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*States of emergency and fundamental rights*

**Turkey**

**Fundamental Rights during States of Emergency in  
Turkey**

**Prepared by: Ali Rıza Çoban**

# Fundamental Rights during States of Emergency in Turkey

*Ali Rıza ÇOBAN\**

## 1. THE LAW

### *Relevant Provisions of the Constitution*

#### **Article 15: Suspension of the Exercise of Fundamental Rights and Freedoms**

In times of war, mobilisation, martial law, or state of emergency the exercise of fundamental rights and freedoms can be partially or entirely suspended, or measures may be taken, to the extent required by the exigencies of the situation, which derogate the guarantees embodied in the Constitution, provided that obligations under international law are not violated.

Even under the circumstances indicated in the first paragraph, the individual's right to life, and the integrity of his material and spiritual entity shall be inviolable except where death occurs through lawful acts of warfare; no one may be compelled to reveal his religion, conscience, thought or opinion, nor be accused on account of them; offences and penalties may not be made retroactive, nor may anyone be held guilty until so proven by a court judgement.

#### **Procedure Governing Emergency Rule**

#### **Article 119: Declaration of State of Emergency on Account of Natural Disaster or Serious Economic Crisis**

In the event of natural disaster, dangerous epidemic diseases or a serious economic crisis, the Council of Ministers, meeting under the chairmanship of the President of the Republic may declare a state of emergency in one or more regions or throughout the country for a period not exceeding six months.

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\* Rapporteur at the Constitutional Court of Turkey.

**Article 120: Declaration of State of Emergency on Account of Widespread Acts of Violence and Serious Deterioration of Public Order**

In the event of serious indications of widespread acts of violence aimed at the destruction of the free democratic order established by the Constitution or of fundamental rights and freedoms, or serious deterioration of public order because of acts of violence, the Council of Ministers, 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.

**Article 121: Rules Relating to the State of Emergency**

(1) In the event of a declaration of a state of emergency under the provisions of Articles 119 and 120 of the Constitution, this decision shall be published in the Official Gazette and shall be submitted immediately to the Turkish Grand National Assembly for approval. If the Turkish Grand National Assembly is in recess, it shall be assembled immediately. The Assembly may alter the duration of the state of emergency, extend the period, for a maximum of four months only, each time at the request of the Council of Ministers, or may lift the state of emergency.

*(2) The financial, material and labour obligations which are to be imposed on citizens in the event of the declaration of state of emergency under Article 119 and, applicable according to the nature of each kind of state of emergency, the procedure as to how fundamental rights and freedoms shall be restricted or suspended in line with the principles of Article 15, how and by what means the measures necessitated by the situation shall be taken, what sort of powers shall be conferred on public servants, what kind of changes shall be made in the status of officials, and the procedure governing emergency rule, shall be regulated by the Law on State of Emergency.*

**(3) During the state of emergency, the Council of Ministers meeting under the chairmanship of the President of the Republic, may issue decrees having the force of law on matters necessitated by the state of emergency. These decrees shall**

**be published in the Official Gazette, and shall be submitted to the Turkish Grand National Assembly on the same day for approval; the time limit and procedure for their approval by the Assembly shall be indicated in the Rules of Procedure.**

**Article 122: Martial Law, Mobilization and State of War**

(1) The Council of Ministers, under the chairmanship of the President of the Republic, after consultation with the National Security Council, may declare martial law in one or more regions or throughout the country for a period not exceeding six months, in the event of widespread acts of violence which are more dangerous than the cases necessitating a state of emergency and which are aimed at the destruction of the free democratic order or the fundamental rights and freedoms embodied in the Constitution; or in the event of war, the emergence of a situation necessitating war, an uprising, or the spread of violent and strong rebellious actions against the motherland and the Republic, or widespread acts of violence of either internal or external origin threatening the indivisibility of the country and the nation. This decision shall be published immediately in the Official Gazette, and shall be submitted for approval to the Turkish Grand National Assembly, on the same day. If the Turkish Grand National Assembly is in recess, it shall be assembled immediately. The Turkish Grand National Assembly may, when it deems necessary, reduce or extend the period of martial law or lift it.

**(2) During the period of martial law, the Council of Ministers meeting under the chairmanship of the President of the Republic may issue decrees having the force of law on matters necessitated by the state of martial law.**

**(3) These decrees shall be published in the Official Gazette and shall be submitted for approval to the Turkish Grand National Assembly on the same day. The time limit and procedure for their approval by the Assembly shall be indicated in the Rules of Procedure.**

Extension of the period of martial law for a maximum of four months each time, shall require a decision by the Turkish Grand National Assembly. In the event of state of war, the limit of four months does not apply.

(4) In the event of martial law, mobilization and state of war, the provisions to be applied and conduct of affairs, relations with the administration, the manner in which freedoms are to be restricted or suspended and the obligations to be imposed on citizens in a state of war or in the event of emergence of a situation necessitating war, shall be regulated by law.

(5) The Martial Law Commanders shall exercise their duties under the authority of the Chief of the General Staff.

#### **Article 148: Functions and Powers (of the Constitutional Court)**

(1) The Constitutional Court shall examine the constitutionality, in respect of both form and substance, of laws, decrees having the force of law, and the Rules of Procedure of the Turkish Grand National Assembly. Constitutional amendments shall be examined and verified only with regard to their form. **However, no action shall be brought before the Constitutional Court alleging unconstitutionality as to the form or substance of decrees having the force of law issued during a state of emergency, martial law or in time of war.**

#### **Article 91: Authorisation to Enact Decrees Having the Force of Law**

(1) The Turkish Grand National Assembly may empower the Council of Ministers to issue decrees having the force of law. *However, the fundamental rights, individual rights and duties included in the First and Second Chapter of the Second Part of the Constitution and the political rights and duties listed in the Fourth Chapter, cannot be regulated by decrees having the force of law except during periods of martial law and states of emergency.*

## **2. HUMAN RIGHTS DURING THE PUBLIC EMERGENCIES IN TURKEY**

Two different emergency rules are embodied in Turkish law, namely state of emergency and martial law. State of emergency can be declared by two different reasons; either because of natural disaster, dangerous epidemic diseases or a serious

economic crisis or because of widespread acts of violence aiming the destruction of the free democratic order. The power to declare state of emergency is belong to the Council of Ministers meeting under the chairmanship of the President of the Republic. But in the case of widespread acts of violence before declaring state of emergency, the issue should be consulted with the National Security Council.

Martial law can be declared in the event of widespread acts of violence which are more dangerous than the cases necessitating a state of emergency and aiming at the destruction of free democratic order or the fundamental rights and freedoms embodied in the Constitution; or in the event of war, the emergence of a situation necessitating war, an uprising, or the spread of violent and strong rebellious actions against the motherland and the Republic, or widespread acts of violence of either internal or external origin threatening the indivisibility of the country and the nation. Martial law also can be declared by the Council of Ministers meeting under the chairmanship of the President of the Republic after consultation with the National Security Council.

Both decisions of state of emergency and martial law are published in the Official Gazette and submitted to the Parliament for approval. The Parliament may reduce or extent the period of public emergency or lift it as well as it may approve the decision. So, the declaration of public emergency can be reviewed by the legislative, but not by the judiciary. The Council of State (The highest administrative court) rejected to review a decision to declare martial law by the Council of Ministers meeting under the chairmanship of the President on the ground that after approval of such decision by the Parliament it became a legislative act and it does not have competence to review legislative acts. The approval decision of the parliament also cannot be reviewed by the Constitutional Court because ratification decisions are taken as parliamentary resolutions not as laws. And save the exceptions, parliamentary resolutions cannot be reviewed by the Constitutional Court in Turkish Law.

The Turkish Constitution includes a derogation clause during public emergencies in Article 15. Article 15 of the Turkish Constitution is almost identical with the Article 15 of the European Convention on Human Rights. According to this

Article during public emergencies the exercise of fundamental rights and freedoms can be partially or entirely suspended, or measures may be taken, to the extent required by the exigencies of the situation, which derogate the guarantees embodied in the Constitution, provided that obligations under international law are not violated.

The limits of derogation power are principle of proportionality and obligations under international law. Fundamental rights can be restricted, during the public emergencies, only proportionate with the exigencies of the situation. Such derogation power cannot be used arbitrarily. Furthermore, obligations arising from international law should be observed.

Article 15 of the Constitution exempted some fundamental rights from this derogation power. According to the Article, during the public emergencies *«the individual's right to life, and the integrity of his material and spiritual entity shall be inviolable except where death occurs through lawful acts of warfare; no one may be compelled to reveal his religion, conscience, thought or opinion, nor be accused on account of them; offences and penalties may not be made retroactive, nor may anyone be held guilty until so proven by a court judgement»*.

There is a small difference between the lists of inviolable rights during public emergencies in the Turkish Constitution and the European Convention. The rights listed in Article 15 of the Turkish Constitution are the right to life, the right to physical and spiritual integrity of the person, the right not to be compelled to reveal personal religion, conscience, thought or opinion, the right to protection from retroactive criminal laws, and the right to presumption of innocence. The rights listed in Article 15 of the European Convention are the right to life, the right not to be tortured, the right not to be held in slavery or servitude, and the right not to be punished without law.

Although the Constitution clearly defined the limits of the power to derogate from fundamental rights during public emergencies, there are structural problems in Turkey in terms of the judicial control of whether those limits are observed in practice. During the public emergencies, the Council of Ministers meeting under the

chairmanship of the President of the Republic may issue decrees having the force of law on matters necessitated by the state of emergency or martial law. In order to issue such decrees there is no need to authorisation of parliament by law. Therefore, the Council of Ministers meeting under the chairmanship of the President may enact decrees having the force of law during public emergencies without seeking an authorisation from the Parliament.

Although the fundamental rights and freedoms except social rights cannot be regulated by ordinary decrees having the force of law, they can be regulated by the decrees having the force law issued during public emergencies (Article 91). Furthermore, these decrees cannot be reviewed by the Constitutional Court (Article 148). Considering these points together, it can be said that the Turkish Constitution left fundamental rights limitations completely out of the judicial control during public emergencies. The Constitution made decrees having the force of law issued during public emergencies subject to legislative review. According to Articles 121 and 122 decrees having the force of law issued during public emergencies are published in the Official Gazette, and are submitted to the Turkish Grand National Assembly on the same day for approval. The Parliament should discuss the issue within 30 days according to the Rules of Procedure. The parliament may approve, change or refuse a decree. The decrees rejected by the Parliament cease to have effect on the day of the publication of the decision in the Official Gazette.

Turkey has applied state of emergency rule for almost 15 years in some parts of the country between 1987 and 2002. During that period, too many state of emergency decrees were issued and fundamental rights were restricted by those decrees. Furthermore, the Law on State of Emergency (The Law No:2935) was enacted during military rule in 1983 and was left outside the constitutionality review of the Constitutional Court with Provisional Article 15 of the Constitution until constitutional amendment in 2001. This law also includes some restrictions for fundamental rights and judicial review of those restrictions was not possible until 2001. They have not been reviewed after the constitutional amendment either, because such provisions can only be

brought before the Constitutional Court through concrete review and it has not been possible since there has been no public emergency rule after the constitutional amendment.

But the Constitutional Court reviewed some state of emergency decrees during nineties on the ground that they were not decree of state of emergency. According to the judgement of the Constitutional Court, state of emergency decrees may only include provisions which can be applicable in the places where state of emergency declared and during the state of emergency period. Therefore, if a state of emergency decree includes provisions applicable outside the places where state of emergency declared, it cannot be regarded as a state of emergency decree, and the Court may review constitutionality of such provisions. The Court annulled some provisions of the Decree No:430 on the ground that they have effect outside the state of emergency region<sup>1</sup>. The Court also ruled that state of emergency decrees cannot include provisions amending laws because they can only be issued to be in force during the state of emergency period, and if they amend law they would have effect exceeding the state of emergency period<sup>2</sup>.

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<sup>1</sup> Decision of the CCT, Date 3.7.1991, Registry No: 1991/6, Decision No: 1991/20

<sup>2</sup> Decision of the CCT, Date 10.1.1991, Registry No: 1990/25, Decision No: 1991/1