

ASSESSMENT OF AGE-STRATIFIED LOCKDOWN IMPOSED DURING THE COVID-19 PANDEMIC REGARDING PROHIBITION OF DISCRIMINATION

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Abstract

Age-stratified lockdown is one of the measures implemented in Turkey to control the new coronavirus outbreak. This article examines the constitutionality of the age-stratified lockdown and argues that by restricting the freedom of movement and the right to work, this measure violates the prohibition of discrimination principle. This study determines whether the age-stratified lockdown is based on discrimination, which is prohibited by the Turkish Constitution. In the descriptive analysis, it considers whether there is a justifiable reason for differential treatment as a result of this measure. In the light of the resulting data, the article concludes with an assessment of the age-stratified lockdown's compliance with the prohibition of discrimination.

Keywords: *Prohibition of Discrimination, Age Discrimination, Lockdown, Freedom of Movement, COVID-19.*

COVID-19 PANDEMİ SÜRECİNDE UYGULANAN YAŞA BAĞLI SOKAĞA ÇIKMA YASAĞININ AYRIMCILIK YASAĞI AÇISINDAN DEĞERLENDİRMESİ

ÖZ

Yeni koronavirüs salgınının kontrol altına alınabilmesi için Türkiye'de uygulanan tedbirlerden biri de yaşa bağlı sokağa çıkma yasağıdır. Bu çalışma, belli yaş aralıkları gözetilerek uygulanan ve başta seyahat özgürlüğü ile çalışma hakkını sınırlayan bu tedbirin Anayasa'da güvence altına alınan ayrımcılık yasağına uygunluğunu irdelemektedir. Bu bağlamda öncelikle yaşa bağlı sokağa çıkma yasağının farklı bir muamele olup olmadığı ve bu muamelenin Anayasa'da yasaklanan bir ayrımcılık temelinde gerçekleşip gerçekleşmediği tespit edilmektedir. Akabinde ise bu tedbir

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uyarınca farklı muamele edilmesini gerektiren haklı bir nedenin olup olmadığı, betimsel analiz yöntemi ile sınımlanmaktadır. Çalışma, ortaya çıkan veriler ışığında, söz konusu kısıtlama tedbirin ayrımcılık yasağına uygunluğunun değerlendirilmesiyle sona ermektedir.

Anahtar Kelimeler: *Ayrımcılık Yasağı, Yaş Ayrımcılığı, Sokağa Çıkma Yasağı, Seyahat Hürriyeti, COVID-19.*

INTRODUCTION

When does differential treatment lead to discrimination? In order to address this question, this article examines the prohibition of discrimination principle, according to which discrimination among individuals is based on clear, understandable, and predetermined criteria.¹ Many perceive the lockdown for over-65-year-olds and under-20-year-olds in Turkey as one of the most drastic measures taken within the scope of combating COVID-19. Age discrimination, which is common but rarely acknowledged in Turkey, has raised the question of whether the lockdown, which is only applied to the aforementioned age ranges, is inevitable. As this lockdown restricts the freedom of movement of around 30 million people² for an open-ended period, it is necessary to evaluate the extent to which the age-stratified lockdown applied in the pandemic process results in discrimination. This chapter utilizes a descriptive analysis method and analyzes the case law of the Turkish Constitutional Court. Since the approach of the Turkish Constitutional Court is parallel to that of the European Court of Human Rights (ECHR) concerning the criteria for the implementation of the equality principle, the case law of the ECHR will be referred to where applicable.

Firstly, this study considers the definitions of the principles of equality and the prohibition of discrimination as well as their methodology in the case law of the Turkish Constitutional Court. Then it examines whether the age-stratified lockdown is discriminatory according to the case law of the Turkish Constitutional Court, whether the age-stratified lockdown can be considered differential treatment, and whether that treatment is based on discrimination prohibited by the Turkish Constitution. This leads to an assessment of

¹ Ulaş Karan, "Bireysel Başvuru Kararlarında Ayrımcılık Yasağı ve Eşitlik İlkesi", 2015, (32), Anayasa Yargısı Dergisi, p. 237.

² Turkish Statistical Institute, Population Projections 2018, <<http://www.tuik.gov.tr/UstMenu.do?metod=temelist>> Access 10.06.2020.

whether there are justifiable reasons for differential treatment as a result of the implementation of the age-stratified lockdown in Turkey. The study concludes that the age-stratified lockdown in Turkey is in violation of the prohibition of discrimination principle, and proposes alternative methods for administrative and judicial authorities in their determination and implementation of this measure.

I. CASE LAW FRAMEWORK of EQUALITY PRINCIPLE and PROHIBITION of DISCRIMINATION

The fundamental basis of the prohibition of discrimination in Turkish constitutional law is Clause 10 of the Turkish Constitution, which is entitled ‘Equality before the Law’. This clause sets out that *‘everyone is equal before the law without distinction as to language, race, color, sex, political opinion, philosophical belief, religion, and sect, or any such grounds’*. Regarding the principle of equality and the prohibition of discrimination, the Turkish Constitutional Court judges refer, if justified, different rules of law can be applied to people who are living in the same conditions.³ According to the Court, *‘classification must depend on an understandable difference in relation to the purpose of the law, reasonable and fair, and it shouldn’t be groundless, unjustified, and arbitrary’*. Otherwise, *‘offering or depriving opportunities based on the elements of an individual’s personality and personal preferences, i.e. religion, political opinion, sexual and gender identity or on the personal characteristics having no option of choosing, i.e. gender, race, disability and age’* will constitute discrimination.⁴

The Turkish Constitutional Court also presents compliance with the definition of discrimination in its methodology and addresses the allegations of the violation of the prohibition of discrimination, an approach parallel to that of ECHR.⁵ In its examination, the Turkish Constitutional Court ascertains whether there is differential treatment and whether the differential treatment is based on discrimination prohibited in Clause 10 of the Turkish Constitution. In an individual application, the applicant reveals with reasonable evidence that

³ İdil Işıl Gül, Ulaş Karan, Ayrımcılık Yasağı: Kavram, Hukuk, İzleme ve Belgeleme, İstanbul Bilgi Üniversitesi Yayınları-351, 2011, p. 6, 92.

⁴ The Constitutional Court of Turkey, E. 2006/159, K. 2010/47, K.T. 24.03.2010.

⁵ *Mazurek v. France* Ap. No. 34406/97 (ECHR 01 February 2000) para. 48; *Burden v. UK* Ap. No. 13378/05 (ECHR 29 April 2008) para. 60; S.E., The Constitutional Court of Turkey, Ap. No: 2017/40178, 26/2/2020, para. 42.

they have been subject to differential treatment and subsequent discrimination on one of the aforementioned unjustified and prohibited grounds⁶, the Court applies the justifiable reason test. This assesses whether the differential treatment, if any, is based on reasonable and objective reasons and whether a reasonable proportional link is established between the means used and the intended purpose.⁷

The Turkish Constitutional Court, which primarily oversees the existence of reasonable and objective justification, first determines the purpose of the justification that gives rise to differential treatment. The purpose of the justification can be determined by the wording, the classification clause, the legislation date, and various sources that may reveal the purposes intended by the law.⁸ The Court that considers whether the classification serves its intended purpose explained the relationship between the classification and the purpose in a decision as follows:

‘It is the incontestable right and duty of the legislator to act in the public interest. The requirements of public interest should be taken into account when a legislator performs their civic duty, and an objective and mandatory cause-and-effect relationship based on facts should be established between the requirements and restrictions of public interest.’⁹

According to the Court, *‘if statements are being made regarding the purpose of differential treatment, the justifications that are put forth must have a reasonable basis and must be based on evidence’¹⁰.*

The other criterion to be addressed within the framework of the prohibition of discrimination is the assessment of whether differential treatment, based on reasonable and objective reasons, establishes a fair balance between the protection of public interest and the rights and the freedoms protected by the Constitution, in other words, the existence of a proportional ratio between the purpose and the means.¹¹

⁶ The Constitutional Court of Turkey, Kamil Çakır, Ap. No. 2013/997, 15.10.2014, para. 45.

⁷ S.E. Ap. No: 2017/40178.

⁸ Merih Öden, Türk Anayasa Hukuku’nda Eşitlik İlkesi, Yetkin Yayınları, 2003, p. 204, 205.

⁹ The Constitutional Court of Turkey, E.1992/40, K.1992/55, K.T.31.12.1992.

¹⁰ The Constitutional Court of Turkey, Tuğba Arslan Ap. No: 2014/256, 25/6/2014, para. 122.

¹¹ The Constitutional Court of Turkey, Mehmet Akdoğan ve diğerleri, Ap. No: 2013/817 19/12/2013 para. 37, 38.

According to the Turkish Constitutional Court, the principle of proportionality ‘consists of three sub-principles: “appropriateness”, “necessity” and “proportionality in strict sense”’. ‘Appropriateness’ indicates that the measure applied is conducive to the intended purpose.¹² ‘Necessity’ indicates that the measure applied is necessary for the intended purpose. ‘Proportionality in strict sense’ indicates the proportion that must be available between the measure applied and the intended purpose. The first sub-principle under the principle of proportionality insinuates that the means applied in limiting rights and freedoms can achieve or at least support the purpose.¹³ What is essential under the principle of necessity is whether the most lenient means is preferred when there are multiple means suitable for achieving the purpose.¹⁴ For this, the intensity of each means should be evaluated one by one, in a bottom-up approach towards the goal.¹⁵ Through this evaluation process, the necessity of the chosen means is accepted if no means that imposes less burden on the obligant can be found when the disadvantages of all the possible means are compared with each other.¹⁶ Even if we agree that the measure is appropriate and necessary, it is necessary to investigate whether the proportion between the burden placed on the person and the goal to be achieved is reasonable for the integrity of purpose.¹⁷ The principle of proportionality cannot be mentioned if the restriction imposes a disproportionate burden on the persons concerned.¹⁸

¹² The Constitutional Court of Turkey, E.2014/171, K.2015/41, K.T.22.4.2015.

¹³ Karan, Bireysel Başvuru, p. 286.

¹⁴ Fazıl Sağlam, Temel Hak ve Özgürlüklerin Sınırlanması ve Özü, Ankara Üniversitesi Siyasal Bilimler Fakültesi, 1982, p. 115.

¹⁵ Zafer Gören, “Temel Hakların Sınırlanması-Sınırlamanın Sınırları”, 2007, 6(12), İstanbul Ticaret Üniversitesi Sosyal Bilimler Dergisi, p. 52.

¹⁶ Yüksel Metin, Ölçülülük İlkesi, Seçkin Yayıncılık, 2002, p. 32

¹⁷ Christian Rumpf, “Ölçülülük İlkesi ve Anayasa Yargısındaki İşlevi ve Niteliği”, 1993, Anayasa Yargısı Dergisi, p. 42, 47.

¹⁸ The Constitutional Court of Turkey, Ferhat Üstündağ Ap. No: 2014/15428, para. 48.

II. EVALUATION of the AGE-STRATIFIED LOCKDOWN in terms of PROHIBITION of DISCRIMINATION

A. DETERMINATION OF THE BASIS OF DIFFERENTIAL TREATMENT and DISCRIMINATION in relation to AGE-STRATIFIED LOCKDOWN

Shortly after the first COVID-19 case was detected in Turkey¹⁹, over-65-year-olds with weak immune systems were prohibited from going out in all provinces and districts as of 22nd March 2020.²⁰ On 3rd April 2020, the scope of the age-stratified lockdown was expanded to those under the age of 20 who were born on or after 1st January 2000.²¹ A later revision to the lockdown exempted those who were born between 1st January 2000 and 1st January 2002, amely aged between 18 and 20, who can provide evidence of employment.²² This lockdown, which was applied until June, started to be implemented again as of 20st November 2020.²³

The age-stratified lockdown primarily concerns the freedom of movement, the right to work, and the right to health. The age groups that subject to the restriction, i.e. over-65-year-olds, under-20-year-olds, and aged between 18 and 20, show that the age is the determinant of differential treatment. Just like as race, religion, sex, sect, etc., age is a basis of discrimination prohibited by the Turkish Constitution. The Turkish Constitutional Court prohibited the types of discrimination not listed in Clause 10 of the Constitution by setting out that *‘the subjects that cannot be discriminated against for “such grounds” have been expanded and thus clarified in terms of implementation*

¹⁹ Detected on 11 March 2020.

²⁰ People with chronic lung disease, asthma, COPD, cardiovascular disease, and kidney, hypertension and liver disease, and those who use drugs that disrupt the immune system; The Lockdown Circulation Circular for People 65 Years of Age and Over and Chronic Disease, <<https://www.icisleri.gov.tr/65-yas-ve-ustu-ile-kronik-rahatsızligi-olanlara-sokaga-cikma-yasagi-genelgesi>> Access 10.06.2020.

²¹ The Circular on City Entry/Exit Measures and Age Restriction, <<https://sehirlere-arac-giriscikis-kisitlamasi-ile-ilgili-istisnalar>> Access 10.06.2020.

²² The Circular on Exceptions for Young People between the Ages of 18 and 20 Subject to Lockdown, <<https://www.icisleri.gov.tr/sokaga-cikma-yasagi-bulunan-18---20-yas-arasindaki-genclerle-ilgili-istisnalar>> Access 10.06.2020.

²³ The lockdown still continues as of the time the article is written. The Circular on Coronavirus Outbreak New Measures, <<https://www.icisleri.gov.tr/koronavirus-salgini-yeni-tedbirler>> Access 18.11.2020.

*of the rule*²⁴. Thus, the Turkish Constitutional Court secured the right not to be discriminated against. Therefore, at this point, it is necessary to examine whether there is a justifiable reason for this age-based differential treatment.

B. DETERMINATION of REASONABLE and OBJECTIVE JUSTIFICATION for the AGE-STRATIFIED LOCKDOWN

1. Assessment for Those Over 65 years old and Under 20 years old

Scientific studies and statistical data on the COVID-19 pandemic confirm that the two groups at greatest risk for Covid-19 related deaths are older people and people with chronic disease.²⁵ For this reason, people who are over 65 years old and have chronic illnesses are prohibited from going out shortly after the first case is seen in Turkey. Considering the age data shared in Turkey and the world-wide case data confirmed by the WHO, the biggest common feature of people who died is that they are over 65 years old. As a matter of fact, in the circular containing the lockdown for over 65 years old says: *'the virus is stated to threaten lives by creating serious health problems in people over the age of 65 and with chronic illness, and the purpose of the ban is to prevent the spread of the epidemic by creating a serious risk to their own lives and to community health, increasing the number of cases and to prevent the number of cases and the need for treatment from increasing and the deterioration of Community Health and public order'*. Therefore, we can say that a reasonable and objective justification is provided for the prohibition against those over 65 years of age.

The justification for the lockdown for under-20-year-olds is that social isolation must be ensured by reducing social mobility and contact between people to manage the risk posed by the COVID-19 pandemic, which can be transmitted and infected very quickly by means such as physical contact, respiratory droplets, etc. Otherwise, the spread of the virus would increase the number of cases and the subsequent need for treatment. Citizens would increasingly be at risk of losing their lives, and community health and public

²⁴ The Constitutional Court of Turkey, E.1986/11, K.1986/26, K.T. 4/11/1986.

²⁵ WHO, Coronavirus disease 2019 (COVID-19) Situation Report-51, <https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200311-sitrep-51-covid-19.pdf?sfvrsn=1ba62e57_10> Access: 08.06.2020; Abdul Hafeez, Shmmon Ahmad, Sameera Ali Siddqui, Mumtaz Ahmad, Shruti Mishra, 'A Review of COVID-19 (Coronavirus Disease-2019) Diagnosis, Treatments and Prevention', 2020, 4(2), EJMO, p. 117-118; Sağlık Bakanlığı Yeni Coronavirus (Covid-19), <https://covid19bilgi.saglik.gov.tr/depo/Kitapcik/COVID-19_YENI_KORONAVIRUS_HASTALIGI_KITAPCIK_A6.pdf

order would be adversely impacted.²⁶

Given the contagious nature of the virus, this measure will no doubt reduce contact between people and ensure social isolation in order to help prevent further spread of the pandemic. However, contrary to the threshold for over-65-year-olds, no objective and reasonable explanation appears to have been provided as to why the threshold of 20 years of age has been set for the lockdown. Over-65-year-olds are labeled as a vulnerable group most affected by the outbreak of COVID-19, although the disease has been detected in and carried by all age groups.²⁷ How the spread of the pandemic amongst under-20-year-olds differs to those between the aged of 20 and 65 has not been discussed with regards to the justification for the threshold. Although the purpose of the measure is legitimate and in the public interest, when a distinction is reached in respect of persons covered by the prohibition, it should be based on an understandable difference, and should not be arbitrary.²⁸ No objective or reasonable explanation was provided for this measure regarding why the age threshold of 20 was set for the lockdown. The reason why the classification in question is based on the age of 20 rather than another age, such as 15 or 25, lacks a causal link, and therefore requires a reasonable and rational justification.

2. Assessment for Those Between the Ages of 18 and 20

Another issue that needs to be addressed in the examination of reasonable and objective justifications for the lockdown is the exception provided for under-20-year-olds. As mentioned above, those between the ages of 18 and 20 who can provide evidence of employment are exempt from the lockdown. In order to justify this exemption as a reasonable and objective measure to combat the pandemic, as mentioned in the announcement of the age thresholds, there must be significant differences that separate the segregated group from the non-segregated one.²⁹ However, according to the Turkish Labor Act, children who have completed their primary education and are 14 years of age can work and be considered as workers.³⁰ Objective justification is then needed for the

[>]Access 08.06.2020.

²⁶ The Circular on City Entry/Exit Measures and Age Restriction.

²⁷ WHO, Coronavirus Disease 2019 (COVID-19) Situation Report-51.

²⁸ The Constitutional Court of Turkey, E.2006/159, K. 2010/47, K.T. 24.03.2010.

²⁹ The Constitutional Court of Turkey, E.1986/11, K.1986/26, K.T. 4/11/1986.

³⁰ Labour Act of Turkey, No. 4857, Article 71, <<https://www.ilo.org/dyn/natlex/docs/>

exclusion of those between the ages of 18 and 20 from the lockdown among young workers employed under the same legislation and who live in the same legal situation.³¹ No justification has been provided for this exception. According to the announcement of the age thresholds, it is possible to conclude that this differential treatment among young workers violates the prohibition of discrimination because it is not based on objective and reasonable grounds.

3. Assessment for those Between the Ages of 20 and 65

Although the age group most affected by the COVID-19 pandemic in terms of the right to life is over-65-year-olds, approved age data shared by the World Health Organization shows that every age group is able to contract and spread the virus. Therefore, those in the 20-65 age group who were excluded from the lockdown without an objective and reasonable justification and were subsequently obliged to leave their homes have the right to demand effective protection from the COVID-19 outbreak in terms of the right to health in the same way as other age groups. The principle of equality is the main condition applied to realize both the *rule of law* and the *social state* and to benefit from social rights, which are the main tools of the social state.³²

Each fundamental right and freedom, including the right to health and the right to life, which is guaranteed in the Turkish Constitution, imposes three main obligations on the state: the obligations to respect, protect, and fulfill. Although it is stated in Article 65 of the Turkish Constitution that social and economic rights are to be fulfilled by the state '*within the scope of the adequacy of its financial resources*', the right to health cannot be evaluated only within social rights in terms of subject and scope due to its nature as a multidirectional right.³³ The right to health not only denotes remedies for the deterioration of health, but also respect and protection for health in the same way as the integrity of the body.³⁴ The multiplicity and diversity of the dangers to one's life and health in modern life constitute an area of case

ELECTRONIC/64083/77276/%20F75317864/TUR64083%20English.pdf> 10.06.2020.

Access

³¹ The Constitutional Court of Turkey, E.2017/33, K.2019/20, K.T. 10/04/2019, para. 89.

³² Mesut Gülmez, "İnsan Haklarında Ayrımcılık Yasaklı Eşitlik İlkesi: Aykırı Düşünceler", 2010, (25), Çalışma ve Toplum Ekonomi ve Hukuk Dergisi, p. 259.

³³ Selman Karakul, "Avrupa İnsan Hakları Mahkemesi Kararlarında Sağlık Hakkı I", 2016, 3(2), İstanbul Medipol Üniversitesi Hukuk Fakültesi Dergisi, p. 171.

³⁴ Özgür Temiz, "Türk Hukukunda Bir Temel Hak olarak Sağlık Hakkı", 2014, 69 (1), Ankara Üniversitesi SBF Dergisi, p. 169.

law that gradually expands the scope of the positive obligation of the state.³⁵ One of the primary requirements of the right to health is that activity with an obvious impairing effect on the person's health is not allowed to be carried out by the state or third parties.³⁶

Therefore, the Turkish public authorities have not presented a justifiable reason for the age range of 20-65 being exempted from this lockdown. COVID-19 threatens not only the right to health of over-65-year-olds, but also the right to health of all ages. The close relationship between the right to health and the right to life must be taken into account. Therefore, it is important to examine the possibility that the lockdown measure to protect the right to health was not applied without discrimination.

C. EVALUATION of the AGE-STRATIFIED LOCKDOWN in terms of the PRINCIPLE of PROPORTIONALITY

What needs to be examined in the next and final stage for the criterion of justifiable reason is whether a reasonable relationship of proportionality has been established between the means used and the aim pursued. As the Turkish Constitutional Court stated, whatever the purpose of the democratic state of law, restrictions 'should not be implemented to a level that would significantly complicate or eliminate the exercise of certain freedoms'³⁷. For this principle, the Constitutional Court applies a phased method of judgment, which is to ascertain whether the restriction is appropriate and necessary whilst taking into account all the possible options for appropriate measures, and whether this is proportionate to the protection of general interests.

Considering that the number of people who are subject to the lockdown is over 30 million, there is no doubt that the age-stratified lockdown is an appropriate measure when it supports social isolation and subsequent protection of the right to health, which is the purpose of the measure. To determine the measure that limits the freedom of movement to the least extent

³⁵ Osman Dođru, Yařama Hakkı, Avrupa Konseyi: Anayasa Mahkemesi'ne Bireysel Bařvuru Serisi El Kitapları-5, 2018, p. 41.

³⁶ Temiz, p. 169. In line with the Constitutional Court decision, *see* The Constitutional Court of Turkey, E.2014/177, K.2015/49, K.T.14.05.2015; Also for the relationship between the right to health and the right to life, *see* The Constitutional Court of Turkey, E.2010/29, K.2010/90, K.T.16.07.2010; *L.C.B. v. UK* 14/1997/798/1001 (ECHR 09 June 1998) para. 36.

³⁷ The Constitutional Court of Turkey, E. 2015/19, K. 2015/17, K.T.18.2.2015.

among all the possible options for appropriate measures, it is firstly necessary to examine the ways in which social mobility can have adverse effects on the right to health. The impact of each measure should be determined by objective criteria and the assessment of all the possible options for appropriate measures should start from the most lenient. A lockdown should be the last resort, and fundamental rights and freedoms should not be rendered inapplicable because people are forbidden to leave their homes. Restriction measures should not expose people to undue burden.³⁸ The two main criteria that can be applied to evaluate this are the *duration* and *impact* of the age-stratified lockdown. To summarize, the duration of the lockdown and the opportunities that the restricted persons are deprived of during this period determine whether the measure can be considered appropriate.

As soon as the age-stratified lockdown was implemented in Turkey, the Vefa Coordination Group was established under the chairmanship of district governors to ensure that the persons subject to the lockdown were able access emergency telephone numbers and that their basic needs of the were met, particularly for those with limited access to help from persons outside of the restricted age groups. Public officials were assigned to answer emergency calls and provide necessary services. In addition to this, toll-free emergency calls were provided for people subject to the lockdown who have hearing and speech impairments. Furthermore, children and young people under the age of 20 diagnosed with autism, Down's syndrome, or severe mental illness were allowed to leave their homes. In the light of these data, it can be asserted that people subject to the lockdown were provided with continuous and easily accessible support to ensure that their basic needs were met, thus alleviating the negative impacts of the lockdown on their livelihoods.

The COVID-19 outbreak has had significant social and psychological effects. Although the physical needs of the elderly and unaccompanied persons are addressed by the Vefa Coordination Group, the COVID-19 outbreak is still likely to result in health problems due to isolated people's inability to meet their social, psychological, mental, intellectual, emotional, and spiritual needs. This has led to an increased state of burnout, alienation from society, and unaccompanied elderly people becoming depressed due to the inability to socialize as a result of isolation.³⁹ Although it is possible for the people

³⁸ The Constitutional Court of Turkey, Aksaray Tır Nakliyat Sanayi ve Ticaret LimiteE Şirketi, Ap. No: 2017/36736, 19/9/2018, para. 70.

³⁹ "Yaşlılarda Koronavirüsün Psikolojik Etkileri", <<https://npistanbul.com/koronavirus/>

to leave their homes at certain times every day as of November, in the first implementation of the age-stratified lockdown (in March and April), an uninterrupted lockdown was imposed for 49 days for over-65-year-olds and 39 days for under-20-year-olds between the announcement of the lockdown and its subsequent extension. It can be asserted that a balance was established between the individual benefit and the public benefit against the individual as well as between the freedom of movement and the right to health against the freedom of movement. As a result of 49-day and 39-day continuous lockdown, many maintain that the use of freedom of movement was stopped.⁴⁰

Another issue that needs to be addressed is the negative effect of the uncertainty regarding the duration of the lockdown. The continuation of the lockdown undoubtedly depends on the course of the outbreak, which is uncertain. However, a regular and frequent review of the lockdown in line with renewed health data will help to reduce the impact of this indefinite period of social isolation on the persons subject to the lockdown. Statistical data provided by autonomous and objective scientific institutions are effective in determining both the continuation of lockdown and its periods of exemption, which is of great importance for reinforcing the principle of equality. Otherwise, the burden on people will be exceeded and the principle of proportionality will be violated by an uncertain precautionary process.⁴¹

The lockdown for under-20-year-olds, who were prohibited from leaving their homes since April 3rd 2020, was revised in such a way that they were able leave their homes at certain hours once a week from mid-May.⁴² Those

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⁴⁰ See 'restriction' and 'stopping' for the concepts: The Constitutional Court of Turkey, E.1992/36, K.1993/4, K.T.20.1.1993; The Constitutional Court of Turkey, E.2007/4, K.2007/81, K.T. 18.10.2007.

⁴¹ The Constitutional Court of Bosnia and Herzegovina addressed this negativity in its ruling that it considers the lockdown imposed on Under-18s and over-65s in its country and considering the uncertainty caused by the prolongation of the measures "until further notice" is unacceptable, the Court emphasized the need to limit the measures that interfere with human rights significantly over time and only take as long as necessary. Noting that the time limit would force the authority implementing the order to review these measures regularly and to mitigate or completely eliminate the measures ordered as a result, the Court stated that it was unclear whether the measure would be considered 'until further notice' and would leave too much power for the Authority implementing the order. The Constitutional Court of Bosnia and Herzegovina, Leila Dragnic and A.B., Ap. No.: 1217/20, 22.04.2020, para. 60.

⁴² The Circular on Exemption for Restriction of Lockdown of People Aged 65 and over and Those Aged below 20, <<https://www.icisleri.gov.tr/65-yas-ve-uzeri20-yas-altikronik-rahatsızligi-bulunan-kisilerin-sokaga-cikma-kisitlamasi-istisnasi-genelgesi>> Access: 10.06.2020.

between the ages of 18 and 20 were excluded from the scope of the lockdown from 29th May 2020, and for those under 18 years-olds the lockdown was finally revoked on 10th June 2020.⁴³ The age-stratified lockdown started to be implemented again as of 20th November, allowing the aforementioned age groups to go out at certain times every day. The dynamic underlying the decisions of the public authorities is relevant here, both in the process of declaring the prohibitions and exceptions, and in increasing and decreasing their intensity according to the situation. It is essential that the rule of law respects human rights, that decisions are made based on objective criteria and transparency at every stage. Only when these conditions are met can the necessity and proportionality of the measures taken be determined. It will thus be possible to discuss alternative measures such as why the lockdown exemption period was only implemented one day per week in the beginning instead of certain hours every day, or the effect of the lockdown on certain age ranges during the course of the pandemic in line with objective data. Otherwise, when the clarity and objectiveness required to prevent practices that can lead to unnecessary adverse effects cannot be demonstrated, it is difficult to maintain and control the *reasonable measure* and *fair balance* required by the prohibition of discrimination principle.⁴⁴

CONCLUSION

To the question of how legislators and administrations exercise their authority in a non-discriminatory manner, if different legislation is to be applied to people in the same legal situation, the Constitutional Court answers as ‘with justified reason’. The Turkish Constitutional Court firstly deems it is necessary to have a reasonable and objective reason for doing so and secondly requires the application of legislation to be carried out according to the principle of proportionality. At this point, the announcement of the age thresholds did not provide a justification as to why the age threshold for the lockdown was set at 20 rather than 18, for example. Another differential treatment that requires reasonable and objective justification is that people within the 18-20 age range who can provide evidence of employment were excluded from the lockdown. This was because according to the Turkish Labor Act, children over the age of 14 can work and be considered as workers. Despite this, the

⁴³ The Circular on Removal/Bending of Restriction of lockdown of People Aged 65 and over and Those Aged below 18, <<https://www.icisleri.gov.tr/81-il-valiligine-18-yas-alti-ile-65-yas-ve-uzeri-kisilerin-sokaga-cikma-kisitlamasi-genelgesi>> Access 10.06.2020.

⁴⁴ The Constitutional Court of Turkey, E. 2007/4, K. 2007/81, K.T. 18.10.2007.

answer to the question of why only the 18-20 age range was exempt from the lockdown was also not mentioned in the announcement of the age thresholds. On the other hand, the members of the 20-65 age group who aren't subject to the lockdown and are forced to leave their homes and work outside have also been alluded to in the discussions pertaining to equality and the right to health. As known every age group is able to contract and spread the virus. In this case, it is possible to assert that no reasonable and objective link can be established between the age thresholds set by the Turkish public authorities and the exceptions to rights and obligations.

The Turkish Constitutional Court then determines whether the proportionality of the relationship between the restriction measure and its purpose is reasonable. This leads to the examination of whether the restriction is appropriate, necessary and proportionate. Age-stratified lockdown is an appropriate measure when it supports social isolation, which is the purpose of the measure. However, whether the most lenient measure is preferred among the appropriate measures in this process presents controversy. The necessity of a restriction measure and alternative measures can only be assessed in line with objective data. For example, without objective data, it is neither possible to determine why the period exempt from the lockdown was originally envisaged as certain hours only one day a week rather than certain hours each day, nor is it possible to measure the impact of the lockdown imposed on only certain age ranges during the course of the pandemic.

The *effect* and *duration* of the age-stratified lockdown are the main parameters that determine compliance with the principle of proportionality. In Turkey, people subject to the lockdown were offered continuous and easily accessible support to ensure that their basic needs are met. Thus, the negative effect of the lockdown on those subject to it was mitigated. On the other hand, it is undoubtedly difficult to ensure compliance with the principle of proportionality and to oversee age-stratified lockdown, as the duration continues *until the next announcement*. Alternatively, the age-stratified lockdown could be reviewed at short intervals and the underlying reasons for the decisions should be shared. Statistical data provided by autonomous and objective scientific institutions should be effective in determining both the continuation of lockdown and its periods of exemption. In the case of Turkey, the burden of a measure with an indefinite period is perceived by many as excessive, and the principle of proportionality appeared to be violated by an uninterrupted lockdown that lasted 49 days for over-65-year-olds and 39 days

for under-20-year-olds. In conclusion, it can be asserted that the age-stratified lockdown imposed in Turkey violated the prohibition of discrimination, as it couldn't meet the criterion of justifiable reason as required by the case law of the Turkish Constitutional Court.

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