Constitutional Review, Volume 9, Number 2, December 2023
P-ISSN: 2460-0016 (print), E-ISSN: 2548-3870 (online)
https://doi.org/10.31078/consrev921

The Turkish Constitutional Court During the State of Emergency Between 2016 and 2018

Engin Yıldırım*
The Constitutional Court of the Republic of Türkiye
engin.yildirim@anayasa.gov.tr

Received: 3 November 2022 | Last Revised: 6 September 2023 | Accepted: 10 October 2023

Abstract

This article investigates the judicial approach of the Turkish Constitutional Court (TCC) during the period of state of emergency between 2016 and 2018 in Türkiye. Like its counterparts facing similar challenges, the TCC has endeavored to strike a balance between defeating grave threats to the constitutional system and defending fundamental rights in a time of public emergency. While constitutional courts should try to protect constitutional rights from executive abuse of emergency powers, they should do so without jeopardizing the effectiveness of these measures in countering threats to the nation. During the period of state of emergency, the TCC adopted a deferential stance in its constitutionality review cases arising from its textualist interpretation of the constitution, which explicitly prohibits the review of emergency decrees. However, the Court embraced a posture of rights protection in its individual applications procedure, which requires the TCC to follow case law of the European Court of Human Rights (ECtHR).

Keywords: Constitutionality Review; Individual Application; State of Emergency; Turkish Constitutional Court.

I. INTRODUCTION

Constitutionalism has historically aimed to limit political power through a system of separation of powers and resolve conflicts that may arise between state organs. Since the second half of the last century, protecting fundamental

* Justice of the Constitutional Court of the Republic of Turkiye

rights and freedoms against encroachments by the branches of power has also become one of the most important functions of constitutionalism. Although constitutionalism derives its legitimacy from the democratic sovereignty of a nation, it endeavors to curb the emergence of authoritarian tendencies of a majoritarian democracy that may pose a threat to fundamental rights.

It is, in this context, the role of constitutional courts in many parts of the world has been to protect rights and freedoms in an increasingly challenging global political and economic environment where democracy is in decline and power-holders have become more prone to trade liberty for security. Under such circumstances, constitutional courts are being forced to utilize their authority, otherwise they may risk rendering themselves redundant. However, they should also exercise restraint to avoid overextending their constitutionally granted competencies at the expense of other branches of the state.

When there are exceptional conditions, such as the imposition of martial law or a state of emergency arising from an external or internal threat to the nation, in which rights and freedoms are inevitably curtailed to address these threats to the constitutional order, their responsibility to uphold the rule of law and protect human rights assumes a greater significance. On the other hand, writing in the aftermath of 9/11, some put forward the view that the constitution and the courts should not be limiting the emergency powers of a government.[1] For example, Mark Tushnet asserts that constitutional limitations rarely succeed in reducing the executive's propensity to exercise extreme discretion, "it is better to have emergency powers exercised in an extraconstitutional way, so that everyone understands that the actions are extraordinary, than to have the actions rationalized away as consistent with the Constitution and thereby normalized".[2] He claims that this is necessary "in order to avoid normalizing the exception".[3] Similarly, others maintain that there may be instances where the best way to deal with grave threats is, at times, defying constitutional norms provided that

[1] Oren Gross, "Chaos and Rules: Should Responses to Violent Crises Always be Constitutional?" *Yale Law Journal* 112, no. 6 (2003): 1011, 10.2139/ssrn.370800; Mark Tushnet, "Defending Korematsu? Reflections on Civil Liberties in Wartime," *Wisconsin Law Review*, no.2 (2003): 273.

[2] Tushnet," Defending Korematsu?" 306.

[3] Ibid., 307.

this measure is aptly applied.[4] Richard Posner even goes further arguing that "terrorism suspects should have no or very few guarantees in criminal proceedings against them due to the *sui generis* nature of the terrorist threat".[5]

It appears that these scholars base their arguments on dealing with threats in a timely manner because they believe that taking such a position will enable the executive to implement successful counterterrorism measures in "the war on terror" within a reasonably short period of time. However, states already have a wide range of tools at their disposal to deploy against grave threats and it is an open question whether compromising fundamental liberties would necessarily lead to better security.[6] For example, many constitutions enshrine emergency powers granting broad powers to the executive.[7]

Compared to normalcy, the executive is granted a wide range of powers to take necessary measures in extraordinary times because of the urgency of the situation. Of course, this is not to say that the exercise of emergency powers by the executive is unlimited or largely free from judicial scrutiny and legislative approval. After all, the overall protection of human rights is needed most in emergencies. On the other hand, while constitutional courts should strive for the protection of constitutional rights from the misuse of emergency powers by the executive, they should do so in a manner that does not hamper the efficacy of these measures in overcoming threats to the nation. In fact, some jurisdictions explicitly ban judicial review after the declaration of a state of emergency or of emergency measures taken by the executive and the legislature.[8] Even when there are no procedural or substantial constitutional hurdles, during the period of a state of emergency, courts tend to avoid considering cases on their merits or usually adopt the government's stance.[9] For example, during the radical left-

4 Gross," Chaos and Rules," 1097

5 Richard Posner, *Not a Suicide Pact: The Constitution in a Time of National Emergency* (Oxford: Oxford University Press, 2006), 11.

6 David, Cole, "The Poverty of Posner's Pragmatism: Balancing Away Liberty After 9/11," *Stanford Law Review* 59, no. 6 (2007): 1735.

7 Oren Gross, "Constitutions and Emergency Regimes" in *Comparative Constitutional Law,* ed. Tom Ginsburg and Rosalind Dixon (Cheltenham: Edward): 336-337.

8 Gross, "Constitutions and Emergency Regimes," 342.

9 David Cole, "Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis," *Michigan Law Review* 101 (2003): 2565; John C. Yoo, "Judicial Review and the War on Terrorism," *George Washington Law Review* 72 (2003): 427.

wing terrorism of the 1970s and 1980s, the German Constitutional Court found security measures to fight terrorism constitutionally in many cases by applying a balancing and proportionality analysis.[10] Likewise, in the early days of the "War on Terror" proclaimed after the September 11 terrorist attacks, the Supreme Court of the United States of America tended not to interfere with the executive's actions in this area. In this context, the Supreme Court did not touch the extremely broad powers of the military and the executive in the definition and application of the category of enemy combatant in criminal law.[11]

When courts are called upon to review governmental decisions and actions in times of emergencies, they are likely to assume a deferential attitude. They may avoid examining issues related to emergency powers and measures on their merits using legal tools like the political question doctrine or maintain that these issues are non-justiciable.[12][12] Even if they examine a legal challenge against the emergency powers, the decision tends to be in favor of the government.[13]

Not surprisingly, constitutional, and other high courts are forced walk a tightrope between liberty and security when an urgent situation arises, threating the existence of the nation and democratic political system. This is exactly what the Turkish Constitutional Court (TCC) experienced when a state of emergency was declared in the country following a failed bloody coup attempt in June 2016 by a faction within the Turkish Armed Forces consisting of followers of a religious group. It faced an uphill task to strike a balance between liberty and security as the government took a wide range of measures issued in the form of emergency decrees, which raised a great deal of significant constitutional and human rights issues and challenges.

This article aims to assess the TCC's behavior during this state of emergency between 2016 and 2018. It investigates the degree to which the TCC was able to

[10] Russell A. Miller, "Balancing Security and Liberty in Germany," *Journal of National Security Law and Policy* 4 (2010): 378-379.

[11] Renata Uitz, "Courts and the Expansion of Executive Power: Making the Constitution Matter," in *The Evolution of the Separation of Powers: Between the Global North and the Global South, ed. David Bilchitz and David Landau* (Cheltenham: Edward Elgar Publishers, 2018), 105, https://doi.org/10.4337/9781785369773.00010.

[12] Oren Gross, "Once More unto the Breach: The Systemic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies," *The Yale Journal of International Law* 23 (1998): 491, 437-501.

[13] Oren Gross, "Once More unto the Breach," 491.

protect constitutional rights. Specifically, this study seeks to address the ensuing main questions: What justifications did the TCC provide in its judgments? Did its decisions vary depending on the type of review? Did it adopt a deferential attitude? We suggest that the type of review which enables applicants direct and easy access to the Court is more likely to be effective in protecting rights compared to traditional methods of constitutional justice such as concrete and abstract norm review. This article therefore contributes to the discussion on the court's behavior under state of emergency conditions.

This article is structured as follows: it begins with a brief outline of the constitutional background of the emergency system as enshrined in the constitution with a note on the competencies of the TCC. The following section examines the TCC's case law during the state of emergency between 2016 and 2018. The final section discusses the findings and contextualizes them in broader literature.

II. CONSTITUTIONAL FRAMEWORK OF THE STATE OF EMERGENCY REGIME IN TURKEY

Turkey's state of emergency powers are codified in the Constitution of 1982, which outlines the declaration procedure and delineates the conditions for the restriction of fundamental rights and freedoms under this extraordinary system. According to Article 119 of the Constitution, the executive has the authority to declare a state of emergency. Before the constitutional amendment that replaced the parliamentary system with the presidential one in 2017, the cabinet convened under the chair of the President was granted the sole power to declare a state of emergency. However, with the new arrangement, the president has the exclusive power to declare a state of emergency and issue executive decrees. A declaration of a state of emergency requires the seal of approval from parliament. A constitutionally recognized state of emergency may be legitimately declared in the following situations:

> In the event of war, the emergence of a situation necessitating war, mobilization, an uprising, strong rebellious actions against the motherland and the Republic, widespread acts of violence of internal or external origin threatening the indivisibility

> of the country and the nation, emergence of widespread acts of violence aimed at the destruction of the Constitutional order or of fundamental rights and freedoms, serious deterioration of public order because of acts of violence, occurrence of natural disasters, outbreak of dangerous epidemic diseases or emergence of a serious economic crisis; 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.[14]

In addition, Article 15 of the Turkish Constitution includes a specific review procedure for the suspension of fundamental rights and freedoms in times of war, general mobilization and a state of emergency. Article 15 emphasizes that measures taken should only be to "the extent required by the exigencies of the situation" and "obligations under international law should not be violated".[15] It also guarantees that the individual's right to life and the integrity of his/her corporeal and spiritual existence shall be inviolable throughout the state of emergency. Accordingly, even in these extraordinary times, certain fundamental rights such as the right to life and torture prohibitions are still in full force as they are considered absolute rights.

The Turkish Constitution distributes the emergency powers between the legislative and the executive with a power concentration in favor of the latter but excludes judicial scrutiny of the emergency decrees by the Constitutional Court. Article 148 of the Turkish Constitution states that "no action can be brought before the Constitutional Court alleging unconstitutionality as to the form or substance of decrees having the force of law issued during a state of emergency, martial law or in time of war".[16] This provision explicitly bars the TCC from reviewing emergency decrees, granting a broad scope of discretion to the executive.

The Turkish Constitution gives precedence to international treaties over domestic statutes if their provisions are in conflict concerning fundamental freedoms and rights.[17] With the constitutional amendment in 2004, international

[14] Constitution of the Republic of Turkiye, Article 119, Law No 2709 of 1982, accessed 7 August 2022, https://global.tbmm.gov.tr/docs/constitution_en.pdf.
[15] Constitution of the Republic of Turkiye, Article 15, Law No 2709 of 1982. Accessed 7 August 2022.
[16] Constitution of the Republic of Turkiye, Article 148. Accessed 7 August 2022.
[17] Constitution of the Republic of Turkiye, Article 90. Accessed 7 August 2022.

treaties on fundamental rights and freedoms, especially the European Convention on Human Rights (ECHR) were attributed a greater value than domestic law. The judiciary is expected to take provisions of international treaties, notably the ECHR into consideration when adjudicating a case related to human rights issues. Turkey became a party to the ECHR in 1954. It adopted the right to individual application to the European Court of Human Rights (ECtHR) in 1987 and recognized the binding jurisdiction of the Strasbourg Court in 1990. The impact of the ECHR on Turkish constitutional order was amplified by the introduction of individual application to the TCC through an amendment of the Constitution in 2010.

Since the ECHR exerts a significant influence on the Turkish constitutional system, we also need to give a brief outline of the emergency regime within the ECHR system. Article 15 of the ECHR stipulates that measures taken in a state of emergency must be "proportionate to the exigencies of the situation" and "provided that such measures are not inconsistent with its other obligations under international law".[18] In the ensuing provision, it also allows no derogation from the right to life, prohibitions against torture, slavery, servitude, and retrospective penal punishment. Derogation under Article 15 of the Convention may only be carried out if it is temporary in duration and limited in scope as this provision aims to achieve a balance between a contracting state's interest in weeding out security threats and protecting basic rights that may be considerably restricted during emergencies.

The ECHR defines a state of emergency as an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organized life of the community of which the state is composed".[19] For the Court (Commission at the time of judgment), 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. On the other hand,

[18] "The Convention for the Protection of Human Rights and Fundamental Freedoms," opened for signature 4 November 1950, Article 15.

[19] Decision of the European Court of Human Rights, *Lawless v. Ireland (3)*, App. no. 332/57, 01 July 1961, § 28.

unlike the United Nations Human Rights Council (UNHRC), the supervisory body of the International Convention on Civil and Political Rights (ICCPR), which expects that any derogation from the rights set out in the ICCPR be temporary, the Strasbourg Court has shunned adopting this criterion explicitly. For example, it held that although derogation measures can last for a considerable length of time, they cannot be ruled unjustified just because they are not temporary.[20]

III. THE TURKISH CONSTITUTIONAL COURT IN THE STATE OF EMERGENCY PERIOD

Since 1962, the Turkish Constitutional Court has been tasked with constitutional review. One of the first non-Western constitutional courts, its jurisprudence has echoed the highs and lows of the nation's volatile political history. The TCC, like many of its counterparts, has played a key role in domestic politics, and its decisions have drawn both praise and harsh criticism from various segments of society.[21] It was frequently charged with judicial activism that crossed constitutional boundaries to affect politics and was criticized for its propensity to rule in favor of the state and its reluctance to offer protection in situations involving abuses of human rights.[22] Although the TCC was not part of the "rights revolution", it has recently started to move towards more right-based adjudication. This change is largely attributable to the introduction of the individual application system in 2012, which required the Court to take the ECHR's case law into account. The TCC's powers, which include reviewing both abstract and concrete norms, conducting financial audits, dissolving political parties, and bringing high-ranking state officials to trial, have undergone a significant change because of the constitutional complaint mechanism. Under the amended Article 148 of the Constitution, any person may apply to the Constitutional Court with

[20] Decision of the European Court of Human Rights *A and others v. the United Kingdom*, App. no. 3455/05, 19 February 2009, § 178.

[21] Levent Köker, "Turkey's Political-Constitutional Crisis: An Assessment of the role of the Constitutional Court," *Constellations* 17, no. 2 (2010): 342; Ergun Özbudun, "Political Origins of the Turkish Constitutional Court and the Problem of Democratic Legitimacy," *European Public Law* 12 (2006): 213.

[22] Ceren Belge, "Friends of the Court: The Republican Alliance and Selective Activism of the Constitutional Court of Turkey," *Law and Society Review* 40, no. 3, (2006): 654; Yasushi Hazama, "Hegemonic Preservation or Horizontal Accountability," *International Political Science Review* 33, no. 4 (2012): 421; Aslı Bali, "Courts and Constitutional Transitions: Lessons from the Turkish Case," *International Journal of Constitutional Law* 11, no.3 (2013): 668.

an allegation that any of his or her constitutional basic rights and freedoms, within the scope of the European Convention of Human Rights, have been violated by public authority.[23]

Only those fundamental rights and freedoms set out in the Constitution, which are also guaranteed in the ECHR and its Additional Protocols may be invoked in the individual application procedure. This means that individual application has a relatively limited scope of protection against violations of rights as it is confined to protect fundamental rights regulated in the ECHR rather than all rights secured in the Turkish constitution. For example, claims related to the infringement of social rights are excluded from the individual application mechanism.

Unlike abstract and concrete norm reviews where the TCC deals with issues of more abstract nature, the individual application procedure calls for the Court to pinpoint alleged violations of constitutional rights by government authorities and provide the victim with effective remedies. The TCC has established leading principles that have acquired a quasi-precedent status and its rulings concerning, for example, the right to a fair trial, long and undue detention periods, curbing the excessive length of legal proceedings, freedom of expression, freedom of association and freedom of access to the internet have been generally acclaimed and have accorded well with the jurisprudence of the Strasbourg Court.[24]

On 15 July 2016, Turkey went through a bloody coup attempt which constituted a dire threat to the very existence of the state and the nation, and the government initially declared a state of emergency for a period of 90 days, which was later extended seven times. After the declaration of the state of emergency, the Council of Ministers issued several emergency decrees with the force of law granting wide discretionary powers to the executive and administrative authorities. During the period between 21 July 2016 and 23 July 2018, thirty-two emergency decrees were issued by the government with the aim of "fighting terrorism" and "protecting

[23] Constitution of the Republic of Turkiye, Article 148, accessed 7 August 2022. https://global.tbmm.gov.tr/docs/constitution_en.pdf.

[24] See, for example, Individual Application to Constitutional Court of the Republic of Turkiye, YouTube LLC Corporation Service Company and Others, B. No. 2014/4705 (29 May 2014); Individual Application to Constitutional Court of the Republic of Turkiye, Erdem Gül and Can Dündar, B. No: 2015/15867 (25 February 2016).

national security". Under the state of emergency, the executive acquired widened counter-terrorism powers through new terror-related legislation and amendments to existing laws. For example, the government was granted the authority to draft new laws without parliamentary approval.

Upon the declaration of the state of emergency, Turkey notified the Council of Europe and the United Nations of its intentions to derogate from certain obligations under the ECHR and the ICCPR as they allow derogations in cases of war involving armed conflicts and public emergencies posing a threat to the stability and existence of a nation. Although the derogation clauses of the ECHR and the ICCPR allow for the suspension of certain rights and freedoms during emergencies, the nature and scope of the derogations must be proportionate to the declared reason for the emergency, and measures taken to that effect must be strictly required by the exigencies of the situation. The derogation clauses also determine derogable and non- derogable rights and the suspension of the latter is not allowed even during a state of emergency.

This particular declaration of a state of emergency produced significant constitutional issues and challenges among which the constitutional review of emergency decrees issued by the Council of Ministers, meeting under the chairmanship of the President of the Republic, attracted the most attention. Under normalcy, the TCC has the competence to examine the constitutionality of decrees with the force of law, whereas, as alluded above, Article 148 of the Constitution explicitly states that decree laws issued during a state of emergency shall not be brought before the Constitutional Court.

When the government's power to issue emergency degrees was challenged by the main opposition party before the TCC, the Court held unanimously that it did not have the jurisdiction to review decree-laws issued under a state of emergency:

> Claims 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 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, 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.[25]

The Court observed that although decree laws must be scrutinized under judicial review in a democratic state of law, the existing constitutional provision does not allow the conduct of a such review, which is binding on the Court itself. It opined that since Article 148 of the Constitution explicitly stipulates that the decrees issued during a state of emergency, it does not have the authority to review the statutory decrees implemented during a state of emergency. In other words, it held that it lacked the competence to determine whether the decree laws approved during the state of emergency were compatible with the Turkish Constitution. For the TCC, it was bound by the constitution like all branches of the state and could not trespass constitutional boundaries. It pointed out that it is barred from assessing the constitutionality of decrees issued during a state of emergency "as to form or substance."[26] In addition, it argued that it may only examine emergency decrees when they are approved by parliament, rendering them into conventional statutes. Drawing on a textualist interpretation of the relevant constitutional provisions, it concluded that the constituent power had completely and explicitly prohibited the judicial scrutiny of emergency decrees. The TCC pointed out that the Constitution requires emergency decrees having the force of law to be submitted to the approval of parliament rapidly against the risk of a complete lack of review of these decrees adopted during a state of emergency. In the TCC's view, it could only review emergency decrees following their ratification by parliament as laws. It should be noted that when the

[25] Judicial Review of Constitutional Court Law, Decision of Constitutional Court, E. 2016/166, K. 2016/159 (The Constitutional Court of the Republic of Türkiye 12 October 2016), § 23.

[26] Judicial Review of Constitutional Court Law, Decision of Constitutional Court, E. 2016/166, K. 2016/159 (The Constitutional Court of the Republic of Türkiye 12 October 2016), § 23.

emergency decrees were enacted as statutes, the TCC began to review them and in several cases, it handed down annulling rulings.[27]

The TCC's ruling was tantamount to a complete reversal of its previous case law in which it argued that some decrees adopted during a state of emergency were not ordinary decrees in terms of their substance, as their provisions went beyond the period or location of the declared state of emergency. Despite the ban on constitutional scrutiny of emergency decrees, the TCC reviewed them in 1991, maintaining that it had the power to determine whether they satisfy the criteria set out by Articles 120 and 121 involving proportionality, temporariness, and geographical restriction.[28] Along the same lines, it found that the competence of the government to issue emergency decrees was subject to limitations provided in Articles 121 and 122 of the Constitution in another decision delivered in 2003.[29] It, therefore, held that the emergency decrees could be subject to constitutionality review.[30] Furthermore, the TCC observed that if the regulations defined as decrees having the force of law and adopted during a state of emergency cover issues other than those required by the exigencies of the situation under the state of emergency then they could not be seen as ordinary decrees and could therefore be reviewed as ordinary decrees.

According to the new precedent, the TCC no longer conducts constitutionality review of emergency decrees and leaves them to the political review of parliament. The Court assumes its constitutional review only after these norms consequently become law. Nevertheless, in Turkish practice, the legislative does not usually

[27] Judicial Review of Constitutional Court Law, Decision of Constitutional Court, E.2016/205, K.2019/63 (The Constitutional Court of the Republic of Türkiye 24 July 2019); Judicial Review of Constitutional Court Law, Decision of Constitutional Court E.2018/73, K.2019/65 (The Constitutional Court of the Republic of Türkiye 24 July /2019); Judicial Review of Constitutional Court, Decision of Constitutional Court E.2018/90, K.2019/85 (The Constitutional Court of the Republic of Türkiye 14 November 2019); Judicial Review of Constitutional Court, Decision of Constitutional Court, E.2018/74, K.2019/92 (The Constitutional Court of the Republic of Türkiye 24 December 2019).

[28] Judicial Review of Constitutional Court Law, Decision of Constitutional Court E. 1990/25, K. 1991/1 (The Constitutional Court of the Republic of Türkiye), 10 January 1991;

[29] Judicial Review of Constitutional Court Law, Decision of Constitutional Court E.2003/28, K.2003/42 (The Constitutional Court of the Republic of Türkiye 22 May 2003).

[30] Judicial Review of Constitutional Court Law, Decision of Constitutional Court E. 1990/25, K. 1991/1 (The Constitutional Court of the Republic of Türkiye 10 January 1991); Judicial Review of Constitutional Court Law, Decision of Constitutional Court, E. 1991/6, K. 1991/20 (The Constitutional Court of the Republic of Türkiye 10 January 1991).

deliberate these decree laws and consequently these norms are excluded from judicial review because the Constitution does not have a provision for parliament to review state of emergency decrees.

The TCC previously adopted an activist stance regarding the review of emergency decrees despite the explicit prohibition in the constitutional text. Although this constitutional ban may be problematic from the standpoint of the separation of powers and the protection of human rights and it is susceptible to abuse by the executive, this does not change the fact that it is a constitutional provision which is binding for all branches including the judiciary. The TCC's new deferential approach to the review of emergency decrees was criticized some commentators who argued that the TCC's retreat from its former jurisprudence gave free rein to the executive.[31] It is not, nevertheless, uncommon that judicial oversight was generally restricted under emergencies as has happened for example, in France.[32]

In France, the enactment of a state of emergency has never been challenged under the abstract form of review, which allows bills to be presented before the *Conseil Constitutionnel* (Constitutional Council – CC) after being approved by Parliament but before becoming law.[33] The amended provisions of the 1955 Emergency Act was utilized in France between 2015 and 2017 following several serious terror attacks. Despite the potential unconstitutionality of several of the amendments, they were not challenged before the CC as the then Prime Minister claimed that "both the times and stakes were too dramatically important for juridical games to be played".[34] By contrast, another remedy known as *Question Prioritaire de Constitutionnalitte* (Priority Question of Constitutionality) that allows any person involved in court proceedings to challenge the constitutionality of a legislative provision that is to be applied to his or her case, subject only to

[31] Ece Göztepe, "The Permanency of the State of Emergency in Turkey: The rise of a Constituent Power or Only A New Quality of the State?" *Z Politikwiss* 28, no. 4 (2018): 531, doi.org/10.1007/s41358-018-0161-0 521-534; Pablo Castillo Ortiz "The illiberal abuse of constitutional courts in Europe," *European Constitutional Law Review* 15, no. 1 (2019): 48-72, https://doi.org/10.1017/S1574019619000026.

[32] Triestino Mariniello, "Prolonged Emergency and Derogation of Human Rights: Why the European Court Should Raise Its Immunity System," *German Law Journal* 20, no.1, (2019): 67 pp. 46-71, doi.org/10.1017/glj.2019.3.

[33] Stephanie Hennette Vauchez, "The State of Emergency in France: Days without End," *European Constitutional Law Review* 14, no. 4 (2018): 714, 700-720, doi.org/10.1017/S1574019618000391.

[34] Vauchez, "The State of Emergency," 715.

the condition that the provision in question must infringe upon "rights and freedoms guaranteed by the Constitution". Considering that various provisions of the 1955 Act were ruled to be unconstitutional, this legal avenue was far more successful for contesting the legitimacy of the state of emergency regime. On the other hand, the existence of a clause in the French Constitution allowing the CC to choose the date in which its ruling is put into effect allowed it to, in effect, choose to neutralize its findings of unconstitutionality by delaying the impact of its rulings. Because of this, the constitutional protection of rights and freedoms for those who had been subject to various measures, such as home arrest, or the seizure of electronic data, was less effective.[35]

Even when a parliament has the authority to review emergency measures like in Sweden where the government has broad unspecified emergency powers, the constitutional scope of review is unclear. Although a emergency regime is not recognized as a constitutional concept, a special parliamentary committee (the Committee on the Constitution) is charged with overseeing emergency regime measures, dubbed as a supra-legal state of emergency, which constitutes an exception to the principle of legality.[36] Sweden's supra-legal approach to domestic emergencies empowers the government to declare whether an emergency exists and to take emergency measures, which are subject to ex post political review by the Committee on the Constitution.[37]

In the Turkish case, as we have seen, the ban on the review of emergency decrees stems directly from the Constitution itself. It could be argued that the TCC could have overcome the ban with creative interpretations using teleological and systematic methods of constitutional interpretation as it had done in its previous case law, but this does not provide a satisfactory answer to the question of how to bypass an explicit prohibition specified in the Constitution. The adoption of the previous approach of the TCC may lead to a slippery slope in which open and explicit constitutional prohibitions may easily be sidestepped

35 Vauchez, "The State of Emergency," 716.
36 Anna Jonsson Cornell and Janne Salminen, "Emergency Laws in Comparative Constitutional Law – The Case of Sweden and Finland," *German Law Journal* 19, no.2 (2018): 236.
37 Cornell and Salminen, "Emergency Laws in Comparative Constitutional Law," 247.

by the Court, making the text of the Constitution meaningless. On the other hand, it is undeniable that the TCC's new case law concerning emergency decrees enabled the executive to take measures with widespread effects without being subject to any judicial scrutiny. The emergency measures implemented by the authorities substantially restricted the scope of many guarantees of the Turkish Constitution and of the ECHR. For example, one of the first decrees issued in the state of emergency extended the period of preventive detention up to 30 days for terrorism related charges excluding the period of time required to bring the suspect before a competent judicial body.[38] Likewise, in another decree, it was stipulated that any person who is a member of, affiliated with, otherwise connected to, or in any way in contact with terrorist organizations or structures, or groups that the National Security Council identified as carrying out activities against the national security of the State may be dismissed from the public service, his/her property may be confiscated and they may not enjoy certain rights such as travelling abroad.[39]

Although the TCC refused to review the emergency decrees, it continued to receive individual applications including those related to measures taken under the state of emergency and handed down decisions regarding whether the implementation of an emergency measure resulted in a breach of a constitutional right within the scope of the individual application. Not surprisingly, the TCC was flooded with individual applications by people alleging violations of their rights. Before the declaration of the state of emergency, the number of pending individual applications before the Court was about 22,500, whereas this rose to 107,000 in a year, indicating there were about 80,000 applications alleging violations of constitutional rights due to administrative and judicial emergency measures.[40] Unsurprisingly, this created a huge backlog of applications.

[38] Decree No 667, accessed on 12 August 2022, https://www.resmigazete.gov.tr/eskiler/2016/07/20160723-8.htm. When the state of emergency was lifted, a new legislation established a maximum of seven days for administrative detention.

[39] Decree No 672, accessed on 12 August 2022 https://www.resmigazete.gov.tr/eskiler/2016/09/20160901M1-1.htm.

[40] "Bireysel Başvuru İstatistikleri (Individual Applications Statistics)" accessed on 25 March 2022, https://www.anayasa.gov.tr/media/7946/bb_2022-1_tr.pdf. (23/9/2012- 31/3/2022/1).

Meanwhile, there were an upsurge of applications from Turkey lodged directly to the ECHR without exhausting domestic individual application remedies. The applicants claimed that there was not any effective remedy since they could not file a lawsuit against measures issued in the form of emergency decrees, arguing that the TCC conceded that it did not have the competence to review emergency measures and therefore could not be regarded as a remedy that could be exhausted.[41] The ECHR found these applications inadmissible on the grounds that the TCC could conduct this review by means of individual application instead of a norm review, thus it was accepted that "the right to lodge an individual application with the TCC constitutes an effective remedy."[42] For example, the Strasbourg Court issued an inadmissibility decision when a journalist complained about the duration of his individual application before the TCC. It noted that although the duration of 18 months and 3 days their case spent pending before the Constitutional Court could not be described as 'speedy' in an ordinary context, in the specific circumstances of the case there was no violation of Article 5 § 4 of the European Convention.[43]

To deal with the rising number of applications to the TCC, new measures were introduced by the state authorities. A special commission called the 'State of Emergency Inquiry Commission' was set up to examine complaints concerning emergency measures and administrative acts introduced by or taken under the emergency decrees, such as the dismissal of public servants, confiscation of property, and closure of private schools and associations. Following this step, applications filed to both the TCC and the ECHR were found to be inadmissible on the grounds that the remedy introduced by this commission should be exhausted.[44] The TCC declared over 70,000 complaints, which remained within

[41] Decision of the European Court of Human Rights Mercan v. Turkey, App. No. 56511/16, 17 November 2016, Decision of the European Court of Human Rights Zihni v. Turkey, App. No. 59061/16, 08 December.

[42] Decision of the European Court of Human Rights Mehmet Hasan Altan v. Turkey, App. No 13237/17, 20 March 2018) § 142 and Decision of the European Court of Human Rights Şahin Alpay v. Turkey, App. No 16538/17, 20 March 2018, § 121.

[43] Decision of the European Court of Human Rights Şahin Alpay v. Turkey, ECtHR, App. no. 16538/17, 20 March 2018, § 137. See also Decision of the European Court of Human Rights Mehmet Hasan Altan v. Turkey, ECtHR, App. no. 13237/17, 20 March 2018.

[44] Individual Application to the Constitutional Court of Türkiye, Hacı Osman Kaya, B. No. 2016/41934, 16 February 2017; Decision of the European Court of Human Rights Çatal v. Turkey, ECtHR, App. No. 2873/17, 07 March 2017.

the jurisdiction of the Commission, as inadmissible due to a failure to exhaust all available legal remedies.[45]

The TCC faced a formidable challenge to maintain its newly adopted rights-based approach as it had to examine applications arising from the issuance of emergency measures under Article 15 of the Constitution. This Article is clearly in line with provisions laid down in Article 15 of the ECHR that permits states to derogate "in time of war or other public emergency threatening the life of the nation" but only "to the extent strictly required by the exigencies of the situation." Article 15 of the Constitutions does not bring about a *Schmittian* state of exception.

In ordinary times, the TCC first reviews individual applications based on Article 13 of the Constitution, which reads that "fundamental rights and freedoms may be restricted only by law and in conformity with the reasons mentioned in the relevant articles of the Constitution without infringing upon their essence. These restrictions shall not be contrary to the letter and spirit of the Constitution and the requirements of the democratic order of society and the secular republic and the principle of proportionality."(citation required) This article sets forth the backbone of the protection of human rights in normal times based on the concept of proportionality review.

Under the state of emergency, the TCC reviewed complaints regarding the emergency measures under Article 15 that authorizes substantial restrictions on human rights and freedoms. In a leading judgment, it held that while public authorities have a very broad margin of discretion in determining policies and means to eliminate threats causing the state of emergency, their powers are not unlimited.[46] For the Court, any interference with constitutional rights in a state of emergency must satisfy three criteria set by Article 15. Accordingly, first, an emergency measure must not interfere with non-derogable, absolute rights and

[45] Constitutional Cour of the Republic of Türkiye, "Anayasa Mahkemesi Başkanliği-Bireysel Başvuru İstatistikleri [Presidency of the Constitutional Court - Individual Application Statistics]," Constitutional Court of the Republic of Türkiye, 2022, www.anayasa.gov.tr/media/7946/bb_2022-1_tr.pdf.

[46] Individual Application to the Constitutional Court of Türkiye, Aydın Yavuz and others. B. No. 2016/22169, 20 June 2017, § 166-167.

liberties stated in Article 15 of the Constitution such as the right to life and torture prohibition. Secondly, the interference or restriction must not violate obligations under international law. Thirdly, any restriction on derogable rights and liberties must be required by the exigencies of the situation. The last guardrail under Article 15 calls for the application of proportionality analysis.

In one of the leading decisions delivered under the individual application procedure, the TCC defined 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.[47]

For the TCC, emergency decrees may be issued only when the existence of the state or society or public order are faced with a serious threat. It maintains that emergency regimes in democratic countries are not arbitrary governments that disregard the rule of law since they aim to maintain and safeguard the constitutional order. Even though emergency regimes render significant powers to the executive and considerably restrict rights and freedoms, they are still regimes bound by the rule of law and constitutional order. Drawing attention to the "temporary and exceptional" nature of the emergency regime, the TCC observes that the ultimate goal of this regime is to return normalcy when threats to the democratic order are stamped out.[48] Emphasizing the temporary and exceptional feature of the emergency regimes, the TCC pursued a judicial approach dovetailing well with the UNHRC. According to the TCC, the emergency decrees can be applied only when the existence of state or society or public order is under serious threat or danger and if such a situation continues to exist.

When reviewing individual applications regarding the emergency measures, the TCC first applies the standards of normalcy as laid out in Article 13 and

[47] Aydın Yavuz and others, § 164.
[48] Aydın Yavuz and others, § 166.

if it finds a violation of a constitutional right, it, then, examines whether this infringement could be justified within the framework of a state of emergency regime under Article 15 of the Constitution. In its analysis, the Court considers if a violation is proportionate that is absolutely necessitated by a state of emergency and breaches the core of constitutional rights. For instance, in a ruling the Court held that a failure of bringing applicants detained in a coup investigation before a judge for a period of 8 months 18 days after the first trial would lead to a violation according to ordinary standards under Article 13, but this measure was necessary and proportionate under Article 15 due to the complexity of coup investigations and the workload of courts and public prosecutors.[49]

The TCC applied the above principles in its examinations of individual applications complaining about the implementation of the emergency measures. For example, the implementation of the principles can be observed in individual applications lodged by two famous journalists who had been arrested following the coup attempt on suspicion of having connections with the coup-plotters. They filed an individual application to the TCC challenging the unconstitutionality of their pre-trial detention. They alleged that their initial and continued pre-trial detention was a breach of their right to liberty and security and of their right to freedom of expression and freedom of press. In its judgment, the TCC first underlined that the coup attempt was a very serious threat to the existence of the Turkish nation. It noted that the detention of the two journalists was not lawful as there was not any concrete evidence corroborating terrorism charges apart from some newspaper articles penned by the applicants. The TCC opined that the articles did not prove sufficient evidence for the applicants' alleged engagement in terror-related activities. It underlined that the reasoning of the lower courts was not sufficient because the reasons for detention were not only based solely on newspaper articles, but these articles did not convincingly constitute evidence that the individuals were implicated in the failed coup attempt. The Court found that

[49] Aydın Yavuz and others § 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, Individual Application to the Constitutional Court of Türkiye, Erdal Tercan, B. No. 2016/15637, 12 April 2018.

the applicants' prosecution and detention did not correspond to any pressing social need and was, therefore, not proportionate even under the conditions of the state of emergency. The TCC concluded that the applicants' right to personal liberty and security and the rights to freedom of expression and freedom of press were infringed.[50] In this decision, the TCC closely incorporated the relevant ECHR's jurisprudence in its ruling.

IV. CONCLUSION

This article has examined one of the most daunting tasks of constitutional courts, which is the challenge in striking a balance between addressing threats to constitutional systems and protecting fundamental rights during public emergencies, using Turkey as a case study. Constitutional courts tasked with realizing the supremacy of the constitution and safeguarding constitutional order have a delicate and crucial function in extraordinary times in fulfilling this function. They discharge their rights-protection duties in an extraordinary time when the executive branch enjoys widely extended prerogatives under emergency provisions and may be tempted to go beyond exigencies of the situation in dealing with threats that brought about a public emergency. In extraordinary times, constitutional courts act as a bulwark of rights and liberties and are expected to be more attentive against encroachments of the government.

During emergencies, courts have a limited and circumscribed power in reviewing the acts and activities of the executive power. It is certainly beyond the power of the courts to remove the threat to the constitutional system as the executive and the legislative powers are tasked with addressing this problem. The role of the courts in such process is to ensure that the state authorities act within constitutional and statutory boundaries.

Even though the executive has the necessary expertise to assess the threats to the state and the means to eradicate them, this does not mean that it has unlimited powers because it must act within constitutional boundaries. Within

[50] Mehmet Hasan Altan, § 158, 242, Şahin Alpay, § 111, 147.

this perspective, the role of the constitutional or supreme courts is to ensure that the executive fights the threats by adopting measures within the framework of the law. These measures must be necessary in a democracy and proportionate to the aim of eliminating the dangers that caused the state of emergency. A democratic state under a public emergency must be a state governed by the rule of law just as in the normal times.

The TCC went through a challenging time in the state of emergency declared between 2016 to 2018 as it strived to protect basic rights while also respecting the executive's constitutionally granted prerogatives. As we have seen, the TCC came under severe attacks for overturning its precedence that had allowed it to review the emergency decrees, despite an explicit constitutional ban. The question of whether the ban legitimizes executive overreach, potentially leading to unconstitutional behavior and policies, is an important issue that cannot be overlooked. However, the existence of constitutional provisions restricts the avenues the TCC can pursue. It is evident that constitutional courts are also bound by their respective constitutions. They must safeguard constitutional rights by operating within the boundaries of constitutions themselves.

If the constituent power does not grant the judicial review of emergency decrees, constitutional courts should not overstep their competencies, as this could lead to judicial activism under the guise of rights protection. Such a situation could imply the substitution of constitutional provisions with the personal views of judges, no matter how well-intended they might be. Judges are expected to exercise the powers defined in the provisions of the constitution. The Turkish Constitution is very clear in this respect as Article 6 stipulates, "No person or organ shall exercise any state authority that does not emanate from the Constitution." From this perspective, the TCC's deferential interpretation regarding the constitutional review of emergency decrees appears to be in tandem with the constitutional requirement. Of course, it is preferable that the executive action should always be subject to restraints including judicial review and parliamentary approval. However, if the constituent power does not endow the court with such power, it would be unfair to blame

the TCC for all problems created by a state of emergency. It should be kept in mind that the Court continued to examine individual applications in the state of emergency period and delivered judgments citing violations arising from the application of the emergency measures.

BIBLIOGRAPHY

Bali, Asli. "Courts and Constitutional Transitions: Lessons from the Turkish Case." *International Journal of Constitutional Law* 11, no.3 (2013): 666-701. doi.org/10.1093/icon/mot025.

Belge, Ceren. "Friends of the Court: The Republican Alliance and Selective Activism of the Constitutional Court of Turkey." *Law and Society Review* 40, no. 3 (2006):653-692. doi.org/10.1111/j.1540-5893.2006.00276.x.

"*Bireysel Başvuru İstatistikleri* [Individual Applications Statistics]: Accessed on 25 March 2022. https://www.anayasa.gov.tr/media/7946/bb_2022-1_tr.pdf. (23/9/2012- 31/3/2022/1).

Castillo-Ortiz, Pablo. "The Illiberal Abuse of Constitutional Courts in Europe." *European Constitutional Law Review* 15, no. 1 (2019):48-72. doi.org/10.1017/S1574019619000026.

Cole, David. "The Poverty of Posner's Pragmatism: Balancing Away Liberty After 9/11." *Stanford Law Review* 59, no. 6 (2007): 1735-1751.

Cole, David. "Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis." *Michigan Law Review* 101, no. 8 (2003): 2565- 2695. doi:10.2307/3595389.

Constitution of the Republic of Turkiye, Article 119, Law No 2709 of 1982. Accessed 7 August 2022. https://global.tbmm.gov.tr/docs/constitution_en.pdf.

Constitution of the Republic of Turkiye, Article 15, Law No 2709 of 1982. Accessed 7 August 2022. https://global.tbmm.gov.tr/docs/constitution_en.pdf.

Constitution of the Republic of Turkiye, Article 148, Law No 2709 of 1982, accessed 7 August 2022. https://global.tbmm.gov.tr/docs/constitution_en.pdf.

Constitution of the Republic of Turkiye, Article 90, Law No 2709 of 1982. Accessed 7 August 2022. https://global.tbmm.gov.tr/docs/constitution_en.pdf.

Decision of the European Court of Human Rights, Sahin Alpay v. Turkey, App. No 16538/17, 20 March 2018.

Decision of the European Court of Human Rights, *Mehmet Hasan Altan v. Turkey*, App. no. 13237/17, 20 March 2018.

Decision of the European Court of Human Rights, Çatal *v. Turkey*, ECtHR, App. No. 2873/17, 07 March 2017.

Decision of the European Court of Human Rights, *Mercan v. Turkey*, App. No. 56511/16, 17 November 2016.

Decision of the European Court of Human Rights, *Zihni v. Turkey,* App. No. 59061/16, 08 December 2016.

Decision of the European Court of Human Rights, *A and others v. the United Kingdom*, App. no. 3455/05, 19 February 2009.

Decision of the European Court of Human Rights, *Lawless v. Ireland* (3), App. no. 332/57, 01 July1961.

Decree No 667. Accessed on 12 August 2022. https://www.resmigazete.gov.tr/eskiler/2016/07/20160723-8.htm.

Decree No 672. Accessed on 12 August 2022. https://www.resmigazete.gov.tr/eskiler/2016/09/20160901M1-1.htm.

Göztepe, Ece. "The Permanency of the State of Emergency in Turkey: The Rise of a Constituent Power or Only a New Quality of the State?" *Z Politikwiss* 28, no. 4 (2018): 521-534. doi.org/10.1007/s41358-018-0161-0.

Gross, Oren. "Constitutions and Emergency Regimes." In *Comparative Constitutional Law,* edited by Tom Ginsburg and Rosalind Dixon, 334-355. Cheltenham: Edward Elgar, 2011. doi.org/10.4337/9780857931214.00027.

Gross, Oren. "Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?" *Yale Law Journal* 112, no. 6, (2003): 1011-1134. doi. 10.2139/ssrn.370800.

Gross, Oren. "Once More unto the Breach: The Systemic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies." *The Yale Journal of International Law* 23 (1998): 437-501. http://hdl.handle.net/20.500.13051/6386.

Hazama, Yasushi. "Hegemonic Preservation or Horizontal Accountability." *International Political Science Review* 33, no. 4 (2012): 421-440. doi.org/10.1177/0192512111414132.

Individual Application to the Constitutional Court of Türkiye, *Erdal Tercan,* B. No. 2016/15637 (Constitutional Court of the Republic of Turkiye, 12 April 2018).

Individual Application to the Constitutional Court of Türkiye, *Aydın Yavuz and others.* B. No. 2016/22169 (Constitutional Court of the Republic of Turkiye, 20 June 2017).

Individual Application to the Constitutional Court of Türkiye, *Hacı Osman Kaya*, B. No. 2016/41934 (Constitutional Court of the Republic of Turkiye, 16 February 2017).

Individual Application to Constitutional Court of the Republic of Turkiye, *Erdem Gül and Can Dündar,* B. No: 2015/15867 (Constitutional Court of the Republic of Turkiye, 25 February 2016).

Individual Application to Constitutional Court of the Republic of Turkiye, *YouTube LLC Corporation Service Company and Others*, B. No. 2014/4705 (Constitutional Court of the Republic of Turkiye, 29 May 2014).

Jonsson Cornell, Anna and Janne Salminen. "Emergency Laws in Comparative Constitutional Law – The Case of Sweden and Finland." *German Law Journal,* 19, no.2 (2018): 219-249. doi.org/10.1017/S2071832200022677.

Judicial Review of Constitutional Court Law, Decision of Constitutional Court, E. 2016/166, K. 2016/159 (The Constitutional Court of the Republic of Türkiye, 12 October 2016).

Judicial Review of Constitutional Court, Decision of Constitutional Court, E.2018/74, K.2019/92 (The Constitutional Court of the Republic of Türkiye 24 December 2019).

Judicial Review of Constitutional Court, Decision of Constitutional Court E.2018/90, K.2019/85 (The Constitutional Court of the Republic of Türkiye 14 November 2019).

Judicial Review of Constitutional Court Law, Decision of Constitutional Court, E.2016/205, K.2019/63 (The Constitutional Court of the Republic of Türkiye, 24 July 2019).

Judicial Review of Constitutional Court Law, Decision of Constitutional Court E.2018/73, K.2019/65 (The Constitutional Court of the Republic of Türkiye 24 July 2019).

Judicial Review of Constitutional Court Law, Decision of Constitutional Court E.2003/28, K.2003/42 (The Constitutional Court of the Republic of Türkiye 22 May 2003).

Judicial Review of Constitutional Court Law, Decision of Constitutional Court E. 1990/25, K. 1991/1 (The Constitutional Court of the Republic of Türkiye 10 January 1991).

Judicial Review of Constitutional Court Law, Decision of Constitutional Court, E. 1991/6, K. 1991/20 (The Constitutional Court of the Republic of Türkiye 10 January 1991).

Köker, Levent. "Turkey's Political-Constitutional Crisis: An Assessment of the Role of the Constitutional Court." *Constellations* 17, no. 2 (2010): 328-344. doi.org/10.1111/j.1467-8675.2010.00594.x.

Mariniello, Triestino. "Prolonged Emergency and Derogation of Human Rights: Why the European Court Should Raise Its Immunity System." *German Law Journal* 20, no.1 (2019): 46-71. doi.org/10.1017/glj.2019.3.

Özbudun, Ergun. "Political Origins of the Turkish Constitutional Court and the Problem of Democratic Legitimacy." *European Public Law* 12, no.2 (2006): 213-223. doi.org/10.54648/eurO2006014.

Posner, Richard. *Not a Suicide Pact: The Constitution in a Time of National Emergency*. Oxford: Oxford University Press, 2006.

Russell A. Miller. "Balancing security and Liberty in Germany." *Journal of National Security Law and Policy* 4 (2010): 369-396.

"The Convention for the Protection of Human Rights and Fundamental Freedoms." Opened for signature 4 November 1950, Article 15. https://www.echr.coe.int/documents/convention_eng.pdf.

Tushnet, Mark. "Defending Korematsu? Reflections on Civil Liberties in Wartime." *Wisconsin Law Review* 2003, no.2 (2003): 273307. dx.doi.org/10.2139/ssrn.368323.

Uitz, Renata. "Courts and the Expansion of Executive Power: Making the Constitution Matter." In *The Evolution of the Separation of Powers: Between the Global North and the Global South*, edited by David Bilchitz and David Landau, 85-113. Cheltenham: Edward Elgar, 2018. doi.org/10.4337/9781785369773.00010.

Vauchez, Stephanie Hennette. "The State of Emergency in France: Days without End." *European Constitutional Law Review* 14, no. 4 (2018): 700-720. doi.org/10.1017/S1574019618000391.

Yoo, John C. "Judicial Review and the War on Terrorism." *George Washington Law Review* 72 (2003): 427-451. dx.doi.org/10.2139/ssrn.461721.