

# When the Gloves Go Off? Turkey Intends to Suspend the European Convention on Human Rights

Could the state of emergency and the suspension of the ECHR justify the measures which have been adopted in Turkey in the past days (removal of public servants and teachers, purge in the judiciary, ban on academic travel, etc.)? With the ECHR suspended, are the (legal) gloves off in Turkey? Can the government use just any means it finds appropriate to suppress those segments of society in which it sees a threat? This reflection shows that all these questions have to be answered in the negative. It gives more details on the topic discussed in [ILR#5](#).

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On 20 July 2016, the Turkish president Recep Tayyip Erdogan declared three-month state of emergency. One day later, Turkey announced its intention to suspend the 1950 European Convention on Human Rights (ECHR), which it had ratified in 1954. The measures follow a failed military coup aimed at ousting Erdogan's government which took place on 15 July 2016. They are, according to [Erdogan](#), being taken to counter threats to democracy, the rule of law and human rights in Turkey.

## Turkey and the ECHR – An Uneasy Relationship

Turkey has been party to the ECHR for 62 years now. Its relationship to the Convention and to the European Court of Human Rights (ECtHR) in Strasbourg, established under the Convention, has never been an easy one. Turkey is the State against which the highest number of [inter-state](#) complaints and one of the highest numbers of individual complaints have been filed over the years. On 1 January 2016, the ECtHR registered [8648](#) pending applications against Turkey (204 against the Czech Republic at the same date).

Turkey is the absolute champion in the number of judgments (i.e. decisions on the merit) – since 1987, when Turkey accepted the right to individual petition, almost 3.000 judgments have been rendered by the ECtHR in cases against Turkey. As [Cali](#) indicates, in 87% of the cases, the Court has found at least one violation. These violations often relate to

some of the most fundamental provisions of the ECHR, such as the right to life (Article 2), prohibition of torture (Article 3) or freedom of expression (Article 10).

Certain cases – especially those concerning the occupation of Northern Cyprus ([Loizidou v. Turkey](#) – 1996, [Cyprus v. Turkey](#) – 2001), the use of force in the Kurdish regions and outside Turkey ([Issa and Others v. Turkey](#) – 2004) and the treatment of political opponents ([Öcalan v. Turkey](#) – 2005) touch upon highly sensitive political issues. The level of implementation of these and similar judgments is rather low, which ranks Turkey among the countries with the highest number of unenforced judgments (see also [here](#)).

## Turkey and the Derogation of the ECHR – A Reluctant Champion

Turkey is also, together with the United Kingdom, at the top of the list of countries having resorted the most frequently to the suspension (also called the “derogation”) of the European Convention on Human Rights. The derogation is foreseen in Article 15 of the ECHR which stipulates that:

*In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.*

The derogation of the Convention is not the same thing as a denunciation of (withdrawal from) the Convention. The former is temporary, the latter is definitive. The former means a time-limited non-application of certain provisions of the Convention, the latter entails the exit from the Convention system as a whole. During a derogation, the Convention remains in force but some of its provision cannot be used. After a withdrawal, the Convention does not apply any longer.

The derogation of the ECHR is linked to strict conditions.

- ◆ It can only be resorted to in times of emergency.
- ◆ It has to be necessary in and proportionate to this emergency.
- ◆ It may not entail deviations from other obligations under international law, for instance obligations stemming from other human rights treaties.
- ◆ It may never suspend the application of certain fundamental rights, such as the right to life or, interestingly enough, the prohibition of the death penalty.
- ◆ It has to be publicly declared and communicated to the Secretary General of the Council of Europe (e).

A derogation does not preclude in any way the right of individuals, or other States, to file a complaint against the derogating State to the European Court of Human Rights. Nor does it preclude the right of the Strasbourg Court to consider complaints against this State. When doing is, the Court may also consider the validity and lawfulness of the derogation itself or of specific measures adopted under the derogation umbrella.

Since the early 1960s, Turkey has repeatedly availed itself of the possibility to suspend the ECHR. The Council of Europe [database](#) gives the total number of 15 derogations, covering the total period of 33 years. This is more than half of the period since the Turkish ratification of the European Convention in 1954. The most recent (up to this week) derogation, introduced in 1990, was withdrawn in 2002. Turkey is thus currently nearing the end of the longest period of normalcy in its modern history, spanning over 14 years (2002-2016).

Most of the Turkish derogations have been justified either by the armed clashes in the South-Eastern part of the country or by other instances of civil unrest. In one instance, in 1963, Turkey resorted to the derogation following an attempted military coup against the then government. The derogation and the state of siege which had been proclaimed after the attempted coup, were originally to last for one month. In the end, they remained in force for 14 months.

Some of the Turkish derogations have been considered by the ECtHR. This is mainly the case of the most recent (1990-2002) derogation. In a series of cases starting with [Aksoy v. Turkey](#) (1996), the ECtHR has held that some of the measures introduced as part of the derogation package – usually prolonged periods of detention – were not required by the exigencies of the situation and, thus, their application constituted not a lawful suspension, but an unlawful violation of the Convention.

## **Turkey and the Planned Derogation of the ECHR – An Exercise with Limits**

Though announcing its intention to derogate from the ECHR, Turkey has not made the text of the derogatory note public yet. We therefore do not know which provisions of the Convention will be suspended and what it will exactly mean for the lives of people in Turkey (and of those visiting Turkey, as the effects of the derogation will certainly not be limited to the Turkish citizens). Let us nevertheless consider what it could mean and, also, what the limits are that the Turkish authorities cannot overstep.

The derogation has to respond to emergency. It can only be resorted to “*in time of war or other public emergency threatening the life of the nation*”. A military coup, even a failed one, certainly can meet this condition, especially if it is followed by armed clashes between the government and armed opposition forces. Yet, once the coup is effectively quashed, as it seems to be the case in Turkey, the State has to have cogent reasons to maintain (and, even, introduce) derogatory measures. Claiming that those directly responsible for the coup were just the top of the iceberg and that there is a much wider anti-governmental movement in the society might in these circumstances be quite a useful legal strategy to justify why the state of emergency is not over and the derogation has to stay (or to take place). This claim however should not be taken at its face value. It has to be supported by reliable evidence that other States and possibly the ECtHR will be able to consider.

The derogation has to be proportionate to the severity of the emergency. And it has to have some direct link to this emergency in the first place. In other words, a State can suspend only *such provisions* whose strict application might prevent it from effectively suppressing the emergency. It can suspend them only to *such extent* that is absolutely necessary to achieve this aim. The term extent relates not only to the degree in which a provision may be suspended (complete suspension, some deviation, etc.) but also to the territory in which and the time over which the derogation can apply. In this respect, depicting the threat – rightly or wrongly – in dark and intensive colours might again be a natural inclination of a derogating State. An inclination which, also again, does not need to be accepted as legitimate.

The derogation may not entail (and may not justify) deviations from other obligations under international law. The provisions of the ECHR are quite similar to those we find in some other human rights treaties, typically the 1966 UN International Covenant on Civil and Political Rights (ICCPR). States which suspend the ECHR but fail to suspend treaties with a similar content violate the requirement of consistency set by Article 15 of the ECHR. Yet that is what Turkey, which is Party to the ICCPR since 2003, seems to intend to do, as it has so far only announced the intention to suspend the ECHR (not any other treaty).

Most of the provisions of the ECHR may be derogated from. Some, however, may not, as they enshrine absolutely and non-derogable rights. These rights can never, even in the worst emergency, be suspended. The ECHR in its Article 15 contains a relatively short list of such rights encompassing the right to life, the prohibition of torture, the prohibition of slavery, the prohibition of retroactivity, the prohibition of the death penalty and, *de facto*, the prohibition of discrimination. The Turkish Constitution, in its [Article 15](#) adds two more rights: the right not to be compelled to reveal one’s religion,

conscience, thought or opinion, nor be accused on account of them; and the right not to be held guilty until so proven by a court judgment.

If Turkey wanted to touch upon one of the rights mentioned in Article 15 of the ECHR, it could not do so via a derogation. It would have to fully withdraw from the ECHR. Yet, even if it did so, the withdrawal (denunciation) would only take effect six months after its notification. And it would not release Turkey from the responsibility for violations of the ECHR committed in the meantime which could still be considered by the ECtHR. A denunciation of the ECHR would also automatically entail the loss of membership in the Council of Europe.

If Turkey decides not to leave the system, it still has a wide range of human rights provisions from which it can derogate. Based on the past practice, we may expect that these provisions would include Article 5 – Right to liberty and security (prolonged detentions?), Article 6 – Right to a fair trial (speedy proceedings?), Article 8 – Right to respect for private and family life (wiretapping?), Article 10 – Freedom of Expression (mass further limits on the criticism of the president?) or Article 11 – Freedom of Assembly and Association (prohibition of mass meetings?, dissolution of political parties deemed to support the putschists?). If suspending these rights, Turkey obviously has to keep with all the conditions we have gone through.

Finally, the derogation has to be notified to the Secretary General of the Council of Europe. A mere notification of the intention to derogate is not sufficient. The relevant note has to contain details that would allow other States, and the ECtHR, to consider whether the conditions stated above have been met.

## Turkey and the Planned Derogation of the ECHR – An Impossible Task?

It is still not fully clear, whether a State can use a derogation to justify measures which were introduced prior to the derogation. This question is highly relevant with respect to Turkey. The measures introduced in the aftermath of the attempted coup, i.e. the dismissal of thousands of civil servants and teachers, the purges in the judiciary, the ban on any academic travel, clearly touch upon various human rights, including the right to a fair trial, freedom of expression and, arguably, the prohibition of discrimination.

If they are to be justified by the (still) upcoming derogation, Turkey would not only have to demonstrate that a derogation can produce effects retroactively. It would also have to show that:

- ◆ the adopted measures, many of which seem to be permanent in nature, are truly necessary to suppress the (temporary) emergency;
- ◆ these measures are proportionate to the severity of this emergency;
- ◆ these measures do not entail deviations from other obligations, for instance those under the ICCPR; and
- ◆ these measures do not touch upon any of the absolute, non-derogable rights, such as the prohibition of discrimination.

Whatever content the derogatory note will have in the end, it is quite clear that using it to justify the measures which have already been taken, as well as some of those which are envisaged (the reestablishment of the death penalty) will not be an easy task. In some respect, it might even turn out as a wholly impossible task.

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