

WHEN STATE OF EMERGENCY BECOMES
THE NORM

THE IMPACT OF EXECUTIVE DECREES
ON TURKISH LEGISLATION

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2. AMENDMENTS TO THE JUDICIARY SYSTEM

1. Amendments Concerning the Right to Defense Counsel and the Practice of Attorneyship

a.) Continuation of Trials without Defense Counsel

Executive Decree 676 Article 5 made an addition to the Criminal Procedure Code stating that in cases where the law requires defense counsel, “the trial can continue when the defense counselor abandons the trial without an excuse”. In such cases, the judge will be able to continue the trial in the absence of a defense counselor. The purpose for adding this phrase is to deter defense counselors from abandoning the court in protest. Criminal Procedure Code (CMK) stipulates that, in crimes where the lowest limit of prison sentence is more than five years, an attorney has to provide legal counsel to the suspect or defendant at every stage of investigation and prosecution. In judiciary procedures concerning such crimes, the discontinuation of the trial is a key guarantee of the defendant’s rights and interests. Executive Decree goes further, by changing the wording as “the trial can continue when the defense counselor abandons the trial without an excuse or does not come to the trial”. As such trials can continue even when the legal counselor does not come to the trial.

b.) Restriction of Representation by Attorney in Trial

Executive Decree 676 has made amendments to the Criminal Procedure Code with direct effect on the defendant’s rights to due process and to effective defense. First of all, the said Executive Decree’s Article 1 makes an addition to the Article 149 of the Code, stipulating that “in investigations into organized activities, at most three attorneys can be present at the trial”. As such, with the addition of this phrase, the three-attorney limit has been expanded to include not only the interrogation of the defendant as before, but also the process of investigation. As such, a defendant on trial for organized activities can be represented by at most three attorneys. It has thus become impossible for numerous attorneys to participate in political trials.

c.) Prohibition from Defense Counsel Duty

Secondly, Executive Decree 676 expanded the concept of prohibition from defense counsel duty in the Criminal Procedure Code.¹⁶ The old text stipulated that, the attorneys who defend individuals detained or convicted for creating an organization for engaging in criminal activity, establishing and managing an armed organization, and terror related crimes, could be banned from providing defense counsel for one year in case they themselves were undergoing a prosecution for the same crimes, that is, if they were being sued, and that this period could be extended at most twice, for six months. Executive Decree 676 Art 2. stipulates that an attorney can be prohibited from defense counsel duty even if she / he undergoes a criminal investigation for these crimes. Furthermore, there does not even have to be an organic link



Executive Decree 676 has made amendments to the Criminal Procedure Code with direct effect on the defendant’s rights to due process and to effective defense. A defendant on trial for organized activities can be represented by at most three attorneys.

¹⁶ Prohibition of defense counsel had previously been regulated with the Executive Decree 667 Article 6.



Executive Decree 676 Article 2. stipulates that an attorney can be prohibited from defense counsel duty even if she / he undergoes a criminal investigation for these crimes.

between the crimes attributed to the legal counselor and the defendant / suspect. In the old text, the attorneys of only “detainees and convicts” could be prohibited from defense counsel, whereas with the Executive Decree 676 this has been expanded into “suspects, defendants and convicts”. As such, the attorney can be banned from defense counsel not only during the prosecution stage, but also during the criminal investigation on her / his client. This provision, by expanding the prohibition to include even investigations on the aforementioned crimes, violates the principle of presumption of innocence. As a result of the widespread and arbitrary application of this provision, numerous attorneys were banned from defense counsel duty and defendants and suspects in political trials have started to have great difficulty in finding lawyers to defend them.

d.) Limitation of the Right to Confer with a Defense Counselor during Investigation

Executive Decree 676 has also made changes to the defendants’ right to confer with a lawyer. Executive Decree 668 has stipulated that in certain crimes indicated in the Turkish Criminal Code, in crimes falling under the Law on Counterterrorism and crimes of organized drug manufacturing and trafficking, the public prosecutor can request that an individual under custody be prevented from conferring with a lawyer for up to 5 days. Executive Decree 676 Article 3 has then limited this period to 24 hours, and stated that the suspect’s testimony cannot be taken during this time. Although the duration of the limitation of the right to confer with a lawyer has thus been reduced with this latest amendment, the danger still continues since the suspect’s right to confer immediately with a lawyer is an important bulwark against the manufacturing of testimonies by force, in an informal and illegal manner.

e.) Limitation of the Right to Confer with an Attorney in Prison

Executive Decree 676 also introduced strict limitations to the right to confer with an attorney in prison. The Executive Decree’s Article 6 made an addition to the *Law on the Execution of Punishment and Security Measures*, specifying that the attorney meetings of those convicted of certain crimes listed in the Turkish Criminal Code and crimes falling under the Law on Counterterrorism can be recorded with audio or video devices for a period of three months upon the demand of the public prosecutor and the decision of the judge of execution; an officer can attend the meeting between the convict and attorney; the documents, files and meeting notes shared by the convict and attorney can be seized; and the days and hours of these meetings can be reduced. This period can be extended more than once, in three-month increments. This addition did not bring any limitation to the power to extend the period. In case there appears information, documents and evidence showing that the convict directs terror organizations or other criminal organizations with orders and instructions or secret, open or deciphered messages, the meetings can be ended and prohibited for a six-month period by the judge of execution. The Executive Decree stipulated that the same measures can be applied to detainees. The State of Emergency Executive Decree 667 had already introduced similar limitations for detainees. This provision is in breach of Criminal Procedure Code Article 154, which guarantees the confidentiality of a detainee’s meeting with their attorney. The Executive Decree 676 has added similar limitations for convicts to the Law on the Execution of Punishment and Security Measures.

With the Executive Decree 667 Article 6 and Executive Decree 676’s addi-

tions to the *Law on the Execution of Punishment and Security Measures*, it has become possible to sharply limit the convicts' and detainees' rights to meet with their attorneys, as well as the confidentiality and timing of such meetings. However, the chance to meet an attorney of their own is the very precondition for convicts' and detainees' access to legal advice in prison. For the protection of the right to defense, the inviolability and confidentiality of the attorney - client meeting are essential elements. Executive Decree 676 has eliminated this confidentiality, paving the ground for arbitrary interventions.

2. Amendments to the Power to Take Investigative Measures

Executive Decree 668 Article 3 has significantly expanded the powers of the public prosecutor and the law enforcement officials during the investigation of crimes described in Turkish Criminal Code, Book 2, Section 4, Chapters 4-5-6-7, crimes falling under Law on Counterterrorism and collective crimes; judicial control over investigative measures has been weakened or eliminated.

a.) Granting Prosecutors the Power to Issue Arrest Warrants

As per Executive Decree's Article 3(1)(a), prosecutors will be able to issue arrest warrants in non-delayable cases. However, in the regular legal regime, the issuance of arrest warrants for a person under investigation is possible only upon the demand of the public prosecutor and decision of the judge of court of peace, in case it is impossible to contact the person and summon her / him to court.

Executive Decree Article 3(1)(b) has stipulated that, in all types of crimes, suspects who are in hiding in Turkey or abroad in order to hamper an investigation about themselves and therefore are not accessible by the public prosecutors are to be deemed fugitives. Prior to this Executive Decree, the concept of fugitive existed only in the phase of prosecution (trial). Now however, fugitive status applies even during the investigation phase. With an amendment by the Executive Decree to Criminal Procedure Code 247(2)(b), a simpler procedure has been accepted for the fugitive person to be brought to the prosecutor's office or court. If under fugitive status, a person's properties, rights and receivables can be confiscated by a court order. When someone can be declared a fugitive so easily, their property can be confiscated if they are overseas and even if they are not fugitives.

b.) Weakening Judicial Control of Confiscation Procedures

As per Executive Decree Article 3(1)(h), in cases of confiscations performed without a judge's decision, the confiscation can be submitted to the judge's approval in 5 days and the judge can announce her / his decision within 10 days of the confiscation. However, in the regular legal regime, it is compulsory to present the confiscation process without judicial decision to the judge within only 24 hours and the judge has to make a decision within 48 hours of the confiscation. The extension of these terms will prevent the individual from using her / his belongings for a longer time, which creates the danger of tampering with the evidence and jeopardizing the security of the evidence.

c.) Elimination of Controls During Search and Confiscation

Executive Decree 668 Article 3(1)(e) specifies that it is sufficient to have one of the neighbors present while searching a residence, workplace or another indoors area. However, in the regular legal regime, at least two of the neighbors had to be in attendance. In military areas, police officers can search and confiscate items without



With the Executive Decree 667 Article 6 and Executive Decree 676's additions to the Law on the Execution of Punishment and Security Measures, it has become possible to sharply limit the convicts' and detainees' rights to meet with their attorneys, as well as the confidentiality and timing of such meetings.

Finally, Executive Decree 668 Article 3(1)(n) stipulates that if the public prosecutor deems an investigative measure necessary during investigation, she / he can obtain a court order from the judge of the court of peace in charge and, when required by the investigation, demand buildings, equipment and personnel from the civilian authorities falling within the jurisdiction in question.

3. Amendments Concerning the Principles of Equality of Arms and Immediateness in Criminal Justice

The principle of equality of arms requires that parties of a trial be given a reasonable opportunity to put forward their claims without a serious disadvantage vis-a-vis the other party. Furthermore, the criminal proceeding must be conducted in a contentious manner; that is, the parties should be made aware of the evidence and arguments by the opposing party and the prosecution, and be given the opportunity to respond to these.

a.) Limitation of Attorney's Right to Examine the File's Content and Make a Copy

The State of Emergency Executive Decree 668 Article 3(1) stipulates that the attorney's right to examine the file's content and get a copy can be limited upon a decision of the public prosecutor, if this could jeopardize the criminal investigation. For the legal counselor to produce a real defense against the claims concerning the suspect, to object against restrictive measures and to take legal steps, he / she has to be able to examine the content of the file and the evidence against the suspect. The limitation of these rights is tantamount to the restriction of the right to defend and to object to measures limiting personal rights.

It is seen that, in practice, the concept of the possibility of jeopardizing the investigation is usually based not on concrete but abstract claims, and a mere possibility of the lawyer to abuse these materials. If the lawyer who shall offer legal counsel to the suspect is considered to be a possible threat against the investigation, this will make it impossible for the lawyer to perform her / his profession, breaching the principle of the equality of arms to the detriment of the suspect. Furthermore, although the Criminal Procedure Code Article 153/2 specifies that the power to decide on such a restriction is only granted to the judge of court of peace upon the request of the prosecutor, Executive Decree 668 shifts this power directly to the public prosecutor.

b.) Limitation of the Right to Call Witness

Executive Decree 676 Article 4 introduced an amendment to the *Law on the Structure and Duties of First Instance Judiciary Courts and District Courts*, stipulating that the judge may reject a witness or specialist called to the trial by the defendant or participant. Previously, the law text used to set forth that, in cases where a witness or specialist was rejected, the defendant or participant nevertheless had the right to bring the said person to court and have them heard. The Executive Decree added a phrase to the relevant paragraph, granting the judge the right to reject demands made for extending the trial. However, in criminal jurisdiction, in line with the principle of "verbal proceedings", a witness must absolutely be heard in court if this is possible. However, the latest provision creates the risk of an arbitrary rejection of a witness or expert during trial. As such, it limits a crucial component of the right of due process, which is the right of the defense to call its witnesses and have equal arms with the prosecutor's office during jurisdiction, and the right of the participant to elaborate her / his claim.



Executive Decree 694 Article 148 made an addition to the Criminal Procedure Code Article 216 specifying that "the absence of the legal counselor will not prevent the announcement of the verdict". Making it unnecessary for the obligatory legal counselor to be present during the announcement of the verdict eliminates the legal counselor's chance to affect the verdict in the last trial.

c.) Limitation of the Right to Examine a Witness

Executive Decree 694 Article 142 stipulates that if public officers assigned to the position of secret investigator²¹ must be called as witness in court, their testimony can be heard even in the absence of the defendant and her / his attorney, or in a special location where measures will be taken to dissimulate their voice or image. As such, secret investigators can be heard as secret witnesses during court, in the absence of the defendant and her / his attorney.

As per the principle of the immediateness of evidence, the court which will reach a verdict must confront the defendant, witnesses, and all evidence one on one, and have direct contact with them. As per the principle of equality of arms, the defendant and her / his attorney must be informed about all the evidence and claims against the defendant; must have the chance to examine the witnesses and experts heard in court; and must have the possibility of disproving the claims with counter arguments. As such, the calling of a secret investigator as a witness is controversial in the context of the right to due process.

If the identity of the secret investigator has to be kept secret due to the nature of her / his duty, in cases where this investigator is heard in court, they can be heard in a way that will dissimulate their identity by technically manipulating their voice or image. However, Executive Decree 694 has made an addition to the Criminal Procedure Code, making it possible for a secret investigator to be heard in the absence of the defendant and her / his attorney and without them having the chance to respond to adverse claims and pose questions. As such, this violates the most important pillars of the right to due process, namely the principle of the equality of arms and the right to “examine the adverse witnesses”.

d.) Limiting the Defendant’s Right to Appear in Court

Executive Decree 694 Article 147 makes an addition to the Criminal Procedure Code Article 196, stipulating that when deemed necessary by the court, the defendant’s interrogation can be conducted outside of the court, by means of audio and visual means of communication. However, owing to the principle of immediateness of trial, the judges must listen directly to the defendant before formulating their opinion, and observe their gestures and words without intermediation. The defendant’s right to appear in court, guaranteed by the Criminal Procedure Code Article 193, is among the most important elements of the right of defense. Executive Decree has granted a huge judicial discretion to the courts, and the decision to prevent the defendant’s appearance court damages the defendant’s right to due process.

e.) Announcement of the Verdict in the Absence of the Legal Counselor

Executive Decree 694 Article 148 made an addition to the Criminal Procedure Code Article 216 specifying that “the absence of the legal counselor will not prevent the announcement of the verdict”. As such even if the obligatory legal counselor is not present in court, the verdict will be considered to be pronounced if it’s announced to the face of the defendant and it will also be possible to appeal against the verdict through legal ways. The lawmaker has stipulated that representation by lawyers is

²¹ Criminal Procedure Code Article 139 specifies that public officers can be assigned to secret investigator positions upon a court order, if it is strongly suspected based on concrete evidence that the investigated crime has been committed and if it is not possible to gather evidence through other means. Secret investigators submit to the court evidence against the defendant.



There will be no criminal legal, administrative or financial responsibility for those making decisions, implementing actions or measures, or assuming duties as per judiciary or administrative measures for suppressing coup attempts or terror incidents, as well as individuals taking decisions or fulfilling duties as per State of Emergency executive decrees (Executive Decree 668 Article 37).

obligatory in certain circumstances.²² Making it unnecessary for the obligatory legal counselor to be present during the announcement of the verdict eliminates the legal counselor's chance to affect the verdict in the last trial, and also puts the defendant in a disadvantage in terms of utilizing the means of objection in an effective way.

4. Amendments Concerning Personal Freedoms and Safety

a.) Extension of the Custody Period

Article 6(1) of the Law on the Revision of the Executive Decree dated October 29, 2016 and numbered 674 on Measures Taken During the State of Emergency had set a 30-day custody period for the crimes described in Turkish Criminal Code's Book 2, Section 4, Chapters 4, 5, 6 and 7, crimes falling under the Law on Counterterrorism and collective crimes, during the State of Emergency. Executive Decree 684 Article 10(a) made a revision to this law, and set the custody period for the said crimes as a maximum of 7 days, and gave the public prosecutor the chance to extend this period for 7 more days. As such, the custody period is not to surpass 7+7, or 14 days. Before the State of Emergency provisions, as per Criminal Procedure Code Article 91, the custody period was limited to 24 hours after apprehension, except the time required for the individual under custody to be sent to the closest judge or court. In collective crimes, this period could be extended by the public prosecutor for a total of three days, in one-day increments, due to difficulty in collecting evidence or owing to the large number of suspects.

b.) Extension of Maximum Detention Period in Terror Related Crimes

Executive Decree 694 Article 141 made an addition to the Criminal Procedure Code Article 102. As such, in crimes described in the aforementioned chapters of the Turkish Criminal Code and in Law on Counterterrorism, which have a maximum detention period of two years, it became possible to extend this period by not three but five years. As such the aggregate maximum detention period for terror related crimes reached 2+5, or 7 years.

c.) Requirement of Finalization of Compensation Verdict in Cases of Illegal Custody or Detention

Criminal Procedure Code Articles 141 and 142 set forth the compensation for the material and moral damages inflicted on individuals by illegal apprehension, detention or continuation of detention, or on by not bringing them before court within a convenient time period. Executive Decree 694 Article 144 added two extra paragraphs to the Criminal Procedure Code Article 142, which outlines the requirements for a demand of compensation, stipulating that it is not possible to commence execution proceedings for such compensation before the verdict is final and the administrative application process is complete. Previously, as per the law and Supreme Court of Appeal (*Yargıtay*) resolutions, it was not necessary to wait until finalization of verdict to commence execution proceedings for compensation of decisions of illegal apprehension, detention or continuation of detention. The amendment introduced by the Executive Decree, however, requires the finalization of the compensation verdict and thus makes it harder to compensate for the material and moral damages inflicted by unjust apprehension, detention or continuation of detention measures.

²² For these circumstances, see Criminal Procedure Code Articles 150, 91/7, 101/3, 6, 247/3,7, 74/2, 8, 204.