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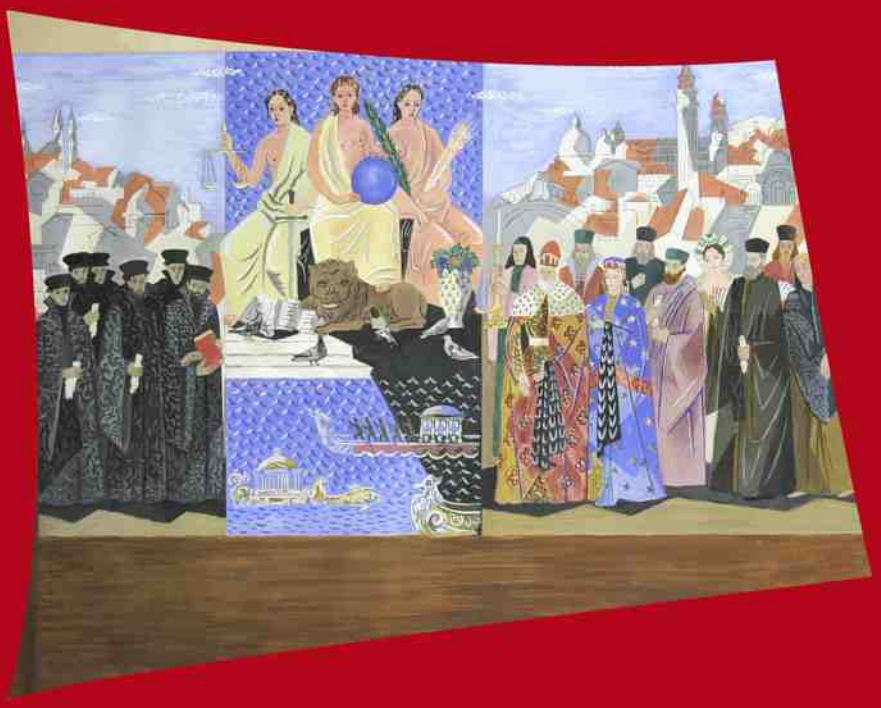
Diritto penale della Repubblica di Turchia

Criminal law of the Republic of Turkey

a cura di

Silvio Riondato e Rocco Alagna



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On Criminal Law and Criminal Justice in the Constitution of the Republic of Turkey[1]

Lorenzo Pasculli – Chiara Candiotto – Silvio Riondato

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1. The root problem of the criminal law approach to the Turkish Constitution

The authors of this paper recognize themselves in the figure of western criminal lawyers, not properly introduced to the effectiveness of Turkish constitutional

[1] The results of the research of the Authors are entirely fruit of common work and reflections. Lorenzo Pasculli wrote paragraphs 2, 3, 5 and 7; Chiara Candiotto wrote paragraphs 4 and 6; Silvio Riondato wrote the first paragraph. The Authors give thanks to Ali Emrah Bozbayındır, whose collaboration allowed them to overcome also language difficulties.

and criminal law. Most of all, they have no personal experience of the multiversal complexity of Turkish civilization and culture – not only legal. This posed serious problems with respect to the ambition of at least trying to understand the meaning of the Turkish Constitution. Such problems can be summarized starting with the risk of a wrong pre-comprehension (*Vorverstaendis*), as conditioned by "western" acquisitions of many kinds, which are not applicable to the Turkish (not only) legal experience.

The consequent discomfort increased in the experimentation of the supposed remedy consistent in taking advantage of the studies of others[2]. Indeed, at least at first sight and above all, wide margins of incompatibility of that singular plurality of constitutional theories elaborated for Turkey, also by Turkish authors, emerge. And all such theories are more or less "deviant" compared to the models employed in western countries, while many basic differences are detected, and not unanimously.

We cannot deal with all these aspects, not even briefly, given the economy of this work. It is enough to say that the detected differences in effectiveness (not only) of Law seem to depend, at the end of the day, on the not yet sufficiently matured process of reciprocal approach between traditions of Islamic origin and traditions of Christian origin and vice versa. Two examples would be relevant in this regard: 1) an idea of sovereignty tendentially non-transferable; 2) the particular relation between "constitutional matters" and statutory reservation: many aspects consolidated as "object" of statutory reservation by the western constitutionalism in Turkey have

[2] It is enough to recommend some studies used as a starting point, recalling for any further examination the works cited there: R. Bottoni, *Il principio di laicità in Turchia. Profili storici e giuridici,* Vita e Pensiero, Milano 2012; A. Serra Cremer, *Turkey between the Ottoman Empire and the European Union: Shifting Political Authority through Constitutional Reform*, in *Fordham Int'l L.J.*, 35, 2011-2012, p. 279; M. Carducci, *Il sistema di giustizia costituzionale della Turchia*, in L. Mezzetti (ed.), *Sistemi e modelli di giustizia costituzionale*, t. II, Cedam, Padova 2011, p. 293; F.M. Göçek, *The transformation of Turkey: redefining state and society from the Ottoman Empire to the modern era*, Tauris Academic Studies, London 2011; M.G. Sahin, *Turkey between the Ottoman Past and the Kemalist Republic*, in *Yale J. Int'l Aff.*, 6, 2011, p. 140; T. Oğuzlu, *Turkey and the west. The rise of Turkey-centric westernism*, in *Int'l J.*, 66, 2010-2011, p. 981; V. Bader, *Constitutionalizing secularism, alternative secularisms or liberal-democratic constitutionalism?*, in *Utrecht L. Rev.*, 6, 2010, p. 8; E. Özbudun, Ö.F. Gençkaya, *Democratization and the Politics of Constitution-Making in Turkey,* Central European University Press, Budapest-New York 2009; M. Carducci, *Teorie costituzionali per la Turchia*, in *Dir. pubbl. comp. Eur.*, II, 2008, p. 546; M. Carducci, B. Bernardini d'Arnesano, Turchia, Il Mulino, Bologna 2008; E. Lagro, K.E. Jørgensen (eds.), *Turkey and the European Union: prospects for a difficult encounter,* Palgrave Macmillan, Basingstoke 2007; Ö. Kaboglu Ibrahim, *Le riforme costituzionali in Turchia*, in *Dir. pub. Comp. Eur.*, 2006, p. 20; E. Özbudun, *Political Origins of the Turkish Constitutional Court and the Problem of Democratic Legitimacy*, in *Eur. Pub. L.*, 12, 2006, p. 213; S. Allievi, *Le trappole dell'immaginario: islam e occidente*, Forum, Udine 2007; Id., *Musulmani d'Occidente*, Carocci, Roma 2002; E. Gentile, *Le religioni della politica. Fra democrazie e totalitarismi*, Laterza, Bari 2001; B. Lewis, *Il suicidio dell'Islam*, Mondadori, Milano 2002; S. Noja, *Storia dei popoli dell'Islam*, I (1995, I ed. 1974 Editrice Esperienze), II (1993), III (1994), IV (1990), Mondadori, Milano.

been constitutionalised, with consequent stiffening of normative dynamics and – for us unconceivable – extension of a very pervasive constitutional review on political choices.

In such perspective, the sometimes brilliant and exemplary unifying solutions offered by the literal formulation of the Turkish Constitution stand aside. As for their effectiveness, such solutions at times live only amongst élites, no matter how large. Élitist is, without any doubt, the lively group of Turkish, German and Italian criminal lawyers who developed the research project, the results of which are presented in this book. And aside they lay, although important, the common solutions that, especially with regard – amongst others – to criminal law, can be detected in the text of the Constitution of the Republic of Turkey and that we like to trace back to a higher and broader unifying moment, that is to say the common subjection to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).

Nevertheless, all these solutions help to build an effective common legal house, which the housemates, if tolerant, will know how to widen with democratic spirit, without violent breakings of history. But there is even a more intense communion based on a radically different critical, philosophical conception of the relations between Islam and western tradition, according to which the latter includes the former and vice versa, and instead of detecting clashes amongst civilizations, opposed ways of life, irremediable legal differences, from both sides could be pointed out the common religious and philosophical roots, which, moreover, together face an inexorable sunset, chiefly caused by the fall of gods[3].

However, lawyers who want to embark in the solution of the problems concerning the effectiveness of Turkish and Italian criminal law cannot ignore the urgent and tragically unifying common problem: Italy and Turkey are the most condemned member States for violation of the ECHR. Italy is not an example of effectiveness of criminal law, which is what really matters. We are the most condemned State for the breach of Art. 6, § 1 ECHR, due to the unreasonable length of court proceedings (more than 2.000 condemnations). We are the State with the highest number of non-executed sentences of the Court of Strasbourg. On March 13th, 2012 the Committee of Ministers of the Council of Europe noticed that the current functioning of Italian justice undermines the respect of the supremacy of law, which ends up in a negation of the rights proclaimed by the ECHR and which poses a serious threat for the efficacy of the system on which the same Convention is based.

The Commissioner for Human Rights of the Council of Europe, Nils Muiznieks, at the end of his recent visit in Italy from 3 to 6 July 2012, states in his report that «the excessive length of court proceedings in Italy» is «a long-standing human rights

[3] E. Severino, *Dall'Islam a Prometeo*, Rizzoli, Milano 2003.

problem, which has considerable negative repercussions [...] for individuals and the Italian economy» and that in times of crisis this fact should be an incentive to find solutions capable to change such a route[4]. After Serbia, we are the member State with the highest prison overcrowding rate. Detainees in Italy are more than 66.000, whereas the normal capacity amounts to about 55.000 (according to the data of the Ministry, updated to August 31st, 2012). During the last 14 months many deaths occurred: 116 deaths amongst those detained in prison or interned in judicial psychiatric hospitals, 66 of which are suicides. We have been condemned recently five times for inhuman and degrading conditions of detention. Before the Court of Strasbourg more than 1.200 recourses are pending concerning detainees in Italian prisons, who allege violations of Art. 3 of the ECHR. It is not just a generically humanitarian problem, because it is a matter of systematic breach of constitutional legality. The Italian Constitution can certainly teach very much, by its words, especially where it expressly affirms the penal principle of humanity[5], beloved by Cesare Beccaria[6] and, much later, by two unequalled Masters of criminal law, Giuseppe Bettiol, author of the Italian constitutional norms concerning criminal law, and Franco Bricola[7]: «punishments cannot consist in treatments contrary to the sense of humanity...» (Art. 27, co. 3, Cost.). Here is the postulate that, on paper, can unite and unify Italian and Turkish (not only) criminal law, because the Turkish Constitution, in turn, affirms that «...no one shall be subjected to penalties or treatment incompatible with human dignity» (Art. 17, para. 3). The two traditions do not seem capable of distinguishing or nullifying the essence of the principle, which can stand beyond the cultural roots of individual and collective action[8]. Let's talk about it, but especially let's enforce

[4] *Report by Nils Muiznieks Commissioner for Human Rights of the Council of Europe Following his visit to Italy from 3 to 6 July 2012*, CommDH(2012)26, Strasbourg, 18 September 2012, in < https://wcd.coe.int/ViewDoc.jsp?id=1975447 > (2 October 2012).

[5] Such principle has been affirmed several times also by the Italian Constitutional Court. See, for instance, Corte Cost., 22.12.1964, n. 115; Corte Cost., 12.02.1966, n. 12; Corte Cost., 27.05.1982, n. 104; Corte Cost., 28.07.1993, n. 349; Corte Cost., 24.05.1996, n. 165; Corte Cost., 18.10.1996, n. 351; Corte Cost., 18.05.2006, n. 200. The Supreme Court (Corte di Cassazione) also mentioned it in different occasions: cf., *ex multis*, Cass. Pen., sez. I, 30.03.2004 n. 17947; Cass. Pen., sez. I, 9.05.2006, n. 20035; Cass. Pen., sez. I, 24.01.2011, n. 16681.

[6] C. Beccaria, *Dei delitti e delle pene* (1764 I ed.), Newton, Roma 2012, con *Introduzione* di R. Rampioni. See also M. Pisani, *Cesare Beccaria e il principio di umanità*, in *Riv. it. dir. proc. pen.,* 2011, p. 407.

[7] G. Bettiol, *Diritto penale*, XII ed., Cedam, Padova 1978; F. Bricola, *Teoria generale del reato*, in *Novissimo digesto italiano*, vol. XIX, Utet, Torino 1973; Id., *Politica criminale e scienza del diritto penale*, Il Mulino, Bologna 1997. They are two Italian criminal lawyers who, only because of the missing english translation of their works, still remain unknown to a good part of the world criminal legal science (Bettiol, however, has widely been translated especially in spanish language). See also S. Riondato, *Un diritto penale detto ragionevole. Raccontando Giuseppe Bettiol*, Cedam, Padova 2005.

[8] Cf. A. Bernardi, *Il "fattore culturale" nel sistema penale*, Giappichelli, Torino 2010.

such norms, which are prior to any other.

2. General principles and basic features of the Turkish constitutional order

According to the Turkish Constitution, the Republic of Turkey (Art. 1) is a democratic, secular and social state governed by the rule of law; bearing in mind the concepts of public peace, national solidarity and justice; respecting human rights; loyal to the nationalism of Atatürk (Art. 2). The first two articles of the Constitution reveal the underlying tension between the nationalist and solidaristic vocation of the Republic of Turkey and its aspiration to become a modern state governed by the rule of law and personalistic in nature inspired to the Western tradition[9].

Such a dichotomy runs through the whole constitutional text. The recognition and proclamation of fundamental rights and freedoms finds a systematic counterpoint in limitations, restrictions, exceptions to their exercise set in the interest of the nation. To the extent that, in general, one has the impression that the centrality of the Turkish state in the constitutional provisions overshadows the value of the human person, whereas other constitutions tend to reduce the sacrifices of individual rights in the name of collective interests to the bare minimum. Someone well observed that in the statist philosophy of the Turkish Constitution restrictions on rights and freedoms become the rule rather than the exception[10].

It must be said, however, that many of those provisions that in the original formulation of 1982 relegated Turkey to the status of a «quasi-democracy»[11] were repealed, amended or replaced, especially since 2001, in view of a possible accession of Turkey to the European Union[12]. Thus, as others noticed, the European Union

[9] Cf. T. Oğuzlu, *Turkey and the west. The rise of Turkey-centric westernism*, cit.; P. Ala'ı, *Turkey: at the Crossroads of Secular West and Traditional East. Introduction*, in *Am. U. Int'l L. Rev.*, 24, 2008-2009, p. 679. For an historical evolution of Turkish state and society from the Ottoman Empire until today see F.M. Göçek, *The transformation of Turkey*, cit. On the most recent Neo-Ottomanism of the Justice and Development Party (AK Party) cf. M.G. Sahin, *Turkey between the Ottoman Past and the Kemalist Republic*, cit.

[10] E. Özbudun, Ö.F. Gençkaya, *Democratization and the Politics of Constitution-Making in Turkey,* cit., p. 22.

[11] L.M. McLaren, *Constructing Democracy in Southern Europe. A comparative analysis of Italy, Spain and Turkey*, Routledge, London-New York 2008, p. 104. See also J.S. Joseph (ed.), *Turkey and the European Union: internal dynamics and external challenges*, Palgrave Macmillan, Basingstoke 2006, and, more generally, M. Lake (ed.), *The EU & Turkey: a glittering prize or a millstone?*, Federal Trust, London 2005 e M. Ugur, N. Canefe (eds.), *Turkey and European integration: accession prospects and issues*, Routledge, London 2004.

[12] See E. Örücü, *The Turkish Constitution Revamped?*, in *Eur. Pub. L.*, 8, 2002, p. 201 and Id., *The Turkish Constitution Revamped Yet Again*, in *Eur. Pub. L.*, 17, 2011, p. 11 and A. Serra Cremer, *Turkey between the Ottoman Empire and the European Union*, cit., p. 279. See also E. Hughes, *The Secularism Debate and Turkey's Quest for European Union Membership*, in *Religion & Hum. Rts.*, 3, 2008, p. 15 and E. Lagro, K.E. Jørgensen (eds.), *Turkey and the European Union*, cit.

played an important role in promoting democracy in Turkey, just as it happened before for the countries of South Asia and Central and Eastern Europe[13].

2.1. The relation between Constitution and ordinary law and the constitutional review (and its limits)

The Constitution is the primary source of law in the Turkish legal order. Constitutional provisions are fundamental legal rules binding upon legislative, executive and judicial organs, administrative authorities and other institutions and individuals (Art. 11, para. 1). Laws cannot be in contrast with the Constitution.

The Constitutional Court (*Anayasa Mahkemesi*) has the competence to verify the compliance, in form and in substance, of ordinary laws with the Constitution[14]. There are two ways to challenge unconstitutional legislative provisions: the action for annulment and the contention of unconstitutionality. While the latter is a concrete form of control of norms, since it is always triggered in occasion of a specific case, the former operates in the abstract, that is, without particular reference to a concrete case (abstract control of norms)[15].

As for the action of annulment, the President of the Republic (Art. 104), parliamentary groups of the party in power and of the main opposition party and a minimum of one-fifth of the members of the Turkish Grand National Assembly have the right to apply for annulment, based on the assertion of their unconstitutionality in form and in substance, of laws, of decrees having the force of law, of Rules of Procedure of the Turkish Grand National Assembly or of specific articles or provisions thereof (Art. 150). When it is based on substantial grounds the annulment action shall be brought before the Court within sixty days after the publication of the norm concerned in the Official Gazette (Art. 151), while if it is based on formal grounds the term is of ten days only[16].

As for the contention of unconstitutionality (or objection procedure), claims of

[13] Cf. E. Özbudun, Ö.F. Gençkaya, *Democratization*, cit., p. 43 ss.

[14] On the Turkish Constitutional Court cf. E. Özbudun, *Political Origins of the Turkish Constitutional Court*, cit.

[15] See K. Başlar, H. Tülen, *The Constitutional Court 1962-2003. An Introduction to the Composition and Functions of the Constitutional Court of the Republic of Turkey*, in < www.anayasa.gen.tr/baslar1.htm >, 31 may 2004 (7 September 2012), p. 5 ss.

[16] Cf. also Article 37 of Law n. 6216 of 30 March 2011 on the establishment and the rules of procedure of the Constitutional Court specifies that the right to lodge a direct annulment case with a claim of unconstitutionality of amendments on the Constitution and of laws as to their form shall cease ten days following the date of their promulgation in the Official Gazette. Such right shall cease for decree laws and the Regulation on the Grand National Assembly of Turkey or certain articles and provisions of mentioned regulations as to merits and form, and for laws only as to merits sixty days following their promulgation in the Official Gazette.

unconstitutionality are normally brought before the Constitutional Court by the court called to apply the norm suspected to be unconstitutional to a specific case. This court can raise the claim of its own motion or upon a claim of unconstitutionality submitted by one of the parties, if it is convinced of its «seriousness» (Art. 152, para. 1). If the court is not persuaded the claim shall be decided upon by the competent authority of appeal together with the main judgment (Art. 152, para. 2). Intervention of the parties of the a quo trial is not allowed during the concrete review proceedings[17].

There are some provisions that could compromise the effectiveness of the control of the Constitutional Court on the legislative power. The functioning and the powers of the Turkish Constitutional Court have been significantly affected by the constitutional amendments made with Law n. 5982 dated 7 May 2010 and by the following Law n. 6216 dated 30 March 2011 on the establishment and the rules of procedure of the Constitutional Court (which repealed and replaced Law n. 2949 dated 10 November 1983)[18]. This could have been a great occasion to correct also those aspects of those constitutional regulations of functions and powers of the Court, which still raise perplexities and criticisms. But the cited Law n. 5982 kept silent on such profiles.

The first limitation to the scope of constitutional review of norm concerns its possible object. Three categories of laws cannot be contested before the Court on grounds of unconstitutionality: international treaties (Art. 90 of the Constitution and Art. 42, para. 1, of Law n. 6216 of 2011); decrees having the force of law issued during a state of emergency, martial law or in time of war (Art. 148, para. 1, of Const.); a number of laws expressly listed by Law n. 6216 of 2011.

As for international treaties, Article 90 of the Constitution establishes a precise hierarchy between international law and constitutional law, especially in the area of fundamental rights and freedoms: in case of conflict between international agreements in such area duly put into effect and domestic laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail (Article 90, last Paragraph). Such a choice is the result of the amendment made with Law n. 5170 dated 7 May 2004. Considering the political context in which it was enacted, the norm can be (positively) regarded as an implicit acknowledgement of the higher standards of protection of fundamental rights and freedoms provided by international law compared to those provided by Turkish (constitutional) law and as

[17] Cf. A.R. Çoban, *Concrete control of constitutionality: Turkey. Concrete Review of Norms by the Turkish Constitutional Court*, paper for the *Comparing Constitutional Adjudication (Co.Co.A.)* Summer School on Comparative Interpretation of European Constitutional Jurisprudence, 3rd Edition, University of Trento, 2008, in < http://www.jus.unitn.it/cocoa/papers/papers.html > (8 September 2012), 4.

[18] For a European perspective on Law n. 6216 of 2011 see the report n. 612/2011 Venice Commission of the Council of Europe in < http://www.venice.coe.int/site/dynamics/N_Opinion_ef.asp?L=E&CID=31 > (4 October 2012). In the same site other many interesting reports about Turkish law can be found.

a consequential form of commitment of the Republic of Turkey to comply with international law of human rights and to improve domestic legislation. The limitation set by Article 90 seems, therefore, understandable and reasonable.

On the contrary, the reminded provision of Article 148 is quite problematic. As we are about to see, in times of war and emergency the Constitution authorizes even the entire suspension of the exercise of fundamental rights and freedoms (along with measures derogating the guarantees embodied in the Constitution: Art. 15, para. 1). Since during the states of war or emergency the Council of Ministers may issue decrees having the force of law on matters necessitated by the situation (Art. 121-122, see also Art. 91) it is rather expectable that many of the authorized restrictions or suspension of individual rights will be imposed by such decrees. Yet even in those times the Constitution declares some specific rights absolutely inviolable (such as the right to life and to personal integrity, Art. 15, para. 2). Now, given the limitation to the scope of constitutional review set by the first Paragraph of Article 148, one wonders how could be possibly evaluated, then, the legitimacy of the provisions of the decrees having force of law which should violate the Constitution and especially those rights which the Constitution considers inviolable even in exceptional times.

Also problematic is the list of laws excluded by constitutional review by Article 42 of Law n. 6216 of 2011. Many of such laws, dating back to the Twenties and the Thirties, are part of the secular reform of Atatürk and concern social customs in the context of the legal protection of laicism (and of a completely different constitutional background). Yet one could ask if nowadays some of these laws are fully respectful of human rights, such as Law n. 2596 of 3 December 1934, which forbids the wearing of certain garments (such as the wearing of clerical garbs outside houses of prayer)[19], or Law n. 671 of 25 November 1925, on the wearing of the hat[20]. And, indeed, the European Court of Human Rights already had the chance to declare that certain concrete applications of such laws can end up in compressions of human rights, which are not necessary in a democratic society, in violation of the European Convention on Human Rights[21].

[19] Cf. P. Yannas, *The Human Rights Condition of the Rum Orthodox*, in Z.F. Kabasakal Arat (ed.), *Human Rights in Turkey*, University of Pennsylvania Press, Philadelphia 2007, p. 60.

[20] On this topics see M.C. Uzun, *The Protection of Laicism in Turkey and the Turkish Constitutional Court. The Example of the Prohibition on the Use of the Islamic Veil in Higher Education*, in *Penn St. Int'l L. Rev.*, 28, 2009-2010, p. 383.

[21] ECtHR, case *Ahmet Arslan and others v. Turkey*, Application n. 41135/98, Strasbourg, 23 February 2010: the applicants had been criminally convicted for having worn forbidden clothes. The Court considered that the necessity for the disputed restriction had not been convincingly established by the Turkish Government, and held that the interference with the applicants' right of freedom to manifest their convictions had not been based on sufficient reasons. It held, by six votes to one, that there had been a violation of Article 9. On such topics see R. Bottoni, *Il principio di laicità in Turchia*, cit., especially p. 250-252; V. Bader, *Constitutionalizing secularism, alternative secularisms or liberal-*

Another limitation is set by Paragraph three of Article 152, which establishes that the Constitutional Court shall decide on the matter and make public its judgment within five months of receiving the contention. This quite strict deadline could appear, at first sight, a guarantee for the individual right of a speedy trial (since the *a quo* trial is suspended until the Constitutional Court takes its decision). The following provisions of the same Paragraph, though, states that if no decision is reached within this period, the trial court shall conclude the case under existing legal provisions (however, the trial court must comply with the decision of the Constitutional Court if the decision of the latter is rendered before the decision on the merits becomes final)[22]. That seems to mean that if, for whatever reason, the Constitutional Court does not decide the merits of the claim of unconstitutionality before the five-months deadline the case can be adjudicated according to unconstitutional norms.

Even more surprising is the limitation set by the fourth paragraph of Article 152, according to which no allegation of unconstitutionality shall be made with regard to the same legal provision until ten years elapse after publication in the Official Gazette of the decision of the Constitutional Court dismissing the application on its merits. The wide formulation seems to prevent a further review of a norm already considered by the Court within the same decade, even if the new claim of unconstitutionality is based on different grounds or articles of the Constitution[23]. Such a limitation, widely criticised[24], could appear a feature still linked to the 1982 constitutional system and deserving amendment, if only a similar provision would not have been recently repeated by Law n. 6216 of 2011 (the same law called to implement the most recent constitutional amendments)[25]. The topicality of the question is, therefore, still burning.

The primacy of the Constitution on ordinary law is assured also by the (relative) rigidity of the constitutional text, which can be modified only through the articulated amendment procedure provided by Article 175. It must be said, however, that such rigidity is absolute with reference to certain provisions, which cannot be amended in any way (Art. 4). The norms that cannot be amended are, in particular,

democratic constitutionalism?, cit. For an accurate analysis of the cited decision of the European Court of Human Rights see A. Madera, N. Marchei, *Simboli religiosi "sul corpo" e ordine pubblico nel sistema giuridico turco: la sentenza "Ahmet Arslan e altri c. Turchia" e i confini del principio di laicità*, in R. Mazzola (a cura di), *Diritto e religione in Europa. Rapporto sulla giurisprudenza della Corte europea dei diritti dell'uomo in materia di libertà religiosa*, Il Mulino, Bologna 2012, p. 117-140.

[22] See also Article 40, Para. 5 of Law n. 6216 of 30 March 2011.

[23] Cf. A.R. Çoban, *Concrete control of constitutionality: Turkey*, cit., p. 6.

[24] See, for instance, M. Carducci, B. Bernardino d'Arnesano, *Turchia*, cit., p. 131 or Id., *Il sistema di giustizia costituzionale della Turchia*, cit., p. 299: the Author considers such limitation a serious obstacle to the effective protection of human rights.

[25] Article 41, Para. 1: «In case the trial court deals with the merits and renders a decision of dismissal, the provisions of the same law may not be contested on the grounds of unconstitutionality unless ten years have passed after the promulgation of the decision of dismissal in the Official Gazette».

Articles 1 and 2, which establish the salient features of the Republic of Turkey (democratic, secular and social state governed by the rule of law; bearing in mind the concepts of public peace, national solidarity and justice; respecting human rights; loyal to the nationalism of Atatürk; based on the fundamental tenets set forth in the Preamble) and Article 3, which proclaims the (territorial and national) indivisibility and establishes language, flag, national anthem and the capital.

2.2. Sovereignty, the role of the state, separation of powers and equality

Sovereignty is vested «fully and unconditionally» in the Turkish nation, which shall exercise it through the authorised organs as prescribed by the principles laid down in the Constitution. The right to exercise sovereignty shall not be delegated to any individual, group or class, nor person or agency shall exercise any state authority which does not emanate from the Constitution (Article 6).

These provisions are echoed in the Preamble (which, as we have seen, contains the fundamental immutable principles of the Turkish constitutional order). There, «absolute supremacy» is recognized to the nation, in a perspective centred on the state, rather than the human person. The interests of the nation prevail on the interests of the individual.

The same perspective is also reflected on the definition of the «Fundamental Aims and Duties of the State» (§ V). These aims and duties consist, in order, in the safeguard of the independence and integrity of the Turkish Nation[26], the indivisibility of the country, the Republic and democracy; in ensuring the welfare, peace, and happiness of the individual and society; in striving for the removal of political, social and economic obstacles which restrict the fundamental rights and freedoms of the individual in a manner incompatible with the principles of justice and of the social state governed by the rule of law; in providing the conditions required for the development of the individual's material and spiritual existence (Art. 5).

This norm seems to establish a hierarchy of values in which the interests of the nation still prevail on individual rights. It also seems particularly cautious in affirming the State's duty to protect human rights: the State is not required, in fact, to remove «all» obstacles to the exercise of the rights and freedoms of the individual, but only those that result in restrictions «incompatible with the principles of justice and of the social state governed by the rule of law». Instead of stating the absolute value of certain human rights, the norm sets forth the basis for the legitimacy of restrictions covered in the second part of the Constitution.

[26] Cf. M. Carducci, B. Bernardini d'Arnesano, *Turchia*, cit., p. 64, who define that for the material and spiritual integrity of the Turkish community a real obsession which pervades the whole constitutional lexicon.

3. The recognition of individual rights and freedoms and their basic means of protection

The Turkish Constitution proclaims and recognizes a large number of fundamental human rights and freedoms, including the right to life and individual material and spiritual integrity (Art. 17), the right to liberty and security of person (Art. 19), the right to privacy and the inviolability of domicile (Artt. 20-21), freedom of communication (Art. 22), freedom of movement and residence (Article 23), freedom of conscience and religion (Art. 24), freedom of thought, opinion, expression and of the press (Artt. 25-26 and 28), freedom of science and the arts (Art. 27), freedom of association and assembly (Artt. 33-34), property rights (Article 35). The proclamation of each of these rights and freedoms is punctually accompanied, however, by the explicit provision and regulation of a number of restrictions[27].

The fact that Turkey ratified the European Convention on Human Rights and the several amendments recently introduced in order to ease the access of the Turkish Republic to European Union (especially those of 2001, which mainly concerned the second part of the Constitution, dedicated to fundamental rights and duties) did not prevent many restrictions from being still expressly and widely authorized by constitutional norms[28].

It is not surprising, therefore, that the European Court of Human Rights found Turkey responsible for so many violations of human rights. According to official reports, at the end of 2011, the Court had delivered 2,747 judgments concerning Turkey, of which 2,404 found at least one violation of the European Convention on Human Rights, primarily of Article 6 (right to a fair trial within a reasonable time) and Article 1 of Protocol No. 1 (protection of property), and only 57 found no violation[29]. In 2011, the highest number of judgments of the European Court of Human Rights concerned Turkey (174 cases)[30].

[27] Cf. M. Carducci, B. Bernardini d'Arnesano, *Turchia*, cit., p. 108. See also the observations of E. Örücü, *The Turkish Constitution Revamped?*, cit., p. 218, who also maintains that the particular grammatical structure of many constitutional norms could give the impression that limitations are more important than freedoms and rights.

[28] Cf. Id., op. ult. cit., p. 202 and European Court of Human Rights, *Annual Report 2011*, Registry of the European Court of Human Rights Strasbourg, Vallblor, Illkrich 2012, p. 161.

[29] European Court of Human Rights, *Press Country profile: Turkey*, updated to January 2012, in <http://www.echr.coe.int/NR/rdonlyres/53726604-BC07-4247-8D82-5053943D458E/0/PCP_Turkey_en.pdf > (7 September 2012).

[30] European Court of Human Rights, *Annual Report 2011*, cit., p. 14. On this topic see A. Reidy, F. Hampson, K. Boyle, *Gross Violations of Human Rights: Invoking the European Convention on Human Rights in the Case of Turkey*, in *Neth. Q. Hum. Rts.,* 15, 1997, p. 161; W. van Genutgen, *Turkey and Human Rights: Concerted Action Required*, in *Tilburg Foreign L. Rev.*, 2, 1992-1993, p. 249. See also E. Yilmaz, *Domestic Implementation of the Judgments of the European Court of Human Rights at the National Level: Turkey*, in *Ankara B. Rev.*, 2, 2009, p. 85.

3.1. General provisions concerning human rights and freedoms (and their restrictions)

In general (i.e., with reference to all rights and freedoms), the constitutional framework on human rights is clear already from the Articles opening the first chapter of the second part of the Constitution, containing «general provisions» on fundamental rights and freedoms[31]. Article 12 states that everyone possesses inherent fundamental rights and freedoms, which are inviolable and inalienable. At the same time, however, the same norm states – rather peculiarly – that these rights and freedoms also «comprise» the duties and responsibilities of the individual to the society, his or her family, and other individuals. Thus, even from the first Article dedicated to the protection of fundamental rights the tension between personalism and solidarism emerges. Human rights are never unconditional, but always balanced by corresponding duties.

But there is more than that. The next article expressly prescribes that fundamental rights and freedoms may be restricted by law, in conformity with the reasons mentioned in the relevant articles of the Constitution without infringing upon their essence and in accordance with the letter and spirit of the Constitution and the requirements of the «democratic order of the society and the secular Republic» and the principle of proportionality. The Article sets two important requirements for any restriction of fundamental rights and freedoms: the compliance with the principles of legality and of proportionality. The two principles are strictly complementary[32] and, given the broad variety of restrictions allowed by the Constitution itself, could represent a fundamental safeguard for the individual. While the former principle prevents the introduction of restrictive measures by the executive power (except for cases of emergency, as we are about to see), the latter dictates a punctual rule on how law shall configure such restrictions. That is, the legislator cannot provide for restrictions of fundamental rights and freedoms which are not strictly necessary (necessity is a premise for proportionality) and proportionate to the aims pursued, which is most welcome since other limitations to the legislative power established by the norm do not seem so stringent and remain quite unclear. In this regard, recalling the letter and spirit of the Constitution is quite vain, as it is the same Constitution that – both in general and with regard to specific rights – allows a wide range of restrictions and limitations to the individual sphere. As for the requirements of the «democratic order of society» and of the «secular republic», these are expressions so indefinite in their contents that can be interpreted even in the sense of justifying, rather than limiting,

[31] In general, on the protection (and the abuses) of human rights in Turkey, see P.J. Magnarella, *The Legal, Political, Cultural Structures of Human Rights Protections and Abuses in Turkey*, in *J. Int'l L. & Prac.*, 3, 1994, p. 439.

[32] See also infra, paragraph 3.1.

wider restrictions[33]. For instance, the exercise of certain freedoms of expression in political matters and resulting in political dissent could be well regarded as contrary to the «democratic order» of the Republic, as well as certain manifestations of religious freedom could be regarded as contrary to the spirit of the secular Republic. The necessary compliance with the principle of proportionality represents therefore a healthy device to prevent the legislator from introducing excessive and useless restrictions.

Any act or action of administration imposing restrictive measures is subject to judicial review (Art. 125)[34]. However, judicial power of review is limited to the verification of the conformity of the actions and acts of the administration with law and it cannot be used as review of expediency: that is why some constitutional principles (such as the one of proportionality) setting clear limitations to legislative discretion is quite essential. In general the Constitution seems concerned about the eventuality that the judges can compress or usurp the competences of the executive. The same paragraph of the cited norm clearly states that no judicial ruling shall be passed which restricts the exercise of the executive function in accordance with the forms and principles prescribed by law, which has the quality of an administrative action and act, or which removes discretionary powers.

Article 15 authorizes, in times of war, mobilization, martial law, or state of emergency, the (partial or total) suspension of the exercise of fundamental rights and freedoms, along with the adoption of measures derogating the guarantees embodied in the Constitution, to the extent required by the exigencies of the situation. However, such suspension or measures shall, in any case, comply with obligations under international law and with certain inviolable rights and principles (including criminal law principles) set forth to protect the individual.

First of all, the right to life and the personal spiritual and material integrity are declared inviolable (Art. 15, Para. 2). The only exception is that of deaths occurring through «lawful act of warfare». Such acts shall be interpreted as acts in accordance with the laws of war, according to the original version of the constitutional text («*savaş hukukuna uygun fiiller sonucu meydana gelen ölümler*»).

Secondly, the same paragraph of Article 15 establishes that no one may be compelled to reveal his religion, conscience, thought or opinion, nor be accused on account of them. Such rule was apparently contradicted by Civil Registration Act (Law n. 1587 dated 5 May 1972), which prescribed (Art. 43) that amongst the personal information contained in the civil registers should be also the religion of the person

[33] On some features (and for the possible overcoming) of the extreme («esasperato») conservative laicism of some kemalist élites see M. Carducci, T*urchia: la costituzione turca al tramonto del kemalesimo*, in *Quad. cost.*, 4, 2007, p. 863 ss.

[34] An exception is made for the acts of President of the Republic on his or her own competence, and the decisions of the Supreme Military Council, which are outside the scope of judicial review.

concerned. In 1995 the Constitutional Court declared such norm to be in conformity with Article 2 (secularism) and Article 24 (freedom of religion) of the Constitution[35]. The Court held, in particular, that the rule that no one shall be compelled to reveal his or her religious beliefs and convictions must be read in conjunction with the rule that no one shall be censured or prosecuted for his or her religious beliefs or convictions. In no circumstances does this amount to compulsion, censure or prosecution. The same rule, though, cannot be interpreted as a prohibition on indicating that person's religion in official registers. According to the Constitutional Court the Constitution forbids compulsion (which concerns the disclosure of religious beliefs and convictions), but the State must be aware of the characteristics of its citizens and that the information about religion is required for the purposes of public policy, the general interest, and economic, political and social imperatives, although, according to the principles of secularism, such indication on identity cards must not engender inequality among citizens nor give rise to discrimination. And, indeed, the more recent Civil Registry Services Act (Law no. 5490 dated 29 April 2006), which replaced Law n. 1587, still prescribed that civil registers could contain information about the individual's religion (Articles 7 and 35). It was the European Court of Justice that maintained such a situation is undoubtedly at odds with the principle of freedom not to manifest one's religion or belief and can realize a violation of Article 9 of the Convention[36].

Moreover the rule of Article 15 does not mention the possibility that someone may be compelled to adhere to certain political or religious ideas. Someone could think that this silence suggests the possibility to derogate, in exceptional circumstances, to the express prohibition of any coercion of this kind contained in Article 24. The compliance with international law recalled by the same norm, though, seems to exclude the legitimacy of such compulsions even in the covered cases of emergency.

Finally, even in such cases, offences and penalties may not be made retroactive, nor may anyone be held guilty until so proven by a court judgment (Art. 15, Para. 2). This is certainly an important protection, but still weak compared with the provisions of other European constitutions, since it does not comprises other important principles. Article 55 of the Spanish Constitution, for example, in the event of declaration of the state of emergency or the state of siege, forbids any derogation to the due process of law and the rights of defence.

As for the rights and freedoms of aliens, the Turkish Constitution merely states that they may be restricted by law in a manner consistent with international law (Art. 6). It is clear, therefore, that fundamental rights of aliens are exposed to even greater

[35] Turkey Constitutional Court, 21 June 1995, published in the Official Gazette on 14 October 1995.
[36] See ECtHR, case *Sinan Işık v. Turkey*, Application n. 21924/05, Strasbourg, 2 February 2010 (there more details on the dispositions of the two Turkish laws of 1972 and of 2006 on civil registers can be found).

restrictions than Turkish citizens. This seems to contrast with the current trend to ensure a minimum level of constitutional protection also to aliens – by virtue of the universal recognition of the inviolability of a minimum set of individual rights[37]. Nevertheless, in this case too, the required compliance with international law is enough to exclude any sacrifice of aliens' rights inviolable according to international law[38].

Finally, there is a norm on the «abuse of rights and fundamental freedoms», where abuse means first of all an exercise of these rights aimed at violating the «indivisible integrity of the state with its territory and nation», and endangering the existence of the «democratic and secular order of the Turkish Republic based upon human rights» (Art. 14, Para. 1). It is worthy noticing that Article 24, regulating the freedom of religion and conscience, makes express reference to Article 14 establishing that acts of worship, religious services, and ceremonies shall be conducted freely... provided that they do not violate the provisions. That in Article 14 is a clear affirmation of the primacy of the Turkish nation on the individual, consistent with the approach that we have already pointed out above. Moreover, the statement appears in a way contradictory. Given the overall constitutional structure, the words of the Preamble and the explicit legitimacy of so many restrictions on rights and individual freedoms, it is not quite clear, indeed, the exact meaning of the assertion by which the Turkish Republic would be based on human rights. So that, placed as it is at the end of the norm, it could appear just a vague and meaningless formula. In order to give it some concrete effectiveness, it should be used to fill all the voids of protection, such as those we have enlightened above, left by the literal formulation of the constitutional provisions, in the sense that it is not possible, in a Republic founded on human rights, to admit some restrictions that malicious interpretations of the constitutional norms could suggest.

The second paragraph of Article 14 expressly forbids to interpret any provision of the Constitution in a manner that enables the State or individuals to destroy the fundamental rights and freedoms embodied in the Constitution or to stage an activity with the aim of restricting them more extensively than stated in the Constitution. But again, the mere respect of constitutional provisions proves to be quite a feeble

[37] See the position of the Supreme Court of the United States of America, which stated the need for granting the protections afforded by the Geneva Convention also to aliens suspected of terrorism and detained in Guantanamo in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006). Cf. also *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), *Rumsfeld v. Padilla*, 542 U.S. 426 (2004) e *Boumediene v. Bush*, 553 U.S. 723 (2008).

[38] On such topics see A. Kaya, *Management of Ethno-Cultural Diversity in Turkey: Europeanization of Domestic Politics and New Challenges*, in *Int'l J. Legal Info.*, 38, 2010, p. 214; D. Kurban, *Unravelling a Trade-Off: Reconciling Minority Rights and Full Citizenship in Turkey*, in *Eur. Y.B. Minority Issues*, 4, 2004-2005, p. 341. With regard also to historical aspects, cf. D. Jung, *Minorities as a Threat: A Historical Reconstruction of State-Minority Relations in Turkey*, in *Eur. Y.B. Minority Issues*, 2, 2002-2003, p. 127.

protection against the State discretion of imposing restriction to individual rights, since it is the Constitution itself that enables the State to enact the widest range of restrictions, so that in most cases the State will not need to violate the Constitution in order to apply them in an authoritarian way.

The third paragraph of Article 14 provides that sanctions against those who perpetrate both types of abuse shall be determined by law.

3.2. Restrictions to specific individual rights and freedoms

We will now consider the restrictions of specific individual rights and freedoms provided for by the second chapter of Part II of the Constitution, dedicated to the «rights and duties of individuals», leaving aside, for the moment, the provisions relating to the right to life and inviolability of person and to personal freedom, which are directly involved by the principles of criminal law which we will examine later.

Any restriction of human rights and freedoms (at least in ordinary non-emergency times) shall comply with the principles of legality and proportionality and is subject to (subsequent) judicial review (see Articles 40 and 125). Not every restriction, though, must necessarily be imposed by a court's decision: certain rights and liberties can be compressed directly by the administrative authority.

The decision of a judge is required to restrict the rights to private and family life and the inviolability of domicile and to freedom of communication (Articles 20-22), the freedom of the press (Art. 28) and to dissolve of associations and foundations (Art. 33). In many of these cases, though, where delay is prejudicial, provisional restrictions can be directly imposed by a written order of authorized administrative agencies. The decision of these authorities shall be notified to the competent judge within twenty-four hours. If the judge does not uphold it within forty-eight hours, the administrative decision becomes null and void (see Articles 20, para. 2, 21, para. 2, 22, para. 3, 28, para. 4 and 6, 33, Para. 5).

As for freedom of movement (Art. 23), freedom of expression and dissemination of thought (Art. 26) and property rights (Art. 35), they can apparently be restricted directly by administrative authorities without the intervention of a judge (except for restrictions of a citizen's freedom to leave the country, which require a court decision based on criminal investigation or prosecution: Art. 23, para. 3). In these cases, however, the person concerned can always make recourse to subsequent judicial review.

The grounds for the restrictions of fundamental rights and freedoms are expressly listed in every single norm authorizing such restrictions. They (slightly) differ from case to case but they comprise a wide number of possible reasons. They include: national security, crime prevention, punishing or apprehending offenders, the protection of public health and public morals, the protection of the rights and freedoms of others, the safeguard of the basic characteristics of the Republic and of the indivi-

sible integrity of the State with its territory and nation.

A close inspection of such grounds reveals the particular stress posed by the norm on the needs for social control and social defence. Furthermore, it is hardly necessary to point out that the definition of many of such grounds sounds generic enough to allow extensive interpretations aimed at legitimizing the adoption of the most invasive restrictive measures for reasons that probably, in many other jurisdictions, would not sufficient to justify them. In particular, the vagueness of certain interests (e.g., «public morals») could open the way to unfair trade-offs to the detriment of delicate personal values (e.g., the right to family life)[39].

Preventive measures restrictive of individual rights and liberties are expressly admitted, even *praeter delictum* (that is, before a crime is committed). Indeed, the prevention (of the commission) of a crime is one of the most common grounds for restricting fundamental rights and freedoms. It is quite puzzling and criticisable, though, the choice of using different expressions to describe the ground of crime prevention. It is not clear why sometimes the Constitution refers to "prevention of the commission of a crime" («*suç işlenmesinin önlenmesi*»: Artt. 20, para. 2, Art. 22, para. 2, Art. 23, para 3), sometimes to prevention of crimes («*suçların önlenmesi*»: Art. 28, para. 6 and Art. 26, para. 2), as opposed to the prevention of «the continuation of a crime» (Art. 23, para. 5). It could be arguable that probably all these expressions mean the same thing, that is the prevention of crime even before its commission – the explicit reference, in some cases, to the prevention of the commission indicating that this is the meaning to assign to any other reference to crime prevention. It could be also argued, though, that the explicit reference to (the prevention of) the commission of a crime shall be interpreted as the perpetration of a well specified and identified offence which is about to be committed (therefore implying some kind of criminal activity – at least at the stage of programming and preparation – already in act): so that in these cases the norms legitimate the enforcement of restrictive measures aimed at preventing the clear and present danger of the immediate commission of a crime; whereas where the norm is silent about the perpetration of a crime, it shall be interpreted only as allowing restrictions of the rights in question only *post delictum*. In our opinion, the first interpretation seems more coherent with the general constitutional background – yet the mentioned terminological choice remains confusing.

The only rights and freedoms that cannot be restricted at all appear to be freedom of religion and conscience (Art. 24) and freedom of thought and opinion seems to be practically absolute. No restriction of such liberties is allowed, although interestingly enough education and instruction in religion and ethics shall be «conducted under

[39] Cf. E. Örücü, *The Turkish Constitution Revamped?*, cit., p. 204.

state supervision and control»: Art. 24, para. 4)[40].

The right to privacy and family life, the domicile and freedom of communication can be restricted for the same grounds and usually by seizure, search and interception of communications (Articles 20-22). The exercise of freedom of expression and dissemination of thought can also be variously restricted (Art. 26)[41]. Freedom of movement may be restricted by law only for the purpose of investigation, prosecution and prevention of offences (however, citizens may not be deported, or deprived of their right of entry to their homeland: Art. 23, para. 2-3). Freedom of residence can be restricted, other than to prevent offences, to promote social and economic development, to ensure sound and orderly urban growth, and to protect public property (Art. 23, para. 2).

Quite peculiar is the configuration of restrictions applicable to freedom of the press. The Constitution considers «offences» the conduct of those who write or print any news or articles threatening the (internal or external) security of the state or, again, the indivisible integrity of the state with its territory and nation, tending to incite offence, riot or insurrection, or referring to classified state secrets, along with the conduct of those who print or transmit such news or articles to others for the above purposes and obliges the legislator to hold responsible the authors these offences. This affirmation of responsibility sets forth a clear balance between the value of freedom of the press and the national values which prevail on the former. Such balance rules the following provision of several instances of suspension and seizure of the press.

Firstly, distribution of news may be suspended as a preventive measure by the decision of a judge. Like the restrictions of the rights to private life, domicile and communication, in the event delay is prejudicial (the norm does not specify to what, but one can presume to the same values that justify the suspension), the suspension can be imposed by the competent authority designated by law, which shall notify a competent judge of its decision within twenty-four hours at the latest. The administrative order becomes null and void if not upheld by the judge within forty-eight hours.

Secondly, a court sentence can temporarily suspend periodicals published in Turkey containing material contravening the indivisible integrity of the state with its territory and nation, the fundamental principles of the Republic, national security and public morals. Of course, any publication representing a continuation of a su-

[40] On this topic, with special regard to compulsory education, see, amplius, R. Bottoni, *Il principio di laicità in Turchia*, cit., p. 246-247 and O. Akbulut, Z.O. Usal, *Parental Religious Rights vs. Compulsory Religious Education in Turkey*, in *International Journal on Minority and Group Rights,* 15, 2008, p. 433-455.

[41] Cf. M. Aslan, *Secure State, Insecure People: Turkey's Freedom of Expression Problem*, in *Finnish Y.B. Int'l L.*, 15, 2004, p. 177.

spended periodical is prohibited and can be seized by a judge.

Thirdly, periodical and non-periodical publications may be seized by a decision of a judge in cases of ongoing investigation or prosecution of offences prescribed by law, and, in situations where delay could endanger the indivisible integrity of the state with its territory and nation, national security, public order or public morals and for the prevention of offence by order of the competent authority designated by law (which becomes null and void if not notified to a competent judge within twenty-four hours and upheld within forty-eight hours). The same considerations we made regarding generic definitions of values such «public morals» and «public order» and the same criticisms we pointed out about the constant primacy of the «national integrity» over the rights of the individual can apply here too.

In any case, the ban of reporting of events is forbidden, except when applied by decision of a judge in order to ensure proper functioning of the judiciary, within the limits specified by law.

4. Means of protection of individual rights and freedoms. Judicial review and individual application to the Constitutional Court

According to Article 40 of the Turkish Constitution, as amended in 2001[42], everyone whose constitutional rights and freedoms have been violated has the right to request prompt access to the competent authorities. The State is obliged to indicate in its transactions the legal remedies and authorities the persons concerned should apply and to compensate damages incurred by any person through unlawful treatment by holders of public office (the State, in turn, has the right of recourse to the official responsible).

The general remedy against all actions and acts of public administration is the recourse to judicial review, granted by Paragraph 1 of Article 125 of the Constitution. Paragraph 7 of the same Article adds to such remedy the obligation for the administration to compensate for damages resulting from its actions and acts. If such damages should be difficult or impossible to compensate for, and at the same time the administrative act is clearly unlawful, then a stay of execution may be decided upon (Para. 5). The issuing of stay of execution orders can be restricted by law in cases of state of emergency, martial law, mobilisation and state of war, and for reasons of national security, public order and public health. While such restriction to stay of execution orders in war and emergency situations can be understandable, it could result in a substantial weakening of judicial review in the other cases, namely national security, public order and public health. Indeed, these are the typical sectors of administrative activity where harms to fundamental rights and freedoms are likely to occur.

[42] Law n. 4709 of 3 October 2001.

As we saw already, the Constitution takes care of providing the administrative power with some form of protection against the judiciary. According to the same Article, judicial power is limited to the verification of the conformity of the actions and acts of the administration with law and in no case it can be used as review of expediency. No judicial ruling can restrict the exercise of the executive function in accordance with the forms and principles prescribed by law, nor judicial ruling can have the quality of an administrative action or remove discretionary powers (para. 4).

The acts of the President of the Republic on his own competence and the decisions of the Supreme Military Council are outside the scope of judicial review (except for Supreme Military Council decisions regarding expulsion from the Armed Forces: Para. 2).

An important and innovative remedy, even compared to some other European countries (such as Italy) which still have not introduced similar procedures, is the individual application to the Constitutional Court on the grounds that one of the fundamental rights within the scope of the European Convention on Human Rights which are guaranteed by the Constitution has been violated by public authorities. The remedy of individual application, introduced with the amendment to Article 148 made with Law n. 5982 of 7 May 2010 and fully regulated with Law n. 6216 of 30 March 2011, closely reminds of the *Verfassungsbeschwerde* before the German *Bundesverfassungsgericht*[43] and of the *Recurso de Amparo* before the *Tribunal Constitucional* in Spain[44].

Individual application is a subsidiary remedy: all administrative and judicial remedies provided by the law relating to the proceeding, act or negligence which is alleged to have caused violation must be exhausted prior to individual application (Art. 148, Para. 3, Const. and Art. 45, Para. 2, Law n. 6216). Moreover, judicial review shall not be made for matters which would be taken into account during the process of recourse to legal remedies (Art. 148, Para. 4, Const. and Art. 49, Para. 6, Law n. 6216).

Individual applications may be filed only by citizens and foreigners whose actual and personal rights are directly affected by the alleged proceeding, act or negligence which has caused the violation (although foreigners may not petition individual applications concerning rights exclusive to Turkish citizens). Also private-law legal persons may apply, but solely on the grounds that their rights concerning legal personality have been violated, whereas public legal persons may not apply at all (Art. 46 Law n. 6216).

Not every case brought to the attention of the Court is decided on the merits. The Court may decide inadmissibility not only of applications which lack of explicit

[43] § 93, Abs. 1, *Satz* 1, BVerfGG (*Bundesverfassungsgerichtsgesetz*).
[44] *Ley Orgánica* 2/1979, *de 3 de octubre, del Tribunal Constitucional*.

basis, but also of applications which do not bear significance for the enforcement and interpretation of the Constitution or for the determination of the scope and limits of fundamental rights, as well as applications which do not involve significant damage (Art. 48, para. 2, Law n. 6216). When an application is found admissible, the Court may, *ex officio* or upon request of the applicant, take any measure it deems necessary for the protection of the applicant's fundamental rights (in that case the decision on the merits must be rendered within six months at the latest, otherwise, the decision on measures is revoked ipso facto). The power to take measures is an important device for granting effectiveness and promptness to the remedy of individual application: no much good would it do if the Court could not timely stop unlawful and harmful administrative actions from being carried out.

Article 45, para. 3, of Law n. 6216 establishes that direct individual applications may not be petitioned against proceedings excluded from judicial review by the Constitution pursuant to Constitutional Court judgments (other than legislative proceedings and regulatory administrative proceedings). This limitation makes the interpreter wonder if it could be possibly referred also to proceedings leading to the promulgation of decrees having the force of law issued during a state of emergency, martial law or in time of war, expressly excluded by the Constitution to constitutional review. If that is the case, important questions as to the effective protection of individual rights during exceptional times raise.

5. Constitutional principles of substantive criminal law

Other than the above mentioned remedies, the Turkish Constitution includes amongst the means of protection of rights a number of principles and guarantees – many of which typical of criminal law and procedure.

A long list of substantive criminal law principles (literally «Principles Relating to Offences and Penalties») is set by Article 38, which is significantly included in the section of the «Provisions Relating to the Protection of Rights». The same list comprises also principles of criminal procedure, but most of procedural principles and guarantees are stated in Article 19, dedicated to the protection of personal liberty and security.

We will consider here the substantive criminal law principles, while the criminal procedure principles will be examined in paragraph 6.

5.1. Principle of legality

The first principle to be proclaimed by Article 38 is the principle of legality. It concerns, in a very extensive way, not only offences, penalties and security measures, but even the statute of limitations on offences and penalties and on the results of conviction (prescription periods). The first three paragraphs of the cited Article

establish, in particular, that no one shall be punished for any act which does not constitute a criminal offence under the law in force at the time committed nor shall be given a heavier penalty for an offence other than the penalty applicable at the time when the offence was committed (such provisions shall also apply to the statute of limitations on offences and penalties and on the results of conviction) and that penalties, and security measures in lieu of penalties, shall be prescribed only by law.

Before going any further with our analysis, it must be clarified that the use in the English translation of the Constitution of the word «law», instead of «statutes» or «statutory law», could be tricky. Especially in common law systems the expression «law» is used to mean *jus* and not *lex*, so that it could appear that Article 38, instead of proclaiming the *nullum crimen, nulla poena sine lege* principle (typical of the civil law systems), merely affirms the *nullum crimen, nulla poena sine jure* (more familiar to international criminal law). However, the original version of the Turkish Constitution prevents any chance of ambiguity or misinterpretation. The literal formulation of Article 38 in Turkish language uses the term «*kanun*» which means *lex* (*loi*, *legge*), while the Turkish term for *jus* (*droit*, *diritto*), «*hukuk*», is not used in Article 38. Besides, any different interpretation would not be coherent with the overall system and spirit of the Turkish Constitution. The general structure of the Constitution clearly draws its inspiration from some constitutional texts of civil law countries (such as the German, the French, the Spanish or the Italian Constitution), whose translations usually resort to the term «law» to signify «statutory law». But more than that, it is obvious that the frequent expressions «proscribed by law», «limited by law only», «prescribed only by law» and similar used by Turkish Constitution make sense only if interpreted as properly referred to «statutory law». Containing restrictions on human rights to cases prescribed by law would be of little use if by «law» we meant just *jus*, so to include also administrative acts, the decisions of the court and so on. Finally, and above all, in some passages we read phrases such as «by the decision of a judge in cases prescribed by law»[45]: that means that in the perspective of Turkish Constitution case law («the decision of a judge») is a different thing than mere «law» (statutory law), otherwise there would be no need to require the presence of both in order to restrict rights and freedoms. Moreover, the principle of necessary statutory provision (so called «statutory reservation»), at least in criminal matters, is shared also by common law countries[46].

That clarified, it is still necessary to identify what is the «*kanun*» empowered to establish offences and penalties, that is, to specify the exact meaning of «(statutory) law». Is that just the formal law enacted by the parliament or is it also some other

[45] See, for instance, Art. 28, Para. 6 or Art. 33, Para. 5.

[46] See, amongst others, US Supreme Court, *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32 (1812) e US Supreme Court, *United States v. Coolidge*, 14 U.S. (I Wheat.) 415 (1816).

regulatory act enacted by other State powers?

According to the Turkish Constitution, the legislative power is ordinarily vested in the Grand National Assembly of Turkey (*Türkiye Büyük Millet Meclisi*) (Art. 7 and Art. 87), composed of 550 members elected by universal suffrage (Art. 75)[47]. Normally, this power cannot be delegated (Art. 7). The Turkish Grand National Assembly, though, may empower the Council of Ministers to issue decrees having the force of law. Over such decrees the Grand National Assembly exerts a double control. The first form of control is the empowering law, shall define the purpose, scope, principles, and operative period of the decree having the force of law, and whether more than one decree will be issued within the same period. The second form of control is the necessary approval of the Turkish Grand National Assembly after the publication: decrees are submitted to the Assembly on the day of their publication in the Official Gazette. Decrees not submitted to the Turkish Grand National Assembly on the day of their publication shall cease to have effect on that day and decrees rejected by the Turkish Grand National Assembly shall cease to have effect on the day of publication of the decision in the Official Gazette (Art. 91).

Given the (limited) legislative power conferred to the Council of Ministers, it is necessary to verify if it is possible that criminal matters could be regulated by decrees having the force of law. Apparently, the Constitution offers a negative answer. The first paragraph of Article 91 specifies that (ordinarily) the fundamental rights, individual rights and duties included in the First and Second Chapter of the Second Part of the Constitution and the political rights and duties listed in the Fourth Chapter, cannot be regulated by decrees having the force of law. Since those parts of the constitutional text comprise practically all principles and regulations of criminal law established by the Constitution, it is quite clear that the Council of Minister has no legislative power on criminal matters.

An exception is made for periods of martial law and states of emergency. As we saw before, the Turkish Constitution dedicates many norms to the regulation of such hypothesis (see Articles 119 and following)[48]. During such periods the Council of Ministers may issue decrees having the force of law on matters necessitated by the state declared. According to Article 91, Para. 1, such decrees may well regard fundamental rights and freedoms, as well as criminal matters. Moreover, apparently the Constitution does not require a specific empowering law by the Turkish Grand National Assembly in such cases, but it directly authorizes the Council to issue decrees. The only parliamentary control on such decrees is the subsequent approval of

[47] For a brief overview on the legislative and the (dual) executive power in Turkey cf. M. Carducci, B. Bernardino d'Arnesano, *Turchia*, cit., p. 68-73.

[48] See *amplius infra*, paragraph 4.

the Assembly, to which they must be submitted the same day of their publication in the Official Gazette.

This form of control does not seem enough to prevent any abuse from the State powers. Firstly, the acts of the President of the Republic on his own competence and the decision of the Supreme Military Council are outside the scope of judicial review (Art. 125). Secondly, as we pointed out before, decrees having the force of law issued during a state of emergency, martial law or in time of war cannot be challenged before the Constitutional Court alleging their formal or substantial unconstitutionality (Article 148). In cases of emergency and martial law, therefore, the individual rights and liberties are still at stake.

Along with the so-called principle of «statutory reservation» (*nullum crimen, nulla poena sine lege poenali*), the principle of un-retroactivity of (unfavourable) criminal law is expressly affirmed (*nullum crimen, nulla poena sine praevia lege poenali*). A proper interpretation of such principles in the same way of their homologous in other European Constitutions could easily allow to consider implied also the prohibition of analogy, the principle of clarity and precision and even the principle of retroactivity of favourable criminal law (*favor rei*).

As for the prohibition of analogy, it is necessarily implied in a strict interpretation of the statutory reservation in criminal matters (and of the concept of «law» as statute law), since the judicial (analogical) application of penal norms could not be considered law itself. Similar considerations can be made for the principle of clarity and precision, since the formulation of vague and undetermined penal legislation would call for necessary interpretative integrations by the courts, thus nullifying the same essence of *nullum crimen, nulla poena sine lege*.

As for the principle of *favor rei*, the first Paragraph of Article 38 explicitly refers only to the non-retroactivity of norms prescribing offences and heavier penalties than those prescribed at the time when the crime was committed. Yet there are various theories (also elaborated in other countries) that can be recalled in order to maintain the implicit recognition in such a provision of the principle of retroactivity of favourable penal norms[49]. Some consider that the principle of un-retroactivity is but a corollary (and therefore an affirmation) of the superior principle of *favor libertatis*, based on the fundamental value of human liberty. The constitutional affirmation (or, at least, its constitutional relevance) of *favor libertatis* allows to consider (implicitly) recognized the principle of *favor rei*, which is a corollary of the former and with it shares the same rationale of protection of individual rights and freedoms.

[49] On such principle, with special regard also to the favourable overruling in courts decisions, see, amongst others, S. Riondato, *Retroattività del mutamento giurisprudenziale sfavorevole tra legalità e ragionevolezza*, in U. Vincenti (ed.), *Diritto e clinica. Per l'analisi della decisione del caso*, Cedam, Padova 2000, p. 239 ss. and, more recently, S. Riondato, *Influenze di principi penali europei su un nuovo codice penale italiano*, in *Riv. it. dir. proc. pen.*, 4, 2011, p. 1557 ss. See there also for other references.

Others consider that the principle of *favor rei* depends on the proclamation of the principle of equality (Art. 10 of the Turkish Constitution). And so on... More than the different theories of the constitutional grounds of the *favor rei* principle, what it is interesting to notice here is the fact that the formulation of the first Paragraph of Article 38 is almost the same of the first Paragraph of Article 7 of the European Convention on Human Rights. That allows to invoke all the arguments that recently led the European Court of Human Rights to consider implicitly recognized in Article 7.1 of the Convention also the principle of *favor rei*. Amongst such arguments are the consensus gradually emerged in Europe and internationally around the view that application of a criminal law providing for a more lenient penalty (even one enacted after the commission of the offence) has become a fundamental principle of criminal law, the dimension of proportionality implied by the Article cited, the (necessity to ensure the) foreseeability of penalties[50]. Besides, in its Article 49, the recent Charter of Fundamental Rights of the European Union expressly proclaims the principle of *favor rei*, and that just in tight connection with the principle of proportionality («If, subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that penalty shall be applicable»). Similarly, indeed, the recent Turkish criminal code (enacted with Law n. 5237 of 26 September 2004, a few months after the amendment of Article 38 of the Constitution) expressly and widely proclaims the principle of *favor rei* (Article 7 of the criminal code).

5.2. Principle of personality of the criminal responsibility

Article 38 establishes, at paragraph 7, that criminal responsibility shall be personal. As well known also in other legal orders, the minimal content of such principle is to forbid the criminal liability for facts committed by other individuals (objective responsibility). But there could be another very important meaning of such principle, that is that criminal responsibility shall be not only personal in a material way (personality as objective connection between fact and its author), but also in a moral way (personality as subjective, psychological connection between the fact and its author). In this second, wider meaning, the principle of personality becomes the constitutional foundation of the principle of culpability, which makes the criminal law system proportionate and, therefore, fair and just. Besides, proportionality is also implied by many other criminal law principles proclaimed by the Constitution (for instance, the principle of un-retroactivity, as we have just seen), thus proving a constitutional conception of criminal law based on culpability. Finally, the whole set of principles proclaimed by the Constitution (especially after the most recent amend-

[50] ECtHR, Grand Chamber, case *Scoppola v. Italy (No. 2)*, Application n. 10249/03, Strasbourg, 17 September 2009. Cf., *amplius*, S. Riondato, op. cit., p. 39 ss.

ments) draws a criminal law system based on the rule of law, which cannot imply, as such, the necessary recognition of the principle of culpability.

Indeed, the criminal code, after having stated that no one can be kept responsible from another person's act (Article 20, para. 1) expressly requires, as a necessary element of crime (and condition of punishment), the culpability of the author of the fact, in the two forms of malice (which, as in the Italian criminal code, is considered the general criterion of attribution of criminal responsibility) and negligence (which is a subsidiary criterion of subjective inculpation)[51].

The 2004 amendment to Article 38 of the Constitution could have represented a good occasion to introduce a clear statement of the principle of culpability. It would have been enough to add an adjective to the phrase of Paragraph 7 («Criminal responsibility shall be personal and culpable»). Thus would have allowed to consider finally achieved the (constitutional) affirmation of the primacy of the value of the human person before the value of the Turkish nation, at least in criminal matters. Yet the afore-mentioned interpretation of the principle of personality, quite undisputed and diffused in other legal systems, can provide a strong argument to consider the principle of culpability (at least implicitly) proclaimed by the Turkish Constitution.

5.3. Principle of materiality and principle of harm

The principle of materiality of criminal offences (that is the necessity for the legislator to criminalize only material facts and not mere intentions) can be traced in the first Paragraph of Article 38, where the norm makes reference to an «act» in order to qualify the substance of a criminal offence. It is clear that an act is an externalization, a manifestation of a criminal intent, unlike an attitude. Indeed, the also the Latin expression used to signify the objective element of crime is that of *actus reus* (as opposed to *mens rea*, used to mean the subjective element of crime).

There is no explicit recognition, though, of the principle of harm – further development of the principle of materiality – according to which no one should be punished for a fact (or an «act») which is not harmful or at least dangerous for some relevant interest, good or value. Well known is the double nature of such principle: it can serve as a binding rule for the courts (principle of harm as interpretative criterion) or as a binding rule for the legislator (principle of harm as legislative criterion). When the principle of harm is affirmed as an interpretative criterion, that means that courts must ascertain the concrete harmfulness or dangerousness of a fact corresponding in the abstract to a criminal offence established by law. When it is affirmed as a legislative criterion, that means that the legislator itself cannot establish as criminal offences facts which are not concretely dangerous or harmful.

[51] Articles 21 and 22 of Turkish criminal code.

Even if not expressly proclaimed by the Constitution, one can say that the principle of harm – at least in its interpretative dimension – is nevertheless tacitly implied in the Turkish constitutional framework of criminal law. That seems to be confirmed especially by the several recalls the Constitution makes to the principle of proportionality (which we already highlighted before), together with the principle of materiality. That the sanction shall be proportionate to the crime means that the former must match the gravity of the latter, both objective (since a crime cannot be mere intent, but has to result into a act – materiality) and subjective (since the criminal act must belong even morally to its author – culpability). And of course, the only way to measure the objective gravity of an act is to assess its dangerousness or harmfulness to the protected interests.

Moreover, each of the grounds for the imposition of restrictions on individual rights and freedoms (which we analysed before and which we will consider in the next paragraph) seems to be somehow connected to a dangerous situation and justified by the consequent need for protection of certain interests («national security», «public order», «public health», «public morals») – even if, as pointed out, too widely described.

Finally, the general and progressive evolution of the Constitution – especially with the last decade amendments – towards a growing compliance with the rule of law (even in criminal matters) and with international and supranational law seems to allow to consider constitutionalised – at least in its minimal interpretative dimension – the principle of harm. The punishment of authors of harmless or not even dangerous facts could not be consistent with the value of the human being protected by the rule of law and international and supranational law.

5.4. Principles concerning penalties and measures restrictive of personal liberty

The constitutional justification for punishment and other measures restrictive of personal liberty (in its proper and narrow meaning) is provided by Article 19. After having proclaimed that everyone has the right to liberty and security of person, the norm establishes two broad categories of restrictions to individual liberty: on the one hand, penalties and preventive measures (in a wide meaning) and, on the other hand, pre-trial (or precautionary) measures.

As for the former category, paragraph 2 prescribes that no one shall be deprived of his or her liberty except in the following cases where procedure and conditions are prescribed by law: execution of sentences restricting liberty and the implementation of security measures decided by court order; apprehension or detention of an individual in line with a court ruling or an obligation upon him designated by law; execution of an order for the purpose of the educational supervision of a minor or for bringing him or her before the competent authority; execution of measures

taken in conformity with the relevant legal provision for the treatment, education or correction in institutions of a person of unsound mind, an alcoholic or drug addict or vagrant or a person spreading contagious diseases, when such persons constitute a danger to the public, apprehension or detention of a person who enters or attempts to enter illegally into the country or for whom a deportation or extradition order has been issued.

The peculiarity of such provision is the fact that, after the express legitimization of penalties and security measures, it then lists a number of measures and restrictions which, in most civil law legal orders, would be normally considered security measures. It almost seems that measures such as (coercive) educational measures for minors or therapeutic, correctional measures for dangerous persons affected by various illnesses (the mentally ill, the drug addict, the alcoholic, persons spreading contagious diseases) are not included in the scope of security measures. There could be several interpretations for such a normative choice.

First of all, one could simply maintain that the list of measures in the cited paragraph is but an exemplification of possible security measures. That seems to be hardly plausible for a constitutional norm regulating one of the most important values for the human being. On the contrary, such a norm should strictly and expressly establish the cases when law could prescribe restrictions to personal liberties, otherwise its function of guarantee would be frustrated. All the same, given the literal formulation of the provision concerned, which quite clearly separates security measures from the measures listed straight after, it sounds quite unlikely also that the list could be a complete and exhaustive list of all the possible security measures.

A more reasonable, but nevertheless very critical, interpretation could be that while the first phrase of the Paragraph refers to proper security measures, that is restrictive measures applicable only *post delictum*, that is after a crime has been committed, the enforcement of measures provided by the second phrase does not necessarily imply the previous commission of a crime. This could be a way to forbid preventive (pre-crime) detention of dangerous subjects, except for the cases explicitly listed here (minority, mental illness, drug addictions and so on), whereas preventive (post-crime) detention of dangerous subjects is allowed also in other cases (provided that they are prescribed by law). Since the list of measures contained in the Paragraph concerned covers almost all cases of dangerous non-imputable subjects, such interpretation could lead to conclude that in the Turkish Constitutional system the application of security measures is permitted also with regard to dangerous imputable authors of crimes (the norm does not specify whether in addition or in alternative to punishment), like in other European countries (such as Italy).

The formulation of Paragraph 2 raises other perplexities. Again, as in the case of many restrictions on other personal rights and freedoms, some expressions are too undetermined to serve their purpose of constitutional limitations to unlawful restri-

ctions. That is the case of «apprehension or detention of an individual in line with a court ruling or an obligation upon him designated by law». Especially if interpreted, as suggested before, as referred to a *praeter delictum* measure, such provision could potentially bring to restrictions of personal liberties based on the most disparate violations of law (not necessarily criminal law) or on the most disparate violations of court orders (not necessarily in criminal matters). That is, according to such interpretation, law could well prescribe (and courts could well impose) the detention of a subject for the violation of civil or administrative obligations.

The reference to the education and correction of some dangerous individuals, without the express requirement of the consent of the person concerned, could endorse interpretations aimed to introduce mandatory or, even worse, coercive forms of correctional treatment. Moreover, this is true not only with regard to subjects affected by proper pathologies, but also to categories of persons who can be perfectly sound, such the vague category of the «vagrant», which can well include the idle, the poor, prostitutes etc. and which in many countries represents, now as in the past, a traditional target for preventive restrictive measures of doubtful legitimacy. In a criminal law system (aiming to be) governed by the rule of law such impositions shall be regarded with caution and suspicion and invoke a corrective interpretation.

Other constitutional dispositions concerning the contents of penalties and security measures can be useful to this aim. Fundamental provisions are set by Article 17, which proclaims the right to life and the right to protect and develop his material and spiritual entity. According to its paragraph 2, the physical integrity of the individual shall not be violated except under medical necessity and in cases prescribed by law nor shall be subjected to scientific or medical experiments without his or her consent. This provision, forbidding any State intervention on the physical sphere of the individual against its will, can be a precious safeguard against any interpretation of Article 19 aiming at legitimizing coercive treatments which can result in an alteration of the physical integrity of the human person. Yet it is not enough, by itself, to avoid readings of Article 19 aiming at legitimizing coercive treatments affecting the spiritual entity of the individual. To this end, the next paragraph of Article 17 can help. It states that no one shall be subjected to torture or ill-treatment nor be subjected to penalties or to treatment incompatible with human dignity. The express reference not only to punishment strictly considered, but also to any kind of «treatment», seems to exclude the legitimacy of coercive educational, therapeutic or correctional measures resulting in a compression of the moral sphere of the individual. There is no doubt, indeed, that such measures are, as such, a clear diminution of personal dignity.

The last paragraph of Article 17 is more critical. It excludes from the scope of the provision of paragraph 1 not only cases such as the act of killing in self-defence, but also occurrences of death as a result of the use of a weapon permitted by law as

a necessary measure during apprehension, the execution of warrants of arrest, the prevention of the escape of lawfully arrested or convicted persons, the quelling of riot or insurrection, or carrying out the orders of authorized bodies during martial law or state of emergency. As for the use of weapons the mere law provision could be not enough to grant their substantial legitimacy: the requisite of necessity («necessary measure») can help configuring such use as the *extrema ratio*. As for the carrying out of orders, it would have been most important to provide also for the requisite of the lawfulness and legitimacy of such orders.

Article 18 of Turkish Constitution establishes that no one shall be forced to work and that forced labour is prohibited. Nevertheless, the notion of «forced labour» does not include: work required of an individual while serving a prison sentence or under detention, services required from citizens during a state of emergency and physical or intellectual work necessitated by the requirements of the country as a civic obligation (provided that the form and conditions of such labour are prescribed by law). Although no disposition in the Constitution explicitly deals with the functions of punishment, some useful indications can be found in the norm concerned. The express reference to work «while serving a prison sentence or under detention» allows to maintain that in the Turkish constitutional punishment strictly considered (including its most traditional retributive forms, that is detention or imprisonment) can well have some special-preventive, if not educational, function. Besides, that prison work could be employed as a means to increase the level of affliction implied by imprisonment is excluded by the prohibition of forced labour.

Further important indications about the possible contents of punishment and security measures are given by Article 38. Paragraph 8 prescribes that no one shall be deprived of his liberty merely on the ground of inability to fulfil a contractual obligation. Such a provision can be profitably invoked in order to prevent interpretations of paragraph 2 of Article 19 aiming to authorize the enforcement of sanctions and measures restrictive of personal liberty for mere violations of civil and administrative obligations. Paragraph 9, introduced by amendment Law n. 5170 of 22 May 2004, establishes that neither death penalty nor general confiscation shall be imposed as punishment. The abolition of death penalty is a significant achievement of legal civilization and complies with some international law provisions, such as those of the United Nations Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, adopted and proclaimed by General Assembly resolution 44/128 of 15 December 1989. As for the prohibition of general confiscation, it could turn into an essential individual safeguard against invasive property measures (such as the freezing of funds), also preventive in nature, which are increasingly established by domestic and international and supranational legal sources to fight certain form of criminality (such as

terrorism) and which can end up in serious restriction of personal liberty[52]. Indeed, if general confiscation could not be imposed as punishment (that is after a crime has been committed), it follows that – *a fortiori* – it cannot be imposed as pre-crime preventive measure either.

As for pre-trial or precautionary measures, Paragraph 3 of Article 19 states that individuals against whom there is strong evidence of having committed an offence can be arrested by decision of a judge solely for the purposes of preventing escape, or preventing the destruction or alteration of evidence as well as in similar other circumstances which necessitate detention and are prescribed by law. The first part of this provision seems to authorize such measures in order to pursue purely procedural objectives, that is, to ensure the regular course of justice. In that sense it should be interpreted also the latter part of the disposition, (too) generally speaking of «other circumstances which necessitate detention». Such circumstances must be connected to procedural needs and cannot include purposes of criminal justice typically entrusted to other criminal law instruments (penalties, security measures, preventive measures). The vagueness of the expression, though, could still suggest broad interpretations aimed at bending such measures to (purely) preventive objectives. Besides, that is what happens also in many western legal orders. In the Italian criminal procedure code, for instance, amongst the precautionary measures are hidden some preventive measures[53], while in Great Britain and in the United States of America, with special regard to the war on terror, the boundaries between investigative and preventive measures are often blurred[54].

6. Constitutional principles of criminal procedure

We already pointed out that many principles of criminal procedure are affirmed by Article 19, dedicated to the protection of personal liberty and security, and by Article 38 («Principles Relating to Offences and Penalties»).

Article 19 establishes an articulated set of principles regulating any case of apprehension and detention of a person. It can be noticed, though, the lack of some fundamental principles concerning the rights of defence. Interestingly enough, fur-

[52] Cf. UK Supreme Court, *Her Majesty's Treasury v. Ahmed* [2010] UKSC 2, 60 and 192, according to which the freezing of funds against suspected terrorists is a restriction which strike at the very heart of the individual's basic right to live his own life as he chooses, so that it is no exaggeration to say that designated persons are effectively prisoners of the state: their freedom of movement is severely restricted without access to funds or other economic resources, and the effect on both them and their families can be devastating.

[53] Cf. Article 274, letter c). See R. Guerrini, L. Mazza, S. Riondato, *Le misure di prevenzione. Profili sostanziali e processuali*, II ed., Cedam, Padova 2004, p. 8.

[54] Think about the *Terrorism Prevention and Investigation Measures Act 2011* recently enacted in the United Kingdom.

thermore, special provisions are made – as we are about to see – for cases of crimes committed collectively.

In general, the intervention of a court is always required: even when the restriction is not imposed directly by order of a court, it must be upheld by the subsequent decision of a judge. In particular, apprehension of a person without a decision by a judge shall be resorted to, at the conditions defined by law, only in cases when a person is caught in the act of committing an offence or when delay is likely to thwart the course of justice. The person arrested or detained shall be brought before a judge within forty-eight hours and in the case of offences committed collectively within at most four days, excluding the time taken to send the individual to the court nearest to the place of arrest. No one can be deprived of his or her liberty without the decision of a judge after the expiry of the above-specified periods. These periods may be extended during a state of emergency, under martial law or in time of war.

One of the rights of defence ensured during the procedures of arrest and detention is the right of information, which surely is a crucial condition for the exercise of an effective defence. Individuals arrested or detained shall be promptly notified, and in all cases in writing (or orally, when the former is not possible) of the grounds for their arrest or detention and the charges against them; in cases of offences committed collectively this notification shall be made, at the latest, before the individual is brought before a judge (Article 19, para. 4). Moreover, the arrest or detention of a person shall be notified to next of kin immediately (Article 19, para. 5). Such notification allows the relatives of the person concerned to contact a lawyer and arrange everything should come useful for the defence and the protection of the rights of the arrested or the detained.

Yet an express affirmation of the other rights of defence proclaimed, amongst others, by the European Convention on Human Rights and by the European Charter of Fundamental Rights (the right of the accused to adequate time and facilities for the preparation of his defence; the right to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; the right to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; the right to have the free assistance of an interpreter if he cannot understand or speak the language used in court)[55] is missing.

Persons under detention shall have the right to request trial within a reasonable time or to be released during investigation or prosecution. Release may be made conditional to the presentation of an appropriate guarantee with a view to securing

[55] Art. 6, para. 3, ECHR and, with regard to legal assistance, Art. 47, para. 2 and 3, and, more generally, Art. 48, para. 2 CFRUE.

the presence of the person at the trial proceedings and the execution of the court sentence.

Persons deprived of their liberty under any circumstances are entitled to apply to the appropriate judicial authority for speedy conclusion of proceedings regarding their situation and for their release if the restriction placed upon them is not lawful.

To the general obligation to compensate damages incurred by any person through unlawful treatment prescribed by Article 40, the last paragraph of Article 19 adds the obligation for the State to compensate any damage suffered by persons subjected to treatment contrary to the above-mentioned provisions. In a perspective aiming to maximize the protection of human rights – and considered also the recalled provision of Article 40 – the disposition of the last paragraph of Article 19 should be interpreted as referred also to the provisions of Articles 17 and 18, which also regulate treatment of persons.

Important principles concerning criminal trial are set in Articles 36-38. Article 36 affirms that everyone has the right of litigation either as plaintiff or defendant and the right to a fair trial before the courts through lawful means and procedures and that no court shall refuse to hear a case within its jurisdiction. Technically these provisions seem to refer to the freedom to claim rights especially in civil suits. The wide formulation of such norms, though, allows (and the absence of other dispositions dedicated to the fairness of criminal trials imposes) to interpret them as a general proclamation of the principles of the due process of law, including the right to the technical assistance of a lawyer and the right to examine witnesses, which cannot be found elsewhere in the Constitution.

Article 37 concerns the guarantee of lawful judgement[56]. Firstly, it proclaims the principle of the natural judge, by stating that no one may be tried by any judicial authority other than the legally designated court. Consequently, it forbids any special jurisdiction, by prohibiting the establishment of extraordinary tribunals with jurisdiction that would in effect remove a person from the jurisdiction of his legally designated court. Article 139, in chapter three of part three of the Constitution, dedicated to judicial power, regulates the security of tenure of judges and public prosecutors. They cannot be dismissed, or retired before the age prescribed by the Constitution nor they can be deprived of their salaries, allowances or other rights relating to their status, even as a result of the abolition of court or post. Exceptions can be provided by law relating to those convicted for an offence requiring dismissal from the profession, those who are definitely established as unable to perform their duties on account of ill-health, and those determined as unsuitable to remain in the profession. The latter provision, in particular, arises some doubt because of its

[56] For an analysis of the Court system (and of the criminal law principles) in Turkey also in the light of the European Court of Human Rights decisions, see M. Yang, *The Court System on Trial in Turkey*, in *Loy. L.A. Int'l & Comp. L. Rev.*, 26, 2003-2004, p. 517.

vagueness: in the absence of further specifications, it could mean that the legislative power (that is, the law introducing the exception) could remove judges deemed «unsuitable» to their profession according to the most disparate criteria (perhaps their moral incompatibility with the secularism of Atatürk? The violation of the above-mentioned old laws, which cannot be declared unconstitutional, on the secular Republic of Turkey – such as having worn a fez or having defended the right to wear a Muslim headscarf?)[57].

As for the prohibition of special jurisdiction, it must be remembered that Article 143 (repealed in 2004) established State Security Courts to deal with offences against the «indivisible integrity of the State with its territory and nation, the free democratic order, or against the Republic whose characteristics are defined in the Constitution, and offences directly involving the internal and external security of the State» (provisions concerning state of martial law and state of war were reserved). As one can easily see, the competence of such Courts was quite wide and created many criticisms especially in view of the possible accession of Turkey to the European Union. So in 2004 Article 143 was completely repealed and Law n. 5190 of 16 June 2004 abolished State Security Courts and replaced them with the Serious (or Extraordinary) Felony Courts. It has been said, though that this repeal would be merely apparent. The newly introduced Courts have pretty much the same competences of the old State Security Courts and with them they share the same shortcomings.

Military justice shall be exercised by military courts and military disciplinary courts (Art. 145). These courts shall only have jurisdiction to try military personnel for military offences related to military services and duties. Cases regarding crimes against the security of the State, constitutional order and its functioning shall be heard before the civil courts in any event. Non-military persons («*kişiler*») shall not be tried in military courts, except in war time.

The Constitution proclaims the principle of independence of the courts[58]. Article 9 prescribes, in general, that judicial power shall be exercised by independent courts

[57] For more detailed and wider observations and reports on this topic cf. U.S. Department of State, *International Religious Freedom Report*. Turkey, 26 October 2009, in < http://www.state.gov/j/drl/rls/irf/2009/130299.htm > (4 October 2012); A.A. An-na'im, *Islam and the Secular State: Negotiating the Future of Shari'a*, Harvard University Press, Cambridge 2008, p. 208-209, 212; H. Elver, *Lawfare and Wearfare in Turkey,* April 2008, in < http://www.merip.org/mero/interventions/elverINT.html > (4 October 2012); Human Rights Watch, *Turkey. Country summary*, January 2007, < http://hrw.org/wr2k7/pdfs/turkey.pdf > (4 October 2012), p. 4. See also V.R. Scotti, *Turchia. Approvati emendamenti alla Costituzione per consentire alle studentesse di indossare il velo in università*, in *Dir. pubbl. comp. eur.*, II, 2008, p. 670 ss.

[58] On the subject of judicial independency in Turkey see A.Ü. Bäli, *The Perils of Judicial Independence: Constitutional Transition and the Turkish Example*, in *Va. J. Int'l L.*, 52, 2011-2012, 235. More generally, on the (internal and external) independence of the judiciary in European law and in general and constitutional principles see G. Neppi Modona, *External and Internal Aspects of the Independence of the Judiciary*, Report at the Expert Seminar «The Independence and Integrity of the Judiciary»

on behalf of the Turkish Nation. More detailed provisions on the independence and impartiality of judges are contained in Article 138 («Independence of the Courts»), which establishes that judges shall be independent in the discharge of their duties and they shall give judgment in accordance with the Constitution, law, and their personal conviction conforming with the law. No organ, authority, office or individual may give orders or instructions to courts or judges relating to the exercise of judicial power, send them circulars, or make recommendations or suggestions. No questions shall be asked, debates held, or statements made in the Legislative Assembly relating to the exercise of judicial power concerning a case under trial. Legislative and executive organs and the administration shall comply with court decisions; these organs and the administration shall neither alter them in any respect, nor delay their execution. Article 140 prescribes that judges themselves shall discharge their duties in accordance with the principles of the independence of the courts and the security of tenure of judges (para. 2). Moreover, it affirms that they shall not assume official or public functions other than those prescribed by law (para. 5) and they shall be attached to the Ministry of Justice where their administrative functions are concerned (para. 6). The regulation of qualifications, appointment, rights and duties, salaries and allowances, promotion, temporary or permanent change in duties or posts, disciplinary proceedings, investigation and prosecution of judges and public prosecutor is entrusted to law in accordance with the principles of the independence of the courts and the security of tenure of judges (para. 3). Also the organisation, functions and jurisdiction of the courts, their functioning and trial procedures shall be regulated by law (Art. 142).

Paragraph 4 of Article 38 establishes the presumption of non-culpability: «No one shall be considered guilty until proven guilty in a court of law» (unlike the European Convention on Human Rights and the European Charter of Fundamental Rights, both proclaiming the presumption of innocence)[59]. The following paragraph establishes the principle of *nemo tenetur se detegere*, significantly extended also to the relatives of the person concerned («no one shall be compelled to make a statement that would incriminate himself or his legal next of kin, or to present such incriminating evidence»).

Paragraph 6 of Article 38 prescribes that findings obtained through illegal methods shall not be considered evidence. The right to prove an allegation is not expressly proclaimed, although it could be inferred from Article 39, which sets particular limitations to such right with regard to specific cases (thus implying that in any other case the right to prove an allegation is free). The cited Article prescribes that in libel and defamation suits involving allegations against persons in the public service

(Istanbul, Turkey, 28-29 June 2012), in < http://www.venice.coe.int/site/dynamics/N_Country_ef.asp?C=31&L=E > (4 October 2012).

[59] Art. 6, para. 1, ECHR and Art. 48, para. 1, CFRUE.

in connection with their functions or services, the defendant has the right to prove the allegations, while a plea for presenting proof shall not be granted in any other case unless proof would serve the public interest or unless the plaintiff consents.

The last paragraph of Article 38 establishes that no citizen shall be extradited to a foreign country on account of an offence except under obligations resulting from being a party to the International Criminal Court. More than the prohibition of extradition, what is worth noticing is the explicit recognition of the binding force for Turkey of the provisions of the Rome Statute for the International Criminal Court (and of the obligations deriving from it). This is even more valuable and significant, considered that Turkey is not a State-party to the Rome Statute yet.

Article 141 establishes the principle of publicity of hearings – proclaimed also by the European Convention on Human Rights and by the European Charter of Fundamental Human Rights[60] – and of necessary verdict justification. As for the former, the Article prescribes that Court hearings shall be open to the public, except when for reasons of public morality or public security it is absolutely required to conduct all or part of the hearings in closed session (special provisions shall be provided in the law with respect to the trial of minors). As for the latter, the decisions of all courts shall be made in writing with a statement of justification. Moreover, the same Article clearly proclaims the principle of speedy trial and of economy of the trial, by imposing specific duties on judges («It is the duty of the judiciary to conclude trials as quickly as possible and at minimum cost»).

A fundamental principle of criminal procedure which appears to be lacking in the Turkish Constitution is that of *ne bis in idem*, both substantial and procedural, that is the right not to be tried or punished twice in criminal proceedings for the same criminal offence, which, instead, is expressly proclaimed both by the European Convention on Human Rights and the European Charter of Fundamental Rights[61].

7. The emergency rule

As we came seeing during our exposition, several exceptions and derogations to the protection of individual rights and freedoms and to many of the criminal law and procedure principles (which at that protection are aimed) are explicitly allowed by the Constitution itself in case of declaration of the state of emergency, martial law, mobilization and state of war. As others have correctly pointed out, even for historical reasons, the concept of «crisis» plays a fundamental role in the Constitution of Turkey and heavily affects the level of effectiveness of individual rights and liberties[62].

Other than various compressions to human rights and liberties, in such cases

[60] Art. 6, para. 1, ECHR and Art. 47, para. 2, CFRUE.
[61] Art. 4 of Protocol No. 7 to the ECHR entered into force Nov. 1, 1988 and Art. 50 CFRUE.
[62] M. Carducci, B. Bernardino d'Arnesano, *Turchia*, cit., p. 107 and 108 ss.

the Constitution authorizes also the exercise of quite broad legislative powers by the executive power, which – as if it was not enough – cannot be challenged for unconstitutionality before the Constitutional Court (Art. 148, para. 1).

For the criminal lawyer is, therefore, fundamental to understand when such exceptional circumstances recur, in order to make clear when personal rights and freedoms can be posed at stake by possible abuses of the State powers, facilitated by the weakened constitutional individual safeguards.

First of all, it must be said that, compared to other European constitutions, the number of the various types of states of exception, so to say, is quite impressive. Whereas other constitutions, in a logic of pure exception, establishes usually one or two of such states (in Italy only the state of war, in Spain the *estado de excepción* and the *estado de sitio*, in France the *état d'urgence* and the *état de siège*), the Turkish Constitution prescribes two states of emergency, the state of martial law, the mobilization and the state of war.

A first kind of state of emergency can be declared in the event of natural disaster, dangerous epidemic diseases or a serious economic crisis (Art. 119). A second kind of state of emergency can be declared in the event of serious indications of widespread acts of violence aimed at the destruction of the free democratic order established by the Constitution or of fundamental rights and freedoms, or serious deterioration of public order because of acts of violence (Art. 120). Both states of emergency are declared by the Council of Ministers, meeting under the chairmanship of the President of the Republic, after consultation with the National Security Council, with regard to one or more regions or throughout the country for a period not exceeding six months. This decision shall be published in the Official Gazette and shall be submitted immediately to the Turkish Grand National Assembly for approval. The Assembly may alter the duration of the state of emergency, extend the period, for a maximum of four months only, each time at the request of the Council of Ministers, or may lift the state of emergency (Art. 121).

The grounds for the declaration are so broadly described that they can comprise the most disparate situations (the spread of violent criminality, terrorist attacks, serious political crimes, the spread of diseases...). During the states of emergency the financial, material and labour obligations which are to be imposed on citizens and the procedure as to how fundamental rights and freedoms shall be restricted or suspended in line with the principles of Article 15, how and by what means the measures necessitated by the situation shall be taken, what sort of powers shall be conferred on public servants, what kind of changes shall be made in the status of officials, and the procedure governing emergency rule, shall be regulated by the Law on State of Emergency. Moreover, as we saw before, the Council of Ministers may issue decrees having the force of law on matters necessitated by the state of emergency.

As for martial law, mobilization and the state of war, the Council of Ministers,

under the chairmanship of the President of the Republic, after consultation with the National Security Council, may declare martial law in one or more regions or throughout the country for a period not exceeding six months, in the event of widespread acts of violence which are more dangerous than the cases necessitating a state of emergency and which are aimed at the destruction of the free democratic order or the fundamental rights and freedoms embodied in the Constitution; or in the event of war, the emergence of a situation necessitating war, an uprising, or the spread of violent and strong rebellious actions against the motherland and the Republic, or widespread acts of violence of either internal or external origin threatening the indivisibility of the country and the nation. This decision shall be published immediately in the Official Gazette and submitted for approval to the Turkish Grand National Assembly, which may reduce or extend the period of martial law or lift it. Extensions of the period of martial law for a maximum of four months each time are decided by the Assembly. In the event of state of war, the limit of four months does not apply. (Art. 122).

It is clear that martial law can be declared not necessarily in case of threats coming from outside the State, but also in case of internal violent actions, such as for the (second kind of) state of emergency. The difference with the latter case merely consists in the seriousness and dangerousness of such actions. Thus, a terrorist attack could well justify both the declaration of the state of emergency and of martial law, depending on its dangerousness. The Constitution is silent about who is competent to assess such dangerousness, but it seems quite clear that it will be the Council of Ministers, which is entrusted with the decision of the declaration of the state necessitated. This overlapping of grounds justifying different exceptional states is not convincing, especially without a clear establishment of principles and criteria to guide the decision of their declaration, although the subsequent approval of the Assembly at least ensure some form of control on the choices of the Council of Ministers.

During the period of martial law, the Council of Ministers may issue decrees having the force of law on matters necessitated by the state of martial law according to the regulations we analysed before. In the event of martial law, mobilization and state of war, the provisions to be applied and conduct of affairs, relations with the administration, the manner in which freedoms are to be restricted or suspended and the obligations to be imposed on citizens in a state of war or in the event of emergence of a situation necessitating war, shall be regulated by law.

La riforma del codice penale turco (2005) traduce in norma una complessa realtà storica, sociale e antropologica. Il nuovo codice penale vuole essere emblema e metafora della compiuta cucitura tra tradizione, storia e modernità, e tra influenze culturali europee, interessi geo-politico-economici e rideterminazione dell'identità nazionale. Cardini e tratti salienti dell'assetto attuale post-riforma sono qui illustrati sia nella loro dimensione normativa statica che nel carattere problematico vivente di certi istituti significativi, sotto varie prospettive – storica, comparatistica, costituzional-penalistica, istituzionale e topica. L'opera è frutto della cooperazione internazionale tra la Facoltà di Giurisprudenza dell'Università degli Studi di Padova e la Facoltà di Giurisprudenza dell'Università Bahçeşehir di Istanbul. Vi hanno partecipato Rocco Alagna, Riccardo Borsari, Rossella Bottoni, Ali Emrah Bozbayındır, Chiara Candiotto, Vesile Sonay Evik, Patrizia Marzaro, Attilio Nisco, Ayşe Nuhoğlu, Lorenzo Pasculli, Debora Provolo, Silvio Riondato, Mauro Ronco, Aylin Sekìzkök, Silvia Tellenbach, Umberto Vincenti, Feridun Yenisey, Ali Kemal Yıldız, Giuseppe Zaccaria.

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