

Fighting COVID-19 – Legal Powers, Risks and the Rule of Law: Turkey

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While it is early for ascertaining the political and social outcomes of the pandemic and whether it will lead to a new social and political order or undermine capitalist mode of production, it is evident that the threat and fear of an epidemic are already eroding the fragile concept of the rule of law. Turkey is not the only state limiting the rights and freedoms due to the pandemic, and probably it will not be the only example of sacrificing legal guarantees of these rights and freedoms for a rapid reaction to health risks and possibly avoiding supervision by actors other than the executive branch on adopted measures. In order to ensure a quick and flexible response in fighting against COVID- 19, Turkish presidency and administration preferred to introduce the measures against the pandemic in the form of circulars instead of declaring a state of emergency. This choice is being criticised for opening the way for arbitrariness and undermining the principle of legality.

Legal Background

The Turkish Constitution authorizes the President of the Republic to declare a state of emergency in the event of an outbreak of a dangerous epidemic disease (Art 119) in a region or nationwide; and that the state of emergency shall not exceed six months. (Art.119). The decision for the state of emergency shall be published in the Official Gazette and submitted to the Parliament on the same day with the declaration. In addition to the authority to remove the state of emergency, the Parliament is also authorized to extend or shorten the period of the state of emergency.

The state of emergency enables the President to issue presidential decrees which have the same force with laws adopted by the Parliament according to the Constitution. Fundamental rights, individual rights and duties including the right to liberty and security, right to private life, freedom of expression, freedom of travel and right to property can be governed by state of emergency presidential decrees as long as the measures included in these decrees are directly related with the state of emergency, or in this case, connected with the pandemic. It is generally accepted that these decrees may even partially or entirely suspend the exercise of most of the fundamental rights and freedoms as long as obligations under international law are not violated.

Unlike ordinary presidential decrees which have a limited scope and power, all state of emergency presidential decrees must be submitted for approval to the Turkish Parliament on the same day with its adoption. The Constitution stipulates that state of emergency presidential decrees must be debated and resolved within three months as long as the Parliament is able to convene; otherwise, these decrees

are to be considered as automatically repealed. While this does have the effect of providing some oversight, state of emergency presidential decrees are not subject to judicial review as it is not possible to claim the unconstitutionality of these decrees before the Turkish Constitutional Court. In light of the [Constitutional Court's judgments in 2016](#), it is possible to say that the Court would not even evaluate whether the measures included in such a decree are sufficiently connected with the state of emergency or not, that is to say, that any presidential decree under the heading of state of emergency may be outside the scope of judicial review even where the content of those decrees would indicate it is not even loosely related to the pandemic.

In addition to the power of adopting presidential decrees, the Law on the State of Emergency ([Law no.2935](#) adopted in 1983) directly authorizes the President to obligate individuals to provide monetary, labor, and/or property contributions. In the event of a pandemic, the law stipulates that measures including but not limited with the prohibition of living in, entering or exiting from specific areas, evacuation of some settlements, suspending educational activities, closing dormitories, closing or restricting the activities of places of gathering, benefiting from all means of communication or seizing these, destructing contaminated properties and foodstuff, limiting transportation of foodstuff can be taken. The law also provides additional criminal provisions for enforcing the cooperation of individuals and preventing false or exaggerated news which may cause panic and turmoil. Sanctions for the offences created by the Law on the State of Emergency, varies between a heavy fine and imprisonment up to one year and subject to the same procedures with other offences included in the Turkish Penal Code.

Although Turkey has an experience of living under the conditions of the state of emergency prior to the COVID-19 pandemic, the executive branch is still reluctant to establish a state of emergency. Current measures are being taken based on legislation regulating ordinary conditions. While the scope of the existing legislation is controversial, most essential instruments used as a basis for measures against the Covid-19 pandemic are The Law on the Protection of Public Health (Law no.1593) and the Law on Provincial Administration (Law no.5442). The Law on Provincial Administration stipulates that a governor of a province is responsible and authorized for taking necessary measures to provide peace, security, and public well-being; these measures include prohibiting certain people from entering or exiting certain places. The Law on the Protection of Public Health authorizes Public Health Councils, established in all provinces to take necessary measures for removing threats against public health and assisting the execution of measures taken against a pandemic. According to the same law, under specific pandemics, infected patients can be kept in quarantine, travellers may be medically examined, and public places effected by pandemic may be closed down and evacuated. As of today, a state of emergency has not been declared in order to prevent its economic consequences and to continue production in factories as long as possible.

Measures Taken against Covid-19 Pandemic

Under the Constitution, Turkey is a “social state”: it is thus the state’s responsibility to ensure everyone has the means and the opportunity to have a physically and mentally healthy life and to take all necessary measures for this aim. Constitutionally it is the State’s responsibility to prevent the spread of COVID-19 and to protect the people from the effects of the pandemic. The principle of the rule of law requires these measures to be taken within the frame of law and with the minimum possible impact on fundamental rights and freedoms. As explained above, the legislation provides broad powers to the executive branch to be used for taking measures against a pandemic. Still, most of these powers require the declaration of a state of emergency. The state of emergency is the only legal way that may enable limitations and even suspension of certain fundamental rights and freedoms for preventing the spread of the disease.

Following the first official Covid-19 case on March 10, immediate and effective actions were taken by the Turkish government, but the number of officially declared coronavirus-related fatalities raised to 214 as of March 31 and the expected state of emergency and general lockdown is not on the agenda yet. In reply to questions about the lockdown and the state of emergency, the Minister of Health stated that "[everyone should declare his/her own state of emergency](#)". Instead of presidential decrees, all measures were taken with administrative decisions generally in the form of presidential or ministerial circulars. In Turkish law, regulatory acts mentioned in the Constitution are presidential decrees and bylaws, but the administration is also authorized to issue other regulatory acts, including circulars; such administrative acts are called unnamed or atypical regulatory acts. Legally [atypical regulatory acts are almost at the bottom of the hierarchy of norms](#), and they cannot be contrary to laws and regulations. Typically, circulars are issued only for clarifying provisions of laws and regulations.

As the name clearly shows, a state of emergency is an extreme measure, and it is not a desirable state, but it also provides clarity and legal certainty. None of the decisions except one declared directly by the Presidency were published in the Official Gazette and most legal professionals, let alone ordinary citizens, would have a difficult time finding the original texts of these circulars and decisions. Although all actions and acts of the administration are subject to judicial review, this raises the problem of judicial control and opens the way for an excess of power. On the other hand, in a state of emergency, although related presidential decrees are not within the scope of judicial review, the control mechanisms by the Parliament would be in force, and this would provide reinforced legality and legitimacy to extraordinary measures.

The first significant legal measure undertaken was the closure of all schools and universities. While the authority for closing down schools due to a pandemic is subject to the Law on the State of Emergency, the Ministry of National Education declared that it was decided to have an early holiday for a week and transition to distance learning starting from March 23rd. This decision was never published in the Official Gazette but immediately executed. In case of universities, at first, the

Council of Higher Education declared that universities should not act separately, and they may not decide on suspending education. However, following a meeting chaired by President Recep Tayyip Erdoğan, the Council announced that education in all universities would be suspended for three weeks, which followed with an announcement that higher education would continue by means of distant learning only. Although the Council is entitled to decide on suspending the education according to law, the process of decision making is controversial; the Constitution stipulates that universities have scientific autonomy and public legal personality however they are unable to have an influence on the process.

The strictest measures affecting daily life in Turkey have been those taken by the Ministry of Interior. Citing the powers mentioned above conferred by the Law on the Protection of Public Health and the Law on Provincial Administration, the Ministry of Interior in its ministerial circular declared a curfew for individuals who are sixty-five years or older, and anyone with a chronic illness. While the circular itself did not directly adopt the measure, as an order to provincial administrations to declare a curfew for seniors and patients with chronic illnesses, it was, in practice, is executed nationwide as provincial Public Health Councils adopted identical decisions for curfew. In addition to Public Health Councils established according to the Law on the Protection of Public Health a new council named as Provincial Pandemic-Council was founded in all provinces per the directive of the Presidency; however, and a concern for the rule of law, the legal duties and authorities of these councils are unknown as they are not mentioned in any laws or presidential decrees but in some provinces restrictions on freedoms are based on decisions of these.

The Turkish Constitution strictly requires the fundamental rights and freedoms to be restricted only by law and in conformity with the reasons mentioned in the relevant articles of the Constitution without infringing upon their essence. Neither the Law on Provincial Administration nor the Law on the Protection of Public Health was designed to enable the administration to limit rights and freedoms in a general sense; measures regulated by these laws can only be applied to individuals under certain conditions for example if they have been infected by one the illnesses listed in the Law. Even though [a provision](#) in the Law stipulates that other invasive illnesses may be incorporated into the scope of the Law by the Ministry of Health, this provision is noticeably ignored. To have a legally valid curfew, this measure should be properly based on a legal norm providing authority. In this case, Ministry's and provincial administrations' using a power that is not given by law raises questions for the rule of law.

Another disputable measure is the prohibition of accepting resignations of health staff, a measure introduced for securing continuance in health services was introduced a ministerial circular of Ministry of Health. However, the Public Servants Law clearly states that the resignation is subject to acceptance only under a state of emergency – which has not, as of yet, been declared. Similar measures introduced by the presidency and ministries, including closure of all gathering places like restaurants and bars, suspending religious congregations including Friday prayers, limiting the number of passengers in intercity mass transport vehicles, limiting the number of maximum customers in grocery stores and closing down

beauty parlours and hairdressers in one way or another limit fundamental rights and freedoms secured by the Constitution and requires to be regulated by a law adopted by the Parliament and shall not be adopted by ministerial circulars and ordinary administrative decisions without any direct authorization by the law. Ministerial circulars are outside the scope of direct parliamentary oversight, and the only way for reviewing their legality is by bringing each regulatory act before the administrative courts.

In Lieu of Conclusion

It is not easy to object that in the COVID-19 outbreak states are required to take extraordinary measures, and in most of the cases, the measures taken in response to the outbreak have the effect of limiting or even suspending fundamental rights and freedoms. This situation revives the classical security and freedom dilemma, and under the conditions of a pandemic outbreak, it is harder to articulate the problems from a freedom and rights point of view. Procedural and formal legal mechanisms are at least the minimum standards to protect freedoms, and these should be protected even under the pandemic conditions; otherwise, the rule of law, one of the most significant achievements of our civilization, would sustain substantial damages. In the Turkish case, the immediate actions required by the circumstances were taken mostly as administrative decisions instead of declaring a state of emergency.

Although the content of the measures taken until now and the efforts of Turkish healthcare professionals are praiseworthy, measures introduced in this period require a solid normative base which may either be the state of emergency or new laws adopted by the Parliament for directly addressing the situation otherwise in the long term the possibility of arbitrariness may be as destructive as the pandemic itself.

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