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The genesis of the 'Exceptional' Republic: the permanency of the political crisis and the constitution of legal emergency power in Turkey

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ABSTRACT

Almost half of the political life has been experienced under the state of emergency and state of siege policies in the Turkish Republic. In spite of such a striking number and continuity in the deployment of legal emergency powers, there are just a few legal and political studies examining the reasons for such permanency in governing practices. To fill this gap, this paper aims to discuss one of the most important sources of the 'permanent' political crisis in the country: the historical evolution of legal emergency power. In order to highlight how these policies have intensified the highly fragile citizenship regime by weakening the separation of power, repressing the use of political rights and increasing the discretionary power of both the executive and judiciary authorities, the paper sheds light on the emergence and production of a specific form of legality based on the idea of emergency and the principle of executive prerogative. In that context, it aims to provide a genealogical explanation of the evolution of the exceptional form of the nation-state, which is based on the way political society, representation, and legitimacy have been instituted and accompanying failure of the ruling classes in building hegemony in the country.

Introduction

Nothing can illustrate the impression created by the evolution of legislative emergency power in Turkey better than Walter Benjamin's *Ninth Thesis on History*. Here he writes, 'where we see the appearance of a chain of events, *he* [the Angel of History] sees one single catastrophe, which unceasingly piles rubble on top of rubble and hurls it before his feet'.¹ Historians and political scientists working on the subject from a critical perspective in Turkey are also generally inclined to see one single catastrophe, which is in fact nothing other than the 'exceptional' republic itself, beset by endless political crises and violent clashes. After emphasizing the continued dominance of the military, endless state of emergency practices and the fragilities of civil society, they generally

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¹See W. Benjamin, *On the Concept of History*, trans. Dennis Redmond (Creative Commons, 2005), <https://www.marxists.org/reference/archive/benjamin/1940/history.htm>, (accessed 20 February 2019).

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refer to this catastrophe using terms such as ‘authoritarianism,’ ‘tutelary democracy’ or ‘strong state tradition’. Consequently, instead of providing a genealogy of the deeply rooted authoritarian policies and practices and discussing the political, legal and institutional incentives within the political system, they prefer to impose theoretical generalizations somewhat insensitively on the varying lines of conflicts, clashes and the different paths to state formation, modern citizenship and state–society relations in the country.

However, to discern the emergence and production of a specific form of legality based on the concept of emergency and the rise of the principle of executive prerogative, we should not accept any political and legal reality without questioning its real emergence since ‘there can only be concepts, laws and societies because of a virtual potentiality that allows for the creation of actual instances’.² In line with this philosophical caveat, to expose the reasons behind the permanent use of legal emergency power and its never-ending metamorphoses, I will follow the legal and political traces behind the ascendancy of these policies from a genealogical perspective and argue that the legal and political sources of the permanent state of emergency policies in Turkey can be observed in the way the political society is articulated or ‘instituted’ and legitimacy and sovereignty are organized. In pursuit of such an alternative legal and political analysis, in the first part of the paper I attempt to provide a perspective that grounds the legal and political reasons behind the predominance of the executive prerogative principle in the process of territorial state formation, nation-building and how representation was organized or distorted in the early republican period.

Rather than limiting the argument to civil–military relations, I will outline a political analysis that emphasizes the incapacity of the ruling classes in building hegemony and the fragile infrastructural power of the nation-state, emerging from the way political society, representation, and legitimacy have been organized or instituted. In the second part of the paper, I will discuss the historical constitution of legal emergency power and its relationship with the exceptional form of the nation-state in Turkey. I assert that the political project, produced by the Republican People’s Party (Cumhuriyet Halk Partisi, CHP) and undertaken by its voluntary or ‘dissenting’ followers, inherently necessitates the constant deployment of emergency power. In the third part, I will provide a historical account of the constitutionalization of military emergency power after the 1980 military coup and the genealogy of the ways in which laws directed against ‘terror’ have taken on the very quality of terror in order to contain political and social ‘crises’.³ Finally, I will very briefly describe the current appeal by the Justice and Development Party (Adalet ve Kalkınma Partisi, AKP) to state of emergency policies and its efforts to subsume legal emergency power within a new conception of legality, which I will call strategic legalism.⁴ Hence, I will discuss how the party and President Erdoğan have deployed the principle of executive prerogative for the sake of institutionalizing a new political regime, articulated under the dominance of the president’s supreme power.

²As emphasized by Colebrook, ‘This virtual domain of ideas is not some abstract and undifferentiated, or unknowable beyond that we can only approach negatively and critically’. And See Colebrook, ‘Legal Theory After Deleuze’, in *Deleuze and Law: Forensic Futures*, eds. Rosi Braidotti, Claire Colebrook and Patrick Hanafin (Hampshire: Palgrave, Macmillan, 2009), 13.

³Colebrook, ‘Legal Theory After Deleuze’, 21.

⁴For further discussion on the concept, see Zafer Yılmaz, ‘Erdoğan’s Presidential Regime and Strategic Legalism: Turkish Democracy in the Twilight Zone’, unpublished manuscript.

Legal and political reasons for the rise of the executive prerogative principle in Turkey

Political scientists generally attribute the sources of a permanent state of siege and emergency policies to either civil–military relations, the ideological orientations of military-bureaucratic elites, disagreements among political elites or a continuing strong state tradition in the country.⁵ It is argued that the military's extreme perception of threat, the predominance of its security mentality and its intervention in political life in times of political 'crisis' are generally responsible for the fragility of the rule of law and institutionalization of the state of emergency paradigm as a 'reason of state,' even in normal times. The common assumption is that military and judiciary bureaucratic elites view themselves as the founders of the republic and have created a special regime of guardianship and 'tutelage' suppressing civil society and the modern public sphere. Meanwhile, this kind of political regime has also hindered the institutionalization of democracy and citizenship rights and imposed the highly narrow concept of constitutionalism based on the restriction of the democratically elected government out of fear of majoritarianism. Although this perspective may bring crucial insights, it ignores the complex political and social reasons behind the rise and durability of this form of an institutional, legal and political framework, which provides strong incentives and structural conditions for sustaining state of emergency practices under 'security policies' or 'counterterrorism arrangements'. Contrary to this mainstream perspective, I assert that the reasons behind the permanence of state of emergency policies should be sought not only in the institutional configuration of state power (constitutional organization of the relations between different branches of the state), but also in the constitution of political society, which structures relations between state and society and, more importantly, the legal and constitutional foundations of citizenship.

I propose that we should focus instead on how legitimacy and the symbolic dimension of power—which have been structured so as to institutionalize the executive prerogative principle as a paradigm of government—administer society in a certain way. We should also examine the fundamental social and political conflicts that have been continuously emerging from the state's foundational contradictions in different forms since the establishment of the republic.⁶ A very brief glance at the

⁵The concept of state tradition, developed by Metin Heper, has become the dominant perspective in analyzing civil–military relations and political instability. See Heper, *The State Tradition in Turkey* (North Humberstone, Eothen Press, 1985). For a succinct and insightful critique of this perspective, see Demet Dinler, 'Türkiye'de Güçlü Devlet Geleneği Tezinin Eleştirisi', *Praksis* 9, (2003): 17–54; Ali Rıza Güngen and Şafak Erten., 'Approaches of Şerif Mardin and Metin Heper on State and Civil Society in Turkey', *Journal of Historical Studies* 3, (2005): 1–14; İsmet Akça, 'Türkiye'de Ordu, Devlet ve Sınıflar: 27 Mayıs 1960 Darbesi Örneği Üzerinden Alternatif Bir Okuma Denemesi', in *Türkiye'de Ordu, Devlet, Güvenlik ve Siyaset*, eds. Evren Balta Paker and İsmet Akça, (İstanbul: İstanbul Bilgi Üniversitesi Yayınları, 2010), and G. Yalman, 'Tarihsel Bir Perspektiften Türkiye'de Devlet ve Burjuvazi', *Praksis* 5, (2002): 7–23. However, most of these critiques also ignore how political society and sovereignty are organized and share the same sociological assumptions, even if they differ in their concepts of the state. Another dominant paradigm is the centre-periphery perspective offered by Şerif Mardin. See Şerif Mardin, 'Center-Periphery Relations: A Key to Turkish Politics?', *Daedalus* 102, no. 1 (1973): 169–190. For critique of this perspective, see Zafer Yılmaz, 'The AKP and the spirit of the "new" Turkey: imagined victim, reactionary mood, and resentful sovereign', *Turkish Studies* 18, no. 3 (2017): 482–513, and Onur Bakiner, 'A key to Turkish politics? the centre–periphery framework revisited', *Turkish Studies* 19, no. 4 (2018): 503–522.

⁶Joakim Parslow, 'Theories of exceptional executive powers in Turkey, 1933–1945', *New Perspectives on Turkey* no. 55 (2016): 29–54; Joakim Parslow, 'Jurists of War and Peace: Sıddık Sami Onar (1898–1972) and Ali Fuad Başgil (1893–1967) on Law and Prerogative in Turkey', *International Journal of Middle East Studies* 50, (2018): 45–64.

legal history of Turkey reveals how and why its legal and political tradition depends on the integration of the concept of the executive prerogative principle into the normal functioning of the legal and political system to enable politicians, security personnel and judicial decision-makers to suppress any threats to the construction of the nation-state, nation building (Turkification of the population), and their distortion or controlling of the field of representation (presenting the army, one party or nationalist movements as the true embodiment of the nation and delegitimizing the opposition as an internal extension of the enemy). Hence, rather than simply reproducing the same old adage of normalizing an emergency, the Turkish case clearly shows us that the real story of emergency power is much less a story of wartime responses and much more a transformation of martial law into a complex legal and political form capable of governing nation-state formation, nation building and institutionalizing control over the fields of representation and legitimacy. The institutionalization of this form of governing society occurred through the generation of new concepts, legal practices and judicial institutions that allowed the key practices of martial law to be carried out in a conceptual and legal form that could also be more easily defended in times of peace, as Neocleous argues in a different historical context.⁷

During the late nineteenth and early twentieth centuries, an enormous amount of legal amendments, practices, regulations, statutory decrees and laws concerning the implementation of martial law and the state of emergency allowed governments to avail themselves of the right to use special, constitutionally prescribed powers in situations in which 'public security and order' were thought to be in danger. This process has had salient political and legal consequences. The most important ones are the institutionalization of a 'prosaic politics of emergency' (governing the population through state of emergency and counter-terror policies), institutionalization of strategies that 'partition the political space into those "few" affected by the uses of emergency powers and those "many" who are not',⁸ the continuous suspension of basic rights and freedoms, the insertion of an emergency mentality into the criminal justice system, the creation of special legal institutions that have easily acquired a permanent character, the institutionalization of judicial deference to an executive, consolidation of fragile constitutionalism structured purely around the idea of emergency, a massive deployment of coercive forces, and finally the creation of an atmosphere of insecurity, fear and menace for all political opponents. Political scientists and legal scholars alike have mistakenly sought the causes of the constant deployment of emergency policies and practices in the dominance of state tradition, the tutelary authority of military and bureaucratic elites, and the decisions of judicial actors, making their assumptions in line with the logic of the reason of state. Rather than explaining the reasons for the dominance of the executive prerogative principle from a political perspective, thus shedding light on the role of the republic's fundamental socio-political contradictions in this process, they attribute the acceptance of this paradigm of governing society by means of emergency power either to conflicts

⁷See Mark Neocleous, 'The Problem with Normality: Taking Exception to "Permanent Emergency"', *Alternatives* 31, (2006): 191–213.

⁸Kim Lane Scheppele, 'Legal and Extralegal Emergencies' in *The Oxford Handbook of Law and Politics*, eds. Keith E. Whittington, R. Daniel Kelemen, and Gregory A. Caldeira (Oxford and New York: Oxford University Press, 2008), 178.

between and among military-bureaucratic and political elites or to the struggle between 'center and periphery' with reference to sociological analysis.

Studies that aim to critique such a short-sighted sociological view and emphasize the role of the contradictions in capital accumulation processes or clashes between alternative hegemonic projects also share the same theoretical perspective that fails to provide any explanation of the political factors related to state formation, the constitution of political society (nation building) and the institutionalization of the political field, more specifically the organization of representation and legitimacy in the country. Here, Lefort's theoretical arguments on the symbolic aspect of political power in modern society give us crucial insights that help us understand the link between the deployment of emergency powers and the historically specific constitution of that symbolic power in the case of Turkey. Lefort's analysis emphasizes 'a particular way in which society is articulated or "instituted". This mode of articulation or institution involves a certain configuration of power and a certain conception of its symbolic character'.⁹ According to Lefort, we can comprehend the new form of legitimation in modern society only by understanding the changing form of the symbolic nature of power. He asserts that, in modern society,

the legitimacy of power is based on the people; but the image of popular sovereignty is linked to the image of an empty place, impossible to occupy, such that those who exercise public authority can never claim to appropriate it. Democracy combines these two apparently contradictory principles: on the one hand, power emanates from the people; on the other, it is the power of nobody. And democracy thrives on this contradiction.¹⁰

The process of representation in liberal societies guarantees the proper functioning of this symbolic aspect and legitimacy. Whenever a political party or movement asserts that it actualizes this empty image of the people by identifying itself with it, it in fact attempts to invade this 'empty place', inserting an ineradicable indeterminacy into the heart of representative democracy. Hence, Lefort claims, when the party or a leader appropriates

power under the cover of this identification, then it is the very principle of the distinction between the state and society, the principle of the difference between the norms that govern the various types of relations between individuals, ways of life, beliefs and opinions, which is denied; and, at a deeper level, it is the very principle of a distinction between what belongs to the order of power, to the order of law and to the order of knowledge which is negated.¹¹

This is not an exception; rather, it is an inherent and permanent possibility within modern democracy which is directly linked to the question of how political society is instituted and how this symbolic dimension is constituted.¹² Lefort's ideas on symbolic

⁹J. B. Thompson, 'Editor's Introduction', in *The Political Forms of Modern Society, Bureaucracy, Democracy, Totalitarianism*, Claude Lefort, ed. and introduction by John B. Thompson (USA, MIT Press, 1986), 20.

¹⁰Claude Lefort, 'The Logic of Totalitarianism', in *The Political Forms of Modern Society, Bureaucracy, Democracy, Totalitarianism*, 1986, ed. and introduction by John B. Thompson (USA: MIT Press, 1986), 279. For Lefort, democracy should be seen not as a specific institution or cluster of institutions but rather as a 'form' of modern society, that is, as a particular way in which society is articulated or 'instituted'. This mode of articulation or institution involves a certain configuration of power and a certain conception of its symbolic character. See Thompson, 'Editor's Introduction'.

¹¹Lefort, 'The Logic of Totalitarianism', 280.

¹²The process also encompasses the vague relationship between the people and the nation. For a discussion on nationalism and popular sovereignty, and see B. Yack, 'Popular Sovereignty and Nationalism', *Political Theory* 29, no. 4 (2001): 517–536.

power give us significant insight into the fundamental contradictions of modern state formation in Turkey and the constant deployment of emergency power.¹³

The Party of Union and Progress (*İttihat ve Terakki Partisi*) in the late nineteenth century and its successor the Republican People's Party or RPP (*Cumhuriyet Halk Partisi*) in the early twentieth century both followed policies of nation-building around the idea of the unitary state and the Turkification of the entire population.¹⁴ The RPP and its so-called liberal 'opposition', the Democrat Party or DP, aimed to identify themselves directly with this homogenized conception of the political community in order to invade the above-mentioned 'empty space' and capture the symbolic dimension of power. Hence, for them, the political society needed to be instituted around the idea of the homogenous Turkish nation.¹⁵ For the ruling elites, the nation-building process was based on assimilationist policies, the territorial centralization of the state founded on the erosion of the autonomy of local powers, and strict control of the field of representation. They also believed that construction of the political society and the institutionalization of the state's infrastructural power, based on the imposition of the rule-making authority upon society in line with modernization policies, required a historically specific articulation between 'the image of the People as One with that of a Power-as-One'.¹⁶ They saw this identification as essential to achieving the state formation, nation-building and modernization.

Therefore, the ruling party, the RPP, promoted a conception of society that was sufficient unto itself by following an organicist understanding throughout the 1930s.¹⁷ Furthermore, it rejected the very notion of social heterogeneity, which 'radically contradicts the image of a society in harmony with itself'. To confer unity and identity upon society and its citizens, the ruling elites chose to impose the Turkish identity as a unitary and homogenizing framework. For them, one of the most important results of the late nation building and state formation was the strict concentration of power around the ruling apparatus, the party and the state and, more importantly, a focus on presenting the party as embodying the unity and will of the people. Consequently, the party aimed to invade the empty space of democracy and distorted/twisted the fields of representation and legitimacy to form a view of the party as representing the unity of the people,

¹³Lefort in fact developed this framework in his analysis of totalitarianism. I did not assert that the Republican People's Party embraced totalitarianism entirely nor does Lefort's framework fully explain the contradictions of modern state formation in Turkey. However, the Turkish case shows that there is a clear link between the attempt to usurp the symbolic power, impose a unitary state idea, and constitute political society on the basis of rejection of social heterogeneity, despotic suppression of political opposition and constant deployment of emergency power.

¹⁴See Erol Ülker, 'Contextualising "Turkification": nation-building in the late Ottoman Empire, 1908–18', *Nations and Nationalism* 11, no. 4 (2005): 613–636; and Ayhan Aktar, "'Turkification" Policies in the Early Republican Era', in *Turkish Literature and Cultural Memory*, ed. Catharina Dufft, (Wiesbaden: Harrassowitz Verlag, 2010), 29–62.

¹⁵Being a Muslim was also seen as an inevitable part of this notion of the nation. See Sener Aktürk, 'Persistence of the Islamic Millet as an Ottoman Legacy: Mono-Religious and Anti-Ethnic Definition of Turkish Nationhood', *Middle Eastern Studies* 45, no. 6 (2009): 893–909, and, in particular, Ceren Lord, *Religious Politics in Turkey: From the Birth of the Republic to the AKP* (Cambridge, Cambridge University Press, 2018).

¹⁶Michael Mann differentiates between infrastructural and despotic power of the state. Infrastructural power refers to 'the capacity of the state to actually penetrate civil society, and to implement logistically political decisions throughout the realm.' A state's infrastructural power is greater when the volume of its binding, rule-making capacity is also great, see Michael Mann, 'The autonomous power of the state : its origins, mechanisms and results', *European Journal of Sociology* Vol. 25, No. 2 (1984): 189. For Mann, infrastructural power also 'enables civil society parties to control the state, as Marxists and pluralists emphasize'. Michael Mann, *The Sources of Social Power: Vol II, The Rise of Classes and Nation-States, 1760-1914*, (Cambridge, Cambridge University Press, 1993), 59.

¹⁷See Taha Parla, *Ziya Gökalp, Kemalizm ve Türkiye'de Korporatizm*, (İstanbul, Deniz Yayınları, 2013), and Onur Atalay, *Türk'e Tapmak: Seküler Din ve İki Savaş Arası Kemalizm*, (İstanbul, İletişim, 2018).

whose identity and integrity depended on the constant struggle of the state against both alien and internal parasitical elements. This symbolizes a fundamental disagreement within society over questions of political identity. This distortion of representation or legitimacy and presentation of the party or founding leader of the Republic of Turkey, Mustafa Kemal Atatürk, as the true embodiment of the nation during the one-party era all, opened the way for suppression of any disagreements over the identity of political community in the field of representation. It also promoted the introduction of a constitutional legality based on the logic of emergency, designed to grant authority to executive actors so as to defend the nation's identity and territorialization of the state by resorting to extra-constitutional means when deemed necessary. This characteristic of state formation and nation building combined the despotic and infrastructural power of the state to administer civil society in order to fabricate a social order and create a homogenous social and political body out of individual subject-citizens to establish new grounds for capital accumulation and political society.¹⁸

A highly fragile regime of citizenship also accompanied this distortion/twist of the representational field towards a monopoly by the one party and delegitimization of any disagreement over the fundamental political identity.¹⁹ To curb the contestation of political identity (nation building) and the outbreak of political opposition, the principle of executive prerogative was introduced into the legal and political system. Emerging political alternatives such as the Democrat Party also embodied a similar political perspective on nation building, state formation and legitimacy, and asserted the monopoly of representing the national/general will during the multi-party era. The leaders of the DP very quickly moved on from a majoritarian understanding of politics to a political strategy based on the invasion of the empty space of democracy by proclaiming an identification between the party, the people and the leader. As a result of this understanding, the Democrat Party also deployed emergency power several times and created an atmosphere of permanent emergency for the opposition. Hence, considering the endless legal amendments to emergency power since the beginning of the republic, it is no exaggeration to say that succeeding governments from different political parties only wanted to increase the dominance of the executive prerogative principle even if they clashed to a certain extent with military and judicial actors regarding the form and content of exceptional governmental power.

In the context of the imposition of a fragile regime of citizenship, the institutionalization of the controlled political field and unending securitization of politics, each type of factional conflict and power struggle inevitably also appeared 'as a crisis of authority, which is always a crisis of hegemony, a disintegration of the legitimating structures of the state'.²⁰ This means that the ruling classes did not

¹⁸ follow the insights of Neocleous' pioneering analysis. See Mark Neocleous, *Administering Civil Society: Towards a Theory of State Power*, (London, Macmillan Press, 1996). These policies were also instrumental in disciplining both capital and labour. Hence, we see a newly emerging bourgeoisie and working class at that time.

¹⁹ For a discussion on the impacts of this understanding as well as the accompanying security policies restricting the ability of Turkish citizens to exercise civil and political rights associated with citizenship, see Aviad Rubin, 'Turkish citizenship: the perils of hegemonic tendencies and the "shadow of securitization"', *Citizenship Studies* 21, no. 8 (2017): 872–888, and Bilgin and Ince, 2015. Pinar Bilgin and Başak Ince, 'Security and citizenship in the global South: In/securing citizens in early republican Turkey (1923–1946)', *International Relations* 29, no. 4 (2015): 500–520. For a discussion on citizenship in Turkey, and see Aysel Kadioğlu, 'The Paradox of Turkish Nationalism and the Construction of Official Identity', *Middle Eastern Studies* 32, no. 2 (1996): 177–193.

²⁰ Benedetto Fontana, 'The Concept of Caesarism in Gramsci', in *Dictatorship in History and Theory: Bonapartism, Caesarism, and Totalitarianism*, ed. Peter Baehr (Cambridge: Cambridge University Press, 2004), 185.

have an integrative capacity to incorporate new groups into the prevailing socio-political order by appealing and operationalizing the above-mentioned fundamental contradiction of democracy in pursuit of building a comprehensive hegemony. This fragility of the ruling classes' moral and intellectual hegemony was also rooted in their inability to create widespread consensus and legitimizing mechanisms within society. This inability intensified their failure to develop a morally and politically resilient state capacity to withstand what Gramsci calls a 'crisis of authority', which at the same time emerges as a 'crisis of hegemony, or general crisis of the State'.²¹ Furthermore, the configuration of political power based on the strict control of the field of representation and the attempt to constitute political society on the grounds of rejecting social heterogeneity led to the dominance of the executive prerogative principle and made the entire political field 'receptive to military culture and to military control of civil and political life'.²² Hence, political crises emerged, as they tend to particularly when the ruling class has failed in some major political undertaking for which it has requested, or forcibly extracted, the consent of the broad masses (war, for example), or because huge masses ... have passed suddenly from a state of political passivity to a certain activity ... ' as Gramsci eloquently argues.²³

Creating and protecting a form of political belonging organized around a homogenous Turkish nation, imposing the idea of a unitary nation-state and promoting state-centred modernization prevailed over constitutionally organized democratic politics and subsumed the modern concepts of legality and law under a highly authoritarian framework. In this legal and political context, the moment of political crisis principally emerged also as a moment of decision-making in terms of who would be the 'sovereign, [...] who determines when and where strict constitutional legality must give way to make room for a purely political form of guardianship of the integrity of the nation'.²⁴ The result was systematic deployment of extra-constitutional power, the continual invention of constitutional devices and legal institutions designed to suppress political conflicts which emerged from the fundamental contradictions of the republic, the greater exclusion of the masses from the centres of political decision-making, a growing distance between citizens and state apparatuses, an unprecedented degree of state centralism and the invasion of the life of society,²⁵ in other words, the formation of the unitary nation-state which has a permanent character of exceptionality.²⁶

²¹Antonio Gramsci, *Selections from the Prison Notebooks*, ed. and trans. Quintin Hoare and Geoffrey Nowell Smith, (New York: International Publishers, 1971), 210.

²²Fontana, 'The Concept of Caesarism in Gramsci', 186. For militarism in the context of Turkey, see Güven Gürkan Öztan, *Türkiye'de Militarizm: Zihniyet, Pratik ve Propaganda*, (Istanbul: Istanbul Bilgi Üniversitesi Yayınları, 2014) and also Ayşe Gül Altınay, *The Myth of the Military Nation: Militarism, Gender and Education in Turkey*, (USA: Palgrave MacMillan, 2004).

²³Gramsci, *Prison Notebooks*, 210.

²⁴Gülşen Seven and Lars Vinx, 'The Hegemonic Preservation Thesis Revisited: The Example of Turkey', *Hague J Rule Law* 9, (2017): 78.

²⁵Nicos Poulantzas discusses these features with reference to authoritarian statism. See Nicos Poulantzas, *State, Power and Socialism*, trans. Patrick Camiller (London: Verso, 1980), 286.

²⁶For an insightful analysis of the anatomy of this exceptional state form, see also B. Bezci Egemen and Güven Gürkan Öztan, 'Anatomy of the Turkish Emergency State: A Continuous Reflection of Turkish Raison d'état between 1980 and 2002', *Middle East Critique* 25, no. 2 (2016): 163–179.

The historical evolution of legal emergency power and the exceptional state in Turkey

There has been a state of emergency for almost half of the history of political life in the Turkish republic. The persistence of these policies gives rise to the question whether security concerns and claims to exceptionalism have been used as a rhetorical device for the expansion of state power, restriction of the rule of law and suspension of citizenship rights. A very brief look at the history of the legal regulation of state of siege and state of emergency periods in the country would show how the call for an emergency state has become a highly common practice in sidestepping core institutional, procedural and substantive principles of the rule of law.²⁷ The numbers regarding the declaration of the state of siege and emergency periods are very striking. As mentioned by Parslow, 'since the Republic of Turkey was established in 1923, Turkey's state leaders have declared a "state of siege" (*örfi idare or sıkıyönetim*) 11 times, transferring the jurisdiction of the police, gendarmerie, and criminal justice system concerning certain categories of crimes to the armed forces in parts of all of the country for a total of 25 years, 9 months, and 28 days'.²⁸ We should also add to this number the declaration of a state of emergency, which depended on close cooperation between centrally appointed civilian governors and military authorities in Kurdish cities (Bingöl, Diyarbakır, Elazığ, Mardin, Siirt, Hakkari, Tunceli, Van, Bitlis, Muş, and Adıyaman) between 1987 and 2002 as well as the recent declaration of a state of emergency after the July 2016 failed coup, from 21 July 2016 to 19 July 2018. All in all, emergency periods account for more than 40 years of the republic's 96-year history.²⁹ Consequently, it became a common assumption among scholars working on legal emergency power in the late Ottoman and Republican periods that 'exceptional executive powers are anything but exceptional in Turkey' and that 'emergency powers are no accidental, contingent feature of the Turkish legal tradition'.³⁰ Interestingly, despite such striking figures and continuity in the deployment of executive emergency powers, there are very few legal and political studies examining the reasons for such permanency in these governing practices.³¹

In attributing this characteristic of the republic to either the dominance of military and judicial elites and their tutelary understanding of democracy or the fragile hegemonic capacity of the ruling classes, political and legal scientists have generally neglected the main question raised by Joakim Parslow: 'how executive powers that have, from the earliest days of the Republic of Turkey, been framed as "exceptional" have at the same time been justified as keeping legitimately within the bounds of Turkey's constitutional architecture'.³² However, to answer such a question and explain

²⁷In line with Parslow's emphasis, I also prefer to use state of siege instead of martial law, since the legal tradition on the subject followed the French tradition. See J. Parslow, 'Exceptional Executive Powers', 2016.

²⁸Parslow, 'Exceptional Executive Powers', 31–32.

²⁹Parslow, 'Exceptional Executive Powers', 31–32. And see also Zafer Üskül, 'Türkiye'de Sıkıyönetim Uygulamaları Üzerine Notlar', *Toplum ve Bilim* 42, (1988): 85–104.

³⁰Parslow, 'Exceptional Executive Powers', 32–52; See also Noemi Levy-Aksu 'An Ottoman variation on the state of siege: The invention of the idare-i örfiyye during the first constitutional period', *New Perspectives on Turkey* no. 55 (2016): 5–28; Haluk İnanıcı, 'Örfi İdare Yargısından Yeni Devlet Güvenlik Mahkemelerine Sanık Hakları', in *Parçalanmış Adalet: Türkiye'de Özel Ceza Yargısı*, ed. Haluk İnanıcı (Istanbul: İletişim, 2011); and Üskül, *Türkiye'de Sıkıyönetim Uygulamaları*.

³¹The works of S. Gemalmaz, J. Parslow, Z. Üskül, S. Von Ende, G. G. Öztan and E. Bezci, S. Esen, E. Göztepe are among the most prominent ones.

³²Parslow, 'Exceptional Executive Powers', 32–33.

the reasons behind the articulation of symbolic deference to the rule of law and the gradual emergence of a highly obscured separation of the 'normal' and the 'exceptional' within Turkey's legal tradition, we need to discuss first of all what the social, economic and political reality must be if a society of lawful relations based on the idea of emergency and prerogative has indeed historically evolved in the context of Turkey. This can then provide an answer to the question of how the state of emergency has become a foundational paradigm of government.

A brief glance at the Late Ottoman and Republican history of legal amendments concerning the institutionalization of emergency power and quasi-emergency situations gives us significant insight not only into how this development became legally possible but also how it was accompanied by the transformation of society in line with the evolution of this legal and political paradigm of governing. The institutionalization of legal emergency power goes back to the Late Ottoman Empire. The Early Republic also followed in the steps of the Late Ottoman tradition to develop a legal framework on the regulation of emergency power. Although the Empire did not have a clear legal framework regarding the declaration of states of siege or emergency, lawmakers inspired in particular by the French constitution and inserted a special article to protect imperial power against disorders or threats to political authority in the first constitution, known in Turkish as the Basic Law (*Kanun-i Esasi*).³³ The words *idare-i örfiyye*, which refers to a declaration of the state of siege and suspension of basic rights and freedoms, were first used in Article 113 of the 1876 Constitution.³⁴ To curb social unrest generated by the Russian attack on 24 May 1877, the Ottoman government declared a state of siege first in Istanbul and then extended it to Bosnia, Crete, Salonica and finally to the whole of Rumelia.³⁵ The first implementation was also in harmony with the first Ottoman written legal regulation (*Kanun-i Esasi*, Article 113), which gives special priority to the possibility of *ihtilâl* (political insurrection/revolution, or signs of a possible *ihtilâl*).

To provide a legal framework around the content and scope of the *idare-i örfiyye*, the Ottoman parliament drafted a law (*idare-i örfiyye kanun layihası*) which gave considerable power to the military, including judicial and police powers, and clarified the role to be played by the court martial (*divan-ı harb*) in April 1877.³⁶ Although the law was approved by both the Chamber of Deputies (*Meclis-i Mebusan*) and the Senate (*Meclis-i Ayan*), this draft was never promulgated. Thereafter, the Ottoman government enacted the *Decree of Idare-i Örfiyye* (*idare-i Örfiyye Kararnamesi*) on 30 September 1877. This decree was the first comprehensive regulation on the *idare-i örfiyye*, establishing the superiority of emergency over normal legal regulations, civil laws and constitutional articles.³⁷ However, the decree

³³ Levy-Aksu, 'Invention of the idare-i örfiyye'.

³⁴ For the definition of the term, see Levy-Aksu, 'Invention of the idare-i örfiyye' and İnanıcı, 'Örfi İdare Yargısı', 26. The article states that '[i]n the case of the perpetration of acts, or the appearance of indications of a nature to presage disturbance at any point on the territory of the Empire, the Imperial Government has the right to proclaim a state of siege [idare-i örfiyye] there. The state of siege consists in the temporary suspension of the civil laws. The mode of administration of localities under a state of siege will be regulated by a special law'. Quoted from Levy, 'Invention of the idare-i örfiyye', 10. This article gives power of declaration to the Imperial power (*hükümet-i seniye*). The anonymous English translation of the constitution is available at <http://www.anayasa.gen.tr/1876constitution.htm>.

³⁵ For historical details, see Levy-Aksu, 'Invention of the idare-i örfiyye'. On 24 April 1877, Czarist Russia declared war on the Ottoman Empire.

³⁶ See Osman Köksal, 'Osmanlı Devletinde Sıkı Yönetim ile İlgili Mevzuat Üzerine Bir Deneme', *Ankara Üniversitesi Osmanlı Tarihi Araştırma ve Uygulama Merkezi Dergisi* 12, (2001): 157–171.

³⁷ The second article states that '[a]fter the proclamation of the state of siege, the articles of the constitution and other laws and regulations which contradict this decree on the state of siege will be temporarily suspended as long as the state of siege is maintained', quoted from Levy, 'Invention of the idare-i örfiyye', 24.

did not clearly define the scope of emergency power and only stated that executive and judiciary authority passes to the military during a state of siege.³⁸ Hence, as incisively argued by Levy,

this omission thereby removed reference to exceptional circumstances such as war, revolution, or major troubles, thus paving the way for indiscriminate use of the measure as one tool of governance among others. Moreover, none of the nine articles devoted to the courts-martial dwelled upon the actual composition of these courts or the procedures they were to follow, a lacuna that only served to increase the discretionary power of the judges.³⁹

This meant there was now a legal black hole, a juridically produced lawless void, in the legal system making it possible to increase the discretionary power of the military, who had primary responsibility for implementing the *idare-i örfiyye* measures.⁴⁰

This definition of legal regulations of emergency power was refined by successive Ottoman governments, resulting in a sophisticated legal tradition that aimed to incorporate into the system the executive prerogative principle based on executive authorities' ambiguous relationship to state power and the transformation of legal and political measures for exceptional situations into non-exceptional ones.⁴¹ This legal tradition based on vagueness was also supported by other legal practices. Article 36 of the Basic Law gave the Council of Ministers (*Heyet-i Vükela*) the right to issue temporary laws in order to protect the state against threats and public disorders in cases where the Chamber of Deputies (*Meclis-i Mebusan*) was not able to assemble. This legal regulation opened the way for intensifying legislative practices, which were allegedly only temporary and designed to institutionalize the normalization of emergency power as a prominent governmental paradigm. Executives promulgated 1,061 temporary laws between 1908 and 1918 and 621 from 1918 to 1922. The Party of Union and Progress (PUP) enacted approximately 1,000 temporary laws during its period of government.⁴²

The young Republic of Turkey also followed the example of the Ottoman Empire in institutionalizing emergency power by enacting laws and regulations to integrate the executive prerogative principle into the broad and diffuse body of ordinary legal sources of temporary laws, regulations, and decrees. The first Ankara government, which gathered as the Grand National Assembly (*Büyük Millet Meclisi*), embodied a constitutive power that wielded exceptional powers during the War of Independence (1919–1921).⁴³

³⁸Köksal, 'Osmanlı Devletinde Sıkı Yönetim', 162–163.

³⁹Levy, 'Invention of the idare-i örfiyye', 25.

⁴⁰Dyzenhaus argues that the creation of black holes depends on the suspension of rule-of-law controls. See David Dyzenhaus, *The Constitution of Law, Legality in a Time of Emergency* (Cambridge: Cambridge University Press, 2006), 30–39.

⁴¹The Ottoman government issued several decrees and temporary laws to revise the 1877 *İdare-i Örfiyye Decree* after the state of siege was extensively used following the reinstatement of the constitution in 1908. In particular, this government passed a law to make revisions to the decree on 3 July 1909 and 1 September 1910. The 1920 law introduced new commissions (*İstidla Komisyonu*) and committees (*Heyet-i Tahkikiye*), which acted as interrogating judge and prosecutor. A special decree, issued in 1919, reorganized the court martial and increased the power of the military. Finally, a decree on organization and duties of the court martial on 23 April 1920, which virtually reduced the status of court martial to that of a military penal court. Köksal, 'Osmanlı Devletinde Sıkı Yönetim', 168.

⁴²See Selin Esen, *Karşılaştırmalı Hukukta ve Türkiye'de Olağanüstü Hal Rejimi*, (Ankara, Adalet Yayınevi, 2008), 140. It should be noted that the Armenian Genocide also played a highly crucial role in the institutionalization of the emergency regime in this period. However, because of the scope of the present article, I did not discuss it here. The tragedy and depth of the issue deserve its own analysis in this context.

⁴³Diğer Demirkent, *Bir Devlet İki Cumhuriyet, Türkiye'de Özyönetim ve Merkeziliğin Anayasal Dinamiği* (İstanbul: Ayrıntı Yayınları, 2017).

The Ankara government initiated comprehensive legal action to confer exceptional powers upon itself and other organs of the provisional state.⁴⁴ The legal history of the early republican period in fact demonstrates that the government constantly required the deployment of exceptional power.⁴⁵ The line between lawmaking to regulate normal situations and legislation to govern exceptional ones has been very blurred since the beginning of the republic. The reason behind such a striking pattern is not only that the early republican government continuously required such a legal framework in order to create a unitary, centralized and legal-rational state in times of war, but also that the Ankara government evaluated the introduction of the executive prerogative principle to the core of political and legal structures as an inevitable action needed to ward off any opposition to nation-building, Turkification of the population, and territorialization of the new nation-state.

In line with this mentality, early republican governments enacted several laws of an emergency nature. The 1920 Law on Treason Against the Nation, the law establishing a number of 'Independence Courts' in September 1920 (*İstiklâl Mahkemeleri*), and the Law on the Commander-in-Chief (*Başkumandanlık Kanunu*) in August 1921 can be mentioned, among others, as enabling legal actions designed to provide discretionary power to executive, judiciary and military authorities.⁴⁶ The young republic's state-of-siege regulations depended on Article 86 of the 1924 Constitution, according to which the cabinet could declare a state of siege for a month in the event of 'the danger or imminence of war, or of internal sedition or conspiracy or intrigues directed against the nation or against the Republic', and postponed determining the specific measures that could be taken during a state of siege until such a 'special law' could be passed.⁴⁷ The Article defined the state of siege as 'the suspension or temporary restriction of the inviolability of the person, the home, freedom of the press, correspondence, association, and incorporation' without clarifying the limits of the suspension. Hence, it embedded a special legal grey area within the legal system, which gave salient discretionary power to military personnel and jurists to determine how they should deal with all these ambiguities.⁴⁸

In February 1925, the İsmet Pasha government promulgated the Law on the Maintenance of Order (*Takrir-i Sükûn Kanunu*) to curb Kurdish 'religious' uprisings and established a martial regime in 14 Kurdish provinces, introducing a state of siege to enable the government to ban oppositional publications and organizations, and to re-establish the Independence Courts for two years.⁴⁹ The following RPP governments also declared a state of siege in 1931 due to the religious uprising in a small town in Anatolia (Menemen) and again in the 1940s during World War II. The governing party finally promulgated the above-

⁴⁴Parslow, 'Exceptional Executive Powers', 35.

⁴⁵For a comprehensive list of the laws of an extraordinary character, see Selin Esen, *Türkiye'de Olağanüstü Hal Rejimi*, 150–151. The most important ones are the following: the Law on Treason Against the Nation (*Hıyanet-i Vatanîye Kanunu*, Law no. 2, 1920), the law establishing Independence Courts (*İstiklâl Mahakimi Kanunu*, Law no. 249, 1922), the Law on the Commander-in-Chief (*Başkumandanlık Kanunu*); the Law on the Maintenance of Order (*Takrir-i Sükûn Kanunu*, Law on 578, 1925), the Law on the Protection of the Value of the Turkish Currency (Law no. 1567, 1930), the Tunceli Law (Law no. 2884, 1935); the Law on Settlement (Law no. 2510, 1934), the National Defense Law (Law no. 3780, 1940), and State of Siege, *Örfî İdare Kanunu* (Law no. 3832, 1940).

⁴⁶As emphasized by Parslow, Independence Courts went far beyond their initial mandate, arresting 7,446 people and executing 660 before the last of these was removed in 1927 (Parslow, 2016), 38.

⁴⁷See the 1924 Constitution, translated by Edward Mead Earle, in *Political Science Quarterly* 40, no. 1 (March 1925): 73–100.

⁴⁸Parslow, 'Exceptional Executive Powers'.

⁴⁹Esen, 'Türkiye'de Olağanüstü Hal Rejimi', 149–150.

mentioned special law on the state of siege on 25 May 1940.⁵⁰ Law no. 3832 clarified what kind of measures could be taken by military authorities in the event of a state of siege, including house searches, a halt to activities of associations, control over communication devices such as radio and television, and established the authority of the court martial, which could also examine cases initiated even before the state of siege period.⁵¹

Finally, this combination of enabling legal acts, strict security policies and regular declarations of a state of siege opened the way for the institutionalization of a legal tradition based on the principle of executive prerogative in a one-party era. As Parslow argues in his pioneering work,

[t]he law professors of the 1930s and 1940s thus integrated executive prerogative into the broad and diffuse body of ordinary legal sources of temporary laws, regulations, and decrees through their doctrinal commentary. The effect of their work has been to transform exceptional powers into normal governance, enabling and perpetuating what Leonard Feldman calls a 'prosaic politics of emergency' that continues even today.⁵²

This led to the emergence of a legal tradition that works primarily to enable a legal environment for the deployment of exceptional executive powers, rather than protecting the fundamental rights of the country's citizens. More importantly, this deployment of exceptional executive power also resulted in ambiguity concerning the executive branch's relation to both legality and legislative power. The emergency laws bestowed executive, quasi-legislative power, since decrees, regulations and ordinances gradually gained the power of law and functioned as enabling legal acts.⁵³ And, finally, this legal complex and idea of legality based on emergency, in combination, gradually normalized the 'regulation by the military of the whole social order on behalf of the state'.⁵⁴ The historically specific blurring of the line between legal and illegal in the Turkish case also produced a succinct answer to the question of how martial law could be exercised without being declared.

Towards the institutionalization of military emergency power after the 1980 coup

The multi-party era and the subsequent 1960 military coup opened the way for the restructuring of the political regime and drove the institutionalized integration of the

⁵⁰Üskül, 'Türkiye'de Sıkıyönetim Uygulamaları', 86. Örfi İdare Kanunu, law no. 3832, in RG 4518, 25 May 1940, replaced both the 1877 *İdare-i Örfiye Kararnamesi* and the 1919 *İdare-i Örfiye Kararnamesi*.

⁵¹Esen, 'Türkiye'de Olağanüstü Hal Rejimi', 150–151.

⁵²Parslow, 'Exceptional Executive Powers', 33. For a succinct analysis of how prominent law professors of the time such as Siddık Sami Onar, A. Fuat Başgil and Ragıp Sarıca created this tradition, see Parslow, 'Exceptional Executive Powers' and Parslow, 'Jurists of War and Peace' and Esen, 'Türkiye'de Olağanüstü Hal Rejimi'. Onar played a very influential role and constructed a legal doctrine by introducing 'the distinction in French administrative doctrine between "acts of administration" and "acts of government"'. For a comprehensive analysis, see Parslow, 'Exceptional Executive Powers' and Parslow, 'Jurists of War and Peace'.

⁵³The theme of regulations and their relation to law was a hot topic among law professors in the early republican period, while they provided 'a kind of carte blanche' to the executive branch. Onar proposed considering them to be 'delegated' or 'mandated' legislative power (vekâlet). However, Sarıca conceded that these laws 'almost' (âdetâ) provided the executive branch with legislative power, a situation he considered both 'exceptional' (istisnai) and 'extraordinary' (fevkalâde) since they granted the executive branch the power to issue regulations. Parslow, 'Exceptional Executive Powers', 48.

⁵⁴Mark Neocleous, 'The Problem with Normality: Taking Exception to "Permanent Emergency," *Alternatives* 31, (2006): 191–213.

executive prerogative principle into the state power.⁵⁵ The military overthrew the Democrat Party government, which based its politics on the claim that it was exclusively representing the people. Therefore, the DP pushed for the unification of the people, the party and the leader by suppressing its political opponents, particularly after it began to lose political support. The Party also emerged as the centre of opposition to the Kemalist project, built on the above-mentioned nation-building and unitary state idea. Although the party did not show strong disagreement with the principles of nation-building or the nation-state, its stance on emboldening religion, rejecting any checks and balances, and endorsing a purely majoritarian conception of democracy created strong dissidents within society.⁵⁶ In this context, the army intervened in politics to regain its extra-constitutional power and authority in administering society and containing fundamental conflicts that emerged from the state and capitalist development. In order to fulfil this aim, the army organized a constitution-making process which was prepared by a bicameral constituent assembly.⁵⁷

The 1961 Constitution introduced a more liberal political system, based on the separation of powers, checks and balances among the three branches of government, a delegation of power to autonomous administrative agencies, and the institutionalization of relative autonomy for higher education institutions.⁵⁸ However, it also embedded a comprehensive and institutionalized legal emergency power organized around the newly established National Security Council (*Milli Güvenlik Kurulu, MGK*), which provided salient political power to members of the National Unity Committee (*Milli Birlik Komitesi, MBK*).⁵⁹ Consequently, the military retained a considerable degree of power in the new political regime, which was also subsequently supported by the promulgation of the Turkish Armed Forces Internal Service Code.⁶⁰ The 1961 Constitution also presented a new legal regime on the regulation of the states of siege and emergency. Article 124 regulated the declaration of the state of siege and Article 123 regulated the declaration of the state of emergency, which was introduced for the first time. Article 124 states that '[i]n the event of war, or of a situation likely to lead to war, or in case of revolt or the emergence of definite indication of a serious and active uprising against the homeland and the Republic, the Council of Ministers may proclaim martial law in one or more than one region of the country.' After the military intervention of 12 March 1971, Article 124 was revised and the state of siege implementations were more strictly imposed.⁶¹ The military authorities interpreted the 'definite indication of a serious and active uprising

⁵⁵The Democrat Party declared a state of siege which continued for nine months after riots and violent attacks on non-Muslims on 6–7 September 1955, and following student protests on 28 April 1960. See Üskül, *Olağanüstü Hal Üzerine Yazılar*, (İstanbul: Buke Yayınları, 2003).

⁵⁶There were multiple reasons behind the coup. For a more detailed analysis, see Akça, 'Türkiye'de Ordu'.

⁵⁷Seven and Vinx, 'The Hegemonic Preservation Thesis', 54. The politically more liberal constitution of 1961 was designed by Istanbul University and ratified by popular vote in July 1961. See Tim Jacoby, *Social Power and the Turkish State*, (London and New York: Frank Cass, 2004), 135.

⁵⁸Türküler İşksel, 'Between text and context: Turkey's tradition of authoritarian constitutionalism', *International Journal of Constitutional Law* 11, no. 3 (2013): 714.

⁵⁹They were given the power to become members of the Senate and control over the appointment of another 15 appointees to the Upper House. See Jacoby, *Social Power and the Turkish State*, 135.

⁶⁰The famous Article 35 of the Turkish Armed Forces Internal Service Code, promulgated on 1 October 1961, states: 'The mission of the Armed Forces is to watch over and protect the Turkish homeland and the Turkish Republic as stipulated by the Constitution', quoted from İşksel, 'Turkey's Authoritarian Constitutionalism', 713.

⁶¹Üskül, 'Türkiye'de Sıkıyönetim Uygulamaları', 86.

against the homeland and the Republic' very loosely and broadened the discretionary power of the Council of Ministers regarding the declaration of a state of siege.⁶²

The liberal framework of the 1961 Constitution very quickly proved its inadequacy in containing the rising social and political conflicts, which intensified due to the entrance of new political figures onto the political scene. In particular, the governments led by the Justice Party (*Adalet Partisi*, AP), the DP's loyal descendant, complained persistently about counter-majoritarian institutions like the Constitutional Courts and the relatively broad basic rights and freedoms that restricted the hands of the government both in normal times and in periods of political turmoil. Therefore, military-backed technocratic cabinets followed the trajectory that had already begun during the one-party era, in empowering the executive branch with very wide-ranging enabling acts. Right after the March 1971 military intervention, the army-installed technocratic cabinet of RPP member Nihat Erim quickly drafted several constitutional amendments to increase executive power. The technocratic cabinet revised Article 64 of the 1961 Constitution and empowered the executive branch to issue statutory decrees (decrees in law).⁶³ The government also issued the State of Siege Law, number 1402, to regulate the operations of courts martial and state-of-siege declarations in detail.

By granting the power to issue 'statutory decrees' (*Kanun Hükmünde Kararname*, KHK) to the executive branch, the cabinet provided executive authorities with 'widened emergency powers'.⁶⁴ The constitutional amendments following the 1971 coup also removed the statutory decrees from the purview of the judiciary branch and once more multiplied the number of black holes in the legal system.⁶⁵ To strengthen judicial emergency power, the military-backed technocratic cabinet also introduced 'exceptional' criminal courts, called State Security Courts (*Devlet Güvenlik Mahkemesi*, DGM) in 1973.⁶⁶ The Constitutional Court cancelled the law on State Security Courts on a procedural basis on 11 September 1976. However, the 1982 military coup reopened these courts in 1983 since they became highly efficient in normalizing the criminal justice system based on the idea of emergency and discretionary power. Despite all these exceptional measures, succeeding governments could not manage to curb social unrest and political instability and declared a state of siege several times from 1961 to 1982.⁶⁷

⁶²Esen, 'Türkiye'de Olağanüstü Hal Rejimi', 159.

⁶³Parslow, 'Exceptional Executive Powers', 50. For Özbudun, 'even though since 1971 the Council of Ministers may be authorized by Parliament to enact decree-laws (law-amending ordinances), the Constitutional Court carefully refused to describe it as a case of the delegation of legislative power, and eventually limited its application to a rather narrow area'. See Ergun Özbudun, *The Constitutional System of Turkey: 1876 to the Present* (New York: Palgrave Macmillan, 2011), 72.

⁶⁴Parslow, 'Exceptional Executive Powers'.

⁶⁵This executive power has been used quite extensively by successive governments to date. The judicial review process was very widely discussed among legal scholars at the time. Esen, 'Türkiye'de Olağanüstü Hal Rejimi', 168–173.

⁶⁶These had been established by amendments to the 1961 Constitution established in 1973 following the 1971 coup. The Constitutional Court found the law on State Security Courts unconstitutional on 11 September 1976. On 16 June 1983, they were re-established with the Law numbered 2845 and they started to work on 1 April 1984. İnanıcı, 'Örfi İdare Yargısı', 43. Legal changes in 1999 removed the military member from the three-judge panels, and the State Security Courts themselves were abolished as a result of the 2004 constitutional reforms, and their functions transferred to the new Örgütlü Suçlar Ağır Ceza Mahkemeleri (Assize Courts for Organized Crime). See İskisel, 'Turkey's Authoritarian Constitutionalism', 718.

⁶⁷For the list of state-of-siege declarations, see Üskül, 'Türkiye'de Sıkıyönetim Uygulamaları'.

The economic crisis also exacerbated the increasing political instability emerging from the state's inability to incorporate the rising labour movement, escalating student movement and increasing Kurdish activism into the political system.⁶⁸ By refusing to confine the rise of violent right-wing activism, nationalist front coalition governments made the state increasingly dependent on the 'partial "colonisation of [the] government bureaucracy"' by the ultra-nationalist National Movement Party (Milliyetçi Hareket Partisi, MHP) and implemented strict security policies composed of curfews, police operations, and extra-judicial detentions 'aimed at nullifying labour groups and restoring business confidence and military administrations' to compensate for this inability.⁶⁹ Therefore, towards the end of the 1980s, the military elites composed an agenda that included the following: neutralization of the large numbers of political activists operating throughout the country; restriction of the political field in order to control interest group formation and organization; imposition of a neoliberal policy-friendly economic and political environment and, more importantly, the creation of a political system based fundamentally on the principle of executive prerogative, within which the military elite would play the primary role. To realize this agenda, the military intervened in politics once again on 12 September 1980.

The 1982 Constitution was designed to realize the above-mentioned aims.⁷⁰ As succinctly discussed by Işıkşel,

Turkey's 1982 Constitution is permeated by the spirit of emergency rule and is designed primarily to circumscribe the liberties themselves rather than govern their restriction. One might go so far as to say that democratic procedures and rights guarantees are the exceptional provisions of the 1982 Constitution, whose text is shot through with references to and anticipations of states of emergency.⁷¹

In order to both provide prerogative power and grant entrenched executive authority to the military, the role of the National Security Council (*Milli Güvenlik Kurulu, MGK*), which influenced a variety of policies, including education, broadcasting and internal security, throughout the 1990s and 2000s, was strengthened and the executive power of the president was also increased.⁷² The 1982 Constitution also introduced a new State Supervisory Council which worked directly with the chief executive. In addition to establishing a new institutional framework to increase the power of the military, the 1982 Constitution 'authorized an advance exception for unconstitutional acts' and once

⁶⁸Economic development in the 1960s depended on the import-substituted industrialization policies. These policies created a base for the working-class and left-wing activism. In particular, the Workers' Party of Turkey played a critical role in challenging the hegemony of the ruling classes. Increasing left-wing activism exacerbated the Turkish bourgeoisie's already high level of threat perception and militarism, which was of great significance in the 1982 military interventions. Another reason for the political instability was the inter-army conflict and coup attempts in the '60s and '70s.

⁶⁹Jacoby, *Social Power and the Turkish State*, 141.

⁷⁰The military dominated the establishment of the 1982 Constitution. As emphasized by Seven and Vinx, 'the MGK convened a bicameral constituent assembly, of which the MGK itself made up one chamber. The civilian chamber, the "Consultative Assembly", was even less representative of society at large than the 1961 House of Representatives. Whereas the latter had included representatives of two political parties and of various other institutions of civil society, all members of the former were individually appointed by the MGK', Seven and Vinx, 'The Hegemonic Preservation Thesis', 60. The military also organized a referendum, which was done in a highly oppressive political atmosphere and the constitution was ratified with almost 92% of the votes. See Seven and Vinx, 'The Hegemonic Preservation Thesis', 60.

⁷¹Işıkşel, 'Turkey's Authoritarian Constitutionalism', 719.

⁷²Ayşegül Kars Kaynar, 'Making of military tutelage in Turkey: the National Security Council in the 1961 and 1982 Constitutions', *Turkish Studies* 19, no. 3 (2018): 452.

again inserted new both black and grey holes into the legal system by inventing new ways to enhance the role of discretionary power in the government.⁷³

Hence, the 'executive prerogative' principle became the foundational principle of state organization and the legal system both structurally and institutionally after the 1980 military coup. The strict functioning of this idea of executive prerogative can be seen in the regulations of the state of emergency declarations in the 1982 Constitution, specifically in Articles 119, 120 and 121 and 15. Article 120 states that

[i]n 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, meeting under the chairmanship of the President of the Republic, after consultation with the National Security Council, may declare a state of emergency in one or more regions or throughout the country for a period not exceeding six months.

In addition to the related articles of constitutions, the Consultative Assembly issued the State of Emergency Law (numbered 2935) to clarify legal details in 1983. Following the transition to the parliamentary regime, the military government declared a state of emergency initially in two Kurdish cities in 1987. This state of emergency was renewed a total of 46 times, extended to 14 provinces and continued until the end of 2002 under civilian governments. The succeeding 'civilian' governments of the Motherland Party and coalition governments in the 1990s and 2000s also enacted enormous numbers of statutory decrees and in fact broadened the scope and content of both the state of emergency and legal emergency power.

As a result, the period under a state of emergency or state of siege in Diyarbakir spanned over 23 years, from 1979 to 2002. Even this single example can show how the state of emergency regime very easily gained a permanent character in the Kurdish region and became highly 'prosaic'. The emergency decrees also intensified this prosaic aspect, which made it possible to implement unlimited powers in the emergency zone while maintaining normal governance in the rest of the country, transforming emergency power into a paradigm of governing, particularly for the Kurdish population. By issuing emergency decrees to make changes to the State of Emergency Law, the executive branch not only usurped the rights of the legislating authority but also 'invested extra-ordinary dictatorial powers in provincial governors and in a regional 'super-governor'".⁷⁴ Decree 285 (1987) introduced the super-governor and allowed him/her to evacuate and resettle civilian areas in the interests of the region's security. Subsequent decrees also expanded the authority of the super-governor to adjacent cities and turned virtually the entire country into an emergency zone.⁷⁵ In addition to

⁷³Şişksel, 'Turkey's Authoritarian Constitutionalism', 720.

⁷⁴Tim Jacoby, 'Semi-Authoritarian Incorporation and Autocratic Militarism in Turkey', *Development and Change* 36, no. 4 (2005): 649. In terms of Article 148, the Turkish Constitutional Court does not have the power to review emergency decrees on either procedural or substantial bases. The judicial review is only possible when parliament passes these decrees. See Serap Yazıcı, *Yeni Bir Anayasa Hazırlığı ve Türkiye, Seçkinlikten Toplum Sözleşmesine*, (İstanbul: İstanbul Bilgi Üniversitesi Yayınları, 2016), and for an interpretation of the restrictive constitutional norms by the Turkish Constitutional Court, see Ece Göztepe, 'The permanency of the state of emergency in Turkey: The rise of a constituent power or only a new quality of the state?', *Zeitschrift für Politikwissenschaft* 28, no. 4 (2018): 521–534.

⁷⁵See Zafer Üskül, *Olağanüstü Hal Üzerine Yazılar*, (İstanbul: Buke Yayınları, 2003). The content of these decrees shows just how broad the authority of the super-governor was. For instance, Decree 430 (1990) granted the office of the super-governor the power to exile people from the region without further recourse (Article 8), to detain suspects without charge for up to 10 days (Article 3), and to prohibit publications deemed to be provocative from entering into, or being disseminated within, the region. See Jacoby, 'Autocratic Militarism in Turkey', 649.

these constitutional legal arrangements, which directly regulated the declaration of martial law, the scope of the emergency jurisprudence was also supported by special articles of Turkish Criminal Code (Türk Ceza Kanunu, TCK), in particular, 141, 142, 149, 163, 168 and the Anti-Terror Law (Terörle Mücadele Kanunu, TMK, 1991). By issuing an enormous number of counterterrorism laws and building a comprehensive exceptional court system to deal with terrorist activities, the governments of the 1990s and 2000s gradually made the emergency laws an inevitable part of the criminal justice system, continuing from the 1970s.⁷⁶ Hence, the provision of an identifiable ‘enemy of the Turkish nation’ became a permanent part of political life in order to perpetuate and legitimize constitutionally mandated emergency rule based on the executive prerogative mentality. This paradigm of government consequently ‘deprived millions of citizens of basic rights protections, promoted rampant extra-judicial killings, disappearances, torture, ill-treatment, forcible displacement, and countless other grave abuses’.⁷⁷

The AKP and restructuring of legal emergency power: violent return of the security policies

When the AKP came to power with a promise to end the state of emergency regime in 2002, the first reaction of the victims of this endless emergency was relatively positive. However, it quickly became clear that the AKP would also take the same path, despite finally cancelling the state of emergency in the Kurdish region in 2002 and passing several harmonization packages in line with the EU acquis. In fact, to curb the political opposition and suppress the cracks within the power bloc, the AKP constructed a highly comprehensive exceptional legal complex and deployed emergency power in a strategic manner. There are three crucial turning moments in the reorganization and deployment of legal emergency power: The 2013 Gezi uprising, the state of emergency declaration after the failed coup in July 2016 and constitutional amendments in April 2017. However, the party’s initial widespread securitization of dissent went back to the 2013 Gezi uprising.

The party revised the Anti-Terror Law, which presented a broader and vaguer definition of terror. The new Anti-Terror Law became highly instrumental in embedding an exceptional criminal law regime for terror crimes from 1991 onwards. After revising the law in line with a more preventative mentality, the party deployed these antiterrorism regulations extensively to criminalize dissent, including student movements, the Kurdish political movement, women’s movement, the LGBTI movement and to prevent other possible candidates from obtaining power both within and outside of the power bloc.⁷⁸ Particularly after the Gezi uprising, the party reincarnated the old security state in a new form. To neutralize the oppositional forces within society and enforce the new legal emergency power, the party enacted several crucial legal amendments under allegedly escalating security concerns, such

⁷⁶Inanıcı, ‘Örfi İdare Yargısı’.

⁷⁷İşiksel, ‘Turkey’s Authoritarian Constitutionalism’, 718.

⁷⁸Here, the Ergenekon case (2008), the KCK case (2009), the Sledgehammer case (2010) and the Revolutionary Headquarters case (2011) are among the most important. After failure of the collation with Gülen Movement, the Gülen group also became a target for terrorism investigations and they were firstly named as parallel state and then as FETÖ (Fethullah Terror Organization).

as establishing new exceptional judicial courts (Specially Authorized Courts, *Özel Yetkili Mahkemeler*, 2004–2014) in place of the old State Security Courts in 2004, reforming the Police Powers and Duties Law No. 2559 (*Polis Vazife ve Salahiyet Kanunu-PVSK*) in 2005, revising the Anti-Terror Law (Law No. 6526) in 2006, introducing the Internet Law (Law No. 5651), which expanded the government-controlled Telecommunications Authority's (Telekomünikasyon İletişim Başkanlığı, TIB) jurisdiction over websites in 2014, and the Law on National Intelligence Agency (Milli İstihbarat Teşkilatı, Law No. 6532) in 2014, as well as enacting the Internal Security Package (Law No. 6638) in 2015. The AKP also introduced new judicial venues such as Penal Judgeships of Peace (*Sulh Ceza Hakimlikleri-2014*) in order to entrench liminal and strategic legality, designed to structure the dominance of the executive prerogative principle in a new form.

Meanwhile, recent security operations in the Kurdish region and the coup attempt in July 2016 were also seen as an opportunity to exacerbate the security concerns in the country. Following the coup, Erdogan and the AKP declared a state of emergency, which was extended seven times and became highly instrumental for entrenching a new emergency regime, within which the party and the executive branch unified around the leader and took the place of the military in operationalizing the executive prerogative principle.⁷⁹ During the entire state of emergency, the government declared 32 emergency decrees, which amended 154 permanent laws and dismissed over 125,000 state employees.⁸⁰ More importantly, the Party and its leader Recep Tayyip Erdogan pushed for a constitutional amendment during the emergency period and successfully transformed the political regime into a type of presidential system. In line with constitutional amendments, the AKP government changed the legal state of siege regime through constitutional amendments, too.⁸¹ Following the constitutional amendment, the government issued a new law (Law No. 7145, in *Resmi Gazete* no 30,495) and annulled the state of siege law on 31 July 2018. To sustain the implementation emergency measures, the new law granted local governors power to restrict the freedom of travel, provided authority to state institutions to dismiss public employees who were suspected of being members of a terrorist organization or of having any connection with them, initiated new strict

⁷⁹The Gülen movement was the prominent partner of the AKP in entrenching this new emergency regime. However, this partnership became unsustainable when the Gülen movement began an operation (graft probe) on 17–25 December 2013, broadcasting secret records on the Erdogan family. In fact, the reasons behind the disagreement were more complicated. On 15 July 2016, military personnel who had connections with the Gülen movement attempted a military coup. More than 250 civilians lost their lives during the protest movements against the coup. See Berk Esen and Sebnem Gumuscu, 'Turkey: How the Coup Failed', *Journal of Democracy* 28, no. 1 (January 2017): 59–73.

⁸⁰Almost two years after the promulgation of decrees, parliament approved all of them without any discussion. For the legal debates on the status of decrees, see the excellent legal analysis of Kerem Altıparmak, Dinçer Demirkent and Murat Sevinç, 'Atipik KHK'ler ve Daimi Hukuksuzluk: Artık Yasaları İdare mi İptal Edecek', *Olağanüstü Hal ve Uygulamaları Bilgi Notu 1/2018*, (Ankara: İHOP, 2018); Kerem Altıparmak, Dinçer Demirkent, Murat Sevinç, 'Atipik KHK'ler ve Daimi Hukuksuzluk: OHAL KHK'si ile Kadını Erkek, Erkeği Kadın Yapamazsınız', *Olağanüstü Hal ve Uygulamaları Bilgi Notu 2/2018*, and for the content of the emergency decrees, see İHOP's report on the state of emergency, *Updated Situation Report- State of Emergency in Turkey, 21 July 2016–20 March 2018*, Publication date: 17 April 2018, (Ankara: İnsan Hakları Ortak Platformu, Human Rights Joint Platform, 2018), and the Heinrich Böll Stiftung's report on the subject, İsmet Akça, S. Algül, H. Dinçer, E. Keleşoğlu, and B. A. Özden, *When the State of Emergency Becomes the Norm: The Impact of Executive Decrees on Turkish Legislation*, (Istanbul: Heinrich Böll Stiftung, 2018).

⁸¹Articles 120–122 of the 1982 Constitution were repealed on 16 April 2017; Act No. 6771 by Constitutional Amendment.

restrictions on meetings and demonstrations. It granted legal protection to the National Intelligence Agency (Milli İstihbarat Teşkilatı, MİT) against any use of the right to information act, and made on file decision possible about the detentions till 90 days.⁸² Hence, the country's violent state of siege regime was replaced with a state of emergency regulation unified around the supreme power of the president. These measures designed to reinforce the power of the president, who was also granted the right to declare a state of emergency under the 2017 constitutional amendment.

The main difference between the old and the new legal emergency regimes anchored in the increased role of the police and intelligence forces in imposing emergency regulations and the main actor who actually assumed the executive prerogative power, i.e. the president. In order to contain the political conflicts emerging both from the fundamental contradictions within the 'exceptional' republic and to impose Erdogan's new presidential regime, the party and President Erdogan successfully restructured legal emergency power around a new strategic and liminal legality. This new legality mainly consisted in an usurping of judicial power by the executive branch and police forces, the introduction of new judicial venues which legally blurred the distinction between the 'ordinary' and 'exceptional', entrenching the ambiguity concerning the leader's relation to legality, and institutionalizing the 'rule by law' approach based on the principles of prerogative and authorization of the utmost discretionary power of the executive branch, acting both as legislative and judiciary power. Consequently, President Erdogan has successfully replaced the old emergency regime with a new one so as to suffocate political opposition and cement a new nationalist and Islamist power bloc. This new emergency regime is essentially characterized by multi-layered emergency power, which involves proliferation of emergency laws and regulations, escalating enlargement of 'parallel administrative zones' that function as emergency spheres, and deployment of the supreme power of the president who has suspended the separation of power in the country.⁸³

Conclusion: in pursuit of a real state of emergency

A thesis of strong state tradition and military tutelage created a form of 'tunnel vision' in political science literature in Turkey and prevented an understanding of the deep political roots of the rise of the executive prerogative principle. Political scientists focused solely on military elites rather than searching deeply for reasons for such permanency within the constitution of political society and the social, political and institutional structure of society. The executive prerogative principle and exceptional legal regulations have in fact been the founding reason for the state and paradigm of government since the early republican era. However, this power had been transformed in every episode of political crisis to administer civil society, discipline political opposition and provide the necessary political authority to the ruling classes by military, judicial

⁸²See Law 7145, 25 July 2018, *Official Gazette*, 31 July 2018, No. 30, 495, <http://www.resmigazete.gov.tr/main.aspx?home=http://www.resmigazete.gov.tr/eskiler/2018/07/20180731.htm&main=http://www.resmigazete.gov.tr/eskiler/2018/07/20180731.htm>.

⁸³On Erdogan's presidential system, see Yılmaz, 'Erdogan's Presidential Regime'.

and political elites. In this context, it also became a very significant tool for changing the political regime so as to curb political conflicts and clashes, emerging from the fundamental contradictions inherent in the republic. The short genealogy of the transformation of this power shows how these clashes and conflicts played a constitutive role in the construction of this emergency regime, how these policies have displayed a historically 'prosaic' character, and how 'the more diffuse conditions of exceptional laws of all sorts' can easily be found throughout the administrative apparatus of state in Turkey.⁸⁴

These structural and diffuse conditions of emergency within the Turkish legal system in fact created a very effective hybrid legal regime which blurs the division between normal and emergency to repress oppositional political activity and dehumanize any political player acting in defiance. In the light of this, recent legal and political developments also showed that Turkey is a clear example of a country in transition from a despotic to a more insidious and subtle emergency regime, structured around the supreme power of the president and organized to suppress democratic opposition and any form of democratic public space. The multi-layered character of the new regime and the continuing 'exceptionality' of the republic in deploying emergency power still requires a well-grounded political analysis.⁸⁵ Hence, in the pursuit of understanding this complicated and comprehensive legal-political background behind the incorporation of exceptional governmental powers into the political system in Turkey, it is still incumbent on us to arrive at a concept of politics and 'history which corresponds to' the permanency of emergency in the country. Then, as Walter Benjamin emphasizes, 'it will become clear that the task before us is the introduction of a real state of emergency' in the light of political analysis of such permanent deployment of emergency power, designed to stifle any attempts to achieve freedom and equality in the country.⁸⁶

Disclosure statement

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⁸⁴Nasser Hussain, 'Beyond Norm and Exception: Guantánamo', *Critical Inquiry* 33, no. 4 (2007): 741.

⁸⁵For a critique of methodological nationalism in this context, see Saygun Gökarişel and Z. Umut Türem, 'The Banality of Exception? Law and Politics in "Post-Coup" Turkey', *The South Atlantic Quarterly* 118, (2019): 175–187.

⁸⁶See W. Benjamin, *On the Concept of History*, trans. Dennis Redmond, <https://www.marxists.org/reference/archive/benjamin/1940/history.htm>, (accessed 20 February 2019).