

# **Restricted at Discretion:**

## The Enjoyment of the Freedoms of Movement and Assembly in Turkey During and After the State of Emergency

September 2019

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## 1. Context

Following the attempted coup of 15 July 2016, the Turkish Government declared a state of emergency, initially for three-months and effective from 21 July in 2016. This state of emergency was extended seven times and ended on 18 July 2018.

Following the end of state of emergency, the Turkish Parliament passed Law no. 7145, an omnibus law (i.e., a law enshrining several provisions and amendments not directed at a single purpose or theme) that extended some of the restrictions on fundamental rights imposed during the state of emergency for 3 years<sup>1</sup> and gave new powers to the Executive to restrict certain human rights and fundamental freedoms protected under Turkish and international law.<sup>2</sup>

This briefing paper assesses the impact of new measures under the omnibus law extending the powers of administrative authorities to restrict the rights to freedom of movement and freedom of assembly. In particular, it considers measures such as the powers of Governors (*vali*) to impose curfews and to restrict, for up to 15 days, the entry to and exit from certain parts of their province of people who they contend might pose a threat to public order. These new measures have a significant impact on the rights freedom of movement and of assembly, due not only to the wide scope of the powers under the omnibus law, but also to the vagueness and arbitrariness of already existing executive powers to restrict these rights.

The new powers granted to the Executive, must be assessed in light of Turkey's obligations under international law. According to article 90 of the Turkish Constitution, in the case of a conflict between international agreements, duly put into effect, concerning fundamental rights and freedoms and the laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail.

Turkey is a party to the many of the principal regional and UN human rights treaties, including the European Convention on Human Rights and the International Covenant on Civil and Political Rights.<sup>3</sup>

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<sup>1</sup> For instance, the power of the Council of Judges and Prosecutors to dismiss judges and prosecutors under the same criteria of emergency legislation was maintained for further three years. This extension was criticised by the ICJ in its submission to the UN Human Rights Council's Universal Periodic Review of Turkey, available at <https://www.icj.org/wp-content/uploads/2019/07/Turkey-UPR-Advocacy-non-legal-submissions-2019-ENG.pdf>, para. 3.

<sup>2</sup> See, joint declaration of EuroMed Rights, the International Federation for Human Rights (FIDH), Human Rights Association (HRA), and the World Organisation Against Torture (OMCT), Recommendations on the recent legislative amendments in Turkey integrating state of emergency restrictive provisions into ordinary law, available at <https://euromedrights.org/wp-content/uploads/2018/09/NGOs-joint-recommendations-after-the-lifting-of-state-of-emergency-in-Turkey.pdf>.

<sup>3</sup> Turkey is also party to the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and its Optional Protocol; the First and Second Optional Protocols to the ICCPR; the Convention on the Elimination of All Forms of Discrimination against Women and its Optional Protocol; the International Convention on the Elimination of All Forms of Racial Discrimination; the International Covenant on Economic, Social and Cultural Rights; the International Convention on the Protection of the Rights of Migrant Workers and Members of Their Families; the Convention on the Rights of the Child and its First and Second Optional Protocols; and the Convention on the Rights of Persons with Disabilities; Protocols nos. 1, 6, 7, 13; the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment; the European Social Charter (revised).

## 2. International law

### 2.1. Freedom of movement

Freedom of movement is guaranteed by article 12 of the International Covenant on Civil and Political Rights (ICCPR) and article 2 of Protocol 4 to the European Convention on Human Rights (ECHR). Aspects of this right are also protected by other core UN human rights treaties, including the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women, the International Convention on the Protection of the Rights of Migrant Workers and of the Members of Their Families, and the Convention on the Rights of Persons with Disabilities.<sup>4</sup> Article 23 of the Turkish Constitution also protects this right. Since Turkey has not ratified Protocol 4 ECHR, the concrete obligations related to this right flow mainly from the ICCPR, as well as from the other relevant global human rights treaties.<sup>5</sup> Nonetheless, the jurisprudence of the European Court of Human Rights may assist in the interpretation of the content of this obligation.

Article 12 ICCPR provides:

1. *Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.*
2. *Everyone shall be free to leave any country, including his own.*
3. *The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.*
4. *No one shall be arbitrarily deprived of the right to enter his own country.*

For the purpose of this assessment, the focus will be on article 12.1, movement within a State's territory and residence, and the potential for limitations under paragraph 3. It should be noted that article 12 ICCPR may be subject to derogations, under a state of emergency subject to the strict limitation provided under article 4 ICCPR. The state of emergency having ended in Turkey, this is however not immediately relevant.<sup>6</sup>

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<sup>4</sup> Article 15, paragraph 4 of the Convention on the Elimination of All Forms of Discrimination against Women provides that "States Parties shall accord to men and women the same rights with regard to the law relating to the movement of persons and the freedom to choose their residence and domicile". Article 18, paragraph 1 of the Convention on the Rights of Persons with Disabilities states that "States Parties shall recognize the rights of persons with disabilities to liberty of movement, to freedom to choose their residence and to a nationality, on an equal basis with others, including by ensuring that persons with disabilities". All States Parties to International Convention on the Elimination of All Forms of Racial Discrimination, pursuant to Article 5 (d) (i), also undertake to prohibit and to eliminate racial discrimination in the enjoyment of the right to freedom of movement and residence within the border of the State.

<sup>5</sup> International Convention on the Elimination of All Forms of Racial Discrimination, article 5; Convention on the Elimination of All Forms of Discrimination against Women, article 15.4; International Convention on the Protection of the Rights of Migrant Workers and of the Members of Their Families, article 39; Convention on the Rights of Persons with Disabilities, article 18 .

<sup>6</sup> The notification of derogation to the ICCPR to the UN Secretary General with regard to the ICCPR referred to derogation from articles 2.3 (right to an effective remedy), article 9 (right to liberty and security), article 10 (right to humane treatment in detention), article 12 (freedom of movement), article 13 (procedural guarantees in expulsion proceedings), article 14 (right to a fair trial), article 17 (right to privacy), article 19 (right to freedom of expression), article 21 (right of peaceful assembly), article 22 (freedom of association), article 25 (political rights), article 26 (equality before the law) and article 27 (protection of minorities). In its report *Justice Suspended*, the ICJ concluded that the derogation did not satisfy the requirements under article 4 ICCPR to describe in detail the extent of the derogation in relation to such provisions and to the exceptional measure(s) undertaken. Finally, the ICJ considered that the derogations by Turkey to the right to an effective remedy (article

The Human Rights Committee has stated that the “right to move freely relates to the whole territory of a State, including all parts of federal States. According to article 12, paragraph 1, persons are entitled to move from one place to another and to establish themselves in a place of their choice. The enjoyment of this right must not be made dependent on any particular purpose or reason for the person wanting to move or to stay in a place.”<sup>7</sup>

Article 12.3 of the ICCPR authorizes the State to restrict these rights only to protect national security, public order (*ordre public*), public health or morals and the rights and freedoms of others. The Human Rights Committee has stated that that it is not sufficient that the restrictions serve the permissible purposes; they must also be necessary to protect them.<sup>8</sup>

Article 12(3) tracks the language of other restriction clauses in respect of fundamental freedoms, including for freedom of expression, freedom of assembly, freedom of association and the right to political participation. The Human Rights Committee also has held that to “be permissible, restrictions must be provided by law, must be necessary in a democratic society for the protection of these purposes, and must be consistent with all other rights recognized in the Covenant.”<sup>9</sup> This means that they must comport with the principles of necessary and proportionality, i.e. that they must be necessary for one of the permissible bases for restriction, i.e. must be the least restrictive means of achieving the objective. For a restriction to be adequately prescribed by law, a law must not only be in place, but must also be of sufficient quality so as to ensure that its application is reasonably accessible and foreseeable. As to the quality of law, the Human Rights Committee stressed that “[t]he laws authorizing the application of restrictions should use precise criteria and may not confer unfettered discretion on those charged with their execution.”<sup>10</sup>

The European Court of Human Rights has held that freedom of movement may only be restricted if the measure is in accordance with law, pursues a legitimate aim, is necessary in a democratic society and proportionate to that aim “and strike a fair balance between the public interest and the individual’s rights”.<sup>11</sup>

Similarly, the European Court stressed that:

*“the expression “in accordance with law” not only requires that the impugned measure should have some basis in domestic law, but also refers to the quality of the law in question, requiring that it should be accessible to the persons concerned and foreseeable as to its effects”*<sup>12</sup>

To meet the test of foreseeability, the legal provision on the restrictive measure must be “formulated with sufficient precision to enable citizens to regulate their conduct; they must be able – if need be with appropriate advice – to foresee, to

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2.3 ICCPR), the right to humane treatment in detention (article 10 ICCPR), and the protection of minorities (article 27 ICCPR) were invalid, as they refer to non-derogable rights.

<sup>7</sup> UN Human Rights Committee, *General Comment no. 27: Article 12 (Freedom of Movement)*, 2 November 1999, CCPR/C/21/Rev.1/Add.9, para. 5.

<sup>8</sup> *Ibid.*, para. 14.

<sup>9</sup> *Ibid.*, para. 11.

<sup>10</sup> *Ibid.*, para. 13.

<sup>11</sup> *De Tomaso v. Italy*, ECtHR, Application no. 43395/09, para. 104.

<sup>12</sup> *Ibid.*, para. 106. See also, *Khlyustov*, Application no. 28975/05, para. 68; *X v. Latvia*, Application no. 27853/09, para. 58; *Centro Europa 7 S.r.l. and Di Stefano v. Italy*, Application no. 38433/09, para. 140; *Rotaru v. Romania*, Application no. 28341/95, para. 52; *Maestri v. Italy*, Application no. 39748/98, para. 30; *Mursaliyev and Others v. Azerbaijan*, Application no. 66650/13, paras. 29-36.

a degree that is reasonable in the circumstances, the consequences which a given action may entail.”<sup>13</sup> Under international law such a measure must be linked to reasoned and articulated factual evidence and identification of specific conduct that must go into any assessment as to whether a risk necessitates such measures.<sup>14</sup>

The European Court concluded that a law that “include[s] an absolute prohibition on attending public meetings [that] does not specify any temporal or spatial limits to this fundamental freedom, the restriction of which is left entirely to the discretion of the judge” does not meet the test of prescription by law. Therefore “[since] the law left the courts a wide discretion without indicating with sufficient clarity the scope of such discretion and the manner of its exercise[,] the imposition of preventive measures on the applicant was not sufficiently foreseeable and not accompanied by adequate safeguards against the various possible abuses.”<sup>15</sup>

The demonstration of whether a measure is “necessary in a democratic society” involves showing that the action taken was in pursuit of that legitimate aim, and that the interference with the rights protected was no greater than was necessary to achieve it, i.e. were proportionate.<sup>16</sup> Governments are required to provide a link between the restrictive measure in issue and its purported protective function. Restrictive measures must not only “serve the permissible purposes; they must also be necessary to protect them. Restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected.”<sup>17</sup>

#### The difference between restriction of freedom of movement and deprivation of liberty

Certain situations that may be perceived as denials or restrictions on freedom of movement may in reality constitute deprivations of liberty, the right to which is protected under article 9 ICCPR and article 5 ECHR. As the UN Human Rights Committee has affirmed, “[I]awful detention affects the right to personal liberty and is covered by article 9 of the covenant. In some circumstances, articles 9 and 12 may come into play together”.<sup>18</sup>

In its General Comment 35 on Liberty and Security of the Person, the Human Rights Committee clarified that: “[t]he liberty of movement protected by article 12 of the Covenant and the liberty of person protected by article 9 complement each other. Detention is a particularly severe form of restriction of liberty of movement, but in some circumstances both articles may come into play together.”<sup>19</sup> Detention in the course of transporting a migrant involuntarily, is often used as a means of enforcing restrictions on freedom of movement.

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<sup>13</sup> *De Tomaso v Italy*, *op. cit.*, para. 107.

<sup>14</sup> *Ibid.*, para. 117.

<sup>15</sup> *Ibid.*, para. 123-124.

<sup>16</sup> *Bartik v. Russia*, Application no. 55565/00, para. 46.

<sup>17</sup> *General Comment no. 27*, *op. cit.*, para. 14.

<sup>18</sup> *Ibid.*, para. 7.

<sup>19</sup> *Ibid.*, para. 7. See also, *Gorji-Dinka v. Cameroon*, Communication no. 1134/2002, para. 5.4–5.5 (house arrest); *Mpandanjila et al. v. Zaire*, Communication no. 138/1983, paras. 8 and 10.

Article 9 addresses such uses of detention in the implementation of expulsion, deportation or extradition.<sup>20</sup>

Under international law, whether a restriction on freedom of movement amounts to a deprivation of liberty does not entirely depend on its classification in national law, but rather on the degree and intensity of the restriction, based on its type, duration, effects and manner.<sup>21</sup> Deprivation of liberty is not confined to classic situations of custodial detention but may extend to “house arrest, administrative detention, involuntary hospitalization, institutional custody of children and confinement to a restricted area of an airport, as well as being involuntarily transported.”<sup>22</sup>

The availability of support, information, advice, and other procedural safeguards necessary to overcome restrictions on freedom of movement, is relevant to an assessment of whether there is deprivation of liberty.<sup>23</sup>

The European Court of Human Rights explained this in *Khlaifia and others v. Italy*, where it decided that the restrictions of movement in a migrants’ reception centre in Italy amounted to deprivation of liberty:

*... the classification of the applicants’ confinement in domestic law cannot alter the nature of the constraining measures imposed on them .... Moreover, the applicability of Article 5 of the Convention cannot be excluded by the fact ... that the authorities’ aim had been to assist the applicants and ensure their safety ... . Even measures intended for protection or taken in the interest of the person concerned may be regarded as a deprivation of liberty. ....*<sup>24</sup>

The European Court has stated the test for deprivation of liberty in *De Tomaso v Italy*:

*In order to determine whether someone has been “deprived of his liberty” within the meaning of Article 5, the starting-point must be his or her specific situation and account must be taken of a whole range of factors such as the type, duration, effects and manner of implementation of the measure in question. The difference between deprivation and restriction of liberty is one of degree or intensity, and not one of nature or substance. ... Furthermore, an assessment of the nature of the preventive measures ... must consider them “cumulatively and in combination”.*<sup>25</sup>

Indeed, in *De Tomaso*, the European Court of Human Rights drew a line between right to liberty and right to freedom of movement cases. Recalling that in the

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<sup>20</sup> UN Human Rights Committee, *General Comment no. 35*, UN Doc. CCPR/C/GC/35, para. 60.

<sup>21</sup> *Engel and Others v. Netherlands*, Applications nos. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72, para. 59; *Guzzardi v. Italy*, Application no. 7367/76, para. 92; *Amuur v. France*, Application no. 19776/920, para. 42; *Nolan and K. v. Russia*, Application no. 2512/04, paras. 93–96; *Abdolkhani and Karimnia v. Turkey*, Application no. 30471/08, paras. 125–127; *Ashingdane v. United Kingdom*, Application no. 8225/78, para. 42; *Austin and others v. United Kingdom*, Applications nos. 39692/09, 40713/09 and 41008/09, para 57; *De Tommaso v. Italy*, *op. cit.*, paras. 79–92; *Khlaifia and others v. Italy*, Application no. 16483/12, para. 64; United Nations High Commissioner for Refugees (UNHCR), *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, para. 7 (UNHCR Guidelines on Detention).

<sup>22</sup> *General Comment no. 35*, *op. cit.*

<sup>23</sup> *Amuur v France*, *op. cit.*, paras. 45 and 48; *Riad and Idiab v. Belgium*, Applications nos. 29787/03 and 29810/03, para 68.

<sup>24</sup> *Khlaifia and Others v. Italy*, *op. cit.*, para. 71.

<sup>25</sup> *De Tomaso v. Italy*, *op.cit.*, para. 80; *Guzzardi v. Italy*, *op.cit.*, paras. 92–93; *Nada v. Switzerland*, Application no. 10593/08, para. 225; *Austin and Others v. the United Kingdom*, Applications nos. 39692/09, 40713/09 and 41008/09, para. 57; *Stanev v. Bulgaria*, Application no. 36760/06, para. 115; and *Medvedyev and Others v. France*, Application no. 3394/03, para. 73.

Guzzardi judgment it had found a violation of article 5, the Court noted that “[t]he applicant, who<sup>26</sup> was suspected of belonging to a “band of mafiosi”, had been forced to live on an island within an (unfenced) area of 2.5 sq. km, mainly together with other residents in a similar situation and supervisory staff [...] The Court attached particular significance to the extremely small size of the area where the applicant had been confined, the almost permanent supervision to which he had been subjected and the fact that it had been almost completely impossible for him to make social contacts”.<sup>27</sup>

It follows then, that restrictions imposed on the right to freedom of movement can only be classified as deprivation of liberty in exceptional cases, when a person is for a certain period prevented from leaving a restricted area where limited social contacts are available.

The European Court has classified as restrictions on freedom of movement, cases of special supervision together with a compulsory residence order and other associated restrictions: not leaving home at night, not travelling away from the place of residence, not going to bars or places of entertainment or attending public meetings, not associating with individuals who had a criminal record and who were subject to preventive measures.<sup>28</sup> The same approach was taken for a prohibition to leave home, except in case of necessity, between 10 p.m. and 6 a.m.<sup>29</sup>

House arrest is considered, in view of its degree and intensity, to amount to deprivation of liberty within the meaning of Article 5 of the Convention.<sup>30</sup> When a person is permitted to leave his house, restrictions imposed upon movement rarely falls within deprivation of liberty category.

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<sup>26</sup> *Buzadji v. the Republic of Moldova*, ECtHR, Application no. 23755/07, para. 104; *Navalnyy v. Russia*, ECtHR, Application no. 43734/14, para. 57.

<sup>27</sup> *De Tomaso v Italy*, *op. cit.*, para. 83.

<sup>28</sup> *Ibid.*, para. 84.

<sup>29</sup> *Ibid.*, para. 86.

<sup>30</sup> See also, for the Human Rights Committee, Communication No. 138/1983, *Mpandajila v. Zaire*, para. 10; Communication No. 157/1983, *Mpaka-Nsusu v. Zaire*, para. 10; Communication Nos. 241 and 242/1987, *Birhashwirwa/Tshisekedi v. Zaire*, para. 13.

## 2.2. Freedom of assembly

Certain restrictions imposed on the right to freedom of movement may also have serious implications for the enjoyment of the right to freedom of assembly.<sup>31</sup>

Freedom of peaceful assembly is guaranteed by article 21 of the ICCPR:

*The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.*

It is similarly protected by article 11 ECHR:

1. *Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.*
2. *No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, 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. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.*

As with freedom of movement and other fundamental freedoms, us subject to restrictions that are in accordance with law, serve a legitimate aim, and are necessary and proportionate to that aim.

The Human Rights Committee has affirmed that the right to peaceful assembly "is a fundamental human right that is essential for the public expression of an individual's views and opinions and indispensable in a democratic society. This right entails the possibility of organizing and participating in a peaceful assembly, including a stationary assembly (such as a picket) in a public location. The organizers of an assembly generally have the right to choose a location within sight and sound of their target audience and no restriction to this right is permissible unless it is (a) imposed in conformity with the law; and (b) necessary in a democratic society, in the interests of national security or public safety, public order (*ordre public*), protection of public health or morals or protection of the rights and freedoms of others. When a State party imposes restrictions with the aim of reconciling an individual's right to assembly and the aforementioned interests of general concern, it should be guided by the objective of facilitating the right, rather than seeking unnecessary or disproportionate limitations to it."<sup>32</sup>

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<sup>31</sup> Universal Declaration of Human Rights, article 20.1; European Convention on Human Rights, article 11. See, e.g., Organization for Security and Cooperation in Europe (OSCE) *Guidelines on Freedom of Peaceful Assembly*.

<sup>32</sup> *Zinaida Shumilina and others v. Belarus*, UN Human Rights Committee, UN Doc. CCPR/C/120/D/2142/2012, para. 6.4

According to the UN Human Rights Committee's jurisprudence, "[w]hen a State party imposes restrictions with the aim of reconciling an individual's right to assembly and the aforementioned interests of general concern, it should be guided by the objective to facilitate the right, rather than seeking unnecessary or disproportionate limitations to it. The State party is thus under the obligation to justify the limitation of the right protected by article 21 of the Covenant."<sup>33</sup>

General prohibitions of public assemblies in wide areas, such as for example an entire city would be prohibited as not meeting the requirements of necessity and proportionality.<sup>34</sup>

The European Court of Human Rights has held that "the right to freedom ... should not be interpreted restrictively."<sup>35</sup> The right encompasses "both private meetings and meetings in public places, whether static or in the form of a procession; in addition, it can be exercised by individual participants and by the persons organising the gathering."<sup>36</sup>

With regard to restriction of the right, the European Court has held that an *interference does not need to amount to an outright ban, legal or de facto, but can consist in various other measures taken by the authorities. The term "restrictions" in Article 11 § 2 must be interpreted as including both measures taken before or during a gathering and those, such as punitive measures, taken afterwards ... . For instance, a prior ban can have a chilling effect on the persons who intend to participate in a rally and thus amount to an interference, even if the rally subsequently proceeds without hindrance on the part of the authorities. A refusal to allow an individual to travel for the purpose of attending a meeting amounts to an interference as well. So too do measures taken by the authorities during a rally, such as dispersal of the rally or the arrest of participants, and penalties imposed for having taken part in a rally ... .*<sup>37</sup>

With regard to the requirement that the restrictive measures be provided for by law, the Court stressed:

*a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail (... . Experience shows, however, that it is impossible to attain absolute precision in the framing of laws, particularly in fields in which the situation changes according to the prevailing views of society ... . In particular, the consequences of a given action need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice ... .*<sup>38</sup>

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<sup>33</sup> *Turchenyak et al. v. Belarus*, UN Human Rights Committee, UN Doc. CCPR/C/108/D/1948/2010 and Corr.1, para. 7.4.

<sup>34</sup> *Ibid.*, para. 7.5.

<sup>35</sup> *Kurdevicius and Others v. Lithuania*, ECtHR, Application no. 37553/05, para. 91.

<sup>36</sup> *Ibid.*, para. 91.

<sup>37</sup> *Ibid.*, para. 100.

<sup>38</sup> *Ibid.*, paras. 109-110.

Under article 11 ECHR, freedom of assembly may be restricted provided such interference pursues one of the following legitimate aims: national security, public safety, the prevention of disorder or crime, the protection of health or morals, the protection of the rights and freedoms of others. The interference must be necessary and not do more than is needed to achieve the aim desired.

When assessing the proportionality of restrictions on freedom of assembly, the Court stressed that “any measures interfering with freedom of assembly and expression other than in cases of incitement to violence or rejection of democratic principles – however shocking and unacceptable certain views or words used may appear to the authorities – do a disservice to democracy and often even endanger it ... . The nature and severity of the penalties imposed are also factors to be taken into account when assessing the proportionality of an interference in relation to the aim pursued .... Where the sanctions imposed on the demonstrators are criminal in nature, they require particular justification (see *Rai and Evans*, decision cited above). A peaceful demonstration should not, in principle, be rendered subject to the threat of a criminal sanction ..., and notably to deprivation of liberty.<sup>39</sup>”

Existence of effective remedies that can be applied for against administrative decisions is an element that should be considered in deciding the proportionality of the interference with freedom of assembly. As noted in the Venice Commission and OSCE’s joint *Guidelines on Freedom of Peaceful Assembly*, the organizers of an assembly should be able to appeal the decision of the regulatory authority to an independent court or tribunal. Any such review must also be prompt, so that the case is heard and the court ruling published before the date for the planned assembly.<sup>40</sup>

The European Court of Human Rights has also held that an effective remedy to protect enjoyment of freedom of assembly must provide for reasonable time-limits within which the State authorities, when giving relevant decisions, should act. Remedies being of a *post-hoc* character, could not provide adequate redress in respect of the alleged violations of the freedom of assembly.<sup>41</sup>

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<sup>39</sup> *Kurdevicius and Others v. Lithuania*, paras. 145-146.

<sup>40</sup> Venice Commission and OSCE (2010), *Guidelines on Freedom of Peaceful Assembly*, (Warsaw, 2<sup>nd</sup> ed.), para. 138.

<sup>41</sup> *Baczowski and Others v. Poland*, no. 1543/06, 03.05.2007, para. 68 and 83.

### 3. The state of the freedoms of movement and of assembly in Turkey

Among Council of Europe Member States, Turkey has been among the most restrictive with respect to freedom of assembly and association, and its record is replete with well documented violations. Until the end of 2018, of a total of 262 judgments in which the ECtHR has found a violation of freedom of assembly and association under Article 11 of the European Convention on Human Rights (ECHR), Turkey easily ranks first with 95 judgments.<sup>42</sup>

In 2015, following the suspension of a peace process with Kurdish groups, governors and sub-governors declared open-ended and round-the-clock curfews. Although curfews in principle were authorized during a state of emergency, according to Article 11(a) of Law No. 2935 of 25 October 1983 on States of Emergency, no such state of emergency was declared when the curfews were imposed in 2015, and so the legal basis of the curfews was questionable.

In a response to the Venice Commission's report on Curfews<sup>43</sup>, the Turkish authorities stated that general rules governing the curfews were provided for under Law No. 5442 of 11 June 1949 on Provincial Administration. As no express reference to institution of curfews is made in that law, the government argued that general provisions on the powers of governors provided sufficient legal basis for curfews.<sup>44</sup> In particular the Turkish government relied on:

- Article 11(a), authorising the governor to take the "necessary measures to prevent crimes from being committed and protect public order and security", relying for this on the State's general and special law enforcement forces;
- Article 11(c), providing that it is one of the tasks of the governor "to secure peace and security, personal immunity, safety of private property, public well-being and the authority of preventive law enforcement".

The Venice Commission was not satisfied with this explanation and concluded that "the Provincial Administration Law, on which decisions imposing curfews were based, and the decisions themselves do not meet the requirements of legality enshrined in the Constitution and resulting from Turkey's international obligations in the area of fundamental rights, in particular under the ECHR and relevant case-law".<sup>45</sup>

As this example shows, Article 11 of the Law on Provincial Administration is read by the Turkish authorities as giving administrative authorities overbroad, if not unfettered, discretion. According to the Turkish authorities, even such a restrictive measure as a curfew could find a legal basis in the general wording of article 11 (c) of this Law.

This interpretation leaves an extremely wide discretion to the governors to restrict the freedoms of movement and assembly of persons present under their jurisdiction, at provincial level, without the need to provide effective reasoning as to the legitimate aim, necessity and proportionality of the restriction. In

<sup>42</sup> See, *Violations by Article and State*, available at [https://echr.coe.int/Documents/Stats\\_violation\\_1959\\_2018\\_ENG.pdf](https://echr.coe.int/Documents/Stats_violation_1959_2018_ENG.pdf)

<sup>43</sup> Venice Commission, *Opinion on the Legal Framework Governing Curfews*, CoE Doc. CDL-AD(2016)010.

<sup>44</sup> See the Information note sent to the Venice Commission by the Turkish authorities, 24 April 2016, p.3. Cited in Venice Commission, *Opinion on the Legal Framework Governing Curfews*, CoE Doc. CDL-AD(2016)010, para. 5-59..

<sup>45</sup> Venice Commission, *Opinion on the Legal Framework Governing Curfews*, CoE Doc. CDL-AD(2016)010, para. 99.

particular, it conflicts both the general legal principle of legality and with international human rights law under the ECHR and the ICCPR, which, as the European Court of Human Rights and the UN Human Rights Committee affirm, require that any restriction to these rights be precise and foreseeable.

### **3.1. The situation under the State of Emergency**

During the state of emergency, Governors' powers to impose restrictions on freedom of movement and assembly were increased under the Law on State of Emergency.<sup>46</sup>

According to recent reports, during the state of emergency, governorships<sup>47</sup> imposed at least 163 restrictive measures on meetings and demonstrations, of which at least 86 were blanket bans. In provinces where those decisions were taken, all gatherings during state of emergency were banned. Thirty-seven of the decisions banned all meetings and gatherings during the whole state of emergency, while 73 of them were taken for between 30 days to three months. Reasons provided for restrictions were quite general; such as prevention of crimes, protection of public order, prevention of terrorist propaganda.<sup>48</sup>

Some specific activities were also banned by governors. For instance, in Ankara the Governorship prohibited "singing songs and ballads after sunset".<sup>49</sup> The German LGBT Film Days, organised by a LGBTI NGO in Ankara, was also banned by the same governorship on the grounds that public events held by LGBTI communities "may incite hatred and hostility in one group towards another social group, giving rise to dangerous situations in terms of public security; the protection of the rights and freedoms of the groups and individuals who participate in the events might be jeopardized; and some social groups could react and cause provocations because of certain social sensitivities".<sup>50</sup> This decision was extended to "all film and theatre events, screenings, panels, colloquium, exhibitions, etc..." relating to LGBTI people on 19 November 2019. The ban was imposed on "until further notice".<sup>51</sup>

The legal basis of the bans was Article 17 of the Law on Meetings and Demonstrations No. 2911 and Article 11(f) of the Law on State of Emergency No. 2935.

According to Article 11 (f) of the Law on State of Emergency, "[a]ll audio broadcasting as well as oral, written materials, movies, records, audio and visual tapes shall be controlled, if necessary restricted or prohibited."

Furthermore, under Article 17 of the Law on Meetings and Demonstrations, regional governors, governors or district governors can delay a meeting for up to

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<sup>46</sup> Pursuant to Article 11 of the Law, Governors can declare curfews; restrict the entry of all people to the certain parts of the province at certain times; restrict certain persons' entry to a region; ban any kind of meeting, marches or delay them.

<sup>47</sup> Governorships is a public institution that use central governments' powers in provinces. Governor, appointed by the President, is the highest public servant in governorships. Measures taken by governors affect various human rights protected under the Convention.

<sup>48</sup> Toplumsal Hukuk, OHAL Döneminde Toplantı Özgürlüğü İhlalleri Raporu, available at: <http://www.toplumsal hukuk.net/wp-content/uploads/2019/02/OHAL-RAPORU.pdf>. As stated in the report, not all bans are published at governorships' websites. Thus, it is considered that the total number of restrictions might be more than this.

<sup>49</sup> Ankara Governorship decisions, 27 May 2017, 18 September 2017.

<sup>50</sup> Ankara Governorship decision, 15 November 2017.

<sup>51</sup> However, Ankara Administrative Court held that the ban was valid until the end of state of emergency. Ankara 4<sup>th</sup> Administrative Court, Case no. 2017/3255, Decision no. 2018/2623, 15.11.2018

a month on grounds of national security, public order, prevention of commission of crime, protection of public health and public morals or the rights and freedoms of others or ban it if clear and present danger exists that a crime will be committed.

Following the failed coup attempt, Turkey notified the Secretary General of the Council of Europe that it would derogate from the ECHR and on 2 August 2016 with the UN Secretary General with regard to article 4 of the International Covenant on Civil and Political Rights

However, States do not enjoy unlimited power during a state of emergency. Pursuant to Article 4 of the ICCPR, "In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin." Pursuant to Article 15 (1) of the ECHR, in time of public emergency threatening the life of the nation, any High Contracting Party may take measures derogating from its obligations under the Convention to the extent strictly required by the exigencies of the situation. Turkey declared state of emergency to tackle the threat posed to the life of the nation by the severe dangers resulting from the attempted military coup and other terrorist acts.<sup>52</sup>

The ICJ is concerned that many restrictions on meetings and demonstrations during this period were based on broad and vague decisions with insufficient reasoning to meet standards of legality, necessity and proportionality. In particular, the ICJ fails to see how the banning of LGBTI events could be of any relevance to the circumstances that led to the declaration of state of emergency. Indeed, measures taken to control these activities cannot be seen as strictly required by the exigencies of the particular situation related to the attempted coup. Furthermore, such restriction is clearly a measure that discriminates on the grounds of sexual orientation, which is a prohibited ground and it is therefore in breach of the prohibition of discrimination, a non-derogable principle even under a state of emergency

### **3.2. The situation after the end of the State of Emergency**

Since the end of the state of emergency on 18 July 2018, no significant change occurred in practice, for mainly two reasons.

First, governors continued to take similar decisions based upon different provisions. They could not rely on the Law on State of Emergency, but the Law on Meetings and Demonstrations and/or Law on Provincial Administration give very wide discretion to governors such that they considered that measures were available to them similar to those provided under the Law on State of Emergency.. Indeed, the Ankara Governorship banned all LGBTI activities once again after the end of state of emergency on 3 October 2018. This new decision

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<sup>52</sup> *Mehmet Hasan Altan v. Turkey*, ECtHR, Application no. 13237/17, 20.3.2018, para. 89.

was based on Article 17 of Law on Meetings and Demonstrations and/or Law on Provincial Administration and Article 11/C of Law on Provincial Administration.

Secondly, an omnibus law passed the Parliament which both extended some state of emergency powers accorded to administrative authorities and also gave governors new powers. According to Article 1 of this law, amending Article 11/C of Law on Provincial Administration, the governor can take necessary measures and decisions to secure public order, peace, security and the right to physical integrity. As noted below, the Turkish authorities have assumed nearly unfettered discretion from these types of provisions. As a result, they even declared open-ended and round-the-clock curfews based upon this general provision.

However, Law no. 7145 also added that, when public order and security is disturbed or when there are serious indications that it could be disturbed at a level that could interrupt ordinary life, a Governor may restrict the entry and exit to certain parts of the province, for up to 15 days, of those people who might pose a threat to the public order. A Governor will also be able to restrict wandering or gathering of people at certain places or certain times, and regulate the navigation of vehicles.

This new provision fails to meet the principle of legality that is a key requirement for any restrictions of the enjoyment of a right under international human rights law, including rights to freedom of assembly and freedom of movement. As emphasized by the HRC, the laws authorizing the application of restrictions on freedom of movement must use precise criteria and may not confer unfettered discretion on those charged with their execution. However, under the new law, governors will have very wide discretion to decide about the place, time and subject of restrictions under this new rule. Indeed, it is not clear which acts of a person might pose threat to public order nor the extent of the powers and the geographical limitations to the restriction of rights that can ensue.

Although decisions of governors may be challenged before administrative courts, considering that decisions taken will apply for up to 15 days, the chance that administrative courts will decide in those cases before the expiry of the measure is quite low. Therefore, the result is that, in practice, the discretion left to governors will not be subject to judicial review. As noted above, the European Court of Human Rights has observed that remedies that were *post-hoc* character, could not provide adequate redress in respect of the alleged violations of the freedom of assembly.

Recently, following the suspension of elected mayors of Van, Diyarbakır and Mardin by the Ministry of Interior on 19 August 2019, demonstrations relating to suspension of mayors have been banned in at least 10 provinces.

In August 2019, the governorships of Gaziantep,<sup>53</sup> İzmir,<sup>54</sup> Van,<sup>55</sup> Muş,<sup>56</sup> Mardin,<sup>57</sup> Hakkari,<sup>58</sup> Şırnak,<sup>59</sup> Kocaeli,<sup>60</sup> Iğdır<sup>61</sup> and Adana<sup>62</sup> banned all meetings

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<sup>53</sup> Communication by the governorship available at: <http://www.gaziantep.gov.tr/basin-aciklamasi-2019-31>

<sup>54</sup> Communication by the governorship available at: <http://www.izmir.gov.tr/-kamuoyu-duyurusu1>

<sup>55</sup> Communication by the governorship available at: <http://www.van.gov.tr/26082019-tarihli-yasaklama-karari>

<sup>56</sup> Communication by the governorship available at: <http://www.mus.gov.tr/toplantı-ve-gosteri-yuruyuslerinin-yasaklanması45>

and demonstrations, under Article 11(c) of the Provincial Administration Law n.5442 was amended on 25 July 2018.

Mayors of Diyarbakır Metropolitan Municipality, Adnan Selçuk Mızraklı, Van Metropolitan Municipality, Bedia Özgökçe Ertan, and Mardin Metropolitan Municipality, Ahmet Türk, have been charged with “establishing or running an armed terrorist organization”, “membership in an armed terrorist organization”, “aiding a terrorist organization”, “propaganda of a terrorist organization,” and “praising crime and criminals” initiated by public prosecutors.

In his order, Ministry of Interior stated that “for the safety of judicial and administrative investigations, Mızraklı, Ertan, Türk were temporarily suspended of their duties according to the Article 127 of the Constitution and the Article 47 of the Municipality Law n.5393”. The governors of Diyarbakır, Mardin and Van were appointed as Trustees to these mayorships.<sup>63</sup>

The decision to suspend mayors has been widely protested in the country. To prevent the spreading of protests against this decision, governors have used the new power granted under Article 11 (c) of the Provincial Administration Law n.5442, as well as Article 17 of the Assembly and Demonstrations Law n.2911, that they relied on as legal basis for these bans.

Although, under Article 11(c) the Law n. 5442, restrictions can continue for 15 days, the Governors of Gaziantep, Mardin, Hakkari have imposed 30-day bans, exceeding the period envisaged by the law.

Secondly, Article 11(c) of Law n.5442 does not allow governors to impose blanket bans. Pursuant to this new provision, bans can only be imposed for a certain time or a certain location. However all governors cited above have imposed blanket bans, prohibiting all demonstrations in the relevant provinces for 5 to 30 days.

Thirdly, Article 17 of Law n.2911 does not allow for a blanket ban either. The ban can be imposed on a specific meeting or demonstration. Furthermore, Article 11(c) the Law n. 5442 requires prohibitions to be applied to certain persons on suspicion of disrupting public order or public security. These conditions have been blatantly disregarded.

As noted above in this briefing paper, the new powers provided by Law no. 7145 are vague and overbroad. However, the recent practice has shown that even the foreseeable limits of this provision have been ignored by authorities. These new provisions, as well as those of Law no. 2911, have been interpreted as giving governors unfettered discretion.

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<sup>57</sup>Press news available at: <https://www.haberturk.com/mardinde-gosteri-ve-yuruyuslere-30-gunluk-yasak-2514473>; <https://www.yeniakit.com.tr/haber/belediyeye-kayim-atanmist-mardin-valiliginden-flas-aciklama-30-gun-sureyle-yasak-892310.html> .

<sup>58</sup> Press news available at: <https://www.dha.com.tr/yurt/hakkaride-gosteri-ve-yuruyuslere-30-gunluk-yasak/haber-1702716>

<sup>59</sup>Press news available at: <http://www.haber7.com/guncel/haber/2890925-sirnak-valiligi-acikladi-15-gun-sureyle-yasaklandi>

<sup>60</sup> Press news available at: <https://www.kocaelibarisgazetesi.com/guncel/kocaelide-kayyum-eylemleri-yasaklandi-2-h113170.html>

<sup>61</sup> Press news available at: <https://www.evrensel.net/haber/376922/igdirde-valilik-15-gun-eylem-yasagi-ilan-etti>

<sup>62</sup> Press news available at: <http://www.adanaulus.com/adanada-15-gun-eylem-yapmak-yasak/>

<sup>63</sup> Press release of the Ministry of the Interior: <https://www.icisleri.gov.tr/diyarbakir-mardin-van-buyuksehir-belediye-baskanlarinin-gorevden-uzaklastirilmasina-dair-basin-aciklamasi>

#### 4. Conclusion

Even before the recent amendments to the Law on Provincial Administration, the law and practice of Turkish authorities relating to governors' powers to restrict freedom of movement and assembly were not sufficiently well described in law to be foreseeable or to prevent arbitrary, disproportionate or discriminatory application.

A general rule about the powers of governors was relied on to declare open-ended and round-the-clock curfews. Unlike the Venice Commission in its assessment, the Turkish judicial bodies have not identified in their rulings any problems about wide interpretation of law to justify curfews.

Indeed, in different provinces, individuals and the Diyarbakır Bar Association applied to the administrative courts to request the annulment of curfews. They also requested the stay of execution of the measure. All claimants in those cases argued that the Law on Provincial Administration could not be relied on as the legal basis, as the Law did not include a provision concerning curfews. However, all applications were dismissed by the courts.<sup>64</sup> Following these decisions, three individual applications were submitted to the Constitutional Court requesting interim measures to lift curfews. Their request for interim measures was also rejected by the Constitutional Court on the grounds that the applicants could not present concrete evidence that pose risk to their physical integrity.<sup>65</sup> Considering that there was no legal basis to empower governors to impose curfews at the time and the serious impact of curfews on rights of the residents, the decision of the Constitutional Court is questionable.

Similarly, general and specific bans on meetings and demonstrations have been easily imposed not only during state of emergency but also before and after state of emergency.

Recalling inconsistency of these rules with international law standards, the ICJ and IHOP consider that the Turkish authorities make the necessary amendments in relevant laws to bring them in line with their international legal obligations. .

These rules should ensure that there are no undue restrictions imposed on protected human rights and fundamental freedoms, including freedom of movement and assembly. only in exceptional conditions, when the restriction comports with the principles of legality, non-discriminatory, necessity and proportionality may such restriction be contemplated. . Rules concerning the freedom of assembly should not be implemented in a discriminatory manner as occurred in the case of banning LGBTI activities.

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<sup>64</sup> Diyarbakır 2nd Administrative Court, Case No 2014/1148, Decision No. 2015/204, 11.3.2015; Mardin Administrative Court, Case No. 2015/3425.

<sup>65</sup> *Mehmet Girasun and Ömer Elçi application* (TAK), No: 2015/15266, 11/9/2015; *Meral Daniş Beştaş application* (TAK), No: 2015/19545, 22/12/2015; *Ekrem Şen application* (TAK), No. 2015/20376, 20.1.2016.

**In order for Turkey to comply with its obligations under articles 12 and 21 of the ICCPR and Article 11 of the ECHR, the ICJ and IHOP recommend the following:**

- 1. General restrictions based upon Article 17 of Law on Meetings and Demonstrations and/or Law on Provincial Administration and Article 11/C of Law on Provincial Administration should not be imposed.**
- 2. Both the former general power given to governors under Article 11/C of Law on Provincial Administration and the new one given through Law no. 7145 should be abolished.**
- 3. All decisions of administrative authorities affecting freedom of movement and freedom of assembly should be subject to expeditious and effective judicial review by an independent and impartial court.**

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