern-European Criminal Law», 1, 2016, p. 17.

37. <https://www.ensonhaber.com/gundem/erdogandan-fetoculeri-ihbar-edin-cagrisi-2016-08-10> After this call, MIT alone received 25.000 entries through its website in 2017. <https://www.aa.com.tr/tr/turkiye/mite-2017de-ihbar-yagdi/1022280>.

tions against the security measures in one hand as well as to avoid overloading the judiciary, an Inquiry Commission of the State of Emergency was founded by a further Decree Law upon the recommendation of the Venice Commission.³⁸ It was composed of members,³⁹ including four bureaucrats and three judges, to review the security measures in limited matters⁴⁰ that were directly inflicted by the Decree Laws based on the majority's voting.⁴¹

Ultimately, both civilians and public servants who took part in repulsing the coup d'état attempt are deemed to be exempt from private, administrative, fiscal, and criminal liability.⁴² Extraordinary decree-laws were later adopted as ordinary laws in the Parliament in 2018, making the extraordinary situation ordinary.⁴³ Parallel to administrative proceedings for security measures, 289 criminal proceedings have been completed as of 12.07.2022, ending up with 117.208 convictions, 1.634 sentences to life imprisonment with aggravated execution regime, 19.300 people as current prisoners and detainees, 87.519 acquittals, 29.455 fugitives, and 1.133 extradition requests made to 110 countries.⁴⁴

38. Decree Law 685, of 02.01.2017. Also see Council of Europe, Venice Commission, Türkiye Opinion on Emergency Decree Laws Nos. 667-676 Adopted Following the Failed Coup of 15 July 2016, Adopted by the Venice Commission at its 109th Plenary Session (Venice, 9-10 December 2016), Opinion No. 865/2016, para. 220-222.

39. Being affiliated with FETÖ as a termination ground for the service of the commission members (art. 4(1)e) is not only seemingly ironic but deserves also reconsideration on a general due diligence for state governance.

40. These included dismissal of public service and studentship, closure of legal entities, deprivation of ranks of the retired personnel as well as any act relating to legal status of natural and legal persons. See Decree Law 685, art. 2. This limitation was approved by the legislation afterwards, see Law 7075, of 01.02.2018; yet, repealed by the Turkish Constitutional Court. See Decision of 24.12.2019, No. E.2018/74 K.2019/92.

41. Decree Law 685, art. 1(3).

42. Decree Law 667, art. 9. For the provisions regarding exemption for the members of the State of Emergency Commission, see Decree Law 685, art. 4(3) and amending Decree Law 690. Other special provisions regarding exemption for public servants, see the respective Law 6755, 08.11.2016, art. 37. For civilians, see Decree Law 696, art. 121. For law enforcement officers, who involved in disqualifying FETÖ affiliates from public tenders, see Decree-Law 680. This method of exemption was also applied during the "Solution Process" about the so-called Kurdish problem. See the related Law 6551, art. 4(2).

43. See Official Journal of 08.03.2018, No: 30354 and of 03.11.2018, No: 30584. For more on the normalization of the state of emergency in a comparative perspective, see passim Ersin Bayra, *Security State [Güvenlik Devleti]*, Istanbul, Oniki Levha, 2019.

44. <https://www.aa.com.tr/tr/info/infografik/28993> (accessed at 12.02.2023).

4. Legal Findings

Under this heading, the legal response to 15/7 coup attempt is dealt with in the sense of substantive and procedural criminal law as well as criminal policy. Hereby, I opt for beginning with the latter, since it makes it possible to get an overarching insight into the responsive strategy pursued by the security measures as a whole, which has had critical impacts on both substantive and procedural criminal law. Therefore, some outstanding features of this response will be inducted to the concept of “enemy criminal law” (ECL) below.

4.1. Criminal Policy

The concept of “enemy criminal law” (*Das Feindstrafrecht*), coined by German legal scholar Günther Jakobs in 1985, refers to a *criminal policy* approach where the offenders of specific crimes are no longer characterized as citizens, that is, as members of the society to whom the law of citizens (*Das Bürgerstrafrecht*) applies, but rather as enemies, that is, as outsiders of the society to whom the law stripped of the basic rights designated for citizens applies.⁴⁵ Because, otherwise, it is believed that granting human rights guarantees to enemies is most likely to disrupt the effectiveness of criminal law.⁴⁶ By doing this, the enemy is alienated.⁴⁷ The centrepiece of the enemy criminal law is the perception of a person as a source of threat, to which it orientates itself as a war armed with its measures and all its intensity.⁴⁸

The keywords stated above already provide a sufficient basis to discuss the post-15/7 measures in Turkish sample; thus, a further elaboration on the concept is not seen as necessary at this point. Even if the concept of ECL had only meant alienating the offender as an enemy, such a reference would have been made anyhow in the literal sense due to the measure of deprivation of citizenship.

45. Cfr. Geraldine Louisa Morguet, *Feindstrafrecht: Eine kritische Analyse*, Berlin, Duncker&Humboldt, 2009, pp. 20, 28.

46. Morguet, p. 58.

47. Morguet, p. 35.

48. Cfr. Günther Jakobs, *Das Selbstverständnis der Strafrechtswissenschaft vor den Herausforderungen der Gegenwart*, in *Die deutsche Strafrechtswissenschaft vor der Jahrtausendwende*, ed. by Albin Eser, Winfried Hassemer, Björn Burkhardt, München, Beck, 2000, pp. 47 ff.

Yet, there are sufficiently additional connecting points. First and foremost, any ECL legislation reveals itself through its terminology. Those legislations often have combative headings, e.g., “anti”, “fight”, “war”, etc., in order to demonstrate the intensity of the state’s determination.⁴⁹ Although the Decree-Laws did not contain any of these headings, their aim and scope were to establish necessary measures to be taken within the scope of the attempted coup and fight against terrorism under the state of emergency,⁵⁰ while declaring the Islamist Gülenist Movement as a terror organization⁵¹ and referring the criminal proceedings to the Anti-Terror Law.⁵² The classification of a coup attempt as a terror crime may be *de lege ferenda* arguable,⁵³ but *de lege lata* applicable to crimes against the state’s constitutional order in Türkiye. However, the underlying advisory decision of the Turkish National Security Council and the rationale of the first Decree Law did not mince words by referring FETÖ affiliates as a “treachery gang”, “infiltrated blood-shedder terrorist malefactors”, and “traitors wearing soldier uniform”.⁵⁴

Besides, and even more substantially, ECL can be identified by its justification grounds, which predominantly stress the inevitable need to protect national security against an actual threat.⁵⁵ This characteristic was also proved in the post-coup attempt emergency law by calling for an effective response to threats against democracy, the rule of law, basic rights and freedoms as well as national security.⁵⁶ However, the justification of the dangerousness is not self-evident in its descriptive sense considering the

49. See Morguet, p. 105.

50. Decree Law 667, art. 1(1); Decree Law 668, art. 1(1); Decree Law 669, art. 1(1); Decree Law 670, art. 1(1); etc.

51. Decree Law 667, art. 2(1); Decree Law 668, art. 2(1); Decree Law 669, art. 2(1); Decree Law 670, art. 2(1); etc.

52. See Decree-Law 667, art. 6; Decree Law 668, art. 3(1); Decree Law 670, art. 8(1), etc.

53. Interpol considers coup d’Etat crimes as of military and politic nature; thus, rejects international cooperation requests pursuant to Article 3 of Constitution of the Interpol. See Interpol, Application of Article 3 of INTERPOL’s Constitution in the context of the processing of information via INTERPOL’s channels, Second Edition – February 2013, pp. 11, 24, 25, 26.

54. See above fn. 9. See Decision of Turkish Constitutional Court, of 04.08.2016, No: 2016/12, para. 75.

55. Morguet, p. 106.

56. See above fn. 9. Also see Opinion of the Venice Commission, above fn. 38, para. 66.

underlying dangerousness of FETÖ's structure, aim, strategy, and modus operandi.⁵⁷

In the aftermath of the 9/11 attacks, the global trend towards responding to such great dangers against national securities has typically been the proclamation of a state of emergency under which the obligations of human rights are derogated.⁵⁸ In fact, normalization of extraordinary regimes has already become a part of this trend in many jurisdictions,⁵⁹ just as it occurred in the Turkish sample in various manners as well. Initially, specific security measures set forth by the Decree Laws, including, *inter alia*, dismissal from public service with a prohibition of return, and deprivation of citizenship, are indeed of a perpetual nature. Besides, the extraordinary Decree Laws not only restricted or suspended the application of existing laws, but also introduced amendments to existing laws⁶⁰ and were themselves enacted as laws,⁶¹ leaving a permanent emergency legacy.⁶² Moreover, until they were approved by the Parliament, the Turkish Constitutional Court avoided the judicial review of this expansion of power by favouring the explicit constitutional provision⁶³ over its established precedents⁶⁴ where it reviewed the emergen-

57. See above fn. 10-14.

58. Helen Duffy, *The War on Terror and the Framework of International Law*, Second Edition, Cambridge, Cambridge University Press: 2015, p. 582, Also see Christopher Michaelsen, *Permanent Legal Emergencies and the Derogation Clause in International Human Rights Treaties: A Contradiction?*, in *Post 9/11 and the State of Permanent Legal Emergency*, ed. by Aniceto Masferer, Springer, 2012, p. 287.

59. See Ersin Bayra, *Güvenlik Devleti*, pp. 294 ff. For the human rights concerns in France, see <https://www.hrw.org/news/2017/06/27/france-dont-normalize-emergency-powers>.

60. See Decree Law 668, art. 4-36; Decree Law 669, art. 9-104. For a previous precedent of the Constitutional Court categorically declaring that it is prohibited to amend the laws through emergency decree laws, see Constitutional Court, of 10.01.1991, No. E.1990/25 K. 1991/1, p. 18.

61. For a list of the enactments of the extraordinary decree laws as ordinary law, see Hüsnü Öndül, *Emergency Decree Laws and Their Impact on Human Rights in Türkiye*, December 2021, pp. 5-6. For a study concerning the enactments according to corresponding fields of law, see *passim* Report by İsmet Akça *et al.* on *Extraordinary Situation Become Ordinary: Impacts of Decree Laws on Legal Statute [Olağanlaşan Ohal: Khk'ların Yasal Mevzuat Üzerindeki Etkileri]*.

62. See Constitutional Court, of 24.07.2019, No. E. 2016/205 K. 2019/63, para. 72, 76; of 14.11.2019, No. E. 2018/90 K. 2019/85, para. 33.

63. Turkish Constitution, art. 148(1): «... presidential decrees issued during a state of emergency or in time of war shall not be brought before the Constitutional Court alleging their unconstitutionality as to form or substance».

64. See *Ibid.*, p. 20. Also see Constitutional Court of 03.07.1991, No. 1991/20; of 05.03.1992, No. 1991/1; of 26.05.1992, No. 1992/36; of 22.05.2003, No. 2003/42.

cy Decree Laws under their constitutional limitations in terms of matter, place, and time period.⁶⁵ Despite the fact that numerous provisions of the decree laws were found unconstitutional, and thus, repealed by the Constitutional Court⁶⁶ following legislative approval, those that remained as ordinary legislation indicate that both the FETÖ threat and corresponding security measures are, more or less, still present. Consequently, it must be underlined that dealing with the state of emergency regimes, one way or another, must not lead the derogation clauses to allow for a permanent legal emergency, as the case law of the ECtHR indicates.⁶⁷

4.2. Substantive Criminal Law

As for the substantial criminal law, the definition of the danger under the first Decree Law⁶⁸ deserves, in several aspects, a closer scrutiny. To begin with the *ratio legis* of this formulation, it was not exclusively intended to suppress past wrongdoings, but rather, and even more importantly, to avert the danger of future harm to national security; that is to say, the dangerousness of a possible repetition of the coup d'Etat attempt that FETÖ had already presented on 15/7.⁶⁹ Otherwise, if suppressing the coup offenders was the sole intention, this could have been materialized by the criminal law measures strengthened through the Decree Laws alone.

65. See Constitutional Court, of 12.10.2016, No. E.2016/166, K.2016/159. Also see ECtHR, *Köksal v. Türkiye*, of 12.06.2017, No. 70478/16, para. 11-12. Also see Ahmet Mert Duygun, *Karşılaştırmalı Anayasa Tarihi Işığında Hukuk Devletinin Aşınması ve Yeniden İnşasında Yargıcın Rolü*, in *Türkiye'de ve Dünyada Hukuk Devletinde Aşınma Hukukun Araçsallaştırılması*, ed. by Yılmaz *et al.*, On İki Levha, 2022, fn. 60.

66. See, for instance, Constitutional Court, of 14.11.2019, No. E.2018/90 K. 2019/85; of 24.12.2019, No. 2019/92; of 30.06.2022, No. E.2018/137 K.2022/86. For a guide on the constitutional review of the emergency Decree Laws approved by the Parliament as to the review regime either in ordinary or extraordinary times, see Taylan Barın, *Temel Hak ve Hürriyetlerin Kullanılmasının Durdurulması ve Sınırlanması Arasında: Kanunlaşan Ohal Khk'larının Yargısal Denetimi [Between the Suspension of the Exercise of Fundamental Rights and Freedoms and Restriction of Them: Judicial Review of Approved State of Emergency Decrees Having the Force of Law]*, in «Ankara Üniversitesi SBF Dergisi», Vol. 75, No. 2, 2020, 557-587, pp. 566-567.

67. See Michaelsen, p. 310.

68. See above fn. 19.

69. In the same vein, see Opinion of the Venice Commission, above fn. 38, para. 146. Also see Constitutional Court, of 24.07.2019, No. E. 2016/205 K. 2019/63, para. 15, 38, 43. For a similar concern of the US government following the 9/11 attacks, see Johannes Thimm, *From Exception to Normalcy: The United States and the War on Terrorism*, SWP Research Paper 7, October 2018, p. 9.

The functional role of the definition in bypassing the substantive criminal law is worth mentioning. Besides manifesting the danger of FETÖ, it enabled, more importantly, the executive to overcome the complexities of the established terror definition⁷⁰ as well as of the accomplice liability rules of criminal law. Not only did it allow for derogation from the essential elements of the definition of terror, e.g., commission of a violent act or being a member of a criminal organization, but it also managed to predate the liability of individuals (*Vorverlagerung*) at the forefront of the terror crimes, sticking to the traditions of the ECL.⁷¹

Yet, this move provided the executive with a remarkable degree of competence in averting the FETÖ danger. Thus, the security measures, many of which are of a criminal nature in their essence, could be imposed without having to exhaust these bypassed elements. Otherwise, it would have had to link the FETÖ affiliates to the violent acts committed on the night of 15/7 as well as to the vertical hierarchy of FETÖ, in which case the scope of the executive's target would be much narrower. This bypassing compensated for the amendment law in 2006 aggravating the terror definition through the element of violent act, which granted Gülen an acquittal.⁷² However, *ex post* implementation of the definition of dangerousness to people considered as FETÖ affiliates prior to the entry into force of the first Decree Law violates the prohibition of non-retroactivity, which must not be derogated even in times of emergency.⁷³ In other words, convictions that are origi-

70. Turkish Anti-Terror Law, art. 1: «Terror is any violent criminal act conducted by member of an organization, through intimidation or threat, for the purpose of changing the characteristics and political, legal, social, laicist, economic order of the Constitution, overturning the Unitarian state, jeopardizing the existence of Turkish State and Republic, debilitating or overthrowing the authority of the State, demolishing the fundamental rights and freedoms, overturning the national and outer security, public order or public health». For a comprehensive analysis of the Turkish Anti-Terror Law, see Erdem İzzet Külçür, *Eco-Terrorism in Criminology and Criminal Law Aspects [Kriminoloji ve Ceza Hukuku Boyutuyla Çevreci Terörizm]*, İstanbul, Hukuk Akademi, 2020, pp. 231-433.

71. For more on the predating as a component of enemy criminal law, see Morguet, pp. 49 ff.

72. See above fn. 14.

73. Turkish Constitution, art. 15(2): «Even under the circumstances indicated in the first paragraph, the individual's right to life, the integrity of his/her corporeal and spiritual existence shall be inviolable except where death occurs through acts in conformity with law of war; no one shall be compelled to reveal his/her religion, conscience, thought or opinion, nor be accused on account of them; offences and penalties shall not be made retroactive; nor shall anyone be held guilty until so proven by a court ruling». Also see ECHR, art. 15(2).

nally of a criminal nature may only be justified on the ground of the existence of an act that constitutes a criminal offense at the time when it was committed.⁷⁴ In the same vein, the Constitutional Court repealed some wording in this definition with reference to retroactivity and the presumption of innocence in the absence of a final conviction.⁷⁵

Another finding is that the definition of threat shifted the traditional guilt-based criminal law to a risk-based criminal law.⁷⁶ After being bypassed, traditional security measures of criminal law, which normally require an unlawful criminal act,⁷⁷ *i.e.*, either the commission of or participation in crime, though not necessarily the guiltiness of the offender, were imposed based on the mere dangerousness of persons without requiring any link to a criminal act. Although the formulation of “being affiliated with FETÖ” theoretically suffices for the degree of probability sought for dangerousness,⁷⁸ the principle of proportionality requires the adjustment of the degree and the type of measures to be imposed accordingly to the level of dangerousness each target affiliated person poses. Disregarding individual dangerousness, *e.g.*, in the case of dismissals, approximates it to ECL,⁷⁹ where the point is not a specific individual and its dangerousness anymore, but a potential offender, *i.e.*, an individual as a source of danger.⁸⁰

Undoubtedly, any review of the post-15/7 security measures would fall short without scrutinizing their legal nature. The very first finding in this sense is that the security measures, which are *prima facie* administrative and imposed by the executive/administration itself, are essentially of criminal law character pursuant to the Engel criteria of the ECtHR. Accordingly, the nature of a criminal charge within the meaning of Article 6 of the ECHR is

74. See ECHR, art. 7(1).

75. Constitutional Court, of 24.06.2021, No. E. 2018/81 K. 2021/45, para. 52-62; of 30.06.2022, No. E. 2018/137 K. 2022/86, para. 222-228.

76. Ulrich Sieber, *Legal Order in a Global World – The Development of a Fragmented System of National, International, and Private Norms*, in *Max Planck Yearbook of United Nations Law*, vol. 14, Leiden-Boston, Martinus Nijhoff, 2010, p. 1.

77. Gerhard van Gemmeren, *MüKoStGB*, § 61 mn. 3., Morguet, p. 42.

78. See Gerhard van Gemmeren, *MüKoStGB* § 62 mn. 18.

79. See Morguet, p. 55.

80. Cfr. Günther Jakobs, *Das Selbstverständnis der Strafrechtswissenschaft...*, p. 47 ff.

determined not solely by the formal manifestation of an act as criminal by the State, but also by the nature of the violation as well as the nature and degree of severity of the sanction.⁸¹ The same applies to misdemeanours (regulatory offenses)⁸² and disciplinary offenses⁸³ as well.

Examined under the criteria above, certain measures of the Decree Law, primarily the dismissal from public service,⁸⁴ confiscation of assets,⁸⁵ invalidation of firearm licenses,⁸⁶ pilot and sea captain licenses,⁸⁷ cancellation of passports,⁸⁸ disincorporation of legal entities,⁸⁹ and unseating the executives and auditors thereof,⁹⁰ prove to be of a punitive and deterrent nature rather than solely preventive,⁹¹ which should necessarily lead to the conclusion that the description of danger therein⁹² qualifies as a criminal charge (limb) under art. 6 of the Convention,⁹³ since these are close substitutes for the se-

81. See ECtHR, *Engel and Others v. the Netherlands*, of 08.06.1976, No. 5100/71, para. 82-83. Also see *Jussila v. Finland* [GC], of 23.11.2006, No. 73053/01, para. 38; *Bendenoun v. France*, of 24.02.1994, No. 12547/86, art. 47; *Produkcija Plus Storitveno podjetje d.o.o. v. Slovenia*, of 23.10.2018, No. 47072/15, para. 42; *Öztürk v. Germany*, of 21.02.1984, No. 8544/79, para. 54.

82. See ECtHR, *Öztürk v. Germany*, of 21.02.1984, No. 8544/79, para. 46-56.

83. See ECtHR, *Engel and Others v. the Netherlands*, of 08.06.1976, No. 5100/71, para. 80-85. However, for the classification of disciplinary proceedings on dismissals as a civil limb despite tacitly implying its punitive character, see ECtHR, *Ramos Nunes de Carvalho e Sá v. Portugal*, of 06.11.2018, No. 55391/13, para. 196; Also see ECtHR, *Vilho Eskelinen and Others v. Finland* [GC], of 19.04.2007, No. 63235/00, para. 62; *Pişkin v. Türkiye*, 15.12.2020, No. 33399/18, para. 101. For a pointed critic of this exceptional view due to its unreasonableness leading to arbitrariness and inconsistencies, see Lorena Bachmaier Winter, *Disciplinary Sanctions against Judges: Punitive but not Criminal for the Strasbourg Court*, in «Eu crim», 4, 2022, p. 263.

84. See above fn. 28.

85. See above fn. 22.

86. See above fn. 32.

87. See above fn. 33.

88. See above fn. 31.

89. Decree Law 667, art. 2(1); Decree Law 668, art. 2(1)b, 2(1)c, 2(4).

90. See above fn. 25.

91. In the same vein, see Opinion of the Venice Commission above fn. 38, para. 146. Also see ECtHR, *Pişkin v. Türkiye*, 15.12.2020, No. 33399/18, para. 89. For a view that the Decree Laws created criminal offences against the State, see Sieber, *The New Architecture of Security...*, p. 18.

92. See above fn. 19.

93. For a recent analysis of the concept of criminal charge, see passim Anna Maria Maugeri, *The Concept of Criminal Matter in the European Courts' Case Law: The Protection of Fundamental Principles v. Political Compromise*, in «European Criminal Law Review», 9, 2019, pp. 4-39.

curity measures set forth under the Turkish Penal Code⁹⁴ and related laws⁹⁵ provided for crimes.⁹⁶ This is also true in terms of the intensity (third) criterion since the security measures of criminal law are, as a rule, imposed for a limited period of time, usually lasting to the end of execution⁹⁷ whereas post 15/7 security measures are inflicted perpetually.⁹⁸ In addition, publishing

94. For the disqualification of public service and unseating the executives and auditors, see TPC, art. 53(1): «Where a person is sentenced to a penalty of imprisonment for an intentional offence the legal consequence of such shall be his prohibition from: a) becoming a member of the Turkish Grand National Assembly or undertaking employment as, or in the service of, an appointed or elected public officer permanently, temporarily or for a fixed period of time within the administration of the state, a province, municipality or village, or institution or entity under their control or supervision; b) voting or being elected and exercising other political rights; c) acting as a guardian or being appointed in the role of guardianship and trustee; d) being the administrator or inspector of a legal entity namely, foundation, association, labor union, company, cooperative or political party; e) conducting any profession or trade, which is subject to the permission of a professional organization (which is in the nature of a public institution or organization), under his own responsibility as a professional or a tradesman». For the disincorporation of legal entities and confiscation of their assets under certain circumstances, see TPC, art. 60: «(1) Where there has been a conviction in relation to an intentional offence committed for the benefit of a legal entity, which is subject to civil law and operating under the license granted by a public institution, by misusing the permission conferred by such license and through the participation of the organs or representatives of the legal entity it shall cancel this license. (2) The provisions relating to confiscation shall also be applicable to civil legal entities in relation to offences committed for the benefit of such entities».

95. For the cancellation of firearms licenses, see Law on Firearms and Knives 6136 [*Ateşli Silahlar ve Bıçaklar ile Diğer Aletler Hakkında Kanun*], art. 7(4), 7(7), 10(1). For the cancellation of pilot licenses, see Turkish Civil Aviation Law 2920 [*Türk Sivil Havacılık Kanunu*], art. 97 and Regulation on Pilot License 30084 [*Pilot Lisans Yönetmeliği*], art. 16(1)b. For the withdrawal of driver licenses, see Turkish Penal Code 5237, art. 53(6). Yet, for its inapplicability to intentional crimes, see Court of Appeal 12. Criminal Chamber, of 04.04.2017, No. E.2016/7267 K.2017/2779. For the withdrawal of passports, see Passport Law 5682 [*Pasaport Kanunu*], art. 22(4). For the deprivation of citizenship, see Turkish Citizenship Law 5901 [*Türk Vatandaşlığı Kanunu*], art. 29.

96. For comparing with the withdrawal of pilot and sea captain licenses here, see ECtHR, *Maszni v. Romania*, 21.09.2006, No. 59892/00 on the reception of administrative sanction of withdrawal of driver license under a criminal charge. For comparing with confiscation of assets, see ECtHR, *Menarini Diagnostics S.r.l. v. Italy*, 27.09.2011, No.43509/08 on administrative fine imposed on a company for breaching the competition. However, for the disciplinary proceedings of compulsory retirement not qualifying as criminal charge, see ECtHR, *Mouillet v. France*, 13.09.2007, No. 27521/04; of dismissal, see ECtHR, *Suküt v. Türkiye*, 12.01.2000, No. 59773/00.

97. TPC, art. 53(2): «A person shall not exercise these rights until the completion of the term of his penalty of imprisonment».

98. For the classification of preventive detention (*Sicherungsverwahrung*) provided as a security measure without time limit in German law as a criminal charge, see ECtHR, *M. v. Germany*, 17.12.2009, No. 19359/04.

the lists of FETÖ affiliates annexed to the decree laws takes the stigmatizing character of criminal punishments beyond the criminal records that are not publicly accessible, strengthening the intensity of the measures.

Provided that the Engel criteria are applicable to the post-15/7 security measures, inflicting those of a punitive character without a final criminal conviction may constitute a violation of the principle of presumption of innocence, which must not be derogated in emergency situations.⁹⁹ Also, it is likely to be arguable to discuss security measures that may amount to “civil death”¹⁰⁰ under the non-derogation clause of the right to corporeal and spiritual existence,¹⁰¹ yet, more than likely, exceeding the limits of the principle of proportionality.¹⁰² Last but not least, the same non-derogation clause involving the prohibition of non-retroactivity¹⁰³ may also apply to the definition of FETÖ threat as well as to the security measures. Even if the security measures have been conceptually prescribed under the law prior to the state of emergency, they are not necessarily identical, e.g., in terms of legal requirements, duration, etc.

At this point, particular attention should be paid to the deprivation of citizenship. Although the list of FETÖ affiliates designed to be stripped of their Turkish citizenship has not been approved by the State President yet, perhaps due to the avoidance of statelessness¹⁰⁴ or non-extradition of the FETÖ affiliates, deprivation of citizenship is, as a rule, found legitimate by the ECtHR for crimes against democracy since the individual’s bond of loyalty to the state is broken.¹⁰⁵ However, the ECtHR disregarded the first

99. See above fn. 73.

100. This term refers to people perpetually deprived of their economic, social and civil rights as a whole.

101. See above fn. 73.

102. Turkish Constitution, art. 15(1): «In times of war, mobilization or a state of emergency, the exercise of fundamental rights and freedoms may be partially or entirely suspended or measures derogating the guarantees embodied in the Constitution may be taken *to the extent required by the exigencies of the situation*, as long as obligations under international law are not violated».

103. See above fn. 73. For the applicability of this prohibition to misdemeanours, see Constitutional Court, of 15.10.2014, No. 2012/731.

104. See 1961 Convention on the Reduction of Statelessness, art. 8(1).

105. ECtHR, *Ghoumid and Others v. France*, 25.06.2020, No. 52273/16. Also see ECtHR, *Johansen v. Denmark*, 01.02.2022, No. 27801/19. Also see the 1961 Convention on the Reduction of Statelessness, art. 8(3)a-ii.

criterion of its own Engel criteria by rejecting the applicant's claim that the deprivation of his citizenship imposed by the administration following a conviction constitutes a disguised punishment, on the mere ground that it was prescribed as an administrative sanction in the national law; thus, no violation of the right not to be punished twice.¹⁰⁶

4.3. *Procedural Criminal Law*

Undoubtedly, the most crucial formal impact of the Decree Laws was achieved through the transfer of authority from the judiciary to the executive branch, *inter alia*, of the imposition of security measures and the recognition of terror organizations.¹⁰⁷ This shift played a key role in taking a swift and effective response against the immediate threat to democracy¹⁰⁸ because otherwise going through the traditional judicial processes, which entail lengthy hearings, rigorous evaluation of evidence, reaching a conviction, appeal phases, etc. would be unbearable amidst such a crisis. Once the authorities were transferred from the criminal judiciary to the executive, the legal remedies for *prima facie* administrative security measures were automatically affected, making the administrative courts of appeal authorized to review the security measures. Ultimately, it was not upon the discretion of the criminal courts anymore to recognize an organization as a terrorist organization and impose measures of a punitive nature through a judicial review of the legal requirements set forth under the Penal Code, but of the executive/administration and the administrative courts.

The procedural shift deserves close attention in several aspects. Although emergency situations may traditionally entail the transfer of authorities to the executive for the sake of effectiveness as well as restrictions and suspensions of basic rights, it is not a *carte blanche* given to the executive. In inflicting the security measures both directly and through the self-investigation

106. ECtHR, *Ghoumid and Others v. France*, 25.06.2020, No. 52273/16.

107. Unlike the USA and UK, the only authority in Türkiye to decide on recognizing an organization as a terrorist organization in an ordinary situation is the General Assembly for Criminal Matters of the Court of Appeal. See Erdem Izzet Külçür, *op. cit.*, p. 270.

108. See above fn. 38, para. 42.

commissions, the Decree Laws did not stipulate adversarial proceedings¹⁰⁹ or any single procedural guarantee.¹¹⁰ Nor did the existence of applicable laws and regulations on administrative disciplinary proceedings help any better to secure these guarantees in that even the General Assembly of the Constitutional Court dismissed its members, stating that the nature of the assessment did not qualify as an investigation of a criminal or administrative offence but rather as an exclusive process where investigators express their “beliefs” based on information from the social milieu in whether the person concerned has had any kind of connection with FETÖ.¹¹¹ Similarly, the Council of State declared an appeal regarding the dismissal of a judge inadmissible on the ground that the administrative act acquired an “extraordinary” qualification cannot be considered as a disciplinary penalty subject to judicial review.¹¹² In the face of this quasi-*Blitzkrieg* strategy, individuals were completely deprived of their general and special guarantees of the right to a fair trial.¹¹³ As expected, imposing security measures without securing fair trial and evidentiary standards, solid evidence going beyond hearsay as well as individualized reasoning led to unreasonable decisions, ending up with mass stigmatization.¹¹⁴

At this point, particular consideration should be given to the *ad hoc* Inquiry Commission. Although it was established to review individual appli-

109. Yet, in repealing the measure of cancellation of passports, the Constitutional Court referred to the inexistence of a judicial decision through criminal proceedings. See Constitutional Court, of 24.07.2019, No. E. 2016/205 K. 2019/63, para. 75; of 03.06.2021, No. E. 2019/114 K. 2021/36, para. 43, 44. The reference to the criminal proceedings is a tacit acceptance of the requirement of adversarial proceedings.

110. In the same vein, see above fn. 38, para. 134, 141. Also see Council of Europe, Commissioner for Human Rights, Memorandum on the human rights implications of the measures taken under the state of emergency in Türkiye, of 07.10.2016, No. CommDH(2016)35, para. 32.

111. Constitutional Court, General Assembly Decision, of 04.08.2016, No. 2016/12, para. 96, 98.

112. For this inaccessible decision by the Council of State of 04.11.2016, see ECtHR, *Köksal v. Türkiye*, of 12.06.2017, No. 70478/16, para. 14.

113. See Council of Europe/ECtHR, Guide on Article 6 of the European Convention on Human Rights, Right to a fair trial (criminal limb), 31.08.2022. For more on these guarantees, see Mehmet Arslan, *Procedural Guarantees for Criminal and Administrative Criminal Sanctions*, Ettenheim, Stücker Verlag, 2019.

114. See above fn. 38, para. 140. For a criticism of these decisions under arbitrariness, see *op. cit.*, para. 132-140. For a criticism of the lack of evidentiary standards, see the Memorandum in above fn. 110, para. 32.

cations for the emergency measures directly imposed by the Decree Laws exclusively,¹¹⁵ its limited task which excludes measures imposed secondarily by the self-investigation commissions was due repealed by the Constitutional Court on the ground of violating the individuals' right to effective remedy,¹¹⁶ paving the way for administrative review of any measures. This is also in line with the case law of the ECtHR, which stresses the importance of adversarial proceedings in democratic societies even in cases of threats against national security.¹¹⁷ Nonetheless, given the Inquiry Commission's 6-year term of office, proper implementation of the right to an effective remedy is likely to be a source of concern in terms of, *inter alia*, promptness.¹¹⁸

Furthermore, for several reasons, one can hardly argue that establishing the Inquiry Commission enhanced the level of legal standards, first and foremost, the independency. The composition of the commission of four bureaucrats and three judges, some of whom are assigned as subordinates in the ministry of justice as well as the quorum of decisions based on a simple majority pose a high risk to the operation of the commission, which possibly results in the domination of bureaucrats over the decisions.¹¹⁹ It also must not be overlooked that the commission was formed by the same authority that pronounced the state of emergency and ordered the direct imposition of the security measures.¹²⁰ Furthermore, the principle of irremovability of members serving as an indication of independence was

115. See Decree Law 685, para. 1(1).

116. Constitutional Court, of 24.12.2019, No. E.2018/74 K.2019/92, para. 29-39.

117. ECtHR, *Al-Nashif v. Bulgaria*, of 20.06.2022, No. 50963/99, 2002, para. 137; *Riener v. Bulgaria*, 23.05.2006, No. 46343/99, para. 138; *Pişkin v. Türkiye*, 15.12.2020, No. 33399/18, para. 227.

118. For the case law recognizing the promptness as an essential component of the effective remedy, see ECtHR, *Vidas v. Croatia*, of 03.07.2008, No. 40383/04, para. 37.

119. Compare with the decision of the ECtHR on martial courts, *Şahiner v. Türkiye*, of 25.09.2001, No. 29279/95, para. 45. For a similar consideration of the appointments as a strong governmental influence, see Özenç Bilgili, *The Controversial Position of the European Court of Human Rights towards the Large-Scale Human Rights Crisis in Türkiye in the "Age of Subsidiarity"*, Master Thesis, University of Strasbourg, 2019, p. 31.

120. See Bilgili, p. 31. However, although a mere appointment by the executive is permissible, appointees must be free from influence or pressure. See ECtHR, *Henryk Urban and Ryszard Urban v. Poland*, of 30.11.2010, No. 23614/08, para. 49.

exempted by the same description of threat¹²¹ applied to FETÖ affiliates without requiring a criminal conviction but requiring the Prime Minister to initiate an administrative investigation. As a result, the free will of decision making was put under the influence in the midst of a crisis where the fear of being labelled as a FETÖ collaborator became prevalent due to the widespread denunciation campaigns. As additional empirical evidence, the outcomes of the Inquiry Commission, amounting to 109.332 rejections out of 127.292 applications, may only verify this concern.¹²² All in all, the designation of the Inquiry Commission does not appear to be sufficiently eliminating doubts on the independency from the executive,¹²³ be it applying the Engel criteria to the security measures¹²⁴ for the sake of a more precise legal qualification or simply accepting their *prima facie* administrative character. Because, even in the latter case, an administrative body not fulfilling the requirements of independency cannot be seen as an effective remedy.¹²⁵

Similar to the self-investigation commissions' lack of procedural guarantees, the examination procedure of the Inquiry Commission was not particularly designed to restore the minimum standards of a fair proceeding. Rather, they were simply ignored with the adoption of a written procedure that does not fully secure the essential components of the right to a fair trial, particularly including, *inter alia*, the right to be present, be heard, access the adverse evidence, confront the witnesses as well as to obtain the attendance of those on his behalf.¹²⁶ In addition, the authority to request information

121. See above fn. 19.

122. See Activity Report 2017-2022 of the Inquiry Commission on the State of Emergency Measures, p. 1. (accessible at https://soe.tcgb.gov.tr/Docs/SOE_Report_20172022.pdf).

123. In the same vein, see European Commission, Commission Staff Working Document, Türkiye 2022 Report, Brussels, 12.10.2022 SWD(2022) 333 final, pp. 5, 6, 26.

124. For the applicability of the guarantees of independence and impartiality under Article 6(1) to the bodies called upon to decide on the "criminal charge" only, see ECtHR, *Kontalexis v. Greece*, of 31.05.2011, No. 59000/08, para. 57; *Haarde v. Iceland*, of 23.11.2017, No. 66847/12, para. 78.

125. ECtHR, *Khan v. the United Kingdom*, of 12.05.2000, No. 35394/97, para. 47; *Riener v. Bulgaria*, 23.05.2006, No. 46343/99, para. 138.

126. See Decree Law 685, art. 9(1) and 11. See ECHR, art. 6(3). The same procedure applies, more or less, to the judicial reviews in the administrative courts. See Turkish Administrative Procedure Act [*İdari Yargılama Usulü Kanunu*] of 06.01.1982, No. 2577. For the case law of the ECtHR on the obligation of oral hearings in cases where the credibility of witnesses is contested or the subject matter is not exclusively legal or highly technical, see ECtHR, *Koot-*

from those concerned,¹²⁷ including private persons, as well as the obligation of public authorities to support inquiries,¹²⁸ caused concerns regarding the compatibility with the functions of certain public bodies, particularly those involved in health care, where the duty of confidentiality must be secured, and education, where the free flow of ideas is crucial.¹²⁹ It resulted not only in the attenuation of procedural guarantees of evidence,¹³⁰ but also in false allegations via denunciation campaigns. Under these circumstances, it is not possible to consider the procedure of the Inquiry Commission, which ruled out adversarial proceedings and afforded no procedural safeguards, as an effective remedy.¹³¹ At this point, considerations must be, once again, given to enemy criminal law, one of whose appearance forms is the attenuation of procedural guarantees¹³² which poses a risk of driving the decision making process under the influence of cultural biases, and social and/or patriotic reactions against such a dangerous event.¹³³ This, taken as a whole, brings the fairness of the process into question.¹³⁴

tummel v. Austria, of 10.12.2009, No. 49616/06, para. 19-21; *Schuler-Zgraggen v. Switzerland*, of 24.06.1993, No. 14518/89, para. 58.

127. Decree Law 685, art. 5(1). Also see the corresponding articles in the enacted version under Law no. 7075.

128. Decree Law 685, art. 5(2). Also see the corresponding articles in the enacted version under Law no. 7075.

129. See Report of the Special Rapporteur of UN Human Rights Council, A/HRC/31/65, para. 45. For more on this duty, see Ulrich Sieber, *Blurring the Categories of Criminal Law and the Law of War – Efforts and Effects in the Pursuit of Internal and External Security*, in *Criminal Law Between War and Peace – Justice and Cooperation in Criminal Matters in International Military Interventions*, ed. by Manacorda S., Nieto Martín A., Cuenca, Universidad de Castilla-La Mancha, 2009, p. 47.

130. For the attenuation of guarantees on evidence obtained through torture and applicability of hearsay evidence in Guantanamo sample, see Ulrich Sieber, *Blurring the Categories...*, p. 59. Also see U.S. Military Commission Act of 2006. Sec 948r, para (c), (d).

131. See ECtHR, *Chahal v. the United Kingdom*, of 15.11.1996, No. 22414/93, para. 154; *Klass and Others v. Germany*, of 06.09.1978, No. 5029/71, para. 67; *Riener v. Bulgaria*, 23.05.2006, No. 46343/99, para. 138.

132. See Morguet, pp. 58, 59.

133. Oren Gross, Fionnuala Ni Aolain, *Law in Times of Crisis*, Cambridge University Press, 2006, p. 105., Avidan Y. Cover, *Presumed Imminence: Judicial Risk Assessment in the Post-9/11 World*, in «Cardozo Law Review», 35, 4, 2014, p. 1421.

134. For the same conclusion of the ECtHR, see *Pişkin v. Türkiye*, (33399/18), 15.12.2020, § 153.

On the other hand, imposing security measures that connote a conviction due to their criminal nature without fully securing the individuals' procedural rights may raise questions on the presumption of innocence which must not be derogated even in emergency situations.¹³⁵ So indeed, the Constitutional Court held that recognizing individuals as members of terrorist organisation by an administrative decision without providing a fair trial was a violation of the presumption of innocence.¹³⁶

5. Conclusion

The post-15/7 sample of averting serious danger to national security has left a highly controversial legacy in Türkiye. Its impacts are twofold. In terms of *legal impacts*, it undoubtedly altered the traditional premises of modern criminal law. It concerned criminal law indeed, since the emergency measures imposed, which are *prima facie* administrative, prove to be essentially of a punitive nature in the light of the Engel criteria of the ECtHR; thus, requiring to be discussed within the parameters of criminal law. The legal results of this emergency process can be summarized as follows:

- it must be first and foremost noted that an axis shift occurred from the liberal criminal law rooted in the acquisitions of the Enlightenment towards a pseudo-administrative, security-oriented criminal law. This new area of law emerged outside the criminal law by means of borrowing the components of the criminal law; yet, leaving out the judicial authorities and guarantees;
- one of the most important consequences of this shift, which occurred particularly in substantive law, is the transformation of traditional guilt-based criminal law, which focuses on past wrongdoings, into risk-based preventive criminal law, which devotes itself to future wrongdoings, namely, the danger. Accordingly, in the post-15/7 era, the factual danger to national security was averted by a legal regime of security measures on the ground of *prima facie* dangerousness;

135. See above fn. 73.

136. Constitutional Court, of 24.06.2021, No. E. 2018/81 K. 2021/45, para. 52-62; of 30.06.2022, No. E. 2018/137 K. 2022/86, para. 222-228. Also see Constitutional Court, of 03.06.2021, No. E. 2019/114 K. 2021/36, para. 5.

- doing so in the concrete case compromised the fundamental principles of criminal law, including, *inter alia*, the principles of legality, non-retroactivity, and presumption of innocence;
- the procedural impact of this shift occurred with regards to the attenuation of procedural guarantees, including, *inter alia*, the independency, the right to a fair trial, adversarial proceedings, the minimum standard of evidence, and the right to an effective remedy;
- Along with the above substantial and procedural attenuations, certain characteristics of the emergency regime, including, *inter alia*, the use of combative terminology, the collective reception of certain individuals as a source of threat, the predating of liability through the definition of danger, the focus on dangerousness instead of an unlawful criminal act as well as the normalization of the emergency regime, amount to a practice of enemy criminal law.

All in all, it is evident that the traditional concepts of substantive and procedural criminal law have begun to be emptied out. As is often the case, states of emergency are introduced to protect citizens' rights and freedoms; yet, ending up with their infringements. Unfortunately, the recent Turkish sample did not fully prove the opposite. Nevertheless, the efforts made by the Turkish Constitutional Court to hold the emergency practice in a legitimate framework by repealing large numbers of emergency provisions upon review *in abstracto* as well as providing compensation upon individual applications should be greeted with a *not enough but yes*. Following the completion of the applications before the Inquiry Commission as of 22.01.2023, the Court will face a high number of individual applications where it may further shape emergency practice; yet, the administrative appeal process has yet to be exhausted. It is suggested that the Court apply the Engel test to reveal the essential nature of the security measures in order to leave a legacy connoting that the law is not formed by the formal classification but by the essential qualification.

After that, the ECtHR will have no chance to evade its responsibility again, as it pragmatically declared in its 2017 decision the Inquiry Commission as an effective remedy on the mere ground of the availability of subse-

quent judicial review,¹³⁷ despite its deficits ascertained by the Venice Commission,¹³⁸ in order to avoid dealing with a new pile of incoming cases¹³⁹ from a country that is one of the ringleaders of the Court's workload.¹⁴⁰

Considering the other side of the shield, namely the *factual impacts*, one may magnify the advantages of the extraordinary authorities practiced by the executive, allowing for effectiveness and the capability of tackling such an immediate crisis. This point must not be underestimated since democracies do need to survive such threats. In averting this threat, the model of the state of emergency regime in Türkiye has undoubtedly proven successful. Following the security measures imposed, indeed, FETÖ has dramatically lost its capacity and capabilities domestically, despite having remarkable potential abroad owing to the harbouring by foreign countries for political reasons.¹⁴¹ Aside from the factual impact, one can also argue that the FETÖ threat was averted in such a manner that they once obtained the power: *unlawful come unlawful goes*. At the end of this fight for power, those consecrating Gülen were defeated by those sanctifying the (executive) authority.

However, in order to avoid this contentious legacy becoming the fate of modern Türkiye, any future defense of democracy must inevitably adhere to rule of law standards. The legitimate defense of democracies is as much a need as the effective defense of democracies. In fact, the need for the former must be praised even more since the latter does not necessarily need a legal order to materialize.

All in all, bypassing criminal law can be inevitable, but it must be a last resort in extraordinary situations to tackle great immediate threats against na-

137. See ECtHR, *Köksal v. Türkiye*, of 12.06.2017, No. 70478/16, para. 29.

138. See above fn. 38, para. 220-222. For the founding Decree Law, see Decree Law 685, of 02.01.2017.

139. The total amount of the applications to the Inquiry Commission is 127.292 as of 31.12.2022. See above fn. 122.

140. For a line chart presenting the volume of the pending cases in 2016 by respondent states, see Annual Report 2016 of the European Court of Human Rights, Council of Europe, p. 192. For a tacit acknowledgement of the problem by pushing this pile of cases to the Turkish authorities over a recommended *ad hoc* commission, see the Opinion of the Venice Commission in above fn. 28, para. 220.

141. For the organizational structure and responsible key leaders of respective countries see Coup d'Etat Report of Turkish National Intelligence Agency (MIT), No: 50-97549206, 22.05.2017, p. 32.

tional security. Nevertheless, it must not derogate from the fundamental Enlightenment acquisitions of the modern criminal law, even amid such crises. Thus, it is also inevitable to give this fight in accordance with the rule of law, the principle of proportionality, and the necessities of a democratic society.¹⁴²

Last but not least, future research to be conducted on this subject should compare the Turkish sample with the global samples in order to ascertain the common parameters of the extraordinary regimes as well as good practices applicable to the legitimate defense of democracies. Aside from the examination of the security measures in this study, there is similar needt for the restrictions and suspensions imposed by the Decree Laws on the criminal proceedings. Not less important is to scrutinize the consistency of the case law of the ECtHR on emergency practices vis-à-vis the Turkish sample.

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