



Emergency Powers, Constitutional (Self-)Restraint and Judicial Politics: the Turkish Constitutional Court During the COVID-19 Pandemic

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Abstract

This paper investigates the Turkish Constitutional Court (TCC)'s treatment of legal challenges brought against Turkey's legal responses to the COVID-19 pandemic. Drawing on a detailed examination of the TCC's institutional features, political origins and jurisprudential trajectory, and taking three politically salient judgments of the TCC concerning Turkey's executive-dominated pandemic control as the point of departure, the paper argues that the TCC chose to exercise judicial restraint both in protecting fundamental rights and reviewing pandemic policies of the executive. It also argues that the TCC's judicial restraint during the pandemic was simply the re-manifestation of its 'play-it-safe' strategy — a judicial stance the TCC willingly adopted in the aftermath of the 2016 attempted coup despite possessing strong constitutional powers of judicial review, and its established attitude of assertive scrutiny in the past. From a more theoretical perspective, the analysis also explores how the passive role to which the TCC is consigned in an increasingly authoritarian regime since the 2016 failed coup relates to the global phenomenon of judicialization of authoritarian politics.

Keywords COVID pandemic · Emergency · Judicial politics · Turkey · Constitutional court

1 Introduction: Turkey's Executive-Dominated Response to COVID-19

The COVID-19 pandemic has seen a renewed power concentration in the executive. 'Crises' or 'emergencies' are conventionally believed to provide a rather lax authorization to the executive to surpass the other two branches, and the COVID-19

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pandemic was no exception. Over the past 2 years, the pandemic responses in many countries saw executive-led state dominance, with legislatures willingly taking a back seat by delegating significant authority to executive officials enabling them to take drastic and coercive measures in order to combat the spread of the virus encompassing such measures as travel bans, closures schools and other public places, and more stringently lockdowns and curfews. Courts across the world have likewise exercised greater restraint and deference than usual in their substantive reviews of the COVID-19 measures.

Turkey's pandemic response followed a similar thread. Turkey did not declare a formal state of emergency under the Turkish Constitution — as revised in the 2017 constitutional amendments, which enabled the President to declare a state of emergency on numerous occasions, including during the 'outbreak of dangerous epidemic diseases'.¹ Instead, against the backdrop of Turkey's new presidential system that came into force in 2018 following the approval of the 2017 constitutional amendments in a referendum,² the Turkish state response to COVID-19 has heavily been based on executive administrative discretion and largely implemented by executive decisions and circulars (both presidential and ministerial). To provide legal justification for these measures, the Turkish executive (President and his administration) relied on two pre-existing old piece of legislations, namely the Law on General Protection of Public Health (LPH)³ and the Law on Provincial Administration (LPA).⁴ While these two legislations cover a wide number of public health-related issues such as diseases, epidemics and emergency contingency plans and grant broad-ranging powers to Turkish state and local authorities, they do not however provide clear basis for several of the wide-ranging measures Turkey resorted to combat the pandemic, *inter alia*, lockdowns and curfews. As a result, legal basis of Turkey's pandemic measures appeared to be rather insufficient, but the Turkish executive saw no need to put more teeth on this deficient framework.

Whilst the Turkish Parliament remained fully functional over the past 2 years, it played almost no oversight role over the drastic measures taken by the Turkish executive. Noteworthy here is that Turkey's new presidential system severely curbed the Parliament's legislative and oversight functions. While the opposition parties have tried to initiate all existing three parliamentary oversight mechanisms, namely, the right to put written questions, parliamentary inquiry, parliamentary investigations,⁵ President Erdogan's Justice and Development Party (AKP) together with its small coalition partner, the Nationalist Movement Party (MHP) which holds the

¹ Article 119 of the Turkish Constitution, as amended on 16 April 2017, Act No 6771. Accessed 9 June 2022: https://global.tbmm.gov.tr/docs/constitution_en.pdf.

² For a detailed analysis on the proposed amendments, see: Venice Commission, Opinion No 875/2017 on the Amendments to the Constitution Adopted by the Grand National Assembly on 21 January 2017 and to be submitted to a National Referendum on 16 April 2017, CDL-AD(2017)005, 13 March 2017.

³ Law No 1593 on General Protection of Public Health, 24 April 1930.

⁴ Law No 5442 on Provincial Administrations, 10 June 1949.

⁵ See Article 98 of the Turkish Constitution.

parliamentary majority was able to effectively block them.⁶ One notable exception to this parliamentary non-involvement was the adoption of an early release legislation in April 2020 which released up to 90,000 prisoners, around one-third of Turkey's prison population (see *infra* Sect. 3.2.).⁷

Similarly, Turkish courts have simply refused to function as a forum of legal accountability for both pandemic policies implemented by Turkey's strong executive and their vast human rights implications by displaying notable signs of judicial restraint and enhanced deference. This paper investigates the Turkish Constitutional Court (TCC)'s treatment of legal challenges brought against Turkey's legal responses to the COVID-19 pandemic. Drawing on an examination of the TCC's institutional features, political origins and jurisprudential trajectory (Sect. 2), and taking three politically salient judgments of the TCC concerning Turkey's executive-dominated pandemic control as the point of departure (Sect. 3), the paper analyses these decisions against the backdrop of the TCC's 'play-it-safe' strategy it adopted in 2016-post-coup-period and argues that the TCC's judicial restraint approach during the COVID-19 pandemic was merely the re-manifestation of this newly minted strategy. From a more theoretical perspective, the article explores how the passive role to which the TCC is consigned in an increasingly authoritarian regime since the 2016 attempted coup relates to the global phenomenon of judicialization of authoritarian politics (Sect. 4).

2 Turkey's Post-Coup Emergency and the Position of the Turkish Constitutional Court

2.1 The Turkish Constitutional Court in Political Context

Turkey introduced the constitutional court as the authentic Supreme Court — the highest court in its constitutional system — for the first time in the 1961 Constitution. The 1961 Constitution was adopted by a military regime after the 1960 military coup, but it counter-intuitively introduced a liberal framework for the protection of civil rights advocating pluralistic democracy, separation of powers and a system of checks and balances.⁸ Borrowing from Ginsburg and Moustafa,⁹ one wonders why such a military regime establishes a constitutional court. A rather naive explanation

⁶ The official statistics, for example, clearly show that the Turkish Government glossed over the overwhelming majority of the opposition lawmakers' nearly 600 pandemic-related written questions since 2020. Moreover, over 80 motions for parliamentary inquiry requests have not been addressed at all in the past 2 years. The final mechanism alive, parliamentary investigation is rather impossible to be triggered due to the required three-fifth majority. See the Turkish Grand National Assembly website, under 'Denetim' (Parliamentary Scrutiny). Accessed 9 June 2022: https://www.tbmm.gov.tr/develop/owa/tbmm_internet.anasayfa.

⁷ Law No 7242 on the Execution of Penalty and other Security measures amending certain legislations, 15 May 2020. Accessed 9 June 2022: <https://www.resmigazete.gov.tr/eskiler/2020/04/20200415-16.htm>.

⁸ Szyliowicz 1963.

⁹ Ginsburg and Moustafa (eds), 2008 and Ginsburg, 2012,722.

could be that the TCC was expected to be the guardian of this liberal framework adopted by the 1961 Constitution. The role played by the TCC in Turkish politics, however, ‘turned out to be completely different from its formal calling as guardian of liberal values’.¹⁰ Since its creation, the TCC emerged as a ‘tutor’ institution empowered to safeguard the strictly militant, secular and nationalist legacy of the Turkish state with its strongest bastions in the military, judiciary and bureaucracy.¹¹ It was vested with far-reaching powers and competences with substantial institutional independence, allowing it to intervene in many political matters.¹² In actual practice, save for a handful of exceptions,¹³ it exercised these powers in the service of the Kemalist founding ideology of the Turkish republic and redefined itself into a guardian of this particular hegemony aligned with the interests of the military-state elites¹⁴ — a phenomenon described in the literature as ‘elite hegemonic preservation through juristocracy’.¹⁵ The succeeding regimes that took office after the 1971 military memorandum and the 1980 military coup refrained from altering the powers of the TCC, rather co-opted it to maintain their grip over Turkish politics.¹⁶ The TCC has repeatedly outlawed dozens of political parties either based on alleged threats to national unity or based on alleged anti-secular activities, thus assertively setting the bounds of permissible political participation. It has also hindered political reform for decades based on overly politicized grounds.¹⁷ In short, the TCC provides perhaps the clearest example of how courts are deployed to “contain majoritarian institutions”¹⁸ by means of “effectuating the forms of political crackdown that have retarded democratic consolidation”.¹⁹ And following the AKP’s rise in the early 2000s, the Court emerged as a formidable counter-majoritarian force to challenge the AKP’s political domination with its institutional centrality.²⁰

Especially from 2010 onwards, the AKP engaged in several strategies to contain the TCC’s judicial activism starting with making formal changes to the legal

¹⁰ Qoraboyev and Turkut 2017, 47.

¹¹ Shambayati 2008a and Kuru 2009.

¹² The TCC has the following competencies: (1) constitutional review of legislative acts, (2) dissolution and/or financial control of political parties, (3) the capacity of Supreme Criminal Tribunal, (4) control of parliamentary immunity and deprivation of the status of MP and (5) individual applications (since September 2012).

¹³ Especially in 1970s, the TCC issued rulings antagonistic to the military. The Court found the law establishing military courts unconstitutional in 1972 (TCC, Constitutionality Review, Plenary Assembly, Doc No 1971/31, Dec No 1972/05, 14 October 1972), annulled the law establishing state security courts that were created to try crimes against state in 1975 (TCC, Constitutionality Review, Doc No 1974/35, Dec No 1975/126, 11 October 1975) and struck down a constitutional amendment aiming to exempt disciplinary measures and decisions about judges from judicial review (TCC, Constitutionality Review, Doc No 1977/82, Dec No 1977/117, 6 September 1977).

¹⁴ Özbudun 2015. See also, Brown and Waller 2016, 828.

¹⁵ Hirschl 2000.

¹⁶ Qoraboyev and Turkut 2017, 48.

¹⁷ Belge strikingly notes that between 1962 and 1999, the TCC used its veto powers to strike down more than half of the legislations referred to it. See, Belge 2006, 653–654.

¹⁸ Moustafa 2014, 286.

¹⁹ Bâli 2013, 666–668.

²⁰ Shambayati and Sütçü 2012.

framework. Following a set of conflicts that allowed the TCC again to increasingly intervene in domestic politics,²¹ the AKP proposed a comprehensive reform package in 2010.²² In the 2010 constitutional amendments, judicial appointments to the TCC were highly centralized, i.e. strengthening the role of the political branch.²³ In the years that followed, the AKP started to dominate the TCC through controversial appointments.²⁴ Numerous commentators have given increasingly stark warnings that the ensuing appointments are overtly political and that the 2010 reforms have produced drastic changes in the TCC's ideological orientation and practice, exposed it to more political influence and substantially undermined its ability to serve as an effective check on political branches.²⁵ For example, the findings of a recent empirical study analysing whether the 2010 constitutional amendments have generated any ideological changes for TCC judges show 'a significant break ... in the ideological position of the Court and detect a conservative ideological shift following the reforms that is increasing in magnitude over time.'²⁶

Over time, the AKP moved beyond these formal changes to more acute limitations that had a direct effect on how the TCC would approach legal challenges. In response to many decisions that go against the regime interests of the ruling party, the AKP initiated direct attacks and public campaigns. In April 2014, for example, when the TCC annulled several provisions of the Law No. 6524 which introduced

²¹ In particular, one TCC decision in 2007 (on the election of the Turkish President) and then a pair of related decisions in 2008 (on the AKP's closure and the 'headscarf' ban). For an in-depth analysis on these decisions, see: Bâli 2013.

²² The package included amendments that empower civilian courts, limit the jurisdiction of military courts, and expand a number of constitutional rights, including privacy rights and gender equality.

²³ Before the 2010 constitutional amendment, all eleven regular and four alternate judges were selected by the President from among the candidates nominated by the Turkish (civilian and military) high courts namely the Turkish Court of Cassation, the Council of State, the Military Court of Cassation and the Supreme Military Administrative Court. The 2010 constitutional amendments produced three outcomes: First, the constitutional amendment increased the number of seats in the TCC from eleven permanent with four-substitute members to seventeen permanent with no substitutes. Second, it strengthened the role of the political branch in judicial appointment procedures. More particularly, the proportion of the TCC members selected from within the judicial system was reduced, while the President would select fourteen out of the seventeen members drawn from a pool of candidates from high courts such as the Turkish Court of Cassation and the Turkish Council of State and other institutions such as the Turkish Council of Higher Education. The Turkish Parliament would appoint the remaining three members — a role accorded to it for the first time in the TCC judges' appointments. Third, while the amendment retained the retirement age of 65 for TCC judges, it imposed a non-renewable term limit of 12 years.

²⁴ Apart from one member (Serdar Ozguldur), all members currently serving on the TCC have been directly appointed by presidents (President Gul and Erdogan who are both founders of the ruling AKP) or by the Parliament under the AKP control. President Erdogan's most recent overtly political appointments to the TCC in 2019 (Yıldız Seferinoğlu and Selahaddin Menteş who both previously served as Deputy Minister of Justice in the AKP Government) received strong criticism. See, 'Erdoğan Appoints Former AKP MP to Constitutional Court' *Bianet*, (Istanbul, 25 January 2019). Accessed 9 June 2022: <https://m.bianet.org/english/politics/204830-erdogan-appoints-former-akp-mp-to-constitutional-court>.

²⁵ International Commission of Jurists, 'Turkey: The Judicial System in Peril', 2016, 3. Accessed 9 June 2022: <https://www.icj.org/wp-content/uploads/2016/07/Turkey-Judiciary-in-Peril-Publications-Reports-Fact-Findings-Mission-Reports-2016-ENG.pdf>

²⁶ Varol et al. 2017.

retrogressive amendments to laws on the Turkish judiciary,²⁷ led by the then Prime Minister Erdogan, the AKP Government strongly and openly attacked the decision and invited the members of the TCC “to take off their robes and engage in politics under the roof of political parties”.²⁸ Ultimately, this reached a point, as confirmed by the then TCC president, where the TCC started facing an unprecedented and systematic pressure by the Government concerning the cases pending before it.²⁹

In fact, the effects of the developments since 2010 have become more visible in more recent years. As the process wore on, the AKP increased its dominance on the TCC — and on the judiciary in general — creating what the Council of Europe (CoE) Commissioner for Human Rights called, ‘a general climate of fear within the Turkish judiciary’.³⁰ While the 2017 constitutional amendments introduced only minor changes such as reducing the number of the TCC judges from 17 to 15, and although the competences of the TCC largely remain the same, a closer examination on the modifications suggests that they run the serious risk of having indirect consequences for the Court’s institutional independence.³¹ It should be no surprise that the TCC retreated into subservience during the post-coup period. For optimistic observers, especially for those committed to the daunting task of bettering the state of human rights in Turkey, the TCC was expected to be a major obstacle to the AKP’s far-reaching emergency policies and its drift toward authoritarianism.³² But the reality turned out to be the almost complete opposite. The following section will now turn to judicial trajectory of the TCC in post-coup period.

2.2 The 2016 Attempted Coup as a Constitutional Rupture

On 15 July 2016, an attempted coup took place in Turkey at a time when military coups appeared to be a matter of the past — thus sending a powerful shockwave through Turkish society. By their nature, states of emergency make the fundamental rules of political life uncertain. The 15 July attempted coup was also no exception. As the coup attempt unfolded into the night, came along a period of constitutional rupture, marked by ‘uncertainty over the role and norms of a state’s constitutional and legal apparatus’.³³ Whilst it is true in its immediate aftermath, Turkey adopted a ‘shotgun’ approach to human rights curtailment, which involved severe repression of virtually all dissent; the 15 July attempted coup was just ‘not’ another emergency.

²⁷ TCC, Constitutionality Review, Doc No 2014/57, Dec No 2014/81, 14 April 2014.

²⁸ ‘Turkey’s Erdogan targets Twitter taxes, blasts constitutional court’ *Deutsche Welle*, (Bonn, 12 April 2014). Accessed 9 June 2022: <https://www.dw.com/en/turkeys-erdogan-targets-twitter-taxes-blasts-constitutional-court/a-17563500>

²⁹ Özbudun 2015, 4.

³⁰ CoE Commissioner for Human Rights, Third Party Intervention, CommDH(2018)30, 20 December 2018, 36.

³¹ The Venice Commission strongly criticized the vast appointment powers of the President in the new system (12 members out of 15 of the TCC), which ‘would weaken an already inadequate system of judicial oversight of the executive’. See, Venice Commission Opinion No 875/2017 supra note 2 para. 129.

³² Özbudun 2015, 4.

³³ Brown and Waller 2016, 820.

It was argued that the 15 July attempted coup unleashed two different forces: ‘an assertive *raison d’état* that seeks to re-establish unity among state apparatuses and to enhance state power from above’ and, ‘the popular energies of resistance that have countered the coup attempt from below’.³⁴

The AKP, assuming leadership over both forces, repurposed the 15 July attempted coup into a project of social and political re-engineering using the emergency setting as a veil of legal legitimacy. The Turkish post-coup emergency has thus facilitated an array of reforms that led to a dramatic constitutional transformation marked by increasing state repression in the country. President Erdogan and his party, relying on ‘constituent power’ and through the capricious use of vast emergency powers, implemented highly elaborate and controversial policies to centralize political authority, using the state of emergency as an ideal tool to transform, rather than preserve, the underlying legal and constitutional order.³⁵ This includes the establishment of an executive presidential system *à la Turca* with sweeping powers in a referendum during the protracted emergency regime under the thin and all-too-transparent veneer of constitutional legitimacy³⁶ — the implementation of which since then perpetuated the executive dominance and eradicated the key checks and balances³⁷ and which paved the way for a process of what some scholars have defined as ‘constitutional capture’,³⁸ authoritarian degeneration³⁹ and/or ‘authoritarian constitutionalism’.⁴⁰ This has rightly prompted many observers and stakeholders to rightly argue that Turkey’s contemporary political regime is authoritarian, not democratic.⁴¹

In this backdrop, the TCC rode perhaps one of the most dramatic ‘constitutional roller coasters’⁴² of its recent history. In the new political and constitutional environment in the country, the TCC demonstrated increasingly higher levels of deference to the ruling party in order to avoid a major conflict that the constitutional judges were quite sure they would never win. Although possessing strong powers

³⁴ Bargu 2018, 25.

³⁵ As Ferejohn and Pasquino (2004, 210) famously argue, if constitutional emergency powers undercut the existing legal order or the constitution itself, such an exercise is ‘no longer properly an exercise of an emergency power’ at all but instead amounts to ‘an exercise of constituent power’.

³⁶ A substantial number of constitutions contain specific provision limiting or precluding constitutional amendment during a state of emergency — though there is no formal rule in international law that completely prevents the amendment of the constitution during such situations. These countries include Albania, Estonia, Georgia, Lithuania, Moldova, Montenegro, Poland, Portugal, Romania, Serbia, Spain, Ukraine. See Venice Commission, ‘Compilation of Venice Commission Opinion and Reports on States of Emergency’ CDL-PI(2020)003, 16 April 2020, 25.

³⁷ European Commission, ‘Turkey 2019 EU Progress Report’ (Communication) COM 260 final (2019) 29 May 2019, 5.

³⁸ Müller 2014.

³⁹ Gregorio 2019.

⁴⁰ Isiksel 2013.

⁴¹ This serious ‘rule of law backsliding’ led the Freedom House to rate Turkey ‘not free’ for the first time in its 2018 report. See, Freedom House, ‘Freedom in the World 2018 – Democracy in Crisis (2018)’. Accessed 9 June 2022: https://freedomhouse.org/sites/default/files/2020-02/FH_FIW_Report_2018_Final.pdf. See also Caliskan 2018 and Esen and Gumuscu 2019.

⁴² Brown and Waller 2016, 819.

of judicial review, and despite the ‘high-energy role’ that it once played, the TCC applied a play-it-safe strategy in the most controversial political cases.

2.3 Emergency Powers (Now) Lie Beyond Judicial Cognizance: TCC’s Judicial Abstention Politics

It is well known that judges around the world are acutely aware of their limited ability to act as a meaningful constraint on the executive especially in such rupture settings (likely to be followed by chaotic regime transition as in the case of Turkey).⁴³ And even more so when they are confronted with cases that impinge on the core interests of the regime. Evidence from dozens of authoritarian regimes suggests that judges are typically particularly cognizant of their inability to challenge core regime interests for threat of reprisal.⁴⁴ Core interests may vary from one regime to another, as noted above; in the Turkish post-coup case, emergency powers provided main legal mechanisms for the executive to transform the legal order and remove checks on their power. In many constitutional challenges in the post-coup period, the TCC abstained from reviewing controversial policies brought up by emergency decrees at the expense of making radical departures from its long established standards. These decisions appear as strategic choices and calculations by the TCC to resist impinging on the new political regime’s needs.

Two ‘constitutionality review’ decisions issued by the TCC in the post-coup period provide stark examples of this newly minted judicial strategy.⁴⁵ In September 2016, the opposition Republican People’s Party (CHP) petitioned the TCC for the annulment of numerous provisions of the earliest post-coup emergency decrees (Decrees Nos. 668 and 669) — arguing in particular that these decrees brought permanent and structural changes to Turkey’s ordinary laws such as restructuring of many public institutions and regulating large swathes of the public space.⁴⁶ Article 148 (1) of the Turkish Constitution in principle prevents the constitutional review of decree emergency decrees: ‘No action shall be brought before the Constitutional Court alleging unconstitutionality as to the form or substance of decrees having the

⁴³ Beširević 2014; Cole 2003; Solomon and Fogelson 2000 and Hendley 1998.

⁴⁴ Urribarri 2011; Moustafa 2007 and Carmen 1973.

⁴⁵ The TCC’s judicial politics in the post-coup period are not only limited to the ‘constitutionality review’ decisions: the individual application mechanism since 2016 has been a similar site of judicial politics where the TCC has often *negotiated* between political pressure and individual justice especially in cases of heightened political significance which resulted in selective justice and undermined the individual application mechanism. Due to space constraints, it is not possible to provide a detailed account here, but one important avoidance technique utilized by the TCC in individual applications in both the post-coup period and during the COVID-19 pandemic (a strict application of the domestic remedies rule) is briefly elaborated in Sect. 3.2.

⁴⁶ Thirty-two provisions (out of a total number of 40) under Decree No. 668 and 105 provisions (out of a total number of 113) under Decree No. 669 possessed the *permanent* character. English translations of the Decrees are available at (accessed 9 June 2022): [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF\(2017\)011-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2017)011-e). For an analysis, see: Akça et al. 2018.

force of law issued during a state of emergency...'⁴⁷ As a *verbatim* approach may likely to jeopardize human rights and constitutional guarantees, the TCC has masterfully created ways to substantially review emergency decrees adopted during the protracted emergency rule in Turkey's predominantly Kurdish southeast (from 1987 to 2002).

In two cases decided in January and July 1991,⁴⁸ the TCC novelly developed a three-pronged test examining *ratione temporis*, *ratione loci* and the *ratione materiae* of the emergency decrees on the basis of the then in force emergency constitutional framework under Article 119–122 of the Turkish Constitution — to decide whether they fall within the scope of its constitutional review powers. Famously, the Court ruled that an emergency decree can only be issued during a time of emergency and on matters necessitated by emergency situations and must be geographically limited to the regions where the state of emergency is declared.⁴⁹ Consequently, the TCC highlighted a decree must meet these requirements in order to be classified as an 'emergency' decree because, as the Court noted — the former — Article 148 of the Turkish Constitution limits the constitutional review of only 'genuine' (or, real) emergency decrees,⁵⁰ and it was eventually for it to rule on the legal classification or status of an emergency decree regardless of how it was characterized by the executive branch. Eventually, in January 1991, the TCC ruled unconstitutional the provisions of Decree No. 425 which amended the 1983 Turkish Law on State of Emergency highlighting that this should have been through 'ordinary' legislation procedures.⁵¹

Similarly, in July 1991, the TCC annulled some controversial provisions granting far-reaching powers to the state of emergency regional governors⁵² under Decree No. 430 on the ground that they failed the *ratione loci* test as their effects extended the emergency region.⁵³ In 2003, in a petition on the unconstitutionality of an emergency decree provision excluding administrative acts of the state of emergency regional governors from the scope of judicial review,⁵⁴ the TCC ruled that

⁴⁷ Article 148 has been slightly amended in the 2017 constitutional amendments in line with the presidential system of government, which abolished both the office of the Prime Minister and the Council of Ministers. In the current version, presidential decrees issued during a state of emergency or in time of war shall not be brought before the Constitutional Court alleging their unconstitutionality as to form or substance.

⁴⁸ TCC, Constitutionality Review, Doc No 1990/25, Dec No 1991/1, 10 January 1991 and TCC, Constitutionality Review, Doc No 1991/6, Dec No 1991/20, 3 July 1991.

⁴⁹ TCC, *ibid*, 3 July 1991.

⁵⁰ TCC decision of 10 January 1991 *supra* note 48.

⁵¹ Decree No. 425 of 1990, in tandem with Decree No. 424, broadened the powers of the state of emergency regional governors authorizing them 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).

⁵² The regional emergency governorships, initially created by the 1983 Turkish Emergency Law, were extensively regulated by emergency decrees. See generally Decree No. 285, 10 July 1987.

⁵³ On broad powers *within* or *outside* the state of emergency region, see Articles 1, 5 and 6 of Decree No. 430, 16 December 1990.

⁵⁴ Many more emergency decrees (i.e. Articles 5 and 7 of Decree No. 413 and Article 8 of Decree No. 430) in this period provided full immunity to the regional governors for all actions taken lacking any mechanism for impartial judicial review.

the constitutional framework regulating emergency powers should not be confined to Article 119–122, rather, all *relevant* provisions under the Turkish Constitution must be taken into account, thus effectively expanding the scope of its precedents.⁵⁵ As a consequence, the TCC annulled the said provision holding that only a ‘law’ may restrict the issuing of an order on suspension of execution of an administrative act in cases of state of emergency in line with Article 125 (6) of the Turkish Constitution.⁵⁶

On 12 October 2016, the TCC did, however, reject the argument that it could review the constitutionality of the Emergency Decrees *in abstracto* under Article 148 of the Turkish Constitution⁵⁷ — thus departing from these established standards. In justifying this departure, the TCC uttered two vague arguments. First, the Court noted that a ‘verbatim’ interpretation of the limited scope of its review concerning emergency decrees under the then into force Article 148 (1) is imperative, because the intention of the Constitution drafter was to place emergency decrees only under (*ex post*) Parliamentary control beyond the scope of constitutional review. In this newly adopted stance of the Court, even if an emergency decree contains provisions repugnant to the Turkish Constitution, it should not be subject to constitutional review.⁵⁸ Second, and relatedly, had the TCC engaged in such review on the substance and content of an emergency decrees (like its previous precedents in 1991 and 2003), this would have violated Articles 6 and 11 of the Turkish Constitution, which cumulatively prohibit state organs from exercising any authority that does not emanate from the supreme law of the land, that is, the Turkish Constitution.

Scholars have criticized these decisions as a ‘self-destruction attempt’.⁵⁹ Similarly, the CHP representatives denounced it as ‘a legal scandal’ noting that ‘what makes a court are its case law and vision in the name of providing judicial security’.⁶⁰ Echoing the CHP’s reaction, it is indeed safe to note that the precondition of judicial review is the doctrine of precedent — outside the guidelines of which judges might have different interpretations in questions of constitutionality that would lead to quite often conflicting judicial responses and standards.⁶¹ Perhaps more importantly, the TCC transitioned away from the requirements imposed by the separation of powers to a rather lax authorization to the executive to surpass the other two branches. Considering at the time of the decision that the parliamentary majority was under the control of the AKP, which repeatedly attempted to bypass

⁵⁵ TCC Constitutionality Review, Doc No. 2003/28, Dec No. 2003/42, 22 May 2003.

⁵⁶ *Ibid* Section VI.

⁵⁷ TCC, Constitutionality Review, Doc No. 2016/166, Dec No. 2016/159, 12 October 2016 and TCC, Constitutionality Review, Doc No. 2016/167, Dec No. 2016/160, 12 October 2016.

⁵⁸ *Ibid*, para. 23.

⁵⁹ Esen 2016.

⁶⁰ ‘Turkish Constitutional Court rejects CHP’s appeal to annul decree laws’ *Hurriyet Daily*, (Istanbul, 12 October 2016). Accessed 9 June 2022: <https://www.hurriyetdailynews.com/turkish-constitutional-court-rejects-chps-appeal-to-annul-decree-laws-104889>

⁶¹ Patrono 2000, 402.

parliamentary control over the post-coup emergency decrees,⁶² this strategic jurisdictional change revealed that the particular political persuasion of the TCC was now too closely tied to the executive. As such, this stark turn eroded formal limits on executive powers and represented a blank check for it to go uninterrupted in moving the country toward authoritarianism under emergency rule.⁶³ Even after the lapse of emergency rule, the TCC's unwillingness to confront the regime needs remains unchanged. In a number of constitutionality review decisions after the post-coup emergency rule was lifted, the TCC legally validated several controversial provisions originally adopted by emergency decrees, including provisions authorizing 14-day detention periods and granting 'full immunity' to government officials.⁶⁴

3 The COVID-19 Pandemic and the Turkish Constitutional Court

With the new presidential system firmly in place in Turkey at the breakdown of the COVID-19 pandemic, the TCC was already contained within a profoundly illiberal and increasingly authoritarian political system. Against the backdrop of Turkey's executive-dominated pandemic responses, the TCC retreated more into subservience. While the TCC remained fully functioning—albeit remotely⁶⁵—and received scores of individual applications challenging either the legality of executive action or the constitutionality of legislations, it largely turned a blind eye and issued decisions in a handful of cases. Using such keywords as 'COVID-19', 'pandemic' or 'coronavirus', a detailed search tracks the total number of 13 decisions in the TCC's official database (at the time of writing) — with ten being individual applications and two abstract norm review complaints.⁶⁶ In what follows, the present section will zoom in on one individual application (*Senih Ozay*) challenging Turkey's (age and

⁶² In the post-coup period, there have been serious concerns as to whether the procedure for parliamentary control over emergency decrees under Article 128 of the Rules of Procedure of the Grand National Assembly of Turkey ('decrees should be submitted to the Parliament immediately within 30 days at the latest after their adoption') is strictly followed. Writing in December 2016, the Venice Commission noted that due to the delays, the *ex post facto* parliamentary control lost its effectiveness. See, Venice Commission Opinion No. 875/2017 supra note 2 12–14 and 17–18. Concerning the Turkish Government's attempt to bypass parliamentary control over the emergency decrees, see also Akça et al. 2018, 108–13.

⁶³ In this decision, the TCC also indirectly paved the way for the legal vacuum that is likely to be created by presidential (emergency) decrees in the new system. Under Article 119 of the Turkish Constitution as amended in 2017, the President has the sole authority to declare state of emergency and rule by presidential emergency decrees not confined by a specific area. By this 'self-destruction attempt', the TCC largely abdicated its own ability and competence to check presidential emergency decrees in the future in favour of almost limitless presidential power in times of emergency.

⁶⁴ TCC Constitutionality Review, Doc No. 2016/205, Dec No. 2019/63, 24 July 2019, paras. 130–137 and TCC Constitutionality Review, Doc No. 2016/205, Dec No. 2019/63, 24 July 2019, paras. 78–79.

⁶⁵ During the pandemic, the judicial deadlines for the TCC proceedings were extended, and judicial (plenary and section) sessions have proceeded remotely. See, the Venice Commission, Observatory on Emergency Situations, 'Turkey'. Accessed 9 June 2022: <https://www.venice.coe.int/files/EmergencyPowersObservatory/T14-E.htm>

⁶⁶ TCC's official database is available at (accessed 9 June 2022): <https://kararlarbilgibankasi.anayasa.gov.tr>

time-targeted) lockdowns⁶⁷ and two abstract norm complaints challenging the constitutional propriety of the early release legislation adopted in April 2020.⁶⁸ This is mainly because in all 8 of the remaining individual applications that raise different issues under the right to liberty (as protected under Article 19 of the Turkish Constitution) as well as the right to education in prison (Article 42 of the Turkish Constitution) and the right to protect improve his/her corporeal and spiritual existence (Article 17 of the Turkish Constitution), the COVID-19 has merely been cited in the ‘Facts’ section of the judgments — thus have no particular relevance for our analysis. In another individual application which is linked to a COVID-19 measure, the TCC ruled an individual’s right to fair trial (the right to have reasoned judgment) was violated when a Turkish court upheld a fine imposed on him for breaking the curfew rules without giving a reasoned judgment.⁶⁹ This decision, however, did not constrain the executive to revise/update the fine regime, rather merely instructed to give reasoned judgments. It thus does not merit any further substantial discussion. The next section will now delve into these three decisions.

3.1 The Senih Ozay Individual Application

Originally brought by the 2010 constitutional referendum, Turkey introduced the individual complaint procedure to the TCC in September 2012 for alleged rights violations at the intersection of the ECHR and the Turkish Constitution.⁷⁰ In these applications, the constitutional judges pinpoint alleged violations of human rights against the actions of the executive and other public bodies that use public power and provide victims with effective remedies. The individual complaint mechanism got off to a good start in the country. The TCC had issued a number of landmark freedom-serving decisions when the individual application mechanism started to be fully implemented. In December 2013, in a precedent setting judgment in *Mustafa Balbay*, the Court found the pre-trial detention of a journalist and a member of the Turkish Parliament to have violated his right to representation.⁷¹ In April and May 2014, in two highly praised judgments, the TCC held that the government ban on access to Twitter⁷² and Youtube⁷³ violated free speech. These judgments, among many others, in highly critical cases, which raised urgent matters of human rights,⁷⁴

⁶⁷ TCC, *Senih Ozay*, Individual App No 2020/13969, 9 June 2020.

⁶⁸ TCC, Constitutionality Review, Doc No. 2020/44, Dec No. 2020/41 17 July 2020 (decision on the legislation’s unconstitutionality with regard to its form) and Constitutionality Review, Doc No. 2020/53, Dec No. 2021/55 14 July 2021 (decision on the legislation’s unconstitutionality with regard to its substance).

⁶⁹ TCC, *Necla Yasar*, Individual App No. 2020/35444, 14 September 2021.

⁷⁰ See TCC, *Onurhan Solmaz*, Individual App No. 2012/1049, 26 March 2013.

⁷¹ TCC, *Mustafa Ali Balbay*, Individual App No. 2012/1272, 4 December 2013.

⁷² TCC, *Yaman Akdeniz and Others*, Individual App No. 2014/3986, 2 April 2014.

⁷³ TCC, *Youtube LLC Corporation Company and Others*, Individual App No. 2014/4705, 29 May 2014.

⁷⁴ These include headscarf bans for attorneys, patriarchal surname regulations, freedom of expression issues and particularly journalism, and environmental protection. See TCC, *Tuğba Arslan*, Individual App No. 2014/256, 25 June 2014; *Sevim Akat Eşki*, Individual App No. 2013/2187, 19 December 2013; *Mehmet Kurt*, Individual App No. 2013/2552, 25 February 2016; *Erdem Gül ve Can Dündar*, Individual

increased the Court's popularity and garnered much praise from domestic and international circles.⁷⁵ Reasonably enough, the European Court of Human Rights (ECtHR) took the position that an individual application before the TCC qualifies as an effective domestic remedy and on numerous occasions declared applications inadmissible for failure to seek redress before the TCC.⁷⁶

In the years to come — especially in the aftermath of the 2016 attempted coup — the TCC has kept sending increasingly contradictory signals in individual complaints. Flooded by hundreds of thousands of individual cases since then, however, the TCC utilized a number of avoidance techniques to side step looking into the merits of the complaints by applying a strict application of the domestic remedies rule. This in turn effectively deprived the applicants of any meaningful justice whatsoever, by requiring that they first try to navigate the legal chaos in post-coup Turkey.

It was also at this hurdle that the applicant in *Senih Ozay* stumbled. The applicant, a fairly known lawyer and civil society activist in Turkey who was at the age of 69 at the time of application, mounted a frontal constitutional challenge to the legal basis of Turkey's pandemic-related lockdowns imposed on citizens over 65 — a measure adopted via a circular by the Turkish Interior Ministry.

The applicant uttered three main arguments. First, the application claimed that the LPH and LPA do not provide a clear and foreseeable legal basis for Turkey's age-targeted lockdowns (curfews). Second, and relatedly, he argued that a declaration of a state of emergency under the Turkish Constitution would have provided such basis for curfews, but Turkish authorities simply chose not to do so.⁷⁷ Third, the applicant alleged the lockdown measures disproportionately interfered with several of his constitutional rights, including the right to liberty and security the right to freedom of movement (Article 23 of the Turkish Constitution) and the right to work (Article 49 of the Turkish Constitution).⁷⁸

In turn, the TCC judges found all three claims inadmissible without proceeding to the merit stage noting the applicant had not exhausted all available remedies. In particular, the TCC highlighted that curfew in its nature is an administrative measure and that the applicant should first take this case before an administrative court.⁷⁹ As regards whether the remedy before administrative courts was both available and effective, the TCC simply noted that the applicant can request an order of stay of execution before administrative courts due to 'irreparable harm or damage' caused by the administrative action, and/or its 'complete lack of legal basis' within a

Footnote 74 (continued)

App No. 2015/18567, 25 February 2015; *Sencer Başat and Others*, Individual App No. 2013/7800, 18 June 2014.

⁷⁵ Oder 2017.

⁷⁶ See *inter alia*, *Hasan Uzun v Turkey* App No. 10755/13 (ECHR, 30 April 2013).

⁷⁷ *Senih Ozay* supra note 67 para 19 (ii). A state of emergency allows for 'partial or total' suspension of fundamental rights and freedoms only 'to the extent required by the exigencies of the situation' as long as measures taken are in conformity with Turkey's international legal obligations — see: Article 15 of the Turkish Constitution.

⁷⁸ *ibid* para.19 (i).

⁷⁹ *Ibid*, para. 30.

reasonable time, and this in itself is enough to conclude that a remedy before administrative courts should be considered both available and effective. The rather formalistic and uncritical decision by the apex court of the country had a snowball effect and revealed numerous challenges. Particularly, the court refrained from issuing its authoritative views on who may be the competent body to declare lockdown, subject to what procedural-substantive constraints. More importantly, this executive minded decision allowed the Turkish government to go interrupt with the drastic COVID-19 measures. Over the past 2 years, from Turkey, there emerged clear evidence of pre-textual use of the pandemic to achieve other controversial ends. The under-reporting of pandemic cases and deaths by the Turkish Government⁸⁰ as well as its selective application of pandemic rules despite legal restrictions in place⁸¹ have raised regular concerns about whether the Turkish government was taking the pandemic seriously. More strikingly, the Turkish authorities launched a series of crackdowns that has seen thousands of individuals who challenged the government's official line on the pandemic.⁸²

3.2 The Constitutionality Review of the Law No 7242

The TCC was also asked to address abstract norm review complaints concerning Turkey's pandemic restrictions. As noted above, in a bid to reduce the risk of COVID-19 outbreaks in prisons, on 31 March 2020, the AKP and its close ally, MHP, tabled an omnibus bill to the Parliament, which proposed amendments inter alia to the Turkish Law No. 5275 on the Execution of Sentences and Security Measures (TLES) as well as to 11 other legislations including the Turkish Penal Code and Anti-Terrorism Law. The bill was then approved by the Turkish Parliament on 13 April 2020 known as the Law No. 7242.⁸³ As a result, the legislation has reportedly led to the release of 100,000 prisoners in Turkey.⁸⁴ It is important to highlight that

⁸⁰ Kisa and Kisa 2020.

⁸¹ 'Turkey's Hagia Sophia holds first Friday prayers since conversion back to mosque', *CNN* (Atlanta, 26 July 2020). Accessed 9 June 2022: <https://edition.cnn.com/2020/07/24/europe/hagia-sophia-mosque-friday-prayers-turkey-intl/index.html> (reporting that over 350,000 people attended at the inaugural Friday public prayer in Hagia Sophia, after its conversion to a mosque in July 2020).

⁸² OSCE, 'OSCE Media Freedom Representative about detention of several journalists following their reports on coronavirus crisis in Turkey', 23 March 2020. Accessed 9 June 2022: <https://reliefweb.int/report/turkey/osce-media-freedom-representative-concerned-about-detention-several-journalists> > and Dyer 2020.

⁸³ Law No. 7242 amending the Turkish Law on the Execution of Sentences and Security Measures, 13 April 2020.

⁸⁴ Prison overcrowding has long been a fundamental marker of Turkey's desolate legal landscape. According to a CoE report in 2020, Turkey's prison population rate has increased 115.3% in the last decade with the total number of 297,019 inmates which make Turkish prisons the most crowded in Europe exceeding their official capacity (of 233,194). Turkey has also the highest incarceration rate of the 47 CoE member countries in 2020 with 357 prisoners per 100,000 habitants and the most crowded prisons in Europe with 127 inmates per 100 available places. See, COE Annual Penal Statistics — SPACE I 2020. Accessed 9 June 2022: https://wp.unil.ch/space/files/2021/04/210330_FinalReport_SPACE_I_2020.pdf.

the legislation failed to provide measures to release remand prisoners who are currently estimated at 40,000.⁸⁵

The Law No. 7242 introduced detailed provisions that are aimed at lowering the prison population both of a general nature and as a particular measure of the COVID-19 pandemic. As regards the former, amending the parole provisions of the TLES, the legislation reduced the general service requirement for parole eligibility from two-thirds of the sentence to half of the sentence.⁸⁶ The potential effect of this change is further enhanced by several amendments to the probation (supervised freedom) regime that increase the ‘time left to parole’ eligibility from 1 to 3 years for crimes committed before 30 March 2002 — the date when the legislative work for this legislation began.⁸⁷ As regards the latter, the legislation granted a temporary release provision (leaves of absence) for inmates who were sentenced to imprisonment for 3 years or less including those under probation, in open penal institutions, and those in closed penal institutions that are eligible to be transferred to open penal institutions.⁸⁸ This one-time temporary release provision was inspired by the scope of various executive measures to prevent the spread of COVID-19 in Turkey in prisons, and accordingly was set to expire on 31 May 2020.⁸⁹ Relatedly, inmates over the age of 60 with chronic illnesses and disability and women with children younger than three are released immediately to serve the rest of their term under house arrest.⁹⁰

The bone of contention has been that the legislation excluded inmates convicted of certain crimes from its scope, such as crimes of intentional killing, and torture and torment, and crimes against sexual inviolability (sexual assault, child molestation), but also crimes against national security, constitutional order and crimes included under Turkey’s overly broad Anti-Terrorism Law (Law No 3713) including Article 314 of the Turkish Penal Code (on membership of terrorist organization) — Turkey’s main and most invoked anti-terrorism provision.⁹¹ It must be stressed in this context that Turkey has the largest population of inmates convicted for terrorism-related offences. As per a CoE report in 2020, out of the total number of 30,524 inmates in CoE member states who were sentenced for terrorism, 29,827 reside in Turkish prisons.⁹²

What this legislation means in practice is that any inmate — except those sentenced under terrorism crimes, who is sentenced to, say, 9 years (108 months) in

⁸⁵ Turkey, General Directorate of Prisons and Detention House, General Information on Penal Institutions, 10 May 2021. Accessed 9 June 2022: <https://cte.adalet.gov.tr/Home/SayfaDetay/cik-genel-bilgi>

⁸⁶ Provisional Article 48 of Law No 7242.

⁸⁷ Provisional Article 6, *ibid.*

⁸⁸ Provisional Article 9, *ibid.*

⁸⁹ Provisional Article 9(5), *ibid.*

⁹⁰ Provisional Article 52 (a) and (b), *ibid.*

⁹¹ Article 314/1 of the Turkish Penal Code criminalizes the establishment and/or commanding an armed terrorist organization, and Article 314/2 criminalizes the membership to an armed organization — carrying the penalty of up to 22.5- and 15-year imprisonment, respectively (aggravated by half under Article 5 of the Turkish Anti-Terrorism Law No 3713.

⁹² See CoE Annual Report 2020, *supra* note 81.

prison — could be freed after 18 months (half the sentence (54 months) minus supervised release (36 months). But, for an inmate sentenced to 9 years imprisonment under terrorism offences, the incarceration is still 69 months as such offences are excluded from the scope of the Law No. 7242. This has rather expectedly drawn sharp criticism on discrimination grounds from a broad swath of international community. Ever since the preparatory work for this legislation began, regular calls were made to the Turkish Government by numerous organizations including civil society groups, international bar associations and human rights NGOs — uniformly calling on the Government to treat all prisoners equally, to broaden the scope of the legislation to cover those convicted under terrorism charges and not to discriminate against political prisoners.⁹³ The Office of High Commissioner for Human Rights of the United Nations similarly warned that ‘political prisoners should be among first released in pandemic response’.⁹⁴

During the Justice Committee deliberations in the Parliament, the opposition parties inter alia the CHP took a very critical stance regarding the unconstitutionality of the draft legislation with regard to both its form/procedure and substance — vowing to lodge a petition to the TCC. The AKP and MHP lawmakers, in turn, argued that the law was penned as a draft bill which introduces a ‘reform in the law of execution’ — thus should be considered as a necessary change in execution policy rather than proposing ‘amnesty’.⁹⁵ Soon after the Parliament adopted the legislation, the CHP lodged two separate applications before the TCC for the annulment of the legislation with regard to both its form and substance in April and June 2020 respectively.⁹⁶

In the first petition as regards the form, the CHP lawmakers contended that the draft legislation should have been debated as a special amnesty law rather than an early release law — essentially uttering two interrelated arguments: First, as defined in Article 65 of the Turkish Penal Code, a special amnesty, as they argued, is essentially a commutation of sentence — reducing or terminating a term of confinement (sentence of imprisonment) in a correctional institution or converting it into a judicial fine.⁹⁷ Second, and relatedly, the Parliament (as well as the President) can enact (a general or special) amnesty law only with a three-fifth quorum as stipulated under Articles 87 and 88 of Turkish Constitution and Article 92 of the Rules of Procedure of the Turkish Parliament — which would expectedly have made it impossible for the legislation to pass only with the votes of the members of the AKP-MHP

⁹³ Amnesty International, ‘Turkey: Prison release law leaves innocent and vulnerable prisoners at risk of COVID-19’ 13 April 2020. Accessed 9 June 2022: <https://www.amnesty.org/en/latest/news/2020/04/prison-release-law-leaves-prisoners-at-risk-of-covid/> and Bar Human Rights Committee of England and Wales, ‘Political prisoners in Turkey in the face of the pandemic’, 3 April 2020. Accessed 9 June 2022: <https://barhumanrights.org.uk/political-prisoners-in-turkey-in-the-face-of-the-covid-19-pandemic/>

⁹⁴ UN OHCHR ‘Political prisoners should be among first released in pandemic response, says UN rights chief’, 3 April 2020. Accessed 9 June 2022: <https://news.un.org/en/story/2020/04/1061002>

⁹⁵ The full text of deliberations in Turkish is available at (accessed 9 June 2022): <https://www.tbmm.gov.tr/tutanak/donem27/yil3/ham/b07801h.htm>

⁹⁶ See supra note 68.

⁹⁷ Article 65 (2) of the Turkish Penal Code reads as follows: ‘Where there is a special amnesty, the offender may be released from the enforcement institution where he is serving his sentence of imprisonment or the term of imprisonment may be reduced or converted to a judicial fine’.

allegiance. As a result, the CHP members sought the annulment of the legislation in its entirety on the grounds of breaches under the said provisions of Turkish Constitution and Turkish Parliament's Rules of Procedure.

In turn, the TCC rejected both arguments. In particular, the majority of the court, simply giving a legal cover to the abovementioned arguments of the AKP and MHP lawmakers during the parliamentary deliberations of the legislation, found that the legislation does not deal with the scope of the penalty imposed, but rather with the ways in which a penalty is executed. As such, it does not propose an amnesty, but can be deemed a change in execution policy could be adopted by the Parliament through normal procedures (simply majority in line with Article 96 of the Turkish Constitution).⁹⁸

In the second application regarding the unconstitutionality of the legislation with regard to its substance, the CHP lawmakers sought the unconstitutionality of several provisions of the Law No. 7242.⁹⁹ Most importantly, in relation to the provision that excludes the high number of prisoners sentenced under Turkey's harsh anti-terrorism framework, the CHP members argued that the Law No. 7242 discriminates between categories of offences without any legitimate aim. This would, in the view of the CHP lawmakers, exacerbate the already serious problem of the wanton use of Turkey's broad anti-terrorism arsenal for politically motivated prosecutions of political opponents, human rights defenders and journalists, despite repeated warnings and condemnations by the ECtHR.¹⁰⁰ To illustrate, since the July 2016 attempted coup, more than 330,000 people have been charged with some 265,000 individuals being sentenced for membership in an armed terrorist organization.¹⁰¹ Moreover, such an 'illegitimate and unjustified' differentiation, to the CHP members, would cast serious doubt over Turkey's COVID-19 response in terms of positive state obligations and duties under international law to safeguard the human rights of prisoners, particularly their right to life, health and human treatment.¹⁰² Taken together, the CHP lawmakers argued that the Law No. 7242 violated, due to its discriminatory nature, numerous constitutional principles and rights as protected under the Turkish Constitution including Article 2 (social state governed by rule of law as the characteristics of the Turkish State), Article 5 (fundamental aims and duties of the Turkish State), Article 10 (equality), Article 17 (personal inviolability, corporeal and spiritual existence of the individual) and Article 56 (the right to live in a healthy and balanced environment).¹⁰³

⁹⁸ TCC decision of 17 July 2020, supra note 68 paras 70–73.

⁹⁹ These include provisions that extend the mandate and jurisdiction of enforcement judgeships and criminal peace judgeships, which delegate powers to administrative authorities to regulate and restrict the rights of inmates (right to be informed) in violation of the principle of legality, which prescribe the rate of conditional release by increasing the rate within the scope of Anti-Terror Law.

¹⁰⁰ See i.e. *Selahattin Demirtaş v Turkey (No 2)* App No. 14305/17 (ECtHR Grand Chamber, 22 December 2020) para. 278.

¹⁰¹ The official judicial statistics released by the Turkish Ministry of Justice is available at (accessed 9 June 2022): <http://www.adlisicil.adalet.gov.tr/Home/SayfaDetay/adalet-istatistikleri-yayin-arsivi>

¹⁰² For analysis on the rights of prisoners, and state obligations under international law, see Turkut and Yildiz 2020.

¹⁰³ TCC decision of 14 July 2021, supra note 68 para. 168.

In July 2021, the TCC found these claims meritless too. The court began by making generic statements as regards the outer limits of its ‘unconstitutionality of legislations’ analysis. It is noted that any legislation should serve a public interest of constitutional, economic or social nature, and it is eventually for the legislative power to determine such public interest. And, as the court continued, its inquiry is normally limited to whether such legislation is enacted for the purpose of public interest (rather than whether the right purpose was chosen on this point).¹⁰⁴ In the past, however, in line with its activist predilections, the TCC has adopted a rather sharp and fierce stance in relation to the existence of the public interest displaying extreme examples of the teleological interpretation and readily using its broad powers to annul many regulations on the ground that they do not serve a public interest goal.¹⁰⁵ What appears from the TCC’s recent case law, especially in the post-2016 era, is that as for the TCC, the assumption of its unconstitutionality analysis is that when *reason* for the enactment of legislation resides, the public interest emerges. Much in line with its newly adopted overall ‘play-it-safe’ strategy, the TCC was readily convinced without any further explanation that the Law No. 7242 purpose is to ‘increase deterrence and thus to prevent the commission of...[terrorism] crimes... by foreseeing a more severe execution procedure in terms of these crimes, taking into account their gravity, nature, dangerousness and legal issues surrounding such crimes’.¹⁰⁶

Moving to the more substantial prongs of its proportionality analysis (on whether the Law No. 7242 gives rise to discrimination under Article 10 of the Turkish Constitution), here too, the court’s approach is far from being convincing. The TCC noted that the Law No. 7242 indeed makes a difference in treatment on the basis of categories of offences and inmates.¹⁰⁷ As regards whether this differential treatment may be justified, the TCC made two arguments¹⁰⁸: the court first noted that the legislation has a reasonable and objective basis, because it aims to serve as a deterrence for certain crimes inter alia terrorism offences. Second is that, to the TCC, the Law No. 7242 represents a new criminal justice and execution policy — an area that falls completely within the discretion of the power-holders (i.e. the legislative branch). Relying on these two vague arguments, the TCC concluded that the differential treatment of the Law No. 7242 did not go beyond the reasonable permissible limitations and rejected the application. However, the main question of whether there is a much more pressing public interest in reforming the domestic law on execution than the public interest in the exercise of fundamental rights (i.e. the equality and discrimination in the application of the said Law) was left open by the TCC.

¹⁰⁴ Ibid, para. 169.

¹⁰⁵ For example, the TCC annulled a law on the transfer of the Abana district centre to the town of Bozkurt–Pazaryerin, because the law in question was not enacted for the purpose of public interest but for the purpose of punishment. See: TCC, Constitutionality Review, Doc No. 1963/145, Dec No. 1967/20, 14 July 1967.

¹⁰⁶ TCC decision of 14 July 2021, supra note 68 para. 171.

¹⁰⁷ Ibid, para. 172.

¹⁰⁸ Ibid, paras 187–191.

4 Discussion and Conclusion: the Judicialization of Authoritarian Politics

For several decades, scholars have attempted to understand how courts ‘become increasingly important, even crucial, political decision-making bodies’.¹⁰⁹ As Ran Hirschl notes, the clearest manifestation of the wholesale judicialization of core political controversies is the growing reliance on courts for contemplating the very definition, or *raison d’être*, of the polity as such.¹¹⁰ The central role the TCC has played for decades in preserving the strictly secular nature of Turkey’s political system, by continually outlawing anti-secularist and ethnic political forces, by disallowing public choices by other governmental institutions and by policing elected institutions provides a particularly striking example of this type of judicialized ‘mega-politics’. As such, the TCC served as the linchpin of the Kemalist founding regime to maintaining social control over the popular will.¹¹¹

Especially from 2010 onwards, the AKP adopted a whole set of measures to contain the TCC’s judicial activism. In the 2010 constitutional amendments, judicial appointments to the TCC were highly centralized, and the ensuing overtly political appointments produced a remarkably ‘ideologically split court’. In the following years, the TCC faced acute limitations — constraints more subtle and serious that tightly controlled appointment procedures and short-term limits. Direct attacks and public campaigns against the TCC judges have long been part of the Turkish Government’s rhetoric. The TCC was ultimately contained within a profoundly illiberal and increasingly authoritarian political system in post-coup period. As a consequence, the court in post-coup period candidly acknowledged the new political realities in the country that undoubtedly shaped its unwillingness to confront the regime. Shying away from engaging in any controversy with President Erdogan and his ruling party, the TCC never ruled on constitutional challenges to the post-coup emergency decrees, which formed the bedrock of regime dominance. Yet, perhaps this was not entirely unexpected, as the AKP and Erdogan have long been inspired by the “Turkish tradition of viewing the judiciary as an institution that can be effectively used to bolster the authority of the central government”.¹¹² So, perhaps the role of the Turkish judiciary including the TCC has remained unchanged in that they re-emerged as a tool of the state, but what has changed was the group upon which they set their sights.

The judicial restraint of the TCC in failing to adequately review the merits of Turkey’s coercive pandemic response measures in light of their impact on fundamental rights has been nothing more than re-manifestation of its new overall judicial strategy in the post-coup period. Adopting a formalistic, strained and obfuscatory reasoning in *Senih Ozay*, the TCC demonstrated an undue deference to the executive when the robust protection of human rights is needed the most during crises,

¹⁰⁹ Woods and Hilbink 2009; Kmiec 2004 and Ferejohn 2002.

¹¹⁰ Hirschl 2008, 128.

¹¹¹ Shambayati 2008b.

¹¹² Koplw 2014.

i.e. the COVID-19 pandemic. Similarly, the TCC had two ample opportunities to strike down the controversial early release legislation; however, it exercised greater restraint and deference because it would likely have resulted in a futile confrontation with the new political regime in Turkey. With the new presidential system firmly in place, the TCC is expected to retreat more into subservience. The only way out for reform-oriented judges in the TCC seems to apply subtle pressure for political reform and bide their time in anticipation of the moment that Turkey's authoritarian regime will weaken to the extent that compliance with the regime interests is no longer needed.

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