

The Derogation from the European Convention on Human Rights by Turkey after the Attempted Coup

After the unsuccessful coup attempt in Turkey, its high-level officials, including the president, have constantly talked about the necessity of the introduction of a state of emergency, and it has actually been declared on 20 July. At the same time, the president has also mentioned the “suspension” of the European Convention on Human Rights. What does this exactly mean? What are the effects and consequences of this step?

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Even before the declaration was made, the removal or the suspension of thousands of civil servants, soldiers, and even university staff in Turkey for suspected complicity in the attempted coup has drawn strong criticism and caused serious concerns of a human rights nature, so this political step was not welcomed by many. Obviously, President Erdogan argued that the extra powers provided by the state of emergency are needed to protect democracy in Turkey, rejecting criticism of it by some European leaders and various human rights groups. In their criticism, critics have targeted the purge of state institutions, and also the more and more intense calls by the pro-government public opinion to reinstate the death penalty (we have covered this issue in the previous [International Law Reflection](#)). At the same time President Erdogan declared that he wants to “suspend the [European Convention on Human Rights](#)”, the fundamental human rights treaty of the Council of Europe, of which Turkey is a founding member. The use of the word “suspension” has immediately caused confusion, with analysts and political actors, among others, trying to figure out the intent behind the wording. Does this mean a complete pullout? Is it the first step in seriously trying to reinstate the death penalty?

On 21 July, six days after the coup, and one day after the idea of the suspension has been introduced by the president, the Turkish government has finally clarified its position, and it [has informed the Secretary General of the Council of Europe](#), Thorbjørn Jagland, about its decision to apply a derogation from the European Convention on Human Rights, according to its Article 15.

What does the derogation mean?

Under normal circumstances, when the life and the normal operation of a state are not endangered by any extreme or extraordinary events, full respect for human rights is expected, with only limitations or interference from the state or its authorities in this respect that are “in accordance with the law and [are] necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others” being allowed, as the Convention generally defines it.

But under specific situations, which are defined by the Convention as “times of public emergency threatening the life of the nation”, the state may legitimately need more powers to serve its functions, which also means that it cannot fulfil all of its human rights obligations. This is accepted by the Convention on the grounds of trying to strike a fair balance between liberty and security, and hence the option of derogation is stipulated by Article 15. This allows governments of states parties to the Convention to derogate from their obligation to secure some human rights under the Convention, giving them more political-legal manoeuvring space to handle a situation, and practically serving as an internationally recognized state of emergency related to human rights obligations.

At the same time, it is an exceptional option: it requires exceptional circumstances, and it is allowed only as a temporary, limited and supervised measure. According to Article 15, this possibility can only be invoked in time of war or a public emergency which “threatens the life of the nation”, which sets the applicability threshold at a high level, and thus the option requires a serious threat. States may only take measures that are strictly required by the exigencies of the situation, meaning that the derogating state still has to apply a certain necessity-proportionality test; it cannot generally ignore every obligation. This is reinforced by the requirement that any derogations by the state made under this option have to stay inconsistent with other obligations of the state under international law. As for supervision, the state party wanting to derogate has to inform the Secretary General of the Council of Europe, firstly about the fact of the derogation, and then about all the measures it employs.

A very important limit of this option is that some of the human rights recognized by the Convention may not be derogated from at all. No derogation is allowed regarding the right to life, the prohibition of the death penalty, the prohibition of torture and inhuman or degrading treatment or punishment, the prohibition of slavery and servitude, and the principles of *nullum crimen sine lege* and *nulla pena sine lege*, meaning the prohibition of punishing any act which is not a codified crime, or the application of any punishment that is not part of the legal system at the time of the commission of a crime. The right not to be tried or punished twice for the same crime, recognized by Protocol No. 7 to the Convention, also cannot be derogated from.

Finally, even a legitimate derogation does not mean a total escape from the control by the Strasbourg-based [European Court of Human Rights](#) either. It can still examine individual complaints against the member state concerning human rights which are not affected by the derogation, or which cannot be derogated from, the list of which we have seen above.

The option of derogation under Article 15 had already been invoked by other states parties to the Convention during the 66 years of its existence. Recently, in 2015, [Ukraine \(because of the civil war situation in the country\)](#) and [France \(because of the large scale terrorist attacks in Paris\)](#) have derogated from their obligations, while earlier more Council of Europe member states have used this possibility in different situations, including Turkey. As a result of this, the Court has developed a firm practice of controlling the actions of member states even under these complex and uneasy circumstances, with some of its earlier controls of this sort being directed against Turkey.

The effects and consequences of the Turkish derogation

The derogation from the Convention by the Turkish government obviously serves both legal and political goals. Apart from trying to widen the legal space of manoeuvring and lessening human rights constraints in the current situation, President Erdogan wants to send a powerful message to both his political opponents and his supporters about his being a tough and firm leader who is even willing to take a potentially dangerous course of action if needed. Currently it seems that the actions of the government are aimed at a very wide political goal which goes hand in hand with massive violations of human rights, and the derogation probably does not make them legitimate, especially when many of the human rights violations have happened before the derogation was communicated to the Secretary General.

We have to emphasize that the Convention does not lose its binding force over Turkey as a result of the derogation, and it will stay in force. The European Court of Human Rights is still going to have jurisdiction to decide on individual complaints filed against Turkey, and its task will be to decide if any contested action by the state or its authorities meets the criteria set by the Convention, for example, the criteria of proportionality of any measure taken in violation of a human right. Any disproportionate action will still be considered a violation of the Convention. These examinations may also cover the delicate question of the legitimacy of the decision to derogate *per se*, as it could be dealt with as part of an individual complaint.

The derogation itself does not make it possible for Turkey to reinstate the death penalty. As we have pointed out in the previous [International Law Reflection](#), Turkey had ratified both [Protocol No. 6](#) to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty, and [Protocol No. 13](#) to the Convention for the Protection of Human Rights and Fundamental Freedoms, aiming to abolish the death penalty in all circumstances. Both of these protocols stipulate that no derogation is allowed from them, just as no derogations are allowed from the right to life under the Convention.

According to Article 15, the Turkish government will be under a constant obligation to inform the Secretary General about the measures it takes. This, together with the Court, may offer some hope for the situation still having a chance to be settled with time and not go into extreme directions. However, this all rests now on the actions of the Turkish government in the near future.

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