



## Executive Decree Authority in Turkey Before the Constitutional Amendments of 2017: In Light of the Turkish Constitutional Court's Retreat\*

### 2017 Anayasa Değişiklikleri Öncesinde Türkiye'de Yürütmenin Kararname Yetkisi: Anayasa Mahkemesi Kararları Işığında

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#### Abstract

Since the incorporation of decree powers into the Turkish constitutional system in 1971, the Constitutional Court (the Court) had adopted a disposition which has tended to construe decree powers in a narrow margin. In this context, the Court looked for additional conditions besides the conditions set in the constitution for the empowerment of executive with decree powers: the tripartite test which required that the empowerment should be urgent, necessary and important. The Court acted in a similar way for emergency decrees by examining them - although the supervision of emergency decrees is prohibited in the constitution. Thanks to this attitude, decree powers both in ordinary times and emergencies were restricted and used with aims solely seen necessary to abolish the reasons which caused the usage of decrees. However, the Court changed its case law regarding decree powers and opened the way for the possibility of executive influence on law making. For ordinary decrees, it abandoned the practice of looking for "extra" conditions not present in the constitution's text in 2011. With its judgment in late 2016, the Court gave up controlling emergency decrees as well. This retreat by the Court has greatly influenced the recent inflation of executive dominance in Turkey.

#### Keywords

Turkish Constitutional Court, Executive decree authority, Judicial review, Emergency decrees, Nondelegation doctrine

#### Öz

Kanun hükmünde kararname çıkarma yetkisinin 1971 yılında anayasal dayanağa kavuşmasından bu yana Anayasa Mahkemesi (Mahkeme) kararname yetkisini oldukça dar yorumlama eğilimine sahip olmuştur. Bu çerçevede Mahkeme, kararname çıkarılması amacıyla yetki yasası çıkarılabilmesi için anayasada öngörülmeleyen şartların varlığını aramış ve yetkilendirmenin acil, gerekli ve önemli olması gerektiğine hükmetmiştir. Mahkeme olağanüstü hâl kararname ile ilgili olarak da benzer bir tutum takınmış; anayasada yasak olmasına rağmen bu kararnamelerin denetimini gerçekleştirmiştir. Böylelikle hem olağan hem de olağanüstü dönemlerde kararname yetkisinin bu yetkinin kullanılmasına neden olan sebeplerle ilgili olarak kullanılması sağlanmaya çalışılmıştır. Ancak Mahkeme 2011 ve 2016 yıllarında verdiği kararlarla söz konusu içtihatlarından dönmüştür. 2011 yılında verilen kararlar, yetkilendirme için olması gerektiği varsayılan acillik, gereklilik ve önemli olma gibi koşulların artık aranmayacağına hükmedilmiş; 2016 yılında verilen kararlar da olağanüstü

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hâl kararlarının denetiminin yapılamayacağı kararlaştırılmıştır. Mahkeme'nin söz konusu içtihat değişikliklerinin son zamanlarda görülen, yönetimde yürütme organının ön plana çıkması olgusunun temel sebeplerinden birisi olduğu düşünülmektedir.

#### **Anahtar Kelimeler**

Türk Anayasa Mahkemesi, Yürütmenin kararname yetkisi, Yargısal denetim, Olağanüstü hâl kararnameleri, Yasama yetkisinin devredilmezliği ilkesi

## **Executive Decree Authority in Turkey Before the Constitutional Amendments of 2017: In Light of the Turkish Constitutional Court's Retreat**

### **I. Executive Decree Authority in Ordinary Times**

Ordinary decree power was introduced into Turkish law with constitutional amendments to the 1961 Constitution in 1971.<sup>1</sup> With these amendments, the Council of Ministers was empowered to promulgate decrees having the force of law only in ordinary times after being authorized by the Turkish Grand National Assembly.<sup>2</sup> However, the 1982 Constitution, which was accepted after the military coup in 1980, authorized the executive to issue ordinary decrees after enabling acts of the parliament and directly granted power to the executive to issue decree-laws in emergencies as well. Within this context, executive decree authority was used on a large scale in the 1980s and 1990s. In addition to issuing emergency decrees for territories which were under emergencies, governments used ordinary decrees to regulate vast areas including the economy, employment, the structures of ministries and public entities.

As noted above, the parliament had the power to enable the Council of Ministers to issue decrees having the same force as statutes before the latest amendments. However, the Council of Ministers was not able to regulate all spheres with ordinary decrees as the parliament could do with statutes. Especially in the field of basic

1 Such amendments were made during a period which was dominated by military. See, Ergun Özbudun, *The Constitutional System of Turkey: 1876 to the Present*, United States, 2011, pp. 9-15.

2 According to the article 64 of the (former) 1961 Constitution, "*The Turkish Grand National Assembly may authorize the Council of Ministers, by virtue of a law and for definite objects, to promulgate decrees having the force of law. The law concerning such authorization should clearly indicate the aim of the decrees to be promulgated, their extent and their principles, as well as the duration of the exercise of this right, and the provisions of law to be abrogated. The decree having the force of law should also indicate the law by virtue of which it is promulgated. These decrees shall go into force as of the day of their publication in the Official Gazette. However, a later date can be indicated in the decree as the date of its entry into force. Such decrees shall be submitted to Grand National Assembly on the day of their publication in the Official Gazette. The authorization laws and the decrees submitted to the Grand National Assembly are debated and decided upon in conformity with the rules established for the discussion of laws by the Constitution and by the internal regulations of the Legislative assemblies; however, they receive priority and urgency in the committees and plenary sessions of the Assemblies over other draft resolutions and bills of law. Decrees not submitted to the Turkish Constitutional Assembly on the day of their publication become ineffective as of that date; and those rejected by the Turkish Grand National Assembly shall cease to be effective as of the date of publication of such rejection in the Official Gazette. Modified provisions of decrees adopted under modification shall go into force as of the date of publication of these modifications in the Official Gazette. Basic rights and freedoms cited in the first and second chapters of Part II of the Constitution, and the political rights and obligations mentioned in chapter IV of the same Part cannot be regulated by decrees having the force of law. The Constitutional Court will also control the constitutionality of such decrees.*" See *The 1961 Turkish Constitution as Amended*, Office of the Prime Minister, Directorate General of Press and Information, Ankara 1978, available at <http://www.anayasa.gen.tr/1961constitution-amended.pdf>, (last accessed on January 12 2018).

rights, ordinary decree power was largely limited on the subject matter. According to the former article 91 of the constitution, basic principles regarding fundamental rights (art. 12-16), individual rights and duties (art. 17-40), political rights and duties (art. 66-74) could not be regulated with ordinary decrees.<sup>3</sup> In this respect, the Constitutional Court had annulled ordinary decrees which contain regulations regarding such principles and rights.<sup>4</sup> On the other hand, it was possible to regulate social and economic rights and duties (art. 41-65) with ordinary decrees. However, it was not possible to restrict social and economic rights with ordinary decrees as well. Indeed, article 13<sup>5</sup> of the constitution states that basic rights and freedoms could be restricted only by statutes in ordinary times subject to the reasons specified for each right or freedom in the relevant article. Thus, ordinary decrees could regulate social and economic rights but such regulations could only foresee improvements, not restrictions of such rights.<sup>6</sup>

Former article 91 of the 1982 Constitution stated that enabling acts shall define purpose, scope, principles and expiration date of the decrees to be issued. It was also mandatory to regulate, whether it was possible to issue more than one decree in the designated time or not. When an ordinary decree was issued, it had to be submitted to the parliament on the day of its publication in the Official Gazette. Otherwise it used to lose its effect on the same day. Also, the decrees which were rejected by the parliament used to lose their effects on the day of publication of the rejections in the Official Gazette. Apart from these, there was no condition estimated in the constitution for the issuance of ordinary decrees. However, the Court had adopted a position which tended to construe decree powers in a narrower margin. In this regard, it looked for additional conditions besides the conditions set in the constitution for the authorization of executive with decree powers: The tripartite test which required that the authorization should be urgent, necessary and important. In its first judgment<sup>7</sup> in which it ruled that such requirements should be met, the Court held that, “*The use of decree-laws in situations which are not urgent and necessary, extensification and continuation of this practice means the transfer of legislative authority and forms*

3 Apart from these, article 163 of the constitution had prohibited the empowerment of the Council of Ministers to amend the budget by decree-laws.

4 See for instance, Turkish Constitutional Court, Date: 14/12/2016, E: 2016/148, K: 2016/189 (annulment because of containing a regulation regarding individual rights and duties); Turkish Constitutional Court, Date: 04/04/1991, E: 1990/12, K: 1991/7 (annulment because of containing a regulation regarding political rights and duties).

5 According to the article 13 of the constitution, “*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 the society and the secular republic and the principle of proportionality.*” This article wasn’t changed in the latest amendments. Unless otherwise indicated, English version of the articles in Turkish Constitution are cited from the official page of the Grand National Assembly of Turkey. See [https://global.tbmm.gov.tr/docs/constitution\\_en.pdf](https://global.tbmm.gov.tr/docs/constitution_en.pdf) (last accessed on January 12 2019).

6 Nevertheless, these restrictions regarding the subject do not exist for emergency decrees as can be seen below.

7 See Kemal Gözler, *Kanun Hükümünde Kararnamelerin Hukuki Rejimi*, Bursa, 2000, p. 83. In one of its older judgments (Turkish Constitutional Court, Date: 16/05/1989, E: 1989/4, K: 1989/23) the Court had already mentioned about this trio but not as requirements, rather expectations to be met. See Gözler, *Kanun Hükümünde Kararnamelerin Hukuki Rejimi*, p. 82.

*unconstitutionality.*<sup>8</sup> In the following years, the Court maintained and matured this tripartite test jurisprudence and used the same justification as a template to annul enabling acts: “*In the 8<sup>th</sup> paragraph of the 91<sup>st</sup> article of the Constitution it is stated that enabling acts and decree-laws shall be negotiated in the committees and in the plenary session of the Grand National Assembly of Turkey with priority and urgency. Since the constitution even required the negotiation of decree-laws with priority and urgency, the decree power should be used in urgent situations like not being able to enact a statute because of scarcity of time.*”<sup>9</sup> According to the Court, as the enabling acts are contrary to the constitution and annulled, the decrees which are issued on the basis of such enabling acts were also contrary to the constitution and must be annulled: “*The situation of decrees which do not base on enabling acts, decrees which stand out of the scope of enabling acts or decrees whose enabling acts are annulled are the same. As the decrees are deprived of constitutional basis in such circumstances, they should be repealed even their contents are not contrary to the constitution.*”<sup>10</sup> Thanks to the Court’s tripartite test, the parliament refrained from enacting too many enabling acts and accordingly, the executive didn’t issue lots of decrees. While the parliament had enacted 13 enabling acts between November 9<sup>th</sup> of 1982<sup>11</sup> and February 1<sup>st</sup> of 1990,<sup>12</sup> it enacted 19 enabling acts between 1990 and 2011.<sup>13</sup> Similarly, 343 decrees were issued between November 9<sup>th</sup> of 1982 and February 1<sup>st</sup> of 1990, while 263 decrees were issued after the date the Court judged on the extra necessities for the first time until November 2011.<sup>14</sup> The interesting point is that, 240 of 263 decrees were issued before 2002, while 23 of them were issued after June 2011. As it is seen, there was a radical decrease in the numbers of enabling acts and decrees after the Court’s restricting judgments. Of course, the issuance of enabling acts and decrees was influenced by many other factors, but in my opinion the Court’s restricting judgments contributed to this development as well.

However, the Court changed its jurisprudence on the tripartite test regarding ordinary decrees in 2011 and abandoned the practice to look for “extra” conditions

8 Turkish Constitutional Court, Date: 01/02/1990, E: 1988/64, K: 1990/2.

9 Turkish Constitutional Court, Date: 16/09/1993, E: 1993/26, K: 1993/28; Turkish Constitutional Court, Date: 05/10/2000, E: 2000/45, K: 2000/27; Turkish Constitutional Court, Date: 20/03/2001, E: 2001/9, K: 2001/56.

10 Turkish Constitutional Court, Date: 17/05/2007, E: 2004/46, K: 2007/60; Turkish Constitutional Court, Date: 20/10/2006, E: 2006/138, K: 2006/100; Turkish Constitutional Court, Date: 27/06/2006, E: 2006/97, K: 2006/74; Turkish Constitutional Court, Date: 27/01/2004, E: 2004/6, K: 2004/5; Turkish Constitutional Court, Date: 19/09/2000, E: 2000/27, K: 2000/24; Turkish Constitutional Court, Date: 06/09/1995, E: 1995/47, K: 1995/40.

11 1982 Constitution came into force on November 9<sup>th</sup> of 1982.

12 The date when the Court judged for the first time that the requirements of urgency, necessity and importance should be met in order to enact an empowering act.

13 See Ender Türk, 1982 Anayasası’na Göre Kanun Hükümünde Kararnameler ve Yargısal Denetimi, Ankara, 2013, pp. 225-227.

14 See Türk, 1982 Anayasası’na Göre Kanun Hükümünde Kararnameler ve Yargısal Denetimi, pp. 163-224. From 1971 to military coup in 1980, 4 enabling acts and 34 decrees were issued. From military coup to November 9<sup>th</sup> of 1982, 2 enabling acts and 14 decrees were issued. See Türk, 1982 Anayasası’na Göre Kanun Hükümünde Kararnameler ve Yargısal Denetimi, pp. 163-227.

not present in the constitution's text. According to the Court, *"The matter in dispute is an enabling act which aims the issuance of ordinary decree-laws. There is not any provision in the constitution which requires urgent, necessary and important situation for the issuance of such decrees. In this respect, it is not possible to create new conditions which are not foreseen in the constitution for the supervision of decree-laws and enabling acts. Moreover, deciding what is important, urgent and necessary is not compatible with the operation of a judicial body which makes a review of constitutionality. There is no doubt that, such concepts are subjective and relative in nature. For this reason, the examination of the situation whether it is urgent, important and necessary to issue enabling acts and decree-laws could be equal to a supervision which exceeds the limits set by the constitution. Yet, the supervision of enabling acts should stay within such limits. Thus, it not necessary to examine whether the subject of the enabling law is urgent, important and necessary."*<sup>15</sup>

Putting aside emergency decrees which were issued after the coup attempt in July 2016, only 17 decrees were issued after the Court had changed its case law in October 2011. What is more striking is, only one enabling act was issued thereafter. Thus, the Court's reversal didn't cause the executive dominance by ordinary decrees in rule making contrary to expectations. However, we can explain this "unexpected" result with respect to government structure. Between 2002 and 2018, the Justice and Development party had been a single ruling party in Turkey<sup>16</sup> and it had the majority of seats in the parliament. Besides the other factors which effect the use of decrees, it had not been so difficult for the government to enact statutes in the parliament quickly which lowered the need to resort to decrees. This claim could also be supported by the data regarding total enabling acts and decrees issued after 2002. After 2002, only 2 enabling acts and 40 ordinary decrees were issued until 9<sup>th</sup> of July, 2018. Another interesting point is that, 35 of such decrees were issued between 4<sup>th</sup> of June and 2<sup>nd</sup> of November 2011 and most of them were concerned with the formation and duties of ministries.<sup>17</sup> The remaining 5 decrees were issued in July 2018, just before the inauguration of President Recep Tayyip Erdoğan on 9<sup>th</sup> of July, 2018.

After all we can conclude that, other factors such as government structure and needs to adopt rapid reforms were as important as the effects of the Constitutional Court's judgments on the use of ordinary decree power. When the governments had no majorities in the parliament as in the period between 1991 and 2002, the restricting case law of the Court had significant influence on the issuance and adoption of enabling acts and decrees. On the contrary, when the governments did have sufficient

15 Turkish Constitutional Court, Date: 27/10/2011, E: 2011/60, K: 2011/147.

16 The only exception to this domination was the period between general election of June 7th 2015 and general election of November 1st 2015. As none of the parties held majority in the parliament and coalition talks didn't succeed after the June elections, the general election was made again in November. Justice and Development Party gained majority in the parliament after this election and formed the government alone.

17 I would like to state that general election was made on June 12th 2011.

majorities in the parliament, the need to resort to decrees went down as we witnessed after 2002. This assertion is further supported by the number of decrees issued before and after 2011- the year in which the Court reversed its case law.

As it is seen, the Court's influence on the executive decree authority in ordinary times was limited and mostly effected coalition governments, especially between 1991 and 2002. Apart from this period, it is not possible to tell the same. Conversely, the alteration of the case law of the Court regarding emergency decrees had highly important impacts on Turkish constitutional order.

## II. Executive Decree Authority in Emergencies

Before the last constitutional amendments, the Council of Ministers, meeting under the chairmanship of the president, could issue decree-laws on matters necessitated by a state of emergency which could be declared because of natural disasters, economic crises, widespread acts of violence or severe deterioration of public order<sup>18</sup> pursuant to the former article 121 of the Turkish Constitution.<sup>19</sup> In this case, decree-laws had to be published in the Official Gazette and submitted to the parliament for the approval on the day of issuance. Moreover, emergency decrees were not subject to the limitations envisaged for ordinary decrees. In this respect, it was possible to regulate basic principles regarding fundamental rights, individual rights and duties, political rights and duties and restrict them as well.<sup>20</sup> However, the constitution had determined a core area in article 15<sup>21</sup> which could not be restricted even during the emergencies.

According to the former article 148 of the Turkish Constitution, decrees issued during a state of emergency, martial law or in time of war could not be brought before

18 As Göztepe stated, although natural disasters and economic crises are also envisaged as the reasons of state of emergency, governments did not choose to declare a state of emergency because of natural disasters or economic crises. For example, after the devastating earthquake in 1999 or the economic crises in 1994 and 2001 a state of emergency was not declared. Therefore, it could be said that governments generally use the emergency tool to battle widespread acts of violence or deterioration of public order. See Ece Göztepe, "Ein Paradigmenwechsel für den Sicherheitsstaat: Die Praxis des Ausnahmezustandes im Südosten der Türkei", *Ausnahmezustand: Theoriegeschichte - Anwendungen - Perspektiven*, Edited by Matthias Lemke, Wiesbaden 2017, p. 110.

19 Former article 122 of the constitution had regulated emergency decrees to be issued during martial law in a similar manner. Martial law had been arranged as a heavier emergency regime when compared to a state of emergency in Turkish law. In this regard, the transfer of powers from civil authorities to military authorities had differentiated martial law from a state of emergency. Martial law had not been declared in Turkey for more than thirty years. As can be seen below, regulations regarding martial law were completely abolished after the latest constitutional amendments.

20 Also see Christian Rumpf, "Der Not- und Ausnahmezustand im türkischen Verfassungsrecht", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, Volume: 48, 1988, pp. 683-716.

21 According to the former article 15 of the constitution, "*In times of war, mobilization, martial law, or a state of emergency, the exercise of fundamental rights and freedoms may be partially or entirely suspended, or measures derogating the guarantees embodied in the Constitution may be taken to the extent required by the exigencies of the situation, as long as obligations under international law are not violated. Even under the circumstances indicated in the first paragraph, the individual's right to life, the integrity of his/her corporeal and spiritual existence shall be inviolable except where death occurs through acts in conformity with law of war; no one shall be compelled to reveal his/her religion, conscience, thought or opinion, nor be accused on account of them; offences and penalties shall not be made retroactive; nor shall anyone be held guilty until so proven by a court ruling.*" With the latest amendments, the phrase "martial law, or" was removed from this article.

the Constitutional Court for supervision. In connection with this, when parliament approved or amended an emergency decree with a statute then it was possible to apply to the Court for the supervision of such a statute which had the same or revised provisions of an emergency decree.<sup>22</sup> Thus, it was prohibited to supervise emergency decrees before they were handled by the parliament. However, the Court had broken this ban thanks to its wise reasoning beginning from the early 1990s:

*“... Inasmuch as the Constitutional Court cannot be contingent upon the description of a norm which is brought before itself with the plea of constitutionality, it has to describe such norms derived from legislative or executive organ on its own. As a consequence, the Court has to supervise norms which are made under the name of “emergency decrees” whether they constitute valid emergency norms in a way the constitution stipulates or not. If the norms which are named as emergency decrees do not fulfil such constitutional requirements, they have to be reviewed by the Court, since they do not constitute real “emergency decrees”. In this regard, article 148 of the Constitution prevents only the supervision of real emergency norms.”<sup>23</sup> In pursuant of this approach, the Court had determined conditions for emergency decrees which should be fulfilled for the prohibition of supervision: “In order to meet the constitutional requirements of emergency decrees, a decree should include regulations which should have the possibility to be implemented during the emergency and in the places where state of emergency is declared. Moreover, such regulations must be necessitated by the state of emergency. As emergency decrees are implemented in the places where state of emergency is declared and as they are implemented only during the emergencies, they cannot change statutes. Otherwise such regulations would exceed the limits prescribed for the scope of emergency and they cannot be accepted as emergency decrees.”<sup>24</sup>*

According to the Court, when the aforementioned requirements were not met, the regulations could not be accepted as emergency decrees and they had to be accepted as ordinary ones. Since ordinary decrees required authorization as noted above, the so-called emergency decrees in question lacked this requirement and they were contrary to the constitution. The Court’s logic is simple: if an emergency decree, which must be temporary in nature, changes a non-temporal norm like a statute it means that such an emergency measure is not prescribed for a limited time. Thus, it cannot be accepted as an emergency decree.<sup>25</sup> Similarly, if an emergency decree

22 See Merih Öden/Selin Esen, “Fundamental Rights and Freedoms in Turkey and the Turkish Constitutional Court”, *The Convergence of the Fundamental Rights Protection in Europe*, Edited by Rainer Arnold, Dordrecht, 2016, p. 156.

23 Turkish Constitutional Court, Date: 10/01/1991, E: 1990/25, K: 1991/1; Turkish Constitutional Court, Date: 03/07/1991, E: 1991/6, K: 1991/20.

24 Turkish Constitutional Court, Date: 03/07/1991, E: 1991/6, K: 1991/20. In conjunction with this, the Court ruled that emergency decrees cannot make changes on statutes regarding emergencies as well.

25 Turkish Constitutional Court, Date: 10/01/1991, E: 1990/25, K: 1991/1; Turkish Constitutional Court, Date: 03/07/1991, E: 1991/6, K: 1991/20.

has a regulation on territories in which a state of emergency has not been declared or exceeds the limits foreseen in the constitution for emergency decrees, such a regulation cannot be accepted as a measure necessitated by emergency.<sup>26</sup> Thanks to this reasoning, the Court had annulled emergency regulations which prescribed changes on ordinary statutes or regulations which were not related to the necessities created by emergencies. In addition to contributing to the protection of basic rights even in emergencies, the Court also “did not allow an emergency regime to either become an ‘extra-legal regime’, or to change its extraordinary character and turn into an ‘ordinary regime’.” As Esen stated.<sup>27</sup>

Nevertheless, the Court reversed its case law regarding the supervision of emergency decrees issued after the coup attempt in July 2016. What is more striking is, the Court’s opinion about its former judgments: *“While judging a case on hand, the Court evaluates its former judgments and pays attention to the balance between maintaining its case law and the need for the development or change of its case law. In this regard, when the Court changes its case law it should explain the reasons behind that change and ground its new argument... Taking into account of the wording of article 148 of the Constitution, the purpose of the constituent power and related legislative documents, it is understood that, emergency decrees cannot be subject to judicial review. A judicial review which is contrary to such provision conflicts with the articles 6 and 11 of the Constitution and these articles express superior and binding nature of the Constitution and prohibit the use of power which doesn’t originate from the Constitution... For these reasons, requests for the annulment of the rules on hand must be rejected due to lack of jurisdiction.”*<sup>28</sup> Obviously, this was an acknowledgement of the Court regarding its former “contrarian judgments”. As it is well known, the rule of law requires the judicial review of all acts of the state, especially during emergencies.<sup>29</sup> Such a requirement is also recognized by the Court: *“... Since basic rights and freedoms are more restricted in emergencies, it*

26 Turkish Constitutional Court, Date: 03/07/1991, E: 1991/6, K: 1991/20; Turkish Constitutional Court, Date: 22/05/2003, E: 2003/28, K: 2003/42. Also see Christian Rumpf, *Das türkische Verfassungssystem: Einführung mit vollständigem Verfassungstext*, Wiesbaden, 1996, pp. 257-258; Necmi Yüzbaşıoğlu, *1982 Anayasası ve Anayasa Mahkemesi Kararlarına Göre Türkiye’de Kanun Hükmünde Karamameler Rejimi*, İstanbul, 1996, pp. 190-200.

27 Selin Esen, “Judicial Control of Decree-Laws in Emergency Regimes - A Self-Destruction Attempt by the Turkish Constitutional Court?”, December 19, 2016, Blog of the IACL, AIDC available at <https://iacl-aidc-blog.org/2016/12/19/judicial-control-of-the-decree-laws-in-emergency-regimes-a-self-destruction-attempt-by-the-turkish-constitutional-court/> (last accessed on 11 January 2018). Also see Öden/Esen, “Fundamental Rights and Freedoms in Turkey and the Turkish Constitutional Court”, pp. 156-158; European Commission for Democracy Through Law (Venice Commission), *Emergency Powers*, Strasbourg, 1995, p. 29. According to Örtücü and Özbudun, these judgments also show the Court’s distrust of the mechanisms of majoritarian democracy. See Esin Örtücü, “The Constitutional Court of Turkey: The Anayasa Mahkemesi as the Protector of the System”, *Journal of Comparative Law*, Volume: 3, 2008, p. 257; Ergun Özbudun, “Political Origins of the Turkish Constitutional Court and the Problem of Democratic Legitimacy”, *European Public Law*, Volume: 12, 2006, pp. 218-219.

28 Turkish Constitutional Court, Date: 12/10/2016, E: 2016/166, K: 2016/159; Turkish Constitutional Court, Date: 12/10/2016, E: 2016/167, K: 2016/160; Turkish Constitutional Court, Date: 02/11/2016, E: 2016/171, K: 2016/164; Turkish Constitutional Court, Date: 02/11/2016, E: 2016/172, K: 2016/165.

29 As emergency regime is not unfamiliar with Turkey’s history and lots of grave violations of human rights occurred during the emergencies the importance of judicial review is obvious. See Esen, *Judicial Control of Decree-Laws in Emergency Regimes - A Self-Destruction Attempt by the Turkish Constitutional Court?*

*might be said that emergency decrees should be subject to judicial supervision in compliance with the rule of law. However, such opinion does not affect the existence and implementation of constitutional norms which prescribe exemption to judicial supervision.*"<sup>30</sup> In my opinion, such a reversal cannot be justified on the grounds of wording of the constitution.

The text of the 1982 Constitution was finalized by military junta and adopted under extreme undemocratic conditions which shaped the content of the constitution as well.<sup>31</sup> Thanks to successive constitutional amendments, many undemocratic articles in the constitution have been changed or repealed.<sup>32</sup> Even the article which guarantees immunity to coup plotters and sets prohibition on the supervision of the acts issued during military administration was repealed. After this repeal, coup plotters were put on trial more than 30 years after the coup and "untouchable" acts became subject to judicial review. Although the article which prevented supervision of emergency decrees had not been changed, wise reasoning of the Court closed the gap and made the supervision of the emergency decrees possible in order to obstruct the abuse of such decrees. Nonetheless, the Court has upset the apple-cart with its recent reversal and destroyed the gains regarding the protection of basic rights - even in emergencies.

The conditions might differ from the ones in the 1990s or 2000s and another approach towards the conditions and necessities of emergency situations might be inevitable. However, it was also possible to make such an evaluation after making substantial examinations of the emergency decrees: rather than rejecting the supervision of emergency decrees on the basis of wording of the constitution, evaluating the content of the decrees and deciding whether the taken measures are necessitated by the state of emergency or not... If the Court had adopted this approach towards emergency decrees, the evaluation of the content might have been different. A measure which was not seen as a necessity for an emergency 20 years ago would have been found essential under the new conditions. However, the Court didn't choose this way and contented itself with abandoning its well-grounded case law.<sup>33</sup>

30 Turkish Constitutional Court, Date: 12/10/2016, E: 2016/166, K: 2016/159.

31 See Ergun Özbudun/Ömer, F. Gençkaya, *Democratization and the Politics of Constitution-Making in Turkey*, Budapest, 2009, pp. 19-26; Sibel Inceoğlu, "Constitutional Conflict and the Idea of New Constitution in Turkey", *Norms, Interest, and Values*, Edited by Henning Glaser, Baden-Baden, 2015, pp. 162-163.

32 See Levent Göneç, "The 2001 Amendments to the 1982 Constitution of Turkey", *Ankara Law Review*, Volume: 1, 2004, pp. 89-109; Saadet Yüksel, "Constitutional Changes of Turkey in 2001 under the Framework of the EU Adaptation Process", *Annales de la Faculte de Droit d'Istanbul*, Volume: 39, 2007, pp. 153-156; Saadet Yüksel, "Turkey's Procedural Challenges to Making a New Constitution", *Annales de la Faculte de Droit d'Istanbul*, Volume: 41, 2009, p. 120; Saadet Yüksel, "A Comparative Approach on New Turkish Constitutionalism", *Annales de la Faculte de Droit d'Istanbul*, Volume: 44, 2012, pp. 342-356.

33 According to Gözler, since the constitution prohibits the supervision of emergency decrees, the Court's recent judgments regarding emergency decrees are accurate. See Kemal Gözler, "15 Temmuz Kararnameleri: Olağanüstü Hâl Kanun Hükümünde Kararnamelerinin Hukukî Rejiminin İfsadı Hakkında Bir İnceleme", February 17 2017, available at <http://www.anayasa.gen.tr/15-temmuzkararnameleri.pdf>, pp. 18-20 (last accessed on January 10 2018). For the criticisms of such judgments see Osman Can/Duygu Şimşek Aktaş, "Olağanüstü Hâl Dönemi Kanun Hükümünde Kararnamelerinin Yargısal

After the coup attempt on 15<sup>th</sup> of July 2016, a state of emergency was declared<sup>34</sup> throughout Turkey. By the end of this emergency period on 18<sup>th</sup> of July 2018, 32 emergency decrees were issued.<sup>35</sup> With these decrees, many organizational modifications such as founding a new university on national defense<sup>36</sup> or transferring military hospitals to the ministry of health<sup>37</sup> were made. Also, countless amendments were made to statutes with these decrees<sup>38</sup> including an amendment to the statute regarding unemployment insurance and even an amendment to the highway code regarding an obligation to use winter wheels.<sup>39</sup> There is no doubt that the necessity of these kinds of measures for an emergency is extremely questionable.

Case law of the Court towards emergency decrees was quite progressive and did well to fill the gap regarding supervision of emergency decrees in Turkish law. However, the Court waived this approach and the parliamentary control of emergency decrees proved to be insufficient. Although it was possible to apply to the Constitutional Court after the parliament approves or amends an emergency decree with a statute, the parliament did not act quickly on this matter. Between July 2016 and January 2018, only 5 out of 32 emergency decrees were negotiated and passed by the parliament. The remaining ones were passed afterwards.<sup>40</sup> Despite new applications to the Court being made after the decrees had been transformed into statutes, the Court hasn't announced any judgment regarding them up until today (August 25<sup>th</sup> 2019). In sum, as parliamentary supervision of emergency decrees was not sufficient and as the Court abandoned its case law regarding the examination of emergency decrees, there was no constitutional mechanism to compel emergency decrees to stay within the boundaries

Denetimi Üzerine", Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi, Volume: 23, 2017, pp. 31-39; Serkan Köybaşı, "Developments in Turkish Constitutional Law", 2016 Global Review of Constitutional Law, Edited by Richard Albert, David Landau, Pietro Faraguna and Simon Drugda, Electronically published by I-CONnect and the Clough Center for the Study of Constitutional Democracy at Boston College, available at <http://www.bc.edu/content/dam/files/centers/clough/constitutional-law/ReviewofConLaw-final.pdf>, p. 220 (last accessed on January 10 2018).

- 34 The Council of Ministers under the chairmanship of the President decided to declare state of emergency on July 20, 2016. On the next day the state of emergency went into operation.
- 35 In this context, 8 of such decrees were issued before the Court reversed its previous case law and 24 of them were issued thereafter.
- 36 Emergency Decree No: 669, Date: 31. 07. 2016.
- 37 Emergency Decree No: 669, Date: 31. 07. 2016.
- 38 Emergency Decree No: 668, Date: 27. 07. 2016; Emergency Decree No: 669, Date: 31. 07. 2016; Emergency Decree No: 671, Date: 17. 08. 2017; Emergency Decree No: 674, Date: 01. 09. 2016; Emergency Decree No: 678, Date: 22. 11. 2016; Emergency Decree No: 680, Date: 06. 01. 2017; Emergency Decree No: 681, Date: 06. 01. 2017; Emergency Decree No: 684, Date: 23. 01. 2017; Emergency Decree No: 690, Date: 29. 04. 2017; Emergency Decree No: 691, Date: 22. 06. 2017; Emergency Decree No: 694, Date: 25. 08. 2017; Emergency Decree No: 696, Date: 24. 12. 2017; Emergency Decree No: 687, Date: 09. 02. 2017.
- 39 See Emergency Decree No: 687, Date: 09. 02. 2017. For more examples of the measures taken with emergency decrees see European Commission for Democracy Through Law (Venice Commission), Turkey Opinion on Emergency Decree Laws Nos. 667-676 adopted Following the Failed Coup of 15 July 2016, adopted by the Commission at its 109th Plenary Session (Venice, 9-10 December 2016), Opinion No. 865 / 2016, Strasbourg 12 December 2016, pp. 23-39; European Commission for Democracy Through Law (Venice Commission), Turkey Opinion on the Measures Provided in the Recent Emergency Decree Laws with Respect to Freedom of the Media, adopted by the Commission at its 110th Plenary Session (Venice, 10-11 March 2017), Opinion No. 872 / 2016, Strasbourg 13 March 2017.
- 40 The last statute regarding emergency decrees was accepted in November 2018. In this regard, parliament disregarded its own rules of procedure which stated that emergency decrees shall be negotiated within thirty days after submission. This rule was also changed in late 2018.

set by the constitution.<sup>41</sup> The country was governed under the state of emergency for two years and a lot of issues which were not necessitated by the state of emergency were regulated by emergency decrees. In my opinion, the Court's retreat had great influence on the inflation of such executive dominance in Turkey.<sup>42</sup>

### III. What to Expect from the Court After the Constitutional Amendments of 2017

With the latest amendments, article 91 of the constitution was repealed. At the moment, there is no mechanism to authorize an executive organ to issue decree laws. Alternatively, a new version of article 104 of the constitution directly furnishes the President with the authority to issue ordinary decrees without prior authorization from the parliament. Also, there are 5 articles in the constitution which bring special regulations regarding ordinary decrees. In this regard, article 104/9, 106, 108 and 118 of the constitution designate particular areas to be regulated by decrees<sup>43</sup> and article 123 states that, public entities could be established by statutes or decrees. However, these "brand new" ordinary decrees are much more different than previous ones.<sup>44</sup> The new type of ordinary decrees are designed for the areas which are not regulated by statutes and subject to vast limitations. For example, they do not enjoy the same power as statutes and it is not possible to change statutes with them.

For emergency decrees, the latest amendments were less radical. First of all, article 120, 121 and 122 were repealed. The state of emergency was regulated as the single emergency regime in article 119 and regulations regarding martial law were abolished. Emergency decrees are not subject to judicial review after the amendments either. However, the new article regarding emergency decrees prescribes a new condition:

41 According to Köybaşı, by rejecting the supervision of emergency decrees, the Court "created an unstoppable executive organ". See Köybaşı, "Developments in Turkish Constitutional Law".

42 For the changing role of the Court from 1970s up until today see Bertil Emrah Oder, "Populism and the Turkish Constitutional Court: the Game Broker, the Populist and the Popular", Int'l J. Const. L. Blog, May 2 2017, available at: <http://www.iconnectblog.com/2017/04/populism-and-the-turkish-constitutional-court-the-game-broker-the-populist-and-the-popular/> (last accessed on January 11 2018). Also see Volkan Aslan, "The Role of Turkish Constitutional Court in the Democratization Process of Turkey: From 2002 to Present", *Constitutionalism in a Plural World*, Edited by Catarina Santos Botelho/Luis Heleno Terrinha/Pedro Coutinho, Porto, 2018, pp. 139-155.

43 At the moment, there are intensive debates whether these articles create reserved regulatory areas for decrees or not.

44 According to the new version of article 104/17, "*The President of the Republic may issue presidential decrees on the matters regarding executive power. The fundamental rights, individual rights and duties included in the first and second chapters and the political rights and duties listed in the fourth chapter of the second part of the Constitution shall not be regulated by a presidential decree. No presidential decree shall be issued on the matters which are stipulated in the Constitution to be regulated exclusively by law. No presidential decree shall be issued on the matters explicitly regulated by law. In the case of a discrepancy between provisions of the presidential decrees and the laws, the provisions of the laws shall prevail. A presidential decree shall become null and void if the Grand National Assembly of Turkey enacts a law on the same matter.*" New version of ordinary decrees is very similar to the Russian President's ordinary decrees. According to the article 90 of the Russian Constitution, "*The President of the Russian Federation shall issue decrees and orders. The decrees and orders of the President of the Russian Federation shall be obligatory for fulfillment in the whole territory of the Russian Federation. Decrees and orders of the President of the Russian Federation shall not run counter to the Constitution of the Russian Federation and the federal laws.*" For the English version of Russian Constitution see <http://www.constitution.ru/en/10003000-01.htm> (last accessed on January 12 2018). For detailed information see Abdurrahman Eren, *Anayasa Hukuku Ders Notları (Genel Esaslar-Türk Anayasa Hukuku)*, İstanbul, 2018, s. 526; Thomas F. Remington, *Presidential Decrees in Russia: A Comparative Perspective*, United States, 2014.

if emergency decrees are not debated by the parliament in three months after their promulgation, they cease to have an effect automatically.<sup>45</sup>

Features of new decrees are subject for another study. However, it is possible to say a few words regarding the prospective role the Constitutional Court could play related to the new decree regime. If the Court doesn't change its latest jurisprudence regarding emergency decrees, these decrees will be subject to judicial review only after parliamentary debates, just as before. With regards to ordinary decrees, it is not possible for the Court to adapt the old-fashioned three partite test again, as delegated decree authority is completely abandoned along with the latest amendments. However, new articles regarding decrees create a wide room for maneuver and there are lots of conflicting interpretations which have already whetted stakeholders' appetites. Taking into account all of the debates regarding new articles on decrees, it is fair to say that the Constitutional Court will be the leading actor in the formation of decree authority in the future just as in the past.

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<sup>45</sup> According to the new version of article 119, "*In the event of state of emergency, the President of the Republic may issue presidential decrees on matters necessitated by the state of emergency, notwithstanding the limitations set forth in the second sentence of the seventeenth paragraph of the Article 104. Such decrees which have the force of law shall be published in the Official Gazette, and shall be submitted for approval to the Grand National Assembly of Turkey on the same day. Except in the case of inability of the Grand National Assembly of Turkey to convene due to war or force majeure events, presidential decrees issued during the state of emergency shall be debated and decided in the Grand National Assembly of Turkey within three months. Otherwise presidential decrees issued during the state of emergency shall be annulled automatically.*"

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