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CONSTITUTIONALISM IN A PLURAL WORLD

Eds. **Catarina Santos Botelho**
Luís Heleno Terrinha
Pedro Coutinho

PORTO

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CATARINA SANTOS BOTELHO; LUÍS HELENO TERRINHA; PEDRO COUTINHO [EDS.]

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CONTENTS

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22-23 NOVEMBER 2017

Porto Faculty of Law, Universidade Católica Portuguesa

22nd November

MORNING

AUDITÓRIO CARVALHO GUERRA

9h00 Welcome

9h30 Opening Ceremony

Manuel Fontaine Campos (Dean of the Porto Faculty of Law, Universidade Católica Portuguesa)

10h00 **KEYNOTE SPEECH: RICHARD ALBERT** (Boston College)

- "Constitutional amendment and dismemberment"

Period: 11h00-13h00

I - CONSTITUTIONAL AMENDMENT

Moderator: Richard Albert

Auditorium Carvalho Guerra

- "Constitutional dismemberment" in the Portuguese transition to democracy?"

Catarina Santos Botelho (Assistant Professor, Porto Faculty of Law, Universidade Católica Portuguesa, Coordinator Council Member of ANESC)

- "Popular Constitution-Making: Towards amendment of traditional constitutional amendment provisions"

Jurgen Goossens (Postdoctoral Research Fellow at Ghent University and Assistant Professor of Constitutional Law at Erasmus University of Rotterdam – LL.M. Yale Law School)

- "Unconstitutional Constitutional Amendments in Georgia: the Constitutional Court and judicial review of constitutional amendments"

Malkhaz Nakashidze (Fulbright Visiting Scholar - Boston College Law School, USA; Associate Professor - Batumi Shota Rustaveli State University, Georgia)

- "The People's Will within the paradox of the Unconstitutional amendment processes"

Neliana Rodean (University of Verona, Italy)

- "Impact of Constitutional Amendments on Interpretation by the Georgian Constitutional Court"

Nino Kashakashvili (Ph.D. student at Ivane Javakhishvili Tbilisi State University, Georgia)

- "Constitutional amendment 95/2016 and the limit for public expenses in Brazil: amendment or dismemberment?"

Bárbara Marianna de Mendonça Araújo Bertotti (Student at the Pontifical Catholic University of Paraná, Brasil)

II - CONSTITUTIONAL DOGMATICS

Moderator: Benedita Mac Crorie

Room: Auditórium Ilídio Pinho

-"Constitutionalism and intergenerational justice: between past and future."
João Carlos Loureiro (Law Faculty of the University of Coimbra)

- "Incorporation or delegation? Sketching the constitutional implications of technical legislation"
Marta Morvillo (Post-doctoral researcher at the University of Bologna)

- "'Parametro Interposto': The Constitutionalization of International Law from an Italian Perspective"
Riccardo Perona (Lawyer and University Lecturer)

- "The distribution of power and Canadian federalism in a postmodernist analysis: critics to the partition of competences and comparisons with others federalists models"
Daniel Melo Garcia (Université Laval, Québec)

- "So that the dead cease to govern the living": the practice of constitutional evolution and intergenerational justice in plurinational Canada"
Catheryne Bélanger, *Frédéric Perreault* and *Antoine Verret-Hamelin* (Laval University, Québec, Canada)

AFTERNOON

Period: 14h00-16h00

III - GLOBAL CONSTITUTIONALISM
Moderator: Maria d'Oliveira Martins
Room: EC 105

- "Global Standards of Constitutional Law: Epistemology and Methodology"
Maxime St-Hilaire (Faculté de droit - Université de Sherbrooke - Québec)
- "The role of hierarchy in global constitutionalism"
Martinho Lucas Pires (Nova Law School of Lisbon)
- "Constitutionalism beyond the State and the Question of the Limitation of Power"
Lilian Barros de Oliveira Almeida (Lawyer; Universidade de Lisboa)

IV - FUNDAMENTAL RIGHTS AT RISK
Moderator: Sofia Pinto Oliveira
Auditorium Carvalho Guerra

- "The Rights of Older Persons"
Gordon DiGiacomo (Professor of Political Science at the University of Ottawa-Canada)
- "Protection of immigrant children and adolescents: a combination of competence, culture and protection"
*Ísis Boll de Araujo Bastos (*Doutoranda em Direito pela PUCRS)
*Sebastião Patrício Mendes da Costa (*Doutorado em Direito pela PUCRS)
- "The right to recognition: immigrants and refugees in Brazil and their right to a name"
Caio Cesar de Arruda (Faculdade de Direito de Curitiba)

Claudio Roberto Barbosa Filho (Faculdade de Direito da Universidade Federal do Paraná)

V - PROPORTIONALITY AND LEGAL REASONING
Moderator: Fátima Castro Moreira
Room EA 107

- "Another Brick in the Wall? Constitutional Dialogues with the image of Christ"

Fabio Ferrari (University of Verona, Italy)

- "Margin of appreciation and bioethics"

Benedita Mac Crorie (School of Law – University of Minho)

- "Margin of appreciation and religious freedom"

Anabela Costa Leão (Faculty of Law – University of Porto)

Period: 16h00-18h00

VI - CONSTITUTIONAL PLURALISM
Moderator: Pedro Coutinho
Room EC 105

- "Legal Pluralism in Islamic Jurisprudence"

Shams Al Din Al Hajjaji (Judge - North Cairo Primary Court)

- "Supranationalism as response to a plural world?"

Caroline Glöckle (Research assistant, University of Passau, Germany)

- "Shades of Constitutions and Constitutionalism as a 3-Dimensional Concept: National, Post-National and Co-owned Elements"

Constantinos Kombos (Law Department, University of Cyprus)

- "Constitutional Asymmetry and Multi-Tiered Multinational Systems: Shaken not Stirred. An empirical approach"
Maja Sahadžić (Researcher at the Faculty of Law, University of Antwerp, Belgium)

VII - CONSTITUTIONALISM, PUBLIC SPENDITURE AND SOCIAL JUSTICE

Moderator: Catarina Santos Botelho

Auditorium Carvalho Guerra

- "Fair public spending: taking social justice seriously"
Maria d'Oliveira Martins (Law Faculty, Lisbon School, Universidade Católica Portuguesa)
- "À propos du statut constitutionnel de l'assurance vieillesse française."
Juliano Barra (École de droit, Université Paris 1 Panthéon - Sorbonne)
- "The Intervention of the State and the Role of the Individual in the Society under the Prism of Individual Freedom"
Rui Miguel Zeferino Ferreira (Arbitrator in administrative matters - Public Contracts, at the Administrative Arbitration Center - CAAD)
- "'L'enfer, c'est les autres'. Populism today: new strategy, old formula. Can Human Rights and Constitutions outlast this old global phenomenon? The challenge of protecting Human Rights and Constitutional Guarantees through Economic Crises in an unequal country"
Ian Henrique Bertoldi (Law Student at UFPR-Brazil)

23rd November

MORNING

Period: 9h00-11h00

VIII - EUROPEAN CONSTITUTIONALISM

Moderator: Sofia Pais

Auditorium Carvalho Guerra

- "Pluralism Confined? Regulation of Political Parties – European Standards and Case Studies from Hungary"

Peter Smuk (Associate Professor - Department of Constitutional Law and Political Sciences, Széchenyi István University, Győr, Hungary)

- "Things we lost in the fire: EU constitutionalism after Brexit"

Patrícia Fragoso Martins (Faculty of Law, Lisbon School, Universidade Católica Portuguesa)

- "European Constitutionalism and the multilevel parliamentary field: towards a legisprudential role of National Parliaments?"

Luís Heleno Terrinha (Porto Faculty of Law, Universidade Católica Portuguesa)

- "Lawmaking in disputed areas controlled and influenced by EU"

Attila Nagy (Lawyer at Local Government Administration, City of Subotica, Serbia)

- "Constitutional challenges against the EU – Canada Free Trade Agreement: Canadian and European Perspectives"

Mário Simões Barata (Adjunct Professor of Law and Political Science – Polytechnic Institute of Leiria)

- "Intra-EU investment disputes: Implications for the autonomy of the EU legal order"

Marta Vicente (Invited Lecturer at Porto Faculty of Law, Universidade Católica Portuguesa)

IX - CONSTITUTIONAL COURTS

Moderator: Paulo Pichel

Room EC 105

- "Like oil and water? Decision-Making by the Turkish Constitutional Court"
Maria Haimerl (Humboldt-Universität zu Berlin)
- "The Congress in the Court: Analysis of the use of constitutional complaints by members of Congress in Colombia 1992-2015"
Santiago Virgüez Ruiz (Universidad de los Andes, Bogotá, Colombia)
- "The Role of Turkish Constitutional Court in the Democratization Process of Turkey: From 2002 to Present"
Volkan Aslan (Research Assistant at Istanbul University Faculty of Law, Department of Constitutional Law)

X - FUNDAMENTAL RIGHTS AND PLURALISM

Moderator: Filipe Cerqueira Alves

Room EA 107

- "Constitutional right to conscientious objection: an adequate response to moral and religious pluralism?"
Wojciech Brzozowski (Faculty of Law and Administration University of Warsaw, Poland)
- "Beyond Judicial Protection: Empowering Minorities in a Pluralistic America"
Franciska A. Coleman (Yonsei University Law School, Seoul, Korea)
- "Democracy in crisis and political propaganda of appeal to the masses: Influence on minority rights"
Isa António (ISCET - Instituto Superior de Ciências Empresariais e do Turismo, Porto, Portugal)

Period: 11h30-13h30

XI - JUDICIAL REVIEW

Moderator: Luís Heleno Terrinha

Auditorium Carvalho Guerra

- "The 'empirical turn' in constitutional adjudication"

Leonid Sirota (AUT Law School - New Zealand)

- "International Judicial Review in a Diverse World: the Pros and Cons of Deference"

Johannes Hendrik Fahner (LL.M. M.A., University of Amsterdam and University of Luxembourg)

- "Taricco and its sons: a 'dangerous' exercise of judicial cooperation?"

Marco Bassini (Bocconi University - Law Department)

- "Judicial Activism and judicialization of politics in Brazil. How political ideologies impacts constitutional decision-making and affects the rule of law"

Allan Augusto Antonio (Presbiterian University Mackenzie, Brazil)

XII - MULTILEVEL PROTECTION OF HUMAN RIGHTS

Moderator: Marta Vicente

Room EA 107

- "Values and Charter Interpretation"

Catheryne Bélanger (Faculty of Law, Laval University, Québec, Canada)

- "Bringing Human Dignity back to Light: the Case of Social Rights Protection in a Multilevel Perspective."

Antonia Baraggia (Emile Noël Fellow, New York University)

Maria Elena Gennusa (Associate Professor, University of Pavia)

- "Another brick in the wall? Shaping mutual trust between courts in the European multilevel system of fundamental rights protection"

Marco Galimberti (PhD Student in Public and International Law, University of Milano-Bicocca)

XIII - CONSTITUTIONAL REALITY AND CONTEXT
Moderator: Nuno Sousa e Silva
Room EC 105

- "Beyond Constitutional Rules: the case of the Constitution of the Portuguese Republic of 1976"
André Azevedo Alves (Institute of Political Studies, IEP-UCP)
Daniela Silva (IEP-UCP)
Inês Gregório (IEP-UCP)
- "Electoral authoritarianism and Political dominance: Foundations of unconstitutional stability and constitutional instability in Sub-Saharan Africa"
Duncan Okubasu (Advocate; Lecturer, Kabarak University)
- "'Discuss Your Own Constitution!': Soviet Dissident Writings on the 1977 USSR Constitution and Their Impact on the 1993 Russian Constitution"
Kirill Koroteev (Legal Director, Human Rights Centre "Memorial", Moscow)

AFTERNOON

Period: 14h30-16h30

XIV - CONSTITUTIONALISM IN THE DIGITAL AGE
Moderator: Ingo Wolfgang Sarlet
Room EC 105

- "Digital Constitutionalism in the Age of Protest: The Right to Virtual Assembly"
Miguel Calmon Dantas (Professor of Universidade Federal da Bahia and of

Unifacs – Universidade Salvador)

Vitor Soliano (Professor of Unifacs – Universidade Salvador)

- “Data Protection Rights and Surveillance: a comparative perspective in the European Context”

Monica Cappelletti (Post-doc researcher at School of Law and Government, Dublin City University [DCU], Ireland)

- "The Fundamental Rights in Data Protection – A transnational problem with different approaches: a comparative study"

Sofia Felício Caseiro (Researcher at Católica Research Centre for the Future of Law - Universidade Católica Portuguesa)

XV - CONSTITUTIONALISM AND CITIZENSHIP

Moderator: Ana Teresa Ribeiro

Room EA 107

- "Building a democratic citizenship"

Luísa Neto (Law Faculty of the University of Porto, Portugal)

- "'*Ceci est une fiction*': Constitutional *referendums* in the federal state of Belgium. Comparative constitutionalism as a source of inspiration"

Daan Bijnens & *Stef Keunen* (PhD-researchers, Faculty of Law, Hasselt University, Belgium)

- “Sovereignty and state of exception in the refugee crisis: constitutionalism in a Europe of interdependent states”

Samo Bardutzky (University of Ljubljana)

XVI - CONSTITUTIONAL CHALLENGES

Moderator: Pedro Coutinho

Room EA 109

- "Symbiotic Interpretation: Reading Constitutions Through National Laws - (And Not Only the Other Way Around)"

Roman Zinigrad (Yale Law School)

- "The security and defence aspects in the Constitution of the Republic of Poland"

Malwina Kolodziejczak (Assistant, Department of Security Law, Institute of Law and Administration, War Studies University, Warsaw)

- "Freedom, security and justice area and the European Arrest Warrant: when (no) mutual trust on the conditions of detention justifies their non-implementation"

Dora Resende Alves (Universidade Portucalense Infante D. Henrique)

Fátima Pacheco (ISCAP, IPP)

XVII - MULTILEVEL CONSTITUTIONALISM

Moderator: Rui Medeiros

Auditorium Carvalho Guerra

- "The role of Charter of Fundamental Rights of the European Union in the Deepening of EU Multilevel Constitutionalism"

Ondrej Hamulak (Assistant Professor at Faculty of Law, Palacký University Olomouc, Jean Monnet Chair in EU Law)

- "Cultural diversity, legal pluralism and fundamental rights: The 'multicultural jurisprudence' of Portuguese courts in comparative perspective"

Patrícia Jerónimo (Law School of the University of Minho)
- “Are territorial limits the border for fundamental rights?"
Sofia Pinto Oliveira (Law School of the University of Minho)
- "EU fundamental rights at the crossroads of EU constitutionalism"
Sophie Perez Fernandes (Law School of the University of Minho)
- “Fundamental rights protection in European legal space - Extracts from the evolution of Court of Justice of European Union and European Court of Human Rights jurisprudence”
Marija Daka (PhD candidate, University of Pecs, Hungary)

Period: 17h00-18H30

GENERAL SESSION
Moderator: Catarina Santos Botelho
Auditorium Carvalho Guerra

- "Personality Rights und their Protection in the Digital Age - The case of the right to be forgotten"
Ingo Wolfgang Sarlet (PUC-RS, Appeal Judge at Rio Grande do Sul Court of Justice)
- "Italian Constitutional Court and social rights in times of crisis: in search of a balance between principles and values of contemporary constitutionalism"
Giovanni Guiglia (Università di Verona, General Coordinator of ANESC)
- "Is Democracy Killing Constitutionalism or Constitutionalism Killing Democracy?"
Miguel Poiares Maduro (European Univerity Institute, Florence)
- "Federalism as a Constitutional Tool for a Plural World?"
Holger Hestermeyer (King's College London)
- 'We the People': Popular Sovereignty and Constituent Power
Gonçalo Almeida Ribeiro (Portuguese Constitutional Court Judge)

18H30: CLOSING CEREMONY

Catarina Santos Botelho

Luís Heleno Terrinha

Pedro Coutinho

The Role of Turkish Constitutional Court in the Democratization Process of Turkey: From 2002 to Present

Volkan Aslan[1]

Abstract

Since its establishment in 1961, the Turkish Constitutional Court has been seen as the guard of democratic principles on the one hand but also one of the main obstacles for the democratization process on the other. Nevertheless, it was seen mostly as the protector of democratic values and ideals –by contrast with its past- between the years of 2002 and 2015. In this context, the Court dramatically changed its "state-sided" rights attitude and dissolution practice towards political parties. After the incorporation of individual application procedure into Turkish legal system in 2010, the Court even started to undertake protective role and gave sensational decisions which made tremendous impressions and were applauded by various political and non-political actors. However, this practice started to change in the other way around after 2015. The Court started to decline from its protective role and choose a passive attitude towards the protection of the basic rights and freedoms.

Keywords: Turkish Constitutional Court, State of emergency in Turkey, Dissolution of political parties, Constitutional complaint in Turkey, Judicial review, Twitter ban, YouTube ban, Arrested deputies, Emergency decrees in Turkey.

A. Introduction

In the paper, the changing approach of the Turkish Constitutional Court (the Court) and its effects on Turkish democracy will be analyzed by citing examples from the judgments given in the period between 2002 and 2017. The reason behind the selection of this time period is clear: Since 2002, Justice and Development Party (JDP) has been governing Turkey as a ruling party and the trend concerning the development of democracy shows non-uniform characteristics in this period.[2] It is important to state that, apart from the legislative-

[1] Istanbul University, Faculty of Law, volkan.aslan@istanbul.edu.tr. This paper was presented at the international conference "Constitutionalism in a Plural World" hosted by The Porto Faculty of Law, Universidade Católica Portuguesa, Porto, Portugal, November 22-23, 2017.

[2] According to the Democracy Index prepared by the Economist Intelligence Unit, democracy ranking of Turkey was much better before 2013 and this ranking got worse in the following years. In his regard, Turkey was 88th in 2007, 87th in 2008, 89th in 2010, 88th in 2011 and 2012, 93th in 2013, 98th in

executive relations, political parties and other political entities, the Constitutional Court played a central role in this conflictual progress. In this sense, changes on the Court's approach since 2002 are, *inter alia*, much related to such instable democratization/anti-democratization process in Turkey.

As democracy requires free and fair elections, ensuring the plurality in politics, effective protection of basic rights and freedoms, rule of law and supervision of the use of public force, the judgments which have positive and negative effects on these areas are examined in this paper. Since it is impossible to analyze all the important judgments of the Court that were given in fifteen years, only a few judgments of the Court will be discussed. Therefore, such selection reflects rather subjective perspective of the writer.

According to the articles 69 and 148 of the Turkish Constitution[3], the Court oversees the constitutionality of statutes, decree laws and internal regulations of the National Assembly, settles the cases about dissolution of political parties and gives judgments on the individual applications.[4] In line with this arrangement, the judgments and their effects are examined under three sections: individual applications to the Court, dissolution of political parties and constitutional supervision of legislative and executive activities. While the judgments given for the individual applications generally have positive effects on the democratization, judgments regarding the constitutional supervision had impacts on the other way around. Lastly, we could describe the judgments of the Court given within the frame of dissolution of political parties as "mediocre".

B. Individual Applications to the Court

After the incorporation of individual application/constitutional complaint procedure into Turkish legal system with constitutional amendments in 2010, the Court started to receive applications from persons and legal entities in 2012. According to the amended article 148 of

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2014, 97th in 2015 and 2016. See https://www.eiu.com/home.aspx. Similar direction could be followed from the freedom ranking reports of the Freedom House: 4,5 points in 2002, 3,5 in 2003 and 2004, 3 between the years of 2005-2012, 3,5 between the years of 2013-2016 and 4,5 in 2017 (1=Best, 7=Worst). See https://www.freedomhouse.org/.

[3] Turkish Constitution has been amended more than 15 times since its entry into force in 1982. Although some amendments are aimed to make difference on state structure and relations between state organs, most of the amendments aimed improvements on basic rights and freedoms. Desire to join European Union fostered such improvements and amendments after 2001 could be addressed within this framework in particular. See ÖZBUDUN, GENÇKAYA (2009), pp. 43-71; İNCEOĞLU (2015), pp. 162-163; GÖNENÇ (2004), pp. 89-109; YÜKSEL (2007), pp. 153-165; YÜKSEL (2009), pp. 122-124; YÜKSEL (2012), pp. 345-346.

[4] Apart from these, the Court has other duties such as financial audit of political parties, hearing the cases regarding the crimes committed by high state officials regarding their duties or supervision of the resolution of the assembly regarding the termination of the capacities or immunities of deputies. See the articles 69, 85, 146-153 of the Constitution.

the Constitution, everybody has the right to apply to the Court alleging that his/her basic right or freedom was violated by public force. In order to apply to the Court, the right or freedom in question must be protected both by the constitution and the European Convention on Human Rights. Moreover, other domestic remedies should be exhausted before making an individual application to the Constitutional Court. As it will be seen below, judgments given in individual applications mostly reflect the change of the Court's attitude from its past and generally served for the improvement of basic rights and freedoms. Indeed, adoption of such procedure enhanced human rights score of Turkey and contributed to the protection of basic rights and freedoms in this respect.[5] Since it would be impossible to mention about all the judgments of the Court from 2012 to today[6], it would be wise to select decisions which affected the rights and freedoms in a considerably extend. In this regard, the judgments of the Court about blockade of Twitter and YouTube, availability of the usage of maiden names by married women and detention of deputies were *inter alia* prominent ones which were praised by other human rights actors as well.

1. Judgments Regarding Twitter and YouTube

Due to not carrying out the decisions of Turkish courts regarding deleting posts which violate personal rights and rights of privacy, access to social media site Twitter was blocked by Telecommunication and Communication Authority (TCA) in Turkey. Although there was a lower court's temporary restraining order against the TCA's decision, individual complaint was accepted by the Constitutional Court on the ground that such order was not carried out immediately. According to the Court, despite TCA has 30 days to implement temporary restraining order[7], such duration is an utmost period for such order. Because of not implementing the order immediately, the Court said that TCH failed to fulfil its obligations. Thus, the Court gave admissibility decision, despite the non-exhaustion of other remedies: "There is no doubt that, news and thoughts which are shared in social media and relate certain events and facts lose their actuality, value and influence over time. Since the uncertainty regarding the access to the internet site lasts, application to the lower court cannot be accepted as an efficient way with respect to removing the violation and its negative effects."[8] After giving such "revolutionary" admissibility decision, the Court gave its judgment regarding the merits. According to the Court, as the decision of TCH lacks statutory

[5] For more information about the individual applications in Turkey see GÖZTEPE (2015), pp. 485-506; YILDIRIM, GÜLENER (2016), pp. 269-294.
[6] Since 2012 the Court gave more than 45000 judgments. The data was taken from the official internet site of the Court. See: http://www.anayasa.gov.tr/files/bireyselbasvuru/istastik-31122016.pdf.
[7] According to the Administrative Procedure Act (Numbered 2577, art. 28), in order to comply with administrative courts' temporary orders and judgments, administrations have to act without delay. Duration for implementation of such orders or judgments cannot exceed 30 days.
[8] Turkish Constitutional Court, Application No: 2014/3986, Date: 02/04/2014.

authorization and the lower court decisions which were used as a justification to block Twitter were not about blockading the whole site, but rather some URL addresses, the interference to freedom of expression is not authorized[9] and violated the constitution. Thus, just 8 days after the lower court's order, the Constitutional Court gave its judgment and blockade on Twitter was abolished.

In the case regarding the blockade of access to YouTube[10], the Court judged in a similar fashion. According to the Court, despite the temporary restraining order from lower court existed, the uncertainty regarding the access to the internet site lasted and application to the lower court could not be accepted as an efficient way. In the merits, the Court ruled that, as the scope and limits of statutory authorization given to the TCH is not clear, the intervention to the freedom of expression does not meet the requirements of lawfulness. Since there is not a valid statutory basis, such intervention has violated the constitution.[11]

2. Judgments Regarding Maiden Names

According to the Turkish Civil Code (TCC), women can use their maiden names with their husbands' surnames, but it is not possible for them to use only maiden names after the marriage.[12] The applicant who wanted to use her maiden name without her husband's surname brought proceedings in Turkey to use her maiden name alone, but her request was dismissed by the first instance and then appeal courts respectively. After this process, the applicant applied to the Court by claiming that, the inability to use her maiden name alone violates her right to private life and right to family. According to the Court, European Convention on Human Rights (ECHR) is directly applicable in Turkish Law and European Court of Human Rights had found violations of article 14 in conjunction with article 8 of the convention in the applications regarding the inability of women to use their maiden names in

[9] According to the article 13 of the 1982 Constitution, basic rights and freedoms could be restricted only by statutes subject to the reasons specified for each right or freedom in relevant article. Such restrictions cannot harm essences of rights. The restrictions also cannot be contrary to the wording and spirit of the constitution, the requirements of the order of democratic society and secular republic and the principle of proportionality. Such restriction system of basic rights and freedoms was introduced with constitutional amendments in 2001. Before the amendments, it was possible to restrict a right for unspecialized and general reasons which can be named as cumulative restriction system. After the amendments, basic rights and freedoms can only be restricted not generally but according to specific reasons contained in each article about basic rights and freedoms. Such a system is progressive restriction system rather than cumulative one. In doing so, principle of proportionality was also explicitly stated in article 13 of the constitution. In line with such system change, amendments were made to articles especially by adding reasons for restriction in specific basic rights and freedoms.

[10] Turkish Constitutional Court, Application Number: 2014/4705, Date: 29/05/2014.

[11] Also see GÖZTEPE (2015), pp. 514-516.

[12] According to the article 187 of the Turkish Civil Code, "Women take their husbands' surnames after the marriage. However, they can also use their maiden names with their husbands' surnames after applying in written form to marriage registry or later to civil registry."

Turkey.[13] In accordance with article 90 of the constitution, statutes which clash with conventions concerning fundamental rights and freedoms have no ability to be implemented.[14] In the Court's view, as article 187 of the Turkish Civil Code is clearly contrary to the ECHR, court of first instance and appeal court should directly apply the ECHR pursuant to the article 90 of the constitution. In this respect, the application of Turkish Civil Code rather than the ECHR means that the intervention to right has no legal basis and violates the constitution.[15] Thanks to this decision women started to use their maiden names without their husbands' surnames in Turkey. Such decision was also an interesting shift on the Court's jurisprudence regarding the usage of maiden names: Yet just two years ago the Court ruled on the constitutionality of article 187 of the TCC and found it constitutional. The interesting point is that, while deciding on the constitutionality of such regulation the Court saw no relation between the article 187 of TCC and the article 90 of the constitution.[16] It might be thought that article 187 is contrary to ECHR but not to the constitution and in any case it is superseded by the ECHR thanks to the constitution. Indeed, despite not seeing any connection between maiden names and article 90 of the constitution, it is surprising to see the judgment on violation on the ground of the same regulation just two years later. In any case, the Court's judgment was a positive step towards the development of human rights in Turkey.[17]

3. Judgments Regarding Arrested Deputies

Judgments which are given after individual applications of arrested deputies are also good indicators of the role Constitutional Court played in democratization process in Turkey. After being elected as a deputy in 2011, Mr. Balbay, who was arrested in alleged plot to overthrow the government two years ago, requested to be released as the constitution provides immunity for deputies. However, his request was rejected on the grounds of article 83 of the constitution. According to the article 83 of the constitution, a deputy who is alleged to have committed a crime before or after elections could not be detained, interrogated, arrested or tried without a decision of the Assembly, but it sets two exceptions to such immunity: in cases where a deputy is caught in *flagrante delicto* which requires severe

[13] See Case of Ünal Tekeli v. Turkey, Application No: 29865/96, Judgment, Strasbourg, 16 November, 2004; Case of Leventoğlu Abdülkadiroğlu, Application No: 7971/07, Judgment, Strasbourg, 28 May 2013; Case of Tuncer Güneş v. Turkey, Application No: 26268/08, Judgment, Strasbourg, 3 September, 2013; Case of Tanbay Tüten v. Turkey, Application No: 38249/09, Judgment, Strasbourg, 10 December 2013.
[14] In 2004, an additional sentence was added to the article 90 of the constitution which recognized superiority of international agreements in case of a conflict between an agreement and a national statute regarding basic rights and freedoms.
[15] Turkish Constitutional Court, Application Number: 2013/2187, Date: 19/12/2013.
[16] Turkish Constitutional Court, E: 2009/85, K: 2011/49, Date: 10/03/2011.
[17] Also see GÖZTEPE (2015), pp. 519-523.

punishment or in cases subject to article 14[18] provided that investigation stage has already been started before the election. As Balbay's situation was evaluated in scope of article 14, his request for release was rejected. Then he applied to the Constitutional Court with the claims that, his detention *inter alia* violates his right to be elected. According to the Court "… while the decision for the continuation of detention was handed down, proper balance between the public interest expected from such continuation and applicant's right to be elected and right to engage in political activity was not ensured."[19] As the tenure of deputies is five years and Mr. Balbay spent more than two years of that term in detention, the Court decided that his right to personal liberty and also right to be elected were violated. In this context, rather than using another protection measures, continuous use of detention measure was accepted as disproportionate. After the Court's finding, Mr. Balbay was released in a few days. Furthermore, other arrested deputies were also released after similar judgments[20] given by the Court. Thanks to the Court's these judgments, arrested deputies managed to attend to the meetings of the National Assembly and performed their duties. Since they were deputies from opposition parties, such releases were also contribution to the protection of democratic plurality in the National Assembly. Nevertheless, recent inadmissibility decisions[21] of the Court regarding arrested deputies could be accepted as signs that, the Court is going to take more passive stance in individual applications as well. However, it might also be early to jump to such conclusion since the recent judgments are about the arrests which have differences in comparison with aforementioned ones in terms of basis, detention time and other facts.[22]

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[18] Article 14 (Prohibition of Abuse of Basic Rights and Freedoms) of the Constitution: "None of the rights and freedoms in the Constitution could be used as tools which aim to damage the indivisible integrity of State with its land and nation and aim to abolish the democratic and secular republic based on human rights. None of the provisions of the Constitution could be interpreted in a way which enables State or individuals to demolish basic rights and freedoms recognized by the Constitution or restrict them in a wider manner than stated in the Constitution. The sanctions to be applied against those who behave contrary to these provisions shall be regulated by statute."

[19] Turkish Constitutional Court, Application Number: 2012/1272, Date: 04/12/2013.

[20] See Turkish Constitutional Court, Application Number: 2013/9894, Date: 02/01/2014; Turkish Constitutional Court, Application Number: 2013/9895, Date: 02/01/2014; Turkish Constitutional Court, Application Number: 2014/85, Date: 03/01/2014; Turkish Constitutional Court, Application Number: 2014/9, Date: 03/01/2014. Also see GÖZTEPE (2015), pp. 528-530.

[21] See Turkish Constitutional Court, Application Number: 2016/25189, Date: 21/12/2017; Turkish Constitutional Court, Application Number: 2016/40170, Date: 16/11/2017.

[22] After the constitutional amendment (see provisional article 20 of the Turkish Constitution), which stipulated the abolishment of parliamentary immunity for a certain period, was accepted in May 2016 deputies from the opposition parties were arrested. Although just after the amendment, some parliamentarians assumed that such amendment is contrary to law, the Court refused to hear the case regarding the legality of constitutional amendment which prescribed abolition of parliamentary immunity for the members of Turkish National Assembly: According to the Constitution, the supervision of constitutional amendments is possible only regarding to form and such supervision is possible after the application of minimum 110 deputies or the president. Since only 70 deputies applied to the Court for annulment the case was dismissed by the Court. Although the applicants asserted that such amendment is like lifting of the immunities of deputies and constitutes

C. Dissolution of Political Parties

After having banned more than twenty political parties that were mostly conservative or leftist mainly due to seeing them threat to national security, territorial integrity or the secularity of the state, the Court changed its dissolution practice towards political parties as well. Since 2002, only two political parties were dissolved by the Court and one party has been punished with the deprivation of state aid. Given the fact that 22 political parties had been dissolved between 1970[23] and 2002, such statistic seems quite optimistic. Between 1982 and 2002, three parties were dissolved because of the activities seen contrary to secularism and ten parties were dissolved due to activities seen detrimental to the territorial integrity of the state and the unity of the nation.[24] In addition to dissolving political parties for just having the expression of "communist" in their names, the Court also banned the parties which mentioned Turkish and Kurdish people as separate entities in their programs. After the constitutional amendments in 1995[25] the Court started to ground its judgments on the article 68 of the constitution rather than Law on the Political Parties[26] which has much more restricting regulations[27] about political parties. Thanks to such amendments and partly because of changing its attitude towards political parties, the Court ended its practice to dissolve parties just because of their names or programs. In this regard, criteria of clear and imminent danger, calling for violence and relationship with terror organizations started to be basis of dissolving political parties. For instance, despite having the statement "We believe that if governments of Turkey defend the same claims, which they defend for the Turks in Cyprus, Bulgaria, Greece, Kosovo and other similar countries, for Kurds living in Turkey, the problem will be solved." in its party program, Rights and Freedoms Party was not dissolved by the Court in 2008. According to the Court, there is no proof that the political party in question would implement any method contrary to the constitution and imposing sanction to a political party for only expressions in its program would constitute unbalanced intervention

parliamentary resolution which is normally subject to Court's supervision under article 85, the Court dismissed this claim. See article 83, 85, 148 of the Constitution and the judgment of Turkish Constitutional Court, E: 2016/54, K: 2016/117, Date: 03/06/2016.

[23] From the foundation of the Court in 1961 until 1970, only one political party had been dissolved by the Court. In sum, 25 political parties have been dissolved by the Court. Statistics were taken from the official site of the Court. See http://www.anayasa.gov.tr/icsayfalar/istatistikler/genelkurulistatistik.html

[24] In addition to these parties, four other political parties were also dissolved in this period due to not meeting procedural requirements or using the same names with formerly dissolved parties. For more information see EREN (2009), pp. 30-31; ÖRÜCÜ (2008), pp. 264-265; ÖDEN, ESEN (2016), p. 142; HAKYEMEZ (2008), pp. 136-137; UZUN (2010), pp. 384-386; KOÇAK, ÖRÜCÜ (2003), pp. 407-418.

[25] With the same amendments in 1995, bans on political parties to establish abroad offices, woman and youth branches were abolished. Also, ban on university scholars and students to be a member of a political party and ban on the non-governmental organizations' ability to cooperate with political parties were repealed. Also see YÜKSEL (2012), p. 345.

[26] It should be indicated that, having a special statute on political parties is not a widespread feature in comparative law. See EREN (2009a), pp. 45-71.

[27] See UYGUN (2000), pp. 256-272; BULUT (2003), pp. 535-562; YOKUŞ (2001), pp. 107-109.

to its freedom of expression and association.[28] There is no doubt that, the fate of aforementioned party would be other way around, if the case was hold by the Court not so more but about ten years ago. However, "the red line" of the Court regarding the calls for violence and relationship with terrorist organizations is still in use. Indeed, Democratic Society Party was dissolved on these grounds in 2009.[29]

On the other hand, the case law of the Court regarding the dissolution of political parties on the ground of being contrary to secularism had a transformation within this period as well. In this context, judgment on the request for the dissolution of Justice and Development Party (JDP) which has governed Turkey since 2002 serves as a good example for such transformation. In this judgment, despite confirming the fact that JDP has become center of activities which violate paragraph four of article 68 of the constitution, the Court contented with punishing JDP with deprivation of state aid rather than dissolution. In this regard, the Court concluded that considering all of JDP's activities with the absence of call for violence, it was decided to deprive the party in question of state aid rather than dissolution.[30] The difference of this judgment from the previous ones was that, although JDP was seen as a center of activities which were contrary to the principles of democracy and secularism, the party in question was not dissolved. Although the lack of call for violence affected the Court's judgment in a considerably extent, the parties which also had not called for violence had been dissolved on the grounds of secularism earlier. However, it would also be wise not to overlook the constitutional amendments in 2001 which raised the quorum of decision for the dissolution of political parties to 3/5 of all members of the Court.[31] Since six members of the Court voted for the dissolution, 4 members voted for the deprivation of state aid and one member voted for the dismissal of the case, the quorum was not reached and JDP was punished with deprivation of the half of the annual state aid.[32] Therefore, JDP could have had the same fate with its predecessors, if such amendments had not been made so.

[28] Turkish Constitutional Court, E: 2002/1, K: 2008/1, Date: 29/01/2008.
[29] Turkish Constitutional Court, E: 2007/1, K: 2009/4, Date: 11/12/2009.
[30] The Court reached this judgment by evaluating JDP's activities. According to the Court such activities didn't endanger the democratic values and didn't have the potential to harm the harmony in the society. In this regard, the positive steps taken by the government for the democratization and modernization of country constituted important factors for the Court.
[31] With the constitutional reform in 2001, the Court was also enabled to punish political parties with partial or complete deprivation of state aid rather than dissolving them. With the same reform the quorum of decision for the dissolution of political parties was raised to 3/5 of all members of the Court. In 2010, aforesaid quorum was raised to 2/3 of participating members of the Court. Also see ÖZBUDUN, GENÇKAYA (2009), pp. 49-63; GÖNENÇ (2004), pp. 89-109; YÜKSEL (2007), pp. 153-165; YÜKSEL (2009), pp. 122-124; YÜKSEL (2012), pp. 345-346.
[32] Turkish Constitutional Court, E: 2008/1, K: 2008/2, Date: 30/07/2008.

D. Constitutional Supervision of Legislative and Executive Activities

Judgments which are given on the constitutional supervision of legislative and executive acts like statutes have significant effects on the democratization and protection of human rights in Turkey as well. Yet unlike individual applications, such judgments have generally adverse impacts: In addition to blocking constitutional amendments which aim to improve fundamental rights[33], the Court also interfered legislative activities such as the election of president since 2002. While this "excessive interventionist" attitude of the Court damaged the democratization process before 2010, the "excessive inaction" of the Court which hit the top after 2016 has also damaged such process as can be seen below. Within this context, we are going to examine the judgments regarding the election of the president and supervision of emergency decrees in a more detailed way.

1. Judgment Regarding the Election of the President in 2007

According to the 1982 Constitution the parliament has the competence to adapt its decisions in the forms of statute or resolution. Although statutes are subject to supervision of the Constitutional Court, only three resolutions of the assembly are subject to such supervision:

1. decision to lift parliamentary immunity of any member,
2. decision on the loss of membership,
3. amendments to the rules of procedure.

Apart from these, the other resolutions of the assembly are not subject to supervision of the Court. However, in order to overcome such limitation, the Court uses its old-fashioned but a unique jurisprudence which can be named as supervision of *de facto* amendments to rules of procedure. The reasoning is persuasive: As amendments to the internal regulations of National Assembly is subject to revision under 1982 Constitution, the resolutions which are taken in violation of such rules correspond to *de facto* amendments to the rules of procedure and could be revised and annulled. Although this practice dates back to the early years in

[33] In 2008, the Court annulled the constitutional amendments which aimed to lift headscarf ban in universities. Article 148 of the constitution states that Court could only supervise procedural aspects of the constitutional amendments in terms of quorum and double debate requirement. However, the Court also supervises constitutional amendments whether they are compatible with unamendable articles of the constitution or not. In this regard, the Court annuls the amendments which it sees contrary to such articles. In the headscarf issue, the Court found such amendments contrary to the secularism principle which is designated as unamendable principle in Turkish Constitution and annulled them. See Turkish Constitutional Court, E: 2008/16, K: 2008/116, Date: 05/06/2008. Also see ÖZBUDUN, GENÇKAYA (2009), pp. 106-109; YÜKSEL (2012), pp. 348-350.

1960's[34] the result of the landmark 2007 decision had an unrivalled impact on Turkish constitutional order.

According to the former 102th article of Turkish Constitution, the National Assembly used to elect the president of the republic with the votes of at least two-thirds of all members by secret ballot. In the event of not ensuring two-thirds majority (367), it was possible to elect the president with majority of all members in the third round.[35] As the term of office of President Sezer was about to end in 2007, Turkish National Assembly convened to select the new president on April 27th of 2007. Before holding the first round of elections, one of the deputies raised question regarding the quorum and asserted that two-thirds majority was not only required for election, but also for quorum of meeting. However, this objection was denied by the speaker of the assembly and such denial was approved with the resolution adopted by members. In view of the assembly, the general rule about quorum of meeting, which equals to 184[36], was applicable to that case and there were more than 184 deputies present. After candidate Gül received 357 votes from the votes cast (361) in the first round, main opposition party namely Republican People's Party (RPP) applied to the Constitutional Court in order to invalidate the first round of elections. In order to annul the first round of elections RPP brought forward the same argument about the quorum. The Constitutional Court gave its judgment just four days later and invalidated the resolution of National Assembly about the quorum: Since two-thirds majority is a constitutional requirement for both meeting and election and such requirement is also necessitated by internal regulations[37], contradictory resolution of the assembly is equal to *de facto* amendment to the rules of procedure and violates the constitution. Consequently, such resolution was annulled.[38] The most interesting point of the decision was that, two-thirds majority as a quorum of meeting requirement had never been sought in former presidential elections. Since the constitution went into force in 1982 three presidents had been elected by the National Assembly until 2007. What's more striking was that, during the election of 8th president in 1989, less than two-thirds of deputies were present in all rounds and Mr. Özal had been selected with 263

[34] See GÖZLER (2000), pp. 394-398.
[35] If the president was not elected in the third round it was also possible to elect the president in the fourth round among the two candidates who received most of the votes in previous round. In the event of not electing the president after the fourth round, the immediate renewal of elections to National Assembly was mandatory pursuant to the former 102th article.
[36] According to the former 96th article of Turkish Constitution, unless otherwise stated in other articles, the National Assembly convenes at least with one-thirds of its members.
[37] According to the article 121 of internal regulations, president of the republic was elected in conformity with the article 102 of the constitution.
[38] Turkish Constitutional Court, E: 2007/45, K: 2007/54, Date: 01/05/2007; Also see KÖKER (2010), pp. 332-333.

votes[39] in the third round. At that time, none of the objections regarding the constitutionality of quorum of meeting were brought before the Constitutional Court, even by the opposition parties[40] which boycotted the election.

The judgment of the Constitutional Court, which was heavily criticized by different actors and mainly by the governing party JDP, constituted a milestone for the constitutional future of Turkey. As the election of president was deadlocked, governing party called for early elections to the parliament and proposed amendments to the constitution which foresaw, *inter alia*, the election of president by popular vote of people.[41] After the proposed amendments were approved by the national assembly, they were submitted to referendum by president Sezer. Then, everything went in the right direction for the JDP: In addition to securing the first place again in early parliamentary elections in July, former candidate Gül was elected as the new president thanks to the Nationalist Movement Party's (NMM) ensuring of quorum of meeting by participating in presidential elections. Furthermore, the constitutional reform was ratified (%68,95) by referendum in October 2007.[42]

As one can see that, not only failing to block the election of the president subsequently, the controversial judgment of the Court also caused to quick and unprepared change to Turkish constitutional system. Just after the election of new president by people in 2014, actual use of presidential power started to be out of line with related articles of the 1982 Constitution which initially prescribed a "supra-political" role for head of state. With the intend of harmonizing *modus operandi* with norms, a new constitutional reform, which aimed to transform dual executive into unilateral one, was proposed by governing party JDP and was also supported by one of the opposition parties namely NMM. Such reform was ratified with %51, 41 votes cast in referendum in April 2017.[43] This meant a radical shift from parliamentary system to *sui generis* Turkish presidential system. In other words, it was a death-warrant of the long standing parliamentary system in Turkey. Apart from gaining only half of the population's support and having other handicaps regarding time and other formal issues, the constitutional reform in question was also heavily criticized in terms of context. According to the Venice Commission "… the substance of the proposed constitutional

[39] Before the constitutional amendment in 1995, the National Assembly was composed of 450 members. With the aforementioned amendment, total number of members was raised to 550. Therefore, two-thirds majority was equal to 300 in 1989.
[40] Between the general elections of 1987 and 1991 there were only three political parties in the National Assembly. Among these Motherland Party (MP) was the ruling party. Because of the boycott, only MP as a political party participated in the election of president.
[41] With 2007 amendments, term of office of deputies were also reduced to four years from five years (Art. 77) and general rule regarding the quorum of meeting was extended to all activities of assembly including the elections (Art. 96).
[42] See ÖZBUDUN, GENÇKAYA (2009), pp. 97-103; GÖNENÇ (2008), pp. 518-521.
[43] As such amendments were made under the state of emergency, a lot of criticism was made regarding the timing.

amendments represents a dangerous step backwards in the constitutional democratic tradition of Turkey."[44]

In sum, the Court's controversial decision was one of the biggest reasons for the increase of severe political polarization which resulted with an adoption of a new government system in a conflicting rather than a consensual process. This also meant the end of hopes towards an inclusionary, plural and consensus-based constitution making process which is a long-waited wish in Turkey, at least for now.

2. Judgments Regarding the Emergency Decrees

According to the article 148 of the 1982 Constitution, decrees having the force of law which are issued during the emergencies could not be brought before the Constitutional Court with the plea of unconstitutionality. In this context, it is possible to apply to the Court after the parliament approves or amends an emergency decree and publishes it in the official journal. Thus, it is not possible to supervise an emergency decree until the parliament takes an action. Despite such restraint, the Court circumvented the prohibition by handing down rights-sided judgments in early 1990s. In its first judgment regarding the issue the Court stated that:

"... 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 supervised 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."[45]

Beginning with aforementioned reasoning, the Court supervised so-called emergency decrees which are brought before it with the plea of constitutionality and invalidated lots of emergency norms on the basis of such reasoning. Indeed, the related articles of the constitution mandate that, emergency decrees could only be issued for the issues necessitated

[44] European Commission for Democracy Through Law (Venice Commission), Turkey, Opinion On The Amendments To The Constitution Adopted By The Grand National Assembly On 21 January 2017 and To Be Submitted To A National Referendum On 16 April 2017, adopted by the Venice Commission at its 110th Plenary Session, Venice, 10-11 March 2017. Available at: http://www.venice.coe.int/webforms/documents/default.aspx? pdffile=cdl-ad(2017)005-e.
[45] Turkish Constitutional Court, E: 1990/25, K: 1991/1, Date: 10/01/1991.

by emergencies.[46] In this respect, the Court overruled the norms which exceeded necessities, especially on the grounds of location, subject and time. For instance, the Court invalidated the emergency norms which are designed to be applied also in territories in which state of emergency is not in effect.[47] Moreover, the Court also invalidated emergency rules which provided amendments to ordinary statutes. According to the Court, the norms which provide amendments to ordinary statutes cannot be accepted temporary in nature and they fail to fulfil requirements emergencies necessitate.[48] In the following years, the Court maintained this approach regarding the emergency decrees.[49]

Nevertheless, the Constitutional Court reversed its case-law concerning the supervision of emergency decrees and denied the suits regarding the constitutionality of the emergency decrees issued after the coup attempt in July 2016. In doing this, the Court acknowledged its previous "oversteps" as well:

"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 supervision. 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."[50]

The state of emergency was declared because of an unprecedented event in Turkish history and it is prevalent on the whole country for the first time since the 1982 Constitution took effect. For this reason, it is understandable and rational to evaluate the reasons and results of the emergency regime more different than previous ones. However, the Court should have made such evaluation by examining emergency norms rather than rejecting the

[46] Articles 121 and 122 of the 1982 Constitution.
[47] Turkish Constitutional Court, E: 1991/6, K: 1991/20, Date: 03/07/1991.
[48] Turkish Constitutional Court, E: 1990/25, K: 1991/1, Date: 10/01/1991; Turkish Constitutional Court, E: 1991/6, K: 1991/20, Date: 03/07/1991.
[49] See Turkish Constitutional Court, E: 2003/28, K: 2003/42, Date: 22/05/2003.
[50] Turkish Constitutional Court, E: 2016/166, K: 2016/159, Date: 12/10/2016; Turkish Constitutional Court, E: 2016/167, K: 2016/160, Date: 12/10/2016; Turkish Constitutional Court, E: 2016/171, K: 2016/164, Date: 02/11/2016; Turkish Constitutional Court, E: 2016/172, K: 2016/165, Date: 02/11/2016; For critiques of these decisions see ESEN (2016); CAN, AKTAŞ (2017), pp. 31-39; KÖYBAŞI (2017), pp. 216-220. As the constitution prohibits the supervision of emergency decrees, Gözler finds the decisions of the Court right. See GÖZLER (2017), pp. 18-20.

cases on the sole ground of wording of the article 148 of the constitution. Indeed, in comparison with ordinary times, the requirement for the supervision of decrees is higher in emergencies. Interesting point is that, such belief is agreed by the Court while rejecting the supervision of emergency decrees as well:

"... Since basic rights and freedoms are more restricted in emergencies, it 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."[51]

As one can see, although admitting the necessity of supervision of decrees in times of emergencies, the Court renounced its rights-sided case law in a self-contradictory manner. Consequently, all the savings regarding the supervision of emergency decrees went away.[52] Taking into consideration that, some of the provisions of current emergency decrees such as provision regarding "winter tires"[53] are not necessitated by the emergency, decrees are used also for the issues not necessitated by emergencies. As the National Assembly has also the duty to supervise emergency decrees, its efficiency to substitute judicial supervision is doubtful.[54]

E. Conclusion

As it is understood from the sample judgments, it is difficult to say that the Turkish Constitutional Court had a consistent approach regarding the democratic values and protection of human rights in Turkey, at least in the last fifteen years. For the dissolution practice, the performance of the Court remained moderate. In this regard, the Court contributed to the improvement of dissolution practice of political parties even if just a bit, along with the improvements of regulations regarding the political parties.[55] On the other hand, we saw contrasting but more apparent attitudes concerning individual applications and judicial reviews of constitutionality. While rights sided decisions are given especially on the area of individual applications, is it difficult to say the same for the cases regarding the constitutionality of executive and legislative acts. This argument could also be supported with inconsistent approaches of the Court regarding the same regulation in Turkish Civil Code as it was stated above.

[51] Turkish Constitutional Court, E: 2016/166, K: 2016/159, Date: 12/10/2016.
[52] See ESEN (2016); KÖYBAŞI (2017), pp. 216-220.
[53] See Emergency Decree, Number: 687, Date: 09. 02. 2017.
[54] According to the internal regulations of the parliament, emergency decrees should be negotiated within 30 days after the submission. However, parliament neglects this rule and such negligence has no sanction. From July 2016 up until today, 31 emergency decrees have been issued. Only five of them have been negotiated by the parliament.
[55] Also see ÖDEN, ESEN (2016), pp. 142-148; ARSLAN (2002), pp. 9-25; ALGAN (2011), pp. 809-836.

Before 2010, the Court had always tried to push its limits by interpreting the constitution and its powers widely and this attitude was subjected to heavy criticism by political and non-political actors.[56] In spite of receiving similar criticisms for the judgments in some controversial cases like Twitter or YouTube cases after 2010, the Court was generally praised as it contributed to the protection of basic rights and freedoms. However, the Court started to renounce from this role especially after 2015. After the coup attempt and declaration of state of emergency in July 2016, the Court even abandoned its previous case law which was on the side of protection of basic rights even in national emergencies. Bearing in mind the passive stance adopted by the Court and considering the continuance of national emergency more than one year in Turkey, such lack or deficiency of supervision has the potential to damage pluralistic democracy which is already in menace.

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[56] Oder describes the roles of the Court as "game broker", "populist" and "popular" from 1970s up until today. See ODER (2017).

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