UNIVERSITÀ DEGLI STUDI DI TRENTO

Facoltà di Giurisprudenza

Corso di Laurea Magistrale in Giurisprudenza

OPINION CRIMES IN ITALY AND IN TURKEY: BALANCING THE RIGHT TO FREEDOM OF EXPRESSION WITH THE DEFENCE OF NATIONAL SECURITY AND PUBLIC ORDER

Supervisor

Prof. Gabriele Fornasari

Graduand

Sofia Verza

FREEDOM OF EXPRESSION – NATIONAL SECURITY– PUBLIC ORDER – ITALY– TURKEY

ACADEMIC YEAR 2015/2016

Solo il poter essere letto da un individuo determinato

prova che ciò che è scritto partecipa del potere della scrittura,

un potere fondato su qualcosa che va al di là dell'individuo.

L'universo esprimerà se stesso fin tanto che qualcuno potrà dire:

" Io leggo dunque esso scrive".

ITALO CALVINO

Se una notte d'inverno un viaggiatore

Table of Contents

INTRODUCTION

My subjects of study are the criminal law systems in Italy and Turkey, especially concerning the field of opinion crimes. After the fall of the Ottoman Empire and the founding of the Republic of Turkey in 1923 under Mustafa Kemal Atatürk‟s leadership, a transposition of several European codes took place: the Italian Zanardelli Code in 1926 and the Rocco Code in 1930 were adopted in the field of criminal law. Considering the influence arising from the Italian legal system, the provisions regarding the crimes against "State personality" and against national security and public order are particularly interesting; the Rocco Code of 1930, which was written in the middle of the two fascist decades, and the previous Zanardelli Code of 1889 badly conceal an extreme – and later we will analyze weather it is unbalanced- attention to the protection of the State, its institutions and senior political representatives, public order and national security.

The first chapter of this dissertation will expand on the origins of the Italian and Turkish Criminal Codes and, above all, it will try to individuate some links between the ideological contexts surrounding their draft and adoption; I will outline some links and differences between the Fascist and Kemalist ideologies.

In the second chapter, I will analyze the concepts of national security and public order in a balance with the fundamental rights of an individual, especially the right to free expression, as prescribed by the constitutional norms of the two countries and the European and international law. The criminal provisions of the Italian Penal Code must respond to Article No. 21 of the Italian Constitution, which protects freedom of expression and - therefore- a critical public debate. The same protection should be guaranteed under Articles No. 25-28 of the Turkish Constitution. Moreover, both of the countries must respect Article No. 10 of the European Convention of Human Rights (ECHR) [1]- since they both are members of the Council of Europe- and other international conventions.

In the third chapter, I have chosen to analyze three particular examples of criminalization of the human expression. Firstly, I will refer to the laws protecting the State, the institutions and senior political representatives from public denigration. The reputation of these bodies is supposed to be functional to their efficiency and- consequently- to national security and the legislation provides pecuniary and prison sentences for the persons who do not respect it. Secondly, the analysis will focus on the instigation to commit a crime and the apology for a crime, which can constitute a serious concern for free expression especially if they are applied as "abstract danger" crimes, protecting no immediate and concrete danger. Thirdly, I will focus on the crimes of instigation and apology in the counter-terrorism legislation's context. The terrorism threat has pushed most of the legal systems toward a "securitarian" approach which can easily result in a misleading fight against terrorism.

[1] From now on, this acronym will distinguish the European Convention of Human Rights from the European Court of Human Rights (ECtHR).

Terrorism is a vague term itself and the protection against this vague danger often leads to severe restrictions of free expression. In this regard, I will analyze the balance between the need for prevention and detection of crimes, and those who are accountable for them, and the interest in giving and receiving information, especially if they have a socially relevant content.

The crimes quoted above are just a partial segment of the several connections existing between the Turkish and the Italian code, in the broad sector of crimes that are likely to be committed in expressing opinions vehemently protecting national security, public order and State personality. I am conscious of the extent to which the topic consists in a trade-off between the protection granted by criminal law to these interests and freedom of expression; however, synthesis needs have led to exclude more detailed analysis of the offenses of libel and insult, obscenity, hate speech, privacy, data protection and retention, surveillance, violence against speakers and writers [2] and the rules prohibiting the disclosure of secret documents (protection of State secrets) or whose disclosure is prohibited by the authority [3]. Moreover, most of these issues find new applications in the digital age, where the World Wide Web has become the most significant public *agora*. For this reason, opinion crimes provide for aggravating circumstances if committed using computer and telematic tools or they are even regulated in specific laws which provide higher penalties.

This dissertation aims to focus on the comparison between the Italian and the Turkish system in the field of opinion crimes, since I am interested in the peculiarity of analysing criminal law in two countries where provisions were literally and formally identical 80 years ago and are still very similar. Certainly, Italy and Turkey have witnessed very different historical and social developments and, therefore, they have developed their own practices in the fields of freedom of expression and State‟s protection.Nevertheless, both of the systems can learn from the other‟s evolution in the scholarship and enforcement of opinion crimes, observing the consequences that follow the legal practice.

---

[2] Italy holds a long tradition of violence against speakers and authors; I would like to remember two personalities who opened and (hopefully) closed this sad tradition since the Fascist period, namely the journalist Giovanni Amendola, who died in 1926 because of the blows suffered during a Fascist aggression and Mario Piccolino, journalist and lawyer active on issues about mafia, who died in May 2015 because of a gunshot. As far as Turkey is concerned, 25 journalists were killed since 1992, 5 of them in the last 2 years alone (from the website of CPJ, *Committee to Protect Journalists,* https://cpj.org/killed/europe/turkey/).

[3] According to me, the relative crime provisions, which are not usually listed in the category of opinion crimes, fall within this field when we interpret the expression “opinion crimes” as meaning a criminalization of opinions‟ expression. Indeed, when a reporter wants to prove his point by enriching the information with reliable sources and evidences, as any good professional journalist would do, a strict application of the laws on State’s secret or on the prohibition of divulgation by an authority would ultimately hinder the basis upon which his theory relies on.
The list of areas where a limitation of free expression could occur is inspired also by the selection done by the *Global Freedom of Expression Centre* of Columbia University; link: https://globalfreedomofexpression.columbia.edu/cases/.

CHAPTER No. 1

THE ITALIAN CRIMINAL CODE AND THE TURKISH TCK (*TÜRK CEZA KANUNU*), THE ORIGINS

Today, there is no trace of Islamic law in the modern Turkish legislation. However, during the Ottoman Empire (which lasted from 1300 until 1920), Islamic law was the source of criminal law [4]. It classified crimes in two groups: crimes against God (whose punishments were determined by the written sources of Islamic law) and crimes whose definitions and punishments were left to the discretion of the sovereign. During the late stage of the Ottoman Empire, there were legislative efforts for a legal change such as the *Mecelle* (Civil Code) and the translation of Western codes [5]. While Islamic law was effective, before 1839, in principle no legal remedies existed; only political pardon was possible. Even after the principles of Western European criminal law were introduced in the Ottoman Empire, secular law and Islamic law were applied side by side until Atatürk's legal reforms began in 1920.

The year 1839 is important because it indicates the beginning of a period of secularization: that year, the *Tanzimat-i Hayriye Fermanı* ("Decree of Reorganization"), known as *Gülhane Hattı* (the "Noble Edict of Gülhane"), brought fundamental changes in the political structure of the Ottoman Empire [6]. The *Tanzimat*'s period, which literally means "reorganization", began with this Edict and ended with the 1876 Ottoman Constitution [7]. The first modern Turkish Criminal Code was the Imperial Penal Code (*Ceza Kanunname-i Hümayunu)* published in 1858. It was the Turkish translation of the French Penal Code of 1810 and it remained in force until 1926; however, from 1909, it started to be integrated with the Italian Zanardelli Code. However, the reactionary Napoleonic Code had a deep influence on both the Italian and the Turkish system. With the foundation of the Republic of Turkey, the whole legislative system was reconstructed adopting different legislations from many different countries in the various law branches. Reception was the main method of legislation. The foreign commentators of that period considered that no other country had ever undertaken such a vast program of reforms in the relevant period [8]. Still, it is a case study in the light of modern theories of "legal transplants" and about the success of the reception [9]. Mahmut Esat Bozkurt, a personality that will be better analyzed in the following paragraph, was the Minister of Justice who

[4] ATAR, *İslam Adliye Teşkilatiö Ortaya Çıkışı ve İşleyişi*, Ankara Diyanet Işleri Başkanlığı, 1982, pg.39

[5] F. YENIŞEY, *Criminal Law in Turkey,* Wolters Kluwer, 2011, pg. 34.

[6] N.GÜRELLI, *The Turkish Criminal Code,* Sweet and Marxwell, London, 1965, Introduction.

[7] In broader terms, the Late Ottoman Period can be considered as starting in 1827: during that period various regions started to obtain their indipendence from the Ottoman control (e.g.: Greece in 1832) and a period of inexorable decline begun. In the relevant period, the Western powers used to refer to the Ottoman Empire as the "sick of Europe".

[8] M.O.HUDSON, *Law reform in Turkey,* in *American Bar Association Journal*, vol. XII, no.1, January 1927, p.8

[9] A. NISCO, *Le tracce del diritto penale italiano nel codice penale turco,* in *Diritto penale della Repubblica di Turchia,* Padova University Press, 2012, p.127

introduced the Swiss Civil Code in Turkey in 1926. In his preface to the new law (which also figures in some recent editions) he wrote: “The Turkish nation […] must at all costs conform to the requirements of modern civilization. For a nation which has decided to live this is essential”. Hans Lukas Kieser defines Bozkurt as an “ethno-nationalist rightist revolutionary” [10]: this definition alone gives the idea of how complicated ideological issues were in that historical period. In-depth studies about the reception of Western law in Turkey - except for civil law – have yet to be done [11].

In 1926, the Italian Zanardelli Code was adopted. The Italian Criminal Code was considered the best one from a technical point of view, a French translation was available and, more importantly, adopting it was a political choice of the Turkish authorities **[12]**. Besides the Kemalist willingness to break with the past and the international pressure resulting from the Treaty of Lausanne of 1923 **[13]**, specific political and criminal reasons influenced the Turkish choices. First of all, the need of protecting the “sacralised State”, which was to become a strong nation. To say it with the words of Alfredo Rocco, the Italian Minister of Justice at the time, “ we witness a universal competition of nationalisms. […] We consider necessary that our nation as well, if it does not want to be overpowered and die, has to do some nationalism” **[14]**.

As far as Italy is concerned, the first regulatory unification in the field of criminal law after the unification of Italy in 1861 was the Zanardelli Code [15], which was considered to have an innovative liberal nature since, for instance, it abolished the death penalty for most of the crimes, it introduced the rehabilitative principle of punishment and lowered the penalties. Nevertheless, it maintained a continuity with the general structure of principles of the Restoration descending from the Napoleonic Code of 1810 [16]. Moreover, in order to better understand the ideological environment in the relevant period, it is useful to analyze some other legislative works- such as the Public Safety Laws No. 2248 of 1865 or No. 6144 of 1889- which followed the tensions caused by the national unification.

---

[10] H.L. KIESER*, Turkey beyond nationalism: toward post- nationalist identities*, 2006, Chapter No. 2, pg.20.

[11] A.NISCO, *supra* note 10,p. 128. Nisco proves this statement referring to the important convention in Istanbul in 1955 by the “*Association International des Sciences Juridiques*” which debates the criminal law issue only saying that “Reliance upon Italian scholarship, which advanced especially during the relevant period, may have been decisive”.

[12] From an interview with Nazif Koray Kırca, Turkish criminal lawyer. Everytime there is no bibliographical reference and I do not specify that a statement is an observation of mine, I am referring to interviews I realized with some legal actors, professors, human rights activists. Most of them can be found in the final part of this dissertation.

[13] E.E.HIRSCH, *Rezeption als sozialer Prozess***,** Berlin, 1981, p.30.

[14] A. ROCCO, *L"ora del nazionalismo* in *Scritti e discorsi politici,* Giuffrè, Milano, 1938, vol. II, p. 508.

[15] Actually the first code after the unification was the 1839 Penal Code of the Savoy Kingdom of Sardinia, which was later replaced by the 1859 Criminal Code and extended to the rest of the peninsula. However from 1861 to 1889 two criminal codes coexisted because Tuscany continued to use its own code.

[16] C. FIORE, *I reati di opinione,* CEDAM, Padova,1972, p.142-147

These laws enforced the need of a police authorization for printing activities, allowed prior seizure of the press and so on.

Italy adopted the new Rocco Code in 1930 [17]: "It was necessary to renew the Codes […]: they were old and inspired by the prevailing ideas of the second half of the last century; we had the chance to conciliate the classical and the positivist ideas", Benito Mussolini wrote eight years later [18]. Similarly to the Zanardelli Code, Carlo Fiore teaches that the mind-set of the 1810 Napoleonic Code – that means, of the first half of the 19th century- still constituted the main framework of the Rocco Code [19]. Moreover, there is a continuity between the Zanardelli and the Rocco code regarding the concept of public order: already in 1889, the legislator considered it as an abstract and vague legal interest [20]. The novelties introduced by the Fascist Code consisted in a renewed attention for "finally cutting off the wishes of the remaining reactionaries" [21]. Moreover, as the populist tradition teaches, the issue of an increasing criminality was used to justify why the Italian Criminal Code needed a reform [22].

Before adopting the Rocco Code in 1930 (the same year it was adopted in Italy) [23], Turkey made 60-70 amendments in a non-liberal direction to the newly-adopted Zanardelli Code [24]. It is interesting to note that thanks to a combination of historical and comparative analysis, we can deduce an original prospective: we can observe the stratification of liberal and authoritarian moments in the Italian legislation through the study of the Turkish system [25].
The above mention Turkish Minister of Justice, Mahmut Esat Bozkurt, was truly convinced of the Turkish capacities to build a new state system in a short time. During a Grand Assembly [26] session, he said: "We need six months for these laws to get real life: afterwards we will apply them"; when a deputy argued

[17] Royal Law-Decree of October 19, 1930, No. 1398, published on the Official Gazette in October 26, 1930, No. 251, in force since July 1, 1931.
[18] B. MUSSOLINI, preface in ALFREDO ROCCO, *Scritti e discorsi politici,* Giuffrè, Milano, 1938.
[19] C.FIORE, *supra* note No. 17.
[20] G. FORNASARI, S. RIONDATO, *Reati contro l"ordine pubblico,* Giappichelli, Turin, 2013, Introduction.
[21] B. MUSSOLINI, *supra* note No. 19.
[22] "The considerable increase of crime in recent years, particularly in the post-war period, due to various economic and moral, social and political, general and particular reasons - causes that are difficult to scrutinize in their entirety but that all lead back to the profound upheavals in psychology and morality of the individuals and the community [...]. Particularly, the failure, in the fight against crime, of the repressive and criminal means has been proven [...] as well as the absolute unfitness of the penalties", in *Lavori preparatori del codice penale e del codice di procedura penale, Atti parlamentari della legge 24 Dicembre 1925 n.2260 che delega al Governo del Re la facoltà di emendare i codici penali e di procedura penale,* Provveditorato Generale dello Stato, Rome, 1928, vol.I, p. 13.
[23] Granting basically no time to the study of the scholarship founding the legislation.
[24] HUMAN RIGHTS AGENDA ASSOCIATION, *Freedom of expression in the new Turkish Penal Code,* Ankara, 2006, Introduction.
[25] S. RIONDATO, R. ALAGNA, *Diritto penale della Repubblica di Turchia, Criminal Law of the Republic of Turkey,* Padova University Press, 2012, Introduction.
[26] The Grand Assembly is the Parliament of the Republic of Turkey.

during the voting session that a semester would not have been enough time for such a transition, Bozkurt replied: “It is even too much for a *Turkish* law man” [27].

1.1.- Fascism and Kemalism: The Authoritarian Modernization

- Commonalities and Differences

The study of the criminal provisions under analysis in the following chapters will focus mainly on the last thirty-five years. I am conscious that thirty-five years can be considered quite a long time for political and legal changes; however, it is not such a long time for social changes at all. This is the reason why it is appropriate to mark some milestones in the Italian and Turkish society in the 1920-40 period, to better understand the evolution of free expression and security regulation in the two countries.

"The Turkish Republic was founded using the ideology of the Committee of Union and Progress [28]. […] The society as a whole was dominated by the settled official ideology. The government set red lines. The Kurdish question, the Armenian genocide, the military occupation in Cyprus and the anti-democratic secularism constituted the base of these redlines”, writes the lawyer Eran Keskin [29]. It could be persuasive to identify the first “shock” to the static centuries-old Ottoman society with the foundation of the Republic in 1923. Instead, it is oversimplistic since many changes in society and legislation took place during the Late Period of the Ottoman Empire (since 1827), as previously explained. The main attempt of the “Committee and Union Party” was to complete the process of “modernization” of Turkey. However, while in the European society at the end of the 18th century the process of modernization was associated with the gradual development and expansion of critical reason, and with the emergence of a civil society, in Ottoman Turkey the reverse was true. There, modernization was embraced by an intelligentsia of bureaucrats and military officers, who identified their own interests with those of the state [30]. Enlightened individuals, inspired by social egalitarianism, liberalism and romantic nationalism, imported and implemented European rules and laws in order to resist the external colonial and imperialist pressure as well as the domestic centrifugal forces in an ethnically mixed state[31]. Ultimately, they were ready to accept the view that only ruling institutions coordinated by a strong leader were able to instigate the change necessary in order to modernize society. Those members of the intelligentsia who actually went to Europe as students, refugees or political activists, felt attracted by the authoritarian ideologies of the political right. Positivism had merged with a strong belief in

---

[27] M. E. BOZKURT, *Liberalism masalı,* Kaynak Yayınları, 1932,p. 34.

[28] *İttihat ve Terakki Cemiyetim,* that was followed by the Republican People's Party (*Cumhuriyet Halk Partis*I- CHP) maintaining the same ideological scheme.

[29] ERAN KESKIN in *Yesteday, today, tomorrow: freedom of expression in Turkey report (1995-2015*), The Initiative for Freedom of Expression, Istanbul, 2015, p.112.

[30] T.ATABAKI and E.J.ZURKER, *Men of order: authoritarian modernization under Atatürk and Reza Shah,* I.B.Tauris & Co Ltd, 2000, p.2.

[31] *Ibidem***,** p. 3

progress through science; Darwinism and social Darwinism were also part of this mind-set.

There are important differences and the connections between the two prevailing ideological structures in Italy and Turkey in the 30‟s, when both of the countries adopted the Rocco Criminal Code: Fascism and Kemalism.

As far as the differences are concerned, unlike other countries, Turkey proclaimed secularism as the pillar of an ideological system. It is one of the six Kemalist arrows: republicanism, nationalism, populism, *étatisme*, secularism and revolutionism [32]. The principle of secularism was inserted in the Turkish Constitution in 1937. It cannot be isolated from the other Kemalist arrows. A very important one, for instance, is revolutionism, which has committed Atatürk‟s "sons" and "daughters" to remain loyal to the principles on which the "New Turkey" was founded. The principle of revolutionism also formalized the future generations‟ duty to defend such principles at all costs: this task has been effectively carried out by the army in the course of the four *coup d‟états,* which have marked the Republic of Turkey‟s history at regular intervals (1960, 1971, 1980, 1997)[33]. Secularism should not be regarded as a principle merely regulating the relationship between state and religion: although it refers to a relegation of religion to the private sphere, this notion explains the functional tie that has been created over time between secularism and national-republicanism. However, this bulwark has weakened in the last ten years. As explained above, a strong belief in science was part of the mind-set of Turkish intelligentsia: therefore, the respect for Islam as the right religion of the State cannot be doubted. The leading positivists had a quite high opinion of Islam as a religion, which was supposed to be much less opposed to "reason" and "science" than Christianity [34].

This "functional tie" between religion and the state‟s benefits can be found in the Fascist ideology as well. It is true that one of the critics that Alfredo Rocco - the Italian Minister of Justice who drafted the 1930's Criminal Code- made toward the other political parties concerned their care for problems such as religion, "which is a big and respectable thing but concerns more the inner conscience than political action" [35]. Nevertheless, commenting an article of the Catholic newspaper *L‟Osservatore Romano,* Rocco affirms: "*L'Osservatore* sustains the thesis that Catholics have to be clericals as well, namely that they have to obey the Church's precepts. […] This thesis is not acceptable from a nationalistic point of view but is not anti- Italian. We should see what the Italian clergy asks the lay people. If it asked, for instance, […] the obedience to laws, order and national cohesion,[…] the clergy's influence would be favourable to the national aims. Instead, if it claimed to impose the supremacy of the Church upon the State or absurd temporal claims, it would be damaging and detestable"[36].

[32] R. BOTTONI, *The origins of secularism in Turkey,* in *Ecclesiastical Law Journal,* 9, 2007, p.175.
[33] E.J.ZÜRCHER, *Turkey. A Modern History,* I.B. Tauris, London 1993, p.271-272 and 262-295.
[34] T.ATABAKI and E.J.ZURKER, *supra* note No. 31, p.3.
[35] A. ROCCO, *Che cosa è il nazionalismo* in *Scritti e discorsi politici,* Giuffrè, Milano, 1938, p.69.

However, from Rocco's standpoint these kinds of claim are not taking place and "Catholicism is, by now from centuries (from the Counter- Reformation), a loyal ally of nationalism"[37]. Finally, the Catholic Church was considered "intended, for its own historical necessity, to become an instrument of Italian irradiation in the world"[38].

So, even if the Turkish national government was more insistently distancing itself from religion, the two nationalist powers were clearly against clerical orders and were considering religion as functional to the State‟s purposes [39]. Nevertheless, the Islamic and Catholic mind- set have countless differences which have continued to influence the legal environment itself until today.

Regarding other common grounds of the two ideologies, I would focus on the principles of nationalism, populism and *étatisme.* In Turkey, nationalism founded the ideal of the "new Turk" or, saying it with Mustafa Akyol, the "Homo Kemalicus"[40], that is an ethnic Turk and a devoted but not fundamentalist Sunni Muslim; more examples of Turkish nationalism will follow later in this paragraph. Populism has meant, among other things, the refusal to recognise a privileged religious class whereas *étatisme* has defined a protectionist political economy. The affinity of those two principles with Fascist populism- oriented against class fights- and the economic theory of national and corporative economy, is impressive [41].

One of the most influential authors for the Turkish bourgeoisie was Gustave LeBon, the "father of crowd psychology"; LeBon, who was recognized as a source of inspiration by the members of *Actione Français* and by Benito Mussolini as well, was really popular among younger military officers in the Middle East. His works were translated in Arabic and Turkish and, beyond positivism and scientism, what resulted more attractive was his authoritarian slant. A deep distrust of the "crowd" [42] entered in the mentality of the Turkish

---

[36] A. ROCCO, *Gioia democratico- massonica per un articolo clericale* in *Scritti e discorsi politici,* Giuffrè, Milano, 1938, p.120.

[37] A. ROCCO, *Il papato e i cattolici di fronte alla guerra nazionale* in *Scritti e discorsi politici,* Giuffrè, Milano, 1938, p.202.

[38] A. ROCCO, *La santa sede, l‟Italia e la guerra* in *Scritti e discorsi politici,* Giuffrè, Milano, 1938, p.392. I would also like to remember the stipulation of the Later Pacts between Italy and the Vatican, which, among other things, declared the Catholic religion to be the only State religion and introduced the teaching of Catholic religion in public schools. The Pacts were modified with Law. No. 121 of the March 25, 1985.

[39] Obviously, it has to be noted that the Turkish population- until a few years before the foundation of the Republic of Turkey- experienced a great influence and interference of the Caliphate over the Sultanate and, therefore, over the government of the Ottoman Empire. The Grand Assembly of Turkey abolished the Caliphate and the Ministry of *Shari‟a* in 1924 and unified secular education (*Tevhid-i Tedrisat Kanunu).*

[40] M. AKYOL, *A politically incorrect Q&A on the headscarf,* Turkish Daily News, February 7, 2008, link:http://www.hurriyetdailynews.com/a-politically-incorrect-qampa-on-the-headscarf.aspx?pageID=438&n=a-politically-incorrect-qa-on-the-headscarf-2008-02-07.

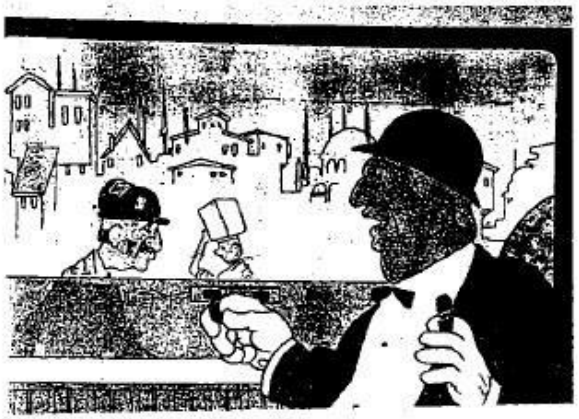
[41] A. CARDINI, *L‟elaborazione di una "teoria dell‟economia nazionale" fra il 1914 e il 1930* in *Quaderni di storia dell‟economia politica,* Accademia Editoriale, Vol. No. 8, No. 2/3, 1990, p. 377-401.

[42] "Things appear by now too big, confronting with the pre-war nationalism, which, despite the single value of its leaders, basically never went beyond the limits of a "school". Now crowds entered the scene", B. MUSSOLINI, preface in A. ROCCO, *Scritti e discorsi politici,* Giuffrè, Milano, 1938.

reformers, and the resistance they encountered trying to implement their modernization program (in Istanbul in 1909, with the Kurdish insurrection in 1925 [43], in the "Menemen incident" in 1930) tended to confirm their theories. The practice of authoritarian modernization in post-World War I was embedded in the perceived failure of the previous attempts to introduce modernization, both from below as well as from above [44]. Two other influential thinkers influenced the "Committee and Union Party" choices: firstly, the Turkist Mehmet Ziya Gökhalp, whose ideology was influenced by the German romantic nationalist thinkers, was one of the minds of the famous reform of Atatürk in adopting the European family law, clock and calendar, measures and weights, clothing and alphabet as well as religious orders and shrines; secondly, also the Westernists (*garbcilar)* were very influential: they were asserting that there is just one world civilization – the European one– rejecting the dichotomy of culture and civilization. Thus, the adoption of a European lifestyle was needed, down to the wearing of hats and a prohibition of the veil.

A two-part cartoon, which clearly shows *Papağan*'s critical awareness of the gap between desire and reality, may serve as a resumé: "Watching Istanbul from the window of a car":

ill. 20



ill. 21
(*Papağan* 132:1)

"Foreign tourist: "Oh, there is really no difference between Istanbul and a European city. Let me open the window and have a look! Aaaaa!"[45]

Figure 1

[43] The revolt followed the Caliphate"s abolition. The most important symbol of Turkish- Kurdish brotherhood disappeared (T.ATABAKI and E.J.ZURKER, *supra* note No. 31).
[44] *Ibidem,* p.4-5.

ill. 1 (1:1): the first isssue

ill. 2 (Yeni Seri 32:1): one of the last issues, concerning the new letters

Figure 2

ill. 8
(*Papağan* 12:1)

ill. 9
(*Papağan* 89:1)

ill. 10
(*Papağan* 10:4)

Figure 3

In the pictures, some drawings from the satirical magazine of the early Republican Era, "Papağan" [45]*. It came out weekly from 1924 to 1927. It was loyal to the government: only in a few cases exclusively political cartoons were printed.*

Figure 1*- Confidence in progress was not unlimited;*

Figure 2*- On the left: the first issue was in Arabic. On the right: "At the newspapers all women and men are busy teaching the new letters to each other". Similarly to other newspapers, the change from the Arabic to the Latin alphabet seems to have been the main reason for the end of "Papağan";*

Figure 3*- Often you can see a certain inconsistency, a discrepancy between enthusiasm for new looks and crazes and mental reservations against them; E.g. this pictures show the fear of the consequences of women"s newly- gained freedom;*

[45] G.PROCHAZKA-ESIL, *Modernism in Turkish society as reflected in the cartoons of the satirical magazine Papağan (1924-27),* in *Law, Christianity and Modernism in Islamic society,* Uitgeverij Peeters Leuven, 1998, p.259-271.

The constitutionalisation of the Kemalist principles has made it impossible to elaborate and implement alternative programs: the Constitutional Court and the army have contributed to an effective defence of the six arrows of Kemalism and, in particular, of secularism and nationalism (dissolving "heterodox" political parties – religiously oriented and Kurdish- and declaring the illegitimacy of some laws) [46]. One example of the implications of constitutionalisation is that**,** over the time, the constitutionalized principle of secularism that drove to the closure of religiously oriented political parties has been creating serious doubts on its compatibility with the right to freedom of expression [47]. Instead, in Italy the 1948 Constitution - which arose in contrast with the dictatorship- overturned many of the Fascist principles [48]; nevertheless its influence on politics, case law and legislation required some time to be effective and still, to some extent, it is not complete. To conclude, what has to be noted is the never-ending influence of the Kemalist ideology on Turkish politics (notably, the *CHP* Party [49]– established in 1919 and led by Atatürk is still the second party of the country), while the Italian society had a strong reaction against Fascism.

Another similarity between the Turkish and the Italian context in the period analyzed is the single-party experience: in Turkey, such a system took place from 1923 to 1946, for about 20 years, as well as in Italy. In Turkey, after the attempt of the "Free Republican Party" (*Serbest Cumhuriyet Fırkası*, SCF) in 1930, it was proven that- if left to their own will- the Turkish people would easily deviate from the principles of the Kemalist revolution. The *SCF* was established following Atatürk‟s orders, to provide the experience of a multi- party democracy but it was soon closed after it surprisingly gained massive popularity and came to threaten the ideological hegemony of the *CHP*. In this context, the *CHP* political and intellectual leaders grew highly suspicious of parliamentary democracy. Süreyya Aydemir [50] himself forcefully stated his opposition to popular democracy: "No to a multi-party regime! Yes to the single party. […] Furthermore, we prefer national guidance to national sovereignty, that is- the dominance of a leader and of an enlightened minority" [51].

---

[46] R.BOTTONI *The Constitutional Court and the Principle of Secularism,* in *Diritto penale della Repubblica di Turchia,* Padova University Press, 2012, p. 77-78

[47] For instance, the *Refah Partisi* (RP) case in 1998 is maybe the most remarkable case: it occurred approximately 15 years later the foundation of the Party, when it was the largest one in Turkey and in a controversial judgment the Strasburg Court did not regard it to be a violation of Article 11 ECHR.

[48] Consider, for instance, the 12th Final and Transitional Norm of the Italian Constitution which prohibits to reorganize the dissolved Fascist party; also, consider the "Scelba Law" (Law No.645/1952) which enforced this norm and criminalized the apology of fascism.

[49] *Cumhuriyet Halk Partisi,* the "Republican People's Party".

[50] Aydemir was a member of the Communist Party of Turkey, who studied at Moscow University. He wrote for the *Aydınlık* magazine. The magazine was shut down in 1925 for political reasons, and he was sentenced to 10 years in prison for the views he had expounded in the magazine. Released after a year and a half, Aydemir mixed his Marxist–Leninist leanings with the nationalist Turkish ideology to create the basis for the "Kadro theory". Aydemir argued that Turkey would lead a new world order, where former colonies and economically subjugated states would rise up and overcome the hegemony of the industrialized world (GEORGE HARRIS, *The Communists and the Kadro Movement: Shaping Ideology in Atatürk's Turkey*, Isis Press, Istanbul, 2002, p.141).

[51] I. S. AYDEMIR*, Atatürk çülüğün Ekonomik ve Sosyal Yönü Semineri*, Istanbul Iktisadi ve Ticari Ilimler Akademisi, Istanbul, 1973, p.108, quoted in E. AYDIN, *Peculiarities of Turkish*

Furthermore, the *CHP* Party Congress established in 1931 the so-called *Halk Evleri* ("People‟s Houses"), adult education centres which served as propaganda institutions to spread the principles of Kemalism. As far as Italy is concerned, the single-party period culminated in the abolition of the Chamber of Deputies in 1939, replaced by the "Chamber of Fasci and Corporations" until 1943 [52]: its members were not elected, but chosen for their roles in other Fascist organs. Regarding propaganda and the educational tools, some examples of these practices are the *Opera Nazionale Balilla* and the *Gioventù Italiana del Littorio* [53].

Finally, it seems that the Turkish interest in Italy in the field of law even generated the idea of building the law faculties following the Italian standards. The notion and education of law was intended to be created by integrating it with a definite spatiality: borrowing some forms from Italy was considered to be an architectural representation of the Turkish change. In a letter sent to the Italian Ministry of Foreign Affairs, plans of law schools in Rome, Padua and Bologna were requested [54], and this request was met by the relevant institutions[55]. The Italian architecture was followed in shaping the courtrooms as well.

1.2- Mahmut Esat Bozkurt, Alfredo Rocco and Other Prominent Personalities

The Turkish intellectual bourgeoisie was trained in Europe, especially in France, and considered following the European model the fastest and best way to reach modernization and westernization of the country. Nevertheless, it would be naïve to think the prominent figures of Turkish Revolution passively accepted the supremacy of the Western model: conversely, most of them were profoundly convinced of the capacities of Turkish citizens and, sometimes, even of their superiority. Here the Kemalist pillar of nationalism returns again.

Mahmut Esat Bozkurt, Minister of Justice during the Atatürk's government, was one of the most influential men in the Turkish justice system from 1924 to his death in 1943 together for example with Ernst Hirsch, whom I will briefly speak about in the third chapter of this dissertation analysing the "Law on Atatürk". [56]

Revolutionary ideology in the 1930‟s, the Ülkü Version of Kemalism, *1933-1936*, Middle Eastern Studies 40, no. 5, 2004, p.63.

[52] The new "Chamber of Fasci and Corporations" was established by Law No. 129 in January 19, 1939.

[53] K. SCHEMBS, *Fascist youth organizations and propaganda in a transnational prospective,* in *Amnis,* 2013, link: *https://amnis.revues.org/2021* (9/9/2016).

[54] ASDMAE (ARCHIVIO STORICO DIPLOMATICO DEL MINISTERO DEGLI ESTERI), AP. Turchia, 1931-1945, B. 23, f. 4*, Ministero degli Affari Esteri al Ministero dell'Educazione Nazionale*, Telespresso N. 213225/102, April 20, 1937. The reference was found thanks to the accurate work of Erhan Berat Fındıklı in the PhD thesis *İtalyanlar ve Türkler: mekaın reel ve historiografik inşası (1922- 43)*, Yıldız Teknik Üniversitesi, Sosyal Bilimler Enstitüsü, p. 61.

[55] ASDMAE, AP. 1931-45, Turchia, B. 23 f. 4, Prot. N. 2115, *Ministero dell'Educazione al Ministero degli Affari Esteri*, 18 Giugno 1937, quoted in E. B. FINDIKLI, *supra* note No. 55, p. 61.

Bozkurt was fascinated by the French Revolution, considering it the starting point for nationalism. In his book *Liberalizm masalı* ("The Story of Liberalism"), he refers to 1789 as a turning point and reports the speech of Jacques Roux [57]. "Nationalism is the ideology everyone should believe in!" was one of Bozkurt‟s mottos. This tie with French culture, and therefore French legal culture as well, may be one of the reasons why the principles embedded in the Italian Criminal Code, so deeply influenced
by the Napoleonic Code, were so appealing. During the first economic policy congress of the Turkish Republic, on November 17, 1923, he defended the concept of having a strong national economy (*étatisme*) to such an extent that all the words from different languages in use in Turkey referring to the economy should be unified in Turkish words: many different words existed, because many ethnic groups were composing Turkish society and leading the economy, often more than Turks. So it happened for instance with the word *vergi* (tax), which was completely different in Armenian and Greek language [58].

The Ministry of Justice‟s renovation plan was broad, as is shown by the expression *Türk Medeni Kanonu* (*"* Turkish *Corpus Iuris Civilis"*) he used referring to the upcoming law system [59]. Moreover, I find it interesting to note that this reference (and reverence) to the Roman law system will be a *leit-motiv* of the Turkish scholarship and law education; in this regard, I would remember Şemseddin Talip, who was lecturing Roman law in Istanbul University, and publishing the research magazine *Capitolium*. He was one of the conspicuous personalities of the Turkish-Italian relations in the legal field [60]. Great emphasis was put especially on the *Corpus Iuris Civilis* drafted by Justinian I, the Eastern Roman Emperor of Byzantium, the old Istanbul. Turkey was not going to lose the fascination for being a leading international power and it used any propaganda method for doing so.

---

[56] Turkish Law No. 5816 ("The Law Concerning Crimes Committed Against Atatürk") was enacted 13 years after Atatürk's death on July 25, 1951 by Prime Minister Adnan Menderes's government, and protects "Atatürk's memory" from being offended by any Turkish citizen.

[57] M.E.BOZKURT, *supra* note No. 28 pg. 19 and 33; the second chapter of the book, "The pains of evolved democracies", analyszes deeply the correlation between nationalism and democracy.

[58] The westernization process led to a change in the alphabetical system from Arabic to Latin letters and completely new terms were introduced as well, such as *inkilab* (a complicated concept meaning more or less "the legitimate revolution", referring to Ataturk‟s revolution, and more generally referring to a top-down revolution). *Devrim* remains as the word referring to a bottom-up revolution, trying to overturn a legitimate government. This process of change of Turkish language started one hundred years before the Republic's foundation, for example with the introduction of French terms (e.g. *chauffeur, pardon,*…). The word *inkilab* (or *inkilap)* comes from the Arab word *kalıp*, which means mold, plate, frame and which may refer to the new framework that the Atatürk‟s revolution was creating for the Turkish system.

[59] M.E.BOZKURT, *supra* Note No. 28, pg. 68.

[60] Having finished his education in Rome, at "La Sapienza" University during the Fascist period, Talip stood out with his effort to add a Fascist stylisation to the Kemalist evolutions. In Italy, inctellectuals judged the Turkish professor quite unfavourably. The rector of the University of Rome remarked this situation in a letter he sent to the *Sottosegretariato di Stato per la Stampa e per la Propaganda* ("Undersecretary of the State for the Press and Propaganda"), suggesting the conferences which were planned to be arranged in the Universities of Istanbul and Rome to be processed between rectorates, avoiding to involve Talip (ACS, *Ministero della Cultura Popolare*, 247 Turchia, 1935, I/74, from *Regia Università degli Studi di Roma al S. E. il Sottosegretariato di Stato per la Stampa e per la Propaganda*, pos. No: 23, prot. No: 1879, Rome, March 22, 1935), quoted in E. B.FINDIKLI, *supra* note No. 55, p. 59.

This reminds us of the analogous strategy of the Fascist regime in Italy, fascinated too by reviving the old Roman Empire tradition in order to remind its citizens of the country's potential. The third chapter of *Liberalizm Masalı* is titled "Why I do defend the Union Party": here a Bozkurt's speech dated September 18, 1930 is reported, where he is trying to explain that the Turkish nation must stand on its own legs. Therefore, he continuously attacked academics and intellectuals because they "are bending their heads to the European countries and forcing us to ask for their help. So it does Fatih Bey, who says we should accept France's help" [61]. So, why was the Atatürk's government referring to the Western powers in this way, but trying in the meanwhile to adopt their state‟s system and life style? Basically, the government recognized Turkey could learn from them in order to "westernize" the country, while refusing to be dominated by them as other Middle Eastern areas were under the process of colonization. Nationalism returns again, as the protection of specific interests of the nation: similarly, Alfredo Rocco was writing that "until we fight against the inhabitants of the Moon or of Mars, the human kind will not have specific [global] interests to defend; […] the national society is the only social aggregation, which has solemn specific interests to assert, that are continuously opposed by the other national societies" [62]. Finally, the superiority of Turkish population is underlined again by a story where Bozkurt addresses to the "*Büyük Öz Türk Gençliğine"*, the "unbelievable great Turkish youth" [63]. The story‟s moral is teaching the "bloody history of freedom": again, he refers to the French Revolution as a model for deeply renovating a country‟s system, eliminating most of the previous establishment and tradition with no fear of using violent means. Similarly, in Mussolini's preface to *Scritti e discorsi politici* ("Political writings and speeches") by the Minister of Justice Alfredo Rocco, the Duce affirms that "Fascism is the future because it doesn't desert, but it fights: its propaganda is action, […] the never ending battle consecrated by blood".

Another important figure in the first Republican Era of Turkey is Recep Peker [64]: his most important work is titled *Inkilab dersleri* [65] ("Lesson on revolution"); Peker was teaching his doctrine in 1934-35 at Ankara and Istanbul University and subsequently initiated the introduction of a subject called "History of the Revolution" in the school curricula, which is still compulsory today in all of the Turkish universities. As I better explained in Note No. 59 above, the westernization process led to a change in the alphabetical system from Arabic to Latin letters and completely new terms were introduced as well, such as *inkilab*:it is a complicated concept meaning "revolution", but referring specifically to Atatürk's one and, more generally, to a top-down revolution. The Fascist movement itself used to call their gaining of power as "revolution" [66]. Despite of

[61] I assume Fatuh Bey is another deputy, unfortunately no source was found referring clearly to this person. Bozturk addresses him ironically as *"Paris sefindir",* "the ambassador of Paris".
[62] A.ROCCO, *Scritti e discorsi politici,* Giuffrè, Milano, 1938.
[63] M.E.BOZKURT, *supra* note No. 28, pg. 82.
[64] He used to be the Secretary General of the General Assembly of Turkey (1920-23), Minister of Finance (1924), Minister of National Defence (1926), Minister of Public Works (1927).
[65] R.PEKER, *İnkilab dersleri*, ULUS Basımevi, Ankara, 1936.
[66] B.MUSSOLINI, *supra* Note No. 19.

the several commonalities between the Fascist and the Kemalist ideology, after Recep Peker went to Italy and Germany for studying the structure of the Fascist and Nazi systems in 1936, the model he proposed was not fully accepted for Turkey. Before leaving for Italy, Peker dogmatized the party-state identity [67]; afterwards, he was proposing the idea of an authoritarian leader ruling over the whole system, which was not considered appropriate in Turkey- at least not at an official level- instead than the Party‟s prominence. Moreover, while in Italy having an aggressive foreign policy was considered fundamental [68], the Turkish foreign policy was cautious and the country chose to remain neutral during World War II. Nevertheless, Atatürk was acting as a dictator, appointing and dismissing the members of the Parliament at his will and growing around himself a personality cult [69]: from 1926 onward the first statues of Atatürk started to appear [70] and this cult have been lasting until the current days where almost every shop and every public building hangs portraits of Mustafa Kemal. The growing personality‟s cult took place also because the previously mentioned Roman inheritance of Turkey. While narrating the resemblances between Gazi (Mustafa Kemal Atatürk) and Justinianus in *Capitolium, Roman Law and History Studies Magazine* [71], Aydemir wrote a text both in Turkish and Latin in order to be able to develop a historical and cultural sense of continuity[72]. On the Italian side, the epigraphic use of Latin language on

[67] "The Republic of Turkey is a party government. The party works together with the state". Again, at the Fourth *CHP* Grand Congress, in 1935, Peker said: "The rise and development of our party is linked to the independence of our country and the foundation and development of a new Turkish state. The state is almighty and crucial for the whole world" and "My friends; the main distinctive feature of the new program is a tighter closeness of the essence of new Turkey and the essence of the Republican People‟s Party, which has been working for the state and together with the state, to one another". Recep Peker‟s article "Volk- und Staat-Werdung" published in Germany in the *Europäische Revue* and translated as "Uluslaşma-Devletleşme", (Ülkü, VIII, 41, July 1936), advocated a system in which the people, the Party and the State were closely integrated. See M. NURI DURMAZ, *An ideologist, an ideology: Recep Peker and corporatism,* in *TODAİE*‟s Review of Public Administration, Vol. No. 2, June 2, 2008, p. 189-216.

[68] "If there is an Italian state, an Italian society is just now taking shape. The Italian citizen, in the North as well as in the South, feels a very little national interest while he feels very much the individual one or those of his group. […] Well then, this disintegration must disappear. And to make it disappear, there is only one way: strongly focusing the attention of the Italians on the struggle that the Italian nation fights and will fight in the world. In this regard, it has been proven the utility of the Libyan war" in A. ROCCO, *Scritti e discorsi politici,* Giuffrè, Milano, 1938.

[69] T.ATABAKI and E.J.ZURKER, *supra* note No. 31. Regarding the establishment of Mussolini‟s cult, see E. GENTILE, *Il culto del Littorio,* Rome- Bari, Laterza Editore, 2001 and E. GENTILE, *La vita italiana al totalitarismo. Il partito e lo Stato nel regime fascista,* Carrocci Editore, Rome, 2002.

[70] The Atatürk‟s statue in Taksim square (Istanbul) was realized by the Italian sculptor and composer Pietro Canonica.

[71] S. AYDEMIR, *Capitolium, Roman Law and History Studies*, publisher Dr. Jur. Şemseddin Talip, Istanbul: Ahmet Ihsan Press,1934, Year I. p. 1, quoted in E. B. FINDIKLI, *supra* note No. 55, p. 60.

[72] This article was printed in capital letters in both of the languages to create an epigraphic effect (with a grotesque result), reads as follows: "The law history of this country was propelled into a new adventure by the hands of a very high intellect and willpower twice: once by Justinianus' creation of the Corpus Juris between 530-534, and then by the great Turkish general Gazi's creation of the new laws of Turkey between 1924-27. Just as Justinianus determined the old Roman law culture and influenced the future with his command todraft a legislation, similarly Gazi determined Turkey's present law culture with his command about

monuments and the teaching of this language in schools became predominant in the Fascist period.

1.3- Authoritarian Criminal Law for the Authoritarian Modernization

The opinion crimes, especially those that have to be balanced with the interests of national security and public order, can be inserted in the frame of "authoritarian criminal law". Eugenio Florian, in his *Trattato di diritto penale* ("Essay on criminal law") wrote in 1923 that "the whole traditional doctrine was moulded on the despotic state‟s premise. Now, the doctrine of political crime and of the crimes against the state has to be developed on the democratic state‟s premise" [73]. This statement wants to underline that the lasting existence of this kind of crimes in the Criminal Code necessitates a credible justification in a democratic environment; still, Carlo Fiore -fifty years later- was considering this statement correct in his own society, where judges were not sparing in applying political crimes, crimes against the State and opinion crimes and were asking the scholarship to justify this practice from a democratic point of view [74]. Florian's statement is actually even more correct today than in 1923, when- both in Italy and in Turkey- the Constitution was not existing yet [75], as well as the several binding conventions signed by the two countries (above all, the European Convention of Human Rights). Moreover, the communication tools and the potentially global extent of any information make the enforcement of opinion crimes even more damaging.

Focusing on the dates, 1923 is the same year when the Turkish Republic was founded; only three years later, Mustafa Kemal Atatürk and the Minister of Justice Mahmut Esat Bozkurt will be choosing the Italian Zanardelli Criminal Code as the most advanced in terms of technique; nevertheless, only a few references where done directly to the Italian scholarship since most of the Turkish intellectuals were not able to read Italian and were constantly referring to the comments of French thinkers on the Italian doctrine [76]. In those years, many criminal law writers became aware of the substantial reactionary nature of the criminal law in force. The historiography of the second half of the 20th century underlined the superficiality of the idea of an "idyllic and mythical arising" of a new criminal law after the French Revolution [77]. Fiore considers the thesis of a progressive development of criminal law "anti-historical", since the essentially "regressive" nature of French Restoration; consequently, also the criminal law approaches in the 19th century were "regressive": nevertheless, they greatly inspired the French Code of 1810 and the following European

---

enacting new laws. The works of Gazi will designate the juridical awareness of his nation forever as well as the works of Justinianus continue to exist".

[73] E. FLORIAN, *Trattato di diritto penale: delitti contro la libertà,* Vol. 3, F. Vallardi Editore, 1923.

[74] C. FIORE,*supra* note No. 17.

[75] In order to be precise, the first Turkish Constitution dates 1921: it was ratified by the Grand National Assembly of Turkey in January 1921. It was a simple document consisting of only 23 short Articles. In October 1923, the Constitution was amended to declare Turkey a Republic.

[76] Among others, N.KUNTER, *Le code penal turc de 1926 et les principales reformes dont il a été l"object,* in *Rev.int.doct.leg.pen.comp,* 1941.

[77] I. MEREU, *Storia del diritto penale nel '500- Studi e ricerche*, I, Napoli, 1964.

codes, first of all the Italian one: the Napoleonic code was considered an enlightened example [78]. Conversely, other authors, such as Max Ascoli [79], considered other kind of Italian regulations of the 20‟s– such as the Laws of the Press during the period 1848-1924 - as patterned after the traditional Anglo-Saxon liberalism. Thus, no censorship existed except in time of war; jury trials were guaranteed to persons accused of crimes committed through the instrumentality of the press and the editor was very frequently exempt from criminal and civil liabilities. Until 1924, a queer situation was taking place: increasing violence and Fascist attacks on the several opposition‟s newspapers[80] but a comparative free press was addressing a country that had already lost its political freedom. Afterwards, before the enactment of the new 1930 Criminal Code, the reorganization of the press was done cautiously, changing the editors but trying to maintain the same general style so that the readers could sense as little difference as possible. Finally, with the institution of the Fascist Union of the Press, the newspapermen, like all the other Italian workers, received the assurance of a more sheltered work as a compensation for their lost freedom of organization and dissent [81]. A lot more would need to be said concerning the academic freedom of expression, but synthesis needs prevent me to do so. In this regard, I just refer to the *Manifesto of the anti-fascist intellectuals*, written by Benedetto Croce in 1925 for the newspaper *Il Mondo.*

As far as it concerns Turkey in the early Republican Era, academics, journalists and writers were there to be used for a purpose: to feed the leaders with ideas and to spread the leaders‟ ideas. Those who were too independent-minded soon found themselves ostracised: it meant isolation, surveillance and the need of finding a job not related with the educational system or the media[82].

[78] The lack of big transformations with respect to the previous 1889 Code is confirmed in *Lavori preparatori del codice penale e del codice di procedura penale* ("The preparatory works for the Criminal Code and Procedural Criminal Code"), that report: "A few adjustments and prudent amendments seem to be enough […]. The system will remain unchanged as well as the general physiognomy and the principles and fundamental features of the penal institutes". (*Lavori preparatori del codice penale e del codice di procedura penale, Atti parlamentari della legge 24 Dicembre 1925 n.2260 che delega al Governo del Re la facoltà di emendare i codici penali e di procedura penale,* Provveditorato Generale dello Stato, Rome, 1928, Vol. No. 1, p. 14).

[79] Max Ascoli (1898–1978) was a Jewish Italian-American professor of political philosophy and law at the New School for Social Research (USA). He graduated in Law from Ferrara and in Philosophy from Rome and moved to US because of the Fascist repression thanks to a "Rockefeller Foundation" scholarship. He was active in the "Mazzini Society", an anti-fascist organization founded in 1939 by some Italian intellectuals who had fled Italy.

[80] The *Corriere della Sera* in Milan, *La Stampa* in Turin and the satiric sheet *Becco Giallo* in Rome. After Matteotti‟s murder, their circulation jumped to records that were never surpassed for the following 20 years. See M. ASCOLI, *The press and the Universities in Italy* in *The Annals of the American Academy of Political and Social Science,* Sellin, Philadeplhia, 1938, p.235 and 240.

[81] *Ibidem*, p.241.

[82] T.ATABAKI and E.J.ZURKER, *supra* Note No. 31.

To conclude, for the reasons explained in this chapter, I believe that the choice of adopting the Italian Criminal Code was political and it was led by the fact that the "Republican People‟s Party" was sharing with the Italian State the same standpoint regarding the relationship between the rights of the State and the individual rights. In 1926, parliamentarian Alfredo De Marsico wrote: "One of the two major problems that our reality poses on our work and motivates the Criminal Code‟s change is the need of a stronger defence of the State rights against individuals" [83]. This conception is based on the ideal which considers a duty of the individual to sacrifice for the superior benefit of the Nation. De Marsico continued writing that "because of the increasing prevalence of the State rights upon those of the individual, *the concept of social defence as a purpose of punishment is emphasized*" [84]. A sacred conception of the State was extremely prevalent in both of the Italian and the Turkish state ideologies and, to a certain extent, is still of major importance. Moreover, following Fiore's theory, the Italian Criminal Code has ineradicable Napoleonic roots, that aim at building a system in defence of the existing social order. This was the reason why- already in 1810- the subject of the offences against the State received the highest attention. The reactionary aspiration will be much more long-lasting than the institutions which created it [85]. For these reasons, freedom of thought was intended to meet rigorous limits: because of the ties which link the individual to the State "mission". This brought to inevitable consequences, such as the need of specific judges for political crimes, the death penalty for such crimes, the introduction of new crimes such as the offence to the Head of the Government and increased penalties.

The thesis I defend in this dissertation aims to show how changing social and political factors can lead to the enforcement of very reactionary provisions as long as they exist in our codes. Italy and Turkey have very similar criminal provisions and Turkey is at present one of the worst examples in the field of protecting freedom of expression. The binding provisions of the Turkish Constitution and of the ECHR do not seem to be that binding when they face a strong political will and when the social environment is dominated by a government-led propaganda, fear and instability. My work claims for a need of greater awareness from governments and legislative powers as well as from the public opinion about the importance of abolishing any kind of legislation which criminalizes thought and expression as soon as possible. Moreover, I will individuate the fundamental elements that must be considered for a human rights-oriented interpretation of the existing penal provisions, as long as they exist.

---

[83] A. DE MARSICO, *Relazione sul codice penale dei lavori preparatori,* Tipografia delle Mantellate, Roma, 1927-30, vol.I, p. 39.
[84] *Ibidem,* p.41
[85] C.FIORE, *supra* note No. 17, p. 147

CHAPTER NO. 2

NATIONAL SECURITY AND PUBLIC POLICY: EVOLUTION OF THE CONCEPTS AND NEED FOR A BALANCE WITH THE FUNDAMENTAL HUMAN RIGHTS

2.1- The " Emotional" Criminal Law Before the Perpetual Emergency

"Those who are in favour of penalties and bans on thought, seem to ignore the requisite relation between the thinking of an individual and the expression of it, the attempt of influencing others with this thought. Otherwise, what is not expressed or communicated to others has no value at all!"

ALI BULAÇ [86]

All over the world, very often the right to free expression, that is the freedom to give and receive information, is limited in the name of national security and public order. The concepts of "national security" and "public order" are very broad in themselves, so the attempt to define them requires an analysis of the historical roots of the terms as well as their current use and meaning. In the meanwhile, they are so vague that they can every time match with different ideological and political choices [87]. If it is true that "law is politic under other appearances"[88], this is particularly true for criminal law and especially for political criminal law. In this sector, fundamental individual freedoms, such as freedom of expression, are limited in the name of super-individual interests, such as the State interest; in particular, the meaning of "State interest" is often an expression of the official order [89].

Historically, one of the main objectives and reasons for the existence of a structure called "State" is assuring the security of its citizens, but the question is: are the citizens always in need of such a protection? Is the system really securing them or is it securing mainly the State itself? In this regard, I would mention Judgment No. 87 of 1977 of the Italian Constitutional Court: it regards the crime of torture, and a kind of "safety torture" was inherently tolerated in the name of the security of the State "which constitutes a fundamental, ineradicable interest of the community, with a clear predominance rather than any other interest, because it concerns the State existence itself". But the State interest, itself, when balanced with certain other rights, is never an issue [90]. In a torture case, for instance, human dignity is the issue. Consequently, the usage of this

---

[86] Turkish sociologist, theologian and writer in *Yesterday, Today, Tomorrow: Freedom of Expression in Turkey Report (1995- 2015),* "Initiative for Freedom of Expression", Istanbul, January 2015, p. 138.

[87] For the relationships between law and ideology, see: V. MOCCIA, *Il diritto penale tra essere e valore. Funzione della pena e sistematica teleologica,* Napoli 1992, p. 21 et seq. .

[88] R. VON JHERING, *Der Zweck im Recht,* I, Leipzig, 1877, p.180.

[89] V. MASARONE, *Politica criminale e diritto penale nel contrasto al terrorismo internazionale,* Edizioni Scientifiche Italiane, 2013, p. 15.

[90] M.LA TORRE- M. LALATTA COSTERBOSA, *Legalizzare la tortura? Ascesa e declino dello Stato di diritto,* Il Mulino, 2013, p.148.

particular category of super-individual interests represents the borderline between an authoritarian state and a not- authoritarian one: when the defence of State security prevails on free expression without considering the entity of the offence, it results in suffocating the evolutionary incentives that a conflicting and dialogical dimension of the society can express inside a truly democratic system.

Focusing historically on the security issue, one of the reason for having criminal laws is that they make us feel more secure. According to Thomas Hobbes, this is the key reason why a society should be regulated with criminal norms [91], otherwise you would feel vulnerable to the predation of others. Jeremy Bentham properly links freedom with "security from criminals on one side, and security from the instruments of the government on the other side" [92]. In the transition from the absolute regimes to the constitutional systems, the individual freedoms guaranteed and allowed by the State have to be enforceable toward the State itself. If security is the essential prerequisite for enjoying freedom, the former must not limit in any way the full expression of the latter.
However, the kind of freedom I am speaking about is defined as "negative freedom" by many authors: it concerns the absence of coercion rather than the "positive freedom" to participate to the administration of the *polis* [93]. Moreover, it is important to distinguish between the (increasing) demand for *security*, meaning the material protection of life, and *safety*, that is a long-term existential security [94].

To the extent you believe that criminal law is effective in lowering the "objective risk" of victimization, that risk is reduced in our subjective perceptions[95]. On the other hand, a degree of public confidence in the law"s justice and effectiveness is also necessary: therefore, in certain systems- for example in Italy and in Turkey- laws are sometimes enforced for creating public confidence. When a society is experiencing a period of economic and social decline, the executive, legislative and why not judiciary powers (when the judiciary is not really independent) tend to issue and implement more and more regulations in order to give people the impression of reacting and working for a better common environment. The idea that the duty of political leaders is mainly to guarantee security and stability as well as juridical stability, is increasing today [96]. For instance, Massimo Pavarini, analysing the Italian criminal punishments in the 20th century noted that "for a long time […] the collective feelings of insecurity were expressed as a request for political change". This tendency changed from the end of the 20th century onwards [97].

---

[91] T. HOBBES, *Leviathan or The Matter, Form and Power of a Common Wealth Ecclesiastical and Civil,* 1651.
[92] J. BENTHAM, *An introduction to the principles of morals and legislation*, 1823.
[93] R. ESPOSITO, *Libertà o sicurezza?*, MicroMega, February 2016, p. 98-105.
[94] Sociologists as Bauman, Back or Castel well described the topic in details.
[95] On the difference between objective and subjective sense of security, see L. ZEDNER, *Security,* Routledge, 2009.
[96] J. RAMONEDA, *La strategia della paura come impotenza,* MicroMega, February 2016, p.88-97.
[97] M.PAVARINI, *La criminalità punità. Processi di carcerizzazione nell"Italia del XX secolo* in L. VIOLANTE, *Storia d"Italia. Annali 12. La criminalità*, Einaudi, Turin, 1997.

- **Penal populism** [98]

The phenomenon called "penal populism" is characterized by two main features: one consists in understanding how the logic of political consensus alters the normal functioning of the justice system; the second one runs along with the issue of preventing any abuse of power at the expenses of the citizen in his or her relationship with the State [99]. The idea of the "security State" is influential because it is the default of a politically disengaged society, and not because of a politically engaged population believes in it passionately [100]. In this regard, populism has been considered something that concerns only the nascent phase of a state and not political contexts that are deemed to be fully democratic [101]. Instead, populist phenomena are conditioning the (apparently) most stable democracies of the Western world, especially thanks to the role of media in contemporary society[102]. As a matter of fact, penal populism – that is, the kind of populism which involves the juridical dimension- is not just related with a single event or personality, but is first of all a social issue and leads to deep anti- democratic distortions: it is described as a "syndrome" by the "Political Dictionary" of Norberto Bobbio, Nicola Matteucci and Gianfranco Pasquino[103].

[98] This paragraph benefited from: S. ANASTASIA, M. ANSELMI, D.FALCINELLI, *Populismo penale: una prospettiva italiana,* Wolters Kluwer, CEDAM, 2015.
[99] *Ibidem,* Introduction.
[100] P. RAMSAY, *The Insecurity State- Vulnerable Autonomy and the Right to Security in the Criminal Law,* Oxford University Press, 2012, p. 232.
[101] "The impression I have is that provisions protecting the prestige of the State, State institutions or the authority of the State […] usually were entire in penal codes of […] young states. My impression is that, like in the case of Italy and the case of Greece, we used to keep an article as long as we thought our state is threatened by other internal or external forces": stated by Andreas Pottakis (Deputy Director of the Academy of European Public Law) during the discussion of the conference *The evaluation of the new Turkish press law in terms of freedom of expression,* "Bahçeşehir University" (Istanbul) in 2006. I do not agree with this reasoning since the current Italian legislation proves the opposite.
[102] S. ANASTASIA, M. ANSELMI, D.FALCINELLI*, supra* note No. 98**,** p. 2.
[103] Entry "populism" in N. BOBBIO, N. MATTEUCCI, G. PASQUINO, *Il dizionario di politica,* UTET, Turin, 2004, p. 735.

	Definition of populism	Unit of analysis	Relevant methods	Exemplars
Polotical ideology	A set of interrelated ideasabout the nature of politics and society	Parties and party leaders	Qualitative or automated text analysis, mostly of partisan literature	Mudde (2004,2007), Kaltwasser and Mudde (2012)
Political style	A way of making claims about politics	Texts, speeches, public discourse about politics	Interpretative textual analysis	Kazin (1995), Laclau (2005), Panizza (2005)
Political strategy	A form of mobilitation and organization	Parties (with a focus on structures), social movements, leaders	Comparative historical analysis, case studies	Roberts (2006), Wayland (2001), Jansen (2011)

Figure 4: Characteristics of the three approaches to populism research [104]

Moreover, we cannot consider the political reactions just as emotive and reactive, since they are also reflecting normative principles shared across the mainstream political life today, "from the 90's onward" Peter Ramsay says in his book "The insecurity State" [105]. Those principles are crystalized from a long time in the relationship "ruler- ruled". For instance, in Britain the normative justification for the *right to security* [106] (security as a legally protected interest that is the ground of penal obligations to the state not to set it back) is found in the idea of *vulnerable autonomy*; Ramsay considers this concept to be axiomatic even in the theory of Friedrich Hayek**,** that has been a chief source for neo-liberalism. "The vulnerability of the law"s subjects assumed by these theories is the normative basis of the rights of the subjects to be free from fear, their right to security", Ramsay evaluates.

In all of these pictures, the role of media is essential and the need of free media and independent thinkers, fundamental: often, also in Italy and Turkey, we assist to a real *spectacularization* of criminal facts, emphasizing drama and amplifying violence and fear; consequently, this is highly influencing public opinion. Another important factor is *destatisticalization*[107], where statements disregard statistical data revealing their rhetorical nature [108]. In this regard, a good picture is furnished by the "Italian National Institute of Statistics" (ISTAT):

[104] From S. ANASTASIA, M. ANSELMI, D.FALCINELLI*, supra* note No. 98**,** p. 5.
[105] P. RAMSAY, *supra* note No. 101, p. 5.
[106] See also later, Paragraph "The right to security" in thi dissertation. For a socio- political approach on the national security culture, see P. J. KATZENSTEIN AND OTHERS, *The culture of national security: norms and identity in world politics,* Columbia University Press, New York, 1996.
[107] J. PRATT, *Penal populism,* Routledge, New York, 2007.
[108] For an in-depth analysis of fallacies in the public debate, see F. D"AGOSTINI, *Verità avvelenata. Buoni e cattivi argomenti nel dibattito pubblico,* Bollati Boringhieri, 2010, Turin.

some tables show the trends of and the differences between prosecuted criminality and punishments. It is evident that the reality of criminality as objectified in judicial processes has been increasing in the last twenty years [109]. Basically, Italy- as well as many other countries- has a high index of criminality which does not necessarily correspond with an higher danger for citizens‟ safety. Finally, a study published by an American magazine of psychology, called "*Developing and Testing a scale to Measure Need for Drama"* [110] showed an inclination to propose bigger or smaller catastrophes and apocalypses as a profit-making business or for mobilizing the others.

- **Criminalization and the Criminal Caw of the Enemy**

Thus, often some kind of political strategies move from the society‟s insecurity and promote contrasts, such as "we" against "them". Building social prejudices is a characteristic of populist movements[111]: however, populism is not a precise ideology, but rather a colloquial, semantic style which reveals a lot about the audience and the general public debate [112].

The third chapter of this dissertation will show that particular individuals are more inclined than others to be charged with the provisions under analysis in this dissertation: so it happens, in the Italian and Turkish experiences- with foreigners, anarchists, Kurdish separatists and the so-called "terrorists" [113]. This feature can be included in the concept of "criminalization". The concept of criminalization has two related meanings: firstly, it refers to a process by which a group of people, an organization or an ideology is identified with criminality. Secondly, it refers to the usual consequences of that process, namely the ideology or organization is treated as it was illegal or, at the very least, as the evidence of a crime, whether or not the fact it is actually prohibited by law [114]. In the language of social scientists, criminalization is the "assignment of criminal status to people through a norm-enforcing mechanism such as arrest and trial". One way to accomplish it is to enact a norm against some activities in which members of the group are engaged; another way is to criminalize the people themselves. There is usually no need to enact specific laws against the group in

---

[109] Of course, this tendency has to be ascribed also to an increasing urban society, a greater tendency to sue and other factors. See the tables in S. ANASTASIA, M. ANSELMI, D.FALCINELLI, *supra* note No. 98, p. 111-112.

[110] S. FRANKOWSKI, A.K. LUPO, B. A. SMITH, M. DANE'EL, C. RAMOS, O. F. MORERA, *Developing and Testing a scale to Measure Need for Drama*, in *Elsevier,* November 12, 2015; link: https://www.researchgate.net/publication/283646497_Developing_and_Testing_a_Scale_to_Measure_Need_for_Drama.

[111] T. A. VAN DIJK, *Ideologie. Discorso e costruzione sociale del pregiudizio,* Carocci, Rome, 2004.

[112] Generally populist movements arise in specific socio-economic conditions of impoverishment, social polarization, social exclusion, weakening of the democratic institutions and lack of effectiveness from the authority in assuring the rights of citizens. S. ANASTASIA, M. ANSELMI, D.FALCINELLI, *supra* note No. 98, p. 13.

[113] Furthermore, in Italy, populist movements such as "Movimento Cinque Stelle" and "Lega Nord" focus on the differences with the *èlite,* with foreigners in the contest of migrations and often ask for increasing security against a persistent "decay". In Turkey, the focus concentrates on terrorism, ethnic minorities and an insistent risk of a *coup d" état* by a "parallel State".

[114] K. WILLIAMS, *Confrontations, selected journalism,* Portland, 2007.

question, as the directed enforcement of existing, supposedly neutral, laws may product the same effect: for example, there is no law against African-Americans but "racial profiling" persists.

This phenomenon is called "*criminal law of the enemy*": it finds its explanation as a means of special and general prevention and is connected to the "logic of exceptions" of the *crimen maiestatis*. The special features of this phenomenon are, among others, a high anticipation of the defence and a decrease of procedural guarantees[115]. Probably, the most explicit and provocative formulation of laws that protect a "right to security" has been provided by Günther Jakobs, who has proposed that much of the contemporary criminal law can be characterized as such [116]. In the "enemy criminal law", the punishment precedes actual harms, is disproportionate to any actual wrong and the defendant‟s procedural rights are greatly reduced. It contrasts with the "*citizen criminal law*": the justification is based on the fact that those who manifest a hostile attitude toward the criminal norms - and therefore, that are hostile to the ideological and political interests of the moment [117], dissenting with it- are a threat to be controlled rather than normal citizens. This distinction threat-
citizen is compelling, since it focuses on the security laws that separate what is dangerous from what is law-abiding, stigmatizing a disloyal attitude of hostility or indifference to the law‟s precepts [118]. Such an attitude is definitely evident in crimes such as the instigation to commit a crime, the instigation to disobey the law, the apology or the praise of a crime[119]. Nevertheless, isn‟t it legitimate, in a State which wants to be considered "democratic", to criticize or more simply to doubt the legitimacy of some norms?

In many "democratic" states, also called "old democracies", the welfare state has given social- democratic legitimacy to some of these State powers to restrict individual freedoms [120]. That is why Ramsey considers the UK's security laws not as an example of backsliding to an older form of patriarchal authority but as an extension of some powers that a liberal state would take to uphold the real autonomy of citizens beyond the limits of the authority of a liberal state. The same cannot be said about the Italian and Turkish experiences, since the laws on the paper are the same from 85 years and the judiciary applies them differently following the political situation. However, Ramsey‟s theory is interesting for evaluating one of the main characteristics of the penal populism's trends: there is a change in the meaning of the word "security". It slipped from the area of "social security" (namely job, health, welfare) and security of the

[115] ANASTASIA, ANSELMI, FACCINELLI, *supra* note No. 98, p. 28.

[116] G. JAKOBS, *Diritto penale del nemico? Una analisi sulle condizioni della giuridicità*, in A. GAMBERINI, R. ORLANDI, *Delitto politico e diritto penale del nemico*, Monduzzi, Bologna, 2007.

[117] V. MASARONE, *supra* Note No. 89, p.1-20; on the relationships between ideology and law see *V.* MOCCIA, *Il diritto penale tra essere e valore. La Funzione della pena e sistematica teleologica,* Napoli, 1992, p.21 et seq.

[118] P. RAMSAY, *supra* note No. 101, p. 192.

[119] Articles No. 414 and 415 of the Italian Criminal Code and Articles No. 214-218 of the Turkish Criminal Code.

[120] P. RAMSAY, *supra* note No. 101, p. 210.

individual freedom against the arbitrary will of the authority, turning into "public security" in the forms of public order [121].

Those who actually sustain the increasing need of security, because of globalization and the technological development, argue that the detractors are not scared by the security measures themselves, but by the fact they could be applied to *us*, that evidently have no antisocial intentions [122]. I am nevertheless convinced that most of the security laws lead the liberal order into a self-contradiction by upholding certain liberal basic commitments at the cost of undermining the system as a whole [123].

- **Increasing Jailing and Decrease of Procedural Guarantees**

"Only a tyrannical legislator can persuade and be persuaded by the fact that penalties can fully banish crimes from society"

GAETANO FILANGIERI [124]

Criminal law has a heavy influence on the fundamental individual rights: that is why, in a State of law, it should be considered as an *extrema ratio* [125]. Particularly, when it comes to punishment, criminal law can lead to detention penalties and, thus, to restrictions of personal liberty. As I have already outlined, one of the characteristics of penal populism is an increase in detention penalties, which reflects a tendency to issue reparative rather than restorative rulings. The violation of a norm is interpreted as an injury directed toward the whole community, losing the re-educational aim of the penalty[126]. Indeed, this approach is a substantial violation of the rule of law.

Speaking about the decrease of procedural guarantees, while the right to a fair trial is not listed as a provision that cannot be derogated in Article 4 (2) ICCPR, the United Nations Human Rights Committee has stated that "the fundamental requirements of a fair trial must not be abrogated in any circumstances" [127]. Moreover, Article 6 of the ECHR (right to a fair trial) is the

---

[121] L.FERRAJOLI, *Democrazia e paura* in *La democrazia in nove lezioni,* Laterza, Rome- Bari, 2010, p. 115 et seq.

[122] F. SAVATER, *Le torri gemelle,* in *MicroMega*, February 2016, p. 106-109.

[123] P. RAMSAY, *supra* note No. 101, p. 184.

[124] Italian jurist and philosopher, 1753-1788. See G. FILANGIERI, *La scienza della legislazione,* Naples, 1780.

[125] This is clear also in the Turkish scholarship, see for example F. YENISEY, *Il nuovo diritto penale turco: un bilancio dopo sette anni* in *Diritto penale della Repubblica di Turchia- Criminal Law of the Republic of Turkey*, Padova University Press, 2012, p. 26. Yenisey reports that Article 1 of the Turkish Criminal Code highlights the defence of personal freedoms and liberties together with the "principle of culpability". In Italy, the culpability principle is assured by Article No. 42 of the Criminal Code and by Article 27 of the Italian Constitution.

[126] J. PRATT, *Penal populism,* Routledge, New York, 2007.

[127] THE HON JOHN VON DOUSSA QC PRESIDENT HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION, *Incorporating human rights principles into national security measure,* International conference on terrorism, human security and development: human rights perspectives, City University of Hong Kong, October 16-7, 2007, link: https://www.humanrights.gov.au/news/speeches/incorporating-human-rights-principles-national-security-measures (9/10/2016) quoted in A. CALLAMARD, *Freedom of expression and national*

provision of the Convention which, historically, gave rise to the greatest number of judgments between 1959 and 2015 [128]. Trial guarantees occupy a central role every national and international legal systems, in that they are crucial to the actual protection of other rights.

- ***Italy***

In Italy, a tradition of penal populism and criminal law of the enemy is particularly evident from the enactement of the Rocco Code. Compared to the Zanardelli Code, both the general and the special part of the Code were expanded. The former passed from 103 to 240 articles and the latter from 395 to 494 [129]. Moreover, all of the the penalties were doubled.

The emergency legislation also has a significant role: in the 70‟s for example, it led to broader police powers in terms of custody, where the preventive detention time could reach 96 hours without warning anyone, not even the suspect‟s lawyer [130]. The preventive measures experienced a long evolution, from the time they were openly used to silence political dissident, arriving to new categories of danger for the prevention of international terrorism [131]: in the past, for instance, confinement was provided for anyone who had been tried for crimes against public order or public safety and for the promoters of associations threatening social order (under Law No. 314 of 1894 and the "Text on Public Safety" of 1926).

Another recent example of increasing jailing dates March 2016 (Law No. 41 of 2016) with the crime of road homicide: it is very criticized for the extremely high penalties that can reach 18 years of imprisonment with no need of intentionality and even just for lack of attention [132].

---

security: balancing for protection, Columbia Global Freedom of Expression, Judges‟ Training Materials, December 2015, link: https://globalfreedomofexpression.columbia.edu/wp-content/uploads/2016/01/A-Callamard-National-Security-and-FoE-Training.pdf (9/10/2016).

[128] COUNCIL OF EUROPE/EUROPEAN COURT OF HUMAN RIGHTS, Annual Report 2015, p. 198- 199, link: http://www.echr.coe.int/Documents/Annual_Report_2015_ENG.pdf (9/12/16).

[129] The numerical increase of the provisions of the general part, however, was accompanied by a system of definitions that interested the most important institutes as well, such as causality, intent, fault, the objective conditions of punishability.

[130] Some examples of emergency laws are the Laws "Reale" (Law No. 152/1975), "Cossiga" (Law No. 15/1980), "Pisanu" (Law No. 155/2005) and Law No. 43 of 2015. A more detailed analysis of these Laws will follow in this dissertation.

[131] See F. MENDITTO, *Presente e futuro delle misure di prevenzione (personali e patrimoniali): da misure di polizia a prevenzione della criminalità da profitto,* presented to the annual conference of the association of the reasearhers of the criminal process "G.D. Pisapia", *Preventive criminal justice- commemorating Giovanni Conso*, Cagliari, October 29 and 30, 2015;in *"Diritto penale contemporaneo"*, link: http://www.penalecontemporaneo.it/upload/1463736128MENDITTO_2016a.pdf.

[132] A. MASSARO, *Omicidio stradale e lesioni personali stradali gravi o gravissime: da un diritto penale "frammentario" a un diritto penale "frammentato",* May 20, 2016, in "Diritto penale contemporaneo.it", link: http://www.penalecontemporaneo.it/area/3-/15-/-/4705-omicidio_stradale_e_lesioni_personali_stradali_gravi_o_gravissime__da_un_diritto_penale___frammentario__a_un_diritto_penale__frammentato__/?utm_source=Newsletter+DPC&utm_campaign=9ea90f7a01-DPCgamc&utm_medium=email&utm_term=0_8d8fdd708d-9ea90f7a01-224820505 (10/9/16).

Focusing on the decrease of procedural guarantees, given the many occasions where the Strasbourg Court has found Italy in violation of Article No. 6 ECHR, the Italian legislator complied with it enacting a new Code of Criminal Procedure in 1989 [133]: the new provisions implemented the judicial guarantees provided by Article No. 6 ECHR. Furthermore, Article No. 111 of the Italian Constitution was enacted in 2001 [134], granting the right to a fair trial, the contradictory principle, the independence and impartiality of judges and a reasonable duration of the trial.
The Italian system, after the Fascist period, has never experienced special judges or special tribunals, not even in the 70's following the emergency laws. This would be straining the principle of the natural judge, provided by Article 25 (1) of the Italian Constitution [135].
Finally, as I will better focus on in the following chapter, speaking about the counter-terrorism provisions, one of the rights which are threatened by the security system is the right to information, namely being able to know the grounds for the arrest or detention and the charges moved against the defendant.

- ***Turkey***

Even if in the new 2005 Turkish Criminal Code the number of provisions diminished, the number of people detained resulted doubled in 2010: 122.662 against 55.966. Moreover, the number of people under precautionary custody between 2003 and 2008 was higher than the number of people detained under a final judgment: even if there is no hypothesis of compulsory preventive custody, Turkish judges can invoke the existence of a danger to escape or of manipulation of the proofs under the broad provision of Article No.19 (3) of Turkish Constitution [136]; preventive custody can be imposed with no need of further explanation, under Article 100 (3) of the Turkish Code of Criminal Procedure, even if Article No. 19 of the Turkish Constitution should protect personal liberty and security. Instead, at least after the second renewing of the custody, those hypothesis should be properly motivated [137]. The third paragraph of Article 100 includes the case of "forming an organization in order to commit a crime, crimes against the security of the state and against the constitutional order and the functioning of this system". Preventive measures are sometimes permitted expressly even *praeter delictum* (before a crime is committed): prevention is one of the most common grounds for restricting fundamental rights and freedoms. They should prevent the clear and present danger, whereas where the norm is silent it shall be interpreted only as allowing restrictions *post*

[133] Decree of the President of the Republic No. 447, September 22, 1988; it was effective since October 24, 1989.
[134] Constitutional Law No. 2/1999, Law No. 63/2001.
[135] All the red and black terrorism trials, together with the mafia ones, were set up by ordinary tribunals, usually by Assize Courts.
[136] Article 19 (3) of the Turkish Constitution states too broadly that those measures can be adopted also " in other circumstances prescribed by law and necessitating detention".
[137] *Şeyhmus Uğur and others v. Turkey* (multiple applications, Judgment April 11,2011), link: http://hudoc.echr.coe.int/eng?i=001-101245; *Kapar v. Turkey* (App. No. 7328/03 , Judgment August 3, 2007), link: http://hudoc.echr.coe.int/eng?i=001-80423.

delictum [138]*.* Finally, regarding the problems that stand from the indiscriminate use of precautionary measures without appearing before a judge or extending them for a not proportionate time, the recent case of the journalist and editor of the newspaper *Cumhuriyet*, Can Dündar and Erdem Gül has to be mentioned: they were released on February 26, 2016 after the Turkish Constitutional Court ruled that their rights were violated during the pre-trial detention; the imprisonment lasted 92 days violating their right to freedom and security granted under Article 19 of the Turkish Constitution [139]**.**

Focusing on the decrease of procedural guarantees, first of all the right to information of the defendant is often violated: it should include the right to examine or have witnesses examined, to have advocacy in case of lack of sufficient economic means for legal assistance, the right to prepare a proper defence and so on. Nevertheless, Articles 36-38 of the Turkish Constitution affirm the right to be heard, the right to a fair trial and the principle of the natural judge, formally proclaiming the principles of a due process of law.

Among the numerous findings of Turkish violations regarding Article No. 6 ECHR, often the ECtHR has dealt with the Turkish "National Security Courts" (*Devlet Güvenlik Mahkemeleri*, DGM): they were established by the Turkish Constitution in the 80‟s and lasted until 2004 for the offences against the territorial integrity and unity of Turkey. One out of three judges composing the Court was a military judge: this fact was compromising the independence and impartiality of the judiciary, and the Strasbourg Court recognized it beginning with the case *Incal v. Turkey* [140]. The Court came to the same conclusion in the case *Öcalan v. Turkey* [141]: the notorious PKK leader (*Partîya Karkerén Kurdîstan, "*Kurdistan Workers‟ Party") was not allowed to have a lawyer during his questioning in custody, was subsequently unable to communicate with his lawyers and to access the case file in due time. Öcalan was captured in Nairobi and brought to Turkey on February 16, 1999. He was sentenced to death on May 31, 1999. On January 2000, the Turkish authorities decided to abide to the interlocutory injunction of the ECtHR about Öcalan‟s death sentence, following the Strasbourg indications on the topic for the first time after the *Incal v. Turkey* case [142]*.* Again, a remarkable protest against Turkish special judges was made during one of the trials against the artist and activist Şanar Yurdatapan and other 14 defendants, after they published the book "Freedom of Thought-

---

[138] L. PASCULLI, *Restrictions to specific individual rights and freedoms,* in *Diritto penale della Repubblica di Turchia- Criminal law of the Republic of Turkey,* Padova University Press, 2012, 53.

[139] The first source of the news (the online version of the newspaper *Today‟s Zaman*) was shut down following the closure of the newspaper *Zaman* and of the related *Feza Holding* on March 16, 2016, link: http://www.todayszaman.com/national_president-erdogan-prosecutors-may-object-to-dundar-and-guls-release_413970.html. Also the English publication of the newspaper, the most sold of the country, is not existing anymore in its online version.
See more about the case, with the related alternative sources, in the "Case Law" section of the Turkish counter-terrorism privisions, in the third Chapter of this dissertation.

[140] *Incal v. Turkey,* App. No. 41/1997/825/1031; *http://hudoc.echr.coe.int/eng?i=001-58197*.

[141] *Öcalan v. Turkey,* App. No. 46221/99, Grand Chamber Judgment of May 12, 2005, link: http://hudoc.echr.coe.int/eng?i=001-69022.

[142] See Yurdatapan‟s interview in the end of this dissertation and THE INITIATIVE FOR FREE EXPRESSION*, Yesterday, today, tomorrow: Freedom of expression in Turkey Report 1995- 2015,* Istanbul, 2015, p. 11-21.

2000" [143]: it consisted in republishing some articles which caused trials and punishments to their authors. The first booklet of this civil disobedience initiative was signed by 1080 intellectuals. In the second case, all of the defendants refused to make statements, even defences, repeating that in such a court the right to a fair trial was being violated.

The Turkish State Security Courts were abolished in 2004 but the same law replaced them with the "Serious (or Extraordinary) Felony Courts" (*Özel Yetkili Mahkemeler*, ÖYM) [144]. Again, those tribunals were abolished by Law No. 6352 of 2012 but reintroduced by Article No. 10 of the Anti-Terror Law No. 3713 until 2014: they were organized as particular tribunals with special procedures for the organized crime and for terrorism; the role was that of Courts of Assizes, under Article No. 250 of the Code of Criminal Procedure. The Turkish scholarship generally recognized that this system was undermining the constitutional principle of the natural judge[145]. Nevertheless, the abolishment of these courts was considered to be part of the government‟s battle against "counter forces" – that are, the followers of the U.S.-based Islamic scholar Fethullah Gülen, many of whom have been employed in the judicial and security bureaucracy[146].

To conclude, it is essential to underline that the expression of opinions should not be criminalized at all: consequently, no reference to a potential jailing should be done in this context, if there is no a concrete imminent violent danger for the society as a whole. The "arbitrary arrest" is defined as following by the UN: "an attack on a person because of the exercise of his or her freedom of opinion and expression"[147]. Consequently, the imprisonments that are taking place in the field of opinion crimes, even if they are provided by law and thus are not arbitrary, have to be considered deplorable. Moreover, in a context where the concepts of penal populism, criminal law of the enemy and over-

---

[143] *Yurdatapan v. Turkey,* App. No. 70335/01, Judgment of April 8, 2008; http://hudoc.echr.coe.int/eng?i=001-84274. See a more detailed analysis of the cases and my interview to Şanar Yurdatapan, human rights activist, later this dissertation.

[144] Law No. 5190, June 16, 2004.

[145] F. YENISEY, *supra* note No. 6, p.30.

[146] A graft scandal erupted on December 17 with the arrest of businessmen close to Prime Minister Tayyip Erdoğan and three ministers' sons. Subsequently, many judges, prosecutors and police forces were moved to other parts of the country: ninety-six judges and prosecutors were reassigned overnight, one biggest purges of the judiciary in Turkish history before the one that took place in the summer of 2016. See Reuters‟ *Turkish judicial purge brings corruption investigation to halt,* January 22, 2014, link: http://www.reuters.com/article/us-turkey-corruption-idUSBREA0L1G220140122 (10/9/16). See also *Hurriyet*'s *Special Courts abolished as President Gül signs law,* March 6, 2014, link: http://www.hurriyetdailynews.com/special-courts-abolished-as-turkish-president-gul-signs-law.aspx?pageID=238&nID=63290&NewsCatID=338 (10/9/16).

[147] UN HUMAN RIGHTS COMMITTEE, *General comment No. 34 on Article 19 ICCPR: Freedoms of opinion and expression*, 102nd Session, Geneva, July 11-29, 2011, General Remark No. 23. Link: http://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf.

criminalization are alive, the enforcement of opinion crimes can be considered- in the less dangerous cases- "a paternalistic version of democracy" [148].

2.2- "Ethical" Criminal Law and the Protection of Fundamental Human Rights: Freedom of Expression as the Cornerstone and the Prerequisite of Fundamental Rights

"Freedom of opinion and freedom of expression are indispensable conditions for the full development of a person. They are essential for any society. They constitute the foundation stone for every free and democratic society"

UN HUMAN RIGHTS COMMITTEE, *General comment No. 34* [149]

A democratic society is based on pluralism and its development- since the basic ancient Greek *agora*- consists in a living debate on the society‟s issues. Only in this way, the society‟s problems can be discussed and, eventually, solved [150].
It has to be noted that freedom of expression and freedom of opinion are considered separately in the UN statement, but "they are closely related, with freedom of expression providing the vehicle for the exchange and development of opinions" [151]. Among the fundamental individual rights, freedom of expression is considered to be a cornerstone and the prerequisite of fundamental rights, a "necessary condition for the realization of the principles of transparency and accountability that are, in turn, essential for the promotion and protection of human rights" [152]. In fact, it is "a basis for the full enjoyment of a great range of other human rights. For instance, […] the rights to freedom of assembly and association, and the exercise of the right to vote" [153].

The right to freedom of expression is provided also by Article No. 19 of the International Covenant on Civic and Political Rights (ICCPR) [154]: 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" [155]. The *General comment No. 34* includes the political discourse, commentaries on one‟s own and on public

---

[148] C. FIORE, *supra* note No. 17, p. 159. Fiore quotes Kelsen, when the latter states that "in a context where the father is the archetype of authority […], democracy is […] a society without a father" (*Vom Wesen und Wert der Demokratie,* Tübingen, 1929).
[149] General Remark No.1.
[150] "Freedom of expression constitutes one of the cornerstones of a democratic society. […] The free communication of information and ideas about the public and political issues between citizens, candidates and elected representatives is essential", UN HUMAN RIGHTS COMMITTEE, *General comment No. 34, supra* note No. 149, General Remark No. 13.
[151] *Ibidem.*
[152] *Ibidem.* See also the United Nations Secretary-General Ban Ki-moon, Message on World Press Freedom Day, May 3, 2016, link: http://www.unis.unvienna.org/unis/en/pressrels/2016/unissgsm738.html.
[153] UN HUMAN RIGHTS COMMITTEE , *Ibidem,* General remark No. 4.
[154] Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of December 16, 1966; entry into force March 23, 1976, in accordance with Article 49. See the link at the United Nation‟s Human Rights office of the Commissioner website: http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx.
[155] Para. No. 2 of Article No. 19 ICCPR.

affairs, canvassing, discussions on human rights, journalism, cultural and artistic expression, teaching and the religious discourse.

The field of crimes against national security and public order, therefore of the opinion crimes which threat those interests as well, is dominated by a "*logic of exceptions*": with this statement, I mean that often the constitutional and international prospective on free expression, speech and information is reversed in the name of exceptional circumstances which would threat or damage higher interests, namely State‟s (and communities‟) order and security. In this regard, the *Johannesburg Principles on national security, freedom of expression and access to information* are another important source of international law [156]: they acknowledge the enduring validity of the *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights* [157] and the *Paris Minimum Standards of Human Rights Norms In a State of Emergency* [158]. Already in their Preamble, it is underlined that they were drafted "keenly aware that some of the most serious violations of human rights and fundamental freedoms are justified by governments as necessary to protect national security" and "desiring to promote a clear recognition of the limited scope of restrictions on freedom of expression and freedom of information that may be imposed in the interest of national security, so as to discourage governments from using the pretext of national security to place unjustified restrictions on the exercise of these freedoms". One of the problems of this logic is that often the exceptions become regular and turn into normality. Moreover, the terms "national security" and "public order" are broad and vague, so the risk is to restrict a fundamental right in the name of a not well defined interest. Later on, I will examine better what is the meaning of the two terms, especially in the two countries under study.

More generally speaking, at the level of public consensus, in principle most of the people around the world support freedom of expression: nevertheless, there is a fine line between general support for freedom of speech and support for specific forms of expression such as statements calling for violent protests, offensive to minority groups, criticizing government‟s policies,

---

[156] The *Johannesburg Principles on national security, freedom of expression and access to information* were adopted on 1 October 1995 by a group of experts in international law, national security, and human rights convened by ARTICLE 19, the International Centre Against Censorship, in collaboration with the Centre for Applied Legal Studies of the University of the Witwatersrand, in Johannesburg. Link: https://www.article19.org/data/files/pdfs/standards/joburgprinciples.pdf.

[157] United Nations, Economic and Social Council, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, U.N. Doc. E/CN.4/1985/4, Annex (1985)**:** https://www1.umn.edu/humanrts/instree/siracusaprinciples.html .

[158] The 61st Conference of the International Law Association, held in Paris from August 26 to September 1, 1984, approved by consensus a set of minimum standards governing the declaration and administration of states of emergency that threaten the life of a nation, including 16 articles setting out the non-derogable rights and freedoms to which individuals remain entitled even during states of emergency. Read them in the "American Journal of International Law" of October, 1985: http://www.uio.no/studier/emner/jus/humanrights/HUMR5503/h09/undervisningsmateriale/Paris MinimumStandards.pdf.

related to sensitive national security issues and so on [159]. A certain version of *free speech absolutism* ("purism") claims that speech cannot ever legitimately be regulated. Instead, normally, it is recognized that speech and free expression should enjoy special protections, but a commitment to free speech and free expression does not prohibit the regulation of speech; rather, it just makes it *more difficult* to regulate speech [160].

2.2 a)- The Protection of Free Expression in the Italian and Turkish Constitutions

- ***Italy***

The Italian Constitution has an antifascist spirit: the Italian reaction to the dictatorship can be compared to other countries who have experienced strong authoritarianism, such as Spain and Germany. In Germany, a "right to revolution" is even enshrined. While the constitutions of the past were based essentially on private property and the recognition of equal dignity, for example by recognizing the strike as a constitutional right (social democracy), today Article No. 3 of the Italian Constitution requires the Republic to remove the barriers that *de facto* eliminate freedom and equality. Consequently, political freedoms are not a privilege anymore [161]. Moreover, it is correct to state that "the first requirement for freedom to develop its creative role is that the legal system […] is made more and more permeable to its practice, without opposing constraints and limitations. […] Freedom, when imprisoned in the cage of a rigid legislation […] will inescapably see its creative possibilities drying up very soon. […] In fact, the democratic meaning of freedom rights lies entirely in its subversive abilities" [162].

Freedom of expression is guaranteed by Article No. 21 of the Italian Constitution, that states: "Anyone has the right to freely express his thoughts by speaking, writing, or by any other form of communication. The press may not be subject to any authorisation or censorship". It continues explaining in which cases seizure (Paragraph No. 3), orders of disclosure of financial sources (Paragraph No. 5) and prohibitions or other measures against activities impairing public morality (Paragraph No. 6) can be undertaken. There is no express mention of national security or public order as grounds for restrictions to freedom of expression, instead than in Article No. 10 ECHR. Specifically, the Constitution grants a specific and enhanced protection to the press (Article No.

---

[159] J. POUSHTER, D. GIVENS, *Where the world sees limits to free speech,* "Pew Research Center", November 18, 2015, Link: http://www.pewresearch.org/fact-tank/2015/11/18/where-the-world-sees-limits-to-free-speech/ (9/11/16). For more detailed data and percentages that I will better analyze in the following chapter, R.WIKE, K. SIMMONS, *Appendix C: detailed tables,* November 18, 2015, http://www.pewglobal.org/2015/11/18/appendix-c-detailed-tables/#free-speech (10/9/16).

[160] I. MAITRA, M. K. MCGOWAN, *Speech and harm, controversies over Free Speech,* Oxford University Press, 2012.

[161] From the conference *Verso un mondo nuovo* of Stefano Rodotà (January 29, 2016) in the series of conferences "The birth of the Constitution" organized by the "School of Constitutional Culture" of the University of Padua.

[162] C. FIORE, *supra* note No. 17.

21 (3)) by inhibiting seizure if it is not strictly provided by law in the specific case. Also the enactment of Law No. 47 of 1948 ("Provisions on the press"), which is implementing the 12th Transitory and Final Disposition of the Constitution, has to be linked to Article 21. The Press Law did not change the legal provisions of the Criminal Code concerning which crimes can be committed through the exercise of journalistic activities, but merely introduced the category of "Press Offenses" (Article No. 16 on the "clandestine press") and integrated the provisions regarding the "offenses committed through the press" (Articles No. 13, 14 and 15). In this regard, criminal responsibility rests not only on the author of the offending article but also on the director or vice-director of the publication, who is responsible for *culpa in vigilando* (Article No. 57 of the Criminal Code, as modified by Article 1 of Law No. 127 of 1958) [163], excluding any kind of objective responsibility conversely than the Fascist period.

"Italy and its constitutional scholarship can be a fruitful laboratory for investigating the more general transformations affecting European constitutionalism in the field of fundamental rights" [164], in relationship with the ECHR"s provisions and the Strasbourg jurisprudence. Two examplifications of this statement are the "*balance approach*" and the "*margin of appreciation*" doctrine**:** Italy and Turkey inherited the principle of proportionality from the EU law, especially for understanding how the proportionality test should be applied by domestic courts in situations where the State interferences undermined certain human rights. Therefore, there must be a reasonable relationship of proportionality between the means employed and the aim sought by any State measure. From the standpoint of the Strasbourg Court, the Member States enjoy a great "margin of appreciation" in this balance, "with regard both to choosing the means of enforcement and to ascertaining whether the consequences of enforcement are justified in the general interest for the purpose of achieving the object of the law in question" [165]. However, legislatively speaking, the various interventions of the Italian Republican legislator in order to solve the contrasts between an authoritarian political criminal law and the fundamental democratic principles embedded in the Italian Constitution, are still not completely effective: this is particularly unacceptable in a sector which is the core of the relationships between the individual and the authority. Instead, orienting the provisions in a teleological way to the respect of the constitutional principles allows a higher normative validity and systematic abidingness as well [166]. In addition to the Constitutional protection accorded to freedom of expression, criminal law has to respect especially the Constitutional principles of proportionality and reasonableness (Article No. 3), legality and rule of law (Articles No. 13 and 25 (2) (3)), subsidiarity (Articles No. 2, 3, 13, 25 (2) (3)),

---

[163] See the Joint Chamber of the Court of Cassation, judgment No. 31022/2015, equating the on-line registered newspapers and the printed ones in terms of guarantees and limits to the possibilities of seizure. See my paper *The case of Blocking Il Giornale.it News website,* "Global Freedom of Expression Centre", Columbia University, link: *https://globalfreedomofexpression.columbia.edu/cases/case-blocking-il-giornale-news-website-italy/* (9/12/16).

[164] G. REPETTO, *The constitutional relevance of the ECHR in domestic and European Law: An Italian Perspective,* Intersentia, Cambridge, 2013, p.13.

[165] *Ormanni v. Italy,* July 17, 2007, App.No. 30278/04, quoted in G. REPETTO, *supra.*

[166] MOCCIA, *Il diritto penale tra essere e valore, supra* note No. 88, p. 83-84.

offensiveness (Articles No. 13, 25 (2) (3)), personal penal responsibility (Article No. 27 (1)) and social integration as legitimate aim of the criminal sanctions (Article 27 (3)).

- *Individual or incidental access to the Constitutional Court*

The access to the Constitutional Court is more limited in Italy than in other countries [167]. For example, the Italian system does not allow individuals to issue Constitutional complaints alleging the State direct infringement upon one of their basic right: the access to this remedy is limited to judges or State bodies, instead than in Germany (*Verfassungsbeschwerde*) or Spain (*amparo*) [168]. The main means for accessing the Constitutional Court is the incidental method of judicial review, provided by Article No. 1 of the Constitutional Law No. 1 of 1948[169]. Subsequently, if the statute (or act with the same force) under review is deemed to be unconstitutional, it has to be abolished. However, despite of the quality of the Italian constitutional guarantees and the increasing tendency of judges to interpret evolutionarily the individual rights guaranteed by the Constitution, the European law and the international conventions, some judgments - such as that regarding the brutalities that took place during the protests for the G8 summit in Genoa (2001) [170] or the recent legislation on migrants - often draw criticism on the political nature of some judgments and legislative choices [171].

- ***Turkey*** [172]

The first Turkish Constitution was adopted in 1876 (end of the *Tanzimat* period). After the founding of the Republic, the Constitutions of 1921, 1924, 1961 and 1982 were consecutively enacted.

---

[167] The scope of this paragraph is not to analyze in-depth the functioning method of the Constitutional Court, but the extremely important role of this institution in the Italian system has to be kept in mind. "The Court's birth is the first real moment of effectiveness of the Constitution", Stefano Rodotà (January 29, 2016), *supra* note No. 163.

[168] V.BARZOTTI, P.G. CAROZZA, M.CARTABIA, A.SIMONCINI, *Italian Constitutional Justice in Global Context,* Oxford University Press, 2015, part 4. Among the critics about an enlargement of the access to the Constitutional Court, it is said that it could be a potential flood of cases before the Court and it would increase the Court"s involvement in the political process.

[169] It states as follows: "A question concerning the legitimacy of a statute or of an act with the same force, raised by a judge on his own motion, or upon request of one of the parties in the course of a judicial proceeding […] must be referred to the Constitutional Court for its consideration".

[170] See Repubblica.it, *G8 Genova, Strasburgo condanna l"Italia: "Alla Diaz fu tortura, ma colpevoli impuniti"*, April 7, 2015: http://www.repubblica.it/politica/2015/04/07/news/diaz_corte_strasburgo_condanna_l_italia_per_tortura-111347188/ (9/10/16).; ANSA.it, *Italy condemned for G8 torture:* http://www.ansa.it/english/news/politics/2015/04/07/italy-condemned-for-g8-torture_d1b158b0-1384-4a38-ab50-5e8b5bf51c30.html (9/10/16).

[171] ANASTASIA, ANSELMI, FACCINELLI, *supra* note No. 98, Introduction.

[172] A brilliant explanation of the freedom of expression rights in the Turkish system, including in the Constitution, can be found in the *Museum of Crimes of Thought,* by the "Initiative for freedom of expression" (Istanbul), link: http://www.dusuncesuclarimuzesi.net/?s=giris&aid=10.

The 1961 Constitution can be considered as opening to democratic values: Article No. 2 proclaimed that the Republic of Turkey would have been governed by the rule of law based on human rights and a Constitutional Court for the judicial review of legislation was established. Nevertheless, it was drastically revised in 1971 under the army‟s pressure [173]. After the 1980 *coup d‟etat*, a "Consultative Assembly" controlled by the military drafted the new Constitution in 1982: it is still in force and - resting on the implicit understanding that Turkey is in a constant state of emergency- it broke with the protective tradition of the previous constitution [174]. Professor Atilla Yayla underlines that it would be wrong to assume that the violations of freedom of expression in Turkey have only one source: nevertheless, the 1982 Constitution has to be listed as one of them [175].

The ECHR pushed toward some important amendments of the Turkish Constitution, most remarkably in 1995 and 2001, for example - in the area of freedom of expression- regarding Article No. 26 (3) of the 1982 Constitution (that was banning the use of languages prohibited by law)[176]. Those reforms should not be underestimated but they are not sufficient and stopped since 2005. One of these amendments concerns the balancing to be adopted in applying rights‟ and freedoms‟ restrictions: similarly to Italy, also Turkey adopted the *principle of proportionality* in order to balance conflicting interests. In Turkey, under the original version of Article No. 13 of the Constitution, fundamental rights and freedoms could be restricted by law for various purposes such as maintaining the indivisibility of the State, national security and public order. On one hand, Article No. 13 (2) held that the restrictions should not conflict with the requirements of a democratic society, echoing Articles 8-11 ECHR; occasional Constitutional Court‟s rulings described the requirements of a democratic society mandating the inviolability of the right's essence[177] or following the three-pronged test of appropriateness, necessity and proportionality of State action[178]. On the other hand, in practice, Article No. 14 of the Constitution on non-abuse of fundamental rights was used to limit them, with no consideration of the proportionality issue. In 2001, some amendments[179] reformulated Article No. 13 as a guarantee, rather than a limitation clause: it requires limitations to fundamental rights to not infringe upon their essence. "These restrictions shall not be contrary to the letter and spirit of the Constitution and the requirements of the democratic order of the society and the

[173] The Turkish military has been maintaining a substantial influence over Turkish politics that is unique when compared to other European countries and that has been partly shaken only in the last ten years, for example by the *Ergenekon*‟s investigations and charges.
[174] I. O. KABOĞLU, STYLIANOS – I. G. KOUTNATZIS, *The reception process in Greece and Turkey,* in H. KELLER, A. STONE SWEET*, A Europe of Rights,* Oxford University Press,2008, p.457.
[175] A. YAYLA, Professor at the Istanbul Commerce University, in INITIATIVE FOR FREEDOM OF EXPRESSION*, Yesterday, Today, Tomorrow: Freedom of Expression in Turkey Report (1995-2015)*, Istanbul, January 2015.
[176] Other important amendments regarded the ban on death penalty (Article 38 (9), thanks to Law No. 5170, May 22, 2004), enshrining the proportionality principle (Article 13), clarifying a vague provision on the non- abuse of fundamental rights (Article 14), the right to affair trial (Article 36).
[177] TCC, Judgment November 26, 1986, 1985/8, 1986/27.
[178] TCC, Judgment June 23, 1989, 1988/50, 1988/27.
[179] Act No.4709 of 2001.

secular republic and the principle of proportionality" [180]. Article No. 14 of the Turkish Constitution was modified as well, and now recites as follows:

"None of the rights and freedoms embodied in the Constitution shall be exercised in the form of activities aiming to violate the indivisible integrity of the State with its territory and nation, and to endanger the existence of the democratic and secular order of the Republic based on human rights. No provision of this Constitution shall be interpreted in a manner that enables the State or individuals to destroy the fundamental rights and freedoms recognized by the Constitution or to stage an activity with the aim of restricting them more extensively than stated in the Constitution".

Therefore, the "abuse" consists mainly in endangering the "integrity of the state" and the "democratic and secular order". Finally, Article No. 15 reads as follows (and requires no comment):

"In times of war, mobilization, martial law, 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.
(As amended on May 7, 2004; Act No. 5170) 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 […]".

One of the main differences between the Italian and the Turkish Constitutional systems, relies on the relationship between "constitutional matters" and statutory reservations: many aspects that, for Italy, belong to the latter category, have been constitutionalised in Turkey stiffening normative dynamics and extending the constitutional review on political choices [181]. In this regard, it is of primary importance to focus on the first articles of the Turkish Constitution[182], keeping in mind that they cannot be modified through any process of constitutional amendment[183] : Article No. 1 states that the Republic is a democratic, secular and social state, governed by the rule of law; in the meanwhile, it has to be loyal to the nationalism of Atatürk under Article No. 2. Finally, Article No. 3 proclaims the territorial and national indivisibility and establishes language, flag, national anthem and the capital. This already shows the tension between the "nationalist and solidaristic vocation" of Turkey and its

[180] Turkish Constitution, Article 13 (2) (3). However, such requirements are so indefinite that can be interpreted even in the sense of justifying, rather than limiting, greater restrictions. Read more: M.CARDUCCI, *Turchia: la costituzione turca al tramonto del kemalesimo,* in *Quad. Cost* 4, 2007,
p. 863 et seq. .

[181] S. RIONDATO, *The root problem of the criminal law approach to the Turkish Constitution,* in *Diritto penale della Repubblica di Turchia- Criminal Law of the Republic of Turkey,* Padova University Press, 2012, p. 37.

[182] In this regard, this work benefitted from: L. PASCULLI, *General principles and basic features of the Turkish Constitutional order* in *Diritto penale della Repubblica di Turchia- Criminal Law of the Republic of Turkey,* Padova University Press, 2012, p. 41-46.

[183] The rigidity of the Constitutional text is particularly evident considering that certain provisions listed in Article No. 4 cannot be amended at all, such as the first three articles of the Constitution.

aspiration to become a modern state governed by the rule of law. This dichotomy runs throughout the whole constitutional text, where rights and freedoms always find restrictions and exceptions in the name of the centrality of the Turkish state.

Furthermore, other limitations regard the request of constitutional review of ordinary laws: again, the limits concern the object of the laws under analysis, and, in particular, three categories of laws cannot be contested: 1. International treaties, 2. Decrees having the force of law issued during a state of emergency, martial law or in time of war (Article 148 (1)); 3. A number of laws listed in Law No. 6216 of 2011 [184].

Finally, the "Fundamental Aims and Duties of the State" (Article No. 5 of the Turkish Constitution) are particularly interesting: they are listed in order of importance, starting with the safeguard of the independence and integrity of the Turkish Nation and the indivisibility of the country [185] and followed by the duty to remove the obstacles which restrict the fundamental rights and freedoms of the individual "in a manner that is incompatible with the principles of justice and of the social state governed by the rule of law"; this last sentence itself shows the hierarchy of values which is traced by the Turkish Constitution, where the Republic does not have to remove *all* of the obstacles but only those that are "incompatible with the principles of justice and of the social state governed by the rule of law". This sets the basis for the legitimacy of the restrictions provided in the second part of the Constitution.

Particularly interesting is the duty consisting in the defence of the independence and integrity of the Turkish Nation: it led, for example, to the ban of Kurdish political parties, separatist movements [186] and so on together with charges of threatening the existing public order and national security when you for independence. In this regard, some master cases are: *Incal v. Turkey* [187], concerning the conviction of a party official for disseminating a leaflet that criticized discrimination against citizens of Kurdish origin; *Özgür Gündem v. Turkey*[188] relating to the failure to protect a newspaper‟s freedom of expresson against a list of attacks on journalists, prosecutions and convictions; *Ayşe Oztürk v. Turkey*[189]*,* regarding the seizure of a publication for allegedly disseminating terrorist propaganda**.** In most of these cases, the ECtHR found that political statements, rather than incitement to violence or threaths on high State interests, were addressed and therefore the measures enforced were deemed unnecessary in a democratic society.

---

[184] Most of those laws date back to the 20's and the 30's and concern the Atatürk‟s reforms and social customs.

[185] Already protected in Article No. 14 and Article No. 3 of the Constitution. Another example of the supreme attention for national security within the Turkish Constitution is given by Article No. 199 et seq., where there is an exception to the rule that criminal matters can only be regulated by decrees having the force of law, thus issued by the Grand Assembly: in case of martial law and states of emergency, the Council of Ministers may issue decrees having the force of law regarding rights and freedoms, also in the criminal field.

[186] E.g. Turkish Constitutional Court Judgment, 1992.07.10, E. 1991/2, K. 1992/1, AYMKD, No.28 Vol. II, 816 et seq. (Socialist Party), overruled by the ECtHR in *Socialist Party and Others v. Turkey* (Appl. No. 21237/93).

[187] App. No. 22678/93, Grand Chamber judgment.

[188] App. No. 23144/93, Fourth Section‟s judgment.

[189] App. No. 24914/94, Second Section‟s judgment.

The Turkish Constitution protects freedom of thought and opinion under Article No. 25, freedom of expression under Article No. 26, freedom of science and the arts under Article No. 27 and freedom of the press under Article No. 28. This Constitutional Chart is, again, much more specific than the Italian one: in this case, Articles 29-32 provide on the right to publish periodicals and non-periodicals, the protection of printing facilities, the right to use media other than the press owned by public corporations and the right of rectification and reply. While in the cases under Article 28 the decision of a judge is required, freedom of expression and dissemination of thought (Article 26) can apparently be restricted directly by administrative authorities without the intervention of a judge, even if the person can always petition for judicial review [190]. Article No. 26 (2) as amended on October 3, 2001 by Act No. 4709, reads as follows:

"The exercise of these freedoms may be restricted for the purposes of national security, public order, public safety, safeguarding the basic characteristics of the Republic and the indivisible integrity of the State with its territory and nation, preventing crime, punishing offenders, withholding information duly classified as a state secret, protecting the reputation or rights and private and family life of others, or protecting professional secrets as prescribed by law, or ensuring the proper functioning of the judiciary".

Article No. 28, in the first part of paragraph 4, reads as follows:

"Anyone who writes any news or articles which threaten the internal or external security of the State or the indivisible integrity of the State with its territory and nation, which tend to incite offence, riot or insurrection, or which refer to classified state secrets or has them printed, and anyone who prints or transmits such news or articles to others for the purposes above, shall be held responsible under the law relevant to these offences".

It continues regulating the correct ways for preventing distribution, banning events, seizure of publications "in situations where delay may constitute a prejudice with respect to the protection of the indivisible integrity of the State with its territory and nation, national security, public order or public morals and

[190] L. PASCULLI, *Restrictions to specific individual rights and freedoms,* in *Diritto penale della Repubblica di Turchia - Criminal law of the Republic of Turkey,* Padova University Press, 2012, 52. See, for example, the restrictions imposed on websites by TIB (Telecommunications Communication Presidency): it enjoyed extensive prerogatives for blocking the unpleasant platforms. No official statistics on banned sites are published, but monitoring by civil society organisations indicate that close to 80 000 websites have been banned until 2015, of which only 5% following a court decision. In July 2015, TIB banned briefly access to Twitter and YouTube on grounds of relaying propaganda of terrorist organisations. See EUROPEAN COMMISSION, *Turkey Report 2015,* EU enlargement strategy, Brussels, 10.11.2015 SWD(2015) 216 final; link: http://ec.europa.eu/enlargement/pdf/key_documents/2015/20151110_report_turkey.pdf. This administrative authority was closed in the summer of 2016 following the *coup attempt* and was substituted by the BTK (Information and Communication Technologies Authority), link: http://www.hurriyetdailynews.com/turkey-shuts-down-telecommunication-body-amid-post-coup-attempt-measures.aspx?pageID=238&nID=102936&NewsCatID=338 (10/9/16) and https://www.telegeography.com/products/commsupdate/articles/2016/08/16/turkish-internet-content-authority-tib-scrapped-merged-into-telecoms-regulator/ (10/9/16). See also Y. AKDENIZ, K. ALTIPARMAK, *Internet: restricted access- A critical assessment of Internet Content Regulation and Censorship in Turkey,* November 2008, link: http://www.cyber-rights.org/reports/internet_restricted_bw.pdf.

for the prevention of crime". Basically, it is clear that in most of the cases, the State does not need to violate the Constitution in order to apply restrictions to the fundamental rights and freedom, applying them in an authoritarian way.

- *Individual or incidental access to the Constitutional Court*

Instead than in Italy, for addressing the Constitutional Court the Turkish legislation does recognize the right to individual constitutional complaints since 2011[191], on the grounds that one of the fundamental rights within the scope of the ECHR which are guaranteed by the Constitution has been violated by the public authorities. It is considered an important and innovative remedy [192].

2.2 b)- Freedom of Expression's Appendixes: The Right to Criticize and The Right to Report

"The penalization of a media outlet, publisher or journalist solely for being critical of the government or the political social system espoused by the government can never be considered to be a necessary restriction of freedom of expression" [193].

- ***Italy***

The right to criticize and the right to report are justification clauses, that have to be considered when restrictions to free expression are going to be applied. With regard to the right to criticize, it requires: 1. The objective or reasonably supposed truth of the facts reported, when it is the result of an accurate research work, considering the seriousness of the news published; 2. The public interest in knowing the fact (the so-called "relevance"); 3. Formal accuracy of the exposition (the so-called "continence") [194]. The right to criticize does not consist in the facts" narration, but in an opinion based on the facts" interpretation; consequently, it is inescapably subjective even if it has necessarily to be based on the [reasonably supposed] truth [195]. Consequently, in the area of the right to criticize, the truth parameter is necessarily weaker than in the area of the right to report: this is even more important in the context of *political* criticism, as explained for instance in the Criminal Court of Cassation"s judgment No. 4938/2010; in the political context, the public interest

[191] Law No. 6216, March 30, 2011. See W. ZELDIN, *Turkey: Individual access to Constitutional Court,* in *Library of the Congress, Global Legal Monitor,* October 12, 2012, link: *http://www.loc.gov/law/foreign-news/article/turkey-individual-access-to-constitutional-court/.*
Important questions as to the effective protection of individual rights during exceptional times is raised by Article No. 45 (3) of Law No. 6216 since no petition is possible against proceedings excluded from judicial review by the Constitution.
[192] CHIARA CANDIOTTO, *Means of protections og individual rights and freedoms. Judicial review and individual application to the Constitutional Court,* in *Criminal Law of the Republic of Turkey,* p. 56.
[193] UN HUMAN RIGHTS COMMITTEE, *General comment No. 34*, *supra* note No. 149, General Remark No. 42.
[194] E.g. Court of Cassation"s judgments No. 31392/2008, No. 22190/2009 and 22600/2013.
[195] Cassation"s judgments No.22600/2013, No. 7847/2011 and No. 379/2005.

to the information increases. In this 2010 judgment, it was considered legitimate to report in a national newspaper the words of the former President of the Province of Rome: he stated that it was not tolerable to allow political spaces of expression to organizations like *Forza Nuova,* explicitly fascist and carrying values such as xenophobia, racism, violence and anti-Semitism [196]. Instead, the right to political critic was not accorded to the journalist Claudio Lazzaro, author of a documentary on some members of the movement "Nazi rock": he was convicted under defamation charges for having shown how extreme-right wing ideologies influence the movement [197].

The right to journalistic criticism can also be carried out in a "biting" way, even if always proportionally to the importance of the fact; therefore, it cannot exceed in personal attacks, aiming to damage the criticized personality [198]. The social relevance of the news might include information or statements about public figures [199].

Moreover, in order to evaluate if the justification clauses of the rights to criticize, to report and of satire occur, it is necessary to analyze the whole context where the expressions under charge took place: consequently, objectively offensive words can lose this characteristic when they are linked with the previous or the following terms, and the other way around- objectively neutral words can become offensive up to the context [200].

It is important to add that "the rights to report and to criticize do not belong just to journalists - or those who provide professional information- but they are granted to anyone through any medium [201]. Assuming this, however, as explained in the previous paragraph, the protection granted by Article No. 21 of the Italian Constitution changes whether or not the expression falls into the concept of "printing or publishing product"[202]: if it does not do so, it just falls under the more general protection accorded to free expression of thought (Paragraph 1 of Article 21).

To conclude with some examples, the parameters listed in this parahraph were considered respected in the Criminal Court of Cassation"s judgment No. 12203

---

[196] See *Dare del razzista ad un fascista non è reato (Cass. Pen. No. 4938/2010),* in "Studio Legale Canestrini", October 28, 2010, link: http://www.canestrinilex.com/risorse/fascista-razzista-nazista/#ixzz44KKhYPbH. See also the 5th section of the Court of Cassation, Judgment No. 6415, November 16, 2010.

[197] Lazzaro was convicted on June 12, 2015, in Rome. In particular, Lazzaro was criticized for not having published in its entirety a long interview in which far-right leaders claimed their positions. It was not considered sufficient that the full text was available among the extra contents of the DVD. See OSSIGENO PER L"INFORMAZIONE, *Italia. Le notizie più pericolose di Giugno 2015 segnalate da Ossigeno,* July 6, 2015, link: http://notiziario.ossigeno.info/2015/07/italia-le-notizie-piu-pericolose-di-giugno-2015-segnalate-da-ossigeno-59477/ (9/10/16).

[198] Court of Cassation"s judgment No. 22600/2013 and No. 17180/2007.

[199] Public figures are actually particularly protected in the Italian system: for instance, in the Criminal Code specific provisions (e.g. Article No. 278) as well as aggravating factors (e.g. Article No. 595 (4)) are granted to these individuals.

[200] Cassation"s judgment No. 22600/2013 and No. 89/2012.

[201] Court of Cassation, judgment No. 31392/2008.

[202] Criminal Supreme Court of Cassation , judgment No. 10535/2009.

of 2014[203]: in this case of criminal defamation, there was not the required "seriousness", necessary for providing a prison penalty rather than the pecuniary one. As a matter of fact, the soldiers, subjects of the article, were mentioned only with their name"s initials and the daily newspaper had just a local circulation.

- ***Turkey***

Regarding the Turkish system, a particular attention for the public interest to receive an information and, consequently, for the fact that a news regards a person in the public service, is inferable – among other provisions- from Article No. 38 (6) of the Constitution. In this case, if a libel or defamation suit involves allegations against persons in the public service, in connection with their functions or services, the defendant has the right to prove these allegations, while a plea for presenting proof is not granted in any other case unless it would serve the public interest [or unless the plaintiff consent] [204].

An example of the limitations imposed on the right to report can be found in the provision enabling the *Yayın Yasağı* (Press silence): under Article No. 285 TCK (Turkish Criminal Code), the government can impose a prohibition of spreading any kind of information on a particular topic subject to an on-going investigation or proceeding. It can last indefinitely, since it can remain in force until their conclusion [205]. The press silence was imposed in several occasions over the last five years [206]: in 2011 after the massacre of Roboski in Şırnak - in the southeast of Turkey - where 34 peasants were killed by the Turkish army; in 2013 after the case of Reyhanlı, a village under jihadist threat at the border with Syria, when 54 people died; in 2014, after the death of 301 miners in Soma; in 2015, when four people died and 400 were injured in Diyarbakır, during a demonstration of the pro-Kurdish party HDP two days before the elections on June 7; a month later, after the death of 33 young people intent to organize aids for Kobanî in a cultural centre of Suruç; following the blast in Ankara in 2015, during a march for the peace in the south-east of the country, that killed over a hundred people; in 2016, after the explosion of January 12, which killed 15 people in the center of Istanbul; in March 13, 2016, after a blast at a bus stop in Ankara, in which at least 37 people were killed and 125 injured.
Article 285 TCK provides detention penalties from one to three years for those who break the press silence, including televisions, newspapers but also hosting providers such as YouTube and Twitter. Ilay Yılmaz, attorney of YouTube, Twitter,

[203] See *Diffamazione a mezzo stampa va punita con pena pecuniaria (Cass. Pen. 12203/14),* in "Studio legale Canestrini", March 13, 2014, link: http://www.canestrinilex.com/risorse/diffamazione-a-mezzo-stampa-va-punita-con-pena-pecuniaria-cassp-pen-sent-n-1220314/#ixzz44Jh8tHxl (10/9/16).
[204] This provision is very similar to Article 596 of the Italian Criminal Code.
[205] See my article for *Unimondo.org, La quite dopo la tempesta,* January 29, 2016; link: http://www.unimondo.org/Notizie/La-quiete-dopo-la-tempesta-155073. See also the interview to Veysel Ök in the end of this dissertation: Ök is the lawyer of P24 (Platform of Indipendent Journalism), of the newspaper *Nokta* and the forme lawyer of the newspaper *Taraf.*
[206] Some of them were also listed in an article by *Sendika.org* but the page is not reachable anymore; it was supposedly blocked. The link is: http://sendika10.org/2016/01/7-massacres-537-deaths-0-resignations-and-always-a-press-blackout-whos-the-murderer/.

Google and WordPress in Turkey, states that " for this kind of news, the interests protected by Article 285, that are the non-interference with the on-going investigations and national security, must be balanced with the fundamental right to disseminate and receive information and the importance of spreading socially relevant information" [207].

2.2 c)- Freedom of Expression Belongs to Everyone but Journalists Need Greater Defences: The Frequency of Cases Involving Journalists

Even if the right to criticize and the right to report do not apply only to journalists and the press, it is important to underline the absolute predominance of cases involving journalists and media outlets at a national, regional and international level. The more widespread means of mass communication are, the more journalists and media outlets have increasingly become the focus of the attempts of the governments to silence annoying dissent. Moreover, recent technological developments have made Internet and the cyber-space a new focus of attention for governments and state authorities.
A good public debate "implies a free press and the other media to be able to comment on public issues without censorship or restraint and to inform public opinion. The public also has a corresponding right to receive media output" [208]. Proportionally, journalists are more subject to threats, intimidations and attacks than common people are for expressing their opinion, because of the greater impact press can have on society [209].

As far as Italy is concerned, the case of Ilaria Alpi is worthy of note: she is a journalist killed in Mogadiscio while investigating on illegal weapons‟ trafficking during the civil war in Somalia, a case that involved the Italian government: the authority never went through her case properly, meaning that the investigations and the examination of the proofs were extremely superficial and the main witness recently admitted that he got paid to lie[210]. In 2016, for the

[207] See the interview I made to Ilay Yılmaz, lawyer for the "ELIG Law Firm" (Istanbul) in the end of the current research
[208] UN HUMAN RIGHTS COMMITTEE, *General comment No. 34, supra* note No. 149, General Remark No. 13.
[209] UN HUMAN RIGHTS COMMITTEE, *General comment No. 34, supra* note No. 149, General Remark No. 23.
[210] Read the original judgments of July 1999 and October 2012 and other documents in *Rete degli Archivi: Per non dimenticare,* "Omicidio di Ilaria Alpi e Miran Hrovatin", link: http://www.fontitaliarepubblicana.it/DocTrace/#home?q= projectid:10&page=1&per_page=10 (10/9/16). See also M. DINUCCI, *La scottante verità di Ilaria Alpi,* "Il Manifesto", June 8, 2015, link: http://ilmanifesto.info/la-scottante-verita-di-ilaria-alpi/ (10/9/16). A. CUSTODERO, D. MAESTROGIACOMO, *Omicidio Ilaria Alpi, tutti i dubbi sul processo: il testimone ritratta. L‟autista era inaffidabile,* in "La Repubblica", April 4, 2016, link: http://www.repubblica.it/cronaca/2016/04/04/news/omicidio_ilaria_alpi_miran_hrovatin_testimone_ritratta_ali_rage_gelle_processo_revisione_perugia_imputato_hashi_commissione_-136833744/; see also the RAI documentary *Ilaria Alpi- L‟ultimo viaggio,* directed by Claudio Canepari, April 11, 2015; link: http://www.rai.tv/dl/RaiTV/programmi/media/ContentItem-77f45782-2361-40cd-a00a-1ede256a8794.html (10/9/16).
Many other examples of threats to Italian journalists can be found in *Exposed: the hidden threats to Italy‟s journalists,* from the archive of the "European Centre for Press and Media Freedom", July 13, 2015, link: https://ecpmf.eu/news/threats/archive/exposed-the-hidden-threats-to-italys-journalists (10/9/2016).

first time the Anti- Mafia Commission dedicated an *ad hoc* report to threats o journalists in Italy [211].

As far as Turkey is concerned, the country is in a deplorable situation regarding the treatment of journalists: in 2016, the number of imprisoned journalists varied between 20 and 38 [212]. As to September 2, 2016, 83 journalists are detained, suffering a pretrial detention or under a definitive sentence, making Turkey the world-biggest prison for journalists [213]. I have asked to Turgay Güvelcin, lawyer of the daily newspaper *Bir Gün,* if he, in my shoes, would have focused on studying the press case law and he responded affirmatively: "When some students were screaming "*Katil Erdoğan*"("Erdoğan murderer") during a protest, the suit was dismissed considering it a political case. But as far as the press is involved, there is a double standard: it is considered more dangerous and you can really risk imprisonment. However, in both of the cases there is a *chilling effect* taking place" [214].

The Strasbourg Court itself issued a worrying judgment this year, that is *Pentikainen v. Finland* [215]: it regards the arrest of a journalist because he disobeyed the police while covering a protest. The Finish Court believed he should have been aware of the fact that he was facing a risky situation and that he cannot be treated differently than other individuals. Even if there is a need to avoid any impairment of the watchdogs (media), still the Court did not find any violation of Article No. 10 [216]. An OSCE chart listing the imprisoned journalists in Turkey (updated to July 2015) follows, showing the that among the main causes

---

[211] A. SPAMPINATO, *Deputati e governo: nuove misure per proteggere I giornalisti minacciati,* in "Ossigeno per l"informazione", February 29, 2016, link: http://notiziario.ossigeno.info/2016/02/deputati-e-governo-nuove-misure-per-proteggere-i-giornalisti-minacciati-67525/.

[212] See the interactive *Museum of Crimes of Thought,* by the " Initiative for Freedom of Expression", link: http://www.dusuncesuclarimuzesi.net/?s=giris. In particular see the list of current prosecutions: for a list of all the current prosecutions in Turkey: http://www.dusuncesuclarimuzesi.net/?s=giris&xoda=savcilik.
To know more about it, see the interview I made with one of its founders, Şanar Yurdatapan, in the end of this dissertation.
See also: Council of Europe, *Platform to promote the protection of journalism and the safety of journalists:* it shows the considerably high number of journalists under threat in Turkey: http://www.coe.int/en/web/media-freedom/all-alerts?p_p_id=sojdashboard_WAR_coesojportlet&p_p_lifecycle=0&p_p_state=normal&p_p_mode=view&p_p_col_id=column-1&p_p_col_pos=2&p_p_col_count=4&_sojdashboard_WAR_coesojportlet_mvcPath=%2Fhtml%2Fdashboard%2Fsearch_results.jsp&_sojdashboard_WAR_coesojportlet_yearOfIncident=0&_sojdashboard_WAR_coesojportlet_selectedCategories=12093570&_sojdashboard_WAR_coesojportlet_fulltext=1.

[213] See *Tutuklu Gazetecilerle Dayanışma Platformu,* September 2, 2016, link: http://tutuklugazeteciler.blogspot.it/.

[214] See the original documents regarding these cases in the Final Appendix of this dissertation.

[215] *Pentikainen v. Finland*, App. No. 11882/10, judgment October 20, 2015; link: http://hudoc.echr.coe.int/eng?i=001-158279.

[216] App. No. 11882/10, judgment October 20, 2015; link: http://hudoc.echr.coe.int/eng?i=001-158279.

of imprisonment for the media operators terrorism-related charges are very frequent [217].

[217] E. ÖNDEROĞLU, *Table of imprisoned journalists and examples of legislative restrictions on freedom of expression and media freedom in Turkey Office of the OSCE Representative on Freedom of the Media,* July 2015, http://www.osce.org/fom/173036?download=true (9/11/2016).

Table of imprisoned journalists and examples of legislative restrictions on freedom of expression and media freedom in Turkey

Office of the OSCE Representative on Freedom of the Media

UPDATED LIST OF IMPRISONED JOURNALISTS IN TURKEY- JULY 2015

Commissioned by the Office of the OSCE Representative on Freedom of the Media

Prepared by Erol Önderoğlu, Reporters Sans Frontieres (RSF), Turkey

Explanatory notes on the commonly used abbreviations:

TCK: Türk Ceza Kanunu (Turkish Criminal Code)

TMK or TMY: Terörle Mücadele Kanunu (Turkish Anti-Terror Law)

CMK: Ceza Muhakemesi Kanunu (Criminal Procedures Code)

Law 2911: Law on Public Assembly

PKK: Kurdistan Workers' Party, listed as a terrorist organization internationally by a number of states and organizations, including Turkey, the United States and the European Union

KCK: Union of Kurdistan Communities

BDP: Kurdish Peace and Democracy Party

MLKP: Marxist Leninist Communist Party

DHKPC: Party and Revolutionary Front for the Liberation of the People

TKEP L: Communist Labour Party of Turkey/Leninist

İBDA-C: The Great Eastern Islamic Raiders' Front

Paralel Yapı: "Paralel Structure" within the State, allegedly under the control of Gülen's religious community

	Name	Profession	Status	Length of Sentence	Law and Article	Prison	Court	Case
1	**AKYÜZ Seyithan**	Azadiya Welat newspaper (published in Kurdish), Adana (Southern Turkey) representative	Convicted on October 16, 2012 Arrested on December 10, 2009 Detained on December 7, 2009	Convicted in 4 different cases, sentenced to 21 years and 9 months in total	Article 7/2 of TMY, Article 314/2 of TCK	Izmir N.1 F Type High Security Closed Prison	Adana 8th Heavy Penal Court	He was convicted to 6 years and 3 months imprisonment for some calendars found in his Adana office; He received a 2 year prison sentence for some copies of "Ülkeye Bakis" newspaper, seized by authorities and found at his office. He was convicted again to 1 year and 6 months imprisonment for selling newspapers in İzmir during "1 May" demonstrations in 2006. This sentence has been confirmed by the Appeals Court. On December 11, 2011, he was sent to prison for "collaborating with the Union of Kurdistan Communities (KCK)". The Adana 8th High Criminal Court has not allowed Akyüz to make his defense in the Kurdish language since December, 10, 2010. His lawyer could not inspect the file nor the evidence for more than one year because of a court decision for secrecy. He was transferred from Adana Kürkçüler T type prison to İskenderun M Type Prison. On October, 16, 2012, he received in KCK trial 12 years prison for "being a member of KCK" and "spreading propaganda" in the name of the PKK. His lawyer has appealed the sentence. On December, 5, 2013, the 9. section of High Court has confirmed the sentence given in the scope of KCK Adana case.
2	**ALGÜL Miktat**	Mersin Mezitli FM (radio) and Ulus Newspaper	Convicted Arrested on May 17, 2010	Convicted and sentenced to 60 years and 5 months	Article 220 of TCK	Ankara N.1 F Type High Security Closed Prison	Adana 5th Heavy Penal Court	He is being accused of establishing an organization with the aim of committing a crime; looting for the organization; violating inviolability of domicile; depriving a person of his liberties by means of threat and violence; and collection of cheques and bonds by means of threat. On September 12, 2011, he informed the public that he was transferred from Osmaniye T Type Prison to Adana Kürkçüler F Type Prison. He was suspected for "threatenin municipality and businessmen to ask for money" and "blackmailing through radio broadcasts". He was sentenced to 61 years of prison for collaborating with criminal organization. On January 3, he complained to the prosecutor of Ankara against the members of the Adana 7th High Criminal Court who condemned him and against the prosecutor who prepared his indictment. He accuses them and some policemen from Mersin of being at the service of the religious community of Fethullah Gülen and for "conspiracy" against him. On January 7, Ankara prosecutor opened an investigation and provided later the transfer of Algül to Ankara Sincan Prison. According to an observation report released on December, 6, 2013 by a CHP MPs delegation, he is now in Sincan Prison of Ankara. In this report, Algül is complaining to MPs who visited the prison on December 4, about his conviction. He believes he was convicted of belonging to several organizations at once. Following his request, on May 18 2015, he was allowed to meet an Alevi religious representative in the prison.
3	**ATAK Sevcan**	Özgür Halk newspaper, editor	Convicted on May 26, 2011 Detained on June 18, 2010	Convicted and sentenced to 7 years and 6 months	Article 220 of TCK Article 5 of TMK	İzmir Women's Closed Prison	Diyarbakır 6th Heavy Penal Court (Closed)	She was arrested on June 18, 2010 in Diyarbakır. On May 26, 2011, the Diyarbakır 6th High Criminal Court sentenced Atak to 5 years imprisonment for "helping PKK organization by making its propaganda" and then further increased the sentence to 7 years and 6 months imprisonment, because she was already convicted in the past under the TMY. The case concerns a 15 years old girl (ZK) who fled her family arguing she was subject to violence there and then attended the Özgür Halk and Firat Distribution Company offices with the desire to work in the press. This girl was taken by Sevcan Atak to the office of Diyarbakir branch of the Association of Human Rights (İHD), where apparently she fled again. Taken into custody with Atak, she claimed at the police that she was forced to win the mountain and participate to PKK militants. According to the lawyer of Law Commission of Diyarbakir branch of İHD, Rehsan Bataray, acquitted in the same case, the sentence against Atak was confirmed by the Supreme Court June 27, 2012. She was transferred from Adana Karataş Women's prison to İzmir Şakran Prison, on April, 27, 2012. An observation report issued by Human Right Association (İHD) on 22 May 2012, notes that Atak and five other women detainees were victims of sexual abuse and bad treatment during this transfer.
4	**BARANSU Mehmet**	Taraf daily columnist and reporter	Arrested on March 2, 2015 Detained on March 1, 2015	Under investigation Faces 20 years of prison	Article 326/1 and Article 327/1 of TCK	Istanbul Silivri F-Type Prison	Istanbul 5th Office of Magistrates	After being taken several times into costudy for insulting the former Head of State and other government representatives, the journalist and columnist of Taraf Daily was arrested on March, 1, 2015, after he wrote an article on January, 20, 2010, on the alleged Balyoz (Sledgehammer) coup plot. He was accusing some top military officers of trying to systematically foment chaos in society through violent acts, among which were planned bomb attacks on the Fatih and Beyazıt mosques in İstanbul. Baransu later submitted the original documents he acquired from an anonymous source to then-İstanbul Chief Public Prosecutor, which became the chief evidence in the Balyoz trials. Balyoz defendants were sentenced to lengthy jail sentences of up to 20 years in 2012 on charges of attempting to overthrowing the government. Baransu is now suspected of "stealing, falsifing or using secrets documents belonging to the state" (article 326/1 of TCK) and "obtaining secrets documents concerning state security" (article 327/1 of TCK). On March, 9, 2015, his lawyers appealed against the İstanbul 5th Peace Court Authorities arrest decision. On March, 16, 2015, the İstanbul 6th, Peace Court Authorities declared "there is no new evidence for ending the detention term" and rejected the demand made by attorney Ahmet Emre Bayrak. On May 9 2015, Baransu was transferred to Silivri highest security prison, and placed in solitary confinement. Baransu is waiting for his indictment.
5	**ÇAĞIR Ethem**	Özgür Gündem daily columnist	Convicted on October 18, 2012 Arrested on February 21, 2015 Detained on February 20, 2015	Convicted and sentenced to 3 years, 1 month and 15 days	Article 220/6 of TCK	Diyarbakır D Type Closed Prison	Diyarbakır 7th Heavy Penal Court (Closed)	Kurdish journalist and writer known as Özgür Amed, Ethem Çağır, was arrested in Diyarbakır on February, 21, 2015, and sent to Diyarbakır D Type prison after his conviction on October, 18, 2012 by Diyarbakır 7th High Criminal Court. This court has sentenced Amed for attending on 31 December 2011 a demonstration in the city against Roboski massacre, and for "committing an illegal organization crime while not being an illegal organization member". The columnist for Özgür Gündem and Yeni Özgür Politika dailies was sentenced on the basis of article 220/6 of Turkish Criminal Code, despite three police officers who were on duty on the day of the incident said in their testimony to the court that "he was among those dispersing after the demo but was not witnessed assaulting the security forces". His lawyer Keziban Yılmaz brought the case to the Constitutional Court. Many organizations, including Özgür Gazeteciler Cemiyeti and Mazlum-Der Diyarbakir Branch have called for the immediate release of the journalist.
6	**ÇAKAR Gurbet**	Hevi Jine women magazine,editor in chief	Convicted on January 17, 2013 Arrested on May 20, 2012 Detained on May 18, 2012 Convicted in a different trial on December 30, 2010	Convicted and sentenced to a total of 10 years and 6 months	Article 314 of TCK Article 5 of TMK Article 7 of TMK	Ankara Women's Closed Prison	Van 5th Heavy Penal Court (2013) Diyarbakır 6th High Criminal Court (2010)	On December, 30, 2010, she was sentenced by Diyarbakır 6th High Criminal Court to 3 years of prison as editor-in-chief of women's magazine in Heviya Jine. She was released after nine months of detention. She was convicted on the basis of article 7 of the Anti-Terror Law, for "spreading propaganda in favor of PKK outlawed organization". On May, 18, 2012, she was jailed again, accused on the basis of a witness identity kept secret of belonging to the DYGM youth organization linked to PKK/KONGRA-GEL. According to this witness, Gurbet Çakar, called "Fatma", is contributing to recruiting new members to the organization. On January 17, 2013, Van 5th High Criminal Court convicted her to 7 years and 6 months of prison. On October, 28, 2013, she has complained to a Human Rights Association (İHD) Prisons Commission against guards brutalities.
7	**ÇİFTÇİ Ferhat**	Azadiya Welat daily, Gaziantep representative	Convicted Arrested on February 16, 2011	Convicted and sentenced to 19 years and 8 months	Article 314 of TCK, Article 5 of TMK, Article 7 of TMK	Gaziantep H Type Closed Prison	Adana 7th Heavy Penal Court	He was arrested on February 16, 2011. On December, 20, 2011, the Adana 6th High Criminal Cour sentenced him to 21 years and 8 months prison for "being a member of outlawed Kurdistan Worker's Party (PKK) organization" and "making propaganda" in favor of this organization.

8	**DEMİR Sahabettin**	DİHA, Van reporter	Convicted Detained on September 5, 2010	Convicted and sentenced to 4 years for propaganda Sentenced to 11 years in another case	Article 7 of TMK Article 5 of TMK	Van Erciş Prison	Van 3rd High Criminal Court	The Court has sentenced him to 4 years prison for "spreading propaganda in favor of PKK organization". The High Appeal Court had confirmed the sentence. He was imprisoned in Bitlis E Type Prison after a violent altercation between him, his two brothers and his cousin. He was transferred on July, 9, 2012 to Giresun E Type Prison. The Heavy Penal Court sentenced Demir to 11 years prison for "attempting murder, assault with a weapon, and trespassing". Yolyapan believes Demir is convicted because of an article that the journalist wrote on the raping of a minor, allegedly perpetrated by four police officers. As the last resort, his lawyer appealed to the Constitutional Court. On November 2012, Demir has launched hunger strike for 28 days with many journalists detained in KCK cases for protesting detention conditions of PKK leader Abdullah Öcalan, and also in recognition of the right of using mother tongue in the courts and education. He stopped it following the government's promises to carry out reforms in favor of the use of the Kurdish language for the defense. Demir was transferred from Giresun F Type Prison to Van Erciş Open Prison.
9	**DOĞAN Cengiz**	Azadiya Welat daily, employee, Mavi ve Kent (Blue and City) local magazine (closed), former editor-in-chief	Convicted Detained on April 20, 2009	Convicted and sentenced to 17 years and 1 month	Article 314 of TCK Article 7/2 of TMK Article 5 of TMK	Izmir N.1 F Type High Security Closed Prison	Diyarbakır 6th Heavy Penal Court (KCK Şırnak) Nusaybin Criminal Court (demonstrating)	He was editor in chief of the local "Mavi ve Kent" (Blue and City) mazagine which does not exist anymore. He was sentenced to 1 year, 6 months and 22 days of prison for "propaganda" as responsible of the magazine. He was condamned again to 2 years and 10 days of prison for resisting the military when he was transferred in prison. He was arrested on April, 20, 2009, in his friend's home in Nusaybin, in a scope of an investigation on KCK launched in Şırnak region (South-Est of Turkey). He is also facing 15 years prison in this file. Nusaybin Prosecutor opened an investigation against him for organizing a picture exhibition held in Mitanni Cultural Center (Nusaybin) in memory of some PKK militants killed during operations. He was also suspected of participating in another demonstration held by MEYA-DER on February 3, 2011. On September 26, 2011, he gave a petition to the prosecutor asking how he could be at this exhibition and in prison at the same time. But a courtcase was opened against him and 27 others defendants for these allegations. The trial started on October 17, 2012, before Nusaybin Criminal Court. He was transferred from Mardin E type prison to Kırıklar N.1 F Type Prison.
10	**DUMAN Hamit (Dilbahar)**	Azadiye Welat daily, columnist	Convicted Arrested on February 13, 2010	Convicted and sentenced to 13 years and 6 months	Article 314/2 of TCK Article 5 of TMK	Erzurum H Type High Security Closed Prison	Erzurum 2nd Heavy Penal Court	He was arrested on February 13, 2010 in the cope of "Ağrı KCK" investigation launched in Patnos, Doğubayazıt ve Diyadin region (Eastern Turkey), in Van and Muş cities. He is also a Peace and Democracy Party (BDP) Headquarter collaborator. On June 14, 2011, the Erzurum 2th High Criminal Cour has sentenced him to 16 years of prison for "being a member of Kurdistan Communities Union (KCK)", linked to Kurdistan Worker's Party (PKK). 11 defendants of the case couldn't make their defense in Kurdish. The president of the Court recorded this demand stating that defendants spoke in an unknown language. Lawyers said that the trial was political and requested the release of their clients. The Court rejected this demand. His lawyer has appealed the sentence.
11	**DUMAN Hatice**	Aklım newspaper owner and editor-in-chief Former owner and editor-in-chief	Convicted Arrested on April 17, 2003 Detained on April 13, 2003 Convicted in another case on May 4, 2011	Convicted and sentenced to life in prison	Article 146 of former TCK (article 309 of actual TCK) Article 5 and 7/2 of TMK	Istanbul Bakirköy Women's Closed Prison	İstanbul 12nd Heavy Penal Court (Closed)	She faced several court cases in the past based on Article 7 of the Anti-Terror Law ("propaganda") because of articles she published in newspapers. She is on trial since seven years for being a "member of an outlawed/armed organization", the Marxist Leninist Communist Party (MLKP). On May 4, 2011, the İstanbul 9th High Criminal Court convicted her to a life sentence for being one of the heads of the MLKP and "attempting to destroy constitutional order by force". She was found guilty of dropping explosive on July 31, 2001, in Kiziltoprak district of Kadıköy(İstanbul), of having a fake ID in the name of Perihan Özdemir, of armed robbery into a bank (Akbank) branch in Eyup (istanbul), robbery against two people for taking their arms. Her lawyers appealed the verdict. On February, 22, 2013, Parliament Prisons Review Commission members visited Gebze Prison. Duman claimed there was no evidence into the indictment.
12	**ERHAN Ufuk**	Gelecek newspaper	Detained May 26, 2015	Awaiting details.	Awaiting details.	Awaiting details.	Awaiting details.	Awaiting details.
13	**GÖK Mustafa**	Ekmek and Adalet newspaper, Ankara representative	Convicted Arrested in February 2004	Convicted and sentenced to life in prison	Article 146 of former TCK (abolished on 1st June 2005, but still used in this lawsuit) Article 314 of TCK	Ankara N.1 F-Type High Security Closed Prison	Istanbul 2. State Security Court (Closed)	In 1993, he was arrested and sentenced in first instance to a life sentence for "attempting to change the constitutional order by force". However, he was released in 2001 due to serious health problems. He was sent to jail three years later, when he was found healthy enough to serve the rest of the sentence. Another case has been opened against him, concerning activities he was involved in between 2001 and 2004. He is accused of "belonging to an outlawed organization, the Revolutionary People Liberation Party (DHKPC) and being its Ankara representative.
14	**KARACA Hidayet**	Samanyolu Editing Group, president	Arrested on December 19, 2014 Detained on December 14, 2014	Under investigation	Article 220/1 of TCK	İstanbul Silivri N.6 L Type Closed Prison	İstanbul 1st Office of Magistrates	Suspected of attempted coup against the government, Samanyolu TV Broadcasting Group Chairman Hidayet Karaca was arrested on December 19, 2014. He refused to testify in Court but was charged with "being a member of an armed terrorist organization" linked to the so-called "Paralel Structure" (Paralel Yapı) allegedly controlled by the Fethullah Gülen movement. He is also suspected of "depriving individuals of their freedom by force or threat" and "making false accusations". Karaca appealed the arrest for various reasons including ill-treatment. His lawyer Fikret Duran has criticized the prosecutor in charge of interrogation for taking account some record of phone conversation allegedly made between his client and Fethullah Gulen in September 2010, on September 28 2013 and October 10, 2013. According to accusation, Karaca is responsible for broadcasting in April 2009 the television series "Tek Türkiye" (One Turkey) with the recommendation of Fethullah Gülen. Duran declared this "open source" element can't have legal value and his client can't be considered as a founder of outlawed organization just for a TV series scenario. On February 10, he asked for the revocation of the judge Bekir Altun for lack of independence and asked for the release of Karaca. The judge rejected these demands on February 12, 2015. The lawyer complained to the High Board of Judges and Prosecutors (HSYK) against Altun and other judges who denied the release of Karaca. Karaca is now in Silivri Prison awaiting indictment.
15	**KARAVİL Kenan**	Radyo Dünya (Adana) editorial director	Convicted Arrested on December 10, 2009 Detained on December 7, 2009	Convicted and sentenced to 19 years and 9 months	Article 314/2 of TCK Article 5 of TMY Article 7 of TMK	Kırıkkale F Type High Security Closed Prison	Adana 8th High Criminal Court Adana 4th Heavy Penal Court	He was the Adana representative of Azadiya Welat from 1997 to 1998. He spent six years in prison from 1999 to 2005 for political activities. From 2007, he started to work for the Adana Radyo Dünya. He was arrested on December 10, 2009, by the Police Directorate Anti-Terror Branch in Adana, in South-Eastern Anatolia on the grounds of alleged connections to the KCK. He stands accused of keeping connections with the Kürdistan İşçi Partisi (PKK) (Kurdistan Workers' Party). The case started on October 22, 2010. The Court did not allow Karanvil to make his defense in the Kurdish language, since December, 10, 2010. His lawyer could not inspect the file or the evidence for more than one year because of a court decision for secrecy. When he was in prison, the Adana 6th High Criminal Court condemned him on February 4, 2010, to an additional 10 months imprisonment for "spreading propaganda". On October 16, 2012, Adana 8th High Criminal Court sentenced him to 13 years and 6 months prison for belonging to the Adana structure of KCK and speading propaganda in favor of this organization. He was transferred from Adana Kürkçüler F type prison to Kırıkkale F type prison. On December 5, 2013, the 9. section of High Court has confirmed the sentence given in the scope of KCK Adana case.
16	**KONAR Ali**	Kurdish Azadiya Welat newspaper, Elazığ representative (Eastern Turkey)	Convicted Arrested on May 27, 2010 Detained on May 24, 2010	Convicted and sentenced to 7 years and 6 months	Article 220 of TCK Article 314.2 of TCK Article 5 of TMY	Malatya E-type Closed Prison	Elazığ 2. Heavy Penal Court	Detained in an operation launched against the Yurtsever Demokratik Gençlik Meclisi (YDGM) (Patriotic Democratic Youth Assembly), linked to the KCK. Konar was not allowed to speak to his lawyer during the first 24 hours of his custody. His detainment was based on charges of "being a member of a terrorist organization". The Malatya 3rd High Criminal Court sentenced Konar on December 17, 2010, to 7 years and 5 months imprisonment. After the High Appeal Court broke the sentence, he was on trial again and received the same sentence.
17	**SAĞALTICI Tahsin**	Yürüyüş political magazine	Detained on June 3, 2015	Awaiting details.	Awaiting details.	Awaiting details.	Awaiting details.	Awaiting details.
18	**SÜSEM Erdal**	Eylül Hapishane Kültür Sanat dergisi (culture and art journal for prisoners), editor	Convicted for life in prison plus one Arrested on February 5, 2010 Detained on February 1, 2010 Stands on trial in a different case	Convicted and sentenced to life in prison Faces additional 15 years imprisonment	Article 146 of former TCK Article 314/2 of TCK Article 7 of TMK	Edirne F-type High Security Closed Prison	İstanbul 12th Heavy Penal Closed Court	On February 24, 2011, the Court of Appeals confirmed the life sentence that the İstanbul 12nd High Criminal Court decided for "attempting to change the constitutional order by force" in link with TİKKO (Turkey Liberation Army of workers and peasants). His lawyer made a final appeal to the High Council of Appeals Court (Yargıtay Ceza Genel Kurulu). His lawyer went to the ECHR in August 2013. Süsem faced several court cases against him for "spreading propaganda" concerning articles and other contents published in the art and literature magazine Eylül (September), since April 1, 2007. Erdal Süsem is also on trial for being a "member of the Maoist Komünist Partisi (MKP) (Maoist Communist Party) organization". He is accused of having connections with members of outlawed organizations. According to the lawyer Gülizar Tuncer, the trial has stopped, as the Istanbul Anatolia 1st High Criminal Court has sent on March 12, 2015, the file (Number 2014/377) to the High Appeal Court for "incompetence". 5th Section of the High Appeal Court will decide whether the trial will be held before this local court or Istanbul 2nd High Criminal Court.
19	**TUNCA Sami**	Yeni Evrede Mücadele Birligi (Union fight in new stage) political review, editor-in-chief	Convicted in the Adana case On trial in the case of Gezi and Newroz demonstration Arrested on September 19, 2013 Detained on September 17, 2013	Convicted and sentenced to 10 years and 5 months Waiting for indictment for the latest accusation	Article 314 of TCK, Law 2911, Article 7/2 and 5 of TMK	Tekirdağ N.1 F type High Security Closed Prison	Adana 7th Heavy Penal Closed Court (convicted) Istanbul 19th. High Criminal Court Istanbul Anatolia 11th, First İnstance Court (acquitted)	He was arrested on September 17, at his home in Tekirdag. In June, he attended several demonstrations held in Sarigazi district. During his arrest, the police showed him pictures of protesters, their faces covered, throwing stones or possession of iron bars. "I participated in these events with my identity as a journalist and socialist", he wrote in a letter sent to readers, on October 5, 2013. He is accused for belonging to Labour Party of Turkey/Leninist (TKEP/L) outlawed organization, "attending illegal demonstrations", "possessing fake ID", "throwing stones and molotov cocktails" and was released pending trial by Istanbul 19th High Criminal Court on July 18, 2014. Next hearing will take place on October 22, 2015. He is now in Tekirdag N.1 F Type Prison because of a sentence of 11 years and six months given by Adana 7th High Criminal Court for "membership of an outlawed organization", "propaganda of an terrorist organization", "possession of explosive device" and "violation of Law 2911 on demonstration" in a case open in Gaziantep (File N. 2008/144). In the last case, Istanbul Anatolia 11th First İnstance Court acquitted Tunca for attending Newroz (New Year of Kurds) celebration and the Gezi demonstrations in 2013. He was taken into custody in Sancaktepe Police Station.
20	**YEŞİL Nuri**	Kurdish Azadiya Welat newspaper, Tunceli worker (Eastern Turkey)	Convicted twice Arrested on May 27, 2010 Detained on May 24, 2010	Convicted and sentenced to 12 years and 6 months Faces 22 years and 6 months in a different case	Article 314/2 of TCK Article 7/2 of TMY (2 times)	Elbistan E-type Closed Prison	Malatya 3. Heavy Penal Court	Nuri Yeşil was arrested on November 6, 2008 for distributing Azadiya Welat newspapers at Dogubeyazit (province of Ağrı) and for being involved in protests on October 20, 2008, in Dogubeyazit. He stayed 10 months in the Erzurum H-Type Prison and was charged of being a member of a terrorist organization (PKK). After being acquitted, he was released on July 2, 2009. Since August 2009, he became a representative of the Tunceli offices of Azadiya Welat. In a separate case, he was sentenced to 1 year and 7 months in prison for "propaganda". On May 24, 2010, he was arrested again and sent to prison three days later with Ali Konar. On June 23, 2011, he was sentenced by a High Criminal Court for "membership to a terrorist organization" (Patriotic and Democratic Youth Assembly - YDGM) and "spreading propaganda for a terrorist organization" to 12 years and 6 months in prison. Decision of the High Appeals Court is awaited.
21	**ZAVAR Erol**	Odak review, former owner and editor-in-chief	Convicted on June 27, 2001 for life in prison Arrested on January 17, 2001 Detained on January 15, 2001	Initialy received a death sentence which was then converted to life imprisonment	Article 146/1 of former TCK (abolished on June 1st 2005)	Ankara N.1 F-Type High Security Closed Prison F-type Prison	Ankara 11. Heavy Penal Closed Court	Charged for membership in the illegal organization "Devrimci Halk Kurtuluş Partisi-Cephesi (DHKPC)/Üçüncü Yol Direniş" (Revolutionary People Liberation Party and Front/Third Path Resistance) movement, and of attempting to "overthrow the existing constitutional order by force". Prior to his conviction, Zavar was diagnosed with bladder cancer. However, he says that his health has improved compared to previous years. He underwent more than 20 surgeries. In June 2011, a legal report stated that he is in better condition and he can have medical consultations once a year. He was arrested in 2001 due to a complaint of a person who said "he collected money by force in the name of the organization".

This table was prepared for OSCE by Erol Önderoğlu, who was arrested on June 20, 2016 together with Şebnem Korur Fincancı and Ahmet Nesin under the charge of "terrorism propaganda" [218]. They were released on June 30 and July 1.

Figure 5: Erol Önderoğlu"s first twit from prison.

The essential role of journalists requires that, even when they go beyond the limits of the rights to criticize and to report, the not-eliminable informative function relying on journalists has to be considered in evaluating their behaviour and the sanction to be charged.

One of the means used for limiting the work of journalists is *restricting their right of movement*, namely "to travel outside the State party, to entry into the State for foreign journalists or to restrict the movement within the State (including to conflict-affected locations, the sites of natural disasters and locations where there are allegations of human rights abuses)" [219]. Examples of these restrictions are, in Italy, the denial of entry to journalists inside the "C.I.E" (*Centri di Identificazione ed Espulsione,* "Centres for identification and Expulsion") [220]: in April 2011 Roberto Maroni, the former Interior Minister, issued a ministerial circular that denies the access to reporters and journalists in the detention centres. After the campaign "LasciateCIEntrare" [221], the next Interior Minister Anna Maria Cancellieri revoked the circular (December 13, 2011): however, she wrote that "access can be deferred for public order reasons"; the

[218] See more in the case law section of the paragraph dedicated to the counter-terrorism Turkish legislation, Chapter No. 3 of this dissertation.
[219] UN HUMAN RIGHTS COMMITTEE, *General comment No. 34, supra* note No. 149, General Remark No. 45.
[220] Centres where foreigners irregularly arrived in Italy that do not claim for international protection or do not have the requirements for obtaining it are detained in order to be expelled and repatriated; from the Department of the Interior's website: http://www.interno.gov.it/it/temi/immigrazione-e-asilo/sistema-accoglienza-sul-territorio/centri-limmigrazione (9/11/16).
[221] Learn more about the campaign from their website, March 15, 2014, http://www.lasciatecientrare.it/j25/chi-siamo.

Programme Document on the Centres for Identification and Expulsion states under Article No. 6(c) that journalists can access C.I.E.s only after an authorization granted by the Prefects.

Similarly, in Turkey there have been many cases of expulsion of foreign journalists reporting on hot issues, such as the situation in the South-East of the country; in this regard, one important case concerns the Dutch journalist Frederike Geerdink [222], expelled from Turkey in 2015 after 10 years working in the country and the case, on different grounds, of three Italian reporters [223]. These expulsions were possible thanks to the "Law on Foreigners" No. 6458 adopted in 2013: among other things, an entry ban to Turkey can be issued under Article No. 9 of the Law "for public order, public security or public health reasons" [224].

2.2 d)- The Balance Between Freedom of Expression, National Security and Public Order in the European Convention of Human Rights and by the European Court of Human Rights' Jurisprudence [225]

Both Italy and Turkey must observe the provisions of the European Convention of Human Rights (ECHR), which was enforced in 1953 and signed by every member of the Council of Europe [226]. Those states have undertaken "to secure

---

[222] See her article *Journalism doesn't exist in Turkey*, November 26, 2015, where she also describes her expulsion after three nights in jail: https://www.beaconreader.com/frederike-geerdink/journalism-doesnt-exist-in-turkey (9/11/16). F. Geerdink became one of the most influential foreign voices on the Kurdish question.

[223] Riccardo Chartroux and Valter Padovani working for RAI and Giuseppe Acconcia working for "Il Manifesto" entered Syria illegally from Turkey, OSSIGENO PER L'INFORMAZIONE, *Turchia:espulsi due giornalisti italiani e uno francese,* June 23, 2015, http://notiziario.ossigeno.info/2015/06/turchia-espulsi-al-confine-siriano-3-giornalisti-italiani-e- uno-francese-59126/ (9/11/16).

[224] In addition, Article No. 15 is titled "Foreigners who should be refused a VISA", listing those who "are banned from entering Turkey" (letter b) or "are considered undesirable for reasons of public order or public security" (letter c). Article No. 56 provides on the summons to leave Turkey: a time lapse of at least 15 days should be granted, but not to those who "pose a public order, public security, public health threat". See a complete verson of the Law- from the Turkish government's website: http://www.goc.gov.tr/files/files/eng_minikanun_5_son.pdf.

[225] Among other sources, this paragraph benefitted from: A. CALLAMARD, *Freedom of expression and national security: balancing for protection,* Columbia Global Freedom of Expression, Judges' Training Materials, December 2015, https://globalfreedomofexpression.columbia.edu/wp/wp-content/uploads/2016/01/A-Callamard-National-Security-and-FoE-Training.pdf?fa0652.

[226] I would here like to specify that no reference will be done to the European Union itself and the respective Court of Justice's jurisprudence. Firstly, this jurisprudence is not enforceable in Turkey, which is not a member of the European Union: for this reason, I think it is more interesting to analyze a system in a comparative prospective, where norms are also applied and interpreted by a court. Secondly, the Turkish failure in respecting the 10th and 23rd Accession Negotiation Chapters- which Turkey should fulfil in order to increase the possibilities of enlargement in its direction- gives no hope that it will happen in the near future (at least not in the next four years of mandate of the current government). Moreover, those Chapters are not the only cause that obstructs Turkey from entering the European Union, but also the need of respecting many other parameters (such as the rights of minorities, the right to a fair trial…). For more information on the enlargement topic, see the paper I have realized for the IKV Foundation (Economic Development Foundation), *Freedom of expression, role and control of media in Turkey and EU- A comparative analysis,* Istanbul, April 2014, p. 6; link:

to everyone within their jurisdiction the rights and freedoms" listed in the Convention [227]. The core of the ECHR is a catalogue of rights, listed especially in Articles No. 1- 18 and in the Convention's Protocols. The first Paragraph of Article No. 10 ECHR reads as follows:

"Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises".

In the second part of the Article, there is a list of possible restrictions to freedom of expression, that have to be "prescribed by law" and "necessary in a democratic society". They require a balance with the security right, which will be better analyzed in the following paragraph; however, "the fundamental litmus test that must be met is the proportionality test" [228]. The Strasbourg Court is required to consider whether the constraint is the less restrictive means for achieving the relevant purpose. Inspired by the German constitutional doctrine, the ECtHR embraced proportionality as a balancing approach to rights adjudication [229]; by the agency of this approach, the ECtHR solves the conflicts between a specific right, on one side, and the public interest that may have led to its limitation, on the other. Such a method is quite intrusive, requiring the Court to stand in judgment of the policy choices of State officials. For this reason, the acceptance and enforcement of the Strasbourg jurisprudence is often avoided justifying such a choice with a populist excuse, namely with the extreme intrusiveness of Europe in the State sovereignty. Nevertheless, as explained in the previous paragraph, Italy and Turkey inherited the principle of proportionality from the EU law, especially in understanding how the proportionality test should be applied by domestic courts in situations where interferences by the State undermined certain human rights: that is, there must be a reasonable relationship of proportionality between the means employed and the aim sought by any State measure [230].
Finally, it is worth to remember the "margin of appreciation" doctrine: on one hand, it was always celebrated as a tool for harmonizing the Convention's rights with the national norms and for promoting the ECtHR's rulings at a national level; on the other hand, the doctrine also met harsh criticism for its excessive vagueness and unpredictability [231]. It refers to the discretionary zone left to the states in fulfilling their ECHR's obligations.

---

https://www.academia.edu/23770314/FREEDOM_OF_EXPRESSION_ROLE_AND_CONTROL_OF_MEDIA_IN_TURKEY_AND_EU_a_comparative_analysis.

[227] Article No. 1 ECHR.

[228] AGNES CALLAMARD, *supra* note No. 226.

[229] H. KELLER, A. STONE SWEET, *The reception of the ECHR in National Legal Orders* in *A Europe of Rights,* Oxford University Press, 2008, p.10.

[230] The principle of proportionality is also quoted by the UN HUMAN RIGHTS COMMITTEE, *General comment No. 34, supra* note No. 149, General Remark No. 34. It adds that the principle "has to be respected not only in the law that frames the restrictions, but also by the administrative and judicial authorities applying the law".

[231] G. REPETTO, *Just deference? The multiple faces of the Doctrine of the Margin of Appreciation,* in *The Constitutional relevance of the ECHR in Domestic and European Law*, *supra* note No. 166, p.140-147. For example, the recent Brighton declaration of the "High Level Conference on the Future of the European Court of Human Rights" expressed hope that the margin of appreciation doctrine may one day be codified.

However, every state interprets differently what is "necessary in a democratic society" and what is an internal matter of national security and public order. Moreover, national security and public order are vague terms themselves so the result is a stratification of vague and abstract concepts which does not benefit freedom of expression. In addition, I would remember that the UN's Human Rights Committee itself stated that "this freedom [freedom of expression] is not to be assessed by reference to a margin of appreciation and […] a State party, in any given case, must demonstrate in specific fashion the precise nature of the threat" that authorizes freedom of expression's exceptions.

- *Relevant ECtHR's case law relating to Article 10 ECHR*[232]

I will here try to define the content, the meaning and the interpretation given to the right to freedom of expression through the European Court of Human Rights' case law.

- *Handyside v. UK* (1976) [233]: The most important concept expressed by this ruling is that "freedom of expression is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the state or any sector of the population. Such are demands of that pluralism, tolerance and broadmindedness without which there is no democratic society". However, states have a certain limited margin of appreciation in assessing the need for interference.

- *Lingens v. Austria* (1986) [234]: The ECtHR is empowered to give the final ruling on whether a restriction is reconcilable with freedom of expression. It rules on the right to criticise a politician and the distinction between allegations of facts and value-judgments, the latter not being susceptible of proof.

- *Observer and Guardian v. UK* (1991) [235]: In the field of the press but also of the new media, the delay of a publication, even for a short period, may deprive the means of communication of all its value and interest.

---

[232] This section benefitted particularly from: VOORHOOF D., MCGONAGLE T., *Freedom of Expression, the Media and Journalists: Case-law of the European Court of Human Rights*, IRIS *Themes*, European Audiovisual Observatory, Strasbourg, 2015 (e-book), link: http://www.obs.coe.int/documents/205595/2667238/IRIS+Themes+-+Vol+III++-+Ed+2015+EN.pdf/2f3d578d-2e05-442f-8326-917beab7626d (9/11/16).
Since 1994, *IRIS* has been highlighting a long series of ECtHR judgments regarding freedom of expression, emphasizing important developments and their consequences for media regulation and policy in the Council of Europe and its Member States.

[233] *Handyside v. UK,* App. No. 5493/72, Judgment December 7, 1976: from the HUDOC website: http://hudoc.echr.coe.int/eng?i=001-57499.

[234] *Lingens v. Austria,* App. No. 9815/82, Judgment July 8, 1986; from the HUDOC website: http://hudoc.echr.coe.int/eng?i=001-57523.

[235] *Observer and Guardian v.* UK, App. No. 13585/88, Judgment November 26, 1991; from the HUDOC website: http://hudoc.echr.coe.int/eng?i=001-57705.

- *Sunday Times v. UK* No. 2 (1991) [236]: The restrictions require a three-part test; they have to be prescribed by law and be legitimate and necessary in a democratic society. The facts of the case took place in the end of the '50s - beginning of the 60's, when in the UK thalidomide was prescribed as a sedative for pregnant women. Several women who took the drug during their pregnancy gave birth to children who suffered from deformities. The Sunday Times published an article on the topic, announcing that another article would be published in order to uncover in more depth the cause of these birth defects.
  A local court issued an injunction in order to restrain the publication of the future article. The Strasbourg Court analyzed whether the restriction was prescribed by law, pursued a legitimate aim and was necessary in a democratic society. In particular, it found that indeed the inference with the applicant's freedom of expression pursued a legitimate aim, because it sought to maintaining "the authority of the judiciary" as well as protecting national security. Second, the Court found that such inference did not meet the standard of being "necessary within a democratic society" because "the inference […] did not correspond to a social need sufficiently pressing to outweigh the public interest in freedom of expression within the meaning of the Convention" (Paragraph No. 67).

- *Castells v. Spain* (1992) [237]: This ruling clearly stated the special role of the press in a democratic society:

  "Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of their political leaders. In particular, it gives politicians the opportunity to reflect and comment on the preoccupations of public opinion; it thus enables everyone to participate in the free political debate which is at the very core of the concept of a democratic society" (Paragraph No. 43).

  Moreover, the case stemmed from a newspaper article signed by a member of the Spanish Parliament, complaining about the inactivity on the part of the authorities with regard to numerous attacks and murders that had taken place in the Basque Country. The Court stressed that while the right to freedom of expression is not absolute, Governments should be open to criticism: the limits of permissible criticism are broader with regard to the Government than in relation to a private citizen, or even a politician. In a democratic system the actions or omissions of the Government must be subject to the close scrutiny not only of the legislative and judicial authorities, but also of the press and public opinion (Paragraph No. 46).

[236] *Sunday Times v. UK No. 2,* App. No. 13166/87, Judgment November 26, 1991, link: http://hudoc.echr.coe.int/eng?i=001-57708.
[237] *Castells v. Spain,* App. No. 11798/85, Judgment April 23, 1992; from the HUDOC website: http://hudoc.echr.coe.int/eng?i=001-57772.

- *Goodwin v. UK* (1996) [238]: This ruling states that freedom of expression implies also duties, as furnishing accurate and reliable information, in accordance with the ethics of journalism and the principle of good faith. It is considered to be a ‗landmark judgment' on the protection of journalistic sources. In its judgment of March 27, 1996, the ECtHR came to the conclusion that a disclosure order requiring a British journalist to reveal the identity of his source and the fine imposed upon him for having refused to do so, constituted a violation of the right to freedom of expression and information as protected by Article No. 10 of the European Convention: the "vital public-watchdog role of press may be undermined and the ability of press to provide accurate and reliable information may be adversely affected - having regard to the importance of protection of sources for press freedom in a democratic society and the potentially chilling effect of orders of source disclosure" [239].

- *Khurshid Mustafa and Tarzibachi v. Sweden* (2009) [240]: The case regards the right to receive information and stems from the applicant's installation of an antenna for receiving TV programs in Arabic and Farsi against the landlord's will. The applicants' family left the house after the Swedish Courts did not recognize any validity to the right to freedom of expression in this case. Instead, the ECtHR found a violation of Article No. 10 ECHR and stated, notably, that while political and social news might be the most important information protected by Article No. 10, the freedom to receive information does not extend only to reports of events of public concern but covers in principle also cultural expressions as well as pure entertainment.

- ***The Right to Security***

As explained in the first paragraph of the current chapter, criminal law and especially political criminal law limits fundamental individual rights, such as freedom of expression, in the name of super-individual rights, such as State security and public order. In particular, traditionally State security can be understood both in its internal or external dimension. The former, defending the State from aggressions to its organs, the governamental structure and the existing institutions; the latter, when the existence of the State is threatened in its complete or partial destruction [241].

---

[238] *Goodwin v. UK* , App. No.17488/90, judgment March 27, 1996; from the HUDOC website: http://hudoc.echr.coe.int/eng?i=001-60596.

[239] *Goodwin v. UK,* official legal summary; http://hudoc.echr.coe.int/eng?i=002-9155. Other judgments specifying the role of the press as a "public watchdog" are: *Tammer v. Estonia*, Application no. 41205/98, Judgment of February 26, 2001, § 62; Cumpănă and Mazăre v. Romania, Application no. 33348/96, Judgment of December 17, 2004, § 93; *Times Newspapers v. United Kingdom*, Applications No. 3002/03 and 23676/03, Judgment of 10 March 2009, § 45.

[240] *Khurshid Mustafa and Tarzibachi v. Sweden*, App. No 23883/06, Judgment March 16,2009; from the HUDOC website: http://hudoc.echr.coe.int/eng?i=001-90234.

[241] R. CANOSA, *Il delitto politico: natura e storia,* in *Il delitto politico dalla fine dell"Ottocento ai giorni nostri,* Notebook 3 of *Critica del diritto,* Rome, 1984, p.21; V. PADOVANI, *Stato (reati contro la personalità dello),* in *Enc. Dir.,* XLIII, Milan, 1990, p.817 et seq. . This distinction was already

The ECHR states out no explicit right to security. Article No. 5 states that everyone should enjoy the "right to liberty and security of the person", but such a provision refers solely to a question of upholding such a right from an arbitrary interference by the state, for instance from arbitrary imprisonment. Nevertheless, the Convention presents little obstacle to the protection of such a right by means of the domestic substantive law [242]. The ECHR "leaves States free to designate as criminal any act or omission not constituting the normal exercise of the rights that it protects" [243]. A "normal exercise" of the rights protected by the Convention includes those protected by Articles No. 8 -11 (right to privacy and family life, freedom of thought, conscience and religion, freedom of expression and freedom of assembly and association). Therefore, for enforcing any national provision properly under the ECHR, it is sufficient that it does not interfere with any Convention right or, if it does so, it has to happen within the terms allowed by the second part of each of the Articles No. 8-11: namely, the interference must be prescribed by law and be necessary for the legitimate aims of a democratic society in the name of other interests such as national security or public safety.

Similarly, at the international level, some rights may be restricted under the conditions set out by the international human rights law; freedom of expression is one of those "non-absolute" rights: under the International Covenant on Civil and Political Rights (ICCPR), it may be restricted under the conditions defined by Article No. 19 (3), which includes the protection of national security and public order [244] and by Article No. 20. As it can be noted, Article 19 (3) does not identify the speech that may be restricted; instead, it identifies the conditions under which a speech may be legitimately restricted, following the so-called three-part test (rule of law, grounds for the restrictions, proportionality) [245]. This approach is particularly important for avoiding to select some kinds of speech which should be considered as offensive from the beginning: a more general approach has been preferred to a compulsory list of particular cases [246].

The basic reason why freedom of expression can be restricted is that it "carries with it special duties and responsibilities", as it is expressly stated by Article No. 19(3) ICCPR as well as in Article No. 10(2) ECHR. However, the restrictions should not jeopardize the right itself: "the relationship between right

---

present in some pre-unitarian codes, following the French tradition, and it was eliminated by the Zanardelli Code; afterwards, it was retrieved by the Rocco Code concerning the crimes "against State personality".

[242] P. RAMSAY, *supra* note No. 101, p. 114-120.

[243] *Engel v. Netherlands* (1978-80) 1 ECHR 647, Para. No. 81.

[244] Para. No. 3 of Article 19 ICCPR states:"The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
(a) For respect of the rights or reputations of others;
(b) For the protection of national security or of public order (ordre public), or of public health or morals".

[245] AGNES CALLAMARD, *supra* note No. 226, p.4.

[246] For instance, it is my impression that this happens in the several and different cases of criminalization of hate speech around the world.

and restriction and between norm and exception must not be reversed" [247]. Again, in the *General Comment No. 34* by the UN Human Right Committee, one of the requirements for correctly balancing free expression with the national security interest is that the State invoking national security to restrict freedom of expression "demonstrates in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing *a direct and immediate connection* between the expression and the threat" [248]. Therefore an individual has no cause for complaint if his or her human rights are interfered, when the interference is necessary to uphold another's right to security. […] There is a liability for failure to reassure others, which implies a positive obligation to be aware of what will cause the others' insecurity. But how can we be aware of what causes the other's insecurity? In the field under analysis, it has to be remembered that "the other" is often the State or the community and not a single individual: this renders the individuation of the protected "other's right" even more complicated. Ramsey evaluates that the ECHR's recognition of a right to security potentially legitimates a very expansive criminal law, referring not only to the above-mentioned Article No. 5 but also to the several parameters for the admissible right's restrictions. From this standpoint, the "over-criminalization" problem is now broadlly recognized and the ECHR seems to do little to prevent it[249]. This expansion of criminal law is possible also because the Convention norms are relatively open-ended and incomplete: most of the rights are qualified in terms of public interest goals that the States may legitimately purse. The same "openness", which can result in "vagueness" characterizes the exceptions to the listed rights allowed: so it happens in the expression "for the legitimate aims of a democratic society" [250]. As I previously mentioned, the Member States of the Council of Europe, still enjoy a great "margin of appreciation" in choosing which interest has to prevail and the consequent adequate means of protection. Moreover, regarding general clauses such as "general principles of law recognized by civilised nations", "public emergency threatening the life of the nation", "public order and morals" and so on, the Convention's own text encourages a *historical and contextual interpretation* [251]. The approach of the Strasbourg Court toward history, memory and national historical traditions and the use of historical and contextual analysis in its jurisprudence is peculiar. It is not an "historical interpretation" in the manner of Savigny, but rather a "practice of contextual interpretation" as explained by Begin: it makes use of historical

---

[247] UN HUMAN RIGHTS COMMITTEE, *General comment No. 34, supra* note No. 149, General Remark No. 21.

[248] *Ibidem,* General Remark No. 30.

[249] P. RAMSAY, *supra* note No. 101, p. 131.

[250] Art. 8-11 ECHR, Paragraph No. 2. I would here remind that these exceptions, being so vague, can be considered "general". The UN HUMAN RIGHTS COMMITTEE in the *General comment No. 34 (supra* note No. 149) states that " while reservations to particular elements of Article 19 (2) may be acceptable, a general reservation to the rights set out in paragraph 2 would be incompatible with the object and purpose of the Covenant".

[251] G.REPETTO, *Histories, Traditions and Contexts in the Jurisprudence of the European Court of Human Rights,* in *The Constitutional relevance of the ECHR in Domestic and European Law, supra* note No. 166, p.173; see also L.BEGIN, *L'internationalisation de droits de l'homme et le defi de la "contextualisation",* in *Revue interdisciplinaire d"etudes juridiques,* 2004, p. 64-66.

references in reconstructing cases and in providing motivations for judicial decisions [252].

Finally, looking at the jurisdiction where most of the today influence on practices for defending national security stems from, I would quote the judgment *New York Times Co. v. United States* (1971) [253], better known as the "Pentagon Papers" case: in this judgment, the Supreme Court hold that the newspaper had the right to print the classified material in its possession. Judge Hugo Black wrote an opinion stating that “The word 'security' is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment”.

The proportionality test explained in the previous paragraph and the balance realized by domestic, regional and international courts requires to a deeper understanding of the content of the interests invoked for limiting free expression; particularly, within the scope of this dissertation, the meaning of national security and public order. It is important to analyze such a meaning from an internal point of view, since every nation and area of the world suffers of different threats for geographical, cultural and historical reasons, but at the same time you also need to keep in mind the international standards: in this regard, the *Siracusa principles* [254] are very important. They require that the scope of a limitation in the Covenant shall not be interpreted in such a way as to jeopardize the essence of the right concerned. They define a legitimate national security interest as one that aims "to protect the existence of the nation or its territorial integrity or political independence against force or threat of force” [255]. Moreover, it has to be reminded that State security has always to be understood as the security of the community, and not of the authorities themselves.

As far as it concerns the concept of “public order”, the law itself is order, in a particular historical moment: it individuates the priorities to be followed given the most shared values in the community. It is the order of a given structure in a given moment [256]. Consequently, it is clear that criminalizing the threats against public order means criminalizing the possibility to change the

---

[252] See the *Refah Partisi v. Turkey* case: in justifying why the measure dissolving the Party did not violate Article No. 11 ECHR, the judges also reconstructed the historical path of the building of the Turkish national state, which was marked by having overcome the theocratic conception of public power. Again, in *Yumak and Sadak v. Turkey* (2008), the clause requiring the threshold of 10% in national political elections was found not violating the Convention in light of the influence that political instability held for the stability of democracy: to do so, the Court retraced the events of Turkish political history from the 1950s elections. It is also evident in the judgments of some Italian Courts regarding fascism as well as it is particularly evident examining more specifically the jurisprudence accumulated in cases of historical denial.

[253] 403 U.S. 713 (1971).

[254] UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, U.N. Doc. E/CN.4/1985/4, Annex (1985)**:** https://www1.umn.edu/humanrts/instree/siracusaprinciples.html .

[255] *Siracusa Principles,* Principle No. 29.

[256] To better understand the relationship between interpretation and society: R. DWORKIN, *The law"s empire,* Harvard University Press, 1988.
“It would be a mere jusnaturalistic abstraction to insist that the concept of public order could consolidate in a stable and universal institution”, R. QUADRI, *Lezioni di diritto internazionale privato,* Napoli, 1983, p. 312. If this is true for Private Law, it has to be even more true for Criminal Law.

given structure, which instead aims to safeguard its internal coherency. Moreover, the meaning of public order can change as a result of a slow evolution rather than all in a sudden because of quick historical or cultural factors. However, I already explained that public order can be invoked in order to defend fundamental values which do not contrast with the European principles [257].

Up to the UN's Human Rights Committee, for the maintenance of public order, it may be permissible in certain circumstances to regulate speech-making in a particular public place [258]. The fact that the expression takes place in a public space, among more people, is particularly important for the Italian and Turkish law systems [259]: the principle of proportionality has to take account of the *form* of expression as well as the *means* of dissemination; in this regard, a higher threshold has to be granted in the circumstances of public debate concerning public personalities and politicians.

- *Relevant ECtHR' s Case Law Relating to the Second Part of Article No. 10 ECHR* [260]

I will hereby try to define the content, the meaning of the right to national security, public order and the requirements for restrictions ("provided by law", a "pressing social need", the "necessity in a democratic society") through the European Court of Human Rights' case-law.

- *Kruslin v. France* (1990) [261]: In order to understand if a restriction to a fundamental right was correctly provided by law, a three-fold test needs to be realized: the restriction has to find its basis in national law, it needs to be accessible and foreseeable.

- *Castells v. Spain* (1992) [262]: On several occasions, the applicant had offered to establish that the facts recounted by him were true and well-known. The Court considered it of decisive importance that he had not

[257] This is clearly stated, for instance, in the judgments of the European Court of Justice (ECJ) *Rutili* (1975) and *Carpenter* (2002), saying that a State cannot adduce reasons of general interest for obstructing the free performance of services if the State measure does not conform to the ECJ's fundamental principles. Therefore, I think it has to be even more true in the human rights' and criminal law field. As a matter of fact, in the European Law context "the belonging of a norm to the category of police laws and security laws does not exempt it from the observance of the Treaty's provisions". This was stated for the first time in the judgment Arblade (C-369/96, judgment of November 25, 1999).

[258] UN HUMAN RIGHTS COMMITTEE, *General comment No. 34, supra* note No. 149, General Remark No. 31.

[259] In particular, consider the aggravating causes stemming by expressions in the cyberspace.

[260] This section benefitted particularly from: Voorhoof D. et al and McGonagle T. (Ed. Sup.), *Freedom of Expression, the Media and Journalists: Case-law of the European Court of Human Rights*, IRIS *Themes*, European Audiovisual Observatory, Strasbourg, 2015 (e-book).

[261] *Kruslin v. France,* App. No. 11801/85, Judgment April 24, 1990, link: http://hudoc.echr.coe.int/eng?i=001-57626.

[262] *Castells v. Spain,* App. No. 11798/85, Judgment April 23, 1992, link: http://hudoc.echr.coe.int/eng?i=001-57772.

been allowed to do so. Many of the applicant's assertions were susceptible to an attempt to establish their truth, and the applicant should have been allowed to demonstrate his good faith. Therefore, the conviction could not be seen as necessary in a democratic society.

- *Jersild v. Denmark* (1994) [263] : The ECtHR came to the conclusion that it was not necessary in a democratic society to convict a journalist for aiding and abetting in the dissemination of racist remarks made by extremist youths in a television programme. The Court was of the opinion that the punishment of a television news journalist for assisting in the dissemination of racist statements made by another person in an interview would seriously hamper the contribution of the press to discussion of matters of public interest. It also stated that it was not for the courts or judges "to substitute their own views for those of the press as to what technique of reporting should be adopted by journalists" and that *"*news reporting based on interviews, whether edited or not, constitutes one of the most important means whereby the press is able to play its *vital role as public watchdog".* In this case, the ECtHR found a violation of Article No. 10 ECHR by the Danish authorities.

- *Şurek v. Turkey* No. 1 (1999) [264]: The applicant was the major shareholder in a company which owned a weekly review. Two readers' articles were published, in which the State authorities were severely criticised for their part in the massacres in "Kurdistan", in the South-East of the country. The applicant was convicted and fined for disseminating propaganda against the indivisibility of the State and provoking enmity and hatred among the people. The Court found a violation of Article No. 10 ECHR, noting that the adjective "necessary" ("necessary in a democratic society") within the meaning of Article 10 (2), implies the existence of a *pressing social need* (Paragraph No. 58). In exercising its supervisory jurisdiction, the Court stated that restrictions to the right to freedom of expression must be examined: in the light of the case as a whole, including the statements under charge and the context in which they were made. In particular, it must determine whether the interference was proportionate to the legitimate aim pursued and whether the reasons adduced by the Government are relevant and sufficient . The national authorities must show that they applied standards in conformity with the principles embodied in Article 10 and, moreover, that they acted basing on an acceptable assessment of the relevant facts (Paragraph No. 58).

The following two paragraphs will analyze the Italian and Turkish behaviour regarding freedom of expression, national security and public order defence in the Council of Europe's context. I will not focus on the European Union's

[263] *Jersild v. Denmark,* App. No. 15890/89, Judgment of September 23, 1994, link: http://hudoc.echr.coe.int/eng?i=001-57891.
[264] *Şurek v. Turkey No. 1,* App. No. 26682/95, Judgment of July 8, 1999, link: http://hudoc.echr.coe.int/eng?i=001-58279.

environment since Turkey is not a Member State of that institution. Nevertheless, the rights provided by the ECHR and the judgments of the ECtHR have a big and increasing importance in the European Union's context. Consequently, one important question is: in the enlargement's perspective, can the Strasbourg Court maintain consistent standards of rights protection, or is the emergence of a two – track Europe inevitable [265]?

- **Italy**

Italy was one of the ten original signatories of the ECHR (November 4, 1950). It participated in the drafting of the Convention and was the host State for its final signature. The Convention was ratified on October 25, 1955 with just one reservation regarding three provisions of Protocol No. 7. As well as for the enactment of the Constitution, joining the Council of Europe was a tremendous step for the country after the fall of a dictatorial regime. Despite this relevant commitment to the Convention, Italy lacked in abolishing or amending many of the opinion crimes embedded in the Italian Criminal Code [266].
Following an amendment in 2001, Article No. 117 of the Italian Constitution obliges the legislative State authorities and the Regions to exercise their powers in compliance with European and international law, including the international treaties [267]. The intent of the constitutional provision is therefore to establish the prevalence of the international and European legislation upon the state and regional ordinary legislation, since the Italian legal system has accepted these international and European sources to be overarching. Nevertheless, for a long time, the Italian Courts refused to apply the ECHR immediately, considering its provisions to be merely programmatic [268]. Moreover, we have to consider the so-called "twin judgments" No. 348 and 349 of 2007 issued by the Italian Constitutional Court (ICC) as a turning point: after them, the cogency of the ECHR in Italy was much more enhanced. The Court declared for the first time the unconstitutionality of a national law [269] under Article No. 1 of Protocol No. 1 [270]: since Article 117 (1) of the Italian Constitution states that national laws should comply with international law, the laws that are incompatible with the ECHR violate Article 117. In these two judgments, the Italian Constitutional Court confirmed once again the infra-constitutional character of the ECHR in the Italian system. In fact, in the Court's view, neither Article No. 10 nor 11 of the Italian Constitution grant constitutional status to International treaties [271].

---

[265] H. KELLER, A. STONE SWEET, *supra* note No. 230, p.8.

[266] Considerable changes where done by Law No. 85/2006, but it is considered a "lost possibility" for definitely abolishing unhistorical provisions which raise many Constitutional and international concerns. See a more detailed analysis of the Law in Chapter No. 3 of this dissertation.

[267] The amendment is contained in Article No. 3 of the Constitutional Law No. 2 of October 18, 2001.

[268] M.C.SORIANO, *The Reception Process in Spain and Italy,* in H. KELLER, A. STONE SWEET, *A Europe of Rights,* Oxford University Press, 2008, p.394- 450.

[269] Namely the law on the refund of unlawful expropriation.

[270] Right to private property.

[271] Article No. 10, paragraph 1, states that : "The Italian legal system conforms to the generally recognised principles of international law"; Article No. 11 states that "Italy agrees, on conditions

Such a debate was resumed after the Lisbon Treaty in 2009: particularly, the new text of the Treaty on European Union (TEU) [272] is important, because of its explicit reference made in Article No. 6(2) and (3); on the one hand it is established the EU accession to the conventional system of protection of human rights, subjugating the EU law to the respect of fundamental freedoms; on the other, it is enshrined that those rights and freedoms are part of the EU law as general principles. However, even if some scholarship said so, the ECHR still has no "super- constitutional" status in the internal judicial system [273].

The Lisbon Treaty also provides for a mechanism (under Article No. 7 TEU) that allows the EU institutions to take action, whether there is a clear risk of a "serious breach" or a "serious and persistent breach" by a Member State of the "values" listed in Article No. 2 TEU [274]: this is an important step forward, which allows the suspension of voting rights of any State found to break such a provision. The mechanism is described as a "last resort" [275], but does potentially provide leverage where states fail to uphold their duty to protect freedom of expression.

To sum up, in Italy as well as in Turkey, important legislative amendments and jurisprudence adaptations to the ECHR have been happening mainly in the last 20 years. However, Italy did not follow the ECHR and ECtHR's indications relating to the need of abolishing opinion crimes: it is true that Italy was involved in a considerably lower number of cases before the Strasbourg Court in comparison, for example, with Turkey. It happens for two reasons: firstly, the trials do not reach the ECtHR because they are overturned earlier by the domestic courts (however it needs to be remembered that the beginning of a trial itself has a strong chilling effect on free expression). Secondly, some restrictions on freedom of expression are tolerated by the ECHR itself when

---

of equality with other States, to the limitations of sovereignty that may be necessary to a world order ensuring peace and justice among the Nations. Italy promotes and encourages international organisations furthering such ends".

[272] See the full text of the Treaty here: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012M/TXT&from=en.

[273] This conclusions are based on the literal interpretation as well: in fact, paragraph 1 of Article No. 6 TEU awarded "the same legal value of the Treaties" to the Charter of Nice; that provision was not envisaged for the ECHR, since it was instead intended merely as an "adhesion". It was confirmed by the Italian Constitutional Court with the judgment No. 230/2012 of October 12, 2012. Read, for example, *Il trattato di Lisbona e la CEDU: nuove prospettive di applicabilità del Diritto europeo in Italia,* report of Pierpaolo Pomes during a course for lawyers in Rome, October 15, 2010, http://www.europeanrights.eu/public/commenti/pomes_testo.pdf or F. V. RINARLDI, *I rapporti fra ordinamento interno e CEDU,* in 'FiloDiritto.com", January 7, 2013, link: http://www.filodiritto.com/articoli/2013/01/i-rapporti-tra-ordinamento-interno-e-cedu/. For the relationship between the Italian Constitutional Court and the ECHR, GALLO F., *Rapporti fra Corte Costituzionale e Corte EDU,* Bruxelles, May 24, 2012, link: http://www.cortecostituzionale.it/documenti/relazioni_internazionali/RI_BRUXELLES_2012_GALLO.pdf (9/12/16).

[274] Namely, human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities, pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men.

[275] EUROPEAN COMMISSION, *Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union,* 19 October 2010, http://ec.europa.eu/justice/news/intro/doc/com_2010_573_4_en.pdf.

connected to impellent needs of national security and public order necessary in a democratic society. These broad provision concede a great margin of discretion to national judges and prosecutors, which may not be double checked if the case does not not reach the Strasbourg Court.

- *Relevant ECtHR's case law addressing Italy and relating to Article No. 10 ECHR* [276]

- *Perna v. Italy* (2001) [277]: The case involves the topic of criticism and offence of public figures and the right to report.
  A journalist from the newspaper *Il Giornale* wrote an article claiming that the judge Gian Carlo Caselli was not impartial (namely, that he was leftist) and abused of his judicial power for political goals. The Strasbourg Court found a violation of Article No. 10 ECHR concerning one of the issues, namely the accuse to have political preferences: the violation took place for having prevented Perna from proving that the offending article was protected by the right to report and comment on current events, in the context of the freedom of the press. In fact, the applicant while challenging the case to the Italian Appeal Court, described himself as a columnist, arguing that his intention was not to present a biography of Caselli but to express his critical opinions, in a figurative and effective way, on the basis of true and uncontested facts; however, the Appeal Court refused the requested cross-examinations. Instead, no violation was found concerning the allegations of trying to institute political trials, since those statements exceeded the limits of acceptable criticism.

- *Riolo v. Italy* (2008) [278]: The applicant wrote an article for *Narcomafie,* titled «Mafia and law. Palermo: the Province against itself in the Falcone's case. The strange case of the lawyer Musotto and Mr Hyde». It originated from the facts of the "Capaci massacre", where the prosecutor of many mafia cases Giovanni Falcone died. The lawyer of one of the people under investigation for this bloodshed, Mr Musotto, was at the time also President of the Province of Palermo, which lately entered the trial for civil injury against Musotto's client. In addition, in this article the journalist made some statements open to the interpretation that Musotto obtained votes thanks to the local mafia. However, the ECtHR stated that the applicant rather expressed the argument that a person who was elected might be affected by the interests of his voters: this view does not exceed the limits of freedom of expression in a democratic society (Paragraph No. 67). As far as other expressions are concerned - such as the title of the article under charge- the Court considered that journalistic freedom may include possible recourse to a degree of provocation (Paragraph No. 68). Moreover, the Court also noted that no one disputes the veracity of the main factual information contained in the article under charge.

[276] It has to be noted that all the findings of Italian violations concern defamation cases.
[277] *Perna v. Italy,* App. No. 48898/99, Judgment July 25, 2001; link: http://hudoc.echr.coe.int/eng?i=001-61075.
[278] *Riolo v. Italy,* App. No. 42211/07, judgment July 17, 2008; link: available in French http://hudoc.echr.coe.int/eng?i=001-87614 and Italian http://hudoc.echr.coe.int/eng?i=001-150359.

Consequently, the Court considered that, although the article contains a certain dose of provocation, it could not be considered a free personal attack against Musotto (here, the *Ormanni v. Italy* [279] case was quoted).
For these reasons, a violation of Article No. 10 ECHR was found because there was no proportionality of the penalty and, as well as in the case below, the high sums the journalist was ordered to pay were likely to dissuade him from continuing to inform the public on topics of general interest (self- censorship, chilling effect).

- *Ricci v. Italy* (2013) [280]: The case is again relevant concerning the self-censorship issue. The journalist Antonio Ricci was sentenced to four months and five days of imprisonment after he was found guilty of broadcasting on his television show images that had been illicitly taken from a video recorded by the public broadcasting company, RAI. The video in question featured the philosopher Gianni Vattimo engaged in an argument with another guest and subsequently showed the presenter complaining because the footage could not be aired. Ricci asserted that some images of this video were shown to document how modern television privileges sensational images over the quality of television programs. The conviction originated from the supposed prevalence of the right to private life (Article No. 8) on the right to freedom of expression (Article No. 10) when the information has no outstanding public interest. However, the Court found that the undue harshness of the sentencing could not overcome the proportionality requirement. The ECtHR further noted that these kind of sentences could potentially discourage journalists from informing the public on matters of general interest [281].

- *Belpietro v. Italy* (2013) [282]: This judgment reflects a tension between the freedom of parliamentary speech on the one hand, and the restrictions and obligations on the media reproducing or publishing statements made by politicians who are covered by their parliamentary immunity on the other hand. The applicant is Maurizio Belpietro, who at the relevant time was editor of the national daily newspaper *Il Giornale*. He complained before the Strasbourg Court for his conviction for defamation, after publishing an article by an Italian Senator, R.I.. The article was a robust opinion piece analysing the lack of results in combating Mafia in Palermo. Particularly, the Senator criticised the Italian judiciary and especially accused some members of the public prosecutors‘ office in Palermo of using political strategies in their fight against the Mafia. The Senator had expressed his views in his capacity as a member of the Senate, and was thus shielded by his parliamentary immunity; instead,

[279] *Ormanni v. Italy,* App. No. 30278/04, judgment October 17, 2007; link: available in French http://hudoc.echr.coe.int/eng?i=001-81739.
[280] *Ricci v. Italy,* App. No. 30210/06, judgment October 8,2013, link: available in French http://hudoc.echr.coe.int/eng?i=001-126795 and Italian http://hudoc.echr.coe.int/eng?i=001-146280.
[281] In doing so, the Court quoted the case *Ceylan v. Turkey,* App. No. 23556/94, judgment July 8, 1999.
[282] *Belpietro v. Italy,* App. No. 43612/10, judgment September 24, 2013, link: available in French http://hudoc.echr.coe.int/eng?i=001-126450 and Italian http://hudoc.echr.coe.int/eng?i=001-146290.

Belpietro, as editor of the newspaper, was convicted under Article No. 57 of the Italian Criminal Code. Although the ECtHR recognized that the article concerned an issue of importance to society that the public had the right to be informed about, it emphasises that some of the allegations against judges Lo Forte and Caselli were very serious, without sufficient objective basis. Furthermore, the Court referred to the obligation of an editor of a newspaper to control what is published. This duty does not disappear when it concerns an article written by a member of the parliament. However, the Court considereed the sanction of imprisonment and the high award of damages as disproportionate to the aim pursued; consequently, it came to the conclusion that, solely for that reason, the interference by the Italian authorities amounted to a breach of Article No. 10 ECHR.

- **Turkey**

Turkey was the thirteenth Member State of the Council of Europe, from 1949, and participated in drafting the ECHR, signed by Turkey in November 4, 1950 and ratified in 1954. It still needs to ratify the Optional Protocol to the Convention on the Rights of the Child and Additional Protocols No. 4, 7, 12 and 16 to the ECHR. "Although we are one of the first applicants to the EU membership [283], we're still lingering at the doorstep", Turkish President of the Republic Erdoğan said during a CNN interview following the migrant's treaty [284]; "We are still being kept busy with irrelevant obstacles, but we are very patient". In reality, the Turkish commitment to openness toward supra-nationalism was never really followed up. After the *coup d'état* in 1980, France, Norway, Denmark, Sweden and the Netherlands filed interstate applications against Turkey alleging the violation of Articles No. 3, 6, 9, 10, 11 and 15(3) ECHR, that eventually reached a friendly settlement [285]. In 1990, the Strasbourg's compulsory jurisdiction was accepted but several conditions were imposed: among others, the right of petition extends only to allegations concerning public authorities' acts or omissions provided also by Turkish Constitution; moreover, the notion of "democratic society" under Articles No. 8-11(2) ECHR must be understood based on Turkish Constitution.

In 2001, Turkey experienced its worst economic crisis since the end of the World War II. In the November 2002 election, the currently ruling AKP Party (*Adalet ve Kalkınma Partisi* ,"Party for Development and Justice") received 34% of the national vote, far short of a numerical majority; nevertheless it gained 66% of the parliamentary seats, thanks to an unusually high electoral threshold that eliminates parties receiving less than 10% of the vote. This threshold is still in force. Since 2002, AKP is the ruling party in Turkey. In January 2002, almost

[283] The first Association Treaty between the European Community and Turkey was signed in September 12, 1963.

[284] J. SHELLEY, *I"m not at war with the press, says Turkish President Recep Tayyip Erdogan,* March 31, 2016, CNN, link: http://edition.cnn.com/2016/03/31/middleeast/recep-tayyip-erdogan-amanpour-interview/ (9/12/16).

[285] *France v. Turkey* (App. No. 9940/82), *Norway v. Turkey* (App.No. 9941/82), *Denmark v. Turkey* (App. No. 9942/82), *Sweden v. Turkey* App. No. 9943/82), *the Netherlands v. Turkey* (App. No. 9944/82).

one year before the elections, Turkey withdrew the previous declarations empowering the executive branch to derogate the ECHR guarantees through measures such as banning publications, shutting down printing presses, ordering the evacuation of villages of residential areas and transferring public officials to other posts. However, all of these measures have been applied in the last decade, with an increasing frequency in the last three years, following the 2013 Gezi protests [286].

With regard to the constitutional reforms, Turkey enacted a set of harmonization packages from 2002 to 2004 in order to align the Turkish legislation with the Constitution. Anyway, the approach was gradual and incomplete [287]. Already in 2001, an Interim Resolution from the Committee of Ministers of the Council of Europe, was urging "with no further delay, *ad hoc* measures to fully erase the consequences of convictions resulting from public statements contrary to Article No. 10 ECHR" [288].

The need of respecting the undertaken international conventions was just one of the factors which led Turkey to issue a new Criminal Code in 2004 (Law No. 5232, September 26), together with the jurisprudence of the *Yargıtay* (the Supreme Court) and other elements. An official commission for elaborating a new Criminal Code was established already in 1985 and the drafts realized until 2003 were strongly influenced by French law. Nevertheless, the Commission which should have revised it for the last time in 2003 was composed by many young professors which were more inclined to German law, as it has already been in the Criminal Procedure Law field already since 1929. However, the great upheaval in a German-oriented direction concerned only the general part of the Criminal Code, leaving the special part – highly influenced by the Italian Fascist Rocco Code- almost unchanged.

At the time of ECHR's ratification, the 1924 Constitution was in force: it contained no explicit references to the status of international agreements in Turkish law. The 1961 and 1982 Constitutions provided that international agreements duly put into effect have the force of law and that no appeal to the Constitutional Court can be made on the grounds that those agreements are unconstitutional: for this reason, there was no consensus among the Turkish scholarship on the rank of international treaties in the internal system until the 2004 amendments [289]. Afterwards, most of the scholars have been distinguishing the human rights treaties from the other international treaties and the ECHR received a privileged, constitutional or even supra-constitutional

[286] The July 2013 report of *Türkiye Gazeteciler Sendikası* (the National Labour Union for Journalists) said that 75 press members quit working after the Gezi mobilizations. The website *Bianet.org* reported that 153 journalists were injured between the 27th of May and the 30th of September 2013. During the protests, the main TV channels neglected what was happening.

[287] I. O. KABOĞLU, STYLIANOS – I. G. KOUTNATZIS, *The reception process in Greece and Turkey,* in H. KELLER, A. STONE SWEET, *A Europe of Rights,* Oxford University Press,2008, p. 495.

[288] ResDH (2001)106.

[289] I. Ö. KABOĞLU, *ÖZGÜRLÜKLER HUKUKU* [LAW OF FREEDOMS], Đmge Kitabevi, 2002, p. 434-435, 359- 360; M. ODEN, *Anayasa Hukukunda Siyasi Partilerin Anayasaya Aykırı Eylemleri Nedeniyle Kapatılmaları* [CLOSURES IN CONSTITUTIONAL LAW FOR ACTIVITIES OF POLITICAL PARTIES CONTRARY TO THE CONSTITUTION], Yetkin Yayınlar, 2003, p. 120.

status [290]. Article No. 90 of the Turkish Constitution ("Ratification of International Treaties") - as amended in 2004 - states in the last paragraph that "in case of a conflict between international agreements, duly put into effect, concerning fundamental rights and freedoms and the laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail" [291]. Thus, it differentiates human right treaties from all the other international treaties. The Turkish Constitutional Court (TCC) also prevents domestic law from conflicting with the ECHR Convention and the Strasbourg rulings, thanks to Article No. 90 of the Constitution and the human rights agreements' priority over statutory norms. However, as professor Selin Esen underlines, "the Constitutional Court's approach to rights and freedoms has tended to be narrowing and limiting, rather than expansive and broadening. Ironically, the TCC uses the Convention to support its restrictive and strict interpretation of domestic norms, at times even disregarding and contradicting the rulings of the ECtHR" [292].
On October 3, 2005, the EU started the negotiation with Turkey on the full membership.

- *Relevant ECtHR's case law addressing Turkey and relating to Article No.10 ECHR*

Many of the Strasbourg cases against Turkey concern the themes under analysis in this dissertation and, instead than Italy, they do not refer only to defamation. I will here list some of them, postponing a more detailed analysis of national provisions and their domestic enforcement to the following chapters.

- *Zana v. Turkey* (1997) [293]: It concerns political expression, incitement to violence and the Anti- Terror legislation.

- *Incal v. Turkey* (1998) [294]: It scrutinizes on political expression, separatist propaganda, the limits of acceptable criticism, the relevance of public interest to receive information and hate speech.

- *Arslan v. Turkey* (1999)[295]: It regards offensive information, political expression, (separatist) propaganda, the limits of acceptable criticism, the right to receive information, duties and responsibilities stemming from the right to free

[290] Y. ODEK, E.K. ARACAOGLU, *Turkey*, in *Fundamental rights in Europe: the European Convention of Human Rights and its Member States 1950- 2000,* p. 883 et seq.
[291] Article No. 90(5) of the Turkish Constitution. For the full English version of the Turkish Constitution, from the official website of the Government of the Republic of Turkey: https://global.tbmm.gov.tr/docs/constitution_en.pdf ; art. No. 90 is at page 41-42.
[292] S. ESEN, *How influential are the standards of the European Court of Human Rights on the Turkish Constitutional system in banning political parties?,* in Ankara Law Review, 2012, Vol. 9 No. 2, p. 135-156; link: http://dergiler.ankara.edu.tr/dergiler/64/1847/19452.pdf.
[293] *Zana v. Turkey,* App. No. 18954/91, Judgment November 25, 1997.
[294] *Incal v. Turkey,* App. No. 41/1997/825/1031, Judgment of June 9, 1998, link: *http://hudoc.echr.coe.int/eng?i=001-58197*.
[295] *Arslan v. Turkey*, App. No. 23462/94, Judgment July 8,1999.

expression, hate speech or promotion of violence and pluralism of the media. The same topics are discussed also in *Ceylan v. Turkey* (1999) [296].

- *Özgür Gündem* (2000) [297]: It concerns critical media reporting, separatist propaganda, racism, political expression, positive obligations and the horizontal effect of human rights.

- *Nur Radio v. Turkey* (2007) [298]: The topics under analysis are the broadcasting licence, religion, shocking or offensive information and hate speech .

- *Ürper and others v. Turkey* (2009) [299]: It regards the Anti- Terror legislation, the suspension of publication and distribution of a newspaper and the role of public watchdog accorded to the press.

- *Ahmet Yildirim v. Turkey* (2012) [300] : It concerns the Internet Law No. 5651 and the blocking of "Google Sites", defamation, the usage of disproportionate measures and the need for restrictions to be prescribed by law.

- *Nedim Şener v. Turkey* (2014) [301]: It analyses the vital role of the press, positive obligations, political expression, the role of public interest to receive information. In this case, the pre-trial detention of investigative journalists accused of aiding and abetting the criminal organisation *Ergenekon* violated the ECHR in several ways.

To conclude, there is a unifying problem of effectiveness of the ECHR in the Turkish and Italian systems: Italy and Turkey are the most condemned Member States of the Council of Europe for violations of the ECHR; it is a matter of systematic breach of constitutional legality [302]. In 2015, Italy was found guilty of 21 violations (none of them concerning Article No. 10 of the ECHR) after being judged in 24 occasions, against the 79 findings of violation for Turkey (10 of them concerning Article No. 10 ECHR) which was judged in 87

[296] *Ceylan v. Turkey,* App. No. 23556/94, judgment July 8, 1999.
[297] *Özgür Gündem v. Turkey,* App. No. App. No. 23144/93, Judgment of March 16, 2000, Remark No. 38, link: http://hudoc.echr.coe.int/eng?i=001-58508.
[298] *Nur Radio v. Turkey,* App. No. 6587/03, Judgment November 27, 2007.
[299] *Ürper and others v. Turkey,* App. No. 14526/07, 14747/07, 15022/07, 15737/07, 36137/07, 47245/07, 14526/07, 14747/07, 15022/07, 15737/07, 36137/07 and 47245/07, judgment October 20, 2009.
[300] *Ahmet Yildirim v. Turkey*, App. No. 3111/10, judgment December 18, 2012.
[301] *Nedim Sener v Turkey,* App. No. 38270/11, Judgment October 8, 2014; link (French version): http://hudoc.echr.coe.int/eng?i=001-145343
[302] Between 1959 and 2015, Italy was under trial before the ECtHR 2236 times and found guilty in 1781 occasions (5 of them regarding Article No. 10 of the ECHR) while Turkey was under trial 3182 times and found guilty 2812 times (258 of them regarding Article No. 10 ECHR): data from the 2015 Annual Report of the European Court of Human Rights, http://www.echr.coe.int/Documents/Annual_Report_2015_ENG.pdf.
Read also: SILVIO RIONDATO, *The root problem of the criminal law approach to the Turkish Constitution,* in *Diritto penale della Repubblica di Turchia- Criminal Law of the Republic of Turkey,* Padova University Press, 2012, p. 39.

occasions [303]. It is interesting to note that most of the cases reaching the ECtHR turn to be actually violating the Convention.

2.2 e)- The Effectiveness of Strasbourg's judgments in Deterring Violations of the Right to Free Wxpression

Human rights are a "floating signifier" [304] supported by an "overlapping consensus" [305] between many different and often strongly contrasting political and moral theories. We assist to a crisis of authority for human rights since the original sources of this "overlapping consensus" (religious natural law, Enlightenment liberalism and socialism) has ebbed away [306]. Ramsey considers it striking that the human vulnerability, which bases the need for social security and increasing criminalization, appeared in the meanwhile as one leading candidate to underpin human rights eroded foundations [307].

"The ECHR is the most effective human rights regime in the world" [308], Sweet and Keller affirm. "The ECtHR has built a sophisticated jurisprudence, whose progressive tenor and expansive reach has helped to propel the system forward". However, it is important to differentiate between the ECHR's influence and the ECtHR's jurisprudence. The latter, is much less effective in prompting legal changes: national courts have sometimes diverged from the Strasbourg jurisprudence or simply ignored it [309]. For example, in Italy it is possible to witness the transition from a situation of low impact to one of higher impact of the ECHR while there are problems traditionally arising from the limited compliance by national authorities with the Strasbourg's rulings [310]. The same assertion is valid for Turkey as well, as the above-mentioned legislative changes and the impact of the ECtHR judgments we will focus on in this paragraph can prove.

One important premise is that national judges are important actors in the process that makes European law become effective in national legal orders[311]. Moreover, the Council of Europe's influence on national officials and their decision-making varies greatly depending on the State and the time [312].

---

[303] The total number of ECtHR judgments in 2015 finding at least one violation of the ECHR is 694 (2015 Annual Report, *supra* note No. 303).
[304] C. DOUZINAS, *The end of human rights,* Hart, 2000, p. 255.
[305] J. DONNELLY, *Universal Human Rights in Theory and Practice,* Cornell University Press, 2003, p.40.
[306] C. GEARTY, *Can Human Rights survive?* , Cambridge University Press, 2006, ch. No. 2.
[307] A. MORAWA, *Vulnerability as a Concept of International Human Rights Law,* in *Journal of International Relations and Development,* 2003, p. 139-55.
[308] H. KELLER, A. STONE SWEET, *supra* note No. 230, p.3.
[309] Final Policy brief, MEDIADEM (European Media Policies Revisited: Valuing and Reclaiming Free and Independent Media in Contemporary Democratic Systems), February 20, 2013, link: http://cordis.europa.eu/result/rcn/140499_it.html.
[310] G. REPETTO, *supra* note No. 166, p.12.
[311] *Ibidem. See also* A.M. SLAUGHTER, A. STONE SWEET and J. WEILER, *The European Court and the National Courts: Legal Change in its Social, Political and Economic Context,* Hart Publishing, Oxford, 1998.
[312] A.M. SLAUGHTER, A. STONE SWEET and J. WEILER, *supra* Note No. 312, p.4

As already said in the previous paragraph, the judging method of the Court is quite intrusive, requiring the ECtHR to stand in judgment of the policy choices of State officials. For this reason, the acceptance of the Strasbourg's outcomes is often avoided, justifying such a choice with a populist excuse, namely the extreme intrusiveness of Europe in State sovereignty. Moreover, in this regard, it has to be considered that national officials, as well as judges, are conditioned by the phenomenon of "penal populism" and "populist punitiveness"[313].

It is known that the ECtHR cannot, on its own, give agency to its jurisprudence in domestic legal orders, but national officials must take decisions that will strengthen its effectiveness. In Italy, one of the laws which tried to do so is the so-called *Azzolini* law of 2006 [314], which specifies the Prime Minister's (and the Governmental) powers and duties relating to the enforcement of the ECtHR's judgments and the drafting of annual reports regarding their implementation.

As far as Turkey is concerned, in the last fifteen years there were several examples of open denial to comply with the ECtHR's judgments, as it results for example by some Interim Resolutions of the Council of Europe [315] that described it as a manifestation of "disregard for its international obligations". Moreover, until fifteen years ago, even if the Turkish Constitutional Court has been citing the ECHR (in 38 judgments, from 1963 to 2003), the Court invoked the Strasbourg jurisprudence only 5 times in the same relevant period: nowadays, the situation has changed and usually higher judges pay respect to the Convention; nevertheless, this is often not happening in the lower courts and who complies to the Convention often receives harsh critics from other powers of the state [316]. As far as Italy is concerned, it is also in poll- position with Turkey concerning the failure in enforcing the ECtHR rulings [317].

Another important provision is Article No. 46 of the ECHR, which states in Paragraph No. 1 that "the High Contracting Parties undertake to abide by the

---

[313] ANASTASIA, ANSELMI, FACCINELLI, *supra* note No. 98, p.17.

[314] January 9, 2006, Law No. 12/2006, *Disposizioni in materia di esecuzione delle pronunce della Corte Europea dei Diritti dell"Uomo".*

[315] July 24, 2000 ResDH(99)680; June 26, 2001 ResDH(2001)80; November 12, 2003 ResDH(2003)174; December 2, 2003 ResDH(2003)190. The owed sums were paid afterwards, in 2003.

[316] A good example is the reaction of President Erdoğan to the Constitutıonal Court's sentence releasing the journalists Can Dündar and Erdem Gül; See *Erdoğan says he "does not respect, will not obey" top court ruling on arrested journalists,"* Hurriyet Daily News", February 28, 2016; link: http://www.hurriyetdailynews.com/erdogan-says-he-does-not-respect-will-not-obey-top-court-ruling-on-arrested-journalists.aspx?PageID=238&NID=95784&NewsCatID=339.

[317] "The Assembly points out, as underlined in Resolutions 1787 (2011) and 1914 (2013), that Bulgaria, Greece, Hungary, Italy, Poland, Romania, the Russian Federation, Turkey and Ukraine have the highest number of non-implemented judgments and still face serious structural problems, which have not been solved for more than 5 years": Committee on Legal Affairs and Human Rights (European Parliament), *Implementation of judgments of the European Court of Human Rights*, 8th report by Rapporteur Mr Klaas de Vries (Netherlands, Socialist Group), June 23, 2015, p. 2; link: http://website-pace.net/documents/19838/1085720/20150623-ImplementationJudgements8-EN.pdf/67c5cb2a-3032-4183-9f3e-45c668257ede (9/12/16).

final judgment of the Court in any case to which they are parties" and provides in Paragraph No. 4 that "if the Committee of Ministers considers that a High Contracting Party refuses to abide by a final judgment in a case to which it is a party […] it *may* refer to the Court the question whether that Party has failed to fulfil its obligation under Paragraph No. 1". Finally, Paragraph No. 5 states: "If the Court finds a violation of paragraph No. 1, it *shall* refer the case to the Committee of Ministers for consideration of the measures to be taken". In this way, structural judicial supremacy is legitimized by the fact that States designed the system and they help to make it effective [318]. The Committee of Ministers of the CoE was recently encouraged by the CoE's Committee on Legal Affairs and Human Rights to implement Article No. 46 more often [319].

- ***Individual Application***

Formally, the nature of the Strasbourg Court's jurisdiction is geared toward rendering individual justice [320]. It is activated by an application from the individuals and the decisions are technically valid only *inter partes* [321]. Notably, one party is always a State. Turkey recognized the individual petition's right only in 1987 and was the last country to recognize the ECtHR's compulsory jurisdiction in January 22, 1990. However, the Turkish Government issued some "conditions", quoted in the previous paragraph [322].

As far as Italy is concerned, in 1973 Italy accepted the right of individual petition before the ECtHR. The absence of an internal individual appeal before the Italian Constitutional Court, increases the number of cases brought before the ECtHR [323].

- ***Just Satisfaction***

If the party found to be in violation is a State, the Strasbourg Court may award damages to the injured party under Article No. 41 ECHR. Nevertheless, the same article underlines that it is "just a satisfaction". The satisfaction is granted only if domestic law does not allow complete reparation to be made, and even then it can take place only "if necessary". Furthermore, the Court will only award such satisfaction as is considered to be "just" in the circumstances. Finally, among many other clauses to be respected, the Court's awards, if any,

---

[318] H. KELLER, A. STONE SWEET, *supra* note No. 230, p.9.

[319] Rapporteur Mr Klaas de Vries, *supra* note No. 318.

[320] On May 11, 1994, the Council of Europe's Member states added an additional protocol to the 1950 European Convention, known as Protocol No. 11, which fundamentally changed the machinery for the judicial enforcement of the Convention's provisions. Protocol No. 11 set up a single permanent Court in place of the existing two-tier system of a Court and a Commission. In the previous system, individuals had access to the Commission, which produced non-binding reports. As from October 1, 1994, Protocol No. 9 enabled individual applicants to bring their cases before the Court as well, subject to the ratification by the respondent State and a screening panel of the Court accepting the case for consideration.

[321] Under Article No. 46 ECHR.

[322] Among others, the right of petition extends only to allegations concerning public authorities' acts or omissions. They have to be provided also by Turkish Constitution and the notion of "democratic society" under Articles 8-11 (2) ECHR must be understood based on Turkish Constitution.

[323] M.C.SORIANO, *supra* note No. 269.

will normally be in the form of a sum of money to be paid by the respondent Contracting Party to the victim or victims of the violations found. Only in extremely rare cases the Court can issue a consequential order aimed at putting an end or remedying the violation in question [324]: it is clearly a little compensation in cases, for example, dealing with jailing or seizure of an entire publication.

However, the ECHR's regime remains of international law nature. Consequently, unlike national constitutional or supreme courts, the ECtHR does not have the authority to invalidate national legal norms judged to be incompatible with the Convention: the Court performs its most important governance functions through the building of a precedent-based case law. This, again, raises empirical core issues, such as the fact that the impact and effectiveness of the Convention will rely mainly on the national officials' decision making. Therefore, the Strasbourg's jurisprudence can be compared to a "system of precedents", giving more importance to the factual dimension of the case: it contrasts with the Italian and Turkish judicial systems where, conversely, there is a civil law tradition, relying much more on norms rather than on case law and circumstantial facts.

"When an individual's rights are violated as a result of the misuse or abuse of national security or counter-terrorism powers, the individual should have access to an effective remedy, which may, depending on the damage suffered, include compensation. This approach is consistent with article 2 (3) of the ICCPR, which provides that a person has a right to an effective remedy if his or her human rights are violated" [325]. In the European context, the ECHR Convention stipulates the "right to an effective remedy" under Article No. 13 ECHR [326]; nevertheless, this requirement is quite vague and often is not undertaken by the Member States. It is worth to quote the 2011 decision of a prison judge of Lecce (Italy), who condemned the Italian State to pay a pecuniary indemnity to an individual for the very first time [327]. The judge made several references to the ECtHR's *Sulejmanovic* decision, which recognized that detention in cells less than 3 square metres are to be considered as degrading treatment under Article No. 3 ECHR.

---

[324] For more details, see the 'Practice Directions" on the European Court of Human Rights website, January 1, 2016: http://www.echr.coe.int/Documents/PD_satisfaction_claims_ENG.pdf (9/12/16).

[325] The Hon John Von Doussa QC, President Human Rights and Equal Opportunity Commission, International Conference on Terrorism, Human Security and Development: Human Rights Perspectives, City University of Hong Kong, 16-17 October 2007.

[326] Article No. 13 of the ECHR states that "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority".

[327] Judge of surveillance (Judge Tarantino) of Lecce, Order of June 9, 2011.

- ***Remedial Action – Reopening of Internal Processes:***

- ***Italy***

Remedial action has been taken by domestic courts and especially by the higher Constitutional Court and Court of Cassation, in response of EChTR's adverse judgments. For instance, already in 2006, as a result of the Strasbourg Court's judgment *Somogyi v. Italy*, the Court of Cassation ordered the re-opening of the proceeding that was carried out *in absentia* [328]. Nevertheless, the influence of the Strasbourg case law varies according to the matter at hand: we can witness a few or no examples of re-openings following Italian violations in the field of "political" judgments, that involve considerable "dark spots" of the Italian system [329]. Consequently, there would be no reopening for serious cases involving the wrongful enforcement of opinion crimes and crimes against national security if they would threathen and dissent with the objectives of current politics. The political approach of State authorities can change, and it happens very fastly in the globalization era: nobody can ensure that certain provisions will not be heavily enforced (and to a certain extent, regarding the terrorism crimes, it is already happening so). The bills, presented in each Italian legislature, aimed at introducing a new source of revision of the criminal process [330], prove the increasing deviation from the criteria of hierarchy or competency of the jurisdiction, swifting to the point of view of the criterion of content.

- **Turkey**

After a 2001 Interim Resolution by the CoE's Committee of Ministers, a 2002 statute provided for the first time for the reopening of proceeding in criminal and civil cases following an ECtHR judgment. Nevertheless, it is subject to strict procedural requirements and time limits [332]. In addition, a subsequent statute of 2003 extended the possibility to request the re-opening of proceeding regarding administrative litigation [333]. Even if no legislation provides for the re-opening before the Constitutional Court, the Court accepted a request regarding the dissolution of political parties, expressing a willingness to reverse its case law in light of an ECtHR judgment.

---

[328] Court of Cassation, Section I, Judgment of July 12, 2006, No. 32678.

[329] E.g. the fail in abiding by the judgment *Cestaro v. Italy,* App. No. 6884/2011, Judgment of April 7, 2015, link ti the Legal Summary: http://hudoc.echr.coe.int/eng?i=002-10650. It regards the recognition of acts of tortur in the school Diaz during the anti- G8 protests in Genoa in 2001.

[330] M. CAIANELLO, *Profili critici e ipotesi di sviluppo nell'adeguamento del sistema interno alle sentenze della Corte Europea dei Diritti dell'Uomo*, quoted by G.REPETTO, *supra* note No.166, p.28.

[332] I. O. KABOĞLU, STYLIANOS – I. G. KOUTNATZIS, *The reception process in Greece and Turkey,* in H. KELLER, A. STONE SWEET*, A Europe of Rights,* Oxford University Press, 2008, p.511.

[333] *Çesitli Kanularda Değişiklik Yapilmasına İşlik Kanun* (Amendment Act of Various Statutes), Act No. 4793, January 23, 2003.

Finally, as said above, national officials have also a role in facilitating or resisting the influence of the Convention. In Turkey, for example, regarding the case of Can Dündar and Erdem Gül, the President of the Republic Erdoğan also added that the Constitutional Court has nothing to do with the trial of the two journalists. He further noted that Turkey is ready to pay compensations if an upper court's decision, detaining the two journalists again, is appealed to the European Court of Human Rights. "The State can object to the ECtHR if it gives a decision supporting the Constitutional Court or it can pay the compensation" he said. These kinds of statement are not new in Turkey [334].

- **National Judges: Their Instruction, Independence and Impartiality in the Perspective of the ECHR and Strasbourg Jurisprudence Reception**

As stated above, national judges are important actors for the development of the reception of international human rights standards inside a country. Before the interpretation process there is no single meaning of a provisions: the judge has the power to decide on the conceptual value that has to be assigned to the normative text, in a certain particular context of space and time. The term "law", thus criminal law as well, includes both norms and interpretation under Article No. 7 ECHR: consequently, the relationship law- judge has primary importance also in the countries with a civil law tradition. Anyway, in Italy, the Constitutional Court stated clearly the principle of separation of powers as provided under Article No. 25 of the Constitution, which "precludes […] an equalization between written law and case law" [335], partially also to avoid jurisprudential populist drifts. Therefore I would also introduce the concept of "*populist punitiveness*", elaborated by Anthony Bottoms [336]: it consists in a procedure of enforcing punishments which is not only based on the juridical merits of the question but is affected by populist influences as well.

Furthermore, speaking about interpretation, it is necessary to distinguish briefly between analogical interpretation and extensive interpretation: the latter is still connected with the meaning of the linguistic signs composing the norm, while the former is creating a new and not existing norm. The analogical interpretation is forbidden in the criminal law field, but it is indirectly taking place anyway because of the large and vague literal meaning of concepts such as "national security" and "public order". Actually, this is contrary to the legality parameter, which is provided in the second part of Article No. 10 ECHR, when it provides that restrictions to the right to freedom of expression should be "prescribed by law".

The approach of the Italian and Turkish judges to the interpretation of criminal law, their Constitutions and of the ECHR is today radically different, but the older approach of Italian judges to the application of opinion crimes reveals many similarities with the Turkish traditional jurisprudence.

[334] The information were originally reported in the *Today's Zaman* website, which is currently shut down: http://www.todayszaman.com/national_president-erdogan-prosecutors-may-object-to- dundar-and-guls-release_413970.html.
[335] Constitutional Court, judgment No. 93/2010, 236/2011 and 303/2011.
[336] Professor at the "Institute of Criminology", Cambridge University.

Moreover, this paragraph also aims to analyse the degree of independence and impartiality of the Italian and Turkish judiciary: I consider this element one of the most relevant ones in defining the different approach of the two systems toward the criminalization of opinion crimes. The Strasbourg Court has defined judge's impartiality as "inalienable" and not susceptible to appeal, exception or offsetting [337].

Finally, the national judges' interpretation of international conventions has to be combined with the fact that, from an international standpoint, "all branches of the State (executive, legislative and judicial) and other public or governmental authorities, at whatever level […] are in a position to engage the responsibility of the State party" [338].

- ***Italy***

The Italian jurisprudence has a peculiar approach toward opinion crimes: in fact, the securitarian choices of the legislator have been mediated by a cautious enforcement by the Italian judges, careful in balancing the consequences of the law changes [339].

The application of the ECHR by the judiciary "has been neither immediate nor unanimous. […] The reluctance on the part of the courts to apply the Convention's provisions may also be explained by the fact that they overlap to a great extent with the human rights provisions embodied in the Italian Constitution. Domestic courts seem to be more inclined to refer to the internal constitutional norms rather than to the European standards" [340]. In the past, this trend may have been caused also by the judge's education, which went back to the 70's for most of them, and was not characterized by an in-depth attention for the European or international law. Nevertheless, all those trends have been rapidly and positively changing and the interest in and the knowledge of the ECHR have been steadily growing in the last twenty years [341]. Soriano was writing in 2008 that the ECtHR's rulings are rarely presented by the Italian broadcast media while they are generally reported in the main newspapers [342]. This data shows that also general public opinion was not prepared, until a few years ago, to recognize the influence and effectiveness of European rulings and norms on issues of enormous relevance for the internal politics.

However, "a small revolution" is taking place in the Italian practice. As far as it concerns the relationships between the Constitutional Court and the Strasbourg Court, they work differently: the former evaluating the constitutionality of internal statutes applied in the lower court's decisions, while

---

[337] For instance, with the *Udorovic v. Italy* case (App. No. 38532/02), Judgment of May 18, 2010; link (Italian and French): http://hudoc.echr.coe.int/eng?i=001-149023 .

[338] See UN HUMAN RIGHTS COMMITTEE, General Comment No. 31 (2004) on the nature of the general legal obligation imposed on State parties to the Conenant, Para. No. 4, *Official Records of the General Assembly, 59th Session, Supplement No. 40,* vol. I (A/59/40 (Vol.I)), annex III.

[339] D. BRUNELLI, *Paradossi e limiti dell"attuale "realpolitik" in materia penale,* Archivio Penale 2013 No. 2, link: *http://www.archiviopenale.it/apw/wp-content/uploads/2013/07/Editoriale-Brunelli.pdf* (9/12/16).

[340] M.C.SORIANO, *supra* note No. 269, p.428.

[341] *Ibidem,* p.443.

[342] *Ibidem,* p.444.

the latter establishing a sort of "system of precedents" based on the facts of the case; consequently, this pushes the Italian judges to familiarize themselves with a new way to use precedents, comparing similarities and differences between the Strasbourg's case law and their case, paying attention to the factual dimension of the Strasbourg jurisprudence [343]. Moreover, during the last decade, the Italian criminal trials has been positively influenced by the decisions of the ECtHR, especially for the strengthened protection of fundamental human rights: this is the result of a fruitful dialogue between the Strasbourg Court, the Italian Constitutional Court and the Court of Cassation. They usually offset the lawmaker's continuous inertia [344].

As far as it concerns judges' independence and impartiality, it is provided by Article No. 111 of the Italian Constitution. One of the main phenomena endangering this necessary condition is corruption: the Italian judges are still often involved in cases of bribery and illegal extra-payments in order to issue certain decisions or to protract the trial's length and let the prescription prevail[345]. However, this problem is caused usually by the payments of private individuals or bodies, often linked to the mafia's environment, and not for (official) public pressures; however, it is also true that often those delays are taking place in trials involving politicians. Moreover, regarding the direct political influence of the government on judiciary, often the former has been accusing the latter of being "leftist" [346] and of instituting political trials: in 2002, the last *UN Report on the Independence of the Judiciary, Administration of Justice and Impunity* about Italy stated that "this developments have led to mutual suspicion and mistrust between the Government and the judges and prosecutors. Every reform affecting the administration of justice is perceived with suspicion and to

[343] G.REPETTO, *supra* note No. 166, p.68.

[344] G. REPETTO, *The Strasbourg Court"s influence on the Italian Criminal Trial,* in *The Constitutional relevance of the ECHR in Domestic and European Law*, *supra* note No. 166, p. 71.

[345] See the assertions of the Minister of Justice Andrea Orlando during the opening of the 2015 judicial year, *Rai News,* January 24, 2015: http://www.rainews.it/dl/rainews/articoli/orlando-anno-giudiziario-6fea033e-b64b-4c53-b6de-58e17d55b316.html (9/12/16). See also E.FITTIPALDI, *La corruzione passa per il tribunale. Tra mazzette, favori e regali,* L'Espresso, April 29, 2014, link: http://espresso.repubblica.it/inchieste/2014/04/25/news/la-corruzione-passa-per-il-tribunale-tra-mazzette-favori-e-regali-1.162956 (9/12/16).

[346] This accuse lies on the fact that the Italian judiciary has various tendencies and is composed of different ideological groups: the accusation of being leftist refers mainly to the members of the group *Magistratura Democratica* (Democratic Magistracy), a group born in 1964 with the aim of 'unfreezing" the Constitution and that fought different campaigns along the years (from their official website: http://www.magistraturademocratica.it/mdem/storia.php and from an article by Annalisa Chirico, *Da dove nasce il contropotere dei magistrati di sinistra,* Il Foglio, May 6, 2016, http://www.ilfoglio.it/politica/2016/05/06/magistratura-democratica-storia-giustizia 1-v-141652-rubriche_c292.htm); nowadays, one of the critics toward is still to act as a political organ through the "constitutional resistance" justification. It is notorious how the former Prime Minister Silvio Berlusconi has been accusing the judiciary of being leftist and not impartial; here, for example, an article reporting the episode where Berlusconi, during a G-8 summit, said to the American President Barack Obama that in Italy judges represent "almost a dictatorship": http://www.thejournal.ie/berlusconi-to-obama-leftist-italian-judges-are-almost-a-dictatorship-144713-May2011/.

be a threat to their independence" [347]. It is interesting to remember that two out of the five cases that found Italy in violation of Article No. 10 ECHR before the Strasbourg Court regarded journalists writing or reporting an article deemed to be defamatory of a judge, accusing him of being not impartial, particularly of being communist [348].

Lastly, regarding the judges independence, it is guaranteed also by their self-regulation through the *Consiglio Superiore della Magistratura* (CSM, "Senior Council of the Judiciary") which is in charge of hiring, transferring, appointing tasks, issuing disciplinary procedures and other powers over Italian judges, distancing them from the executive power.

Regarding the above-mentioned phenomenon of "populist punitiveness", it is indeed true that judges who do not issue high [or not perceived as high] punishments toward certain categories of crimes are often subject to denigration by the public opinion [349]. It has to be underlined that "the decisions of the courts must be respected by all. Even if such decisions can be commented on and even criticized, the judges who make the decisions should not be attacked and subject to any form of calumny by anyone or any institution. If decisions are perceived as incorrect, then the proper appellate procedures must be invoked" [350]. All in all, in Italy, the phenomena of populist legislation exceed those of populist punitiveness: judges often issue balanced decisions and the Italian system owes them the low application of populist, anti-historical and regressive provisions, especially thanks to evolutionary interpretations of the Constitutional Court. Instead, the opposite tendency is true in Turkey, where a populist legislator enjoys a great support among the lowest courts' judges and prosecutors.

- ***Turkey***

Nowadays, Turkish (lower) courts still often lack even to refer to the Turkish Constitutional Court's judgments, especially to the more evolutionary ones [351].

---

[347] DATO' PARAM CUMARASWAMY (Special Rapporteur on the independence of judges and lawyers), CIVIL AND POLITICAL RIGHTS, INCLUDING THE QUESTIONS OF: INDEPENDENCE OF THE JUDICIARY, ADMINISTRATION OF JUSTICE, Un Human Rights Commission, March 26, 2002, 58th session, link: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G02/107/39/PDF/G0210739.pdf?OpenElement (9/12/16)

[348] See *Perna v. Italy* and *Belpietro v. Italy.* Disrespect toward the judiciary is also expressed by many politicians, such as Matteo Salvini, recently charged under Article No. 290 of the Criminal Code (Vilification of the Institutions) for defining the Italian judiciary "disgusting". See again note No. 347 in the previous page about Berlusconi.

[349] This is the case, for example, of Beatrice Bergamasco, the judge who issued a punishment of two years and eight months plus a compensation against a tobacconist who killed a thief in his shop; heavy comments such as 'A bullet should have been kept for her" followed the sentence she issued for excess of legitimate self-defence: see *Il Mattino,* Padua, January 30, 2016, link: http://mattinopadova.gelocal.it/padova/cronaca/2016/01/30/news/tabaccaio-condannato-offese-e-minacce-al-giudice-1.12866148 (9/12/16).

[350] DATO' PARAM CUMARASWAMY, *supra* note No. 348.

[351] Yaman Akdeniz during the 'Columbia Global Freedom of Expression" conference *Justice for Free Expression 2015: litigation developments in Europe,* Columbia University, April 5, 2015; see the video of the session No. 2 at this link: https://globalfreedomofexpression.columbia.edu/justice-free-expression-2015-day-2/ (9/12/16).

The different approach of Constitutional judges is connected to their greater independence from the government, while judges from lower courts are greatly influenced by the executive power. However, the independence of the courts is prescribed by Article No. 9 of the Turkish Constitution, and more detailed provisions are present in Article No. 138 which states that no organ, authority, office or individual may give orders or instructions to courts or judges.

A recent important development is the 2014 Bill giving to the Minister of Justice larger control over the Supreme Board of Judges and Prosecutors (HSYK)- that is an independent body responsible for regulating and overseeing the judge and prosecutor professions [352]. There is the perception that the appointment and transfer system of judges can be used also as a punishment or reward mechanism [353].

Regarding judges' trainings and scholarship, the interest in the ECHR was minimal up to the late 80's. For example, a collective volume- *Türkiye'de İnsan Hakları* (Human Rights in Turkey)- published in 1970 for the commemoration of the Universal Declaration of Human Rights, quoted the ECHR only in one article. Only after the 1987 recognition of the possibility to issue individual petitions and the compulsory jurisdiction of the ECtHR over Turkey from 1990, scholars became more interested in the topic [354]. It is also important to report the establishment of the "Justice Academy" in 2003, responsible of the initial training of judges and prosecutors. It can be considered among the factors of "cultural resistance" influencing the deeply rooted mind-set of the judiciary: there is a general lack of impartiality when there is a case involving State interests, especially when the security of the State is felt to be at stake; the impression is that of a rather prevalent State-centred mentality when, instead, a distinction should be drawn between public and State interests: that is, the exercise of public functions should not be conceived as having the aim of protecting the interests of the government, of a political party or any other State institution [355].

I would also like to focus briefly on the situation of lawyers in Turkey: they are not considered and treated in the same manner as judges and prosecutors are and face difficulties in defending their clients, especially for

[352] It corresponds to the Italian CSM. See Al Jazeera, *Turkey president signs judiciary control law,* February 26, 2014, link: http://www.aljazeera.com/news/europe/2014/02/turkey-president-signs-judiciary-control-law-201422610485659455l.html (9/14/16). The Bill overturned the reform that took place in 2010 (namely, some constitutional amendments adopted following a referendum, in September 12, 2010): the 2010 reform reduced the influence of the Minister of Justice on the judiciary.

[353] Many judges where removed or moved from their work after a 2013 corruption scandal. See also later on the fight against Gulenist bureaucracy. See also C.OZDEMIR, *The Turkish Government's judicial problem,* "Middle East Eye", February 13, 2015, link: http://www.middleeasteye.net/in-depth/features/turkish-governments-judicial-problem-457420840.

[354] I. O. KABOĞLU, STYLIANOS – I. G. KOUTNATZIS, *supra* note No. 176, p.520.

[355] UN's Human Rights Council, Twentieth session, Agenda item 3, GABRIELA KNAUL, *Report of the Special Rapporteur on the independence of judges and lawyers,* Mission to Turkey, A/HRC/20/19/Add. 3, May 4, 2012, Paragraph 55-57, p.14 – 15.

terrorism-related charges [356]. Moreover, their role is diminished by the great power accorded to the chief public prosecutors, that have even more power than judges on judicial policies [357]. Their superiority is also physically strengthen in the courtrooms, which are designed as both judges and prosecutors sit on a podium during the hearings in a higher position than the lawyers. Instead, the equality of arms has to be both physical and psychological [358].

All these reasons influence the low reception of the Council of Europe's obligations by most of the Turkish Courts: the problem can no longer rely on the language issue; at least from ten years, the ECtHR's judgments are translated into Turkish, published on the website of the Ministry of Justice and sent to judges and prosecutors.

2.2 f)- Chilling Effect and Self-Censorship

Finally, the notion of *chilling effect* is fundamental: both in Italy and Turkey, the important data is not only the number of final charges on people expressing their thought and opinion; simple prosecutions as well can lead to dangerous consequences such as the *chilling effect* , that is the inhibition or discouragement of the legitimate exercise of natural and legal rights by the threat of legal sanctions [359]. Consequently, it leads in the field of the right to freedom of expression to a generalized self-censorship, especially among those professionals whose role is to denounce and report issues of public interest.

As explained in the previous paragraphs of this chapter, the notion has been embraced by the Strasbourg jurisprudence and consequently also the national systems should take it into higher consideration [360].

---

[356] Lawyers are often considered linked to the cases they follow and are under threat as a consequence: for example a big wave of arrests took place in 2011 (read *Call for the release and the end of harassment against lawyers,* Fidh, December 2011, https://www.fidh.org/en/region/europe-central-asia/turkey/Call-for-the-release-and-the-end) and in 2015 the case of Tahir Elçi is particularly relevant: he was accused of being part of a terrorist organization (http://www.aljazeera.com/news/2015/10/turkey-arrests-prominent-lawyer-pkk-comments-151020085312267.html) and killed a few months later. See also the interview I realized with the lawyer Tolgay Güvercin in the end of this dissertation and *Report dalla Turchia sul processo a due avvocati,* Giuristi Democratici, June 24, 2016,link: http://www.giuristidemocratici.it/Comunicati/post/20160624113734?page=1 (9/14/16).

[357] For instance, chief public prosecutors decide which room will be used by each judge and which resources will be available for them. See the UN report quoted in the previous note, paragraph No. 35, p. 10.

[358] See GABRIELA KNAUL*, supra* note No. 356, paragraph No. 38, p. 10.

[359] Webster's New World Law Dictionary Copyright © 2010 by Wiley Publishing, Inc., Hoboken, New Jersey.

[360] For more on the topic of self-censorship in Turkey, see my paper *Freedom of expression, role and control of media in Turkey and EU- A comparative analysis*, *supra,* note No. 227.
For self-censorship in Italy, even if judges often prefer a cautious enforcement of this kind of law provisions, especially when fundamental rights are at stake, prosecutors do not always act in the same way: this is for example the case of the process opened against the writer Erri De Luca for sustaining the boycott of the construction site of the High Speed Train (TAV, *Treno ad Alta Velocità*) connecting Lyons with Turin. See more in Chapter No. 3 , p. 197. Finally, refer to the previously quoted ECtHR judgments addressing Italy and finding violations of Article No. 10 ECHR for the risk a potential self-censorship.

Conclusions

To conclude, the more the Strasbourg Court keeps on interpreting the ECHR in a broad, progressive way, the more likely the States' systems will fall below the Convention's standards, creating pressure for national adaptation [361]. However, is the Court interpreting in such a progressive manner? The examples given in the lines above would lead to the answer: sometimes.

Moreover, with the enlargement process of the Council of Europe after the fall of Communism, the Court confronts with some States where there are massive failures to meet the most basic rights; there, institutional capacities to protect those rights are simply underdeveloped. In this situations, the Court arguably plays the role of a last High Court. Therefore, the Court has little choice but to explore other options, such as the so-called "pilot judgments", that aim to make the Convention's rights effective for victims of systemic dysfunction, basically as a class of plaintiffs [362]. This is considered to be a positive development inside the Court for some authors, that consider how Strasbourg changed from being the judge called to verify whether, in the specific case, the holding of the trial violated one of the rights enshrined in the Convention into being an oversight body qualified to indicate the "gaps" underlying the violation.

Still, as underlined above, the ECHR's regime remains of international law nature. Anyway, the need of changes should not be addressed only at a European level: all in all, among the international judicial bodies, the ECtHR perhaps is the only one which has successfully undergone a major overhaul, bearing witness to the vitality of the institution and its significance for member States [363].

Therefore, the real need now is for internal structural changes: the effectiveness of national remedies for violations of ECHR's rights is itself a direct indicator of the effectiveness of the ECHR in national legal orders. The Member States of the Council of Europe themselves should definitely struggle more for protecting fundamental rights and the Council of Europe's system should find new and more effective methods for insisting on a change of national legislations [364]: for example, in March 2015 the Parliament's Human

---

[361] H. KELLER, A. STONE SWEET, *supra* note No. 230, p.13.

[362] E.g. *Broniowski v. Poland* (appl. N. 31442/96), judgment of the Grand Chamber of the 22nd of June 2004.

[363] PICT, "Project on International Courts and Tribunals", ECtHR, http://www.pict-pcti.org/courts/ECHR.html (9/14/16).

[364] It is also true that such a pressure gave results in some cases, such as for the amendment of Article No. 175 of the Italian Code of Criminal Procedure concerning the trial *in abstentia.*
Therefore, the pressure for the need of some legislative changes is sometimes felt but not followed by national legislators: the opinion crimes are in the Code from over 80 years, and the political will to abolish them was never strong enough. Other crimes, such as the counter-terrorism ones, reflect a current phenomenon of 'penal populism".
Concerning national implementations of ECtHR's judgments, see the Turkish and Italian situation in K. DE VRIES, *supra* note No. 318, link: http://website-pace.net/documents/19838/1085720/20150623-ImplementationJudgements8-EN.pdf/67c5cb2a-3032-4183-9f3e-45c668257ede and B.ÇALI, N.BRUCH, *Monitoring the implementation of judgments of the European Court of Human Rights,* May 2011, link: https://ecthrproject.files.wordpress.com/2011/07/monitoringhandbook_calibruch1.pdf (9/14/16).

Rights Inquiry Committee set up a mechanism to follow the implementation of ECtHR judgments; this will become functional in the next parliamentary term [365]. One of the doubts I often step into goes as follows: is it better to change the legislation in order to give an input to the change of general mentality on a particular topic rather than the other way around – i.e.should we wait for the society to ask for these legal changes?; it actually reminds me of the paradox: "Is it the chicken born before the egg?" [366]. Anyway, surely the demand for social changes cannot be heard in a society which criminalizes dissent and speech, so the criminalization of opinion and expression should be avoided without any doubt [367].

Thus, it is necessary that CoE's Member States themselves undertake their own duties and responsibilities, the question posed at the beginning of this paragraph requires an answer: in the EU perspective of enlargement, can the Strasbourg Court maintain consistent standards of protection of fundamental rights, or is the emergence of a two – track Europe inevitable? [368]. One example of the differentiate approach toward different Member States stems from the above quoted "practice of contextual historic interpretation" [369].

All in all, even if I am doubtful regarding a possible admission of Turkey to the European Union, I used to be convinced of the usefulness of the enlargement process in maintaining or trying to maintain certain standards of respect of the fundamental human rights in Turkey; moreover, the actual entrance of Turkey in the European Union would be useful in the sense of strengthening the mechanisms of rules' enforcement toward the State, as explained above speaking about the new enforcing mechanisms granted by the Lisbon Treaty [370]. It is also true that the principal criterion for membership of the Council of

---

[365] COMMISSION STAFF WORKING DOCUMENT TURKEY, 2015 REPORT, European Commission, *supra* note No. 192.

[366] In this regard, see the statistics of the *Pew Research Center* on the Italian and Turkish support for some forms of speech, reported in Chapter No. 3 of this dissertation.

[367] See the critics of the Italian scholarship to the "contempt of the laws", Chapter No. 3, p. 96 and 188 of this dissertation.

[368] I am hereby speaking about the EU and the CoE as inter-related entities, under the point of view of the protection of fundamental rights. In fact, in the analysis of the relationship between the ECJ and the ECtHR, a big progression has been happening culminating in the proclamation of the "Charter of Nice", the EU Charter of Fundamental Rights; the reference to the ECHR was the main tool for the construction of the EU system of rights protection. An important step could have been the EU's accession to the ECHR but the draft was deemed to be incompatible with the EU law. See COUNCIL OF EUROPE, *Accession of the European Union to the European Convention on Human Rights,* http://www.coe.int/t/dghl/standardsetting/hrpolicy/accession/default_EN.asp (9/14/16); COURT OF JUSTICE OF THE EUROPEAN UNION, *The Court of Justice delivers its opinion on the draft agreement on the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms and identifies problems with regard to its compatibility with EU law,* PRESS RELEASE No 180/14 Luxembourg, December 18, 2014, http://curia.europa.eu/jcms/upload/docs/application/pdf/2014-12/cp140180en.pdf (9/14/16).

[369] Sometimes, political history justifies delays and contradictions in current legislations. See the paragraph "The right to security", p. 58 et seq. of this dissertation.

[370] Nevertheless, the EU has expanded its powers to deal with human rights violations, but is reluctant to use these powers even during a crisis within a member state. "The EU must establish clear red lines where it will act collectively to protect freedom of expression in a member state", is stated in the *Headline recommendations* of the interesting paper of M. HARRIS, *Time to step up: the EU and Freedom of Expression, "*Index on Censorship", December

Europe (Article No. 4 of its Statute) is a state willingness to institute the rule of law and safeguard human rights; also in the CoE's context an enforcing mechanism is provided: the membership could be terminated under Article No. 8 of the Statute, which states that any member that has seriously violated those principles may be suspended and then required to withdraw its membership [371]. Despite of these enforcing mechanisms, "the EU could have the function of checking and balancing Turkish politics and in the same time does not want to break its economic relations with the country", professor Erkan Saka said [372].

In the meanwhile, the examples of states like Italy, Bulgaria, Romania and Greece, point a greater problem the EU faces through enlargement: new countries (but not only, since Greece and Italy are not) may easily fall short of both their European and international commitments. Enlargement continues to be the most effective tool at the EU's disposal in incentivising countries to improve their domestic situation with regard to freedom of expression. In 2013, the final finding of the *Speak Up!2* Conference (on freedom of expression and media in the Western Balkans and Turkey) recommended once again that freedom of expression has to be consistently reflected in the action plans for accession negotiations - notably Chapters No. 23 (Judiciary and Fundamental Rights) and No. 10 (Information Society and Media). For the countries already negotiating th EU accession, such as Turkey, the comprehensive action plans need to consistently address freedom of expression issues and propose credible and concrete solutions. Under the positive agenda with Turkey, the work on Chapter No. 23 needs to continue, notably through the involvement of civil society. However, with enlargement getting slower, this leverage may diminish [373].

However, trusting in the enlargement's influence could have been a valid theory until a couple of years ago, when the crackdown on media and free expression in Turkey was not so evident and the on-going war in the South-East of the country was in a promising break. Despite of such a crackdown, the EU stipulated a 3-billion euros agreement with Turkey in order to manage the migration crisis [374], promising Schengen Visas to Turkish citizens and basically

---

2013, link: http://www.indexoncensorship.org/wp-content/uploads/2014/01/Time-to-Step-Up-The-EU-and-freedom-of-expression.pdf.

[371] Read the Statute of the Council of Europe, London, 5.V.1949:http://www.coe.int/en/web/conventions/full-list/-/conventions/rms/0900001680306052.
This reasoning is elaborated also in "State before freedom – media repression in Turkey", Hugh Poulton; edition by "Article 19", 1998, London.

[372] Bilgi University (Istanbul), Faculty of Communication.

[373] *Ibid.*

[374] One month after the seizure of the publishing group *Koza Ipek* in October 2015, the Council of Europe stated that "the process of admission of Turkey into the European Union needs new energy", see COUNCIL OF EUROPE, *Meeting of heads of state or government with Turkey - EU-Turkey statement, 29/11/2015,* http://www.consilium.europa.eu/en/press/press-releases/2015/11/29-eu-turkey-meeting-statement/(9/14/16).
Since, according to the same communication, Turkey hosts more than 2.2 million Syrians and spent for this reason approximately 8 billion euros, the European Union has committed "initially" 3 billion of euros to implement a "Common Action Plan" of migration control. Two days after the seizure of the Turkish publishing group *Feza*, the European Summit of March 7, 2016 basically delegated to Turkey the migration crisis. The country requested additional 3 billion euros and the abolition of the Visa requirement for the Schengen area for 78 million Turks by June 2016.

withdrawing and contradicting years of work done from 2005 for the Turkish accession to European Union [375].

Finally, it is also true that, in certain respects, the influence between the two legal systems [national and European] has worked backward, from down up: the arrangements that are widespread in many Member States end up guiding how the same guarantee is understood in the ECHR legal system as well [376].

This chapter has highlighted, among other things, some of the developments realized by Italy and Turkey in protecting fundamental rights, such as the amendments to the Turkish Constitution realized thanks to the ECHR's influence. In this regard, professor Kerem Altıparmark 377 does not agree with those who think criticism should decrease since big objectives were achieved: "Why would we be forced to compare a bad song and a bad painting? […]Can an order of censorship, whose method was renewed, be affirmed, just because other malignity decreased quantitatively?" [378].

Finally, the approach that accepts freedom of expression's violations more than other human right's breaches (for example violations to the right to personal security, not to be tortured and so on) reveals a common standpoint of the international community and of the public opinion: they miss to see the link between the right to freedom of expression, to seek and receive information, to dissent and criticize and all the other liberties, whose breaches we would not

---

See more in my for *Unimondo.org, Come chiudere il giornale più venduto del paese e ricevere tre miliardi di euro,* March 18, 2016, link: http://www.unimondo.org/Notizie/Come-chiudere-il-giornale-piu-venduto-del-paese-e-ricevere-tre-miliardi-di-euro-156221.

It is furthermore interesting to read the European's Parliament resolution of April 14, 2016, on the 2015 report on Turkey, where it is stated in Paragraph 3: "The postponement of the Commission's 2015 Progress Report until after the November 2015 Turkish elections was a wrong decision, as it gave the impression that the EU is willing to go silent on violations of fundamental rights in return for the Turkish Government's cooperation on refugees; [the Parliament] asks the Commission to commit itself to publishing the annual progress reports in accordance with a specific and fixed timetable; calls on both the Commission and the Council not to ignore internal developments in Turkey and to clearly stand up for respect for the rule of law and fundamental rights in Turkey, as stipulated in the Copenhagen criteria, and irrespective of other interests". See the European Parliament's resolution of April 14, 2016 on the "2015 Report on Turkey" (2015/2898(RSP)), link: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2016-0133+0+DOC+XML+V0//EN.

[375] The agreement of the 29th of November 2015 was not clear in the European Parliament itself, as the Parliamentary question of Marietje Schaake, Dutch euro-deputy, can prove: she is asking clarifications on the status of the agreement and about the publication of a letter sent by President Juncker to Turkish Prime Minister Davutoğlu containing important details on the EU-Turkey deal. Link: http://www.europarl.europa.eu/sides/getDoc.do?type=WQ&reference=P-2016-000175&format=XML&language=EN.

[376] G.REPETTO, *The guarantees of the judge"s impartiality and the various outcomes of the dialogue between legal systems,* in *The Constitutional relevance of the ECHR in Domestic and European Law, supra* note No. 166, p.86. Please note that here the author is referring to Italy, but the same is true for Turkey as well (e.g. the definition of 'secularism" given by the ECtHR in the *Refah Partisi* case, quoted above).

[377] Law professor at the University of Ankara.

[378] *Yesteday, today, tomorrow: freedom of expression in Turkey report (1995-2015), "*The Initiative for Freedom of Expression", Istanbul, January 2015, p. 104-105

hear or know about without an environment of free press, free journalists and broadcasters. They miss to see the importance of a free public debate for the progress of society [379].

[379] The UN Secretary-General Ban Ki-moon said that “human rights, democratic societies and sustainable development depend on the free flow of information, and that the right to information depends on press freedom” and “constraints on freedom of expression place shackles on progress itself”, May 3, 2016, World Press Freedom day.

CHAPTER No.3

PARTICULAR PENAL PROVISIONS PROTECTING NATIONAL SECURITY AND PUBLIC ORDER IN THE ITALIAN AND TURKISH PENAL SYSTEMS

"It is not compatible with paragraph 3 […] to invoke such laws [defending national security or public order] *to suppress or withhold from the public information of legitimate public interest that does not harm national security or to prosecute journalists, researchers, environmental activists, human rights defenders, or others, for having disseminated such information"*

UN, HUMAN RIGHTS COMMITTEE [380]

"The credibility and prestige of the democratic institutions have to be obtained and maintained through good work and not safeguarded artificially"

CARLO FIORE, *I reati di opinione*

This chapter will focus on some particular crimes: they are just some of those which are significantly preventing freedom of expression in Italy and Turkey. It has also to be kept in mind that not only criminal law is influencing the free flow of information: for example, another key-point is the level of diversification in the media [381], which falls outside the scope of this dissertation.

The jurist Giuliano Vassalli links political criminal law directly with the crimes against "State personality" and indirectly with the crimes against "public order" [382]. In the following paragraphs, I will analyse both of these categories within the Italian and Turkish tradition, together with the "emergency laws" and the relatively new counter-terrorism legislation. These categories are historically characterized by a strong anticipation of the punishment's threshold and a tendency to subjectivism in penal responsibility [383]. The fact that political criminal law can maintain, to a certain extent, the authoritarian characteristics of

[380] *General comment No. 34*, General Remark No. 30.

[381] For example in Turkey, one of the most important developments in the last 20 years in Turkey is the diversification of the media, as underlined by professor Atilla Yayla. "The system created by the coup of 1960, which made the media an extension of the government, changed to some extent. Pluralism in the media increased. […] Media organs came to a point where they can mutually balance and check themselves": *Yesteday, today, tomorrow: freedom of expression in Turkey report (1995-2015),* "The Initiative for Freedom of Expression", Istanbul, January 2015, p. 85. This is not true anymore after the newspapers' seizures of October 2015, March 2016 and of the 2016 summer. In the meanwhile, Italy is ranked as one of the worst countries in the EU for media pluralism, where the more important private broadcaster is owned by the former Prime Minister Silvio Berlusconi. See, among others: *Italy"s free expression hamstrung by lack of media plurality*, Index on Censorship, August 15, 2013, link: https://www.indexoncensorship.org/2013/08/italys-free-expression-hamstrung-by-lack-of-media-plurality/.

[382] G.VASSALLI, *Diritto penale e giurisprudenza costituzionale,* Naples, 2006, p.213. See more on the artificial distinction of public order and State personality at p. 183 of this dissertation.

[383] V. PELISSERO, *Reato politico e flessibilità delle categorie dogmatiche,* Jovene, 2000, p. 283.

its origins, even in the context of a "democratic state of law", is explained by decontextualizing political criminal law: political criminal law defends super-individual and essential interests of the State; basically, it is the *function* assigned to this branch of the law together with the *type of interest* protected which makes it possible to detach political criminal law from democratic principles [384].

As previously explained, traditionally State security can be understood both in its internal or external dimension: the former means defending the State from aggressions to its organs, government structure and the existing institutions; the latter is invoked when the existence of the State is threatened with complete or partial destruction [385]. This distinction stems from Roman Law, which was glorified by and an inspiration to the Fascist and Kemalist systems [386]: in the Roman system, the acts that were hostile to the State and committed by an internal enemy were called *perduellio,* where *perduellis* is a person who leads a wrong battle. Similarly, in the Republican age the behaviours aimed at producing political upheaval were considered a serious threat to the State[387]. At the same time, the crimes against the plebs and the tribunes were called *crimen majestatis (tribuniciae) imminutae.* Later, the two criminal categories became equivalent. The punishments for those crimes were discretional and indeterminate: they were conceived as "public punishments", as a social revenge. It was only in the Roman era of despotic principality that the *crimen majestatis* expanded so far as to include mere intentions: from being an instrument of internal and external security for the *populum*, it turned into an arbitrary means of elimination of the political enemies of the emperor. For example, the *adfectatio regni* was punished, that is any act aimed at obtaining the power without the population's consent; it could also consist in simple expressions of thought revealing aversion or irreverence to the emperor. Procedurally speaking, the category of political crimes was of an absolute exceptional nature, and continued to be so throughout history.

The peak of subjugation of penal law to political power took place in the Middle Ages [388]: there was an identification between the duty of obedience to the laws and of loyalty to the lord; the political crime was detached from the offence to a fundamental universal interest. The *obedientia* became a moral duty and the *crimen laesae majestatis* could be committed only from the bottom up, by people at the lower levels of the hierarchy; therefore, those crimes were safeguarding power and the hierarchy, contrasting with the republican Roman

---

[384] "The arm used is always the same, whatever the qualities of the person who wants to be defended are", V. MANZINI, *Trattato di diritto penale italiano,* IV, UTET, Turin, 1908-19, p.13.

[385] R. CANOSA, *supra* note No. 342, p.21; V. PADOVANI, *supra* note No. 242, p.817 et seq. . This distinction was already existing in some pre-Unitarian codes, following the French tradition, and it was eliminated by the Zanardelli Code; afterwards, it was retrieved by the Rocco Code but only for the crimes 'against State personality".

[386] See Chapter No. 1 of this dissertation, p. 21-24.

[387] V. GIOFFREDI, *I principi del diritto penale romano,* Turin, 1970; FERRINI, *Esposizione storica e dottrinale del diritto penale romano,* in E. PESSINA, *Enciclopedia del diritto penale italiano: raccolta di monografie,* I, Milano, 1905, p. 339, quoted in V. MASARONE, *supra* note No. 89, p. 23.

[388] M. SBRICCOLI, *Crimen lesa majestatis. Il problema del reato politico alle soglie della scienza penalistica moderna,* Milano, 1974.

tradition where they were preventing offences to the fundamental freedoms and interests of people.

The distance between people and the sovereign increased during the period of national monarchies : the king enjoyed *iura majestatis* by direct divine will. Until then, the respect of those rights had been conceived as a moral duty, while now the crime against the sovereign was equivalent to a sin.

Since the *crimen laesae majestatis* was a typical expression of the *ancient regime,* it inevitably disappeared during the French Revolution and thanks to the "Declaration of the rights of Man and of the Citizen" [389]. As the word "citizen"–suggests and thanks to, among others, Montesquieu, Filangieri, Beccaria, there was a restoration of the centrality of the individual [390], trying to fix an objective parameter for the criminalization of some offences rather than relying on arbitrary decisions. Within the "contractualistic doctrine" of Hobbes, Rousseau and Pufendorf, the detrimental moment was fixed in the offence to a peaceful coexistence, which was considered the *raison d‟ être* of the state, rather than in a personal offence to the sovereign. However, this evolution led only to a formal disappearance of the *crimen laesae* in the penal legislations of the nineteenth century [391]: the figure of the sovereign was simply substituted with that of a "State entity", giving birth to the modern "crimes against State security". This purely formal change was underlined, for example, by the fact that Francesco Carrara himself renounced to theorize this kind of crimes against the State, denying the existence of a "philosophical criminal law", "ordered on absolute principles" in this field [392]. As I already specified in the introduction of this dissertation, the *crimina maiestatis* have been conceived for protecting particular interests even if disguised as general interests [393]. They include a precise logic of penal despotism, together with a so-called "criminal law of the enemy" scheme, where the enemy is a stigmatized person (foreigners, the poor or other categories that are able to embody people‘s collective fears). Today, the enemies are also- for example- anarchists and terrorists and part of the scholarship recognizes that new fears are being continuously added, thanks to globalization and the uncertainty of maintaining acquired levels of wealth [394].

Within the area of the opinion crimes threatening State security and public order, I will focus on the following particular categories:

1. Denigration of the Head of the State (Article No. 278 of the Italian Criminal Code and No. 299 of the Turkish one), denigration of the Nation, the Republic,

[389] R. CANOSA, *supra* note No. 342, p. 20.

[390] Moccia, for example, individuates the roots of a secular relationship between the State punishment and the individual rights already in Ugo Gorzio, in *De jure belli ac pacis* (1625).

[391] The only exception can be found in the Penal Code of Tuscany (1786), where they were completely abolished and the corresponding behaviours were punished, if necessary, as common crimes.

[392] F. CARRARA, *Programma del corso di diritto criminale,* VII, Lucca, 1871, p. 626 et seq. .

[393] C.FIORE, *supra* note No. 17, p. 19; P. ROSSI, *Traité de droit penal,* Brussels, 1835, p. 39 et seq. .

[394] ANASTASIA, ANSELMI, FACCINELLI, *supra* note No. 98, p. 27.

the Government, the judiciary and the Army (Article No. 290 and 291 of the Italian Criminal Code and No. 301 of the Turkish one)

2. The instigation, apology or propaganda for a terrorist organization (Articles No. 270 and 270 *bis* of the Italian Criminal Code and Art. No. 414(4) of the same Code and Articles No. 314 and 220 of the Turkish Criminal Code together with the Turkish Anti-Terror Law)
3. Instigation to commit a crime or to disobey the law, the apology of a crime, public incitement to hatred or hostility (Articles No. 414 and 415 of the Italian Criminal Code and No. 214 - 218 of the Turkish one).

To conclude, it is interesting to note that even if there is global support for the right to freedom of expression, some forms of speech are less supported than others: for instance, concerning the press freedom that should be granted on national security issues, the support is generally low.

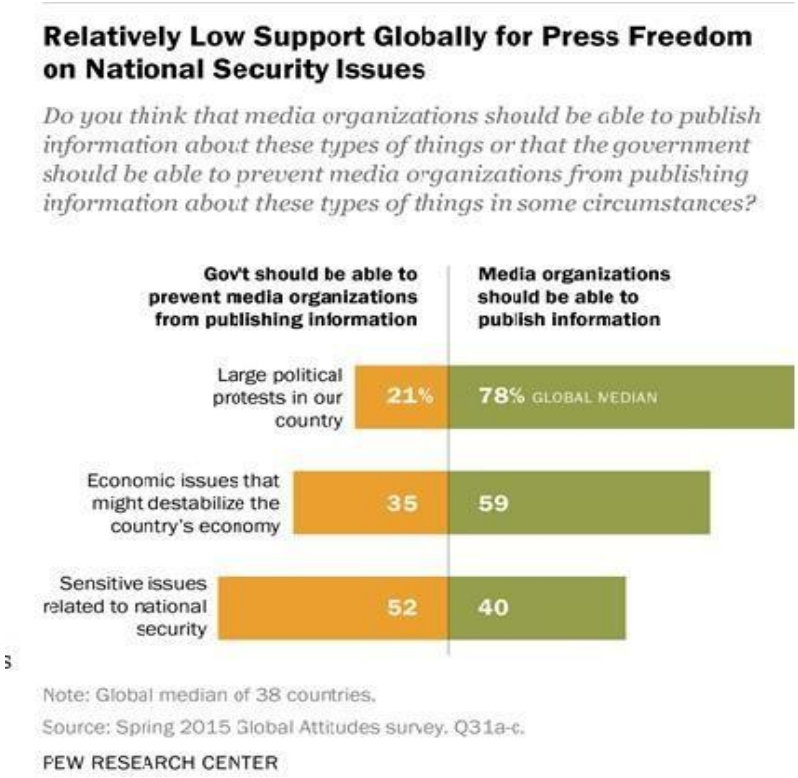


Figure 6

More specifically, a research of the *Pew Research Centre* shows that Latin Americans and Europeans tend to think that the press should be allowed to publish information on sensitive national security issues, while Middle Easterners, Asians and Africans mostly oppose this idea: in Italy, 58% support freedom of the press in this field while in Turkey this percentage diminishes to 26% [395].

[395] From the *"*Spring 2015 Global Attitudes" Survey by "*Pew Research Center"*; November 18, 2015, link: http://www.pewglobal.org/2015/11/18/appendix-c-detailed-tables/#free-speech. The results of the survey are based on telephone and face-to-face interviews made under the

Studying the above-mentioned provisions, their history and their current application will be a fruitful experiment of comparison between two legal systems which are based on basically the same norms but do not share the same history, culture and legal tradition, especially regarding the norms' enforcement. In particular, Turkey is stuck in a situation of extreme enhancement of the State interests: in their name, the provisions under analysis receive broad interpretations and many independent thinkers, whose expressions are far from being violent (that means, directly calling for violence), are silenced. Moreover, emphasizing again the concept of *chilling effect* [396], it is not necessary to convict a person in order to obtain his or her silence; a simple prosecution, which could last a long time or heavily affect his or her work or reputation, may be enough to deter a person from expressing future criticism or dissent [397]. The concept of *chilling effect* has to be kept in mind throughout this chapter and becomes predominant for answering the argument that there is no great danger in a system like the Italian one since, even if the crimes under analysis still exist on the paper, they rarely lead to a conviction [398]. Moreover, the historical references also help to keep in mind that the provisions under analysis were born with an aim and a meaning, that of the historical legislator, and have been interpreted differently in time, up to the political situation of the moment. As long as these provisions exist in the Turkish and Italian Code and they- as in the case of Italy- can enjoy constitutionally-oriented interpretations that save them from abolishment, there can be no certainty as to the fact that they will not be fully enforced anymore.

direction of "Princeton Survey Research Associates International". The results are based on national samples, unless otherwise noted.

[396] See the paragraph "Chilling effect and self-censorship", p. 82 of this dissertation.

[397] '*The worst crime of a totalitarian regime is forcing its citizens, including the victims, to become its accomplices. Making you dance with your jailer […] is an act of extreme brutality*", see AZAR NAFISI, *Reading Lolita in Teheran,* Random House Publishing Group, 2003.

[398] See more about the 2015 Italian prosecutions at: http://notiziario.ossigeno.info/2015/07/italia-le-notizie-piu-pericolose-di-giugno-2015-segnalate-da-ossigeno-59477/#sthash.Ve2PXGcV.dpuf.

3.1- CATEGORY No. 1: INSULT OF THE STATE INSTITUTIONS AND REPRESENTATIVES

The provisions under study prohibit the contempt, insult or vilification of the State institutions and representatives. One important question I will try to answer here is: can the defence of the honour and the threat to the dignity of an institution [or Head of the State], alone, justify the existence of a criminal provision?

The crimes provided under Articles No. 278, 290 and 291 of the Italian Criminal Code and under Articles No. 299 and 301 of the Turkish one, can be considered as particular forms of defamation directed at some subjects which receive a higher protection. In particular, in the case of Articles No. 290, 291 and 301, defamation is directed at an abstract entity.

This dissertation aims to study some forms of criminalization of thought other than common defamation. Italy, in particular, as a EU member, is sadly well-known for the on-going criminalization of defamation of individuals and the frequent beginning of prosecutions, trials and punishments on this ground [399]. Other forms of criminalization, old and anti-historical, remain latent in the Italian Criminal Code, exposed to political and social changes for a potential application. In fact, I will analyse other forms of defamation, namely the vilification of the State and of its institutions and the insult to the Head of the State; all of these provisions fall under the category of the "crimes against the Personality of the State", in Italy, and under the category of "Offences against signs of Sovereignty and Supreme Political Organs of the State", in Turkey. Those are the crime provisions where the State is represented as an "anthropomorphic figure" [400]. Therefore, I am convinced that it is necessary to study the scholarship's doctrine which called for an interpretative reading of those norms in order to unfasten the abstract notion of "personality of the state", where the state is understood as an autonomous stakeholder; instead, this concept has to be interpreted in the sense of defending the essential elements of the constitutional system inspired by a democratic method, especially by political pluralism and freedom of expression.

The UN's Human Rights Committee underlined that "laws should not provide for more severe penalties solely on the basis of the identity of the person that may have been impugned. State parties should not prohibit criticism of institutions, such as the army or the administration" [401]. Moreover, concerns are expressed about laws criminalizing lese majesty, disrespect for authority, flags and symbols, defamation of the Head of the State and protection of the honour of public officials.

Several ECtHR judgments concern criticism of the State, the Government and public figures. Among others, I would remind:

---

[399] See OSCE (ORGANIZATION FOR SECURITY AND CO-OPERATION IN EUROPE), *Legal Analysis of Law no. 925 of 17 October 2013 Concerning the Defamation Legislation in Italy,* November 11, 2013; link: http://www.osce.org/fom/108108.

[400] V. MASARONE, *supra* note No. 89, p. 19.

[401] UN HUMAN RIGHTS COMMITTEE, *General comment No. 34, supra* note No. 149, General Remark No. 38.

- *Castells v. Spain* (1992) [402]: **"**Governments should be open to criticism: the limits of permissible criticism are broader with regard to the Government than in relation to a private citizen, or even a politician" (Paragraph No. 46).
- *Thorgeir Thorgeirson v. Iceland* (1992) [403]: From 1979 to 1983 a number of incidents occurred in Iceland involving allegations of police brutality. The applicant published two open letters in a daily newspaper, where he used the phrases 'wild beasts in uniform' and 'police brutes' to describe the police. The applicant was prosecuted and convicted for defamation: he was sentenced to a fine of 10,000 Icelandic Crowns or eight days of imprisonment. The sentence was considered violating Article No. 10 ECHR since it was not necessary in a democratic society, because he was reporting on matter of public interest.

Finally, another data I would keep in mind while reading the following paragraphs, is that according to a survey of the *Pew Research Center* [404], in Italy 88% of the people interviewed declared that people should be able to make statements that criticize the government publicly, while only 52% of the interviewees thought so in Turkey .

- **ITALY**

- ***From the Crimen Laesae Majestatis to the "Crimes Against the Personality of the State": the Rocco Code and the Preceding Legislation***

I have already explained the history of the *crimen laesae majestatis,* starting from the Roman tradition to the Restoration period. Continuing with the historical reconstruction of the crimes under analysis, part of the Italian scholarship finds a clear line of continuity between the tradition of the nineteenth century and the Rocco Code [405].

Passing from the Zanardelli to the Rocco Code, the category of the "Crimes against State security" changed its name into "Crimes against State Personality": from this moment on, the interpretation of the meaning of "State personality" became central in order to enforce those crimes and, then, from 1948, in order to declare the constitutional legitimacy of those crimes in the new

---

[402] *Castells v. Spain,* App. No. 11798/85, Judgment April 23, 1992; link: http://hudoc.echr.coe.int/eng?i=001-57772. See a more detailed summary in at p. 57 and 62 of this dissertation.

[403] *Thorgeir Thorgeirson v. Iceland,* Application No. 13778/88, judgment June 25, 1992; link: http://hudoc.echr.coe.int/eng?i=001-57795.

[404] *Pew Research Center"s "*Spring 2015 Global Attitudes" Survey; link: http://www.pewglobal.org/2015/11/18/appendix-c-detailed-tables/#free-speech.

[405] Regarding the Italian jurisprudence on the "Crimes against State security", for example, already under the Zanardelli Code, the Court of Cassation constantly considered that "exalting anarchy" constituted an "apology of a crime" and "instigation to hatred among social classes". Therefore, part of the Italian scholarship believes that the Rocco Code found its place inside the tradition of a practice ready to welcome it. See C.FIORE, *supra* note No. 17**,** p. 14.

constitutional system [406]. Going back in time, the category of "State personality" is evoking the old pre-Unitarian title of "majesty crimes", which was existing from the Restoration to 1859. Similarly, the 1859 Code included basically all the *crimina majestatis* of the Code of Sardinia of 1839 [407]. Another important source of law for the Italian system was the *Albertine Statute* ("Statuto Albertino") on the press (1848), which included old and new provisions: old - such as the crimes against religion or against "good customs" (Articles No. 16 and 17) -, partly new - such as the offences " against the Sacred person of the King or the Royal Family" (Article No. 19) - and completely new such as the "provocation to commit crimes" through the press (Articles No. 13 and 14). These new provisions were then adopted in 1889 by the Zanardelli Code.

The crimes of vilification were harshly criticized in the end of the 19th - beginning of the 20th century: Florian, for example, wrote that "it would have been better not to include those crimes in our code and now it will be very difficult to eliminate them" [408]. One of the critics made during the draft of the Zanardelli Code regarded Article No. 121, asking to eliminate the crime of "vilification of the law" [409]: the critic was taken under consideration and only the "vilification of State organs and institutions" remained and was enacted under Article No. 126 of the Zanardelli Code. The jurisprudence immediately started to interpret this provision in a broad way, including also the insult of the army and of the government.

The category of the crimes against the personality of the State was preceded by Law No. 2008 of 1926 ("Provisions for the defence of the State"). It established a "Special Tribunal for State defence" and re-introduced the death penalty for "serious crimes against the security of the State" [410]. "There is now a desire for progress, rise, power, that needs to be safe from both the attacks of violence and from conspiracies. This desire is so merged with the reasons for the existence of the State itself, that every offence and danger for its existence is an offence and threat for its safety", the fascist deputy De Marsico wrote in 1927 [411]; therefore "the Title that necessitates a greater development, for strengthening the State on the basis of the national principle, is of course that of the crimes against State security" [412]. With the insertion of the category of "Crimes against the Personality of the State" in the new Code, the State is treated like a real person and this feature "ends up in substituting the

---

[406] The official report of the Minister of Justice Rocco explains that the concept of "State personality" was raising from the express will of the legislator to extend the area of defence, including "not […] only State security […], but also all the fundamental political interests on which the State wants to exercise its personality"; *Relazione del Guardasigilli sul progetto definitivo,* II, in *Lavori prepartori,* V, Rome, 1929, p. 7.

[407] E. PESSINA, *Elementi di diritto penale,* III, Napoli, 1885, p.24.

[408] FLORIAN E., *Delitti contro la sicurezza dello Stato,* in *Trattato di diritto penale,* II, Milan, 1904.

[409] The deputy Morini declared as inadmissible the idea of a criminalization of the act of criticising the laws, since it is obvious that the citizens have the right to criticize a law which is considered to be unjust. See C.FIORE, *supra* note No. 17, p. 27.

[410] For a comparison with the Turkish Special Tribunals, see p. 36 and 160 of this dissertation, on the decrease of procedural guarantees and the right to a fair trial**;** to read more on the authoritarian turn in Italy from the 20's, see F. COLAO, *Il delitto politico tra '800 e '900. Da delitto fittizio a nemico dello Stato*, A. Giuffrè, Milano, 1986.

[411] DE MARSICO, *supra* note No. 84**,** p. 55.

[412] *Ibidem,* p. 54. See more on the Fascist State ideology in Chapter No. 1 of this dissertation.

commitment toward the sovereign with devotion toward the nation and its leader" [413].

So, from 1930, political criminal law has been inserted in Title No. 1 ("Crimes against the Personality of the State") of Book No. 2 of the Criminal Code and Title No. 5 of the same Book ("Crimes against Public Order") [414]. A definition of what a *political crime* is can be found in Article No. 8 (3) of the Criminal Code: it defined as "every crime which offends a political interest of the State or a political right of a citizen". A common crime determined - totally or partially- by political reasons is also considered a political crime. This definition is clearly overbroad, especially when any common crime committed for political reasons is included; moreover this Article also provides that the Italian State has authority on the political crimes committed abroad as well. The conception of what a political crime is that can be found in the Criminal Code is different from the constitutional one, prvided by Articles No, 10 (4) and No. 26 (2); the latter one limits the power of extradition of the Italian State for political offences, diminishing the greater seriousness that is usually attributed to them in comparison with the other crimes by the criminal legislator [415].

- ***Abstract or Concrete Danger in the Crimes of Vilification and Contempt of the State Institutions and Representatives***

The crimes against State security, against State personality and generally, the political crimes share a common uncertainty: it regards the abstract or concrete nature of the danger necessary to realize te offence. The nature of the danger is the nature of the threat imposed on the interests defended by those provisions. The following considerations are valuable both for the Italian and for the Turkish system and will be expanded speaking about the offences of instigation to commit a crime, apology of a crime, propaganda for a crime and instigation to disobey the law.

In the '70's, Fiore wrote that studying the Italian case law relating to the offences under analysis, they seemed to be supported by a close adherence to the ideological premises of the legislation; therefore, the individual right to express a personal vision of the world was challenged. Also, the event of the crime did not correspond to an actual impairment of the authority of the body or institution but could be found in a "debasement of the spiritual condition" of public opinion, which could undermine a "significant prerequisite" for the efficiency of the institutions [416].

---

[413] S. PANAGIA, *Il delitto politico nel sistema penale italiano,* CEDAM, 1980**,** p. 76-77.

[414] V. MASARONE, *supra* note No. 89, p. 34.

[415] Concerning the interpretation of those crimes right after the enactment of the Italian Constitution, in the end of the 60's the idea was that one element that has to be evaluated for punishing or not a crime of denigration is that of the "characteristics of the expression", that is- if the expression is cultured and conformist rather than if it is not; then, a judgment of 1967 underlined that it is sufficient, for the expression of thought to be punished, "to be pejorative of the ethical and spiritual values toward which the members of the community are loyal" (Court of Cassation, February 20, 1967, judgment No. 1057).

[416] Court of Cassation, November 5, 1954, judgment No. 3556.

In order to establish the psychological element of the offense, it is not necessary to show that the purpose of the act was diminishing the prestige of the institution or of the organ: “General malice” alone is sufficient and it can be inferred from the "vilifying content of the writing or of the speech”, presuming that the author was aware of the insulting nature of the content when he/she expressed it [417]. So, this crime is considered as committed even for an abstract contrast of values, namely a contrast between the values embraced in the speech under charge and those crystalized within the legal and social system. Demanding an unconditional respect of certain particular values rather than others is unreasonable: the respect of rules and regulation must be claimed only if it is functionally connected with a real need of defence of social life; the supreme rule is that every crime has to constitute a *substantial* aggression of an interest. Going beyond this rule means falling in the category of the crimes of “presumed” or “abstract danger” [418].

To conclude, if it is true that a decrease in the prestige of a State institution could diminish its authority and efficiency, I believe the converse is true: it means that the criminalization of denigration of State institutions and representatives is likely to take place mainly in contexts where those institutions and representatives are already powerless and not well-respected by the population. Thus, they defend themselves by preventing criticism rather than improving the administration of the *res publica* for turning criticism into favour in their regard.

- **Crimes Against the Internal Personality of the State**

- **Article No. 278: Offence to the Honour and Prestige of the President of the Republic**

Anyone who offends the honour or the prestige of the President, shall be punished with imprisonment from one to five years.

This provision has the typical structure of defamation offences. However, the fact is punished more heavily in the name of “that particular essence and specification of one‘s honour when the offended person performs public functions” [419]. In this case, the aura of “sacredness” for the figure of the Head of the State recurs again: his honour is preserved even in an artificial way. The interest which is defended through this crime is the prestige of the institution and, consequently, the personality of the State itself [420].

The constitutional legitimacy of this Article for breaching the principle of equality (Article No. 3 of the Constitution) was questioned because of the excessively high penalty this Article provides rather than in the common

[417] Court of Cassation, October 7, 1953, Judgment No. 2593 quoted by L. PISTORELLI, Articles No. 278 and 290, in A. CRESPI, G. FORTI, G. ZUCCALÀ, *Commentario breve al codice penale*, 13th edition, CEDAM, 2012.
[418] See a more detailed description of what a crime of danger is in the paragraph “The crimes of danger”, p. 131 of this dissertation.
[419] Court of Cassation, February 8, 1963, judgment No. 430.
[420] Constitutional Court, judgment No. 5844/78.

defamation crimes: it was considered ill- founded, since Article No. 278 also defends the quiet exercise of public functions that are related with the Head of the State figure. Therefore, there is no breach of the principles of reasonableness and adequacy [421].

Moreover, even if the victim being is a public figure, it is not possible to resort to the *exceptio veritatis* (the exception of truth), in order to prove the truth (or truthfulness) of the facts that are attributed to the Head of the State [422]. This raised another question of constitutional legitimacy: it refers to the potential contrast with Articles No. 21, 24, 25 and 111 of the Italian Constitution. Nevertheless, the Constitutional Court found that the limitation to the right of defence is justified by the interests for the prestige of a Republican institution and the defence of the idea of national unity that the Head of the State represents. In the same judgment, it was also found constitutionally legitimate that this crime is included in the category of the crimes with "free Form", that is- those crimes that can be committed in any way through any means. No specific characteristic is required: the "free form" was not considered in contrast with the principle which requires the penal crimes to be limited to a peremptory number [423]. Consequently, this crime includes any insult to the President of the Republic, both during or because of the exercise of his or her functions and also directed toward his or her private individuality; moreover, it may be committed by communicating the offence to a third party through any means: it is not necessary for the crime to be committed through the press [424].

With regard to the psychological element of the crime, a specific malice to offend the honour and prestige of the Head of the State is not necessary: the mere awareness of committing an offensive act and of the appropriateness of the writing, image or speech to offend, are enough [425].

Moreover, the beginning of a penal action under Article No. 278 depends on the authorization of the Minister of Justice, under Article No. 313 (1) of the Criminal Code; similarly, this authorization is required for the crime of vilification of the institutions under Article No. 290 of the Criminal Code [426]. It is interesting to note that a 2008 Turkish reform reintroduced the rule imposing an authorization by the Minister of Justice in order to proceed under Article No. 301 TCK ("Degrading the Turkish Nation, the State of Turkish Republic, the Organs and Institutions of the State"). Article No. 301 corresponds to our Article No. 290. In this regard, several criticisms have been raised: the contrast

---

[421] Constitutional Court, judgment No. 3069/96.

[422] It is interesting to note that the *exceptio veritatis* is expressly provided for the defamation of other public officials in Article No. 596 (2) of the Criminal Code.

[423] Constitutional Court, Section I, judgment No. 12625/ 2004.

[424] Court of Cassation, Section I, judgment No. 9880/1996.

[425] Court of Cassation, Section I, judgment no. 1019/66. See the previous paragraph -*Abstract or concrete danger in the crimes of vilification and contempt of the State institutions and representatives".*

[426] Precisely, when the crime is committed against the Constitutional Assembly or against the Legislative Assemblies or one of them, you cannot proceed without the authorization of the relevant Assembly. Article No. 313 (3) was declared unconstitutional where it did require for the authorization of the Minister of Justice in case of vilification of the Constitutional Court rather than the authorization of the Court itself (judgment No. 15, February 17, 1969).

with the principle of the independence of the judiciary and separation of powers, the fact that “any political change in time might affect the interpretative attitudes of the Minister of Justice and open the way for arbitrary prosecutions”[427]. That is why part of the Turkish scholarship thinks that it is a good idea to have a filter for prosecutions but the authority empowered to do so should be an impartial body. If it is true that the crimes of vilification and insult to the Head of the State defend the ruling political power in a particular historical moment, then that power is the same power which is in charge of allowing or not the prosecution of a person accused on these grounds.

- ***Case Law***

- *Judgment No. 157 of 2014* [428]: A girl, pregnant and unemployed, vented her anger on the social network Facebook after a speech of the former Italian President of the Republic Giorgio Napolitano urging people to make sacrifices following the economic crisis. She wrote: " WE make sacrifices, asshole!". Under Article No. 278 the offence is a crime regardless of whether the Head of the State feels offended or is aware of the offence. The offence was considered not to be a crime according to the Court for the Preliminary Hearing of Rovigo, which accepted the objection presented by the girl‘s lawyer: it referred to a ruling by the Strasbourg Court (*Eon v. France* [429]). The *Eon* case regards a similar fact against the former French President Nicolas Sarkozy, when an activist showed a sign saying “Get lost, you sad prick” (*casse-toi pov‟con*) during the passage of the President: it was an allusion to a much publicised phrase that the President himself had uttered earlier that year at the *International Agricultural Show* in response to a farmer who had refused to shake his hand. The phrase had given rise to extensive comment and media coverage, it larglly circulated over the Internet and was used as a slogan at demonstrations. Eon was convicted with a fine of 30 euros, a penalty that was suspended. While accepting that the phrase in question, taken literally, was offensive to the French President, the Strasbourg Court considered that the fact should be examined within the overall context of the case. The Court emphasized the importance of free discussion of matters of public interest. The criminal penalty imposed on Eon, although modest, had thus been disproportionate to the aim pursued and unnecessary in a democratic society[430].
  Therefore the judge for the preliminary hearing of Rovigo accepted the ECtHR position, sustaining that political criticism cannot be limited to defend someone‘s honour. This is one of the first Italian sentences recognizing the justification of political criticism in these cases.

[427] *Altuğ Taner Akçam v. Turkey,* App. No. 27520/07, judgment January 25, 2012, link: http://hudoc.echr.coe.int/eng?i=001-107206, Para. No. 94.
[428] Download the original judgment No. 157/2014 from: http://www.parolacce.org/wp-content/uploads/2014/11/Sentenza-157-2014-TRIBUNALE-DI-ROVIGO.pdf.
[429] *Eon v. France,* Application no. 26118/10, judgment March 14, 2013, link: http://hudoc.echr.coe.int/eng?i=001-117742.
[430] D. VOORHOOF, IRIS- Merlin database, http://merlin.obs.coe.int/iris/2013/5/article1.en.html.

- *The case of Storace* (2016): This case against the parliamentarian Francesco Storace - together with other cases of politicians accused for insulting the Head of the State– is considered to be one of the main causes for the request of amendment of Article No. 278 made through the Reform Bill C. 925-B on defamation (2013); I will say more about this Bill in the following paragraph.
  In this case, Storace defined the former President Napolitano as "shameful" after Napolitano himself defined it shameful to attack verbally some life-long senators, such as Rita Levi Montalcini, as Storace did. The first conviction to 6 months of imprisonment (suspended) was quashed by the Court of Appeal [431].

- *The case of Umberto Bossi* (2016): The parliamentarian Bossi called the former President Napolitano "terùn", a term commonly used in a pejorative way to address people from the South of Italy; in September 2015, Bossi was convicted to 18 months in prison [432].

- *Law No. 85 of 2006, "Modifications of the Criminal Code Regarding the Opinion Crimes"*

The law under analysis represents an important moment of reform in the Italian system, which aimed to " erase, for the first time in the history of the Republic, a series of crimes that have nothing to do anymore with freedom of thought and opinion, principles that characterize a democratic state" [433].

Despite of these goals, the reform, which could have been a great opportunity for abolishing definitively the opinion crimes, failed to do so [434]. As a matter of fact, the reform did not abolish all the crimes that are not falling under the umbrella of "violent expressions", namely those crimes that have no reason for not being abolished. For example, Article No. 278 was not even amended, although substituting the detention penalty with a pecuniary one would have been already a considerable step forward. Conversely, this happened with Article No. 290 ("Contempt of the Republic, of the Constitutional Institutions and of the Army"): the penalty of imprisonment from six months to three years was

[431] See *Francesco Storace assolto in appello dall"accusa di vilipendio al Capo dello Stato: "Il fatto non costituisce reato",* Il Fatto Quotidiano, June 1, 2016, link: http://www.ilfattoquotidiano.it/2016/06/01/francesco-storace-assolto-in-appello-dallaccusa-di-vilipendio-al-capo-dello-stato-il-fatto-non-costituisce-reato/2788122/ .

[432] See *Bossi condannato a 18 mesi per vilipendio a Napolitano,* in *La Repubblica,* September 22, 2015, link: http://www.repubblica.it/politica/2015/09/22/news/bossi_condannato_a_18_mesi_per_vilipendio_a_napolitano-123433063/.

[433] Roberto Castelli, the former Minister of Justice, introducing the reform in Rome the 25th of January 2006.

[434] Law No. 85/2006 abolished Articles No. 269 (Anti-national activity of the citizen abroad) ,279 (Offending the prerogative of irresponsibility of the President of the Republic), 292-bis (Aggravating circumstance for furloughed soldiers) and 293 of the Criminal Code (Aggravating circumstance for the citizen abroad). Moreover, in some cases, the words "facts directed to" were changed in "*violent and suitable* facts directed to" (Articles No. 241, 283 and 289 of the Criminal Code.

turned into a fine from 1.000 to 5.000 euros [435]. However, the crime under Article No. 290 also remained in force.

From the standpoint of the compliance with the international law standards of the Italian Criminal Law, one year before the Law No. 85/06 was enacted, Law No. 17 of February 21, 2005 modified the criminal provisions regarding the trial *in absentia* – specifically, Article No. 175 of the Criminal Code- in response to the European pressures for a compliance with the Strasbourg judgments. Conversely, Italy did not follow the international indications relating to the need of abolishing opinion crimes, especially with regard to the crime of defamation[436]. Basically, Law No. 85/06 on the reform of opinion crimes seems to be just a formal attempt to improve legislation which actually changes very little.

Focusing again on Article No. 278, there is a bill for the amendment of this provision- among other provisions- namely Bill C. 925- B [437]. The bill is has been stuck in the Chamber of Deputies for more than one year: on June 4, 2015, the Senate approved it with 193 votes in favour and 21 against the amendment of Article No. 278 [438]. The amendment seeks to replace the detention penalty with a fine between 5.000 and 20.000 euros and, if the offence consists in the attribution of a given fact, with the imprisonment up to two years.

---

[435] Furthermore, Law No. 85/2006 decreased the penalties for a series of crimes, such as in Article No. 270 ("Subversive associations", the maximum decreased from twelve to ten years), No. 283 ("Attempt against the Constitution of the State", from a minimum of twelve to a minimum of five years), No. 292 ("Contempt and damage to the flag and other State symbols", from the detention penalty to a fine between 1.000 and 5.000 euros), No. 403 ("Offence to a religious confession through the contempt of a person", from a detention penalty to a fine).

[436] The common crime of defamation is still punished with imprisonment between two and six years (Article No. 595 of the Criminal Code). The last draft bill of reform (Bill C. 925) is being revised from the Chamber of the Deputies and the Senate from March 2013. Some data from the Italian Federation of Newspapers' Editors (FIEG) show that in the last 10 years 400 cases took place, asking for a complex sum of 2 billion euros of penal compensations. From 2011 to 2015, in 18 occasions, journalists, bloggers and reporters were convicted with detention penalties. See A. SPAMPINATO, *Rassegna di querele e altre azioni legali pretestuose contro i giornalisti in Italia,* "Ossigeno per l'Informazione", Rome, July 3, 2015, link: http://notiziario.ossigeno.info/wp-content/uploads/2015/09/dossier_diffamazione.pdf.
Regarding the international pressure on the decriminalization of defamation, see the 2004 *Declaration on freedom of political debate in the media*, by the CoE's Committee of Ministers; *Recommendation 1814 (2007)* and *Resolution 1577 (2007) Towards decriminalisation of defamation*, as well as the *Resolution 1920 (2013) on the state of media freedom in Europe* by the Parliamentary Assembly of the Council of Europe.

[437] See the parliamentary procedure, which started in 2013, at http://www.camera.it/leg17/126?pdl=0925-B and see the English version of the draft at http://www.venice.coe.int/webforms/documents/?pdf=CDL-REF(2013)051-e ; see the legislative provisions concerning protection against defamation at http://www.venice.coe.int/webforms/documents/?pdf=CDL-REF(2013)035-e (9/17/16).

[438] In favour of the measure, *Partito Democratico*, *M5S (Movimento Cinque Stelle)*, *Area Popolare* and *Forza Italia*, while against it *Lega Nord* and *Sinistra, Ecologia e Libertà.*

Article No. 278 is problematic from the standpoint of the case law on Article 10 ECHR[439], according to which "the protection of the reputation of the Head of State cannot serve as justification for affording him/her special protection vis-à- vis the right to convey information and express opinions concerning him/her", the Venice Commission (Council of Europe) stated in its *"Opinion on legislation on defamation of Italy"* [440]. Therefore, this provision should be reconsidered.

- ***Article No. 290: Vilification of the Republic, of the Constitutional Institutions and of the Armed Forces***

Whoever publicly vilifies the Republic, the Legislative Assemblies, or one of these, or the Government, or the Constitutional Court or the judicial order, shall be punished with a fine from 1.000 to 5.000 euros.
The same penalty applies to those who publicly vilify the Armed Forces of the State or those of the Liberation.

Again, the typical structure of the defamation offences can be found within this provision. Moreover in this case, instead than in Article No. 278, there is not even a physically existent person whose dignity and personality are protected by the norm, while the prestige of the institutions is protected through a process that tends to "personify" those abstract entities.

The Italian word describing the act of offending those institutions is *vilipendio*, which is a more specific term than "insult" or "defamation", but is close to them[441]. In Turkey, instead, the verbs used in the previous Criminal Code were *tahkir* and *tezyif,* while today there is the word aşağılamak ("to insult"): all of them refer to offences to the institutions, and not to human beings. The Turkish scholarship interpreted the terms *tahkir* and *tezyif* considering the Italian concept of *vilification* [442]. The notion of *vilification* is controversial: the common interpretation of the Italian scholarship and jurisprudence is that vilification is taking place in the case of any expression with a unique offensive meaning, expressing contempt toward the listed institutions. In particular, in case of criticism of the government, this act is fully admissible unless it turns in pure mockery [443]. However, it is difficult to understand why criticism is admissible but vilification is not. There is a thin line between (licit) criticism and (punishable) vilification and this line consists in the

[439] For example, *Artun and Güvener v. Turkey*, Application No. 75510/01, Judgment of 26 September 2007, § 31; *Mondragon v. Spain,* Application No. 2034/07, Judgment of March 15, 2011, § 55; see also *Colombani v. France*, Application No. 51279/99, Judgment of June 25, 2002, § 56; *Castell v. Spain*, Application No. 11798/85, Judgment of 23 April 1992.
[440] *Opinion on legislation on defamation of Italy,* n° 715/2013, Adopted by the Venice Commission at its 97th Plenary Session (Venice, December 6-7, 2013) on the basis of comments by: Mr Richard CLAYTON (Member, United Kingdom) Mr Christoph GRABENWARTER (Member, Austria) Ms Herdís THORGEIRSDÓTTIR (Member, Iceland), Strasbourg, December 9, 2013; http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL- AD(2013)038.
[441] In this dissertation, the word villipendio will be translated as "vilification", "insult", "denigration" or "contempt" up to the context in which it is used. [442] T. SENKERI, *Anayasal Kuruluşları,* Istanbul, 1996, p. 180 et seq. [443] Court of Cassation, judgment No. 1045/67.

"danger of disobedience" [444]. However, this theory forgets that the freedom and right to criticize is "dangerous in its nature, or better, in its function: […] it tends to disturb (tending toward something better or something worst) the existing order" [445].

The psychological element is that of "general malice": it means that the specific reasons why the vilification was committed are not relevant. The proof of the psychological element has to be inferred from the content of the writing, [of the image] or of the words and from the suitability of the means to vilify the addressee [446]. Moreover, the crime has to be committed *publicly*: the action in question must then take place publicly; in the view of some authors, this constitutes an objective condition of punishment (under Article No. 44 of the Italian Criminal Code) [447], while for others it is a constitutive element of the offence and therefore it must be known and wanted by the agent [448]. In this case, instead than in Article No. 278, the *exceptio veritatis* counts: therefore, the prestige of the institutions cannot be damaged by any critic within the limits of objectivity and truthfulness of the given facts [449].

Normally, this crime is considered to be committed when the insult is directed toward the institutions themselves, and not toward single or collective personalities which belong to the institution. Therefore, even if this particular provision reminds the scheme of defamation and tends to "personify" the institutions, defending specifically the "personality of the State", those institutions have to be considered *impersonally*. Nevertheless, the case law in Italy in the 50's and in the 60's demonstrates that the crime was applied (and can potentially be applied) also when the offence addresses the organ in its concrete composition, i.e. the people who compose the government [450].
Consequently, in that period some defendants were convicted for denigration of the Army because of stating that the police, during the protests, adopts a "systematic method of violence […] which instils terror" [451] or a poster representing a member of the "Carabinieri Corps" shooting on a peaceful protester, because it was considered an impersonal and indeterminate allusion[452]. However, the ECtHR case law [453] and the constitutionally-oriented Italian jurisprudence teaches that those are topics of public interest and

---

[444] G. BOGNETTI, *Vilipendio del Governo e principi costituzionali di libertà,* in *Riv. It. Dir. proc. pen.,* 1960, p. 957 et seq. .
[445] D. PULITANÒ , *Libertà di pensiero e pensieri cattivi,* in *Quale giustizia*, 1970, p. 198.
[446] L. PISTORELLI, Articles No. 290, in A. CRESPI, G. FORTI, G. ZUCCALÀ, *Commentario breve al codice penale*, 13th edition, CEDAM, 2012.
[447] V. MANZINI, *supra* note No. 385, p. 549 quoted in F. ANTOLISEI, *Manuale di diritto penale- Parte speciale II,* Giuffrè, Minal, 2016, p. 854.
[448] Of course, the will is that of generic malice. F. ANTOLISEI, *Manuale di diritto penale- Parte speciale II,* Giuffrè, Milan, 2016, p. 854.
[449] Court of Cassation, judgment No. 9385/77. See the rights to criticize and to report in Chapter No. 2 of this dissertation, p. 47.
[450] For example, Court of Cassation March 5, 1954, judgment No. 888; January 15, 1962 judgment No 974; June 23, 1967, judgment No. 859.
[451] Court of Cassation March 16, 1953, judgment No. 4716.
[452] Court of Cassation, November 12, 1954, judgment No. 3110.
[453] See *Thorgeir Thorgeirson v. Iceland,* Application No. 13778/88, judgment of June 25, 1992; link: http://hudoc.echr.coe.int/eng?i=001-57795. See a better analysis of the judgment above in this dissertation, p. 93.

therefore the right to freedom of expression covers these kind of expressions. Regarding the insult to the judiciary, it was established that conjecturing that a judge could be not impartial because of pressures he or she received from the executive power or from some political parties, can be charged under Article No. 290 [454]. Generally speaking, it has to be kept in mind that the honour and prestige of the institutions does not need to be defended in itself, but at least only when it is *functional* to guarantee the correct efficiency of those institutions[455].

In the 50's and in the 60's there was a greater number of prosecutions and convictions under Article No. 290 concerning the insult of the Government and of the Army, rather than the insult of the Nation or of the flag (Article No. 292): it confirms the fact that this article can lead to a repression addressing organs that concretely personify power and force rather than symbols and ideal entities. Regarding the constitutional legitimacy of the crime under analysis and more generally of the crime of vilification, in the relevant period courts were sustaining the idea that this crime, together with instigation, apology and propaganda, is not falling under the umbrella of Article No. 21 of the Italian Constitution: "the psychological moment prevails and they do not aim to persuade but to excite, to move" [456]. They fall in the category of "stimulating forms" of thought [457]. Nowadays, though, it is clear instead that most of the facts and acts which could be criminalized under this provision are protected by the right to freedom of expression and to criticize; they receive even a broader protection if criticism is directed towards topics of public interest.

- ***Public Interest***

Article No. 290 provides higher fines (up to 5000 euros) than those provided for the common crime of defamation (up to 2065 euros under Article No. 595 (2). Also, according to Article No. 595 (4) of the Criminal Code, when defamation targets "a political, administrative or judicial agency, a representative of the latter or a collegial authority", increased sanctions will be applied.

---

[454] Court of Cassation, December 17, 1956, judgment No. 922 and it seems to be confirmed by the same Court, Section V, judgment No. 16284/2010 (link: http://bd44.leggiditalia.it.ezp.biblio.unitn.it/cgi-bin/FulShow?DS_POS=1&&OPERA=44&NONAV=2&NAVIPOS=2&). However, this kind of insult against single judges does not always lead to the application of Article No. 290: for example, in the case *Perna v. Italy* , the journalist which accused judge Caselli of not being impartial and to abuse of his power for making political trials was sued for the common crime of defamation through the press, even if with the aggravating circumstance of addressing the defamation against a public official in the performance of his official duties. See more in Chapter No. 1, p. 66 of this dissertation. Part of the public opinion believe Article No. 290 should be applied in cases of defamation towards the whole judicial organ as those realized by the former Prime Minister Silvio Berlusconi.

[455] Constitutional Court, judgment No. 20/1974.

[456] For example, Constitutional Court, judgment No. 39 of 1965; see also G. BETTIOL, *Sui limiti penalistici della libertà di manifestazione del pensiero,* in *Legge penale e libertà del pensiero,* Padova, 1966, p. 13 et seq. .

[457] They are described as "teleologically oriented to stimulate the addressees to behaviours aimed to modify the reality", P. NUVOLONE, *Il problema dei limiti della libertà di pensiero nella prospettiva logica dell'ordinamento* (in *Legge penale e libertà di pensiero*, Padova, 1966, p. 353) .

Under the Italian Reform Bill C. 925-B on defamation, Article No. 595 (4) should be repealed: "It recalls in this context that excessively high fines pose a threat with almost as much chilling effect as imprisonment, albeit more insidious" [458]. Accordingly, Italy should also consider to amend or repeal Article No. 290 and to protect the relevant interests with civil provisions.

It has to be underlined that, when referring to the Republic, the Constitutional Institutions, the judiciary, the Government and the Army, as well as in Article No. 278 referring to the Head of the State, a public interest is always involved. When considering whether an interference with freedom of speech is necessary in a democratic society, the international jurisprudence on the topic, among others of the European Court of Human Rights, grants the strongest protection to political debate on matters of public interest, that has been defined very broadly in order to cover speech on all matters of general public concern. Furthermore, as established in *Handyside v. United Kingdom*[459] the protection of Article No.10 ECHR applies not only to information or ideas that are favourable and inoffensive but also to those that offend, shock or disturb. Consequently, in the area of debates relating to a public interest, *"*exceptions to freedom of expression must be interpreted narrowly" [460].

In this regard, also Article No. 291 ("Vilification of the Italian Nation") has to be addressed: because of a potentially vague and broad interpretation of the concept of "nation" [461], Article No. 291 of the Criminal Code, according to which defamation of the Italian Nation "shall be punished with a fine between 1000 and 5000 Euros" [462] is also problematic and should be abolished.

- **Differentiation Between Statements of Fact and Value Judgments/Truthfulness**

The Strasbourg Court has held that the requirement to prove the truth of a value judgment is impossible to fulfil and "infringes freedom of opinion itself, which is a fundamental part of the right secured by Article 10 ECHR" [463]. Where a statement amounts to a value judgment, the proportionality of the interference may depend on "whether there exists a sufficient factual basis for the impugned statement, since even a value judgment without any factual

[458] VENICE COMMISSION, *Opinion on legislation on defamation of Italy* (n° 715/2013), *supra* note No. 441, Remark No. 62.
[459] *Handyside v. United Kingdom*, Application No. 5493/72,Judgment of December 7, 1976, § 49.
[460] See also *Opinion on legislation on defamation of Italy* (n° 715 / 2013), Venice Commission *supra* note No. 441, Remarks No. 43- 47.
[461] The Ministerial Report to the Criminal Code Project proclaims that Article No. 291 is " a summary disposition, to make use of for punishing the slanderer (..) of the whole Italian Nation, in its thousand-year unity of the race, in the perennial continuity of a glorious heritage of values, for which it has, rightly, among other nations, its own individuality", II, Rome, 1930, p. 81.
[462] The Article was modified in this way by Law No. 85/2006. Before the penalty consisted in detention from 1 to 3 years.
[463] See *Lingens v. Austria*, § 46; *Mahmudov and Agazade v. Azerbaijan*, § 41; *Belpietro v.Italy*, §51. See also the paragraph "Right to criticism and right to report" in chapter No. 2 of this dissertation, p. 47.

basis to support it may be excessive" [464]. Statements of fact, instead, need to be supported at least by truthfulness – that is the fact that who is reporting the facts relied on solid sources and did his/her best to report the correct information.

The Strasbourg Court (and the constitutional) case law have firmly established, as part of the "public interest" defence, the right of the public to receive information and ideas of all kinds, even if sometimes not entirely confirmed. In addition, the Court(s) held that, in the context of public interest debate, journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation [465].

- ***Case Law***

The following cases aim to prove how the crime under Article No. 290 is overbroad and could be applied in many different situations - from cases of activism, to simple expressions of anger – threatening free speech and free expression. Even if only a few of the following cases led to a definitive conviction, the chilling effect following these kind of charges has always to be kept under consideration.

- Three members of the collective "Sa Domu Studentato Occupato Casteddu" (Sardinia) were charged for insulting the Armed Forces (under Article 290 of the Criminal Code) and for disseminating confidential documentation (under Article 326 of the Criminal Code): it led also to the seizure of computers, flags, banners, information material, leaflets and documents. The antimilitarist activists spread the schedule of *Nato* (*North Atlantic Treaty Organization)*'s exercises in Sardinia in January 2016: it has to be noted that Sardinia hosts military bases and rifle ranges in 15 locations [466] and there is a strong grass-root movement against the militarization of the Island; therefore, this kind of information has a public interest; moreover, the activists mocked a member of the Army online in November 2015 [467].

- Using famous slogan against police "A.C.A.B." (acronym of the sentence "All Cops Are Bastards") can lead to the accuse of vilifying the Institutions and the Army. This is the case of three ultras of the football team of Prato who wrote the

[464] See, for example, *Feldek v. Slovakia*, Application No. 29032/95, Judgment of July 12, 2001, §§ 75-76; see *also Steel and Morris v UK*, Application No. 68416/01, Judgment of 15/2/2005, 87.

[465] *Thorgeir Thorgeirson v. Iceland*, Application No. 13778/88, Judgment of 25 June 1992, § 65; *Pedersen and Baadsgaard v. Denmark*, Application No. 49017/99, Judgment of December 17, 2004, §71; *Prager and Oberschlick v. Austria*, Application no.15974/90, Judgment of April 26, 1995, § 38; *Perna v. Italy*, § 39.

[466] See the military basis and rifle ranges on Google Maps: https://www.google.com/maps/d/viewer?mid=1JCiFqCk7EzO2ywzjGIdBI9Rk37k&hl=it.

[467] See *Blitz cc in circolo antimilitaristi,* in ANSA.it, March 4, 2016, link: http://www.ansa.it/sardegna/notizie/2016/03/04/blitz-cc-in-circolo-antimilitaristi_7a6ac8fc-40d1-4edc-85a3-06d8afcd60b0.html.

acronym in a stadium and were convicted to 3.000 euros of fine (suspended) [468]. It is also the case of a 19-years old guy who wrote on some walls in Nardò (Lecce) phrases inciting to anarchy and the slogan "A.C.A.B." [469]. These cases remind the particular attention given to wall writings: for example, writing sentences on the public walls apologising for the acts committed by the "Red Brigades" was deemed to be aggravated instigation of soldiers to disobey the law (since communism would have subverted the ordinary system and the Army as well) [470].

- In the end of March 2016, the leader of *Lega Nord* Matteo Salvini was put under investigation under Article No. 290 for defining the Italian judiciary "disgusting". The beginning of the process is waiting for the authorization requested to the Minister of Justice Orlando [471].

- The case stems from an art piece by Goldiechiari displayed in the musem "Museion" of Bolzano in 2006 [472]: it consisted in the Italian national anthem (*Inno di Mameli)* played while a photocell was reproducing the flush noise at any passage. The piece was seized and the two artists were charged under Article No. 291 for vilification of the Italian Nation. For the prosecutors, this performance can be considered as objectively included in the concept of vilifying, demeaning, belittling, mocking something, which in the "collective feeling" is identified with the Italian Nation. This collective feeling could be "debunked" by the art piece under charge; it could —debunk […] the sacredness that accompanies the national anthem by combining it with everyday noises", vilifying the " Italianity" feeling protected by the rule. The concept of "Italianity" gets along with that of "Turkishness" which have been creating problems of foreseeability and proportionality [473].To conclude, in this case we are before an ART piece, therefore protected both under Article No. 21 and No. 33 of the Italian Constitution ("Freedom of the arts and sciences"). Art is considered among the "highest forms of expression" (judgment No. 59/1960); Article No. 33 renders art a "privileged subject" in the Italian system, free even from the "good customs" limit [474].

---

[468] See *Scritta contro I poliziotti, condannati tre tifosi del prato,* in *Il Tirreno.geolocal.it,* October 21, 2015; link: http://iltirreno.gelocal.it/prato/cronaca/2015/10/21/news/scritta-contro-i-poliziotti-condannati-tre-tifosi-del-prato-1.12300272.

[469] See *Lo cercano per un rave illegale e rivendica le scritte sui muri: denunciato,* March 28, 2015, link: http://nardo.lecceprima.it/scritte-muri-denuncia.html.

[470] Court of Cassation, judgment No. 10428 of 1989.

[471] *Matteo Salvini rischia processo per vilipendio della magistratura. Chiesta l"autorizzazione al ministro Orlando,* Il Fatto Quotidiano, March 29, 2016, link: http://www.ilfattoquotidiano.it/2016/03/29/lega-nord-salvini-rischia-processo-per-vilipendio-della-magistratura-chiesta-lautorizzazione-al-ministro-orlando/2590270/. See also the comment of Charlotte Matteini, *Perché difendo Matteo Salvini da una "schifezza" di processo,* link: http://www.fanpage.it/perche-difendo-matteo-salvini-da-una-schifezza-di-processo/.

[472] See N. CANESTRINI, *Vilipendio e libertà dell'arte: nazione, inno di Mameli e limiti dell'espressione artistica*, June 11, 2013, canestrinilex.com, link: http://www.canestrinilex.com/risorse/vilipendio/.

[473] See Article No. 301 of the Turkish Criminal Code, p. 115 of the current dissertation.

[474] C. ALFONSO, *Commentario alla Costituzione*, Art. 33, vol. I, Utet, 2006, p. 679 et seq. .

These considerations should make the Italian legislator meditate on the real need of maintaining Articles No. 290 and 291 and the relative fines, since the interests protected by these articles can be abused restricting arbitrarily freedom of expression. However, the Italian solution (that is- imposing fines rather than detention penalties) and the Bill of reform C-925 [475] - even if its parliamentary evaluation is stuck- is indeed useful for indicating the direction Turkey should follow in amending the correspondent provisions in the Turkish Criminal Code.

- **TURKEY**

- The Crimes of Lese Majesty and their Historical Reconstruction

Offence to the honour and dignity of the Sultan (itale- i lisan)

As I already explained in the introduction to this chapter, even if the notion of *crime politique* was initially used during the French revolution, the notion of "crimes against the State" originates from Roman Law. From that time onwards, you can find the distinction between crimes against the State of internal or external nature: the former category includes the crimes against the authority, honour and prestige of the sovereign. The countries which followed the Roman Law- tradition have maintained this distinction: for example, the *code pénal* of 1810, which was adopted by the Ottoman Empire in 1858, distinguished between *Des Crimes et Délits contre la sûreté extérieure de l‟ ètat* and *Des Crimes et Délits contre la sûreté intérieure de l‟état*: the second category contained the crimes against the honour of the sovereign, as well as the Ottoman Criminal Code was condemning the offence to the honour and dignity of the sultan (*itale-i lisan*). Adopting the Rocco Code in 1930, Turkey continued on the same path, distinguishing between acts against the international or internal personality of the State.

- *Law No. 5816 on crimes against Atatürk* [476]

An area in which there was no progress is that of Law No. 5816 on the protection of Atatürk [477]. It was enacted 13 years after Atatürk‘s death (July 25, 1951) and protects "Atatürk's memory" from being offended by any Turkish

[475] Another important amendment proposal which has to be welcomed regards an amendment to the Law on the Press No. 47/1948. The effort to strengthen the "right to reply and rectifications" in the new Article No. 8 of the Press Law is a commendable step and certainly a remedy for those in the public limelight. It is positive that the reparatory effect of the timely publication of a correction is added to the criteria for the assessment, by courts, of the damage resulting from defamation by the media (new Article No. 11 *bis*). Similarly, the proposal to eliminate the criminal offence following the publication of rectification is an important step in the direction of limiting the use of criminal provisions in relation to defamation (new Article No. 13), see *Opinion on legislation on defamation of Italy* (n° 715 / 2013), Venice Commission *supra* note No. 441, Remark No. 72.

[476] Atatürk is described as "the immortal leader and the unrivalled hero" by the preamble of the Constitution of Turkey.

[477] ATILLA YAYLA, *Yesterday, today, tomorrow: freedom of expression in Turkey report (1995-2015)*, "The Initiative for Freedom of Expression", January 2015, p. 85.

citizen [478]. For example, it poses a threat on those who criticize certain Atatürk's policies or practices [479].

Article No. 1 of Law No. 5816 states as follows:

Anyone who publicly insults or curses the memory of Atatürk shall be imprisoned with a heavy sentence of between one and three years.
A heavy sentence of between one and five years shall be given to anyone who destroys, breaks, ruins, or defaces a statue, bust, or monuments representing Atatürk or the grave of Atatürk.
Anyone who encourages others to commit the crimes outlined in the paragraphs above will be punished as if committing the crime.

Article No. 2 states as follows:

If the insult is carried out by two or more individuals or via the media, the sentence can be increased by half. If the crimes outlined in the second paragraph of Article No. 1 are committed using force, the penalty will be doubled.

This law is the source of many convictions of Turkey at the European Court of Human Rights , regarding the violation of freedom of expression. It turned out to be useful for the various governments and for the most various aims, such as approving the Internet regulation, Law No. 5651: in fact, the first time You Tube was shut down in Turkey, it happened due to this law [480].

In the case *Ahmet Yıldırım v. Turkey* (2013) [481], a violation of Article No. 10 ECHR was found because of an internal court decision to block access to *Google Sites*, which hosted an Internet site whose owner was facing criminal proceedings for insulting the memory of Atatürk. As a result of the decision, access to all the other sites hosted by the service was blocked [482].

---

[478] KAYA, MEHMED S., *The Zaza Kurds of Turkey: A Middle Eastern Minority in a Globalised Society*, Tauris Academic Studies, London, 2009, p. 209.
The inspiration of the law is often attributed to Professor Ernst Hirsch, one of the émigré professors who participated in major reform projects besides his teaching activities. Hirsch had Jewish origins and therefore escaped from his motherland, Nazi Germany. He became one of the most influential academics in Turkey, writing some of the most important books of philosophy of law and sociology of law that are still used in the Turkish Law faculties.

[479] E. ÖNDEROĞLU, *Comment to the Table of imprisoned journalists and examples of legislative restrictions on freedom of expression and media freedom in Turkey*, Office of the OSCE Representative on Freedom of the Media, 2015, p. 5.

[480] "The availability of defamatory YouTube videos involving Atatürk combined with increasing concern for the availability of child pornographic content as well as the availability of indecent and obscene content, Satanist content and websites which provided information about suicide, all of which deemed harmful to children, resulted with the development of a new parliamentary Bill on Internet", Y. AKDENIZ & K. ALTIPARMAK, *Internet: Restricted Access, A critical assessment of Internet Content Regulation and Censorship in Turkey,* Published with the support of 'Freedom of Expression" Programme of *İnsan Hakları Ortak Platformu*, November 2008, p. 12-13.

[481] *Ahmet Yıldırım v. Turkey,* Application no. 3111/10, judgment March 18, 2013, link: http://hudoc.echr.coe.int/eng?i=001-115705.

[482] Council of Europe, *Turkey, Press Country Profile,* June 2016, http://www.echr.coe.int/Documents/CP_Turkey_ENG.pdf. See more in the interview to Ilay Yılmaz - lawyer of Twitter, YouTube and Google in Turkey- in the end of this dissertation.

In the *Murat Vural v. Turkey* case (2015) [483], a violation of Article No. 10 was found following his complaint about the lengthy prison sentence he had to serve for pouring paint over statues of Mustafa Kemal Atatürk as a political protest. The fact that the offence had been committed in a public place also led the trial court to increase the sentence by half in accordance with section No. 2 of Law no. 5816. The trial court also considered that the applicant had committed the offence on five separate occasions, and decided to multiply the sentence by five. The applicant was thus sentenced to a total prison term of twenty-two years and six months for his above-mentioned actions [484]. After the appeal, the sentence was decreased to thirteen years, one month and fifteen days' imprisonment. Because of "the effects of his actions on the public", the trial court concluded that the applicant's actions had amounted to "insults" [485].

- *The New 2005 Turkish Criminal Code: The Changes after Law No. 5377*

The legal reform process of the Turkish Criminal Code started more than twenty years ago. In the early 80's a law commission was set up: almost all the criminal law academics participated to some extent and the commission concluded its work in 2001 presenting the draft code to the public. The fact that up to year 2006 there were still only fourteen criminal law professors in Turkey can partially explain why this process took so long. Yet in 2002 the draft law was pushed aside by the new AKP government and a new draft was prepared [486]. New young professors were nominated as members of the commission: they were more influenced by German Criminal Law rather than from the French tradition, differently from the older jurists. In 7 months the draft was turned upside down: this fact was strongly criticized in the Turkish academic world because most of the modifications were made too quickly. Anyway, most of them regarded the general part of the Criminal Code [487]. The special part is still greatly stemming from the Italian and French traditions.

The new Code was enacted on the 26th of September 2004 and came into force on June 1, 2005: despite in the new Turkish Criminal Code of 2005 the number of provisions diminished, the number of people detained resulted doubled in 2010 [488].

Among the critics, OSCE ("Organization for Security and Co-operation in Europe") affirms that there is still an automatic punishment for media involvement, and the needed extra protection for the public role of the media is missing [489]: for example Article No. 299 was clearly stating that "the penalty shall be increased by one third if it is committed by way of press and media";

---

[483] *Murat Vural v. Turkey,* Application No. 9540/07, judgment January 21, 2015, link: http://hudoc.echr.coe.int/eng?i=001-147284.
[484] *Murat Vural v. Turkey,* Para. No. 14
[485] *Murat Vural v. Turkey,* Para. No. 20.
[486] HUMAN RIGHTS AGENDA ASSOCIATION, *Freedom of expression in the new Turkish Criminal Code,* Izmir, 2006, Introduction.
[487] S. TELLENBACH, *L"influenza del diritto Tedesco sul nuovo codice penale turco,* in *Diritto penale della Repubblica di Turchia,* Padova University Press, 2012, p. 117- 123.
[488] See the paragraph *"Increasing jailing and decrease of procedural guarantees"* in Chapter No. 1, p. 35 of this dissertation.
[489] OSCE, *Review of the Draft Turkish Penal Code: Freedom of Media Concerns,* Vienna, May 2005, link: http://www.osce.org/fom/14672?download=true.

similarly, Article No. 301 still uses the vague wording of "publicly" in describing the constitutive elements of the act [490]. Clear stipulations securing the right of journalists to freely spread information and discuss public-interest issues should be inserted. Also, referring to offences against symbols of state sovereignty and reputation of its organs, the report states: "We encourage the Turkish legislators to decriminalize defamation and libel; to transfer the handling of those offences to civil law courts". The Turkish civil society (especially, NGOs dealing with human rights issues but also lawyers, journalists and intellectuals) raised concerns as to the 2005 Reform. Above all, the draft laws were written without consulting the views of civil society regarding the necessary amendments or abolitions of the existing opinion crimes. Moreover, the new Turkish Criminal Code fails again in being harmonized with the Constitution.

To sum up, the possibility to make substantial legal changes to the Criminal Code in order to align it with the international standards has been mostly lost. I will say more on the amendments of the particular provisions under analysis in the following paragraphs.

- ***Offences against Signs of Sovereignty and Supreme Political Organs of the State***

  - ***Article No. 299, "Insults against the President of the Republic"***

Any person who insults the President of the Republic shall be sentenced to a penalty of imprisonment for a term of one to four years.
Where the offence is committed in public, the sentence to be imposed shall be increased by one sixth.
The initiation of a prosecution for this offence shall be subject to the permission of the Minister of Justice.

Article No. 299 substitutes Article No. 158 of the former Criminal Code, which was also considered in numerous instances and was closely following the letter of the provision under Article No. 278 of the Italian Criminal Code. As far as it concerns the interest defended by this article, all the considerations done previously regarding Article No. 278 of the Italian Criminal Code are still valid: the prestige of the institution is protected from attacks which could diminish the honour of the Head of the State, because of his function of representing, among other things, State unity [491].

According to paragraph No. 3 of this article, "the initiation of a prosecution for this offence shall be subject to the permission of the Minister of Justice": it is similar to the provision of Article 301(4) TCK; the same permission is necessary also under Article No. 278 and 290 of the Italian Criminal

[490] It is directly adopted from Article No. 290 of the Italian Criminal Code, which also provides for the offence to be committed "publicly".
[491] Another example of the exceptional nature of the figure of President of the Republic in Turkey is the fact that his/her acts [and those of the Supreme Military Council] are not subject to any judicial review, instead than for the other acts or actions of administration imposing restrictive measures (Article No. 125 of the Turkish Constitution, as modified in September 12, 2010 through Act No. 5982) .

Code in order to start a prosecution for insulting the Head of the State and State Institutions. This requirement will be better analysed in the paragraph dedicated to Article No. 301 TCK.

Moreover, also in this context, it is important to make a distinction between value judgments (which are subjective assessments of a person) and statements of facts (which are susceptible of proof and enjoy the defence of truth[492]). This distinction was already fully discussed referring to the Italian discipline which is basically overlapping with the European one [493].

The following cases are just two examples of the ECtHR jurisprudence on Article No. 299 (and the former Article No. 158), which is generally stating that no expression and offence against some special figures of the state should be criminalized:

- *Artun and Güvenler v. Turkey* (2007) [494]: It considered the application of Article No. 158 of the former Code and already held that "conferring a privilege or special protection to the Head of State, shielding him or her from criticism solely on account of his funcion or status, cannot be reconciled with modern practice and political conceptions". The EctHR stated that "the limits of acceptable criticism are accordingly wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance" [495].

- *Tuşalp v. Turkey* (2012) [496]: In 2006, Erbil Tuşalp, journalist for the daily newspaper *Birgün,* wrote an article accusing the [at the time] Prime Minister Erdoğan [497] of "lying about matters from national income to inflation to the budget" and granting immunity to his friends who were facing corruption charges. In his second article, he alleged Erdoğan of having psychological problems with hostile attitude towards academia, journalists, and opposition parties**.** The case regards a request of compensation from Tayyip Erdoğan for an attack on his *personal rights.* Therefore, not criminal but civil law was involved: the journalist was fined 5.000 Turkish Liras for each article deemed to be defaming. In *Tuşalp v. Turkey*, the Court came to the conclusion that the domestic courts had failed to establish convincingly any pressing social need for putting the Prime Minister's personality rights above the journalist's rights and the general interest in promoting the freedom of the press where issues of

[492] UN HUMAN RIGHTS COMMITTEE, *General comment No. 34, supra* note No. 149, Para. No. 47.
[493] See paragraph No. 2b) of Chapter No. 2 of this dissertation ("Freedom of expression's appendixes: the right to criticize and the right to report"), p. 47 of this dissertation.
[494] *Artun and Güvenler v. Turkey*, App. No. 75510/01, judgment June 26, 2007; link: http://hudoc.echr.coe.int/eng?i=001-81181.
[495] *Artun and Güvener v. Turkey*, Application No. 75510/01, Judgment of September 26, 2007, para. 26.
[496] *Tuşalp v. Turkey,* Applications nos. 32131/08 and 41617/08, judgment May 21, 2012; link: http://hudoc.echr.coe.int/eng?i=001-109189.
[497] Recep Tayyip Erdogan performed the office of Prime Minister from 2003 to 2014, when he became President of the Republic of Turkey.

public interest are concerned. The Court held that the issued civil judgments were in violation of Article No. 10 because Tusalp's remarks, while may be considered offensive or inelegant, were value judgments based on particular facts or events. It emphasized, however, that an offensive language may "fall outside the protection of freedom of expression if it amounts to wanton denigration, for example where the sole intent of the offensive statement is to insult". Here, the Court concluded that the remarks contained in the articles were not merely personal attacks against the Prime Minister but were opinions on topics in the public interest.

To conclude, the domestic courts of Turkey overstepped their margin of appreciation and the judgments were disproportionate to the legitimate aim of protecting the Prime Minister's personal reputation.

- ***The Increasing Case Law in 2015*** [498]

The files that were submitted to the Minister of Justice for obtaining the permission to launch an investigation on insult to the President increased from 397 in 2014 to 962 in the first six months of 2015 alone [499]; between August 2014 and March 2015, 8 people were formally arrested under this article [500].

During the visit to Ankara for drafting the Venice Commission's Report, the Turkish authorities justified the increase of prosecutions under Article No. 299 with the fact that, since the constitutional reform of 2007, the President of the Republic is elected by popular vote; therefore, he is more involved in politics and more exposed to attacks and unjustified insults [501]. However, those attacks are just a minimum part of the facts that lead to prosecution.

I interviewed two Turkish lawyers, namely Veysel Ök and Tolgay Güvercin [502]: the former, is the lawyer of the *Nokta* magazine. In 2015, the police raided the magazine pursuant to an investigation for insulting the President and disseminating terrorist propaganda ,and the last edition of the magazine was not published following a ban [503]. Tolgay Güvercin is the lawyer of the daily newspaper *Bir Gün*: this newspaper has been particularly under charge in the last two years, leading it almost to bankruptcy because of the high number of trials against its journalists and the lack of advertisments' insertions. "As far as it concerns Article No. 299, *Bir Gün* itself is full of examples. There is an on-

[498] See also *Intellectuals warn controversial Article 301 resurrected,* by "Today's Zaman" (now closed) and reported in the website of P24 ("Platform for independent journalism"), October 6, 2015, http://platform24.org/en/articles/310/intellectuals-warn-controversial-article-301- resurrected (9/17/16).

[499] 2015 Report on Turkey", *supra* note No. 375, p. 64.

[500] CoE, EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW (VENICE COMMISSION), *Opinion on Articles 216, 299, 301 and 314 of the Penal Code of Turkey,* 106th Plenary Session (Venice, 11-12 March 2016), p.13.

[501] For another example of how Article No. 299 is increasingly used in the last decade, see HUMAN RIGHTS AGENDA ASSOCIATION, *Freedom of expression in the new Turkish Penal Code,* Izmir, 2006: it does not even mention Article No. 299.

[502] See the interviews in the end of this dissertation.

[503] The cover of the magazine depicted the President taking a selfie while in the background a coffin draped with a Turkish flag was passing, symbolizing the increasing violence escalating in South- Eastern Turkey, between PKK and the Turkish army. The same case is relevant also regarding the charge of "provoking people to commit crimes" under Article No. 214 TCK.

going prosecution against Berkant Gültekin (there are 3- 4 cases against him) , Can Uğur, Bariş Ince (again, there are 3- 4 cases against him). In one case, they all together signed an article, were the expression under charge was also in the heading of the newspaper (17 Feb 2015)[504]: "*Hırsız Katil Erdoğan*" ("Erdoğan killer and thief") was the heading, because the content was speaking about some student protesters who were put under trial for having shouted it. The students' case was dismissed because the judge said it is a *political* case[505]. Instead the journalists were charged to 11 months of detention from the Istanbul 2nd Criminal Court, and now they are waiting for the appeal . If we will lose, they'll not go to jail, if they avoid to commit the same crime again for 1 year" [506]. Another case in *Bir Gün* involves the journalist Onur Erem, that reported how Google autocomplete while typing the words "*hirsiz katil*" brought up "Erdoğan" and "AKP" - the President and the ruling party - as the first two suggestions. He merely reported the fact thinking it's newsworthy and he faces up to 5 years of jail" [507].

Some first instance courts recently issued acquittals for the same expression "Thief and Murderer". It has to be underlined that those expressions were addressed to Erdoğan when he was the Prime Minister of Turkey, and therefore the defendants were charged under Article No. 125, for the common crime of defamation [508]; nevertheless, the Principal Public Prosecutor recommended that the chamber of the Court of Cassation uphold the acquittals pronounced by the first instance courts: in fact, the expression "Thief and Murderer", was considered as falling outside the scope of freedom of expression [509]. Moreover, the Turkish authorities stressed that in the case of other expressions having sometimes sexually explicit content, the cultural and moral specificities of the country should be taken into account [510]. While Turkish authorities seemed to disclose to the European Council's representatives only cases of statements containing profanity, the Venice Commission observed that investigations and prosecutions of journalists in particular often concern topics of public interest, such as the Syrian refugee crisis [511]. Instead, in a public debate context, the protection of criticism of public figures should be particularly high.

---

[504] Read *Four journalists face trials for insulting Erdoğan,* in *Hurriyet Daily News,* December 2, 2015; link: http://www.hurriyetdailynews.com/four-journalists-face-trial-for-insulting-erdogan.aspx?pageID=238&nID=91985&NewsCatID=339.

[505] See see the original judgment and some related ones in the Final Appendixes of this dissertation.

[506] See the interview to Tolgay Güvercin in the end of this dissertation

[507] *Turkish journalist faces prison over insulting politicians,* March 23, 2016,DW News; link: http://www.dw.com/en/turkish-journalist-faces-prison-over-insulting-politicians/a-19135465.

[508] Bursa First instance criminal court, E. 2014/558, K. 2015/562, September 15, 2015 and Niğde First instance criminal court, E. 2014/499, K. 2015/477, September 11, 2015.

[509] Opinion of the Public Prosecutor of the Court of cassation, no. 2015/380064, December 29, 2015.

[510] VENICE COMMISSION, *supra* note No. 501**,** Remark No. 61, p. 16.

[511] Prosecutions of columnist Ertuğrul Özkök of Daily Hürrıyet for having referred to the President as a dictator. Although Özkök did not mention anyone specifically, the article referred to a "dictator" who thought the country was the "property of his father"; link to the article under charge: http://www.hurriyetdailynews.com/hurriyet-columnist-faces-up-to-five-years-in-prison-for-insulting-president-erdogan-.aspx?pageID=238&nID=91776&NewsCatID=339.

What we always have to stress in these cases is that even if they do not end up with a detention sentence, there would always be a *chilling effect* on the people's free expression! The Turkish civil society organizations stress the excessive use of Article No. 299 and the fact that the provision is used in order to silence dissenting voices and to intimidate political opponents, making no distinction between criticism and defamation/insult. If the sole intent of an expression is being a gratuitous personal attack, then a proportionate sanction would not, generally speaking, be a violation of freedom of expression [512].

- ***Article No. 301: Degrading Turkish Nation, State of Turkish Republic, the Organs and Institutions of the State***

A person who publicly degrades the Turkish nation, the State of the Republic of Turkey, the Grand National Assembly of Turkey, the Government of the Republic of Turkey or the judicial bodies of the State, shall be sentenced to a penalty of imprisonment for a term of six months to two years.
A person who publicly degrades the military or security organisations of the State shall be sentenced to a penalty in accordance with paragraph 1 above.
The expression of an opinion for the purpose of criticism does not constitute an offence.
Carrying out an investigation into such an offence shall be subject to the permission of the Minister of Justice.

This article substitutes Article No. 159 [513] which was drafted in order to punish some forms of defamation against the Turkish nation and different institutions. Article No. 159 derived from the Zanardelli Code, and Article No. 301 is also following closely Articles No. 290 and 291 of the Italian Criminal Code.

Article No. 301 is considered controversial because of the vagueness of the covered object ("Turkish Nation") and of the punished behavior ("denigration"), which would allow the government to punish not only "insults" but also mere mockery-speeches.

Focusing on the term "Turkish Nation", it is introduced only in 2008 with an amendment [514]: before this, Article No. 159 and Article No. 301 were criminalizing the offence to "Turkishness" (*Türklük*). This concept was interpreted by the Turkish Court of Cassation as "the entirety of national and moral values which is composed of human, religious and historical values as well as of national language, national feelings and traditions" [515]. Because of the possible broad interpretation of this term, the ECtHR suggested that serious doubts could arise as to the foreseeability of the offence. Moreover, in the case *Altuğ Taner Akçam v. Turkey,* the Strasbourg Court considered that, even after

[512] See, *mutatis mutandis,* ECtHR, *Skalka v. Poland,* no. 43425/98*,* May 27, 2003, para. 34, *Pakdemirli v. Turkey*, Para. 46.
[513] Article No. 159 TCK derives from the Zanardelli Code but in the Italian version there was not such a term as 'Turkishness" ('Italianity"); it was added in the Turkish code. For the concept of Italianity , see Article No. 291 of the Italian Criminal Code.
[514] April 30, *2008*, *L*aw No. 5759. The law was subsequent to the strong national and international pressures that followed the assassination of Hrant Dink (see better the Dink's case in the "Case Law" section of the current paragraph).
[515] Cited in *Dink v. Turkey,* Para. No. 28.

the substitution of the term *Turskishness*, "there seems to be no change or major difference in the interpretation of these concepts" and it "does not contribute to the widening of the protection of the right to freedom of expression"[516]. In particular, the lack of specifications of what the "national feelings and traditions" are, leads to restricting whatever is not in line with the official ideology; instead of an approach which ensures the "sacred state", the soveregnty of society should receive greater defence [517].

The problem of foreseeability is emphasized also by the term "degrades", which lacks any specification. Similarly, the word *vilification* in the Italian system received a certain interpretation in the course of the years but remains open to different interpretations.

The same 2008 reform diminished the maximum prison sentance from three to two years in a clear superficial attempt of demonstrating that the Turkish authorities are working in the direction of limiting the consequences for denigrating the Institutions [518]; in line with this, the former paragraph No. 3, providing for an increased penalty when the fact is committed by a Turkish citizen abroad was repealed and Paragraph No. 4 (current Paragraph No. 3), stating that "the expression of an opinion for the purpose of criticism does not constitute an offence" has been maintained. However, also the amended version of the norm is still criticized for being a burden upon freedom of thought and expression [519]. This amendment was described with the adjective "cosmetic" [520].

Paragraph No. 4 requires the authorization of the Minister of Justice for starting an investigation under Article No. 301: this requirement was reintroduced in 2008, re-proposing the solution of former Article 159. Even if the data submitted by the Turkish authorities to the team drafting the Venice Commission's report show a decrease in the number of prosecutions under Article No. 301, in 2015 the Minister of Justice authorised judicial investigation in 486 files, against 107 in 2014 [521]. The explanatory note provided by the Turkish authorities for drafting the Venice Commission's report emphasises that the need for authorization should be considered a positive development, 'as the Minister of Justice shall use his discretion for the benefit of the country' [522]. Şişli (Istanbul) Second Criminal Court of first instance asked for the constitutional

---

[516] *Altuğ Taner Akçam v. Turkey, supra* note No. 428, Para. No. 92.

[517] HUMAN RIGHTS AGENDA ASSOCIATION, *supra* note No. 24, Article No. 301, p. 54; C. FIORE, *supra* note No. 17.

[518] "The importance of this particular amendment is related to a technicality. According to Turkish Criminal Law, execution of an imprisonment for a conviction to two years or less can be postponed on the discretion of the court. Decreasing the maximum penalty will now make sure that any conviction for violating Article 301 will be under this two years limit and therefore may be postponed", see KAAN KARCILIOĞLU, *Article 301 of Turkish Criminal Code Amended,* IRIS-Merlin Database (Database on legal information relevant to the audio-visual sector in Europe), 2008, link: http://merlin.obs.coe.int/iris/2008/6/article28.en.html.

[519] See the NGOs' opinions in the Venice Commission's Report, *supra* note No. 501, Remark No. 82, p. 21.

[520] Among others, B. ALGAN, *The Brand New Version of Article 301 of Turkish Penal Code and the Future of Freedom of Expression Cases in Turkey,* in *German Law Journal,* vol. 12, 2008, p. 2238- 2239.

[521] '2015 Report on Turkey', *supra* note No. 375, p. 64.

[522] Venice Commission's report, *supra* note No. 501, Remark No. 90, p. 23.

review of Article No. 301 (4), claiming that it was contrary to the principle of the independence of the judiciary and separation of powers. The Constitutional Court, in 2009, dismissed the appeal concluding that the power of the Minister 'does not concern a judicial review by the Minister, but, rather a political discretionary power that should be used in the interests of the State and society[523]. Nevertheless, 'any political change in time might affect the interpretative attitudes of the Minister of Justice and open the way for arbitrary prosecutions' [524]. For this reason, part of the Turkish scholarship thinks that it is a good idea to have a filter to prosecutions but the authority empowered to do so should be an impartial body.

Similarly to the Italian Article No. 290, Article No. 301 requires the act to be committed 'publicly': this requirement is satisfied when the expression is spread through the press, through any kind of written material or in a meeting where there is more than one person [525]. Moreover, also in the Turkish case the vilification has to be directed towards the institution as a whole, as well as in Italy, and not towards the single members of the Grand Assembly of Turkey or of the Government, in order to constitute a crime under this provision [526].
Instead, differently from Italian Article No. 290, Article No. 301 explicitly reminds in Paragraph No. 3 that 'the expression of an opinion for the purpose of criticism does not constitute an offence'. Even if it is a repetition (the general rule on the exercise of a right is provided under Article No. 26 TCK, a norm which corresponds to the Italian Article No. 51), it is useful for underlining the constitutional right to criticize in this context. However, again, there is a thin line between the expression of legitimate criticism and vilification: the considerations done in this regard during the analysis of Article No. 290 are still valid. The official comment to the 2008 reform establishes that a speech or a text has to be evaluated in its entirety: a single word or expression cannot justify the use of criminal law. Nevertheless, this principle is currently not followed by the Court of Cassation.

As well as in Italy, the scholarship which speaks in favour of the maintenance of Article 301 believes that the defended interests are more serious than the mere honour of the institutions, namely the Article defends the public quiet and the efficiency of the institutions. This *functional interpretation* would be in line with the constitutional order. Ali Emrah Bozbayındır reminds that this is also in line with the idea of restrictions to the right to freedom of expression under Article No. 19 ICCPR: they are justified on the grounds of 'national security, public order, health and public morals' [527]. However, Bozbayındır recognizes also that if provisions like Article No. 301 are maintained, 'they must be applied by courts with the same standards of

[523] Turkish Constitutional Court, judgment E. 2009/25, K. 2009/57.
[524] *Altuğ Taner Akçam v. Turkey, supra* note No. 428, Para. No. 94.
[525] T.Y. SANCAR, *Alenen Tahkir ve Tezyif Suçları,* 2006, p. 176; see also the Turkish Court of Cassation on diffusion of written material, *Yargıtay,* CGK, 2002/ 9- 95, 2002/234.
[526] T.Y. SANCAR, *supra* note No. 525, p. 93.
[527] A. E. OZBAYINDIR, *Denigrazione della nazione turca, delle istituzioni e degli organi dello Stato: un"incriminazione ingiustificabile?,* in *Diritto Penale della Repubblica di Turchia,* Padova University Press, 2012, p. 221.

objective likelihood and *immediate danger* that govern the application of the laws against provoking and inciting violence". Otherwise sedition statutes are likely to do far more social harm than good. This kind of laws "when properly interpreted by enforcers and courts are at best legal redundancies. At worst they are corrosive of the values normally protected by freedom of expression", the philosopher Feinberg stated [528].

- ***Case Law***

Veysel Ök stressed that Article No. 301 has a very political content, and therefore its application is changing up to the political context.

- *Orhan Pamuk* (2006)*:* This case concerns the thorny question of Armenian genocide [529]. The famous writer and Nobel laureate Orhan Pamuk stated, during an interview with a Swiss newspaper, that "thirty thousands Kurds and a million Armenians were killed in these lands". He was charged under Article 301 and the fact raised the reactions of many international NGOs and of the international public opinion. In January 2006, the charges were dropped because no permission from the Minister of Justice was obtained.

- *Ahmety Altan* (2008)*:* In 2008, Ahmet Altan of *Taraf* was accused of criticizing Atatürk and the Turkish history after writing an article titled "Ah Ahparik" ('Oh brother' in Armenian) saying that "the Unionists [of the Ottoman era] made a cruel genocide" [530].

- *Fırat (Hrant) Dink v. Turkey* (2010) [531]: Dink was a Turkish- Armenian journalist writing for the newspaper *Agos.* Between 2003 and 2004 he wrote a series of articles about the identity of Turkish citizens with Armenian origins. He was charged under Article 301 in 2006 and received a six-month suspended sentence of imprisonment. This verdict did not respect the principle, stated in the official comment to the 2008 of Article 301, that a single word or expression cannot justify the resort to criminal law [532]. In June 2007, he was murdered by a nationalist.
  The ECtHR considered the verdict lacking of any "pressing social need" and - together with the authorities' failure to protect Dink against attacks of extreme nationalist groups - Turkey's "positive obbligations" regarding Dink's freedom of

---

[528] J. FEINBERG, *Limits to the free expression of opinion,* in *Philosophy of Law,* II ed., 1980, p. 202.
[529] See *Altuğ Taner Akçam v. Turkey, supra* note No. 428. See also the Turkish provisions on incitement to hatred (Articles No. 214- 18 TCK) later in this dissertation.
[530] E. ÖNDEROĞLU, *Writer And Journalist Ahmet Altan Charged With Insulting Turkish Nation,* September 12, 2008, http://bianet.org/english/freedom-of-expression/109701-writer-and-journalist-ahmet-altan-charged-with-insulting-turkish-nation.
[531] *Dink v. Turkey,* App. No. 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09, judgment December 14, 2010; link (French version): http://hudoc.echr.coe.int/eng?i=001-100383.
[532] The dissenting opinions in the Dink's case (internal judgment) of the former President of the Court Osman Şirin and of the members Muvaffak Tatar and H. Yaver Aktan are based on the contrast with this principle. This clears also the tension between progressive and orthodox judges in the Turkish judiciary.

epression had not been complied with [533]. Finally, the Court expressed doubts as to the possibility of pursuing the legitimate aim of protecting public order, in the absence of incitement to violence: therefore, it expressed doubts as to weather the protection of the prestige of State organs is useful in this sense [534].

- *Academics for Peace* (2016) [535]: On January 14, 2016, 27 academics were detained for interrogations after having signed a petition with more than other 1.000 people asking for Peace in the South- East of the country, where there are on-going violent clashes between the Turkish Army and the PKK. The academics accused the government of breaching international law [536]. An investigation started upon those academics under charges of "terrorism propaganda", "incitement to hatred and enmity" and for "insulting the State" under Article No. 301.

To conclude, Article No. 299, similarly to Article No. 278 of the Italian Criminal Code, provides for a detention penalty: however, under Article No. 19 ICCPR the United Nations Human Rights Committee states that "State parties should consider the decriminalization of defamation and, in any case, the application of criminal law should only be countenanced in the most serious cases and imprisonment is never an appropriate penalty" [537]. Moreover, the developments in Europe indicate that there is an emerging consensus for decriminalising or at least restricting the range of sanctions and of cases for the enforceability of such provisions [538]. Moreover, in the case *Eon v. France,* the ECtHR found that even a fine of 30 euros in criminal proceedings was likely to have a chilling effect on satirical forms of expression. Therefore, the Italian and Turkish minimum sanction of one year appears completely disproportionate. Italy and Turkey should align their norms with those trends and with the international standards, providing for and enforcing the least intrusive instrument which might achieve the protective function: in this regard, I think Article No. 278 of the Italian Criminal Code and Article No. 299 TCK should be completely repealed and substituted by civil provisions [539].

---

[533] *Dink v. Turkey,* Para. No. 137.
[534] *Dink v. Turkey,* Para. No. 133.
[535] See their official website: (English version),http://internationalsolidarity4academic.tumblr.com/,(Turkish version): https://barisicinakademisyenler.net/.
536 See *Turkey rounds up academics who signed petition denouncing attacks on Kurds,* in *The Guardian,* January 15, 2016: https://www.theguardian.com/world/2016/jan/15/turkey-rounds-up-academics-who-signed-petition-denouncing-attacks-on-kurds.
[537] UN HUMAN RIGHTS COMMITTEE, *General comment No. 34, supra* note No. 149, Para. No. 47.
[538] VENICE COMMISSION, *Opinion on legislation on defamation of Italy* (n° 715/2013), *supra* note No. 441, 2013, Remark No. 57.
[539] As far as Italy is concerned, a draft for the amendment of Article N. 278 is present in the Reform Bill No. C- 925 but it is stuck and this is not a promising element; speaking about Turkey, the recent statement of President Erdoğan is not promising either: "The press in Turkey had been very critical of me and my government, attacking me very seriously. And regardless of those attacks, we have been very patient in the way we have responded to them"; see *I"m not at war with the press, says Turkish President Recep Tayyip Erdogan,* CNN, March 31, 2016, link: http://edition.cnn.com/2016/03/31/middleeast/recep-tayyip-erdogan-amanpour-interview/index.html.

Regarding Article No. 301 TCK, there is a great international pressure for its repeal. Although this great pressure is justified by the high number of prosecutions made under this article and the provision of a detention penalty, I find it superficial not to insist on Italy as well for the repeal of the corresponding Article No. 290. Both of the Articles suffer from their vague wording: the lack of the necessary foreseeability for citizens may lead them to self-censorship, causing a "continuous violation" of the right to freedom of expression [540]. It is true that no detention penalty is provided under Article 290 and a few prosecutions stem from this provision: however, this anti-historical norm remains at the power's disposal for a potential disproportionate censorship of public dissent and there is no real need for protecting the above-mentioned State interests. Moreover, it has to be noted that a repressive application of the crimes under analysis causes a greater domestic and international attention on the relevant government, thus leading a result which is opposite to the norm's objective. In fact, the provisions protecting the State personality aim at defending the State credibility and prestige [541].

Considering that penal coercion is state coercion and the punishable crimes are "wrongful from the standpoint of a political sovereign claiming a monopoly on legitimate coercion" [542], Professor Brudener makes the following assertions: since penal coercion is a question of wrongs to the sovereign, legitimate public coercion must serve "public reason", namely "any interest that is necessarily rather than contingently shared "that is, shared by all subjects". Therefore, only these shared interests can be understood to be public rather than merely the private interests of the State or any other person. That is why no reasons are lasting, admitting that they ever existed, for maintaining a penal coercion in the case of insult to the President, the Nation, the Army, the Institutions, the State as an anthropomorphic figure [543].

[540] *Altuğ Taner Akçam v. Turkey, supra* note No. 428, Paragraphs No. 49-51, 62-64, 68, 75, 77, 94 – 96.
[541] B.L. INGRAHAM, *Political Crime in Europe,* University of California Press, 1979, p. 324.
[542] A. BRUDNER, *Punishment and Freedom,* Oxford University Press, 2009, p.21 et seq.
[543] The image of a State with an anthropomorphic ontology is suggested by V.MASARONE, *supra* note No. 89, p.19.

3.2- CATEGORY No. 2: TERRORISM AND COUNTER- TERRORISM

Sovereign is he who decides on the exception.

CARL SCHMITT

Those who would give up essential liberty, to purchase a little temporary safety, deserve neither liberty nor safety.

BENJAMIN FRANKLIN

3.2 a) The Notion of Terrorism

"Terrorism" is a political term [544]. Consequently, it can change with the political situation of the moment and adapt to the current dominant ideology: this is possible because the notion is vague and has never been defined clearly.
"Because of the lack of an agreement on what or who has to be combated, the counter-terror measures can easily be abused; they can be enforced for justifying "legalized" violent forms of repression against legitimate political oppositions or against dissidents" [545].

Adopting a world-wide definition may diminish the effects of some overbroad definitions adopted on a regional scale [546]. In particular, it is necessary to identify the peculiar distinguishing factors determining if a terrorism act has taken place or not [547]. In this regard, Professor Antonio Cassese considers that, outside the situations of on-going armed conflict, the requirements of an international concept of terrorism can be considered the following: 1. The act has to be considered relevant under criminal law in most of the countries (e.g. homicide, kidnapping, torture etc…); 2. The act aims to coerce the government, an inter- governmental body or a non-governmental international body; it does so through actions that instil terror in people or through the threat of violent actions (such as blasts or kidnapping the president and so on); 3. The act is motivated by political, religious or ideological reasons, namely it has no private purpose [548].

Is it possible to understand the terrorist phenomenon in the light of the right to self-determination? This question is particularly important speaking about Kurdish separatism: the Kurdish question is complicated and stems partially from the division of the ethnic Kurds among different States (Iraq, Iran, Syria, Turkey) due to the colonialist and post-colonialist pressure. The right to self-

[544] GUNTHER JAKOBS and his theory of the criminal law of the enemy, see Chapter No. 1 of this dissertation, p. 32.
[545] C. DI STASIO, *La lotta multilivello al terrorismo internazionale. Garanzia di sicurezza versus tutela dei diritti fondamentali,* Giuffrè, 2010, Introduction
[546] A. GIOIA, *Terrorismo internazionale, crimini di guerra e crimini contro l'umanità*, in "Rivista di diritto internazional", vol. LXXXVII, p. 5- 69.
[547] The first attempt to enact a Convention for the prevention and repression of terrorism was in 1937 after the assassination in Marseilles of the King of Jugoslavia Alessandro and the French Minister of Foreign Affairs Barthou. One of the reasons why the Convention was not enacted relied on the overbroad definition of " terrorism".
[548] A. CASSESE, *Lineamenti di diritto penale internazionale,* Il Mulino, 2005, p. 164 et seq.

determination is expressly recognized in another (failed) UN attempt to create an *ad hoc* Committee on international terrorism, with the difficult scope of studying the roots of the phenomenon, taking into consideration "the inalienable right to self- determination and the independence of all the people subject to colonial and racist regimes and to other forms of foreign domination"; the "legitimation of the struggle" has also to be considered, in particular the struggle of movements for national liberation. These considerations already contain a lot of the necessary elements for evaluating if an action falls has to be included in the concept of "terrorism": colonialism, foreign domination, self- determination, liberation [549].

These few elements show that the terrorist phenomenon already had an international dimension many decades ago. Nevertheless, it is clear that only in the last fifteen years the urgency for an international response to the terrorist threat has become a predominant priority internationally: the World Trade Center attacks on 9/11/2001 together with the attacks in Madrid, London, Sharm El Sheik led to an enormous international reaction, the so-called "war against global terrorism". To be precise, a juridical reaction began as far back as 1999 with the "International Convention for the Suppression of the Financing of Terrorism"[550], and continued with Resolutions No. 1368, 1373 and 1377 of 2001 of the UN Security Council asking for international collaboration in searching, arresting and sanctioning terrorists. Moreover, an *ad hoc* Committee created in 1996, has been trying since 2000 to draft a "*Comprehensive Convention on International Terrorism"* that is still in a deadlock because of the difficulties in finding a shared notion of terrorism. In particular, the States remain divided over domestic and State terrorism and the balance with the right to self-determination [551]. An "indirect" notion of terrorism can be found in the 1999 "Convention on Financing Terrorism", that states under Article No. 2 that the relevant behaviour relates to: 1. Acts "which constitute an offence within the scope of and as defined in one of the treaties listed in the annex"; 2. "Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a

[549] In 1972, the UN – despite the opposition of many Western states- adopted resolution No. 3034 which individuated the causes of terrorism in "misery, frustration and desperation that induce individuals or groups to sacrifice human lives trying to obtain radical changes".

[550] See the Convention at http://www.un.org/law/cod/finterr.htm (9/17/16). The Convention was ratified in Italy with Law No. 7 of 2003 (January 27) and, under Article No. 117 of the Italian Constitution, it has infra- constitutional force.

[551] For example, according to Arab diplomats, Israel has to be singled out for what they call "state terrorism". See the report of the UN Sixty-seventh General Assembly, Sixth Committee, 1st & 2nd Meetings (October 2002) : the countries that stressed more than others on the right to self-determination and struggles for liberation were Egypt, Iran, Saudi Arabia, United Arab Emirates, Kuwait, Pakistan, Bangladesh, Malaysia, Syria, Yemen; link: http://www.un.org/press/en/2012/gal3433.doc.htm. See also T. DEEN, *UN remains divided over domestic and state terrorism,* July 1, 2015, link: http://www.ipsnews.net/2015/07/u-n-remains-divided-over-domestic-and-state-terrorism/ (9/17/16).

population, or to compel a government or an international organization to do or to abstain from doing any act" [552].

Therefore, the essential elements are: 1. The violent nature of the act (where violence shall be understood as the intentional use of physical force or power against another person, or against a group or community that either results in or has a high likelihood of resulting in injury, death, psychological harm, mal-development, or deprivation [553]); 2. The type of victim; 3. The specific malice.

- ***Instigation and Provocation of Terrorism: the European Standards and Notions***

The bedrock of the European Union is often said to be the four freedoms of movement of persons, capital, goods and services. Nonetheless, each freedom may be curtailed in the interest of national security as well as several other public interests. In this sense, I think one of the most recent and significant choices showing faith in the fact that freedom would not be undermined by security was the Schengen Treaty.

After the 9/11 attack, an Extraordinary European Council Meeting was held on September 21, 2001. One of the results of this meeting was the European Framework 2002/ 475/ JHA (July 22) [554]. The Framework defines the acts realized for "terrorist purposes" as those "directed to strongly intimidate the population or to illegitimately force the public powers or an international organization to carry out or to abstain from carrying out any act which aims to destabilize, destroy the fundamental political, constitutional, economic or social structures of a country". The framework also gives an overbroad definition of "terrorist organization" [555]. This act is important because it clears the way for the European Member States with the idea that the need for social defence will prevail on the defence of fundamental rights [556].

---

[552] See V. MASARONE, *Il terrorismo nel diritto penale internazionale,* in *Politica criminale e diritto penale nel contrasto al terrorismo internazionale,* Edizioni Scientifiche Italiane, 2013, p. 111-114.

[553] ARTICLE 19, *Prohibiting Incitement to discrimination, violence and hostility*, Policy Brief, 2012, p. 19.

[554] See the complete Framework No. 475/2002/JHA at http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32002F0475&from=en. Previous agreements on terrorism should also be reminded, such as the 1977 Convention of Strasburg against terrorism, the Resolution of the European Parliament of January 30, 1997 and the Recommendation of the European Parliament No. 1426 of September 1999.

[555] Article No. 2 of Framework 2002/ 475/JHA states as follows: "terrorist group' shall mean "a structured group of more than two persons, established over a period of time and acting in concert to commit terrorist offences". "Structured group" shall mean !a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure.

[556] Nevertheless, Article No. 1 (2) of the Framework provides that "this Framework Decision shall not have the effect of altering the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union".

The Framework is dominated by a logic of emergency and deterrence [557]. For example, it asks the Member States to introduce the necessary measures for punishing not only the contribution to a crime but also the *instigation* to commit one of the crimes listed in the Framework (under Article No.4). In its September 2014 Report on the implementation of the 2008 amending framework decision [558], the European Commission noted that most of the EU countries (except for Ireland and Greece) have adopted measures to criminalize the newly introduced offences of public provocation, recruitment and training to terrorism; there remain some open questions on how the internal implementation of this Framework Decision in EU countries' will affect "indirect provocation" and the criminalization of acts committed by so-called "lone actors" [559]. The amended Article No. 3 (1.a) of Framework 2002/475/JHA reads as follows [560]:

"Public provocation to commit a terrorist offence" shall mean the distribution, or otherwise making available, of a message to the public, with the intent to incite the commission of one of the offences listed in Article 1(1)(a) to (h), where this behavior, whether or not directly advocating terrorist offences, causes a danger that one or more such offences may be committed.

The amended Paragraph No. 3 of the same Article reads as follows:

For an act as set out in paragraph 2 to be punishable, it shall not be necessary that a terrorist offence be actually committed.

The crime of public provocation is considered to be a new opinion crime in the European context [561]. It is literally recognized by the 2008 Framework itself [562], especially in Article No. 2, that reads as follows:

This Framework Decision shall not have the effect of requiring Member States to take measures in contradiction of fundamental principles relating to freedom of expression, in particular freedom of the press and the freedom of expression in other media as they result from constitutional traditions or rules governing the rights and responsibilities of, and the procedural guarantees for, the press or other media where these rules relate to the determination or limitation of liability.

---

[557] The high anticipation of the defence contrasts with the principle of using criminal law as *ultima ratio.* See EUROPEAN CRIMINAL POLICY INITIATIVE, *Manifesto sulla politica criminale europea,* 2009: https://sites.google.com/site/eucrimpol/manifest/manifesto.

[558] Framework 2008/ 919/ JHA amending Framework 475/2002/JHA: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008F0919&from=en.
The 7th considerandum reads as following: "This Framework Decision provides for the criminalization of offences linked to terrorist activities in order to contribute to the more general policy objective of preventing terrorism through reducing the dissemination of those materials which might incite persons to commit terrorist attacks".

[559] *EU rules on terrorist offences and related penalties*, http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=URISERV:l33168&from=EN

[560] Amended by the Council Framework Decision 2008/ 475/ JHA.

[561] V. MASARONE, *supra* note No. 89, p. 151.

[562] See also the 13th and 14th Considerandum.

Thus, if the national authorities fail to verify if the European politics are in line with the internal principles, there will be a lack of protection for the right to freedom of expression.

Another example of the inner logic of the Framework is the request for higher criminal penalties: they have to consist in a more serious penalty than that provided by national law for the same behavior without the terrorist purpose. It is a well-known mechanism in the field of emergency legislation: an increased criminal response is connected to a subjective element, i.e. the "specific malice" mentioned above, which includes the subversive aim; the actual realization of the aim or the suitability to reach it are not necessary and therefore, malice is hard to prove empirically [563].

The whole system contrasts with the right to freedom of expression and with other principles, such as the rule of law, the principle of personal penal responsibility, the function of the penalty as social integration.

- ***Instigation and Provocation of Terrorism: the International Perspective***

Offences such as "encouragement of terrorism" and "extremist activity" as well as offences of "praising", "glorifying", or "justifying" terrorism, should be clearly defined to ensure that they do not lead to unnecessary or disproportionate interference with freedom of expression. Excessive restrictions on access to information must also be avoided. In other words, counter-terrorism measures have to be compatible with Article 19 (3) ICCPR: in particular, " the media plays a crucial role in informing the public about acts of terrorism and its capacity to operate should not be unduly restricted. In this regard, journalists should not be penalized for carrying out their legitimate activities" [564].

In 2005, the UN Security Council adopted the United Nations Security Council (UNSC) Resolution No. 1624 (2005), which requires the States to prohibit incitement to commit a terrorist act (Article 1). The UNSC Resolution separates incitement from hatred [565]. The States' measures should be necessary, appropriate and in accordance with their obligations under international law to:

(a) Prohibit by law incitement to commit a terrorist act or acts; (b) Prevent such a behaviour (c) Deny safe haven to any persons towards whom there is credible and relevant information giving serious reasons for considering that they are guilty for a certain behaviour.

[563] See V. MASARONE, *supra* note No. 89, p. 147. The same anticipation process takes place generally regarding di associative crimes, for the mere fact of associating: MOCCIA, *supra* note No. 88, p. 238 et seq.

[564] UN HUMAN RIGHTS COMMITTEE, *General comment No. 34, supra* note No. 149, Para. No. 46.

[565] AGNES CALLAMARD, *supra* note No. 226, p.7.

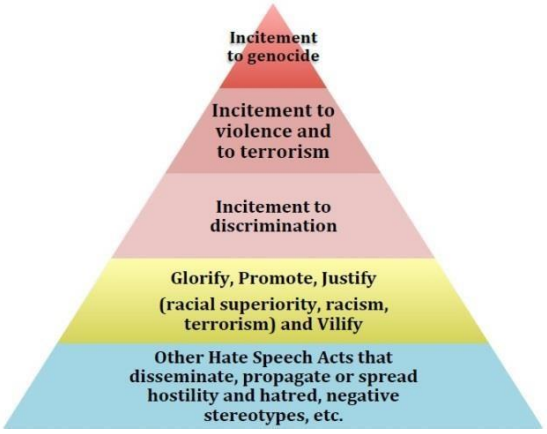


Figure 7: Incitement and Hate Speech Typology [566]

- *Terrorism, Penal Populism and the "Criminal Law of the Enemy"*

One key point, in this field, is the importance of media in fixing the concept of "terrorism": their role is essential and the need of free media and independent thinkers is fundamental. The "war against global terrorism" coincided with an increasing role of social media, blogs and other modern and quick forms of information. You can consider it as a direct consequence or not – and I personally do not - but there is a global *spectacularization* of criminal facts, emphasizing drama and amplifying violence and fear [567]: it is defined with the concept of *glamorization* by John Pratt [568] and is highly influencing public opinion.

The following paragraphs will focus on the limitations of the right to defence as well: this limitation is one of the characteristics of penal populism and it is particularly evident in the counter- terrorism field. Because of the brutality of terrorist attacks, a common tendency is a swift drift toward a "criminal law of the victim" [569]. This focuses on the person of the victim, without considering the rule of law and the need of assuring the rights of the defendant; instead, defendants should not be damaged for reasons of general prevention. The liberal conception of justice finds its core in the rights and duties of the defendant, but many new national and international norms focus on the role of the victim [570]. The risk consists in "abusing" of the role of the victim arriving at a punitive logic that becomes symbolic, in a particularly emotional way [571]. Some examples of this tendency are the following: the European Directive No. 29 of 2012 is "establishing minimum standards on the rights, support and protection of victims of crime" [572].

---

[566] GLOBAL FREEDOM OF EXPRESSION CENTER, Columbia University, 2015.
[567] See the concept of penal populism at p. 29 et seq. of this dissertation.
[568] J. PRATT, *Penal populism,* Routledge, New York, 2007.
[569] To learn more, see V.VALENTINI, *Le garanzie liberali ed il protagonismo delle vittime: uno schizzo sistemico dell"attuale giustizia penale europea,* in Jus17@unibo.it, 2011, p. 77 et seq.
[570] ANASTASIA, ANSELMI, FACCINELLI, *supra* note No. 98
[571] Z. BAUMAN, *Liquid fear,* Polity, Cambridge, 2006.
[572] DIRECTIVE 2012/29/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of October 25, 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA; http://eur-lex.europa.eu/legal- content/EN/TXT/PDF/?uri=CELEX:32012L0029&from=IT.

It states that the rights of the victim should be assured also when the author of the crime is not identified; therefore, the indicted person- or the person that is simply being investigated- can be considered the author of the crime, without violating the presumption of innocence. In addition, the 1999 New York Convention on Terrorism bases the definition of terrorism on the nature of the victim (civilian or not) rather than considering if the action takes place in wartime or peacetime. Moreover, there seems to be a sort of "hierarchy of the victims": when the victims are "western targets", media coverage and political reactions increase in the Western world. Conversely, the "Institute for Economics and Peace" (IEP) has registered that 78% of the deaths due to terrorism are located in five countries: Afghanistan, Pakistan, Syria, Iraq and Nigeria [573].

Secondly, another key characteristic of penal populism regarding terrorism is that particular categories of plaintiffs are addressed: this is clear, for instance, speaking about the Muslim community in the US. For example, the case *Syed Farjah Hassan v. City of New York* (October 13, 2015) concerned the constitutionality of police surveillance on members of a particular religious group based solely on their belonging to the religion rather than any specific behavior of particular members of the group. The Court held that the City could not simply assert that the Program was justified by national security and public safety [574].

3.2 b) - Emergency Legislation during a State of Emergency

In the social sciences the term 'emergency' (emergency, urgency, etc.) is used to indicate sudden situations of difficulty or danger, basically of a transitory nature (even though they are not always going to end in the short-term). The

[573] In 2014, over 32.000 people died in terrorist attacks, 80% more than 2013, with a 172% increase against private citizens. In 2015, 99,4% of people died in countries where there is a war situation (on-going conflict or state-sponsored terror): data from the intervention of Steve Killelea, Director of IPE, at the *Global Freedom of Expression Centre annual conference "Justice for Free Expression 2015",* Columbia University, April 4, 2016 and from the *Global Terrorism Index 2015* by IEP (http://economicsandpeace.org/wp-content/uploads/2015/11/2015- Global-Terrorism-Index-Report.pdf).

[574] See the full judgment: *Syed Farjah Hassan v. City of New York*, Appeal Court of Philadelphia, October 2015; https://ccrjustice.org/sites/default/files/attach/2015/10/Hassan%203rd%20Cir%20Ruling%2010-13-15.pdf. Stephen Vladeck – Law professor at the American University, Washington College – underlined that this case is important not only because of the result but also for the reasoning on the need of dividing paranoia and fear from rational reasons. He also quoted the case *Turkmen v. Hasty,* (Appeal Court of New York, June 2015) : it followed a long-running civil suit for the FBI round-up against Arabs and Muslims in the weeks following 9/11. The challenge regarded the description of Arabs and Muslims and, mostly, the harsh conditions of confinement because of their religious background. There was a valuable cause of action, their claims were true and, for example, the former FBI director was addressed without impunity. The Court ruled in favour of the plaintiffs. This was a great victory in the post- 9/11 civil litigations in the US. However, it is a narrow win because the trial is going before the Supreme Court (Global Freedom of Expression Centre, "Justice for Free Expression 2015", Panel 2 - *Freedom of Expression, Religion and National Security,* Columbia University, April 4, 2015, see the video at https://globalfreedomofexpression.columbia.edu/justice-free-expression-2015-day-1/).

concept of "state of emergency" consequently indicates: a) the factual circumstances b) the legal situation that follows the recognition of this factual situation, for the adoption of appropriate interventions and - often- exceptions to the regular rules of law [575].

During a state of emergency, normal norms cease to apply and state agents can act in the State interest, which means on the grounds of what is necessary for the defence of the state against its enemies. In this regard, Article No. 4 of the ICCPR states that in a "state of public emergency which threatens the life of the nation", a state "may take measures derogating from their obligations under the Covenant to the extent strictly required by the exigencies of the situation". Freedom of expression may be one of the obligations which may be affected in this way: Geoffrey R. Stone rightfully notes that "in order to understand free speech, one must understand free speech in wartime" [576]. A very dangerous emergency for the state could be war itself or something similar: in these kinds of emergency situation, dissent could be interpreted both as courageous, when criticizing an unjust war or situation, or as disloyal. To invoke the above-mentioned Article 4, two fundamental conditions must be met: 1. The situation must genuinely amount to a public emergency which threatens the life of the nation, and 2. The State party must have officially proclaimed a state of emergency. States must also provide "careful justification for not only their decision to proclaim a state of emergency, but also for any specific measures based on such a proclamation" [577]. Moreover, the UN's General comment No. 34, which clearly distinguishes between freedom of expression and freedom of opinion, underlines that freedom of opinion "cannot be made subject to lawful derogation under Article 4 […] since it can never become necessary to derogate from it during a state of emergency" [578]. Finally, another useful international source are the *Paris Minimum Standards of Human Rights Norms In a State of Emergency* [579].

It has been noted throughout the 20th century that the emergency powers taken by liberal states have remained in force long after the extinction of the emergency [580]. This process has been described as the "normalization of security" or, as Carl Schmitt says, the "normalization of the state of exception"[581].

---

[575] A. PIZZORUSSO, *Stato di Emergenza* in *Enciclopedia delle Scienze Sociali,* 1993, Treccani.

[576] G. R. STONE, *Free speech and national security,* Journal Article, University of Chicago Law School, Chicago Unbound, 2009, p.939.

[577] UN HUMAN RIGHTS COMMITTEE, *General Comment No. 29, States of Emergency* (Article 4), U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001), quoted in AGNES CALLAMARD, *supra* note No. 226.

[578] UN HUMAN RIGHTS COMMITTEE, *General comment No. 34, supra* note No. 149, General Remark No. 5.

[579] The 61st Conference of the International Law Association, held in Paris from August 26 to September 1, 1984, approved by consensus a set of minimum standards governing the declaration and administration of states of emergency that threaten the life of a nation, including 16 Articles setting out the rights and freedoms that cannot be derogated: individuals remain entitled to enjoy them even during states of emergency. Read the list in the "American Journal of International Law" of October, 1985: http://www.uio.no/studier/emner/jus/humanrights/HUMR5503/h09/undervisningsmateriale/Paris MinimumStandards.pdf.

[580] M. NEOCLEOUS, *Critique of Security,* Edinburgh University Press, 2008, Ch. No. 2.

There is one recent influential argument sustaining that emergency powers are becoming the norm [582].

As we will better analyse later, as far as Italy is concerned the usage of emergency powers and emergency legislation in the Republican age increased in the '70s, responding to an internal terrorist threat. As far as Turkey is concerned, the country experienced around 15 years of state of emergency (1987- 2002) and the July 20, 2016 a new state of emergency was imposed, following an attempt of coup d'état by the military.

- **The "War against Global Terrorism" and the French E mergency: T wo International Cases of States of Exception**

The "war against global terrorism" [583] – together with increasing threats on free speech connected with this phenomenon – began in 2001 under the United States pressure. This war lacked any clear criteria for victory and, therefore, any prospect of coming to an end. It is interesting to analyse the subsequent threats on free expression, since US citizens enjoy a great protection of this right thanks to the First Amendment. How can the relevant role of free speech in the US system be reconciled with broad and heavy counter-terrorism measures against incitement, apology and so on? [584] Geoffrey R. Stone wrote that "declaring a war on terrorism was more than a rhetorical device to rally the public. It enabled the administration to seize the extraordinary powers reserved to the executive only in wartime" [585]. In the American context, criminal law is not particularly involved in the counter- terrorism measures: most of the decisions are concentrated in the hands of the executive power. This is a state of emergency logic, as I will better analyse in the following paragraph: the Bush administration repeatedly declared that the terrorists had taken "advantage of the vulnerability

[581] G. AGAMBEN, *Lo stato di eccezione,* Bollati Boringhieri, 2003.
[582] P. RAMSAY, *supra* note No. 101, p. 213.
[583] The *World Trade Centre* attacks on 9/11/2001 together with the attacks in Madrid, London and Sharm El Sheik, led to an enormous international reaction. The Bush administration used the expression "War on Terror" after the 9/11 attacks and this concept spread through the media quickly. Steps back from this vague definition of what the objectives of the War were came afterwards, see SCHMITT E., SHANKER T., *U.S. Officials Retool slogan for Terror War,* in *The New York Times,* July 26, 2006, link: http://www.nytimes.com/2005/07/26/politics/us-officials-retool-slogan-for-terror-war.html?_r=0 (9/17/16) and P. D. SHINKMAN, *Obama: "Global War on Terror is over",* in *US News,* May 23, 2013, link: http://www.usnews.com/news/articles/2013/05/23/obama-global-war-on-terror-is-over.
[584] See S. SHAPIRO, *U.S. First Amendment: Opportunities and Challenges,* 'Global Freedom of Expression Centre", Columbia University, May 8, 2014; link: https://globalfreedomofexpression.columbia.edu/publications/u-s-first-amendment-opportunities-and-challenges/. One of the main threats consists in surveillance: in the 1970s, Attorney General Edward Levi promulgated a series of guidelines restricting the FBI's authority to investigate political and religious activities (see J. ASHCROFT, *The Attorney General"s guidelines on general crimes, Racketeering enterprise and terrorism enterprise investigation***,** pt. VI(A)-(B), at 21-23 (2002), available at http://www.usdoj.gov/olp/generalcrimes2.pdf
[585] G. R. STONE, *Free Speech and National Security,* Indiana Law Journal, 2009, p. 953.

of an open society" and that the government therefore needed to restrict the people's freedoms [586].

Figure 8: A cartoon by Chappatè

An important example of this practice is taking place in France, which declared a state of emergency after the Paris attacks of November 13, 2015: the state of emergency led to mass arrests, great limits to fundamental rights and freedoms such as the right to assembly and the freedom to demonstrate together with the rights to personal liberty and security: a good example can be found in the repression of the protest movement opposing the "*Cop21* – Sustainable Innovation Forum", a conference on climate in Paris. Already in December 2015, it was documented that 317 of the people under custody had nothing to do with terrorism [587]. Later, the state of emergency was extended for three more months after the Nice attack of July 14, 2016 [588].

3.2 c)- Crimes of Danger

Before beginning a specific analysis of the provisions under study in this chapter, it is finally necessary to review what a crime of danger is and why its enforcement may be dangerous, especially when it criminalizes opinions. All of the norms that will be analysed from now on represent crimes of danger. The fundamental questions that a regulation of harmful speech should answer are:

---

[586] R. C. LEONE, *The Quiet Republic: The Missing Debate About Civil Liberties After 9/11, in* THE WAR ON OUR FREEDOMS: CIVIL LIBERTIES IN AN AGE OF TERRORISM, Jr. eds., 2003.

[587] J. CLECH**,** *Colpevoli di manifestare nella patria delle libertà. Una testimonianza*, in 'MicroMega", February 2016; F. SIRONI, *Cosa sta succedendo veramente in Francia con lo stato di emergenza,* in "L'Espresso", December 1, 2015; link: http://espresso.repubblica.it/internazionale/2015/12/01/news/stato-d-emergenza-in-francia-cosa-sta-succedendo-veramente-1.241692.

[588] A. WITHNALL , *Nice attack: Hollande extends France's state of emergency after Bastille Day massacre,* July 15, 2016; link: http://www.independent.co.uk/news/world/europe/nice-attack-bastille-day-president-francois-hollande-france-state-of-emergency-extended-a7137991.html .

what are the harms in question? *How* does the speech bring about these harms? *What ought to be done* about these harms? [589]

I have already spoken about the so-called "criminal law of the enemy", whose special features are, among others, a highest anticipation of the defence and a decrease in the procedural guarantees.The danger offences fall into this area, since they lead to an anticipation of the offence to a moment that precedes an actual damage to a juridical interest. Within the category of danger crimes, the offence consists in the probability of a damage: the juridical interest is in potential danger.

The Italian scholarship divides the crimes of danger in three sub-categories: the crimes of concrete danger, of presumed danger and of abstract danger. In the first case, the judge evaluates each time the probability of a danger in the specific situation. In the case of presumed danger, there is no need to verify the risk of damage to the juridical interest: it is a *iuris et de iure* presumption of danger made by the legislator itself, and there is no possibility to counterargue**.** In the case of abstract danger, the action or fact is not threatening one or more concrete and specific interests, but there is only a generic possibility of damage. In the last two cases, in the area of opinion crimes, punishing the abstract or presumed danger of an expression, opinion or thought means risking to punish the mere disobedience to a provision or order [590]; this means confusing juridical and criminal norms with socio-ethical ones, understanding them as a moral duty.

It has to be underlined, moreover, that when a provision or order presuming *iuris et de iure* the existence of a danger is written by an illiberal legislator, all of the actions that are not welcome could fall within the scope of the provision and could be criminalized as crimes of danger. This is exactly what happens in the area of opinion crimes.

Another critical characteristic of the crimes of danger is the presence of theoretical vagueness behind some of the provisions' terms, such as "danger", "harm", "damage", "violence" or "terrorism". Instead, legitimate regulations must eschew overly-vague terms to avoid potential chilling effects[591].

Notably, a crime can be defined as a "crime of abstract danger" also when it criminalizes particular personalities and individuals: as I already reported above speaking about targeting Muslim communities, some figures are more inclined to be a c c u s e d than others; for the purpose of this dissertation, I would also refer to anarchists, members of dissident movements (such as the NO TAV movement or *BDS* activists [592]), Kurdish separatists and, more generally, persons who are deemed to be "terrorists". Some resistance to this approach has come from the so- called "objectivists". These theorists have argued that criminal liability should only be associated with dangerous acts and not to dangerous people as such. "Subjectivists", instead, argue that any culpable choice that results in a wrongful increase in the risk of harm is an appropriate target for punishment [593].

---

[589] I. MAITRA, M. K. MCGOWAN, *supra* Note No. 161, p. 5.
[590] G.FIANDACA, E. MUSCO, *Diritto Penale, Parte Generale*, VII Edition, Bologna, 2014.
[591] I. MAITRA, M. K. MCGOWAN, *supra* Note No. 161, p. 11.
[592] See Appendix No. 1 in the end of this chapter.
[593] P. RAMSAY, *supra* note No. 101, p. 188.

For example, the legal philosopher Douglas Husak, anchoring his theories on moral philosophy, believes that a person may fairly be held morally liable for any state of affairs under his/her control, for any act, omission, possession and, indeed, intention and thought. Anything that supplies compelling evidence of a firm intention that the defendant could be said to have in his/her control will do[594].

One of the key objectivist counter-arguments is that a person who has not done something objectively dangerous could still repent their wrong: punishing them would amount to a failure to consider them a moral agent capable of adjusting their behaviour [595]. Nevertheless - in systems like the Italian and the Turkish ones - even if there is margin before the first-order harm, there is no margin anymore to repent the type of act that contributes to insecurity. This reasoning considers that the protected interest, when an "abstract danger" provision is enforced, is freedom from insecurity- that is, the right not to fear a future crime.

Moreover, defining which one is the necessary malice required in order to consider the crime punishable, is also important in order to avoid a situation of criminalization of abstract or presumed danger: the "generic malice and consciousness" of acting is not enough; it is also necessary to be conscious and malicious regarding the appropriateness of the action in procuring an actual danger that the law wants to avoid. The "principle of materiality" of criminal offences- that is, the need of criminalizing only material facts and not mere intentions (the *actus reus* and not only the *mens rea*) - can be traced in the first Paragraph of Article 38 of the Turkish Constitution, where the norm refers to an "act" describing the "Principles relating to offences and penalties". However, there is no explicit recognition of the principle of harm, further step of the principle of materiality: nevertheless, it can be inferred from the general Turkish constitutional framework of criminal law. The same is valid also in the Italian system, where the principle of materiality can be found under the second Paragraph of Article 25 of the Constitution, that refers to the "committed acts" speaking about the non- retroactivity of the norms. This principle is often at stake in both of the systems under analysis due to broad interpretations of, for example, what a "terrorist purpose" is. The solutions suggested by the doctrine are the following: to invoke the category of the crimes of danger only for protecting legal interests of a certain relevance (in order to respect the *proportionality principle*); to make use of this category only in exceptional cases (respecting the *subsidiarity principle*); crimes of danger have to be anchored to consolidated traditions and recognized scientific rules (respecting the principle of *rational congruence between means and aims*).

Finally, the enforcement of crimes of danger needs to be balanced with the right to personal liberty and security as evaluated from Article No. 5 ECHR, Article No. 13 of the Italian Constitution and Article No. 19 of the Turkish Constitution: these articles prevent the citizens from an unjust or not proportionate imprisonment or punishment.

---

594 See D. HUSAK, *"Reservations about Overcriminalization",* in *New Criminal Law Review 97,*
2011, vol.14 n.1.

595 R.A.DUFF, *Criminal Attempts,* Clarendon Press, Oxford, 1996.

- **ITALY**

- The Concept of Terrorism and the Emergency Legislation: an Overview from the '70's to the Present

There is a situation of emergency and therefore we can face it only with emergency measures […].

Renouncing to part of our independence, being subject to controls, enacting institutes that usually characterize a police regime is the hard price that needs to be paid for restoring order, being free from fear for criminals, vandals and overexcited people, from the terrorism of fanatics.

GIOVANNI BOVIO, 'Corriere della Sera", May 4, 1975

The paradigm of emergency is the terrorism phenomenon, "which carries a risk for security which is equal but different in each of the different phases that have marked its evolution, from the national phase to the international one, from political terrorism to terrorism against humankind" [596].

The first Italian laws after the unification of the country (1861) which are connected with the concept of terrorism are the anti- anarchist laws of 1894, No. 314, 315 and 316. Particularly, Law No. 316, regarding special measures for public safety, enlarged the application of confinement and preventive detention and prohibited meetings that "have the purpose to overthrow social systems". These laws were publicized by the government as regulations for repressing the anarchic "conspirators" 's terrorism [597].

The '70's in Italy were characterized by a great number of bloody and violent attacks of political and ideological nature, both from extreme right-wing and left-wing organizations together with mafia attacks, involving the Italian Secret Services as well. All of them had an internal nature. These years were called "*anni di piombo*" ("Years of lead") [598].

---

[596] S. ANASTASIA. M. ANSELMI, D. FALCINELLI, *supra* note No. 98, p. 28.

[597] F. COLAO, *Il principio di legalità nell"Italia di fine Ottocento tra" giustizia penale eccezionale" e " repressione necessaria e legale […] nel senso più retto e saviamente giuridico , il che vuol dire anche nel senso più liberale" ,* in *Quaderni Fiorentini. Per la storia del pensiero giuridico moderno,* Vol. No. 36, Giuffrè Editore, Milan, 2007, p. 697 et seq. . See also the paragraph '*The anarchic threat: illiberal special provisions on the way to the Rocco Code*", later in this dissertation.

[598] See the article I wrote for Unimondo.org, *Turchia: I mille volti di un terrorista,* December 3, 2015; link: http://www.unimondo.org/Notizie/Turchia-i-mille-volti-di-un-terrorista-154007.
In 1969, one year after the birth of the student movement, the workers' movement began. Its struggles led to positive recognitions from the State- such as the Workers' Statute (Law No. 300 of May 20, 1970), the divorce (Law n.898 of December 1, 1970), the right to conscience objection (Law n.772 of December 1972) and the proposal of a project for a new Code of Criminal Procedure (Law n.108 of April 3, 1974). The demonstrations, however, led also to police violence with killed and injured people (December 2, 1968 in Avola (SR), April 9, 1969 in Battipaglia (SA), August 2, 1970, Porto Marghera (VE)). Then, the "tension strategy" started, with a series of massacres that involved the Italian Secret Services as well (see G. FASANELLA, G. PELLEGRINO, C. SESTIERI, *Segreto di Stato. Verità e riconciliazione sugli anni di piombo,* 2008, Sperling & Kupfer and *Segreto di Stato. La verità da Gladio al caso Moro,* 2000, Einaudi). This period started with the massacre of *Piazza Fontana* (December 12, 1969) and finished in 1980, with

Unlike what happened in the past, it was thought that this kind of phenomena could be fought more effectively by ordinary laws, rather than by exceptional measures, such as martial law or declaring a state of emergency/exception: it could have been politically inopportune to the extent that it could become a form of recognition of the criminal organizations, forcing the democratic state to fight them on an equal footing. This appropriate choice, however, did not prevent a frantic and often poorly reasoned legislative activity tending to modify the law of criminal procedure, the prison regulations, the discipline of preventive measures and other sectors of the ordinary legal order [599].

As far as the Criminal Code is concerned, the new legislation had an impact especially on Title No. 1 (Book No.2, "Crimes against the Personality of the State"): here the first norms against terrorism were adopted, from the second half of the '70's to the beginning of the '80's. The formal collocation itself proves that these crimes fall under the category of political crimes: considering the definition under Article No. 8 of the Italian Criminal Code of what a political crime is, the crimes of terrorism do threat the political interests of the State or the political rights of the citizens, or their aim is political [600].

Among the emergency laws of this relevant period – when the usage of the instrument of decree-laws was predominant [601]- the following are worthy of note:

- Law No. 152 of 1975, "Provisions for defending public order" (also called *Reale Law*): First of all, this law increased the number of cases when it is considered legitimate for the police to use arms. In the other cases, when a charge for abuse of power would have been inevitable, a new preferential procedural regime was inserted: it essentially guaranteed impunity to the police. This means that the investigations were not held by the competent judge but by the general prosecutor in the Court of Appeal. In the first 15 years of enforcement of this law, there were 625 victims of police – precisely 254 deaths and 371 injured. 208 victims were not committing or were not going to commit any crime[602].

  Article No. 4 of the Law allows a personal search even without a magistrate's warrant, authorizing the search on "people whose way of behaving or

---

the massacre at the Bologna station. The former was attributed to an anarchic movement (..) while the latter to an extreme right-wing one. For all the legal documents and original judgments relating to these facts, see *Rete degli Archivi: Per non dimenticare,* link: http://www.fontitaliarepubblicana.it/DocTrace/#home?q=%20projectid:11&page=1&per_page=10 .

[599] F. PALAZZO, *La recente legislazione penale*, Padova, 1985, p. 135 et seq. .

[600] Notably, the scholarship identifies some differences between the common political crimes and the terrorist ones: as far as publicity is concerned, while for a common crime publicity is a danger, publicity and propaganda are peculiar characteristics of the terrorist act itself; often, confessing and glorifying the terrorist actions is part of the program of a terrorist organization. See G. PISAPIA, *Terrorismo: Delitto politico o delitto comune?,* in *Giust. Pen.* 1975 II, p. 263; see also P. THORTON, *Terror as a weapon of political agitation internal war,* New York, 1977, p. 73.

[601] On the excessive role of the executive power in enacting emergency norms, G. RICCIO, *Politica penale dell"emergenza e Costituzione,* Naples, 1982, p. 59 et seq. .

[602] Typical situations consisted in check- points or requests of stopping (153 cases). In 65 cases (10% of the cases) the police justified what happened with the excuse of an "accidental shooting" (See *685, Libro bianco sulla legge Reale,* "Centro di Iniziativa Luca Rossi", Milan, 1991).

whose presence, given certain concrete circumstances of place and time, do not seem to be justifiable". Article No. 5 forbids to take part in demonstrations with "protective helmets" or with completely or partially covered face, through any instrument that may make it difficult to recognize the person. Lately, Law No. 533 of 1977 increased the penalty to a minimum of six months (before, it was from one to six months), introducing the possibility of arrest in the act and extending the prohibition also outside the demonstrations: it turned the misrepresentation in a "crime of suspect" and anyone, in any public occasion, who was "hardly recognizable" could have been sentenced for this reason. Finally, Article No. 18 re-introduced the Fascist legal device of confinement for political reasons.

- Law No. 191 of 1978, "Penal and procedural provision for preventing and suppressing grave crimes": Thanks to this law, the notion of "terrorist purpose" entered the Italian legislation for the first time. The Law introduced Article No. 289 *bis* punishing the crime of "kidnapping a person with purposes of terrorism or subversion".
  Following the 1977 protests of the student movements, new special laws were introduced [603] together with a new wave of political trials, because of the input of prosecutors such as Giancarlo Caselli and Luciano Violante. Both of them started trials in Turin against some right- wing activists who were accused of aiming at the subversion of the system or at a *coup d'état.* Instead of investigating the facts, often the attention focused on the political personality of the defendant. This action against the "Fascist enemies" legitimized those prosecutors and judges image before the public opinion, subsequently allowing also a repression of the radical left-wing [604]. Most of these trials were based on a sort of "subjectivation" of the terrorist charges and were characterized by an extension of the duration of precautionary detention: new arrest warrants were issued at the end of the first term of custody for the same fact but changing the charges, or adding new ones or referring to "connected crimes".

- Law Decree No. 625 of 1979 - converted by Law No. 15 of 1980, "Urgent measures for defending the democratic order and public security" (also called *Cossiga Law*): The novelties and critical points that were introduced by this law were well explained by Amnesty International, which wrote with concern that "four articles are particularly interesting : Article 3 introduces a new offense, the "association for purposes of terrorism and of subverting the democratic order", which becomes Article 270 *bis* of the Criminal Code and provides substantial sentences, between four and eight years for those who participate in acts of terrorism and from seven to fifteen years for those who organize them. This comes in addition to the sentences provided by Article 270 ("Subversive

[603] For example, in 1977, Laws No. 532 ("Urgent provisions regarding the procedural law and the judicial order") , No. 533 ("Provisions regarding public order"), No. 534 ("Modifications regarding the Code of Penal Procedure") and No. 801 - which modified the subject of State secrets: they followed some events where the Italian Secret Services were involved and still permits the survival of a category of "secret news and information" that is hard to justify.

[604] For example, see the prosecutions that started on the movement of Bologna after the happenings of March 1977. Among others, see later the case of Radio Alice, a dissident radio based in Bologna seized and closed with the accuse of instigating to commit crimes. See also the activity of the prosecutor Pietro Calogero in the cities of Treviso and Padua.

Association"). Article 6 is a special provision, which will remain in force for one year: it authorizes the police detention of individuals suspected of being about to commit the offense […] under Article 416 or Article 305 of the Criminal Code. The person under custody can be searched and detained in a police station for 48 hours; the State Prosecutor must be immediately informed and there are other 48 hours more for justifying the custody. Article 9 extends the powers of carrying out a search and allows it even without a warrant of the competent magistrate due to emergency. […] Article 10, in cases relating to terrorism, extends by one third the maximum period of preventive detention admissible at each stage of the proceedings. This means that the procedure can, in the most extreme cases, have a legal duration of 10 years and eight months.
It is the opinion of Amnesty International that these new measures, although legal in themselves, represent a reduction of citizens' rights, especially because the previous legislation already granted sufficiently great powers to the police and the judiciary. Today more delays are permitted for indictment, in a country that is already well-known for its long processes" [605].

Moreover, Article 1 of this Law declared the "terrorist or subversive purpose" to be an aggravating circumstance that can be applied to every crime and that cannot be balanced with extenuating circumstances [606]. This is a "teleological" aggravating circumstance, since it has a subjective nature [607]. In addition, this kind of purpose qualifies the "specific malice" of the newly introduce Article No. 280 (enacted by Article 2 of this Law) and Article No. 270 *bis* (enacted- as mentioned above- by Article 3 of this Law).
The notion of "terrorist or subversive purpose" influenced greatly the emergency perspective, "subjectifying" penal responsibility and outlining a particular category of authors of a crime [608]. The above-mentioned weakening of procedural guarantees was connected with a "reward-hypothesis" where the defendant could receive a better treatment not because of the removal or reduction of the danger but because of his/ her procedural collaboration and ideological rejection of the crime.

The image of a "democracy that defends itself" has to be characterized by two limits: the *provisional nature* of the emergency laws [609] and the *proportionality* of the measures adopted; the latter factor goes beyond a simple balance between different rights, requiring the *reasonableness* of the State action [610].

---

[605] *Amnesty International Annual Report,* London, 1980, p. 279- 281; link: https://www.amnesty.org/en/documents/pol10/0003/1980/en/.
[606] This Article was modified by Law No. 34 of 2003 which ratified the New York Convention, providing that in case of terrorist or subversive purpose the penalty would be increased by half.
[607] Joined Chamber of the Court of Cassation, February 2, 1992, judgment No. 2693.
[608] V. MASARONE, *supra* note No. 89, p. 39- 40.
[609] The Italian Constitutional Court – in judgment No. 15 of 1982 - recognized the right of the authorities to increase the precautionary custody in case of emergency only if justified by its provisional nature (anyway, this judgment is particularly relevant when it states that the Government and the Parliament have the right, because of the situation of emergency, 'not to feel completely bound by the Constitution"). Similarly, the provisional nature of these exceptional means is required by the Constitutional judgment No. 38 of 1985, which regards the increased penalty provided under the aggravating circumstances for terrorism.
[610] S. ANASTASIA. M. ANSELMI, D. FALCINELLI, *supra* note No. 98, p. 91-92.

- **Law No. 155 of 2005 and Article No.270 sexies**

Article No. 270 sexies ("Actions with terrorist purpose") of the Italian Criminal Code reads as follows:

The actions with terrorist purpose are those that – because of their nature or because of the context - may seriously damage a country or an international organization and are committed for the purpose of intimidating a population, or compelling a Government or an international organization to perform or to abstain from performing any kind of act, or those destabilizing/destroying the fundamental political, constitutional, economic and social structures of a country or international organization, as well as other terrorist behaviours or actions that are deemed to be terrorists by conventions or other international laws that are binding for Italy.

The European notion of "terrorism" contained in Framework 2002/475/ JHA has been adopted in Italy in 2005 by Law no. 155 (also called *Pisanu Law*) with the introduction of Article No. 270 *sexies* [611]. It repeats almost literally the kind of behaviours listed in the European Framework 2002/475/ JHA: nevertheless, it does not report one of the clauses of the Framework which specifies that this definition of terrorism cannot be used for obstructing the freedoms of association, expression and union actions. Moreover, Law No. 155/2005 increased again the vagueness of the notion of terrorism.

This Law led to a more severe treatment of foreigners: they would receive a residence permit in case of collaboration with the authorities (Article 2) and they may be expelled if considered dangerous, even without committing any act (Article 3); this Law also broadened telephone and telematic controls: these controls make it more difficult to open an Internet-point and forbid Wi-Fi and other connections lacking a proper registration. Finally, Articles 4-8 introduced new measures of arrest and custody and allows the police – in case of emergency and necessity- to arrest the suspects under the norms of the 1975 "*Reale Law*".

Going back to Article 270 sexies, it notably does not require the "violence factor" for an action to be punished, while this element is required by the other articles of the Italian Criminal Code explicitly criminalizing terrorist acts[612]. Moreover, it speaks about actions that "*could cause serious damage to a country or to an international organization*": the conditional tense avoids indicating a clear index of appropriateness in causing damage, greatly anticipating the defence.

In addition, the concept of "*serious damage to a country*" could also include an "*image damage*", indicting dissident movements aimed at "compelling a Government or an international organization to perform or abstain

[611] Law No. 155 of 2005 (converting Decree No. 144/2005) introduced Articles No. 270 *quarter, quinquies, sexies* in the Italian Criminal Code and modified Articles No. 270 *bis* and *ter.* See GAROFOLI R., *I principali reati con finalità di terrorismo, anche internazionale. Il Dlgs 144/2005,* September 14, 2005, in *Altalex,* link: http://www.altalex.com/documents/news/2005/09/13/i-principali-reati-con-finalita-di-terrorismo-anche-internazionale-il-dlgs-144-2005 (9/17/16). Because of the phenomenon of the succession of laws, the new definition is enforceable only in the case of actions committed after 2005; see V. MASARONE, *supra* note No. 89, p. 223.

[612] This could particularly influence the interpretation of the aggravating circumstance provided under Article 1 of Law No. 15/ 1980.

from performing any kind of act". This aim, does not exclude – for example - the criminalization of damage against "strategic infrastructures", such as in the case of the Lions-Turin High Speed Train (*TAV- Treno Altà Velocità*), under construction in the Susa Valley: there is a wide grass-root protest movement (that is- the NO TAV movement) against this expensive and environmentally unfriendly infrastructure. Some activists have been charged with committing terrorist offences, but no trial has led to a definitive conviction for terrorism yet[613]. In this regard, the Cassation's judgment No. 28009 of 2014 is very important. From a free-speech perspective, a criminalization of the *support* for these movements could take place, such as in cases of diffusion of leaflets or flyers, of exposition of banners, and so on: usually, the criminalization of support takes place using the crimes of instigation, apology or propaganda for a criminal or terrorist association [614]. Meanwhile, not only support, but also *reporting* on the NO TAV Movement actions led to charges and convictions, as in the case of Roberta Chiroli and Davide Falcioni, which I will better analyse in Appendix No. 1.

Article No. 270 *sexies* as well as Article No. 270 *bis* and the aggravating circumstances - applicable to any crime – provided by Article No. 1 of the *Cossiga* Law, refer to the terrorist *purpose*: instead, I think one of the necessary changes that has to be undertaken is considering terrorism as a means, because the "purpose" is an inner attitude, which could be very subjective even among members of the same association. Being an inner attitude, it can be verified only through clues, not with full proof.

To conclude, the same logic of emergency and social defence that led to the Italian emergency legislation in the 70's and in the 80's, returns today's in the internal legislation ratifying the international conventions on terrorism [615]. Professor Alessandro Gamberini writes that "criminal law struggles to maintain its traditional categories when it has to intervene without cultural or territorial boundaries", such as in the case of global terrorism. "The clear border among legal institutes (war, criminal law and criminal law in time of war) disappears, and the effects turn upside down the dogmatic profiles of the penal offence" [616]. Professor Francesco Palazzo finds a logic of war in the terrorist phenomenon: because of the fact that the Italian Constitution has no clear emergency clause, his hypothesis is that there is a danger that the criminal counter- terrorism legislation assume the characteristics of a "criminal law of the enemy" [617].

---

[613] See the Penal Court of Cassation, judgment No. 28009 of June 27, 2014. It is better explained in the Appendix No. 1 in the end of this chapter and is very important for the topic under analysis.

[614] See Appendix No. 1 in the end of this chapter, regarding the NO TAV and BDS movements.

[615] Such as Law Decree No. 374 of 2001 (Law No. 438 /2001), Law No. 7 of 2003 (ratification of the 1999 New York Convention), Law No. 34/2003, Law Decree No. 144/2005 (*"Pisanu* Decree", Law No. 15/2005), the "security packages" in Law Decree Mo. 21/2009 (Law No. 125/2008) and Law Decree No. 11/ 2009 (Law No. 94/ 2009).

[616] A. GAMBERINI, *Delitti contro la personalità dello Stato,* in *Diritto penale. Lineamenti di parte speciale,* 5th Edition, Bologna, p.7.

[617] F. PALAZZO, *Contrasto al terrorismo, diritto penale del nemico e principi fondamentali,* in "Questione Giustizia", 2006, p. 684.

- ***Articles No. 270 ("Subversive associations") and No. 270 bis ("Associations with [also international] Terrorist Purpose or with the Purpose of Subversion of the Democratic Order")***

First of all, both Article No. 270 ("Subversive associations") and Article 270 *bis* ("Associations with [also international] terrorist purpose or with the purpose of subversion of the democratic order") do not require any specific event to happen in order to punish the people who are deemed to be part of [or deemed to promote, organize, direct …] these kind of associations. The associative or contributory element is enough for a conviction, together with the potential efficiency to endanger a legal interest. Therefore, they are crimes of "presumed danger".

Already in 1970 (Judgment of March, 14-18) the Joined Chamber of the Italian Court of Cassation stated the existence of a problem in reconciling the general principle of Article No. 49 of the Criminal Code with the principles regulating the crimes of "attempt". The former excludes the existence of a criminal fact every time there is no detriment to the interests the norms aim to defend. Instead, the "attempt crimes" include a prognostic evaluation, such as "it could have happened if something (a particular potential fact) had occurred"; therefore, we refer to a double level of hypothesis and generic possibilities of something that may happen.

- **Article No. 270, "Subversive Associations"**

Anyone, in the State territory, who promotes, forms, organizes or directs associations aimed at and suitable to violently subverting the State economic or social systems or at violently suppressing the political and legal systems of the State, shall be punished with imprisonment from five to ten years .
Anyone who takes part in the groups referred to in the first paragraph shall be punished with imprisonment from one to three years.
The penalties are increased for those who re-form, even under a false name or in a fake form, the associations mentioned in the first paragraph that were ordered to be dissolved.

This Article has been contained in the Criminal Code since its enactment: the meaning of the expressions "subversive associations" and "to suppress violently the political and juridical systems of the State" were explained in the ministerial reports attached to the new Criminal Code [618]. For example, the "communist or Bolshevik associations" were falling in the former expression while the "anarchic associations" were falling in the latter. Even though the norm ws created to defend the authoritarian State from the pre-existent political and non-political associations, the scope of the norm expanded to the defence of the democratic State from a violent subversion of its system (and it could include the criminalization, for example, of a neo- fascist association) [619].

[618] *Relazione al progetto definitivo,* in *Lavori preparatori del codice penale e del codice di procedura penale*, Rome, 1929.
[619] The crime of re- organizing the dissolved Fascist Party can be in a concurrence with the crime of subversive association: the former can be committed even without organizing an association and injures the personality of the State in an indirect way, while a subversive

This provision sanctions any *violent* behaviour aimed at systematically impairing fundamental freedoms, that are expression of a pluralistic and democratic system; this system protects the enjoyment of fundamental human rights, both as an individual and in the social groups where the individual expresses his/ her personality. Consequently, the notion of "social system of the State" does not end with the State institutions: this system represents the fundamental articulations of freedom that are necessary for realizing the pluralistic model designed by the Constitution [620]. The element of *violence* is fundamental, and the meaning has to be that of a concrete program of violent criminal actions, and not the mere element of a subversive ideology of the association[621].

Threats to free expression stem from the fact that one person could also be charged under Article No. 270 for his or her activities aimed at provoking third parties to join the association or to agree with its objectives: the provocation can take place through spreading the association's program with means that would be legal if they were not aimed only at a merely illicit objective[622]. Moreover, it has to be underlined that the associative crime is different from the single crimes committed by each member of the association: simply being part (or deemed to be part) of an association is not enough to be charged for the specific crimes that were committed following the association's program. The causal link of a person's actions with the criminal event and the consciousness of the crime are necessary [623]. This is particularly important for avoiding to indict someone that just seems to share the objectives of an association or to support its members but that is not actively part of the association; otherwise, it would criminalize his/ her thought and opinion.

- **Article 270 bis, "Associations with [also international] Terrorist Purpose or with the Purpose of Subverting the Democratic Order"**

Anyone promoting, establishing, organizing, directing or financing associations aimed at committing acts of violence with the purpose of terrorism or of subverting the democratic order, shall be punished with imprisonment from seven to fifteen years.

Anyone who participates in such associations shall be punished with imprisonment from five to ten years.

For the criminal law aims, the purpose of terrorism recurs also when the acts of violence are directed against a foreign State, institution or international organization.

The confiscation - against the convicted person - of the things that were needed or were destined to commit the offense and of the things being the price, the product, the profit [..] of the action, is compulsory.

---

association directly aims at damaging the State in its economic and social structures. See L. PISTORELLI, Article No. 270, in A. CRESPI, G. FORTI, G. ZUCCALÀ, *Commentario breve al codice penale*, 13th edition, CEDAM, 2012.

[620] Penal Court of Cassation, 5th Section, Judgment n. 40348/2013.

[621] A. PECCIOLI, *Reati contro la personalità dello Stato, Personalità internazionale dello Stato, Associazone sovversiva,* in F. ANTOLISEI, *Manuale di diritto penale- parte speciale II,* 16th Edition, Giuffrè, Milan, Para. No. 259, p. 785

[622] Court of Cassation, 1st Section, judgment 808/1972.

[623] Court of Cassation, Section I, judgment No. 7125 of 1986 and No.8154 of 1986.

This Article was inserted in the Italian Criminal Code by the above-mentioned Law No 15 of 1980. As a consequence of the 9/11 terrorist attacks in New York in 2001, Italy introduced new amendments to the Criminal Code: particularly, Law No. 438 of December 15, 2001 ("Urgent provisions to combat international terrorism"), inserted a second paragraph in Article 270 *bis* and added Article 270 *ter.* Nowadays, terrorism is a phenomenon without territorial boundaries and this makes it difficult to contrast it using inner national tools: this is one of the reasons why the "terrorist purpose" (that is- spreading fear in the community with criminal actions sustained by ideological or political aims) is distinguished from the purpose of subverting the democratic constitutional order. For this reason, the normative modification of Article 270 *bis* adds the terrorist purpose to the subversive one, which is different and alternative. Previously, the "terrorist purpose" was only mentioned in the title of the Article[624].

Adding the terrorist purpose in the text of Article 270 *bis* helped to define the overbroad concept of terrorism, in its juxtaposition with the "subversive purpose". The terrorism purpose consists in spreading terror in the society with indiscriminate criminal actions: they address what certain people represent or they aim at shaking the faith in the existing system; instead, the subversive purpose wants to subvert the constitutional order and the pluralistic and democratic order of the State, destroying its structures [625]. Thus- as explained above- the insertion of Article No. 270 *sexies* in 2005 created new problems for defining the notions under analysis, absorbing the concept of "subversive purpose" inside the notion of "terrorist purpose". One of the most complex issues is understanding the meaning of the specific juridical interest protected by Article No. 270 *bis,* in conjunction with Article No. 270 *sexies*. In this regard, it has to be remembered that all of these norms are placed in the Title of the Criminal Code called "Crimes against the International Personality of the State" [626].

The unification of the "terrorist purpose" with the "subversive" one, together with the text of Article No. 270 sexies about "serious damage to a country", has led to labelling and charging as terrorists the members (and– consequently- the supporters) of some movements; the relevant situation takes place when those movements aim at obliging the State to perform or to abstain from performing a particular act: for example, this is the case of some NO-TAV activists who are trying to prevent the construction of the fast train tracks [627].

---

[624] The behaviour, for being punishable, requires two kinds of specific malice: one regards the objective of the terrorist association – namely committing acts of violence - and one regards the objective of those acts, namely terrorism or subversion (V.MASARONE, *supra* note No. 89, p. 225).

[625] Court of Cassation, Section I, judgment No. 11382 of 1987.

[626] For understanding if an act was committed for a "terrorist purpose", it is useful to refer to the European Framework 2002/ 475/ JHA (July 22) while the Court of Cassation said that the lists of terrorist associations written by the UN Security Council can be considered just as a starting point for investigations.

[627] See Appendix No. 1 at the end of this chapter. Moreover, in this regard, the "external complicity" does not consist in being a member of the organizational structure but in giving a casually relevant and concrete contribution for conserving, strengthening and achieving the objectives of the organization (Court of Cassation, Section I, judgment No. 1072 of 2007) : see in

The greatest change in Article 270 *bis* consisted in broadening the range of possibilities for its enforcement: from 2001, it criminalizes the associations that pursue a terrorist aim *against a foreign state* as well [628]. Nevertheless, the literal meaning of the paragraph itself maintains the national perspective as far as the subversive purpose is concerned: it continues to refer only to the subversion of the Italian democratic order [629]. Despite the literal text, reading Article 270 *bis* in combination with Article 270 *sexies* could boaden this interpretation, as explained a few lines above: among the potential possibilities of criminalization of political movements, this modification creates the risk of criminalizing organizations that aim to challenge foreign dictatorial or illiberal regimes. In particular, I would focus on the *BDS* Movement (*Boycotts, Divestment and Sanctions*), a civil society campaign to pressure Israel to comply with international law and recognize Palestinian rights [630].

An overbroad criminalization of non-violent forms of dissent could take place when the requisite of "violence" ("violent actions") is interpreted too broadly, including the fact of causing material damages to objects or buildings, economic damage, image damages [631]. If these kinds of interpretations become usual, the act of "promoting" dissident grass-root movements that are deemed to be terrorists would be criminalized as well: it would mean criminalizing support through leaflets, websites, public conferences or demonstrations.
In order to reduce the risk of opening criminal trials in case of peaceful dissent, Decree Law No. 144 of 2005 proposed to introduce a mandatory authorization for proceeding from the Minister of Justice. The same solution had already been proposed in 2001 and both times it was upheld by the

---

Appendix No. 1 at the end of this chapter the case of two anthropologists who wrote a thesis about the NO TAV movement and were convicted for moral complicity.

[628] The protected juridical interest could be the "global public security", transforming the crime under Article No. 270 *bis* in the first transnational crime in the Italian Criminal Code; this interest is particularly generic and evokes the scaring idea of a *pax Americana* which should not become an object of penal defence; see E. ROSI, *Terrorismo internazionale: le nuove norme interne di prevenzione e repressione. Profili di diritto penale internazionale,* in *Diritto Penale e processo,* IPSOA, 2002, p. 157; G. FIANDACA, A. TESAURO, *Le disposizioni sostanziali: linee*, in G. DI CHIARA, *Il processo penale tra politiche della sicurezza e nuovi garantismi*, 2005, p. 123; F. VIGANÒ, *Terrorismo di matrice islamico-fondamentalista e art. 270-bis nella recente esperienza giurisprudenziale*, in *Cass. pen. 2007***,** p. 60.

[629] Court of Cassation, Section V, judgment No. 36776 of 2003.

[630] See more about the *BDS* movement at https://bdsmovement.net/. See Appendix No. 1 at the end of this dissertation.

[631] So it happens in the judgment of the Court of Cassation, No. 42282 of 2005, where an anarchic group is convicted under Article 270 *bis* since its actions were aimed at committing acts of material violence towards prisons, C.I.E.s (Centres for Identification and Expulsions of migrants), banks and multi-national societies: therefore, they are aimed at attacking the symbols of the State foreign policy in the economic and social field, they condition the correct functioning of the central organs and are appropriate for following the objective of subverting the democratic order. See also Recommendation No. 1426 of 1999 by the European Parliament, stating in Remark No. 16.2: "The Assembly recommends that the Committee of Ministers to consider as terrorist acts not only attacks against persons but also attacks against property and material resources"; link: http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=16752&lang=en (9/17/16).

Parliament to distance the interpretation of what a terrorist group or a terrorist phenomenon is from political evaluation [632].

A particular ideological or religious tendency is also considered to be an aggravating factor in evaluating how dangerous an association could be [633]: it is an example of "criminal law of the enemy", where certain figures are *ex ante* deemed to be more dangerous than others.

To conclude, the crime under Article 270 *bis* suffers from the same problem of high anticipation of the defence typical of the "pure" associative crimes, giving too much attention to the presumption of danger of the actions' purpose and risking to clash with freedom of association (Article No. 18 of the Italian Constitution) [634]. Similarly, Articles No. 270 *quater* and *quinquies* also punish merely preparatory acts. In order to avoid the problem of an excessive anticipation of the defence, it would be important to identify more precisely the protected juridical interests, instead of focusing on the reasons why the actions are committed: this operation would transform these crimes into "crimes of concrete danger". Instead, the crime under Article 270 *bis* is still a "crime of presumed danger": nevertheless, there needs to be an organized structure - that is, the organization needs to have a certain degree of effectiveness that could render it possible to enforce a criminal plan.
Consequently, a simple subversive idea, without violent and concrete purposes, cannot fall under Article 270 *bis* [635]. Therefore, the actual practice of violence, as a concrete and actual purpose, has to be proven [636]. However, in some

---

[632] L. BAUCCIO, *L'accertamento del fatto di reato di terrorismo internazionale. Aspetti teorici e pratici,* Giuffrè, 2005, p. 39.

[633] Court of Cassation, Section II, judgment No. 669 of 2005.

[634] It is connected with the anticipation of the defence: the mere program of committing violent actions, common among the members of the association, is enough for attributing the characteristics of a political criminal association; see better the difference between the merely associative crimes and the crimes with mixed structure in G. SPAGNOLO, *Dai reati meramente associativi ai reati a struttura mista,* in AA.VV., *Beni e tecniche della tutela penale, materiali per la riforma del codice*, Milan, 1987, p. 156 et seq. . One of the solutions, proposed for solving this clash with other constitutional principles, is to abolish Article No. 270 *bis* and substituting it with a qualified complicity (qualified by the stability of the organization and the associative link): see MOCCIA, *Il diritto penale tra essere e valore, supra* note No. 88 and A. CAVALIERE, *Il concorso eventuale nel reato associativo- Le ipotesi delle associazioni per delinquere e di tipo Mafioso,* Edizioni Scientifiche Italiane, 2003. The associative crimes became the backbone of the Italian repressive system in the '80's and in the '90's as well.

[635] L. PISTORELLI, Article No. 270 *bis*, in A. CRESPI, G. FORTI, G. ZUCCALÀ, *Commentario breve al codice penale*, 13th edition, CEDAM, 2012. Similarly, see the repealed Article No. 272 of the Italian Criminal Code on subversive or anti-national propaganda and the Court of Cassation, Section I, judgment No. 8952 of 1987: there needs to be a violent program.

[636] So it happened with FAI (*Federazione Anarchica Informale)* by the Court of Cassation, Section I, judgment No. 21686 of 2008: there needs to be an organizational structure with a certain degree of effectiveness to justify the legal evaluation of a danger.
In this regard, in operations like "*Ardire"* (see Appedix No.1 at the end of this chapter) there was a striking attempt of connecting an ontologically informal group as the anarchic one with the feature of an organized association in order to enforce norms such as Article 270 *bis.* The main reasoning for applying precautionary measures to the defendants (Decree-Order of June 9, 2012 by the Preliminary Judge Lucia Brutti) was based on a 2003 public statement deemed to be the "statute" of the organization: the excerpts where it was declaring the lack of any stable bond were considered to be a justification for avoiding criminal consequences.

cases, it has been considered sufficient for accusing someone under Article 270 *bis* to find propaganda leaflets suggesting certain ideological leanings that are justifying violence [637].

- ***The Relationship between Articles No. 270 and 270 bis***

Questions of constitutional legitimacy (under Articles No. 3 and 24 of the Italian Constitution) have been posed regarding the relationship between Articles No. 270 and 270 *bis*: it seems they are protecting the same legal interest. Instead, the Court of Cassation stated that the actions under Article 270 have "specific form" - since this Article prevents the "suppression" of the political and juridical systems of the society- while the actions under Article 270 *bis* have "generic form"- since this other Article tries to prevent the "subversion" of the democratic order [638]. Moreover, the Penal Court of Cassation [639] found a difference between the crime of subversive association (Article No. 270) and the crime of association with purposes of terrorism or of subverting the democratic order (Article 270 *bis*) in the fact that
the former postulates the use of generic violence, while the latter is characterized by the use of terrorist violence: this would justify the greater severity of the penalty of Article No. 270 *bis.*

Finally, it has been said that *terrorism is a means* for achieving a particular subversive purpose: terrorism is not the objective itself [640].

- ***Paragraph No. 4 of Article No. 414***

Outside the cases mentioned in Article No. 302 [641], if the incitement or the apology of a crime refers to crimes of terrorism or crimes against humanity, the penalty is increased by half. The penalty is increased of two thirds if the offense is committed by computer or electronic tools.

This paragraph provides an aggravating circumstance with special effect. It was introduced by Law No. 155 of 2005, ratifying the European Framework No. 475/2002/JHA. As explained above, the Framework - under Article No. 4 - provides on the crime of instigation to commit terrorist offences, guided by a logic of emergency and deterrence.

---

[637] Court of Cassation, Section I, judgment No. 2090 of 1984 quoted in L. PISTORELLI, Article No. 270 *bis*, in A. CRESPI, G. FORTI, G. ZUCCALÀ, *Commentario breve al codice penale*, 13th edition, CEDAM, 2012.
[638] Court of Cassation, Section I, judgment No. 6952 of 1988.
[639] Section No. 5, judgment No. 46340 of July 4, 2013.
[640] Court of Cassation, Section V, judgment No. 12252 of 2012 quoted in L. PISTORELLI, Article No. 270 *bis*, in A. CRESPI, G. FORTI, G. ZUCCALÀ, *supra.*
[641] Article No. 302, "Instigation to commit the crimes provided in Sections No. 1 and 2 [crimes against the international and the internal personality]": it provides a sentence from 1 to 8 years (and however, not superior to half of the penalty provided for the crime instigated itself) for the instigation to commit crimes against the international or internal personality of the State that are punished with a detention penalty. The difference between Article 302 and Article No. 414 relies in the fact that Article 302 provides on facts of private instigation while Article 414 expressly requires the element of "publicity". Moreover, the relevant instigation under Article 302 is not followed by the commission of a crime.

Actually, the European Framework asked to include the behaviour of instigating terrorist acts in the national legislations: such a provision was already existed in the Italian system – together with the apology of a crime - and it was had been already criticised for many reasons, as I will better explain in the following paragraph.
The last paragraph of Article No. 414 creates problems in understanding the boundaries with the general crime of instigating to commit a crime, because it speaks about the diffusion of a message with the "intent of instigating": this phase even precedes instigation, upholding decades of scholarship that aimed at interpreting instigation as a crime of concrete danger.

Moreover, the broad meaning of "terrorism" (even broader because of the new and confusing Article No. 270 *sexies*) and the lack of a formal recognition in the Italian legislation of what a "crime against humanity" is, increase the lack of harmony of this paragraph with the general system.

Once again, the object of this provision is the activity of proselytism, especially relating to fundamental-Islamic terrorism: this feature is again highlighting the potential strong contrast between the crimes of instigation and apology with the right to freedom of expression.

To conclude, it is interesting to note that certain norms protecting national security and public order which should be repealed or greatly and progressively amended decades ago- such as Article No. 414 of the Italian Criminal Code – are, instead, expanding thanks to the addition of new aggravating circumstances.

- ***Law No. 43 of 2015, " Urgent Provisions for Contrasting Terrorism, also [terrorism] of International Nature"***[642]

This Law aims, in particular, at contrasting the emerging phenomenon of the so-called "*foreign fighters"* – that are citizens or residents of European countries which reach Middle-East or Maghreb's countries after training to join organizations that are deemed to be terrorist and, lately, they return to the European countries of origin. In particular, the legislator aims at contrasting a new kind of organization which is not "cellular" anymore (like, for example, *Al- Qaeda*), but "atomic": this means that every single fighter could have a criminal initiative, after being attracted by the terrorist propaganda.

This kind of propaganda takes place, most of the time, online [643]. For this reason, Law No. 43 of 2015 adds some aggravating circumstances when the crimes are committed by computer or electronic tools; in particular, the Law adds: 1. The second part of Paragraph No. 4 of Article 414 (the penalty is increased up to two thirds) 2. A new paragraph to Article 270 *quinquies* ("Training for activities with [also international] terrorist purpose"), 3. A new paragraph to Article 302 ("Instigation to commit the crimes under Sections No. 1 and 2).

---

[642] Law No. 43/2015 converts Decree-Law No. 7/2015; see the complete coordinated text at http://www.gazzettaufficiale.it/eli/id/2015/04/20/15A02961/sg.

[643] In particular, the danger for public security relies in the return of a radicalized fighter, which is difficult to face through the 2001 and 2005 norms: these provisions pay attention to the previous or side manifestations of terrorist activities (such as propaganda) but they still assume the existence of a bilateral relationship between someone who gives instructions and another subject who accepts them.

Moreover, the Law makes provisions to order the removal of contents or blocking of websites that are deemed to be connected with terrorist activities.

Notably, these aggravating circumstances are not structured in a way that allows a discretionary enforcement to the judge: they presume that using the informatic tool will increase the diffusion of the terrorist message, without giving space to the possibility that in some cases it may not happen. Consequently, in some cases the principle of *concrete suitability of the instigation or of the apology to provoke the commission of a crime* – fixed by the Constitutional jurisprudence in judgment No. 65 of 1970 referring to Article 414 (3)- may be ignored [644].

- Limitations of the Right to Defence: the Administrative Expulsion

The counter- terrorism legislation, especially after 2001, created a special sub-system regarding procedural law as well. Among other measures[645], strict provisions concerning the expulsion of individuals who are presumed to be involved in terrorist organizations and/or activities were enforced. Under the new laws (such as the *Pisanu* Law, No. 155/2005), the individuals that are deemed to be involved in such groups or activities may be expelled with an administrative act of the Minister of the Interior or of the Prefect.

It is necessary to make a so-called "concreteness test" before expatriation and deportation: in this sense, the ECtHR had a positive influence on national judicial practices [646]. Italy has been condemned various times by the Strasbourg Court, which ruled that national judges must ensure whether conditions of inhuman treatment and/ or risk of torture persist in the country of deportation. As far as Turkey is concerned, its continuous authoritarian regression should limit the cases of expatriation towards this country, such as in the case of Erden Ünal - a Turkish doctor who obtained political asylum in Austria [647].

---

[644] See a more detailed explanation of the ruling in the following section of this dissertation, regarding the "common" crimes of instigation to commit a crime, apology of a crime and instigation to disobey the law.
See also A. VARVARESSOS, *Integrazione delle misure di prevenzione e contrasto delle attività terroristiche* in *Commento al d.l.7/2015, art. 2, "Lalegislazionepenale.eu",* January 15, 2016, link:http://www.lalegislazionepenale.eu/wp-content/uploads/2016/01/studi_legge4315_art.2-co.-1-varvaressos.pdf.
Among the most important changes to the draft law, during an examination by a Committee of the Chamber of Deputies, it is significant to remind the abridgement of a provision (originally urged by Prime Minister Matteo Renzi) which would have authorized the police to get into the interior of a computer remotely, in order to intercept web- communications from suspects of terrorist crimes.

[645] Some counter-terrorism measures are – for example- the exclusion of prison benefits for those who are convicted for actions with a terrorist purpose. Notably, a 2011 sentence of the Court of Cassation stated that this is valid only for those who concretely committed violent actions (see judgment No. 45945 of 2011 quoted in L. PISTORELLI, Article No.270 *bis* in A. CRESPI, G. FORTI, G. ZUCCALÀ, *Commentario, supra).*

[646] G. REPETTO, *Strasbourg Jurisprudence as an Input for "Cultural Evolution" in Italian Judicial Practice,* in *The Constitutional Relevance of the ECHR in Domestic and European Law, supra* note No. 166, p. 61-62.

[647] See the following "Case Law" section for a more detailed analysis of the case of Erden Unal. See also the interview to Nicola Canestrini – Unal's lawyer and President of the "Italian Union of the Penal Chambers" (UCPI)

The cases that reached the Strasbourg Court regarded administrative acts, not normative content of a law statute: therefore, no question could be addressed to the Constitutional Court [648]. The question is: can an administrative proceeding undermine fundamental human rights because national security is under threat? Some of these cases have regarded expatriations and deportations following the request of foreign authorities: similarly, the same "concreteness test" should be made in case of people that are charged with crimes of terrorism in Italy and deported to their country of origin [649]. In 2008, Soriano wrote that "it is very likely that in the near future the ECtHR will be faced with Italian […] cases concerning the treatment of terrorist suspects and the issue of expulsion" [650].

The Italian approach, weak in the defence of human rights and individual guarantees when it comes to counter-terrorism, reflects a general international approach. For example, many Mediterranean EU Member States - in particular Italy, Spain and France - emphasized cooperation on migration, energy supplies and help with counter-terrorism, while adopting a relatively passive approach toward democracy and human rights (see the Euro- Mediterranean Partnership - European External Action Service Regional Policies - EUROMED). This project involves Turkey as well.

Other legislative innovations can be inserted in the category of the "criminal law of the enemy", focusing on the social control of special categories of people [651]: among others, Law No. 125/2008, Law No. 94/2009, Law No. 217/2010 and the above-mentioned Law No. 43 of 2015. The latter statute, for example, modifies, under its Article No. 4, some other provisions [652] regarding a particular kind of immediate administrative expulsion: it ignores the commission of an offense by the defendant, choosing as a constitutive element his/her belonging to certain categories (considered in terms of irregularities or alleged dangerousness), such as irregular migrants. A case-by-case evaluation will be

---

- in "5 minuti con…" of July 2016, asking for the expulsion of Turkey from the Council of Europe and for limitations to the extraditions towards Turkey; link: https://vimeo.com/175218388.

[648] See Court of Cassation, judgment No. 20514/2010, which expressly refers to the ECtHR's decisions *Saadi v. Italy* (January 23, 2008); *Ben Khemais v. Italy (*February 24, 2009); *Sellem v. Italy* (May 5, 2009); *Trabelsi v. Italy* (April 13, 2010).
See also the ECtHR's ordinances No. 20640, 21867 and 20659 regarding two Moroccan citizens, El Kaflaoui and Zergout, acquitted for the crime of terrorism in Italy and requested by the Moroccan authorities (May 29 and 31). Even if the two individuals were acquitted for not having committed any act, they were expelled under Article No. 3 of the Pisanu Law ("New rules on the expulsion of aliens for the prevention of terrorism") because they were deemed to be *dangerous* for Italian security. See G. GUARINO, *Corte Europea dei diritti dell"uomo e estradizione italiana,* July 14, 2007; download from www.europeanrights.eu/public/commenti/Guarino.doc.

[649] See below, in the "Case Law" section, the case of Usman Rayen Khan (2015).

[650] M.C. SORIANO, *supra* note No. 269, p.419.

[651] S. ALLEGREZZA, *La riscoperta della vittima nella giustizia penale europea,* in *Lo scudo e la spada,* Torino, 2015.

[652] Namely, Article No. 13(2)(c) of Decree No. 286/ 1998.

carried out but the expulsion, enforced by police commissioners, will remain in force also during the challenge of the judge's validation [653].

- Case Law

- *Erden Ünal* (2015) [654]: this case illustrates the Italian attitude towards political charges coming from a foreign state.
  In April 2015, doctor Erden Ünal (a Turkish citizen, resident in Austria) was arrested in a hotel in Venice where he was spending his holidays, because the computer system recognized him in the police SDI database (*Sistema di Indagine,* "Investigative System").
  Turkey issued an international warrant for his arrest in January 2014, for the crime of belonging to a terrorist organization: he is deemed to be a member of the DHKP/C (an extreme-left organization), and is accused of having rented an apartment with other members of the same organization, of having stuck up posters and banners at the *Ulubey* High School of Ankara, of having committed a terrorist attack in a bank of Ankara (he has always declared himself innocent of this charge), of aiding and abetting the members of the organization. All of these charges regarded the years 1994 and 1995.
  Ünal was imprisoned in Italy for 8 days while waiting for the hearing before the Court of Appeal: the Court released him because of the confirmation from the Austrian authorities of his status of political refugee in Austria, which should prevent him also from being extradited to Turkey.
  However, the 8-days detention and the public defamation he was subjected to as a left-wing terrorist - thanks to the Italian press and the declarations of the Minister Angelino Alfano- is completely unacceptable.

- *Hamraouki and others* (2005): This case underlines the confusing meaning of "terrorism" in the Italian system.
  The defendants, Hamraouki and others, were under charge basically for the same facts in two different tribunals. Deciding whether to revoke or renew the precautionary custody, the judge of Milan [655] and the judge of Brescia [656] took two opposite decisions, because of a different interpretation of the notion of "terrorism": one notion stemmed from the *Comprehensive Convention on International Terrorism* [657], while the other considered the actual common sense of the notion, linked to Islamic terrorism and the lists elaborated by the US government.

---

[653] See S. CLINCA, *Interventi in materia di misure di prevenzione, Commento al d.l. 7/2015,* January 1,2016, in "legislazionepenale.eu"; link: http://www.lalegislazionepenale.eu/wp-content/uploads/2016/01/studi_legge4315_art.4-Clinca-terrorismo.pdf.

[654] See the original documents in the end of this chapter, Appendix No. 2. See also http://www.infoaut.org/index.php/blog/varie/item/14462-le-accuse-contro-il-dr-unal-erdel-cominciano-a-frantumarsi-il-garantismo-ai-tempi-di-renzi.

[655] G.u.p. Trib. Milano, January 24, 2005, judge Forleo.

[656] G.u.p. Trib. Brescia, Ord. January 31, 2005, judge Spanò.

[657] *Comprehensive Convention on International Terrorism,* UN, see above Paragraph "The notion of terrorism" of this dissertation.

- *Usman Rayen Khan case* [658]: This case regards more specifically freedom of thought and freedom of opinion.
  On January 2015, an administrative decision of the Minister of the Interior Angelino Alfano expelled a 23-year-old boy with Pakistani origins, Usman Rayen Khan. He was punished for publicly praising terrorism and therefore, he was deemed to be socially dangerous. Khan had put the ISIS flag as a profile photo on his Facebook page and wrote posts expressing "extremist points of view" on the social network.
  His attorney, Nicola Canestrini, based his defence on the fact that the right to freedom of expression also includes the freedom to communicate unpleasant, biting and extreme opinions.
  Moreover, Khan denounced having suffered abuses from the Pakistani police once back in his country of origin, in addition to the fact that his whole family remained in Italy.
  The challenges for the suspension of the measure, based on the lack of proper grounds and the arbitrary nature of the expulsion together with the "abstract" or "presumed" nature of the danger represented by the defendant, were refused both at the Regional Administrative Tribunal (TAR) of Lazio and in the Council of State [659].

- Roberta Chiroli's case, Davide Falcioni's case, the "Shadow" and "Ardire" operations regarding the repression of dissident movements – and consequently, of dissident thoughts and opinions - will be analyzed in Appendix No. 1 of this chapter.

- **TURKEY**

- The Concept of Terrorism and the Emergency Legislation: an Overview from the 70's to the Present

In Turkey, as well as in Italy, the first forms of terrorism regulated with criminal law provisions were of domestic nature – the word "terrorism" meaning a form of subversion of the existing order.
The form of terrorism which has been considered to be the most dangerous in the last 30 years for Turkey's indivisibility is "Kurdish terrorism" – that is, the actions of Kurdish groups asking for Kurdish separatism and/or for better conditions in the treatment of the ethnic Kurds [660].

[658] See the original documents in the Appendixes' section in the end of this dissertation. See also *Pakistano espulso, Salvini attacca il legale bolazanino Canestrini,* February 20, 2016, link: http://altoadige.gelocal.it/bolzano/cronaca/2015/02/20/news/pakistano-espulso-salvini-attacca-il-legale-bolzanino-1.10904014 (9/14/16).
[659] From the original documents regarding the challenge to the Administrative Regional Tribunal of Lazio.
[660] Since 1984, the Government of Turkey has been engaged in an armed conflict with the PKK. More than 40,000 people died since that year, with human rights abuses reported on both sides. In July 2015 there was a new breakdown in the peace process: more than 335.000 people have been temporarily displaced, about 340 civilians were killed, long curfews were imposed and a broad process of house-demolitions took place in various cities of the South-East of Turkey. See HUMAN RIGHTS WATCH, *Turkey: State blocks probes of South- East killings,* July 11, 2016, link:

From the beginning of the Turkish Republic - especially after the abolition of the Caliphate- the Kurdish population living in Turkey has been asking for independence, gradually also accepting the possibility a solution of federalism (that has never existed in Turkey). In 1978 the PKK *(Partîya Karkerén Kurdîstan)* was born, an armed organization of Marxist-Leninist ideology which is now more oriented towards democratic confederalism. The same year, martial law (*sıkıyönetim*) was enacted in Turkey: for a democratic system, this has even more serious consequences than a state of emergency.
In 1980, General Kenan Evren and his "National Security Council" (MGK- *Milli Güvenlik Kurulu)* came to power thanks to a *coup d'etat.* For the following three years, the democratic institutions were suspended and political parties were declared illegal. Once again, the scheme "declaration of the emergency- *coup d'etat* - suspension of the fundamental rights and freedoms" took place [661].
From 1987 to 2002, the martial law was substituted with the state of emergency in several Turkish Provinces - especially in the Centre-South and East of the country. Both martial law and state of emergency were justified based on the need of assuring the security of the country from Kurdish terrorism and from the separatist threat.

Under the 1982 Constitution – that was enacted in the beginning of Evren's military regime – and specifically, under Articles No. 15, 120, 121 and 148, the state of emergency can be declared in case of natural disaster, serious economic crisis or widespread acts of violence and serious deterioration of public order. It allows to the Council of Ministers to enact decree - laws that do not need a parliamentary ratification and that cannot be questioned before the Constitutional Court; moreover, the state of emergency allows the suspension of fundamental rights and freedoms under Article 15 of the Constitution [662]. As far as freedom of thought and opinion are concerned, however, the second paragraph of Article No. 15 [663], specifies that "no one shall be compelled to reveal his/ her religion, conscience, thought or opinion, nor be accused on account of them".

Following the declaration of a state of emergency in 1987 (based on the newly born 1982 Constitution), a regional governor has retained authority over the ten provinces involved. The state of emergency allowed the government to exercise quasi-martial powers, including restrictions on the press, removals and displacements of people whose activities were deemed to be hostile to public order. The state of emergency decree was renewed in 1994 [664].

---

https://www.hrw.org/news/2016/07/11/turkey-state-blocks-probes-southeast-killings; for these reasons, President Erdoğan was accused of war crimes before a federal prosecutor in Berlin, see C. CRUCIATI, *Die Linke: "Erdogan criminale per la strage curda di Cizre",* June 30, 2016, in *Il Manifesto,* link: http://nena-news.it/die-linke-erdogan-criminale-di-guerra-per-la-strage-kurda-di-cizre/.

[661] This is, for example, what happened in Nazi Germany: the Nazi Party immediately declared a state of emergency under the Weimr Constitution, legalizing the exceptions to fundamental rights and freeedoms.

[662] See the article I wrote for *Unimondo.org*, Turchia: i mille volti di un terrorista, in *Unimondo.org,* December 3, 2015, link: http://www.unimondo.org/Notizie/Turchia-i-mille-volti-di-un-terrorista-154007 (9/18/16).

[663] As amended on May 7, 2004 with Act No. 5170.

[664] U.S. DEPARTMENT OF STATE DISPATCH, *Turkey Human Rights Practices, 1994*, (U.S. Dep't of State, Washington, D.C.), March 1995.

As explained above in note No. 664, the clashes between the Turkish Armed Forces and the Kurdish fighters have continued to the present, together with the threats towards Kurdish politicians, lawyers, journalists and academics[665]. Currently, the war in Syria has complicated these fragile relationships: Syria, together with Turkey, Iraq and Iran hosts, especially in the West – in a region called *Kurdistana Rojava* - thousands of ethnic Kurds. Speaking again about the vagueness of the notion of "terrorism", on one hand it is interesting to note that the international community recognized PKK as a terrorist organization since 2001, in the wake of post-9/11 measures; on the other hand, the international community have mainly been relying on these militants - the Kurdish-Syrian *peshmerga* of Rojava - as the only fighters on the ground against the expansion of the Islamic State in Syria [666]. Technically, terrorists against other terrorists. Even if the UN lists of terrorist organizations are not considered to be binding, this example shows that the international community should review them, together with choosing fix and clear parameters and definitions of what is "terrorist" or not: in fact, some states, such as Turkey, use these lists for justifying many exceptional measures adopted in the name of national security and counter- terrorism.

Basing on the Council of Europe representatives' statements, the fight against terrorism– together with the management of the migrant's flow - is one of the reasons why the collaboration between Turkey and the Council of Europe is intense [667]. Nevertheless, the European Parliament itself, in its resolution on the "2015 Report on Turkey", "reiterates its concern about the anti-terrorism law, in particular its broad and excessively vague definition of terrorism, organised crime and propaganda, making it manifestly impossible to determine the precise nature of such offences; insists that criminal and anti-terror legislation needs to be in line with ECtHR case law, which should be fully respected and implemented by Turkey" [668].

The broad and vague definition of terrorism led, in the last three years, to include among the terrorist organizations that are dangerous for Turkish national security the *FETÖ (Fethullahçı Terör Örgütü,* "Gülenist Terror Organization") [669], headed by the auto-exiled imam Fethullah Gülen who is allegedly plotting for destroying the legitimate government of Turkey and who is accused of having organized the *coup* attempt of July 15, 2016.

---

[665] See the European Parliament, *supra* note No. 375, Remarks No. 25-35 (*"Kurdish peace process and the situation in the southeast of Turkey"*), link: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2016-0133+0+DOC+XML+V0//EN.

[666] See *Turkish President Erdogan slams US over YPG support,* in Hurriyet Daily News, May 28, 2016, link: http://www.hurriyetdailynews.com/turkish-president-erdogan-slams-us-over-ypg-support.aspx?PageID=238&NID=99783&NewsCatID=510.

[667] See *Meeting of heads of state or government with Turkey – EU, Turkey statement, 29/11/2015,* Brussels, in "Consilium.europe.eu", link: http://www.consilium.europa.eu/en/press/press-releases/2015/11/29-eu-turkey-meeting-statement/.

[668] European Parliament resolution, *supra* note No. 375.

[669] See my article for Unimondo.org, *Come chiudere il giornale più venduto del paese e ricevere tre miliardi euro,* March 18, 2016, link: http://www.unimondo.org/Notizie/Come-chiudere-il-giornale-piu-venduto-del-paese-e-ricevere-tre-miliardi-di-euro-156221.

On July 21, 2016, one week after the *coup* attempt, Turkey declared its intention to temporary suspend part of the ECHR, under Article No. 15 of the European Convention: this provision allows to temporarily derogate to the ECHR in case of public emergency that threats the life of a nation, and it was recently used also by Ukraine and France [670]. Among the several consequences, a wave of purges took place- involving judges, prosecutors, academics, journalists, media outlets and the public sector - in the name of national security and of counter-terrorism. In the beginning of August 2016, the number of people detained by the Turkish authorities already exceeded 26.000 [671]. Focusing on journalists and media outlets, I will provide a more specific list in the "Case Law" section of this paragraph [672].

- ***The Emergency Legislation***

In case of declaration of a state of emergency or of martial law, the individual rights and liberties are at stake. In the Turkish case, it is proved by the analysis of the two fundamental legal sources that permit to declare these regimes of derogations, namely the Turkish Constitution and the State of Emergency Act (Law No. 2935 of 1983 [673]) [674].

As I already explained in the second Chapter of this dissertation, one of the reasons why a low protection is accorded to fundamental rights in Turkey is the 1982 Constitution itself, which was adopted under the military regime of MGK (*Milli Güvenlik Kurulu*, "National Security Council") and is still in force [675]. It rests on the implicit understanding that Turkey is in a constant state of emergency [676]. Similarly, the State of Emergency Act was enacted in the same period.

---

[670] Secretary General receives notification from Turkey of its intention to temporarily suspend part of the European Convention on Human Rights, from the website of the Council of Europe (www.coe.int), link: http://www.consilium.europa.eu/en/press/press-releases/2015/11/29-eu-turkey-meeting-statement/ (9/18/16).

[671] The Minister of Justice Bekir Bozdağ told to *Anadolu Agency* that 6,000 of the 26.000 detained people in the aftermath of the coup attempt, had been formally arrested and taken into custody while 6,000 detainees were being processed and almost 8,000 suspects remain free but under investigation: see *Turkey coup attempt: Number of people detained passes 26,000 amid international concern over crackdown*, August 9, 2016, in "The Independent", link: http://www.independent.co.uk/news/world/europe/turkey-coup-attempt-news-latest-number-of-people-detained-26000-gulen-hizmet-erdogan-crackdown-a7180256.html.

[672] See my article for *Unimondo.org, Sovrano è chi decide sullo stato di eccezione*, July 26, 2016, link: http://www.unimondo.org/Notizie/Sultano-e-chi-decide-sullo-stato-di-eccezione-159052.

[673] Law dated October 25, 1983, published in the Official Gazette dated October 17, 1983 and numbered 18204. See the English version of the Law in legislationonline.org, link: http://www.legislationline.org/documents/id/6974.

[674] See A. R. ÇOBAN, *Fundamental Rights During States of Emergency in Turkey,* Trento, Comparing Constitutional Adjudication A Summer School on Comparative Interpretation of European Constitutional Jurisprudence 4th Edition – 2009; link: http://www.jus.unitn.it/cocoa/papers/PAPERS%204TH%20PDF%5CEmergency%20Turkey%20Coban.pdf.

[675] M. BELGE, *Trapped in its own history*, Index on Censorship, Vol. 24, Issue 1, 1995.

[676] IBRAHİM ÖZDEN KABOĞLU, STYLIANOS – IOANNIS G. KOUTNATZIS, *supra* note No. 333.

Under Article No. 118 of the Turkish Constitution, the MGK was set up by the Constitution for the purpose of formulating, coordinating and implementing security policy and is composed of the Prime Minister, the Ministers of National Defence, National Affairs and Foreign Affairs, the Chief of General Staff, the Commanders of the respective Armed Forces, the General Commander of the Gendarmerie. It meets monthly and submits to the Council of Ministers its views on the formulation, establishment and implementation of measures for the preservation and security of the state. Essentially, it acquired an executive function rather than the advisory role set in the Constitution. Specific policy recommendations have focused on repressing freedom of expression of political opponents of the State: for example, in the case of the Law on Assembly and Demonstrations or the Law of Associations, they basically prohibit any form of political statement or activity by an organization other than a legal political party and penalize violations with imprisonment. The EU enlargement process led to reduce the MGK powers, to a certain extent. However, the state of emergency – such as the current one - has to be declared after a consultation of the MGK itself under Article 120 of the Turkish Constitution.

The Constitution reflects the ideal of an indivisible and unified state, based on a specific territory and a specific language. The State, via leaders from Atatürk to the present, has tried to convert ethnically heterogeneous people into a homogenous population of Turks. This ideal is well fixed in many passages of the Constitution. In particular, for the scope of this paragraph, I would remember Article No. 15 of the Turkish Constitution:

"*In times of war, mobilization, martial law, 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 that is required by the exigencies of the situation, as long as the obligations under international law are not violated.*
(As amended on May 7, 2004; Act No. 5170) 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".

Another example of the supreme attention for national security is given by Article 121 of the Constitution, where there is an exception to the rule that criminal matters can be only regulated by decrees having the force of law (and therefore, that are issued by the Grand Assembly): in case of martial law or state of emergency, the Council of Ministers may issue decrees having the force of law "on matters necessitated by the state of emergency" - namely, also regarding fundamental rights and freedoms and the criminal field [677].

[677] The same is also ruled by Article No. 4 of Law No. 2935 of 1983, which reads as follows:
"During a state of emergency, the Council of Ministers meeting under the chairmanship of the President of the Republic, may issue decrees having the force of law on matters necessitated by the state of emergency without complying with the restrictions and procedures laid down in Article 91 of the Constitution. Decrees having the force of law shall be published in the Official Gazette and submitted to the Turkish Grand National Assembly for approval".

Moreover, under Article No. 148 of the Constitution, “decrees having the force of law issued during a state of emergency, martial law or in time of war shall not be brought before the Constitutional Court alleging their unconstitutionality as to form or substance”. The state of emergency can last maximum six months, but the Grand Assembly may extend it for a maximum of four months each time at the request of the Council of Ministers under Article No. 121 of the Constitution: it means, as demonstrated during the period 1982-2002, that it can actually last indefinitely.

Shifting from the Constitution to the criminal legislation, in situations of emergency, press silence can be enforced under Article No. 285 of the Criminal Code. This provision punishes with detention from one to three years who breaks the press silence (*yayın yasağı*) including televisions, newspapers but also hosting providers such as Twitter and YouTube [678]. Together with this criminal provision, an administrative ban can be imposed under Article No. 7 of Law No. 6112 , that reads as follows:

(1) In times of crisis caused by war, terrorist attacks, natural disasters and similar extraordinary situations, the freedom of expression and information is fundamental; and beforehand broadcast services cannot be audited, or with decisions of the judiciary being reserved cannot be ceased. However, in evidently required by national security or in situations where it is highly likely that public order will be seriously disrupted, the Prime Minister or the minister to be appointed by the Prime Minister can impose a temporary ban.
(2) The media service provider is obliged to broadcast any announcement in relation to the requirements of national security, public order, general health and general morality issued by the President or the Government before 23:30 on the day of arrival of any such announcements.
(3) Any cancellation lawsuits to be filed against decisions taken pursuant to paragraphs one and two shall be directly brought before the Council of State. The Council of State shall hear these lawsuits and render its decisions with priority, and decide on the stay of execution requests within forty-eight hours.

Focusing on the recent period, the counter- terrorism State action led, on June 24, 2016, to the enactment of a Law (No. 31853594-101-1262-2458 , Bill No. 1/725 [679]) which is granting immunity to the soldiers who are involved in counter- terrorism missions. The only way of proceeding against them would be, once again, the authorization of the Minister of Justice [680]. The exaggerated

[678] Read more above on the *yayın yasağı*, in paragraph No. 2b), Chapter No. 2 of this dissertation (“Freedom of expression‘s appendixes: the right to criticize and the right to report”), p. 47 of this dissertation.
[679] See the draft version of the Law, dated June 7, 2016 (Turkish version): http://www2.tbmm.gov.tr/d26/1/1-0725.pdf. See also the Military Penal Code (*Askeri Ceza Kanunu),* Turkish version: http://www.mevzuat.gov.tr/MevzuatMetin/1.3.1632.pdf.
[680] This law follows another one, regarding the abolition of parliamentary immunity: it put at a stake the freedom of expression of parliamentarians, especially those – for example – dissenting with the line of the Government in the South- East of the country. See *Turkey: Immunity for Soldiers Involved in Counterterrorism Operations,* in “The Law Library of Congress”, link: http://www.loc.gov/law/foreign-news/article/turkey-immunity-for-soldiers-involved-in-counterterrorism-operations/.

aptitude to use the terrorist threat as a pass for enforcing exceptions to the rule of law and fundamental legal rights in Turkey can be summed up with the statement of the Minister of Defence Fikri Işık, describing this law as a "Eid [681] gift for our brave Security Forces who are courageously fighting terrorists in the region" [682].

Following the July 15, 2016 *coup* attempt, a state of emergency was declared on July 20, 2016 under the above-mentioned Law No. 2935 of 1983. As a consequence, some emergency decrees were issued as well, in accordance with Article No. 4 of the same 1983 Law. For the interest of this dissertation - a second Statutory Decree (No. 668) was issued on July 25, 2016: because of it, 3 news agencies, 16 televisions, 23 radio channels, 45 newspapers, 15 magazines/journals and 29 publishing houses and distribution channels were closed [683]. According to the Decree, "the movables and all sorts of assets, debits and rights, documents of the newspapers and magazines that have been closed will be costlessly transferred to the Treasury".

- ***Articles No. 220 and 314 of the Turkish Criminal Code (TCK)***

A relevant provision in the counter - terrorism field is Article No. 220 TCK, especially its Paragraphs No. 6, 7 and 8. They read as follows:

(6) (Amended on 2/7/2012 - By Article 85 of the Law no. 6352) Any person who commits an offence on behalf of an organisation, although he is not a member of that organisation, shall also be sentenced for the offence of being a member of that organisation. The sentence to be imposed for being a member of that organisation may be decreased by half. (Additional Sentence: 11/4/2013 - By Article 11 of the Law no. 6459). This provision shall only be applied in respect of armed organizations.

(7) (Amended on 2/7/2012 - By Article 85 of the Law no. 6352) Any person who aids and abets an organisation knowingly and willingly, although he does not belong to the structure of that organisation, shall also be sentenced for the offence of being a member of that organisation. The sentence to be imposed for being a member of that organization may be decreased by one-third according to the assistance provided.

(8) A person who makes propaganda for an organisation in a manner which would legitimize or praise the organisation"s methods including force, violence or threats or in a manner which would incite use of these methods shall be sentenced to a penalty of

---

See also *TURCHIA. E" legge l"immunità all"esercito,* Nena News, June 25, 2016, link: http://nena-news.it/turchia-e-legge-limmunita-allesercito/ ;

[681] The *Eid* is a Muslim festival that takes place in the end of the Ramadan.

[682] A. MACDONALD, *Turkey passes law granting immunity to soldiers fighting 'terrorism',* MiddleEasteye.net, June 25, 2016: http://www.middleeasteye.net/news/turkey-passes-law-granting-immunity-soldiers-fighting-terrorism-551543630.

[683] Among the closed newspaper, there are *Cihan News Agency, Taraf daily, Zaman daily*. See *2nd Decree Issued in State of Emergency: Closures in Media, Dismissals From Armed Forces, Seizures,* in Bianet.org, July 28, 2016, link: http://bianet.org/english/politics/177270-2nd-decree-issued-in-state-of-emergency-closures-in-media-dismissals-from-armed-forces-seizures. See a complete list of the closed radios, newspapers, publishing houses, televisions, magazines, agencies at: http://bianet.org/english/media/177256-131-media-organs-closed-by-statutory-decree.

imprisonment for a term of one to three years. If the said crime is committed through the press or broadcasting the penalty to be given shall be increased by half [684].

Article No. 220 becomes particularly critical when applied in combination with Article No. 314 TCK ("Establishment, command or belonging to an armed organization"). Paragraph No. 3 of Article No. 314 provides that "All the other provisions related to the crimes of establishing an organisation in order to commit a crime will be applied in conjunction to this offence".

The application of Article 314 in combination with paragraphs No. 6 and 7 of Article 220 took place in many recent judgments. For example, in 2008 the Court of Cassation held that taking part to a public demonstration on the calls of pro- Kurdish media outlets and shouting slogans in support of Öcalan (the PKK leader) are considered crimes committed on behalf of a terrorist organisation[685]. The defendant was convicted as a member of the organization under paragraph No. 6 of Article 220 TCK applied in conjunction with Article No. 314: even if he is not a member of the organization, acting *on behalf* of it leads to being sentenced *as a member.* The Court of Cassation annulled the judgment of the Diyarbakir Assize Court stating that for being accused of acting on behalf of an organization, the latter should have done an individual call to a person and not to a undefined collective [686].

Again, in the *Nedim Şener v. Turkey* case [687], the applicant was convicted under Article 220 (7) in conjunction with Article 314 – namely for aiding and abetting an armed organization. In this case, the defendant allegedly contributed, at the request of the suspected members of a criminal organization, to prepare books criticising the actions of the government. In another case, the Court of Cassation [688] convicted him for having prepared a declaration stating "If it is a crime to refer to Öcalan as Mr Öcalan, I hereby commit this crime and denounce myself". This statement was allegedly done in the frame of a campaign instigated by a terrorist organization online.

Therefore, in these cases, the articulated case law of the Court of Cassation relating to Article 314 establishes that the defendants, although no "organic relationship" with an armed organization can be proven, are also sentenced for being a member of the organization. Normally the Cassation's case law studies the "continuity, diversity and intensity" of the actions for evaluating the existence of this "organic relationship": namely, it analyzes if the defendants were acting *knowingly and willingly* within the hierarchical structure of an armed organization. However, if this kind of relationship cannot be proven, paragraph No. 6 of Article 220 (aiding and abetting) still may be applied [689].

---

[684] The amending Article 11 of Law no. 6459 (April 11, 2013) eliminated the adjective "terrorist" from the word "organization". Anyway, the norm remained open to this interpretation as well.

[685] General Criminal Board of the Court of Cassation, E. 2007/9-282 K. 2008/44.

[686] Diyarbakır Assize Court, May 31 20,07, quoted in the ECtHR judgment, *Gülcü v. Turkey*, Application No. 17526/10, January 19, 2016, Para. No. 58.

[687] *Nedim Sener v. Turkey,* App. No. 38270/11, judgment October 8, 2014; link (French version): http://hudoc.echr.coe.int/eng?i=001-145343. See a more detailed summary of the judgment in the "Case Law" section of this Chapter.

[688] E. 2010/15798 – K. 2012/7455. It appears that this case is currently pending before the General Criminal Board of the Court of Cassation.

[689] Venice Commission's Report, *supra* note No. 501, Remarks No. 100 and 101, p. 25.

Furthermore, Article No. 314 itself raises questions of foreseeability because of the need of very weak evidences for applying it. The "Freedom House" noted in 2015 that this Article " with its broad definition of […] *membership*, continued to be invoked against journalists, especially Kurds and those associated with the political left" [690]. Similarly, the 2013 "Report on Turkey" by Human Rights Watch underlines that the prosecutors perceive those activities as having the same overall objective as a terrorist group and consequently "individuals have been prosecuted […] solely to their engagement in peaceful and […] lawful pro- Kurdish activities" [691].

- ***Law No. 3713 of 1991 [692]: The Diffusion of News about the Kurdish Question and the South- East of Turkey***

The definition of terrorism given by Article No. 1 of the Turkish Anti- Terror Law (Law No. 3713 of 1991) is particularly telling about what it is considered to be an highly dangerous situation for national security:

Terrorism is any kind of act done by one or more persons belonging to an organization with the aim of changing the characteristics of the Republic as specified in the Constitution, its political, legal, social, secular and economic system, damaging the indivisible unity of the State with its territory and nation, endangering the existence of the Turkish State and Republic, weakening or destroying or seizing the authority of the State, eliminating fundamental rights and freedoms, or damaging the internal and external security of the State, public order or general health by means of pressure, force and violence, terror, intimidation, oppression or threat.

It is interesting to note that this Article- whose text caused many incriminations- has a similar structure to the Italian Article No. 270 *sexies,* including the subversive aim among the behaviors having a terrorist purpose.

Article No. 2 of Law No. 3713 describes who the "terrorist offenders" are:

Any member of an organization, founded to attain the aims defined in Article 1, who commits a crime in furtherance of these aims, individually or in concert with others, or any member of such an organization, even if he does not commit such a crime, shall be deemed to be a terrorist offender.

This definition is dangerous because the Turkish Courts often accuse people of being terrorists even if those individuals simply share some of the cultural and

[690] FREEDOM HOUSE, *Turkey: 5-Year Decline in Press Freedom,* December 2015.
[691] Amnesty International, *Turkey: Decriminalize Dissent. Time to Deliver on the Right to Freedom of Expression,* EUR 44/001/2013, 2013, p. 19 *et seq.*
[692] Law No. 3713/ 1991, http://www.opbw.org/nat_imp/leg_reg/turkey/anti-terror.pdf.

political goals of a group which is deemed to be terrorist, even if they do not share their methods [693].

- ***Terrorist Propaganda***

As well as in Italy, various forms of propaganda of groups or ideologies who are deemed to be dangerous for national security, have been prohibited throughout the history of the Turkish Republic.

For instance, communist propaganda was prohibited for a long time under the former Articles No. 141 and 142 of the Turkish Criminal Code [694]. This ban was repealed in 1991 but this intervention was made by the same Law (No. 3713) which introduced the crime of "separatist propaganda", under its Article No. 8. Article No. 8 of Law No. 3713 titles "Propaganda against the indivisible unity of the State": it penalized the publication of propaganda which threatens "the indivisible unity of the state". In 1994 it was amended to require proof of "motive" or "intention" to disrupt the integrity of the country. It was repealed in 2003. Moreover, as explained above, paragraph No. 8 of Article No. 220 TCK ("Establishing an organization for the Purpose of Committing Crimes") provides for imprisonment from one to three years for those making "propaganda for an organisation in a manner which would legitimize or praise the organisation's methods including force, violence or threats or in a manner which would incite use of these methods". Finally, I would also report - even if it is an administrative provision – letters d) and g) of Article No. 8 of the RTÜK Law (Radyo ve Televizyon Üst Kurulu – "Radio and Television Supreme Council") – Law No. 6112 ("Media service principles"):

Media service providers […]:
d) shall not praise or encourage terrorism, depict terrorist organizations as powerful or rightful or portray terrorist organizations" intimidating and deterrent qualities. They cannot present an act, perpetrators and victims of terrorism with the form of serving the interests of terrorism[…]
g) shall not praise commission of crime, criminals, criminal organizations or teach criminal techniques.

[693] K. YILDIZ, *Turkey: protection of national interests and the indivisible unity of the State,* in S. COLIVER, P. HOFFMAN, J. FITZPATRICK, S. BOWEN, *Secrecy and Liberty: National Security, Freedom of Expression and Access to Information,* Kluwer Law International, 1999,p. 449; HR AGENDA ASSOCIATION, *Freedom of expression in the new Turkish Criminal Code,* Izmir, 2006.
[694] F. BAŞKAYA, *Opposer = enemy, Different thinking = traitor* and A. BULAÇ, *The crime of the thought,* in *Yesterday, Today, Tomorrow: Freedom of Expression in Turkey (1995 – 2015),* p. 132- 133 and p. 138- 139.

- The Limitations to the Right to Defence: Minor Procedural Guarantees

Courts are not leading the fight against terrorism. Nor are they deciding the measures to be used. The level of threat, and the extent to which exceptional measures are required, are for the executive, or the legislature

Lord Chancellor of the United Kingdom, LORD FALCONER [695]

In terms of procedural guarantees, among the numerous findings of violations regarding Article 6 ECHR, often the ECtHR has dealt with the Turkish "National Security Courts": they were established in the '80's for judging on the offences against Turkey's territorial integrity and unity, later extending their jurisdiction also on terrorism and organized crime; they were completely abolished only in 2014 [696]. These Courts had (full or partial) military nature – therefore contrasting with the principle of the natural judge - and– as the UN Special Rapporteur on the independence of judges and lawyers pointed out- "the utmost caution should be applied in allocating terrorism or other crimes to special or specialized court, in particular due to the lower fair trial guarantees that often characterize such courts in practice" [697].

Focusing on the Anti- Terror Law No. 3713 of 1991, Article No. 10 "limits the number of possible assisting lawyers and the right of a suspect in detention to consult his/ her lawyer, the lawyers' access to documents pertaining to the case can be restricted before the trial and a suspect's tight to contact a lawyer may be restricted by a judge in the first 24 hours" [698]. Therefore, often the defendants are unable to communicate with their lawyers and to access their case file in due time [699].

Among other cases, the ECHR's judgment found Turkey guilty of violating Hasan Basri Gökbulut's rights to legal assistance and to examine witnesses and concluded that the national court did not provide "any serious reason" for denying those rights. In his 2003 application to the ECHR, Gökbulut explained that he was not able to consult a lawyer while he was held in police custody. He also complained he was denied the right to examine any of the witnesses whose testimony the court relied upon for his conviction [700].

Finally, precautionary measures are over-used in the counter-terrorism field: firstly, suspects of terrorist or separatist activities can be detained before trial for almost double time than common suspects. Secondly, even if there is no hypothesis of compulsory preventive custody, the Turkish judges can invoke the

---

[695] RT Hon Lord Falconer of Thoroton - Lord Chancellor and Secretary of State for Constitutional Affairs, ‗The role of judges in a modern democracy', the Magna Cart Lecture, Sydney, September 13 , 2006, cited by The Hon John Von Doussa QC.

[696] See chapter No. 2, ‚Paragraph:"Increasing jailing and decrease of procedural guarantees", of this dissertation.

[697] See G. KNAUL, *supra* note No. 356, paragraph No. 38, Remark No. 54, p. 14.

[698] *Ibidem,* Remark No. 49, p. 13.

[699] See the case *Öcalan v. Turkey,* App. No. 46221/99, Grand Chamber Judgment.

[700] *Gökbulut v. Turkey*, App. No. 7459 of 2004, Final judgment June 29, 2016, link (French version): http://hudoc.echr.coe.int/eng?i=001-161747. See also *Turkey violated right to a fair trial in anti-terror case, says ECHR,* in *Hurriyet Daily News,* March 29, 2016, link: http://www.hurriyetdailynews.com/turkey-violated-right-to-a-fair-trial-in-anti-terror-case-says-echr-.aspx?pageID=238&nID=97064&NewsCatID=509.

existence of a danger of escape or of manipulation of the proofs in order to enforce it [701]: stating the existence of such a danger has no need of further explanation, under Article 100(3) of the Turkish Code of Criminal Procedure, even if Article 19 of the same Code should protect personal liberty and security. Instead, at least after the second renewing of the custody, those hypothesis should be properly motivated [702]. Article 100(3) includes among the possible grounds for an arrest warrant "forming an organization in order to commit a crime", being suspected of "crimes against the security of the state" and against "the constitutional order and the functioning of this system".
Moreover, preventive measures are sometimes permitted expressly even *praeter delictum* (before a crime is committed): surely, prevention is one of the most common grounds for restricting fundamental rights and freedoms. These measures should prevent a clear and present danger: where the norm is silent, it shall be interpreted only as allowing restrictions *post delictum* [703].

To conclude, I would quote Ramsey, when he states that "in so far that the threat from the disadvantaged is a consequence of the material or other social disadvantages endured by them, the aim of protecting the security of the vulnerable is best served not by imposing on the civil rights of the already marginalized, but by ensuring their human rights in the broadest sense- i.e. their social and economic right (and indeed their procedural rights when accused of wrongdoing). […]. The implication of this argument is that the human rights of the disadvantaged are instrumental to a broader "social security", that it is the security of the vulnerable that has normative priority" [704].

- Case Law

The Turkish case law related with accuses of being part of a terrorist organization, instigation, apology and propaganda of terrorism, is practically endless. For this reason, I will here report some cases choosing two criteria: some of them set legal precedents in the ECtHR case law on Turkey; others – even if equally important- are instead very recent.

- *Nedim Şener v. Turkey* and *Ahmet Şık v. Turkey* (2014) [705]: These rulings set a precedent for other cases of Turkish journalists falsely accused of terror-related offenses.

[701] Article 19 (3) of the Turkish Criminal Code of Procedure. It states too broadly that those measures can be adopted also "in other circumstances prescribed by law and necessitating detention".
[702] See *Şeyhmus Uğur and others v. Turkey* (multiple applications, Judgment April 11,2011), link: http://hudoc.echr.coe.int/eng?i=001-101245; see also *Kapar v. Turkey* (App. No. 7328/03 , Judgment August 3, 2007), link: http://hudoc.echr.coe.int/eng?i=001-80423.
[703] L. PASCULLI, *Restrictions to specific individual rights and freedoms,* in *Diritto penale della Repubblica di Turchia-Criminal law of the Republic of Turkey,* Padova University Press, 2012, 53.
[704] P. RAMSAY, *supra* note No. 101, p. 128-129.
[705] *Sık v. Turkey,* App. No. 53413/11, Final judgment October 8, 2014, link (French version): http://hudoc.echr.coe.int/eng?i=001-145345. *Nedim Şener v. Turkey,* App. No. 38270/11, Final judgment October 8, 2014, link (French version): http://hudoc.echr.coe.int/eng?i=001-145343.

Nedim Şener is a journalist whose work has focused mainly on misappropriation by politicians and businessmen, the links of certain members of the security forces with Mafia-type and terrorist organizations, offences committed by the intelligence services and the influence of religious circles on police. Ahmet Sik is a journalist working on freedom of expression, a number of unsolved killings, problems with the operation of the judicial system, police violence and Kurdish issues.

Şık and Şener were arrested as part of the *Oda TV* case in the *Ergenekon* trials: *Ergenekon* is an alleged terrorist organization accused of plotting to overthrow the Turkish government's ruling 'Justice and Development Party' (AKP). Several opposition journalists were charged of belonging("membership") to the *Ergenekon* organization. Şık and Şener were accused under Article 220 (7) in conjunction with Article 314 TCK – namely for aiding and abetting an armed organization, for 'participating or assisting in the production of two books which accused the government of promoting the infiltration of Islamists into State structures' (one of them – never published- is titled 'The Imam's army') [706]. They were held in pre-trial detention for over a year, from March 3, 2011 to March 12, 2012.
During their detention Şık and Şener were prevented from contesting the legitimacy of their imprisonment, being unable to access their case files. In two separate judgments, the ECtHR found that Turkey violated Articles 5 (3) ECHR (right to liberty and security), 5 (4) (right to have the lawfulness of detention decided speedily) and Article 10 (freedom of expression). Significantly, the Court found that the detention of Şık and Şener was "liable to create a climate of self-censorship" for others reporting on the government. The Turkish government has been ordered to pay € 20,000 and € 10,000 in damages to Şener and Şık respectively.

- *Can Dündar and Erdem Gül case* (2015) [707]: A prosecution started against Can Dundar – the *Cumhuriyet* newspaper Editor in Chief - and Ankara representative Erdem Gül; the prosecution stemmed from an article published with the headline 'Here are the weapons Erdoğan claims to not exist' on May 29, 2015 over 'Procuring information as to state security', 'Political and military espionage', 'Declaring confidential information' and 'Propagandizing a terror Organization'.

[706] *Holding two investigative journalists in pre-trial detention for over a year breached the Convention*, ECHR 200 (2014) 08.07.2014, Press release of the ECtHR, link: file:///C:/Users/FreePC/Downloads/003-4815533-5871641%20(1).pdf.
See also a summary of the case and some Sik's statements in this video, subtitled in Italian by the journalist Murat Cinar: https://www.youtube.com/watch?v=sg1ZI-0vX0k.
[707] See my analysis The case of Journalists Can Dündar and Erdem Gül, 'Global Freedom of Expression Centre', link: https://globalfreedomofexpression.columbia.edu/cases/case-journalists-can-dundar-erdem-gul/.

The images were showing MIT (*Millî İstihbarat Teşkilâtı*- National Intelligence Agency) tracks sending weapons to Syria [708].
The two journalists were arrested on November 26, 2015. Dündar, in front of the prosecutor, declared: 'We are not traitors, spies or heroes: we are journalists'.
The defendants applied to the Constitutional Court demanding to be released, on the grounds that their pre-trial arrest was unconstitutional and that their lawyers were unable to examine their files. In these regards, they also cited the ECtHR decision on Ahmet Şık and Nedim Şener, that found Turkey guilty of violating freedom of speech and the right to a free trial [709]. The Constitutional Court ruled in their favor, recognizing that their right to personal liberty and security together with their right to freedom of expression were infringed: consequently, they were released on February 26, 2016 - after 92 days of detention. Turkish President Tayyip Erdoğan declared he did not respect the decision, saying that "the prosecutor may object the decision and an upper court may start a new process". He further noted that Turkey is ready to pay compensations if an upper court's decision, detaining the two journalists again, would be appealed before the Strasbourg Court. "The State can object to the ECtHR if it gives a decision supporting the Constitutional Court or it can pay the compensation", he said [710].
Later on, the trial did actually continue (with close doors) [711], leading to a verdict on May 6, 2016. The Court stated that: "There was no final judgement which confirmed the existence of the FETÖ/PYD organization, and judgements should not be passed based on charges of helping such an organization the existence of which could not be confirmed". For this reason, the Court announced that the investigations into the FETÖ/PYD organization will continue and thus ordered to separate the files and later attach it when the investigation was completed. Thus, a final conviction of 5 years and 10 months for Dündar and of 5 years for Gül were issued only under Article 329(1) TCK ("Unclosing documents

---

[708] See *Journalists Can Dündar, Erdem Gül Arrested*, in "Bianet.org", http://bianet.org/english/freedom-of-expression/169609-journalists-can-dundar-erdem-gul-arrested and *Turkey jails journalists for 'revealing state secrets',* in 'AlJazeera.com", November 27, 2016, link: http://www.aljazeera.com/news/2015/11/turkey-arrests-journalists-revealing-state-secrets-151127062456674.html. See the original indictment by President Erdoğan that was posted on Twitter by the *Cumhuriyet* correspondent Alican Uludağ: he was prosecuted for having violated confidential information of the investigation; link: https://twitter.com/alicanuludag/status/669879091118645249/photo/1.

[709] *Two arrested Turkish journalists apply to Constitutional Court for release,* in 'Hurriyet Daily News", December 6, 2015, link: http://www.hurriyetdailynews.com/two-arrested-turkish-journalists-apply-to-constitutional-court-for-release.aspx?pageID=238&nid=92156.

[710] See the *Today's Zaman* website (now closed, link: http://www.todayszaman.com/national_president-erdogan-prosecutors-may-object-to-dundar-and-guls-release_413970.html) and the critics of the Minister of Justice Bekir Bozdağ, who said: "The decision is certainly an examination of evidences, the Constitutional Court replaces the court of first instance and makes an examination in substance. The Constitution does not accord the Constitutional Court such a right" (*Minister of Justice: Constitutional Decision is Usurpation of Authority,* in *Bianet.org,* March 10, 2016, link: http://bianet.org/english/human-rights/172897-minister-of-justice-constitutional-decision-is-usurpation-of-authority).

[711] *IFJ/EFJ condemn scandalous ban on media at Turkey media trial,* IFJ (International Federation of Journalists)'s website, March 25, 2016, link: http://www.ifj.org/nc/news-single-view/backpid/1/article/ifj-efj-condemn-scandalous-ban-on-media-at-turkey-media-trial/ .

concerning the security of the State") [712]: the decision clearly contrasts with Principle No. 15(1) of the Johannesburg Principles, which states that "no person may be punished on national security grounds for disclosure of information if the disclosure does not actually harm and is not likely to harm a legitimate national security interest".

- *FETÖ terrorism related cases* (2013 - 2016) **:** The closure of media outlets who were deemed to have connections with Gülenist movements, led to a decrease of media pluralism. This fact particularly serious if we consider that one of the only positive sides in the Turkish media sector was an increase in media pluralism in the last twenty years [713]. The impact of media pluralism on media freedom is relevant in the rest of Europe as well, and this is particularly evident in Italy.

	Netherlands	UK	France	Italy
Market share for three largest newspapers	98.2%	70%	70%	45%

	Italy	Germany	UK	France	Spain
Share of total advertising spend received by the two largest TV stations[80, 81]	79%	82%	66%	62%	59%

Chart from a 2013 ECPMF (Centre for Media Pluralism and Media Freedom) study: the largest media groups having ownership of an overwhelming percentage of the media [714].

After the *Ergenekon* investigation, the July 2016 *coup* attempt was the second biggest fuse of a series of purges among Turkish media operators in the history of the ruling AKP government [715]. However, the second round up process

[712] See *Court Sentences Can Dündar, Erdem Gül to 10 Years, 10 Months Total,* in *Bianet.org*, May 7, 2016; link: http://bianet.org/english/human-rights/174539-court-sentences-can-dundar-erdem-gul-to-10-years-10-months-total.

[713] Prof. Atilla Yayla said that 'one of the most important developments in the last 20 years in Turkey is the diversification in the media ('Yesteday, today, tomorrow: freedom of expression in Turkey report (1995-2015)", The Initiative for Freedom of Expression January 2015, pg. 85). See also my paper *Freedom of expression, role and control of media in Turkey and EU- A comparative analysis*, *supra,* note No. 227.

[714] ECPMF, *European Union Competencies in Respect of Media Pluralism and Media Freedom,* January 2013, link: https://ec.europa.eu/digital-agenda/sites/digital-agenda/files/CMPFPolicyReport2013.pdf.

[715] Erkan Saka - teacher of Communication Sciences at Istanbul Bilgi University – was unable to reach Italy for an anthropology conference scheduled at the Bicocca University of Milan following the order of the Superior Education Council (*YÖK)* of July 20, 2016 that prohibits academics to travel abroad. See *YÖK akademisyenlerin yurt dışı görevlendirmelerini durdurdu,* July 20, 2016, link: http://www.imctv.com.tr/yok-akademisyenlerin-yurt-disi-gorevlendirmelerini-durdurdu/ and Erkan Saka's blog (*Erkan"s Field Diary)*: http://erkansaka.net/2016/07/10/because-of-the-travel-ban-to-all-turkish-academics-i-cannot-make-it-to-easa2016-an-anthropology-roundup/?fb_ref=Default. In those days, 7850 policemen have been suspended, and with them 100 Secret Service employees, 15,200 employees of the Minister of Education (6538 other in a second wave), 257 employees of the 'Office of the Prime Minister and 492 of the Ministry of Religious Affairs , 245 of the Ministry of Sport and Youth, 4

started before the summer of 2016: already in October 26, 2015 and March 5, 2016 respectively the *Ipek Koza* and *Feza Media Holdings* were seized because their owners are allegedly connected with the *FETÖ* terrorist organization. An extraordinary administration of trustees was appointed by the government. The *Zaman* newspaper (together with its English version, the *Today"s Zaman*), was the most read newspaper of the country and was owned by *Feza Holding* [716].

After the declaration of a state of emergency in July 2016, many investigations, arrests and closures took place in the media sector; among others:

- On July 25, 2016, a statutory decree (No. 668) was issued: because of it, as reported above, 3 news agencies, 16 televisions, 23 radio channels, 45 newspapers, 15 magazines/journals and 29 publishing houses and distribution channels were closed [717].
- On July 27, 2016, an operation has been launched into 47 people consisting of Zaman daily's former columnists and managers. Earlier, a detention warrant for other 42 journalists was issued as well: both of the operations were within the scope of the *coup*'s probe [718];
- On July 29, 2016, the Vice President of the Directorate General of Press and Information, Ekrem Okutan, said that 330 Press Cards were revoked, stating that "supporting a terror organization via publishing cannot be considered within press activity" [719].

- *Kurdish terrorism related cases:* The practice of arresting or investigating on journalists under charges of being members, aiding and abetting or propagandizing allegedly terrorist Kurdish organizations, takes place from decades. I will here report just a few of these cases.

- *Turgay and Others v. Turkey* (2010): The applicants (Ali Turgay and Cevat Düşün) were the owners, executive directors, editors-in-chief, news directors and journalists of the Turkish newspapers *Yeni Bakış*, *Alternatif* and *Gelecek*. Their publication was suspended pursuant to section 6(5) of Law no. 3713 by the Istanbul Assize Court on May 8, May 25 and June 30, 2008, respectively, for a period of one month because of different news and reports. "The

---

rectors and deans in 1577; the justice system received serious threats, with 11 Izmir lawyers in pre-trial detention for defending alleged gülenists, 2745 suspended judges (including 140 members of the Supreme Court of Appeal and 48 members of the Council of State, while two members of the Constitutional Court were arrested.

[716] See my article for Unimondo.org, *Come chiudere il giornale più venduto del paese e ricevere tre miliardi di euro,* March 18, 2016, link: http://www.unimondo.org/Notizie/Come-chiudere-il-giornale-piu-venduto-del-paese-e-ricevere-tre-miliardi-di-euro-156221.
See also *Seized Turkish opposition newspaper toes government line,* in "The Guardian", March 6, 2016, link: https://www.theguardian.com/world/2016/mar/06/seized-turkish-opposition-newspaper-zaman-erdogan-government.

[717] *Supra* note No. 687.

[718] See the complete list of names in *Detention Warrant on Zaman Daily"s Former 47 Staff,* in *Bianet.org,* July 27, 2016, http://bianet.org/english/society/177212-detention-warrant-on-zaman-daily-s-former-47-staff.

[719] See *330 Press Cards Revoked,* in *Bianet.org,* July 29, 2016, http://bianet.org/english/media/177345-330-press-cards-revoked.

impugned publications were mainly deemed to be propaganda in favour of a terrorist organisation, the PKK/KONGRA-GEL and to constitute the approval of crimes committed by that organisation and its members" [720]. The applicants were prosecuted under sections 6(2) and 7(2) of Law No. 3713, as well as Articles 215 and 218 TCK.
The applicants claimed under Article 10 ECHR that the suspension of the publication and distribution of *Yeni Bakış*, *Alternatif* and *Gelecek*, constituted an unjustified interference with their freedom of expression. In particular, they claimed that "the banning, for such lengthy periods, of the publication of the newspapers as a whole, whose future content was unknown at the time of the national court's decisions" amounted to censorship [721]. Although the government objected that the ban was proportionate to the legitimate aims of protecting national security, territorial integrity and public safety, the ECtHR stated that similarly to the *Ürper and Others* case [722], "the practice of banning the future publication of entire periodicals on the basis of section 6(5) of Law no. 3713 went beyond any notion of "necessary" restraint in a democratic society and, instead, amounted to censorship" [723]. Therefore, the Court found no particular circumstances in the instant case which would require it to depart from this jurisprudence. Accordingly, there was a violation of Article 10 ECHR.

- *Mohammed Rasool's case* (2015): He was detained in a maximum security prison from August 28, 2015 to January 5, 2016. Rasool, fixer for VICE News, was reporting on the new clashes between the Turkish Army and Kurdish fighters in the South-East of Turkey. He was arrested together with his colleagues Jake Hanrahan and Philip Pendlebury under the charge of "working on behalf of a terrorist organization". They were released in a few days (on September 3, 2015) while he, who has Iraqi nationality, was kept in prison for more than four months and released only on bail [724].
In October 2015, during an interview with *CNN Türk*, Feridun Sinirlioğlu (*ad interim* Minister of Foreign Affairs) said that there is "clear evidence" that Rasool is connected to PKK [725]. Earlier, Rasool was held up as a supporter of the Islamic State.
Notably, Rasool's lawyer – also President of the Diyarbakır's Bar Association - Tahir Elçi, was killed on November 28, 2015 during a press conference. Elçi

[720] Para. No. 5 of *Turgay v. Others (No. 5),* App. No. 32869/08, 35022/08 and 39904/08, Final judgment December 21, 2010, link: http://hudoc.echr.coe.int/eng?i=001-100557.
[721] *Ibidem,* Para No. 15 .
[722] *Ürper and Others* case, App. No. 14526/07, 14747/07, 15022/07, 15737/07, 36137/07, 47245/07, 50371/07, 50372/07 and 54637/07, Final judgment October 20, 2010, link: http://hudoc.echr.coe.int/eng?i=001-95201.
[723] Para. No. 5 of *Turgay v. Others (No. 5).*
[724] See *Free Rasool: VICE News Staff on the Journalist Now Imprisoned for a Month in Turkey*, in *Vice News* September 27, 2015, link: https://news.vice.com/article/free-rasool-vice-news-staff-on-the-journalist-now-imprisoned-for-a-month-in-turkey; and *Turkey Has Released VICE News Journalist Mohammed Rasool On Bail,* in *Vice News,* January 5, 2016, link: https://news.vice.com/article/turkey-has-released-vice-news-journalist-mohammed-rasool-on-bail.
[725] *Turkish Official Claims VICE News Journalist Is Linked to PKK-But Provides No Evidence,* in *Vice News,* October 31, 2015, link: https://news.vice.com/article/turkish-official-claims-vice-news-journalist-is-linked-to-pkk-but-provides-no-evidence.

was charged the previous week of "propaganda for a terrorist organization" after stating in a *CNN Türk* broadcast that " the PKK is not a terrorist organization, but an armed political organization that has a broad local support" [726].

Özgür Gündem case (1993- 2016)*: Özgür Gündem* is a pro- Kurdish and leftist media outlet based in Istanbul [727]. From the beginning of the ‗90's, the newspaper has been subject to raids and legal actions, with many journalists being arrested and even killed. The paper remained closed from 1994 to 2011 due to a court order. These facts were the bases for the *Özgür Gündem v. Turkey* case before the ECtHR: The applicants claimed that "the Turkish authorities had, directly or indirectly, sought to hinder, prevent and render impossible the production of *Özgür Gündem* by the encouragement of or acquiescence in unlawful killings and forced disappearances, by harassment and intimidation of journalists and distributors, and by failure to provide any or any adequate protection for journalists and distributors when their lives were clearly in danger and despite requests for such protection" [728]. Concerning the police operation at the *Özgür Gündem* premises in Istanbul on December 10, 1993 and concerning the legal measures taken in respect of issues of the newspaper, the Strasbourg Court found that there was a breach of Article 10 ECHR.
On August 16, 2016, there was another raid by Turkish police inside the newspaper and a court ordered its interim closure for "continuously making propaganda for Kurdistan Workers' Party (PKK)" and "acting as if it is a publication of the armed terror organisation" [729]. Twenty-four *Gündem*'s journalists were arrested and kept in precautionary detention [730]. Only considering July 2016, the *Özgür Gündem*'s website was blocked twice, first on the 1st and then on the 26th [731].

---

[726] See *Prominent pro- Kurdish lawyer shot dead in Turkey,* in *Al Jazeera,* November 29, 2015, http://www.aljazeera.com/news/2015/11/prominent-pro-kurdish-lawyer-shot-dead-turkey-151128103206863.html.

[727] *Özgür Gündem* is a left- wing Turkish language newspaper sympathetic to claims for Kurdish minority rights. Together with *Özgur Ulke, Yeni Politika,* other two magazınes that were particularly active on the Kurdish question, it was subject to various kinds of censorship. One of the problems stems from the fact that no distinction between the commentary and the news (subjective statements- statements of fact) is done by the competent authorities. In April 1994 an Appeal Court issued orders to close *Özgür Gündem* permanently. The reasons included the promotion of separatism and reporting the views of outlawed PKK. Most of the staff of *Özgür Gündem* moved to *Özgür Ülke*, that was eventually banned. It was followed by the daily *Yeni Politika.* In 3 months in 1996, 93 out of 103 issues of the paper were confiscated by the authorities. See KURDISH HUMAN RIGHTS PROJECT (KHRP), *Freedom of the press in Turkey: the case of Özgür Gündem*, 1993.

[728] See *Özgür Gündem v. Turkey,* App. No. App. No. 23144/93, Judgment of March 16, 2000, Remark No. 38, link: http://hudoc.echr.coe.int/eng?i=001-58508.

[729] See *Turkey: pro- Kurdish newspaper Ozgur Gundem shut down,* in *Al Jazeera,* August 17, 2016, link: http://www.aljazeera.com/news/2016/08/turkey-pro-kurdish-newspaper-ozgur-gundem-shut-160817044530537.html.

[730] See M. CINAR, *Turchia: chiuso il quotidiano nazionale Ozgur Gundem,* in *Pressenza,* August 17, 2016, link: http://www.pressenza.com/it/2016/08/turchia-chiuso-il-quotidiano-nazionale-ozgur-gundem/.

[731] The TIB's (*Telecommunication Communication Presidency*) declaration following the access block reads as follows: "On grounds of the technical examination and legal evaluation in

- *Şebnem Korur Fincancı, Erol Önderoğlu and Ahmet Nesin case* (2016) [732]: Korur Fincancı is the Turkish Human Rights Association (HRFT) Chair and activist, especially on the issue of torture. She is also acting as editor-in-chief ad interim of *Özgür Gündem.* Önderoglu is a representative for *Reporters Without Borders* and member of the governing council of the international free expression group IFEX, as well as a correspondent for *Bianet*. Nesin is a journalist and author.
  They were charged of 'propagandizing a terror organization' after taking part to the 'Editor-in-Chief on Watch" campaign at *Özgür Gündem* daily by Prosecutor Eşref Durmuş [733]; consequently, they were arrested by instruction of the 1st Criminal Judicatory of Peace Judge, Bekir Altun.
  They were released on June 30 and July 1, 2016, but their indictment was accepted by the Istanbul 14th Heavy Penal Court [734].

- ***General Conclusions***

To conclude, the particular social damage caused by the 'terrorist method' to society cannot be denied, because of the generally violent nature of the means, the involvement of innocent victims and the publicity of the damages. Nevertheless, acts of mere expression of dissenting thoughts and opinions, even if they are organized, cannot be criminalized under this label.

Why should we defend the free expression of potential terrorists? The American Attorney General John Ashcroft would answer: 'To those […] who scare peace-loving people with phantoms of lost liberty, my message is this: your tactics only aid terrorists, for they erode our national unity and diminish our resolve. They give ammunition to America's enemies' [735].

---

accordance with the Law No. 5651, Telecommunication Communication Presidency referring its decision No. 490.05.01.2016.-111139 on 26/07/2016 imposes an administrative injuction to this website (ozgurgundem1.com). In this regard, see *Websites of DIHA, Ozgur Gundem blocked,* July 27, 2016, http://bianet.org/english/media/177232-websites-of- diha-ozgur-gundem-blocked.

[732] See also above, chapter No. 2, Paragraph 2 c) "Freedom of expression belongs to everyone but journalists need greater defences: the frequency of cases involving journalists".

[733] The "Co-Editorship-in-Chief" is a campaign launched by Özgür Gündem daily to show solidarity and defend press freedom against oppressions and investigations. Sixteen journalists joined the initiative. See *Özgür Gündem"s Editors in Chief on Watch; Önderoğlu, Nesin, Korur Fincancı Arrested*, in *Bianet.org,* June 20, 2016, link: http://bianet.org/english/media/176044-ozgur-gundem-s-editors-in-chief-on-watch-onderoglu-nesin-korur-fincanci-arrested; see also *Turkey arrests journalists who showed support for press freedom* by *Index on Censorhip,* June 20, 2016, link: https://www.indexoncensorship.org/2016/06/turkey-arrests-journalists-showed-support-press-freedom/.

[734] See *Şebnem Korur Fincancı, Erol Önderoğlu Released*, in *Bianet.org,* June 30, 2016, link: http://bianet.org/english/human-rights/176399-sebnem-korur-fincanci-erol-onderoglu-released and *Arrested Editor-in-Chief Ahmet Nesin Released Too* in *Bianet.org,* July 1, 2016, link: http://bianet.org/english/diger/176454-arrested-editor-in-chief-ahmet-nesin-released-too .

[735] *Department of Justice Oversight: Preserving Our Freedoms While Defending Against Terrorism: Hearing Before the S. Comm. on the Judiciary,* 107th Cong. 313 (2001) (statement of John D. Ashcroft, Att'y Gen. of the United States).

However, who these enemies are is hard to say and the answer is easily changing with the political conditions of the moment; there is a problem of foreseeability: it contrasts with Article No. 7 ECHR, where it states that criminal law must not be extensively construed to an accused's detriment, for instance by analogy. Moreover, human rights should not be subject to the political waves.

The crimes I have analyzed in this chapter still follow the archetype of the *crimen laesae*. Debasing criminal law to a mere "fighting instrument" is not efficient and, more importantly, it eliminates the need for the competent institution to make more concrete and radical interventions (that are, organic reforms of society), even if they are less attractive at the public opinion's glance; instead, old features are exhumed, excessively anticipating the defence as to rendering the incriminations basically unsustainable within a due process. I therefore agree with the intervention of Agnes Callamard, Director of the "Global Freedom of Expression Centre": she notes that there is little or no reason why counter- terrorism should be influencing free speech [736]. "My impression is that people in charge of counter-terrorism have forgotten the basis of policy", she stated, "they are obsessed with mass surveillance, Internet surveillance, instead than working on communities. Recently, in the US 34 people were convicted for speech- related offences. Nobody spoke about them and just two cases were followed by a trial" [737].

[736] GLOBAL FREEDOM OF EXPRESSION CENTRE, *supra* note No. 575, see the video at https://globalfreedomofexpression.columbia.edu/justice-free-expression-2015-day-1/.

[737] The convictions she is speaking about are listed by the "Washington Post", listing 100 charges for connections with the Islamic State;see GOLDAN A., YANG J.L., MUYSKENS J., *The Islamic State"s suspected inroads into America*, in "The Washington Post", August 8, 2016, link: https://www.washingtonpost.com/graphics/national/isis-suspects/?hpid=z3&tid=a_inl (9/18/16).

Appendix No. 1 – The Repression of Dissident Movements in Italy

As explained above, there are different interpretations of the concept of terrorism: the "classic notion" (spreading terror among the population through indiscriminate violent acts towards a political or ideological objective) is often substituted by a "reactionary notion", aimed at repressing social phenomena that are considered to be hostile to the states: this notion anchors the definition to the revolutionary objective [738].
In this regard, some documents by the Italian "*I.c.s.a. Foundation*" (*Intelligence Culture and Strategic Analysis*) show that, except for recognizing the new "Islamic fundamentalism" hreat, the core security problems in Italy seem to be unchanged, focusing on anarchists and on the so-called "social antagonists" (extreme left- wing and right- wing groups) [739].

Terrorist charges or – for the specific interest of this dissertation - charges of instigating or praising actions that are deemed to be terrorist are moved against dissident voices and movements. These kind of charges are possible thanks to the broad interpretations of the notion of terrorism together with the unclear formulation of the respective norms (Articles 270 – 270 *sexies* of the Italian Criminal Code), as I have analyzed above [740]. This Appendix wants to study this specific kind of repression, since I consider it to be one of the scarying results of a disproportionate exploitation of the counter-terrorism legislation. It is common to witness these kind of problems with dissident movements in Turkey as well, but synthesis reasons led me, instead, to choose a focus on the terrorist charges on Turkish journalists. Nevertheless, I should here remember that a logic based on punishing individuals on the charges of being members of organizations that are deemed to be terrorist, with weak evidences and reasoning, is one of the main problems for free expression in Turkey today.

---

[738] Already in 1935, during the VI "Conference for the unification of criminal law" (Brussels) the concept of terrorism was defined as a "public threat or state of terror able to lead to a change of public powers or to obstruct the functioning of public powers".

[739] See ICSA (INTELLIGENCE CULTURE AND STRATEGIC ANALYSIS), *Rapporto su eversione, anarchia insurrezionale e forme di antagonismo sociale,* June 16, 2016; link: http://www.fondazioneicsa.info/2016/06/16/rapporto-su-eversione-anarchia-insurrezionale-e-forme-di-antagonismo-sociale/. The Foundation has many institutional links, starting with its President, the Air Force General Leonardo Tricarico, former Chief of the General Staff and, before, NATO Air Force Commander in Vicenza. The foundation is now under investigation, see M. LILLO, *Woodcock Time,* April 1, 2015, http://www.dagospia.com/rubrica-3/politica/woodcock-time-cpl-concordia-diede-20mila-euro-anche-icsa-97687.htm.

[740] See PRISON BREAK PROJECT, *Terrorizzare e reprimere. Il terrorismo come strumento repressivo in perenne estensione,* in "Osservatoriorepressione.info" July 15, 2014; link: http://www.osservatoriorepressione.info/terrorizzare-e-reprimere-il-terrorismo-come-strumento-repressivo-in-perenne-estensione/. Also, see above the paragraphs analysing Articles 270, 270 *bis* and 270 *sexies* of the Italian Criminal Code.

- ***NO TAV (Treno Alta Velocità) Movement; Anarchic movements***

The new Article 270 *sexies* ("Actions with terrorist purpose") of the Italian Criminal Code can be broadly interpreted: it speaks about actions that aim at "seriously damaging a country". It led to the possibility of criminalizing under terrorist charges the damages to "strategic infrastructures", such as against the Lions - Turin High Speed Train (*TAV- Treno ad Altà Velocità*) which is under construction in the Susa Valley. This construction enjoys a great grass - root movement of protest (namely, the NO TAV movement) against this expensive and non - environmentally friendly structure. Many people who are actively involved in the movement and many others who are solely supporting it were prosecuted or convicted under different charges throughout the years [741]. Some of them were charged for terrorist offences, but no case led to a definitive conviction for terrorism yet.

One relevant case involves four activists (Chiara, Claudio, Niccolò and Mattia) that threw some Molotov cocktails against one of the tunnels of the TAV construction site when nobody was inside: they were charged under Article 280 and 280 *bis* of the Italian Criminal Code ("Attack with terrorist purpose" and "Terrorist action with fatal and explosive devices"). The Penal Court of Cassation's judgment No. 28009 of 2014 [742] ruled on the notion of "terrorist purpose" under Article 270 *sexies* and on the role of malice in the crimes of terrorist attack [743], partially quashing the order of the Tribunal of Turin on the enforcement of precautionary measures in jail against the four defendants.

From a free-speech perspective, the danger increases with the potential criminalization of the *support* for these movements, such as the diffusion of material like leaflets or flyers, the exposition of banners, and so on: usually, the criminalization of support takes place under the crimes of instigation, apology or propaganda for a criminal or terrorist association but it could also cause the charge of being a member of a terrorist association.

- *The "Shadow" operation* (2008): In this case, the latter option took place, namely some people supporting a dissident movement with the diffusion of

[741] One of the most famous cases involves the Italian writer Erri De Luca. I will better analyze this case in the section dedicated to the crime "common" crime of instigating to commit a crime.

[742] See the full text of judgment No. 28009/2014 at http://www.notav.info/wp-content/uploads/2014/06/1404114093Cassazione_no_tav.pdf.

[743] Specifically, the Court said that "the terrorist objective is not a purely psychological phenomenon, but it should materialize in a serious action capable of realizing the typical purposes described by the norm" (p. 30) and that the Italian criminal system "for constitutional necessity, must remain far from the criminal law models of the intention and of the type of author" (p. 22). In addition it stated that " the essence of politics, and of the democratic form of the State (Art. 1, paragraph 2 and Article 49 of the Constitution), consist in the deployment of individual and social forces in order to guide and, in a sense, to impose the choices that are entrusted to the public organs". The judgment clarifies that the mere purpose of political conditioning alone is " totally inappropriate for identifying actions with terrorist purpose " (p. 25). See more in 'Diritto Penale Contemporaneo" (penalecontemporaneo.it), S. ZIRULIA, *No Tav: la Cassazione fissa i parametri interpretativi in merito alle condotte di attentato ed alla finalità di terrorismo,* June 30, 2014; link: http://www.penalecontemporaneo.it/tipologia/0-/-/-/3186-/?utm_source=dlvr.it&utm_medium=twitter.

writings were accused of being members of a terrorist association. In particular, eight people were deemed to be part of F.A.I. (*Federazione Anarchica Informale*) and were charged under Article 270 *bis* of the Criminal Code. The only factual element proving the membership of six of them was the distribution of leaflets of anarchic inspiration (with the aggravating circumstance of acting with "terrorist purpose").
In this case, as well as in the following one, there was a striking attempt of connecting an ontologically informal group as the anarchic one with the feature of an organized association in order to enforce norms such as Article 270 *bis.* All of the defendants were acquitted in the First Instance Tribunal of Perugia on October 22, 2013; the judgment was reversed by the Perugia Court of Appeal on June 29, 2015, when - among other convictions - Stefano del Moro, Alfredo Cospito and Anna Beniamino were sentenced to 3 years of detention under Article 414 for publishing the periodical paper "KNO3".

- *The "Ardire" operation* (2010) : Similarly to the "Shadow" operation, the "Ardire" operation was also opened in the Umbria Region by the prosecutor Manuela Comodi. I have analyzed the operation through the order of enforcing the precautionary measures of June 9, 2012 by the preliminary judge Lidia Brutti (proceedings No. 3866/10 and 2898/10 of the Tribunal of Perugia) [744]. For enacting the precautionary measures, the judge has to prove "serious elements of guilt" and the "dangerousness" of the defendants, therefore focusing more on their personalities.
The main reasoning for the measures' enforcement – contained in the Decree-Order of February 9, 2012 - was based on a 2003 public statement deemed to be the "statute" of the organization: the excerpts where it was declaring the lack of any stable bond were considered to be a justification for avoiding criminal consequences.
The defendants were charged under Article 270 *bis:* the facts attributed to three of them are damaging an ATM, writing on the walls and hanging a banner stating "The state is terrorist. Solidarity with the anarchists" [745]. The element of "solidarity" is interpreted as a feeling of belonging to the same organization, and therefore it is used for proving the belonging to a subversive or terrorist organization. Moreover, the aggravating circumstance of the terrorist purpose was also added to each of these offences. It is evident that two out of three of the contested facts regard the expression of thoughts and opinions.

It has to be noted that the next two cases do not even regard the *support* for a dissident movement, but they criminalize *reporting* on certain

[744] I have the original proceedings but I have not attached with the other documents in the Final Appendixes of this dissertation, because of its length.
[745] The solidarity was addressed to some activists of the community centre "Fuoriluogo" of Bologna, arrested on April 6, 2011. See IL RESTO DEL CARLINO, *Blitz contro gli anarchici: cinque arresti e un fermo per l'attentato all'Eni*, April 6, 2011, http://www.ilrestodelcarlino.it/bologna/cronaca/2011/04/06/485784-terrorismo_blitz_della_polizia.shtml

.

topics, breaching the right to report (in the second case) and to carry out a free academic research (in the first case).

- *Case of Roberta Chiroli and Franca Maltese* (2016) [746]: This is the case of two anthropologists who wrote a thesis about the NO TAV movement and participated as observers to some demonstrations. Roberta Chirioli was convicted to two months of imprisonment (suspended) for moral complicity with the crimes of other NO TAV activists by the Tribunal of Torino [747].
  The complicity in a crime is provided by Article No. 110 of the Italian Criminal Code. The legislator of the 30's adopted a so called "Unitarian model", highlighting the causal contribution of each person and having the general rule of the same penalty for each contributor. In that period there was a strong influence of criminological positivism, together with an authoritarian and repressive tendency [748]. Moral complicity is a form of instigation, because in the language of the Italian Code the term "instigation" is used for any kind of psychological participation: therefore, as well as all the other forms of instigation to commit a crime, it is an indicator of social dangerousness [749]. The moral complicity consists in a sort of psychological input for a crime that was materially committed by someone else: the material author was spurred or gained a sense of security in his behaviour by the moral support of the other person who is responsible for moral complicity.
  Franca Maltese was acquitted since the video material proved that she stayed by herself during the actions under charge (invasion of others' assets, disfiguring and staining others' assets). In the case under analysis, one of the main proofs against Chiroli was a stylistic choice in writing her thesis, namely using the first person plural "we"in the text, which would prove her participation *conscious and willingly* to the demonstrations.

- *Case of Davide Falcioni* (2016) [750]: Davide Falcioni, journalist of the online newspaper "Agora Vox", is under investigation since 2014. He was indicted on April 4, 2016 [751].
  In November 2012 he wrote an article titled "I was with the arrested NO TAV activists: I will tell you what truly happened" [752], explaining the on-going trials

---

[746] It has to be underlined that in the Chiroli's case together with the following Falcioni's case, no "ordinary" opinion crime is involved. Nevertheless, the use of different provisions of the Criminal Code led anyway to a (potential or actual) compression of the right to freedom of expression and of its corollary, the right to report. See the original Judgment No. 1088 of July 7, 2016 in the Final Appendixes of this dissertation.

[747] See the Parliamentary interrogation by Senator Luigi Manconi of June 23, 2016, http://www.senato.it/japp/bgt/showdoc/frame.jsp?tipodoc=Resaula&leg=17&id=00980630&part=doc_dc-allegatob_ab-sezionetit_icrdrs-atto_406003&parse=no&stampa=si&toc=no.

[748] G. FIANDACA, E. MUSCO, *supra* note No. 593, p. 496.

[749] *Ibidem,* p. 503.

[750] Order fixing the preliminary hearing No. 12936/15 R.G. P.M. and No. 802/16 R.G. G.I.P. See the original document of the indictment in the Final Appendixes of this dissertation.

[751] See R. COVELLI, *No Tav: l"accusa al cronista Davide Falcioni è un attacco alla libertà di informazione,* April 12, 2016, "Valigia Blu"; http://www.valigiablu.it/notav-davide-falcioni-diritto-cronaca/. See also OSSIGENO PER L'INFORMAZIONE, *Torino: cronista a giudizio per aver seguito protesta NO TAV,* April 5, 2016; link: http://notiziario.ossigeno.info/2016/04/torino-cronista-a-giudizio-per-aver-seguito-protesta-no-tav-68523/.

against those activists. Subsequently, he was asked to testify in favour of the activists under investigation but during the trial the prosecutor Manuela Pedrotta declared that an investigation would have started from that moment on against Falcioni himself, on the same charges of the other defendants (trespassing, computer damage, theft and domestic violence) [753]. The defence of the journalist is based on the fact that he was exercising his right to report and entered the offices of one of the societies working on the construction of the TAV (GEOVALSUSA Srl) in order to be the source of the information he was going to publish- as he declared during his examination-, thus fulfilling the duty of a journalist to verify the thruth of a news. Preventing him to do so would mean also to breach the community's right to receive plural and reliable information. Moreover, Falcioni's presence in the offices was not in any way determining what happened or what was going to happen: he just observed the situation. Therefore, a conviction would breach his right to free expression [754].

- ***BDS Movement (Boycotts, Divestment and Sanctions)*** [755]

The *BDS* is a civil society movement aimed at damaging economically and politically Israel and its international image.

The vagueness of Article 270 *sexies* in criminalizing actions aimed at seriously damaging a country "for the purpose of intimidating a population" as actions with terrorist purpose, combined with the possibility under Article 270 *bis* of punishing some actions also when they are addressed to a foreign state, may be interpreted in the sense of considering the BDS movement as a terrorist or subversive group.

Obstructions to the *BDS* movement are already taking place all around the world, especially in the US and in France, even if no accuse of terrorism took place yet in a courtroom. For example, regarding the Californian legislation, the *Los Angeles Times* wrote that "the latest version […] no longer seeks to penalize boycotts directly. Rather, it targets violations of existing anti-discrimination laws that take place under the pretext of a boycott or other "policy" addressing —any sovereign nation or people recognized by the government of the United States, including, but not limited to, the nation and people of Israel. […] This shift to an emphasis on individual rights may solve some of the 1st Amendment problems in earlier versions, but it also raises the question of why this proposed law is necessary at all; […] there already are laws on the books to address racial and religious harassment" [756].

---

[752] See the article in "Agoravox.it", November 29, 2012; link: http://www.agoravox.it/Io-ero-con-i-No-Tav-arrestati-Vi.html.

[753] See "Agoravox.it", *No Tav: il cronista Davide Falcioni indagato per aver raccontato la Val di Susa,* December 2, 2014; link: http://www.agoravox.it/No-Tav-il-cronista-Davide-Falcioni.html.

[754] From the original pleadings of the case by Falcioni's attorney.

[755] The BDS Movement is an international campaign launched in July 2005 from the Palestinian civil society that quickly spread internationally: it aims at putting economic pressure on the State of Israel until it meets certain conditions with respect to the Palestinian people.

[756] See LOS ANGELES TIMES, *Boycotts of Israel are a protected form of free speech,* July 5, 2016; link: http://www.latimes.com/opinion/editorials/la-ed-bds-bill-20160630-snap-story.html. See also: G. GREENWALD, A. FISHMAN, *Greatest threat to free speech in the West: Criminalizing activism against Israeli occupation,* February 16, 2016, in "The Intercept", link:

Criminal threats to the free expression and action of the BDS movement are already taking place in Italy as well: the “Mancino Law” is an example of laws on racial and religious discriminations that could be used against various behaviours allowing discretionary interpretations. For instance, it could criminalize a critic of the Israeli politics as an opinion based on “ethnic hatred”[757].

A new threat stems from Law No. 114 of June 2016, which introduced the crime of denying the Holocaust (together with denying any other genocide): it added a new Article (namely Article No. 3 *bis)* to the *Mancino* Law; when propaganda, incitement and apology are committed in a way that results in a concrete danger of diffusion and are based "completely or partially on the denial of the Holocaust or of the crimes of genocide, crimes against humanity and of war crimes”, a sentence from 2 to 6 years of detention is provided [758]. In this regard, I want to report two significant quotes: one is by the historian Carlo Ginzburg, that - discussing this law in the Senate - said that “ the Holocaust denial is not an opinion, it‘s a lie; nevertheless, I think we should not turn this lie into a crime” [759]; the second quote is by another historian, Benedetto Croce, about the historian‘s work: “History is the past saw through the eyes of the present time and it is possible that the present, any kind of present, even in the close future, could judge some acts that now appear horrible under

---

https://theintercept.com/2016/02/16/greatest-threat-to-free-speech-in-the-west-criminalizing-activism-against-israeli-occupation/ ;

South Carolina Disqualifies Companies Supporting BDS from Receiving State Contracts, May 10, 2016, in “Harvard Law Review” (First Amendment: Speech), 129 Harv. L. Rev. 2029, link: http://harvardlawreview.org/2016/05/s-c-code-ann-11-35-3500-2015/?utm_source=Harvard+Law+Review+Mailing+List&utm_campaign=d9696f5a5a-New_Issue_Volume_129_April_2016_Number_64_6_2016&utm_medium=email&Tutm_term=0_62fe9709f5-d9696f5a5a-331623825 ;

NYCLU (NEW YORK CIVIL LIBERTIES UNION), *Legislative Memo: In opposition of Prohibiting Politically Motivated Boycotts,* April 5, 2016, link: http://www.nyclu.org/content/opposition-of-prohibiting-politically-motivated-boycotts.

[757] Decree-law No. 122 April 26, 1993, called "*Mancino* Decree" (converted into Law No. 205 of 1993), titles "Urgent measures concerning racial, national, ethnic and religious discrimination" and punishes "those who spread any idea based on racial superiority or hatred or ethnic hatred, or incite to commit or committing acts of racial discrimination on ethnic or religious grounds ", also prohibiting “any organization, association, movement or group that has among its characteristics and purposes the racial, national, ethnic or religious discrimination ". In addition to heavy prison sentences, other penalties are provided. In the weeks that followed the enactment of this Decree, various materials were seized (magazines, books, discs, cassettes, etc.), ultra-right groups were dissolved, cultural clubs and libraries were closed, dozens of neo-fascist militants were indicted.

[758] See *La Camera approva in via definitiva la proposta di legge che introduce il reato di negazionismo* in Diritto Penale Contemporaneo (Penalecontemporaneo.it), link: http://www.penalecontemporaneo.it/novita_legislative_e_giurisprudenziali/1-/4808-la_camera_approva_in_via_definitiva_la_proposta_di_legge_che_introduce_il_reato_di_negazionismo/; see also G.DELLA MORTE, *Sulla legge che introduce la punizione delle condotte negazionistiche nell‟ordinamento italiano: tre argomenti per una critica severa,* in Sidiblog.org (*Società Italiana di Diritto Internazionale e di Diritto dell‟Unione Europea*), June 22, 2016, link: http://www.sidiblog.org/2016/06/22/sulla-legge-che-introduce-la-punizione-delle-condotte-negazionistiche-nellordinamento-italiano-tre-argomenti-per-una-critica-severa/.

[759] See the parliamentary discussion of the Law under study at the Senate (Ginzburg at p. 17-18), March 2014, link:https://www.senato.it/application/xmanager/projects/leg17/attachments/documento_evento_pro cedura_commissione/files/000/001/129/RACCOLTA_MEMORIE.pdf.

a different light. So, the historian‘s work is revisionist by nature. Therefore, it is both illegitimate and anti-historical to condemn any kind of revisionism”.
Of course, Croce was not thinking about the denial of Holocaust while expressing this idea, that, anyway, together with Ginzburg‘s remark, highlights the seriousness of this recent new form of criminalization. If there could be direct consequences for the *BDS* Movement, is not clear yet; anyway, the potential detrimental consequences for a free exchange of ideas are clear. Finally, there is a law proposal (Act No. 2043 of 2015) which was presented in the Senate in August 15, 2015. The draft law does not expressly address the *BDS* Movement in the text itself but the Act does so in its introduction [760], speaking about anti- Semitism behind the BDS’ actions.

[760] See the law draft‘s introduction at http://www.senato.it/japp/bgt/showdoc/17/DDLPRES/939906/index.html and Act S. 2043 of 2015 at http://www.senato.it/leg/17/BGT/Schede/Ddliter/45945.htm.

3.3- CATEGORY No. 3: THE "COMMON" CRIMES OF INSTIGATION TO COMMIT A CRIME, APOLOGY OF A CRIME AND INSTIGATION TO DISOBEY THE LAW

Diderot said: "For me, freedom of the [author's] style is almost a guarantee of its moral purity". [...] We have said that a novel is not moral, not in the usual meaning of the word. It can be said to be moral, however, when it shakes us from our slumber, forcing us to face the absolute values we claim to believe in.

Similarly to all the enthusiasts of ideology who preceded them, the Islamic revolutionaries considered writers as the guardians of morality, and attributed them, ironically, an almost divine role which was- at the same time - paralyzing. The price the writers had to pay for that privileged position was a kind of aesthetic impotence.

AZAR NAFISI, *Reading Lolita in Teheran*

Punishing instigation and apology means adopting causal and constitutive theories as to the way *how* the speech causes harm: it could be by *persuading* the hearers to believe things that cause a harmful action, or shaping the hearers' desires, or *conditioning* the hearers or finally causing them to *imitate* what is represented [761].

Restrictions on the right to free expression have to be an exceptional measure, especially when they involve the press. Therefore, regarding the crime of instigation to commit a crime, to disobey the law and to hatred, those restrictions should take place only in cases of incitement to violence and violent hate speech: this principle is today firmly recognized internationally[762]. For example, in the case *Dink v. Turkey* the ECtHR itself expressed doubts as to the possibility of pursuing the legitimate aim of protecting public order in the absence of incitement to violence (e.g. in that
specific case, regarding the defence of State organs against discredit). Otherwise, the restrictons might fail to meet the requirement of being "necessary in a democratic society". The same principle is underlined in General Comment No. 34 by the UN Human Rights Committee.

However, this principle requires a deeper specification of some notions, such as the notion of "violence". Is it violent to induce someone to protest (without the required authorization) in the name of some constitutionally recognized rights? Is it violent to make the apology of an unlawful act, when it was committed in order to dissent the laws themselves? Unfortunately,

[761] I. MAITRA, M. K. MCGOWAN, *supra* Note No. 161, p. 6.

[762] "The imposition of a prison sentence for a press offence will be compatible with journalists' freedom of expression […] only in exceptional circumstances, notably where other fundamental rights have been seriously impaired, as, for example, in the case of hate speech or incitement to violence", *Cumpănă and Mazăre v. Romania*, §§ 112 and 115; see *also Mahmudov and Agazade v. Azerbaijan*, Application No. 35877/04, Judgment of December 18, 2008, § 50; for further references *see Feridun Yazar v. Turkey*, Application No. 42713/98, Judgment of September 23, 2004, § 27, and *Sürek and Özdemir v. Turkey* [GC], Application Nos. 23927/94 and 24277/94, Judgment of July 8, 1999, § 63.

synthesis needs do not permit the study of this broad field of analysis, which would be required for the specification of these notions. The complexity of philosophical, historical and political answers those questions would need explains why – in different times and places - the provisions on instigation and apology are interpreted differently.

- ***The Crimes of Danger*** [763]**:** ***The Inevitable Reference to Material Public Order***

The crimes of apology and instigation, both in the Italian and Turkish system, were born as crimes of presumed danger: namely, there was no need of verifying the risk of damage to public order. It was a *iuris et de iure* presumption of danger made by the legislator itself, and there was no possibility to counter argue. However, the possibility of issuing a punishment following a *presumed danger* is subverting the link between a crime and the aggression of a protected interest [764]. Consequently, mere disobedience would be punished. Every breach of the equation [crime=damage to a material legal interest] characterizes the passage to an authoritarian criminal law [765]. Not respecting this equation means considering a fact to be a crime even if only some of the crime's constitutive elements took place. Moreover, there is no space for the criminalization of *words*, but only for the criminalization of *actions:* therefore, the crime of instigation could be acceptable in a democratic system only in the case of an instigation to commit a criminal action and not when the expression is exalting or supporting "revolutionary" ideas.

As far as Italy is concerned, the preparatory works to the Rocco Code specified that the crimes of Title No. V "impair public order, not in some specific elements but in its essence", since "an immediate juridical objectivity of these crimes is unlikely to be found" [766]. The Italian jurisprudence recognized that the crimes under analysis are "concrete danger crimes" only after the Constitutional judgments No. 65 of 1970 and No. 108 of 1974. However, this recognition is not enough. A "concrete danger" may refer to any interest which is protected by the legal system, such as the vague and broad "public order". For this reason, I will try to narrow the field to some particular egregious dangers using the international approach. Under the international human rights law, incitement speech constitutes a particularly egregious form of expressions. The meaning of "incitement" under international law and the human rights' scholarship often refers to the feature of "incitement to hatred" - namely hate speech, which falls outside the scope of this dissertation. However, I will report here some definitions and limits that were elaborated for this kind of incitement because

[763] See the paragraph "The crimes of danger" in the previous section of this dissertation.
[764] D. SANTAMARIA, *Evento* in *Enciclopedia del diritto,* XVI, 1967, p. 16.
[765] See G. BETTIOL, *L"odierno problema del bene giuridico* in *Rivista italiana di diritto e procedura penale,* 1959, p. 705 et seq.
[766] Quoted in G. FORNASARI, S. RIONDATO, *supra* note No. 20, Introduction.

they draw a good frame for understanding when, generally speaking, incitement should or should not be punishable [767].
For instance, the "Triangle of Hatred" by Professor Temperman is a good visual explanation of the structure of incitement speech: this kind of speech requires the existence of an audience ready to act against a target group.

Jeroen Temperman represented the Triangle and the different forces or factors involved as follows:

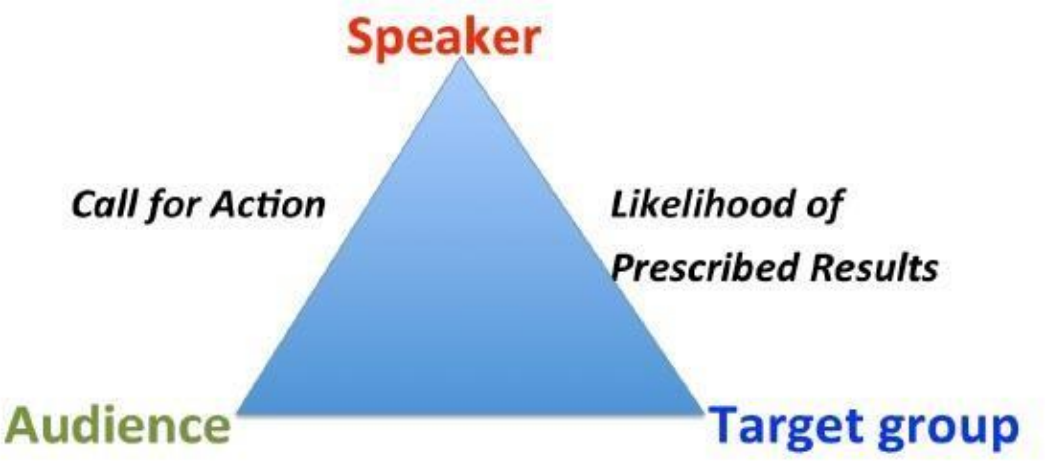


Figure 9: The "Triangle of Hatred" by Jeroen Temperman [768]

For evaluating whether incitement took place or not, the NGO *Article 19* has suggested to consider some elements, on the basis of an extensive review of the worldwide jurisprudence [769]. These factors were further adopted by the "Rabat Plan of Action", a UN-led process to unpack Article 20 of the ICCPR.

1. The *context*: is there a history of violence, discrimination or censorship particularly targeting specific groups?

2. The *speaker*: does he/she have influence? Does he/she hold a position of power and authority? Can he/she influence the audience?

3. The *speech*: is there a direct call for the audience to act in a certain way? Is it provocative? Inflammatory? Coded?

4. The *medium used*: Is it public? Frequent? Massive in its outreach? (e.g. a single leaflet v. mass media)

---

[767] However, Figure No. 7 in this dissertation is showing a scale of the different kinds of instigation, from the more dangerous incitements to genocide, terrorism and violence to the lighter hate speech.

[768] "Incitement speech necessitates the existence of an audience ready to act against a target group", A. CALLAMARD, *Freedom of Expression and National Security: balancing for protection,* January 15, 2016; link: https://globalfreedomofexpression.columbia.edu/publications/national-security-foe-training-manual/.

[769] ARTICLE 19, *Prohibiting Incitement to discrimination, violence and hostility*, Policy Brief, 2012, link: https://www.article19.org/data/files/medialibrary/3572/12-12-01-PO-incitement-WEB.pdf.

5. The *audience*: How large is it? How responsive is it to the speech/speaker? Does it have the means to act on the speech act (e.g. Was the audience able to commit acts [of discrimination, violence or hostility?]) Was the speech reasonably understood by its audience as a call to acts of [discrimination, violence or hostility]?

Finally, Principle No. 6 of the *Johannesburg Principles on National Security, Freedom of Expression and Access to Information* prohibits restrictions on expression unless: 1. The expression is intended to incite imminent violence; 2. It is likely to incite such violence; 3. There is a direct and immediate connection between the expression and the likelihood or occurrence of such violence [770].

To conclude, as I previously wrote, it is interesting to note that even if there is global support for the right to freedom of expression, some forms of speech are less supported than others. For example, considering a research by the *Pew Research Center,* in Italy 32% of the people reached by the survey think that people should be able to make statements that are offensive to minority groups publicly, while only the 25% of the interviewed think so in Turkey; 29% of the Italian interviewed think that it should be allowed to make statements that are offensive to religious beliefs in public, against the 24% in Turkey [771]. Speaking about political protests rather than hate speech, in Italy 30% of the population under survey thinks that people should be able to make statements that call for *violent* protests publicly, against the 24% of Turkish people; when there is no reference to violence, instead, the support for media coverage of political protests is higher, as the chart in the following page clearly shows [772].

[770] A. CALLAMARD, *supra* note No. 226, p. 11.

[771] R. WIKE & K. SIMMONS, *Global support for principle of free expression, but opposition to some forms of speech,* Appendix C: Detailed Tables, *"Pew Research Centre",* November 18, 2015, link: http://www.pewglobal.org/2015/11/18/appendix-c-detailed-tables/.

[772] R. WIKE & K. SIMMONS, *The boundaries of a Free Speech and a Free Press, supra* note No. 774, link: http://www.pewglobal.org/2015/11/18/2-the-boundaries-of-free-speech-and-a-free-press/. In this regard, a recent case of obstruction of media coverage on political protests took place in Turkey during the 2013 Gezi protests: smaller televisions (such as *Halk TV, Ulusal Kanal* and *Cem TV*) broadcasted the protest from the beginning; the three of them were fined for "incitement to violence" by **R**TÜK. See my paper *Freedom of expression, role and control of media in Turkey and EU- A comparative analysis*, *supra,* note No. 227.

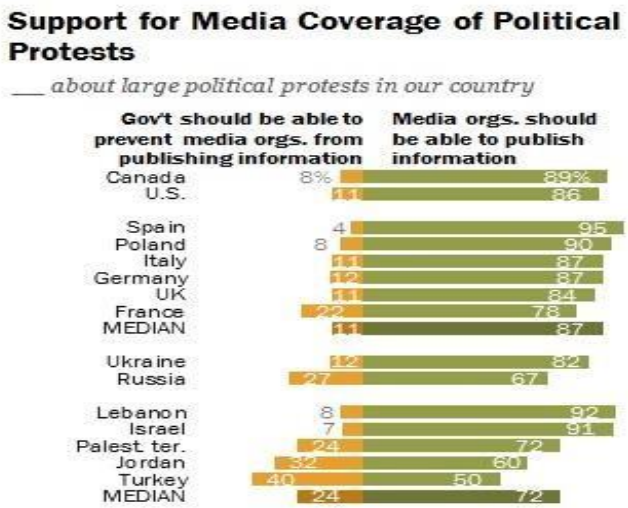


Figure 10: *Pew Research Centre*"s Statistic

- **ITALY**

The crimes under analysis are located in the category of "Crimes against public order" in the Italian Criminal Code (Book No. 2, Title No. 5). I have already analyzed the concept of "public order" in this dissertation, but I would here remind the notions of "ideal public order" and "material public order": the former represents a system of principles that base life in society [773], while the latter corresponds to "public quiet", and is more adequate for being a legal interest defended through criminal law [774]. Moreover, the concept of "public order" is tightly bound to the concepts of "democratic order" [775], "*economic, social, political and juridical systems*" and "*political, constitutional, economic and social structures*", that can be found, respectively, in Articles No. 270, 270 *bis and* 270 sexies of the Italian Criminal Code. This means that the crimes we have analyzed in the previous section of this chapter - namely the crimes of terrorism - pose threats on some interests that are actually protected under the Criminal Code's Chapter on public order as well: from my standpoint, there is an artificial distinction between public order and State personality. Both of the respective chapters contain opinion crimes of instigation, apology and propaganda and furthermore, the instigation and apology of terrorism is expressly provided in

[773] "The notion of constitutional public order […] would correspond to the system of fundamental principles of the society". However, this notion "cannot be subject to an empiric assessment, because is an abstract notion". It can change "up to the current repressive needs, arriving to punish the mere politic-ideological dissent.[…] It can paralyze, in the context of balancing some rights, constitutionally protected freedoms", see G. INSOLERA, *I delitti contro l'ordine pubblico,* in *Diritto penale, lineamenti di parte speciale***,** Monduzzi, 1998, p. 247.

[774] However, the concept of "democratic order" receives criticism as well because it is too vague and cannot be empirically verified; see G. DE VERO, *Tutela penale dell"ordine pubblico. Itinerari ed esiti di una verifica dogmatica e politico- criminale,* Milan, 1988, p. 7 et seq.

[775] The notion of "democratic order" was interpreted as "constitutional order" by Law No, 304 of 1982, Article No. 11.

Article No. 414 (4) of the Italian Criminal Code, namely in the category of crimes against public order [776].

3.3 a) History

- ***The Genesis of Instigation and Apology: Before and After The Zanardelli Code***

The first time the crime of instigation appeared in the Italian system as an autonomous provision was inside the *Statuto Albertino* on the Press (Albertine Statute), where it was provided under the crime of "provocation to commit crimes" through the press (Articles No. 13 and 14). Similarly, Article No. 24 of the Statute provided on the "apology of facts which are qualified as crimes or offences by the criminal law", introducing the world "apology" for the first time; this crime will be later included in the 1889 Zanardelli Code as well (Article No. 247). The critical contemporary existence of the Statute on the Press and of the Penal Code was not sorted out by the adoption of the Zanardelli Code: while abolishing all the previous legislation, it excluded the press laws from this renovation. Afterwards, the jurisprudence expanded the application of Articles No. 246 and 247: they would have been hardly enforceable with the more generic and mild provisions of the Press Law of the *Albertine Statute*. The expansion of instigation and apology crimes became particularly clear after Laws No. 314 and 315 of 1894 (July 19), which increased of one half the penalties for the instigation to commit a crime and the apology of a crime, if committed through the press.

- ***The Anarchic Threat: Illiberal Special Provisions on the Way to the Rocco Code***

Laws No. 314 and 315 of 1894 were enacted following the proposal of the Minister of the Interior, Francesco Crispi: they were defined —laws against social subversion" and are remembered for being anti-anarchist laws. In particular, Law No. 314 was punishing the instigation to commit "anarchic crimes" while especially Law No. 315 regarded the press crimes ("On the instigations to commit crimes or the apology of a crime, committed through the press") [777].

Article No. 247 of the Zanardelli Code specified that for the instigation to hatred among social classes to be punishable, there should have been a danger for public tranquillity: however, the jurisprudence was basically identifying it with the mere publicity of the fact, transforming this norm in a crime

[776] The artificial distinction of public order and State personality was confirmed by the legislative interventions of the 70's, that were openly aimed at defending public order but were renovating the category of crimes against State personality. See S. MOCCIA, *Diritto penale politico e giurisprudenza costituzionale in materia di libertà di riunione e associazione (articoli 17 e 18),* in G. VASSALLI, *Diritto penale e giurisprudenza costituzionale,* Edizioni Scientifiche Italiane, 2006, p. 213.

[777] Law No. 315 was consequently excluding the application of the lighter Press Law for crimes under Articles No. 246 and 247 of the Criminal Code.

of "presumed danger" [778]. The authorities fought against the anarchic ideas even when they were remaining "in the area of opinions and theories", namely when they should be challenged with "converse ideas and opinions" [779].

In 1926, Law No. 2008 was enacted ("Provisions for the defence of the State"): it punished hardly the crimes against State security and re-establishing and participating to banned associations and parties. Article No. 3 (2) provided that : "Anyone who *publicly or through the press***,** instigates to commit one of the crimes provided in the previous articles or makes their apology is punished […] with imprisonment from five to fifteen years". Propagandizing the doctrine, the programs and the methods of actions of those associations or parties was punished with imprisonment from two to five years (under Article No. 4 (3) of Law No. 2008). The direct criminalization of political propaganda appeared for the first time in Article 4 (3) of this Law [780].

From the enactment of the Rocco Code on, the crimes under analysis are inserted in Title No. 5 of Book No. 2 of the Italian Criminal Code, namely in the category of the "crimes against the public order". But, again, "public order" is a broad and vague concept: someone defines it, within the system of the Criminal Code, as "an ethical […] point of view,[…] namely the integrity of the normative system, as a complex of essential structures of the State system" [781]. However, this definition cannot be found in the Italian Constitution, so another less ideal meaning of public order is "a minimal rule of peaceful coexistence and social peace" [782]. In 1992, the *Pagliaro* Commission for the Penal Code's reform proposed to substitute the current heading of Title No. 5 with that of "crimes against the collective security", highlighting especially the aspect of physical security [783].

Finally, the category of "crimes against public order" shares with the category of "crimes against the State personality" the same restrictions in terms of fundamental freedoms and the same incrimination techniques.

3.3 b) The Notions of Apology, Propaganda and Instigation

The three behaviours I am going to analyze - namely making an apology, propaganda and instigation - all share the characteristic of acting basically on

[778] The Court of Cassation heavily applied Law No. 315, for instance, in the case of some communists that deposed some flowers on the grave of some death soldiers with a poster writing "To the proletarians who died defending the interests of the exploiters" (Judgment No. 645/1923); another example is the case of a journalist who defined the 1894 laws "barbaric" (Judgment No. 1430/1895).

[779] G. NAPODANO, *I delitti contro la sicurezza dello stato*, in E. PESSINA*, Enciclopedia del diritto penale italiano,* VI, Milan, 1909*,* p. 83.

[780] C.FIORE, *supra* note No. 17, p. 38.

[781] G. INSOLERA, *I delitti contro l"ordine pubblico,* in S. CANESTRARI, A. GAMBERINI, G. INSOLERA, N. MAZZACUVA, F. SGUBBI. L. STORTONI F. TAGLIARINI, *Diritto penale. Lineamenti di parte speciale,* Ed. No. 5, Bologna, 2009, p. 246.

[782] *Ibidem*, p. 246.

[783] G. FORNASARI, S. RIONDATO, *supra* note No. 20, Introduction.

the intellective sphere of their addressees. Nevertheless, they have substantial differences I will now try to identify [784].

- *Apology*: This action is limited to express a convinced personal support to a fact without making any particular activity direct to influence the other's opinion. If somebody will reproduce the apologized actions, it would be because of personal considerations.
  Speaking about timing, the apology refers to a concrete happening in the past that is forbidden under criminal law [785].

- *Propaganda*: Instead than apology, the addressees of propaganda feel encouraged by the people who stimulated their action, because of the reasons those people advanced in support of their thesis. Therefore, the author of the propaganda used intrinsically effective means and sentences for convincing the others.
  Speaking about timings, propaganda usually refers to people or things in the current moment.

- *Instigation*: Instigation seems to be the strongest process of conviction; it consists in an open (direct or indirect) excitement, both giving and strengthening the reasons for acting and destroying or weakening the pre-existing inhibitions to act. For being punishable, the instigation has to be *suitable* to cause consents and to provoke a danger of adhesion to the illicit act *currently and concretely*: it is evaluated from the *context* and from the *audience*.
  Speaking about timings, instigation refers to future actions.

Even if the three behaviours have different nature, they used to be considered similar: consequently, not only instigation, but also propaganda and apology were (and apology is) criminalized, basing on their content [786]. In this regard, professor Giacomo Delitala commented: "It is not clear why the only protected expression of thought is that which remains in the area of theoretical words, without an inner agreement with the thought, that is- without propagandizing or making an apology of one's own doctrine" [787].

Moreover, it has to be specified that Article No. 115 of the Italian Criminal Code aims to exclude a penalty in the case of a mere agreement among people or mere instigation which is not followed by the commission of a crime. Nevertheless, the agreement for committing a crime or the instigation to commit a crime or to disobey the laws are indicators of social dangerousness and they can lead to the enforcement of security measures [788].
Finally, for the scope of our analysis, I will focus on the crimes of apology, propaganda and instigation *to commit a crime or to disobey the law.*

[784] This analysis benefitted from P. PISA, Articles No. 414 and 415, in A. CRESPI, G. FORTI, G. ZUCCALÀ, *Commentario, supra.*
[785] See the Constitutional Court, Judgment No. 65 of 1970. See a more detailed analysis of this judgment in the Case Law Section of this category of crimes.
[786] P. NUVOLONE, *Reati di stampa,* A. Giuffrè, 1951.
[787] G. DELITALA, *I limiti giuridici alla libertà di stampa,* in *Raccolta degli scritti,* II, Milano, 1976.
[788] G. FIANDACA, E. MUSCO, *supra* note No. 593, p. 503.

Significantly, the mere duty of loyalty to laws is not enough for restricting a fundamental right such as freedom of expression. This is clear, for example, in the case of one form of instigation, namely instigating soldiers to disobey the laws under Article No. 266 of the Criminal Code: in this case, a concrete and immediate danger towards a constitutional interest is requested [789].

- ***Article No. 414 : Instigation to Commit a Crime***

Whoever publicly instigates another to commit one or more crimes shall be punished, for the mere fact of instigating:
1) with imprisonment from one to five years, in cases of instigation to commit a felony;
2) with imprisonment up to one year or with a fine up to 206 euros in case of incitement to commit contraventions;
If the fact consists in incitement to commit one or more crimes, or one or more contraventions, the penalty provided by subparagraph (1) should be applied.
Anyone who makes public apology to commit one or more crimes shall be punished as prescribed by subparagraph (1). If the crime is committed by computer or electronic tools, the punishment provided shall be increased.
Outside the cases referred to in Article No. 302, if the act of instigating or of apology concerns crimes of terrorism or crimes against humanity, the punishment is increased by half. The punishment is increased as much as two thirds if the offence is committed by computer or electronic tools.

The content of Article 414 is an exception to the general principle under Article No. 115 of the Criminal Code: as explained in the previous paragraph, according to Article 115 the incitement to commit a crime is not punishable if the instigation is not accepted and followed by the commission of the respective offense. Article No. 414 aims to defend public order: the threat to public order arises from the *publicity* of the fact and this element itself explains the existence of an exception. Therefore, the sole fact of inciting to commit a crime or to make the apology of a crime *in public* is enough: the act is independent from its consequences. This is also clearly expressed by Article No. 414 by the words "for the mere fact of instigating".

The concept of *publicity* of the commission of the opinion crimes analyzed in this dissertation is particularly important. The legal definition of this notion is explicitly given by Article No. 266 ("Instigation of soldiers to disobey the laws"), which describes it as follows:

1) by means of the press, or other means of propaganda;
2) in a public place or open to the public and at the presence of more people;
3) in a meeting that, for the location where it takes place, or for the number of participants, or for the purpose or object of it, has the character of non-private meeting.

The first definition was object of a great discussion on the possibility of including the television or the Internet; recently, as analyzed in the previous Section of this Chapter, Law No. 43 of 2015 introduced a specific aggravating circumstance if the crime is committed by computer or electronic tools. The second definition used to be interpreted as requiring the presence of at least

[789] For example, Court of Cassation, Judgment No. 8518 of 1988; No. 44789 of 2010; Const. Court Nos. 263, 519 and 531 of 2000.

two people: nevertheless, it would contrast with the principle of concrete suitability to impair the relevant legal interest. The really important element, instead, is asserted in the the third definition, namely the characteristic of being a "non-private" meeting [790].

Beside Article 414, also Article No. 290 of the Italian Criminal Code and Article 301 of the Turkish Criminl Code require that the crime has to be committed "publicly": in the view of some authors, this constitutes an objective condition of punishment (under Article No. 44 of the Italian Criminal Code), while for others it is a constitutive element of the offence and therefore it must be known and wanted by the agent [791].

Moreover, a curious consequence of this provision is that there are some crimes whose punishment is less than one year of imprisonment: consequently, instigating or making the apology of those crimes could lead to a greater punishment than committing those actions themselves [792]. The instigation or apology should refer to a specific crime, while the generic instigation to commit crimes falls under the following provision (Article 415) [793].

Criticizing the legislation and/or the jurisprudence is not restricted under Article 414; similarly, making propaganda for groups, parties, movements whose objective is abolishing a law provision cannot fall in the area of this crime. In addition, making the apology of some allegedly criminal facts sustaining that they have (or could have) a positive moral or social content, is not a crime [794]. For these reasons, the notable Constitutional Judgment No. 65 of 1970 states that Article No. 414 (3) is not unconstitutional for a contrast with Article No. 21 of the Constitution: the only punishable kind of apology is that *concretely suitable to provoke the commission of a crime,* causing a concrete and material danger. Consequently, praising the authors of a crime or praising some facts that are criminalized by the penal system is considered by most of the Italian scholarship as a form of *indirect instigation* [795], rendering the existence of this legal device redundant.
Conversely, if the punishment would not follow a concrete and material danger, criminal law would end up in punishing mere disobedience. Actually, this was exactly the will of the Fascist legislator [796]; this is even clearer in the case of Article No. 415 of the Italian Criminal Code, which punishes *"whoever publicly*

[790] G. FORNASARI, S. RIONDATO, *supra* note No. 20, p. 4.
[791] F.CONSULICH, *Reati contro l"ordine pubblico, pubblica istigazione a violare le leggi, istigazione a delinquere,* in F. ANTOLISEI, *Manuale di diritto penale,* 16th Edition, Giuffrè, Milan, 2016, p. 103.
[792] G. FORNASARI, S. RIONDATO, *supra* note No. 20, p. 6.
[793] The latter idea is sustained by F. CONSULICH, *supra* note No. 795, p. 103.
[794] Acting for socially or morally relevant reasons is also recognized to be an extenuating circumstance under Article No. 62 (1.1) of the Italian Criminal Code.
[795] Notably, this principle is ignored by the aggravating circumstances provided by Law No. 43 of 2015, which introduces some aggravating circumstances when the crimes under Article 414 are committed by computer or electronic tools. These circumstances are not structured in a way that allows a discretionary enforcement of the judge: they presume that using the informatic tool will increase the diffusion of the terrorist message, giving no space to the possibility that in some cases it may not happen. Consequently, in some cases the principle of concrete suitability of the instigation or of the apology of a crime – fixed by the Constitutional jurisprudence in judgment No. 65 of 1970 - may be ignored.
[796] G. FORNASARI, S. RIONDATO, *supra* note No. 20, p. 5.

instigates to disobey the laws relating to public order […] with imprisonment from six months to five years".
To conclude, then, both instigation and apology can be punishable when they have a great strength of suggestion and persuasion. This principle should be followed strictly [797]: actually, from my standpoint, no exception to Article 115 should be allowed and therefore, no criminal sanction should be issued if instigation and apology are not followed by an actual crime. For this reason, Article 414 should be repealed and, eventually, substituted by a new provision with more precise references to an imminent threat to public security, intended as a threah to physical security.

- ***Article No. 415, " Instigation to Disobey the Laws"***

Whoever publicly instigates to disobey the laws relating to public order or to hatred between social classes, shall be punished by imprisonment from six months to five years.

As far as the first part of this provision is concerned, "the laws relating to public order" refer to the *material public order* – that is not only public security, but also the fundamental principles of the State, protected with juridical norms. Therefore, also who instigates not to pay some taxes (such as IRPEF- the *Personal Income Tax)* could be charged under Article No. 415 [798].

In any case, the instigation has to be *public* and *suitable* to cause the action of the subject who was incited[799].

Since the enactment of the Italian Constitution, a contrast between the Fundamental Chart and this Article, especially in its second part – relating to instigation to hatred between social classes- was perceived. The theories on the need of a struggle among social classes are political, social and philosophical believes that, most of the time, remain in the personal conscience of individuals. Expressing and spreading these ideas – if it does not develop in violent actions- has no contrast with the constitutional rights: conversely, limiting the right to express such an idea would contrast with Article No. 21 of the

[797] However, the more rigid approach of some judges rather than others led sometimes to paradoxical results, such as considering irrelevant the behavior of a major commenting during a TV show the killing of an African drug dealer and declaring that he would have done the same. The judge considered there was no probability for the speech to have a suggestive effect, considering the speaker and the audience (2001, quoted in G. FORNASARI, S. RIONDATO, *supra* note No. 20, p. 6).
[798] Judgments No. 171191 and 171192 of 1985, quoted in P. PISA, Article No. 415, in A. CRESPI, G. FORTI, G. ZUCCALÀ, *Commentario, supra.*
However, when, for example, somebody decides not to pay a percentage of the Income Tax which would be directed to the military expenses, the Court of Cassation in 1989 stated that it is only an opinion's expression, with a consequent attempt to adhere to it. Quoted in G. FORNASARI, S. RIONDATO, *supra* note No. 20, p. 18. Conversely, see MANZINI, *supra* note No. 385, p. 169 quoted in F. CONSULICH, *supra* note No. 795, p. 109.
[799] Regarding the element of *publicity,* the considerations made for the previous provision No. 414 are valid.

Constitution [800]. For these reasons, the Constitutional Judgment No. 108 of 1974 specified that Article No. 415 is unconstitutional where it punishes instigation to hatred among social classes without adding "in a way that is dangerous for social tranquility": basically, thanks to this judgment, the crime turns to be a "crime of concrete danger", from being a "crime of presumed danger", enhancing the value of any kind of political speech. Therefore, focusing on the defendant's malice, he/she needs to be conscious of making some actions that are suitable of directly causing hatred among social classes. The crime provided in the second part of Article No. 415 is a form of *political hate speech*. Another example of political hate speech in the Italian system is the apology of fascism, which is contained in the "Scelba Law" (Law No. 645 of 1952, "Regulations implementing the 12th transitional and final provision- First Paragraph - of the Constitution") [801].

The hate-speech category was created and defined initially by the American jurisprudence [802], but it focused mainly on national, racial or religious hatred rather than on political hate speech [803]. Currently, Article 20 (2) ICCPR states

[800] P. PISA, Articles No. 414 and 415, in A. CRESPI, G. FORTI, G. ZUCCALÀ, *Commentario, supra.* This part of the Article is clearly inspired by the will of the Fascist Party to limit the ideas and propaganda of the socialist and anarchic movements. See G. FORNASARI, S. RIONDATO, *supra* note No. 20, p. 16.

[801] The 12th Transitional and Final Provision of the Constitution forbids to "reorganize, under any form, the dissolved fascist party". See a more detailed analysis below, in Paragraph "The peculiar case of the crime of apology of fascism".

[802] "The history of libel, group defamation and hate speech regulation in American constitutional law begins with the Supreme Court's 1942 decision in *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), in which the Court announced that some categories of speech are of only "low" First Amendment value and are thus accorded less than full constitutional protection", see G.R. STONE, *Hate speech and the U.S. Constitution,* 1994, Journal of the University of Chicago Law School.

[803] Briefly, the American approach turned from being really strict in protecting free expression under the First Amendment of the American Constitution, to broader interpretations of the possible restrictions to free expression. For instance, in the 1992 "Case of the Missing Amendments", *R.A.V. v. City of St. Paul,* some youths burned crosses in the intimidating style of the KKK in front of the home of an African American family. The US Supreme Court concluded that although ethically reprehensible, the applicable sanction was unconstitutional (St. Paul, Minnesota's Bias-Motivated Crime Ordinance). See the *Yale Law School Legal Scholarship Repository, http://digitalcommons.law.yale.edu/fss_papers/1039/.* In 2009, instead, a UN Resolution on Religious Defamation was enacted ("Combating Intolerance, Negative Stereotyping and Stigmatization of, and Discrimination, Incitement to Violence and Violence Against, Persons Based on Religion or Belief"). Speaking at the United Nations themselves, Australian Prime Minister Julia Gillard said that "it appears that the one thing modern society can no longer tolerate is intolerance.[…] Our tolerance must never extend to tolerating religious hatred". The changing approach to free speech of American public opinion finds a good example in the cases of hate speech of October 2012, where courts in Washington and New York ruled that transit authorities could not prevent or delay the posting of a controversial advertisement, stating: "In any war between the civilized man and the savage, support the civilized man. Support Israel. Defeat jihad". After U.S. District Judge Rosemary Collyer ruled that the government could not bar the ad simply because it could upset some Metro riders, "the ruling prompted calls for new limits on such speech. In New York, the Metropolitan Transportation Authority responded by passing a new regulation banning any message that is considered likely to "incite" others or cause some "other immediate breach of the peace". Such efforts focus not on the right to speak but on the possible reaction to speech- a fundamental change in the treatment of free speech in the West"; see J. TURLEY, *Shut up and play nice: How the Western world is limiting free speech,* October 12, 2012, in *The Washington Post,* link:

that “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law” [804]. Nevertheless, “law does not necessary mean criminal law”. However, Article 20 can limit freedom of expression, as provided also by the UN‘s General Comment No. 34 [805], but hate-speech is not the focus of this dissertation. Anyway, I would report a definition given by the NGO *Article 19* to a key term for any kind of hate speech, namely the term *hostility*: “Hostility implies a manifested action “*it is not just a state of mind, but it implies a state of mind*, *which is acted upon*”. In this case, hostility can be defined as a manifestation of hatred– i.e. the manifestation of “intense and irrational emotions of opprobrium, enmity and detestation towards the target group” [806].

Finally, under international human rights law, incitement to some forms of violence may be prohibited not only under Article 20 of the ICCPR but also under the 1948 Genocide Convention. All of these forms of incitement to violence are linked to the existence of “hatred” and thus usually fall under the sociological category of the so-called “hate speech”, which is also prohibited by Article 4 of the 1965 “International Convention on the Elimination of All Forms of Racial Discrimination” and by Article 19 of the ICCPR [807].

- ***The abolished Article No. 272, “Subversive and Anti-National Propaganda and Apology”***

Anyone in the State who makes propaganda for the violent establishment of the dictatorship of one social class over the others, or for the violent suppression of a social class or otherwise, for the overthrow violently the State economic or social orders, or propagandizes the destruction of every political and legal system of the society, shall be punished with imprisonment from one to five years.
If propaganda is made to destroy or suppress the national feeling, the punishment shall be imprisonment from six months to two years.
Those who make an apology of the offenses listed above is subject to the same penalties.

The second paragraph of Article No. 272 was declared unconstitutional by Judgment No. 87 of 1966, because of its contrast with Article 21 of the Italian Constitution: the national feeling- namely the consciousness of the Italian territorial, social and political unity and of the rights Italy enjoys in the international relationships- cannot prevail in a balance with the right to freedom of expression. In fact, such a feeling exists only in the ideal world of thoughts.

---

https://www.washingtonpost.com/opinions/shut-up-and-play-nice-how-the-western-world-is-limiting-free-speech/2012/10/12/e0573bd4-116d-11e2-a16b-2c110031514a_story.html?utm_term=.13385fed9ebc.

[804] However, it is clear that national and racial discrimination corresponds to political hate speech when you focus on the “apology of Fascism”, historically, Fascism was based on national and racial discrimination.

[805] UN HUMAN RIGHTS COMMITTEE, *General comment No. 34, supra* note No. 149, Remark No. 11.

[806] ARTICLE 19, *supra* note No. 773, p. 19.

[807] A. CALLAMARD, *supra* note No. 226, p.7.

Instead, Paragraph No. 1 and 3 of Article 272 were considered legitimate by the same judgment and by the following ones since freedom of expression, under Article 21, finds its limitations in the protection of public order and of the *democratic method* [808]: the 1966 sentence stated that "we cannot consider the right to freedom of expression to be injured by a limitation protecting the democratic method". The judgment did not propose an evaluation of the content of political expression [809], but rather imposed a mere acceptance of the *democratic method*: according to the Court, this method cannot be found in political expressions which openly declare the will of subverting a democratic system violently.

Thus, even if the original aim of Article 272 was suppressing the political organizations dissenting with Fascism, this provision was saved after the enactment of the Constitution, justifying this fact with the usefulness of the provision for protecting State personality, "irrespective of the political form it [the State] assumes in each historical moment" [810]. However, this observation was made without considering the interpretation that wants the constitutional right to freedom of expression independent "from the subsequent advantages or disadvantages for the State" [811]. This is particularly true in a contest of critic to the economic, social and political systems: the protection of State personality and security through criminalizing the propaganda of certain political ideas damages freedom of political expression in its core. Moreover, sustaining that there is an "unalterable neutrality" of the legal norm, irrespective of the context when the norm was enacted, is a paradox [812].

This crime was a "crime of danger", criminalizing the support of violence as a means for affirming a political idea: however, the *means* of a political ideology are they themselves part of it; even, only the specification of the means for reaching certain objectives renders an ideology *political.* So, Article 272 was a pure crime of opinion, as all the crimes of propaganda and apology are: they anticipate danger to a moment which is far from causing direct harm and violence. Inferring the prohibition of violence as an *idea* from the prohibition of violence as a *fact*, necessitates a demonstration of the fact that "expressing an idea about violence can be identified with violence itself": it is an arbitrary extension of the concept [813].

Article No. 272 was completely repealed in 2006, thanks to Law No. 85. Nevertheless, propaganda is now criminalized through Article No. 270 *bis*

---

[808] See for example also Court of Cassation, Section I, judgment No. 1621 of 1982, quoted in PISTORELLI L., Articles No. 270, 270 *bis*, 278 and 290 in A. CRESPI, G. FORTI, G. ZUCCALÀ, *Commentario, supra.*

[809] A proposal of evaluation of the content of a political speech can be found in C. VISCONTI, *Aspetti penalistici del discorso pubblico*, Turin, 2008, p. 25

[810] Court of Cassation, Section I, Judgment No. 29 of 1969, quoted in PISTORELLI L., Articles No. 270, 270 *bis*, 278 and 290 in A. CRESPI, G. FORTI, G. ZUCCALÀ, *Commentario, supra* note No. 418.

[811] C. ESPOSITO, *La libertà di manifestazione del pensiero nell"ordinamento italiano,* Milan, 1958, p. 3 quoted in C. FIORE, *I reati di opinione,* Padua, 1972, p. 85- 87.

[812] For instance, the Court of Cassation stated that Article 272 could also protect a communist State (Judgment of January 15, 1969); see C. FIORE, *supra* note No. 17, p. 98.

[813] PISTORELLI L., Articles No. 270, 270 *bis*, 278 and 290 in A. CRESPI, G. FORTI, G. ZUCCALÀ, *Commentario, supra* note No. 418, p. 94 et seq.

(punishing those who "promotes" an association that has a criminal purpose); moreover, the broad concept of "action with terrorist purpose" introduced by Article No. 270 *sexies* helped criminalizing "subversive propaganda" as well. Similarly to Article 270 *bis* of the Italian Criminal Code, the simple subversive idea, without violent and concrete purposes, could not fall under the crime under Article 272: the action should have provoked consensus not only about an idea but also on a violent program of subversion among a non-determined number of people [814]. The boundary with the mere expression of opinions was then the aim of obtaining an adhesion to the propagandized violent program. The existence of a program presumes the existence of a "permanent multi-subjective bond". Nowadays, Article 270 *bis* itself can be considered as a re-actualization of the classical canons of this kind of tie. To sum up, prosecuting terrorist propaganda means re-introducing, under different appearances, the repealed Article No. 272. Moreover, in Italy the anti-mafia legislation created very elaborated legal devices: it is possible to assist to a modernization of the organizational scheme- that is, it does not only consist in a hierarchical organization but is also composed of many organizations in a functional relationship; belonging to an organization may be inferred, for example, from the diffusion of propagandistic documents or, more generally, from an activity of proselytism. Saying it with Townshend, modern terrorism "is not simply the use of violence for political objectives […]. It is understood as an autonomous political strategy" [815].

- ***The Peculiar Case of the Crime of "Apology of Fascism"***

The controversial criminalization of the apology of Fascism is provided under Law No. 645 of 1952 ("Regulations implementing the 12th transitional and final provision (First Paragraph) of the Constitution"), also called *Scelba* Law [816]. In fact, the 12th Transitional and Final Provision of the Constitution forbids to "reorganize, under any form, the dissolved Fascist party".

Under Article No. 1 of the *Scelba* Law, "a reorganization of the dissolved Fascist Party takes place when an association or a movement has anti-democratic purposes that are typical of the Fascist Party, exalting, threatening or using violence as a means of political fight or supporting the suppression of the Constitutional freedoms, or denigrating democracy, its institutions and the Resistance's values or making racist propaganda, or exalting representatives, principles, facts and methods of the Fascist Party or externally acting in a Fascist way".

The specific crime of apology of Fascism is provided under Article No. 4 of the same Law, and refers to a kind of incitement that *potentially* can *concretely* lead to the re-constitution of the Fascist Party. It states that:

---

[814] PISTORELLI L., Articles No. 270, 270 *bis*, 278 and 290 in A. CRESPI, G. FORTI, G. ZUCCALÀ, *Commentario, supra.*

[815] C. TOWNSHEAD, *La minaccia del terrorismo,* Bologna, 2004, p. 31.

[816] See Law No. 645 of 1952 at http://archivio.rivistaaic.it/materiali/atti_normativi/XIII/pdf/l1952_00645.pdf.

" Whoever makes propaganda for the establishment of an association, movement or group having the characteristics listed in Article No. 1, is punished with imprisonment from six months to two years and with a fee from 400.000 to 1.000.000 Liras. The same penalty is provided for whoever, publicly exalts Fascist representatives, principles, facts or methods or the typical anti-democratic purposes of the Fascist Party. If the fact concerns racist ideas or methods, the penalty is imprisonment from one to three years and a fee from one to two million Liras. If one of the facts provided in the above paragraphs is committed through the press, the penalty is imprisonment from two to five years and a fee from one to two million Liras"[817].

Moreover, under Article No. 8 the Law under analysis, the apology of fascism is one of the few cases when preventive seizure of the press is allowed, even before the beginning of the penal action [818].

The constitutionality of Law No. 64/52 for a contrast with the right to freedom of expression (Article 21 Const.) was questioned various times, especially in the wave of several trials against some members of the right-wing party *Movimento Sociale Italiano* (MSI). In this regard, a significant case is the Constitutional Judgment No. 1 of 1957 [819]: the sentence reported the opinion of the attorney general (*Avvocatura dello Stato*), defending the existence of such a provision and stating that the apology of fascism is just a particular category of apology of a crime, since Fascism has to be considered a crime against society. Moreover, the Constitutional Court stated that the crime does not consist in a mere "elogiative defense", but rather in "such a praise that can lead to the reorganization of the Fascist Party", namely an "indirect instigation to commit an action with the purpose of such a reorganization and therefore *appropriate* and *adequate* in that sense". The Italian scholarship still defends the existence of a crime of apology of fascism by quoting this judgment [820]. Significantly, the sentence under analysis adopted a restrictive interpretation of the concept of "danger" - categorizing this crime as a "crime of concrete danger" and requiring a specific malice for the action. This interpretation was even more evolutionary considering the relevant period - the end of the '50's- when almost opposite criteria were applied for the "common" apology of a crime and other similar opinion crimes, such as subversive propaganda under Article 272. This fact is exemplifying the different weight that can be given to violence as a means of political fight, up to which ideological group expressed the relevant opinion and up to the historical moment when the opinion was expressed.

---

[817] The pecuniary penalties were not converted into euros. Therefore, the judge will calculate the exact amount of owed euros case by case.

[818] The other two cases when the preventive seizure is allowed are: obscene publications (under Article No. 2 of R.d.l. No. 561 of 1946) and in case of plagiarism (Article No. 161 of Law No. 633 of 1941).

[819] See the constitutional judgment No. 1 of 1957 at http://www.giurcost.org/decisioni/1957/0001s-57.html. To be precise, the question of constitutional legitimacy was asked from the defence only regarding Article No. 4 (apology of fascism) but the challenged court, notably, asked the constitutional revision for the whole Law No. 645/52, considering this question not openly ill- founded.

[820] P. PISA, Articles No. 414 and 415, in A. CRESPI, G. FORTI, G. ZUCCALÀ, *Commentario breve al codice penale*, 13th edition, CEDAM, 2012.

I believe the crime of apology of fascism, together with other hate crimes, should be repealed or – at least - decriminalized. Penal sanctions are not a solution to racism, national or religious discriminations and so on. The overall culture of society holds the solution, and – even if education and acceptance of the others require a longer time for being effective than the enforcement of a penal punishment, they alone can solve the problem in the long term without side effects.

3.3 c) - Case Law

- *Constitutional Court, Judgment No. 65 of 1970:* The case stemmed from the local Court of Rovigo, where the defendants Leobaldo Giovanni Traniello and Paolo Milan were under charge under Article No. 414 (3) for being the authors of an article describing the conscience objectors as "precious"; the objectors, it was written, "are risking to suffer from the consequences of their idea personally, maintaining alive the idea that one day we may renounce to the compulsory military service, if we want to keep on considering ourselves as a civilized population". As already explained above, the question regarded the constitutionality of Article 414 (3) in relation with the right to freedom of expression (Art. No. 21 Const.). This sentence stated that the only punishable kind of apology is that *concretely suitable to provoke the commission of a crime.* Apology is therefore considered to be a form of *indirect instigation.* For these reasons, there is no contrast between Article No. 414 (3) of the Criminal Code and Article No. 21 of the Constitution, when the former is interpreted in the correct way.
  From my standpoint, in this judgment the Constitutional Court seemed to describe the crime of instigation as a crime of concrete danger, but in the meanwhile it considered praising the disobedience of laws an attack to public order: laws are provided for preventing what the legislator already considers to be a crime – and therefore dangerous for the system - and consequently the danger is *presumed* in case of apologizing for the commission of a crime [821]. Moreover - since just seldom apology leads to the commission of a crime, differently than in the instigation cases- criminalizing apology means criminalizing a system of spiritual and moral values that are "glorifying" a crime: therefore, the constitutional question was evaluating the acceptability of this kind of ban [822].

- *Radio Alice case* (1977): On January 26, 1976 the official broadcast of *Radio Alice* begun, with the aim of "giving voice to those who have no voice". From the beginning, the Radio was targeted by local newspapers for its scurrilous language. The Radio, among other voices, was also an expression of the Bologna's student movement of the end of the '70's.

[821] Article No. 414 (3) is a crime of presumed danger also in the view of the Court of Cassation (Judgment No 8600 of 1988).
[822] C. FIORE, *supra* note No. 17, p. 107- 109.

On March 11, 1977, police and Carabinieri [823] intervened following some brawls between the Movement's students and some other students, members of *Comunione e Liberazione* (CL), a catholic association. The clashes evolved after the authorities' arrival, leading to the death of Francesco Lorusso, shot death by a member of the corp of Carabinieri.
Radio Alice diffused the news of the death and a huge procession took place in the city: the headquarters of political institutions, political parties and police stations were attacked. Finally, the university was occupied for three days. *Radio Alice* broadcasted the telephone calls of people reporting the on-going clashes, the police's position, inciting to demonstrate or insulting the demonstrators. The format of the radio itself required everything to be broadcasted. The following day, on March 12, the police raided *Radio Alice*'s office and some editors were arrested (Valerio Minnella, Mauro Minnella, Gabriele Gatti, Angelo Pasquini, Stefano Saviotti, Maurizio Bignami, Marzia Bisognin), under the charges of instigation to delinquency, subversive association and resistance to a public official [824]. They were kept in pre-trial detention between two and five months, and were allegedly beaten by police in that circumstance [825]. On March 13, some tanks entered the city. On the 15th, the government gave the possibility to make "public security arrests", which allowed the police to arrest any suspect [826].
"We were indicted in 1977, but the First Instance hearing was 6 years later, and the Appeal hearing one year later: initially, the prosecutor asked our full acquittal, instead we were acquitted with "doubtful formula" – that means, an acquittal because of the insufficiency of evidences. Therefore, we challenged the decision. The indictment was accusing us for having created the radio in the beginning, for committing a crime almost a year and half later", one of the defendants, Valerio Minnella, explains [827].

- *De Luca case* (2015) [828]*:* The Italian writer Erri De Luca was charged under Article 81 and 414 (1) and (2) of the Italian Criminal Code for having publicly instigated to commit various crimes and contraventions against the society "L.T.F. S.a.S." and the construction site "TAV LTF", that are in charge of constructing the Lions-Turin high speed train (TAV). In particular, the indictment followed two interviews with the *Huffington Post* website (September 1, 2013) and *A.N.S.A* Press Agency (September 5, 2013), where he allegedly instigated

[823] National gendarmerie of Italy, policing both military and civilian populations.
[824] Read the broadcast of March 12, 1977 in Appendix No.2, in the end of this section.
[825] Interview to Valerio Minnella, *I 40 anni di Radio Alice,* in *Il Corriere di Bologna,* February 8, 2016, link: http://corrieredibologna.corriere.it/bologna/notizie/cultura/2016/8-febbraio-2016/i-40-anni-radio-alice-24021531925.shtml. See also Minnella's personal blog, where he says he was released after a visit of Emma Bonino and that the trial took place only 7 years after the indictment, link: http://www.valeriominnella.it/?page_id=14.
[826] F. GUALDI, *Radio Alice: tra avanguardia e rivoluzione,* Graduate thesis, Faculty of History, Bologna, 2015, p. 76 et seq. . See also ZIC (ZERO IN CONDOTTA), *11 Marzo: non dimentichiamo,* March 8, 2006, http://www.societacivilebologna.it/ser/documenti/06/mar06/ZIC%2077.pdf.
[827] From a via e-mail conversation with Valerio Minnella.
[828] First Instance Tribunal of Turin, Judgment No. 4573 of October 19, 2015. See *Punibilità dell'istigazione a delinquere: il caso TAV De Luca (Trib. Torino, 4573/15)* in *Canestrinilex.com,* January 18, 2016, http://www.canestrinilex.com/risorse/punibilita-dellistigazione-a-delinquere-il-caso-tav-de-luca-trib-torino-457315/.

to boycott and damage the TAV construction site. The indictment under Article 81 ("Concurrence of offences, continuous crime") indicates the idea that De Luca's declarations were deemed to be part of the same criminal plan for instigating the boycott of the TAV's construction. He said that "boycotting the TAV is correct" and "is the only option" while "terrorism has nothing to do with it, the shears were necessary to cut the nets". These statements followed two interviews: De Luca was asked to comment the statement of prosecutor Caselli on some Italian leftist intellectuals "underestimating the terrorism alert in the Susa Valley", following the arrest of two activists with suspect material in their car (among others, shears).
The prosecutor asked 8 months of imprisonment for De Luca.
In this judgment, the Tribunal reminded that the border line for not violating Article 21 of the Constitution consists in the suitability of the instigation to disturb public order. Therefore, also in this case, the judge needs to operate a "concreteness test" on the De Luca's statement before taking a decision: are those statements able to provoke the commission of the allegedly instigated crimes in the short period? The judge believed that his statements were more aimed at commenting some facts that already happened rather than provoking new actions. Moreover, the defendant explained what he meant with the verb "boycotting": he did not mean "materially damaging" the construction, but more generally, he meant "obstructing", "preventing" the construction.
The judge has also to evaluate the *context* where these statements were pronounced, with reference to the persuasive strength they could have on the audience: in this regard, the Italian case law shows how the crime of instigation is usually enforced in contexts where the audience is ready to accept the provocation and act [829]. In this case, instead, the statements were written on two national newspapers, and the audience was varied and not very sensitive to the TAV's topic. It would have been different if the same expressions were reported on some anarchic papers, or on some local papers of the Susa Valley. For these reasons – namely the *non-suitability* of De Luca's words to be *currently and concretely dangerous* for the commission of the instigated crimes- the Italian writer was acquitted under Article 530 of the Criminal Code.

[829] This is the case, for example, of a subject commenting an article about an attempted rape against an Italian woman by an African man: he wrote in his Facebook profile "nobody is never raping her, so she could understand what the victim of this horrible crime can feel, what a shame!", combined with a photo of the Ministrer of Integration, Cecile Kyenge: the fact was considered to be "instigating to commit racial violence". In this case, the Court of Cassation specified that they considered "the context where the fact took place, which was characterized by an intense debate on an episode of sexual violence against an Italian woman by an African"; (see Penal Court of Cassation, Section No. 1, Judgment No. 42727 of May 22, 2015). Another example is a case where the crime of apology was considered committed because of the "publication, in an anarchic periodical, of three articles describing three attacks to public utility sites or industrial factories and characterized by a strong exaltation of the actions, which is able to provoke a danger of further attacks and of disturbing public order"; (see Penal Court of Cassation, Section No. 1, Judgment No. 11578 of November 11, 1997).

- *Court of Cassation, Judgment No. 39860 of 2013* [830]: This sentence focuses on two other provisions regarding the crime of apology of fascism, namely Article No. 2 of Law No. 205 of 1993 [831], which in turn mentions Article No. 3 of Law No. 645 of 1975 (ratifying the 1965 New York Convention on racial discrimination)[832]. Article No. 2 of the *Mancino* Law prohibits anybody from accessing competitive events with emblems or symbols of racist organizations or groups and similar, without considering if the individual is enrolled or not to those groups or associations.
  In this case, the Tribunal of Bolzano convicted C.P. under this Article to 2 months of imprisonment, for wearing a t-shirt with an image of Benito Mussolini and reporting Fascist writings. The Court of Appeal of Trento substituted the detention penalty with a fine.
  The Court of Cassation stated that the above-mentioned Article 2 is the only relevant provision, which does not consider the malice or the aim of the defendant, but only the fact he/she objectively carried the prohibited symbols at a competitive event. In this regard, I would note that the provision is far from enjoying the restrictive interpretation of Article 4 of the *Scelba* Law given by the Constitutional Court [833]: this interpretation does not consider the apology of Fascism a mere "eulogistic defence", but rather "such a praise that can lead to the reorganization of the Fascist Party", namely an "indirect instigation to commit an action with the purpose of such a reorganization and therefore *appropriate* and *adequate* in that sense". In this case, instead, the mere public exposition of a symbol can be punished with detention penalties.
  For these reasons, the Court of Cassation rejected the defence's claim that, under Article 3 of the *Mancino* Law, as modified in 2006, not the mere diffusion of ideas based on ethnical and racial hatred, but their propaganda is punishable; consequently, propaganda would requires a specific malice which is not present in the case under study. The Court of Cassation confirmed the Court of Appeal's decision.

[830] Penal Court of Cassation, Section I, Judgment No. 39860 of 2013, link: http://www.canestrinilex.com/risorse/apologia-del-fascismo/.
[831] Law No. 205 of 1993 is also called *Mancino* Law.
[832] Read Law No. 645 of 1975 at http://old.asgi.it/public/parser_download/save/l.13.ottobre.1975.n.654.pdf.
Read the *International Convention on the Elimination of All Forms of Racial Discrimination*, Adopted and opened for signature and ratification by UN General Assembly resolution 2106 of December 21, 1965, entry into force January 4, 1969, in accordance with Article 19, link: http://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx.
[833] Constitutional Court, Judgment No. 1 of 1957.

- **TURKEY** [834]

The "common" crimes of instigation and apology are contained in the Fifth Section ("Offenses against public peace") of the Third Chapter ("Offenses against Community") of the Turkish Criminal Code (TCK). Most of these provision report almost literally the corresponding Italian ones: significantly, detention penalties are lower in Turkey than in Italy.

- ***Article No. 214, "Incitement to Commit an Offence"***

Any person who openly provokes the commission of an offense is punished with imprisonment from six months to five year.
Any person who arms a group against another group, or provokes the killing of a person, is punished with imprisonment from fifteen to twenty-four years.
When the incited offences are actually committed, the instigator should be sentenced as having aided and abetted them.

The external justification of this Article states that "because of the threat to public peace, it is necessary to apply punitive measures without waiting for the harmful consequences of the offences to arise and independently from the rules concerning complicity" [835]. Therefore, this crime is a "crime of abstract danger", with high potentialities to obstruct free expression.
In addition, considering also the broad meaning of the notions of "public peace" and "public order", judges can arbitrarily decide in which cases the State needs to be protected: instead, the bases for incriminating a defendant should not be only the aim of the author and the gravity of his/her words, but also the actual social effects and consequences of the speech (for example, up to the audience). For these reasons, Paragraphs No. 1 and 3 of this Article should be repealed.

- ***Article No. 215, " Praising the Offence and the Offender"***

Any person who openly praises an offense or the person committing the offense, is punished with imprisonment up to two years.

This provision criminalizes the apology of an offence or who committed such offence: nevertheless, whether or not an opinion is deemed to be laudatory, can vary up to who evaluates it and, therefore, it can change up to the political climate. Moreover, the boundaries and the scope of this crime are not clear: it is another "crime of abstract danger". Similarly to the Italian system, apology is limited to express a convinced personal support to a fact (or a person for his/her

[834] I have to underline from the beginning that language barriers did not allow me to write a more detailed analysis of the Turkish doctrine on the crimes of instigation, apology and propaganda as I did for the Italian system. Thanks to the lawyers, journalists and academics who helped me in my research and to the *Bilgi* and *Bahçeşehir* University Libraries, I think the following analysis can be considered quite complete anyway. I will therefore focus more on the case law rather than on the doctrine: in fact, Turkish case law regarding opinion crimes can be even more eloquent than a scholarship analysis. It is interesting, anyway, to analyze the Turkish case law in the light of the Italian scholarship, which used to be, and to a certain extent, in some aspects, is still close to the Turkish one.

[835] HUMAN RIGHTS AGENDA ASSOCIATION, *Freedom of expression in the new Turkish Penal Code,*

actions) without making any particular activity direct to influence the other's opinion. If somebody perpetrates the praised actions, it would be because of personal considerations. This means that apology must be considered protected by the right to freedom of expression.
One of the reasons why the Italian scholarship considers the apology of a crime a form of *indirect instigation* is merely formal: the crime of apology is inserted in the third paragraph of the same norm providing on the instigation to commit an offence (Article No. 414 of the Italian Criminal Code). Instead, from 2005, the Turkish Criminal Code differentiates the crimes of instigation and apology in two different Articles, namely No. 214 ("Incitement to commit an offence") and No. 215 ("Praising offences and offenders")[836].Therefore, justifying the criminalization of apology defining it a crime of concrete danger becomes even more difficult.

A peculiar example of the potential broad application of this norm is the case of Deniz Gezmiş: Gezmiş is a Turkish Marxist-Leninist activist and revolutionary who, during the 60's, was sentenced to death on October 9, 1971 under Article No. 146 of the old Criminal Code (for attempts to "overthrow the Constitutional order"). Remembering him, even just with flags or writings on the Internet, can lead to an indictment for 'praising an offender': for example, it happened in 2011, when three people were indicted by an Ankara prosecutor for – among other things- attending a commemoration ceremony held for him and Mahir Çayan during the May Day celebrations in the Anatolian province of Çorum. The suspects were allegedly committing the crime of 'praising a crime and a criminal' [837]. Similarly, a paradoxical situation could have happened in the case of *Çarşı*, the ultras of the football team *Beşiktaş JK:* the group was accused of attempting to 'overthrow the government' after taking part with strong actions to the 2013 Gezi protests. A final judgment on these charges could have led to the criminalization of the support for the fan club [838].

2006, Izmir, p. 18.

[836] Previously, both of the crimes were provided under Article No. 312 TCK, which stated as follows: *"(1) A person who expressly praises or condones an act punishable by law as an offence or incites the population to break the law shall, on conviction, be liable to between six months" and two years" imprisonment and a heavy fine of from six thousand to thirty thousand Turkish liras.*
(2) A person who incites the people to hatred or hostility on the basis of a distinction between social classes, races, religions, denominations or regions, shall, on conviction, be liable to between one and three years" imprisonment and a fine of from nine thousand to thirty-six thousand liras. If this incitement endangers public safety, the sentence shall be increased by one-third to one-half.
(…)"

[837] *Hammer-and-sickle badge held as evidence in terror case in Turkey,* in 'Hurriyet Daily News", July 27, 2012, link: http://www.hurriyetdailynews.com/hammer-and-sickle-badge-held-as-evidence-in-terror-case-in-turkey--.aspx?pageID=238&nID=26489&NewsCatID=341.

[838] The charges on the 35 defendants were lifted in the end of December 2015, see *All defendants acquitted in coup case against Turkish football fan group çArşı,* December 29, 2016, http://www.hurriyetdailynews.com/all-defendants-acquitted-in-coup-case-against-turkish-football-fan-group.aspx?pageID=238&nid=93170.

- ***Article No.216, "Provoking the Public to Hatred, Hostility or Degrading"***

Any person who publicly provokes hatred or hostility in one section of the public against another section which has a different characteristic based on social class, race, religion, sect or regional difference, which creates an explicit and imminent danger to public security shall be sentenced to a penalty of imprisonment for a term of one to three years.
Any person who publicly degrades a section of the public on grounds of social class, race, religion, sect, gender or regional differences shall be sentenced to a penalty of imprisonment for a term of six months to one year.
Any person who publicly degrades the religious values of a section of the public shall be sentenced to a penalty of imprisonment for a term of six months to one year, where the act is capable of disturbing public peace.

As far as the international framework of hate speech is concerned, I would refer to the analysis of Article 415 of the Italian Criminal Code previously made in this dissertation.

Studying this national provision, first of all it has to be noted that it fails in protecting some particular categories, such as homosexuals, atheists, communists and others. Paragraph No. 2 includes the word "gender" but the notion is always interpreted as the difference between men and women, and therefore the term "sexual orientation" should be added in the first two paragraphs of the provision. In practice, however, denigration of the groups listed in the provision is widespread and goes unremarked [839]: it is the umpteenth proof that criminalizing hate speech is not the correct politic, but education is. The second and third Paragraphs do not specify the need of a "clear and imminent danger to public order" for criminalizing denigration of the listed groups, which should be added: according to an explanatory note provided by the Turkish authorities for drafting the 2016 Venice Commission's Report, "provoking hatred" should be "beyond discrete disrespect and objection and should be objectively suitable to inciting a hostile attitude toward sections of the population". Basically, the only forms of expressions inciting to violence that may be criminalized are those violating the first Paragraph of Article 216 TCK.

Article No. 216 (1)(2) replaced the former Article 312, which was negatively addressed many times by some ECtHR judgements, such as *Incal v. Turkey* [840], or *Dicle v. Turkey*[841]. Article 312 was criminalizing expressions of criticism of public policies, especially if expressed in articles or books and particularly if criticism regarded the counter-terrorism measures: these

[839] Recently, Hande Kader - a trans-gender LGBT activist - was found death and mutilated in a rich residential area of Istanbul; see E. SHAFAK, *The shocking murder of trans activist says much about Turkey today,* in *The Guardian,* August 23, 2016, https://www.theguardian.com/commentisfree/2016/aug/23/murder-transgender-lgbt-hande-kader-turkey. In its 2016 report, Human Rights Watch stated: "Despite Turkey's ratification of the Council of Europe convention on preventing and combating violence against women and domestic violence, violence against women remains a significant concern": HRW, *Turkey, events of 2015, https://www.hrw.org/world-report/2016/country-chapters/turkey.*
[840] *Incal v. Turkey,* Application No. 22678/93 , Judgment June 9, 1998.
[841] *Dicle v. Turkey,* Application No. 34685/97, Judgment February, 10, 2005.

expressions were not inciting to hatred or violence and neither the sanctions were proportionate to the legitimate aim pursued. Former Article 312 was containing also the acts of praising or making the apology of an offence or inciting the population to break the law, that - following the 2005 new Criminal Code– were moved to the new Articles No. 214, 215 and 217. Nevertheless, they "modified the wording of the old text while keeping its contents intact", the Council of Europe noted [842]. The 4th Report on Turkey of the "European Commission against Racism and Intolerance" (ECRI) found in 2011 that Article 216 continues to be used against journalists, writers, publishers, activist with non-violent opinions regarding minority groups' issues rather than against persons making truly racist statements [843]. Instead, the actions and omissions of the government should be subject to close scrutiny also by public opinion, even if the expressions used contain very harsh criticism and could offend, shock or disturb: a criminal proceeding should be possible only if they amount to incitement to violence [844].

As far as the last paragraph on degrading religious values is concerned, some opinions can be considered denigrating by some people, but unexceptional by others. Considering that most of the Turkish population is Muslim, it seems this provision was inserted mainly for protecting the religious sensibility of the majority while it is unlikely to be enforced when the community subject to denigration has little social influence. Moreover, the crime of denigration is already provided by Article No. 125 of the Turkish Criminal Code. Statistics prove that, whereas in the 80's and in the 90's most of the prosecutions against free expression regarded insulting Atatürk, "Turkishness" and the indivisibility of the country, in the recent years they turned into prosecutions for insulting religion and the President [845]. Those who choose to manifest their religion cannot reasonably expect to be exempt to criticism: however, criminal sanctions against those critics should be enforced only if they *intentionally and severely disturb public order and – consequently- call for public violence.*

To conclude, from my standpoint the crime of incitement to hatred and to denigration should be decriminalized [846].

---

[842] CM/Inf/DH(2008)26, *Freedom of expression in Turkey: Progress achieved - Outstanding issues,* May 23, 2008.

[843] ECRI, *General Policy Recommendation No. 7 on National Legislation to Combat Racism and Racial Discrimination*, adopted on December 13, 2002, Remark No. 18.

[844] VENICE COMMISSION, *supra* note No. 50, Remark No. 40, p. 11.

[845] The statistics provided by the Turkish authorities to the Committee of Ministers of the Council of Europe, show that the number of indictments under Article 216(3) have increased: 10 bills of indictment in 2010, 10 in 2011, 26 in 2012, 42 in 2013 and 32 in 2014 (DH-DD(2015)447rev). According to a different statistic cited by Yaman Akdeniz and Kerem Altıparmak *(The silencing effect on dissent and freedom of expression in Turkey,* in *Journalism at Risk. Threats, challenges and perspectives,* Council of Europe publishing, October 2015, p. 159), these numbers are: 66(2012), 107(2013) and 47(2014).

[846] Instead, international organs such as the European Commission seem recommending, anyway, the use of criminal sanctions for incitement to hatred. See the Venice Commission's report, note No. 501, Remark No. 44, p. 12.

- ***Article No. 217, "Incitement to Disobey the Law"***

Any person who openly provokes people to disobey the laws is punished with imprisonment from six months to two years, or imposed punitive fine, if such act causes potential for public peace.

Similarly to the previous ones, also this crime is a "crime of abstract danger". Moreover, it is redundant: the State is already equipped to punish persons who break the law and has other means for ensuring that citizens abide by the law. For these reasons, this provision should be repealed.

- ***Article No. 218, "Common Provision"***

(Amended by Law No. 5377 of June,29 of 2005, Article 25) If the offences defined in the previous Articles are committed through the media and the press, the penalty should be increased by one half.
However, expressions of thought made with the intention of criticism and which do not exceed the limits of providing information shall not constitute an offence.

The first paragraph of this provision increases the penalties when the previous provisions are committed through the media and the press. The logic is that those means broaden the *publicity* of the expression, rendering it more dangerous for public security. Instead, since no expression which remains in the world of ideas can be actually dangerous for national security, the author of such expression cannot be punished with criminal penalties. Moreover, these means of communication should enjoy an even higher protection since they are crucial for forming a public opinion informed in a pluralistic way. The risk is, instead, to exert influence on the press, even also through the potential "chilling effect" these kind of norms have.

The second paragraph of Article 218 is appropriate but Article No. 90 of the Turkish Constitution – regarding international conventions as part of national legislation - and the Strasbourg case law make this provision redundant, increasing the risk that judges refusing to apply the international obligations of Turkey and believing their task is primarily to defend the State, could give an excessively broad interpretation of what criticism is or is not.

For these reasons, the provision under analysis should be repealed.

- **Case Law**

- *Incal v. Turkey* (1998) [847]: Ibrahim Incal was a member of the Izmir section of the "People's Labour Party" (HEP-*Halkın Emek Partisi*): he was hold responsible for editing a leaflet criticising the local authorities for their campaign against the Kurdish population. He did not obtain the authorization from the local prefect for distributing it, because it was deemed to be "separatist propaganda"- capable of inciting the people to resist the Government and to

[847] *Incal v. Turkey,* Application No. 22678/93 , Judgment June 9, 1998, link: http://hudoc.echr.coe.int/eng?i=001-58197.

commit criminal offences. The Izmir National Security Court issued an injunction ordering the seizure of the leaflets, the prohibition of their distribution and lately Incal was sentenced to 7 months of imprisonment and fined.
The ECtHR reiterated the importance of freedom of expression, especially for political parties and their active members [848]. The Court reminded also that permissible criticism is greater with regard to the Government. Moreover, the leaflet urged the population of Kurdish origin to band together to raise political demands and to organise "neighbourhood committees": this cannot amount to incitement to violence, hostility or hatred between citizens.
For these reasons, the Court held that Incal's conviction was unnecessary in a democratic society and, consequently, that Article 10 ECHR was violated.

- *Fazıl Say's case* (2012): This case regards the crimes of insultıng or offending religious values. In 2012, the composer and pianist Fazıl Say was charged under Article 216 (3) after some posts of him on Twitter: among others, he reported some lines by the 11-12th century Persian poet Oman Khayyam, attacking pious hypocrisy: "You say rivers of wine flow in heaven, is heaven a tavern to you? You say two *huris* [companions] await each believer there, is heaven a brothel to you?". He was sentenced in September 2013 to 10 months of prison. In October 12, 2015, the Turkish Court of Cassation quashed this judgment because "the words […] did not reveal a clear, imminent or serious danger in terms of public security, nor it was a call for violence, and the accused exercised his freedom of expression" [849].

  Significantly, Tayyıp Erdoğan himself was convicted for inciting religious hatred: on December 12, 1997- at a public meeting in Siirt in southeastern Turkey - he recited a poem written by the nationalist poet Ziya Gökalp, stating: "Mosques are our barracks, domes our helmets, minarets our bayonets, believers our soldiers" [850]. As a consequence, he was tried and convicted for inciting religious hatred in 1998. He was sentenced to ten months of imprisonment. He served four of them between March and July 1999.

[848] See also *United Communist Party of Turkey and Others vs. Turkey*, quoted in IRIS Merlin, *Database on legal information relevant to the audio-visual sector in Europe,* link: http://merlin.obs.coe.int/iris/1998/7/article3.en.html.
[849] Court of Cassation, E. 2014/35434, K. 2015/22535, October 12, 2015.
[850] Z. GÖKALP, *Asker Duasi* [Prayer of the Soldier] (1912) in *Ziya Gökalp Kulliyati-I*, F. A. Tansel edition, *Turk Tarih Kurumu Yayinlari,* Istanbul, 1989.

- *Nokta case* (2015) [851]: *Nokta* is a Turkish magazine [852]. Cevheri Güven and Murat Çapan, respectively *Nokta*'s publisher and editor of the weekly magazine, were arrested on November 3, 2015 for an article stating that there would have been a civil war after the elections of November 1, 2015 [853] Moreover, the *Nokta* magazine published a picture of Erdoğan in military clothes. The journalists were charged under Articles No. 313 ("Incitement to armed uprising against the Turkish Government") and No. 214 ("Incitement to commit an Offence") of the Turkish Criminal Code. The remaining copies of the magazine were seized by police and *Nokta*'s website was blocked.

Figure 7 : Erdoğan taking a selfie in front of a coffin draped in a Turkish flag in the background - one cover of *Nokta* in early September 2015.

The prosecutor demanded between 15 and 20 years in jail for Güven and Çapan. They were released pending trial after almost 2 months of pre-trial detention, following the first hearing of the case, on December 29, 2015 [854]. This is a case of political criticism against the Government, and therefore, it should be a particularly protected form of speech.
The defence of *Nokta*'s lawyer, Veysel Ök, was based on the fact that actually before the 2015 parliamentary elections more than 400 people died in Turkey, considering the clashes in the South-East of the country and the terroristic attacks in several Turkish cities: it was like in a war [855] During the second

[851] See CoE, *Two Turkish Journalists, Cevheri Güven and Murat Çapan, Charged with "Inciting Armed Rebellion*", Link*:* *https://www.coe.int/en/web/media-freedom/all-alerts/-/soj/alert/12851522*.
See also CPJ (COMMITTEE TO PROTECT JOURNALISTS), *Two editors at critical magazine Nokta arrested in Turkey for election coverage,* November 4, 2015; link: https://cpj.org/2015/11/two-editors-at-critical-magazine-nokta-arrested-in.php and *Two Turkish editors released after first hearing over 'inciting crime",* Hurriyet Daily News, December 29, 2015; link: http://www.hurriyetdailynews.com/two-turkish-editors-released-after-first-hearing-over-inciting-crime.aspx?pageID=238&nID=93163&NewsCatID=339.
[852] *Nokta* was already raided by Turkish police in September 2015, for another cover of the magazine, representing Erdoğan taking a selfie in front of a coffin draped in a Turkish flag in the background. The image is reported below in this dissertation. See P24*, Managing editor of Nokta magazine detained in police raid,* September 14, 2015, http://platform24.org/en/articles/306/managing-editor-of-nokta-magazine-detained-in-police-raid.
[853] The article titled: '2 Kasım Pazartesi: Türkiye Iç Savaşı'nın başlangıcı" ("Monday, November 2: The beginning of Turkey's civil war").
[854] See *Two Turkish editors released after first hearing over "inciting crime"* in Hurriyet Daily News, December 29, 2015, http://www.hurriyetdailynews.com/two-turkish-editors-released-after-first-hearing-over-inciting-crime.aspx?pageID=238&nID=93163&NewsCatID=339.
[855] See my interview to Veysel Ök in the end of this dissertation.

hearing of the case, in the end of February 2016, Istanbul Public Prosecutor Ali Kaya recommended the Istanbul 14th High Criminal Court to acquit the defendants [856].

- *Case of the "Academics for Peace"* (2016) [857]: In January 2016, about 1200 intellectuals (the "Academics for Peace"- *Barış için akademisyenler*) published a press release about the need of peace between Turks and Kurds. They were charged for insulting the Turkish nation (Article 301 TCK), for inciting hatred and enmity (Article 216 TCK) and for making terrorist propaganda. Many criminal cases were opened everywhere in Turkey, after President Erdoğan called them 'traitors' [858].

[856] See *Prosecutor Asks For Acquittal Of Nokta Editors Charged Over Magazine Cover*, in *En.Haberler.com,* March 1, 2016, link: http://en.haberler.com/prosecutor-asks-for-acquittal-of-nokta-editors-888168/.

[857] See the 'Academics for Peace' official website: https://barisicinakademisyenler.net/.

[858] *18 academics detained, over 130 face criminal charges amid accusations by president of "Terrorist propaganda",* in 'Hurriyet Daily News', January 15, 2016, *http://www.hurriyetdailynews.com/four-turkish-academics-charged-with-terror-propaganda-released.aspx?PageID=238&NID=98203&NewsCatID=509.*

Appendix No. 2

- *The last broadcast of Radio Alice (1977) and Radio GAP (2001)* [859]

Bologna, 12 Marzo 1977		Genova, 22 Luglio 2001
Radio Alice		**Radio GAP**
R2: arriva la polizia e allora? lascia accesso su al massimo al massimo al massimo R3: non scappate, calma calma R1: se c'è un avvocato, se c'è un avvocato del collettivo di difesa per favore venga qui immediatamente per favore immediatamente c'è la polizia qui in questo momento le pistole e i mitra puntati tutte le radio tutta la gente che ci sente, c'è la polizia con i giubbotti antiproiettile R3: calma ragazzi calma qui stanno per entrare portate via questo R2: avete il mandato? (la PS è alla porta) (PS SI!!) R2: mi fa vedere? (urla della PS) ring R1: alice? metti giù per favore c'è la polizia qui su da noi R4: di? scappiamo di sopra? scappiamo lì?		RG1: e amici ascoltatori è un momento molto tragico, i telefoni sono isolati RG2: ok si RG1: speriamo comunque che le comunicazioni comunque continuino a funzionare RG2: CHIAMATE TUT ecco, chiamiamo l'ANSA x (??) RG2: è dentro al cortile RG1: è dentro al cortile RG2: è dentro al cortile RG1: la polizia. (..) bene ascoltatori è ufficiale sono qui dentro sono nel cortile non sappiamo quello che succederà cerchiamo di fare qualcosa di non mantenere.. di non perdere il controllo (rock music 2sec) stanno assaltando il media center di via cesare battisti qui a genova (music 5sec) stanno cercando di sfondare stanno cercando di sfondare amici ascoltatori stanno cercando di sfondare la porta nella quale ci siamo barricati

[859] *Radio GAP* was Genoa- based and seemed to be the follower of *Radio Alice* because of their similar contents and because of the way they were closed down: *Radio GAP* was raided by police in July 22, 2001. The raid took place the last day of the strong demonstration (and consequent harsh repression) against the 2001 *G8 summit* in Genoa (July 20- 22, 2001).
However, the "open content and open voice" format of Radio Alice was a peculiar experience, not really adopted by the following radios of political movements. In this sense, instead, a more effective means was *Indymedia,* a website of grass-root information which was able to influence main-stream media as well. See R. RAMIERI, *Radio Alice: il linguaggio al di là dello specchio,* University "La Sapienza", Rome, Faculty of Communication Sciences, 2005-2006.

	R3: piano ragazzi su R2: non aprite non aprite fino quando arriva qualcuno ring pronto alice si? (..) senti c'è la polizia se trovi qualcuno del collettivo giuridico di difesa (...) immediatamente qui (rumori di oggetti spostati) R2: prendi questo coso qui non scappate dalla finestra R1: no non me ne frega niente ascolta è più importante (..) si ascolta lascia giù, ti prego dai. attenzione attenzione a tutti gli avvocati a tutti i compagni per favore che ci sentono che si mettano immediatamente in comunicazione con gli avvocati attenzione a tutti i compagni a tutti i compagni che ci sentono in questo momento che tentino di mettersi in comunicazione con l'avvocato insolera e gli altri del collettivo giuridico di difesa PS (ALICE?) R4: gli sparo alla polizia gli sparo (..) R1: Daniela (..) se sei al telefono (..) cioè se sei alla radio, stai calma R3: no ma dove andate? R2: dai il numero di telefono non va bene questo? questo qui gamberini 51 R4: casa? R3: si xxxxxx R1: ancora un appello da radio alice		non so siamo come topi in trappola cercheremo di tenervi informati fino a quando ovviamente sarà possibile (music 6sec) daniela al microfono per favore (music 11sec) RG1: io non me ne vado dal mixer fino a quando non mi ci trascinano via (music 3sec) RG3: (excited) è una scena cilena stanno sfondando la nostra porta stanno sfondando la nostra porta non so se lo sentite (rumori) RG1: stanno cercando di sfondare la nostra porta al secondo piano (music 3) bene, mani alzate resistenza passiva ragazzi uno sgombero in diretta radio gap sta per essere RG3: ragazzi RG1: sgomberata (urla) RG3: CALMA CALMA SEDUTI E MANI ALZATE RG1: manteniamo la calma (urla) PS (LEVALO LEVALO) RG1: ok TUTTI TUTTI con le mani RG3: leva quel tavolo via RG1: leviamo quel tavolo noi non abbiamo nulla da di- da nascondere per nessuno RG3: noi non abbiamo nulla da dire noi non abbiamo nulla da RG1: i telefoni sono isolati RG3: abbiamo tanto da dire ma nulla da nascondere RG1: i telefoni sono isolati RG3: ci hanno ciulato i telefoni probabilmente ci hanno anche tagliato RG1: ci hanno tagliato le linee

radio alice ha la polizia alle porte tutti i compagni del collettivo di difesa per favore si precipitino qui in via pratello (...) R2: risponde nessuno? R3: non risponde nessuno (...) R1: attenzione attenzione tutti i compagni del collettivo giuridico di difesa per favore telefonino alla radio si precipitino immediatamente qui ring R2: pronto? si? Mauro ascolta c'è la polizia qui Stiamo aspettando gli avvocati R1: attenzione ancora qui è radio alice stiamo ancora aspettando che arrivino gli avvocati per poter fare entrare la polizia c'è la polizia che sta sfon- tentando di sfondare la porta in questo momento non so se sentite i colpi per radio abbassa il coso ring R2: pronto? chi sei? si c'è la polizia qui fuori che tenta di sfondare. c'hanno le pistole puntate e io mi rifiuto di aprire gli ho detto fino a che non calano le pistole e non mi fanno vedere il mandato e poi siccome che non calano le pistole gli ho detto che non apriamo fino a chè non arriva il nostro avvocato puoi venire per favore? d'urgenza, ti prego, d'urgenza		RG1: si si RG3: ci hanno tagliato le linee non sappiamo se ci stanno ascoltando anche da qui RG1: bene quaranta persone all'interno della di rete dello studio di rete di radio gap siamo tutti con le mani alzate aspettiamo la celere che sta sfondando la porta del nostro secondo piano l'invito è è a mantenere la calma anche se è difficilissimo la porta per il momento rimane chiusa ah a secondi sarà aperta ragazzi è un momento veramente difficile (..) ecco sentiamo anche i rumori RG3: no non siamo isolati con i telefoni non siamo isolati con i telefoni RG1: non siamo isolati bene cerchiamo di telefonare di comunicare con l'esterno RG3: ragazzi telefonate, diffondete la notizia RG1: a tutti gli amici ascoltatori stanno sfondando radio gap RG3: diffondete la radio dappertutto su calma non ci devono fare niente non abbiamo fatto nulla stiamo semplicemente facendo informazione abbiamo continuato a farla continueremo a denunciare 'sto stato criminale RG1: eccoli sono entrati RG3: e questa polizia fascista RG1: sono entrati sono entrati i poliziotti in radio- RG3: che è entrata nella sede di una radio con manganelli in mano RG1: manganelli in mano e a cas…

	c'hanno le pistole i corpetti antiproiettili tutte 'ste palle qua via del pratello 41 ok ti aspettiamo ciao R3: digli- mauro, stai basso... R2: stanno arrivando gli avvocati un momento che stanno arrivando gli avvocati ring R4: il telefono il telefono PS (urla) R2: dopo, quando ci sono gli avvocati. ring R4: il telefono R3: alice R4: dxo bxxa che sxxxa R3: si ascolta ci abbiamo la polizia alla porta lascia giù il telefono R2: attenzione qui è sempre alice abbiamo la polizia fuori dalla porta abbiamo la polizia fuori dalla porta abbiamo la polizia fuori dalla porta coi corpetti antiproiettili pistole in mano e queste cose qua i nostri avvocati stanno aspettando ci rifiutiamo assolutamente di far entrare la polizia fino a chè i nostri avvocati non sono qua perchè loro puntano le pistole cose di questo genere e non sono assolutamente cose che noi possiamo accettare e (ride) vabbè e prego i compagni di radio città		

	se stanno ritrasmettendo come mi pare il nostro programma, se per favore ci danno un avviso via radio, li sto ascoltando (rumori radiofonici) R3: prima di mezzanotte assolutamente radio città che telefoni qui a radio alice ring R3: pronto? R2: radio città che telefoni qui a radio alice per favore o che avvisi di essere in ascolto e di stare ritrasmettendo questa cosa attraverso la radio per favore li stiamo ascoltando però non riusciamo a capire se è un nostro rientro o se sono loro che ritrasmettono per favore radio città date una voce R3: grazie R2: radio città, attenti allora amici di radio città telefonate compagni comunque compagni la situazione è stabile ring R3: pronto? (..) no, signora, stiamo solo aspettando gli avvocati. R2: la polizia è sempre fuori che aspetta di entrare sempre con i corpetti antiproiettile sempre con le pistole puntate hanno detto che sfonderanno la porta e cose di questo genere preghiamo tutti i compagni comunque che conoscono avvocati di telefonargli di dirli che noi siamo		

	appunto assediati qui dalla polizia in questa maniera non so se avete visto il film, porca vacca, come cxxxo si chiamava? (ride) quello di bohl sulla germania, il caso katharina blum, ecco, gli stessi identici elmetti, gli stessi identici giubbotti antiproiettile, le berette puntate e cose di questo genere. è veramente assurdo veramente incredibile veramente (ride) da film. giuro che se non battessero sulla porta qui di fuori penserei di essere al cinema. Ring (..) R3: non ce l'ho sotto mano ascolta, nessuno sa il numero di radio città? R1: 3 4 6 4 5 8 R3: 3 4 6 4 5 8 R2: stiamo aspettando ancora l'arrivo del compagno R3: ciao grazie R2: siamo in quattro qui alla radio siamo in quattro qui che facevamo il lavoro di controinformazione e siamo qui che aspettiamo la polizia per vedere che cazzo fa per il momento sembrano tranquilli non fanno tanto casino, si sono calmati hanno smesso di picchiare contro la porta si vede che la ritengono molto robusta (ride)		

	(...) R2: mi dai un disco che mettiamo su un pò di musica pxxxo dxo Ring R3: alice? R2: il telefono qui è a getto continuo Veramente a getto continuo ecco qui beethoven, e se vi va bene, bene, se no, sxxxe R3: pronto? no calimero è andato via R4: dxo bxxa lo sapevo lo sapevo che è successo R3: no ascolta, ascolta abbiamo la polizia qui fuori che sta facendo (music) R2: un pò di musica di sottofondo R3: non lo so ascolta non so nemmeno se vado a casa a dormire, stanotte R4: vagli a dire che stiamo aspettando gli avvocati PS APRITE R2: dunque la polizia ha ricominciato a battere sulla porta, continua ad urlare di aprire stai attento stai giù (urla della polizia) R4 stanno arrivando gli avvocati aspettate cinque minuti beh sono qui per strada (urla della polizia) R2: gli unici commenti sono pxxxo dxo aprite e cose di questo genere ring R2: alice? non so chi sia alberto comunque, no non sono matteo, senti c'è la polizia alla porta R3: sono entrati		

	R2: sono qui sono entrati sono entrati R3: sono qui sono qui R2: sono entrati sono entrati siamo con le mani alzate, sono entrati siamo con le mani alzate R3: ecco stanno strappando il microfono R2: mi stanno strappando il microfono ci abbiamo le mani in alto dicono che questo è un posto di …..		

CONCLUSIONS

"Criminal justice, considered as the aim that the law and the trial are intended to reach, cannot be historically represented within the scheme of steady progress toward civilization. It has experienced crises and regressions, along with phases when it was subjugated to tyrannical designs and projects of political domination. And it could experience them again".

MARIO SBRICCOLI, *Giustizia criminale* [860]

Some legal workers, human rights activists and academics call for complete abolition of opinion crimes from the various legal systems. The supporters of this idea are defined as "purists", since they see no solution besides completely repealing the norms that can lead to restrictions of the right to freedom of expression.

My personal approach is almost fully "purist": the opinion crimes analyzed in this dissertation are often enforced on the pretext of security, forgetting that security should be guaranteed to the community and not to the State as if it were an "anthropomorphic" figure. Therefore, I believe most of these crimes should be repealed.

In the first section of Chapter No. 2 of this dissertation, I have analyzed a first category of opinion crimes, namely those regarding the vilification of certain State figures. They can be considered as particular forms of defamation directed at some subjects which receive a higher protection: the crimes provided under Articles No. 278, 290 and 291 of the Italian Criminal Code and under Articles No. 299 and 301 of the Turkish one, are in this category. However, in the case of Articles No. 290, 291 and 301, defamation is directed at abstract entities (in particular, the government, the State, the army, the judiciary). That is why I believe that the latter provisions should be completely repealed too, since protecting the honour and prestige of these State institutions is not necessary in order for them to be efficient. Instead, such a criminalization often leads to silencing the critics on matters of public interest.

The vilification of the Head of the State is an actual form of defamation, which can damage the honour and personal dignity of a physical person: these interests deserve juridical protection, which however should come from a different branch of the law, not from criminal law. Indeed, both the Italian and the Turkish system should decriminalize defamation, shifting to forms of civil protection of the relevant legal interests. Finally, no difference should exist between the right to personal dignity and honour of the President of the Republic and that of a common citizen: otherwise, the idea that defamation can impair the efficiency of an institution would re-enter through the back door.

In the second and third section of this dissertation, I analyzed the "common" crimes of instigation, apology and propaganda and the same crimes in the field of counter-terrorism. These legal devices are aimed at protecting national security and public order; however, most of the time they end up,

[860] M. SBRICCOLI, *Giustizia criminale* in *Lo Stato moderno in Europa: Istituzioni e Diritto,* Rome-Bari, Laterza, 2002, p. 164.

again, criminalizing dissent and contrasting, “biting”, unpleasant opinions. That is why these crimes should be completely repealed, since other solutions already exist in the Italian and Turkish criminal systems for punishing the instigator whose instigation has been taken on, when concrete consequences threathening public security actually follow the instigation. Instead, the category of apology, justified as a form of indirect instigation, should be definitely repealed. Justifying its existence through this definition renders it superfluous. The only acceptable reason to limit a fundamental right and freedom, such as freedom of expression, is the existence of an actual, concrete and serious threat. Therefore, as far as the instigation to commit a crime actually and concretely threatens public security- when no other interest different from the security of the community as a whole is defended- a new specific provision could be introduced, less vague and open to arbitrary interpretations, without risking the rights of dissenting thinkers and dissenting movements.

Although my standpoint tends to be “purist”, it should be recognized that such a proposal is certainly, still, utopian and anachronistic. The so-called *realpolitik* cannot be ignored while making juridical considerations. As was analyzed throughout this dissertation, neither the approach of the international community nor, in particular, the approach of the single national countries, specifically of Italy and Turkey, are oriented toward complete elimination of the restrictions imposable on free expression. In particular, two main elements cannot be ignored in studying and proposing the ideal juridical solutions in this field.

Firstly, a general issue looms over the interpretation, enforcement, renovation or repeal of opinion crimes: penal populism. The study of populist distortions is the only method for monitoring and preserving the rule of law and the democratic institutions from any form of authoritarianism [861]. The most important thing for gaining freedom of expression in the long term is *social perception*. Even if there were evolutionary legal changes, they would not reflect the social mentality and the legal practice at an equal rate. Therefore, the competent authorities should dedicate resources to education (of legal professionals and others) and to finding socially-accepted solutions for the defence of certain legal interests, in alternative to criminal provisions.

Secondly, an essential element is the independence of the judiciary: when the judicial order is controlled or influenced by other State powers, it is almost impossible for the right to freedom of expression to prevail in a balance with the defence of national security and public order. A ECtHR judgment pointed out that “any political change in time might affect the interpretative attitudes [of the Minister of Justice] and open the way for arbitrary prosecutions”[862]: I am convinced this is also valid for judges’ interpretations. Moreover, if the role of jurisprudence in not applying certain illiberal laws is deemed to be a sufficient reason not to abolish them [863], an important element is forgotten: the institutional structures may change to become a government-

[861] ANASTASIA, ANSELMI, FACCINELLI, *supra* note No. 98, p. 19.
[862] *Altuğ Taner Akçam v. Turkey, supra* note No. 428, Para. No. 94.
[863] It has to be underlined that this kind of reasoning is more reasonable in a *common law* system, where case law and legal precedents are more important than written law. However, notably, some *civil law* scholarships, such as the Italian one, increasingly refer to the Anglo-

controlled juridical system, where the separation of powers is no longer clear. Obviously, the duration of this process depends on the context, but there is no reason to exclude such a possibility also in countries such as Italy that are usually considered to be liberal and "democratic" [864]. Moreover, even if some provisions analyzed above are not regularly enforced, "every interpretation is a link" [865]: therefore, "the meaning of every provision of the juridical system is influenced by all the other provisions that compose the system itself in the same moment" [866]. Consequently, when many provisions defend the State, the whole system is influenced when it comes to balancing State interests and other contrasting interests.

In particular, the Italian experience shows that, even when there is an evolutionary jurisprudence or scholarship, the government and the legislative power are still unlikely to abolish any of the norms that strongly limit free expression: this is especially true when those norms are aimed at (officially) defending State security and public order. The governments' tendency is to maintain this kind of norms. The Turkish experience demonstrates even more strongly that it is utopian to believe a non-liberal or authoritarian government will abolish, in the short term, provisions that are (officially) directed at national defence and that can easily be used for controlling dissent and preventing interference in official policies.

For these reasons, even if an almost "purist" proposal should continue to be submitted to the Italian and Turkish authorities until they comply with it, alternative solutions have to be considered: they would, at least, lead to a disapplication of the provisions under study or to acquittals even if indictments still take place [867]. In this regard, the necessary elements for a constructive critique - by legal professionals and also by public opinion- are:

- A precise (not overbroad and vague) and non-anachronistic identification of the legal interests which are defended by the relevant legal provisions, in order to avoid the dependence on the ruling political power of the enforcement of opinion crimes;
- The actual *appropriateness* of the punishable action to *concretely damage* the protected legal interest;
- A closer attention to the potential *chilling effect* of legal regulation on free and pluralistic expression of ideas and opinions;
- An actual effectiveness of the "constitutional shield" in protecting the fundamental right to freedom of expression; in cases- such as the Turkish one- where the Constitution itself allows broad exceptions to this right (such as in the case of a state of emergency)- careful attention,

---

Saxon tradition as a model to tend toward. On the other hand, in the *common law* systems, the opposite tendency is also taking place, in order to assure a greater certainty and foreseeability of the law.

[864] Moreover, in Italy- for example- this kind of issues already exist in the relationship between the judiciary and other State powers.

[865] J.ESSER, *Precomprensione e scelta del metodo nel processo di interpretazione del diritto,* Naples, 1983, p.136.

[866] Court of Cassation, September 26, 2008, "T.R. and others".

867 Notably, this is what is happening in Italy from the '70's, with the first evolutionary interpretations by the Constitutional Court. Also, the potential *chilling effect* stemming from an indictment has to be reminded.

should be paid to the approach of international instruments such as the ICCPR, the *Siracusa* and *Johannesburg Principles,* and – above all, especially when Member States of the Council of Europe are concerned- to the ECHR and the Strasbourg case law.

Finally, international organs such as the Council of Europe and the European Union, must demand greater respect for fundamental rights within their Member States and from the States they make agreements with, through their existing disciplinary powers, by enacting new and more effective disciplinary legal devices and also by using their contractual power.

This dissertation aims at creating a fruitful contemporary comparison between the Turkish and the Italian juridical systems and their current juridical solutions regarding the defence of national security and public order in a balance with the right to freedom of expression. Reflecting upon this comparison, between two legal systems that are closely linked by the letter of their criminal norms, could be useful for both of the countries under analysis: for Turkey, in order to adopt more progressive and human rights-oriented approaches in amending, repealing, interpreting its domestic criminal legislation; for Italy, in order to think about the risks stemming from an authoritarian enforcement of the existing opinion crimes and from a State policy oriented toward the elimination of critical dissent.

INTERVIEWS

This section is dedicated to the interviews I did during my period of research in Istanbul, Turkey, between September 2015 and February 2016. The interviewees are Şanar Yurdatapan- human rights activist- Tolgay Güvercin, Veysel Ok and Ilay Yılmaz- lawyers- and Orkut Murat Yılmaz- software developer.

Şanar Yurdatapan – Political Activist and Composer

January 2016

Şanar Yurdatapan was born in 1941 in Susurluk, north-western Turkey. Composer, political activist and co-founder of the "Initiative for Freedom of Expression" in 1995, he moved to Germany in 1980, in 1983 his Turkish citizenship was stripped away; it was restored in 1992 after Şanar returned to Turkey.

Can you describe the circumstances behind your move to Germany and that led to the removal of your Turkish citizenship? Are these episodes connected with the content of your songs, or were you already politically active?

"Well, I was a composer and my wife was a singer. The content of my songs was not directly political. In the beginning of the 80's I suffered a lot, some friends went to fight in the mountains in the East of the country and were killed. We felt everything in our political system was changing and the power of the military was increasing: after the "Decision of January, 24th", the government decided
that wages would be frozen and the unions abolished.

On the 2nd of January 1980 I flew to Germany to organize my wife's tour, she was a famous actress as well. We felt like we should save some money before taking any decision, our artist friends also wanted to move together . After 8 days the military coup took place, and we decided to remain in Germany. Nobody of our friends came after us.

Three years later, we were invited at the Cyprus Film Festival. I was asked to speak in that occasion as Turkish representative and I said that one day our children would have played together and the tension in Cyprus would have ended. The day after I was on the front page of all the Turkish newspapers for my statements and the military junta asked us to go back to Turkey otherwise we would have been stripped of the citizenship. We did not go back for more than 11 years".

You are well-known for the acts of civil disobedience you organized and as one of the founders of the "Freedom of Expression Initiative" in 1995. Which methods of activism do you consider most effective at present? Which ones in the past?

“Well, in the 80‘s, due to the increasing power of the military, was not possible to do any militant activism. For this reason, about 1200 people subscribed to the government a petition on the problems of the country, especially regarding freedom of expression. It was not mentioned by Turkish media and the head of the military junta, general Evren, stated “Who are these people, what do they think they can do?”, and a case was opened against the petitioners. However, it didn‘t end too badly.

After the Sosurluk scandal, a car accident who found in the same car the deputy chief of the Istanbul Police Department, a Member of the Parliament who led a powerful Kurdish clan and the leader of the Grey Wolves (who was a contract killer on Interpol's red list), a civil disobedience action called “One Minute Darkness For Permanent Light” began. Every night at 8 o‘ clock people were turning off the lights for one minute. It spread quickly and it was useful to show how many people were sick of the ongoing situation since half of the city was turning dark, also in the richest areas.

Then in 1995, civil disobedience actions for freedom of expression in the form of republishing banned articles started. As a reaction to the summoning of the writer Yaşar Kemal because of an article he wrote for “Der Spiegel”, 1080 intellectuals re-published 10 articles that caused their authors to suffer in courts and prisons. They were re-published in a book called ‘Freedom for Thought’ committing a *new crime* under article 162 of the Turkish Penal Code. Under this article, whoever re-publishes a banned articles commits a new crime and should be convicted with the same punishment of the author of the writing. Because of the presence of so many defendants, even the identification and first interrogation period lasted for 2 years and a half. It was a funny period! There were long lines of famous writers, journalists, lawyers waiting at the prosecutor door. The prosecutor demanded the acquittal of all of us and brought Article 162 before the Constitutional Court.

We were acquitted, and I appealed it. In 1999, Law No. 4454 was enacted for suspending all the cases with the condition of not repeating them for 3 years. It was described as “sweeping dust under the carpet instead of making necessary changes in the law”.

When the year 2000 came, we started to publish this kind of booklets every year: in 2000, 1278 people published 43 booklets, and two of them ended with the conviction of the journalist Nevzat Onaran and me for two months. Moreover, in the same year we wrote a book titled ‘Freedom of Thought- 2000’ which was banned , but a decision of acquittal was given by the State Security Court, which was in practice a Military Court. This decision was really funny! During the hearing, all the defendants refused to make statements, even defenses, repeating that in such a court the ‘right to a fair trial’ was being violated and pointing out the previous ECtHR‘s decision *İncal v. Turkey*.

In 2004, the State Security Courts were abolished, even if they basically just changed their name and we had to wait until 2014 for a substantial abolishment of these courts run by members of the army”.

So, would you say that legal action is the best path to follow in order to obtain effective results?

"Of course I would".

But how can it be the best method considering the alleged corruption of the legal actors and the malfunctioning of the legal system? In an interview with *Index on Censorhip* [868], you said "*Many judges and prosecutors think that their duty is not to protect the law but to defend the state. Several years ago a survey by TESEV (Turkish Economics and Social Studies Foundation) revealed that 70 per cent of them said openly that when it comes to defending state, law is not important anymore. We see it in practice all the time".*

"On what can we depend if not on law? Even if the judicial system is sick, it is the peaceful way to get problem solved. Only peaceful ways can convince not aware people, if you use violent methods you may obtain what you want but you would never have a big consensus and awareness of your activism's reasons".

Is this "sacred view of the State" widespread also outside the judiciary?

"Of course it is. It is pervading the culture, if it wouldn't be like that in the citizens mind it wouldn't be happening. I define it a "culture of obedience": it is lasting from the Ottoman Empire, full faith in the state and in the leader of the state. Sultan or not, only the boss has changed".

What are the main legal provisions used to silence speech in the name of national security, in your opinion? Which articles from the Criminal Code (TCK) and the Anti-Terror Law would you indicated as the most critical articles at the present time? And which ones in the past?

"Nowadays I would indicate Article 299 TCK (Insulting the President of the Republic),which is very often applied since Recep Tayyip Erdoğan is the Head of the State. In the recent past, I would have indicated Article 125 TCK which was very used when he was Prime Minister. Moreover, the former Article 159 was very used, that now is the current 301 TCK (Insulting the Turkish Nation, the organs and institutions of the State).

Even if in 2005, when the Penal Code was renovated, they promised to improve and simplify the legislation, the Anti-Terror Law is still there, due to the army's pressure, and so are also the Press Law and the Law for Demonstration and Assembly. Especially from 2010, the previous efforts made under the EU harmonization process were reversed, and many package laws and decrees

[868] S. GALLAGHER, *Şanar Yurdatapan on Turkey: "Things will never be the same again",* June 20, 2013, Index on Censorship; link: https://www.indexoncensorship.org/2013/06/sanar-yurdatapan-on-turkey-things-will-never-be-the-same-again/.

have been enacted creating a great confusion. One of the latest scaring changes is the Law for Universities, giving to YÖK ("Turkish Higher Education Board") the power of replacing the private universities' administration with some appointed trustees [869]. It can be done if the university "have become a focal point for activities against the state's indivisible integrity". It will increase academic self-censorship in good institutions like Bilgi University, which is among other things hosting our annual "Gatherings in Istanbul for Freedom of expression".

What about the Internet restrictions? When interviewed by *Global Voices*[870]*,* you said that the *Museum of the Crimes of Thought'*s website is not hosted in Turkey in order not to avoid being easily shut down by the authorities[871]. Moreover you were sure that the website would be closed after April 1, 2015, when political leaders' busts started emerging in the main "corridor".

"It was not shut down! And I'm seriously shocked because of that. I think the explanation lies on the fact that if they would ban it, more people will get to know it. Anyway, they cannot destroy it: that's why a virtual museum is much stronger than a real one".

[869] J. GROVE, *Turkey"s new HE laws are "assault on education and free speech, critics claim,* December 1, 2015 in *TimesHigherEducation.com;* link: https://www.timeshighereducation.com/news/turkeys-new-he-laws-are-assault-education-and-free-speech-critics-claim. Most of the information were originally reported in an article by *Today's Zaman*, which is closed at present: http://www.todayszaman.com/anasayfa_new-yok-regulation- to-pave-way-for-arbitrary-closure-of-universities_404913.html.

[870] *Şanar Yurdatapan's Museum of Crimes of Thought Takes Aim at Growing Oppression in Turkey ,* January 7, 2015, link: https://globalvoices.org/2015/01/07/sanar-yurdatapans-museum-of-crimes-of-thought-takes-aim-at-growing-oppression-in-turkey/.

[871] An online museum realized by the 'Initiative for Freedom of Expression" where all the past and current cases involving freedom of expression are catalogued. At this link, https://www.youtube.com/watch?v=5OAJxMaLHic , it is possible to can find a promotion of the online museum on the YouTube Channel *of* the Initiative for Freedom of Expression. Antenna*,* which is overseeing the museum, is a member of *IFEX*, an umbrella for many artists, journalists, activists and Human Rights organizations internationally.

Tolgay Güvercin– Lawyer of the Daily Newspaper Bir Gün

December 12, 2015

What are the main articles used to silence speech in the name of national security, in your opinion? Which articles from the TCK (Turkish Criminal Law) and the Anti-Terror Law would you indicate as the most critical articles at the present? And which in the past?

"I would say the following:

- In the last 4 years, Article 299 TCK punishing the act of "insulting the President of the Republic" became very common;
- Articles 6 and 7 of the Anti-Terror Law: the word "propaganda" was eliminated but it was amended in a way that actually I think broadened the scope of the articles. They address *" whoever says positive things about a terror organization";*
- Article 14 of the Anti-Terror Law: it addresses those who disclose or publish the identities of state officials that were assigned in fight against terrorism . This provision used to be in Article 6. So, if somebody writes the name of some public officials working in the South- East of the country against PKK in an article, he/she could be charged;
- Article 329 et seq. TCK: on revealing state secrets an espionage; the case of Can Dündar from *Cumhuriyet* stemmed from those provisions;
- Article 125 TCK on defamation;
- Art 215 TCK on praising the offence or the offender: e.g. in writing/ speaking about the PKK leader Öcalan. Also the musician Ferhat Tunç was prosecuted and spent one month in prıson; I think the case is on appeal now.
- In the past, when the conflict in the South- East was stronger and on-going[872], Article 318 TCK was very often used: it criminalizes discouraging militars to perform their duties; some speeches discouraged people from performing their military service (which is compulsory). But *this is not our war*: I for example paid for not performing it. In the past, it was enough to write about the situation in the South- East to be charged with this article. Also writing about conscience objection was a cause of being charged with Article 318; nowadays, it will probably start to be used again".

[872] The simultaneous development of Kurdish media or media covering the Kurdish question with the political situation in Turkey is well explained in *Media Freedom is part of the solution to the Kurdish Issue,* Reporters Without Borders, August 2015; link: http://www.rcmediafreedom.eu/Publications/Reports/Media-Freedom-is-part-of-the-solution-to-the-Kurdish-issue.

Could you give me some other examples of related case law?

"Sure. As far as it concerns Article 299, *Bir Gün* itself is full of examples. There is a prosecution against Berkant Gültekin (there are 3- 4 cases against him) , Can Uğur, Bariş Ince (again, there are 3- 4 cases against him). In one case, they signed an article together (17 Feb 2015)[873]: "Hırsız Katil Erdoğan" ("Erdoğan killer and thief") was the heading, since the content was speaking about some student protesters who were put under trial for having shouted it (this slogan is very popular during the protests in Turkey). It was dismissed because the judge said it is a *political* case. Instead, the journalists were charged 11 months from
the Istanbul 2nd Criminal Court, and now they are waiting for the appeal. If we will lose, they will not go to jail, if they avoid to commit the same crime again for one year.

Another case inside *Bir Gün* involves the journalist Onur Erem, that reported how Google's autocomplete engine while typing the words "hirsiz katil" brought up "Erdogan" and "AKP" - the president and the ruling party - as the first two suggestions. He merely reported it thinking it's newsworthy and he faces up to 5 years of jail [874].

At the ECtHR level, you can consider the following cases, where the judgment is basically stating that no expression and offence against some special figures of the state should be criminalized: *Pakdemirli v. Turkey*, *Artun and Güvener v. Turkey*, *Otegi Mondragon v. Spain*. Finally, in the case *Tuşalp v. Turkey*, there is a violation of Article 10 ECHR: the case should not invoke the criminal law . It is a request of compensation from Erdoğan for an attack on his PERSONAL RIGHTS (Article 125, defamation).

What we always have to stress in these cases is that even if they don't end up with a detention sentence, there would always be a *chilling effect* on people's free expression!

As far as it concerns the Internet Law, *Bir Gün* has again good examples: both its website and its Twitter account were shut down. The latter, because of news on the MIT (Turkish Intelligence Organization) tracks transporting arms in Syria. For the website, the case was followed by the academic Yaman Akdeniz: it contested a decision taken by TIB (Turkish Telecommunication Authority) dated 6th of May 2015 under Article No. 8 of Law 5651, as amended in 2015. In fact, the reasoning of the blocking was "for national security […] and in case of emergency". What is this emergency, so great to shut down the entire website of a newspaper without giving any further explanation? Why acting so quickly?".

---

[873] Read *Four journalists face trials for insulting Erdoğan,* in *Hurriyet Daily News,* December 2, 2015; link: http://www.hurriyetdailynews.com/four-journalists-face-trial-for-insulting-erdogan.aspx?pageID=238&nID=91985&NewsCatID=339.

[874] *Turkish journalist faces prison over insulting politicians,* March 23, 2016,DW News; link: http://www.dw.com/en/turkish-journalist-faces-prison-over-insulting-politicians/a-19135465.

Note this fact, there is no publications or notice of the blocking order. The confirming sentence by the Criminal Court came on the same day: how can they have read such a long list of blocking orders in half a day and checked if national security is threatened or an emergency is on? Then, we challenged the decision and again it was dismissed on the same day we did it. So we appealed to the Constitutional Court for two reasons:

- How can they check carefully the existing charges in one day?
- Under Article No. 6 ECHR, namely the right to be informed and to defence.

In my shoes, would you concentrate on the press cases?

"Yes, I would. See the cases we spoke about: when some students were screaming *'Katil Erdogan"* ("Erdoğan murderer"), then the case was dismissed as a political case. But for the press there is a double standard: it is considered more dangerous and you can really risk imprisonment. For both of the case, though, there is a *chilling effect* taking place.

Is it true that the quantity of trials against some newspapers is leading them to bankruptcy?

"Yes it is true. The newspaper I work for is not paying me, and they also haven't been paying the other journalists for the last 3 months. Paying the legal costs is not the only cause of losses for the newspapers: there is a great cut in government's (or industries close to the government) advertisement funds in the dissident newspapers".

Is the Tahir Elçi assassination[875] the symbol of a new period of threats for lawyers, that are often considered to be involved in the issues for which they are defending their clients? In this regard, do you have any personal experience?

"This connection between lawyers and the cases they follow is common. They have been charged:

- For being part of PKK (Kurdistan Workers' Party); for example, it happened to the Öcalan's lawyers such as Ibrahim Bilmez in context of a broad legal operation against lawyers that took place in 2011[876];
- For being part of DHKPC (The Revolutionary People's Liberation Party) : it happened recently to the workers of the Law firm *Halkın Hukuk Barosu*

[875] One month after his prosecution for being a member and supporter of PKK, the lawyer was shot dead in Diyarbakir: *Prominent pro-Kurdish lawyer was shot dead in Turkey,* Al Jazeera, November 25, 2015; link: http://www.aljazeera.com/news/2015/11/prominent-pro-kurdish-lawyer-shot-dead-turkey-151128103206863.html.

[876] See the list of 40 lawyers in *Call for the release and the end of judicial harassment against lawyers,* https://www.fidh.org/en/region/europe-central-asia/turkey/Call-for-the-release-and-the-end.

(the “People‘s Law Office”: they are volunteers asking for low fees); in particular, I can remember Mr Ebru Timtik.

For the specific case of Elçi, I personally think it was not premeditated and just a policemen decided In that moment to shoot. I experience every day the hostility police toward lawyers”.

Why do many Turkish people, when thinking about a terrorist organization, still immediately link terrorism to PKK?

“Well, it is up to your position on terrorism and the meaning of this word, if you have one: it is up to which aims you consider legitimate if you consider one group or person terrorist or not. Some Muslim people in this country don’t think ISIS is a terror organization. Others, as the murdered Tahir Elçi, do not think PKK as a terrorist organization. Another important element is also the killing of civilians rather than not: killing civilians makes you a killer, not a fighter”.

See one of the Turkish domestic judgment connected with the expression “Hırsız Katil Erdoğan” (“Erdoğan killer and thief”) in the Final Appendixes of this dissertation.

Veysel Ok- Legal Advisor for P24 (Platform for Independent Journalism) [877] ***and Nokta Magazine***

January 13, 2016

Could you describe to me the association and newspapers you are working for?

"I was the legal advisor of the newspaper *Taraf* [878]. P24, where I am currently working, is an association of journalists. We help journalists in their activities, also defending them in case of charges stemming from their work. Finally, I'm also the lawyer of *Nokta* magazine: its director, Ceferi Güven, was arrested for an article he wrote about elections, saying there would be a civil war after elections publishing a picture of Erdoğan in military clothes. He stayed in prison more then 1 month, charged under Articles 313 (overthrowning the government with violence) and 214 (provoking people to commit crimes) of the Turkish Criminal Code. One of the defences, in this case, is that before elections in 2015 more than 400 people died, considering the clashes in the South- East of the country and the terroristic attacks in several Turkish cities: it is like in a war[879]" .

What are the main articles used to silence speech in the name of national security, in your opinion? Which articles from the Turkish Criminal Code (TCK) and the Anti-Terror Law No. 3713 would you indicate as the most critical articles at present? And which in the past?

"Nowadays, I would say Article 299: I am following about 10 cases that involve this article (e.g. the ones of Ahmet Altan, Hasan Cemal…); I guess the government established a special commission looking for the possibility to charge someone on this grounds, since there are around 1000 on-going cases under Article 299 TCK.

Regarding the Anti- Terror Law, when the political climate is peaceful, it is not applied; now they started enforcing it again.

The case of Ceferi Güven I previously mentioned, involves Article 214 TCK, the incitement to commit a crime: it is often used even if there is no evidence of any

[877] P24's website: http://platform24.org/en/.

[878] *Taraf* was functional to the AKP (the ruling Justice and Development Party) government against the military tutelage, since in 2007 it revealed the coup attempts from the Turkish Armed Forces. Nevertheless, in the last years it is under threath as an opposition newspaper and was accused for influencing the judiciary and invasion of privacy.

[879] See also: CPJ (*Committee to Protect Journalists), Two editors at critical magazine Nokta arrested in Turkey for election coverage,* November 4, 2015; link: https://cpj.org/2015/11/two-editors-at-critical-magazine-nokta-arrested-in.php. Read also *Two Turkish editors released after first hearing over "inciting crime",* Hurriyet Daily News, December 29, 2015; link: http://www.hurriyetdailynews.com/two-turkish-editors-released-after-first-hearing-over-inciting-crime.aspx?pageID=238&nID=93163&NewsCatID=339 .

organization, gun, etc. Again, two days ago 1200 intellectuals (the "Academics for Peace"- *Bariş İçin Akademysienler*) published a press release about the need of peace between Turks and Kurds and they are charged under Article No. 214: cases were opened in many cities Turkey, after President Erdoğan called them "traitors".

Article No. 301 (Insulting Turkish Nation, the Republic, the organs and institutions of the State, the Army) has a very political content, and therefore its application is changing up to the political context: four years ago Ahmet Altan of *Taraf* was accused of criticizing Atatürk and Turkish history after writing an article titled "Ah Ahparik" ('Oh brother' in Armenian) saying that "the Unionists [of the Ottoman era] carried out a cruel genocide"[880] ".

What is your position on the frequent imposition of press silence after events like the one two days ago[881] or the Ankara massacre? What is the *ratio* behind this usage of those articles? How does the government justify it and what are the consequences on public opinion?[882]

"It can happen under Article 7 of the RTUK Law (Law No. 6112) but it can be conjugated with Article 285 TCK (the so-called *Yayın Yasağı*). The former is valid just for radio and television and is an administrative law, while the latter in a penal provision that can lead to detention sentences from 1 to 3 years. The prohibition's duration can be limitless, until the end of the investigations.

Yesterday I made an objection about the press silence imposed on Sulthanamet's bombing [883] with P24; *Taraf* has been charged in many cases during the past months for reporting about the Ankara bombing, the Suruç one and so on. Now the situation about freedom of speech is like in the 80's: the government attacks even academics. For example, Hasan Cemal wrote three books about the Kurdish guerrilla, he sold many copies but he was prosecuted just in the current times.

Concerning the Internet Law, I think that only online people can be completely free. If you are able to use the technology (such as VPNs) you will be free, still the Web cannot be controlled completely; for example, we can find news about what is going on in Dyarbakır only on the social media. The same concept is valid for citizen journalism.

---

[880] EROL ÖNDEROĞLU, *Writer And Journalist Ahmet Altan Charged With Insulting Turkish Nation,* September 12, 2008, http://bianet.org/english/freedom-of-expression/109701-writer-and-journalist-ahmet-altan-charged-with-insulting-turkish-nation.

[881] That is, the blast of January 12, 2016, that took place in the historical center of Istanbul.

[882] Please read the article *La quiete dopo la tempesta,* I realized for *Unimondo.org,* January 29, 2016. Link: http://www.unimondo.org/Notizie/La-quiete-dopo-la-tempesta-155073.

[883] A suicide attack killed 11 people in the historical core of Istanbul in 12, January 2016, http://bianet.org/english/human-rights/170998-explosion-in-sultanahmet-istanbul-governorate-makes-statement.

P24 made objections to the Strasburg Court for cases concerning the shut-down of YouTube and Twitter: they are not final yet, but there are other similar examples, such as in *Ahmet Yildirim v. Turkey* and *Cengiz and Others v. Turkey".*

All in all, are you still optimistic about the effectiveness of the ECtHR judgments?

I think they are useful for freedom of speech cases, but not for other political charges. Anyway, I think we should challenge more and more cases before the Strasburg Court.

Is the assassination of Tahir Elçi a symbol of a new period of threats for lawyers, often considered to be involved in the issues they are defending their clients from? In this regard, do you have any personal experience?

For lawyers living in the East part of the country, the situation is more dangerous. The ECtHR's case *Elçi v. Turkey* [884] is a good example on this regard. I haven't experienced that kind of problems yet, but a common issue is for example that there are frequent controls attempting to disturb and punish us, such as looking over the payment of taxes.

[884] App. No. 23145/93, link: http://hudoc.echr.coe.int/eng-press?i=003-874578-897719.

İlay Yılmaz- Partner of ELİG Law Firm (Istanbul) [885]

January 26, 2016

Which cases has your law firm been involved in?

"We are the attorneys of YouTube, Google, WordPress and Twitter in Turkey. I should underline that nothing of what I will say is on behalf of our clients.

These companies have been involved in many cases in our country: in 2014 YouTube and Twitter faced an access ban. In 2008, YouTube was blocked for almost two and a half years after the circulation of some videos offending Atatürk and many other short-terms ban orders where applied in these last years".

Did any of these cases arrive at the European Court of Human Rights?

"Not directly for one of our clients' applications. For some business policies of these companies (e.g. Twitter has the highest penetration in Turkey then in all over the world) they don't intend to follow all the possible remedies as far as they manage to avoid the complete ban of the website.

For example, a case related with "Google Sites" was brought before the Strasburg Court but the applicant was not Google![886] "

Could you summarize the main actions that can be initiated in the name of national security and public order today in cyberspace? Do we find them mainly in the new Article 8 (a) of the Internet Law No. 5651?

"The defence of the national security interest was inserted in the Internet regulation field before the existence of Article 8 (a): blocking decisions were enforced applying the Anti- Terror Law under propaganda charges (Article 8 of Law No. 3713). When this article was cancelled due to political reasons, we started to object all the decisions that were subsequently realized without any legal basis. So they introduced Article 8 (16) and then 8 (a) in Law No. 5651. The latter is the copy of Article 8 (16), which was deemed unconstitutional in 2014. The Constitutional Court stated that "In terms of national security, preservation of public security and prevention of crime, granting access ban decisions without considering the authority to render a decision or the evaluation of the authorised institutions would be against the Constitution".

[885] Among others, the preparation of this interview largely benefitted from Yılmaz's article *National security as basis for broad access bans,* International Law Office, ELIG Law Firm, September 22,2015 link: http://www.internationallawoffice.com/Newsletters/IT-Internet/Turkey/ELIG-Attorneys-at-Law/National-security-as-legal-basis-for-broad-access-bans.

[886] *Ahmet Yildirim v. Turkey.*

How are they implemented in practice? Is there still a lack of information for content providers? I mean, do they have knowledge about the charges or the blocking orders?

"First of all, the definition of the legal bases themselves is really broad. The terms "national security' and "public order" are vague. And when it comes to national security, in some cases like bomb attacks or corruption allegations of public officials, the bans come to all the media (newspapers, Internet with hundreds of URLs ...). National security can also be invoked when Article 299 TCK (Turkish Criminal Code) is applied, for insulting the President of the Republic, or for other penal law articles (e.g. espionage). The first time they used this national security ground for access bans to Internet contents was after the reporting of the wiretappings of high officials speaking about bombing a mosque in Syria and after the corruption wiretappings[887]. Before it was not that usual.

Moreover, the orders are implemented on the grounds of Article 8 (a) and that's all: the prosecutor or the Agency for Telecommunications (TIB) don't specify which parts of the article were violated. We don't receive any further explanation: is it in the name of prevention of a crime, terrorism charges or...? We afterwards try to check the URL under ban for inferring what the charge could be.

In the end, we as attorneys as well as the defendants, will know the charges before the trial just if the prosecutor or TIB will release any press declaration".

Did the amendments of 2014 and 2015 to the Turkish Internet Law impose a monitoring obligation on Turkish Internet Service Providers (ISPs)?[888]

"Yes they did, and it is the same for hosting and service providers! For example, for one twit that does not comply with the law requirements, you have to go through all the twits and Twitter shouldn't be obliged to check and monitor the contents posted by its users".

[887] In the end of 2013 some wiretappings revealed a widespread corruption situation among Turkish high officials; read T. DALOGLU, *Turkey"s tales of the tapes,* February 26,2014, Al-Monitor, link: http://www.al-monitor.com/pulse/originals/2014/02/erdogan-corruption-audio-bilal-graft-probe-police-money.html#.

[888] To know more about the blocking policy, read Y. AKDENIZ, *To block or not to block: European Approaches to Content Regulation and Implications for Freedom of Expression,* Computer Law and Security Review, Vol. 26, No. 3, pp. 260-273, May 2010, link: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1906712.

A constitutional case[889] was opened by TID ("All Internet Association") and TBD ("Turkish Informatics Association") on the unconstitutionality of TİB actions under Article 22 of the Constitution: this Article provides that communications shall not be impeded unless there is a decision by a judge on some particular grounds (national security, public order...) "or an agency authorised by law on the same grounds where the delay is prejudicial". Can TIB be considered an "agency authorised by law"? Or does the unconstitutionality rely on the lack of a prejudicial delay?

"TIB is an administrative agency. So it is not entitled for Turkish Law to order such bans, where access providers are requested to comply in four hours".

Do the Courts always confirm or dismiss the blocking orders in time or do they sometimes remain effective without any further confirmation? Speaking with the lawyer Tolgay Güvercin, he told me that the judges often confirm very long lists of banned URLs and websites and it would be impossible to check them properly in the legal time limit of 24 hours.

"The article requiring TIB's decisions to be approved by a court does not say they need "to obtain" the approval; anyway, they always receive it. The time limit for the decision is 24 hours but the time for complying with the bans is 4 hours! So it means: first you implement it, then the court grants/does not grant the authorization... and afterwards you could challenge the decision to another court.

For example, after the Sultanahmet bombings of January 12, 2016, the government imposed an access ban on every news- even on those not showing harsh images, having mere reporting purposes. Inside hosting providers as the social media we spoke about (Twitter, Facebook…), photos and comments regarding the blast were searched with keywords (not a deep scrutiny criteria) and the blocking decision was sent to the hosting providers and also to the "Access Provider's Union". The access provider has to comply in 4 hours; it is not so for the hosting provider, but if the latter doesn't comply with the order, it could face the ban of the entire website (justified by the fact that it is technically impossible to ban just part of it). Just a few objections are successful, so hosting providers usually comply with the banning order.

I should underline that in cases like this (Sultanahmet or Ankara bombing), it doesn't mean the contents are not formally illegal! But they have some public benefit and it should be balanced with freedom of expression and the importance of spreading socially relevant information".

---

[889] Better, on constitutional grounds, before the Council of State, since the individual constitutional complaint is in force just from 2010; on the Turkish constitutional complaint: Z. ARSLAN, *Constitutional Complaint in Turkey: a cursory analysis of essential decisions*, Council of Europe, link: http://www.coe.int/t/dgi/hr-natimplement/Source/echr/Conference_07072014_Speech_Arslan.pdf.

Which parts of the Internet Law are most influencing hosting providers like YouTube and Twitter?

"Well, regarding your subject of study relating to national security and public order, the presidency may file a criminal complaint with the public prosecutor against parties that create or disseminate content subject to the offences listed under Article 8 (a). Following a judge's decision, content, hosting and access providers must provide judicial authorities with the information required to identify the perpetrators of these crimes. Here it comes another big problem: fines. Authorised personnel from these providers that fail to provide this information will be fined: judicial fines range from 3,000 to 10,000 day judicial fines, provided that the action does not result in another crime that requires a more severe penalty. Content, hosting and access providers that fail to comply with a removal-of-content decision or access ban imposed under Article 8(a) will be subject to administrative fines ranging from TRY 50,000 to TRY 500,000".

Can we say that anyway the blocking or filtering orders are not effective, since people have learnt how to avoid them with VPNs, proxies and so on?

"Well, it is most of the time true, but some IP addresses' bans are taking place as well. It has to be noted that thousands of websites may serve on just one IP address. For instance, there is a satellite TV provider (Lig TV) which was completely banned in this way, under the Intellectual Property Law in that case".

The "Freedom on the Net 2015" Report by the "Freedom House" [890], states there are more concerns after the 2015 "Homeland Security Act", in terms of surveillance, retention of user data and measures to undermine encryption and anonymity. Are those specific provisions for the cyberspace? Is the insertion of the new Article 8 (a) part of this Act?

"No, and these risks stem from the Criminal Law, not from the Internet Law. Moreover, the authorities have the right to ask for users' data, for example, also under some international conventions, such as the European Cyber-crime Convention".

[890] Link: https://freedomhouse.org/report/freedom-net/2015/turkey.

Orkut Murat Yılmaz – Software Developer [891]

January 22, 2016

Orkut used to be a member of the "Hacker-space" [892] *in Istanbul: he organized meetings about free software and "Crypto-parties"* [893] *in order to teach people how to protect their privacy and data.*

Which reasons push a hacker to hack? What pushed you to do it?

"The hacking culture does not consist in simply hacking someone's computer. I will make an example for you: my mother used to put food into the ice- cream plastic boxes after the content is finished: the same is happening in the hacker's world. The core is finding a second aim for the object you are working with! The hacker's world started during the Second World War, when people were collecting the destroyed parts of the airplanes for building new ones. Later on, Richard Stallman, the founder of the *Free Software Movement*, was the forerunner who started to hack as a form of activism .

By hacking, we are trying to solve billion of problems: the most important ones are related with Internet censorship and surveillance. A lot of people use the VPNs or TOR for their own purposes and not just for protecting their contents from censorship and surveillance. For instance, a lot of people are easily hacking someone else's intellectual property.

As far as censorship is concerned, people always find a way : for example, they use the VPNs for following Kurdish media. Instead, concerning the surveillance issue, peopl''s awareness is very low. There is very low privacy even in the Turkish culture, for instance in the family at large, where everyone thinks they have the right to know about your private life! Furthermore, I am actually more afraid of private companies than of the government in this field, especially of the trainees with no experience trying to get your data for a company. This is the weakest part of the Turkish hacking culture.

---

[891] See my article *"L"etica di un hacker",* February 27, 2016, *Unimondo.org*. Link: http://www.unimondo.org/Notizie/L-etica-di-un-hacker-155683.

[892] See the documentary *"Hacking Istanbul"* by Konstanze Scheidt and Tim Schütz on the "Hacker-space" organization in Turkey (20'), link*:* https://vimeo.com/117663606.

[893] *CryptoParty* is a decentralized movement with events happening all over the world. The goal is to pass on knowledge about protecting yourself in the digital space. This can include encrypted communication, preventing being tracked while browsing the web, and general security advice regarding computers and smartphones; see more at https://www.cryptoparty.in/.

Finally: why I do it. Well, I don‘t believe in white and black hackers: the point is that we do it because we can! I will make another example for you: consider Ernest Walton, who realized the first fission of the atom in 1932. His purpose was not to develop a devastating new bomb, but to understand if he could make the protons apart from the atom or not. By hacking, you want to jump over a barrier”.

Does your hacker group have a set of values that you follow during your activities?

“We have a little manifesto: it is mainly about free softwares, making a research before asking silly questions (otherwise you may be answered *RTFM! Read The Fucking Manual!)* and if you find a system , you should try to use it in different and new ways. Some of us hacked their own computers in the beginning (freeing their BIOS, changing the driver of some parts of it).

Most of us are activists , both in the real and virtual world (actually they are both physical! Let‘s say with or without a computer). There is an ideology that all of us share, called crypto-anarchism: we believe in spreading freedom in the cyberspace”.

What do you mean by anarchism, then? Do you think the cyber-space should have no regulation, being able to self-regulate itself? We know that usually committing a crime on the web is considered as an aggravating factor, since the public space a crime could reach is potentially limitless.

“Anarchism means *no rulers,* not no rules. We believe in an existing but different kinds of regulation for the cyber-space. It just cannot be regulated with the same criteria as the traditional legislation”.

What do you think about the role of anonymity on line? Do you think it should generally be allowed? Is it particularly important in countries which have fewer freedom of expression rights and that more generally we don’t consider to fit in the “Western democratic standard”?

“We are using gloves for being warmer, but also thieves use them. So, forbidding anonymity on-line is like forbidding using gloves to everyone!

I always support the science reason: anonymity helps us to break prejudice, even in a chat room; you don’t know if you are speaking with, giving or asking suggestions to, exchanging information with a man or a woman, old or young, black or white... and you don’t fear being judged for what you are asking for or speaking about. Moreover, especially if you come from countries such as North Korea, Iran, Cuba and you could be anonymous, you may access and share much more information than your government actually allows you to. But the same reasoning is valuable everywhere in the world you come from. Consider Julian Assange: he has problems with the Swedish authorities as well. There is not such a thing as a good government. The beauty contest is just between worst and less bad governments!

If you are anonymous in some country and then you act on-line in some other country where you are not, how can you trust the latter government is not going to share your personal data with another governmental agency? And the role of anonymity is not only undermined by governments! For example, if you are looking for the word “cancer” so much on Google, your insurance company could delete it from your policy”.

Do you agree with the fact that authorities sometimes would need to know the identity of the responsible of a crime committed in the cyber space (e.g.: child pornography, videos explaining how to make a bomb, recruiting fighters for ISIS …)?

“The Turkish government is not following those crimes in a serious way, and so are (not) doing other governments. There is a sick relationship between anonymity and chasing child pornography or other crimes. In my opinion, sometimes it's not even a point of being anonymous! It's much more a question of training our children, of creating a common ethic”.

Proc. n. 12672/13 R.G. N.R.
Proc. n. 14949/16 (stralcio del 1431/16) R.G. G.I.P.

N. 1088 Reg. Sent.
Data del deposito 21/07/16
Data irrevocabilità
V° del P.G.
N. Reg. Esec.
N. camp. pen.
Redatta scheda il

REPUBBLICA ITALIANA
IN NOME DEL POPOLO ITALIANO

TRIBUNALE ORDINARIO DI TORINO
Sezione dei Giudici per le Indagini Preliminari

Il Giudice dell'udienza preliminare, dr. [redacted]
all'esito dell'udienza in camera di consiglio del 15.6.2016,
ha pronunciato e pubblicato mediante lettura del dispositivo la seguente

SENTENZA

ai sensi degli artt.442 e segg. c.p.p. nei confronti di:

1) [redacted] nata [redacted],
domiciliata ex art. 161 c.p.p. [redacted]
difesa di fiducia dall'Avvocato [redacted] del foro di Torino
- LIBERA ASSENTE-

2) [redacted] nata a [redacted],
domiciliata ex art. 161 c.p.p. [redacted]
difesa di fiducia dall'Avv. [redacted] del foro di Torino;
- LIBERA PRESENTE -

3) [redacted] nato a Torino il 28.4.95,
residente a Roma via Pasquale Revoltella 24,
difeso di fiducia dall'Avvocato [redacted] del foro di Roma e dall'avv. [redacted] del foro di Torino
- LIBERO ASSENTE-

IMPUTATI

(in concorso tra loro e con [redacted]

[redacted] già [redacted] giudicati separatamente)
per i seguenti reati:
A) dei delitti di cui agli artt. 110, 112 n.1 639 c. 1 e 2 c.p., perché, in concorso con i minorenni [redacted], e con altri soggetti allo stato non identificati, in più di dieci persone e segnatamente in numero maggiore di 40, imbrattavano cose mobili e mezzi di trasporto di proprietà della Ditta [redacted] S.p.a. e della Ditta [redacted] sotto indicate custodite all'interno del cantiere predetto, scrivendovi sopra utilizzando vernice spray di colore nero le parole seguenti " NO TAV, BASTA DISTRUZIONI, BASTA CANTIERI TAV, TAV=MAFIA, BASTA DEVASTAZIONI:

- RULLO [redacted] matricola interna [redacted]
- Autobetoniera Astra targata [redacted]
- Autobetoniera Astra targata [redacted]
- Autobetoniera Man targata [redacted]
- Autocarro Man targato [redacted]
- Autocarro Iveco targato [redacted]
- Cartelli di segnalazione stradale che segnalano la Ditta [redacted]

Tutto di proprietà della Ditta [redacted] S.p.a.

- Autocarro DAF trg. [redacted] di proprietà della s.a.s. [redacted]

In Salbertrand in data 14.6.13.

B) dei delitti di cui agli artt. 61 n. 2, 110, 633 c.2 c.p., perché, in concorso fra loro nelle condizioni di tempo e d'azione indicate al capo A), in più di dieci persone, al fine di occuparla o trarne comunque profitto nella specie per eseguire il reato di cui al capo a), invadevano arbitrariamente la sede operativa della Ditta [redacted] S.p.a.", cantiere sito in [redacted].
In Salbertrand in data 14.6.13.

C) dei delitti di cui agli artt. 61 n.2., 110, 337, 339 c.p. per avere, in concorso fra loro nelle condizioni di tempo e d'azione indicate al capo A) usato violenza e minaccia nei confronti del [redacted] dei Carabinieri di Susa, ponendosi davanti all'auto con i colori di istituto su cui si trovavano impedendogli di accedere all'interno della Ditta [redacted] ove si stavano consumando i reati di cui agli artt. 633 e 639 c.p. e quindi opponendosi nel mentre compivano un atti d'ufficio, nella specie procedere all'identificazione degli autori impedire che i reati venissero portati ad ulteriori conseguenze e commettere e ottenere l'impunità dai reati di cui ai capi A) e B).
In Salbertrand in data 14.6.13.

D) dei delitti di cui agli artt. 110, 610 c. 1 e 2, 339 in rif.to all'art. 112 n.1 c.p. per avere, in concorso fra loro nelle condizioni di tempo e d'azione indicate al capo A), con violenza e minaccia consistita nel porsi, impugnando bandiere e striscioni riportanti la scritta NO TAV, davanti all'autobetoniera targata [redacted] condotta da [redacted], urlando e girando intorno al mezzo stesso, costretto M[redacted], autista alle dipendenze della [redacted] S.p.a., a fermare la marcia dell'autobetoniera impedendo alla p.o. di accedere al cantiere della [redacted] S.p.a.
In Salbertrand in data 14.6.13.

CONCLUSIONI DELLE PARTI:

P.M.:
dichiararsi gli imputati penalmente responsabili dei reati loro contestati e condannarli ciascuno alla pena di mesi sei di reclusione con il riconoscimento del vincolo della continuazione in riferimento al più grave reato sub C)

Difesa [redacted]:
in via principale: assoluzione dell'imputata con la formula ritenuta dal giudice;
in subordine: assoluzione dell'imputata per l'applicazione dell'esimente ex art. 131 bis c.p.;
in ulteriore subordine: concessione delle circostanze attenuanti generiche, riconoscimento del vincolo della continuazione tra i reati contestati, contenimento della pena nel minimo edittale e concessione dei doppi benefici di legge

Difesa [redacted]:
in via principale: assoluzione dell'imputata con la formula ritenuta dal giudice
in subordine: assoluzione dell'imputata per l'applicazione dell'esimente ex art. 131 bis c.p.;
in ulteriore subordine: concessione delle circostanze attenuanti generiche, riconoscimento del vincolo della continuazione tra i reati contestati, contenimento della pena nel minimo edittale e concessione dei doppi benefici di legge

Difesa [redacted]:
in via principale: assoluzione dell'imputato per non aver commesso il fatto quanto meno ex art. 530 cpv. c.p.p.
in subordine: concessione delle circostanze attenuanti generiche con giudizio di prevalenza, riconoscimento del vincolo della continuazione tra i reati contestati, contenimento della pena nel minimo edittale e concessione della sospensione condizionale della pena

MOTIVI DELLA DECISIONE

All'udienza preliminare dell'11.5.2016 il difensore degli imputati [redacted] depositava documentazione relativa all'attività di studio svolta dalle proprie assistite mentre il p.m. produceva l'annotazione di p.g. redatta il 6.5.2016 dalla Compagnia [redacted]. Così integrato il materiale probatorio, i difensori degli imputati [redacted] Edoardo muniti di apposite procure speciali e M[redacted] personalmente richiedevano il giudizio abbreviato; ammesso il rito richiesto,

alla successiva udienza del 13.6.2016 il p.m., nulla opponendo le controparti, produceva copia integrale della tesi di laurea redatta dall'imputata G[redacted] – documentazione già richiamata dalla difesa dell'imputata che nulla opponeva circa la produzione del p.m. - si procedeva alla discussione della causa e le parti concludevano come sopra sintetizzato.
Il giudizio veniva infine definito all'udienza del 15.6.2016 fissata per l'esposizione delle repliche (cui il p.m. rinunciava) con la lettura del dispositivo di sentenza.
Il presente procedimento trae origine dallo svolgimento in Salbertrand (TO) in data 14.6.2013 di una manifestazione organizzata da alcuni appartenenti al c.d. movimento No-Tav nel corso della quale, secondo l'ipotesi d'accusa, venivano poste in essere le condotte di reato descritte nelle imputazioni riportate in epigrafe.
I dati probatori attraverso i quali è possibile ricostruire quanto accaduto si ricavano dalla lettura delle annotazioni di p.g. redatte dal personale della Compagnia dei Carabinieri di Susa intervenuti sui luoghi della manifestazione, dalle dichiarazioni rese da alcuni soggetti presenti in occasione dei reati ipotizzati, dal materiale video e fotografico acquisito agli atti nonché, per quanto concerne in particolare la posizione di [redacted], dal contenuto di una parte della tesi da laurea dalla stessa elaborata.
La disamina complessiva del materiale in questione consente in primo luogo di ritenere provati con certezza alcuni aspetti della vicenda così sintetizzabili:
- alle 15:30 circa del 14.6.2013 un gruppo di oltre quaranta giovani provenienti dal campeggio studentesco sito in Venaus (TO) ed organizzato nell'ambito del movimento "NO TAV", si reca a bordo di alcune auto verso Salbertrand (TO) e, verso le 16:30, dà inizio ad un corteo sulla SS 24 raggiungendo la sede operativa della ditta [redacted] s.p.a. (società fornitrice di calcestruzzo impiegato nel cantiere TAV di Chiomonte) collocata nei pressi della strada statale in località [redacted]
- una parte dei giovani incamminatisi sul posto si ferma all'imbocco della S.S. 24 dove staziona esponendo bandiere e striscioni mentre un'altra parte del corteo prosegue entrando nel piazzale della [redacted] durante la permanenza in tale luogo gli automezzi specificamente elencati al capo A) vengono imbrattati con della vernice *spray* di colore nero scrivendo sui veicoli le espressioni "NO TAV, BASTA DISTRUZIONI, BASTA CANTIERI TAV, TAV=MAFIA, BASTA DEVASTAZIONI";[1]
- il gruppo di manifestanti entrati nel piazzale dell'impresa menzionata, dopo avere lasciato sul posto dei volantini e trascorsi pochi minuti, ritorna sulla SS 24 ricongiungendosi ai giovani rimasti a presidiare l'ingresso del [redacted] i quali, nel frattempo, avevano impedito alla vettura dei Carabinieri con a bordo il [redacted] di proseguire verso l'interno della ditta per identificare i soggetti che vi avevano poco prima acceduto;[2]

[1] Cfr. annotazione di p.g. della Stazione CC di Oulx ed allegate fotografie.
[2] Cfr. annotazione di p.g. 15.6.2013 a firma del [redacted] e rilievi fotografici allegati nonché fotografie allegate alla denuncia-querela presentata da [redacted].

- una volta ricompostosi, il corteo dei giovani riprende a sfilare sulla SS 24 in direzione dell'abitato di Salbertrand e, dopo avere percorso circa 400 metri, si imbatte nel camion betoniera targato [redacted] condotto da [redacted] dipendente della [redacted] s.p.a. proprietaria del mezzo;
- il camion in questione, che sta facendo rientro in sede, viene bloccato dai partecipanti al corteo alcuni dei quali si parano davanti al mezzo – che nello stesso frangente viene imbrattato con una scritta "NO TAV" - esponendo striscioni e bandiere e gli impediscono la marcia;
- il gruppo di giovani, dopo aver costretto il [redacted] a fermarsi, si rivolge con delle grida nei suoi confronti urlandogli che non avrebbe dovuto portare il cemento per la TAV;
- il conducente non riconosce alcuno dei manifestanti anche perché principalmente preoccupato, secondo le parole dello stesso [redacted], *"di tutelare la mia persona e il mezzo che conducevo"*; [3]
- intorno alle 17:30 la situazione si normalizza grazie all'arrivo di personale dei Carabinieri di rinforzo che allontanano i manifestanti dalla sede stradale e ripristinano la viabilità;
- il corteo prosegue a quel punto sino al municipio di Salbertrand ove si svolge un breve *sit-in* per poi allontanarsi verso la locale stazione ferroviaria e qui la p.g. operante procede all'identificazione dei partecipanti alla manifestazione generalizzando compiutamente 43 persone una delle quali – [redacted] – viene trovata in possesso di due bombolette spray di colore bianco e nero spontaneamente consegnate ai CC;
- tra le persone identificate alla stazione FF.SS, gli operanti generalizzano gli odierni imputati [redacted]. [4]

Così sintetizzati i passaggi fondamentali – sin qui pressochè pacifici – in cui si articola la presente vicenda, va in primo luogo osservato che se rispetto a [redacted] sono state acquisite immagini video e fotografiche che consentono almeno in parte di collocare le medesime in alcuni dei momenti in cui si è sviluppata la manifestazione di protesta, non altrettanto si può affermare rispetto a [redacted] il quale compare unicamente nella fase finale corrispondente all'identificazione posta in essere dai CC quando il corteo si era ormai concluso.
Tale circostanza, unitamente al fatto che nessun altro elemento di prova acquisito in questa sede è utile a comprendere dove si trovasse e cosa facesse il [redacted] negli specifici frangenti temporali in cui venivano posti in essere i reati descritti nelle imputazioni in esame, porta alla formazione di un quadro probatorio insufficiente a distinguere la sua posizione in termini di concorrente materiale e/o morale piuttosto che di mero connivente se non addirittura di soggetto estraneo alla messa in atto di condotte possibilmente attuate in un

[3] Cfr. verbale di s.i.t. rese da [redacted] il 17.6.2013.
[4] Cfr. fascicolo fotografico relativo all'attività di identificazione dei manifestanti.

punto distinto dalla sua posizione e ciò, in particolare, rispetto alle contestazioni sub A), B) e C).

[redacted] deve quindi essere assolto da tutti i reati a lui ascritti per non aver commesso il fatto.

Considerazioni in parte diverse valgono per [redacted], le quali, al contrario, del [redacted], vengono fotografate nel momento dell'attuazione del blocco stradale descritto al capo D) e compaiono altresì per qualche breve istante nel video intitolato "Campeggio Studentesco No Tav" e nel video consegnato da Gelera Fabio acquisiti agli atti che collocano entrambe le imputate all'interno della sede della I[redacted], segnatamente nella fase di uscita dal piazzale della ditta.[5]

La presenza della [redacted] e della [redacted] nella zona interessata dagli imbrattamenti esclude logicamente che le medesime abbiano preso parte alla condotta di resistenza descritta al capo C) posto che, trovandosi le due imputate in un luogo diverso, non si vede come esse abbiano potuto concorrere alla realizzazione di tale reato consumatosi all'esterno della ditta lungo la SS 24 a meno di ipotizzare che tra tutti i partecipanti alla manifestazione di protesta sussistesse un previo accordo circa eventuali comportamenti minacciosi e/o violenti da tenere nei confronti delle forze dell'ordine e che a tale accordo abbiano preso parte [redacted] e [redacted].

Tale ipotesi, tuttavia, è sfornita di qualsiasi principio di prova con conseguente proscioglimento di entrambe dal reato sub C) per non aver commesso il fatto.

La circostanza – pacificamente provata – di avere fatto ingresso nel piazzale della I[redacted] ove venivano posti in essere gli imbrattamenti descritti al capo A) non è poi sufficiente a dimostrare che la [redacted] e la [redacted] abbiano concorso nel reato in questione: se da un lato è infatti sicura la finalità di protesta che connotava l'ingresso non autorizzato nella ditta anche in vista di un volantinaggio poi effettivamente eseguito in tale luogo, deve dall'altro evidenziarsi che la specifica azione consistita nell'utilizzo della vernice *spray* non è stata oggetto di alcuna diretta osservazione da parte né delle forze dell'ordine né dei dipendenti della [redacted] e che si tratta, per sua natura, di una condotta che può agevolmente essere attuata con modalità repentine. Non può quindi escludersi che l'imbrattamento sia stato il frutto di un'iniziativa improvvisa di singoli manifestanti rimasti sin qui non identificati senza che la [redacted] e la [redacted] fossero a conoscenza di tale azione rispetto alla quale, analogamente a quanto affermato trattando della condotta ex art. 337 c.p., non può fondatamente sostenersi che si trattasse di un comportamento previamente concordato.

[redacted] devono quindi essere assolte anche dal reato sub A) per non avere commesso il fatto.

---

[5] Cfr. annotazione CC Susa 6.5.2016 e fotogrammi allegati.

Alcune brevi considerazioni in merito all'attività di studio svolta da [redacted] e [redacted] sono a questo punto indispensabili al fine di chiarire se le stesse debbano rispondere o meno degli ulteriori reati contestati a loro carico ai capi B) e D) rispetto ai quali è senz'altro provata la presenza delle due imputate sia all'interno del luogo fatto oggetto di un'occupazione risoltasi in alcuni minuti – durata comunque apprezzabile per quanto contenuta – sia, poco più tardi, sulla sede stradale ove veniva impedito a [redacted] di muoversi a bordo dell'automezzo proprio a causa della compresenza di più persone all'interno della carreggiata stradale, circostanza quest'ultima che rende tutt'altro che neutra la valenza della presenza fisica *in loco* – sulla strada – delle due imputate.

Quanto a [redacted], che come la [redacted] ha allegato di essersi trovata in Salbertrand al solo scopo di acquisire elementi utili a redigere la propria tesi di laurea focalizzata ad approfondire alcuni aspetti relativi al c.d. movimento NO TAV[6], tutti i fotogrammi che la ritraggono mostrano come la [redacted] si trovasse al di fuori della sede stradale nel momento corrispondente all'invasione della carreggiata della SS 24 così come, in precedenza, la stessa appare in qualche misura decentrata rispetto ai manifestanti che, nelle immagini video raccolte all'interno della [redacted] orreggono uno striscione.

L'esame complessivo delle immagini raccolte offre quindi un riscontro rispetto alla versione difensiva resa dalla [redacted] rispetto alla quale – contrariamente a quanto si vedrà per la posizione di [redacted] - non sono stati raccolti elementi indicativi di una sua esplicita adesione alle condotte di protesta organizzate per il 14.6.2013 e sfociate nella commissione dei reati in esame non essendo ovviamente sufficiente in tal senso l'adesione, più o meno esplicita, alle ragioni ed alle iniziative legate al movimento NO TAV.

Non risultando smentita in questa sede la prospettata veste di mera osservatrice ricoperta dalla [redacted] rispetto a quanto accaduto in data 14.6.2013, la stessa deve quindi essere assolta per non aver commesso il fatto anche dai reati sub B) e D).

[redacted] ha al contrario certamente aderito in termini espliciti sia all'ingresso all'interno della [redacted] s.p.a. sia al blocco attuato in danno di [redacted] ed ha fornito in tal modo un apprezzabile contributo causale, quanto meno sotto il profilo morale, rispetto alla commissione di entrambe le fattispecie di reato.

Premesso che il contenuto della tesi di laurea redatta dalla [redacted] costituisce un elemento certamente utilizzabile in questa sede posto che la provenienza di tale scritto dall'imputata è del tutto pacifica, che il contenuto dello scritto in questione è esplicito ed intellegibile e che la stessa [redacted] non ha fornito alcuna spiegazione alternativa alle espressioni di tenore autoaccusatoria da lei stessa adottate, si segnala

[6] Cfr. documentazione prodotta a cura della difesa dell'imputata che conferma tale circostanza.

che, alle pagine 130 e ss. dell'elaborato, l'imputata ha ripercorso la sua partecipazione all'azione dimostrativa organizzata il 14.6.2013.
Nel riferire dell'esperienza in questione, la [redacted] ha spiegato essersi trattata di una *"iniziativa previamente discussa in campeggio"* e consistita nel *"compiere un raid all'interno della ditta e successivamente un breve corteo con il blocco temporaneo di due camion diretti all'azienda"*. Proprio nella descrizione di quest'ultima fase, lo scritto dell'imputata è particolarmente esplicito nell'attribuire anche a sé un ruolo attivo e non certo di mera osservatrice rispetto al blocco del traffico e quindi del mezzo condotto dal [redacted] laddove si legge testualmente che *"ci siamo diretti verso la stazione per poter prendere il treno..improvvisando un piccolo corteo e bloccando di fatto la viabilità sulla strada. In quel momento arrivavano due camion e gli attivisti si sono disposti davanti alzando lo striscione mentre altri sventolavano le bandiere No Tav e gridavano slogan contro le ditte coinvolte nel cantiere.(...) dopo una decina di minuti...abbiamo interrotto il blocco del traffico permettendo ai camion e ai veicoli in coda di passare dirigendoci alla stazione."*
I termini impiegati sono quindi chiari nell'illustrare che l'imputata partecipò alla manifestazione in oggetto con la piena consapevolezza del fatto che si sarebbe eseguito il blocco stradale poi effettivamente attuato e, prima di esso, l'occupazione simbolica della sede della [redacted] sicchè, con riferimento a tali momenti penalmente rilevanti dell'azione di protesta del 14.6.2013, appaiono indiscutibili, da un lato, la coscienza e volontà in capo all'imputata di aderire in via preventiva alla commissione dei reati descritti ai capi B) e D) e, dall'altro, la persistenza di tale atteggiamento soggettivo anche durante lo svolgimento della manifestazione ed in concomitanza della consumazione dei delitti in questione. In conseguenza di ciò, il fatto che la [redacted] sia rimasta sul posto unitamente agli altri partecipanti all'iniziativa ha integrato un contributo apprezzabile alla realizzazione dei reati stessi quanto meno rafforzando la determinazione degli altri compartecipi nella messa in atto di condotte la cui efficacia è strettamente dipendente dall'effettiva presenza fisica di un numero elevato di persone, numero che la [redacted] ha concorso a formare.
La lettura integrale del paragrafo in questione (3.4) dedicato anche all'illustrazione delle conseguenze giudiziarie della manifestazione in questione non porta poi alcuna smentita di tale lettura, né si ricava alcuno spunto circa la pretesa estraneità della [redacted] rispetto alle specifiche condotte di reato in esame eccezion fatta per l'inveritiera collocazione all'esterno della [redacted] che l'imputata ha dato di sé.
A fronte di tale quadro, è quindi dimostrata con certezza la responsabilità di [redacted] quale concorrente morale nei reati descritti ai capi B) e D) la cui qualificazione giuridica appare corretta anche in relazione alle circostanze aggravanti specificate.
Passando ora al trattamento sanzionatorio da riservare all'imputata [redacted] Roberta, si ritiene che l'incensuratezza ed il carattere estemporaneo degli illeciti

posti in essere giustifichino il riconoscimento in suo favore delle circostanze attenuanti generiche.
I reati posti in essere dalla [redacted] sono stati realizzati all'interno di un contesto spazio-temporale unitario con la conseguenza che deve essere ravvisata l'esistenza di un unico disegno criminoso ex art. 81 cpv. c.p. con riferimento al più grave reato sub D) che si individua quale violazione più grave visti i più elevati limiti edittali di pena che lo contraddistinguono.
La pena da irrogare in concreto, in forza dei criteri indicati dall'art. 133 c.p., va individuata secondo il seguente calcolo che tiene conto, da un lato, dell'intensità del dolo mostrato e, dall'altro, della modesta capacità a delinquere dell'imputata:

- pena base (capo D): mesi 2 e giorni 15 di reclusione
- pena aumentata ex art. 81 cpv. c.p. per la continuazione con il capo B) a mesi 3 di reclusione;
- pena definitivamente ridotta a mesi 2 di reclusione in virtù della scelta del rito alternativo;

All'affermazione di responsabilità dell'imputata [redacted] segue di diritto la condanna della stessa al pagamento delle spese processuali.
L'effetto deterrente della presente condanna, unitamente allo stato di incensuratezza dell'imputata, consentono di formulare una prognosi di non recidivanza nei confronti di [redacted] ed a giustificare la concessione della sospensione condizionale della pena e della non menzione della condanna sul certificato penale spedito a privata richiesta in favore della medesima.
La complessità delle osservazioni svolte e la molteplicità delle posizioni prese in esame giustificano il termine di 30 giorni indicato per il deposito della motivazione.

P.Q.M.

Visti gli artt. 442, 533 e 535 c.p.p.;
dichiara [redacted] colpevole dei reati a lei ascritti ai capi B) e D) unificati dal vincolo della continuazione ex art. 81 cpv. c.p. con riferimento al più grave reato sub D) e, riconosciute le circostanze attenuanti generiche equivalenti alle aggravanti contestate ed operata la diminuzione per il rito, la condanna alla pena di mesi due di reclusione oltre al pagamento delle spese processuali.

Visti gli artt. 442, 530 cpv. c.p.p.,
assolve [redacted] dai reati a lei ascritti ai capi A) e C) per non avere commesso il fatto
assolve [redacted] dai reati a loro ascritti per non avere commesso il fatto

Visti gli art. 163 e 175 c.p.,
concede a [redacted] i benefici della sospensione condizionale della pena e della non menzione della condanna sul certificato penale spedito a privata richiesta.

Visto l'art. 544, 3° comma c.p.p.
indica in giorni trenta il termine per il deposito della motivazione

Torino,15.6.2016.

Il giudice

DEPOSITATO IN CANCELLERIA
- 7 LUG 2016
IL FUNZIONARIO GIUDIZIARIO

TRIBUNALE ORDINARIO DI TORINO
Sezione indagini preliminari
si assegna al Giudice dr. [redacted] (1/310)
13 GEN. 2016 Il Presidente

PROCURA DELLA REPUBBLICA
PRESSO IL TRIBUNALE DI TORINO

IL GIUDICE
Dr.ssa [redacted]

R.G..12936/15

RICHIESTA DI RINVIO A GIUDIZIO
- artt. 416, 417 c.p.p., 130 D.Lv. 271/89 -

Al Sig. Giudice per l'udienza preliminare
presso il Tribunale di Torino

Il Pubblico Ministero

Visti gli atti del procedimento nei confronti di:

[redacted], **nato a** [redacted], **con domicilio dichiarato in** [redacted]

Difeso di fiducia dall'Avv. [redacted]

IMPUTATO

Del reato di cui

agli artt. 110, 614, comma 1, 2, 4, 61 n. 2 c.p., perché, in concorso con [redacted] (nei cui confronti si è proceduto separatamente) e con persone allo stato non ancora identificate, si introduceva con inganno in un luogo di privata dimora ed ivi si tratteneva contro l'espressa volontà degli aventi il diritto di escluderli, in particolare:
suonando al citofono, asserendo di dover consegnare una lettera raccomandata da far firmare, facendo così ingresso dal portone lato strada nella sede dello studio di architetti denominato "[redacted]", staccando l'interruttore generale della corrente elettrica e così disattivando le linee telefoniche ed il server di studio, versando della sostanza gelatinosa e maleodorante nei cassetti delle scrivanie, trattenendosi all'interno dalle ore 15:20 alle ore 16:30 c.a., benché i collaboratori di studio, i soci [redacted] li invitassero ripetutamente ad allontanarsi dagli uffici;
Con l'aggravante di avere commesso il fatto con violenza sulle cose
In Torino il 24.8.12

13 GEN. 2016

PERSONE OFFESE:

[redacted]lo, residente [redacted]
[redacted], residente [redacted]
[redacted] in qualità di amministratore di [redacted] Srl, domiciliato presso
[redacted]

Evidenziata l'acquisizione delle seguenti fonti di prova:
verbale di interrogatorio
annotazioni PG
articoli postati su internet

Visti gli artt. 416, 417 c.p.p.;

CHIEDE

L'emissione del decreto che dispone il giudizio nei confronti dell' imputato e per i reati sopraindicati.

Manda alla Segreteria per gli adempimenti di competenza e in particolare per la trasmissione, unitamente alla presente richiesta, del fascicolo contenente la notizia di reato, la documentazione relativa alle indagini espletate e i verbali degli atti eventualmente compiuti davanti al giudice per le indagini preliminari.

Torino, lì 7 gennaio 2016

IL PUBBLICO MINISTERO
[redacted], Sost.

Visto,
Torino, li 12.1.16
Il Procuratore della Repubblica Agg.
[redacted]

MOD. 4 U.C.O.

Il Ministro dell'Interno

Prot. nr. 400B/2015/343/55/15

VISTO il decreto legislativo 25 luglio 1998, n. 286, e successive modificazioni, recante il T.U. delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero e, in particolare, l'articolo 13, comma 1;

VISTO l'art. 3 del decreto-legge 27 luglio 2005, n. 144, convertito con modificazioni nella legge 31 luglio 2005, n. 155;

RAVVISATA l'irrilevanza di quanto disposto dagli articoli 13, comma 2-*bis* e 19, comma 2, del citato decreto legislativo 25 luglio 1998, n. 286, e successive modificazioni;

ESAMINATI gli atti d'ufficio, dai quali emerge che il cittadino pakistano [redacted], nato a Jhelum (Pakistan) il [redacted], ha abbracciato l'ideologia *jihadista*, risultando particolarmente attivo nell'attività di propaganda in favore dello *Stato Islamico* attraverso la condivisione di video e proclami inneggianti al *jihad*;

PRESO ATTO che il medesimo intrattiene frequenti contatti su *social network* con persone che condividono le sue medesime posizioni ideologiche estremiste, a cui ha manifestato la propria ammirazione per la partecipazione di cittadini europei al conflitto in Siria tra le fila dello Stato Islamico;

VALUTATO che il [redacted], nonostante si trovi in Italia dal 1999 e sia titolare di un permesso di soggiorno UE per soggiornanti di lungo periodo, rilasciato dalla Questura di Bolzano il [redacted], non risulta inserito nel contesto sociale di riferimento per il suo atteggiamento ostile ai principi democratici;

RITENUTO che la presenza in Italia del predetto cittadino pakistano costituisca una minaccia per la sicurezza dello Stato e che possa agevolare, in vario modo, organizzazioni o attività terroristiche, anche internazionali;

RAVVISATA pertanto, la necessità che il predetto venga espulso dall'Italia e che dalla valutazione dei parametri di cui all'articolo 9, comma 11, del citato decreto legislativo n. 286 del 1998, e successive modificazioni, nonché di quanto previsto dalla Direttiva 2008/115/CE, non viene meno l'esigenza di allontanare immediatamente il [redacted] dal territorio italiano, per le motivazioni indicate in premessa;

MOD. 4 U.C.O.

Il Ministro dell'Interno

DATA preventiva notizia al Presidente del Consiglio dei Ministri ed al Ministro degli Affari Esteri;

DECRETA

per i motivi indicati in premessa, il cittadino pakistano [redacted], nato a Jhelum (Pakistan) il [redacted], è espulso dal territorio dello Stato ed accompagnato alla frontiera a mezzo della forza pubblica, con l'avvertenza che non può rientrare in Italia senza una speciale autorizzazione del Ministro dell'Interno, in applicazione dell'articolo 13, comma 13, del decreto legislativo 25 luglio 1998, n. 286, e successive modificazioni.

Il suddetto divieto di reingresso opera, in applicazione dell'articolo 13, comma 14, del medesimo decreto, per un periodo di dieci anni, in considerazione del particolare profilo di pericolosità sociale evidenziato dallo straniero, come specificato in premessa; in caso di trasgressione, l'interessato è punito con la reclusione da uno a quattro anni ed è nuovamente espulso con accompagnamento immediato alla frontiera.

Il Questore competente per territorio è incaricato degli adempimenti connessi all'esecuzione del presente provvedimento.

Avverso il suddetto decreto è ammesso ricorso al Tribunale Amministrativo Regionale del Lazio, sede di Roma, entro 30 giorni dalla data di notifica.

Roma, 15 GEN. 2015

PER COPIA CONFORME ALL'ORIGINALE
IL PRESENTE DOCUMENTO SI COMPONE
DI ... 2 PAGINE

IL MINISTRO
Angelino Alfano

QUESTURA DI BOLZANO

- Ufficio Immigrazione -

Il 16.1.2015 alle ore 11.12 il sotto
...nte/Ufficiale d... [redacted]
notificato a [redacted]

STUDIO LEGALE
CANESTRINI
Piazza Podestà, 10
38068 Rovereto -Tn
T +39.0464.436688
F +39.0464.436648
www.canestrinilex.it

n.9/2015 estr.

CORTE DI APPELLO DI VENEZIA
Sezione Prima- procedimenti di estradizione
Palazzo Grimani - S.Luca 4041 VENEZIA
Tel. 041 5217618- Fax 041 5217751

Il Presidente

Visto il verbale relativo all'arresto di [redacted], nato il 1°.12.1970 a Yildizeli (Turchia), [redacted], cittadino austriaco, eseguito a Venezia in data 6.4.2015 alle ore 7 dalla D.I.G.O.S. della locale Questura;
rilevato che l'arresto è stato eseguito perché il predetto risulta colpito da mandato di cattura internazionale emesso in data 22.1.2014 dal Tribunale di Ankara (Turchia) per il reato di partecipazione ad associazione terroristica (il riferimento è anche al mandato di cattura n.[redacted]4 ILAM emesso in data 26.12.2012 dalla Procura di Erzurum);
ritenuto che ricorrono i presupposti di cui agli artt. 715 e segg. c.p.p. essendo stati comunicati gli estremi del provvedimento restrittivo, indicato il fatto e la specificazione del reato, ed identificata la persona (vedi verbale di arresto), e potendosi ravvisare il pericolo di fuga non risultando, allo stato, che l'estradando disponga in Italia di stabile dimora od occupazione;
ritenuto pertanto che l'arresto debba essere convalidato e disposta la misura cautelare della custodia in carcere come la sola, allo stato, idonea a garantire la consegna del ricercato all'autorità giudiziaria straniera;
visti gli artt.716 e 717 c.p.p.

CONVALIDA

l'arresto di [redacted], nato il [redacted] a Yildizeli (Turchia).

DISPONE

a carico del medesimo la misura coercitiva della custodia cautelare in carcere e la sua convocazione davanti al Presidente della Corte d'Appello di Venezia il giorno **9 aprile alle ore 9** in Venezia, Palazzo Grimani, affinché sia compiutamente identificato e possa eventualmente prestare il suo consenso all'estradizione.
Manda la Cancelleria per l'avviso al difensore di ufficio nominato Avv. [redacted] del Foro di Venezia.
Manda la Polizia Penitenziaria per l'esecuzione di quanto sopra disposto.
Si comunichi al Procuratore Generale ed al Ministro della Giustizia, in funzione degli adempimenti previsti dagli artt. 715 commi V° e VI° e 716 comma IV° del codice di rito.
Manda la Cancelleria per quanto altro di competenza.

Venezia, 7.4.2015

Il Consigliere delegato dal Presidente
Dott.ssa [redacted]

IL CANCELLIERE
(Sabrina Cacciapaglia)

OGGETTO: Trasmissione atti relativi all'**arresto,** operato ai sensi ai sensi dell'Art. 716 C.p.p., in relazione all'Art. 715 C.P.P, nei confronti di:

[redacted] nato il [redacted] in Turchia, residente in Austria, cittadino austriaco identificato mediante C.I. austriaca nr. [redacted] rilasciata il [redacted], (codice [redacted]).

Domicilio eletto: studio dell'Avv. [redacted] Venezia [redacted].

Difensore d'Ufficio: Avv. [redacted], del Foro di Venezia (tel. [redacted]).

Destinatario di mandato di cattura emesso dalle Autorità Giudiziarie della Turchia [redacted] ILAM il 26.12.2012 dalla Procura di Erzurum per il reato di partecipazione ad associazione terroristica. (Riferimento numero informativa DCPC – Servizio Interpol 2013-8788).

Sintesi dei fatti:

Alle ore 00.30 del 06.04.2015, personale della locale Sezione Volanti, intervenuto a seguito di un alert del sistema di controllo "alloggiati", ha individuato tra gli ospiti dell'hotel Quidhotel Venice Airport, ubicato a Venezia Mestre in Via [redacted], il cittadino austriaco di origine turca [redacted], meglio in oggetto generalizzato, il quale, da controllo della banca dati interforze (SDI), è risultato essere destinatario di un provvedimento di cattura internazionale (provvedimento in oggetto specificato), come da inserimento in banca dati interforze effettuato dal Servizio per la Cooperazione Internazionale di Polizia di Roma.

Lo straniero è stato pertanto accompagnato presso la Questura di Venezia e fotosegnalato presso il locale Gabinetto Provinciale di Polizia Scientifica.

E' stata, quindi, acquisita dal Servizio per la Cooperazione Internazionale di Roma la documentazione di conferma circa la validità del provvedimento di cattura, nonché una descrizione dei fatti, la specificazione del reato e gli elementi sufficienti per l'esatta identificazione della persona da arrestare. In particolare, per il tramite della Sala situazioni del Servizio per la Cooperazione Internazionale di Roma, è stato trasmesso il cartellino fotodattiloscopico delle Autorità turche al GID del Servizio di Polizia Scientifica di Roma, che ha consentito il necessario confronto con il cartellino del fotosegnalamento effettuato dal personale della Questura di Venezia in data odierna.

Ministero dell'Interno

DIPARTIMENTO DELLA PUBBLICA SICUREZZA
DIREZIONE CENTRALE DELLA POLIZIA CRIMINALE
Servizio per la Cooperazione Internazionale di Polizia
INTERPOL – UNITA' NAZIONALE EUROPOL – S.I.R.E.N.E.

URGENTISSIMO

ROMA, 6.4.2015

[redacted] INTERPOL

QUESTURA –D.I.G.O.S. VENEZIA

OGGETTO: [redacted] NATO [redacted] A YILDIZELI (TURCHIA) , RICERCATO IN CAMPO INTERNAZIONALE DALLA TURCHIA PER TERRORISMO.

COMUNICASI CHE NOMINATO E' RICERCATO IN CAMPO INTERNAZIONALE AI FINI ESTRADIZIONALI DALLE AUTORITA' TURCHE PERCHE' COLPITO DA MANDATO DI CATTURA SENZA NUMERO EMESSO IN DATA 22.01.2014 DAL TRIBUNALE DI ANKARA (TURCHIA), PER IL REATO DI TERRORISMO/APPARTENENTE GRUPPO ARMATO TERRORISTICO.

ESPOSIZIONE DEI FATTI:

QUALE MEMBRO DEL DHKP/C ORGANIZZAZIONE TERRORISTICA, [redacted] HA PRESO IN AFFITTO UN APPARTAMENTO CON ALTRI MEMBRI DELL'ORGANIZZAZIONE TERRORISTICA E PARTECIPATO NELL'AFFISSIONE ILLEGALE DI MANIFESTI E STRISCIONI PRESSO LA ULUBEY HIGH SCHOOL DI ANKARA LANCIANDO MOLOTOV NEL PARCO DI PIYANGO TEPE IL 29.12.1994. IL 14.01.1995 COMPIVA ATTENTATO NEGLI UFFICI DELLA BANCA IN KONYA STREET DI ANKARA. OLTRE A CIO' ERDEN ERA INDAGATO PER ASSICURARE/GARANTIRE MEMBRI ALL'ORGANIZZAZIONE TERRORISTICA IN SIVAS.

PERTANTO, ED IN CONSIDERAZIONE CHE LE RICERCHE A CARICO DEL NOMINATO IN OGGETTO SONO TUTTORA VALIDE, SI PREGA CODESTO UFFICIO DI PROCEDERE, AI SENSI DEGLI ART 716 IN RELAZIONE AL 715 DEL C.P.P **NOTIZIANDO ED ALLEGANDO NS NOTA** : MINISTERO DI GIUSTIZIA D.G.G.P UFFICIO II° (FAX [redacted]), SIG. PRESIDENTE CORTE D'APPELLO- (COMPETENTE PER TERRITORIO), PROCURA GENERALE CORTE D'APPELLO (COMPETENTE PER TERRITORIO) E LA 2ª DIVISIONE 1ª SEZIONE –DI QUESTO SERVIZIO (FAX [redacted])

INOLTRE, QUALORA SI PROCEDA, SI PREGA DI PROVVEDERE AD INSERIRE A SDI AVVENUTA ESECUZIONE PROVVEDIMENTO PER CONTO AG ESTERA INSERITO DA QUESTO SERVIZIO, QUI ASSICURANDO E CITANDO SUINDICATO RIFERIMENTO.

IL COLLATERALE UFFICIO INTERPOL TURCO E' STATO INFORMATO AVVENUTA LOCALIZZAZIONE /ARRESTO PREDETTO E INVITATO A FAR TRASMETTERE DA QUELLE COMPETENTI AUTORITA' A CODESTO DICASTERO LA FORMALE E DOCUMENTATA RICHIESTA DI ESTRADIZIONE, COSI' COME FORMALMENTE PREANNUNCIATO DAL COLLATERALE ALL'ATTO DELLA DIFFUSIONE DELLE RICERCHE IN CAMPO INTERNAZIONALE IN CASO DI SUA EVENTUALE LOCALIZZAZIONE IN TERRITORIO ITALIANO.

IN ALLEGATO, FOTO ED IMPRONTE DEL SOGGETTO D'INTERESSE.

D'ordine del Direttore Centrale
Il Direttore supplente del Servizio
Capoluongo

Questura di Venezia

Divisione Investigazioni Generali Operazioni Speciali

Venezia, 6 aprile 2015

OGGETTO: Annotazione relativa all'arresto di [redacted], nato il [redacted] in Turchia, residente in Austria, cittadino austriaco identificato mediante C.I. austriaca nr. [redacted] rilasciata il [redacted] (codice [redacted]). Destinatario di mandato di cattura emesso dalle Autorità Giudiziarie della Turchia n.2011/1-364 ILAM il 26.12.2012 dalla Procura di Erzurum per il reato di partecipazione ad associazione terroristica (Riferimento numero informativa DCPC – Servizio Interpol 2013-8788).

Il Sottoscritto Sost. Comm. Andrea Bortolussi, in servizio presso al Digos della Questura di Venezia, su disposizione dell'Ufficio alle ore 00.30 odierne si è recato presso l'hotel Quidhotel Venice Airport, ubicato a Venezia Mestre in Via Terraglio 15, dove alle precedenti ore 00.15 circa, personale della locale Sezione Volanti, intervenuto a seguito di un alert del sistema di controllo "alloggiati", aveva individuato tra gli ospiti dell'albergo il cittadino austriaco di origine turca [redacted], meglio in oggetto generalizzato, il quale, da controllo della banca dati interforze (SDI), è risultato essere destinatario di un provvedimento di cattura internazionale, come da inserimento in banca dati interforze effettuato dal Servizio per la Cooperazione Internazionale di Polizia di Roma.
Lo straniero è stato pertanto accompagnato presso la Questura di Venezia e fotosegnalato presso il locale Gabinetto Provinciale di Polizia Scientifica. Alle ore 02.00 odierne, nell'attesa di poter raccogliere elementi utili all'identificazione certa del catturando, lo scrivente ha informato telefonicamente il PM di turno presso la locale Procura della Repubblica, Dr. [redacted] dell'avvenuto fermo per identificazione (cell. [redacted]).
E' stata quindi acquisita dal Servizio per la Cooperazione Internazionale di Roma (tel. [redacted]) la documentazione di conferma circa la validità del provvedimento di cattura, nonché inerente la descrizione dei fatti, la specificazione del reato e gli elementi sufficienti per l'esatta identificazione della persona da arrestare (tra cui la foto del soggetto). In particolare, su espressa richiesta dello scrivente, per il tramite della Sala situazioni del Servizio per la Cooperazione Internazionale di Roma, è stata trasmesso il cartellino fotodattiloscopico delle Autorità turche al GID del Servizio di Polizia Scientifica di Roma, per il necessario confronto con il cartellino del fotosegnalamento effettuato dal personale della Questura di Venezia in data odierna, che ha dato esito positivo.
All'esito dei citati accertamenti, alle ore **07.00** del **06.04.2015**, il predetto [redacted], è stato tratto in arresto e successivamente associato presso la Casa Circondariale Santa Maria Maggiore di Venezia, alle ore 11.40.

All'esito dei citati accertamenti, alle ore **07.00** del **06.04.2015,** il predetto [redacted] è stato tratto in arresto e successivamente associato presso la Casa Circondariale Santa Maria Maggiore di Venezia, alle ore 11.40 odierne.

Si precisa di aver provveduto agli adempimenti previsti e di aver informato dell'avvenuto arresto il Presidente della Corte d'Appello di Venezia tramite contatti telefonici con quella Cancelleria Penale, alle ore 08.40 odierne (sul numero del reperibile: 3[redacted]).

Si allegano i seguenti atti :

1. Annotazioni di polizia Giudiziaria, redatte dal personale intervenuto;
2. Verbale di arresto;
3. Verbale di traduzione presso la Casa Circondariale di Venezia con orario di ingresso;
4. Documentazione del Servizio per la Cooperazione Internazionale di Polizia di Roma del 6 aprile 2015;
5. Verbale di elezione di domicilio e contestuale nomina di difensore d'Ufficio;
6. Verbale di nomina di ausiliario di PG, come interprete di lingua turca;
7. Comunicazione all'avvocato difensore d'Ufficio sulla segreteria telefonica del cellulare ([redacted]), effettuata a mezzo fax all'utenza [redacted]0 alle ore 09.26;
8. Verbale di sottoposizione ai rilievi fotodattiloscopici, elenco precedenti dattiloscopici (A.F.I.S.) e cartellino del fotosegnalamento.

p. IL DIRIGENTE DELLA D.I.G.O.S. t.a.
Dr. [redacted]

T.C.
SİNOP
2. ASLİYE CEZA MAHKEMESİ

BERAAT

DOSYA NO	: 2015/340 Esas
KARAR NO	: 2015/473
[C.SAVCILIĞI ESAS NO]	: 2015/569

GEREKÇELİ KARAR
TÜRK MİLLETİ ADINA

HAKİM	: [redacted]
KATİP	: [redacted]
DAVACI	: **K.H.**
MAĞDUR	: **RECEP TAYYİP ERDOĞAN**, [redacted] ve [redacted] oğlu, [redacted] İSTANBUL doğumlu, RİZE, GÜNEYSU, Dumankaya mah/köy nüfusunda kayıtlı. Türkiye Cumhuriyeti Cumhurbaşkanı Olarak Görev Yapar Merkez/ ANKARA adresinde oturur. TC Kimlik No:[redacted]
SANIK	: [redacted] ve [redacted] doğumlu, [redacted] mah/köy nüfusunda kayıtlı. [redacted] adresinde oturur. TC Kimlik No: [redacted]
MÜDAFİİ	: [redacted]
SANIK	: [redacted] ve [redacted] doğumlu, [redacted] mah/köy nüfusunda kayıtlı. [redacted] adresinde oturur. TC Kimlik No: [redacted]
SANIK	: [redacted] ve [redacted] oğlu, [redacted] doğumlu, [redacted] mah/köy nüfusunda kayıtlı. [redacted] adresinde oturur.TC Kimlik [redacted]
SANIK	: [redacted] ve [redacted] doğumlu, [redacted] adresinde oturur.TC Kimlik No[redacted]

SANIK : [redacted] ve [redacted] mah/köy nüfusunda kayıtlı. [redacted] adresinde oturur. TC Kimlik No[redacted]

SANIK : [redacted] doğumlu, [redacted] kayıtlı. [redacted] adresinde oturur. TC Kimlik No:[redacted]

SUÇ : Cumhurbaşkanına Hakaret,
SUÇ TARİHİ : 13/05/2015
SUÇ YERİ : SİNOP/MERKEZ
KARAR TARİHİ : 20/10/2015

Yukarıda açık kimliği yazılı sanıklar hakkında mahkememizde yapılan duruşma sonunda;

GEREĞİ DÜŞÜNÜLDÜ:

İDDİA: Sinop Cumhuriyet Başsavcılığının 29/06/2015 tarih ve 2015/523id nolu iddianamesi ile;Sinop Valiliği İl Emniyet Müdürlüğünce Cumhuriyet Başsavcılığınca gönderilen 14/05/2015 tarihli ihbar ile başlatılan soruşturmada;sanıkların öncülüğündeki 13/05/2015 tarihinde saat:17.25 sıralarında Sinop ili, Atatürk Caddesi Yedaş Binası arkası Kaledibi Aralığı Sokak içerisinde bulunan KESK binası önünde toplanan grubun ellerindeki pankartı açarak yürüyüşe geçtikleri ve **"SOMAYI UNUTMA UNUTTURMA", "KAZA DEĞİL KATLİAM HIRSIZ KATİL ERDOĞAN", "HAZİRAN GÜM GÜM GÜM", "KAZA DEĞİL KATLİAM YÜREĞİMİZ SOMA DA"** şeklinde sloganlar atarak Türkiye Cumhuriyeti Cumhurbaşkanı Recep Tayyip ERDOĞAN'ı halk nezdinde küçük düşürücü, onur ve saygınlığını zedeleyecek ifade ve istinatlarda bulunduklarının, olay tutanağı, CD kayıtları ile anlaşıldığı,sanıkların alınan savunmalarında, iddialarla ilgili savunma yapmayacaklarını ancak ifadelerinin suç unsuru taşımadığını belirtmişlerdir.Sanıkların, ifadelerinin suç unsuru taşımadığına dair savunmaları Cumhuriyet Başsavcılığınca yerinde görülmemiş,Cumhurbaşkanına hakaret suçu açısından kovuşturma yapılmasının TCK'nın 299/3 maddesi gereğince Adalet Bakanının iznine tabi olması nedeniyle Adalet Bakanlığından kovuştrma izni istenmiş, Bakanlık Makamı'nın 19/06/2015 tarihli olur yazısı ile şüpheliler hakkında kovuşturma yapılmasına izin verilmiş, mevcut anlatım ve deliller karşısında,sanıkların Türkiye Cumhuriyeti Cumhurbaşkanına hakaret kastı ile hareket ederek, atılı suçu işlediklerine dair haklarında kamu davasının açılmasına yeterli şüphe oluşturacak delil elde edildiği anlaşıldığından, sanıkların mahkememizde ayrı ayrı yargılamalarının yapımarak TCK.nın 299/1.,53/1. Maddeleri gereğince cezalandırılmalarına karar verilmesi kamu adına talep olunmuştur.

SAVUNMA:

SANIK [redacted] SAVUNMASINDA; aynen,"Söz konusu tarihte Somada yaşanan faciadan dolayı anayasal hakkımı kullanmak için yürüyüşe katıldım. Amacım üzüntümüzü dile getirmekti. Hala da bu olaydan dolayı üzgünüm. Ancak kesinlikle Cumhurbaşkanına hakaret etmedim. İddianamede bahsedilen sloganlara katılmadım. Bu nedenle mahkemeden beraatimi talep ediyorum. Mahkeme aksi kanaatte ise lehime olan

hükümler uygulansın takdir mahkemenindir." demiştir.

SANIK [redacted] **SAVUNMASINDA**; aynen,"Ben daha önceki vermiş olduğum savunmalarımı tekrar ediyorum. Herhangi bir hakarette bulunmadık. Siyasi sorumluları siyasi olarak eleştirdik. Söz konusu sloganı ben attırmadım. Ancak grupta atılan slogana eşlik ettim. Bu nedenlerle mahkemeden beraatimi talep ediyorum. Mahkeme aksi kanaatte ise lehime olan hükümler uygulansın takdir mahkemenindir." demiştir.

SANIK [redacted] **SAVUNMASINDA**; aynen,"Ben daha önceki vermiş olduğum savunmalarımı tekrar ediyorum. Herhangi bir hakarette bulunmadım. Söz konusu sloganı ben attırmadım. Slogan atmadım. Bu nedenlerle mahkemeden beraatimi talep ediyorum. Mahkeme aksi kanaatte ise lehime olan hükümler uygulansın takdir mahkemenindir." demiştir.

SANIK [redacted] **SAVUNMASINDA**; aynen,"Ben daha önceki vermiş olduğum savunmalarımı tekrar ediyorum. Herhangi bir hakarette bulunmadık. Söz konusu sloganı ben attırmadım. Slogan atmadım. Bu nedenlerle mahkemeden beraatimi talep ediyorum. Mahkeme aksi kanaatte ise lehime olan hükümler uygulansın takdir mahkemenindir." demiştir.

SANIK [redacted] **SAVUNMASINDA**; aynen,"Ben daha önceki vermiş olduğum savunmalarımı tekrar ediyorum. Herhangi bir hakarette bulunmadım konusu sloganı ben attırmadım. Slogan atmadım. Bu nedenlerle mahkemeden beraatimi talep ediyorum. Mahkeme aksi kanaatte ise lehime olan hükümler uygulansın takdir mahkemenindir ." demiştir.

SANIK [redacted] **TALİMAT YOLUYLA ALINAN SAVUNMASINDA;** aynen," Olay tarihinde üyesi olduğum partinin çağrısı üzerine 13 Mayıs Soma anmasına katıldım. 301 tane madencinin ölümüyle bütün ülkede yas ilan edilmesiyle atmış olduğumuz sloganlar hakaret içermeyip sadece eleştiri anlamında söyledim. İddianamede belirtildiği gibi "Somayı unutma unutturma, kaza değil katliam hırsız katil Erdoğan" sözleri söylediğim doğrudur. Bunu anayasal hakkım olan eleştiri hakkımı kullanarak söyledim. Savunmam bundan ibarettir." demiştir.

DELİLLER: Sanık savunmaları, adli sicil kaydı, nüfus kaydı,

DELİLLERİN DEĞERLENDİRİLMESİ, TARTIŞILMASI, HÜKME ESAS ALINAN İLE REDDEDİLEN DELİLLER VE ULAŞILAN KANAAT ;

Her ne kadar, Sinop Cumhuriyet Başsavcılığının 29/06/2015 tarih ve 2015/523id nolu iddianamesi ile;Sinop Valiliği İl Emniyet Müdürlüğünce Cumhuriyet Başsavcılığınca gönderilen 14/05/2015 tarihli ihbar ile başlatılan soruşturmada;sanıkların öncülüğündeki 13/05/2015 tarihinde saat:17.25 sıralarında Sinop ili, Atatürk Caddesi Yedaş Binası arkası Kaledibi Aralığı Sokak içerisinde bulunan KESK binası önünde toplanan grubun ellerindeki pankartı açarak yürüyüşe geçtikleri ve **"SOMAYI UNUTMA UNUTTURMA", "KAZA DEĞİL KATLİAM HIRSIZ KATİL ERDOĞAN", "HAZİRAN GÜM GÜM GÜM", "KAZA DEĞİL KATLİAM YÜREĞİMİZ SOMA DA"** şeklinde sloganlar atarak Türkiye Cumhuriyeti Cumhurbaşkanı Recep Tayyip ERDOĞAN'ı halk nezdinde küçük düşürücü, onur ve saygınlığını zedeleyecek ifade ve istinatlarda bulunduklarının, olay tutanağı, CD kayıtları ile anlaşıldığı,sanıkların alınan savunmalarında, iddialarla ilgili savunma yapmayacaklarını ancak ifadelerinin suç unsuru taşımadığını belirtmişlerdir.Sanıkların, ifadelerinin suç unsuru taşımadığına dair savunmaları Cumhuriyet Başsavcılığınca yerinde görülmemiş,Cumhurbaşkanına hakaret suçu açısından kovuşturma yapılmasının TCK'nın 299/3 maddesi gereğince Adalet Bakanının iznine tabi olması nedeniyle Adalet Bakanlığından kovuştrma izni istenmiş, Bakanlık Makamı'nın 19/06/2015 tarihli olur yazısı ile sanıklar hakkında kovuşturma yapılmasına izin verilmiş,

mevcut anlatım ve deliller karşısında,sanıkların Türkiye Cumhuriyeti Cumhurbaşkanına hakaret kastı ile hareket ederek, atılı suçu işlediklerine dair haklarında kamu davasının açılmasına yeterli şüphe oluşturacak delil elde edildiği anlaşıldığından, sanıkların mahkememizde ayrı ayrı yargılamalarının yapımlrak TCK.nın 299/1.,53/1. maddeleri gereğince cezalandırılmalarına karar verilmesi kamu adına talep olunmuş *ise de;*

Doğal haklardan kabul edilen ifade hürriyeti, çoğulcu demokrasilerde, vazgeçilemez ve devredilemez bir niteliğe sahiptir. Öğretide değişik tanımlara rastlanmakla birlikte, genel bir kabulle ifade/düşünce hürriyeti, insanın özgürce fikirler edinebilme, edindiği fikir ve kanaatlerinden dolayı kınanmama, bunları meşru yöntemlerle dışa vurabilme imkan ve özgürlüğüdür. Demokrasinin <olmazsa olmaz şartı> olan ifade hürriyeti, birçok hak ve özgürlüğün temeli, kişisel ve toplumsal gelişmenin de kaynağıdır.

İşte bu özelliğinden dolayı ifade hürriyeti, temel hak ve hürriyetler kapsamında değerlendirilerek, birçok uluslararası belgeye konu olmuş, T.C. Anayasası'nda da ayrıntılı düzenlemelere tabi tutulmuştur.

Bu bağlamda;İnsan Hakları Evrensel Bildirgesi'nin 19. maddesinde;

Herkesin görüş ve anlatım özgürlüğüne hakkı vardır. Bu hak, karışmasız görüş edinme ve herhangi bir yoldan ve hangi ülkede olursa olsun bilgi ve düşünceleri arama, alma ve yayma özgürlüğünü içerir

İnsan Hakları Avrupa Sözleşmesi'nin;10. maddesinin 1. fıkrasında;

Herkes görüşlerini açıklama ve anlatım özgürlüğüne sahiptir. Bu hak, kanaat özgürlüğü ile kamu otoritelerinin müdahalesi ve ülke sınırları söz konusu olmaksızın haber veya fikir alma ve verme özgürlüğünü de içerir. Bu madde, devletlerin radyo, televizyon ve sinema işletmelerini bir izin rejimine bağlı tutmalarına engel değildir.Hükümlerine yer verilmiş,

Anayasa'nın;25. maddesinde düşünce ve kanaat hürriyeti başlığı altında;

Herkes, düşünce ve kanaat hürriyetine sahiptir. Her ne amaçla olursa olsun kimse düşünce ve kanaatlerini açıklamaya zorlanamaz. Düşünce ve kanaatleri sebebiyle kınanamaz ve suçlanamaz

26. maddesinde, İHAS'nin 10. maddesinin 1. fıkrasındaki düzenlemeye benzer şekilde;

Herkes, düşünce ve kanaatlerini söz, yazı, resim veya başka yollarla tek başına veya toplu olarak açıklama ve yayma hakkına sahiptir. Bu hürriyet resmi makamların müdahalesi olmaksızın haber veya fikir almak ya da vermek serbestliğini de kapsar. Bu fıkra hükmü, radyo, televizyon, sinema veya benzeri yollarla yapılan yayımların izin sistemine bağlanmasına engel değildir.Hükümleri yer almış,

Görüldüğü gibi, Sözleşmenin 10. maddesinin 1. fıkrası ile Anayasa'nın 25 ve 26. maddelerinde ifade (düşünce) hürriyeti en geniş anlamıyla güvence altına alınmıştır.

Ancak, ifade hürriyetinin sonsuz ve sınırsız olmadığı, kısıtlı da olsa sınırlandırılmasının gerekeceği, uluslararası ve ulusal alanda normlara konu edilmiştir.

Ayrıca AİHM Mahkemesinin kararları incelendiğinde;

Mahkeme 10. maddenin 2. fıkrasının, siyasi söylem ve tartışma alanında -ifade özgürlüğünün en üst düzeyde önem tasıdığı- ve kamuyu ilgilendiren genel nitelikli sorunlara iliskin alanlarda ifade özgürlüğüne sınırlama getirilmesine kesinlikle izin vermediğini hatırlatmaktadır. Bir siyasetçiye siyasetçi olması dolayısıyla yöneltilen elestirinin sınırları,sıradan bir kisiye yöneltilen elestirinin sınırlarından daha genistir:ikincisinin aksine birincisi zorunlu ve bilinçli olarak fiillerini ve davranıslarını vatandasların ve gazetecilerin dikkatli bir kontrolüne açık bırakmaktadır; dolayısıyla [siyasetçinin] daha fazla hosgörülü

olması gerekmektedir (bk. Lingens v. Avusturya, 8 Temmuz 1986, § 42, A serisi,No. 103, Vides Aizsardzības Klubs v. Letonya, No. 57829/00, § 40, 27Mayıs 2004 ve Lopes Gomes da Silva v. Portekiz, No. 37698/97, § 30,CEDH 2000-X)

Mahkeme, somut olayda olduğu gibi, basvuranın davranısına benzer davranısları cezalandırmanın, demokratik toplumların olmazsa olmazı olan genel nitelikli tartısmalarda çok önemli bir rol oynayan toplumsal tartısmalara iliskin hiciv yoluyla yapılan çıkıslar üzerinde caydırıcı bir etki doğurma ihtimali olduğu kanaatindedir (bk. mutatis mutandis, yukarıda anılan Alves da Silva kararı, § 29).

Mahkeme somut davanın kendine has kosulları dikkate alındığında ve devlet baskanına hakaret sebebiyle verilen mahkûmiyetin yararını ve basvuran üzerindeki etkisini tarttıktan sonra **Mahkeme, kamu yetkililerinin cezalandırma yoluna basvurmalarının hedeflenen amaç ile orantılı olmadığına ve dolayısıyla demokratik bir toplumda gerekli olmadığına karar vermistir.**

Nihayet kovusturmanın Cumhurbaskanının girisimi ile değil, iç hukuk hükümleri uyarınca savcılık tarafından baslatıldığını da vurgulamak gerekmektedir. Somut olayda da sanıkların " hırsız katil Erdoğan" şeklinde slogan attıkları sabittir.Ancak AİHM kararlarında da belirtildiği üzere; Bir siyasetçiye siyasetçi olması dolayısıyla yöneltilen elestirinin sınırları,sıradan bir kisiye yöneltilen elestirinin sınırlarından daha genistir:ikincisinin aksine birincisi zorunlu ve bilinçli olarak fiillerini ve davranıslarını vatandasların ve gazetecilerin dikkatli bir kontrolüne açık bırakmaktadır; dolayısıyla [siyasetçinin] daha fazla hosgörülü olması gerekmektedir ve kamu yetkililerinin cezalandırma yoluna basvurmalarının hedeflenen amaç ile orantılı olmadığına ve dolayısıyla demokratik bir toplumda gerekli olmadığına karar vermistir.Tüm bu hususlar gözetildiğnde T.C. Anayasasının 90/5 maddesinde *"Usulüne göre yürürlüğe konulmuş Milletlerarası andlaşmalar kanun hükmündedir. Bunlar hakkında Anayasaya aykırılık iddiası ile Anayasa Mahkemesine başvurulamaz. (Ek cümle: 07/05/2004 - 5170 S.K./7.mad) Usulüne göre yürürlüğe konulmuş temel hak ve özgürlüklere ilişkin milletlerarası andlaşmalarla kanunların aynı konuda farklı hükümler içermesi nedeniyle çıkabilecek uyuşmazlıklarda milletlerarası andlaşma hükümleri esas alınır."* denilmektedir.Avrupa İnsan Hakları Sözleşmesi ve ek protokolleri,de bu antlaşmalar içinde bulunduğundan dolayı sanıkların söz konusu suça ilişkin eylemleri için beraat kararı verilerek aşağıdaki hüküm Türk Milleti Adına Tesis edilmiştir.

HÜKÜM :

TÜRK MİLLETİ ADINA

1-Her ne kadar sanıklar [redacted] hakkında Cumhurbaşkanı'na karşı **Hakaret** suçundan bahisle 5237 Sayılı T.C.K.'nun 299/1. maddesine göre cezalandırılması istemiyle kamu davası açılmış ise de sanıklara yüklenen fiilin kanunda suç olarak tanımlanmamış olması nedeniyle 5271 sayılı C.M.K'nun 223/2-a.maddesine göre AYRI AYRI **BERAATLERİNE,**

2-5271 Sayılı C.M.K.'nun 141.vd. maddelerine göre sanıkların tazminat isteme olanağının **BULUNMADIĞINA,**

3-Bu sanıklar yönünden yapılan yargılama giderlerinin 5271 Sayılı C.M.K.'nun 327.maddesi gereğince devlet hazinesi üzerinde **BIRAKILMASINA,**

4-Karar kesinleştiğinde 5320 Sayılı Ceza Muhakemesi Kanununun Yürürlük Ve Uygulama Şekli Hakkında Kanun'un 16/1.maddesi gereği kovuşturmayı sona erdiren kesinleşmiş kararın, soruşturmada görev alan kolluk birimlerine

BİLDİRİLMESİNE,

Dair karara sanıklar [redacted] ve [redacted]efhimden sanık [redacted] kararın kendisine tebliğinden itibaren **1 hafta** içinde mahkemeye verilecek dilekçe ile veya tutanağa geçirilmek suretiyle mahkeme zabıt kâtibine yapılacak beyanla veya bulunduğu Ceza İnfaz Kurumu Müdürüne beyanda bulunarak veya bu hususta dilekçe vererek **Yargıtayda Temyiz yoluna** başvurulabileceği ve istenmesi halinde karardan bir örnek alınabileceği hususu bildirilmek suretiyle sanıklar [redacted] ve [redacted] yüzüne karşı sanık [redacted] ve mağdurun yokluğunda verilen kararın ana çizgileri ve gerekçeleri açıkça okunup usulen anlatıldı. 20/10/2015

Katip [redacted]

e-imzalıdır

Hakim [redacted]

e-imzalıdır

Bibliography

ACS, *Ministero della Cultura Popolare*, 247 Turchia, 1935, I/74, from *Regia Università degli Studi di Roma al S. E. il Sottosegretariato di Stato per la Stampa e per la Propaganda*, pos. No: 23, prot. No: 1879, Rome, March 22, 1935 quoted in E. B. FINDIKLI, *İtalyanlar ve Türkler: mekaın reel ve historiografik inşası (1922- 43)*, Yıldız Teknik Üniversitesi, Sosyal Bilimler Enstitüsü, PhD thesis, 2016.

ACS, *Ministero della Cultura Popolare*, 247 Turchia, 1935, I/74, from *Regia Università degli Studi di Roma al S. E. il Sottosegretariato di Stato per la Stampa e per la Propaganda*, pos. No: 23, prot. No: 1879, Rome, March 22, 1935 quoted in E. B. FINDIKLI, *İtalyanlar ve Türkler: mekaın reel ve historiografik inşası (1922- 43)*, Yıldız Teknik Üniversitesi, Sosyal Bilimler Enstitüsü, PhD thesis, 2016.

AGAMBEN G., *Lo stato di eccezione,* Bollati Boringhieri, 2003

AKDENIZ Y, ALTIPARMAK K., *The silencing effect on dissent and freedom of expression in Turkey,* in *Journalism at Risk. Threats, challenges and perspectives,* Council of Europe publishing, October 2015

AKDENIZ Y., ALTIPARMAK K., *Internet: Restricted Access, A critical assessment of Internet Content Regulation and Censorship in Turkey,* Published with the support of "Freedom of Expression" Programme of *İnsan Hakları Ortak Platformu*, November 2008

ALFONSO C., *Commentario alla Costituzione*, Art. 33, vol. I, Utet, 2006, p. 679 et seq

ALGAN B., *The Brand New Version of Article 301 of Turkish Penal Code and the Future of Freedom of Expression Cases in Turkey,* in *German Law Journal,* vol. 12, 2008, p. 2238- 2239

ALLEGREZZA S., *La riscoperta della vittima nella giustizia penale europea,* in *Lo scudo e la spada,* Torino, 2015

ANASTASIA S., ANSELMI M., FALCINELLI D., *Populismo penale: una prospettiva italiana,* Wolters Kluwer, CEDAM, 2015

ANTOLISEI F. , *Manuale di diritto penale - Parte speciale II,* Giuffrè, Minal, 2016

ARTICLE 19, *Prohibiting Incitement to discrimination, violence and hostility*, Policy Brief, 2012

ASCOLI M., *The press and the Universities in Italy* in *The Annals of the American Academy of Political and Social Science,* Sellin, Philadeplhia, 1938, p. 235-240

ASDMAE (ARCHIVIO STORICO DIPLOMATICO DEL MINISTERO DEGLI ESTERI), AP. Turchia, 1931-1945, B. 23, f. 4, *Ministero degli Affari Esteri al Ministero dell'Educazione Nazionale*, Telespresso N. 213225/102, April 20, 1937, quoted in E. B. FINDIKLI, *İtalyanlar ve Türkler: mekaın reel ve historiografik inşası (1922-43)*, Yıldız Teknik Üniversitesi, Sosyal Bilimler Enstitüsü, PhD thesis, 2016.

ASDMAE, AP. 1931-45, Turchia, B. 23 f. 4, Prot. N. 2115, *Ministero dell'Educazione al Ministero degli Affari Esteri*, 18 Giugno 1937, quoted in E. B. FINDIKLI, *İtalyanlar ve Türkler: mekaın reel ve historiografik inşası (1922- 43)*, Yıldız Teknik Üniversitesi, Sosyal Bilimler Enstitüsü, PhD thesis, 2016.

ATABAKI T., ZÜRKER E.J., *Men of order: authoritarian modernization under Atatürk and Reza Shah,* I.B.Tauris, 2000

ATAR, *İslam Adliye Teşkilatiö Ortaya Çıkışı ve İşleyişi*, Ankara Diyanet Işleri Başkanlığı, 1982

AYDEMIR I. S*., Atatürk çülüğün Ekonomik ve Sosyal Yönü Semineri*, Istanbul Iktisadi ve Ticari Ilimler Akademisi, Istanbul, 1973 quoted in AYDIN E., *Peculiarities of Turkish Revolutionary ideology in the 1930"s, the Ülkü Version of Kemalism*, *1933-1936*, Middle Eastern Studies 40, no. 5, 2004

AYDEMIR S., *Capitolium, Roman Law and History Studies*, publisher Dr. Jur. Iemseddin Talip, Istanbul: Ahmet Ihsan Press,1934, Year I. p. 1, quoted in E. B. FINDIKLI, *supra* note No. 55

BARZOTTI V., CAROZZA P. G., CARTABIA M., SIMONCINI A., *Italian Constitutional Justice in Global Context,* Oxford University Press, 2015, part. 4

BAUCCIO L., *L"accertamento del fatto di reato di terrorismo internazionale. Aspetti teorici e pratici,* Giuffrè, 2005

BAUMAN Z., *Liquid fear,* Polity, Cambridge, 2006

BEGIN L., *L"internationalisation de droits de l"homme et le defi de la "contextualisation",* in *Revue interdisciplinaire d"etudes juridiques,* 2004, p. 64-66.

BELGE M*., Trapped in its own history*, Index on Censorship, Vol. 24, Issue 1, 1995

BENTHAM J., *An introduction to the principles of morals and legislation*, 1823

BETTIOL G., *L"odierno problema del bene giuridico* in *Rivista italiana di diritto e procedura penale,* 1959, p. 705 et seq.

BETTIOL G., *Sui limiti penalistici della libertà di manifestazione del pensiero,* in *Legge penale e libertà del pensiero,* Padova, 1966, p. 13 et seq.

BOBBIO N., MATTEUCCI N. , PASQUINO G., "*Populismo"* in *Il dizionario di politica,* UTET, Turin, 2004

BOGNETTI G., *Vilipendio del Governo e principi costituzionali di libertà,* in *Riv. It. Dir. proc. pen.,* 1960, p. 957 et seq

BOTTONI R., *The Constitutional Court and the Principle of Secularism,* in *Diritto penale della Repubblica di Turchia,* Padova University Press, 2012

BOTTONI R., *The origins of secularism in Turkey,* in *Ecclesiastical Law Journal,* 9, 2007, p. 175

BOZKURT M. E., *Liberalism masalı,* Kaynak Yayınları, 1932

BRUDNER A. , *Punishment and Freedom,* Oxford University Press, 2009

CANOSA R., *Il delitto politico: natura e storia,* in *Il delitto politico dalla fine dell"Ottocento ai giorni nostri,* Notebook 3 of *Critica del diritto,* Rome, 1984, p.21

CARDINI A., *L"elaborazione di una "teoria dell"economia nazionale" fra il 1914 e il 1930* in *Quaderni di storia dell"economia politica,* Accademia Editoriale, Vol. No. 8, No. 2/3, 1990, p. 377-401

CARDUCCI M., *Turchia: la costituzione turca al tramonto del kemalesimo,* in *Quad. Cost* 4, 2007, p. 863 et seq.

CARRARA F., *Programma del corso di diritto criminale,* VII, Lucca, 1871, p. 626 et seq.

CASSESE A., *Lineamenti di diritto penale internazionale,* Il Mulino, 2005, p. 164 et seq

CAVALIERE A., *Il concorso eventuale nel reato associativo- Le ipotesi delle associazioni per delinquere e di tipo Mafioso,* Edizioni Scientifiche Italiane, 2003

CENTRO DI INIZIATIVA LUCA ROSSI*, 685, Libro bianco sulla legge Reale*, Milan, 1991

CLECH J.**,** *Colpevoli di manifestare nella patria delle libertà. Una testimonianza*, in "MicroMega", February 2016

CoE, CM/Inf/DH(2008)26, *Freedom of expression in Turkey: Progress achieved - Outstanding issues,* May 23, 2008

CoE, EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW (VENICE COMMISSION), *Opinion on Articles 216, 299, 301 and 314 of the Penal Code of Turkey,* 106th Plenary Session, Venice, 11-12 March 2016

COLAO F., *Il delitto politico tra '800 e '900. Da delitto fittizio a nemico dello Stato*, A. Giuffrè, Milano, 1986

COLAO F., *Il principio di legalità nell"Italia di fine Ottocento tra" giustizia penale eccezionale" e " repressione necessaria e legale […] nel senso più retto e saviamente giuridico , il che vuol dire anche nel senso più liberale" ,* in *Quaderni Fiorentini. Per la storia del pensiero giuridico moderno,* Vol. No. 36, Giuffrè Editore, Milan, 2007, p. 697 et seq

CONSULICH F., *Reati contro l"ordine pubblico, pubblica istigazione a violare le leggi, istigazione a delinquere,* in F. ANTOLISEI, *Manuale di diritto penale,* 16th Edition, Giuffrè, Milan, 2016, p. 103

PULITANÒ D., *Libertà di pensiero e pensieri cattivi,* in *Quale giustizia*, 1970

D"AGOSTINI F., *Verità avvelenata. Buoni e cattivi argomenti nel dibattito pubblico,* Bollati Boringhieri, Turin, 2010

DE MARSICO A., *Relazione sul codice penale dei lavori preparatori,* Tipografia delle Mantellate, Roma, 1927-30, Vol. No. 1, p. 55

DE VERO G., *Tutela penale dell"ordine pubblico. Itinerari ed esiti di una verifica dogmatica e politico- criminale,* Milan, 1988, p. 7 et seq

DELITALA G., *I limiti giuridici alla libertà di stampa,* in *Raccolta degli scritti,* II, Milano, 1976

DI STASIO C., *La lotta multilivello al terrorismo internazionale. Garanzia di sicurezza versus tutela dei diritti fondamentali,* Giuffrè, 2010

DONNELLY J., *Universal Human Rights in Theory and Practice,* Cornell University Press, 2003, p.40

DOUZINAS C., *The end of human rights,* Hart, 2000, p. 255

DUFF R.A., *Criminal Attempts,* Clarendon Press, Oxford, 1996

DURMAZ M. N., *An ideologist, an ideology: Recep Peker and corporatism,* in *TODAİE*"s Review of Public Administration, Vol. No. 2, June 2, 2008, p. 189-216

ECRI (EUROPEAN COMMISSION AGAINST RACISM AND INTOLERANCE), *General Policy Recommendation No. 7 on National Legislation to Combat Racism and Racial Discrimination*, adopted on December 13, 2002, Remark No. 18

ESPOSITO R., *Libertà o sicurezza?*, MicroMega, February 2016. p. 98-105

ESSER J., *Precomprensione e scelta del metodo nel processo di interpretazione del diritto,* Naples, 1983, p.136

FASANELLA G., PELLEGRINO G., SESTIERI C., *Segreto di Stato. La verità da Gladio al caso Moro,* 2000, Einaudi

FASANELLA G., PELLEGRINO G., SESTIERI C., *Segreto di Stato. Verità e riconciliazione sugli anni di piombo,* 2008, Sperling & Kupfer

FEINBERG J. , *Limits to the free expression of opinion,* in *Philosophy of Law,* II ed., 1980, p. 202

FERRAJOLI L., *Democrazia e paura* in *La democrazia in nove lezioni,* Laterza, Rome- Bari, 2010, p. 115 et seq.

FIANDACA G., MUSCO E., *Diritto Penale, Parte Generale*, VII Edition, Bologna, 2014

FIANDACA G., TESAURO A., *Le disposizioni sostanziali: linee*, in G. DI CHIARA, *Il processo penale tra politiche della sicurezza e nuovi garantismi*, 2005, p. 123

FILANGIERI G., *La scienza della legislazione,* Naples, 1780

FIORE C., *I reati di opinione,* CEDAM, Padova,1972

FLORIAN E., *Trattato di diritto penale: delitti contro la libertà,* Vol. 3, F. Vallardi Editore, 1923

FORNASARI G., RIONDATO S., *Reati contro l"ordine pubblico,* Giappichelli, Torino, 2013

GAMBERINI A., *Delitti contro la personalità dello Stato,* in *Diritto penale. Lineamenti di parte speciale,* 5th Edition, Bologna

GEARTY C., *Can Human Rights survive?*, Cambridge University Press, 2006, Ch. No. 2

GENTILE E. , *Il culto del Littorio,* Rome- Bari, Laterza Editore, 2001 quoted in E. B. FINDIKLI, *İtalyanlar ve Türkler: mekaın reel ve historiografik inşası (1922- 43)*, Yıldız Teknik Üniversitesi, Sosyal Bilimler Enstitüsü, PhD thesis, 2016.

GENTILE E., *La vita italiana al totalitarismo. Il partito e lo Stato nel regime fascista,* Carrocci Editore, Rome, 2002 quoted in E. B. FINDIKLI, *İtalyanlar ve Türkler: mekaın reel ve historiografik inşası (1922- 43)*, Yıldız Teknik Üniversitesi, Sosyal Bilimler Enstitüsü, PhD thesis, 2016.

GIOIA A., *Terrorismo internazionale, crimini di guerra e crimini contro l'umanità*, in "Rivista di diritto internazionale", vol. LXXXVII, p. 5- 69

GÖKALP Z., *Asker Duasi* [Prayer of the Soldier] (1912) in *Ziya Gökalp Kulliyati-I*, F. A. Tansel edition, *Turk Tarih Kurumu Yayinlari,* Istanbul, 1989

GUALDI F., *Radio Alice: tra avanguardia e rivoluzione,* Graduate thesis, Faculty of History, Bologna, 2015, p. 76 et seq.

GÜRELLI N. , *The Turkish Criminal Code,* Sweet and Marxwell, London, 1965

HARRIS G., *The Communists and the Kadro Movement: Shaping Ideology in Atatürk's Turkey*, Isis Press, Istanbul, 2002, p. 141

HIRSCH E.E., *Rezeption als sozialer Prozess***,** Berlin, 1981, p .30

HOBBES T., *Leviathan or The Matter, Form and Power of a Common Wealth Ecclesiastical and Civil,* 1651

HUDSON M.O., *Law reform in Turkey,* in *American Bar Association Journal*, vol. XII, no.1, January 1927, p. 8

HUMAN RIGHTS AGENDA ASSOCIATION, *Freedom of expression in the new Turkish Penal Code,* Ankara, 2006

HUSAK D., *"Reservations about Overcriminalization",* in *New Criminal Law Review 97,* 2011, vol.14 n.1

INGRAHAM B.L., *Political Crime in Europe,* University of California Press, 1979

INITIATIVE FOR FREEDOM OF EXPRESSION*, Yesterday, Today, Tomorrow: Freedom of Expression in Turkey Report (1995- 2015)*, Istanbul, January 2015

INSOLERA G., *I delitti contro l"ordine pubblico,* in *Diritto penale, lineamenti di parte speciale***,** Monduzzi, 1998, p. 247

INSOLERA G., *I delitti contro l"ordine pubblico,* in S. CANESTRARI, A. GAMBERINI, G. INSOLERA, N. MAZZACUVA, F. SGUBBI. L. STORTONI F. TAGLIARINI, *Diritto penale. Lineamenti di parte speciale,* Ed. No. 5, Bologna, 2009, p. 246

JAKOBS G., *Diritto penale del nemico? Una analisi sulle condizioni della giuridicità*, in GAMBERINI A., ORLANDI R., *Delitto politico e diritto penale del nemico*, Monduzzi, Bologna, 2007

KABOĞLU I.Ö., *ÖZGÜRLÜKLER HUKUKU* [LAW OF FREEDOMS], Đmge Kitabevi, 2002, p. 434-435, 359- 360

KATZENSTEIN P. J. AND OTHERS, *The culture of national security: norms and identity in world politics,* Columbia University Press, New York, 1996

KAYA, MEHMED S., *The Zaza Kurds of Turkey: A Middle Eastern Minority in a Globalised Society*, Tauris Academic Studies, London, 2009

KELLER H. and STONE SWEET A., *A Europe of Rights,* Oxford University Press, 2008

KIESER H.L., *Turkey beyond nationalism: toward post- nationalist identities*, London, I.B. Tauris, 2006

KNAUL G., *Report of the Special Rapporteur on the independence of judges and lawyers,* Mission to Turkey, UN‟s Human Rights Council, Twentieth session, Agenda item 3, A/HRC/20/19/Add. 3, May 4, 2012

KUNTER N., *Le code penal turc de 1926 et les principales reformes dont il a été l‟object,* in *Rev.int.doct.leg.pen.comp,* 1941

KURDISH HUMAN RIGHTS PROJECT (KHRP), *Freedom of the press in Turkey: the case of Özgür Gündem*, 1993

LA TORRE M., LALATTA COSTERBOSA M., *Legalizzare la tortura? Ascesa e declino dello Stato di diritto,* Il Mulino, 2013, p. 148

Lavori preparatori del codice penale e del codice di procedura penale, Atti parlamentari della legge 24 Dicembre 1925 n.2260 che delega al Governo del Re la facoltà di emendare i codici penali e di procedura penale, Provveditorato Generale dello Stato, Vol. No. 1, Rome, 1928

MAITRA I., MCGOWAN M. K., *Speech and harm, controversies over Free Speech,* Oxford University Press, 2012

MANZINI V., *Trattato di diritto penale italiano,* IV, UTET, Turin, 1908-19

MASARONE V., *Politica criminale e diritto penale nel contrasto al terrorismo internazionale,* Edizioni Scientifiche Italiane, 2013

MEREU I., *Storia del diritto penale nel ‘500- Studi e ricerche*, I, Napoli, 1964

MOCCIA S., *Diritto penale politico e giurisprudenza costituzionale in materia di libertà di riunione e associazione (articoli 17 e 18),* in G. VASSALLI, *Diritto penale e giurisprudenza costituzionale,* Edizioni Scientifiche Italiane, 2006, p. 213.

MOCCIA S., *Il diritto penale tra essere e valore. Funzione della pena e sistematica teleologica,* Napoli 1992, p. 21 et seq.

MORAWA A., *Vulnerability as a Concept of International Human Rights Law,* in *Journal of International Relations and Development,* 2003, p. 139-55

MUSSOLINI B., preface in ROCCO A., *Scritti e discorsi politici,* Giuffrè, Milano, 1938

NAFISI A., *Reading Lolita in Teheran,* Random House Publishing Group, 2003

NAPODANO G., *I delitti contro la sicurezza dello stato*, in PESSINA E.*, Enciclopedia del diritto penale italiano,* VI, Milan, 1909*,* p. 83

NEOCLEOUS M., *Critique of Security,* Edinburgh University Press, 2008, Ch. No. 2

NISCO A. , *Le tracce del diritto penale italiano nel codice penale turco,* in *Diritto penale della Repubblica di Turchia,* Padova University Press, 2012

NUVOLONE P., *Il problema dei limiti della libertà di pensiero nella prospettiva logica dell"ordinamento* in *Legge penale e libertà di pensiero*, Padova, 1966, p. 353

NUVOLONE P., *Reati di stampa,* A. Giuffrè, 1951

ODEK Y., ARACAOGLU E.K., *Turkey*, in *Fundamental rights in Europe: the European Convention of Human Rights and its Member States 1950- 2000,* p. 883 et seq

ODEN M., *Anayasa Hukukunda Siyasi Partilerin Anayasaya Aykırı Eylemleri Nedeniyle Kapatılmaları* [CLOSURES IN CONSTITUTIONAL LAW FOR ACTIVITIES OF POLITICAL PARTIES CONTRARY TO THE CONSTITUTION], Yetkin Yayınlar, 2003, p. 120

ÖNDEROĞLU E.*, Comment to the Table of imprisoned journalists and examples of legislative restrictions on freedom of expression and media freedom in Turkey*, Office of the OSCE Representative on Freedom of the Media, 2015

OZBAYINDIR A. E., *Denigrazione della nazione turca, delle istituzioni e degli organi dello Stato: un"incriminazione ingiustificabile?,* in *Diritto Penale della Repubblica di Turchia,* Padova University Press, 2012

PADOVANI V., *Stato (reati contro la personalità dello),* in *Enc. Dir.,* XLIII, Milan, 1990

PALAZZO F., *Contrasto al terrorismo, diritto penale del nemico e principi fondamentali,* in "Questione Giustizia", 2006

PALAZZO F., *La recente legislazione penale,* 2nd Edition, Padua, 1982, p. 135 et seq.

PANAGIA S., *Il delitto politico nel sistema penale italiano,* CEDAM, 1980**,** p. 76-77.

PASCULLI L., *Restrictions to specific individual rights and freedoms,* in *Diritto penale della Repubblica di Turchia- Criminal law of the Republic of Turkey,* Padova University Press, 2012

PAVARINI M., *La criminalità punita. Processi di carcerizzazione nell"Italia del XX secolo* in L. VIOLANTE, *Storia d"Italia. Annali 12. La criminalità*, Einaudi, Turin, 1997

PECCIOLI A., *Reati contro la personalità dello Stato, Personalità internazionale dello Stato, Associazione sovversiva,* in F. ANTOLISEI, *Manuale di diritto penale- parte speciale II,* 16th Edition, Giuffrè, Milan, Para. No. 259, p. 785

PELISSERO V. , *Reato politico e flessibilità delle categorie dogmatiche,* Jovene, 2000

PESSINA E., *Elementi di diritto penale,* III, Napoli, 1885

PISA P. , Articles No. 414 and 415, in A. CRESPI, G. FORTI, G. ZUCCALÀ, *Commentario breve al codice penale*, 13th Edition, CEDAM, 2012

PISAPIA G., *Terrorismo: Delitto politico o delitto comune?,* in *Giust. Pen.* 1975 II

PISTORELLI L., Articles No. 270, 270 *bis*, 278 and 290 in A. CRESPI, G. FORTI, G. ZUCCALÀ, *Commentario breve al codice penale*, 13th Edition, CEDAM, 2012

PIZZORUSSO A., *Stato di Emergenza* in *Enciclopedia delle Scienze Sociali,* 1993, Treccani

POTTAKIS A., *The evaluation of the new Turkish press law in terms of freedom of expression,* Bahçeşehir University, Istanbul, 2006

PRATT J., *Penal populism,* Routledge, New York, 2007

PRISON BREAK PROJECT, *Terrorizzare e reprimere- Il terrorismo come strumento repressivo in continua estensione,* July 2014

PROCHAZKA-ESIL G., *Modernism in Turkish society as reflected in the cartoons of the satirical magazine Papağan (1924-27),* in *Law, Christianity and Modernism in Islamic society,* Uitgeverij Peeters Leuven, 1998

QUADRI R., *Lezioni di diritto internazionale privato,* Napoli, 1983, p. 312

R. C. LEONE, *The Quiet Republic: The Missing Debate About Civil Liberties After 9/11, in* THE WAR ON OUR FREEDOMS: CIVIL LIBERTIES IN AN AGE OF TERRORISM, Jr. eds., 2003

RAMIERI R., *Radio Alice: il linguaggio al di là dello specchio,* University "La Sapienza", Rome, Faculty of Communication Sciences, 2005-2006

RAMONEDA J., *La strategia della paura come impotenza,* MicroMega, February 2016, p. 88-97

RAMSAY P., *The Insecurity State- Vulnerable Autonomy and the Right to Security in the Criminal Law,* Oxford University Press, 2012

REPETTO G., *The constitutional relevance of the ECHR in domestic and European Law: An Italian Perspective,* Intersentia, Cambridge, 2013

RIONDATO S., ALAGNA R., *Diritto penale della Repubblica di Turchia, Criminal Law of the Republic of Turkey,* Padova University Press, 2012

RIONDATO S., *The root problem of the criminal law approach to the Turkish Constitution,* in *Diritto penale della Repubblica di Turchia- Criminal Law of the Republic of Turkey,* Padova University Press, 2012

ROCCO A., *Scritti e discorsi politici,* vol. II Giuffrè, Milano, 1938

ROSI E., *Terrorismo internazionale: le nuove norme interne di prevenzione e repressione. Profili di diritto penale internazionale,* in *Diritto Penale e processo,* IPSOA, 2002, p. 157

ROSSI P., *Traité de droit penal,* Brussels, 1835, p. 39 et seq. .
Royal Law-Decree of October 19, 1930, No. 1398, published on the Official Gazette in October 26, 1930, No. 251, in force since July 1, 1931

RT Hon Lord Falconer of Thoroton - Lord Chancellor and Secretary of State for Constitutional Affairs, *"The role of judges in a modern democracy",* the Magna Cart Lecture, Sydney, September 13, 2006, cited by The Hon John Von Doussa QC.

SANCAR T.Y., *Alenen Tahkir ve Tezyif Suçları,* 2006

SANTAMARIA D., *Evento* in *Enciclopedia del diritto,* XVI, 1967, p. 16

SAVATER F., *Le torri gemelle,* in *MicroMega*, February 2016, p. 106-109

SBRICCOLI M., *Crimen lesa majestatis. Il problema del reato politico alle soglie della scienza penalistica moderna,* Milano, 1974

SBRICCOLI M., *Giustizia criminale* in *Lo Stato moderno in Europa: Istituzioni e Diritto,* Rome- Bari, Laterza, 2002, p. 164

SENKERI T. , *Anayasal Kuruluşları,* Istanbul, 1996

SPAGNOLO G., *Dai reati meramente associativi ai reati a struttura mista,* in AA.VV., *Beni e tecniche della tutela penale, materiali per la riforma del codice*, Milan, 1987, p. 156 et seq.

STONE G. R. , *Free speech and national security,* Journal Article, University of Chicago Law School, Chicago Unbound, 2009

STONE G.R., *Hate speech and the U.S. Constitution,* 1994, Journal of the University of Chicago Law School.

TELLENBACH S., *L"influenza del diritto Tedesco sul nuovo codice penale turco,* in *Diritto penale della Repubblica di Turchia,* Padova University Press, 2012

THORTON P., *Terror as a weapon of political agitation internal war,* New York, 1977

TOWNSHEAD C., *La minaccia del terrorismo,* Bologna, 2004, 31

U.S. DEPARTMENT OF STATE DISPATCH, *Turkey Human Rights Practices, 1994*, (U.S. Dep't of State, Washington, D.C.), March 1995

UN HUMAN RIGHTS COMMITTEE, *General Comment No. 29, States of Emergency*, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001)

VAN DIJK T. A., *Ideologie. Discorso e costruzione sociale del pregiudizio,* Carocci, Rome, 2004

VASSALLI G., *Diritto penale e giurisprudenza costituzionale,* Naples, 2006

VIGANÒ F., *Terrorismo di matrice islamico-fondamentalista e art. 270-bis nella recente esperienza giurisprudenziale*, in *Cass. pen. 2007***,** p. 60

VISCONTI C., *Aspetti penalistici del discorso pubblico*, Turin, 2008

VON JHERING R., *Der Zweck im Recht,* I, Leipzig, 1877, p. 180

Webster's New World Law Dictionary Copyright © 2010 by Wiley Publishing, Inc., Hoboken, New Jersey

WILLIAMS K., *Confrontations, selected journalism,* Portland, 2007

YENISEY F., *Criminal Law in Turkey,* Wolters Kluwer, 2011

YILDIZ K., *Turkey: protection of national interests and the indivisible unity of the State,* in S. COLIVER, P. HOFFMAN, J. FITZPATRICK, S. BOWEN, *Secrecy and Liberty: National Security, Freedom of Expression and Access to Information,* Kluwer Law International, 1999,p. 449

ZEDNER L., *Security,* Routledge, 2009

ZÜRCHER E.J., *Turkey. A Modern History,* I.B. Tauris, London 1993, p.271-272 and 262-295

Web Bibliography

Academics for Peace, website: (English version): http://internationalsolidarity4academic.tumblr.com/, (Turkish version): https://barisicinakademisyenler.net/

AGORAVOX, *No Tav: il cronista Davide Falcioni indagato per aver raccontato la Val di Susa,* December 2, 2014; link: http://www.agoravox.it/No-Tav-il-cronista-Davide-Falcioni.html

AKDENIZ Y, ALTIPARMAK K., *Internet: restricted access- A critical assessment of Internet Content Regulation and Censorship in Turkey,* November 2008, link: http://www.cyber-rights.org/reports/internet_restricted_bw.pdf

AKDENIZ Y., Conference *Justice for Free Expression 2015: litigation developments in Europe,* "Global Freedom of Expression Centre", Columbia University, April 5, 2015; see the video of Session No. 2 at: https://globalfreedomofexpression.columbia.edu/justice-free-expression-2015-day-2/.

AKDENIZ Y., *To block or not to block: European Approaches to Content Regulation and Implications for Freedom of Expression,* Computer Law and Security Review, Vol. 26, No. 3, pp. 260-273, May 2010, link: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1906712

AKYOL M., *A politically incorrect Q&A on the headscarf,* Turkish Daily News, February 7, 2008, link:http://www.hurriyetdailynews.com/a-politically-incorrect-qampa-on-the-headscarf.aspx?pageID=438&n=a-politically-incorrect-qa-on-the-headscarf-2008-02-07 (9/9/16)

AL JAZEERA, *Prominent pro- Kurdish lawyer shot dead in Turkey,* in *Al Jazeera,* November 29, 2015, http://www.aljazeera.com/news/2015/11/prominent-pro-kurdish-lawyer-shot-dead-turkey-151128103206863.html

AL JAZEERA, *Turkey arrests prominent lawyer over PKK comments,* October 20, 2015, http://www.aljazeera.com/news/2015/10/turkey-arrests-prominent-lawyer-pkk-comments-151020085312267.html

AL JAZEERA, *Turkey jails journalists for 'revealing state secrets',* November 27, 2016, link: http://www.aljazeera.com/news/2015/11/turkey-arrests-journalists-revealing-state-secrets-151127062456674.html

AL JAZEERA, *Turkey president signs judiciary control law,* February 26, 2014, link: http://www.aljazeera.com/news/europe/2014/02/turkey-president-signs-judiciary-control-law-201422610485659455l.html (9/14/16)

AL JAZEERA, *Turkey: pro- Kurdish newspaper Ozgur Gundem shut down,* in *Al Jazeera,* August 17, 2016, link: http://www.aljazeera.com/news/2016/08/turkey-pro-kurdish-newspaper-ozgur-gundem-shut-160817044530537.html

ALTO ADIGE, *Pakistano espulso, Salvini attacca il legale bolazanino Canestrini,* February 20, 2016, link: http://altoadige.gelocal.it/bolzano/cronaca/2015/02/20/news/pakistano-espulso-salvini-attacca-il-legale-bolzanino-1.10904014 (9/14/16)

Amnesty International Annual Report, London, 1980, p. 279- 281, link: https://www.amnesty.org/en/documents/pol10/0003/1980/en/

ANSA, *Blitz cc in circolo antimilitaristi*, March 4, 2016, link: http://www.ansa.it/sardegna/notizie/2016/03/04/blitz-cc-in-circolo-antimilitaristi_7a6ac8fc-40d1-4edc-85a3-06d8afcd60b0.html

ANSA, *Italy condemned for G8 torture,* April 7, 2015, link: http://www.ansa.it/english/news/politics/2015/04/07/italy-condemned-for-g8-torture_d1b158b0-1384-4a38-ab50-5e8b5bf51c30.html

ARSLAN Z., *Constitutional Complaint in Turkey: a cursory analysis of essential decisions*, Council of Europe, link: http://www.coe.int/t/dgi/hr-natimplement/Source/echr/Conference_07072014_Speech_Arslan.pdf

ARTICLE 19, *Prohibiting Incitement to discrimination, violence and hostility*, Policy Brief, 2012, link: https://www.article19.org/data/files/medialibrary/3572/12-12-01-PO-incitement-WEB.pdf

ASHCROFT J., *The Attorney General"s guidelines on general crimes, Racketeering enterprise and terrorism enterprise investigation***,** pt. VI(A)-(B), at 21-23 (2002), available at http://www.usdoj.gov/olp/generalcrimes2.pdf

BDS (BOYCOTT, DIVESTMENT, SANCTIONS) Movement's website: https://bdsmovement.net/

BIANET, *131 Media Organs closed by statutory decree,* July 28, 2016, link: http://bianet.org/english/media/177256-131-media-organs-closed-by-statutory-decree.

BIANET, *2nd Decree Issued in State of Emergency: Closures in Media, Dismissals From Armed Forces, Seizures*, July 28, 2016, link: http://bianet.org/english/politics/177270-2nd-decree-issued-in-state-of-emergency-closures-in-media-dismissals-from-armed-forces-seizures

BIANET, *330 Press Cards Revoked,* in *Bianet.org,* July 29, 2016, http://bianet.org/english/media/177345-330-press-cards-revoked

BIANET, *Court Sentences Can Dündar, Erdem Gül to 10 Years, 10 Months Total,* May 7, 2016; link: http://bianet.org/english/human-rights/174539-court-sentences-can-dundar-erdem-gul-to-10-years-10-months-total

BIANET, *Detention Warrant on Zaman Daily"s Former 47 Staff,* July 27, 2016, http://bianet.org/english/society/177212-detention-warrant-on-zaman-daily-s-former-47-staff

BIANET, *Journalists Can Dündar, Erdem Gül Arrested*, November 26, 2015, link: http://bianet.org/english/freedom-of-expression/169609-journalists-can-dundar-erdem-gul-arrested

BIANET, *Minister of Justice: Constitutional Decision is Usurpation of Authority,* in *Bianet.org,* March 10, 2016, link: http://bianet.org/english/human-rights/172897-minister-of-justice-constitutional-decision-is-usurpation-of-authority

BIANET, *Özgür Gündem"s Editors in Chief on Watch; Önderoğlu, Nesin, Korur Fincancı Arrested,* June 20, 2016, link: http://bianet.org/english/media/176044-ozgur-gundem-s-editors-in-chief-on-watch-onderoglu-nesin-korur-fincanci-arrested

BIANET, *Websites of DIHA, Ozgur Gundem blocked,* July 27, 2016, http://bianet.org/english/media/177232-websites-of-diha-ozgur-gundem-blocked

Bill C- 925-B, English version of the draft at http://www.venice.coe.int/webforms/documents/?pdf=CDL-REF(2013)051-e

Bill C- 925-B, parliamentary procedure, link: http://www.camera.it/leg17/126?pdl=0925-B

BRUNELLI D., *Paradossi e limiti dell"attuale "realpolitik" in materia penale,* Archivio Penale 2013 No. 2, link: *http://www.archiviopenale.it/apw/wp-content/uploads/2013/07/Editoriale-Brunelli.pdf* (9/12/16).

ÇALI B., BRUCH N., *Monitoring the implementation of judgments of the European Court of Human Rights,* May 2011, link: https://ecthrproject.files.wordpress.com/2011/07/monitoringhandbook_calibruch_1.pdf

CALLAMARD A., *Freedom of expression and national security: balancing for protection,* Columbia Global Freedom of Expression, Judges" Training Materials, December 2015, link: https://globalfreedomofexpression.columbia.edu/wp-content/uploads/2016/01/A-Callamard-National-Security-and-FoE-Training.pdf (9/10/2016)

CANEPARI C., *Ilaria Alpi- L"ultimo viaggio*, RAI documentary, April 11, 2015; link: http://www.rai.tv/dl/RaiTV/programmi/media/ContentItem-77f45782-2361-40cd-a00a-1ede256a8794.html (10/9/16)

CANESTRINI N., *Dare del razzista ad un fascista non è reato (Cass. Pen. No. 4938/2010),* in "Studio Legale Canestrini", October 28, 2010, link: http://www.canestrinilex.com/risorse/fascista-razzista-nazista/#ixzz44KKhYPbH (9/10/16)

CANESTRINI N., *Diffamazione a mezzo stampa va punita con pena pecuniaria (Cass. Pen. 12203/14),* in "Studio legale Canestrini", March 13, 2014, link: http://www.canestrinilex.com/risorse/diffamazione-a-mezzo-stampa-va-punita-con-pena-pecuniaria-cassp-pen-sent-n-1220314/#ixzz44Jh8tHxI (9/10/16)

CANESTRINI N., in "5 minuti con…", July 2016, link: https://vimeo.com/175218388

CANESTRINI N., *Vilipendio e libertà dell'arte: nazione, inno di Mameli e limiti dell'espressione artistica*, June 11, 2013, canestrinilex.com, link: http://www.canestrinilex.com/risorse/vilipendio/

CHIRICO A., *Da dove nasce il contropotere dei magistrati di sinistra,* Il Foglio, May 6, 2016, http://www.ilfoglio.it/politica/2016/05/06/magistratura-democratica-storia-giustizia 1-v-141652-rubriche_c292.htm (9/12/16)

CINAR M., *Turchia: chiuso il quotidiano nazionale Ozgur Gundem,* in *Pressenza,* August 17, 2016, link: http://www.pressenza.com/it/2016/08/turchia-chiuso-il-quotidiano-nazionale-ozgur-gundem/

CLINCA S., *Interventi in materia di misure di prevenzione, Commento al d.l. 7/2015,* January 1, 2016, in "legislazionepenale.eu"; link: http://www.lalegislazionepenale.eu/wp-content/uploads/2016/01/studi_legge4315_art.4-Clinca-terrorismo.pdf.

ÇOBAN A. R., *Fundamental Rights During States of Emergency in Turkey,* Trento, Comparing Constitutional Adjudication A Summer School on Comparative Interpretation of European Constitutional Jurisprudence 4th Edition – 2009; link: http://www.jus.unitn.it/cocoa/papers/PAPERS%204TH%20PDF%5CEmergency%20Turkey%20Coban.pdf

COE, *Meeting of heads of state or government with Turkey – EU, Turkey statement, 29/11/2015,* Brussels, in "Consilium.europe.eu", link: http://www.consilium.europa.eu/en/press/press-releases/2015/11/29-eu-turkey-meeting-statement/

COE, Parliamentary Assembly, Recommendation No. 1426 (1999), *European Democracies Facing Up to Terrorism,* September 20, 1999, link: http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=16752&lang=en (9/18/16)

COE, *Turkey, Press Country Profile,* June 2016, http://www.echr.coe.int/Documents/CP_Turkey_ENG.pdf

CoE, *Two Turkish Journalists, Cevheri Güven and Murat Çapan, Charged with "Inciting Armed Rebellion",* Link: https://www.coe.int/en/web/media-freedom/all-alerts/-/soj/alert/12851522

CORRIERE DI BOLOGNA, *I 40 anni di Radio Alice,* February 8, 2016, link: http://corrieredibologna.corriere.it/bologna/notizie/cultura/2016/8-febbraio-2016/i-40-anni-radio-alice-24021531925.shtml

COUNCIL OF EUROPE, *Accession of the European Union to the European Convention on Human Rights, http://www.coe.int/t/dghl/standardsetting/hrpolicy/accession/default_EN.asp* (9/14/16)

COUNCIL OF EUROPE, *Meeting of heads of state or government with Turkey - EU-Turkey statement, 29/11/2015,* http://www.consilium.europa.eu/en/press/press-releases/2015/11/29-eu-turkey-meeting-statement/(9/14/16).

COUNCIL OF EUROPE/EUROPEAN COURT OF HUMAN RIGHTS, Annual Report 2015, link: http://www.echr.coe.int/Documents/Annual_Report_2015_ENG.pdf

COURT OF JUSTICE OF THE EUROPEAN UNION, The Court of Justice delivers its opinion on the draft agreement on the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms and identifies problems with regard to its compatibility with EU law, PRESS RELEASE No 180/14 Luxembourg, December 18, 2014, http://curia.europa.eu/jcms/upload/docs/application/pdf/2014-12/cp140180en.pdf (9/14/16)

COVELLI R., *No Tav: l"accusa al cronista Davide Falcioni è un attacco alla libertà di informazione,* April 12, 2016, " Valigia Blu"; http://www.valigiablu.it/notav-davide-falcioni-diritto-cronaca/

CPJ (COMMITTEE TO PROTECT JOURNALISTS), *25 Journalists Killed in Turkey since 1992/Motive Confirmed,* link: https://cpj.org/killed/europe/turkey/ (9/9/16)

CPJ (COMMITTEE TO PROTECT JOURNALISTS), *Two editors at critical magazine Nokta arrested in Turkey for election coverage,* November 4, 2015; link: https://cpj.org/2015/11/two-editors-at-critical-magazine-nokta-arrested-in.php

CRUCIATI C., *Die Linke: "Erdogan criminale per la strage curda di Cizre",* June 30, 2016, in *Il Manifesto,* link: http://nena-news.it/die-linke-erdogan-criminale-di-guerra-per-la-strage-kurda-di-cizre/

CUSTODERO A., MAESTROGIACOMO D., *Omicidio Ilaria Alpi, tutti i dubbi sul processo: il testimone ritratta. L"autista era inaffidabile,* in "La Repubblica", April 4, 2016, link: http://www.repubblica.it/cronaca/2016/04/04/news/omicidio_ilaria_alpi_miran_hrovatin_testimone_ritratta_ali_rage_gelle_processo_revisione_perugia_imputato_hashi_commissione_-136833744/

DALOGLU T., *Turkey‟s tales of the tapes,* February 26,2014, Al- Monitor, link: http://www.al-monitor.com/pulse/originals/2014/02/erdogan-corruption-audio-bilal-graft-probe-police-money.html#

DATO‟ PARAM CUMARASWAMY (Special Rapporteur on the independence of judges and lawyers), CIVIL AND POLITICAL RIGHTS, INCLUDING THE QUESTIONS OF: INDEPENDENCE OF THE JUDICIARY, ADMINISTRATION OF JUSTICE, Un Human Rights Commission, March 26, 2002, 58th session, link:https://documents-ddsny.un.org/doc/UNDOC/GEN/G02/107/39/PDF/G0210739.pdf?OpenElement (9/12/16)

DE VRIES K. (Rapporteur - Netherlands, Socialist Group), *Implementation of judgments of the European Court of Human Rights*, Committee on Legal Affairs and Human Rights (European Parliament), 8th report , June 23, 2015, p. 2; link: http://website-pace.net/documents/19838/1085720/20150623-ImplementationJudgements8-EN.pdf/67c5cb2a-3032-4183-9f3e-45c668257ede (9/12/16)

DEARDEN L., *Turkey coup attempt: Number of people detained passes 26,000 amid international concern over crackdown*, August 9, 2016, in the " Independent", link: http://www.independent.co.uk/news/world/europe/turkey-coup-attempt-news-latest-number-of-people-detained-26000-gulen-hizmet-erdogan-crackdown-a7180256.html

DEEN T., *UN remains divided over domestic and state terrorism,* July 1, 2015, link: http://www.ipsnews.net/2015/07/u-n-remains-divided-over-domestic-and-state-terrorism/ (9/17/16)

DELLA MORTE G. *Sulla legge che introduce la punizione delle condotte negazionistiche nell‟ordinamento italiano: tre argomenti per una critica severa,* in Sidiblog.org (*Società Italiana di Diritto Internazionale e di Diritto dell‟Unione Europea*), June 22, 2016, link: http://www.sidiblog.org/2016/06/22/sulla-legge-che-introduce-la-punizione-delle-condotte-negazionistiche-nellordinamento-italiano-tre-argomenti-per-una-critica-severa/

DEPARTMENT OF THE INTERIOR, "C.I.E" (*Centri di Identificazione ed Espulsione, "*Centres for identification and Expulsion"), link: http://www.interno.gov.it/it/temi/immigrazione-e-asilo/sistema-accoglienza-sul-territorio/centri-limmigrazione (9/11/16)

DINUCCI M., *La scottante verità di Ilaria Alpi,* "Il Manifesto", June 8, 2015, link: http://ilmanifesto.info/la-scottante-verita-di-ilaria-alpi/

DIRITTO PENALE CONTEMPORANEO, *La Camera approva in via definitiva la proposta di legge che introduce il reato di negazionismo,* link: http://www.penalecontemporaneo.it/novita_legislative_e_giurisprudenziali/1-/4808-
la_camera_approva_in_via_definitiva_la_proposta_di_legge_che_introduce_il_reato_di_negazionismo/

Draft version of Law (No. 31853594-101-1262-2458 , Bill No. 1/725) granting immunity to the soldiers who are involved in counter- terrorism missions, June 7, 2016, link (Turkish version): http://www2.tbmm.gov.tr/d26/1/1-0725.pdf

ECPMF, "*European Union Competencies in Respect of Media Pluralism and Media Freedom*", January 2013, link: https://ec.europa.eu/digital-agenda/sites/digital-agenda/files/CMPFPolicyReport2013.pdf

ECTHR, Press release, *Holding two investigative journalists in pre-trial detention for over a year breached the Convention*, ECHR 200 (2014) 08.07.2014, link: file:///C:/Users/FreePC/Downloads/003-4815533-5871641%20(1).pdf

ESEN S., *How influential are the standards of the European Court of Human Rights on the Turkish Constitutional system in banning political parties?,* in Ankara Law Review, 2012, Vol. 9 No. 2, p. 135-156; link: http://dergiler.ankara.edu.tr/dergiler/64/1847/19452.pdf

EUROPEAN CENTRE FOR PRESS AND MEDIA FREEDOM, *Exposed: the hidden threats to Italy"s journalists,* from the archive of the, July 13, 2015, link: https://ecpmf.eu/news/threats/archive/exposed-the-hidden-threats-to-italys-journalists (10/9/16)

EUROPEAN COMMISSION, *Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union,* October 19, 2010, http://ec.europa.eu/justice/news/intro/doc/com_2010_573_4_en.pdf

EUROPEAN COMMISSION, *Turkey Report 2015,* EU enlargement strategy, Brussels, 10.11.2015 SWD(2015) 216 final; link: http://ec.europa.eu/enlargement/pdf/key_documents/2015/20151110_report_turkey.pdf

EUROPEAN COURT OF HUMAN RIGHTS, *Practice Directions,* January 1, 2016: http://www.echr.coe.int/Documents/PD_satisfaction_claims_ENG.pdf (9/12/16)

EUROPEAN CRIMINAL POLICY INITIATIVE, *Manifesto sulla politica criminale europea,* 2009: https://sites.google.com/site/eucrimpol/manifest/manifesto

EUROPEAN PARLIAMENT AND COUNCIL OF THE EUROPEAN UNION, Directive 2012/29/EU, October 25, 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, link: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32012L0029&from=IT

EUROPEAN PARLIAMENT, Resolution of April 14, 2016 on the "2015 Report on Turkey", 2015/2898(RSP), link: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2016-0133+0+DOC+XML+V0//EN (9/14/16)

FALCIONI D., *Io ero con in NO TAV arrestati. Vi racconto come sono andate davvero le cose,* in "Agoravox", November 29, 2012; link: http://www.agoravox.it/Io-ero-con-i-No-Tav-arrestati-Vi.html

FIDH (Worldwide movement for human rights), *Call for the release and the end of harassment against lawyers*, December 2011, https://www.fidh.org/en/region/europe-central-asia/turkey/Call-for-the-release-and-the-end

FITTIPALDI E., *La corruzione passa per il tribunale. Tra mazzette, favori e regali,* L"Espresso, April 29, 2014, link: http://espresso.repubblica.it/inchieste/2014/04/25/news/la-corruzione-passa-per-il-tribunale-tra-mazzette-favori-e-regali-1.162956 (9/12/16)

FRANKOWSKI S., LUPO A.K., SMITH B. A., DANE'EL M., RAMOS C.,. MORERA O. F, *Developing and Testing a scale to Measure Need for Drama*, in *Elsevier,* November 12, 2015; link: https://www.researchgate.net/publication/283646497_Developing_and_Testing_a_Scale_to_Measure_Need_for_Drama (10/10/16).

GALLAGHER S., *Şanar Yurdatapan on Turkey: "Things will never be the same again",* June 20, 2013, Index on Censorship; link: https://www.indexoncensorship.org/2013/06/sanar-yurdatapan-on-turkey-things-will-never-be-the-same-again/

GALLO F., *Rapporti fra Corte Costituzionale e Corte EDU,* Bruxelles, May 24, 2012, link: http://www.cortecostituzionale.it/documenti/relazioni_internazionali/RI_BRUXELLES_2012_GALLO.pdf

GAROFOLI R., *I principali reati con finalità di terrorismo, anche internazionale. Il Dlgs 144/2005,* September 14, 2005, in *Altalex,* link: http://www.altalex.com/documents/news/2005/09/13/i-principali-reati-con-finalita-di-terrorismo-anche-internazionale-il-dlgs-144-2005 (9/17/16).

GAZZETTA UFFICIALE DELLA REPUBBLICA ITALIANA, Law No. 43/2015 (that converts Decree- Law No. 7/ 2015), complete coordinated text: http://www.gazzettaufficiale.it/eli/id/2015/04/20/15A02961/sg

GEERDINK F., *Journalism doesn"t exist in Turkey*, November 26, 2015, https://www.beaconreader.com/frederike-geerdink/journalism-doesnt-exist-in-turkey (9/11/16)

GIURISTI DEMOCRATICI, *Report dalla Turchia sul processo a due avvocati*, June 24, 2016,link: http://www.giuristidemocratici.it/Comunicati/post/20160624113734?page=1 (9/14/16)

GLOBAL FREEDOM OF EXPRESSION CENTRE, *Case Law,* Columbia University, link: https://globalfreedomofexpression.columbia.edu/cases/ (9/9/16)

GOLDAN A., YANG J.L., MUYSKENS J., *The Islamic State"s suspected inroads into America,* in "The Washington Post", August 8, 2016, link: https://www.washingtonpost.com/graphics/national/isis-suspects/?hpid=z3&tid=a_inl

GOOGLE MAPS, military basis and rifle ranges in Sardinia: https://www.google.com/maps/d/viewer?mid=1JCiFqCk7EzO2ywzjGIdBI9Rk37k&hl=it (9/17/16)

GREENWALD G., FISHMAN A., *Greatest threat to free speech in the West: Criminalizing activism against Israeli occupation,* February 16, 2016, in "The Intercept", link: https://theintercept.com/2016/02/16/greatest-threat-to-free-speech-in-the-west-criminalizing-activism-against-israeli-occupation/

GROVE J., *Turkey"s new HE laws are "assault on education and free speech, critics claim,* December 1, 2015 in *TimesHigherEducation.com;* link: https://www.timeshighereducation.com/news/turkeys-new-he-laws-are-assault-education-and-free-speech-critics-claim

GUARINO G., *Corte Europea dei diritti dell"uomo e estradizione italiana,* July 14, 2007, link for download: www.europeanrights.eu/public/commenti/Guarino.doc (9/18/16)

HABERLER, *Prosecutor Asks For Acquittal Of Nokta Editors Charged Over Magazine Cover*, March 1, 2016, link: http://en.haberler.com/prosecutor-asks-for-acquittal-of-nokta-editors-888168/

HARRIS M., *Time to step up: the EU and Freedom of Expression,* "Index on Censorship", December 2013, link: http://www.indexoncensorship.org/wp-content/uploads/2014/01/Time-to-Step-Up-The-EU-and-freedom-of-expression.pdf

HARVARD LAW REVIEW, *South Carolina Disqualifies Companies Supporting BDS from Receiving State Contracts,* May 10, 2016, in "Harvard Law Review" (First Amendment: Speech), 129 Harv. L. Rev. 2029, link: http://harvardlawreview.org/2016/05/s-c-code-ann-11-35-3500-2015/?utm_source=Harvard+Law+Review+Mailing+List&utm_campaign=d9696f5a5a-New_Issue_Volume_129_April_2016_Number_64_6_2016&utm_medium=email&Tutm_term=0_62fe9709f5-d9696f5a5a-331623825

HUMAN RIGHTS WATCH, *Turkey, events of 2015, https://www.hrw.org/world-report/2016/country-chapters/turkey.*

HUMAN RIGHTS WATCH, *Turkey: State blocks probes of South- East killings,* July 11, 2016, link: https://www.hrw.org/news/2016/07/11/turkey-state-blocks-probes-southeast-killings

HURRIYET DAILY NEWS*, 18 academics detained, over 130 face criminal charges amid accusations by president of "terrorist propaganda",* January 15, 2016, *http://www.hurriyetdailynews.com/four-turkish-academics-charged-with-terror-propaganda-released.aspx?PageID=238&NID=98203&NewsCatID=509*

HURRIYET DAILY NEWS, *All defendants acquitted in coup case against Turkish football fan group çArşı,* December 29, 2016, http://www.hurriyetdailynews.com/all-defendants-acquitted-in-coup-case-against-turkish-football-fan-group.aspx?pageID=238&nid=93170

HURRIYET DAILY NEWS*, Four journalists face trials for insulting Erdoğan,* December 2, 2015; link: http://www.hurriyetdailynews.com/four-journalists-face-trial-for-insulting-erdogan.aspx?pageID=238&nID=91985&NewsCatID=339

HURRIYET DAILY NEWS*, Four journalists face trials for insulting Erdoğan,* December 2, 2015; link: http://www.hurriyetdailynews.com/four-journalists-face-trial-for-insulting-erdogan.aspx?pageID=238&nID=91985&NewsCatID=339

HURRIYET DAILY NEWS*, Hammer-and-sickle badge held as evidence in terror case in Turkey,* July 27, 2012, link: http://www.hurriyetdailynews.com/hammer-and-sickle-badge-held-as-evidence-in-terror-case-in-turkey--.aspx?pageID=238&nID=26489&NewsCatID=341

HURRIYET DAILY NEWS, *Special Courts abolished as President Gül signs law,* March 6, 2014, link: http://www.hurriyetdailynews.com/special-courts-abolished-as-turkish-president-gul-signs-law.aspx?pageID=238&nID=63290&NewsCatID=338 (9/10/16)

HURRIYET DAILY NEWS*, Turkey violated right to a fair trial in anti-terror case, says ECHR,* March 29, 2016, link: http://www.hurriyetdailynews.com/turkey-violated-right-to-a-fair-trial-in-anti-terror-case-says-echr-.aspx?pageID=238&nID=97064&NewsCatID=509

HURRIYET DAILY NEWS*, Turkish President Erdogan slams US over YPG support*, May 28, 2016, link: http://www.hurriyetdailynews.com/turkish-president-erdogan-slams-us-over-ypg-support.aspx?PageID=238&NID=99783&NewsCatID=510

HURRIYET DAILY NEWS*, Two arrested Turkish journalists apply to Constitutional Court for release,* December 6, 2015, link: http://www.hurriyetdailynews.com/two-arrested-turkish-journalists-apply-to-constitutional-court-for-release.aspx?pageID=238&nid=92156

HURRIYET DAILY NEWS, *Two Turkish editors released after first hearing over 'inciting crime",* December 29, 2015; link: http://www.hurriyetdailynews.com/two- turkish-editors-released-after-first-hearing-over-inciting-crime.aspx?pageID=238&nID=93163&NewsCatID=339

HURRIYET DAILY NEWS, *Two Turkish editors released after first hearing over 'inciting crime',* December 29, 2015, http://www.hurriyetdailynews.com/two- turkish-editors-released-after-first-hearing-over-inciting-crime.aspx?pageID=238&nID=93163&NewsCatID=339

ICSA (NTELLIGENCE CULTURE AND STRATEGIC ANALYSIS), *Rapporto su eversione, anarchia insurrezionale e forme di antagonismo sociale,* June 16, 2016; link: http://www.fondazioneicsa.info/2016/06/16/rapporto-su-eversione-anarchia-insurrezionale-e-forme-di-antagonismo-sociale/

IFJ- INTERNATIONAL FEDERATION OF JOURNALISTS, *IFJ/EFJ condemn scandalous ban on media at Turkey media trial,* IFJ (International Federation of Journalists)'s website, March 25, 2016, link: http://www.ifj.org/nc/news-single-view/backpid/1/article/ifj-efj-condemn-scandalous-ban-on-media-at-turkey-media-trial/

IL FATTO QUOTIDIANO, *Francesco Storace assolto in appello dall"accusa di vilipendio al Capo dello Stato: "Il fatto non costituisce reato"*, June 1, 2016, link: http://www.ilfattoquotidiano.it/2016/06/01/francesco-storace-assolto-in-appello-dallaccusa-di-vilipendio-al-capo-dello-stato-il-fatto-non-costituisce-reato/2788122/

IL FATTO QUOTIDIANO, *Matteo Salvini rischia processo per vilipendio della magistratura. Chiesta l"autorizzazione al ministro Orlando,* , March 29, 2016, link: http://www.ilfattoquotidiano.it/2016/03/29/lega-nord-salvini-rischia-processo-per-vilipendio-della-magistratura-chiesta-lautorizzazione-al-ministro-orlando/2590270/

IL MATTINO, Padua, January 30, 2016, link: http://mattinopadova.gelocal.it/padova/cronaca/2016/01/30/news/tabaccaio-condannato-offese-e-minacce-al-giudice-1.12866148 (9/12/16)

IL RESTO DEL CARLINO, *Blitz contro gli anarchici: cinque arresti e un fermo per l'attentato all'Eni*, April 6, 2011, http://www.ilrestodelcarlino.it/bologna/cronaca/2011/04/06/485784-terrorismo_blitz_della_polizia.shtml

IL TIRRENO.GEOLOCAL.IT, Scritta contro I poliziotti, condannati tre tifosi del prato, October 21, 2015; link: http://iltirreno.gelocal.it/prato/cronaca/2015/10/21/news/scritta-contro-i-poliziotti-condannati-tre-tifosi-del-prato-1.12300272

IMC, *YÖK akademisyenlerin yurt dışı görevlendirmelerini durdurdu,* July 20, 2016, link: http://www.imctv.com.tr/yok-akademisyenlerin-yurt-disi-gorevlendirmelerini-durdurdu/

INDEX ON CENSORSHIP, *Italy"s free expression hamstrung by lack of media plurality*, August 15, 2013, link: https://www.indexoncensorship.org/2013/08/italys-free-expression-hamstrung-by-lack-of-media-plurality/ (9/14/16).

INDEX ON CENSORSHIP, *Turkey arrests journalists who showed support for press freedom,* June 20, 2016, link: https://www.indexoncensorship.org/2016/06/turkey-arrests-journalists-showed-support-press-freedom/

INFOAUT.ORG, *Le accuse contro il Dr. Unal Erden cominciano a frantumarsi. Il garantismo ai tempi di Renzi,* April 22, 2015, link: http://www.infoaut.org/index.php/blog/varie/item/14462-le-accuse-contro-il-dr-unal-erdel-cominciano-a-frantumarsi-il-garantismo-ai-tempi-di-renzi (9/18/16)

INITIATIVE FOR FREEDOM OF EXPRESSION, *Museum of Crimes of Thought,* Istanbul, link: http://www.dusuncesuclarimuzesi.net/?s=giris&aid=10

INTERNATIONAL COVENANT ON CIVIC AND POLITICAL RIGHTS (ICCPR), March 23, 1976, link: http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx (9/10/16)

IPE (INSTITUTE FOR ECONOMICS AND PEACE), *Global Terrorism Index 2015,* link: http://economicsandpeace.org/wp-content/uploads/2015/11/2015-Global-Terrorism-Index-Report.pdf

JOHANNESBURG PRINCIPLES on national security, freedom of expression and access to information, October 1, 1995, link: https://www.article19.org/data/files/pdfs/standards/joburgprinciples.pdf.

KARCILIOĞLU K., *Article 301 of Turkish Criminal Code Amended,* IRIS- Merlin Database (Database on legal information relevant to the audio-visual sector in Europe), 2008, link: http://merlin.obs.coe.int/iris/2008/6/article28.en.html

KILLELEA S. , Director of IPE, Global Freedom of Expression Centre annual conference *"Justice for Free Expression 2015",* Columbia University, Day 1, Session 3, April 4, 2016, link: https://globalfreedomofexpression.columbia.edu/justice-free-expression-2015-day-1/ (9/17/16)

KI-MOON B., Message on World Press Freedom Day, May 3, 2016, link: http://www.unis.unvienna.org/unis/en/pressrels/2016/unissgsm738.html (09/10/16)

LASCIATECIENTRARE, *Chi siamo,* March 15, 2014, http://www.lasciatecientrare.it/j25/chi-siamo (9/11/16)

Law No. 6458 of 2013, Turkish *Law on Foreigners,* http://www.goc.gov.tr/files/files/eng_minikanun_5_son.pdf (9/11/16)

Law proposal (Italian Act No. 2043 of 2015), Introduction (http://www.senato.it/japp/bgt/showdoc/17/DDLPRES/939906/index.html) and Draft (http://www.senato.it/leg/17/BGT/Schede/Ddliter/45945.htm)

LECCEPRIMA.IT, *Lo cercano per un rave illegale e rivendica le scritte sui muri: denunciato,* March 28, 2015, link: http://nardo.lecceprima.it/scritte-muri-denuncia.html

LETSCH C., *Seized Turkish opposition newspaper toes government line,* in "The Guardian", March 6, 2016, link: https://www.theguardian.com/world/2016/mar/06/seized-turkish-opposition-newspaper-zaman-erdogan-government

LILLO M., *Woodcock Time,* April 1, 2015, http://www.dagospia.com/rubrica-3/politica/woodcock-time-cpl-concordia-diede-20mila-euro-anche-icsa-97687.htm

LOS ANGELES TIMES, *Boycotts of Israel are a protected form of free speech,* July 5, 2016; link: http://www.latimes.com/opinion/editorials/la-ed-bds-bill-20160630-snap-story.html

LUTHER BLISSETT PROJECT, *Nemici dello Stato- Criminali, "mostri" e leggi speciali nella società di controllo,* 2002, http://www.lutherblissett.net/archive/078_it.html

MACDONALD A., *Turkey passes law granting immunity to soldiers fighting 'terrorism',* MiddleEasteye.net, June 25, 2016: http://www.middleeasteye.net/news/turkey-passes-law-granting-immunity-soldiers-fighting-terrorism-551543630

MAGISTRATURA DEMOCRATICA, *Storia di MD,* link: *http://www.magistraturademocratica.it/mdem/storia.php* (9/12/16)

Mancino Law (Italian Law No. 645 of 1975), link: http://old.asgi.it/public/parser_download/save/l.13.ottobre.1975.n.654.pdf

MASSARO A., *Omicidio stradale e lesioni personali stradali gravi o gravissime: da un diritto penale "frammentario" a un diritto penale "frammentato",* May 20, 2016, in "Diritto penale contemporaneo.it", link: http://www.penalecontemporaneo.it/area/3-/15-/-/4705-omicidio_stradale_e_lesioni_personali_stradali_gravi_o_gravissime__da_un_diritto_penale___frammentario___a_un_diritto_penale___frammentato___/?utm_source=Newsletter+DPC&utm_campaign=9ea90f7a01-DPCgamc&utm_medium=email&utm_term=0_8d8fdd708d-9ea90f7a01-224820505 (10/9/16)

MATTEINI C., *Perché difendo Matteo Salvini da una "schifezza" di processo,* link: http://www.fanpage.it/perche-difendo-matteo-salvini-da-una-schifezza-di-processo/

MEDIADEM (European Media Policies Revisited: Valuing and Reclaiming Free and Independent Media in Contemporary Democratic Systems), *Final Policy brief*, February 20, 2013, link: http://cordis.europa.eu/result/rcn/140499_it.html (9/12/16)

MENDITTO F., *Presente e futuro delle misure di prevenzione (personali e patrimoniali): da misure di polizia a prevenzione della criminalità da profitto,* Cagliari, October 29 and 30, 2015;in *"Diritto penale contemporaneo"*, link: http://www.penalecontemporaneo.it/upload/1463736128MENDITTO_2016a.pdf

Military Penal Code (*Askeri Ceza Kanunu),* link (Turkish version): http://www.mevzuat.gov.tr/MevzuatMetin/1.3.1632.pdf

MINNELLA V., Personal Blog, http://www.valeriominnella.it/?page_id=14

NENA NEWS, *TURCHIA. E" legge l"immunità all"esercito,* Nena News, June 25, 2016: http://nena-news.it/turchia-e-legge-limmunita-allesercito/

NYCLU (NEW YORK CIVIL LIBERTIES UNION), *Legislative Memo: In opposition of Prohibiting Politically Motivated Boycotts,* April 5, 2016, link: http://www.nyclu.org/content/opposition-of-prohibiting-politically-motivated-boycotts

OFFICIAL JOURNAL OF THE EUROPEAN COMMUNITIES, Council Framework Decision 2008/ 919/ JHA amending Framework 475/2002/JHA, November 28, 2008, link: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32008F0919

OFFICIAL JOURNAL OF THE EUROPEAN COMMUNITIES, Council Framework Decision on combating terrorism, No. 475/2002/JHA , June 13, 2002, link: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32002F0475&from=en

ÖNDEROĞLU E. , *Writer And Journalist Ahmet Altan Charged With Insulting Turkish Nation,* September 12, 2008, http://bianet.org/english/freedom-of-expression/109701-writer-and-journalist-ahmet-altan-charged-with-insulting-turkish-nation

ÖNDEROĞLU E., *Table of imprisoned journalists and examples of legislative restrictions on freedom of expression and media freedom in Turkey Office of the OSCE Representative on Freedom of the Media,* July 2015, http://www.osce.org/fom/173036?download=true (9/11/2016).

Original indictment by President Erdoğan against Can Dündar and Erdem Gül posted on Twitter by the *Cumhuriyet* correspondent Alican Uludağ, link: https://twitter.com/alicanuludag/status/669879091118645249/photo/1

OSCE (ORGANIZATION FOR SECURITY AND CO-OPERATION IN EUROPE), *Legal Analysis of Law No. 925 of October 17, 2013 Concerning the Defamation Legislation in Italy,* November 11, 2013; link: http://www.osce.org/fom/108108.

OSCE, *Review of the Draft Turkish Penal Code: Freedom of Media Concerns,* Vienna, May 2005, link: http://www.osce.org/fom/14672?download=true

OSSIGENO PER L'INFORMAZIONE, *Italia. Le notizie più pericolose di Giugno 2015 segnalate da Ossigeno,* in " Ossigeno per l'informazione", July 6, 2015, link: http://notiziario.ossigeno.info/2015/07/italia-le-notizie-piu-pericolose-di-giugno-2015-segnalate-da-ossigeno-59477/ (10/9/16)

OSSIGENO PER L'INFORMAZIONE, *Torino: cronista a giudizio per aver seguito protesta NO TAV,* April 5, 2016; link: http://notiziario.ossigeno.info/2016/04/torino-cronista-a-giudizio-per-aver-seguito-protesta-no-tav-68523/

OSSIGENO PER L'INFORMAZIONE, *Turchia: espulsi due giornalisti italiani e uno francese,* June 23, 2015, http://notiziario.ossigeno.info/2015/06/turchia-espulsi-al-confine-siriano-3-giornalisti-italiani-e-uno-francese-59126/ (9/11/16)

OZDEMIR C., *The Turkish government's judicial problem,* "Middle East Eye", February 13, 2015, link: http://www.middleeasteye.net/in-depth/features/turkish-governments-judicial-problem-457420840 (9/14/16)

P24 ("PLATFORM FOR INDEPENDENT JOURNALISM"), *Intellectuals warn controversial Article 301 resurrected,* October 6, 2015, http://platform24.org/en/articles/310/intellectuals-warn-controversial-article-301-resurrected (9/17/16)

P24, *Managing editor of Nokta magazine detained in police raid,* September 14, 2015, http://platform24.org/en/articles/306/managing-editor-of-nokta-magazine-detained-in-police-raid

Parliamentary discussion at the Senate of Bill No. 2874-B (on Holocaust and other genocides denial) at the Senate, March 2014, link: https://www.senato.it/application/xmanager/projects/leg17/attachments/documento_evento_procedura_commissione/files/000/001/129/RACCOLTA_MEMORIE.pdf

Parliamentary interrogation by Senator Luigi Manconi of June 23, 2016, http://www.senato.it/japp/bgt/showdoc/frame.jsp?tipodoc=Resaula&leg=17&id=00980630&part=doc_dc-allegatob_ab-sezionetit_icrdrs-atto_406003&parse=no&stampa=si&toc=no

PICT, "Project on International Courts and Tribunals", ECtHR, http://www.pict-pcti.org/courts/ECHR.html (9/14/16)

POMES P., *Il trattato di Lisbona e la CEDU: nuove prospettive di applicabilità del Diritto europeo in Italia,* Rome, October 15, 2010, link: http://www.europeanrights.eu/public/commenti/pomes_testo.pdf

POUSHTER J., GIVENS D., *Where the world sees limits to free speech,* "Pew Research Center", November 18, 2015, Link: http://www.pewresearch.org/fact-tank/2015/11/18/where-the-world-sees-limits-to-free-speech/ (9/11/16)

PRISON BREAK PROJECT, *Terrorizzare e reprimere. Il terrorismo come strumento repressivo in perenne estensione,* in " Osservatoriorepressione.info", July 15, 2014; link: http://www.osservatoriorepressione.info/terrorizzare-e-reprimere-il-terrorismo-come-strumento-repressivo-in-perenne-estensione/

Punibilità dell'istigazione a delinquere: il caso TAV De Luca (Trib. Torino, 4573/15) in *Canestrinilex.com,* January 18, 2016, http://www.canestrinilex.com/risorse/punibilita-dellistigazione-a-delinquere-il-caso-tav-de-luca-trib-torino-457315/

RAHME T., *Şanar Yurdatapan's Museum of Crimes of Thought Takes Aim at Growing Oppression in Turkey ,* January 7, 2015, link: https://globalvoices.org/2015/01/07/sanar-yurdatapans-museum-of-crimes-of-thought-takes-aim-at-growing-oppression-in-turkey/

RAI NEWS, Justice Minister Andrea Orlando during the opening of the 2015 judicial year, January 24, 2015, link: http://www.rainews.it/dl/rainews/articoli/orlando-anno-giudiziario-6fea033e-b64b-4c53-b6de-58e17d55b316.html (9/12/16)

REPORTERS WITHOUT BORDERS, *Media Freedom is part of the solution to the Kurdish Issue,*, August 2015; link: http://www.rcmediafreedom.eu/Publications/Reports/Media-Freedom-is-part-of-the-solution-to-the-Kurdish-issue

REPUBBLICA, *Bossi condannato a 18 mesi per vilipendio a Napolitano,* September 22, 2015, link: http://www.repubblica.it/politica/2015/09/22/news/bossi_condannato_a_18_mesi_per_vilipendio_a_napolitano-123433063/

REPUBBLICA, *G8 Genova, Strasburgo condanna l"Italia: "Alla Diaz fu tortura, ma colpevoli impuniti"*, April 7, 2015, link: http://www.repubblica.it/politica/2015/04/07/news/diaz_corte_strasburgo_condanna_l_italia_per_tortura-111347188/ (10/9/16)

RETE DEGLI ARCHIVI, *PER NON DIMENTICARE*, "Omicidio di Ilaria Alpi e Miran Hrovatin", link: http://www.fontitaliarepubblicana.it/DocTrace/#home?q=projectid:10&page=1&per_page=10 (10/9/16)

RETE DEGLI ARCHIVI: Per non dimenticare, Trials regarding the massacre of Piazza Fontana (1969), link: http://www.fontitaliarepubblicana.it/DocTrace/#home?q=%20projectid:11&page=1&per_page=10 (9/17/16)

REUTERS, *Turkish judicial purge brings corruption investigation to halt,* January 22, 2014, link: http://www.reuters.com/article/us-turkey-corruption-idUSBREA0L1G220140122 (9/10/16)

RINARLDI F. V., *I rapporti fra ordinamento interno e CEDU,* in "FiloDiritto.com", January 7, 2013, link: http://www.filodiritto.com/articoli/2013/01/i-rapporti-tra-ordinamento-interno-e-cedu/

SAKA E., *Because of the travel ban to all Turkish academics, I cannot make it to #EASA2016… An anthropology roundup,* in *Erkan"s Field Diary,* http://erkansaka.net/2016/07/10/because-of-the-travel-ban-to-all-turkish-academics-i-cannot-make-it-to-easa2016-an-anthropology-roundup/?fb_ref=Default (9/18/16).

Scelba Law (Italian Law No. 645 of 1952), link: http://archivio.rivistaaic.it/materiali/atti_normativi/XIII/pdf/l1952_00645.pdf

SCHAAKE M., Question for written answer to the Commission, Rule 130, January 12, 2016, http://www.europarl.europa.eu/sides/getDoc.do?type=WQ&reference=P-2016-000175&format=XML&language=EN (9/14/16)

SCHEIDT K., SCHÜTZ T., *"Hacking Istanbul",* documentary (20"), link: https://vimeo.com/117663606

SCHEMBS K., *Fascist youth organizations and propaganda in a transnational prospective,* in *Amnis,* 2013, link: *https://amnis.revues.org/2021* (9/9/2016)

SCHMITT E., SHANKER T., *U.S. Officials Retool slogan for Terror War,* in *The New York Times,* July 26, 2006, link: http://www.nytimes.com/2005/07/26/politics/us-officials-retool-slogan-for-terror-war.html?_r=0 (9/17/16)

SHAFAK E., *The shocking murder of trans activist says much about Turkey today,* in *The Guardian,* August 23, 2016, https://www.theguardian.com/commentisfree/2016/aug/23/murder-transgender-lgbt-hande-kader-turkey

SHAPIRO S. , *U.S. First Amendment: Opportunities and Challenges,* "Global Freedom of Expression Centre", Columbia University, May 8, 2014; link: https://globalfreedomofexpression.columbia.edu/publications/u-s-first-amendment-opportunities-and-challenges/

SHELLEY J., *I"m not at war with the press, says Turkish President Recep Tayyip Erdogan,* March 31, 2016, CNN, link: http://edition.cnn.com/2016/03/31/middleeast/recep-tayyip-erdogan-amanpour-interview/ (9/12/16).

SHINKMAN P.D., *Obama: "Global War on Terror is over",* in *US News,* May 23, 2013, link: http://www.usnews.com/news/articles/2013/05/23/obama-global-war-on-terror-is-over (9/17/16)

SIRONI F., *Cosa sta succedendo veramente in Francia con lo stato di emergenza,* in "L'Espresso", December 1, 2015; link: http://espresso.repubblica.it/internazionale/2015/12/01/news/stato-d-emergenza-in-francia-cosa-sta-succedendo-veramente-1.241692

SPAMPINATO A., *Deputati e governo: nuove misure per proteggere I giornalisti minacciati,* in "Ossigeno per l'informazione", February 29, 2016, link: http://notiziario.ossigeno.info/2016/02/deputati-e-governo-nuove-misure-per-proteggere-i-giornalisti-minacciati-67525/

SPAMPINATO A., *Rassegna di querele e altre azioni legali pretestuose contro i giornalisti in Italia,* "Ossigeno per l'Informazione", Rome, July 3, 2015, link: http://notiziario.ossigeno.info/wp-content/uploads/2015/09/dossier_diffamazione.pdf

Statute of the Council of Europe**,** **L**ondon, 5.V.1949, link: http://www.coe.int/en/web/conventions/full-list/-/conventions/rms/0900001680306052

Summary of the Şık and Şener case, subtitled in Italian by the journalist Murat Cinar, link: https://www.youtube.com/watch?v=sg1ZI-0vX0k

THE GUARDIAN, *Turkey rounds up academics who signed petition denouncing attacks on Kurds,* January 15, 2016: https://www.theguardian.com/world/2016/jan/15/turkey-rounds-up-academics-who-signed-petition-denouncing-attacks-on-kurds

THE HON JOHN VON DOUSSA QC PRESIDENT HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION, *Incorporating human rights principles into national security measure,* International conference on terrorism, human security and development: human rights perspectives, City University of Hong Kong, October 16-7, 2007, link: https://www.humanrights.gov.au/news/speeches/incorporating-human-rights-principles-national-security-measures (9/10/2016)

THE JOURNAL.IE, *Berlusconi to Obama: Leftist Italian judges are "almost a dictatorship",* May 27, 2016, link: http://www.thejournal.ie/berlusconi-to-obama-leftist-italian-judges-are-almost-a-dictatorship-144713-May2011/ (9/12/16)

The Paris Minimum Standards of Human Rights Norms in a State of Emergency, in the "American Journal of International Law" of October, 1985: http://www.uio.no/studier/emner/jus/humanrights/HUMR5503/h09/undervisningsmateriale/ParisMinimumStandards.pdf (9/17/16)

Turkish "State of Emergency Act", Law No. 2935 of 1983, link: http://www.legislationline.org/documents/id/6974

Turkish Anti-Terror Law, No. 3713/ 1991, link: http://www.opbw.org/nat_imp/leg_reg/turkey/anti-terror.pdf

TURLEY J., *Shut up and play nice: How the Western world is limiting free speech,* October 12, 2012, in *The Washington Post,* link: https://www.washingtonpost.com/opinions/shut-up-and-play-nice-how-the-western-world-is-limiting-free-speech/2012/10/12/e0573bd4-116d-11e2-a16b-2c110031514a_story.html?utm_term=.13385fed9ebc

TUTUKLU GAZETECILERLE DAYANIŞMA PLATFORMU, September 2, 2016, link:http://tutuklugazeteciler.blogspot.it/ (9/14/16)

UN GENERAL ASSEMBLY, *Legal Committee Urges Conclusion of Draft Comprehensive Convention on International Terrorism,* 6th Committee, October 8, 2012, link: http://www.un.org/press/en/2012/gal3433.doc.htm (9/17/16)

UN HUMAN RIGHTS COMMITTEE, *General comment No. 34 on Article 19 ICCPR: Freedoms of opinion and expression*, 102nd Session, Geneva, July 11-29, 2011, link: http://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf

UN, "International Convention for the Suppression of the Financing of Terrorism", 1999, link: http://www.un.org/law/cod/finterr.htm (9/17/16)

UN, *International Convention on the Elimination of All Forms of Racial Discrimination*, Adopted and opened for signature and ratification by UN General Assembly resolution 2106 of December 21, 1965, entry into force January 4, 1969, in accordance with Article 19, link: http://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx

UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, U.N. Doc. E/CN.4/1985/4, Annex (1985)**:** https://www1.umn.edu/humanrts/instree/siracusaprinciples.html

VALENTINI V. , *Le garanzie liberali ed il protagonismo delle vittime: uno schizzo sistemico dell"attuale giustizia penale europea,* in Jus17@unibo.it, 2011, p. 77 et seq.

VARVARESSOS A., *Integrazione delle misure di prevenzione e contrasto delle attività terroristiche* in *Commento al d.l.7/2015, art. 2, "Lalegislazionepenale.eu",* January 15, 2016, link:http://www.lalegislazionepenale.eu/wp-content/uploads/2016/01/studi_legge4315_art.2-co.-1-varvaressos.pdf

VENICE COMMISSION, *Legislative provisions concerning protection against defamation* (Italy), link: http://www.venice.coe.int/webforms/documents/?pdf=CDL-REF(2013)035-e (9/17/16)

VENICE COMMISSION, *Opinion on legislation on defamation of Italy,* n° 715/2013, 97th Plenary Session (Venice, December 6-7, 2013) on the basis of comments by: Mr Richard CLAYTON (Member, United Kingdom) Mr Christoph GRABENWARTER (Member, Austria) Ms Herdís THORGEIRSDÓTTIR (Member, Iceland), Strasbourg, December 9, 2013, link: http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2013)038

VERZA S., *Come chiudere il giornale più venduto del paese e ricevere tre miliardi di euro,* March 18, 2016, Unimondo, link: http://www.unimondo.org/Notizie/Come-chiudere-il-giornale-piu-venduto-del-paese-e-ricevere-tre-miliardi-di-euro-156221 (9/14/16)

VERZA S., *Freedom of expression, role and control of media in Turkey and EU-A comparative analysis,* Istanbul, April 2014, p. 6; link: https://www.academia.edu/23770314/FREEDOM_OF_EXPRESSION_ROLE_AND_CONTROL_OF_MEDIA_IN_TURKEY_AND_EU_a_comparative_analysis (9/12/16)

VERZA S., *La quiete dopo la tempesta,* January 29, 2016. Link: http://www.unimondo.org/Notizie/La-quiete-dopo-la-tempesta-155073

VERZA S*., Sovrano è chi decide sullo stato di eccezione,* July 26, 2016, Unimondo, link: http://www.unimondo.org/Notizie/Sultano-e-chi-decide-sullo-stato-di-eccezione-159052

VERZA S., *The case of Blocking Il Giornale.it News website,* "Global Freedom of Expression Centre", Columbia University, link: *https://globalfreedomofexpression.columbia.edu/cases/case-blocking-il-giornale-news-website-italy/* (9/12/16)

VERZA S., *The case of Journalists Can Dündar and Erdem Gül,* "Global Freedom of Expression Centre", Columbia University, link: https://globalfreedomofexpression.columbia.edu/cases/case-journalists-can-dundar-erdem-gul/ (9/12/16)

VERZA S., *Turchia: I mille volti di un terrorista,* in Unimondo.org, December 3, 2015; link: http://www.unimondo.org/Notizie/Turchia-i-mille-volti-di-un-terrorista-154007

VICE NEWS, *Free Rasool: VICE News Staff on the Journalist Now Imprisoned for a Month in Turkey,* September 27, 2015, link: https://news.vice.com/article/free-rasool-vice-news-staff-on-the-journalist-now-imprisoned-for-a-month-in-turkey

VICE NEWS, *Turkey Has Released VICE News Journalist Mohammed Rasool On Bail,* in *Vice News,* January 5, 2016, link: https://news.vice.com/article/turkey-has-released-vice-news-journalist-mohammed-rasool-on-bail

VLADECK S. , Global Freedom of Expression Centre annual conference " Justice for Free Expression 2015", Panel 2 - *Freedom of Expression, Religion and*

National Security, Columbia University, April 4, 2015, link: https://globalfreedomofexpression.columbia.edu/justice-free-expression-2015-day-1/

VOORHOOF D., *Eon v. France,* in IRIS- Merlin database, http://merlin.obs.coe.int/iris/2013/5/article1.en.html (9/17/16)

VOORHOOF D., MCGONAGLE T., *Freedom of Expression, the Media and Journalists: Case-law of the European Court of Human Rights*, IRIS *Themes*, European Audiovisual Observatory, Strasbourg, 2015 (e-book), link: http://www.obs.coe.int/documents/205595/2667238/IRIS+Themes+-+Vol+III++-+Ed+2015+EN.pdf/2f3d578d-2e05-442f-8326-917beab7626d (9/11/16)

WIKE R., SIMMONS K., *Global support for principle of free expression, but opposition to some forms of speech,* Appendix C: Detailed Tables, *"Pew Research Centre",* November 18, 2015, link: http://www.pewglobal.org/2015/11/18/appendix-c-detailed-tables/

WIKE R., SIMMONS K., *The boundaries of a Free Speech and a Free Press, supra* note No. 774, link: http://www.pewglobal.org/2015/11/18/2-the-boundaries-of-free-speech-and-a-free-press/

WITHNALL A. , *Nice attack: Hollande extends France's state of emergency after Bastille Day massacre,* July 15, 2016; link: http://www.independent.co.uk/news/world/europe/nice-attack-bastille-day-president-francois-hollande-france-state-of-emergency-extended-a7137991.html

YILMAZ I., *National security as basis for broad access bans,* International Law Office, ELIG Law Firm, September 22,2015 link: http://www.internationallawoffice.com/Newsletters/IT-Internet/Turkey/ELIG-Attorneys-at-Law/National-security-as-legal-basis-for-broad-access-bans

ZELDIN W., *Turkey: Immunity for Soldiers Involved in Counterterrorism Operations,* in "The Law Library of Congress", link: http://www.loc.gov/law/foreign-news/article/turkey-immunity-for-soldiers-involved-in-counterterrorism-operations/

ZELDIN W., *Turkey: Individual access to Constitutional Court,* in *Library of the Congress, Global Legal Monitor,* October 12, 2012, link: *http://www.loc.gov/law/foreign-news/article/turkey-individual-access-to-constitutional-court/*

ZIC (ZERO IN CONDOTTA), *11 Marzo: non dimentichiamo,* March 8, 2006, http://www.societacivilebologna.it/ser/documenti/06/mar06/ZIC%2077.pdf

ZIRULIA S., *No Tav: la Cassazione fissa i parametri interpretativi in merito alle condotte di attentato ed alla finalità di terrorismo,* June 30, 2014; link: *http://www.penalecontemporaneo.it/tipologia/0-/-/-/3186-/?utm_source=dlvr.it&utm_medium=twitter*

Jurisprudence

European Court of Human Rights (ECtHR)

ECtHR , *Ahmet Yıldırım v. Turkey,* Application no. 3111/10, judgment March 18, 2013, link: http://hudoc.echr.coe.int/eng?i=001-115705

ECtHR , *Murat Vural v. Turkey,* Application No. 9540/07, judgment January 21, 2015, link: http://hudoc.echr.coe.int/eng?i=001-147284

ECtHR , *Tuşalp v. Turkey,* Applications nos. 32131/08 and 41617/08, judgment May 21, 2012; link: http://hudoc.echr.coe.int/eng?i=001-109189

ECtHR, *Altuğ Taner Akçam v. Turkey,* App. No. 27520/07, judgment January 25, 2012, link: http://hudoc.echr.coe.int/eng?i=001-107206,

ECtHR, *Artun and Güvenler v. Turkey*, App. No. 75510/01, judgment June 26, 2007; link: http://hudoc.echr.coe.int/eng?i=001-81181

ECtHR, *Belpietro v. Italy,* App. No. 43612/10, judgment September 24, 2013, link: available in French http://hudoc.echr.coe.int/eng?i=001-126450 and Italian http://hudoc.echr.coe.int/eng?i=001-146290

ECtHR, *Castells v. Spain,* App. No. 11798/85, Judgment April 23, 1992; from the HUDOC website: http://hudoc.echr.coe.int/eng?i=001-57772

ECtHR, *Cestaro v. Italy,* App. No. 6884/2011, Judgment of April 7, 2015, link to the Legal Summary: http://hudoc.echr.coe.int/eng?i=002-10650

ECtHR, *Dicle v. Turkey,* Application No. 34685/97, Judgment February, 10, 2005.

ECtHR, *Dink v. Turkey,* App. No. 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09, judgment December 14, 2010; link (French version): http://hudoc.echr.coe.int/eng?i=001-100383

ECtHR, *Eon v. France,* Application no. 26118/10, judgment March 14, 2013, link: http://hudoc.echr.coe.int/eng?i=001-117742

ECtHR, *Gökbulut v. Turkey*, App. No. 7459 of 2004, Final judgment June 29, 2016, link (French version): http://hudoc.echr.coe.int/eng?i=001-161747

ECtHR, *Goodwin v. UK* , App. No.17488/90, judgment March 27, 1996, link: http://hudoc.echr.coe.int/eng?i=001-60596

ECtHR, *Handyside v. UK,* App. No. 5493/72, Judgment December 7, 1976, http://hudoc.echr.coe.int/eng?i=001-57499

ECtHR, *Incal v. Turkey,* App. No. 41/1997/825/1031, Judgment of June 9, 1998, link: *http://hudoc.echr.coe.int/eng?i=001-58197.*

ECtHR, *Jersild v. Denmark,* App. No. 15890/89, Judgment of September 23, 1994, link: http://hudoc.echr.coe.int/eng?i=001-57891

ECtHR, *Kapar v. Turkey,* App. No. 7328/03, Judgment August 3, 2007, link: http://hudoc.echr.coe.int/eng?i=001-80423.

ECtHR, *Khurshid Mustafa and Tarzibachi v. Sweden*, App. No 23883/06, Judgment March 16,2009, link: http://hudoc.echr.coe.int/eng?i=001-90234

ECtHR, *Kruslin v. France,* App. No. 11801/85, Judgment April 24, 1990, link: http://hudoc.echr.coe.int/eng?i=001-57626

ECtHR, *Lingens v. Austria,* App. No. 9815/82, Judgment July 8, 1986, link: http://hudoc.echr.coe.int/eng?i=001-57523

ECtHR, *Nedim Sener v Turkey,* App. No. 38270/11, Judgment of October 8, 2014; link (French version): http://hudoc.echr.coe.int/eng?i=001-145343

ECtHR, *Observer and Guardian v.* UK, App. No. 13585/88, Judgment November 26, 1991, link: http://hudoc.echr.coe.int/eng?i=001-57705

ECtHR, *Öcalan v. Turkey,* App. No. 46221/99, Grand Chamber Judgment of May 12, 2005, link: http://hudoc.echr.coe.int/eng?i=001-69022.

ECtHR, *Özgür Gündem v. Turkey,* App. No. App. No. 23144/93, Judgment of March 16, 2000, Remark No. 38, link: http://hudoc.echr.coe.int/eng?i=001-58508

ECtHR, *Pentikainen v. Finland*, App. No. 11882/10, judgment October 20, 2015; link: http://hudoc.echr.coe.int/eng?i=001-158279

ECtHR, *Perna v. Italy,* App. No. 48898/99, Judgment of July 25, 2001; link: http://hudoc.echr.coe.int/eng?i=001-61075

ECtHR, *Ricci v. Italy,* App. No. 30210/06, Judgment of October 8,2013, link: available in French http://hudoc.echr.coe.int/eng?i=001-126795 and Italian http://hudoc.echr.coe.int/eng?i=001-146280.

ECtHR, *Riolo v. Italy,* App. No. 42211/07, Judgment of July 17, 2008; link: available in French http://hudoc.echr.coe.int/eng?i=001-87614 and Italian http://hudoc.echr.coe.int/eng?i=001-150359

ECtHR, *Şeyhmus Uğur and others v. Turkey,* multiple applications, Judgment April 11,2011, link: http://hudoc.echr.coe.int/eng?i=001-101245;

ECtHR, *Sık v. Turkey,* App. No. 53413/11, Final judgment October 8, 2014, link (French version): http://hudoc.echr.coe.int/eng?i=001-145345

ECtHR, *Sunday Times v. UK No. 2,* App. No. 13166/87, Judgment November 26, 1991, link: http://hudoc.echr.coe.int/eng?i=001-57708

ECtHR, *Şurek v. Turkey No. 1,* App. No. 26682/95, Judgment of July 8, 1999, link: http://hudoc.echr.coe.int/eng?i=001-58279

ECtHR, *Thorgeir Thorgeirson v. Iceland,* Application No. 13778/88, judgment June 25, 1992; link: http://hudoc.echr.coe.int/eng?i=001-57795

ECtHR, *Yurdatapan v. Turkey,* App. No. 70335/01, Judgment of April 8, 2008; http://hudoc.echr.coe.int/eng?i=001-84274.

USA

New York Times Co. v. United States (1971), 403 U.S. 713 (1971)

Syed Farjah Hassan v. City of New York, Appeal Court of Philadelphia, October 2015; link: https://ccrjustice.org/sites/default/files/attach/2015/10/Hassan%203rd%20Cir%20Ruling%2010-13-15.pdf

Turkmen v. Hasty, (Appeal Court of New York), June 2015

Supreme Court, *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942)

Supreme Court, "Case of the Missing Amendments", *R.A.V. v. City of St. Paul* (1992), link at the *Yale Law School Legal Scholarship Repository: http://digitalcommons.law.yale.edu/fss_papers/1039/*

Italy- Domestic Courts

Order fixing the preliminary hearing of Davide Falcioni, No. 12936/15 R.G. P.M. and No. 802/16 R.G. G.I.P

First Instance Court of Rovigo, Judgment No. 157 of 2014

First Instance Tribunal of Turin, Judgment No. 4573 of October 19, 2015

Criminal Court of Cassation, judgment No. 4938/2010

Criminal Court of Cassation‟s judgment No. 12203/2014

Court of Cassation, Section I, No. 32678/2006

Penal Court of Cassation, judgment No. 28009 of June 27, 2014

Penal Court of Cassation, Section I, Judgment No. 39860 of 2013, link: http://www.canestrinilex.com/risorse/apologia-del-fascismo/

Constitutional Court , Judgment No. 15 of 1982

Penal Court of Cassation, 6th Section, Judgment No. 28009/2014 at http://www.notav.info/wp-content/uploads/2014/06/1404114093Cassazione_no_tav.pdf

Court of Cassation, February 20, 1967, judgment No. 1057

Italian Constitutional Court, Judgment No. 87 of 1977

Italian Constitutional Court, Judgment No. 65 of 1970

Italian Constitutional Court, Judgments No. 348 and 349 of 2007

Italian Constitutional Court, Judgment No. 1 of 1957, link: http://www.giurcost.org/decisioni/1957/0001s-57.html

Çok iyi bir arkadaş ve muhteşem bir avukat olan Koray'a. Türkiyeyi tanımama yardım eden Hazal, Gianpietro, Göhkan, Güneş, Selen, Bubu, Eren, Emre, Ozgur, Inanc, Asıl'ya ve diğer bütün muhteşem insanlara teşekkür ederim.

I am also grateful to the *Global Freedom of Expression Centre* of Columbia University, that offered me the possibility to work with them, for their professionalism and kindness.

Questo lavoro deve molto all'aiuto e all'insegnamento del professor Gabriele Fornasari, che desidero ringraziare.

Grazie ai miei genitori, per aver reso possibili i miei studi ed assecondato ogni mia esperienza. Grazie a Marta, che è più che una sorella.

Grazie a Duccio, che mi insegna la potenza della scrittura ogni giorno, per il suo amore e la sua pazienza.

Grazie alle amiche di sempre, e alla Ghenghe, che crescono assieme a me.