

The right of the defence in Turkey before and after the State of Emergency

A comparison through the right of defence in Turkey before and after the announcement of State of Emergency is an important tool to understand the situation in Turkey. But at this point some important facts should be underlined. First; it is impossible to discuss any particular subject without examining the characteristic of State of Emergency. But also, it is again impossible to understand State of Emergency without examining Turkey's recent past.

What is State of Emergency and what are the legal backgrounds?

The legal basis of the state of emergency is Article 120 of the Turkish Constitution and State of Emergency Law (the "SoE Law"). According to the regulations a state of emergency may be announced in the event of, among others, serious indications of widespread acts of violence aimed at the destruction of the free democratic order or fundamental rights and freedoms.

Article 15 of the Turkish Constitution also declares that the fundamental rights and freedoms may be limited under the extra-ordinary situations but it also defines the exceptions.

According to this article, ***no one shall be compelled to reveal his/her religion, conscience, thought or opinion, nor be accused on account of them; offences and penalties shall not be made retroactive; nor shall anyone be held guilty until so proven by a court ruling***".

According to the article 121 of Turkish Constitution; during State of Emergency, governmental decrees may be regulated. But of course there are some rules about the decrees:

–they must be related with the reason of the State of Emergency (threat / danger etc..) For instance; if the state of emergency is about the failed coup attempt, then the decision about closing TV/newspaper or establishment of a new university can not be explained in this legal field. Cause they have no connection with the "danger".

–They must be timely limited. It means that, all those decrees are just valid for the period of State of Emergency. It also means that during State of Emergency, government does not have the power to make permanent regulations. They can not discharge public officers. Or for instance they do not have the right to close associations.

–Article 15 also declares the limitations about fundamental rights. So through the decrees, it is impossible to announce people as criminals without a judicial process.

Therefore, it should be accepted that the regulations about state of emergency in Turkey are quite parallel to the international context. So the source of the present problem is not legal, but clearly it is the practice. And when the main subject is the practice of a state, then it means that it is about politics.

State of Emergency; when does it start in Turkey?

This should be the key question to understand what is happening in Turkey currently. If this

question will be answered through the official documents, then it will be claimed that it started when it had announced, right after coup attempt. But if it will be answered through the facts, then it has to be admitted that there have been a state of emergency in Turkey for years and years.

In fact, for many years there were signs for the onslaught of such a transformation in Turkey. The coup attempt was the opportunity for the government to act. Shortly before and after Recep Tayyip Erdoğan was elected as the president, the policies directly targeting one section of the society came into effect. These policies were preceded by the elimination of fundamental rights and freedoms by the state.

The last legitimate election on the 7th of June 2015, with its before and after, was one of the most important moments in Turkey's history. For the first time in Turkey, a president who should be impartial according to Turkey's Constitution, traveled from city to city and organized an election campaign against a political party (HDP-Peoples democracy party) and in favour of AKP. Bombs exploded in HDP meetings and the powerful learned that they can win by organizing terrorism or by condoning it. Despite all the efforts which aimed to divide and polarize society, the HDP passed election.

The government's reflex against the results of the election came very soon. Meanwhile the state authorities which had previously announced that the peace process which was carried out with the Kurdish movement had ended, left the people in Kurdish cities dead under a continuous curfew. The districts like Sur, Cizre, Nusaybin were demolished. The number of the people killed during this long period is still not known exactly.

From the 7th of June 2015 until the coup attempt dated 16 July 2016, everyone like academics, journalists, lawyers, human rights activists faced criminal prosecution, arrests and detention.

Through the today's events, it should be noted that they are not different from the developments of the last years. The judiciary has not been functioning for a very long time. Opponents have already been arrested in order to silence them. The main difference between the past and today, is the amount of people who have been suffering from or affected by the states' politics. Briefly, the most dangerous point of the state of emergency is the fact that it has been declared by the powers who desires to normalize the state of emergency.

Now, the right of defence, after this long introduction: of course this will not only be a comparison which focuses on differences but also focuses to underline the similarities.

The right of defence is an essential element of the right to a fair trial. Which leads us to the fact that it can never be discussed separately, without mentioning other elements of fair trial such as presumption of innocence, equality of arms, adversarial proceedings, right to information about the

charges etc... Likewise it can never be discussed without the concept of „independence of judiciary“ and „immunity of lawyers“ of course. An examination of the right of defence before and after state of emergency in Turkey, should also be done by these parameters.

- According to the governmental decrees first of all the duration of detention was extended. Before state of emergency, the duration of a detention was 1 day and the prosecutor had the right to prolonge it for 4 days in specific situations. With state of emergency, this duration was extended to 30 days and in many cases, suspects needed to stay in police station without a reason or necessity for all those 30 days. It continued like that for the first 6 months of State of Emergency but later with a new decree, it was changed again and now it is 7 days and the prosecutor has the right to extend this duration 7 days more.

- Before state of emergency, there were no restrictions to the access of lawyers. But in the first 6 months of state of emergency, right to access to a lawyer was restricted during the first 5 days of the detention. Now again with a new governmental decree, this restriction had removed but it did not solve the problem because, with an another decree, the government had already changed the Criminal Procedure Law and right now, there is an article which restricted the right to access to a lawyer for the first 24 hours.

- Also, with decrees, now, there is a restriction for the suspects to choose their lawyers. Before state of emergency, if a lawyer was tried with the accusation of organized crime, it could be possible to prevent her to defend an arrestee or a sentenced who were in prison with the same accusation. According to decrees, it changed in 2 ways: 1- Right now, it is not important if there is a court case or not, but an ongoing investigation against the lawyer is enough for the restriction. 2- In the past that rule was only valid for the ones who were in jail but now, the lawyers with the same accusation even can not represent the ones who are investigated.

- Again with the criminal organization accusations, one defendant can not be represented by more than 3 lawyers in a trial. Thus, an implementation which was only valid for the investigation process, is now applied to the whole judicial process. This will especially effect the political trials.

- Also the interviews between the lawyers and the suspects under detention in jail are recorded. The Decree also gives the prison guards the power to participate to the interview and seize the documents if they think it is necessary. And the days and the duration of interviews may be restricted.

These basic regulations show that state of emergency is a complete tool for a transformation. It is clear that all these regulations aim to restrict the right of defence. But if the discussion is „before“ and „after“ the state of emergency, then it should be admitted that the right of defence was violeted repeatedly also before the state of emergency.

The rights which are inseparable parts of the right of defence should also be discussed:

First of all, the right to information about the charges: Which, as a matter of course, is one of the most important elements of the right of defence. In this respect, the proceedings after the state of emergency is a phenomenal. For instance, many judges and prosecutors who are still in jail, defended themselves against the accusation of being a member of Gülen organization but they were arrested with the accusation of threatening to unveil the constitutional order. But it is difficult to claim that this case is „unique“ and only particular to state of emergency. For instance: during Peace for Academics' interrogations – before state of emergency - even the prosecutor had no idea about the accusation. And the lawyers, had to make defence against two possible accusations. They had no chance to learn the accusation, was it terrorism propaganda or was it insulting the state. As it seen, in this sense, nothing has changed.

The other subject to be underlined is the presumption of innocence. Before the state of emergency, this main principle was remembered when there is an ordinary crime like rape, murder, robbery etc. Of course, even in these crimes, this principle can be forgotten depending on the ethnicity or class belonging of the defendant. But today the situation is clearly worse than in the past. Because today, it is an era that the judicial and administrative practices are combined through governmental decrees. As a result it is easy to claim that right now this principle is not valid for at least half of the society. Hundreds of thousands public officers, had dismissed with a justification of having a relation with terrorist organizations. It is obvious that in a state of law, such a dismissal practice definitely needs a judicial sentence. However today, hundreds of thousands of people just faced with the results of a judgement without a judicial process. So since the state of emergency, presumption of innocence have been violated more than ever.

The other subject that has to be focused while discussing the right of defence is the attorney immunity. Because it is impossible to imagine the existence of the right of defence, when there is no attorney immunity. The repression against lawyers has a history in Turkey. But with November 2011, it took an another dimension. 45 lawyers, only just because of being Öcalan's lawyers were arrested with the accusation of being a member of Kurdistan Communities Union. Some of them were in jail for 2,5 years. The trial still goes on and there is no evidence beside their interviews with their client Öcalan in the prison. Then 2013 January, another mass police operation occurred against the Progressive Lawyer Association (CHD). More than 20 lawyers were accused and 9 of them were put in jail for a period between 9 and 14 months. This trial still goes on too. The indictment of this trial can be accepted as a very extraordinary sample of the criminalization of attorneys. Because it was the first time that an indictment included a statistical analysis which shows how many clients of whom refuse to answer questions in the police station. It was claimed in the indictment that when CHD lawyers were advising terrorism suspects, majority of these suspects refused to answer questions. So advising a suspect to

use their right to remain silence became a charge against the lawyers in the indictment.

Right now, hundreds of lawyers are in prison. When the repression of the past and today's circumstances combine together, the result turns out to be a disaster for the right of defence. Many victims of the state of emergency, especially who are accused to be a member of Gülen organization, could not find a lawyer because lawyers are afraid to represent them. This is not only a fear of arrestment, but after the state of emergency the cruel treatment including physical violence against lawyers who were in Ankara Courthouse with the assignment of Ankara Bar Association also stimulated a new kind of fear. The ones who accepted to represent those suspects, unfortunately, are asking unreasonable amount of money. For many suspects accessing a lawyer is quite impossible because of those reasons.

Finally, independance of judiciary is a subject, that has to be discussed with the relation to the right of defence. The judiciary was never independent in Turkey. On the contrary, when the accused are Kurdish or socialists, the judiciary was only a mechanism that worked for the benefits of the State. However, it is possible to claim that nowadays there has been a fundamental change. Because today around 3000 judges and prosecutors were arrested and it means that so called free judges and prosecutors are mentally arrested. The arrestment of 3000 judges and prosecutors also means that all the judiciary mechanism is working with the threat of arrestment today. In the sense of this reality, it is obvious that the defence of a suspect or the evidences in a file are less important than the benefits and desires of the State's power.

Briefly, Turkey never was a rose garden. But the lack of trust to the judiciary was never in this dimension. There were no right of defence for the opponents before the state of emergency. But after state of emergency, not only the for the part of the society who reacts against the reorganization of the state, but also for people who just have concerns, there is not a piece of chance to use the right of defence.

As a result; even the date of 15th of July is recorded as a coup attempt by historiographers, in the future this date will be remembered as a moment of deep darkness, the suspension of the democracy, and the institutionalization of oppression, civil dictatorship and fascism.

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(Progressive Lawyer Association – banned by a governmental decree)