Turkish Emergency Measures in the European Court of Human Rights. Cases: Şahin Alpay V. Turkey and Mehmet Hasan Altan V. Turkey of 20 March 2018

Dimitris Liakopoulos[1]

Abstract: The present work is concentrated on the analysis of European Court of Human Rights (ECtHR), issued on cases: Şahin Alpay v. Turkey and Mehmet Hasan Altan v. Turkey of 20 March 2018. ECtHR has ascertained the violation of conventional rights by Turkish emergency measures for the first time. The extraordinary pre-trial detention of the victims has breached their right to personal liberty and security (art. 5 of the Convention) and their right to freedom of expression (art. 10 of the European Convention on Human Rights). The orientation seems to be based essentially on the findings of the domestic Constitutional Court. This means that the Court of Strasbourg has not departed from its strict interpretation of the rule of previous exhaustion of domestic remedies but open for a more careful international control over emergency measures. The method of analysis is based in analysis of a case study which was analyzed and based on the international doctrine of ECtHR.

Keywords: emergency measures; ECHR; ECtHR; state of exception

1. Introduction

Turkish State of Exception and Search for an Effective Remedy against Emergency Measures between Internal and International Plan

In the face of the failed attempted coup d'état in Turkey on the night between 15 and 16 July 2016, the Ankara government decided to establish a strict and all-encompassing state of exception, resorting, moreover, to the emergency suspension mechanism of the guarentigie, governed by European Convention on Human Rights

[1]Full Professor of European Union Law at the Fletcher School-Tufts University (MA in international law and MA of Arts in Law and diplomacy). Full Professor of International and European Criminal and Procedural Law at the De Haagse Hogenschool-The Hague. Attorney at Law a New York and Bruxelles. ORCID ID: 0000-0002-1048-6468. The present work is updated until November 2019, Corresponding author: prof.d.liakopoulos.984@gmail.com.

(ECHR) and International Covenant of Civil and Political Rights. These are clauses derogating from human rights (Svenssonccarthy, 1998; Prèmont(ed.), 1996; Oraà, 1992; Gross, Ni Aolain, 2006; Hartman, 1981, pp. 155ss. O'Donnell (a cura di), 1983; Higgins, 1977, pp. 282; Kretzmer, 2008; Olivier, 2004, pp. 405ss; Crysler, 1994, pp. 603ss; El Zeidy, 1988, pp. 368ss; Mokhtar, 2004, pp. 658ss; Partsch, 1971, pp. 327ss; Shraga, 1986, pp. 217ss; Tavernier, 1995, pp. 489; Teraya, 2001, pp. 918ss; Norris, Reiton, 1980, pp. 192ss; Joseph, Castan, 2014, pp. 910ss), that is international provisions of agreements, included in two relevant treaties aimed at protecting the fundamental rights of individuals, which allow states in compliance with certain conditions, substantive and procedural to temporarily suspend the protection in question, taking extraordinary measures, suitable for facing and overcoming a serious emergency danger situation, such as to threaten the security and/or independence of the country considered.

More specifically, the exceptional scheme in question was established through Decision no. 2016/9064 of 20 July 2016[2], specifically communicated to the General Secretariats of the Council of Europe and the United Nations, precisely to activate the aforementioned mechanism for the temporary suspension of guarantees. The state of emergency in question, then, was implemented through a large range of decrees with the force of law, intended to eradicate from the structures of the state the coup movement, which was responsible for the events of 15 July. A reportable movement, again according to the authorities of Ankara, to Fethullah Gülen, a Turkish preacher and scholar, residing in the USA, and accused of presiding over a branched terrorist-subversive organization, interested in rising to power in Turkey (Fethullah Gülen Terrorist Organization, so-called "FETÖ") (Gerards, 2019).

Moreover, the state of urgency in question would now seem to have acquired a stable and permanent dimension within the Turkish system, given that it has undergone a series of extensions. Such a diachronic arrangement, moreover, appears to be hardly compatible with the principle of proportionality of exemption (Kretzmer, 2008, pp. 1922; Joseph, Castan, 2014, pp. 912), one of the normative cornerstones of the clauses de quibus, which, on the contrary, imposes a limited duration of the emergency regime and strictly commensurate with the needs of the concrete public danger to be faced[3]. More in detail, the duration of the exceptional regime in

[2]See decision no. 2016/9064 of the Turkish Council of Ministers of 20 July 2016, filed and registered with the General Secretariat of the Council of Europe on 21 July 2016, and notified to the General Secretariat of the United Nations again on 20 July 2016 registered there on 2 August 2016.

[3]More specifically, it implies that the emergency exception to fundamental rights must be limited to what is strictly necessary to face and overcome the state of crisis. Furthermore, it implies that the main

question, originally established, by the Decision n. 9064/2016 of the Council of Ministers, in 90 days, starting from 21 July 2016, was extended, from time to time, by three months in three months, through decision no. 1130 of 11 October 2016[4], Decision n. 1134 of 3 January 2017[5], Decision n. 1139 of 18 April 2017[6], Decision n. 1154 of 17 July 2017[7], Decision n. 1165 of 17 October 2017[8], Decision n. 1178 of 17 January 2018[9] and, finally, Decision n. 1182 of 18 April 2018[10].

Given the above, the state of exception in question would seem to be characterized by the adoption of a wide range of emergency measures, harbingers of various critical profiles with the fundamental rights guaranteed, internationally, both by ECHR and ICPCR. Among these can be remembered, first of all, the forced closure of numerous private organizations and institutions, suspected of links with FETÖ, such as, for example, places of worship, publishing houses, hospitals, educational and university institutions, nursing homes, mass media, etc., with simultaneous dismissal of the relative personnel. But it also includes the massive dismissals of public employees, military personnel and police forces, journalists, judges, prosecutors, etc., also suspected of links with FETÖ. Such disposals, moreover, have been implemented either directly through some of the aforementioned emergency decrees, or on the basis of the same, without permitting any participation by the

emergency restrictions must be substantially predetermined in the founding act of the emergency regime and that the latter must be subjected to a continuous review by the competent governmental authorities. On this point, see the general comment n. 29 of the Human Rights Committee of 30 August 2001, States of emergency (article 4), pp. 4 and 6, available, as all the decisions of the Committee, as well as the judgment of the European Court of Human Rights of May 26, 1993, Brannigan and McBride v. United Kingdom, p. 43 and the decision of the Grand Chamber of the European Court of Human Rights of 19 February 2009, A. and others v. United Kingdom, p. 84.

[4]See decision no. 1130/2016 of the Turkish Council of Ministers of 11 October 2016, deposited with the General Secretariat of the Council of Europe in a note dated 17 October 2016.

[5]See decision no. 1134/2017 of the Turkish Council of Ministers of 3 January 2017, filed with the General Secretariat of the Council of Europe in a note dated 5 January 2017.

[6]See decision no. 1139/2017 of the Turkish Council of Ministers of 19 April 2017, deposited at the General Secretariat of the Council of Europe with a note dated 20 April 2017 and at the General Secretariat of the United Nations with a note dated 19 April 2017.

[7]See decision no. 1154/2017 of the Turkish Council of Ministers of 17 July 2017, deposited at the General Secretariat of the Council of Europe with a note dated 19 July 2017 and at the General Secretariat of the United Nations with a note dated 27 July 2017

[8]See decision no. 1165/2017 of the Turkish Council of Ministers of 17 October 2017, deposited with the General Secretariat of the Council of Europe in a note dated 19 October 2017 and at the General Secretariat of the United Nations with a note dated 19 October 2017.

[9]See decision no. 1178/2018 of the Turkish Council of Ministers of 17 January 2018, filed with the General Secretariat of the Council of Europe in a note dated 19 January 2018 and at the General Secretariat of the United Nations with a note dated 19 January 2018.

[10]See decision no. 1182/2018 of the Turkish Council of Ministers of 18 April 2018, filed with the General Secretariat of the Council of Europe in a note dated 19 April 2018.

interested parties in the relative application procedure. Numerous of the provisions in question, then, were accompanied by the implementation of preventive detention measures, often deprived of motivations that adequately demonstrated the existence of an individual bond between the subjects concerned and the terrorist-cross-border organization under consideration. To all this, then, there has been added a substantial reduction in the judicial guarantees offered by the Turkish legal system[11], which, moreover, has significantly aggravated the state of domestic justice, already impaired by the pervasive purges of the magistrate order, perpetrated by the Ankara government.

In the face of so much, and in the impossibility of accurately identifying internal remedies actually capable of establishing the illegitimacy and/or unfoundeness of the emergency measures in question, some of the interested parties have started to lodge appeals directly with the European Court of Human Rights (ECtHR), asking to be exempted from the rule of prior exhaustion of internal appeals pursuant to art. 35, first paragraph, of ECHR (Rainey, Wicks, Ovey, 2017; Costa, 2017; Timmermans, 2013, pp. 225ss). The main objective of this contribution, therefore, is not so much to examine the entire Turkish emergency regime, assessing its compliance with the aforementioned international parameters, as to account for such international appeals and the effects they have had on the domestic emergency decree. And this also in light of the fact that the attitude ostentatious, on this point, from ECtHR, originally based on a rigorous selfrestraint, would seem to have changed, at least partially, within the two most recent sentences emanated by chance at the same time: the one given on the sulahin Alpay v. Turkey case of 20 March 2018 and the one issued on Mehmet Hasan Altan v. Turkey case of 20 March 2018. The European Court of Human Rights (ECtHR) has, in principle, rejected appeals against Turkish emergency measures, paying specific attention to the implications they have had on the domestic emergency decree. Subsequently, the aforementioned

[11]In this regard, they may be mentioned, by way of example, the extension up to 30 days (later reduced to 7 + 7) of the duration of preventive detention without judicial validation, in relation to the criminal proceedings intended to prosecute the alleged perpetrators of the crimes against the public order and the Constitution related to the coup; the extension up to 5 years from 3 that they were of the maximum total duration of the pretrial detention related to the investigation of acts concerning the coup d'état; various interferences in the technical defense of the accused; the exclusion of all civil, criminal and administrative liability for public officials who have participated in the imposition of emergency measures, etc. Some of these violations, with particular reference to the situation of individuals subject to restrictions on personal freedom, have recently been denounced, in institutional terms, within a report issued within the framework of the Council of Europe. See the report of the Committee on legal affairs and human rights of the Parliamentary Assembly of the Council of Europe of 27 February 2018, pp. 85ss.

"twin" sentences will be analyzed, without leaving out the separate opinions attached to them, to verify to what extent they can constitute the prelude to a more careful international control over the events of the exceptional Turkish regime.

2. Decisions of Ecthr Inadmissibility for Failure to Exhaust Internal Remedies and Their Implications for Domestic Emergency Decree

As mentioned, the "twin" sentences, the main object of this contribution, were issued by ECtHR, the outcome of a theory of inadmissibility decisions due to failure to exhaust internal remedies, with which several appeals against the emergency measures were rejected Turkish, in the name of a rigorous interpretation and even extremist! Of the rule of art. 35, first line, ECHR. On the contrary, it seemed that ECtHR, despite the systematic deconstruction of domestic jurisdictional safeguards, often used formalistic arguments, so as not to deal with the issue. Therefore, it is worthwhile to briefly review, below, the procedure of the decisions in question, also in order to verify what is the "legal gap" between the latter and the two judgments of March 20, 2018, with which it is an asset remember, for the first time ECtHR has ascertained the violation of conventional obligations on Turkey, arising from the application of the relevant emergency measures.

A first attempt to appeal for saltum at the Strasbourg Court is the Mercan v. Turkey case of 17 November 2016 ended with a decision of inadmissibility for failure to test internal remedies. Here, the appellant, a Turkish magistrate, had been dismissed from her duties, just determination by the High Council of judges and prosecutors. Furthermore, she had been arrested and subjected to administrative detention, on the basis of alleged links with the responsible organization, according to the authorities of Ankara, for the facts of 15 July 2016. The applicant therefore complained of the infringement, in her damage, of articles 5, first and third paragraphs, and 3 ECHR. Moreover, she had also pointed out that, on the one hand, there were no effective internal remedies capable of leading to the reform of the offending measures and, on the other, it could not even be worth the direct individual appeal to the Turkish Constitutional Court. And this because the relative independence and impartiality appeared to be compromised: a short time before, in fact, two magistrates of this supreme assembly had, in turn, been dismissed from the relative office, at the request of ECtHR, in application of the pertinent urgent decree, and traits under arrest, as well as being replaced by other togates. This would have resulted in an undeniable impairment of the guarantee of an independent, impartial, competent judge

established by law; a guarantee that, on the contrary, appears to be essential so that an individual and direct constitutional appeal of this kind could satisfy the requirements of accessibility and effectiveness, required by the rule of art. 35, par. 1, ECHR. On the basis of these observations, the applicant asked ECtHR to be exempted from the condition of prior exhaustion, just lack and/or absence of adequate home remedies, at least limited to the aforementioned disposal orders and emergency administrative detention. And this in order to pursue, on the international level, the (hoped for) due reparation, precluded, on the contrary, at internal level. Yet, ECtHR rejected the appeal de quo precisely because of a failure to test internal remedies. Firstly, it is considered the absence and lack of appropriate remedies appropriate to the complained injuries to be unproven. After, ECtHR has identified the remedy to be performed in the individual recourse directly to the domestic Council (in turn conditioned by the preventive execution of the other available home remedies, however not specified), satisfying the admissibility condition referred to art. 35, first line, ECHR. And this, because the partial "re-mix" of the judging panel in question would not have been enough to compromise its independence and impartiality.

The decision here was immediately open to criticism, also in consideration of a significant jurisprudential change occurring in the Domestic Council and documented by the Venice Commission[12]. ECTHR, in fact, was always considered competent to examine the constitutional legitimacy of the governmental emergency decrees, albeit limitedly to the relative conference ratione loci and ratione temporis with respect to the proclaimed regime of exception. And this, despite art. 148 of the Constitution prohibited expressis verbis actions at the Council, which contested the formal and/or substantial constitutionality of the decrees de quibus. However, on 13 October 2016 the Council had rejected an appeal by the main Turkish opposition party, forwarded precisely with reference to the emergency decree n. 2016/667, abandoning the ostentatious and consolidated orientation: in fact, it had proclaimed itself incompetent to carry out any type of constitutional revision of the aforementioned governmental emergency decrees. This approach, which, moreover, ECtHR does not seem to have taken into account in the decision here, would seem to frustrate any attempt to contest the constitutionality of the dismissals implemented through or on basis of the aforementioned urgent decrees. And this seemed to render ineffective, with respect to art. 35 ECHR, the individual constitutional appeal which,

[12]See opinion n. 865/2016 of the European Commission for democracy through law (so called Venice Commission) of 12 December 2016, Turkey. Opinion on Emergency Decree Laws Nos. 667676 Adopted Following the Failed Coup of 15 July 2016, pp. 183ss.

instead, the Strasbourg Court has indicated as the object of prior experiment obligation.

The question of forced dismissals is then returned to the attention of ECtHR in Zihni v. Turkey case of 8 December 2016 also concluded with a decision of inadmissibility for failure to test home remedies. In the present case, the applicant, professor and vice-principal at a high school, had been dismissed from his profession, based on the emergency decree n. 2016/672, as suspected of having no better detailed relations with FETÖ. He had therefore appealed to the Court of Strasbourg, complaining of the violation of articles 6, first, second and third paragraphs, 7, 8, 13, 14 and 15 ECHR. Moreover, he had not attempted any internal remedies, as considered ineffective and deficient, on the basis of arguments similar to those advocated by the applicant in the pre-established Mercan v. Turkey case. Now, unlike what emerged in this last hypothesis, ECtHR, in the Zihni decision, showed full awareness of the doctrinal and domestic jurisprudential confusion regarding the identification of the suitable remedy to dispute the legitimacy of the forced dismissal de quibus.

Furthermore, it also appeared to be aware of the recent revirement operated by the Turkish Constitutional Court, apparently exclusive of any dispute regarding the constitutionality of the aforementioned exceptional decrees. Nevertheless, the Strasbourg court rejected the appeal in question in the legitimacy and always for failure to experiment with domestic remedies a double questionable argument. On the one hand, in fact, it found, at least "more procedural than substantial", that the described overruling of the Turkish Consult would not have deprived individual constitutional appeals of effectiveness. And this because the incompetence to review the constitutionality of the sic generaliter emergency decrees would not preclude the judicial review of the concrete disposal orders, adopted on the basis of such decrees. On the other hand, it would seem that ECtHR intended to enhance a coeval development of domestic administrative jurisprudence: in fact, the Council of State, with a decision of November 4, 2016, declared itself incompetent to examine the appeal filed by a dismissed magistrate for deliberation of the High Council of Judges and Prosecutors, to be the cause of jurisdiction of first instance administrative courts. This had prompted the latter to take cognizance of the appeals for annulment of the aforementioned measures. Therefore, ECtHR, advocating an interpretation extremist of the rule of the previous exhaustion, has left, once again, without answer the request for justice originating from the Turkish order.

These first attempts to appeal to ECtHR, even if thwarted by the restrictive application of the rule on admissibility pursuant to art. 35, first line, ECHR, would

seem, however, to have induced the Ankara authorities to intervene on the system of home remedies, through decree n. 2017/685 of 23 January 2017, moreover subject to changes, made by some of the subsequent decrees. Now, the aforementioned regulatory instrument has intervened, through art. 1 of the relative transitory provisions, on the problem of the magistrates dismissed by resolution of the High Council of judges and prosecutors based on the provisions of decrees n. 2016/667 and n. 2016/674, allowing them to appeal against the measures mentioned, in the first instance, to the Council of State, with a related possibility of challenging any unfavorable decision before the Constitutional Court.

Secondly, the decree under analysis established and regulated a specific administrative body, called the "Inquiry Commission on the state of emergency measures", charged with examining, confirming, reforming or canceling all the measures taken on the basis of urgent decrees. This is an administrative appeal of a temporary nature (this commission will carry out its functions for two years) and prejudicial to access to proper judicial (administrative) system. It is established, in fact, according to art. 2 of the decree, that the Commission can assess the legitimacy of the emergency measures that have ordered the dismissal of public officials from the exercise of their mandate, the disposal of students from their status, the forced closure of associations, foundations, trade unions and other meta-individual social organizations and the loss of social security rights for retired public personnel. Furthermore, it is envisaged that any unfavorable decisions of the Commission regarding dismissals may be challenged, in the administrative courts of first instance, within 60 days of the acquired finality of such decisions. It is, in any case, guaranteed the possibility to apply directly to the Constitutional Court, once all the aforementioned administrative jurisdictional appeals have been tried.

Moreover, these regulatory innovations constitute the argumentative fulcrum of the inadmissibility decision taken by ECtHR on Çatal v. Turkey case. This concerned the events of another dismissed magistrate for the determination of the High Council of judges and prosecutors and was arrested on the grounds of not better defined ties with FETÖ. Now, in the present case, the appellant, who complained about the violation of articles? 6, 7, 8, 13, 14, 15, 17 and 18 ECHR (Harris, O'Boyle, Warbrick, 2014, pp. 372ss; Seibert-Fohr, Villiger, 2017), had addressed directly to the Court of Strasbourg, attaching the inexistence of accessible and effective internal remedies, also because, at the time of the presentation of the appeal, the pre-established decree n. 2017/685 had not yet entered into force. However, the Court, referring to the aforementioned innovations brought by the Ankara authorities to the system of

internal remedies, rejected the request for failure to test domestic claims, claiming that they did not possess elements that would support the supposed ineffectiveness of the new instrument of appeal at the Inquiry Commission[13]. Moreover, in observing so much, ECtHR has made an exception to the consolidated principle that the existence and consistency of the relevant internal remedies must be appreciated at the time of presentation of the judicial request at the same Strasbourg assembly.

Such a jurisprudential solution, however, was not free from criticism concerning the effectiveness of the new administrative remedy, which, as also indicated by Amnesty International, and, more recently, in the aforementioned report of the Committee on legal affairs and human rights of the Council of Europe. The report it displayed various elements of contrast with the procedural guarantees laid down by ECHR, some of which were binding even in the states of emergency. Firstly, well-founded doubts could be advanced around the independence and impartiality of the Commission, which is composed of seven members, of which three are directly appointed by the Prime Minister's office, one each by the Ministries of Justice and the Interior and two by the High Council of Judges and Prosecutors. Consequently, both the members of the governmental extraction, as well as those of judicial origin, are identified by state bodies that, in various ways, have contributed to the issue of the disputed disposal orders.

Secondly, the decree establishing the Inquiry Commission, in addition to not clearly defining the relative rules of procedure, does not even have around the evaluation criteria to be used, thus not remedying that merum arbitrium which we have seen as the provisions of the quibus. It is then excluded from any form of civil, criminal and administrative responsibility for the members of the Inquiry Commission, within the exercise of the relative mandate, something which, although qualified by the government as a suitable guarantee to ensure the independence of the works of such administrative corpus, in reality it does nothing but accentuate the discretion, subtracting the relative components to every type of control in case of bad exercise, even malicious, of its prerogatives. Finally, it should be noted that it is unlikely that an administrative body made up of seven officials will be able to deal with over 100,000 appeals in just two years! This is evidently an undersized Commission with respect to the relevant dispute. All this without counting the questionable prediction of the appealability of any unfavorable decisions of this forum in the administrative

[13]See the inadmissibility decision of the European Court of Human Rights of 10 March 2017, Çatal v. Turkey, pp. 1ss.

courts and not before the ordinary jurisdiction.

Despite all the ostentatious perplexities around the conference of the examined appeal with the rule of the previous exhaustion of the internal remedies, ECtHR, within the subsequent decision of inadmissibility taken on the Köksal v. Turkey case of 12 June 2017, has again rejected an appeal, in terms of admissibility, for violation of the aforementioned rule. There, the applicant, a primary school teacher who had been dismissed from his profession, attached the violation, to his detriment, of articles 6, second and third paragraphs, 7, 8, 10, 11, 13 and 14 ECHR (Schabas, 2015). He had addressed the Strasbourg assembly directly, complaining about the absence of effective domestic remedies to repair the reported violations. However, ECtHR, avoiding making a pronouncement on the criticism of the new administrative appeal in question, added, once again, that it did not possess elements that would doubt the relative accessibility and effectiveness, thus frustrating the demand for justice coming from the Turkish system.

The ostentatious approach of ECtHR, founded, as observed, on a rather rigid interpretation of the rule of the prior exhaustion of internal remedies, has been confirmed, more recently, in the decision of inadmissibility from the latter yield on the Bora v. Turkey case of 21 December 2017. Here, the plaintiff, a Turkish magistrate dismissed from his duties, as suspected of having ties that are not better detailed with FETÖ, and subjected to solitary confinement, complained about the violation of articles. 5, 6, 8 and 14 ECHR, as well as the impairment of art. 3 ECHR (Schabas, 2015). The latter was due, according to him, to the rigid conditions of imprisonment to which he was subjected, moreover indicated as incompatible with his state of health. Now, in the present case, ECtHR has always focused on examining this last complaint, which was also rejected, finally, as a point of admissibility, as manifestly unfounded. However, in the final part of the decision here, Strasbourg judges also rejected the further objections raised by the applicant against the Ankara government, noting the non-exhaustion of internal remedies pursuant to art. 35 ECHR, since the interested party had submitted two appropriate appeals to the domestic Constitutional Court, still awaiting definition.

From the aforementioned procedure of appeals presented at ECtHR, against the emergency measures put in place by the Ankara government, a rather rigid and formalistic interpretation of the rule of the previous exhaustion of internal remedies would seem to emerge, according to art. 35, first paragraph, ECHR. In particular, ECtHR seemed to rely, for this purpose, both on individual and direct recourse to the domestic Council, and on the administrative nature of the newly established Inquiry

Commission, despite the concerns that could arise regarding the relative effectiveness.

As far as the first of the reported remedies is concerned, the most significant criticalities would appear to point to the insufficient independence of the Constitutional Court with respect to the Executive, and this not only because of the aforementioned partial reinstatement of the judging panel. This, in fact, is consistently crippled by the profound constitutional reform approved, moreover in constancy of the state of exception, through the referendum of 16 April 2017 (Kaboglu, 2017, pp. 35ss). It, redefining the form of Turkish government in a "super-presidential" key, has led to a significant strengthening of the President of the Republic, who, according to art. 146 of the Constitution, enjoys the prerogative of appointing most of the members of the Consult.

Moreover, the reform in question has been examined by ECtHR, given that the aforementioned referendum was the subject of the inadmissibility decision made (by majority vote) on the Cumhuriyet Halk Partisi v. Turkey case of 30 November 2017. Here, ECtHR dealt with an appeal lodged by a Turkish opposition party, after having duly denounced electoral fraud and other irregularities with the National Electoral Commission, precisely in relation to the referendum of 16 April 2017. More specifically, the appellant complained so much or violated art. 3, first Protocol, ECHR, accusing the constitutional reform of this of irremediably prejudicing the functioning of parliamentary democracy, as it is correlatively related to the injury of art. 13, given the non-existence, at domestic level, of recourse against the determinations of the aforementioned Commission. However, ECtHR rejected the complaints in terms of admissibility, considering, on the basis of a mere literal criterion that a constitutional referendum was not comparable to the free and periodic elections referred to in art. 3, first Protocol. This made ratione materiae the appeal inadmissible, leading to the failure of the second grievance, linked to art. 13 ECHR. Basically, the Strasbourg Court has preferred not to examine the impact of the constitutional reform in question on the democratic structures of the domestic order. In any case, the above elements would seem to call into question the independence from the government of the Turkish Constitutional Court.

But also the second among the remedies identified by ECtHR for the purposes of art. 35, first paragraph, ECHR, i.e. the administrative appeal to the Inquiry Commission on the state of emergency measures, would appear to be inadequate for this purpose. And this not only because of the aforementioned critical points regarding the independence of the Commission and its effective capacity to deal with all the

devolved litigation, but also because it is not competent to order the returned in integrum, in case of ascertained illegitimacy of the emergency measures examined. So much would induce to qualify such ineffective remedy for the purposes of the previous exhaustion rule. Nevertheless the Court, at the time of writing, has not yet come to express, on this point, such a judgment.

However, the aforementioned judgments made on the Şahin Alpay v. Turkey and Mehmet Hasan Altan v. Turkey, cases would seem to have opened a door in the ostentatious orientation of the Court, if only because they, for the first time, have involved the ascertainment of conventional violations by the defendant government, caused by the application of the de quibus emergency measures.

As mentioned in the introduction, it would not be wrong to classify judgments that are the main subject of this contribution as "twins". And this not only because they were released by ECtHR on the same date, but also because of the related legal contents, structured in substantially similar terms. Moreover, these have faced two similar cases, connoted, however, by some slight differential trait, which makes them worthy, at least in relation to the relative de facto profiles, of a separate treatment.

First, however, to proceed in this direction it is necessary to carry out a twofold preliminary clarification, in order to better frame the de quibus judgments within ECtHR jurisprudence, outlined in the previous pages: first of all it must be observed how the judgments under examination deal with the emergency measures of preventive detention, related to the criminal investigations carried out by the authorities of Ankara, with reference to the events of July 15, 2016. Therefore, unlike most of the inadmissibility rulings examined above, they do not refer directly to forced dismissal measures for decree or on the basis of a decree, which have been seen as the most contested Turkish emergency initiatives. Moreover, the latter have almost systematically accompanied the imposition of precautionary custody measures, and, therefore, the sentences in question can at least denote an average impact on the question of disposals.

Secondly, the rulings given by ECtHR on Şahin Alpay v. Turkey and Mehmet Hasan Altan v. Turkey cases were issued after the domestic issues had been dealt with by the Constitutional Court, without the disputed emergency measures being previously examined by the newly established Inquiry Commission. This means that the juridical reflections developed, in such decisions, by ECtHR exclusively concern the profiles of effectiveness and accessibility of individual and direct recourse to the domestic Consult. And, therefore, they do not involve any evaluation regarding the conference of the administrative appeal to the Inquiry Commission with respect to

the rule of the previous exhaustion of the internal remedies, enucleated in art. 35, first line, ECHR. Therefore, all the critical objections put forward in the previous pages should remain fully valid for this last appeal tool.

Given the above, it must be highlighted as the sentence given on Şahin Alpay v. Turkey case concerns the story of a Turkish journalist, who served in the Zaman newspaper, considered by the Ankara authorities to be one of the main media of the Gülenist network and, not surprisingly, soon became the subject of a special provision for forced closure, based on the emergency decree n. 2016/668. Now, the applicant, after the shutdown of the appointed newspaper, had been arrested and subjected to custody in prison, since, in his regard, criminal investigations had been started for his alleged involvement in the events of 15 July 2016. More specifically, the aforementioned restriction of the personal freedom of Mr. Inahin Alpay had been justified, by all the courts of merit questioned, on the basis of some of his articles, which appeared in the aforementioned newspaper, in which he had supported critical positions with the government and with which, according to local magistrates, he had transcended the constitutional limits of freedom of expression. In the face of so much, the interested party had, therefore, presented a direct appeal to the Constitutional Court, complaining about the disproportionate nature of the relative detention with respect to the facts charged to him, the illicit interference in the exercise of his right to the free manifestation of the thought that achieved and the incompatibility of the detention regime with his health conditions. The Consult, rejected the third grievance for manifest unfoundedness. It had, however, ascertained the other two violations complained by the applicant, classifying his precautionary detention as absolutely disproportionate. Also because the applicant, in his writings, had simply expressed his political dissent regarding certain governmental choices, without ever inciting violence or carrying out an apology for the failed coup. However, the courts of merit, questioned by the interested party to provide for his release, in execution of the arrest of the Constitutional Court, had escaped such an obligation. First for purely procedural reasons, such as the failure to notify the opinion by the Consult, and, subsequently, for far more worrying reasons. The courts called into question, in fact, had objected to the unconstitutionality and illegality of the considered sentence of the Constitutional Court, which was to be considered illegitimate, not definitive and, therefore, non-binding. And this because it would have constituted a usurpation of power by the Consult, since this would not be entitled to examine the evidence contained in the case files. In the face of this objection, however questionable, Mr. Şahin Alpay has therefore decided to present both a new appeal to the Constitutional Court, regretting the failure to implement the

aforementioned ruling, and an appropriate appeal to ECtHR, attaching the violation, to its detriment, of articles. 5, paragraphs 1, 3, 4 and 5, 10 and 18 ECHR (Schabas, 2015).

A rather similar story has instead occurred to the applicant in the related Mehmet Hasan Altan v. Turkey case. It concerns the vicissitudes of a journalist, a professor of economics and a television presenter at a channel that was also the subject of a forced closure measure, following the prefixed decree n. 2016/668. He was also subjected to pre-trial detention because he was under investigation for "attempt to overthrow the constitutional order", a crime for which, among other things, he was sentenced, at first instance, to life imprisonment. At the basis of his pretrial detention the procedural authorities and all the courts of merit variously intervened, placing not only some articles and public statements of Mr. Mehmet Hasan Altan, but also other elements that made him at least suspect contacts with FETÖ, such as, for example, his current accounts, or the fact that he had visited Gülen himself in the past.

Therefore, having unsuccessfully tried various appeals with the courts of merit, Mr. Mehmet Hasan Altan had decided to apply directly to the Constitutional Court. This, although having rejected some of the related complaints as inadmissible or manifestly unfounded, has ascertained, just as had happened in Mr. Şahin Alpay case, the disproportionate nature of pre-trial detention imposed at the moment and the consequent illegitimate interference in the exercise of his right to freedom of expression of thought. And this is because the measure of restriction of personal freedom herein was founded, according to the Consult, exclusively on political opinions of the interested party, hostile to government action. Even in this case, however, the merit courts in charge of issuing the applicant have in various ways refused to execute Constitutional Court's sentence. Here, for procedural quibbles, such as, for example, failure to publication of the judgment herein at the institutional website of the Consult, or in the official gazette. In secundis, because of the same reason opposed to Mr. Şahin Alpay, namely the incompetence of the Constitutional Court with respect to the examination of the evidence of a criminal proceeding and the consequent illegitimacy of the relative ruling. And, therefore, even in this hypothesis the interested party has decided to appeal both to the domestic Council, regretting the failure to execute the relative arrest, and to Strasbourg judges, complaining about the violation, in its damage, of articles 5, paragraphs 1, 3, 4 and 5, 10 and 18 ECHR (Schabas, 2015).

3. (Follows) Legal Profiles

A first legal element of certain interest, within the de quibus sentences, would appear to be constituted by the ascertainment of the non-existence of the failed coup of 15 July 2016 within the notion of public emergency, under article 15 ECHR. In other words, for the first time ECtHR has established that the mechanism of suspension of the safeguards referred to in the aforementioned standard has been correctly and legitimately activated by the Ankara government, in response to the failed attempted coup d'état in question.

However, such an assessment, forecasted elsewhere, should not, however, be overestimated, given that it does not appear to be based on a careful and punctual scrutiny of the factual circumstances in which the failed coup materialized and which would have made it a significant threat to the life of the nation. Indeed, ECtHR, far from examining, as also happened in the past at Strasbourg organs (Yourow, 1996; Gross, Ni Aolain, 2001, pp. 625ss; O'Boyle, 1998, pp. 23ss; Schokkenbroen, 1998, pp. 30ss. Kratochvìl, 2011, pp. 324ss), the situation of public danger faced by the defendant government, based its assessment on three different elements. In the first place, it noted how the domestic Council, in the aforementioned rulings, found the correct establishment of the emergency regime, according to the constitutional parameters provided for this purpose. Secondly, ECtHR noted, on the basis of the procedural principle of non-dispute, how the need to resort to art. 15 ECHR was not disputed between the parties, at least limited to the procedural profile of correct communication to the competent international bodies, governed by the third line of de qua rule. Lastly, the Strasbourg Court referred to the theory of the margin of state appreciation, in order to essentially refer to government's evaluations the proclamation of the emergency regime: assessments that would be justified by the greater proximity of the latter to the public situation danger to be faced.

All these elements would seem to weaken the assessment made, on this point, by ECtHR, and rest on the evaluations of others, such as the domestic Constitutional Court, the Turkish government (margin of appreciation) and the parties (principle of non-dispute). Moreover, despite the renouncement of Strasbourg judges to a more precise examination of the failure of the coup of 15 July 2016 to the notion of public emergency referred to in article 15 ECHR, we must warn that, in all likelihood, it would have been resolved in an altogether similar assessment.

A second relevant legal aspect in the de quibus judgments would seem to consist in the finding of the violation of art. 5, first paragraph, ECHR, by ECtHR, resulting in

the precautionary detention of the interested parties not supported by significant evidence and not in accordance with the principle of proportionality. More specifically, ECtHR did not go into examination of the circumstantial elements that the proceeding domestic authorities had established as the basis for the disputed precautionary custody measures. In fact, in this case, it fully adhered to the observations made, on this point, by the Turkish Constitutional Court, whose sentences were configured in the same way as an admission of responsibility, regarding the violation of art. 5, Lett. 1 ECHR, by the respondent state. Having said that, therefore, Strasbourg judges focused their analysis on the follow-up that the domestic courts guaranteed with respect to the aforementioned arrests of the Consult, censoring their failure to execute. ECtHR, in fact, has stigmatized domestic courts attitude of merit and in particular the fact that they have challenged the Constitutional Court for a usurpation of power, arising from the analysis that it had carried out evidence. Strasbourg judges, in fact, also on the basis of the relevant domestic law, have instead emphasized the centrality of such an examination for the purpose of ascertaining the constitutionality of a precautionary custody measure. And, moreover, just as the Consult had observed, they qualified the disproportionate de quibus measures, even with respect to the demands of the emergency regime, although correctly proclaimed pursuant to art. 15 ECHR.

Nevertheless, the Court of Strasbourg did not consider itself detached from its previous and consolidated jurisprudential orientation, which qualified the individual and direct recourse to the Turkish Consult as accessible and effective, for the purposes of the rule of prior exhaustion of home remedies. On this point, in fact, the judgments in question would appear to have taken on a "side-monitor" nature, given that the Court has reserved, from time to time, to assess the consistency of the de quo remedy, but making present to the defendant government, the opposition to ECHR of the ostentatious approach of the courts of merit. With this, it would seem to allude to the possibility that, if the problems examined continue, the action taken into consideration may, in the future, no longer be deemed to comply with the procedural rule set forth in art. 35, par. 1, ECHR.

However, even in relation to this second legal profile, the original contribution of ECtHR would seem marginal, given that, on the one hand, its assessments have slavishly taken up those formulated by the Turkish Consult and, on the other, it has been limited to a "call to order" of the legislature and judiciary power of domestic appliance.

No particular consideration would seem to emerge, then, in relation to other

complaints concerning art. 5 ECHR. First, the applicants had complained about the violation of the fourth paragraph of the pre-established rule, with reference to the lack of a rapid judicial review, at constitutional level, of the above privative measures of personal freedom. Well, ECtHR, on this point, considered the duration of more than a year of the ostensive proceedings at the domestic Council to be proportionate, also because they are characterized by the elements of novelty and richness of complex problematic issues. Secondly, both interested parties had attached the violation of the fifth paragraph of the aforementioned international standard, with reference to the right to compensation for unfair detention. There, however, ECtHR rejected the complaints as manifestly unfounded, given that, Mr. Şahin Alpay had not asked the Constitutional Court for the compensation that he could claim. Mr. Mehmet Hasan Altan, instead, had received the de quo indemnity, even if it amounted to a lower amount than that which the Court of Strasbourg usually settles in similar hypotheses. Finally, and with exclusive reference to the latter appellant, ECtHR clearly classified the grievance concerning person's lack of access to documents contained in the file of the main proceedings.

The last legal profile of a certain interest, opened by the judgments here under consideration, would seem to be the one related to the alleged violation of art. 10 ECHR, also considering that the further and alleged damage to art. 18 of the Convention was considered, by the Court, totally absorbed in matters dealt with previously. More specifically, the applicants complained of an unlawful interference in the relative right to freedom of expression of thought, ascertained, moreover, also by the domestic Council, in relation to the corresponding constitutional provisions. And, just as happened in reference to the aforementioned questions, even in this case ECtHR has not succeeded in displaying a real autonomy of judgment with respect to the internal Court of this case. Indeed, it has slavishly re-examined the assessments, ascertaining, first of all, the interference in the exercise of the right in question, due to the unlawful preventive detention of the persons concerned. These, in fact, as journalists, had been forcibly deprived of the relative right to inform, to the detriment, moreover, of the control of public opinion on the work of the government. And precisely on the basis of such observations, Strasbourg judges here, in full adherence to the considerations of Turkish Consult have opined for the disproportionate and unnecessary character in a democratic society of the restrictive measures in question, with respect to freedom of expression. In fact, they would have constituted an unlawful and totally abnormal interference in the aforementioned right, with respect to the needs pursued by the government, although ascribable to the state of exception. Therefore, ECtHR was not detached from the assessments

made by the Constitutional Court, ascertaining the violation of art. 10 ECHR and limiting itself to some reference to the importance of the right in emergency contexts, as it is functional to guarantee an effective democratic supervision on the urgent initiatives of government authorities.

On the basis of previous observations, it may be concluded that the sentences given by ECtHR on Şahin Alpay v. Turkey and Mehmet Hasan Altan v. Turkey cases would not seem to denote particularly relevant legal profiles, given that, in essence, they limited themselves to confirming the international level of ascertaining the aforementioned violations of fundamental rights, already established at domestic level by the Turkish Constitutional Court.

4. (Follows) Separate Opinions

Two separate opinions are attached to the sentences in question here: the first signed by the ad hoc judge Ergül, with which he justified his vote against court's arrests; the second signed by the President of the Section Spano, but shared by judges Bianku, Vučinić, Lemmens and Griţco, with whom they intended to reply to the disputes of the dissenting magistrate.

More specifically, the ad hoc judge shared the determinations of the Court regarding the violations it qualified as inadmissible or unfounded without further investigation, but strongly criticized the ascertainment of the alleged injuries to the Ankara government with reference to articles 5, par. 1, and 10 ECHR. And it did so on the basis of a motivation concerning the admissibility of the appeals and another concerning the relative merit.

In the first place, Judge Ergül denounced the inadmissibility of de quibus appeals, both for non-exhaustion of internal remedies, and because, according to him, the instants lacked the status of victim. With regard to the first point, he observed that those concerned, before referring to Strasbourg judges, would have to wait for the results of their second appeal to the Turkish Constitutional Court, which was primarily intended to have the arrests of the latter verified, by the courts of merit. This element, which, as has been shown, was the main source of ECHR violations, ascertained by Strasbourg judges. As for the second, however, the ad hoc judge found that the finding of violations, made by the domestic Council, would have deprived the applicants of the status of victims, given that the responsibility of the respondent state would already have been ascertained internally. Moreover, to support such positions, the writer of this separate opinion carried out a broad recognition of

ECtHR's jurisprudence on the principle of subsidiarity and on the secondary role of the latter which would rape it, with respect to the primary responsibility of Member States in ensuring the concrete application of conventional rights.

On the level of merit considerations, however, the ad hoc judge intended to draw Court's attention to the seriousness of the threat to the security and independence of the nation. This was faced by the Turkish government following the events of July 15, 2016 justified the restrictions on subjective legal positions. They were established by ECtHR, as absolutely necessary to prevent the subversion of constitutional order, within the country concerned. According to the author, therefore, the rights considered could have been considered expendable in the name of preserving state structures and general guarantee of fundamental rights that they would ensure.

In the face of this, the President of the Section Spano replied, reconsidering the principle of subsidiarity, referred to the ad hoc judge, to reaffirm the fundamental role of ECtHR, as the last guarantor of the concrete application o rights contained in the convention. He also condemned the considerations proposed by the latter regarding art. 15 ECHR, noting that this rule does not constitute a sort of “blank authorization” so that the governments concerned can freely take any urgent measures they deem appropriate, but how, instead, the derogatory power disclosed therein is subject to peculiar and unavoidable constraints and limitations, on which the last scrutiny can only be given, once again, to ECtHR.

From the separate opinions just taken into consideration, it would not seem, however, to emerge particular elements of innovation with respect to the examined profiles of de quibus judgments. These, in fact, would not seem, in any case, particularly satisfactory, if compared with the theory of inadmissibility rulings that preceded them, also because ECtHR, in its assessments, adhered almost slavishly to the surveys carried out, at a domestic level, by the Turkish Constitutional Court.

5. Conclusions. A Turning More Apparent Than Real Point

The proclamation of a state of emergency in Turkey, following the failed coup on 15 July 2016, involved the adoption by the government of numerous emergency measures, which consistently limited the exercise of multiple fundamental human rights, guaranteed both by the European Convention for the Protection of Human Rights and Fundamental Freedoms and by the International Covenant on Civil and Political Rights. Moreover, they were accompanied by a vast purge campaign of the domestic magistrate order and a systematic destructuring of judicial guarantees[14], related to emergency initiatives.

In the face of so much, then, various individuals, variously affected by de quibus measures, also considering the difficulty of identifying effective internal redress tools, have started to apply directly to ECtHR, to see the violation of their own fundamental rights. However, Strasbourg judges, in a first phase, have systematically rejected the appeals in question for inadmissibility, due to the non-exhaustion of internal remedies, pursuant to art. 35, first paragraph, ECHR. In fact, they considered conferring the purpose, firstly, the individual and direct appeal to the Turkish Constitutional Court and, subsequently, the newly established administrative appeal to the Inquiry Commission on state of emergency measures. And this, despite raising doubts related both to the independence and impartiality of the judging colleges, and to the possibility of effectively remedying the violations of the denounced human rights.

However, with the "twin" sentences issued by ECtHR, on the same date, on Şahin Alpay v. Turkey and Mehmet Hasan Altan v. Turkey cases, it was received, for the first time, the international ascertainment of ECHR violations perpetrated by the Turkish government, i.e. the correct application of emergency measures. Moreover, it would seem to be a more apparent than a real turning point, because, first of all, these rulings did not change Court's consideration of individual and direct recourse effectiveness to the domestic Council. This, in fact, was considered, once again, as conferring with respect to the rule of the previous exhaustion of internal remedies, despite the merit courts having prevented, with various stratagems, the implementation of Constitutional Coast sentences. Secondly, the evaluations

[14]Significant, in this sense, would appear the indications found in a recent report by Amnesty International, where systematic practices of arbitrary arrests and detentions are denounced and documented, aimed at spreading a climate of fear, functional to the repression of political dissent. To this end, see the Amnesty International report of 26 April 2018, weathering the Storm. Defending Human Rights in Turkey's Climate of Fear, pp. 7ss.

expressed by ECtHR regarding the de quibus cases have slavishly resumed those formulated in this regard by the Turkish Consult. Strasbourg judges, in other words, have relied on the latter, without spreading in the analysis of very important problematic issues, such as, for example, the correspondence of the institutional danger faced by the Turkish State to the notion of public emergency, opened art. 15 ECHR. In essence, ECtHR did not appear to have a real autonomy of judgment, compared to considerations developed in the domestic Constitutional Court, thus remaining consistent with its consolidated self-restraint, already amply demonstrated in relation to the Turkish state of exception.

For these reasons, the "twin" judgments, examined in this paper, do not seem to have marked the much hoped-for turning point in Court's attitude. Nevertheless, as this is the first occasion that conventional violations by Turkish emergency measures are verified, even at international level, it would be desirable for them to herald a more rigorous future control of the de quo state of exception, by ECTHR.

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