Upholding Constitutional Principles in a State of Emergency

by

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Distinguished participants,
Ladies and gentlemen,

Before I start I would like to thank the President, all the members, and staff of the Constitutional Court of Georgia for their warm and generous hospitality.

Thank you Mr. Zaza Tavadze also for giving me the opportunity to address such distinguished colleagues.

Within my limited time, I would like to say a few words about the potential role of constitutional courts in a time of emergency with a special reference to the recent experience of Turkey.

Let me start with a simple statement: **“**We must (*il faut*) more than ever stand on the side of human rights.” Thus spoke Jacques Derrida in an interview made a few weeks after 9/11 terror attacks. He continued to emphasise that "We need (*il faut*) human rights. We are in need of them…."[1]

In fact, this simple statement by Derrida points the direction that the constitutional courts should follow in times of emergencies. Although this statement appears to be simple, the realization of the aim of protecting rights in emergencies is extremely difficult.

Constitutional courts exist to guarantee constitutional boundaries with a view of protecting basic rights and liberties of individuals against possible encroachments of state authorities. This role of the constitutional courts is much more important in states of emergency where the fundamental rights may become more fragile and vulnerable as a result of extended executive powers.

Almost all constitutions lay out the conditions for declaring states of emergency and stipulate the basic requirements for emergency decrees and acts. So it may be regarded as an “emergency constitution” that provides a legal framework for public emergencies.

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[1] Jacques Derrida, “Autoimmunity: Real and Symbolic Suicides- A Dialogue with Jacques Derrida", in Giovanna Borradori, *Philosophy In a Time Terror: Dialogues with Jürgen Habermas and Jacques Derrida*, (Chicago: The University of Chicago Press, 2003), p.32.

In fulfilling their critical roles in a state of emergency, the constitutional courts must be cautious at least in three regards. First of all, as constituted powers the courts must be aware of the fact that they are also bound by the constitution. In other words, they may only exercise the powers defined in the provisions of "emergency constitution". The courts' self-respect for constitution is crucial especially in a state of emergency because any kind of judicial activism during such times may lead to legitimation crises. The constitutional courts must protect constitutional rights by operating within the boundaries of the constitution itself.

Secondly, judicial and/or constitutional review of the courts must not go beyond the statement that any law or administrative action is unlawful or unconstitutional for certain reasons. It is not the job of the courts to dictate which policies are necessary to protect rights and liberties. "This is unacceptable for reasons *a, b, c*,…; find a better way' is seen as an appropriate stance for a constitutional court".[2] As a way of example, constitutional courts must refrain from imposing their own ideas on executive by engaging in substantive analysis regarding policies in fighting terrorism. In other words, an effective counter-terrorism policy requires a judicial modesty and deference to executive organs to a certain extent. The deferential view rests on the widespread assumption that "executive is the only organ of governments with the resources, power, and flexibility to respond to threats to national security".[3]

Thirdly, even though the executive is in a better position to evaluate the threats to public security and the means to eliminate them, it by no means has unlimited powers. The executive must act within the law, and a state of exception must be governed by the rule of law.[4] Therefore, the role of the constitutional courts is to "ensure that the battle against terrorism is conducted within the framework of the law and not outside it".[5]

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[2] Ian Shapiro, *Democratic Justice*, (New Haven: Yale University Press, 1999), p.61.

[3] Eric A. Posner and Adrian Vermeule, *Terror in the Balance: Security, Liberty, and the Courts*, (Oxford: Oxford University Press, 2007), p. 4. See also Richard A. Posner, *Not a Suicide Pact: The Constitution in a Time of National Emergency*, (Oxford: Oxford University Press, 2006).

[4] See David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency*, (Cambridge: Cambridge University Press, 2006), p.2.

[5] Aharon Barak, *Dialogue between Judges- Proceeding of the Seminar 29 January 2016*, the European Court of Human Rights, Strasbourg, 2016, p. 27.

To sum up, during emergencies the courts have a limited and circumscribed power in reviewing the acts and activities of the executive power. It is certainly beyond the power of the courts to remove the terrorist threat to the public order. Solving the problem of terrorism is the task of executive and legislative powers. The role of the courts in such process is to ensure that the state authorities act within "emergency constitution" and law in general.

Distinguished colleagues,

Let me turn to the case of Turkey in order to elaborate further on the application of these principles regarding states of emergency. The current state of emergency was declared due to the military coup attempt of 15 July 2016, which caused severe casualties, including 249 dead and over 2000 injured.

I must say that the coup attempt, which indeed is a heinous terror attack, is far more extensive and disruptive compared to the terror attacks in France or in any other European state. It may only be compared with 11 September (9/11) of the United States in terms of the traumatic effect it created.

As the Council of Europe Commissioner for Human Rights has stressed in his Memorandum, "the success of (coup attempt) would have marked the end of democracy in Turkey and the defeat of all the values underlying the Council of Europe".[6] Likewise, the Venice Commission indicated in its opinion on emergency decrees that "[a] military coup against a democratic government, by definition, denies the values of democracy and the rule of law".[7]

Indeed the 15 July coup attempt was a violent assault on constitutional democracy, rule of law, and human rights. Therefore, at the very beginning of the coup attempt the Turkish Constitutional Court (TCC), as the guardian of the Constitution, made the following declaration: "We repudiate all kinds of antidemocratic attempts against the constitutional order and we stand on the side of the democratic state governed by the rule of law".

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[6] Memorandum on the human rights implications of the measures taken under the state of emergency in Turkey, CommDH(2016)35, Strasbourg, 7 October 2016, par. 4.

[7] Opinion on Emergency Decree Laws Nos. 667- 676 Adopted Following the Failed Coup of 15 July 2016, CDL-AD(2016)037, Strasbourg, 12 December 2016, par. 7.

Responding to this coup attempt, the Council of Ministers decided on 20 July 2016 that a nationwide state of emergency be declared for a period of ninety days, which has been extended for a three months period for the third time effective as from19 April 2017, in order to fight against the “FETO/PDY” and other terror organizations in a comprehensive and effective manner.

Following the declaration of the state of emergency, Turkey notified the Council of Europe its derogation from the European Convention on Human Rights under Article 15 of the Convention. The derogation is still effective as the state of emergency period was extended until 19 July 2017.

The state of emergency poses an onerous challenge for the Turkish Constitutional Court at the level of both norm review and individual (constitutional) complaint. With respect to the norm review, the Constitutional Court rejected to review the constitutionality of emergency decrees by referring to Article 148 of the Constitution, which explicitly provides that emergency decree laws shall not be subject to judicial review of the Constitutional Court.[8] The TCC, however, has the power to review the constitutionality of emergency decree laws once they are adopted by the Parliament in the form of statute.

Moreover, within the state of emergency period, the administrative actions and decisions are subject to judicial review. The only limitation for administrative courts is that they may not order the stay of execution of administrative actions and decisions taken under the emergency decrees.

Compared to norm review, the individual complaint remedy presents more complicated issues during states of emergencies. Before touching upon these issues, I would like to say a few words on the individual complaint system in Turkey. The adoption of constitutional complaint (individual application) system in 2012 has been a revolutionary step in the way of protecting constitutional rights and freedoms in Turkey. In a relatively short period of its practice, the Court proved that constitutional complaint has been an effective remedy for violations of basic rights.

[8] E.2016/166, 2016/159, 12.10.2016; E.2016/67, K. 2016/160, 12.10.2016.

The effectiveness of the constitutional complaint before the TCC has also been confirmed by the European Court of Human Rights.[9] Most recently the Strasbourg Court rejected the applications related to the implementation of emergency decrees on the ground that the applicants failed to exhaust the domestic remedy of individual application before the TCC.[10]

The Turkish Constitutional Court has faced two basic challenges regarding constitutional complaints during the state of emergency. First, the case-load has increased dramatically, reaching currently over 105.000. About 75 per cent of these applications is related to the measures taken during state of emergency, most notably to the dismissals of civil servants and detentions. The number of pending applications before the TCC is more than the total number of pending cases before the European Court of Human Rights coming from 47 states. In this regard I must also note that the number of applications lodged against Turkey before the European Court of Human Rights has increased to a great extent in the course of recent emergency measures.

There is no doubt that the establishment of the "Investigation Commission" by the Emergency Decree Law No. 685 on 2 January 2017 has been a positive step in the way of examining complaints against emergency measures such as dismissals of civil servants. The Commission is expected to receive applications this month and thereby to mitigate the work-load of the TCC.

The TCC has yet to decide whether the Commission is considered to be an effective remedy that must be exhausted before lodging a constitutional complaint. However, last month in the case of *Köksal v. Turkey* (application no. 70478/16), which concerns dismissal of a teacher by an emergency decree law, the Strasbourg Court has unanimously found the application inadmissible on the ground of failure to exhaust domestic remedies. The Court declared that the applicant had to refer his case to the Investigation Commission whose decisions are subject to judicial review of administrative courts. The Court has also stated that decisions of the administrative courts may be challenged before the Constitutional Court through constitutional complaint.

[9] *Hasan Uzun v. Turkey*, Application No. 10755/13, 30/04/2013.

[10] *Zeynep Mercan v. Turkey*, Application No. 56511/16, 17/11/2016; *Zihni v. Turkey*, Application No. 59061/16, 29/11/2016.

The second challenge for the Turkish Constitutional Court is to maintain its well established rights-based approach for protection of constitutional rights and liberties. In cases of individual applications lodged during the state of emergency, the Court interprets and applies Article 15 of the Constitution, which lays down the conditions and requirements for the emergency measures.

Article 15 of the Constitution, an almost identical counterpart of Article 15 of the European Convention on Human Rights, reads that in a state of emergency "the exercise of fundamental rights and freedoms may be partially or entirely suspended, or measures may be taken, to the extent required by the exigencies of the situation". Article 15 also lists the non-derogable, absolute rights and freedoms such as the prohibition of torture, presumption of innocence and freedom of religion and conscience.

Distinguished colleagues,

Last week the TCC has delivered its first judgment in a case of individual application concerning detention of the persons allegedly involved in the coup attempt.[11] This judgment, which is published at today's Official Gazette, is very important because it laid down the basic constitutional principles to be applied in similar cases.

In this pioneering judgment the TCC has stressed that the public authorities have a very broad margin of appreciation as to the adoption of policies and means to eliminate the dangers led to the state of emergency, but they have no unlimited power. It is the task of the TCC to review the emergency measures in the light of constitutional principles enshrined in the Constitution.[12]

In this regard the Court for the first time interpreted and applied the provisions of Article 15 of the Constitution in a systematic manner. The Court pointed out that any interference with constitutional rights in a state of emergency must meet three criteria set by Article 15. In other words, the TCC applies a three-level test in a constitutional complaint if it is related to the emergency measures.

[11] *Aydın Yavuz and Others,* (Plenary), Application No. 2016/22169, 20/6/2017.

[12] *Aydın Yavuz and Others*, § 210.

First of all, an emergency measure must not interfere with non-derogable, absolute rights and liberties stated in Article 15 of the Constitution. Secondly, the interference or restriction must not violate the obligations under international law. Setting out these two criteria, the Court made a special reference to the extended list of non-derogable rights and liberties provided by the UN Convention of Civil and Political Rights and the European Convention on Human Rights. Thirdly, any restriction on derogable rights and liberties must be required by the exigencies of the situation. The last level of the test under Article 15 involves the application of well-known constitutional principle of proportionality.[13]

The TCC applied these principles to the concrete case and found inadmissible the claims that the applicants' detention were unlawful and detention period of 11 months was unreasonable. In fact the Court did not refer to Article 15 of the Constitution in reaching this conclusion, simply because it found these claims to be inadmissible even under non-emergency, default legal regime. In other words, these claims have already failed to survive the admissibility test applied during a state of normalcy. Therefore, the Court relied on Article 13, not on Article 15, in order to declare these parts of the applications inadmissible.[14]

On the other hand, the Court found admissible the claim that objections to the extension of detentions had been reviewed without conducting a hearing within the detention period of 8 months 18 days. According to the Court, this would have been considered to violate the principle of proportionality under Article 13 of the Turkish Constitution. As a matter of fact, the Court had previously found violation in similar cases under state of normalcy.

However, since the extension of the applicants' detention took place during the state of emergency, this measure must be evaluated under Article 15 of the Constitution. After considering the "situation" with a special reference to the dismissals of so many judges and prosecutors from office and the number of detentions following the coup attempt, the TCC declared that the extension of detention period for 8 months and 18 days without hearing was required by the exigencies of the situation, and therefore it was not unproportionate.[15]

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[13] *Aydın Yavuz and Others*, §§ 196-211.

[14] *Aydın Yavuz and Others*, §§ 301, 320.

[15] *Aydın Yavuz and Others*, §§ 350-359.

This approach of the TCC, I believe, is very much in line with the international human rights law, especially with the jurisprudence of the European Court of Human Rights.

In conclusion, the constitutional courts assume a very difficult yet critical role in states of emergency. During such times, it is upon the constitutional courts to undertake the endeavor for protecting fundamental rights while respecting the extended authorities of the executive branch under emergency constitutions.

Let me end my speech by reiterating what Derrida said after 9/11: “We must more than ever stand on the side of human rights”.

Thank you for your attention.