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RESEARCH ARTICLE

The Clear and Present Danger Test in Turkish Penal Law

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ABSTRACT

The concept of clear and present danger originates from American law has become a phenomenon in different legal systems, particularly in connection with freedom of expression. The Turkish legal system uses the criterion of clear and imminent danger and has more than one regulation involving this criterion. Pursuant to Articles 215 and 216 of the Turkish Penal Code, in order for punishment to be possible, a clear and imminent danger must exist in terms of public order and public security. In addition to these provisions, Articles 17 and 19 of the Code on Meetings and Demonstrations (*Toplantı ve Gösteri Yürüyüşleri Kanunu*) state that, if a clear and imminent danger is present that a crime will be committed, meetings may be banned for a certain period. This study aims to examine how the clear and imminent danger test is applied in Turkish judicial decisions in the context of the aforementioned provisions and to reveal the criteria for determination of clear and imminent danger.

Keywords: Clear and present danger, freedom of expression, public safety, public order, danger crime

Introduction

The clear and present danger test closely related to freedom of expression is a concept based on American law. The Bill of Rights was added to the Constitution of the United States of America in 1791 and guarantees freedom of expression, along with many other freedoms. However, according to the decisions of the Supreme Court of the United States, this freedom is not absolute and can be limited under certain circumstances. While making this limitation, the clear and present danger test is also a concept that has emerged in addition to the tendency toward evil and balancing criteria developed by the Court as the test for applying these limitations.[1] In 2002, Turkish legislators introduced the concept of clear and imminent danger through amendments made to the Code on Meetings and Demonstrations (*Toplantı ve Gösteri Yürüyüşleri Kanunu*). This concept had previously been used with similar terms in judicial decisions on freedom of expression and cases concerning the dissolution of political parties. Ultimately, the concept was included as clear and imminent danger with regard to the two types of offenses regulated under the title of Offences against Public Peace in the Turkish Penal Code (TPC).[2]

This study thus aims to display the adaptation and application of the clear and present danger test in Turkish law through the Turkish judicial decisions. Firstly, however, the article will analyze the emergence of the concepts in the decisions of the Supreme Court of the United States, as well as the different meanings the concept acquired in this process. The paper will then provide general information about how the clear and present danger test was first used in Turkish law and its place in the legislation. Finally, after analyzing the judicial decisions that point to or apply the clear and imminent danger test, the study will attempt to determine the concrete grounds for this test by referring to academic writings. In this context, the article will analyze how the Turkish Constitutional Court handles the concept of clear and imminent danger in party dissolution cases and individual application decisions, as well as the decisions of the Turkish Court of Cassation (*Yargıtay*) and the Regional Court of Appeals (*Bölge Adliye Mahkemesi*) on the subject.

[1] Chester James Antieau, 'The Rule of Clear and Present Danger: Scope of Its Applicability' (1950) *Michigan Law Review, 48*(6), 811, 824; Zühtü Arslan, *ABD Yüksek Mahkemesi Kararlarında İfade Özgürlüğü* (Liberal Düşünce Topluluğu 2003) 29.

[2] This study has preferred to express the words "*açık ve yakın*" as chosen by Turkish legislators regarding the nature of the danger as "clear and imminent." Although the legislators did not use the concept of "clear and present" in the texts of the Articles, this concept was included in the justifications of the Articles. In the judicial decisions analyzed later on, both concepts are used interchangeably. For this reason, the study finds using the word "imminent," which may have the closest meaning to the word "present," to be more accurate. In Section II of the study, the details regarding the adaptation of the concept into Turkish law as "clear and imminent danger" will be discussed. With the study preferring the term "clear and imminent danger" from that point onward in accordance with its usage in Turkish law.

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I. The Concept and Historical Background

In 1917 during World War, the Espionage Act was enacted in the United States of America to penalize the betrayal of soldiers and their refusal to fulfill their duties.[3] According to this Act, intentional insubordination, disloyalty, mutiny, or refusal to perform one's duty in the military or naval forces or to willfully obstruct recruiting or enlistment services of the United States while the United States is at war became criminal offenses.[4] Following the seizure of pamphlets at the Socialist Party headquarters on the prevention of recruiting in that same year, the Party General Secretary Schenck and his associates were prosecuted for violating the Espionage Act. The concept of clear and present danger first appeared in the Supreme Court Case of *Schenck v. United States* (1919).[5] In this case, Justice Oliver Wendell Holmes, one of the Supreme Courts judges, used the clear and present danger test as a tool for determining which expressions the government could punish.[6] In his opinion, the question in any case concerning freedom of expression is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.[7] Words' ability to create a clear and present danger is determined by relying upon the conditions and the way they are used in each concrete case. When considering clear and present danger, the place where the expressions are used and the extent of their spread, the state of national and international security at the time of their use, the authority the person using the expression has over the community, the size of this community (organization), and the actuality of the dangerous opinions expressed are the issues that should be taken into consideration.[8]

The clear and present danger test has been adopted in many subsequent judgments of the Supreme Court and also been accepted in different legal systems. When the Supreme Court first used this test, circumstances such as the United States being in World War I led to its use in limiting freedom of expression.[9] Justice Holmes again referred to the concept of present danger in his dissenting opinion on a decision given by the Court in 1925. In this case, the defendants had been accused of recommending, supporting, and teaching the duty, necessity, and propriety of overthrowing or destroying the existing government by force, violence, or any other unlawful means in their article titled "The Left Wing Manifesto." They were also accused in regard to printing and publishing the newspaper *The Revolutionary Age*, which contained articles of similar content. In this case, Justice Holmes had noted that an attempt to overthrow the government by a small group that was believed to share the defendant's views did not pose an immediate danger.[10]

In another decision of the Supreme Court in 1927, Justice Brandeis used the concept of clear and present danger. In his opinion, restrictions on expressions of opinion cannot be justified in cases where the expressions used do not create a clear and present danger or are not intended to create such a danger.[11] For this approach, a clear danger exists when the expression creates a danger without any doubt, whereas a present danger exists when an inevitably high probability occurs that the expression will result in harm.[12]

In another decision given in 1949, the Supreme Court found a decision unconstitutional using the clear and present danger criterion. In the relevant case, a protest occurred over a Catholic priest (Terminiello) for his statements about communists and Jews in front of a crowded group, and he was convicted in the trial that was held after the events. The Supreme Court found the decision unconstitutional by applying the clear and present danger test. For the Court, freedom of expression is not unlimited, but it also has the function of provoking debate. Therefore, the mere fact that the priest's expressions angered people and caused unrest should not be penalized unless a clear and present danger of concrete harm could be shown.[13] Justice Jackson, who dissented from the decision, applied the same criterion and concluded that the decision was constitutional.

In the first half of the 20^{th} century, a number of prohibitive and restrictive policies were implemented in the USA against the communist ideology, which was considered a threat against democracy. The Smith Act was enacted during this period with the aim of suppressing political opposition and punishing views advocating to overthrow the government through violent acts.[14] The approach of the Supreme Court against the decisions made in opposition to this Act played an important role in shaping the

[3] For a detailed discussion of the Espionage Act see: Thomas F. Carroll, 'Freedom of Speech and of the Press in War Time: The Espionage Act' (1919) *Michigan Law Review, 17*, 621; See also, Fred B. Hart, 'Power of Government over Speech and Press' (1920) *Yale Law Journal, 29*, 410; Henry W. Taft, 'Freedom of Speech and Espionage Act' (1921) *American Law Review, 55*, 695; Petra DeWitt, '" Clear and Present Danger" The Legacy of 1917 Espionage Act in the United States' (2016) *Historical Reflections, 42*(2), 115.

[4] Yaşar Salihpaşaoğlu, 'Açık ve Mevcut Tehlike Kriteri ve Türk Hukuk Sistemine Yansımaları' (2008) *Liberal Düşünce Dergisi, 52*, 231, 232.

[5] *Schenck v. United States*, 249 U.S. 47, 1919.

[6] David R. Dow, 'The Moral Failure of the Clear and Present Danger Test' (1998) *William & Mary Bill of Rights Journal, 6*(3), 733, 736.

[7] *Schenck v. United States*, 249 U.S. 47, 1919.

[8] Özge Apiş, *Halkı Kin ve Düşmanlığa Alenen Tahrik veya Aşağılama Suçları (TCK md. 216)* (Adalet Yayınevi 2017) 127.

[9] Hasan Tunç & Murat Erdoğan, 'Yargıtay ve Anayasa Mahkemesi Kararlarında Demokratik Toplum Düzeninde Gereklilik ile Açık ve Yakın Tehlike Kavramları' (2020) *Antalya Bilim Üniversitesi Hukuk Fakültesi Dergisi, 8*(16), 1295, 1303.

[10] *Gitlow v. New York*, 268 U.S. 652, 1925.

[11] *Whitney v. California*, 274 U.S. 357, 1927.

[12] Arslan (n 1) 30; Salihpaşaoğlu (n 4) 234.

[13] *Terminello v. Chicago*, 337 U.S. 1, 1949.

[14] Batuhan Ustabulut, 'İfade Özgürlüğünde Açık ve Mevcut Tehlike' (2017) *Kocaeli Üniversitesi Hukuk Fakültesi Dergisi, 16*, 27, 45.

criterion of clear and present danger.[15] In the case *Dennis v. the United States*, the court approved the decision, arguing that the defense of the doctrine of overthrowing the government by force and violence created a "clear and present danger" after stating that the defendants had intended to overthrow the government when the appropriate conditions arose.[16] Justice Douglas, who dissented from the decision, concluded in summary that the defendants were only defending a doctrine and that therefore no clear and present danger of overthrowing the government existed. For Justice Douglas, if the defendants had been alleged to have taught such techniques as sabotage, assassination of the President, theft of public documents, planting bombs, and the art of street warfare, then a clear and present danger would undoubtedly have existed. However, the lack of evidence regarding the defendants committing such actions made the decision unconstitutional.

In another judgment concerning this Act, the Court overturned the conviction of Communist Party members on the ground that they had propagandized and educated for the overthrow of the government through the use of force and violence. The Court stated that the Act prohibits not mere expressions of opinion but rather concrete actions.[17] With this decision, the Court evaluated the clear and present danger criterion with a liberal approach.[18]

In the 1969 case of *Brandenburg v. Ohio*, the Supreme Court redefined the clear and present danger criterion to better protect freedom of expression.[19] In this case, the Supreme Court held that only statements that directly incite an unlawful act or create an immediate threat to public safety would confer a clear and present danger to society.[20] In other words, the criterion of clear and present danger contends that the mere content of the opinions is not enough to deem something punishable, the way these opinions are expressed and the invitation to concrete actions such as incitement to crime or mutiny are what makes it punishable.[21]

One important judgment of the Supreme Court in which it clarified the criterion of clear and present danger is the case of *Hess v. Indiana*.[22] In this case, the appellant had been arrested during an antiwar demonstration on a college campus for loudly stating, "We'll take the f***ing street later (or again)" and was subsequently convicted for violating Indiana's disorderly conduct statute. The Court held that no clear and present danger had occurred as the defendant's statements related to an action that would take place at an indefinite time in the future.[23]

When analyzing these judgments of the Supreme Court of the United States, the presence of the possibility of harm to society due to the expression of the thought being investigated is understood to be necessary in order for freedom of expression to be restricted. This danger, which was initially referred to as clear and present danger and later characterized by different concepts, must not be a possibility of harm but rather a concrete danger that is capable of causing harm.[24] Throughout history, this criterion has been a means of concretizing a danger and ensuring the use of freedom of expression when handled with a libertarian approach. In times when fears for the survival of the government predominated, such as in periods when communist ideologies were widespread, this criterion also played a restrictive role regarding the use of freedom of expression by using a narrow interpretation.[25]

II. Adaptation and Development of the Concept in Turkish Law

Within the scope of the harmonization process with the European Union, the Code on Meetings and Demonstrations was amended in 2002. The criterion of clear and present danger was thus positively regulated for the first time. However, this criterion was formulated as "clear and imminent danger" in this Code. Pursuant to Articles 17 and 19 of the Code on Meetings and Demonstrations, meetings in which a clear and imminent danger exists that a crime will be committed may be banned or postponed for a certain period of time.

Article 216 of the TPC, which entered into force on June 1, 2005, regulates the crime of provoking the public to hatred and hostility. According to Paragraph 1 of Article 216 of the TPC, provoking hatred or hostility in one section of the public against another section that has a different characteristic based on social class, race, religion, or area or regional difference is punishable. However, in order for this act to be punishable, a "clear and imminent danger" to public safety must occur as a result of this act.

Similarly, pursuant to an amendment made in 2013 to Article 215 of the TPC titled "Praising the Offence and the Offender," in order to punish a crime, a "clear and imminent danger" to public order must occur because of this act.

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15 Arslan (n 1) 31.
16 *Dennis v. United States*, 341 U.S. 494, 1951.
17 *Yates v. United States*, 354 U.S. 298, 1957.
18 Tunç & Erdoğan (n 9) 1303.
19 Salihpaşaoğlu (n 4) 235.
20 *Brandenburg v. Ohio*, 395 U.S. 444, 1969.
21 Türkan Yalçın Sancar, *Alenen Tahkir ve Tezyif Suçları* (2nd ed., Seçkin 2006) 206.
22 *Hess v. Indiana*, 414 U.S. 105, 1973.
23 Aras Türay, *Nefret Söylemi Bağlamında Halkı Kin ve Düşmanlığa Tahrik Suçu* (Seçkin Yayıncılık 2016) 158.
24 Aslı Ekin Yılmaz, 'İfade Özgürlüğü Bağlamında Tehlike Suçlarının Düzenlenişine İlişkin Bir Değerlendirme' (2020) *Yeditepe Üniversitesi Hukuk Fakültesi Dergisi, 17*(Special Issue), 155, 162.
25 Nisan Kuyucu, 'Yargının Siyasallaşması Çerçevesinde Suçu ve Suçluyu Övme Suçu: Yeni Düzenlemenin Anlamı' (2014) *Ankara Üniversitesi SBF Dergisi, 69*(4), 807, 826.

Although legislators have used the concept of clear and imminent danger in these regulations, the term "clear and present danger" is used in the reasoning of Article 216, according to the reasoning of the article regulating the crime of provoking the public to hatred and hostility, freedom of expression and dissemination of opinion is a necessity for the existence of a democratic society. In order for this crime to occur, a danger must be present for the deterioration of public security based on concrete facts. This danger must be a concrete danger. The judge determines whether this danger has been realized as a result of the expressions used by showing the grounds. In this context, the person's words and behavior must be determined to constitute an imminent danger in terms of disrupting public security. The words and behavior of the person must have an effect on a segment of the public that justifies the concern that the acts subject to provocation will be committed. As such, any speech made or ideas put forward may be prohibited if they constitute a clear and imminent danger to society. However, one cannot be punished for this crime unless the existence of such a danger is clearly established by set of concrete terms.[26]

During the parliamentary debates on the Code, the concept of imminent danger was emphasized to be unclear. Instead of this concept, preference for the concept of "present danger" was suggested, as indicated in the justification.[27] However, this proposal was not accepted. Thus, these two concepts can be said to not be identical and the legislators to have made a conscious choice.[28] One opinion is found regarding the doctrine that states the two criteria to be different from each other. Accordingly, pursuant to the criterion of clear and present danger, a short period of time must occur between the expressions used and the provoked act, one that is too short to allow precautions to be taken, whereas in the criterion of clear and imminent danger, this period is slightly longer.[29] On the other hand, although legislators have used different expressions, the content of the concept has been stated to remain the same and the evaluations made in judicial decisions regarding the danger to be similar to those in American law.[30] In this study's opinion, although the legislators chose different words, the criterion of clear and imminent danger, which is accepted with the intention of expanding the freedom of expression, should be evaluated in the same way as the criterion of clear and present danger criterion is in American law. Otherwise, punishment may be possible even if the danger is close, which may lead to the criterion being used to narrow rather than expand freedom of expression.

III. The Clear and Imminent Danger Test in Turkish Judicial Decisions

A. Clear and Imminent Danger in the Decisions of the Constitutional Court

The criterion of clear and present danger has been used in different expressions in the party dissolution cases of the Constitutional Court, in the indictments prepared by the Chief Public Prosecutors of the Court of Cassation, and in the defenses of the parties and by the Court prior to the test being incorporated into Turkish legislation. In the case in which the Court decided to dissolve the Socialist Unity Party (*Sosyalist Birlik Partisi*) in 1995, the Court stated that in democratic societies, racial discrimination could not be the basis, aim, or requirement of a political party and a party that had become a tool of racial discrimination would not be able to maintain its existence. The Chief Public Prosecutor's Office concluded that the points in the program of the defendant Party constituted an "clear and imminent danger" for the Republic of Türkiye.[31] As one can see, although the court did not directly articulate the term as clear and present danger, it indirectly applied this criterion.

Indeed, similar to the case before the Turkish Constitution, the case filed for the dissolution of the Welfare Party (*Refah Partisi*) was the first case in which the concept of clear and present danger had been directly used by referring to the decisions of the Supreme Court of the United States. In the preliminary defense made by the party in this case, parties in contemporary democracies that do not advocate violence and terrorism and do not pose a clear, serious, present, and concrete danger to others were stated to not be able to be dissolved. The defense also referred to the decisions of the Supreme Court of the United States, accepting that the words used must constitute a clear and imminent danger in order to limit freedom of expression. While the Constitutional Court decided to dissolve the party with a majority of votes, the dissenting opinion written against the decision stated that limits to freedom of expression exist in democratic societies, that the US Supreme Court has developed the concept of clear and present danger for the limitation of freedom of expression, and that thoughts expressed can be banned if they pose a clear and present danger to society.[32]

In another party dissolution decision of the Turkish Constitutional Court in 1999, the Court decided to dissolve the Democratic

[26] See the reasoning of Art. 216 of TPC.
[27] https://www.tbmm.gov.tr/Tutanaklar/Tutanak?Id=b0f5a7da-b7ad-4983-bf32-0185ceac78ab
[28] The then Minister of Justice stated regarding the text of the article, "... it is already clear what is meant by clear and imminent danger. The previous motion states: 'Clear and present danger.' In any case, if the danger exists, the offense has already been committed. In other words, public security is clearly being exposed to danger, because it is present; there is no book on it. Therefore, an offense has been committed and will be punished." https://www.tbmm.gov.tr/Tutanaklar/Tutanak?Id=b0f5a7da-b7ad-4983-bf32-0185ceac78ab
[29] Türay (n 23) 285.
[30] Öykü Didem Aydın, 'YTCK Açısından Salt İfade Suç Tiplerine Eleştirel Bir Bakış' (2006) Hukuki Perspektifler Dergisi, *6*, 119, 132.
[31] The Turkish Constitutional Court, Dissolution of Political Parties, 19.7.1995, Case No. (C.) 1993/4, Decision No. (D.) D. 1995/1.
[32] The Turkish Constitutional Court, Dissolution of Political Parties, 16.1.1998, C. 1997/1, D. 1998/1.

Mass Party (*Demokratik Kitle Partisi*) on the grounds that its program was in violation of the Code on Political Parties. In this case, the Chief Public Prosecutor of the Court of Cassation stated that the activities of the party had constituted a clear and imminent danger to the integrity of the country.[33]

Another judgment in which the concept of clear and present danger was used involved the decision to dissolve the Virtue Party (*Fazilet Partisi*), which was claimed to be the continuation of the dissolved Welfare Party (*Refah Partisi*). In this case, the Chief Public Prosecutor of the Court of Cassation considered the existence of the party to be a clear and imminent danger to the constitutional order and stated that freedom of expression can be restricted in cases where this danger exists. However, the defense noted that "clear and imminent danger" and "clear and present danger" stand as different concepts and that the party did not encourage armed actions or the use of force and violence. As a result of the evaluation made by the Court, the decision was made to shut the party down due to its activities against the principle of laicity.[34]

The concept of clear and imminent danger was also included in the Court's decision to reject the dissolution of the Rights and Freedoms Party (*Hak ve Özgürlükler Partisi*) in 2008. Pursuant to the Court's decision, the statements in the statutes and programs of political parties should be considered within the scope of freedom of expression if they do not pose a clear and imminent danger to democratic life. The same judgment also held that the dissolution of political parties in democratic countries is not permitted unless they pose a serious danger to the regime. The Court remarked that proposing solutions to the Kurdish problem in the party's statute could not be characterized as a rejection of the concept of nation based on citizenship and that expressions regarding the existence of a certain problem and proposals for its solution should be evaluated within the scope of freedom of expression in a democratic regime.[35] In summary, the Court concluded that not all expressions of opinion are considered to be within this scope, only those that pose a direct, clear, and imminent danger to democratic life.

With regard to examining individual applications alleging violation of the right to freedom of expression, the Turkish Constitutional Court has essentially assessed the necessity of such intervention in a democratic society.[36] In this context, the court has also included the criterion of clear and imminent danger in its assessments,[37] limitedly referring to this criterion in a case in which it found the applicant's freedom of expression to have been violated after he had been convicted of making propaganda for a terrorist organization. In this case, the applicant Gergerlioğlu applied to the Constitutional Court claiming, among other allegations, that his conviction for making propaganda for a terrorist organization due to a post he had made on his social media account violated his freedom of expression. In this case, the Court evaluated the provision regulated in Article 14 of the Constitution that states "None of the rights and freedoms set out in the Constitution may be exercised in the form of activities aimed at destroying the indivisible integrity of the State with its territory and nation and abolishing the democratic and secular Republic based on human rights." Consequently, in cases where the acts carried out are in the form of the expression and dissemination of ideas, whether these pose a direct, clear, and imminent danger to democratic life; whether they cause real damage; and finally whether the applicant's aim is to destroy the rights of others need to be examined.[38] According to the Court, in order to interfere with a terrorist organization's expression of opinion on grounds such as making its voice heard by the masses, ensuring the public's sympathy and active support for the organization, or increasing the political or social effectiveness of the organization, these statements must possess certain qualities that can be listed as follows: The statement directly or indirectly causes the danger of committing a terrorist offence, recommends resorting to violent means or bloody acts, justifies the commission of terrorist acts, or encourages resorting to violence against certain individuals with a deep and irrational motive of hatred.[39]

In another decision of the Constitutional Court in which this criterion was used, the applicant, a journalist, was convicted of the crime of praising crime and criminals on the grounds that he had described the PKK terrorist organization in a column as "Apo's Patriots" and as the "Kurdish Freedom Movement," glorified the leaders and members of the organization, praised their actions, criticized the struggle of the security forces against the terrorist organization, and had used expressions that were of such a nature as to create a clear and imminent danger to public order. In this case, the Court noted that by taking into account the fact that the crime and criminals that the applicant was deemed to have praised were terrorist crimes and criminals, it needed to assess whether the article in question contained the danger of encouraging the use of force, violence, or threatening methods of the terrorist organization and of spreading a message to the public that would lead to the danger of committing one or more crimes by advocating the commission of terrorist crimes. In the Court's assessments made in this context, it did not accept that statements

[33] Although the Decision includes the concept of clear and imminent danger, detailed explanations regarding this concept are not provided. The Turkish Constitutional Court, Dissolution of Political Parties, 26.2.1999, C. 1997/2, D. 1999/1.

[34] The Turkish Constitutional Court, Dissolution of Political Parties, 22.6.2001, C. 1999/2, D. 2001/2.

[35] The Turkish Constitutional Court, Dissolution of Political Parties, 29.1.2008, C. 2002/1, D. 2008/1.

[36] Case of Meki Katar, Application No. (A.), 2015/4916, 3.10.2019; Case of Sırrı Süreyya Önder, A. 2018/38143, 3.10.2019; Case of Ömer Faruk Gergerlioğlu, A. 2019/10634, 1.7.2021; The Court's approach is in line with that of the ECtHR. The ECtHR does not include the clear and present danger criterion in its judgments, and in its analyses of Article 10 of the Convention, which protects freedom of expression, it examines whether the expressions used are contrary to the fundamental values of the Convention. See also: Ümit Kocasakal, Emine Eylem Aksoy, & Pınar Memiş, 'Avrupa İnsan Hakları Mahkemesi Kararlarında İfade Özgürlüğü' in *İfade Özgürlüğü ve Ceza Hukuku* (Ceza Hukuku Derneği Yayınları 2003) 25, 37.

[37] Tunç & Erdoğan (n 9) 1316.

[38] Case of Ömer Faruk Gergerlioğlu, A. 2019/10634, 1.7.2021, [119].

[39] Ibid. [175].

of opinion, such as the views of various groups on political, economic, and social problems that do not contain expressions encouraging others to resort to violence, had led to the danger of committing a crime such as praising or legitimizing terrorism.[40] The Court held that no expression of opinion should be subjected to punishment by attributing a meaning different from that intended by its author in examinations on freedom of expression and ruled that freedom of expression and freedom of the press had been violated on the grounds that no clear and imminent danger had occurred to justify the interference in the subject matter of the application.[41]

Although the Constitutional Court does not directly include the concept of clear and imminent danger in its examinations within the scope of the right to organize meetings and demonstrations, it does seek justification of the state of danger to public order in interventions in this right.[42] In a case where it was decided that this right was violated, the press statement that the applicant wanted to organize was prevented by law enforcement officers on the grounds of a general ban. The Court held that a violation had occurred on the grounds that the number of participants was small, that they did not pose any danger to public order, and that they did not engage in violent acts that would justify an intervention.[43]

B. Clear and Imminent Danger in the Decisions of the Court of Cassation

The Court of Cassation determines the lawfulness of a punishment by determining whether a danger is clear and imminent in its examinations regarding the offense of praising crime and the criminal and the offense of provoking the public to hatred and hostility, which are regulated as crimes of concrete danger in the TPC. Apart from cases related to these crimes, the Court of Cassation also includes the concept of clear and imminent danger in cases related to the crime of making propaganda for a terrorist organization, as regulated under the Anti-Terror Code. However, the clear and imminent danger test has also been a criterion used in the decisions of the Court of Cassation during the abrogated Turkish Penal Code period. In 1999, the dissenting opinion of the Court of Cassation's Assembly of Criminal Chambers pointed to the concept of clear and imminent danger as set out in the Code.[44] In one case concerning the offense of "making propaganda against the indivisibility of the State," as regulated in the abrogated Article 8 of the Anti-Terror Code, the dissenting member argued that, in order for a piece of propaganda to be considered a crime, the court must determine whether the thought or idea in the way it is expressed poses a clear and imminent danger to the society, State, regime, and social order.

In another decision given by the Court of Cassation's Assembly of Criminal Chambers in 2004, the criterion of clear and present danger was used for the first time. In the case, the defendant had been convicted of the crime of provoking the public to hatred and hostility, as regulated under Article 312 of the abrogated Penal Code, due to an article published in a national newspaper with the title "Let's Protect Our Children."[45] The Court of Cassation's Assembly of Criminal Chambers overturned this judgment by including the concept of clear and present danger. In the judgment, the Assembly concluded that no clear and present danger had occurred to public order, as the expressions in question did not contain a call for violence.[46]

Shortly after this decision, the Court of Cassation's Assembly of Criminal Chambers upheld the conviction based on the criterion of clear and present danger.[47] In the case subject to the decision, the defendant had been sentenced by the Court of First Instance for the crime of provoking the public to hatred and hostility due to a column published in a national newspaper.[48] In this judgment, in which the clear and present danger test was elaborated in detail for the first time, the conditions required for a statement of opinion to be penalized were listed as follows:

> *1- The conditions under which the opinions are expressed must be such as to create a real danger regarding what is being expressed. The mere existence of fear is not sufficient for a danger to be considered present. . .*
> *3- The danger must be so serious that the State must prevent it. In order to eliminate the danger, no other option than the restriction of thought (necessity) must*

[40] Case of Hacı Boğatekin, A. 2020/3630, 19.10.2022, "*Thus, the expression, dissemination, active, systematic and persuasive inculcation, indoctrination and recommendation of ideas - even if offensive to State authorities or a significant part of the population - concerning right-wing or left-wing ideologies, anarchist and nihilist movements, the social and political environment or socio-economic imbalances, ethnic problems, differences in the country's population, the demand for greater freedom or criticism of the country's form of government are protected by freedom of expression.*" [55].

[41] Ibid. [58].

[42] Tunç & Erdoğan, (n 9) 1316.

[43] Case of Filiz Kerestecioğlu Demir (3), A. 2020/11218, 19.10.2022.

[44] Court of Cassation Assembly of Criminal Chambers (ACC.), 20.04.1999, Case No. (C.)1999/58, Decision No. (D.) 1999/69.

[45] "*In summary, the defendant stated that during the years when irreligion was in vogue, religious people were tortured spiritually, children and young people were prevented from reading the Qur'an, eight-year education was imposed, the number of Imam Hatip schools was reduced, children under the age of 12 were prevented from studying in Qur'an courses, the headscarf was banned in public spaces without any basis, and those who endeavored to keep children and young people away from the Qur'an and Islam would be disgraced.*" Court of Cassation ACC, 23.11.2004, C. 2004/130, D. 2004/206.

[46] Court of Cassation ACC, 23.11.2004, C. 2004/130, D. 2004/206.

[47] Court of Cassation ACC, 15.03.2005, C. 2004/201, D. 2005/30.

[48] In his article titled "Terror of Religious Enmity," the journalist stated that in the context of the headscarf ban, an irreligious minority had launched an attack against the dominant religion in the country and that these people were militant and notorious enemies of religion. The Court convicted the journalist on the grounds that these statements exceeded the limits of criticism and that incitement to hostility by the majority against the minority in a Muslim-majority society constituted a clear and present danger to public order.

be present. . .
5- The degree of imminence of the danger must be very high. (Hakyemez, 2000, pp. 73–74).
In terms of clear and present danger, clarity means that the danger is evident in such a way that no doubt can exist, and imminence means that the words used in the expression of opinion are close to the possibility of concrete danger (i.e., the possibility of causing harm). In addition to the high probability of the occurrence of damage to the extent of inevitability, whether the expression of opinion contains a clear and direct threat or not should be examined separately in each concrete case. (Korkmaz, 2000, pp. 294–295)

With this judgment, the Court used the clear and present danger criterion as a justification for upholding the decision of conviction to restrict freedom of expression, contrary to its previous judgment. In the dissenting opinions, no expression and call for violence in the relevant opinion column were considered to be present that would cause the public order to be shaken, and no situation that could constitute a concrete and imminent danger could not be detected. This decision is important in the sense that the majority of the Court and the dissenting members had each reached different conclusions using the clear and present danger criterion in the particular case, thus showing that this criterion is not always interpreted in favor of freedom of expression.[49]

In the case that was the subject of another decision of the Court of Cassation's Assembly of Criminal Chambers in 2008, the First Instance Court (local court) acquitted the defendant on the grounds that certain statements in the report prepared by the Minority Rights and Cultural Rights Working Group of the Human Rights Advisory Board, which was then an institution under the Prime Ministry, had constituted the offense of inciting hatred and hostility among the public. In the examination made by the General Assembly following the reversal decision of the 8^{th} Chamber of the Court of Cassation, the Assembly discussed whether the statements in the aforementioned report had caused the clear and imminent danger required for the offense of provoking the public to hatred and hostility. In summary, the Assembly concluded that the statements did not constitute a clear and imminent danger to public order or public security as they did not contain calls for violence against different groups of people.

After the above-mentioned decision, another decision occurred that included comprehensive explanations regarding the determination of clear and present danger. The Court stated:

In the light of these explanations, in order for the offense regulated in Article 312 of Turkish Penal Code No. 765 to occur and as pointed out in the precedent decisions of the Court of Cassation's Assembly of Criminal Chambers:
. . . 4- The provocation must incite the aforementioned different communities of people to enmity or hatred against each other, but in a manner that may be dangerous for public order and at a level and effectiveness sufficient to realize the result; the provocation must also include a call for violence, and this call must be realized at an effective level, as accurately reflected in many judgments of the ECtHR, the Criminal General Assembly, and the 8th Criminal Chamber of the Court of Cassation,
5- As explained in the justification of Code No. 4744, the fact that the defined danger is not abstract but a concrete and imminent danger should be evaluated by observing the comments, interactions, and movements of the masses,
6- However, even if it cannot be clearly detected at the first stage, the offense will occur in cases where the calls for violence that are conducive to enmity or hatred, as well as which are made under a skillful secrecy that can be perceived by the addressed audience, reach a concrete level that creates an imminent danger and endangers public order,
. . . .
9- In this respect, it is not possible to accept that the crime under Article 312/2 of the Penal Code has occurred by attributing the elements mentioned in indirect and coercive abstraction to the provocations that do not tend to provoke the differences determined by the legal limitation, do not contain a call for violence, and have not reached the level of concrete and imminent danger. Also, the court should never ignore that such an act cannot be accepted to create a crime by analogy in criminal jurisdiction,
10- . . . When doubts arise as to whether the public order based on the coexistence of differences can be disrupted, whether it has become a concrete and imminent danger by getting rid of abstractness, and finally whether it carries a call for violence, the Court should take into consideration that this doubt must first be overcome, and if it cannot be overcome, the interpretation must be made in favor of the accused and in line with the expansion of freedom of expression, The necessity for the criminal judge to evaluate each case in the light of these principles has been made clear.

In this decision, the Court emphasized that the danger must be clear and beyond doubt. The imminence of the danger is expressed as the words used in the expression of opinion being close enough to cause a concrete danger. In its assessment of the concrete case in terms of the clear and imminent danger test, the Court emphasized that no outrage or outburst had occurred among segments of society due to the report or after the press statement made in relation to the report, nor had any concrete phenomenon disrupting public security occurred.[50]

When considering the above-mentioned and other decisions of the Court of Cassation, the Court of Cassation is seen to consider the call for violence as one of the most important elements of the clear and imminent danger test in its analyses of the offense of provoking the public to hatred and hostility.[51]

In the 2013 amendment regarding the offense of praising the crime and criminal, which has been transformed into a crime of concrete danger, the Court of Cassation looked for the existence of a clear and imminent danger to public order with regard to the punishment. In one decision, the 16^{th} Criminal Chamber of the Court of Cassation ruled that the act of a perpetrator shouting

[49] Salihpaşaoğlu (n 4) 240.
[50] Court of Cassation ACC, 29.4.2008, C. 2007/244, D. 2008/92.
[51] Court of Cassation 8^{th} Criminal Chamber (CC.), 12.10.2015, C. 2014/35434, D. 2015/22535; Court of Cassation 8^{th} CC., 17.2.2015, C. 2014/27832, D. 2015/9649; Court of Cassation 8^{th} CC., 24.5.2018, C. 2017/12669, D. 2018/5877; Court of Cassation16^{th} CC., 10.12.2018, C. 2018/3738, D. 2018/5019.

slogans praising the leader of a terrorist organization during a meeting had constituted the offense of praising the crime and the criminal; however, no clear and imminent danger had occurred to public order.[52]

Apart from the cases related to these crimes under the Penal Code, the Court of Cassation has also applied the clear and imminent danger test in cases related to the crime of making propaganda for a terrorist organization under the Anti-Terrorism Code.[53] In these cases, the accused's identity, location, and the place and time of the conversation are also taken into account.[54]

C. Clear and Imminent Danger Test in the Decisions of the Regional Court of Appeals

In Turkish law, appeal as a second instance started being applied as a legal remedy on July 20, 2016. As of this date, due to the legal remedy of appeal being applied first against the judgments given by the Courts of First Instance, with some exceptions, jurisprudence is found in the decisions of the regional courts of appeal that have included the concept of clear and imminent danger in relation to crimes against public peace and the crime of making propaganda for a terrorist organization.[55]

In a case that was subject to an investigation by the Samsun Regional Court of Appeal on the offense of praising the crime and the criminal, the determination of whether a clear and imminent danger existed to public order within the scope of this article was noted should be determined by taking into account such things as the title of the person who said it and the place where it was said.[56]

In a case heard by the Ankara Regional Court of Appeal regarding the offense of provoking the public to hatred and hostility, the following statements were made:

> *"The provocation must have direct results in the form of hatred and hostility, and signs must exist of a clear and imminent danger to public safety by inciting the public to hatred and hostility by creating a psychological state that forms the basis for acts of hatred against a group of people with violence that requires harm and revenge."* [57]

According to the Court, when determining whether the expressions used by the person constitute an imminent danger to public safety, the court must take into account whether those expressions have an effect on a section of the public, which justifies the fear that the acts subject to incitement will be committed. The criterion of clear and imminent danger is used to look for threats against life, bodily integrity, liberty, property, and similar values that are part of the public security being legally protected and of the functions of the organs ensuring the security of these values, and these threats must be serious and alarming. In so doing, the expressions used must be of such a nature as to publicly incite the public to hatred and hostility, and therefore public safety must face a clear and imminent danger.

In another examination of the offense of provoking the public to hatred and hostility, the Court ruled that the offense had not occurred on the grounds that the act did not constitute a clear and imminent danger to public safety in such a way that could be dangerous to the masses or at a level and effectiveness sufficient to achieve such a result.[58]

Conclusion

Although crimes related to freedom of expression as regulated in the TPC have been turned into concrete danger crimes with the clear and imminent danger criterion, this criterion does not provide a judge with the tools necessary to detect the danger; instead, the criterion leaves the decision up to the judge to find these tools. This may mean leaving the protection of freedom of expression to a subjective interpretation.[59] The judicial organs are the ones that will determine when an assembly constitutes a clear and imminent danger of a crime that will be committed or when an expression involves incitement to hatred and hostility, is harsh criticism, or is praise for a criminal. These organs are also the ones who will determine whether these expressions constitute a danger to public order or public security.[60] Thus, determining the principles that should be taken into account in limiting freedom of expression is very important.

The ECHR does not explicitly use the clear and present danger test; instead, it evaluates an expression in terms of the following

[52] Court of Cassation16th CC., 25.4.2018, C. 2016/2510, D. 2018/1384.
[53] Court of Cassation16th CC., 17.3.2016, C. 2015/2276, D. 2016/1947; Court of Cassation 3rd CC., 7.2.2023, C. 2022/39452, D. 2023/382.
[54] Court of Cassation 3rd CC., 14.6.2022, C. 2021/5646, D. 2022/3521; Court of Cassation ACC., 4.10.2022, C. 2018/236, D. 2022/598.
[55] İstanbul Regional Court of Appeal (RCA) 2nd CC., 1.2.2017, C. 2017/101, D. 2017/144; İstanbul RCA 2nd CC., 5.1.2017, C. 2016/181, D. 2017/8; Ankara RCA 4th CC., 3.6.2020, C. 2018/993, D. 2020/414.
[56] Samsun RCA 8th CC., 8.10.2019, C. 2019/1100, D. 2019/866.
[57] Ankara RCA 4th CC., 28.2.2017, C. 2017/17, D. 2017/46.
[58] Ankara RCA 4th CC., 30.1.2019, C. 2017/1568, D. 2019/62.
[59] Kuyucu (n 25) 829.
[60] Salihpaşaoğlu, (n 4) 240.

contents: the care taken in making the expression, the context in which it is made, the position and purpose of the person making the expression in society, the subject of the expression or the person or group targeted by the expression, the potential effect of the expression of opinion, whether ideas can be expressed with other concepts, the proportionality and potential deterrent effect of the imposed sanction, the effectiveness of judicial protection, and the justifications put forward by the courts regarding the restricted opinion.[61] When looking at the decisions of the Turkish Court of Cassation, however, the criteria for how this determination will be made can be seen to have not been explained concretely in every decision.[62] Similarly, in interventions in freedom of expression, whether a compelling social need exists and whether a concrete danger arises due to the expressions used are observed to have not been examined.[63]

When considering the judicial decisions and doctrine, only expressions that include violence or that recommend violence are accepted to constitute clear and imminent danger and to be punishable within this scope.[64] When examining the decisions of the Court of Cassation regarding the crime of provoking the public to hatred and hostility, whether any incident has occurred among the segments of the public that have been provoked as a result of the expressions used is considered a criterion in determining clear and imminent danger.[65] One should note that such an examination may result in this crime, which is a crime of danger, being evaluated as a crime of harm. However, the danger sought in terms of this type of crime points to a situation where the harm has not yet occurred but where the probability of occurrence is high.[66] For this reason, although the expressions used need to have an effect on a segment of the public that justifies the concern that the acts subject to provocation will be committed, an action that does not result in harm must still occur in line with this.[67]

The fact that the types of crimes that interfere with the freedom of expression appear as danger crimes requires an evaluation of the regulation of danger crimes in terms of the criteria to be taken into account in limiting freedom of expression.[68] For this reason, when determining clear and imminent danger, what the danger is that may occur regarding the subject of the crime needs to be determined first. Then, the clarity and imminence of this danger should be evaluated. In crimes where clear and imminent danger is required for punishment to be applicable, the subject of the crime must involve the concept of public order (Art. 215 TPC) and public security (Art. 216 TPC).[69] For this reason, in order to better understand the clear and imminent danger test, the concepts of public order and public security need to be examined.

Public security is defined in the dictionary as the security of life and property provided to the public by police services in a state.[70] In academic writings, public security is the protection of individuals against dangers that may cause harm to their lives in society.[71] The ability of individuals to move around without being attacked, coerced, held up, or detained is part of public security.[72] On the other hand, public order means that individuals live in peace, security, and tranquility within society.[73] In this context, public order is a concept with broader content than public security.[74]

Within the framework of these explanations, in order for the offense of praising the crime and the criminal to be punishable, clear and imminent danger must exist in terms of public order, which means that society should be secure, orderly, and peaceful and that public services should be carried out without interruption.[75] In terms of the crime of provoking the public to hatred and hostility, the possibility of committing the acts constituting the crime must be serious, and the said segments of the public must be exposed to the danger of the disappearance of a social environment in which they can live without fear of their rights being violated.[76] While Article 312 of the former Turkish Penal Code punished public provocation toward enmity or hatred in a way that may be dangerous for public order, Article 216 has narrowed the scope of this crime by stipulating that the concrete danger must arise in terms of public security.[77]

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61 *Bergens Tidende v. Norway*, App no 26132/95 (ECHR, 2 May 2000); *Sürek v. Turkey*, App no 24735/94 (ECHR, 8 June 1999); *Zana v. Turkey*, App no 18954/91 (ECHR, 25 November 1997); *Karataş v. Turkey*, App no 23168/94 (ECHR, 8 June 1999); News Verlag v. Austria, App no 31457/96 (ECHR, 11 January 2000).

62 Court of Cassation ACC, 23.11.2004, C. 2004/130, D. 2004/206; Court of Cassation16^{th} CC., 25.4.2018, C. 2016/2510, D. 2018/1384.

63 Yılmaz (n 24) 169.

64 Hasan Tahsin Gökcan & Mustafa Artuç, *Yorumlu Uygulamalı Türk Ceza Kanunu Şerhi* (Adalet Yayınevi 2021) Vol. 5, 7272.

65 Court of Cassation ACC, 29.4.2008, C. 2007/244, D. 2008/92; Court of Cassation 3^{rd} CC., 7.2.2023, C. 2022/39452, D. 2023/382.

66 Türay (n 23) 278; Aykut Ersan, 'Halkı Kin ve Düşmanlığa Tahrik veya Aşağılama' (2014) *TBB Dergisi, 111*, 77, 83; Elif Ergüne, 'Tehlike Suçları Bağlamında Halkı Kin ve Düşmanlığa Tahrik veya Aşağılama Suçları (TCK m 216)', (2020) *İstanbul Hukuk Mecmuası, 78*(3), 1675, 1694; Soner Demirtaş, *Tehlike Suçları* (Adalet Yayınevi 2023) 98.

67 Gökcan & Artuç (n 64) 7301; Mehmet Emin Artuk, Ahmet Gökcen, Mehmet Emin Alşahin, & Kerim Çakır, *Ceza Hukuku Özel Hükümler* (20^{th} ed., Adalet Yayınevi 2022) 922.

68 Kuyucu (n 25) 829.

69 Artuk, Gökcen, Alşahin, & Çakır (n 67) 922; Apiş (n 8) 118.

70 https://sozluk.gov.tr.

71 Halil Kalabalık, *İdare Hukuku Dersleri C. II* (Seçkin Yayıncılık 2021) 266.

72 Apiş (n 8) 123.

73 Kalabalık (n 71) 265.

74 Adem Sözüer, 'İfade Özgürlüğü' Yuvarlak Masa Toplantısı, (2006) *Hukuki Perspektifler Dergisi, 6*, 100, 108; Gökcan & Artuç (n 64) 7300.

75 Gökcan & Artuç (n 64) 7272.

76 Apiş (n 8) 126.

77 Sözüer (n 74) 108; For detailed information on the former TPC Art. 312, see: Ahmet Gökcen, *Halkı Kin ve Düşmanlığa Açıkça Tahrik Cürmü (TCK md. 312/2)*, (Liberal Düşünce Topluluğu 2001) and Türkan Yalçın Sancar, 'Türk Ceza Kanunu'nun 159. ve 312. Maddelerinde Yapılan Değişikliklerin Anlamı' (2003) *Ankara Üniversitesi Hukuk Fakültesi Dergisi, 52*(1), 89.

After determining the nature of the situations that may endanger public order and public security in this way, the clarity and imminence of such a danger should be evaluated in the concrete case. With regard to the clear and imminent danger criterion, the existence of danger arising from a statement must be concretely determined, and the actuality of the damage arising from this danger must be practically certain unless immediate precautions are taken.[78] In Turkish doctrine, a clear danger generally means that it clearly has an impact on public security or public order, one that can be objectively recognized. Objectively detectable means that the danger can be perceived not only by a certain group but also by different segments of society.[79] In the doctrine, examples such as the occurrence of incidents that could have been prevented with the simple intervention of the police, intense public debates, or the reaction of the aforementioned groups to the expressions used by making harsh statements are not considered sufficient to show that a clear and imminent danger has been realized.[80]

The imminence of the danger is the very high likelihood that harm will occur if action is not taken immediately.[81] The likelihood of harm must be unavoidably high, and the expressions used must contain a clear and direct threat.[82] With regard to the crime of provoking the public to hatred and hostility in this context, the probability of harm to public security must be very high, and the threats to legal values such as the right to life, physical integrity, liberty, and property rights, as well as the functions of the organs responsible for protecting these values, must be serious.[83]

The introduction into Turkish legislation of the criterion of clear and present danger, which emerged and was shaped by the decisions of the Supreme Court of the United States, as "clear and imminent danger" through the amendments made to the Code on Meetings and Demonstrations and the TPC represents a positive development in terms of freedom of expression. The inclusion of the criterion of clear and imminent danger in the texts of the articles is also interpreted in the doctrine as expanding the area of use of fundamental rights and freedoms.[84] However, uncertainties regarding the conditions for applying this criterion may lead to the suppression of dissent and the creation of a system of fear by penalizing acts that do not pose any danger, especially in times of repression.[85] For this reason, judicial bodies are required to reveal, together with their justifications, whether a clear and imminent danger to public order or public security exists as a result of the expressions used in the concrete case.

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[79] Türay (n 23) 283.
[80] Aydın (n 30) 131.
[81] Aydın (n 30) 132.
[82] Gökcan & Artuç (n 64) 7273.
[83] Aydın (n 30) 133; Türay (n 23) 283.
[84] Türay (n 23) 281; Gökcan and Artuç, (n 64) 7272, 7300; Ersan (n 66) 84; İbrahim Dülger & Selami Cin, 'Suçu ve Suçluyu Övme Suçu (TCK md. 215)' (2019) *D.E.Ü.* Prof. Dr. Durmuş TEZCAN'a Armağan, *Hukuk Fakültesi Dergisi, 21*, 2865, 2887.
[85] Arslan (n 1) 32; Murat Ceyhan, 'Türk Milletini, Türkiye Cumhuriyeti Devletini, Devletin Kurum ve Organlarını Aşağılama Suçu (TCK m. 301)', (2013) Prof. Dr. Nur Centel'e Armağan, *MÜHF-HAD, 19*(2), 1781, 1794.

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