

GEDİK & ERAKSOY

21 July 2016

STATE OF EMERGENCY EXPLAINED

In response to the failed coup in Turkey on 15 July 2015, last night President Recep Tayyip Erdogan announced that Turkey is placed under a “state of emergency” (*olağanüstü hal* or **SoE**). The SoE shall initially apply for three months starting from 21 July 2016 (1:00 a.m.). The SoE decision was adopted at the Council of Ministers’ meeting, after being recommended by the National Security Council’s meeting held last night.

What is the State of Emergency?

The SoE is set forth under the Turkish constitution (**Constitution**). As per Article 120 of the Constitution, in the event of serious indications of widespread acts of violence aimed at the destruction of the free democratic order established by the Constitution or of fundamental rights and liberties, or serious deterioration of public order because of acts of violence, the Council of Ministers, after consultation with the National Security Council, may declare, for an initial period of up to six months, the state of emergency in one or more regions or throughout the country.

The Council of Ministers decision declaring the SoE must be published in the Official Gazette and must immediately be submitted to the Parliament for its approval. While the Parliament’s approval is required, the SoE decision will, however, be enforceable upon its declaration, even though the Parliament has not concluded its review of, or come to a decision on, the SoE.

The Parliament is authorized to change the term of the SoE announced by the Council of Ministers. Upon the Council of Ministers’ request, the Parliament may extend the term of the SoE – if required, repeatedly – by up to four more months.

The State of Emergency Regime

The SoE regime is regulated under the Law on State of Emergency dated 25 October 1983 and numbered 2935 (**SoE Law**). The SoE Law, grants governor(s) (*vali*) of the relevant province(s) (*il*) subject to SoE the authority to implement certain SoE measures. While the SoE regime does not directly repeal or amend the laws and regulations applicable at the time of the SoE’s announcement, it grants governors the authority to temporarily restrain the exercise of certain rights.

The measures that can be adopted and implemented by such super-powered governors under the SoE Law are generally as follows:

- Ordering curfew;
- Prohibiting circulation or gathering of individuals and vehicles in certain areas at certain times;
- Frisking individuals, their vehicles and other property and confiscation of those which qualify

as evidence;

- Need to carry identification cards for individuals at all times;
- Introducing pre-approval requirements and, if necessary prohibiting, publication and release of material including books, newspapers, CDs, photos, films etc.;
- Awarding special protection and implementing security measures in relation to sensitive enterprises owned by public authorities or persons and in relation to banks in order to maintain their internal security;
- Prohibiting licenced guns and transportation of weapons;
- Prohibiting or granting permission for the possession, preparation and transportation of any armoury, explosives, radioactive materials, suffocative gasses and etc.;
- Prohibiting, postponing or introducing pre-approval requirements, for all kinds of gatherings and demonstrations; determining and allocating time and place for such gatherings and demonstrations; keeping such gatherings and demonstrations under surveillance, and disperse participants, if need be;
- Prohibiting settlement in, restricting entrance to, and exit from, discharging of, or transferring certain areas;
- Suspending education and temporarily or permanently shutting down dormitories;
- Suspending activities of associations (*dernek*) for a period of up to three months;
- Postponing or introducing pre-approval requirements for layoffs (other than due to termination for just cause or retirement), for a period of up to three months, taking into consideration the employer's interests;
- Inspect community facilities such as restaurants, night clubs, movie and theatres, hotels, camping sites, resorts and other entertainment facilities; determination of opening hours of their operations; limitation of their activities; termination of their operations; and use of the facilities in accordance with the requirements of the SoE;
- Cancelling or limiting annual leave of employees in charge of implementation of SoE measures; and,
- Utilizing and temporarily confiscating all kinds of communication devices in accordance with the requirements of the SoE.

Right to Issue Decrees Having the Force of Law

Once SoE is declared, the Council of Ministers is authorized to issue, under the chairmanship of the President, Decrees Having the Force of Law (*kanun hükmünde kararname*) on matters relating to the SoE. The Council of Ministers' right to issue Decrees Having the Force of Law during an SoE derives from the Constitution and removes the need to obtain the Parliament's prior authorisation. Outside an SoE, the Council of Ministers can issue a Decree Having the Force of Law only with the Parliament's prior authorisation.

As per the Constitution, a Decree Having the Force of Law issued by the Council of Ministers during an SoE (**SoE Decree**) must be published in the Official Gazette and must be submitted, on the same date, to the approval of the Parliament. Such decree becomes enforceable on the earlier of its publication in the Official Gazette or on its enforcement date, if provided therein, and remains in force until review and rejection, as the case may be, by the Parliament.

Unlike a regular Decree Having the Force of Law, the Parliament must review and decide on an SoE Decree within in 30 days following its submission.

SoE Decrees are not subject to any form of judicial review (including the constitutional court.)

Limitation on Civil Rights and Liberties

Although SoE Decrees must be related to the needs of the emergency, civil liberties, rights and duties of individuals can be regulated through an SoE Decree. Article 15 of the Constitution and Article 15 of the European Convention on Human Rights do, however, limit the scope of regulation of civil liberties, rights and duties through SoE Decrees.

As per Article 15 of the Constitution, in time of war, mobilization, martial law (*sıkıyönetim*) or a SoE, the use of fundamental rights and liberties may be partially or entirely suspended by adopting measures contravening the protections afforded by the Constitution for the fundamental rights and liberties. These measures must, however, be proportional and not be violating the Republic of Turkey's obligations under international law.

Furthermore, as per the Constitution, the following rights and liberties must be preserved and remain untouched even during times of war, mobilization, martial law or a SoE:

- the individual's right to life and the individual's material and spiritual existence, except for deaths occurred through acts in compliance with law of war;
- no one can be forced to disclose, or incriminated because of, his/her thoughts, conscience or religion;
- crimes and punishment cannot be implemented or applied retrospectively;
- anyone charged with a criminal offence shall have the right to be presumed innocent until proven guilty.

As per Article 15 of the European Convention on Human Rights "*in time of war or other public emergency threatening the life of the nation, any [Government] may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law*", provided that the following rights shall at all times remain untouched, unlimited and unsuspending:

- Right to life;
- Prohibition of torture;
- Prohibition of slavery and forced labour; and,
- No punishment without law.

Impact of SoE on Business Transactions

With respect to pending transactions, the parties to those transaction should examine "*material adverse change (MAC)*" or "*force majeure*" provisions, if any, under the relevant transaction documents. Depending on the drafting of these provisions, declaration of an SoE may trigger unilateral rights for termination of the agreement governing the transaction or for readjustment of the consideration agreed.

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