Supervision of Emergency in The Council of Europe: Turkey, France and the Venice Commission

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List of Abbreviations

ACs	Administrative Courts
CoE	Council of Europe
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EDs	Emergency Decrees
FCC	French Constitutional Council
ICCPR	International Covenant on Civil and Political Rights
SoE	State of Emergency
TCC	Turkish Constitutional Court
TCS	Turkish Council of State
VC	Venice Commission

Introduction

State of emergency ("SoE") is characterized by an extraordinary concentration of power in the hands of the Executive and a concomitant contraction of human rights.[1] Having regard to the fact that in emergency situations "strategies for containing a threat challenge key techniques for restraining arbitrary exercise of political power that define liberal democratic politics"[2] and that "experience has shown that the most serious violations of human rights tend to occur in emergency situations"[3], a meaningful legal control over the decisions concerning a SoE is indispensable; meaningful review during a state of is/should be a legitimate assumption and expectation in especially legal constitutionalist countries.[4]

Two Council of Europe ("CoE") member countries, Turkey and France, went recently through a SoE. This thesis critically discusses the reactions of the national judicial and constitutional review bodies as well as of the CoE advisory body Venice Commission ("VC")[5] to emergency measures carried out by the governments of these countries. Specifically, the thesis aims to evaluate the performance of these supervision bodies when it comes to controlling emergency action by referring to and justifying the ideal notion of "meaningful legal/juristic control of emergency measures". This notion will be constructed and defended by engaging with conceptual/normative work about emergency situations. The performance of these national

1 Triestino Mariniello, 'Prolonged Emergency and Derogation of Human Rights: Why the European Court Should Raise Its Immunity System' (2019) 20 German Law Journal 46, 46.
2 Jef Huysmans, 'Minding Exceptions: The Politics of Insecurity and Liberal Democracy' (2004) 3 Contemporary Political Theory 322.
3 Venice Commission ("VC"), 'Emergency Powers CDL-STD 1995) 012' 30.
4 "In legal constitutionalism, dominant in most European jurisdictions, legalistic [i.e. by judicial actors] checks on power play a powerful role in the functioning of the political system". For a general discussion of legal constitutionalism in contrast with political constitutionalism (according to which "a healthy democratic system is one in which political conflicts are solved by political means"), see Pablo Castillo-Ortiz, 'The Illiberal Abuse of Constitutional Courts in Europe' (2019) 15 European Constitutional Law Review 48, 52 ff. For a discussion of the justification for constitutional/judicial review of government action based on a formalistic/Kelsenian conception rule of law see, Alan Greene, *Permanent States of Emergency and the Rule of Law* (Hart Publishing 2018) 105. For an argument for judicial control of emergency action in "political constitutionalist" regimes see David Dyzenhaus, *The Constitution of Law: Legality In A Time Of Emergency* (1 edition, Cambridge University Press 2006).
5 See note 88 and 89

and international bodies will be assessed to understand how far from or how close to a meaningful supervision of emergency regimes they have gotten during their supervision and why.

Why SoE?

There are two reasons why I am writing on SoE. One of them relates to personal experience. Coming from Turkey, I witnessed firsthand how far a legal system can go away from a meaningful legal control of emergency measures and how, consequently, power can be abused under an unfettered rule. This experience led me to start thinking about legal tools and justifications that the judiciary can rely on in order to put forth a meaningful control.

The second reason relates to the global context in which we are. SoE can today[6] (especially after 9/11) be seen as part of a broader transformation of state power that has often been called "the rise of the Security State".[7] The Security State, which foregrounds security as the leading political principle[8], frames the public debate by reducing issues and persons to terms of threat and survival in order to justify the expansion (in the hands of the Executive) of new extraordinary and dubious coercive measures that are supposed to efficiently ensure collective interests (especially national security), at the expanse, however, of civil liberties and due process. We can for example remember French President Hollande's talk in Parliament, after the November 2015 attacks, which asserted that "France is at war"[9] as a justification for the invocation of extraordinary measures considerably affecting constitutional rights (which we discuss below).

6 Giorgio Agamben, 'De l'Etat de Droit à l'Etat de Sécurité' *Le monde* (21 December 2015).
7 For a seminal study on the concept of the Security State see; Simon Hallsworth and John Lea, 'Reconstructing Leviathan: Emerging Contours of the Security State': [2011] Theoretical Criminology. For an excellent study that applies this notion to the Netherlands, see Nick Ruis, 'An Emerging Security State? The Netherlands and the Emergence of a Preventative Paradigm' (Master's Thesis, Leiden University 2018). For a discussion of the impacts of the Security State in France, see Vincent Sizaire, 'Maintien de l'ordre, Les Faux-Semblants Du Modèle Français: Des sans-Culottes Aux « gilets Jaunes », Histoire d'une Surenchère Répressive' Le monde diplomatique (April 2019) 4. For Turkey, see Geneviève Zingg, 'Turkey under Emergency Rule: Politicized Terrorism Prosecutions and Criminalized Dissent' (Master's Thesis, Columbia University 2018).
8 Huysmans (n 2) 323.
9 'Hollande Maintient Sa Position : « La France Est En Guerre »' *Le monde* (16 November 2015).

The Security State seems to me to be the wave of the future. The global reaction of governments to the Coronavirus pandemic vindicates this hypothesis[10] and reminds the topicality, although not in the form of "fight" against terrorism, of the Security State which makes use of extraordinary/emergency powers with the proclaimed aim of protecting its citizens. Almost five years after Hollande made his speech, we see today current President Macron who deploys a similar rhetoric, with the enemy being different this time: "We are in a war in which nothing should divert us from fighting an invisible enemy". Once again, as one author comments, "the protection of the 'bare life' of citizens [has been] promoted to a governmental task that overrides everything else" in order to justify restrictive measures that considerably discard the social and political dimensions of citizens' lives.[11] The Security State, with its extraordinary measures, in all its forms, should be subject to meaningful legal control and we should think about how this can happen.

The measures taken by the Security State are dubious because, and this is important for my thesis, of another characteristic of the Security State in its form of fight against terrorism (which this thesis addresses): They tend to make use of indeterminate formulas (concerning targeted persons) in order to justify preventive measures, contrary, thus, both to the principle of legal/juridical certainty and of presumption of innocence. We will see Turkish and French examples of this characteristic below.

The Choice of Comparators

I chose Turkey, France and the VC for the following reason: Turkish bodies, French bodies and the VC all represent three different ways of dealing with emergency situations, the VC being the closest to the ideal notion of "meaningful control". Given the need for effective supervision over emergency action, it is essential to understand how and why these different

10 See for a recent discussion Alan Greene, 'State of Emergency: How Different Countries Are Invoking Extra Powers to Stop the Coronavirus' *The Conversation* (30 March 2020).
11 Lukas van den Berge, 'Biopolitics and the Coronavirus: Foucault, Agamben, Žižek' (2020) 49 Netherlands Journal of Legal Philosophy 5.

bodies reacted as they did. Importantly, the thesis does not include the ECtHR. The reason for this is that the ECtHR has not so far rendered judgments on the merits concerning either of these countries about the emergency measures taken. There have been applications from Turkey that have been rejected because of non-exhaustion of domestic remedies. Although these rejections seem highly problematic[12], and make the ECtHR's attitude similar to the Turkish bodies' with their improper proceduralism as we will see below, it is more appropriate to wait for its final say before engaging in a comprehensive analysis.[13] It should be stated however that there will be a passing reference to the ECtHR in the discussion on the VC.

The Contribution of This Thesis

When it comes to SoE in general, this thesis tries to keep the interest in meaningful legal review of very restrictive and state-transformative measures alive, given the constant considerable pressure during national crises on the judiciary to "go to war"[14] together with the other branches and neglect its duties. When it comes to the Turkish and French cases in particular, it addresses them in a somewhat unusual way in that it relies at the same time on more than one way of approaching SoE. It is rare[15] to find work that addresses either of these cases by drawing on a combination of work exploring contested concepts (conceptual work), addressing normative concerns such as "how can we justify legal control over emergency action?" (normative work), jurisprudential work (how should judges decide cases?) as well as empirical work, which this thesis tries to accomplish. I believe the paramount advantage of this eclectic approach is to see the larger questions that are at stake in a more insightful way.

12 Emre Turkut, 'Has the European Court of Human Rights Turned a Blind Eye to Alleged Rights Abuses in Turkey?' EJIL:Talk! (28 December 2016). See also, Tom Ruys and Emre Turkut, 'Turkey's Post-Coup "Purification Process": Collective Dismissals of Public Servants under the European Convention on Human Rights' (2018) 18 Human Rights Law Review 539, 559.

13 Michael O'Boyle, 'Can the ECtHR Provide an Effective Remedy Following the Coup d'état and Declaration of Emergency in Turkey?' EJIL:Talk! (19 March 2018).

14 Oren Gross, 'Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?' (2003) 112 Yale Law Journal 1035.

15 One important exception in the French literature is Stéphanie Hennette-Vauchez (ed), *Ce qui reste(ra) toujours de l'urgence* (1 edition, IUV 2018).

Methodology and Structure

This thesis concerns only the supervision of measures flowing from the SoE regime and therefore does not cover other measures (those flowing from ordinary laws that existed before the SoE) invoked to deal with the emergency. It draws on legal instruments (provisions and judgments), conceptual, normative and empirical work. It revolves around two key questions that come up in a SoE: the constitutional/judicial review, during the SoE, of the decisions that there is an emergency and how to deal with it. It therefore also does not cover the question of what remains of the SoE after its end. For the purposes of the thesis, by constitutional review I mean control done by constitutional review bodies. By judicial review I mean control done by administrative courts ("ACs").

In Chapter One I first deal with the different aspects of the concept of SoE and meaningful review, by drawing a general picture of emergency regulations. And then, by taking "a step back"[16] I address the normative question "how can there be a meaningful legal control and how can it be justified?" In Chapter Two, I characterize the way Turkish bodies approached the above-mentioned key questions. In chapter three I address France. In Chapter Four I examine the approach taken by the VC. Thus, the thesis follows an order from the least strict to the strictest kind of control. I then conclude by stressing the importance of meaningful legal control during a SoE.

16 Victor V Ramraj, 'No Doctrine More Pernicious? Emergencies and the Limits of Legality', Emergencies and The Limits of Legality (Cambridge University Press 2008) 6.

Chapter One

1.1 A general picture of emergency regulations

It is widely accepted[17] that, from external attacks, internal disturbances, natural disasters to environmental catastrophes, epidemics and economic crises[18], situations deviating from the ordinary course of events call for governmental action that would at normal times not be permissible. This "abnormal" kind of governmental action may involve change in the distribution of powers among different state organs in order to address the exceptional circumstances (for example, the historical example[19] of exceptional legislative power delegated to the Executive for the duration of the SoE); it may also involve citizens' rights being limited for the same purpose (for example, lockdowns affecting freedom of movement beyond ordinary legitimate limitations). Indeed, modern national and international legal orders contain special regulatory frameworks that give effect to this unordinary kind of governmental actions to deal with emergencies. Typically, states first recognize that there exists an emergency situation through a declaration of SoE (which means that the emergency situation cannot be dealt with by means of the legal regime that is in effect in times of "normalcy") and then apply the special emergency regime which enters into force as a consequence of this declaration.

It is now important, considering the foregoing, to define the concept of the SoE because it is this definition that will give us the ideal notion of "meaningful control". By drawing on an ideal-typical[20] and nature-of-things[21] construction of the concept of the SoE, we can define it

17 "Nine of ten countries currently have emergency provisions written into their constitutions". Christian Bjørnskov and Stefan Voigt, 'The Architecture of Emergency Constitutions' (2018) 16 International Journal of Constitutional Law 101, 102.
18 András Sajó and Renáta Uitz, *The Constitution of Freedom: An Introduction to Legal Constitutionalism* (Oxford University Press 2017) 419.
19 Giorgio Agamben, 'The State of Exception as a Paradigm of Government', *State of Exception* (The University of Chicago Press 2005).
20 Greene, *Permanent State of Emergency and the Rule of Law* (n 4) 2.
21 Andrej Zwitter, 'The Rule of Law in Times of Crisis - A Legal Theory on the State of Emergency in the Liberal Democracy' (Social Science Research Network 2012) 96–97.

as an "expansion, in the face of a severe threat to the state and general population that cannot be dealt with by normal means, of permissible state power and action with a view to restoring the state of normalcy by eliminating the threat."[22]

The exception to invoking a SoE is the "business-as-usual" approach. According to this approach, "ordinary legal rules and norms continue to be followed strictly with no substantive change even in times of emergency and crisis. The law in times of war remains the same as in times of peace."[23] The most important criticisms, that I agree with, toward this approach are, first, that it is either naïve or hypocritical because it disregards the reality that states need to and do invoke extraordinary measures at extraordinary times[24] and secondly that it lacks the ability to limit invocation of emergency powers to extraordinary times[25] because it does not recognize a separate extraordinary "state" of the legal order.

The overwhelming majority of states, however, follow "models of accommodation" which "countenance a certain degree of accommodation for the pressures exerted on the state in times of emergency, while, at the same time, maintaining normal legal principles and rules as much as possible. According to the models of accommodation, when a nation is faced with emergencies its legal, and even constitutional, structure must be somewhat relaxed (and perhaps even suspended in parts)."[26] Although critics recognize that this model provides the government with flexibility in the face of crisis, it is criticized because of its susceptibility to manipulation by the government willing to expand power and because emergency powers tend to get

22 For a similar conclusion, see Matthias Lemke, 'What Does State of Exception Mean?: A Definitional and Analytical Approach' (2018) 28 Zeitschrift für Politikwissenschaft 373.
23 Oren Gross and Fionnuala Ní Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge University Press 2006) 10
24 Gross (n 14) 1021.
25 This is what Greene calls "the shielding effect of SoE" Alan Greene, 'Separating Normalcy from Emergency: The Jurisprudence of Article 15 of the European Convention on Human Rights' (2011) 12 German Law Journal 1764, 1766.
26 Gross and Ní Aoláin (n 23) 9.

normalized in the long-run and thus harm the integrity of the legal order.[27] But this is precisely why we need a meaningful legal control so that emergency powers are properly exercised.

To give more sense of the current modes of regulating this special kind of governmental action during SoE, we can make further conceptual remarks. Concerning the locus, within the hierarchy of norms, of emergency regulations, Ferejohn and Pasquino make a distinction between "the constitutional model" (as in Turkey), whereby constitutions contain this special regulation and "legislative model", whereby the Legislature, working within its normal competence, enacts this special regulation in the form of a time-limited piece of legislation, which can be reviewed by the country's constitutional review body (as in France).[28]

Another distinction is made concerning the constitutional actor who has the main (formal) role in the state's dealing with emergency situations. The distinction is made between "the Executive model", whereby "the Executive has the authority to decide on whether there is an emergency and how best to respond to the emergency", and "the Legislative Model", whereby the Legislature "designs a legal regime that deals with both of these issues".[29]

Another issue concerns the flexibility-rigidity of the content of emergency regulations (i.e. both the question of the existence of an emergency and how to deal with it). We can mention two approaches. One approach imposes a rigid content by stipulating, ex ante, in specific, empirical terms what counts as an emergency[30] and by providing a closed list of specific emergency powers.[31] We can call this approach the "prescriptive legal positivist"[32] approach. The second approach is more flexible in that by stipulating the content of emergency regulations on a more abstract level, it makes room for governmental discretion in the face of

27 Gross (n 14) 1021.
28 John Ferejohn and Pasquale Pasquino, 'The Law of the Exception: A Typology of Emergency Powers' (2004) 2 International Journal of Constitutional Law 210.
29 David Dyzenhaus, 'State of Emergency' in András Sajó and Michel Rosenfeld (eds), The Oxford Handbook of Comparative Constitutional Law (Oxford University Press 2012).
30 See e.g. art.119 of the Turkish Constitution.
31 See e.g. the French SoE act of 1955
32 Tom Campbell, 'Emergency Strategies for Prescriptive Legal Positivists: Anti-Terrorist Law and Legal Theory' in Victor V Ramraj (ed), Emergencies and the Limits of Legality (Cambridge University Press 2008).

emergency situations which are unexpected and unpredictable. The derogation clause (Article 15) of the ECHR is, at both limbs, an example of this approach.

We now can introduce the notion of meaningful legal/juristic control during a SoE.[33] We defined the concept of SoE as an "expansion, in the face of a severe threat to the state and general population that cannot be dealt with by normal means, of permissible state power and action with a view to restoring the state of normalcy by eliminating the threat." This definition provides us with limitations on both when one can have recourse to a SoE and how to deal with it. These limitations form the basis of a meaningful legal control: The review body should assess whether there is a concrete ("in the face of") threat of such severity that makes it impossible for the state to deal with it by ordinary means. Once the threat is gone, the SoE should end. Also, the review body should assess whether the measures invoked are necessary to the elimination of the threat. In a state respecting human rights the necessity control should take the form of a full-fledged proportionality test[34], which would also imply a control of temporality and spatiality of the measures. Because in principle it does not make sense to provide for measures concerning areas where there is no threat. It also does not make sense to provide for permanent measures in SoE which by their nature depend on the existence of a temporary[35] event. Once the emergency is over, it does not make sense to keep a measure in force the object of which is gone. Finally, it should be mentioned that a meaningful review body will first have to wait for the Executive to act (to provide breathing space to effective emergency action), but, then, after a reasonable period of time, (in a way that would actually affect the management of subsequent emergency action) intervene.

[33] In constructing this notion, I was largely inspired by the following works Dyzenhaus, *The Constitution of Law* (n 4); Zwitter (n 21); Greene, *Permanent State of Emergency and the Rule of Law* (n 4) and also the wording and the interpretation of art.15 of the European Convention of Human Rights by the ECtHR.

34 For an exploration of a proper proportionality test Luka Anđelković, 'The Elements Of Proportionality As A Principle Of Human Rights Limitations' (2017) 0 Facta Universitatis, Series: Law and Politics 235.

[35] However, an emergency does not necessarily last for a short duration Kushtrim Istrefi and Stefan Salomon, 'Entrenched Derogations From the European Convention on Human Rights and the Emergence of Non-Judicial Supervision Derogations' (2019) 22 The Austrian Review of International and European Law Online.

1.2 How Can There Be A Meaningful Legal Control?

An argument for a meaningful control will firstly depend on one's conception of law and law's ability to govern state action. For a long time, from John Locke to Carl Schmitt, theorists writing on emergency action have thought that law cannot be useful at extraordinary times because what they meant by law was highly determinate, ex ante enacted norms (i.e. rules) governing state action.[36] And given the unpredictable nature of emergency, they rightly thought that it was impossible to govern it through norms covering considerably determinate fact situations. Their approach resonates with the "prescriptive legal positivist" approach that we mentioned above. So, for example, what Locke understood by law was "settled, standing legislated rules" and he insisted that during emergency situations the Executive does and should have the power to "act according to discretion, for the publick good, without the prescription of the Law".[37] The only limit on the Executive's action is therefore its bona fide judgment that its action serves public good because law lacks the tools to deal with emergencies. We can see a similar approach with Schmitt who writes: "The exception…cannot be circumscribed factually and made to conform to a preformed law…The precise details of an emergency cannot be anticipated, nor can one spell out what may take place in such a case, especially when it is truly a matter of an extreme emergency and of how it is to be eliminated."[38]

However, in both theory and juristic practice, the conception of law as being only about rules has been challenged. So, for example, Dworkin introduced policies and principles as elements, beside rules, governing state action. There are cases in which law's control will derive not from a rule but by weighting conflicting principles and policies that are at stake.[39] This refers, in practice, to the proportionality and balancing of interests methods that we see in the

36 Dyzenhaus, *The Constitution of Law* (n 4) 61. We find a similar approach with Albert Dicey, see David Dyzenhaus, 'The State of Emergency in Legal Theory' in Victor V Ramraj et al. (ed), Global Anti-Terrorism Law and Policy (Cambridge University Press 2005).
37 Dyzenhaus, 'State of Emergency' (n 29) 444.
38 Carl Schmitt, *Political Theology* (The University of Chicago Press 2005) 6.
39 Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1978) 26 ff.

case-law of national constitutional and international supervision bodies, including Turkey, France and the VC.[40] And there has been no problem in applying these methods to emergency situations because, under these methods, one is, allegedly, not supposed to subsume responses to emergencies under rules.[41] And my "meaningful review" notion calls precisely for the use of these methods.

Thus far we have dealt with the problem of law's applicability to responses to emergencies, which primarily relates to the second limb (which measures can be taken during emergencies?) of emergency action. Now, we turn to another challenge to a meaningful control that is related to both limbs, including the decision that there is an emergency. This challenge is called the Schmittian challenge. Carl Schmitt argued that the decisions concerning SoE (both the decision that there is an emergency situation and the decision as to the measures that shall be taken to deal with it) are made by "the Sovereign" who stands outside and above the legal order because of the "constituent power"[42] he possesses. As he put it "What characterizes an exception is principally unlimited authority, which means the suspension of the entire existing order."[43] According to Schmitt the Sovereign (the branch in government that is most able to act swiftly and decisive way: the Executive[44]) may impose its will as constituent power in exceptional/existential situations such as emergency situations. In fact, it is the job of the Sovereign to make the distinction, in existential situations (the existence of which is decided by the Sovereign), between the "us" (friend) and "them" (enemy), to sideline "them" and create the political stability based on a homogeneous society that Schmitt thinks is needed (and this is where we understand that Schmitt's account of SoE is not simply descriptive, but normative)

40 For an excellent exploration of the contrast between rule-based and principle-based constitutional interpretation see, Arun K Thiruvengadam, 'Comparative Law and Constitutional Interpretation in Singapore: Insights from Constitutional Theory' in Li-ann Thio and Kevin YL Tan (eds), *Evolution of a Revolution* (Routledge-Cavendish 2009).
41 See e.g. A and others v Secretary of State for the Home (House of Lords, 2004).
42 Renato Cristi, 'Carl Schmitt on Sovereignty and Constituent Power' in David Dyzenhaus (ed), Law as Politics: Carl Schmitt's Critique of Liberalism (Duke University Press 1998).
43 Schmitt (n 38) 12.
44 Dyzenhaus, 'State of Emergency' (n 29).

for a legal order to properly function subsequently.[45] To sum up, at extraordinary times a popular, charismatic leader acts/should act based on "constituent power" (i.e. overwhelming popular support) without being limited by the existing constitution.[46]

The only way, in the face of the Schmittian challenge, that a meaningful control can take place seems to me to resist, as a people/nation, the Executive's rhetoric of "war" consisting of the friend/enemy distinction, which could permit it to rise above the constitution and establish an unlimited government: the nation undergoing extraordinary times should remind the Executive that emergency action is/can only be justified as an exercise of constituted power (as provided for in the constitution or statute) and reject the Executive's rhetoric as an illegitimate/illegal claim for constituent power. One might say that people will not do this because they will think that unconstitutional emergency measures will apply only to "enemies" and therefore they have nothing to fear. However, firstly, human rights should be defended as a matter of principle and secondly it might be late for preventing the Sovereign from applying those measures to new targets. As Justice Jackson stated in his dissenting opinion in *Korematsu:* "[The measures] will lie about like a loaded weapon ready for the hand of any authority [that can] expand it to new purposes."[47]

Only if people advocate for limited government can there be a meaningful legal control.[48] If most of the nation goes to war following the Executive, the judges, as the rest of the nation, will "like to win wars".[49] As Judge Learned Hand stated: "Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no

45 Dyzenhaus, 'The State of Emergency in Legal Theory' (n 36) 71. Greene, *Permanent State of Emergency and the Rule of Law* (n 4) 71.
46 John P McCormick, 'The Dilemmas of Dictatorship: Carl Schmitt and Constitutional Emergency Powers' in David Dyzenhaus (ed), Law as Politics: Carl Schmitt's Critique of Liberalism (Duke University Press 1998).
47 *Korematsu v United States, 323 US 214* (Supreme Court of The United States) 246.
48 For a similar conclusion, see e.g. Samuel Issacharoff, *Fragile Democracies: Contested Power in the Era of Constitutional Courts* (Cambridge University Press 2015) 274. "the absence of allies should prompt caution in a judiciary that cannot easily withstand the powers of mobilization of the political branches."
49 Gross (n 14) 1034.

constitution, no law, no court can even do much to help it. While it lies there it needs no constitution, no law, no court to save it."[50]

Reminding the Executive that emergency action is constituted power entails not only that there be meaningful control over the measures taken but also over the decision that there is a SoE so that the "Sovereign" does not manipulate the emergency provisions. In some cases, it is easy to agree that a situation really constitutes an exceptional and concrete threat. But in some "penumbral" cases much depends on the subjective assessment of the decision-maker who decides that there is an emergency. A meaningful legal control would then scrutinize why the decision maker framed the situation as he did, why he thought it was necessary to invoke emergency provisions.[51] The nature and content of the emergency measures that were taken after the declaration of SoE would tell much about the sincerity of the decision-maker that there is a need for a SoE.

Before proceeding to the case studies, I would like to contrast a meaningful legal control with two other less strict types of control (in fact no control at all) that we frequently see in court decisions dealing with emergencies.[52] The first type is proceduralist: the judiciary is solely interested in whether emergency action is formally taken by the authority that is designated by the law without any substantive control.[53] Emergency conditions/provisions are thought of solely as factors about which the (formally empowered) "Sovereign" decides. The consequence of such a control is what Dyzenhaus calls "a legal black hole", in which the designated authority can do whatever it pleases to do without substantive control by the judiciary. The second type is "minimalist" in that although the judiciary considers itself competent to do some sort of substantive control, the control imposes such low requirements on the governments that once

50 ibid 1014.
51Greene, *Permanent State of Emergency and the Rule of Law* (n 4) 48 ff.
[52] For a recent discussion with examples from multiple jurisdictions Greene, *Permanent States of Emergency and the Rule of Law* (n 4).
[53] ibid 101.

again the authority in charge of emergency action can in the main do as it pleases. This is what Dyzenhaus calls “legal grey hole”.[54]

To conclude, a meaningful legal control can only take place if the nation wants, even at emergency times, to respect human rights in acceptable ways and considers the recourse to a SoE categorically as an exercise of constituted power so that the government does not manipulate it into a tool for circumvention of constitutional restrictions.

54 Dyzenhaus, *The Constitution of Law* (n 4).

Chapter Two: The Turkish Experience

2.1 General Remarks

In Turkey, a SoE was declared and extended for two years, immediately after the failed coup attempt of July 2016.[55] The proclaimed aim of the SoE was to conduct a purge from the State apparatus of coup plotters who threatened a repeated coup. The rhetoric of the Executive was that it was waging war against terrorists ("enemies") and it was able to mobilize overwhelming popular support for the emergency measures[56], the Parliament having become a rubber stamp of the Executive.[57] We should think of the judiciary's performance considering this fact.

Turkey follows the "constitutional model". The relevant constitutional provisions concerning the SoE are the following: Article 120 provides that "in the event of serious indications of widespread acts of violence aimed at the destruction of the free democratic order established by the Constitution or of fundamental rights and freedoms, or serious deterioration of public order because of acts of violence, the Council of Ministers...may declare a SoE …for a period not exceeding six months." Article 121 provides that "The manner how fundamental rights and freedoms shall be restricted or suspended in line with the principles of Article 15, how and by what means the measures necessitated by the situation shall be taken, what sorts of powers shall be conferred on public servants, what kinds of changes shall be made in the status of officials as long as they are applicable to each kinds of SoE separately, and the extraordinary administration procedures, shall be regulated by the Act on SoE. During the SoE, the Council

[55] 'Turkey's Failed Coup Attempt: All You Need to Know' *Aljazeera* (15 July 2017).
[56] '"Türk Halkı OHAL Süreci Uygulamalarını Destekliyor"' *140 Journos* (1 October 2016).
[57] 'OHAL Kapsamında Yayımlanan KHK'lar TBMM'ce Kabul Edilerek Kanunlaştı' *Procompliance* (5 November 2018).

of Ministers…may issue decrees having the force of law [i.e. exceptional regulatory power that is at normal times not permissible] on matters necessitated by the SoE."

Article 15 provides that "In times of war, mobilization, martial law, or a SoE, the exercise of fundamental rights and freedoms may be partially or entirely suspended, or measures derogating from 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." Finally, Article 148 provides that "Decrees having the force of law issued during a SoE…shall not be brought before the Constitutional Court alleging their unconstitutionality as to form or substance."

We should make several conceptual remarks. First, when it comes to the constitutional actor who has the main role during the SoE, we see a mixed approach. Because the existence of an emergency will be decided by the Executive. However, the vital aspects of emergency powers ("what sorts of powers shall be conferred on public servants") shall be decided by the Legislature.

Secondly, when it comes to the flexibility of content of emergency regulations, we once again see a mixed approach. Because on the one hand according to Article 15 "[in a SoE] measures derogating from the guarantees embodied in the Constitution may be taken to the extent required by the exigencies of the situation", which resonates with the flexible approach. On the other hand, the question of the existence of SoE is defined through empirical fact situations. Also, the fact that the Act on SoE (provisions of which should be compatible with Article 15 which prescribes the flexible approach) prescribes (following the Constitution) the vital matters concerning emergency powers, again, in factual, empirical terms resonates with the prescriptive legal positivist method.

2.2 Constitutional Review of Emergency Powers

When the Constitution entered into force in 1982 and the Act on SoE was enacted in 1983, there was much discussion concerning the interpretation of the above-mentioned constitutional provisions. We will first mention two aspects of this discussion and then we will mention the occasion on which the Turkish Constitutional Court ("TCC") established its case law concerning the emergency regime.[58]

The first issue was the relationship between the Act on SoE and the emergency decrees ("EDs") that the Executive could enact during the SoE. Could the Executive regulate through EDs matters that the Constitution had enlisted the Legislature to regulate in Article 121? The second issue was the role that the TCC could play during a SoE given the control ban provided by Article 148: "decrees having the force of law issued during a SoE…shall not be brought before the TCC alleging their unconstitutionality as to form or substance".

In a very famous case in 1991[59], the TCC, relying on the concepts of rule of law (Article 2) and separation of powers (preamble and Article 7 which prescribes that the legislative power of the National Assembly shall not be delegated), established the following: a substantive (not only formal) essence should be attributed to the notion "decrees having the force of law". This essence should have three components; material, temporal and territorial: When it comes to the material component, the EDs cannot regulate the matters necessitated by the SoE that fall within the framework (the vital aspects) created by the legislature (provisions of which are deemed to be compatible with Article 15 of the constitution which calls for a proportionality test). What the Executive can do is implementing/concretizing, through EDs, in each SoE, the framework created by the legislature in advance by the Act on SoE.

[58] For a comprehensive discussion, see Kemal Gözler, *Kanun Hükmünde Kararnamelerin Hukuki Rejimi* (Ekin Kitabevi Yayınları 2000). Ozen Adadag Ulgen, 'L'état d'urgence et la Cour Constitutionnelle Turque' (2019) Annales de la Faculté de Droit d'Istanbul 68.

[59] *Registry No 1990/25, Decision 1991/1* (The Constitutional Court of Turkey).

When it comes to the territorial component matters covered by the EDs should be related to the area with respect to which a SoE was declared and when it comes to the temporal component, they should be temporary – they cannot make changes in ordinary legislation. Therefore, by virtue of this substantive essence, when a regulation called "ED" is brought before it for abstract review, the TCC will decide whether the regulation is *substantively* an ED or not. If not (if for example it regulates an issue falling under the vital aspects), Article 148 (control ban) shall not apply to that regulation and the TCC will be able to control it. As we see, in the face of a "ouster clause" (Article 148), the TCC developed a technique for implementing a kind of meaningful control for the second key question for a SoE (how to deal with it), by the introduction of substance which made possible a proportionality test. We should mention however that when it comes to the existence of a SoE it adopted a proceduralist type of control.

In October 2016 three months after the declaration of SoE, The TCC reversed its case-law.[60] It reasoned that it has no competence to review the EDs that are procedurally sound, that a substantive characterization of EDs was wrong (because it rendered the Article 148 control ban redundant). It is important to note that the Court did not address at all the principles (rule of law and separation of powers) that were the basis of the established case-law. With the EDs declared non-justiciable, the Executive now had unfettered rule-making power. Not only could it violate the basic framework created by the Act on SoE but also the model of accommodation prescribed by the Article 15 of the Constitution. Thus we can say that the TCC fell into what Dyzenhaus calls the validity trap – "the trap we fall into if we think that a sufficient condition for the authority of particular laws is that they meet the formal criteria of validity specified by a legal order"[61] by adopting a proceduralist control. It created a "legal black hole".

The Government consequently considerably disregarded the requirement that the measures be "required by the exigencies of the situation" prescribed by Article 15. Thus, in

[60] *Registry No 2016/166, Decision 2016/159* (The Constitutional Court of Turkey).
[61] Dyzenhaus, *The Constitution of Law* (n 4) 57.

practice, Turkey has become an executive model because not only did the Executive decide that there was an emergency, but it also decided how to deal with it.

2.3 Judicial Review of Emergency Powers

To give a sense of this unfettered power we can give some examples[62] of the measures taken and we can convey the position of ACs against one very important measure that was taken. We can divide these exemplary measures taken by EDs into two groups. One group consists of general measures making *permanent* changes in the legal order and the other group consists of individual measures of *permanent* effect. For the first group examples are: amendment to the Law on municipalities, which sets out a procedure for the replacement of mayors suspended from duties for aiding and abetting terrorism; introduction of the rule that a maximum of three lawyers are admitted to defend a person at a hearing in organized crime cases; making it necessary for citizens to use winter tyres by way of an amendment to the Traffic Code (which has obviously nothing to do with the SoE).

For the second group, examples, which are problematic also in terms of the material component because they are not regulated in the Act on SoE, are: Permanent dissolution of over two thousand private institutions including health institutions, schools, student dormitories, foundations, associations, universities and trade unions which have been liquidated. EDs also provided for the dismissal of judges and other public servants either by allowing the institutions where judges and public servants worked to render such decisions or through the EDs directly. This latter method took the form of appending to the EDs lists of thousands of individuals dismissed directly from public service (without ex ante administrative due process which is required at normal times to dismiss someone).[63] What is important for the discussion on the

[62] İnsan Hakları Ortak Platformu, '21 Temmuz 2016-20 Mart 2018 Olağanüstü Hal Uygulamaları: Güncellenmiş Durum Raporu' (17 April 2018).

[63] For an excellent article on the measures with special emphasis on dismissals from public service see, Ruys and Turkut (n 12). See also Mariniello (n 1) 55. See also generally Kerem Altıparmak and Senem Gürol, 'Turkey's Derogation of Human Rights under the State of Emergency: Examining Its Legitimacy and Proportionality' (2019) 22 Austrian Review of International and European Law Online.

Security State is that these people were dismissed "on the ground that they are a member of, or have relations with, connections to, or contacts with the terrorist organization" Thus, this measure extends to persons beyond "members" of the terrorist organization, vague words like "connections" or "contacts" having nothing to do with judicial certainty and thinking concerning organized criminal activity.

We can now turn to the reaction of ACs to these direct dismissals (which were measures that affected over 100,00 public servants coming from all sectors-university professors, high school teachers, nurses, etc.). When mass dismissals began (in late July), thousands of people went to ACs (as it is at ordinary times a dismissed public servant's right to go to ACs). All over the country, the ACs of first instance decided that these people were dismissed by a legislative act and not an administrative act and that therefore the ACs did not have jurisdiction[64]. Again, we see a choice of characterization: These acts were formally legislative (because they were enacted following the procedural rules provided for EDs having the "force of law") but substantively administrative (because they did not establish abstract, general rules but produced direct, individual legal consequences). People who were directly dismissed went also to the Turkish Council of State ("TCS"). The TCS decided that in cases involving directly dismissed people it did not have jurisdiction because these cases were not one of the enumerated cases where the TCS was a court of first instance.[65] It decided, however, that the courts of first instance had jurisdiction in these cases (which means that the TCS characterized mass dismissals through EDs as administrative acts). But, the TCS's decision notwithstanding, the first instance courts continued to decide that they had no jurisdiction.[66] We can conclude therefore that ACs also adopted a proceduralist approach by questioning only whether the measure taken was formally sound without paying attention to substance, which led them to

[64] See note 60.
[65] *Registry No: 2016/8136, Decision 2016/4076* (The Turkish Council of State).
[66] Feray Salman and Aysel Ergün, 'KHK'lara Karşı Hukuk Yolu' *Bianet* (7 January 2017).

decide that they did not have jurisdiction, which in turn created again a legal black hole, in which the government could act without judicial control.

Chapter Three: The French Experience

3.1 General Remarks

In France, a SoE was declared and extended at various points for two years after the November 2015 terrorist attacks, with the proclaimed aim of combatting terrorism based on the time-limited Act on SoE dating from 1955.[67] It provides that the Executive can declare a SoE in case of "an imminent danger resulting from serious violations of public order". It also provides the Executive with a closed list of "administrative police actions" which directly affect constitutional rights. These include bans on the circulation of persons or vehicles; restricted residence orders; house search during both daytime and nighttime.

As the Act of 1955 was invoked in the last SoE, we will concentrate only on the constitutional/judicial review that it gave rise to. We will not discuss other French states of exception (Article 16 and 36 of the Constitution). Before we proceed to the discussion of the review of this Act, we would like to make a conceptual remark about the flexibility of the content of this emergency regulation. As we saw, this act provides the Executive with specific, empirical powers ex ante. Thus, it follows the prescriptive positivist approach. Another important conceptual issue was the question whether France embodies a model of accommodation about *état d'urgence*. Prima facie, seeing that the Act on SoE is a special act granting powers that cannot be used at normal times, we would conclude that it is. However, the regime of état d'urgence is not prescribed in the Constitution. This is why, the constitutional review body (the Conseil Constitutionnel in France), when the provisions of this Act came before it for review could have imposed the constitutional principles as they are at normal times (without "relaxing" them) which would turn the legal order into a "business-as-usual" model.

67 'Https://Www.Vie-Publique.Fr/Questions-Reponses/269427-Etat-Durgence-et-Autres-Regimes-Dexception-Article-16-Etat-de-Siege'.

However, as we will see below, the Council did not do this and developed a kind of a model of accommodation through case-law, without any constitutional provision that would force it to do so.

In France, too, the general public and the Parliament[68] rallied behind the Executive with respect to emergencies by accepting the measures the Executive proposed through key amendments to the Act on State of emergency and we mentioned above that the French President said, "France was at war with those attacking its values". It is in this light that we should assess judicial performance.

3.2 Constitutional Review of Emergency Powers

The Act on SoE provides the Executive with a closed list of preventive "administrative police actions" which considerably affect constitutional rights.[69] As none of the parliamentarians was willing to go to the French Constitutional Council ("FCC") for an a priori control (for those provisions that were introduced to the Act dating from 1955 by way of amendments after the declaration of SoE), the constitutionality of these measures was addressed in nine "QPC" decisions[70] before the FCC.

The measures that were most intrusive with respect to constitutional rights were house arrest and house search and the FCC did not find them to be unconstitutional.[71] The FCC was satisfied with the conditions concerning the object of the measure, i.e. a person, provided for by the Act. So, for example, the FCC did not find unconstitutional the condition that "there be serious grounds to consider that a person's behavior may constitute a threat for public security" (Article 6 of the Act) for the Executive to place that person under house arrest. Seeing this

[68] 'Si on Suit l'opinion Publique, La Sécurité Supprimera La Liberté' *Europe1* (28 November 2015). See also, Jacqueline Morand-Deviller, 'Réflexions Sur I'état d'urgence' (2016) 3 Revista de Investigações Constitucionais "Cette réaction énergique mise au service de la sécurité reçut l'adhésion quasi unanime de l'opinion publique et de l'ensemble des courants politiques.".

[69] Olivier Beaud, '"Anything Goes": How Does French Law Deal with the State of Emergency?' in Pierre Auriel, Olivier Beaud and Carl Wellman (eds), *The Rule of Crisis Terrorism, Emergency Legislation and the Rule of Law* (Springer 2018).

[70] For the full list of these decision by the 18th of January 2018 see, Hennette-Vauchez (n 15).

[71] *Décision n° 2015-527 QPC* (house arrest); *Décision n° 2016-536 QPC* (house search).

formula, we should be reminded of the Security State with its chipping away at judicial certainty. Why did the FCC not consider the provided conditions to be conducive to arbitrariness? House arrest, just as house search, was brought to the Act from the Code of Criminal Procedure.[72] In criminal proceedings, these measures can be taken only if there are facts satisfying an objective observer that the person committed "a specific and concrete offence" ("the place and time of its commission and its victim(s)" should be ascertained[73]). But here, the impression about persons' being a "threat to public safety" is enough (in fact, only 1% of the house searches led to further terrorism charges).[74] Moreover, in criminal proceedings, these measures can be taken only through an a priori judicial control. But, here, these measures can only be subject to a posteriori judicial control.[75] These measures derogate thus from the above-mentioned safeguards (concerning the "quality of law" -which should be accessible, precise and foreseeable in its application-, the right to defense, the presumption of innocence etc.) against arbitrary limitations on rights. The question we should ask is whether the Council does a meaningful control over these measures before concluding that they are compatible with the Constitution.

We know that the FCC has the established approach that limitations on rights should always be framed through safeguards.[76] In emergency cases, the Council seems satisfied with the safeguards contained in the Act that the emergency measures will be applied only if the SoE exists (temporality) and on the geography where a SoE was declared (spatiality). But for a

[72] Vincent Sizaire, 'De Quoi l'état d'urgence Est-Il Le Nom?,' in Stéphanie Hennette-Vauchez (ed), *Ce Qui Reste(ra) Toujours de l'Urgence* (1 edition, IUV 2018) 35.
[73] The phrases "a specific and concrete offence" and "the place and time of its commission and its victim(s)" are taken from the ECtHR decision *S, V and A v Denmark.* (applications nos. 35553/12, 36678/12 and 36711/12)
[74] Sizaire, 'De Quoi l'état d'urgence Est-Il Le Nom?,' (n 72) 34.
[75] An a posteriori control does not make sense for most of the measures because the violation of the relevant right has already taken place. Cécile Guérin-Bargues, 'The French Case or the Hidden Dangers of a Long-Term State of Emergency' in Olivier Beaud, Carl Wellman and Pierre Auriel (eds), *The Rule of Crisis Terrorism, Emergency Legislation and the Rule of Law* (Springer 2018) 224.
[76] Julien Padovani, 'Quelle Conciliation Entre Droits Fondamentaux et Ordre Public Dans Le Cadre de l'état d'urgence ? À Propos de La Décision N° 2017-635 QPC Du 9 Juin 2017' 112 Revue française de droit constitutionnel 2017/4.

meaningful control to take place these safeguards seem trivial. What takes the Council far from a meaningful control is the fact that it is also satisfied with the "safeguard" that house arrest or house search can be invoked not against any person but only if, "there is serious grounds to consider that a person's behavior may constitute a threat for public security". However, the more rigorous safeguards that are normally required to invoke these measures that we mentioned above are disregarded and we do not why (given that there is no constitutional provision requiring "accommodation") and how (on the basis of which standard of "accommodation"?)

We know that the Council, if it wishes, as documented by its jurisprudence on "ordinary" cases, can carry out a "proper" proportionality test[77] that would come closer to a meaningful control. In a "proper" proportionality test, four elements would be discussed: "Legitimacy of the aim pursued, adequacy, necessity, and proportionality stricto sensu".[78] And this more "proper" proportionality test in the case-law of the Council is not confined, as an author suggests[79], to cases concerning Article 66 of the constitution (the French "habeas corpus").[80] However, a more proper proportionality test is the exception, rather than the rule in the Council's case-law.[81]

The Council, following the rule, attaches too much importance to the fact that the aim pursued (preserving public order) is legitimate and does not really discuss the other three elements. What it does is to check whether the reconciliation between the freedom concerned and the collective interest pursued is "disproportionate" or "manifestly disproportionate" . To adopt this test rather than a proper proportionality test obviously gives more scope to collective

[77] Vincent Sizaire, 'Une Question d'équilibre ? À Propos de La Décision Du Conseil Constitutionnel N° 2017-695 QPC Du 29 Mars 2018' Mai 2018 Revue des droits de l'Homme.
[78] Anđelković (n 34).
[79] Florian Savonitto, 'Etat D'urgence Et Risque D'inconstitutionnalité' (2016) 15 Revue des droits et libertés fondamentaux 7–8.
[80] A recent example concerning the liberty of communication and opinion is *Décision n° 2016-611 QPC*.
[81] Savonitto (n 79) 7. However, a meaningful proportionality test seems to be evolving in the Council's case law, see 'Https://Www.Conseil-Etat.Fr/Actualites/Discours-et-Interventions/Le-Principe-de-Proportionnalite-Protecteur-Des-Libertes#_ftn81'.

interest than individual freedoms. The Council thus dilutes its "proportionality powers" and moves away from a meaningful control.

The character of the Council's "minimalist" (dis)proportionality test in the context of emergency measures can be better grasped by the fact that the FCC found emergency measures unconstitutional only when the Act provided no condition at all concerning the object of the measure. For example, in Decision n° 2017-677 QPC, the fact that no condition was provided at all concerning the person subject to identification control was found to be conducive to arbitrariness because of the lack of safeguard of the "quality of law". Only the fact that there is no condition at all constitutes a (manifestly) disproportionate interference with liberties. However, in the Council's opinion, a measure based on "serious grounds to consider that a person's behavior may constitute a threat for public security" is not "(manifestly) disproportionate".

Thus, we can conclude that, even if it did a substantive control, with the low threshold of safeguards that it required, the Council created a "legal grey hole", in which the authorities in charge of emergency action in the main took the measures that they wished to take. The minimalist approach seems even more dangerous than the proceduralist one in that it legitimizes emergency action with a substantive rule-of-law façade.[82]

3.3 Judicial Review of Emergency Powers

We should first mention the fact that the decree that declares, based on the Act on SoE, a SoE is not a "*acte de gouvernement*". The Council of State stated however that the Executive had a large margin of appreciation, which makes it a typical example of moving the control away from a meaningful control: the burden on the government to justify a SoE declaration is little.[83]

[82] Dyzenhaus, *The Constitution of Law* (n 4) 3.
[83] Véronique Champeil Desplats, 'Aspects Théoriques : Ce Que l'état d'urgence Fait à l'Etat de Droit' in Stéphanie Hennette Vauchez (ed), *Ce Qui Reste(ra) Toujours de l'Urgence* (IUV 2018) 13.

Secondly, according to the law of 1955, ACs are charged with controlling the emergency measures in concreto. This is a manifestation of the French conception of separation of powers[84]: measures taken by the "administrative police" should in principle be controlled by the ACs. And as mentioned above the emergency measures contained in the Act on SoE are administrative measures. During the SoE over 10,000 administrative measures based on this Act were taken, including 4,444 house searches and 754 house arrests.[85] The FCC had prescribed that the ACs control these measures both as to their legality and proportionality – adequacy, necessity, proportionality stricto sensu[86], thus according to a "proper proportionality test". However, because of a close reading of the AC judgements, one can reach the conclusion that in most cases there was no proportionality test. Most of the time, ACs only checked whether the facts the Executive was relying on were true or not or, if the facts were factually established, they checked whether the Executive assessed (as to whether they can really give rise to suspicion concerning the person against whom a measure was taken) the facts in a manifestly wrong way or not.[87]

In the end, only 19,7% of the judgments of the ACs were in favour of the applicants. And most of these favorable judgments resulted from factual errors committed by the Executive. We can say that if the proportionality test (which is a much stricter kind of control) were more widely utilized by judges, more favorable judgments would come out.

Thus, although they had the chance to do a "meaningful" control, ACs too escaped it.

[84] *CC Decision 86-224 DC (On the Council on Competition)*.
[85] Stéphanie Hennette Vauchez et al., 'Analyse Transversale de Corpus' in Stéphanie Hennette Vauchez (ed), *Ce Qui Reste(ra) Toujours de l'Urgence* (IUV 2018) 167.
[86] VC, 'Opinion On The Draft Constitutional Law On "Protection Of The Nation" CDL-AD(2016)006' para 20.
[87] Hennette Vauchez et al. (n 85) 217 ff. and 231.

Chapter Four: The VC's reactions

4.1 General Remarks

I will now address the reaction of the CoE's advisory body, the VC. The European Commission for Democracy through Law (also known as the VC) is the legal advisory body of the CoE. Through its non-binding opinions, it upholds the underlying principles of the European constitutional heritage, namely human rights, democracy and the rule of law. Its members who are experts in law and political science are sent by member states.[88] When it comes to the independence of the members, according to Article 2/1 of its statute, "the members of the Commission shall serve in their individual capacity and shall not receive or accept any instructions."; according to Article 2/3, "members shall hold office for a four-year term and may be reappointed. During their term of office members may only be replaced if they have tendered their resignation or if the Commission notes that the member concerned is no longer able or qualified to exercise his or her functions [if, for example, the member is not able to work independently]".[89]

The VC expresses itself through non-binding opinions on national constitutional/legal developments based on both international (most importantly the ECHR) and national legal instruments. It also makes use of its rule of law checklist[90], which reflects the "European Constitutional heritage". I will discuss the two opinions of the VC during the Turkish and French emergencies.[91] I will convey the VC's normative ideas about the two most important

[88] See Lauri Bode-Kirchhof, 'Why the Road from Luxembourg to Strasbourg Leads through Venice: The VC as a Link between the EU and the ECHR Lauri Bode-Kirchhof' in Kanstantsin Dzehtsiarou (ed), The Influence, Overlaps and Contradictions of the EU and the ECHR (Routledge 2014) 55.
[89] The CoE, 'Revised Statute of the European Commission for Democracy through Law, Resolution(2002)3' art.2.
[90] VC, 'Rule Of Law Checklist CDL-AD(2016)007'.
[91] VC, 'Opinion On Emergency Decree Laws Nos. 667-676 Adopted Following The Failed Coup Of 15 July 2016 CDL-AD(2016)037'.; VC, 'Opinion On The Draft Constitutional Law On "Protection Of The Nation" CDL-AD(2016)006' (n 86).

aspects of a SoE: when to declare it and how to deal with it. I will also touch upon its evaluation of the national review bodies' performance.

It is important to recall that the VC is not a court and its opinions are not binding. Therefore, its opinions should be read having regard to the fact they were not written in a context where the VC was called upon to "go to war" and not to impede the national war, in contrast with the Turkish and French judiciary.

4.2 The VC on France

In its opinion on France, the VC examined the proposal in France to constitutionalize the 1955 law on SoE. When it comes to the definition of emergency situations, the VC stated that "not every disturbance or catastrophe qualifies as a public emergency which threatens the life of the nation…even in wartime, the situation must be really serious before it can be considered as a threat to the life of the nation" and therefore reminded that invocation of a SoE should be exceptional, as required by the notion of meaningful control. It proposed therefore that the phrase "such as to potentially threaten the life of the nation" be added at the end of the definition clause of SoE which read as: "the imminent threat resulting from serious breaches of public order" and "events tantamount to a public disaster"[92], on the basis of which the SoE had been declared by the government. By looking at the definition that it proposes, we can claim that the VC implies that France's declaration of SoE is problematic because it is not clear how the terrorist attacks threatened the life of the nation.[93]

When it comes to the limits on the measures that can be taken in a SoE, the VC proposed the phrase "to the extent strictly required by the exigencies of the situation" to be added to the

[92] VC, 'Opinion On The Draft Constitutional Law On "Protection Of The Nation" CDL-AD(2016)006' (n 86) para 58.

[93] For the problems with declaring a SoE on the ground of terrorism, see Candidate number: 8015, 'The State of Emergency and Terrorism A Legal and Ethical Analysis of the State of Emergency as a Counter-Terrorist Measure' (Master's Thesis, University of Oslo - Faculty of Law 2017).

clause about the measures that could be taken[94] (which read as "the law shall determine the administrative policing measures that may be taken by the civil authorities to avert this threat or deal with these events"), thus implicitly questioning whether the measures that were contained in the law of 1955 and the unclear standard of accommodation developed by the FCC that allowed them are in accordance with this phrase. Authors claimed[95] for example that terrorism charges based on existing ("repressive") laws for the stage of preparation of terrorist acts make unnecessary the introduction of these "preventive" emergency measures. We can also claim, looking at the ECtHR's recent case law on emergency powers, that the phrase "to the extent strictly required by the exigencies of the situation" (contained in Article 15 of the ECHR) prescribes that it is not permissible during emergencies to forego the principle of legality and the requirement of reasonable suspicion as to deprivations of liberty, as we argued is the case in France.[96]

When it comes to judicial review the VC stressed the importance of the legality *and* proportionality. The VC, seeing the FCC's prescription that we mentioned above, concluded that the ACs constituted an effective remedy. However, it turns out that this was a hasty conclusion because as we saw, the ACs very rarely carried out a genuine proportionality control.

4.3 The VC on Turkey

When it comes to the declaration of SoE, The VC stated that the coup attempt in Turkey constituted "a public emergency threatening the life of the nation". It also noted that the declaration was compatible with the fact situations enumerated in Article 120 of the Constitution. However, it questioned whether the extension of the SoE was legitimate. The

[94] VC, 'Opinion On The Draft Constitutional Law On "Protection Of The Nation" CDL-AD(2016)006' (n 86) para 69.
[95] Sizaire, 'De Quoi l'état d'urgence Est-Il Le Nom?,' (n 72) 37–38. Denis Salas, 'La Banalisation Dangereuse De L'état D'urgence' (2016) 2016/3 Études 38.
[96] See e.g. *Alparslan Altan v Turkey Application no 12778/17* para. 117–119 and 147–149. The reasonable suspicion requirement would naturally require the recognition of house arrest as a deprivation of liberty and not as a restriction on freedom of movement, as it is in France.

Government had claimed that a risk of a repeated coup remained even though the "active phase" of the coup was over because many supporters of the coup were still in the state apparatus. The VC however rejected this claim as highly speculative given that a great number of public servants had already been dismissed. Thus, the VC invoked the "concreteness" (of the threat) requirement of a meaningful control.[97]

As to the limitations on emergency powers, the VC stressed the importance of the fact that emergency powers should be strictly required by the exigencies of the situation, which requires that there be material limitations, *ratione personae* and temporal limitations. Emergency powers should be strictly required by the exigencies of the situation and that "the issues that are necessitated by the SoE are limited to the reasons and goals behind the SoE. In other words, any emergency measure should have a sufficiently close *nexus* to the situation which gave rise to the declaration of a SoE."[98] It criticized therefore the fact that emergency measures were taken "within the scope of attempted coup and fight against terrorism" in general and not the specific terrorist organization behind the coup. The emergency measures were phrased in general terms, extending their scope to all sorts of groups that the government considered to be terrorist. So, for example, all public servants should be dismissed if they are "considered to be a member of, or have a relation, connection (link) or contact with terrorist organizations or structure/entities or groups established by the National Security Council as engaging in activities against the national security of the State". The VC stated that the SoE was declared to combat the specific terrorist group behind the coup. For other groups, ordinary legal means should be utilized.[99] In this connection, we should mention the fact that it stressed the importance of legal/judicial certainty in dismissing public servants, by stating that "a dismissal may be ordered only on the basis of a combination of factual elements which clearly

[97] VC, 'Opinion On Emergency Decree Laws Nos. 667-676 Adopted Following The Failed Coup Of 15 July 2016 CDL-AD(2016)037' (n 91) para 40.
[98] ibid 64.
[99] ibid 67.

indicate that the public servant acted in a way which objectively cast serious doubts on his or her loyalty to the democratic legal order."[100] It therefore challenged the Security State logic which, in France as well, relies on the subjective perception of the authorities.

For temporal limitations it stressed the fact that in principle measures of permanent effect should not be taken during a SoE. Measures should be "of limited duration or may be later revoked or amended, since the ultimate goal of any emergency should be for the State to return to a situation of normalcy." It criticized therefore the fact that the public servants who were allegedly linked to the terrorist organization behind the coup were dismissed, while the same result (eliminating the possibility of a second coup attempt) could have been achieved with the measure of suspending them from their posts. The suspension solution "would make it possible the fairer examination of the correctness of the decisions being made according to ordinary judicial process.", once the emergency was over.[101]

When it comes to the lack of constitutional review of emergency powers after the reversal of constitutional jurisprudence, the VC concluded (taking also into consideration the fact that the Parliament had not in any way constrained the government's actions) that the Executive "had unfettered power to rule the country without any checks and balances but its own good will. This situation is dangerous for a democratic legal order, especially in view of the virtually irreversible character of measures taken by the Government."[102]

For the lack of judicial review of directly dismissed public servants, the VC stated first that "the requirement of strict proportionality of derogation measures according to Article 15 § 1 of the ECHR will ordinarily require *basic* safeguards of protection against abuse of power and arbitrary behavior". Secondly, it claimed that, on account of Turkey's obligations under other international treaties (especially the ICCPR), "it could be argued that Article 15 § 1 of the

[100] ibid 131.
[101] ibid 85.
[102] ibid 191.

ECHR embodies an *implicitly non-derogable* right of access to justice."[103] Thus, it emphasized the importance of a meaningful control (which amounts to the "strict proportionality" test) at emergency times, without paying attention to the stress under which the courts are put during emergencies. Given the scale of the problem of thousands of directly dismissed people who could not complain before ACs because of their rebellion against the TCS, the VC invited Turkey to create a special independent *ad hoc* body[104] to deal with directly dismissed people. Such a body was indeed created.[105]

[103] ibid 161.
[104] ibid 220. "The essential purpose of that body would be to give individualized treatment to all cases. That body would have to respect the basic principles of due process, examine specific evidence and issue reasoned decisions. This body should be independent, impartial and be given sufficient powers to restore the *status quo ante*, and/or, where appropriate, to provide adequate compensation."
[105] For the problems with the effectiveness of that body, see Ruys and Turkut (n 12).

Conclusion

Turkish bodies, French bodies and the VC represent three different ways of dealing with emergency situations, the VC being the closest to the ideal notion of "meaningful control". The reason behind this seems to be the fact that the VC renders non-binding opinions without the stress of being "at war". The Turkish bodies had plausible legal reasons/provisions (i.e. a proceduralist reading of the Article 148 control ban of the Constitution) at hand in order to deny jurisdiction to themselves. It was not possible for the French review bodies, however, to deny jurisdiction because there was no legal provision or plausible legal argument that could be adopted for that purpose (formally, the Act on SoE was like any other piece of legislation amenable to constitutional review). Instead they adopted a "light touch" substantive control which misleadingly gave the emergency process a substantive rule of law façade.

Having shown that the lack of a meaningful legal control resulted in a unfettered rule in Turkey and that in France only a tiny number of emergency powers actually served the goal of fighting terrorism (thus overwhelmingly violating the rights of citizens), it is very important to adopt a meaningful legal control, the elements of which can be seen in the VC's opinions. It is important for human rights and for realization of emergency action as constituted power.

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