

Reconfiguration of the Regime of Impunity and Authoritarian Statecraft in Turkey

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Introduction

Impunity is a legal concept defined by the UN Commission on Human Rights as “the impossibility, de jure or de facto, of bringing the perpetrators of violations to account ... since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to making reparations to their victims” (Orentlicher 2005). In that regard, impunity is generally considered to be an exemption of punishment resulting from a “conscious policy” operating through formal legislation or from a “gradual historical indifference”, which through “weakness or lack of political will, creates a de facto regime of impunity” (Cohen 1995, 28). It is not only an overall lack of criminal punishment and official acknowledgment of human rights abuses which is created by impunity, but this also leads to the concealment and denial of the truth that perpetuates state violence over the victims (Zur 1994).

From the very early Republic to the present day, impunity for state crimes has been a consistent and systematic state policy in Turkey, deployed with an aim to legitimize state-sponsored violence against marginalized political, religious, and ethnic groups. Political massacres targeting the Alevi community and left-wing militants in the late 1970s, widespread torture and extrajudicial killings carried out before and after the military coup of September 1980, and systematic enforced disappearances and extrajudicial executions during the states of emergency in the 1990s all still remain unaccounted for and their perpetrators have so far largely remained immune to prosecution (Mecellem 2016; Göral et al. 2013; Dinçer 2020; Sevimli et al. 2021).

However, during the ongoing rule of the Adalet ve Kalkınma Partisi (the Justice and Development Party, AKP), some major criminal cases were initiated. Between 2007 and 2010, with the so-called Ergenekon and Balyoz (operation ‘Sledgehammer’) trials, a large number of high-ranking military officers were put on trial for their alleged involvement in anti-government coup plots (Polat 2011). For a brief period, this evoked hope for families of those tortured, forcibly disappeared, or

killed that the military command would also be held responsible for human rights abuses they had been involved in (Avşar et al. 2013).

Subsequently, the constitutional self-amnesty for the wrongdoings of the 1980 military junta was abolished in 2010 by a referendum, and two retired generals—both leaders of the military coup—were put on trial in 2012. This was equally considered to be a significant step towards accountability for past state crimes (Bakiner 2013). Furthermore, encouraged by the initiation of an official peace process in 2012 between the Turkish state and the Kurdish armed movement,¹ public prosecutors had reopened criminal investigations in dozens of cases and issued indictments against some of the high-ranking military officers and middle-ranking members of the military involved in extrajudicial killings and enforced disappearances in the 1990s.

Scholars have interpreted this judicial endeavour to put those military officers on trial as linked to the “redistribution of the power among elite actors, which created a window of opportunity allowing for ongoing legal mobilization to result in prosecutions” (Mecellem 2018, 14), or considered them to be mere political instruments in the conflict between the AKP and the military (Söyler 2015), or judicial manoeuvres (Budak 2015) that were “limited and strategic acts of acknowledgment” that are falling short of “initiating a more comprehensive process of coming to terms with the past” (Bakiner 2013, 16).

The growing trend of judicialization has eventually failed to establish criminal accountability for human rights abuses, as the majority of the cases were closed with the dismissal of the cases or acquittal of the perpetrators (Dinçer 2020). The dramatic end of the peace process in mid-2015,² and the resumption of the armed

1 In 2012, peace negotiations had officially been initiated between the leadership of the Partiya Karkerên Kurdistanê (Kurdistan Workers' Party, PKK) and the Turkish state to resolve the long-running armed conflict that had begun in 1984. The process, which was aimed at conflict resolution and mostly referred to as the “resolution process” in Turkey had two essential elements: the peace talks between state officials and the PKK; and the enacting of reforms aimed at democratization and recognition of the cultural and political rights of Kurds (Yeğen 2015).

2 After three years of negotiations and despite some achievements in the process, the official peace talks were abruptly ended in 2015 following a shift in the balance of power. The aggressive involvement of the AKP government in the escalating war in Syria against Kurdish autonomy also had a decisive impact on the collapse of the peace talks. Although throughout the process the Kurdish political movement insisted upon the establishment of legal mechanisms to strengthen the negotiations, the government was reluctant to enact the necessary reforms and insisted upon total PKK disarmament. The reciprocal loss of confidence by the parties, alongside the increased militarized activities of the government, accelerated the end of the peace process (Savran 2020). Finally, the peace process officially came to an end following the killing of two police officers in Ceylanpınar, a district of Şanlıurfa Province in south-

conflict alongside the shift in political atmosphere towards an entrenched authoritarianism, had a decisive role on the fate of these trials. Consequently, rather than establishing criminal responsibility, these trials themselves served as a legal means to whitewash state crimes and perpetuate violence against the victims and survivors. The failure of the criminal justice system to reckon with the most egregious crimes of the country's history showed once again that impunity has been operating as a pervasive and routine procedure, endorsed by a politically-dependent judiciary.

While not departing from this long tradition, the third term of the AKP's rule, starting with electoral triumph in the June 2011 general election, saw developments such as the radical transformation of the regime of impunity, alongside a new configuration of political power associated with erosion of the rule of law. This paper investigates how the politics of impunity has changed over the last decade, along with a radical transformation of the political regime in Turkey. Following the trajectories of this transfiguration and situating it within the context of authoritarian consolidation in Turkey, it seeks to uncover the political function(s) of impunity for authoritarian statecraft.

Drawing on the analysis of the successive legal interventions in the field of legal accountability, I argue that the reconfigured regime of impunity has played a crucial role in the establishment of a new form of authoritarianism in Turkey. To unpack this argument, the article first scrutinizes critical stages of the regime transformation. It then offers a critical analysis of the legal developments that have reconfigured the regime of impunity over the last decade. It concludes by discussing the ways in which this reconfigured regime of impunity has served to entrench authoritarian rule in Turkey.

Regime Transformation towards an Exceptional State in Turkey

Recent socio-political literature points to a political regime transformation in Turkey from the 2010s onwards, which is characterized by a gradual centralization of political power and a drastic expansion of coercive force over society. The country is witnessing an enormous democratic breakdown with an intense crackdown on constitutional rights and liberties, an exacerbated targeting of political opposition, and the narrowing of civil space. Some describe this transformation as a transition from a semi-democracy into a form of competitive authoritarianism (Esen and Gümüşçü 2016) or to a semi-competitive (Burç and Tokatlı 2020) or electoral autocracy (Bargu 2018), whereas others view it as an emergent new authoritarianism,

eastern Turkey. Those who were arrested for the killings were recently acquitted and the perpetrators of the attack are still unidentified.

corresponding to a structural transformation which is unprecedented in Turkey's history (Somer 2016).

While there is no agreement on how to define this emergent regime, the first crucial turning point of the current authoritarian drift is considered by many to be the 2013 Gezi Park protests. The Gezi protests initially began in order to oppose the destruction of Gezi Park in Istanbul under the amended urban development plan and quickly turned into an anti-government uprising, accumulating social unrest and the grievances of different opposition groups. The AKP government's reaction to the protests—excessive and blind police violence—marked the beginning of the new era of a “punitive state” (Kaygusuz 2018, 290). Primarily used as a political weapon against the Kurds, in the aftermath of the Gezi uprising, the law started to be increasingly instrumentalized against all progressive forces as a tool of political repression. Consequently, the freedoms of expression, the press, and assembly were severely restricted.

The emerging conflict within the ruling bloc between the AKP and its long-term political ally, the Gülen movement,³ was another crucial moment in the regime transformation. The AKP government's struggle to neutralize the plots of the so-called “parallel state”⁴ and to “purge” the entire state apparatus of its militants resulted in critical legal reforms between 2013–15. The overall aim of the reforms was the reconfiguration of the state apparatus in order to regain control over bureaucracy, the military, national intelligence, and the judiciary. This series of strategic legal amendments allowed the executive branch to monopolize state power and to

3 The Gülen movement is a long-standing religious movement in Turkey which is strongly informed by Turkish nationalism (Tee 2021). Following the doctrine of its religious leader Fethullah Gülen, the Gülen movement was involved in power relations and had succeeded in infiltrating state structures since the 1970s. However, the movement accumulated considerable political power during the AKP era and provided the ruling party with the educated cadre to take over the state bureaucracy, including the security sector, judiciary, and national intelligence (Jongerden 2020). It was the AKP's biggest partner until the early 2010s. Gülenist prosecutors and judges prosecuted socialists and the Kurdish political movement during the 2000s by staging widescale prosecutions on falsified evidence. They also launched the coup plot trials, accusing hundreds of retired and high-ranking active duty members of the Turkish army of attempting to overthrow the AKP government in collusion with secular civil actors (Tee 2021). From 2011 on, the Gülen movement began to challenge the AKP and directly targeted Erdoğan by initiating first the national intelligence and then anti-corruption investigations (Şık 2019). The Gülen movement is now accused of masterminding the July 2016 coup attempt.

4 In the face of the corruption investigations against cabinet ministers and Erdoğan's family members, Erdoğan labelled the Gülen movement as a “parallel state” and branded it “FETÖ” (Fethullah Gülen Terrorist Organization), claiming that its political project was to plot against the democratically elected government.

particularly strengthen its domination of the judiciary and the legislature (Kaygusuz 2018; Oğuz 2017; Yılmaz 2019; Bermeo 2016). The AKP's battle to destroy its former ally, now enemy, has demonstrated how the law can be opportunistically used and misused in line with the party's strategic interests.

The legislative elections of June 2015 were another turning point in the authoritarian escalation. The Pro-Kurdish Halkların Demokratik Partisi (People's Democratic Party, HDP)⁵ had enormous success in the elections by obtaining 13 percent of the votes and 80 seats in the Parliament. The AKP, who lost their absolute majority of seats in the Parliament, dismissed the results of the election and created an atmosphere of chaos to justify calling a new snap election in November 2015. Between the elections of June 2015 and November 2015, peace negotiations between the AKP government and the PKK were disrupted and the country was once again dragged into a vicious circle of violence. Emergency practices and securitization discourse intensified after the resumption of armed conflict in south-eastern Turkey and in the aftermath of subsequent ISIS terrorist attacks in different cities, which claimed hundreds of lives. As a result of this re-securitization (Geri 2016; Jongerden 2020), political repression over the opposition increased. The government mobilized the entire state apparatus against its opponents, targeting primarily the Kurdish political movement,⁶ which was demonized and stigmatized once again as a national security threat (Jongerden 2020).

From summer 2015 onwards, the government declared blanket and round-the-clock curfews in urban areas of Kurdish cities where self-government had been declared by the Kurdish political movement. The establishment of curfews with a view to eradicating the armed resistance of urban PKK units was reliant on a highly controversial power which could be wielded by provincial governors, allegedly derived from the law on special provincial administration (Ardıçoğlu 2015; European Commission for Democracy through Law 2016). Imposed from mid-2015 to late 2016, the curfews resulted in serious violations of fundamental rights affecting a huge population. Thousands of people living in the cities under curfews were for months deprived of access to basic needs such as medical care, food supplies, electricity,

5 The HDP is a pro-Kurdish political party founded in 2011. While endorsing the long political tradition of the earlier Kurdish parties that were judicially repressed and were all disbanded, the HDP declares that it is committed to uniting progressive groups in Turkey, including socialists, feminists, ecologists, Alevis, Armenians, LGBTQ activists, and Kurds. The HDP qualifies itself as an equitable, gender-inclusive, pro-peace party. For the HDP's political programme, see <https://hdp.org.tr/en/peoples-democratic-party/8760/>.

6 Since the collapse of the peace talks between the AKP government and the PKK in 2015, dozens of HDP parliamentarians, mayors, politicians, and supporters have been systematically targeted, massively persecuted, and imprisoned. An indictment seeking to ban the HDP was submitted to the Constitutional Court in June 2021, see <https://hdpeurope.eu/2021/06/constitutional-court-accepts-indictment-seeking-hdps-closure-2/>.

water, communication, and education. The disproportionate uses of heavy shelling and lethal force during the security operations resulted in the killing of hundreds of people including civilians, and the injuring of many more (Human Rights Foundation of Turkey 2016; Office of the United Nations High Commissioner for Human Rights 2017).

Marked by a generalized military violence, this period is to be considered as a *de facto* state of emergency since the curfew measures were adopted ‘in an ordinary time’, without an official state of emergency being declared in line with the Constitution. By thus overriding the Constitution, the executive made excessive recourse to exceptional powers on the basis of a “pseudo-legal parallel method unprecedented in the history of Turkey” (Göztepe 2018, 9).

The attempted coup d’état in July 2016, by a group within the military who were affiliated with the Gülen movement, represents perhaps the most dramatic shift in the regime’s authoritarian consolidation. The coup attempt was successfully repressed by the government, who, on that occasion, did not wait too long to officially declare a countrywide emergency. Declared on 20 July 2016, the state of emergency was finally lifted in July 2018 after being extended seven times. For two years, the country was ruled by way of emergency decrees issued by the executive without being subject to the review of Parliament or the Constitutional Court. Approximately 126,000 civil servants were dismissed from public service as a result of the largest purge to date (Amnesty International 2017, 2018). These included academics, doctors, judges, members of the military, instructors, and security officers, among others. Furthermore, hundreds of civil society associations, workers’ unions, media outlets, schools, and companies were shut down and their properties seized by the emergency decrees (Human Rights Joint Platform 2018). Emergency measures were accompanied by a huge legal campaign against democratically-elected Kurdish politicians, including cases of arbitrary arrest and detention, deprivation of deputy status, lifting of parliamentary immunity, and state takeover of south-eastern municipalities by appointing executive trustees (Bargu 2018; Jongerden 2020). The government thus successfully instrumentalized the security crisis generated by the violent coup attempt in order to stage massive purges, crack down on dissent, and annihilate democratic competition.

Meanwhile, legislating through emergency decrees beyond the constitutional limits became the new technique of governance. Apart from imposing punitive measures, the executive usurped the lawmaking power of the Parliament to regulate every single aspect of state/citizen relations through the use of executive decrees. State institutions were profoundly reshaped by structural and permanent legal changes (Akça et al. 2018). Even after the end of the two-year state of emergency, the law enacted in 2018 authorized the executive for three years to preserve emergency powers such as dismissing any public official from office, severely restricting public assemblies due to the potential threat to public order, and extend-

ing police custody to up to 12 days for terrorism-related charges (Human Rights Watch 2018). This law was renewed again in 2021. In other words, a permanent state of emergency was installed through ordinary statutes, which dramatically expanded executive discretion beyond the security crisis.

Finally, the constitutional amendment in April 2017 accomplished executive centralization by officially transforming Turkey's political regime into a presidential system. The new regime was structured around the supreme power of an unaccountable president, "a one-person executive dominating the other two branches" (Burç and Tokatlı 2016, 79) in the absence of any institutional checks and balances (Göztepe 2018). The office of the presidency acquired full legislative powers and was granted an array of autocratic powers, including the authority to appoint the majority of the members of key state institutions such as the high judiciary (Bargu 2018).

The failed coup attempt in 2016 and the transition into a presidential regime are considered in the literature to be two critical turning points in the reconfiguration of the political regime in Turkey (Yılmaz 2020). Some scholars argue that these two events gave birth to a new security paradigm and paved the way for the emergence of an "exceptional state" as coined by Poulantzas (Kaygusuz 2018; Oğuz 2017; Kaygusuz and Aydın 2020; Türk and Karahanoğulları 2018).

Poulantzas contends that struggles within the political power and hegemony crisis may result in "exceptional state forms", which essentially rely on coercive state control rather than consent production (Poulantzas 1974; Jessop 2016). One feature of the exceptional state form is the concentration of state power in the executive branch, which tends to exercise power not through law but rather through executive decrees (Boukalas 2014). The lawmaking function of the legislative is thus transferred to the executive, which is not bound by any practical or constitutional limits (Kaygusuz and Aydın 2020).

In the same vein, Boukalas (2014) identifies the expansion of counterterrorism legislation, loss of judicial control over policing apparatus, the augmented importance of the police among state mechanisms, and the lifting of legal boundaries for the executive as key features of the exceptional state form as they appeared in the 2000s. In this respect, scrutinizing the increasing abolition of legal and judicial oversight over executive action, and most importantly over the state security apparatus, is particularly important to decoding the current move towards the exceptional state form in Turkey. By freeing national security practices from legal and judicial oversight, I would argue that the renewed regime of impunity has created the necessary conditions for an unconstrained executive to implement its authoritarian agenda within a permanent state of emergency. In what follows, I attempt to track and critically analyse the recent legal developments underpinning the construction of a new regime of impunity in Turkey.

Entrenching the Security State through the Legal Reconfiguration of Impunity

Starting from the early 2010s, Turkey has seen a legal reconfiguration that has restructured state power around the executive prerogative principle. One crucial aspect of this reconfiguration has been the gradual removal of the legal responsibility of executive agents and the security forces so as to create a legal vacuum for executive power. This phenomenon of “executive aggrandizement” is described by Nancy Bermeo (2016) as a series of institutional changes weakening checks on executive power by elected executives. Richard Ericson rightfully calls the laws that were produced for this purpose as “counter-law” or “laws against law” (Ericson 2007, 207), as they completely disregard the principles, standards, and procedures of criminal law; they also eliminate guarantees of the rule of law and dismantle the constitutional principle of accountability. In Turkey, recent legal initiatives considerably empowered the executive by systematically disabling legal control over its actions and thus broadening the realm of impunity.

The first attempt to neutralize legal oversight over the executive actions was ensured by two legal amendments that brought crucial changes to the law on state intelligence services and the National Intelligence Agency.⁷ These amendments subjected Milli İstihbarat Teşkilatı (the National Intelligence Agency, MIT) to the absolute discretion of the prime minister (or now the president, since the transition into the presidential system in 2017), and largely expanded the Agency’s powers and exempted intelligence operations from judicial oversight.

In this vein, the MIT was authorized to collect any kind of information, document, or data from all public institutions, private legal entities, and other organizations without having to obtain judicial permission. This unfettered authority of the MIT to access and collect any kind of information clearly overrides the constitutional right to the protection of private data. Moreover, judicial authorities were precluded from collecting or requiring the MIT to submit any document, data, source, or analysis amounting to intelligence information. Under the amended law, those, including civilians, who assisted the MIT’s activities and carried out “every kind of demand” as part of the duties and powers given to the MIT would not be held responsible legally or criminally.

Most importantly, the legal amendment granted national intelligence agents quasi-immunity from prosecution for crimes they might have committed in the course of their duties. Under the amended law, public prosecutors were required

7 “Law. no. 6278 of 18 February 2012”, see <https://www.resmigazete.gov.tr/eskiler/2012/02/20120218-1.htm>; “Law no. 6532 of 17 April 2014”, <https://www.resmigazete.gov.tr/eskiler/2014/04/20140426-1.htm>.

to directly notify the head of MIT of any complaint or denunciation involving intelligence personnel. The investigation would be immediately blocked if the MIT declared that allegations were connected to intelligence duties or activities. Hence, the law places the MIT above the prosecuting authority as it is authorized to decide if its own activities should be prosecuted (Human Rights Watch 2014).

According to law, criminal investigation of the head of the Agency, all intelligence agents, and other civil servants tasked by the president for intelligence purposes is conditioned upon a pre-authorization by the president. The public prosecutor is not authorized to subject *ex officio* the alleged wrongdoings of the Agency to judicial scrutiny. A decree-law adopted in 2017 under the state of emergency⁸ further made the summoning of MIT agents before the courts conditional upon prior authorization by the head of the Agency; for the head of the Agency this would need to be authorized by the president when either the state's interest or the secrecy of the duty is considered to be at stake.

Accordingly, the Turkish National Intelligence Agency is not to be considered as a legally accountable state institution but rather as a state apparatus which is immune to prosecution and is tasked with implementing the executive's secret priorities above the law. This extra-legal zone created for the 'dark side' of the security apparatus has openly revealed itself in the increase of enforced disappearances and widespread torture after the attempted coup d'état in 2016. At least two dozen persons were reported as having been abducted, tortured, or disappeared for months by MIT agents between 2016 and 2020 (Human Rights Watch 2020).

In March 2015, the government passed its domestic security package in the Parliament. The package amended more than a dozen laws including the law on police powers and duties, the law on meetings and demonstration, the anti-terrorism law, and the Criminal Code. The new legislation significantly expanded the authority and power of the police force to the point that it is considered as an important phase in the institutionalization of an entrenched police state in Turkey (Kaynar 2018; Kaygusuz 2018; Aydın 2015). The law attributed exceptional investigatory powers to the police, which must legally belong to the prosecutor's office. The police's authority to perform body and vehicle searches without a court warrant was expanded in situations deemed to be a flagrant offence. The law further authorized police chiefs to keep a person in custody for 24 hours without a prosecutor's order for crimes involving force and violence during public events and 48 hours for collective crimes. Moreover, the police were given the power to carry out intelligence wiretapping in urgent situations for a 48-hour period (which was 24 hours previously) without a judge's order. The law also widened the authority of the police to use lethal weapons during public demonstrations on wide and open-

8 "Decree-law no. 694 of 15 August 2017", <https://www.resmigazete.gov.tr/eskiler/2017/08/20170825-13.pdf>.

ended terms (Şen 2015) and authorized them to arrest any person considered to be a threat to public order, which entails a high risk of abuse of power. In other words, by legalizing the discretionary margin of the police and the excessive use of force, these provisions reinforced the police state in Turkey and paved the way for unaccountable law enforcement.

Additionally, the law attributed broad investigatory powers—which are constitutionally strictly the duty of prosecutors—to district governors appointed by the executive. This means nothing less than a transfer of judicial authority to the executive, in complete disregard of the principle of separation of powers (Aydın 2015). Finally, district governors were given the authority to order pre-emptive security measures and to largely restrict fundamental rights based on an assumed threat to public order. The exceptional powers conceded to the executive officers aimed in fact at normalizing a *de facto* state of emergency. The domestic security package thus served to reinforce the prerogatives of the executive and opened up an unprecedented security state era by laying down the legal basis for unaccountable security practices (Kaygusuz 2018).

Reinforced Legal Protections for a Perpetual War

The laws and decrees adopted from 2015 onwards, when first a *de facto* and then a *de jure* state of emergency was launched, have introduced a more blatant regime of impunity. Drawing on an aggressive nationalistic narrative and the constant projected threat of a perceived ‘enemy’, the ‘survival of the state’ or the ‘continuity of the state’ became the prevailing official discourse. All kinds of illegal executive actions were framed as legitimate, as long as they were directed at the elimination of threats to national security, and at the survival of the state. In parallel with the rise of this militarized discourse, the legal system began to be overtly instrumentalized to establish a new security regime and to render the regime immune to prosecution for crimes committed in its ‘war on terror’. To this end, the government put forward well-structured and manifest legal guarantees against any attempt to hold the executive legally accountable.

One year after the initiation of heavy military operations under curfews in south-eastern Turkey, as of July 2016, the toll of the armed conflict was very heavy, with hundreds of deaths and thousands of wounded. Local prosecutors were reluctant to perform crime-scene investigations and consistently refused or delayed opening investigations into the reported killings by security forces. This reluctance was accompanied by a denial of adequate autopsies or the identification and returning of the bodies to the families (Office of the United Nations High Commissioner for Human Rights 2017, 2018). Finally, in July 2016, a legal amendment was adopted in order to shield security personnel and other state agents participating

in the ‘fight against terrorism’ from prosecution.⁹ Several articles of the law on provincial administration were modified to make it more difficult, if not impossible, to bring security agents to justice for the damages incurred and human rights abuses committed during the military operations.

Law no. 6,722 defined the crimes committed in the scope of the fight against terrorism as “military crimes” and conditioned their investigation upon authorization by the relevant ministry and the president. Even the criminal prosecution of the most egregious crimes such as torture and aggravated torture, which must normally be launched *ex officio*, was subject to authorization by the executive power. In addition to these, a judicial shield was created for all public servants who were involved in planning or prosecuting counter-terrorism operations, including the *Korucular* (‘village guards’), a paramilitary force created in 1985 to assist the military forces in the fight against the Kurdish insurgency.¹⁰ Most crucially, a provisional article added to the law provided a retroactive application of the authorization requirement for prosecuting wrongdoing committed during counter-terrorism operations conducted before the adoption of the law. This provision was clearly aimed at retroactively shielding from prosecution those who committed crimes in the most recent period, in which military operations had produced disastrous effects in Kurdish cities. Hence, the law itself engendered a legal vacuum, which guaranteed effective impunity for past, ongoing, and future state crimes. Disabling the existing judicial regime and replacing the autonomy of the judiciary with political discretion eventually created a legal black hole for the executive’s campaign for the war on terror.

As Michael Welch (2007) underlines, impunity enhances the risk of perpetuating state abuses in an endless war on terror. It is within the orbit of impunity that a state’s security apparatus is emboldened to commit further abuses without fear of being held accountable (*ibid.*, 147). A curtailment of accountability is a global phenomenon when it comes to extrajudicial military practices carried out by states under the guise of fighting terrorism. Hence, Israel’s shoot-to-kill policy towards Palestinians is widely sanctioned by the Israeli High Court of Justice (Erakat 2019). In this respect, Noura Erakat (*ibid.*) underlines that existing laws of armed conflict are constantly being redesigned in order to expand the state’s “sovereign right to kill”, including, among other things, the narrowing-down of the category of ‘civilian’ and therefore also of who is entitled to immunity during the conflict. Similarly, Haley Duschinski (2010) shows how extrajudicial executions by Indian soldiers in the Kashmir Valley are officially cast as deaths in “legitimate military encounters” so as to legitimize state violence and render it immune to prosecution. Welch (2007)

9 “Law no. 6722 of 14 July 2016”, <https://www.resmigazete.gov.tr/eskiler/2016/07/20160714-1.htm>.

10 For the structure and operation of the village guard system in Turkey, see Özar et al. 2013.

explores the complex legal techniques deployed by the Bush administration after the 9/11 attacks to devise torture as an official policy and to disable existing legal prohibitions. Drawing on evidence from the US war on terror in Afghanistan, Iavor Rangelov and Marika Theros (2019) explore how the pattern of impunity continued after the fall of the Taliban, with legal immunity granted to the local warlords responsible for the most serious war crimes, who were nevertheless seen as indispensable partners in the war.

Rangelov and Theros (*ibid.*, 406) contend that impunity serves an important function in producing a permanent state of emergency, which is essential for the states engaged in the war on terror. In other words, impunity is crucial to create the ‘judicial void’ within which a permanent state of emergency could operate. The primary political role of impunity is therefore creating a favourable environment for promoting and pursuing the war on terror. As such, “impunity works as a mechanism for reproduction of the war on terror” (*ibid.*, 410), which, in turn, means that rule by exception is intrinsically tied to the entrenched regime of impunity within which the exception will unfold.

Accordingly, exceptional war techniques deployed during the curfews in south-eastern Turkey could only become permanent by granting *de jure* and *de facto* amnesties, namely by creating an environment that makes it impossible to hold law enforcement agents accountable. With the legal amendment of July 2016, *de facto* tolerance for arbitrary and excessive use of lethal force in counter-terrorism operations was successfully ‘legalized’ and institutionalized.

The same amendment also expanded the use of exceptional powers in ordinary times by granting the president unilateral discretionary power to deploy military forces for counter-terrorist purposes on a countrywide scale without the need to declare an official state of emergency. In this context, the military acquired a position of command over all the security forces and was granted tremendous powers in the war on terror. In this setting, exceptional powers are, in practice, transposed within the ordinary laws and become permanent, whereas they actually belong to the legal state of emergency subject to constitutional and legislative oversight.

This logic of power is manifestly based on the spatial and temporal overstretching of the ‘executive prerogative’ principle and aims at the normalization of emergency powers. If we examine the work of Mark Neocleous (2008) regarding this normalization trend, we may observe that extraordinary powers which are meant to be temporary and restricted “quickly and easily infiltrate the ordinary legal system, becoming regularised as a technique of government” (*ibid.*, 67).

Towards a Sovereign Impunity: Legal Shield for Emergency Powers

As explained above, in the aftermath of the attempted coup d'état in July 2016, a nationwide state of emergency was declared initially for three months, and was renewed seven times before being formally lifted in 2018. Between 2016–18, the country was ruled by emergency decree-laws, which were only later submitted for parliamentary approval. All 37 decrees issued in this period were later legalized and acquired a permanent status. Of particular interest among these emergency decrees regarding accountability are those that amended critical criminal legislation. Some of these amendments considerably eroded legal guarantees against arbitrary detention and potential ill treatment by security forces. For instance, the period a person could be held in custody without charge was extended to up to 30 days under a state of emergency, and the right to unrestricted access to a lawyer while in custody was drastically curtailed.¹¹ This indeed increased the risk of being subject to torture while in custody, and hampered efforts to produce evidence for establishing torture.

Second and most importantly, a legal shield of immunity was established for state officials and even for civilians who were involved in the suppression of the coup attempt. In this respect, the decree no. 668 dated 8 November 2016, which was later promulgated as law no. 6,755 abolished the “criminal, legal, administrative and financial responsibility of those who made decisions, implemented measures, or fulfilled duties in the context of the state of emergency”.¹² This included government agents, ministers, local governors, security forces, and all state employees open-endedly. Those who took action to suppress the violent coup attempt or the subsequent terror incidents were equally excluded from legal and judicial oversight. As such, state officials who ordered or implemented emergency measures would not be held accountable for having used extremely large discretionary powers granted by the emergency decrees. These provisions, which are now incorporated into the ordinary legal order, have basically established an aegis of impunity for governmental action in the context of a state of emergency. To put it another way, a legal space was created for the arbitrary rule of the executive.

Yet another executive decree dangerously expanded the scope of impunity to the actions of civilians who were involved in the suppression of the coup attempt

11 Decree-law no. 667, issued right after the attempted coup, allowed the police to hold the suspects of terror-related crimes for up to 30 days without charge. This period was then reduced from 30 to 7 days by the Decree no. 684 with a possible extension to 14 days. See also OHCHR 2017.

12 “Article 37 of Law no. 6755 of 8 December 2016”, <https://www.resmigazete.gov.tr/eskiler/2016/11/20161124-2..htm>.

and the “ensuing events”.¹³ This legal initiative was totally in line with the statements of the AKP leadership encouraging mass mobilization against potential political threats to the government and the state.¹⁴ The decree brought forward a full and retrospective exoneration for the criminal acts of civilians, including self-organized militia groups who were suspected of playing a key role in suppressing the violent coup attempt. The extremely vague term of “ensuing events” created a very problematic legal grey area where any violent and illicit act perpetrated by the ‘angry crowds’ could be justified for the survival of the regime. In Turkey’s current political context, any political dissent might be placed under the vague qualification of ‘terror incidents’, which would lead to the criminalization of the regime’s opponents and justify violent attacks against them.

With these decrees now being legalized, one can argue that a regime of “sovereign impunity” (Welch 2009) has been established in Turkey with a view to accomplishing executive aggrandizement. Reminding us that all new configurations of power come with unique forms of immunization, Welch (2007, 2009) proposes the concept of sovereign impunity to characterize the political-legal order in the United States after the attacks of 9/11. This reflects a reorganization of power whereby the state crimes committed in the war on terror are rendered completely immune to prosecution. According to Welch, sovereign impunity “is embedded into a newly configured form of power while accentuating its inherent lack [of] accountability” (Welch 2007, 139). In the same vein, along with the reconfiguration of the state regime in the aftermath of the coup attempt, a new regime of impunity has been established in Turkey by strategic legal interventions whose aim, in reality, is to strengthen political domination. This new era is clearly characterized by a blatant and sovereign impunity, which sustains and constantly reproduces an unconstrained executive prerogative.

Conclusion

The last decade has witnessed an increasing trend towards normalizing the exceptional as a feature of the move toward greater authoritarianism in Turkey’s political arena. This has occurred most specifically through an accelerated emergency law-making that has been aimed at reinforcing executive prerogatives. Consequently, constitutional constraints are loosened: the separation of powers has been severely disrupted while the executive is tremendously empowered. Drawing on Andrew

13 “Decree-law no. 696 of 24 December 2017”, <https://www.resmigazete.gov.tr/eskiler/2017/12/20171224-22.htm>.

14 For more on the increase in far-right mobilization during the AKP’s third term, see Tuğal 2016; Oğuz 2017, pp. 117–19.

Neal's analysis of exceptionalism (2012), it is important to emphasize that this has not happened in the form of a suspension of the law, but through the enactment of legal reforms in an exceptional way, endorsed by a discourse of emergency. The use of autocratic laws to expand the powers of the executive is identified by Javier Corrales (2015) as being a key element of "autocratic legalism".¹⁵ An important feature of the current autocratic legalism in Turkey has been a complete derogation from the rule of law and the creation of 'legal black holes' for the arbitrary rule of the executive through casting out established accountability mechanisms.

The genealogy of recent legal changes studied here demonstrates how the normative basis of the state's 'right to kill' was expanded through gradually disabling judicial constraints over the state's security apparatuses with strategic legal regulations. The analysis has also shed light on how lifting statutory limitations to executive prerogatives through emergency lawmaking permitted the routinization of exceptional powers. The most striking feature of this new era of "sovereign impunity" is that immunity from the law is now not only tolerated, as has historically been the case in Turkey, but it has instead become an officially-sanctioned state policy. Hence, the main argument of this paper is that the removal of executive actions from the rule of law and paralysing judicial control over the security practices is a key feature of and an essential condition for the current regime transfiguration in Turkey towards an exceptional state.

As Welch (2007) points out, every new configuration of power features its own regime of unaccountability. Accordingly, a strategic legal fabrication with a view to building a fortress of impunity for the new regime is the marking feature of the current authoritarian statecraft in Turkey. For a better understanding of how impunity and authoritarianism interplay and are mutually strengthened, we certainly need to dig deeper into the multiple ways in which authoritarian regimes manipulate law and produce new forms of legality to advance their autocratic ends.

References

Akça, Ismet, Süreyya Algül, Hülya Dinçer, Erhan Keleşoğlu, and Barış Alp Özden (2018), *When State of Emergency Becomes the Norm: The Impact of Executive Decrees on Turkish Legislation*, Istanbul: Heinrich Böll Stiftung, available at https://tr.boell.org/sites/default/files/ohal_rapor_web.pdf. Last accessed on 10 June 2022.

15 In his study exploring the mechanisms and the causes of Venezuela's rapid move toward increasing authoritarianism, Corrales (2015) defines autocratic legalism as the use, abuse, and non-use of the law in service of the executive branch. For a comparative analysis on the weaponizing of law by autocratic regimes see Scheppele 2018.

- Amnesty International (2017), *No End in Sight: Purged Public Sector Workers Denied a Future in Turkey*, London: Amnesty International, available at https://www.amnesty.org/en/wp-content/uploads/2021/05/EUR4462722017_ENGLISH.pdf. Last accessed on 10 June 2022.
- Amnesty International (2018), “Purged Beyond Return”, Amnesty International, 25 October, available at <https://www.amnesty.org/en/latest/campaigns/2018/10/turkey-purged-beyond-return/>. Last accessed on 10 June 2022.
- Ardıçoğlu, Artuk (2015), “Hukuka Uygun Olmayan Sokağa Çıkma Yasağı Hukuka Aykırı Mıdır?” *Birikim Dergisi*, 27 November, available at <https://birikimdergisi.com/guncel/7331/hukuka-uygun-olmayan-sokaga-cikma-yasagi-hukuka-aykiri-midir>. Last accessed on 10 June 2022.
- Avşar, Gülçin, Koray Özdil, and Nur Kırmızıdağ (2013), *The Other Side of the Ergenekon: Extrajudicial Killings and Forced Disappearances*, translated by Alex Balistreri, Istanbul: TESEV.
- Aydın, Oya (2015), “İç Güvenlik Yasa Tasarısı: Anayasal Düzene Son”, *Birikim Dergisi*, 20 January, available at <https://birikimdergisi.com/guncel/1155/ic-guvenlik-k-yasa-tasarisi-anayasal-duzene-son/>. Last accessed on 10 June 2022.
- Bakiner, Onur (2013), “Is Turkey Coming to Terms with Its Past? Politics of Memory and Majoritarian Conservatism”, *Nationalities Papers*, vol. 41, no. 5, available at <http://dx.doi.org/10.1080/00905992.2013.770732>. Last accessed on 23 June 2022.
- Bargu, Banu (2018), “Year One: Reflections on Turkey’s Second Founding and the Politics of Division”, *Critical Times*, vol. 1 no. 1, pp. 23–48, available at <https://read.dukeupress.edu/critical-times/article/1/1/23/139313/Year-One-Reflections-on-Turkey-s-Second-Founding>. Last accessed on 10 June 2022.
- Bermeo, Nancy (2016), “On Democratic Backsliding”, *Journal of Democracy*, vol. 27, no. 1, pp. 5–19.
- Boukalas, Christos (2014), “No Exceptions: Authoritarian Statism: Agamben, Poulantzas and Homeland Security”, *Critical Studies on Terrorism*, vol. 7, no. 1, pp. 112–30.
- Budak, Yeliz (2015), “Dealing with the Past: Transitional Justice, Ongoing Conflict and the Kurdish Issue in Turkey”, *International Journal of Transitional Justice*, vol. 9, no. 2, pp. 219–38.
- Burç, Rosa, and Mahir Tokatlı (2020), “Becoming an Autocracy under (Un)Democratic Circumstances: Regime Change Under AKP Rule”, *Erdoğan’s ‘New’ Turkey: Attempted Coup d’état and the Acceleration of Political Crisis*, edited by Nikos Christofis, London: Routledge, pp. 75–93.
- Cohen, Stanley (1995), “State Crimes of Previous Regimes: Knowledge, Accountability and the Policing of the Past”, *Law & Social Inquiry*, vol. 20, no. 1, pp. 7–50.
- Corrales, Javier (2015), “Autocratic Legalism in Venezuela”, *Journal of Democracy*, vol. 26, no. 2, pp. 37–51.

- Dinçer, Hülya (2020), “90’lardan Bugüne Türkiye’de Cezasızlık Politikalarının Bilançosu: Savaşın Gölgesinde Adaletle Bağlamak”, *Toplum ve Bilim*, vol. 152, pp. 40–72.
- Duschinski, Haley (2010), “Reproducing Regimes of Impunity: Fake Encounters and the Informalization of Everyday Violence in Kashmir Valley”, *Cultural Studies*, vol. 24, no. 1, pp. 110–32.
- Erakat, Noura (2019), “The Sovereign Right to Kill: A Critical Appraisal of Israel’s Shoot-to-Kill Policy in Gaza”, *International Criminal Law Review*, vol. 19, no. 5, pp. 783–818.
- Ericson, Richard V. (2007), *Crime in an Insecure World*, Cambridge: Polity Press.
- Esen, Berk, and Sebnem Gümüşçü (2016), “Rising Competitive Authoritarianism in Turkey”, *Third World Quarterly*, vol. 37, no. 9, 1581–1606, available at https://www.swpberlin.org/publications/products/fachpublikationen/Berk_Esen_Rising_competitive_authoritarianism_in_Turkey.pdf. Last accessed on 10 June 2022.
- European Commission for Democracy through Law (Venice Commission) (2016), “Turkey – Opinion on the Legal Framework Governing Curfews”, opinion no. 842/2016, adopted by the Venice Commission at its 107th Plenary Session, Venice, 10–11 June 2016, Strasbourg: Venice Commission, available at [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2016\)010-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)010-e). Last accessed on 10 June 2022.
- Geri, Maurizio (2016), “The Securitization of the Kurdish Minority in Turkey: Ontological Insecurity and Elite’s Power Struggle as Reasons of the Recent Re-securitization”, *Digest of Middle East Studies*, vol. 26, no. 1, available at <https://doi.org/10.1111/dome.12099>. Last accessed on 12 June 2022.
- Göral, Özgür Sevgi, Ayhan Işık, and Özlem Kaya (2013), *The Unspoken Truth: Enforced Disappearances*, Istanbul: Hakikat Adalet Hafıza Merkezi (Truth Justice Memory Centre).
- Göztepe, Ece (2018), “The Permanency of the State of Emergency in Turkey: The Rise of a Constituent Power or Only a New Quality of the State?” *Zeitschrift für Politikwissenschaft*, vol. 28, no. 4, available at <https://doi.org/10.1007/s41358-018-0161-0>. Last accessed on 10 June 2022.
- Human Rights Foundation of Turkey (TİHV) (2016), “Curfews between August 16, 2015 – August 16, 2016 and Civilians Who Lost Their Lives According to the Data of Human Rights Foundation of Turkey Documentation Center”, 21 August, available at https://hakikatadalethafiza.org/wp-content/uploads/2016/08/2016.08.21_T%C4%B0HV-16-August-2016-HRFT-Curfews-Fact-Sheet1.pdf. Last accessed on 12 June 2022.
- Human Rights Joint Platform (İHOP) (2018), 21 July 2016–20 March 2018: State of Emergency in Turkey, Ankara: İHOP, available at https://ihop.org.tr/wp-content/uploads/2018/04/SoE_17042018.pdf. Last accessed on 12 June 2022.

- Human Rights Watch (2014), "Turkey: Spy Agency Law Opens Door to Abuse", 29 April, available at <https://www.hrw.org/news/2014/04/29/turkey-spy-agency-law-opens-door-abuse>. Last accessed on 10 June 2022.
- Human Rights Watch (2018), "Turkey: Normalizing the State of Emergency", 20 July, available at <https://www.hrw.org/news/2018/07/20/turkey-normalizing-state-emergency>. Last accessed on 10 June 2022.
- Human Rights Watch (2020), "Turkey: Enforced Disappearances, Torture", 29 April, available at <https://www.hrw.org/news/2020/04/29/turkey-enforced-disappearances-torture>. Last accessed on 10 June 2022.
- Jessop, Bob (2016), *The State: Past, Present, Future*, Cambridge: Polity Press.
- Jongerden, Joost (2020), "Conquering the State, Subordinating Society: A Kurdish Perspective on the Development of AKP Authoritarianism in Turkey", Erdoğan's 'New' Turkey: Attempted Coup d'état and the Acceleration of Political Crisis, edited by Nikos Christofis, London: Routledge, pp. 200–15
- Kaygusuz, Özlem (2018), "Authoritarian Neoliberalism and Regime Security in Turkey: Moving to an 'Exceptional State' under AKP", *South European Society and Politics*, vol. 23, no. 2, pp. 281–302.
- Kaygusuz, Özlem, and Oya Aydın (2020), "Deconstitutionalization and the State Crisis in Turkey: The Role of the Turkish Constitutional Court and the European Court of Human Rights", *Turkey's New State in the Making: Transformations in Legality, Economy and Coercion*, edited by P. Bedirhanoglu, Ç. Dölek, F. Hülügü, and Ö. Kaygusuz, London: Zed Books, pp. 41–63.
- Kaynar, Ayşegül K. (2018), "Withering Constitutional State? Recent 'Police State' Discussions in Turkey", *Research and Policy on Turkey*, vol. 3, no. 1, pp. 90–102.
- Mecellem, Jessica G. (2018), "Human Rights Trials in an Era of Democratic Stagnation: The Case of Turkey", *Law & Social Inquiry*, vol. 43, no. 1, pp. 1–33.
- Neal, Andrew W. (2012), "Normalization and Legislative Exceptionalism: Counterterrorist Lawmaking and the Changing Times of Security Emergencies", *International Political Sociology*, vol. 6, no. 3, pp. 260–76.
- Neocleous, Mark (2008), *Critique of Security*, Edinburgh University Press.
- Rangelov, Iavor, and Marika Theros (2019), "Political Functions of Impunity in the War on Terror: Evidence from Afghanistan", *Journal of Human Rights*, vol. 18, no. 4, pp. 403–18.
- Office of the United Nations High Commissioner for Human Rights (2017), *Report on the Human Rights Situation in South-East Turkey: July 2015 to December 2016*, Geneva: OHCHR, available at https://www.ohchr.org/sites/default/files/Documents/Countries/TR/OHCHR_South-East_TurkeyReport_10March2017.pdf. Last accessed on 12 June 2022.
- Office of the United Nations High Commissioner for Human Rights (2018), *Report on the impact of the state of emergency on human rights in Turkey, including*

- an update on the South-East: January – December 2017, Geneva: OHCHR, available at https://www.ohchr.org/sites/default/files/Documents/Countries/TR/2018-03-19_Second_OHCHR_Turkey_Report.pdf. Last accessed on 12 June 2022.
- Oğuz, Şebnem (2016), “Yeni Türkiye’nin Siyasal Rejimi”, *Yeni Türkiye’de Kapitalizm, Devlet ve Sınıflar*, edited by Tolga Tören and Melehat Kutun, Istanbul: SAV, pp. 81–127.
- Orentlicher, Diane (2005), *Impunity: Report of the Independent Expert to Update the Set of Principles to Combat Impunity*, Geneva: United Nations Commission on Human Rights, available at <https://digitallibrary.un.org/record/541829?ln=en>. Last accessed on 12 June 2022.
- Özar, Şemsa, Nesrin Uçarlar, and Osman Aytar (2013), *From Past to Present—A Paramilitary Organization in Turkey: Village Guard System*, translated by Sedef Çakmak, Istanbul: DISA, available at <https://dealingwiththepast.org/wp-content/uploads/2015/03/Disa-Paramilitary.pdf>. Last accessed on 12 June 2022.
- Polat, Necati (2011), “The Anti-Coup Trials in Turkey: What Exactly Is Going On?” *Mediterranean Politics*, vol. 16, no. 1, pp. 213–19.
- Poulantzas, Nicos (2019), *Fascism and Dictatorship*, Brooklyn: Verso [1974].
- Savran, Arin (2020), “The Peace Process between Turkey and the Kurdistan Workers’ Party, 2009–2015”, *Journal of Balkan and Near Eastern Studies*, vol. 22, no. 6, pp. 777–92, available at <https://www.tandfonline.com/doi/full/10.1080/19448953.2020.1801243>. Last accessed on 10 June 2022.
- Scheppele, Kim L. (2018), “Autocratic Legalism”, *University of Chicago Law Review*, vol. 85, no. 2, pp. 545–83.
- Sevimli, Emel A., Esra Kılıç, Gülistan Zeren, Melis Gebeş, and Özlem Zıngıl (2021), *İnsan Hakları İhlallerinde Cezasızlık Sorunu: Kovuşurma Süreci*, Istanbul: Hakikat Adalet Hafıza Merkezi.
- Somer, Murat (2016), “Understanding Turkey’s Democratic Breakdown: Old vs. New and Indigenous vs. Global Authoritarianism”, *Southeast European and Black Sea Studies*, vol. 16, no. 4, pp. 481–503, available at <https://doi.org/10.1080/14683857.2016.1246548>. Last accessed on 10 June 2022.
- Söyler, Mehtap (2015), *The Turkish Deep State: Consolidation, Civil-Military Relations and Democracy*, London: Routledge.
- Şen, Ersan (2015), “6638 sayılı İç Güvenlik Kanunu”, *Türkiye’de Hukuku Yeniden Düşünmek*, edited by Haluk İnanıcı, Istanbul: İletişim Yayınları, pp. 87–103.
- Şık, Ahmet (2019), “The Gülen Community and the AKP”, interview by Deniz Çakırer, *Authoritarianism and Resistance in Turkey*, edited by Esra Özyürek, Gaye Özpınar, and Emrah Altındış, London: Springer, pp. 81–93.
- Tee, Caroline (2021), “The Gülen Movement: Between Turkey and International Exile”, *Handbook of Islamic Sects and Movements*, edited by Muhammad Afzal Upal and Carole M. Cusack, Leiden, Boston: Brill, pp. 86–109.

- Tuğal, Cihan (2016), "In Turkey, the regime slides from soft to hard totalitarianism", *Open Democracy*, 17 February, available at <https://www.opendemocracy.net/en/turkey-hard-totalitarianism-erdogan-authoritarian/>. Last accessed on 10 June 2022.
- Türk, Duygu, and Yiğit Karahanoğulları (2018), "Otoriter Devletçilik, Neoliberalizm, Türkiye", *Mülkiye Dergisi*, vol. 42, no. 3, pp. 403–48.
- Welch, Michael (2007), "Sovereign Impunity in America's War on Terror: Examining Reconfigured Power and the Absence of Accountability", *Crime, Law and Social Change*, vol. 47, no. 3, pp. 135–50.
- Welch, Michael (2009), *Crimes of Power & States of Impunity: The U.S. Response to Terror*, New Brunswick, New Jersey, and London: Rutgers University Press.
- Yeğen, Mesut (2015), "The Kurdish Peace Process in Turkey: Genesis, Evolution and Prospects", *Global Turkey in Europe*, Working Paper no.11/2015, pp. 1–15.
- Yılmaz, Zafer (2019), "The Genesis of the 'Exceptional' Republic: The Permanency of the Political Crisis and the Constitution of Legal Emergency Power in Turkey", *British Journal of Middle Eastern Studies*, vol. 46, no. 5, pp. 714–34.
- Yılmaz, Zafer (2020), "Erdoğan's Presidential Regime and Strategic Legalism: Turkish Democracy in the Twilight Zone", *Southeast European and Black Sea Studies*, vol. 20, no. 2, pp. 265–87.
- Zur, Judith (1994), "Psychological Impact of Impunity", *Anthropology Today*, vol. 10, no. 3, pp. 12–17.