



DETENTION IN CUSTODY BEFORE THE FIRST APPEARANCE UNDER THE STATE OF EMERGENCY IN TURKEY

1. Introduction

The European Convention on Human Rights (ECHR) is an international treaty that aims to protect human rights and ensure the implementation of fundamental rights in Europe. It applies to 47 contracting states.¹ Although the Convention secures the protected rights of individuals, governments may derogate from their Convention obligations, in a temporary, limited and supervised manner, albeit only in exceptional circumstances. By explicitly permitting the possibility of a derogation pursuant to Article 15, the Convention enables contracting states to take measures that would otherwise be prohibited and amount to infringements of their Convention obligations. However, the Convention retains control over such situations by prescribing certain procedural criteria on states which adopt such measures.

On July 20th, 2016, Turkey declared a State of Emergency following the coup attempt on July 15, 2016. Subsequently, on July 21st, the Turkish authorities notified the Council of Europe of their intention to derogate from their obligations under the Convention in reference to Article 15 ECHR. The Turkish authorities did not specify which ECHR articles they wished to derogate from.² By following the *de facto* actions of the Turkish Government, it is evident that Turkey has relied on the derogation clause prescribed by the ECHR, without specifically mentioning

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¹ 47 Member States, <https://www.coe.int/en/web/portal/47-members-states-accessed>, 14.12.2017.

² Since the declaration of a state of emergency, the Turkish government has sent five official communications to the Council of Europe.

which articles are being set aside. However, the ECHR requires that any derogation actions must comply with defined procedural criteria.

This article examines one specific measure taken by the Turkish Government for over six months, namely extending the time for which a person can be held in custody prior to their first court appearance. The authorities extended the relevant period up to 30 days during the state of emergency. This has attracted the world's attention, as it poses a threat to a fundamental individual right, namely the right to liberty which is protected under Article 5 ECHR. This inspired the research question which this article addresses, namely: 'Are Turkey's rules on detention in custody prior to a first court appearance, adopted following the state of emergency, compliant with the ECHR's derogation criteria?'

The ECHR is chosen as a legal benchmark for several reasons. Firstly, as mentioned above, the Convention provides a healthy and solid foundation for protecting human rights by applying European standards³. Therefore, it can be considered as a comprehensive system for the protection of human rights. Additionally, the Constitution of Turkey prescribes that, in the event of a conflict between international agreements and domestic laws on fundamental rights and freedoms, the former prevails⁴. Therefore, notwithstanding the enactment by the Turkish legislature of a certain regulation during a state of emergency, the Turkish courts are obliged to apply the ECHR insofar as the national rule is inconsistent with the ECHR. Accordingly, Turkey must comply with its obligations under the Convention perpetually. Furthermore, the judgments and decisions of the European Court of Human Rights (ECtHR) have *res interpretata* effect, which means that any contracting states that are not involved in the case before the ECtHR should nonetheless still treat such judgments as persuasive authority with respect to third-party states.⁵ States should still consider the ECtHR's judgments law even if they were handed down with respect

³ M. Nastic, *The Importance of The European Convention For The Protection of Human Rights and Fundamental Freedoms in Constitutional Law and The Constitutional System of The Republic of Serbia*, LP 7 2009, p. 32.

⁴ Article 90 of the Constitution of the Republic of Turkey of 1982.

⁵ J. Petrov, *Impact of the ECHR Case Law On National Legal Orders: The Role of National Authorities, "Jurisprudence"* 2016, vol. 1.

to another contracting state.⁶ Thus, both the laws and the practices of the Convention are considered as significant reinforcement mechanisms for individuals appearing before the Turkish national courts.

This article analyses the normal procedure governing detention in custody prior to first appearances in order to illustrate the significant difference between the normal procedure and the procedure under the state of emergency. It then examines the pre-requisites for any legitimate derogation from the ECHR, by considering what can constitute legitimate grounds for a derogation, particularly in light of Turkey's declaration on the state of emergency and the legality thereof. Thereafter, it analyses the scope and implementation of the state of emergency's procedure governing detention in custody prior to a first appearance and discusses whether Turkey has gone beyond what is strictly required. This is followed by an analysis of whether this measure is consistent with Turkey's other international obligations, particularly in reference to the International Covenant on Civil and Political Rights (hereinafter ICCPR). Finally, it draws together the various discussions and offers an overall evaluation in the concluding part.

2. Detention in custody according to the ECHR

Article 5 ECHR ("Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: (...) c. the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;") not only aims to guarantee that everyone has the right to individual liberty and security but also to prevent unjustified and unlawful deprivations of liberty. It defines exceptional situations that allow for individuals to be lawfully deprived of these fundamental rights and Article 5(1)(c)

⁶ J. Petrov, [2016].

prescribes the requirements applicable to preventive custody and detention on remand (aka. pre-trial detention).

As shown, both measures aim to bring a person whose right to liberty has been affected before the competent legal authority on suspicion of having committed an offence.⁷ The competent authority is a judge or other officer authorized by law to exercise judicial power pursuant to Art. 5(3) ECHR,⁸ which also states that an arrested person must appear before a judge promptly. This is referred to in academic and vocational literature as a ‘first appearance.’ This mechanism functions as a judicial safeguard against executive arbitrariness, and functions as an important assurance for individuals that any ECHR-compliant procedure is not negotiable and cannot be waived.⁹ It is an automatic judicial control that requires a judge *ex officio* to check the lawfulness of any arrest and view the physical appearance of the suspect.

The ECtHR has already held that a detention period which lasted for four days and six hours prior to a first appearance amounted to a violation of Article 5(3).¹⁰ However, it was not clear from the language of the Court exactly which time limit would be permitted under Article 5(3). Subsequently, the Court held that any period exceeding four days would be deemed to constitute a violation of the right of individual liberty.¹¹ In other words, in the eyes of the ECtHR, a suspect must be brought before a court within four days in order to comply with the ECHR’s requirements on arrest and the lawful deprivation of liberty.

3. Derogation from the ECHR

Article 15(1) ECHR specifies certain circumstances in which a contracting state may decide to take measures derogating from its obligations

⁷ Judgment of the European Court of Human Rights, *Ječius v. Lithuania* (EU:C:2000:34578:9:50).

⁸ D. Ehlers, *European Fundamental Rights and Freedoms*, Berlin 2007, p. 154.

⁹ Guide on Article 5 of the Convention; Right to Liberty and Security para. 132; *Bergmann v. Estonia*, (EU:C:2008:2192:03:45).

¹⁰ Judgment of the European Court of Human Rights, *Brogan v. UK* (EU:C:1988:11:117:62).

¹¹ Judgment of the European Court of Human Rights, *Năstase-Silivestru v. Romania* (EU:C:2011:1689:32).

to secure certain rights and freedoms under the Convention.¹² The guideline on Article 15 ECHR prescribes three cumulative conditions that must be complied with before a derogation will be lawful. These are examined in turn: '(i) it must be in time of war or other public emergency threatening the life of the nation; (ii) the measures taken in response to that war or public emergency must not go beyond the extent strictly required by the exigencies of the situation; and (iii) the measures must not be inconsistent with the State's other obligations under international law.'¹³

3.1. War or state of emergency

As regards the first requirement, derogation is possible in two situations, namely war or other public emergencies that threaten the life of the nation. The former refers to a state of armed conflict between different countries or different groups within a country. Regarding the latter, the Court has taken into account the customary meaning of a public emergency threatening the life of the nation. In *Lawless v. Ireland*, the Court defined a state of emergency as an 'exceptional situation of crisis or emergency that has an influence over the entire population and constitutes a severe danger of a threat to the organized collective life of the community of which the State is composed.'¹⁴ Additionally, the emergency must be imminent and actual. A contracting state is entitled to declare an emergency in relation to a particular region where the imminent and actual danger occurred, as was the case in *Ireland v. the United Kingdom*, where the crisis was confined to the border of a specific territory. In this case, terrorist activities justified the declaration of a public emergency in a specific region, since they posed an acute danger to the country's territorial integrity.

¹² Ch. Walter [et.al.], *Terrorism as a Challenge for National and International Law: Security versus Liberty?*, New York 2004, p. 628.

¹³ Council of Europe, *Guide on Article 15 of the Convention; Derogation in time of Emergency*, Strasbourg 2017.

¹⁴ Judgment of the European Court of Human Rights, *Lawless v. Ireland* (EU:C:1961:15:28).

3.1.1. Legality of the state of emergency

The relevant legal justification for a state of emergency can be found in Articles 119-121 of the Turkish Constitution, which refers to the extraordinary situations, e.g., where a state of emergency can be declared during a natural disaster or a serious economic crisis. Conversely, Article 120 regulates declarations of a state of emergency with respect to widespread acts of violence and serious disturbances of public order. Accordingly, the Council of Ministers may declare a state of emergency for a period not exceeding six months in the event of serious indications of widespread acts of violence aimed at destroying the free democratic order established by the Constitution or fundamental rights and freedoms, or a serious deterioration in public order. Furthermore, Article 121 requires that a declaration of a state of emergency must be published in the *Official Gazette* and immediately submitted for approval by the Grand National Assembly of Turkey. The Assembly may alter the duration of a state of emergency by extending the period for a maximum of four months each time, at the request of the Council of Ministers. Alternatively, it may completely lift the state of emergency.

On July 20, 2016, the Turkey's Council of Ministers declared a state of emergency,¹⁵ pursuant to Article 120 of the Constitution, for a duration of three months, following a large-scale coup attempt that occurred on July 15, 2016. It was alleged that the coup attempt was led by the Peace at Home Council, an organization within the Turkish Armed Forces. The decision was published in the *Official Gazette* and approved by the Assembly on July 21, 2016, which was effective immediately for a period of three months.¹⁶ The duration of the state of emergency was extended

¹⁵ *The Official Gazette* of the Republic of Turkey on 20 July 2016, Council of Ministers's Decision No. 2016-9064.

¹⁶ Note Verbale; Annex to Notification JJ8187C Tr./005-191 dated 22 July 2016, ETS No. 5, Article 15.

respectively on October 19, 2016,¹⁷ January 19, 2017,¹⁸ April 19, 2017,¹⁹ July 21, 2017,²⁰ and lastly on October 19, 2017.²¹

3.1.2. Threatening the life of the nation and notification to the Council of Europe

In the aftermath of the failed July 15 coup, the severity of the attempt became apparent. The Peace at Home Council had targeted not only state institutions and high-official representatives but also aimed to seize control of several places across the country. It was a nation-wide crisis that posed a danger to the entire population by national armed forces. As a consequence of the attempt, over 300 people were killed and more than 2,100 were injured.²² Therefore, it was evident that an imminent and actual danger existed which placed the future of the country at risk, as prescribed by the ECHR. Given the situation, necessary precautions had to be taken, namely a state of emergency.

On July 21 2016, the day after the first state of emergency decision was declared, the Turkish authorities notified the Secretary General of the Council of Europe about the derogation from the ECHR, in reliance on Article 15.²³ Subsequently, Turkey sent five official communications to the

¹⁷ *The Official Gazette* of the Republic of Turkey on 13 October 2016, Council of Ministers's Decision No. 1130.

¹⁸ *The Official Gazette* of the Republic of Turkey on 05 January 2017, Council of Ministers's Decision No. 1134.

¹⁹ *The Official Gazette* of the Republic of Turkey on 18 April 2017, Council of Ministers's Decision No. 1139.

²⁰ *The Official Gazette* of the Republic of Turkey on 18 July 2017, Council of Ministers's Decision No. 1154.

²¹ *The Official Gazette* of the Republic of Turkey on 18 October 2017, Council of Ministers's Decision No. 1165.

²² D.H. Kinney, *Civilian Actors in the Turkish Military Drama of July 2016*, EMPN 2016, No. 10.

²³ Council of Europe, *Secretary General receives notification from Turkey of its intention to temporarily suspend part of the European Convention on Human Rights*, No. DC132(2016), [https://wcd.coe.int/ViewDoc.jsp?p=&Ref=DCPR132\(2016\)&Language=lanEnglish&Ver=original&Site=DC&BackColorInternet=F5CA75&BackColorIntranet=F5CA75&BackColorLogged=A9BACE&direct=true](https://wcd.coe.int/ViewDoc.jsp?p=&Ref=DCPR132(2016)&Language=lanEnglish&Ver=original&Site=DC&BackColorInternet=F5CA75&BackColorIntranet=F5CA75&BackColorLogged=A9BACE&direct=true), 14.12.2017

Secretary-General²⁴ following each decision to extend to state of emergency. However, just like France, Turkey did not specify which ECHR provisions were being derogated from, nor the reason for such derogations. Therefore, a degree of uncertainty and ambiguity exists concerning the possible actions of those countries, which may result in a discretionary use of state power by setting aside individuals rights that are protected by the ECHR.

3.2. The extent strictly required by the exigencies

As regards the second requirement, the ECtHR has limited its own power of review where Article 15 is concerned by endowing contracting states with a wide margin of discretion. This is because national authorities are in a better position than the international judges to comprehend the presence of a national emergency and the necessary scope of any derogation.²⁵ However, such discretion is not unlimited.²⁶ As Plato mentions in Book VIII of *The Republic*, the freedom of state action must be based on necessity.²⁷ Otherwise, a democratic man – each governance regime is represented by a man in *The Republic* – corrupts its power and becomes a tyrant who would deny any lawful restriction and act

²⁴ Notification de Communication on 25 June 2016; <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2930086&SecMode=1&DocId=2380804&Usage=2>, 14.12.2017;

Notification de Communication on 18 October 2016, <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2944324&SecMode=1&DocId=2387736&Usage=2>, 14.12.2017;

Notification de Communication on 06 January 2017, <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2957170&SecMode=1&DocId=2394756&Usage=2>, 14.12.2017;

Notification de Communication on 20 July 2017, <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2974132&SecMode=1&DocId=2404752&Usage=2>, 14.12.2017;

Notification de Communication on 19 October 2017, <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2976022&SecMode=1&DocId=2406032&Usage=2>, 14.12.2017.

²⁵ *Guide on Article 15 of the European Convention on Human Rights*, para. 16.

²⁶ G. Fuglistale, *The Principle of Subsidiarity and the Margin of Appreciation Doctrine in the European Court of Human Rights' Post-2011 Jurisprudence*, IDHEAP 2016.

²⁷ Plato, *The Republic (Book VIII)*, trans. R.E. Allen, Yale 2006.

entirely discretionally.²⁸ In that regard, the Court requires a contracting state's derogation to not go beyond the "extent strictly required by the exigencies."²⁹ The Court's rulings have provided appropriate determining factors for assessing whether a State has abused its power, *inter alia* whether the measure *prima facie* is suitable to reduce the severity of threat or crisis,³⁰ whether the measure is subject to safeguards,³¹ whether the need for the derogation is subject to ongoing review,³² the importance of the right at stake³³ and whether ordinary laws would have sufficed to meet the danger posed by the public emergency.³⁴

3.2.1. Time in custody before first appearance after state of emergency

The Constitution of the Republic of Turkey in Article 121 states that the Council of Ministers shall issue a judicial Decree having the force of law once it has been declared pursuant to the state of emergency. Regarding the time duration of custody, on July 22, 2016, the Council of Ministers decided to use the power vested in it and to Decree certain measures based on the state of emergency. Accordingly, Decree-Law No. KHK/667 was published and Art. 6(a) of the relevant Decree extended the period of custody to a maximum of 30 days from the time of arrest.³⁵ Thus, a suspect can be held in custody without having been charged by the authorities for up to 30 days. Although on January 23, 2017, the Council of Ministers, again by issuing a Decree, reduced the maximum permissible pre-trial

²⁸ Plato, [2006].

²⁹ F. Cowell, *Sovereignty and the Question of Derogation: An Analysis of Article 15 of the ECHR and the Absence of a Derogation Clause in the ACHPR*, BLR 2013, Vol. 1(1), p. 146. Also, I. Y. Nugraha, *Human Rights Derogation During Coup Situations*, IJHR 2017.

³⁰ Judgment of the European Court of Human Rights, *Brannigan and McBride v. United Kingdom* (CE:ECHR:1993:0526JUD001455389).

³¹ Judgment of the European Court of Human Rights, *Lawless v. Ireland* (EU:C:1961:15:37).

³² Judgment of the European Court of Human Rights, *Brannigan and McBride v. United Kingdom* (EU:C:1993: 17:539:54).

³³ Judgment of the European Court of Human Rights, *Aksoy v. Turkey* (EU:C:1996:68:76).

³⁴ Judgment of the European Court of Human Rights, *Ireland v. United Kingdom* (CE:ECHR:1978:-0118JUD000531071).

³⁵ Decree with Force of Law on Measures to be Taken Under State of Emergency; Decree Law No. KHK/667.

custody period to 7 days,³⁶ the authorities had maintained the previous Decree in force for over six months. Therefore, for six months, it was possible for a suspected person to be seen by a judge only after the end of a 30-day period in custody.³⁷ This gives rise to the question whether, in implementing this measure, Turkey exceeded its margin of appreciation by going beyond the “extent strictly required by the exigencies”, especially in light of the importance of the ECHR’s requirement of ‘promptness’.

This is not the first time that Turkey has introduced a lengthy period of pre-trial detention without judicial supervision during a state of emergency. Due to a conflict that had raged in the south-east of Turkey between the security forces and the members of the PKK (Workers’ Party of Kurdistan) whose terrorist activity posed a danger to many civilians, ten provinces of south-eastern Turkey had been subjected to emergency rule from July 17, 1987 until November 30, 2002. Subsequently, on May 5, 1992, Turkey gave notice of its intention to derogate from its ECHR obligations by relying on Article 15. According to the Code of Criminal Procedure which applied in 1992, a detained person must be seen by a judge within 24 hours or, in the case of collective offences, within four days, unless this period has been extended due to a state of emergency.³⁸ If the criminal proceedings involve state security, these periods are extended to 48 hours in the case of individual offences and to 15 days in the case of collective offences.³⁹ Furthermore, during any declared state of emergency, these periods are doubled (four days in the case of individual offences and 30 days in the case of collective offences) if the proceedings involve concerns to the state’s security.⁴⁰

³⁶ Decree Law No. KHK/684.

³⁷ L. Morris, *Law is suspended: Turkish lawyers report abuse of coup detainees*, “The Washington Post” 2016, https://www.washingtonpost.com/world/law-is-suspended-turkish-lawyers-report-abuse-of-coup-detainees/2016/07/24/dc240998-4e9f-11e6-bf27-405106836f96_story.html?utm_term=.d6e5db7379b4, 14.12.2017.

³⁸ Article 128 of the Code of Criminal Procedure of 1929.

³⁹ Article 30 of Law 3842 of 1 December 1992, re-enacting Article 11 of Decree Having the Force of Law No. 285, 10 July 1987.

⁴⁰ European Commission of Human Rights, *Decisions and Reports*, Strasburg 1994, pp. 64–65.

It was not uncommon, during this previous state of emergency, for a person suspected of being involved in a collective offence to be detained up to 30 days until they made their first court appearance. For instance, Zeki Aksoy was taken into custody in November 1992, suspected of having aided and abetted PKK terrorists during a state of emergency.⁴¹ Mr. Aksoy was held in custody for 14 days in connection with a collective offence.⁴² Even though the ECtHR accepted that the Turkish authorities had provided notice of their intention to derogate from their ECHR obligations and such notification contained sufficient information regarding the time limits for such pre-trial detention, the ECtHR found a violation of Article 5(3) ECHR. This was due to the fact that the exigencies of the situation did not necessitate a person suspected of involvement in a collective terrorist offence to be detained in custody for 14 days without judicial control.⁴³ Therefore, even during a state of emergency, 14 days was considered as an exceptionally long period of detention without judicial supervision and amounted to a breach of the ‘promptness’ requirement, which is a significant safeguard to protect individuals against state arbitrariness. Therefore, the breach of the promptness requirement regarding the more recent 30-day detention period may also lead to a conclusion that Turkey went beyond the ‘extent strictly required by the exigencies’ of the state of emergency.

Furthermore, as regards judicial review, Article 148 of the Turkish Constitution stipulates that neither the form nor the substance of state of emergency Decrees are capable of being the subject of judicial control by the Turkish Constitutional Court. This was reiterated by the Constitutional Court during Turkey’s most recent state of emergency when it confirmed that such Decrees fall outside the jurisdiction of the Court.⁴⁴ Therefore, as pre-trial detention during a state of emergency may pre-

⁴¹ Judgment of the European Court of Human Rights, *Aksoy v. Turkey* (CE:ECHR:1996-1218JUD002198793).

⁴² *Aksoy v. Turkey*, para. 29 and 71.

⁴³ *Aksoy v. Turkey*, para. 84.

⁴⁴ Deutsche Welle Türkçe, *AYM Baskani; Mahkememizin KHK'leri denetleme yetkisi yok*, 2016, <http://www.dw.com/tr/aym-ba%C5%9Fkan%C4%B1-mahkememizin-khklar%C4%B1-denetleme-yetkisi-yok/a-38576941>, 14.12.2017.

clude the possibility of judicial supervision for up to 30 days and as there is no possibility for a review of the constitutionality of a Decree, a clear risk exists that individuals do not have sufficient safeguards against the possibility of state arbitrariness. Thus, in practice, it is unfeasible for judicial control to exist during the 30 days until the first court appearance.

Furthermore, on July 25, 2016, the Council of Ministers issued Decree No. 668. Article 3(m) of this Decree stated that a detained person's right to an attorney can be restricted by the public prosecutor for up to five days.⁴⁵ Even if this provision was abolished on January 2, 2017, by another Decree (Decree No. 684 of the Council of Ministers),⁴⁶ it remained in force for over five months. In light of the *Zaichenko* judgment, the ECHR specifically held that the right to an attorney is triggered at the moment of being detained.⁴⁷ Taken into account the importance attributed by the Court to Article 5 ECHR,⁴⁸ when the by state authorities prevent a person's access to a lawyer for five days, this clearly poses a threat that individuals will be exposed to arbitrary state behaviour.

Additionally, as regards individual safeguards, in light of the *Kilic v. Turkey* judgement⁴⁹, the non-derogable Article 2 ECHR not only imposes negative obligations on the contracting states, such as refraining from taking life intentionally and unlawfully, but it also imposes positive obligations such as preventing danger that the state itself caused or preventing real and immediate danger to a person's life by another person.⁵⁰ Thus, even during a state of emergency, Turkey's public bodies, including prison authorities, are obliged to actively provide individuals with minimum health and safety standards of care. This is inseparably interlinked with Article 3 ECHR which prohibits torture and inhumane mistreatment or punishment. Therefore, both articles oblige states to protect the

⁴⁵ *The Official Gazette* of the Republic of Turkey on 27 July 2016, KHK No. 668.

⁴⁶ *The Official Gazette* of the Republic of Turkey on 23 January 2017, KHK No. 684.

⁴⁷ Justice of European Court of Justice, *Zaichenko v. Russia* (CE:ECHR:2010:0218JUD003966002), para. 47.

⁴⁸ *Aksoy v. Turkey*, para. 76.

⁴⁹ Judgment of the European Court of Human Rights, *Kilic v. Turkey* (CE:ECHR:2000:0328JUD002249293), para. 65.

⁵⁰ C. van Dam, *European Tort Law*, Oxford University Press 2013, p. 569.

bodily integrity of individuals and to guard their health against any possible harm. According to a Human Rights Watch Report issued in October 2016, the institution was informed about the existence of torture and ill-treatment during police detention in Turkey. Such reports came from several lawyers, former detainees, and medical personnel.⁵¹ These allegations included reference to sleep deprivation, severe beatings, sexual abuse and rape threats. The Report mentioned 13 different recounted incidents, the seriousness of which can be seen as follows:

‘There, police officers had accused them of being members of the Gülen movement. If they denied the accusations, the client had told his lawyer, the police had started to insult them, then they had started beating and kicking them. They had also threatened to rape them and their wives, the client told his lawyer.’⁵²

Similar allegations were also gathered by Amnesty International. On July 24, 2016, Amnesty International launched a report containing allegations of torture in Turkey.⁵³ Accordingly, sufficient evidence exists to prove that detainees are being subjected to beating and torture at official or unofficial detention centers. They are being denied access to food, water and medical treatment, subject to threats, verbal abuse and sexually assault. The question as to whether such treatment by the Turkish authorities amounts to a violation of Article 3 ECHR is answered by reference to the *Fedotov v. Russia* case. In this case, the ECtHR held that 22 hours detention at a police station without food or drink qualified as inhumane treatment and therefore a violation of Article 3 ECHR. Thus, by failing to provide fundamental necessities to detainees, the Turkish authorities’ behaviour reaches a level of severity which amounts to inhumane treatment. Besides, in the *Gäfgen v Germany* judgment, the Court explicitly stated threatening an individual with torture may also constitute at least

⁵¹ Human Rights Watch, *A Blank Check; Turkey’s Post-Coup Suspension of Safeguards Against Torture*, <https://www.hrw.org/report/2016/10/25/blank-check/turkeys-post-coup-suspension-safeguards-against-torture>, 2016, 14.12.2017.

⁵² Human Rights Watch, [2016].

⁵³ Amnesty, *Turkey: Independent monitors must be allowed to access detainees amid torture allegations*, <https://www.amnesty.org/en/latest/news/2016/07/turkey-independent-monitors-must-be-allowed-to-access-detainees-amid-torture-allegations/>, 14.12.2017.

inhumane treatment.⁵⁴ As regards the torture allegations, each claim must be analyzed separately, however, it is crystal clear fact that even in the most difficult circumstances,⁵⁵ the ECHR absolutely prohibits torture or inhumane or degrading treatment or punishment.⁵⁶

Moreover, in light of the State of Emergency Decree No. 668, the public prosecutor is entitled to restrict the ability of the defence counsel to receive and examine the contents of the case-file or to take copies of documents therein, including reports of medical examinations.⁵⁷ Such an inability to access medical reports makes it impossible for detained persons and their lawyers to assess whether medical examinations were conducted properly or to challenge them or file complaints about torture or ill-treatment. It also contradicts the United Nations' internationally-recognized standards and procedures for assessing persons who allege that they have been subjected to torture or ill-treatment, which is also ironically known as the Istanbul Protocol.⁵⁸

Additionally, as stated in above, Turkey did not specify which particular articles of the ECHR that it sought to derogate from. This should also be taken into account when assessing whether Turkey went beyond the extent required by the crisis, because the scope and reasons of the derogation are imprecise.

Thus, all in all, even if Turkey did not intend to degrade the detainees, which is hard to believe in any case, it could be in violation of Article 3

⁵⁴ Judgment of the European Court of Human Rights, *Gäfgen v Germany* (CE:ECHR:2010:0601JUD002297805), para. 91.

⁵⁵ See the judgement of *Ireland v. UK*. Northern Ireland Government introduced an operation targeting the suspected members of the IRA and they used "five interrogation techniques" on fourteen prisoners, e.g. well standing, deprivation of sleep, deprivation of food and drink. The Respondent state (UK) argued that those measures were necessary because normal procedures of law became inadequate to overcome the problem with IRA terrorists. However, the Court held that the five interrogation techniques violated Article 3 that they amounted to inhuman and degrading treatment.

⁵⁶ *Aksoy v. Turkey*, para. 62

⁵⁷ Article 3/1 Emergency Decree No. 668.

⁵⁸ Para 126 the Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, <http://www.ohchr.org/Documents/Publications/training8Rev1en.pdf>, 14.12.2017.

by failing to take sufficient steps to provide the necessary conditions of detention.

3.3. Consistency with international obligations

The final requirement under the ECHR requires that measures used by contracting states during a period of derogation must be consistent with their other international law obligations. Thus, when resorting to a derogation, a state must ensure that its utilized measures cannot be incompatible with its other obligations under international law, such as higher absolute human rights standards or humanitarian law standards.⁵⁹ As regards the measure which extended the period of pre-trial custody, it would be logical to evaluate its consistency with the ICCPR, which was ratified by Turkey in 2003. This is because the ICCPR is the most widely-accepted treaty adopted by the UN which grants civil and political rights to individuals.

Article 9 ICCPR protects a person's right to liberty and security. Just like the ECHR, it states that any person who was lawfully arrested must be promptly seen by a judge. In that regard, 48 hours are considered as sufficient to prepare for a first appearance⁶⁰ and any longer delay must be absolutely exceptional.⁶¹ Even though Article 9 is not one of the ECHR's non-derogable rights under the derogation clause (Article 4), any arbitrary deprivation of liberty is considered as infringing a non-derogable fundamental guarantee regardless of the situation that allows a contracting state to derogate from the ICCPR.⁶² Although the UN has not explicitly stated that a breach of the derogation has occurred, on August 19, 2016, it pressured the Turkish government to embrace the rule of law

⁵⁹ United Nations Office of the High Commissioner for Human Rights, *Human Rights In The Administration Of Justice: A Manual On Human Rights For Judges, Prosecutors and Lawyers*, New York and Geneva 2003, Chapter 16, p. 879.

⁶⁰ Judgment of the European Court of Human Rights, *Kovsh v. Belarus* [2013] 159 ILR 257, paras. 7.3–7.5.

⁶¹ UN Human Rights Committee, *General Comment No. 35 – Article 9: Liberty and Security of Person*, New York 2014.

⁶² UN Human Rights Committee, [2014], para 66. and UN Human Rights Committee, *General Comment No. 29 – Article 4: Derogations during a State of Emergency*, New York, paras. 4 and 11.

during the crisis and voiced its concerns about Turkey's use of emergency measures.⁶³ Additionally, a Report by the Office of the UN High Commissioner for Human Rights considers the possibility for a person to be detained for 30 days of police custody without judicial supervision as one of its key concerns.⁶⁴ Therefore, there is an inclination that this particular measure evokes arbitrariness by the Turkish authorities and correspondingly, it is not clearly and persuasively possible to say that Turkey complies with its other international obligations by extending the period for pre-trial custody without charge.

4. Conclusion

'Each choice is a renunciation' said Can Dunder, an exiled Turkish journalist who was nominated for the 2017 Nobel Peace Prize. To comprehensively understand Turkey after the attempted coup, it would be beneficial to analyze it in the light of this deeply philosophical statement. Following the first declaration of a state of emergency, the Turkish government imposed several measures to effectively control and secure the country. For this purpose, the government extended the maximum period of pre-trial custody before a first court appearance to 30 days. This was a political choice, implemented more than six months after having notified the Council of Europe about Turkey's derogation from the ECHR. However, if this choice cannot be controlled, it may inevitably lead to several renunciations. Hence, the ECtHR provides several considerations to keep a state under control when it is implementing measures. This is done via certain procedural criteria found within the ECHR's derogation clause. By taking into account the importance of liberty as a fundamental human right, the question of whether the political choice of the Turkish authorities regarding the extension of pre-trial custody went beyond the permitting requirement or not is one that must be answered in the negative.

⁶³ United Nations Human Rights Office of the High Commissioner, *UN experts urge Turkey to adhere to its human rights obligations even in time of declared emergency*, Geneva 2016, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20394>, 14.12.2017

⁶⁴ United Nations Human Rights Office of the High Commissioner, *Report on the human rights situation in South-East Turkey; July 2015 to December 2016*, 2017, para. 56.

In conclusion, despite the serious threat in Turkey, the measure which allowed a suspect to be detained for up to 30 days without appearing before a judge exceeded the Turkish government's margin of appreciation and failed the 'exigencies of the situation' justification. Accordingly, this measure cannot be considered as being compliant with the ECHR's derogation criteria.

S u m m a r y

The European Convention on Human Rights is a comprehensive system that sets the European standards for the protection of fundamental human rights. However, in certain circumstances, the contracting states can validly deviate from their obligations under the Convention. In this regard, Turkey notified the Council of Europe of its intention to derogate from its Convention obligations following the coup attempt on July 15th 2016. The Turkish authorities issues a State of Emergency ruling which extended the duration for which a person can be held in custody prior to making a first court appearance, up to 30 days. This article asks whether that measure complies with the conditions set out in the ECHR's derogation clause, specifically Article 15. First, it examines whether the necessary legitimate foundations exist to justify a derogation claim, by analyzing the legality of Turkey's State of Emergency declaration. It then explores the scope and implementation of this measure and asks whether Turkey has gone beyond what is strictly required by the exigencies of the situation. Finally, it reviews whether the measures imposed by Turkish authorities are consistent with its other international obligations.

Keywords: detention in custody before first appearance, ECHR derogation clause, right to liberty, Turkish Coup D'état Attempt 2016

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