Governing with Emergency Decree Law without Review: A Turkish Case

Assoc. Prof. Tolga Şirin

Marmara University - Faculty of Law

On 15th June of 2016, a coup attempt produced violent clashes between a faction of the army and citizens in Turkey. The Turkish parliament was bombed, thereupon 248 citizens were killed and 2196 citizens were injured. The reaction of the government was very excessive. A state of emergency, which is still in effect now, was declared. In that process, more than 50,000 people including journalists and judges have been arrested and 150,000 people including academics were suspended from employment and many media outlets and associations were dissolved. Additionally, a large number of statutes have been amended. All of those were implemented by means of emergency decrees having the force of statutes. So much so that Turkey has been governed through emergency decrees for the past year and a half.

In this paper, I will explain the emergency decree system in which the executive power is entitled to issue any decree without authorization of the parliament and analyse the "de-constitutionalization" caused by this system. Those issues will be described under two titles.

Under the first title, the provisions of the Turkish Constitution being in concordance with the international minimum standards for regimes of exception and the objective appearance of the system will be presented. Afterwards it will be described how those guarantees stay just on paper and how the constitutional reality emerges. In this context, firstly, the constitutional gaps creating obstacle for political control of the Parliament and review of the Turkish Constitutional Court (TCC) on the emergency decrees will be set forth. By doing so, the need in Turkey for institutions such as "unconstitutionality through omission" and "*Organstreit*" will be emphasized. The main argument of the first title is that some of the guarantees concerning the state of emergency in Turkey have the characteristics of "*lex imperfecta*", in the Kelsenian sense of the term.

Under the second title, focus will be given to the consequences resulting from a lack of any check and control system. In this regard, the concrete instances which could be considered a "perforation of the Constitution" (*Verfassungsdurchbrechung*), in the Schmittian sense of the term, will be presented. The main argument of the second title is that the lack of control of either the parliament or the TCC on emergency law "leads" to certain paradoxical

consequences, i.e. transformation of "emergency decrees having the force of statute" into "emergency decrees having the force of the Constitution" (*Ermachtigungsgesetz*) and "separation of powers" into "unity of powers".

Finally, the lessons to be learned from the Turkish case will be summarized and the potential functions of the European Court of Human Rights (ECtHR) in this process will be questioned.

I. State of Emergency Standards in the Turkish Constitution and International Law

Compliance of the state of emergency regime in Turkey with international standards can be analysed on the basis of the normative grounds of the regime and the issues that undermine these grounds.

A. Normative grounds of the State of Emergency Regime

Contrary to numerous constitutions around the globe, the Constitution 1982 covers a specific state of emergency regime. This regime can be classified under two different categories in the Constitution. The first category covers the contents and the declaration procedure/conditions of the state of emergency while the second category regulates fundamental rights and freedoms introduced with this regime.

1. Decision for the declaration of state of emergency

The TCC defines the concept of "state of emergency" stipulated in the Constitution of 1982 as follows:

> "Extraordinary administration procedures are administration regimes with temporary nature that grant more comprehensive powers to public authorities with the aim to eliminate serious threats and dangers that emerge in cases where the state or the society or public order cannot be protected with the powers of ordinary period and which consequently results in serious threats and dangers."[1]

According to the TCC, these can be applied only when the existence of state or society or public order is under a serious threat or danger and as long as such a situation continues to exist. Considering that the purpose of the state of emergency regime is "to return to ordinary law order with eliminating the reasons that obligate the specified regimes at the earliest, the

[1] *Aydın Yavuz and others*, TCC, App. no. 2016/22169, 20/06/2017, § 164.

Court states that 'temporary and exceptional' nature of the regime is also an indicator of the legitimacy of extraordinary administration procedures."[2]

Concrete and limited number of reasons for state of emergency is given in the Constitution in accordance with this definition. These can be listed as "natural disaster", "dangerous epidemic diseases", "a serious economic crisis", "serious indications of widespread acts of violence aimed at the destruction of the free democratic order established by the Constitution or of fundamental rights and freedoms" and "serious deterioration of public order because of acts of violence". It is not possible to declare state of emergency for a reason other than those listed in Turkey.

Considering the aspects presented up to this point, these data seem to be in compliance with the international standards.

All of the fundamental human rights conventions with derogation provisions define "war" and "public emergency threating the life of the nation" as a reason for state of emergency even if they are given with different formulations. The concept of war here covers armed conflicts. On the other hand, according to the ECtHR, the notion of "public emergency threating the life of the nation" "refers to an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed."[3] According to the Commission, the content of this description also covers "imminent" nature. The effects of the emergency must involve the whole nation, the continuance of the organized life of the community must be threatened, and the crisis or danger should be exceptional, in that the normal measures or restrictions, permitted by the Convention for the maintenance of public safety, health, and order, must be plainly inadequate. Therefore, it can be said that there is a parallelism between the elements of international human rights law concerning state of emergency, and the reasons for state of emergency and the definition of the TCC. On the other hand, it is noteworthy that the TCC defines the state of emergency regime as "temporary and exceptional". The expression of "must be of an exceptional and temporary nature" is used for derogation from the rights set out in the ICCPR in the general interpretation of the UNHCR. Interestingly, this significant emphasis was not identically adopted by the ECtHR. The Court considered in its *A and others* decision that the derogation measures could be possibly maintained for years and stated that it

[2] Aydın Yavuz and others, § 166.
[3] *Lawless v. Ireland (3)*, ECtHR, App. no. 332/57, 01/07/1961, § 28.

cannot be considered as inadmissible merely because it is not temporary.[4] Therefore, it can be said that the TCC is in a more advanced position than the ECtHR and in compliance with the UN standards.

So, who is eligible to make a state of emergency decision that can be given on the basis of these reasons in Turkey? Article 119 of the Constitution grants the power to make and declare this decision to the executive power. Before 2017, both wings of the executive power, i.e. the Board of Ministers that convened under the chair of the President was authorized to declare state of emergency. With transition to "ala turca Presidentialism" with the constitutional amendments in 2017, this power will be exclusively granted to the President. According to the new regime, the President will not have an obligation to consult or ask the opinion of any minister in deciding for declaration of state of emergency and in declaration of this decision. However, the parliament is not completely excluded from this process in both procedures. The power of executive to declare state of emergency is subject to the approval of the parliament. The decision to declare a state of emergency of executive shall be/will be published in the Official Gazette and immediately shall be submitted to the parliament for approval. If the parliament is in recess, it shall be immediately assembled. Declaration of state of emergency that is not approved by the parliament on the date of its declaration shall be annulled.

Considering all these aspects, it can be said that the regulations on declaration of state of emergency in Turkey is in compliance with the international law on paper. A possible issue within this context can be experienced in practice as a failure in making derogation declarations more specific by Turkey.

2. Fundamental Rights and Freedoms Regime Revived by Declaration of State of Emergency

Ordinary fundamental rights and freedoms regime in Turkey differs in extraordinary cases. The Constitution describes the criteria for the limits for restriction of fundamental rights and freedoms. Accordingly, the limits of restrictions are the principles of legality, causality, spirit of the Constitution, requirements of a democratic society order, essence of the secularism, proportionality. However, the Constitution states that suspension measures instead of restriction measures can be applied when the state of emergency regime is launched and measures that are contrary to the safeguards in the constitution can be applied, but some

[4] *A and others v. the United Kingdom*, ECtHR, app. no. 3455/05, 19/02/2009, § 178.

limitations are stipulated for such cases which can be listed as proportionality, compliance with international law and prohibition of interfering with the rights in core area.

The core rights listed in the Constitution are as follows:

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

It's clear that these rights correspond to the rights in Article 15 of the ECHR. However, there are some additional core rights in UN ICCPR such as the prohibition of discrimination, freedom from slavery and servitude, prohibition of imprisonment for debt, right to recognition everywhere as a person before the law, etc. Furthermore, some additional core rights are also introduced by means of additional protocols. The criteria of "compliance with international law" brings along safeguards in relation with these rights as well. The Constitutional Court seems to consider these core rights implicitly among the safeguards with referring to the UN ICCPR and general interpretations in its decision of 2016. On the other hand, there are also some additional safeguards in texts produced by Strasbourg organs and under the body of the UN in international law. For example, the ECtHR made a reference to "safeguards concerning profession of lawyers" in its decision of *Elçi and others v Turkey*[5] and "the right to be brought before a judge immediately" in its decision of *Aksoy v Turkey*.[6] On the other hand, special rapporteurs of UN stated in their various reports that derogation could not be rightful where ordinary restrictions would be considered as sufficient (e.g. right to assembly).[7] Despite the fact that these safeguards concluded with interpretation have not been clearly adopted by the TCC yet except a few exceptions (for instance lawfulness of detention is not considered as subject to derogation)[8], the Court is in a position that is open against these safeguards and international law. In this aspect, it should be noted that there are sufficient constitutional safeguards in Turkey.

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[5] *Elçi and others v. Turkey*, ECtHR, App. nos. 23145/93 25091/94, 13/11/2003, § 699.
[6] *Aksoy v. Turkey*, ECtHR, ECtHR, App. nos. 100/1995/606/694, 18/12/1994, § 76.
[7] See Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai , A/HRC/20/27, 21/05/2012. Human Rights Committee, General Comment 29, States of Emergency (article 4), U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001), §5.
[8] See. *Şahin Alpay*, TCC, App. no. 2016/16092, 11/01/2018.

The method followed by the TCC to review dual regime is also noteworthy. The TCC first reviews individual applications brought to it according to the standards of ordinary period and if it comes to a violation conclusion, it checks whether this violation that could be concluded in an ordinary period is justified or not within the framework of state of emergency regime. In this regard, it focuses on whether this deviation is a proportionate one that is absolutely necessitated by state of emergency and affects the core area. For instance, the Court said that failure of bringing applicants detained in a coup investigation before a judge for a period of 8 months 18 days after the first trial during the process of state of emergency regime in 2016 would result in a violation according to ordinary standards but considered this deviation as justifiable and proportionate due to reasons such as (a) complexity of coup investigations, (b) dismissed judges and (c) workload of current courts.[9]

This approach of the TCC was adopted by Strasbourg organs. For example, the issue of failure in rapidly reviewing lawfulness of detention in an individual application filed by a detained journalist was also justified by the ECtHR with similar reasoning. On the other hand, the ECtHR holded that although the duration of 18 months and 3 days before the Constitutional Court could not be described as "speedy" in an ordinary context, in the specific circumstances of the case there has been no violation of Article 5 § 4 of the Convention[10]

As a conclusion, fundamental rights and freedoms regime in Turkey during the period of state of emergency should be considered to be normatively in compliance with international standards.

B. Issues related to declaration of state of emergency and supervision of decrees having the force of law adopted during the state of emergency

Although the state of emergency regime in Turkey is in compliance with international standards on paper, particularly the lack of judicial review of related standards results in quite different consequences in practice. Lack of this review is observed in two different contexts.

1. Issue related to judicial non-review of decisions for declaration of state of emergency

[9] *Aydın Yavuz*, TCC, App. no. 2016/22169, 30/06/2017, § 359. Nevertheless the TCC found 18 months contrary to the principle of proportionality. Even the state of emergency could not justify such a long period of time. See. *Erdal Tercan*, TCC, App. no. 2016/15637, 12/04/2018.

[10] *Şahin Alpay v. Turkey*, ECtHR, App. no. 16538/17, 20/03/2018, § 137. See also *Mehmet Hasan Altan v. Turkey*, ECtHR, App. no. 13237/17, 20/03/2018.

Executive power is exclusively granted with the power to decide for transition to state of emergency system and to declare this decision by the Turkish Constitution. It is not clear whether this discretion of the executive power is subject to judicial review or not. The Constitution does not have a very clear provision on this issue. According to Article 125 of the Constitution, "recourse to judicial review shall be available against all actions and acts of administration". Therefore, this decision of the executive can be considered to be subject to review by the Council of State at first glance. State of emergency declared by the Executive is immediately submitted to the parliament for approval according to the Constitution. The parliament may approve or reject this declaration. Therefore, a procedure by the legislative organ is added on the same day to the related administrative procedure. This makes the power of the Council of State questionable. Thus, in a case brought before the Council of State, it stated that "although it is considered as an administrative disposal organically and formally, pursuant to the provisions stipulated in Article 124 of the Constitution, a legal disposal becomes a disposal of the legislative organ after its adoption and ratification by the Grand National Assembly of Turkey".[11] In this regard, decision for declaration of state of emergency is not subject to review by administrative judicial organs according to the prevailing opinion in doctrine and practices of the Council of State.

At this point, it becomes meaningful to ask: is the procedure by legislative organ that is added to the declaration of state of emergency in the form of an "approval" subject to review by the Constitutional Court? The answer of this question depends on the type of norm applied to follow the procedure of the related legislative organ. If this procedure is followed by means of "statute", this statute will be subject to review by the Constitutional Court. On the contrary, if the related procedure is implemented by means of a "decision of parliament", this decision will not be subject to review by the Constitutional Court. This is due to the fact that, according to the Constitution, statutes are subject to review by the TCC but the decisions of the parliament – excluding some exceptions- are not subject to review by the TCC. Therefore, the critical issue related to judicial review of declaration of state of emergency rests upon which norm to be followed for approval if the declaration of state of emergency is approved by the parliament that is liable for the political review of declaration.

There are dissenting opinions in the Turkish doctrine on this issue. The common view in the Turkish doctrine is that approval of this decision is related to the relation between legislative and executive powers and such approval decisions are given by means of "the

[11] Council of State, App. no. 1970/839, Jud. no. 1970/442, 03/07/1970.

decisions of the parliament" with the consideration that the relations between the powers are realized by means of "the decisions of the parliament".[12] According to them, these decisions are not subject to constitutionality review since the Constitution prohibits review of parliamentary decisions excluding three exceptions. On the other hand, this issue is not completely unquestionable. There are two different opinions. For example, according to a view, parliamentary decision for the approval of declaration of state of emergency has an impact on fundamental rights. Therefore, even if the Grand National Assembly of Turkey formally approves the declaration of state of emergency with a "parliamentary decision", the Constitutional Court should perceive it as a "statute" with a substantial approach and it should be subject to review.[13]

According to the second view, such procedures have a conditional nature. This procedure brings applicability to the state of emergency laws which are not applicable. Declaration of state of emergency does not have any impact on rights and freedoms of persons. It is the laws and practices of state of emergency that create impact on persons. Therefore, there is no issue in non-review of conditional procedures. On the other hand, existence of state of emergency is a political evaluation according to this view and review of this issue by courts may mean "review of opportuneness".[14]

The TCC seems to be closer to the second opinion.

> "Decision for declaration or their approval is not a legal procedure that directly affects rights and freedoms of persons. Procedure for declaration of state of emergency or its approval consists of ensuring applicability of state of emergency regime laws which are in force but not applied. These procedures are typically conditional procedures due to such nature."[15]

In this regard, the TCC does not consider decisions for declaration of state of emergency as a procedure that affects fundamental rights and freedoms and does not perform constitutionality review of the declaration and of the "parliamentary decision" approving it.

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[12] Ergun Özbudun, *Türk Anayasa Hukuku*, (Ankara: Yetkin Yayınları, 2014), s. 370; Kemal Gözler, *Türk Anayasa Hukuku*, (Bursa: Ekin Yay., 2000), p. 392.
[13] Erdoğan Teziç, *1961 Anayasasına Göre Kanun Kavramı*, (İstanbul: İstanbul Üniversitesi Hukuk Fakültesi Yay., 1972), p. 18-19; Zafer Gören, *Anayasa Hukuku*, (Ankara: Yetkin Yay., 2015), p. 181-182; Bülent Tanör/Necmi Yüzbaşıoğlu, *1982 Anayasasına Göre Türk Anayasa Hukuku*, (İstanbul: Beta Yay., 2014), p. 308.
[14] See Korkut Kanadoğlu, "Silahlı Kuvvetlerin Kullanımın Parlamento Tarafından Denetimi", Hüseyin Ülgen/Arslan Kaya/Gül Okutan Nilsson (ed.), *Bilgi Toplumunda Hukuk: Ünal Tekinalp'e Armağan*, C. III, İstanbul: Beta Yay., 2003, p. 419.
[15] TCC, App. no. 1970/44, Jud. no. 1970/42, 17/11/1970.

There are some nuances when this issue is considered in relation to international law. It is clear that "Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed" according to Article 15/3 of the ECHR. Article 4 of ICCPR stipulates a similar liability. This notification made by the state presents applicable legislation in the exceptional system and describes the measures to be applied. Following this notification, existence of "a situation that threatens life of a nation" as claimed by the party state is not reviewed judicially *ipso facto*. An application by the state or an individual application is required for it. In individual application, a person who has been subjected to exceptional measures files an application. However, such an application cannot be filed against the declaration of state of emergency. Although it can be considered for an instant that potential victim status is a matter of fact, this victim status does not arise from the declaration of state of emergency but from the legislation that will be enacted and/or become applicable upon the declaration of state of emergency. So applications to be filed to the ECtHR in this regard are lodged against the subjective procedure that is applied after the conditional procedure but not against the conditional procedure itself. However, once this application is lodged, the ECtHR does not only review interference with a fundamental right but also reviews the conditional procedure that constitute a basis for this intervention, that is to state the notification of derogation. The Court has reviewed notifications received from Turkey in its individual application case law up to now but did not reject any of them on the grounds of lack of a situation that threatens life of a nation.

We have previously explained that the second type of applications are those filed by states. These are the type of applications with objective nature filed by a party state of Convention against another state independent from its interests in order to present a situation against the Europe public order to the attention of the Commission. In this respect, applications by a state can be considered as similar to the concrete and abstract norm review applications in national law. A single subjective procedure to be reviewed is not necessary in such applications. More general review is launched due to objective nature of the case.

Strasbourg organs review derogation notification in such applications or conducts a review as explained above. Thus, the court closely reviewed the allegations of states who appealed against the statements of Colonels Junta in Greece in 1967 which claimed that the

life of nation was under the threat of communism and concluded that there did not exist any political situation that would threaten the organized life of society.[16] No clear conclusion could be reached in the state application filed after 1980 coup d'etat process against Turkey which was concluded with friendly settlement.[17] However, this does not change the fact that derogation notifications of Turkey are open to judicial review.

As a conclusion, it's clear that international organs do not give a blank cheque to the party states of human rights conventions in terms of notification of derogation and review whether conditions for derogations actually exist or not depending on the situation. Within this context, it does not seem possible to agree with the argument that declaration of state of emergency is a political issue in the Turkish doctrine and its review would be "a subsidiarity review". Thus, withdrawal of a power from the Constitutional Court, which is even granted to international organs is not justifiable. This judicial review should be enabled through constitutional amendment or case laws of the TCC. Nevertheless, the TCC seems to lead the way to such a review for individual applications brought before it owing to the constitutional complaint mechanism introduced in 2010; however, it should not be limited with subjective cases affecting fundamental rights and should be reviewed in connection with overall objective law order.

2. Issue of Lack of Judicial Review for Decrees Having the Force of Law and Adopted during the State of Emergency

Another issue that should be discussed in terms of compliance with international standards during the state of emergency process in Turkey is the judicial review of decrees having the force of law and adopted during the state of emergency. According to the Constitution "During the state of emergency, the Council of Ministers, meeting under the chairpersonship of the President of the Republic, may issue decrees having the force of law on matters necessitated by the state of emergency. These decrees shall be published in the Official Gazette, and shall be submitted to the Grand National Assembly of Turkey on the same day for approval; the time limit and procedure for their approval by the Assembly shall be indicated in the Rules of Procedure." (Article 121). However, "decrees having the force of law issued during a state of emergency, martial law or in time of war shall not be brought before the Constitutional Court alleging their unconstitutionality as to form or substance."

[16] Greek Case, Commission Report, App. no. 3321/67 et. al., 05/11/1969, §§ 159-165 and 207.
[17] Turkish Case, Commission Report, App. no. 9940/82 et. al., 06/12/1983.

(Article 148). This provision brings along the risk to lead to exclusion of the decree laws introduced during the state of emergency from judicial review.

On the contrary, the Constitutional Court eliminated this risk with its case law developed in 1990s. In three different cases, the TCC held some decrees having the force of law adopted during the state of emergency are in fact ordinary decrees having the force of law in terms of their substance, as their regulations went beyond the period or location of the declared state of emergency. Therefore, it held that they could be subject to constiutionality review.Therefore, they could be subject to constitutionality review.[18] Similarly, it was stated that if the regulations defined as decrees having the force of law and adopted during the state of emergency cover issues other than those required by the state of emergency then they cannot be considered as decrees having the force of law and adopted during the state of emergency and could therefore be reviewed as ordinary decrees.

This approach of the TCC was in line with the ECtHR's approach. The ECtHR defined limits in terms of "time" in its *Braggigan and McBride* decision with indicating that 3rd paragraph of Article 15 of the Convention rules for continuous re-evaluation of extraordinary measures.[19] Similarly, the ECtHR concluded that following procedures in accordance with the state of emergency legislation in locations outside the area where the state of emergency was declared in the Southeast Anatolia Region of Turkey was not applicable *ratione loci* in relation to Article 15 of the Convention[20]. In other words, the Court defined the limits for the State of Emergency in terms of "location". Finally, the Court establishes relations between measures related to each case with the requirements of the state of emergency in terms of substance in general and defines limits *ratione materiae*. Namely, both the TCC (with its former case law) and the ECtHR did not consider measures exceeding the time, location and subject of state of emergency within the scope of the state of emergency regime. However, the TCC regressed from this case law with a judgment in 2016. According to the Court which followed quite a formalist approach;

> "Allegation that the decrees having the force of law during the state of emergency covered unconstitutional regulations is not sufficient for them to be subject to constitutionality review. Such a constitutional power should be manifestly granted

[18] TCC, App. no. 1990/25, Jud. no. 1991/1, 10/01/1991; TCC, App. no. 1991/6, Jud. no. 1991/20, 10/01/1991
[19] *Brannigan and McBride v. the UK*, ECtHR 14553/89 14554/89, 26/05/1993, § 54.
[20] *Sakık and others v. Turkey*, ECtHR, App. No. 23878/94 et. al., 26/11/1997, §§ 34-39; *Abdulsamet Yaman v. Turkey*, ECtHR, App. No. 32449/96, 02/11/2004; *Yurttaş v. Turkey*, ECtHR, 25143/94 and 27098/95, 27/05/2004, §§ 54-59; *Sadak v. Turkey*, ECtHR, App. No. 25142/94 and 27099/95, 08/04/2004, §§ 52-57; *Bilen v. Turkey*, ECtHR, App. Bo. 34482/97, 21/02/2006, § 44.

for the review of the decree laws introduced during the state of emergency, by the Constitutional Court. Considering the wording of Article 148 of the Constitution, the objective of the Constitution-maker and related legislative documents, it is clear that the decree laws introduced during the state of emergency cannot be subject to any judicial review under any name whatsoever. A judicial review to be conducted despite the provision given above is not in conformity with Article 11 of the Constitution which regulates the supremacy and binding force of the Constitution and Article 6 of the Constitution which stipulates that no person or organ shall exercise any state authority that does not emanate from the Constitution."[21]

The TCC remarked that the Constitution obligates these decrees having the force of law to be submitted to the approval of the parliament rapidly against the risk of complete lack of review of decrees having the force of law and adopted during the state of emergency that can be introduced during the new regime enacted upon the declaration of state of emergency and noted that these decree laws were subject to political review. In this regard, it "threw the ball out of bounds" by leaving this issue to the review of the legislative organ and postponed a possible judicial review to the process following the ratification of these decrees having the force of law by the Grand National Assembly of Turkey by statute. Thus, according to the TCC, decree having the force of law and adopted during the state of emergency would become open for judicial review by the TCC when they are approved by the parliament by "statute". However, the TCC considered the unconstitutionality of state of emergency decrees having the force of law as decree with secondary nature until they are ratified as law. On the other hand, the TCC remained silent against the possibility of the non-deliberation of the state of emergency decrees having the force of law or procrastination of the deliberations by the parliament. This resulted in a specific category of problem which can be described as "lack of judicial review of the parliament's failure in conducting political review".

3. Issue of Lack of Political Review for Decrees Having the Force of Law and Adopted during the State of Emergency

As described above, the executive power during state of emergency in Turkey means to have an additional authority to introduce "decree having the force of law in state of emergency". It is possible to cease fundamental rights by means of these norms. Judicial review of this power which may jeopardize the safeguards in the Constitution and is open to

[21] TCC, App. no. 2016/166 , Jud. no. 2016/159, 12/10/2016, § 23.

misuse is of great importance. However, the constitutionality review of these norms is prohibited in the Constitution. The TCC previously developed a substantive approach despite the prohibition, considered the regulations with subject, time and location exceeding state of emergency as a decree law of ordinary times and conducted their judicial reviews. However, according to the new case law the TCC no longer conducts this review and leaves this review to the political review of the parliament and until after these norms consequently become a statute. Nevertheless, in the Turkish practice, the legislative organ guided by the executive does not deliberate these decree laws and consequently these norms are excluded from judicial review. This is due to the fact that there is no provision in the Constitution concerning review of the state of emergency decree laws by the parliament. This issue is regulated with the rules of procedures of the parliament.

According to the rules of procedures of the parliament "Decrees having the force of law issued as per articles 121 and 122 of the Constitution and submitted to the Grand National Assembly of Turkey are debated and decided upon according to the rules stipulated in the Constitution and the Rules of Procedure regarding the debate of the government bills and private members' bills, but immediately within thirty days at the latest, and before other decrees having the force of law and bills in the committees and the Plenary" (Art. 121). So, what if the parliament does not deliberate and decide on state of emergency decree laws within 30 days? The internal rules do not answer this question. The doctrine offers three different answers.

According to the first view, no conclusion can be reached if the parliament does not announce its decision to reject, adopt or amend a decree having the force of law introduced during state of emergency. Therefore, a decree having the force of law adopted during state of emergency which is not debated within 30 days remains to be in force.[22] According to the second view, these decrees having the force of law are automatically repealed, a contrary approach would make the systematics of the Constitution and the requirement of 30 days-limit in the Rules of Procedure meaningless.[23] According to the third view, the decrees having the force of law adopted during state of emergency would become "null and void" if they are not debated within 30 days. Any court can identify this situation of being null and void.[24]

[22] Kemal Gözler, *Türk Anayasa Hukuku*, p. 790.
[23] Erdoğan Teziç, *Anayasa Hukuku*, (İstanbul: Beta Yay., 2016), p. 40.
[24] Necmi Yüzbaşıoğlu, *Türkiye'de Kanun Hükmünde Kararnameler Rejimi*, (İstanbul: Beta Yay., 1996), p. 188.

In practice, the decrees with the force of law adopted during the state of emergency, which are not debated by the parliament within 30 days still leads to results and judicial decisions can be given accordingly. This may result in administration of the state with executive procedures that are not subject to constitutionality review. However, the question remains to be unanswered. Thus, the actual reason of the problem is not an action but a lack of action by the parliament. In other words, "unconstitutionality through omission" somehow emerges. The "unconstitutionality by omission" is not recognized in the Turkish constitutional judiciary. On the other hand, there is no mechanism that allows this omission to be brought before the TCC even if this notion is recognized.

3. Criticism of the state of emergency regime in Turkey: Remembering Kelsen

To sum up, we can say that the state of emergency regime in Turkey is in conformity with the international human rights law on paper. However, we have explained that the issues that are visible within this context can be listed under three categories:

(a) not conducting judicial review of declaration of state of emergency or decisions for extension of state of emergency,

(b) The emergency decrees with the force of law introduced during the state of emergency are not reviewed by the TCC regardless of its contents as long as they are defined as state of emergency decrees with the force of law and the issues that are not related to the state of emergency are thereby excluded from judicial review by means of introducing decrees with the force of law during the state of emergency,

(c) No action is taken by the parliament, which does not debate the decrees with the force of law during the state of emergency and this is not subject to the constitutionality review.

These three aspects can be tested within the framework of the law theory of Hans Kelsen. The following observation of Kelsen should not be ignored when considering the first two issues:

> "As long as a constitution lacks the guarantee, presented in the foregoing, of the annullability of unconstitutional acts it also lacks the character of full legal bindingness in the technical sense. A constitution according to which unconstitutional acts, and in particular unconstitutional statutes, must remain valid because they cannot be annulled on the ground of their unconstitutionality amounts to little more, from a legal-technical point of view, than a non-binding wish; though one is in general

unaware of this fact, for the reason that a politically motivated jurisprudential theory prevents the growth of that awareness. Any statute whatsoever, any simple decree – yes, even any general legal transaction of private parties – surpasses such a constitution in legal force, surpasses it though the constitution stands above them all, though all lower levels of legal order draw their validity from it. Legal order, after all, takes care that every act which puts itself in contradiction with any norm of a level lower than the constitutional can be annulled."[25]

According to Kelsen, the constitution technically would not be binding fully in a system that lacks constitutionality review. In democratic and pluralist systems, constitutional judiciary is a major legal instrument that ensures the effectiveness of the constitution and secures the democracy. This brings along political consequences which are related to the balance between pluralism and powers. This allows effective protection of minorities against misuse by the majority. Thus, the constitutional judiciary enables resistance against the dictatorship of majority which is not less dangerous than that of minority.

These considerations by Kelsen should be recalled in terms of the issues described above. On the other hand, observations of Kelsen related to the state of emergency processes provide an insight about today's Turkey:

"The competence of the constitutional court should not be restricted to a review of the constitutionality of statutes. As is clear from our earlier explications, all decrees that can, according to the constitution, be enacted in lieu of statutes belong to the group of acts immediate to the constitution, of acts whose legality consists solely in their constitutionality. The so-called emergency decrees, in particular, belong to this class. The fact that every violation of the constitution, in this context, constitutes a breach of the politically all-important dividing line between the government's and parliament's sphere of power, makes a control of the constitutionality of such decrees all the more necessary. The narrower the conditions the constitution imposes on the enactment of decrees of this kind, the greater is the danger of unconstitutionality in the use of these regulations, and the more necessary is constitutional adjudication. Experience attests that wherever the constitution permits the enactment of emergency decrees, the legality of such decrees, in particular cases, tends to be passionately contested, whether rightly or wrongly. The possibility of having such controversies decided by a

[25] Hans Kelsen, "Kelsen on the Nature and Development of Constitutional Adjudication", *The Guardian of the Constitution*, Lars Vinx (trans.), (Cambridge: CUP, 2015), p. 69.

high- est authority whose objectivity is beyond doubt must be of the highest value; especially where circumstances are such that important areas of life have to be regulated by such emergency decrees."[26]

As a matter of fact, Kelsen also did not overlook the fact that some of the issues are excluded from the constitutional judiciary by means of regulating them under decrees with the force of law introduced during the state of emergency as experienced recently in Turkey and shown with the following concrete examples and made some remarks against this possibility. The observations of Kelsen within this context seems like anticipating the future of Turkey:

"We have to add, finally, acts that, according to their subjective meaning, are not intended to be statutes, but that, according to the constitution, ought to have been statutes, and that have taken a different form in violation of the constitution, such as the form of a non-promulgated parliamentary decision or of a decree, perhaps in order to avoid the control exercised by the constitutional court. If, for example, the constitutional court was endowed only with the power to review statutes, and if the government was to regulate through decree a matter that, according to the constitution, can only be regulated by statute, because it is unable to get the relevant regulation enacted as a statute, then this decree, which replaces a statute in violation of the constitution, would have to be open to challenge in the constitutional court."[27]

In addition to these issues, we can also focus on the third aspect. As emphasized above, the TCC stipulates that the parliament should rapidly conduct political review of emergency decrees with the force of law during state of emergency and the constitutionality review of these laws can be made after the statement of the parliament's will by statute. However, the consequences of failure in conducting this review and non-compliance with the requirement of 30 days-limit for debates in the Rules of Procedures of the Parliament are not very clear. This brings along the "lex imperfecta" discussion.

It is a well-known fact that there are authors who claim that there might be norms without any sanction in the law doctrine. These authors acknowledge the law order as a coercive order and argue that "incomplete law" can exist within the law order. According to them, coercion is a feature that is not attributed to each element of law order but to the complete order in its entirety. However, as Kelsen rightfully expressed, there cannot be any law norm, which lacks sanctions, in other words which does not stipulate sanctions for cases

[26] Ibid., p. 52.
[27] Ibid., p. 49.

of failure in complying with these norms and which also orders specific humane acts. Thus, according to Kelsen "in this case, the subjective meaning of the act in question cannot be interpreted as its objective meaning; the norm, which is the act's subjective meaning cannot be interpreted as a legal norm, but must be regarded as legally irrelevant."[28] In this regard, any definition that does not qualify law as a coercive order should be rejected. On the other hand, Kelsen also do not overlook some of the norms, which do not stipulate sanctions directly. The category defined as dependent norms by Kelsen "are essentially connected with norms that stipulate the coercive acts". According to Kelsen;

> "A typical example for norms cited as arguments against the inclusion of coercion into the definition of law are the norms of constitutional law. It is argued that the norms of the constitution that regulate the procedure of legislation do not stipulate sanctions as a reaction against nonobservance. Closer analysis shows, however, that these are dependent norms establishing only one of the conditions under which coercive acts stipulated by other norms are to be ordered and executed. If the provisions of the constitution are not observed, valid legal norms do not come into existence, the norms created in this way are void or voidable. This means: the subjective meaning of the acts established unconstitutionally and therefore not according to the basic norm, is not interpreted as their objective meaning or such a temporary interpretation is annulled."[29]

So which legal remedy can be improved within this context in Turkey? We are of the opinion that stimulation of the method of "unconstitutionality by omission" by the Constitutional Court is indispensable. Unconstitutional consequences emerge due to failure of the parliament in introducing laws rather than a law of the parliament. Another issue is bringing the subject before the Constitutional Court in this context even if this method is stimulated. Our advice is *Organstreit* proceedings which is implemented in German constitutional law. This method which allows constitutional organs including political parties to bring unconstitutional acts of another constitutional organ before the Constitutional court may also provide that the decrees with the force of law introduced during the state of emergency are included to the agenda of debates for enactment in the parliament where the ruling party has the majority and the rapid review requirement stipulated in the Constitution and the Rules of Procedures are not followed.

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[28] Hans Kelsen, *Pure Theory of Law*, Max Knight (trans.), (London: UCP, 1978), p. 52.
[29] Ibid., p. 51.

II. State of Emergency Practice in Turkish Constitutional System and Non-conformity with International Law: Remembering Schmitt

Normative issues of the state of emergency regime in Turkey produce quite critical impacts in practice. Constitutional Court's refraining from judicial review while the Grand National Assembly of Turkey refrains from political review and/or ineffectiveness of this political review under the guidance of executive lead to many issues in terms of constitutional order. We can describe some of the impacts created with these problems.

Firstly, it can be considered that the conditions of state of emergency exist in Turkey as of 15 July 2016. The Council of Europe and other international organs actually recognized that the coup attempt against the elected government of Turkey was an attack against the existence of the nation. Government authorities declared on that date that the state of emergency which was declared for a period of 90 days could be ended on an earlier date. On the other hand, the state of emergency was extended six times. The government continued to have an arbitrary appreciation authority which is completely excluded from judicial review despite the rightful call of international organs to end the state of emergency. In fact, there is no actual legal obstacle against the state of emergency process in Turkey to last forever.

On the other hand, lack of judicial and political review of the emergency decrees with the force of law introduced during the state of emergency allowed the executive power to introduce regulations and measures on any subject as it wishes and the rationale of restricted administration which is the essence of constitutionalism was put aside.

For instance, Turkey held a referendum on an important issue like constitutional amendment under the conditions of state of emergency and attempts were made in order to ensure that democracy "gained functionality" without effectively exercising high number of democratic society order rights, namely the freedom of assembly and association.

Lack of judicial review of decrees with the force of law introduced during the state of emergency opened the door for these decrees to be introduced without any debates being held in the parliament and in a way that is exempted from the expectations of social opposition. This lack of review further resulted in re-regulation of all elements of Turkish state structure and formation of a type of "exception state".

Although it is not possible to focus on all decrees with the force of law that restructures state organs in a consuming way, the major provisions that were highly discussed can be categorized under three headings.

A. Mass dismissal of civil servants and members of judiciary: civil death

The most controversial issue related to decrees with the force of law introduced during the state of emergency that was declared in 2016 is the dismissal of civil servants and members of judiciary by means of these decrees. The first decree law of state of emergency published on July of 2016. During the period between 21 July 2016 and 23 February 2017, 21 decrees were issued by the government.[30] A list was annexed to the related decree laws and the citizens listed learned that they were dismissed from their public service. This practice was maintained when the TCC did not rule for its annulment and a total of 115.516 public servants were dismissed from their public service up to date. It should be noted that the measure of dismissal from public service was not limited to those who are in a specific relation of loyalty with state such as soldiers or police. On the other hand, although this practice was initiated initially with the claim that they were in relation with the organization of Fethullah Gulen Terrorist Organization / Parallel State Organization (FETÖ/PDY) alleged to be behind the coup attempt of 15 July, its implementation continued in time with the claim that they were connected to "terror organizations" with a general and unclear expression. For example, 386 out of 5822 dismissed academics from 117 universities were those who undersigned the declaration of Academics for Peace which was not related to FETÖ/PDY.

The bottom line is the whole country started to follow the Official Gazette to learn whether themselves or their friends were defined as terrorists with a decree law published midnight. Official Gazette which was previously followed only by experts turned out to be one of the newspapers with the highest circulation in the country.

The application filed to the TCC for the annulment of the decrees with the force of law introduced during the state of emergency with such contents was rejected according to the new case law which stipulated that the decree laws of state of emergency described above were not reviewed. Individual applications filed on this issue were also rejected on the grounds that the administrative judiciary remedies were not exhausted. The victims resorted to the administrative judiciary with the argument that the related norms had an individual procedure nature substantively although they were defined as regulation; however, administrative courts also rejected these cases on the grounds that they did not have the

[30] For further information see İsmet Akça et. al., When State of Emergency Becomes the Norm: The Impact of Executive Decrees on Turkish Legislation, (Istanbul: heinrich Boell Stiftung, 2018). https://tr.boell.org/sites/default/files/ohal_rapor_ing.final_version.pdf

competency to review the decrees with the force of law introduced during the state of emergency.

On the other hand, applications were filed to the ECtHR based on the argument that the TCC did not have the competence to review these norms and therefore should not be considered as a remedy that should be exhausted. The ECtHR found these applications inadmissible on the grounds that the TCC could conduct this review by means of "individual application" instead of "norm review".

During all these developments, the government established a new administrative review unit (Commission) for the victims of decrees with the force of law and following this development, the applications filed both to the TCC and the ECtHR were found to be inadmissible on the grounds that the remedy introduced with this commission should be exhausted.[31] However, both courts did not focus on the facts that (a) this commission which consists of 7 members, majority of which are appointed by the executive power does not have judicial safeguard, (b) the issue that members of this commission can be subject to terrorism investigation with a unilateral procedure of the executive power and can be easily dismissed for this reason, (c) ambiguity of the legal criteria to be followed by this commission in review, (d) in case of a reinstatement decision by the commission, the location and the post of reinstatement is subject to the appreciation of the executive, (e) it would actually take decades for a commission with 7 members to conclude hundred thousands of files and finally and the most important issue is that this (f) commission has not been established and become functional, in other words it is not operational.

Many people who did not have any proceedings and a final conviction as a consequence of a proceeding were suddenly labelled as "in connection with terrorism" one night and besides their confusion about the legal remedies available against this conviction, they virtually hit the wall in every path they tried and were referred to a remedy with an extremely controversial effectiveness and which would lead to loss of time.

Furthermore, apart from producing solutions, the TCC followed a similar practice with dismissing 2 of its members with considering that they were in connection with terrorism, without taking their statements and conducting any investigation, and with making reference to an ambiguous notion like "social environment information". The TCC stated in its decision that the measure of dismissal from profession did not have "a provisional nature" and

[31] Murat Hikmet Çakmacı, TCC, App. no. 2016/35094, 15/02/2017; Hacı Osman Kaya, TCC, App. no. 2016/41934, 16/02/2017; Çatal v. Turkey, ECtHR, 2873/17, 07/03/2017.

signalled that that the dismissals during the state of emergency were permanent. In this regard, there emerged a perception in society that those dismissed from public service without any judicial decision and review were not entitled to recruited for public service again for a lifetime. In fact, numerous measures were taken such as cancellation of the passports of these people and their relatives, not allowing them to enter facilities of public services, not taking any action (admission or rejection) against their administrative requests and petitions, disrupting their attempts in private sector with communicating this decree law, impeding their enrolment to universities as students. In this regard, it was started to be expressed that the addressees of these practices in Turkey were convicted to "civil death" – an expression inspired from the Roman Law.

Actually, the provision of "loss of fundamental rights" which was highly discussed and considered as an excessive measure and rejected to be included to the constitution by the primary constituent power was *de facto* transferred to the Turkish constitutional law by means of state of emergency decree with the force of law. Furthermore, this transfer was made in a manner that would also cover the rights that are not related to political participation instead of a limited number of rights and in a provisional manner unlike the German constitution which clearly regulates this institution.

In other words, very ambiguous and unclear practices turned the rightful reaction of the Turkish government into an unrightful reaction without the lustration provisions like in post-communist countries and an important lesson was learned about the importance of compliance with constitutional rules for the protection of constitutional order.

B. Skipping Constitutional Review with State of Emergency Decrees with the Force of Law: Fraud against the Constitution

Another issue resulting from the emergency decree law regime that is exempted from the judicial review of the Constitutional Court is that subjects that are not related to the State of Emergency process under normal conditions can also be regulated easily. This practice which relieves the executive power from the processes in the parliament, criticisms of the opposition within the parliament and the obligation to debate also impeded the related regulation to be subject to the constitutionality review. A regulation which would normally fall within the scope of review of law could be easily embedded into a text defined as decree having the force of law introduced during the state of emergency and executive consequences were attained from these regulations.

To give a striking example, a decree having the force of law introduced during the state of emergency allowed the registry procedures of vehicles for traffic to be made by the notary public offices instead of traffic registration directorates. Similarly, another decree law introduced during the state of emergency empowered the Ministry to define the period when the transportation vehicles would be obliged to use winter tyres. Numerous subjects such as issuance of documents like passport, driver's licence etc. by the Directorate of Civil Registration which were issued previously by the General Directorate of Security, limiting the period when the consumers are entitled to renege on a contract to a period of 24 months in prepaid house sales and increasing the amount of due compensation, expanding the scope of provisions related to strike postponement and strike prohibitions within the country, which could be provided with ordinary laws and were not directly related to the purpose of declaration of state of emergency could skip the constitutional judiciary review.[32] These can be considered as "fraud against the constitution".

C. Decree Laws with the Force of the Constitution: De-constitutionalization

Another consequence resulting from the fact that the decrees having the force of law introduced during the state of emergency are not subject to judicial review is that these decree laws virtually acquired the nature of "decrees having the force of the constitution".[33] Due to this consequence, the system of the decrees having the force of law introduced during the state of emergency in Turkey was likened to the *Ermachtigunggesetz* practice during Weimar period. For instance, as per Article 130 of the Constitution 1982 "The administrative and supervisory organs of the universities and the teaching staff may not for any reason whatsoever be removed from their office by authorities other than those of the competent organs of the universities or by the Council of Higher Education." This provision has a specific meaning in the Turkish constitutional history. The emphasis of "whatsoever" in the provision which was included under the constitution for the first time in 1961 has a specific significance as a reaction against practices such as interventions of the executive power against the autonomy of universities and dismissal of or assignment of academics which did not support the government to the Ministry in 1950s. However, the state of emergency practice in 2016 and the practice of the TCC, which does not interfere with and even consider such academic interventions of the executive power against the autonomy of the universities

[32] See Akça, *op. cit.*
[33] Tolga Şirin, "Anayasa Hükmünde Kararnameler", *Güncel Hukuk*, 2016, Vol. 155.

as permanent interventions resulted in "*de facto* constitutional amendment" of the related provision by means of decree law.

A similiar case can also be claimed in terms of the safeguards of judges. For example, as per Article 139 of the Constitution "Judges and public prosecutors shall not be dismissed, or unless they request, shall not be retired before the age prescribed by the Constitution; nor shall they be deprived of their salaries, allowances or other rights relating to their status, even as a result of the abolition of a court or a post." However, a large number of judges and presecutors were dismissed by executive based on the decrees having the force of law introduced during the state of emergency. This means "*de facto* constituitonal amendment" of the constitutional provision related to safeguards of judges. Another example related to other organs with independence and autonomy against the power is the dissolution of autonomy provisions applicable for local administrations. A typical example is the dismissal or pre-trial detention or banning a mayor or acting mayor from public service on the grounds of aiding and abeting terrorism or terrorist organizations, which was enabled with the amendments in the Law on Municipalities introduced with Decree Law no. 674 (Article 38-39). However, according to the Constitution (Art. 127) "Loss of status and objections regarding the acquisition of the status of elected organs of local administrations shall be decided by judiciary. However, as a provisional measure until the final court judgment, the Minister of Internal Affairs may remove from office those organs of local administration or their members against whom an investigation or prosecution has been initiated on grounds of offences related to their duties." Nevertheless, this provision became unapplicable by means of the related decree laws.

Furthermore, interventions were made by means of decree laws to RTÜK (Radio and Television Supreme Council), which enjoyed the press autonomy safeguards imposed by the constitution and the provision which stipulated sanctions against media organs that transmits biased broadcasts in elections was repealled.[34]

These examples of high numbers show that the issue is not only limited to fundamental rights and freedoms and the institutions which fall under the control and balance mechanism in the constitution are also modified by means of decree laws without any constitutional amendment. In this context, it should be noted that the Nazi power in Germany

[34] Decree nr. 687 has abolished Article 149/A of the Law on the Basic Provisions for Elections and Voter Records, which necessitated broadcasting bans and penalties to those broadcasts breaching the principles set by the Supreme Election Board, and the principle of equality.

consolidated its power by means of enable acts. Do the Constitutional Court and the ECtHR established in order to prevent history to repeat itself remain unresponsive to this situation? This question, unfortunately, can not easily be answered negatively.

Moreover, remembering Weimar inevitably reminds us of Schmitt. Drawing from Carl Schmitt we can describe "new Turkey" as an "exception" to ordinary procedures. In fact, in the current situation in Turkey, whatever said by the ruling party who decides on what an exception is started to be considered as constitution. Diverging from a constitutional rule specifically in a concrete case becomes available without any general amendment in the wording of the constitution specific to the related concrete case. This constitutes a situation similar to "*Verfassungsdurchbrechung*" in the classification of Schmitt.[35] Furthermore, admissibility of nonconformity with the essence, in other words unchangeable principles of the Constitution is similar to "*Verfassungsdurchbrechung*" which is described as abolishment of the political understanding that constitutes a basis for the constitution instead of the wording of the constitution or constitutional documents. The ongoing situation in Turkey is currently at the limits of these notions and the TCC that is the guard of the constitution fails to function at the desired level. In this respect, the eyes rightfully turn to the European Court of Human Rights.

As a conclusion: What can be the function of the ECtHR?

It is clear that the state of emergency regime in Turkey which is in conformity with the standards of international human rights law on paper brings along the risk of endangering constitutional order particularly due to lack of review in practice. In fact, norms that lack review and sanctions created a form of lex imperfecta situation. This issue is undoubtedly a political one and the effectiveness of legal institutions has a limit. However, whether or not these organs have come closer to the said limit is still questionable.

Within this context, the role of the ECtHR which exists against the risk of the Party States of the Convention to reshift to totalitarian regimes is quite critical.

This role has a much more critical meaning against the failure of the Constitutional Court, the guard of the constitution to resist effectively against flouting the constitution similar to the *Reichsgerichte* which allowed *Ermachtigungsgesetzs* during Weimar period. In this context, the aspects where the ECtHR can function can be listed as follows:

[35] See Carl Schmitt, *Verfassungslehre*, 9. Auflage, (Berlin: Duncker& Humblot, 2003[fehlerbereinigter Neusatz der Erstauflage von 1928]), p. 99.

1-) To review whether the state of emergency conditions actually exist or not with regards to decisions for the continuation of the state of emergency. To conduct this review *ex officio* even in cases when the applicants do not discuss formal requirements within this framework.

2-) To deepen the case-law related to applications of "potantial victim status" against decrees having the force of law, which may bring consequences in practice in terms of the state of emergency measures

3-) To revise its case-law on whether the remedy of state of emergency commissions are effective in theory and practice within the framework of the aspects described above and (a) to review on merits expeditiously in cases where the commissions are not considered as effective, (b) to include guiding findings in the reasoning of its judgments in relation to the conditions required for the sustainment of effectiveness even in cases where the domestic remedies are considered as effective

4-) To give priority to the applications particularly related to interventions based on the practice of derogation

5-) To identify the uncertainty of the new situation that ruins the hierarchy of norms between the decrees having the force of law introduced during the state of emergency and the constitutional provisions in terms of "legal certainty"

6-) To have a more sensitive approach against Article 18 of the Convention in cases related to freedom of press and individuals who exercise their right to opposition in Turkey although they are not particularly related to FETÖ/PDY,

7-) To include considerations that will have a restitio in integrum impact in decisions to be given as per Article 46 of the Convention.