Accommodating Security Imperatives v. Protecting Fundamental Rights

The Challenge of States of Emergency in the Context of Countering Terrorism in Turkey

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Abstract

This article seeks to illuminate the use of exceptional national security and emergency powers in the fight against terrorism in Turkey. The article is organized in four parts. Section I looks at the role of terrorism in the activation and justification of a state of emergency and introduces the Turkish case within this context. Section II explores the historical origins of the Turkish state of emergency regime and analyses the principles regulating emergency regime at the Turkish domestic level. Section III examines the operation of governmental emergency powers by providing an analysis of the state of emergency practices in Turkey, both past and present. A principal focus is necessarily directed at the state of emergency and the measures deployed within this framework in Turkey's predominantly Kurdish southeast, where emergency rule was in force from 1987 to 2002, and the recent nationwide state of emergency in the wake of the 15 July attempted coup. Section IV presents concluding remarks.

Keywords

Turkey – emergency – terrorism – ECHR – national security – derogation

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Introduction: Terrorism and the State of Emergency

Terrorism as a concept and as a topic of discourse has penetrated the agenda of international society since the September 11, 2001 attacks in the United States (9/11). However, it remains contentious and controversial in its vocabulary. Under international law, states have an obligation to act to combat terrorism in various ways, but in any case, they remain bound by their international human rights obligations. Difficult considerations balancing human rights with security imperatives arise when liberty and security come into conflict.

At the international level, the United Nations ('UN') has adopted a whole series of resolutions¹ and international treaties² related to terrorism. Yet, there is still no consensus on a generic definition of 'terrorism'.³ For example, the famous UN Security Council Resolution 1373 qualified the 9/11 attacks along with 'any act of international terrorism' as a threat to international peace and security⁴ and created the Counter-Terrorism Committee (later bolstered by UNSC Resolution 1624 in 2005), but failed to explain what is meant by the term.⁵ Again, in 2004, the UNSC Resolution 1566 included general descriptions of acts that fall within the contours of terrorist activity without however, purporting to fully define terrorism.⁶ Although a number of legally binding resolutions

1 For a list of UN Security Council Resolutions, see <http://www.un.org/en/sc/ctc/resources/res-sc.html>.

2 For a list of these treaties, see <http://www.un.org/terrorism/instruments.html>.

3 M. Williamson, *Terrorism, war and international law: the legality of the use of force against Afghanistan in 2001*, UK: Ashgate, 2009, pp. 49–71. See also A. Cassese, 'Terrorism is Also Disrupting Some Crucial Legal Categories of International Law', in *European Journal of International Law*, vol.12, 2001, p. 993.

4 UNSC Res 1373, 28 September 2001, UN Doc S/RES/1373.

5 M. Scheinin and M. Vermeulen. 'Unilateral Exceptions to International Law: Systematic legal analysis and critique of doctrines to deny or reduce the applicability of Human Rights norms in the fight against terrorism.' EUI Working Papers, no.8, 2010, p. 2; M. Aksenova, 'Of Victims and Villains in the Fight Against International Terrorism', in *European Journal of Legal Studies*, no.10, 2017, p. 18.

6 UNSC Res 1566, 8 October 2004, UN Doc S/RES/1566, para 3. (referring to terrorism as "criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism"). See also R. Giles-Carnero, 'Terrorist Acts as Threats to International Peace and Security' in P. Sánchez (ed.) *International Legal Dimension of Terrorism*, Brill, 2008, p. 67 (arguing that "the Security Council has preferred ... to limit itself to

by the UN Security Council, including *inter alia* Resolution 2178 in 2014,⁷ have reiterated that states are under an obligation to criminalize terrorism domestically, the lack of a definition of the term 'terrorism' has enabled governments to increasingly resort to vague and broad criteria in defining whether an act of terrorism has occurred.⁸

Significantly, the absence of a clear definition has given rise to extremely problematic legal issues as terrorism has been frequently invoked by states to justify a state of emergency and derogate from human rights instruments.⁹ In its past jurisprudence,¹⁰ the European Court of Human Rights ('ECtHR' or 'European Court'), has confirmed that terrorism may be regarded as 'public emergency, which threatens the life of the nation' that would justify derogation. However, based on ample evidence of actual practices, emergency regimes coupled with broad-reaching and vague anti-terrorism laws tend to be accompanied by gross and systematic human rights abuses when states employ extraordinary powers to address threats to public order.¹¹ It has become

expressing a guide definition rather than offering a definitive version of what must be defined as terrorism within its sphere of action").

7 See, *inter alia*, UNSC RES 2178, 24 September 2014, UN DOC S/RES/2178.

8 B. Saul, *Defining Terrorism*, Oxford University Press, 2006, p. 317 (arguing that "in the absence of any 'law on terrorism' in public international law, it is not sufficient to leave the definition of terrorism to individual governments, as the Security Council has done").

9 International human rights law and practice has long recognized that States can take measures that temporarily derogate from certain rights. Most importantly, Article 4 of the International Covenant of Civil and Political Rights ('ICCPR') provides, derogation from human rights can be justified 'in time of public emergency which threatens the life of the nation' but such derogation must be limited 'to the extent strictly required by the exigencies of the situation'. See, Article 4 of the International Covenant on Civil and Political Rights (16 December 1966, S. Treaty Doc. No. 95-20, 999 U.N.T.S. 171). The possibility of derogation is also guaranteed, though not based on identical terms, in the European Convention on Human Rights ('ECHR') and, similarly, in the American Convention on Human Rights (ACHR). See, Article 15 of the European Convention on Human Rights (4 November 1950, 213 U.N.T.S. 221) and Article 27 of the American Convention on Human Rights (22 November 1969, 1144 U.N.T.S. 123). In contrast, the African Charter on Human and Peoples' Rights does not include a derogations provision. Human rights instruments also allow states to justify necessary, proportionate and legitimate limitations on rights to protect public safety and national security. See, e.g. Article 10 (2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5.

10 See, *Lawless v. Ireland* (No. 3), App No 332/57, (ECtHR, 1961) and *Aksoy v. Turkey*, App No 21987/93, (ECtHR, 18 December 1996).

11 UN Commission on Human Rights, Study of the Implications for Human Rights of Recent Developments Concerning Situations Known as States of Siege or Emergency, 35th Session, pp. 8-9, UN Doc. E/CN.4/Sub.2/1982/15 (1982); C. Warbrick, 'The Principles of the

even more common in the post 9/11-era to view terrorist threats as creating a 'permanent and prolonged' emergency.¹² This may potentially lead to an increased and wider recourse to states of emergency and the derogation instrument when confronted with security threats, which in turn effectively risks having wider implications for the regional and international human rights edifice.¹³ In view of the risk that exceptional regimes are rapidly appearing to become the 'new normal', it is noted that states should cope with terrorism by using those means available under 'normal legislation'.¹⁴ Yet, states do not always find that the 'ordinary' laws offer effective responses to terrorism.

A state of emergency based on an explicit or implicit justification of terrorism is a familiar phenomenon throughout Turkish history. The country has been engaged in a serious conflict¹⁵ in Kurdish-inhabited territories for the past three decades. From the mid-1980s, Turkey's strict position on terrorism has led to a hardened legislative response at the national level. However, as seen in the Turkish counter terrorism efforts, preventive measures that provide security forces with wide-ranging and almost unfettered power have predominated.

European Convention on Human Rights and the Response of States to Terrorism', in *European Human Rights Law Review*, no.3, 2002, pp. 287–288; C. Walker, 'Intelligence and anti-terrorism legislation in the United Kingdom', in *Crime, Law & Social Change*, no.44, 2006, p. 387.

- 12 See, D. Webber, *Preventive Detention of Terror Suspects: A New Legal Framework*, UK: Routledge, 2016, p. 326. It must be noted that, even if few States have taken measures as drastic as Turkey, the number of State derogations from human rights instruments appears to be soaring. Following the 9/11 attacks, the UK derogated from its obligations under the ICCPR and the ECHR in response to threats of international terrorism. France also lodged a derogation notice from the ECHR in the wake of the November 2015 terrorist attacks. Ukraine did the same in relation to the ongoing conflict in the eastern part of the country. For the text of these derogations, as well as related declarations, see, Reservations and Declarations for Treaty No.005 – Convention for the Protection of Human Rights and Fundamental Freedoms. Retrieved 9 August 2018, https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/declarations?p_auth=IkZUTjGu.
- 13 Throughout the Organization for Security and Co-operation in Europe ('OSCE') region, for example, the weakening of human rights safeguards and the erosion of full respect to the rule of law have been clearly observed in France, Ukraine, Turkey and United Kingdom during states of emergency. See, OSCE, Office for Democratic Institutions and Human Rights, Expert Meeting Report, 27–28 October 2018. Retrieved 9 August 2018, <https://www.osce.org/odihr/317766?download=true>.
- 14 A. Mokhtar, 'Human rights obligations v. derogations: article 15 of the European convention on human rights', in *The International Journal of Human Rights*, no.8, 2004, p. 79.
- 15 A valuable discussion on the legal nature of this conflict provided in K. Yıldız and S. Breaux, *The Kurdish conflict: international humanitarian law and post-conflict mechanisms*, UK: Routledge, 2010, p. 354.

Focused primarily on domestic terrorism, the most important legal instrument has been the proclamation of a state of emergency. This has enabled derogation from certain human rights, pursuant to the Turkish Constitution and the Law on State of Emergency of 1983 (the LSE). That framework enables the Turkish government to declare a state of emergency 'in the event of serious indications of widespread acts of violence aimed at the destruction of the free democratic order', and to adopt emergency decrees on 'matters necessitated by the state of emergency'.¹⁶

Against this backdrop, this article seeks to illuminate the use of exceptional national security and emergency powers in the fight against terrorism in Turkey. Section II explores the historical origins of the Turkish state of emergency doctrine and analyses the principles regulating the emergency regime at the Turkish domestic level. Section III examines the operation of the government's emergency powers by providing a comprehensive analysis of state of emergency practices in Turkey, both past and present. A principal focus is necessarily directed at the state of emergency and the measures deployed within this framework in Turkey's predominantly Kurdish southeast, where emergency rule was in force from 1987 to 2002 and the recent nationwide state of emergency in the wake of the 15 July 2016 attempted coup. Section IV presents concluding remarks.

Historical Origins of the Turkish State of Emergency Regime

From a historical perspective, *exceptional* regimes in various forms and with only sporadic interruptions have been in force for many years in Turkey. From the period of 1923 to 1987, for a combined total of nearly 26 years, the rule of a state of siege and martial law were ubiquitous throughout the country.¹⁷

The 1970s in Turkey were marked by internal armed conflicts between different political factions. Due to the complexities of Turkish politics and unresolved social and economic problems, the violence had intensified and become unprecedented. Fashioning (legal) responses to this violence was at the top of the Turkish Government's agenda. This led to the establishment of the State Security Courts ('SSC') as part of a system of special courts in Turkey in

16 See Articles 119–121 of the Turkish Constitution. For a detailed legal analysis, see E. Özbudun, *The Constitutional system of Turkey, 1876 to the Present*, 2011, pp. 39–57.

17 Turkey has invoked Article 15 of the ECHR from 1970 to 1987 including a continuous stretch of almost seven years from 1980 to 1987. For a legal and historical account, see S. Gemalmaz, 'State of Emergency Rule in the Turkish Legal System: Perspectives and Texts', in *Turkish Yearbook of Human Rights*, 1991, vol.11, pp. 115–156.

accordance with the then-governing 1962 Turkish Constitution “...to deal with offences against the indivisible integrity of the State with its territory and nation, the free democratic order, or against the Republic whose characteristics are defined in the Constitution, and offences directly involving the internal and external security of the State.”¹⁸ The SSCs, composed of both civilian and military judges, provided far less protection to individual liberties than were available in civilian courts.

By late 1978, the spread of bitter fighting to the Kurdish dominated region led to the imposition of martial law in the Turkish southeast. Of the thirteen provinces designated as martial law regions, eight had a predominantly Kurdish population.¹⁹ Until the 1980 military coup, another seven provinces were ruled under martial law, six of them in Kurdish populated areas.

In the aftermath of the 1980 military coup, martial law was extended throughout the country and until 1983, Turkey was governed under repressive military rule, leading to devastating consequences for human rights.²⁰ To illustrate, more than half a million people were arbitrarily detained on political grounds and were subjected to widespread torture. Additionally, more than two hundred extrajudicial killings and fifty court-ordered executions occurred in this era.²¹

An overlooked but underlying issue during the period of martial law rule between 1980–1983 in Turkey, is that the military governance attempted to impose a military discipline on society through legal means. In 1982, a new constitution that further regressed from the individual rights and liberties granted

18 In 1976, the Turkish Constitutional Court annulled the law creating the SSCs, which was later, re-established by 1982 Turkish Constitution “...to deal with offences against the indivisible integrity of the State with its territory and nation, the free democratic order, or against the Republic whose characteristics are defined in the Constitution, and offences directly involving the internal and external security of the State”. See the repealed Article 143 of the Turkish Constitution. Eventually, on 7 May 2004, such courts were abolished in accordance with the Law No. 5170.

19 H. Oberdiek, ‘Holding Armed Opposition Groups Accountable-A Comparative Study of Obstacles and Strategies: the Situation in Turkey’, International Council on Human Rights Policy Paper, 1999, p. 3.

20 Ö. Çınar and T. Şirin, ‘Turkey’s human rights agenda’, in *Research and Policy on Turkey*, vol.2, 2017, pp. 133–143 (noting that “1,683,000 people had their details recorded by the police, 650,000 people were detained, 230,000 people were put on trial, 52,000 were formally arrested, 30,000 were dismissed from their jobs, 14,000 people lost their citizenship and 50 people were executed”).

21 Amnesty International, *Turkey: Human Rights Denied*, London, 1988, p. 1.

in the former Turkish Constitution of 1961 was imposed²² and introduced the state of emergency regime into the Turkish legal and political system.²³ When the Kurdistan Workers' Party – *Partiya Karkerên Kurdistanê* ('PKK') began its armed struggle in early 1983, the LSE was also enacted, setting the legal framework for proclamation of a state of emergency and any measures taken during such period.²⁴

The Turkish authorities have long asserted that the emergency laws were essential to combat the terrorist threats posed by the outlawed PKK in southeast Turkey. The emergency decrees, in conjunction with the LSE, granted broad discretionary powers to the regional governors,²⁵ enabling them to restrict the free exercise of civil and political rights, such as *inter alia*, the right to liberty and security, the right to free movement, and the right to private and family life.²⁶ These 'quasi-martial law' exceptional powers included the authority's ability to impose curfews, impose restrictions on the press, prohibit persons whose activities were deemed detrimental to public order from entering the

22 As is clear from the language of the preamble of the 1982 Turkish Constitution, the interests of the Turkish state take precedence over the rights of its citizens. It in essence emphasizes 'the everlasting existence, prosperity and material and spiritual well-being' of the Turkish state with only one ethnic and cultural identity. For a critique of the preamble to the Turkish Constitution, see D. Kurban and Y. Ensaroglu, 'Kürt Sorunu'nun Çözümüne Doğru: Anayasal ve Yasal Oneriler', Istanbul: TESEV, 2010, p. 23.

23 In the Turkish Constitution, as regulated in Articles 119–122, there are two distinct categories of exceptional regimes: (a) state of emergency and (b) martial law. Article 120 sets out the material and formal conditions for the declaration of a state of emergency following widespread acts of violence and serious deterioration of public order: "In the event of serious indications of widespread acts of violence aimed at the destruction of the free democratic order established by the Constitution or of fundamental rights and freedoms, or serious deterioration of public order because of acts of violence, the Council of Ministers, meeting under the chairpersonship of the President of the Republic, after consultation with the National Security Council, may declare a state of emergency in one or more regions or throughout the country for a period not exceeding six months." Moreover, according to the Article 122 of the Turkish Constitution, martial law has also two categories: military mobilization and state of war.

24 Turkey, The Law on State of Emergency no. 2935, adopted on 25 October 1983, published in the Official Gazette of Turkey on 27 October 1983.

25 Initially, Article 14(1) the 1983 Law introduced the institution of regional governorship. Its implementation and enforcement, however, was regulated by the state of emergency decrees.

26 See generally Decree No. 285 of 1987; Decree No. 424 of 1990 and Decree No. 425 of 1990.

concerned region, and the authority to evacuate villages.²⁷ The decrees adopted in this period also provided full immunity to the regional governors for all actions taken,²⁸ lacking any mechanism for impartial judicial review. Accordingly, the Turkish courts were not permitted to monitor the implementation of measures taken in furtherance of the decrees.²⁹

Increasing PKK activity in the region, also prompted the Anti-Terrorism Law ('ATL'),³⁰ passed in 1991 and renewed frequently since then.³¹ Without a doubt, the ATL, dominated by a security agenda when it was first adopted, rolled back some long-standing emergency powers in Turkey's southeast but consolidated many of the measures as permanent features of Turkish counter-terrorism law.

Eventually, in December 2002, shortly after the Justice and Development Party-*Adalet ve Kalkınma Partisi* ('AKP') won the 2002 elections, the state of emergency regime was lifted in all Kurdish provinces.³² However, it has been argued that since then a *de facto* state of emergency has continued to exist in legally dubious form and substance, under the rubric of 'temporary and

27 More precisely, pursuant to Decree No. 285 of 1987, Article 4(h), the regional governors were authorized to evacuate villages and similar settlements.

28 See Article 8 of Decree 430 of 16 December 1990 which states: "No criminal, financial or legal responsibility may be claimed against the State of Emergency Regional Governor or a Provincial Governor within a state of emergency region in respect of their decisions or acts connected with the exercise of the powers entrusted to them by this decree, and no application shall be made to any judicial authority to this end." See also, Article 5 and 7 of Decree No. 413.

29 Kurdish Human Rights Project (KHRP), *The Kurdish Human Rights Project Legal Review*, UK, 2002, no.2, p. 30.

30 Turkey, The Law on Fight against Terrorism, No. 3713, adopted on 12 April 1991, published in the Official Gazette of Turkey on 12 April 1991.

31 Article 1(1) of the ATL does not define acts that would constitute terrorism but covers: "... any kind of act done by one or more persons belonging to an organization with the aim of changing the characteristics of the Republic as specified in the Constitution, its political, legal, social, secular and economic system, damaging the indivisible unity of the State with its territory and nation, endangering the existence of the Turkish State and Republic, weakening or destroying or seizing the authority of the State, eliminating fundamental rights and freedoms, or damaging the internal and external security of the State, public order or general health by means of pressure, force and violence, terror, intimidation, oppression or threat."

32 The Turkish parliament abolished the state of emergency in Hakkari and Tunceli by ratifying the Decision No. 774 on 19 June 2002. The Decision also extended the state of emergency in Diyarbakır and Sırnak for a final four months. Consequently, on 1 December 2002, the states of emergency regimes in the Kurdish southeast were entirely removed.

military security zones'.³³ The declaration of such zones enables the military to effectively occupy the area and exercise stringent powers similar to those, which existed under the state of emergency regimes as exemplified by increasing numbers of curfews and entry bans.³⁴ Thus, despite a *de jure* revocation in 2002, a *de facto* exceptional regime³⁵ has raised the spectre of past emergency rule in Turkey's southeast.³⁶

An Analysis of the State of Emergency Practices in Turkey: Past and Present

A *The State of Emergency in the Turkish Southeast (1987–2002)*

Beginning in the early 1980s, Turkish state security forces and the PKK have engaged in violent confrontations, at times verging on full-scale warfare, due to increased Kurdish separatist violence in southeast Turkey.³⁷ Then, beginning

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- 33 In June 2007, the Turkish Armed Forces announced *via* their website that 'temporary security zones' would be formed in three Kurdish provinces: Şırnak, Siirt and Hakkari. Since then, many additional areas have been declared as provisional security zones. The Law on Prohibited Military Zones and Security Zones No. 2565 provided the legal basis of 'temporary security zones'. The Law No. 2565 was adopted on 18 December 1981 by the 12 September military regime and it still remains in effect. See also K. Yıldız and S. Breau, *The Kurdish conflict: international humanitarian law and post-conflict mechanisms*, UK: Routledge, 2010, p. 22.
- 34 VOA News, 'Turkish Security Zones Prompt Human Rights Concerns for Kurds', Turkey, 28 September 2015. Retrieved 9 August 2018, <https://www.voanews.com/a/turkey-kurds-security-zones-curfews-human-rights/2982509.html>. In January 2016, the Parliamentary Assembly of the Council of Europe (PACE), echoing the concerns of the United Nations Committee on the Elimination of Racial Discrimination, stated that in Turkey 'in the context of the fight against terrorism, the enforcement of anti-terrorism legislation and security-oriented policies have reportedly resulted in racial profiling of members of the Kurdish community' See, PACE, *Resolution 2090*, Doc. 13958, 27 January 2016, para.11.
- 35 See, *The Administration of Justice and the Human Rights of Detainees: on the Question of Human Rights and States of Emergency*: Tenth Annual Rep. U.N. Doc. E/CN.4/Sub.2/1997/19, 23 June 1997, para. 117. ('A *de facto* state of emergency, as a irregularity, takes two forms: (a) the adoption of emergency measures without previously proclaiming a state emergency; (b) the maintenance of such measures despite having officially lifted the state of emergency.').
- 36 KHRP, 'Return to a state of emergency? Fact-finding mission report', London, 2008, p. 14.
- 37 Given the conflicting figures of Turkish state authorities, the precise number for the overall casualty rate is impossible to confirm. However, a Turkish Parliament Report of 2013 provides seemingly accurate estimates by comparing these figures. According to the report, the PKK conflict in Turkey is commonly estimated to have killed 35,576 people. This

in 1987 Turkey's Kurdish dominated southeast was subjected to fifteen years of continuous emergency governance until it was officially lifted in 2002. A 1987 emergency decree³⁸ vested virtually total power in the special governors and military security apparatus of the eight provinces³⁹ where fighting between Turkish state forces and the PKK was most intense.⁴⁰

Even though a state of emergency was declared in the Kurdish dominated southeast at the beginning of 1987, the Turkish Government did not submit a declaration about its derogation nor did it inform the Council of Europe ('CoE') as to the nature of the emergency in Turkey's southeast or the measures taken to address it at that time.⁴¹ It was not until three years later, in a letter dated 6 August 1990, that such notice was given:

(1) The Republic of Turkey is exposed to threats to its national security in *South East Anatolia* which have steadily grown in scope and intensity over the last months so as to amounting to a threat to the life of the nation in the meaning of Article 15 of the Convention ... (3) Because of *the intensity and variety of terrorist actions and in order to cope with such actions*, the Government has not only to use its security forces but also take steps appropriate to cope with a campaign of harmful disinformation of the public, partly emerging from other parts of the Republic of Turkey or even from abroad and with abuses of trade-union rights.⁴²

number excludes extrajudicial killings, internal executions of the PKK and forced disappearances. See Turkish Parliament's Human Rights Inquiry Committee, *Terör ve Şiddet Olayları Kapsamında Yaşam Hakkı İhlallerini İnceleme Raporu-Report on the Violations of the Right to Life in Terror and Violence Activities*, Ankara: TP, 2013, p. 78.

38 The Legislative Decree on the Establishment of A State of Emergency Special Governor, No. 285, 10 July 1987.

39 By Decree No. 285, a state of emergency was initially declared in eight provinces: Bingöl, Diyarbakir, Elazığ, Hakkari, Mardin, Siirt, Tunceli and Van.

40 Kurdish Human Rights Project (KHRP), *The Kurdish Human Rights Project Legal Review*, UK, 2002, no.2, p. 30; P. Robins, 'The overlord state: Turkish policy and the Kurdish issue', in *International Affairs*, no.69.4, 1993, pp. 657–676.

41 The most obvious reason in this regard is that Turkey recognized the compulsory jurisdiction of the ECtHR only on 22 January 1990 over "matters raised in respect of facts, including judgments which are based on such facts which have occurred subsequent to" that date. See, *Loizidou v. Turkey*, App No 15318/89, (ECtHR, 18 December 1996), para. 24.

42 Turkey, Derogation to the Convention on the Protection of Human Rights and Fundamental Freedoms Notification (ETS No.5), 6 August 1990. Retrieved 9 August 2018, <http://www.coe.int/en/web/conventions/search-on-reservations-and-declarations/>.

It was against this general background that the Turkish parliament ratified Decree Nos. 424 and 425 in 1990. These Decrees empowered the regional governor to confiscate publications and to disband printing houses (Article 1), to exile anyone deemed to be a threat to the security of the region and public order (Article 2), to suspend the rights of trade and labour unions such as strike and lockout (Article 3) and to remove public officials from their posts (Article 6).⁴³

Between 1990 and 1992, as stated in the original derogation notice of 1990, Turkey derogated from rights enshrined in Art. 5 (right to liberty and security), Art. 6 (right to fair trial), Art. 8 (right to family life), Art. 10 (freedom of expression), Art. 11 (freedom of assembly and association) and Art. 13 (right to an effective remedy) of the ECHR. Since 1992, however, it limited the scope of its derogation solely to Article 5 of the ECHR.⁴⁴

The declared derogation from Article 5 ECHR was inspired in particular by the proceedings before the SSCs. As envisaged by Decree No. 285 of 10 July 1987, it was possible to detain a suspect for a period of forty-eight hours in connection with an individual offence, and fifteen days in connection with a collective offence. In the emergency region in Turkey's southeast, the permissible periods were even longer with respect to the LSE. Accordingly, a person arrested in connection with proceedings before the SSCs could be detained for four days in the case of individual offences and thirty days in the case of collective offences before being brought before a magistrate.

Nevertheless, the European bodies did not adequately vet Turkey's stated grounds for derogation.⁴⁵ First, in its opinion of 1996 in *Aksoy*, the now-defunct European Commission on Human Rights ('European Commission') simply held that "[i]n view of the grave threat posed by terrorism in this region, the Commission can only conclude that there is indeed a state of emergency in

43 See, also, Decree No. 413 of 9 April 1990.

44 Thus, in a letter to the Secretary General of the CoE the Turkish representative wrote that "most of the measures described in the decrees which have the force of law nos. 425 and 430 that might result in derogating from rights guaranteed by Articles 5, 6, 8, 10, 11 and 13 of the Convention are no longer being implemented, I hereby inform you that the Republic of Turkey limits henceforward the scope of its Notice of Derogation with respect to Article 5 of the Convention only." See, Turkey, Derogation to the Convention on the Protection of Human Rights and Fundamental Freedoms Notification (ETS No.5), 6 August 1990. Retrieved 9 August 2018.

45 O. Gross, 'Once More unto the Breach: The Systemic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies', in *Yale Journal of International Law*, no.23, 1998, p. 487.

South-East Turkey which threatens the life of the nation.”⁴⁶ Then, in its judgment in *Aksoy v. Turkey*, the ECtHR also acknowledged that “...in the light of the material before it, that the particular extent and impact of PKK terrorist activity in South-East Turkey has undoubtedly created, in the region concerned, a public emergency threatening the life of the nation.”⁴⁷ Yet, at the time of the Court’s consideration in *Aksoy*, ten out of the eleven provinces in Turkey’s southeast had been subjected to a state of emergency since 1987.

Although the Court held in *Aksoy* that, in exercising its supervision over states’ actions, it “must give appropriate weight to such relevant factors as the nature of the rights affected by the derogation and the circumstances leading to, and the duration of, the emergency situation”,⁴⁸ its application of the margin of appreciation in the case “did not reflect a serious critical attempt to come to grips with the prolonged state of emergency in the jurisdiction.”⁴⁹ As was the case for the Irish Republican Army (‘IRA’) in the UK, the ‘entrenched’ emergency was ‘implicitly’ allowed to exist in Turkey because of the PKK.⁵⁰

In *Aksoy* the Court eventually found that holding a suspect for fourteen days without judicial intervention was disproportionate derogation from Article 5 ECHR, it nevertheless confined its decision to the particular circumstances of that case rather than finding a systemic failure of pre-trial detention procedures in SSC cases. This was all the more striking when contrasted with the general situation in Turkey.

This is not to say that the European bodies had not effectively protected the human rights claims in South-east Turkey. Quite the contrary, it is noted that a closer review on the jurisprudence concerning the Turkish cases reveals a robust human rights protection.⁵¹ Moreover, it has even been suggested that “the protective form of access granted to applicants created a unique oversight of

46 *Aksoy v. Turkey*, App No 21987/93, (European Commission of Human Rights, Report, 23 October 1995), para.179.

47 *Aksoy v. Turkey*, App No 21987/93, (ECtHR, 18 December 1996), para. 70.

48 *Aksoy v. Turkey*, App No 21987/93, (ECtHR, 18 December 1996), para. 68.

49 O. Gross, ‘From Discretion to Scrutiny: Revisiting the Application of the Margin of Appreciation Doctrine in the context of Article 15 of the European Convention on Human Rights’ in *Human Rights Quarterly*, no.23.3, 2001, pp. 625–649.

50 J.P. Loof, ‘Crisis Situations, Counter terrorism and Derogation from the European Convention on Human Rights: A Threat Analysis’ in A. Buyse (ed.), *Margins of Conflict: The ECtHR and Transitions to and from Armed Conflict*, Intersentia, 2010, p. 43.

51 O. Gross, ‘Once More unto the Breach: The Systemic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies’, in *Yale Journal of International Law*, no.23, 1998, pp. 487–488.

the situation in the region".⁵² Accordingly, the Court did not shrink from finding violations of Article 5, eventually leading to a multitude of condemnations by the ECtHR.⁵³ However, the ECHR failed to examine the context and pattern in which the alleged violations took place. The Court consistently ruled that it was not necessary to examine the alleged administrative practices regarding effective remedies.⁵⁴

Thus the most flagrant human rights abuses against the Kurdish minority have occurred in the context of states of emergency.⁵⁵ Emergency practices have been inextricably entwined with oppressive political regimes,⁵⁶ exercising

52 D.S. Dinsmore, 'Forced Displacement in Turkey: Pushing the Limits of the ECHR System', in *International Migration*, no.55-5, 2017, p. 184.

53 In addition to the *Aksoy* case, see also *Mitap and Müftioğlu v. Turkey*, App No 6/1995/512/595-596 (ECtHR, 25 March 1996), *Yağcı and Sargın v. Turkey*, App No 6/1994/453/533-534 (ECtHR, 1995). See also *Akdivar and Others v Turkey*, App No 21893/93 (ECtHR, 1 April 1998); *Menteş and Others v. Turkey*, App No 23186/94, (ECtHR, 24 July 1998); *Dulas v. Turkey* App No 25801/94, (ECtHR, 30 January 2001); *Bilgin v. Turkey*, App No 23819/94, (ECtHR, 17 July 2001); *Gülbahar Özer and Others v. Turkey*, App No 44125/06 (ECtHR, 10 June 2014). For an analysis on how the ECtHR became a court of appeals for human rights abuses in Turkey, see D. Kurban, 'Europe as an Agent of Change – The Role of the European Court of Human Rights and the EU in Turkey's Kurdish Policies', SWP Research Paper, 20014, pp. 15–16.

54 See, for example, *Aslan v. Turkey*, App No 22497/93 (European Commission of Human Rights, Report, 23 October 1995), para. 144. The Commission held that it did not "...deem it necessary to determine whether there exists an administrative practice on the part of the Turkish authorities of tolerating abuses of human rights of the kind alleged by the applicant, because it agrees with the applicant that it has not been established that he had at his disposal adequate remedies to deal effectively with his complaints."

55 J. Brown, 'The Turkish imbroglio: its Kurds', in *The Annals of the American Academy of Political and Social Science*, 1995, p. 129; S.E. Cornell, 'The Kurdish Question in Turkish Politics', in *Orbis*, 2001, p. 46; D. Ergil, 'The Kurdish Question in Turkey', in *Journal of Democracy*, 20010, p. 135. For an historical analysis the Turkish state's changing ways of understanding, framing and dealing with the Kurdish problem, see M. Yeğen, 'The Kurdish question in Turkey: denial to recognition' in M. Casier and J. Jongerden (eds.) *Nationalisms and Politics in Turkey: Political Islam, Kemalism and the Kurdish Issue*, UK: Routledge, 2011, pp. 67–84.

56 As Amnesty International's 1996 Report clearly expresses, "Repression has long been the response to security problems in Turkey, but in 1991 certain elements in the security forces went even further. They stepped outside the law and began to wage a full-scale dirty war. An unprecedented wave of political murder swept through the southeast..." Amnesty International, *Turkey: No security without human rights*, London – October 1996, p. 20. Retrieved 9 August 2018, <https://www.amnesty.org/en/documents/EUR44/084/1996/en/>. See also, Ş. Aktürk, 'Regimes of Ethnicity: comparative analysis of Germany, the Soviet Union / Post-Soviet Russia and Turkey' in *World Politics*, no.63, 2011, pp. 115–164; N. Tocci

arbitrary and sweeping powers against the Kurdish people and resulting in a pattern of widespread human rights violations.⁵⁷ This approach escalated to a point where Turkish state officials engaged in torture, kidnapping, disappearances, extra-judicial killings, destruction of homes and similar human rights infringements.⁵⁸ Accordingly, the protection of human rights became increasingly fraught with difficulty to deliver in practice in Turkey.

B *Turkey's Recent Derogation from Human Rights Treaties in the Aftermath of the 15 July Coup Attempt*

On 15 July 2016, Turkey suffered an attempted military coup that left 246 dead and 2194 wounded.⁵⁹ Throughout the night of 15 July, the Turkish Grand National Assembly, Turkish Police units as well as the Turkish Intelligence Headquarters were attacked. The coup-plotters detained many top ranking military officials, blocked roads and bridges, and seized a TV station. The failed coup was allegedly perpetrated by a faction within the Turkish army loyal to the Gülen Movement, a group designated as the Fetullahist Terrorist Organization/the

and A. Kaliber, 'Human rights, civil society and conflict in Turkey's Kurdish question', in *Civil Society, Conflicts and the Politicization of Human Rights*, 2013, pp. 139–160; G. Tezcür, 'Kurdish nationalism and identity in Turkey: a conceptual reinterpretation', in *European Journal of Turkish Studies*, 2009, pp. 1–18.

- 57 See A. Reidy *et al.*, 'Gross Violations of Human Rights: Invoking the European Convention on Human Rights in the Case of Turkey', in *Netherland Quarterly of Human Rights*, no.15, 1997, p. 165. (noting that "in over 60 cases from South East Turkey declared admissible, the Commission has found in each case that the applicants did not have an adequate remedy at their disposal to address their particular complaint. However, the Commission has also always held that as the individual applicants on the particular facts of their complaints had no remedy available to them, the question of a *systematic* failure to provide domestic remedies need not be addressed. The Commission's approach ... nevertheless prompts the question of how many cases are necessary in which applications, raising essentially similar complaints, are admitted by reason of lack of effective remedies, before the conclusion is reached that there is a practice of violation of the right to an effective domestic remedy?").
- 58 In *Salman v Turkey*, the European Court found a breach of Article 2 on two grounds: first, the Turkish Government had not accounted for the death of the individual by cardiac arrest during his detention, and secondly, the failure of the Turkish state of authorities in fulfilling their responsibility i.e. to conduct an effective investigation into the circumstances regarding the death. *Salman v. Turkey*, App No 21986/93 (ECtHR, 27 June 2000), para. 103.
- 59 For a summary of the failed 15 July coup in Turkey, see BBC, 'Failed Turkey coup: A summary of today's key developments', London, 16 July 2016. Retrieved 9 August 2018, <http://www.bbc.com/news/live/world-europe-36811357>.

Parallel State Structure (FETÖ/PDY) by the Turkish National Security Council in 2015.⁶⁰

Shortly after the attempted coup, on 21 July Turkey announced a nationwide state of emergency (*Olağanüstü Hal-OHAL*) pursuant to Articles 119–121 of the Turkish Constitution and the 1983 State of Emergency Law.⁶¹ On the same day, referring to the existence of a public emergency threatening the life of the Turkish nation arising from *the 15 July coup attempt and its aftermath together with the 'other' terrorist attacks*,⁶² it informed the CoE of its intention to derogate from the ECHR pursuant to Article 15 ECHR.⁶³ However, the derogation notice to the CoE is devoid of any details as to which articles of the Convention would be subjected to derogation. It is no surprise that after receiving Turkey's formal notice, the Secretary General of the CoE felt a need to articulate the constraints that a state must take into account when engaging in lawful derogation.⁶⁴ A similar notification pursuant to Article 4 of the ICCPR was lodged by Turkey with the United Nations (UN), which conversely, provides a list of articles from which Turkey may derogate from its obligations under the ICCPR.⁶⁵

- 60 Turkey's Observations of the Turkish authorities on the memorandum by Nils Muižnieks, Council of Europe Commissioner for Human Rights, concerning the human rights implications of the measures taken under the state of emergency in Turkey, 24 CommDH/GovRep, 07 October 2016, para. 5.
- 61 According to Article 120 of the Turkish Constitution, state of emergency may only be declared 'after consultation with the [Turkish] National Security Council (NSC)'. In the direction of recommendation by the NSC, the Turkish Council of Ministers declared the state of emergency in order "...to take the required measures in an effective manner in order to protect our democracy, the principle of rule of law and the rights and liberties of our people." See, National Security Council, Press Release of the Meeting on 20 July 2016. Retrieved 9 August 2018, <http://www.mgk.gov.tr/index.php/20-temmuz-2016-tarihli-toplantı>.
- 62 The 15 July military coup attempt was the latest ring in the chain of a spiralling violence all over the country dating back to late 2015. Since that time, Turkey has been rocked by a series of deadly terrorist attacks. See, The New York Time, 'Recent Terrorist Attacks in Turkey', New York, 31 December 2016. Retrieved 9 August 2018, <http://www.nytimes.com/interactive/2016/12/31/world/europe/turkey-recent-attacks.html>.
- 63 Turkey, Derogation to the Convention on the Protection of Human Rights and Fundamental Freedoms Notification (ETS No.5), JJ8187C Tr./005-191 22 July 2016. Retrieved 9 August 2018, <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2930083&SecMode=1&DocId=2380796&Usage=2>.
- 64 Statement of the Secretary General of the Council of Europe, "Turkey: Protecting Democracy and Human Rights" 22 July 2016. Retrieved 9 August 2018, <http://www.coe.int/en/web/portal/-/turkey-protecting-democracy-and-human-rights>.
- 65 "...measures taken may involve derogation from obligations under the International Covenant on Civil and Political Rights regarding Articles 2/3, 9, 10, 12, 13, 14, 17, 19, 21, 22, 25, 26

This may be understandable, as the notification regime under the ECHR has traditionally required the state parties to make an explanation of the ‘measures, which they have taken’, rather than provide information on provisions from which they have derogated as in the ICCPR regime. This is reflected in a 1970 report by the Committee of Experts on Human Rights of the CoE which states that the ECHR’s focus on measures taken by the state parties formed a ‘more extensive obligation’ requiring them to provide, at least, the texts of relevant decrees and legislation adopted during the emergencies.⁶⁶ Later in the *Greek* case of 1981, the European Commission confirmed that Greece did not fully meet the requirements of Article 15 (3), having failed to communicate the texts of the 1968 constitution and of several legislative measures.⁶⁷ However, in any case, the Commission held that Article 15(3) ECHR did not oblige the Greek Government to “...indicate expressly the Articles of the Convention” from which it had derogated as the communication of legislative texts would give “sufficient information of the measures taken and the reasons therefor.”⁶⁸

However, it is true that states may be more inclined to supply the normally abstract texts of relevant legislative and administrative measures rather than to list all the suspended basic rights and freedoms. Unfortunately, according to one author, this has given rise, in the past, to the United Kingdom’s ‘shotgun’ approach of suspending all articles even remotely implicated by the emergency measures when dealing with the difficulties in Northern Ireland,⁶⁹ as may now be the case with the recent Turkish state of emergency. In the wake of the 21 July 2016 state of emergency declaration, the Turkish authorities adopted a wide range of emergency decrees, which granted ‘very far-reaching, almost unlimited discretionary powers for administrative authorities’ and thus, affected,

and 27, as permissible in Article 4 of the said Covenant.” See, Turkey, Notification under Article 4(3) of International Covenant on Civil and Political Rights, C.N.580.2016.Treaties-IV.4, 2 August 2016. Retrieved 9 August 2018, <https://treaties.un.org/doc/Publication/CN/2016/CN.580.2016-Eng.pdf>.

66 Committee of Expert on Human Rights of the Council of Europe, *Problems Arising from the Co-Existence of the United Nations Covenants on Human Rights and the European Convention on Human Rights*, CoE. Doc. No. H (70), 1970, p. 22.

67 *Greek Case*, App No 3321/67, 3322/67, 3323/67, 3344/67 (ECtHR, 1969), para. 43–46.

68 *Greek Case*, App No 3321/67, 3322/67, 3323/67, 3344/67 (ECtHR, 1969), para. 43–45.

69 J.F. Hartman, ‘Derogation from Human Rights Treaties in Public Emergencies – A Critique of Implementation by the European Commission and Court of Human Rights and the Human Rights Committee of the United Nations’, in *Harvard International Law Journal*, no.22, 1982, p. 20.

an extraordinarily wide swath of Turkish society.⁷⁰ Since the 21 July declaration, the state of emergency was extended seven times for a total period of 24 months. It was finally lifted on 17 July 2018.⁷¹

Attempted Military Coup (and Other Terrorist Attacks) as a Public Emergency?

Before turning to the question of whether or not there was an exceptional threat in the Turkish case, a further remark on the scope of the recent Turkish state of emergency is essential. While some earlier emergency decrees state that the state of emergency was mainly declared “...to take required measures in the most speedy and effective manner in the fight against the FETÖ terrorist organisation in order to save the nation from this ferocious terror network and return to normalcy as soon as possible”,⁷² it is nevertheless clear from the original Turkish notice of derogation to the CoE and UN that the public emergency threatening the life of the Turkish nation in the aftermath of the 15 July attempted coup covers a broader scope than threats related to the actual coup attempt, *i.e.* threats posed by those directly involved in the planning and implementation of the failed coup. As alluded to above, the original derogation notices indicated the intention of the Turkish Government to ‘take required measures in the most speedy and effective manner’ in its *fight against terrorism against all terrorist organizations* by making a very general reference to the series of events that unfolded in Turkey on the night of 15 July and only touching upon the ‘*other terrorist acts*’ with no further elaboration.

Accordingly the question is: Was the series of events that unfolded in Turkey on the night of 15 July and other terrorist attacks of sufficient intensity and

70 Memorandum on the human rights implications of the measures taken under the state of emergency in Turkey, Council of Europe Commissioner for Human Rights, Comm. DH (2016) 35, 7 October 2016, para.11. Retrieved 9 August 2018, [https://rm.coe.int/ref/CommDH\(2016\)35](https://rm.coe.int/ref/CommDH(2016)35).

71 In his letter to the Secretary General of the CoE, the Permanent Representative of Turkey wrote that “...the State of Emergency terminated on 19 July 2018 at the end of the deadline set by the Decision No. 1182. Accordingly, the Government of the Republic of Turkey has decided to withdraw the notice of derogation.” See, Turkey, Derogation to the Convention on the Protection of Human Rights and Fundamental Freedoms Notification (ETS No.5), JJ8719C Tr./005-223, 8 August 2018. Retrieved 9 August 2018, <https://rm.coe.int/090000016808ccco6>.

72 See, *inter alia*, the information notes on Decree No. 667 of 23 July 2016 and Decree No. 668 of 27 July 2016.

gravity to qualify as a public emergency justifying derogation of human rights obligations?

In 1961, the ECtHR had to address the *Lawless* case, which concerns the UK Government's extrajudicial detention of a member of the IRA in a military camp in Ireland from July to December 1957 without being brought before a judge.⁷³ In *Lawless*, the ECtHR indicated that the meaning of the phrase was 'sufficiently clear' as referring to "an exceptional situation or crisis of emergency which affects the whole population and constitutes a threat to the organized life of the community of which the State is composed."⁷⁴ Such emergency, according to the Court, was reasonably deduced in light of several factors: "(a) the existence in the territory of the Republic of Ireland of a secret army engaged in unconstitutional activities and using violence to attain its purposes; (b) the fact that this army was also operating outside the territory of the State, thus seriously jeopardizing the relations of the Republic of Ireland with its neighbor; (c) the steady and alarming increase in terrorist activities from the autumn of 1956 and throughout the first half of 1957."⁷⁵

Nevertheless, in the *Greek* case, the European Commission stated that a situation of public emergency must fulfil the following four conditions in order to qualify as a 'threat to the nation':

- (a) It must be actual or imminent.
- (b) Its effects must involve the whole nation.
- (c) The continuance of the organised life of the community must be threatened.
- (d) The crisis or danger must be exceptional, in that the normal measures or restrictions, permitted by the Convention for the maintenance of public safety, health and order, are plainly inadequate.⁷⁶

73 *Lawless v. Ireland*, App No 332/57 (A/3), (ECtHR, 1 July 1961), paras. 15–20; *Lawless v. Ireland*, App. No. 332/57 (European Commission of Human Rights, Report, 1960–1961) p. 66. For a thorough analysis on the *Lawless v. Ireland* case, see D.G. Valentine, 'The European Court of Human Rights. The Lawless Case', in *International and Comparative Law Quarterly*, no.4, 1961, pp. 899–903.

74 *Lawless v. Ireland*, App No 332/57 (A/3), (ECtHR, 1 July 1961), para. 28.

75 *Lawless v. Ireland*, App No 332/57 (A/3), (ECtHR, 1 July 1961), para. 28.

76 *Greek Case*, App No 3321/67, 3322/67, 3323/67, 3344/67 (ECtHR, 1969), para. 153. In April 1985, largely based on the drafts of the International Commission of Jurist, the main features of 'a threat to the life of the nation' were also articulated in the Siracusa Principles on the Limitation and Derogation of Provisions, as that which: (a) affects the whole of the population and either the whole or part of the territory of the state; and (b) threatens the physical integrity of the population, the political independence or the territorial integrity

More recently, in 2009 the ECtHR delivered its judgment in the case *A & Others v. United Kingdom*, which concerns the UK government's preventive detentions that derogated from Article 5(1) of the ECHR in the context of a public emergency said to flow from the terrorist attacks of 11 September 2001.⁷⁷ The Court eventually shared "the view of the majority of the House of Lords that there was a public emergency threatening the life of the nation",⁷⁸ even though an actual terrorist attack had not yet taken place. According to the Court, it "has in previous cases been prepared to take into account a much broader range of factors in determining the nature and degree of the actual or imminent threat to the 'nation' and has in the past concluded that emergency situations have existed even though the institutions of the State did not appear to be imperilled to the extent envisaged by Lord Hoffman."⁷⁹

In light of the foregoing, the attempted military coup is patently of sufficient gravity to qualify as a public emergency that justifies derogation of international human rights obligations.⁸⁰ There is also no doubt that the failed coup did affect the Turkish nation as a whole and constituted a threat to the organized life of the community, as evidenced by the violence, the physical damage and the serious loss of life that occurred in Turkey on the baleful night of 15 July.

Notably, after Turkey invoked the state of emergency in response to the 15 July failed coup, there has been a flood of applications to the ECtHR from Turkey.⁸¹ Nevertheless, the European Court thus far has held a number of applications to be inadmissible based on a finding that domestic remedies had not

of the state or the existence or basic functioning of institutions indispensable to ensure and protect the rights recognized in the Covenant. See, Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, UN Doc E/CN.4/1984/4 (1984) para. 39.

77 *A & Others v. United Kingdom*, App No 3455/05 (ECtHR, 2 February 2009) para.173.

78 *A & Others v. United Kingdom*, App No 3455/05 (ECtHR, 2 February 2009) para. 181.

79 *A & Others v. United Kingdom*, App No 3455/05 (ECtHR, 2 February 2009) para. 179.

80 Venice Commission, Opinion on Emergency Decree Law Nos. 667–676 Adopted Following the Failed Coup of 15 July 2016' CDL-AD(2016)037, 9–10 December 2016, para.38. Retrieved 9 August 2018, [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2016\)037-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)037-e).

81 See, ECtHR, Annual Report, 2017, p. 8. Retrieved 9 August 2018, https://www.echr.coe.int/Documents/Annual_report_2017_ENG.pdf. ("2017 was also marked by a flood of applications directly linked to the measures taken following the attempted coup in Turkey. Most of these applications were lodged by individuals who had been taken into custody, in particular journalists and judges. Since the onset of this crisis, the Court has taken the view that the subsidiarity principle must be fully observed and that applicants must exhaust domestic remedies before bringing their application. As a result, more than 27,000

been exhausted. First, in the *Mercan* case, the Court dismissed the application, which concerned the unlawfulness, length and conditions of a judge's pre-trial detention in the absence of any evidence.⁸² Then, in *Zihni*, the applicant was suspended from his duties as a schoolteacher on 25 July 2016 and subsequently dismissed from public service, together with 50,874 other civil servants, by the list appended to the Decree no. 672 on 1 September 2016, on account of his alleged "membership of, affiliation, link or connection" to terrorist organizations.⁸³ Both applicants in *Zihni* and *Mercan* lodged their application without having first brought proceedings before the national courts including an individual application before the Turkish Constitutional Court ('TCC'). To explain their failure to do so, they asserted that no effective remedies capable of allowing them to challenge their dismissal and detention before the national courts were available since the measures taken by decrees within the framework of the state of emergency would not be subject to appeal. The European Court, relying on the principle that the safeguard mechanism established by the ECHR is subsidiary to national human rights protection systems, held that there were no special circumstances absolving the application from the obligation to exercise the domestic remedies available to them, namely an administrative action and an individual appeal to the Constitutional Court (both remedies in the *Zihni* case and the latter for the *Mercan* case).⁸⁴

Later, in *Çatal* case in which a dismissed judge complained, *inter alia*, on the basis of Article 5, 6 and 13 ECHR that she did not have access to a court and an effective remedy before a national authority to challenge her dismissal and detention,⁸⁵ the Court reached the same conclusion that the recently adopted Decree No.685 (2 January 2017) provided an accessible remedy exclusively for dismissed judges to appeal against measures before the Turkish Council of State.⁸⁶

Finally, on 12 June 2017, the Court also dismissed the application in the *Köksal* case for a failure to exhaust domestic remedies, finding that a new remedy was available to the applicant, provided by Decree No. 685. That decree also provided for the creation of a commission, namely the 'State of Emergency

applications lodged in this context have been declared inadmissible for failure to exhaust domestic remedies").

82 See, *Mercan v Turkey*, App No. 56511/16 (ECtHR, 17 November 2016).

83 *Zihni v. Turkey*, App No. 59061/16 (ECtHR, 8 December 2016).

84 *Zihni v. Turkey*, App No. 59061/16 (ECtHR, 8 December 2016) para 30: *Mercan v Turkey*, App no. 56511/16 (ECtHR, 17 November 2016) paras. 26–27.

85 *Çatal v. Turkey*, App No. 2873/17 (ECtHR, 10 March 2017).

86 *Çatal v. Turkey*, App No. 2873/17 (ECtHR, 10 March 2017) para.28.

Inquiry Commission', tasked with assessing the measures adopted directly by the emergency decrees issued in the context of the state of emergency, including the dismissals of civil servants.⁸⁷

In those inadmissibility decisions, the ECtHR adopted a rather formalistic and narrow approach due to its uncritical assumptions implicit as to accessibility and availability of the domestic remedies in Turkey.⁸⁸ In doing so, the Court missed an opportunity to examine the validity and the legitimacy of the Turkish derogation of rights in the aftermath of the 15 July attempted coup i.e. whether the attempted coup created a public emergency threatening the life of the Turkish nation and, if so, whether such an emergency continued to exist for two years. More significantly, it also failed to provide its authoritative views on the proportionality and the necessity of the far-reaching post-coup derogation measures.

Some two years after the 15 July attempted coup, on 20 March 2018, the European Court ruled for the first time on two cases arising out of alleged human rights violations in Turkey.⁸⁹ The cases of *Alpay* and *Altan* concern complaints by two journalists who had been arrested following the attempted military coup on suspicion of having links to FETÖ/PDY's media wing and challenged their pre-trial detention by lodging an individual application with the TCC.⁹⁰ Apart from the issues that are addressed below, the ECtHR adopted a very deferential approach in its assessment of the presence of the emergency in Turkey. The European Court simply focused on the TCC finding that the attempted coup constituted a public emergency, and that the applicants did not dispute this assessment. This may come as no surprise given the exceptional situation in Turkey, and given the fact that the ECtHR has generally adopted

87 *Köksal v. Turkey*, App No. 70478/16 (ECtHR, 12 June 2017).

88 For a critique of the ECtHR's approach in *Zihni* and *Mercan*, see also E. Turkut, 'Has the European Court of Human Rights Turned a Blind Eye to Alleged Rights Abuses in Turkey?' EJIL: Talk!, 28 December 2016. Retrieved 9 August 2018, www.ejiltalk.org/has-the-european-court-of-human-rights-turned-a-blind-eye-to-alleged-rights-abuses-in-turkey/; and for a critique of ECtHR's *Köksal* decision, see E. Turkut, 'The *Köksal* case before the Strasbourg Court: a pattern of violations or a mere aberration?', Strasbourg Observers, 2 August 2017. Retrieved 9 August 2018, <http://strasbourgobservers.com/2017/08/02/the-koksal-case-before-the-strasbourg-court-a-pattern-of-violations-or-a-mere-aberration/>.

89 See *Mehmet Hasan Altan v Turkey*, App No 13237/17, (ECtHR, 20 March 2018) para. 92 and *Şahin Alpay v Turkey*, App No 16538/17, (ECtHR, 20 March 2018) para 76.

90 Constitutional Court (*Anayasa Mahkemesi*, Turkey), *Mehmet Hasan Altan* (ind. app.) Plenary Assembly, App No 2016/23672, 11 January 2018 and, Constitutional Court (*Anayasa Mahkemesi*, Turkey), *Şahin Alpay* (ind. app.), Plenary Assembly, App No 2016/16092, 11 January 2018.

such submissive attitude when it comes to establishing the existence of a state of emergency.⁹¹

What may be surprising in these cases, however, is that the Court simply omitted any reference to the facts and circumstances, which had led the Turkish Government to prolong the state of emergency during the past two years. Accordingly, the following questions arise: was there insufficient evidence and information at its disposal for the ECHR to make its own assessment in this context, or did such evidence and information as was submitted by the Turkish Government insufficient to genuinely convince the Court?

It is important to bear in mind that emergency regimes ought to be of an 'exceptional and temporary' nature,⁹² and following the ECtHR's reasoning in *Alpay* and *Altan* cases, it is legally dubious in the Turkish case whether the periodic prolongation of the state of emergency within this 24-month period remained justified. Since the first prolongation in October 2016, the Turkish state authorities attempted to justify the extension by referring not only to the coup attempt of 15 July, but also to the activities of 'other terrorist organisations', thus failing to provide a clear basis for the 're-extension' of the state of emergency.⁹³ Accordingly, it remains questionable whether these justifications

91 See, for example, *A & Others v United Kingdom* App No 3455/05, (ECtHR, 2 February 2009) paras. 173–181. See also O. Gross, 'Once More unto the Breach: The Systemic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies', in *Yale Journal of International Law*, no.23, 1998, p. 465; J.P. Loof, 'Crisis Situations, Counter terrorism and Derogation from the European Convention on Human Rights: A Threat Analysis' in A. Buyse (ed.), *Margins of Conflict: The ECtHR and Transitions to and from Armed Conflict*, Intersentia, 2010, pp. 51–52; E. Criddle, 'Protecting Human Rights During Emergencies: Delegation, Derogation, and Deference' in Criddle (ed.), *Human Rights in Emergencies*, Cambridge University Press, 2016, pp. 50–54.

92 UN Human Rights Committee, General Comment No. 29: States of Emergency (Article 4), 31 August 2001, UN Doc. CCPR/C/21/Rev.1/Add.11 para 2. See also Gross O. Gross, 'Once More unto the Breach: The Systemic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies', in *Yale Journal of International Law*, no.23, 1998, p. 44; (noting that "...the derogation regime is premised on, and constructed around, the basic assumption that emergency is a distinct and extraordinary exception to the general rule of normalcy").

93 As early as in December 2016, the Venice Commission labels as 'highly speculative' the claim that a risk of a repeated coup remains. At the same time, the Commission refrains from taking an express position on the periodic extension of the state of emergency. See, Venice Commission, Opinion on Emergency Decree Law Nos. 667–676 Adopted Following the Failed Coup of 15 July 2016' CDL-AD(2016)037, 9–10 December 2016, para.10–11. See also Harris, O'Boyle & Warbrick, *Law of the European Convention on Human Rights*, Oxford University Press, 2014, p. 84 (holding that "...in order to prolong the emergency rule, the

for multiple extensions of the state of emergency have been truly 'beyond the control of the public authorities using normal measures', or that they are 'on a scale threatening the life' of the Turkish nation.⁹⁴

Nevertheless, the European Court's practice has consistently failed to acknowledge the bright-line distinctions between normalcy and emergency.⁹⁵ Thus, the 'entrenched' emergencies were 'implicitly' allowed to exist in the UK and Turkey for several decades because of the IRA and the PKK respectively. More recently, in *A & Others v. United Kingdom*, the ECtHR 'explicitly' rejected the UN Human Rights Committee ('HRC')'s requirement that the emergency be temporary,⁹⁶ by stating "it is possible for a 'public emergency' within the meaning of Article 15 to continue for many years."⁹⁷ Although the proportionality test includes an assessment of the duration of the emergency, the European Court does not apply specific temporal limitations, *per se*, to Article 15 ECHR.

Proportionality of the Turkish Post-Coup Emergency Measures

We now reach the second and more complicated issue *vis-à-vis* the state of emergency regime: proportionality of the extent of the derogation made by the Turkish Government in response to the threat posed by the failed coup itself. The question is: to what extent were the measures taken by the Turkish authorities strictly required by the exigencies of the situation?

state can muster evidence to the effect that its belief that the campaign was at least dormant (with real potential to revive) was not an unreasonable one.”).

94 The periodic prolongation of the state of emergency in Turkey led to “an enduring system of governing characterized by a large number of arbitrary decisions that profoundly affect the lives of many individuals and families”. See, Office of the United Nations High Commissioner for Human Rights, Report on the impact of the state of emergency on human rights in Turkey, including an update on the South-East January – December 2017, March 2018, p. 4. Retrieved 9 August 2018, http://www.ohchr.org/Documents/Countries/TR/2018-03-19_Second_OHCHR_Turkey_Report.pdf.

95 J.P. Loof, 'Crisis Situations, Counter terrorism and Derogation from the European Convention on Human Rights: A Threat Analysis' in A. Buyse (ed.), *Margins of Conflict: The ECtHR and Transitions to and from Armed Conflict*, Intersentia, 2010, p. 43.

96 In the past, the HRC has expressed its deepest concerns at the lengthy emergency rules in Israel and Egypt. See UN Human Rights Committee, Concluding Observations: Israel, 18 August 1998, CCPR/C/79/Add.93. Retrieved 9 August 2018, <http://www.refworld.org/docid/3ae6b0284.html> and HRC, Concluding Observations: Egypt, 28 November 2002, CCPR/CO/76/EGY. Retrieved 9 August 2018, <http://www.refworld.org/docid/3ecb70f94.html>.

97 *A & Others v. United Kingdom*, App No 3455/05 (ECtHR, 2 February 2009) para. 178.

To begin with, as construed by the HRC and the ECtHR the mere existence of a ‘public emergency threatening the life of the nation’, does not justify *ipso facto* every derogation measure. Rather, the principle of proportionality posits that each measure must be necessary and proportionate to overcome the exceptional threat.⁹⁸ This position recognizes a close *nexus* between the circumstances of the public emergency and the proportionality of measures taken in response thereto. The latter requires a probe into the former.⁹⁹

Secondly, the proportionality of measures is ultimately a judicial determination, to be made by competent judicial bodies at the national and international levels. As the ECtHR held in *A & Others v. United Kingdom*, “it is ultimately for the Court to rule whether the measures were ‘strictly required’. In particular, where a derogating measure encroaches upon a fundamental Convention right ... the Court must be satisfied that it was a genuine response to the emergency situation, that it was fully justified by the special circumstances of the emergency and that adequate safeguards were provided against abuse.”¹⁰⁰

Over time, the European Court has reiterated its general position of according substantial deference and a *wide* margin of appreciation¹⁰¹ to national authorities to decide both on the presence of such an emergency and on the

98 The HRC, for example, held that “a fundamental requirement for any measures derogating from the Covenant ... is that such measures are limited to the extent strictly required by the exigencies of the situation” and this applies to “the *duration, geographical coverage and material scope* (emphasis added) of the state of emergency and any measures of derogation resorted to because of the emergency.” See, the HRC, General Comment No. 29: States of Emergency (Article 4), 31 August 2001, UN Doc. CCPR/C/21/Rev.1/Add.11, para. 4.

99 S. Sheeran ‘Reconceptualizing states of emergency under international human rights law: theory, legal doctrine, and politics’, in *Michigan Journal of International Law*, no 24, 2012, pp. 514–557.

100 *A & Others v. United Kingdom*, App No 3455/05 (ECtHR, 2 February 2009) para. 184.

101 Subsequent to the *Lawless* and *Greek* cases, the ECtHR has built on its early jurisprudential interpretations regarding legal foundations for a state of emergency. In *Ireland v. United Kingdom*, for example, the Court shed light on the question of proportionality. The Court initially held that a “degree of violence, with bombing, shooting and rioting was on a scale far beyond what could be called minor civil disorder.” (para. 117.) The Court then applied a *wide* margin of appreciation, both as to the existence of the emergency and the proportionality of measures, stating that it was “certainly not the Court’s function to substitute for the British Government’s assessment any other assessment of what might be the most prudent or most expedient policy to combat terrorism.” The Court concluded that “...the limits of the margin of appreciation left to the Contracting States by Article 15 ... were not overstepped by the United Kingdom when it formed the opinion that extra-judicial deprivation of liberty was necessary from August 1971 to March 1975” (para. 207). See also, *Brannigan and McBride v. UK*, App Nos 14553/89 and 14554/89 (ECtHR, 26 May

nature and scope of the derogations necessary to avert it.¹⁰² In any case, this domestic margin of appreciation is not an unlimited discretion, albeit a *wide* one:

It is for the Court to rule whether, inter alia, the States have gone beyond the 'extent strictly required by the exigencies' of the crisis. The domestic margin of appreciation is thus accompanied by a European supervision. In exercising this supervision, the Court must give appropriate weight to such relevant factors as the nature of the rights affected by the derogation and the circumstances leading to, and the duration of, the emergency situation.¹⁰³

Pursuant to the emergency decrees in the aftermath of the 15 July attempted coup, more than 170,000 persons (in the appended lists of the decrees and by decisions of the relevant administrative bodies *in toto*) have been dismissed from their posts, including more than 4,400 judges and public prosecutors and 6,000 academics.¹⁰⁴ More than 140,000 others, including soldiers, officers, policemen, civil servants, academics, teachers and others have been detained, and more than 80,000 people have been arrested. One of the most extraordinary examples of the broad scope of the measures is that more than 3,000 institutions – including schools, dormitories, associations, foundations and media outlets – were disbanded and liquidated with immediate effect and without judicial proceedings.¹⁰⁵ It is also worrying that over 180 media outlets have been shut down and more than 300 journalists have been imprisoned.

1993) paras. 48–66; *Aksoy v. Turkey*, App No 21987/93, (ECtHR, 18 December 1996) paras. 71–84.

102 *A & Others v. United Kingdom*, App No 3455/05 (ECtHR, 2 February 2009) para.184: "The Court recalls that it falls to each Contracting State, with its responsibility for 'the life of [its] nation', to determine whether that life is threatened by a 'public emergency' and, if so, how far it is necessary to go in attempting to overcome the emergency. By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle better placed than the international judge to decide both on the presence of such an emergency and on the nature and scope of the derogations necessary to avert it. Accordingly, in this matter a wide margin of appreciation should be left to the national authorities."

103 *Aksoy v. Turkey*, App No 21987/93, (ECtHR, 18 December 1996) para. 68.

104 By virtue of the later emergency Decrees, a small number of public servants have been reinstated. See, for example, Decree No. 675 and Decree No. 677.

105 Some disbanded institutions have also been removed from the relevant lists of institutions to be disbanded. For example, Decree No. 673 removed 53 schools and then, Decree No. 677 excluded further 194 institutions, including 1 health institution, 175 associations and 18 foundations, of the relevant lists of institutions to be disbanded.

As aptly stated by the Commissioner for Human Rights of the CoE ('CoE Commissioner'), the emergency decrees "...have introduced sweeping measures affecting, among others, civil society, municipalities, private schools, universities and medical establishments, legal professionals, media, business and finance, as well as the family members of suspects."¹⁰⁶

While the state of emergency in the aftermath of the 15 July attempted coup was supported by a wide political consensus in Turkey,¹⁰⁷ the wave of restrictions that ensued, has led to a flood of criticism from across a broad spectrum of the international community. A major focus of international attention has been directed at the proportionality (or apparent lack thereof) of measures taken under the guise of the state of emergency regime, including from the European Commission for Democracy through Law ('Venice Commission'), the CoE Commissioner, the OSCE as well as other civil society organizations.¹⁰⁸

Generally speaking, the emergency measures undertaken by the Turkish authorities during this 24-month period suggest that the post-coup measures reached an unprecedented level, targeting economic, social and cultural rights, and civil and political rights, through excessive detentions, massive dismissals,

¹⁰⁶ Council of Europe Commissioner for Human Rights, Memorandum on the human rights implications of the measures taken under the state of emergency in Turkey, by Nils Muižnieks, Comm.DH (2016) 35, 7 October 2016, para. 35. Retrieved 9 August 2018, <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2942452&SecMode=1&DocId=2386132&Usage=2>.

¹⁰⁷ In the aftermath of the failed military coup in Turkey, the Turkish political parties and society at large shared a rare moment of political unity to condemn the failed putsch and to express their support for the elected president. President Erdogan emerged as (perhaps, the most) unassailable Turkish politician after having survived a vicious attempted coup, increased his popularity drastically and gripped a power of unprecedented strength. This is clearly what James Madison referred to as 'an enthusiastic confidence of the people in their patriotic leaders, which stifled the ordinary diversity of opinions on great national questions' See, Clinton Rossiter, *the Federalist Papers no. 49* (James Madison), p. 315.

¹⁰⁸ Venice Commission, Opinion on Emergency Decree Law Nos. 667–676 Adopted Following the Failed Coup of 15 July 2016' CDL-AD(2016)037, 9–10 December 2016, para.38; CoE Commissioner, Memorandum on the human rights implications of the measures taken under the state of emergency in Turkey, by Nils Muižnieks, Comm.DH (2016) 35, 7 October 2016, para. 35; OSCE, Parliamentary Assembly, Statement by the Chair of the General Committee on Democracy, Human Rights and Humanitarian Questions, 4 November 2018. Retrieved 9 August 2018, <http://www.oscepa.org/parliamentary-diplomacy/helsinki40/project-news/press-releases/2016/2632-osce-pa-human-rights-chair-sanchez-amor-calls-for-rule-of-law-in-turkey>; Human Rights Watch 'A Blank Check-Turkey's Post-Coup Suspension of Safeguards Against Torture', 24 October 2016. Retrieved 9 August 2018, <https://www.hrw.org/report/2016/10/24/blank-check/turkeys-post-coup-suspension-safeguards-against-torture>.

broad institutional closures and measures exclusively affecting the Kurdish minority in Turkey. For example, in the context of Article 5 (3) ECHR, Decree No.667 adopted in the aftermath of the 15 July attempted coup in Turkey authorised detentions without access to a judge for up to thirty days 'due to the difficulty in collecting evidence or higher number of suspects'.¹⁰⁹ This thirty-day period of unsupervised detention applied to all terrorism-related organized crimes, and it substantially exceeds the outer limit held to be justifiable in times of derogation under Article 15 ECHR. Even under such circumstances, the ECtHR, in *Aksoy v. Turkey*, judged holding a suspect for fourteen days and in *Nuray Sen v. Turkey*, for eleven days without judicial intervention found not be disproportionate derogations from Article 5 ECHR.¹¹⁰

As regards the collective dismissal of tens of thousands of public servants, the CoE Commissioner noted that the dismissals were not based on individualized reasoning and ordered on the basis of a number of 'opaque'¹¹¹ or 'loose'¹¹² criteria. Moreover, the Emergency Decrees make clear that the dismissed public servants are excluded indefinitely and shall not be employed again in public sector.¹¹³ It is clear that a life-long exclusion from public service seems hardly defensive from a proportionality perspective.¹¹⁴

109 See, Article 6 (1)-a of the Decree No. 667.

110 Later, Decree No. 684 of 23 January 2017 reduced this period to seven days. See, Article 10 of the Decree No.684.

111 CoE Commissioner, Memorandum on the human rights implications of the measures taken under the state of emergency in Turkey, by Nils Muiznieks, Comm.DH (2016) 35, 7 October 2016, para 24.

112 Venice Commission, Opinion on Emergency Decree Law Nos. 667–676 Adopted Following the Failed Coup of 15 July 2016' CDL-AD(2016)037, 9–10 December 2016, para 108. The Venice Commission outlined some criteria for the dismissals in its Opinion: "[M]aking monetary contributions to the Asya Bank and other companies of the 'parallel state', being a manager or member of a trade union or association linked to Mr Gülen, using the messenger application *ByLock* and other similar encrypted messaging programmes, ...police or secret service reports about relevant individuals, analysis of social media contacts, donations, web-sites visited, and even on the fact of residence in student dormitories belonging to the 'parallel state' structures or sending children to the schools associated with Mr Gülen ... [i]nformation received from colleagues from work or neighbours and even continuous subscription to Gülenist periodicals".

113 The permanent nature of these 'dismissals' is confirmed by the Turkish Constitutional Court (*Anayasa Mahkemesi*, Turkey, Esas (doc) No 2016/6, Karar (decision) No 2016/12, 4 August 2016, para. 30) and by the Turkish Council of State (Dniştay, Turkey, 5th Chamber, Esas (doc) No 2016/8196, Karar (decision) No 2016/4066, 4 October 2016).

114 See T. Ruys and E. Turkut, 'Turkey's Post-Coup "Purification Process": Collective Dismissals of Public Servants under the European Convention on Human Rights', in *Human Rights Law Review*, vol.18, 2018, pp. 539–565.

As stated above, on 20 March 2018, the European Court for the first time found violations in cases related to the 15 July attempted coup.¹¹⁵ The applicants, Alpay and Altan, both journalists were arrested following the attempted military coup and later placed in pre-trial detention in July 2016 and September 2016 respectively. After numerous unsuccessful applications for release pending trial, they lodged individual applications with the TCC on September 2016 and November 2016 respectively. In their applications before the ECtHR, Alpay and Altan complained that their initial and continued pre-trial detention was a breach of their right to liberty and security under Article 5 ECHR and of their right to freedom of expression under Article 10 ECHR.

In October 2017, The ECtHR gave priority to applications concerning the detention of journalists and urged the TCC to rule on the individual applications of *Alpay* and *Altan*. In turn, the TCC delivered judgments on 11 January 2018, finding a violation of the right to liberty (Article 19 of the Turkish Constitution/Article 5 ECHR counterpart) and of freedom of expression (Article 26 and 28 of the Turkish Constitution/Article 10 ECHR counterpart) of both journalists.¹¹⁶ In reaching this outcome, the TCC first found that the attempted coup disclosed the existence of a public emergency threatening the life of the Turkish nation. It then held that detention of the two journalists was not 'lawful' because their detention was based solely on newspaper articles written by them and those article did not constitute concrete evidence that they had committed the alleged crimes. Moreover, in its judgment the Turkish high court stressed that the applicants' prosecution and detention did not correspond to any pressing social need and thus, was neither necessary nor proportionate, even in the context of a public emergency. Despite the TCC's clearly articulated judgment, two lower courts refused to implement these decisions, holding that the TCC exceeded its scope of competence when assessing the reason for the pre-trial detention of the applicants and arguing that these judgments were not in compliance with the law and amounted to usurpation of power.¹¹⁷

115 See *Mehmet Hasan Altan v Turkey*, App No 13237/17, (ECtHR, 20 March 2018) para. 92 and *Şahin Alpay v Turkey*, App No 16538/17, (ECtHR, 20 March 2018) para 76.

116 Constitutional Court (*Anayasa Mahkemesi*, Turkey), *Mehmet Hasan Altan* (ind. app.) Plenary Assembly, App No 2016/23672, 11 January 2018 and, Constitutional Court (*Anayasa Mahkemesi*, Turkey), *Şahin Alpay* (ind. app.), Plenary Assembly, App No 2016/16092, 11 January 2018.

117 See, Massimo Frigo, 'The Constitutional Conflict in Turkey: Is There Still an Effective Remedy for Human Rights Violations?', *Opinio Juris*, 26 January 2018. Retrieved 9 August 2018, <http://opiniojuris.org/2018/01/26/the-constitutional-conflict-in-turkey-is-there-still-an-effective-remedy-for-human-rights-violations/>; Basak Çalı, 'Will Legalism be the End of Constitutionalism in Turkey?', *Verfassungsblog*, 22 January 2018. Retrieved 9 August 2018, <https://verfassungsblog.de/will-legalism-be-the-end-of-constitutionalism-in-turkey/>.

In its account, on 20 March 2018, the ECtHR judges mirrored the TCC's judgment, holding that the detention of two journalists constituted a breach of their right to liberty under Article 5 (1) ECHR and freedom of expression under Article 10 ECHR. In particular, the Court held that a measure of pre-trial detention that was not "lawful" and had not been effected "in accordance with a procedure prescribed by law" on account of the lack of reasonable suspicion could not be said to have been strictly required by the exigencies of the situation.¹¹⁸

While these judgments represent a vigorous affirmation of the protection of freedom of expression and the press in Turkey after the attempted coup,¹¹⁹ the ECtHR again confirmed its acritical and deferential stance by holding that it 'will not depart from its previous finding that the right to lodge and individual application with the TCC constitutes an effective remedy'.¹²⁰ Particularly, as the Court noted, it had not been provided any evidence for the pre-trial detention of the applicants that could eventually persuade it to depart from the findings reached by the TCC.¹²¹ Instead, in line with its previous jurisprudence, the ECtHR provided the Turkish state authorities with a wide margin of appreciation in the assessment of the presence of the emergency and of the nature and scope of the derogations necessary to avert it.¹²²

Concluding Remarks

This article provides a detailed overview of the state of emergency practices in the fight against terrorism in Turkey. In retrospect, the states of emergency practices in Turkey from 1987 to 2002 were mainly grounded in fear or threats of terrorism. Yet, the emergency decrees were inextricably entwined with oppressive political regimes exercising arbitrary and sweeping powers. It is patently evident that the most flagrant human rights abuses against the Kurdish minority have occurred in the context of states of emergency. The use of

¹¹⁸ *Mehmet Hasan Altan v Turkey*, App No 13237/17, (ECtHR, 20 March 2018) para. 140 and *Şahin Alpay v Turkey*, App No 16538/17, (ECtHR, 20 March 2018) para.119.

¹¹⁹ See, Senem Gürol, 'Resuscitating the Turkish Constitutional Court: the ECtHR's Alpay and Altan Judgments' Strasbourg Observers, 3 April 2018. Retrieved 9 August 2018, <https://strasbourgobservers.com/2018/04/03/resuscitating-the-turkish-constitutional-court-the-ecthrs-alpay-and-altan-judgments/>.

¹²⁰ *Mehmet Hasan Altan v Turkey*, App No 13237/17, (ECtHR, 20 March 2018) para. 142 and *Şahin Alpay v Turkey*, App No 16538/17, (ECtHR, 20 March 2018) para 121 (emphasis added).

¹²¹ *Şahin Alpay v Turkey*, App No 16538/17, (ECtHR, 20 March 2018) para 119.

¹²² *Mehmet Hasan Altan v Turkey*, App No 13237/17, (ECtHR, 20 March 2018) para. 75 and *Şahin Alpay v Turkey*, App No 16538/17, (ECtHR, 20 March 2018) para 91.

national security discourse and bureaucratic discretion not only pushed outer limits of state of emergency practices, but also blurred the line between the normal legal order and measures reserved for distinct states of emergency. Moreover, the exceptional national security powers and counter-terrorism laws have metamorphosed into permanent legislation, thus becoming part of the ordinary law of the Turkish state.

The same also appears to be true in the nationwide state of emergency declared in the aftermath of the 15 July 2016 attempted coup. While the state of emergency (primarily) declared as a response to the attempted coup, emergency decrees issued since imposition of the nationwide state of emergency consist primarily of measures in a very broad '*counter-terrorism*' context, with wide-ranging powers granted to the state authorities, to counter the severe dangers to public security and order from terrorist activities, regardless of whether or not the latter are related to the coup attempt.

There is no doubt that the decision of Turkish authorities to declare a state of emergency in the wake of the contemptible attempt to forcibly oust the democratically elected government can be justified as was confirmed by the both the TCC and the ECtHR in the *Altay and Alpay* cases. However, with regard to the overwhelming majority of emergency measures, there is reasonable doubt that such sweeping measures, affecting an extraordinarily wide swath of Turkish society, could be 'strictly required by the exigencies of the situation' as exemplified in the *Altan and Alpay* cases. (See also, Section III.B.2) It may indeed prove difficult indeed to establish the necessity and the proportionality of those far-reaching emergency measures that were imposed, or whether such measures were the most appropriate methods in order to strike a proper balance between the objective risks considered and the applicable human rights.¹²³

¹²³ CoE Commissioner, Memorandum on the human rights implications of the measures taken under the state of emergency in Turkey, by Nils Muižnieks, Comm.DH (2016) 35, 7 October 2016, para 37. Note that the ECtHR held that it recognizes "...the need, inherent in the Convention system, for a proper balance between the defence of the institutions of democracy in the common interest and the protection of individual rights." See *Fox, Campbell and Hartley v. UK*, App Nos 12244/86, 12245/86, 12383/86 (ECtHR, 30 August 1990), para. 28.