

# States of Emergency and Derogation of Human Rights: Erosion of the Rule of Law?

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# Rule of Law | Democracy | Human rights

“The Rule of Law is linked not only to human rights but also to democracy, i.e. to the third basic value of the Council of Europe. Democracy relates to the **involvement of the people in the decision-making process** in a society; human rights seek to **protect individuals from arbitrary and excessive interferences** with their freedoms and liberties and to secure human dignity; the Rule of Law focuses on **limiting and independently reviewing the exercise of public powers**. The Rule of Law promotes democracy by establishing accountability of those wielding public power and by safeguarding human rights, which protect minorities against arbitrary majority rules.”

# Order of this presentation

## 1. States of exception in Europe

## 2. Derogation clauses in human rights treaties and their background

## 3. Features of emergency regimes / states of exception and risks to rule of law and human rights

- History: UK + Turkey
- France
- Turkey

## 4. Limits to emergency measures

- Non-derogable rights
- Who is supposed to guard the boundaries? Parliament, national courts?
- Principle of exceptional threat → European supervision: margin of appreciation
- Principle of proportionality: strictly required by the exigencies of the situations

# How many European States are under a state of exception?



# Derogation clauses: Art. 15 ECHR / Art. 4 ICCPR



# History Art. 15 ECHR

- Temporary emergency regime
- Many States had constitutional provisions like this
- Goal: upholding Rule of Law as much as possible
- Limiting use of derogating emergency regimes

# Text Art. 15 ECHR

1. In time of war or any other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention **to the extent required by the exigencies of the situation**, provided that such measures are not inconsistent with its other obligations under international law.
2. **No derogation from** article 2, except in respect of deaths resulting from lawful acts of war, or from articles 3, 4 (paragraph 1) and 7 shall be made under this provision.
3. **Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor.** It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.

# Is anyone supervising the executive?

## Parliament

IHRL requires 'official proclamation' → parliamentary involvement

Venice Commission → exceptions in emergency situations should be provided for by law

Is parliament the best guarantor of fundamental rights in emergency situations?

## National courts

Shift to executive powers limits role of courts → vague grounds for applying powers

Shift from criminal law approach towards 'war' paradigm or towards administrative measures



# International supervision?

ECrtHR →



ECrtHR →



# Principle of exceptional threat

- War
- Public emergency threatening the life of the nation
  - Actual or imminent
  - Affect whole nation
  - Threatening organized life of the community
  - Normal limitation of HR insufficient to overcome crisis

# Assumption of separation

- Normalcy = rule
- Emergency = exception

→ *Still valid in post 9/11 era?*

# ECtHR's scrutiny and ability

- Wide margin of appreciation

- See: Brannigan and McBride v. UK (1993) + A and others v UK (2009)
- Long-term emergency in Northern Ireland, 1957-2001

- Entrenched emergencies

- Transnational threat of terrorism by Islamic extremists
- Not temporary

- Legal grey hole

- There seems to be a kind of human rights scrutiny by bodies like ECtHR, but in fact there is virtually none
- True?

# How about this 'grey hole' theory?

- **In the past → no worries!**

- only small number of derogations
- only concerning Art. 5 ECHR (habeas corpus)

- **Proportionality test → 'strictly required'**

- National courts in France start getting more critical, apply stricter scrutiny
- ECtHR: wide 'margin of appreciation', but also strict proportionality test (including assessment of effectiveness)
- Turkey: much more troublesome

# CoE Commissioner on Human Rights: Memorandum on State of Emergency in Turkey

- Far-reaching, almost unlimited discretionary powers for administrative authorities
- Stretching the application of emergency decrees well beyond the actual emergency situation (risk of *coup d'état* has been diminished)
- Emergency decrees have force of Act of Parliament. Persons that have been removed from their position/job, have no access to a remedy
- Collective 'punishment': no individual assessment
- If remedies in theory exist, no court officers to apply them
  
- Warning: ECtHR will be overloaded by cases from Turkey

# Extra-territorial effects of state of exception

- German courts denying extradition to Turkey
  - Fair trial at risk, reasonable time requirement → too little judges available
  - Overpopulated prisons → inhuman or degrading treatment

# The current state of emergency in France

- 13 November 2015: declaration for 12 days

Based on *Loi n° 55-385 du 3 avril 1955 relatif à l'état d'urgence*

Art. 36 French Constitution: 'A state of siege shall be decreed in the Council of Ministers. The extension thereof after a period of twelve days may be authorized solely by Parliament.'

After 12 days parliamentary approval necessary

- 20 November 2015: extension until 26 February 2016

Only 12 votes against + 1 abstention

Very brief advisory opinion Council of State

How long may state of siege last?

“to the extent required by the exigencies  
of the situation”

How is continuation of state of siege monitored?





# Article 16 French Constitution

Where the institutions of the Republic, the independence of the Nation, the integrity of its territory or the fulfilment of its international commitments are under serious and immediate threat, and where the proper functioning of the constitutional public authorities is interrupted, the President of the Republic shall take measures required by these circumstances, after formally consulting the Prime Minister, the Presidents of the Houses of Parliament and the Constitutional Council.

He shall address the Nation and inform it of such measures.

The measures shall be designed to provide the constitutional public authorities as swiftly as possible, with the means to carry out their duties. The Constitutional Council shall be consulted with regard to such measures.

Parliament shall sit as of right.

The National Assembly shall not be dissolved during the exercise of such emergency powers.

After thirty days of the exercise of such emergency powers, the matter may be referred to the Constitutional Council by the President of the National Assembly, the President of the Senate, sixty Members of the National Assembly or sixty Senators, so as to decide if the conditions laid down in paragraph one still apply. It shall make its decision by public announcement as soon as possible. It shall, as of right, carry out such an examination and shall make its decision in the same manner after sixty days of the exercise of emergency powers or at any moment thereafter.

# Emergency powers applied

- The state of emergency grants the local state's representatives (préfets) important powers that encroach upon individuals' freedom and rights

House arrest without prior judicial authorisation (also house searches)

**Decisions implementing the state of emergency can only be challenged ex post before an administrative court. Under normal circumstances, a citizen can be subject to house arrest if he or she has been officially charged with a criminal offence by an investigative judge.**

For any person whose actions prove dangerous for security and public order

As soon as there are serious grounds for believing [???] that this person constitutes a threat

**Impact assessment published with legislative proposal indicates: anyone who has attracted the attention of the police or the intelligence service because of his or her behavior, his or her acquaintance with the 'wrong crowd,' his or her statements (which do not even have to be made public), or projects can be subject to house arrest → allowed under Art. 5 ECHR?**

This person can be obliged to surrender his or her passport or ID card

# Abuse of emergency powers?

- During UN climate summit in Paris (25 Nov-11 Dec. 2015), several environmental activists were placed under house arrest and were obliged to report three times a day to the police station based on article 6 of the law on the state of emergency
- **Council of State + Constitutional Council: no disproportionate interference with Art. 5 ECHR and art. 2 Prot. No. 4**
  - Law on state of emergency does not oblige the local authority to establish a direct link between on the one hand, the severe events justifying the state of emergency (i.e. the terrorists attacks in Paris on the 13th of November), and on the other hand, the nature of the threats to the security and public order grounding a particular house arrest.
  - **Critical comments on judgments:** The 1955 law on the state of emergency has, according to the explanatory memorandum of the 2015 law, only been extended and the powers of public authorities increased in order to face the threats posed by the terrorist attacks in Paris. The French courts give thus a very broad interpretation of what should be necessary in order to justify the restriction of these citizens' freedom (necessity being an essential condition for the legality of an administrative measure in French law). >> **will this stand proportionality test under art. 15 ECHR? Is this still genuine response to emergency situation?**
- **Recently however: Critical ruling by Council of State suspending a house arrest on insufficient evidence**