



**THE EUROPEAN COURT OF HUMAN RIGHTS' CONTROL OVER STATES' DEROGATION IN TIME OF EMERGENCY: EXAMPLE OF EFFECTIVENESS OF THE LESSONS LEARNED FROM WW2<sup>1</sup>**

**Marine Toullier<sup>2</sup>**

*Université de Rouen Normandie, Rouen, France  
E-mails: [marine.toullier@univ-rouen.fr](mailto:marine.toullier@univ-rouen.fr)*

*Received 7 November 2016; accepted 28 February 2017*

**Abstract.** This Article has two aims: the first is to check if the European Court of Human Rights has learned lessons from WW2, being a safeguard for the arbitrary abuses, the escalating of violence, protectionism, nationalism, etc, and the second aim is to analyse if European Court is playing a moderating role towards the Member States in controlling state's derogation in time of emergency. Because of terrorism, we are at a crossroads, like the tightrope walker who roams on a thread at a vertiginous height and can fall any time. We reached a crucial point, where our societies have the choice between two roads: growing of the extremes, withdrawal behaviours, nationalism, escalation of intolerance, even civil wars between cultural or ethnical or religious groups inside the population, or, a multidimensional integration to guarantee both for state and human beings security, survival of our free-based societies and our values. To help European States to choose the second path, the European Court of Human Rights should be a helpful instrument, because it supposed to put forward measures to control what are genuine abuses and prevent the states from authoritarian drifts. This Article will study from the case law about states' derogation in time of emergency, if the conditions are gathered for the European Court of Human Rights to constraint member states to be reasonable. The structure of the study of the European Court of Human Rights case law will follow the level of control of the European judge: 1. The Court exerts a limited control over the conditions of implementation of Article 15, 2. But the Court imposes a stricter control over the respect of the Convention for the Protection of Human Rights and Fundamental Freedoms by the measures taken in the framework of the derogation of Article 15.

**Keywords:** Derogations, Time of Emergency, ECtHR, France

## **Introduction**

This Article has two aims: the first is to check if the European Court of Human Rights has learned lessons from WW2, being a safeguard for the arbitrary abuses, the escalating of violence, protectionism, nationalism, etc, and the second aim is to analyse if the European Court of Human Rights is playing a moderating role towards the Member States in controlling state derogation in time of emergency.

Because of terrorism, we are at a crossroads, like the tightrope walker who balances on a thread at a vertiginous height and can fall any time. We have reached a crucial point, where our societies have the choice between two roads: growing of the extremes, withdrawal behaviours, nationalism, escalation of intolerance, even civil wars

<sup>1</sup> This is the publication of the WISE project, commemorating the 70th anniversary WWII end, implemented with the support of 'Europe for Citizens Programme' of the EU.

<sup>2</sup> Assoc. prof. dr. Marine Toullier holds her Ph.D. from University Paris I Pantheon-Sorbonne since 2013. Since 2007, Director of the International Relations of the Law Faculty. Since 2005 Senior Lecturer at Rouen University, mostly on European Protection of Human Rights, European Union Litigation and European Convention on Human Rights litigation, Legal Methodology (Erasmus Mundus students), Fundamental Rights and Freedoms, Freedoms and liberties, graduate and post-graduate. Extensive teaching abroad, namely in the Consortium universities, but also in Italian universities (she is a trilingual French, English and Italian).

between cultural or ethnical or religious groups inside the population<sup>3</sup>, or, a multidimensional integration to guarantee both for the State and Human beings security, the survival of our free-based societies and our values.

To help European States to choose the second path, the European Court of Human Rights should be a helpful instrument, because it is supposed to put forward measures to control what are genuine abuses and prevent the states from authoritarian drifts.

In this Article, we will study from the case law about state derogation in times of emergencies, if the conditions are gathered for the European Court of Human Rights to constrain member states to be reasonable. In other words, to check if the European judge can restrain states in privileging the security over the liberty.

Before analysing the European control, a general remark should be made: it is clear from the international texts and the case-law, that any state of emergency which, by definition, derogates from obligations on human rights must meet strict criteria to circumscribe the exceptional powers of the authorities. The exemption right is framed by the following minimum principles: principle of proclamation, principle of notification, principle of exceptional threat, principle of temporality, principle of proportionality, principle of non-discrimination and compatibility, consistency and complementarity of international law obligations and principle of intangibility of rights (Amnesty International).

The structure of the study of the European Court of Human Rights case law will follow the level of control of the European judge: the Court exerts a limited control over the conditions of implementation of Article 15 (part I), but the Court imposes a stricter control over the respect of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter - the Convention, ECHR or European Convention on Human Rights) by the measures taken in the framework of the derogation of Article 15 (part II).

## **1. A limited control over the conditions of implementation by the states of the derogating clause of Article 15**

### **A. A control in the framework of the derogating clause of Article 15 ECHR: “public emergency threatening the life of the nation”**

In controlling the states, the European Court is guided by a textual limit: Article 15 ECHR.

*a) Article 15 ECHR, safeguard of the rule of law in case of serious crisis?*

First, it is necessary to read carefully the text of Article 15 of ECHR.

*Article 15 of ECHR. Derogation in time of emergency: 1. In time of war or 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 strictly 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*

---

<sup>3</sup> It is exactly what French people realised could happen in France after the first Charlie Hebdo's attack and then afterwards with Nice 11.13 slaughters, as it is part of DAESH's project!

*executed” (Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, Art. 15).*

Therefore, Article 15 is the legal basis for derogation.

Firstly, it is necessary to note that contrary to the ICCPR<sup>4</sup>, a State can make a reservation to Article 15. Some states have made reservations essentially interpreting Article 15 of the Convention. On the legal character of the reservation, the European Court has progressively asserted its jurisdiction in order to control reservations issued by states. Thus, in the *Belilos v/Switzerland* case law on 29 April 1988, the Court held that a reservation was invalid. As the French recent use of derogation is to be studied later on, it is necessary to have a look at the French reservation to Article 15<sup>5</sup>. Despite the recurrent criticism against the French reservation being too general, the Court has never ruled on its validity.

Hopefully, moreover the limitations of the derogations that are contemplated by the text of Article 15 can be added limitations of some additional protocols. So neither Article 4 of Protocol 7 - which provides the right not to be judged or punished twice for the same action - nor Protocol 13 - concerning the abolition of the death penalty - cannot suffer from derogations. It is also necessary to consider that the ban on any discrimination, at least as it has a relationship with one of the non-derogable rights, is itself non-derogable.

For its exceptional nature, this device was rarely mobilised. In sixty years, only nine States parties have used it (Albania, Armenia, France, Georgia, Greece, Ireland, United-Kingdom, Turkey and Ukraine). This doesn't mean that the states confronted by an important situation of crisis, haven't taken exceptional measures, but that they refused to use that mechanism, like Russia about Caucasus conflicts. To explain that lack of use of Article 15, let's suggest that to pretend thus derogate from the treaty rights and freedoms, it is necessary that the State agreed to officially recognize the crisis and above all to undergo the requirements of Article 15 of the Convention (Hervieu, 2016).

Indeed, this device involves meeting an important procedural requirement: inform, through the treaty depository, Secretary General of the Council of Europe "of the measures which it has taken and the reasons therefore". Then, eventually, indicate, "when such measures have ceased to operate and the provisions of the Convention are again being fully executed" (art. 15, § 3).

The official proclamation condition is an advertising condition that allows warning the population aiming to guarantee the principle of legality and rule of law, and to prevent arbitrariness. Advance notification as a formal condition is used to ensure a review of the lawfulness of the establishment of the state of emergency by the institution.

*b) Is the recent French derogation after the massive terrorist attack in Paris in November 2015 consistent with Article 15 of the ECHR?*

Unfortunately, we have an on-going example of using Article 15 by France from 24 November 2015.

---

<sup>4</sup> ICCPR is stricter than the Convention, since it declares non-derogable, in addition to rights under Article 15 ECHR, the right not to "be imprisoned merely on the grounds of an inability to fulfil a contractual obligation (art. 11), the recognition of his legal personality (art. 16: "the right to recognition everywhere as a person before the law") and freedom of thought, conscience and religion (art. 18).

<sup>5</sup> Reservation contained in the instrument of ratification, deposited on 3 May 1974 - Or. Fr.: "The Government of the Republic, in accordance with Article 64 of the Convention (Article 57 since the entry into force of the Protocol No 11), makes a reservation in respect of paragraph 1 of Article 15, to the effect, firstly, that the circumstances specified in Article 16 of the Constitution regarding the implementation of that Article, in Section 1 of the Act of 3 April 1878 and in the Act of 9 August 1849 regarding proclamation of a state of siege, and in Section 1 of Act No. 55-385 of 3 April 1955 regarding proclamation of a state of emergency, and in which it is permissible to apply the provisions of those texts, must be understood as complying with the purpose of Article 15 of the Convention and that, secondly, for the interpretation and application of Article 16 of the Constitution of the Republic, the terms to the extent strictly required by the exigencies of the situation shall not restrict the power of the President of the Republic to take the measures required by the circumstances. Period covered: 03/05/1974".

In fact, France informed the Secretary General of the Council of Europe's of Article 15 derogation of the European Convention on Human Rights because of emergency measures taken in the framework of the state of emergency. The notification under the ECHR, which justifies the derogation in Article 15.1 reads: "[t]he French authorities have informed the Secretary General of the Council of Europe about a number of state of emergency measures taken following the large scale terrorist attacks in Paris and which may involve a derogation from certain rights guaranteed by the European Convention on Human Rights. The derogation is foreseen by Article 15 of the European Convention on Human Rights in times of public emergency threatening the life of a nation and has been used in the past by other member states. There can be no derogation from Article 2 (Right to life), Article 3 (Prohibition of torture and inhumane or degrading treatment or punishment), Article 4 para. 1 (prohibition of slavery), and Article 7 (No punishment without law). The European Convention on Human Rights will continue to apply. Where the Government seeks to invoke Article 15 in order to derogate from the Convention in individual cases, the Court will decide whether the application meets the criteria set out in the Convention" (Council of Europe, 2015).

As mentioned above, the content of the notification act is necessary for the supervisory bodies to review the legality of the establishment of the state of emergency. Therefore the reasons given in the note verbale should be identical to those that will later be put forward to govern and justify measures on the state of emergency that is, here, terrorist attacks and terrorist threats.

This procedure is the consequence of the state of emergency proclaimed after the murderous attacks of November 13 in Paris and Saint-Denis<sup>6</sup>. The French Government has decided, by Decree No. 2015-1475 of 14 November 2015, to apply the law no. 55-385 of 3 April 1955 regarding the state of emergency".

It seems necessary to present the French state of emergency regime. It was established by the law of 3 April 1955 and motivated by the situation in Algeria.

The state of emergency is an exceptional regime which - certain disorders occurring<sup>7</sup> - strengthens the powers of the administrative authority. It is an intermediate regime between the state of besieged and the normal situation.

The state of emergency has been used 6 times since its creation: 3 times because of the situation in Algeria: 1955, 1958 (after the coup d'état of 13 May 1958 in Alger, the state of emergency is declared for three months on the whole metropolitan territory), 1961 during the so-called "putsch of the generals". In 1984, the state of emergency had been decreed in New Caledonia to fight the wresting of the Kanak freedom fighters. In 2005, because of the riots of suburbs, being translated by institution of a curfew in certain municipalities and the arrest of 3.000 people for more than 500 detentions, in 2015 because of terrorist attacks.

The law of 1955 provides that "the state of emergency is declared by a decree of the Council of Ministers that determines the territorial zones within which it takes effect. The extension of the state of emergency beyond 12 days has to be authorized by law"<sup>8</sup> (Law No. 55-385, 1955, Article 2 and Article 3).

So, the law was adopted on 14 November 2015 (Law No. 55-385, 1955, Article 2 and Article 3). It provided two main elements: the over-sea territories that are concerned and that state of emergency is extended for 3 months, since 26 November 2015.

---

<sup>6</sup> 130 deaths and more than 350 wounded persons.

<sup>7</sup> Article 1 of the Law on the state of emergency states that "in case of imminent danger resulting from important infringements to public order, either in cases of events presenting, by their nature and their gravity, the character of public calamity (note - free translation by the author) (in French: *«en cas de péril imminent résultant d'atteintes graves à l'ordre public, soit en cas d'événements présentant, par leur nature et leur gravité, le caractère de calamité publique»*). We can notice that the French law vocabulary is different from the ECHR's one (Article 15: "In time of war or other public emergency threatening the life of the nation"): there is no necessity that "the life of the nation" has to be threatened.

<sup>8</sup> Free translation by the author.

It gives the police of new powers, without first going through a judge, especially for the searches or the electronic surveillance of people.

However, derogation procedure does not mean that human rights are not any more protected in France. The General Secretary of the Council of Europe, Thorbjorn Jagland, moreover specified himself that the European Convention on Human Rights will continue to apply. The declaration of exemption "deprives no competence to the European Court of Human Rights to consider possible infringements of fundamental rights. Simply, the court may consider them in a more flexible way", says Michel Tubiana (Tubiana, 2015).

This flexibility would apply, for example, to the case of a person living in France, having recently suffered from an administrative search, within the framework of the state of emergency and which, in the future, would want to dispute the legitimacy in front of the European Court of Human Rights. In such a case, the Court would begin to verify if the French authorities were entitled to invoke the possibility of derogation and then if the measures taken have violated some of the European Convention's rights.

If a claim is introduced in front of the Court, there will be a control on two aspects: the conditions of the derogation (that the Court is allowed to examine *proprio motu* (Lawless, §41), in other words if the "measures are not inconsistent with its other obligations under international law" (Art. 15), and the concrete measures taken during the crisis time.

In order to be able to anticipate what would be the Court's judgment, it is necessary to analyse in which direction the case law is directed.

### **B. A self-restraint control over the conditions of implementation of the derogating clause**

Here the objective of this article is to realise if the Court is demanding when it controls, after a notification of derogation, if it exists a "public emergency threatening the life of the nation" or not.

We will analyse some emblematic case law out of the some twenty case law relative to Article 15.

The oldest and also the very first case law that the European Court has delivered - *Lawless v. Ireland* (*Lawless v. Ireland*, 1961) - was about derogation entered by Ireland in 1957 following terrorist violence connected to Northern Ireland.

The Court followed the European Commission on Human rights, according to which, in "July 1957 there existed in Ireland a public emergency threatening the life of the nation".

This threat is the result of a combination of three factors: firstly, the existence in the territory of the Republic of Ireland of a secret army engaged in unconstitutional activities and using violence to attain its purposes; secondly, this army was also operating outside the territory of the State, thus seriously jeopardising the relations of the Republic of Ireland with its neighbour; thirdly, the steady and alarming increase in terrorist activities.

As none of the other means would have made it possible to deal with the situation existing in Ireland in 1957, therefore, the administrative detention of individuals suspected of intending to take part in terrorist activities, appeared, despite its gravity, to be a measure required by the circumstances.

Moreover, the offences against the State (Amendment) Act of 1940, was subject to a number of safeguards designed to prevent abuses in the operation of the system of administrative detention: the constant supervision of the Parliament, that could also at any time, by a Resolution, annul the Government's Proclamation; the establishment of a "Detention Commission" was in fact set up by the Government.

Therefore, in these conditions, the detention without trial appears to be a measure strictly required by the exigencies of the situation within the meaning of Article 15 of the Convention.

From the very beginning of its existence (in *Lawless* case) the Court had the occasion to define the expression “public emergency threatening the life of the nation”: “Whereas, in the general context of Article 15 (Art. 15) of the Convention, the natural and customary meaning of the words “other public emergency threatening the life of the nation” is sufficiently clear; whereas they refer to an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed” (*Lawless v. Ireland*, 1961).

The European Court considers that in assessing whether there is a danger threatening the life of the nation, States have a “wide margin of appreciation”. They are more likely to know the needs of the nations than the international judge<sup>9</sup>. However, as the Human rights Committee, the Court evaluates the necessity or not of the proclamation of a state of emergency in the *A and others v. United Kingdom*, case law of 19 February 2009 (*A and others v. UK*, 2009).

It is necessary for the comprehension to give the facts: derogation was submitted by the United Kingdom in 2001 (after the September 11 terrorist attacks in the United States) to Article 5 ECHR (Right to liberty and security), because of the ruling 4 December 2001 Anti-terrorism, Crime and Security Act. The eleven applicants complained about their detention in high security conditions under a statutory scheme which permitted the indefinite detention of non-nationals certified by the Secretary of State as suspected of involvement in terrorism; regime declared in contradiction to the ECHR by the House of Lords in 2004; the law was thus modified in 2005.

In this case, the European Court gives the significance of the first words of Article 15: “In time of war or other public emergency threatening the life of the nation”. The emergency should have four characters: a) to be a crisis or exceptional danger; b) imminent (the Court precises that it doesn’t mean for the State that it has to wait for a disaster before taking measures; these could aim to coming dangers; the danger is not necessarily temporary for the Court (differs from the Committee of Human Rights of United Nations) as it was the case with the threat of terrorists attacks from al-Qaeda; c) concerning the hole population; c) representing a threat for the organised life of the community composing the State.

One of the most important element is the national margin of appreciation. Even if Great Britain was the only European State to announce a derogation, while all States were under threat of terrorists, the Court has decided that: “it was for each Government, as the guardian of their own people’s safety, to make their own assessment on the basis of the facts known to them” and approved the analysis of the House of Lords ruling that there was a public danger threatening the life of the nation.

The *A and others v. UK* case is a confirmation that the large national margin of appreciation, even if it a revolutionary government (*Greek case law*, 1968) in order to protect itself from an imminent danger, can’t escape from the Court’s control (*Ireland v. UK*, 1978, *Branningan and McBride v. UK*, 1993, *Aksoy v. Turkey*, 1996).

---

<sup>9</sup> *A and others v. UK*, 19 February 2009 (Grand Chamber): “173. The Court reiterates that it falls to each Contracting State, with its responsibility for “the life of [its] nation”, to determine whether that life is threatened by a “public emergency” and, if so, how far it is necessary to go in attempting to overcome the emergency. By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle better placed than the international judge to decide both on the presence of such an emergency and on the nature and scope of the derogations necessary to avert it. Accordingly, in this matter a wide margin of appreciation should be left to the national authorities. Nonetheless, Contracting Parties do not enjoy an unlimited discretion. It is for the Court to rule whether, *inter alia*, the States have gone beyond the “extent strictly required by the exigencies” of the crisis. The domestic margin of appreciation is thus accompanied by a European supervision. In exercising this supervision, the Court must give appropriate weight to such relevant factors as the nature of the rights affected by the derogation and the circumstances leading to, and the duration of, the emergency situation (...).”

\*The first element the Court will control is the respect of the formal condition - the information of the Secretary General of the Council of Europe in 3 different times: quickly after the start of the declaration of the state of emergency; during its use; when it ends because it not necessary anymore.

The sanction? The Court would judge the measures as if they were taken during normal time (no derogation allowed) even if States are facing really delicate situations.

\*The second condition is material: the identification of the danger. Except from the Greek case, where the burden of the proof were judged insufficient (Commission report 5 November 1969), neither the Commission nor the Court have contested the reality of the peril invoked by the States that wanted to benefit from the derogation of Article 15.

The question of time is also an important element to take into consideration. Because derogation should fit to a very particular situation, based on emergency, it shouldn't last very long, like in Algeria where the state of emergency lasted 19 years (from 1992 till February 2011).

Nevertheless, the Court doesn't seem to be very strict on that point: it never till now, required a derogation to be temporary. It has held that "it is possible for a "public emergency" within the meaning of Article 15 to continue for many years", particularly regarding the terrorist threat. It clearly takes distance from UN Human Rights Committee position<sup>10</sup> (*A and others v. UK*, 2009).

About the duration, the French notification warns that "On 13 November 2015, terrorist attacks large scale took place in Paris. The terrorist threat in France is of sustainability, given the indications of the intelligence services and the international context. This is why the notification specifies the duration of the exemption: "for three months, starting on 26 November 2015". It indicates: "some [measures], provided by the Decrees of 14 November 2015 and 18 November 2015 and by the Act of 20 November 2015, are likely to involve a derogation from the obligations under the European Convention of Human rights and fundamental freedoms"<sup>11</sup>. Subsequently, the state of emergency was prolonged 5 times already; the last time till July 15, 2017, by the law of the December 14, 2016<sup>12</sup>. This exceptional regime would have lasted, at least twenty months, if not more. Duration never reached, even during the Algerian war, for which it was imagined.

We can already foresee, on the basis of the previous case law on Article 15 derogations we have just mentioned, that the Court would most probably admit that the circumstances France is facing since 11.13 can be defined as "public emergency threatening the life of the nation", but that could also sanction some measures being discriminatory regarding French nationality persons but with foreign origin, excessive use of violence or because of their inefficiency in fighting terrorism<sup>13</sup> (Amnesty International, 2016).

## **2. A stricter control over the respect of the Convention by the derogatory measures taken in the framework of Article 15**

---

<sup>10</sup> ECHR, 19 Feb. 2009, *A. and Others v. UK*: "178. While the United Nations Human Rights Committee has observed that measures derogating from the provisions of the International Covenant on Civil and Political Rights must be of "an exceptional and temporary nature" (...), the Court's case-law has never, to date, explicitly incorporated the requirement that the emergency be temporary, although the question of the proportionality of the response may be linked to the duration of the emergency. Indeed, the cases cited above, relating to the security situation in Northern Ireland, demonstrate that it is possible for a "public emergency" within the meaning of Article 15 to continue for many years. The Court does not consider that derogating measures put in place in the immediate aftermath of the al-Qaeda attacks in the United States of America, and reviewed on an annual basis by Parliament, can be said to be invalid on the ground that they were not "temporary"."

<sup>11</sup> Free translation by the author from two declarations (Declaration deposited in a Verbal note of the Permanent representation of France, dated November 24th, 2015, recorded to the General Secretary on November 24th, 2015) and another one on February 25, 2016.

<sup>12</sup> Adopted, by Members of parliament 288 votes, against 32.

<sup>13</sup> Already criticised by different NGO's, within which Amnesty international.

The European control, softer on the existence and the persistence of the state of emergency, is however much more demanding towards the concrete measures implemented within this framework. The Convention itself firstly requires these exigencies.

*A. The textual limit: only “to the extent strictly required by the exigencies of the situation”*

Indeed, the Court will exert a control over two elements: first, the respect by the State of the exclusions from derogation of Article 15; second, the respect by the States of the limits to derogable rights.

On one hand, Article 15<sup>14</sup> having excluded *expressis verbis* some rights from the eventual derogation (right to life, prohibition of torture and inhuman and degrading treatment; prohibition of slavery, principle of legality of penalties) to which it is necessary to add the prohibition of any derogation from Article 1 of Protocol No. 6 to the Convention bearing abolition of the death penalty in peacetime, and Article 1 of Protocol No. 13 to the Convention on the abolition of the death penalty in all circumstances, and Article 4 (right not to be tried or punished twice, principle of non bis in idem) of Protocol No. 7 to the Convention; so the Court shall ensure that no derogation can be made to these rights whatever difficult situation a State can be confronted to.

On the other hand, even for the rights less protected because subjected to exceptions - such as the right to liberty and security, the right to respect for private life and freedom of expression, freedom of movement and demonstration-, Article 15 does not confer the States "unlimited power" (Aksoy v. Turkey, 1996, para. 68). Indeed, this text tolerates derogations only to "the extent strictly required by the situation and provided that such measures do not conflict with other obligations under international law".

*a) Strict necessity character of the measures*

The text of Article 15 ECHR says: only “to the extent strictly required by the exigencies of the situation”. The Court will control case by case if this condition is respected by the State confronted to important difficulties.

For example, in the case law already cited *A and others v. UK*, the Court is controlling if the litigious measures were strictly necessary in that specific situation. So a derogatory measure, violating one of the rights protected by the ECHR, has to respect 3 conditions to be considered compatible with the Convention:

- be a real answer to the state of emergency,
- be fully justified by the specific circumstances,
- guaranties against abuses have to exist,
- be proportionate: according to the Court, the derogating measures have to be balanced with the threat to the nation,
- that implies that they are not discriminatory.

If they are disproportionate and discriminatory, the State would be condemned, which was the case here, as the House of Lords had already judged<sup>15</sup> (*A and others v. UK*, 2009).

---

<sup>14</sup> “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”.

<sup>15</sup> *A and others v. UK*, 19 February 2009 (Grand Chamber): “21. In addition, the majority (of the Lords, words added by the author) held that the 2001 Act was discriminatory and inconsistent with Article 14 of the Convention, from which there had been no derogation. The applicants were in a comparable situation to United Kingdom nationals suspected of being international terrorists, with whom they shared the characteristics of being irremovable from the United Kingdom and being considered a threat to national security. Since the detention scheme was aimed primarily at the protection of the United Kingdom from terrorist attack, rather than immigration control, there was no objective reason to treat the applicants differently on grounds of their nationality or immigration status. 22. Although the applicants’ appeal had included complaints under Articles 3 and 16 of the Convention, the House of Lords did not consider it necessary to determine these complaints since it had found the derogation to be unlawful on other grounds. 23. It granted a quashing order in respect of the derogation order, and a declaration under section 4 of the 1998 Act (...) that section 23 of the 2001 Act was incompatible with Articles 5§1 and 14 of the Convention in so far as it was disproportionate and permitted discriminatory detention of suspected international terrorists”.



*b) A special category for terrorism*

The Court is less demanding when the state takes counterterrorism measures than in another field of intervention, if therefore there are sufficient safeguards. Here is its general philosophy: “The Court, having taken notice of the growth of terrorism in modern society, has already recognised the need, inherent in the Convention system, for a proper balance between the defence of the institutions of democracy in the common interest and the protection of individual rights” (*Brogan v. the United Kingdom*, 1988). Nevertheless, the Court doesn’t let the State completely free of his movements.

*1°) Show of understanding and flexibility*

Let’s first take the example of the case *Brannigan and McBride v. the United Kingdom*, 25 May 1993. In this case, the two applicants, who were IRA suspects, were arrested by the police in Northern Ireland and kept in police custody for six days, fourteen hours and thirty minutes, and four days, six hours and twenty-five minutes, respectively. They both complained in particular that they had not been brought promptly before a judge (*Brannigan and McBride v. the United Kingdom*, 1993).

The Court held that there had been no violation of Article 5§3 (right to liberty and security) of the Convention. The detention of the applicants for periods longer than in the *Brogan and Others* case<sup>16</sup> did not breach the Convention as the United Kingdom had made a “valid emergency derogation under Article 15 of the Convention”. It seems that the derogation being valid is sufficient in se to justify longer detention (*Brogan v. the United Kingdom*, 1988).

Always in the detention field we have the case *Sher and Others v. the United Kingdom*, 20 October 2015. This case concerned the arrest and detention of the applicants, three Pakistani nationals, in the context of a counterterrorism operation. The applicants were detained for 13 days, before ultimately being released without charge. During that period they were brought twice before a court with warrants for their further detention being granted. They were then taken into immigration detention and have since voluntarily returned to Pakistan. They complained in particular about the hearings on requests for prolongation of their detention because certain evidence in favour of their continued detention had been withheld from them and that one such hearing had been held for a short period in closed session (*Sher and Others v. the United Kingdom*, 2015).

The Court held that there had been no violation of Article 5§4 of the Convention. Why? Because the UK authorities had suspected an imminent terrorist attack and had launched an extremely complex investigation aimed at thwarting it. And for the Court, terrorism falling into a special category, it found that Article 5§4 could not be used

---

<sup>16</sup> Another case of derogation under Article 15 of the European Convention, even if, because of withdrawing of derogation under Article 15, the Articles of the Convention in respect of which complaints have been made were fully applicable: *Brogan and Others case v. the United Kingdom* (Application no. 11209/84; 11234/84; 11266/84; 11386/85), 29 November 1988 : “(...) 48. The Government have adverted extensively to the existence of particularly difficult circumstances in Northern Ireland, notably the threat posed by organised terrorism. The Court, having taken notice of the growth of terrorism in modern society, has already recognised the need, inherent in the Convention system, for a proper balance between the defence of the institutions of democracy in the common interest and the protection of individual rights (...). The Government informed the Secretary General of the Council of Europe on 22 August 1984 that they were withdrawing a notice of derogation under Article 15 (art. 15), which had relied on an emergency situation in Northern Ireland (...). The Government indicated accordingly that in their opinion “the provisions of the Convention are being fully executed”. In any event, as they pointed out, the derogation did not apply to the area of law in issue in the present case. Consequently, there is no call in the present proceedings to consider whether any derogation from the United Kingdom’s obligations under the Convention might be permissible under Article 15 (art. 15) by reason of a terrorist campaign in Northern Ireland. Examination of the case must proceed on the basis that the Articles of the Convention in respect of which complaints have been made are fully applicable. This does not, however, preclude proper account being taken of the background circumstances of the case. In the context of Article 5 (art. 5), it is for the Court to determine the significance to be attached to those circumstances and to ascertain whether, in the instant case, the balance struck complied with the applicable provisions of that Article in the light of their particular wording and its overall object and purpose “(...) The Court: 1. Holds by sixteen votes to three that there has been no violation of Article 5 para. 1 (art. 5-1); 2. Holds by twelve votes to seven that there has been a violation of Article 5 para. 3 (art. 5-3) in respect of all four applicants; 3. Holds unanimously that there has been no violation of Article 5 para. 4 (art. 5-4); 4. Holds by thirteen votes to six that there has been a violation of Article 5 para. 5 (art. 5-5) in respect of all four applicants; 5. Holds unanimously that it is not necessary also to consider the case under Article 13 (art. 13)”.

to prevent the use of a closed hearing or to place disproportionate difficulties in the way of police authorities in taking effective measures to counter terrorism.

Then the Court studied the applicants' case and founded that the threat of an imminent terrorist attack and national security considerations had justified restrictions on the applicants' right to adversarial proceedings concerning the warrants for their further detention. Moreover, there had been sufficient safeguards against the risk of arbitrariness in respect of the proceedings for warrants of further detention, in the form of a legal framework setting out clear and detailed procedural rules (*Sher and Others v. the United Kingdom*, 2015).

In relation to the late applicants' access to counsel and subsequent admission to the trial concerned the statements made in the absence of a lawyer, the case *Ibrahim and Others v. the United Kingdom* is particularly interesting. On July 21, 2005, four bombs were ignited in the public transport system of London, but they did not explode. The bombers fled and police opened an investigation on the spot. The first three applicants, who were suspected of having fired three bombs, were arrested. The fourth applicant was initially interrogated as a witness about the attacks, but it later emerged he had helped one of the bombers after the failure of the attack and, as a result of his written statement, he was also arrested. The case relates to the late applicants' access to counsel<sup>17</sup> and subsequent admission to the trial concerned the statements made in the absence of a lawyer (*Ibrahim and Others v. the United Kingdom*, 2014). In its Chamber judgment of 16 December 2014, the Court held by six votes against one, that no violation of Article 6§1 and 3c) (right to a fair trial and the right to assistance of a lawyer) of the Convention.

The Court decided that at the time of the first interrogation of the four applicants by the police, there was an unusually serious and imminent threat to public safety, namely the risk of further attacks, and this threat gave rise to compelling reasons justifying temporarily delay the access of applicants to an attorney. The Chamber also considered that the admission at trial of statements made by the applicants during police interrogation and before they had access to a lawyer had not infringed unjustifiably their right to a fair trial. It took into account the compensatory guarantees provided by the national legislative framework, as applied in the case of each applicant, the circumstances in which the statements were obtained and reliability, the procedural guarantees at trial, particularly the opportunity to challenge the statements, and the probative value of other incriminating evidence. Furthermore, as regards the fourth applicant, who had made statements incriminating himself during his interrogation by the police, the chamber pointed out that the applicant was not retracted his statements, even after that he had consulted a lawyer, but had continued to rely on those statements in his defence until he asked their exclusion at trial.

However the particularly difficult field of intervention, the Court will make sure the State is under control.

### *2°) Potential conviction on a particular anti-terrorist measure: sword of Damocles hanging over States' heads*

If the Court is less demanding in general towards anti-terrorist measures and despite the fact that a State may validly claim a general state of emergency, however, that doesn't mean that the Court accepts any State terrorist countermeasure. The State is not prevented from a conviction on a particular measure, especially if it consists in inhuman or degrading treatment. We have an example in *the Saadi v. Italy* case decided by the Grand Chamber. This case concerned the risk of ill treatment if the applicant was to be deported to Tunisia, where he claimed to have been sentenced in absentia to 20 years' imprisonment for membership of terrorist organisation acting abroad in peacetime and for incitement to terrorism. The Court observed that it could not underestimate the danger of terrorism and noted that States were facing considerable difficulties in protecting their population from terrorist violence and the threat it represents to the community. However, that should not call into question the absolute nature of Article 3 (prohibition of torture) of the Convention (*Saadi v. Italy*, 2008).

---

<sup>17</sup> Regarding the first three, after their arrest, and as regards the fourth, after the police had begun to suspect him of involvement in the commission of a criminal offense.

In the present case, substantial grounds were shown for believing that there was a real risk that the applicant would be subjected to treatment contrary to Article 3 if he were to be deported to Tunisia. The Court further noted that the Tunisian authorities had not provided the diplomatic assurances requested by the Italian Government.

Lastly, even if the Tunisian authorities had given the diplomatic assurances, that would not have absolved the Court from the obligation to examine whether such assurances provided a sufficient guarantee that the applicant would be protected against the risk of treatment forbidden by the Convention. Consequently, the Court found that the decision to deport the applicant to Tunisia would breach Article 3 if it were enforced.

In the case *Demir and others v. Turkey*, the Court held that it was not sufficient for the State to invoke the difficulties of the fight against terrorism in a crisis to justify long deprivation of freedom without judicial intervention (*Demir and others v. Turkey*, 1998). While admitting that the United Kingdom benefiting from Article 15, the European judges have strongly criticized the detention without charge of foreign device introduced after 11 September 2001<sup>18</sup> (*A and others v. UK*, 2009, para. 186).

So we can conclude on that point with Nicolas Hervieu that “[c]ertainly more flexible, the European control of the necessity and proportionality of each measure therefore does not evaporate. In this context, the Court also is taking into account “relevant factors such as the nature of the rights affected by the derogation, the duration of the state of emergency and the circumstances that have created it” (Hervieu, 2016, *Brannigan and McBride v. the United Kingdom*, 1993, para. 43).

Even if we still not have a judgement of the Court on the French measures taken under the state of emergency, we can - on the basis of the case already judged – imagine what would be the *modus operandi* of the Court controlling French measures taken in the framework of the on going derogation to Article 15.

#### *B. The specific case of French measures in the framework of the derogating clause*

The state of emergency already extended to three times, on 19 November, then on 16 February, one yet – for the last time said the government – 10 May 2016, high majority of the Senate having voted in favour<sup>19</sup> of the extension of the state of emergency until the end of July, in order to “insure the security” of the Euro 2016 (from 10 June to July 10). Then the “tour de France” (from 2 to 24 July). The minister of Interior’s<sup>20</sup> bill does not include the use of administrative searches. But after the Nice attack, on the night of 19 July, the National assembly voted the prolongation of the emergency regime for the 4th time, but directly for 6 months instead of 3 months as the other times.

No Court’s decision yet, but we have the point of views of two institutions of the Council of Europe: the General Secretary and the High Commissioner for Human Rights.

The General Secretary of the Council of Europe, Thorbjorn Jagland, expressed his worries about the French use of derogation in a letter to the President of the Republic, François Hollande: on the 22 January 2016: “(...) In my capacity as Secretary General of the Council of Europe, organisation guarantor of Human Rights, of which France is a founding member, I would like to draw your attention to the risks arising prerogatives conferred to the executive power by the provisions applicable during the state of the emergency. I refer, inter alia, the conditions under which administrative searches and house arrest can be made. I very much hope that the constitutional and

---

<sup>18</sup> ECHR September 23, 1998, *Demir and others v. Turkey*, § 52: “In respect of such lengthy periods of detention in police custody it is not sufficient to refer in a general way to the difficulties caused by terrorism and the number of people involved in the inquiries”.

<sup>19</sup> 309 Senators voted in favour and 30 voted against: Communists and much of the Environmentalists.

<sup>20</sup> Bernard Cazeneuve.

criminal reform projects will contain the necessary guarantees from the point of view of the respect for fundamental freedoms and maintain the necessary balance to which you are personally attached” (...) <sup>21</sup>.

He seems to be worried both about the present practice measures and the future norms that will be adopted and will remain even after the end of the emergency state has stopped.

The High Commissioner for Human Rights of the pan-European organisation, Nils Muiznieks, expressed its concern at the alarming practice of the state of emergency in France and “the risk” that represents its implementation for democracy.

Waiting for the Court’s judgment on the French derogation, we could launch ourselves in a “guess” that the European control will be mild on the existence of a need to ask for derogation to Article 15 ECHR (it will admit without any doubt that the circumstances after the massive terrorist attack in Paris, could justify the derogation to Article 15) and that the control on the persistence of the state of emergency would be soft too, even if it was prolonged two times, because of Brussels bombing showed that the threat is still very high, furthermore, organising Euro football meetings is not easy in that context. However, most probably, the control towards the concrete measures implemented within this framework will be more consistent.

The first element that the European Court could consider not in conformity with the European Convention on Human right is the new version <sup>22</sup> of the law on the state of emergency (Article 6 establishing the legal regime of house arrest when the state of emergency is declared) (Convention for the Protection of Human Rights and Fundamental Freedoms, 1950). As we discovered in the first part of the Article, the new version is using the word “behavior” instead of “activity”. This modification seems to translate a drift in the conception from suspicion logic, based on predictions to prosecution logic, based on evidence: the law compels individuals not because they were preparing offenses, but because they are likely to commit a crime (Gandini, 2016).

Searches unrelated to terrorism, such as those made in environmentalists militant houses before the climate summit in Paris in November and December 2015 - Cop 21 - could eventually be censured, even if it the Constitutional Council, seized by the advocates of environmental activist under house arrest during the COP 21, had declared legal the measure through a priority preliminary ruling on the issue of constitutionality <sup>23</sup> (Constitutional Council, 2008). It has decided that preventive house arrest of a political opponent decided within the framework of the state

---

<sup>21</sup> « Je souhaite appeler votre attention sur les risques pouvant résulter des prérogatives conférées à l’exécutif par les dispositions applicables pendant l’état d’urgence, écrit le secrétaire général. Je me réfère entre autres aux conditions dans lesquelles des perquisitions administratives ou assignations à résidence peuvent être effectuées ». Il « espère vivement » que les projets de réforme constitutionnelle et pénale « contiendront les garanties nécessaires du point de vue du respect des libertés fondamentales » - c’est déjà dire, diplomatiquement, qu’il en doute. En ma qualité de Secrétaire général du Conseil de l’Europe, organisation garante des droits de l’homme, dont la France est membre fondateur, je souhaite attirer votre attention sur les risques pouvant résulter des prérogatives attribuées à l’exécutif par les dispositions applicables pendant l’état d’urgence. Je me réfère entre autres aux conditions dans lesquelles des perquisitions administratives ou assignations à résidence peuvent être effectuées. J’espère vivement que les projets de réformes constitutionnelle et pénale en cours contiendront les garanties nécessaires du point de vue du respect des libertés fondamentales”. (...) « Je songe notamment à l’usage des armes à feu par les forces de l’ordre et aux restrictions à la liberté d’aller et venir » : Je suis également avec attention les discussions qui se tiennent au niveau national autour de l’élargissement des cas de déchéance de la nationalité française ».

<sup>22</sup> Version of November 20, 2015, Article 6.

<sup>23</sup> QPC, in French acronym for: “*Question Prioritaire de Constitutionnalité*”. “An “application for a priority preliminary ruling on the issue of constitutionality” is the right for any person who is involved in legal proceedings before a court to argue that a statutory provision infringes rights and freedoms guaranteed by the Constitution. Once conditions of admissibility have been complied with, the Constitutional Council, to whom the application will have been referred by the Conseil d’Etat or the Cour de cassation, will give its ruling and, if need be, repeal the challenged statutory provision. The application for a priority preliminary ruling on the issue of constitutionality was introduced under the constitutional reform of July 23rd 2008. Prior to this reform, it was impossible to challenge the constitutionality of a statute which had come into force. From now on, persons involved in legal proceedings will be vested with this new right under Article 61-1 of the Constitution” (Constitutional Council, 2008).

of emergency is in line with the Constitution. So Members of the Constitutional Council validated Article 6 of the law in full<sup>24</sup> (Constitutional Council, 2015).

By decision of December 11, 2015, the Council of State referred the QPC to the Constitutional Council. The Constitutional Council based his analysis on the European Court of Human Rights relative to what constitutes or not a deprivation of liberty, considering it very close to his own jurisprudence<sup>25</sup>. In its decision to the referral of a QPC, the Council of State ruled that it was not a deprivation of liberty<sup>26</sup> (Constitutional Council, 2015).

The Constitutional Council - in its Decision no. 2015-527 QPC December 22, 2015, M. Cédric D., chose to follow the advice of the State Council following the logic of the previous constitutional jurisprudence. It found that the house arrest under the impugned provisions did not constitute a deprivation of liberty<sup>27</sup> (Constitutional Council, 2015). The Constitutional Council considered also that beyond this continuous period of twelve hours, the measure would become far too constraining for not being analysed as affecting individual freedom in the sense of Article 66 of the Constitution<sup>28</sup> (Constitution, 1958).

Following its analysis, the Constitutional Council dismissed the complaint under Article 66 of the Constitution (cons. 7). Regarding the interference with freedom of coming and going by the provisions discussed in the commented decision, the Constitutional Council found it to be consistent with the Constitution.

In a more recent decision no. 2016-536 QPC of 19 February 2016 - Human Rights League (Administrative searches and seizures in the event of a state of emergency), the Constitutional Council took a partial censure decision, ruling that “[t]he provisions of the second phrase of the third subparagraph of comma I of Article 11 of the Law of 3 April 1955 are unconstitutional”<sup>29</sup>, but also ruling that “the remaining part of paragraph I of Article 11 is constitutional” (Human Rights League, 2016).

---

<sup>24</sup> In its decision of 22 December 2015, the Constitutional Council found to be constitutional the first nine paragraphs of Article 6 of Law No. 55-385 of 3 April 1955 regarding the state of emergency.

<sup>25</sup> A summary of the European case law review done by the Constitutional Council: the Strasbourg Court considers that home confinement under surveillance and ban to leave is a deprivation of liberty (ECHR, *Lavents v. Latvia*, 2002) as well as the assignment of a person in a remote location, difficult access with permanent police control (ECHR, *Guzzardi v. Italy*, 1980). However, a person under house arrest or placed under police surveillance that does not involve confinement in a defined local, experiences freedom restriction traffic and not a deprivation of liberty (ECHR, *Freimanis and Lidums v. Latvia*, 2006). It is the same for a measure requiring a person to appear once a month to the police authority responsible for supervision, keep contact with a psychiatric centre, live at a particular address, do not leave the town where the person lives and stay at home from 22 pm and 7 am (ECHR, *Villa v. Italy*, 2010).

<sup>26</sup> Here are the terms used by the Council of State in its decision to refer the QPC, "if a house arrest measure of the nature of that which was taken against the applicant does place restrictions on the exercise of certain freedoms, especially the freedom to come and go, it does not, given its duration and its implementing rules, the nature of a deprivation of liberty within the meaning of Article 5 of the European Convention of human rights and fundamental freedoms; that as a result and, in any event, M. Domenjoud can't properly rely on that article to contest the residency measure taken against him".

<sup>27</sup> For the following reasons: "Whereas, first, that the contested provisions allow the Minister of the Interior, when the state of emergency has been declared, to "pronounce the house arrest, in the place which he fixes, any person residing in the secured zone" by the decree declaring a state of emergency; this house arrest, may be imposed only in respect of a person for whom "there are serious reasons to believe that his conduct constitutes a threat to security and public order", is a measure which shall fall under the responsibility of a single Administrative police and so can have no other purpose than to preserve public order and prevent crime; that this house arrest "should allow those who are subjected to reside in an urban area or in close proximity to an agglomeration" and can in no way "have the effect of creating camps where would be held persons "under house arrest; that, in both object and in scope, these provisions have no deprivation of individual liberty "(cons. 5).

<sup>28</sup> It has, therefore, considered "that, under house arrest ordered by the Interior Minister, the person "may also be compelled to remain in the place of residence determined by the Minister of interior, during the timeframe it determines, within twelve hours per twenty-four hours"; the maximum timeframe of duty at home under house arrest, fixed at twelve hours a day, cannot be extended without the arrest is then regarded as a deprivation of liberty, therefore subject to the requirements of Article 66 of the Constitution " (Cons. 6).

<sup>29</sup> "Considering that the provisions of the second phrase of the third subparagraph of paragraph I of Article 11 of the Law of 3 April 1955 enable the administrative authority to copy all computer data that it may have the possibility to access during the course of the search; that this measure is equivalent to a seizure; that neither this seizure nor the exploitation of the data thereby collected has been authorised by a court, even if the occupant of the location searched or the owner of the data objects and even though no offence has been established; that in addition data may be copied that has no link with the person whose conduct constitutes a threat for security and public order and who has frequented the location at which the search has been ordered; that in doing so, the legislator did not put in place legal guarantees capable of

Notwithstanding these national case law, most probably, the European Court on Human rights will have to make a decision on the legal character of Article 6, the counsellors of that militant having declare that in case of failure they would seized the Court. As the Court doesn't feel in general bounded by the national jurisdiction decisions, it could consider that Article 6 consists in a violation of the European Convention on Human rights.

Another aspect of the law that could be criticised is the fact that it also allows to ban assemblies and demonstrations<sup>30</sup>. This proved to be the "great march" for the climate that was scheduled on November 29 on the sidelines of the Climate conference, which had been forbidden. It also creates the possibility of administrative dissolution of associations facilitating acts against public order (Art. 6).

Articles of the Convention that could be violated by France are: Article 8 (right to respect for private and family life), Article 5 (right to liberty and security), Article 10 (freedom of expression) and Article 11 (freedom of assembly and association), but also the ban for discrimination guaranteed by Article 14 ECHR due to the risk of stigmatisation based on ethnic or religious belonging.

It seems that there is source of criticism: individual police abuses or mistakes reported including an online "Observatory of emergency" created by the Journal Le Monde journalist, Laurent Borredon<sup>31</sup> and Amnesty international (M. Blogs, 2016, Amnesty International, 2016). According to that last organisation: more than 3.242 searches were conducted and more than 406 decrees imposed house arrest, 200 lawsuits were consequently brought<sup>32</sup> (Audouin, 2016). The majority of people whom Amnesty International interviewed said they had received almost no information indicating how they were involved in any security threat. Notes of the Intelligence service presented to the courts contained little else. Therefore, many people have had difficulty in challenging the restrictions that were imposed on them.

The emergency measures have had a significant impact on the rights of the concerned persons. Some have lost their jobs. Almost all now suffer from stress and anxiety.

Yet these emergency measures, heavy of consequences for the human rights of the population, have harvested very few concrete results, which raise the question of the proportionality of the measures<sup>33</sup> (Lochak, 2015).

---

ensuring a reasonable balance between the objective of constitutional standing of safeguarding public order and the right to respect for private life; that accordingly, without any requirement to examine the other objections, the provisions of the second phrase of the third subparagraph of paragraph I of Article 11 of the Law of 3 April 1955, which violate Article 2 of the 1789 Declaration, must be declared unconstitutional".

<sup>30</sup> In its decision no. 2016-535 QPC of February 19, 2016 - Human Rights League – (Policing of meetings and public places during a state of emergency). On 18 January 2016 the Constitutional Council, in the conditions provided for by Article 61-1 of the Constitution, received from the Council of State (decision no. 395091 of 15 January 2016), an application for a priority preliminary ruling on the issue of constitutionality raised on behalf of the association Human Rights League by the SCP Spinosi et Sureau, Attorney at the Conseil d'État and the Cour de Cassation, regarding the conformity of Article 8 of Law no. 55-385 of 3 April 1955 on the state of emergency with the rights and freedoms guaranteed by the Constitution, registered with the general secretariat of the Constitutional Council as no. 2016-535 QPC. The Council held that Article 8 of Law no. 55-385 of 3 April 1955 on the state of emergency is constitutional. In order to justify the QPC, the counsel, Me Patrice Spinosi wrote: "It is not to challenge the legitimacy of the state of emergency, but to stigmatise the achievement threat to fundamental freedoms decided on its behalf without judicial review. There is a constitutional requirement for judicial review of the measures taken, which affect home inviolability and respect for private life. Constitutional principles of freedom of expression and the right to collective expression of ideas and opinions are violated" (Gandini, 2016).

<sup>31</sup> M. Blogs, 2016. Reported improvisations, failures and brutalities. To demonstrate this, there are the individual stories such as that of the Tunisian family living in Nice. November 19, 2015, at 4 pm 30 am, men of an elite unit of the National Police detonated the door of their apartment and shrapnel wound to the head and neck the little girl aged 6 years. The men left the scene empty-handed: they were at the wrong address. Or the story of a father under house arrest since November 15, 2015 and was to point four times daily to the police because his former employer had denounced him for whimsical motifs. The mistake was recognized, belatedly...

<sup>32</sup> According to Jean-Jacques Urvoas, the president of the Law Committee of the National Assembly, who has held Parliamentary Control over the state of emergency, "the key targets and the goals were treated in first two weeks " and surprise effect, has probably largely worn off.

<sup>33</sup> For Danièle Lochak the "necessary proportionality" of repression has been overridden: "with the development of telephone tapping, surveillance, and house arrests and searches, the police and judiciary have woven a huge cobweb on the whole population, with a risk of

According to the authorities, 3.242 raids during previous months have given rise to four preliminary investigations of crimes related to terrorism and 21 investigations on the grounds of "apology for terrorism", ill-defined. 488 additional investigations were also opened as a result of these searches, but for criminal offenses unrelated to terrorism<sup>34</sup> (France Inter Radio, 2016).

As resisting attitude, counsellors of the Paris Bar and the order of Lyon counsellors have set up observatories to monitor the way in which state of emergency is applied in France.

Moreover, in a press release of December 2015, the League of Human Rights denounced the abuses<sup>35</sup> and asked the government to lift the state of emergency and to relinquish the constitutional reform to bring in legislation some decried practices that are now allowed by the state of emergency (League of Human Rights, 2016).

The League of Human Rights has been heard since March 30, 2016, the President of the Republic, after meeting with the presidents of the National Assembly and the Senate, decided to abandon - for lack of agreement between the two Houses of Parliament - the constitutional reform. Thus, the text will not be adopted<sup>36</sup>. It consisted of two Articles on the one hand, the state of emergency and, secondly, the forfeiture of nationality<sup>37</sup> (Gandini, 2016).

## Conclusions

In conclusion, Article 15 consists of a general derogation clause allowing to suspend some guaranteed rights in the ECHR, which misused is risky for democratic societies. It is suppose to protect from an imminent and exceptional danger, and especially these days of terrorist attacks, the Court has an important responsibility in keeping our

---

reaching people who have nothing to do with terrorism but have the wrong to be Muslim" (Journal *Le Monde*, November 28, 2015) ; this is a free translation from the author of the quotation of the article.

<sup>34</sup> According to figures released by the France Inter radio, 3.189 administrative searches (ie without the approval of a court judge) have been conducted, both day and night, between 13 November 2015 and 20 January 2016. During these searches, 541 weapons were seized. In a little over 10 % of cases, there were arrests, 382 exactly, but only four are actually open procedures related to anti-terrorism. So these searches were conducted mainly for arms trafficking, narcotics, or illegal residence offenses.

<sup>35</sup> "We are seeing a real diversion of emergency which also targets people with no connection to the risks of attacks. These abuses must stop. (...) The state of emergency and the internal climate of war, fuelled by the government, contributes to the strengthening of amalgam and discriminatory practices, including by police. It is not the "terrorists who are terrorized", but some young and some populations victims of arbitrary because of their origin and/or religion who see their situation even more weakened".

<sup>36</sup> Announced by the President of the Republic at the Congress meeting in Versailles 16 November 2015, two days after the attacks, presented by the Council of ministers 23 December 2015 by Mr. Manuel Valls, Prime Minister, the bill was passed, first reading, with amendments, by the National Assembly of 10 February 2016 and, with modifications, by the Senate on 22 March 2016. Article 1 integrated in the Constitution the state of emergency whose regime was until now only secured by ordinary legislation. In this way, the trigger conditions of the state of emergency could not be easily modified anymore. The original text of the Constitution Bill referred to a common law the setting of administrative measures that authorities can take during the state of emergency. Article 2 of the original text allowed for deprivation of nationality for persons with dual nationalities born French. This was to punish the perpetrators of the most serious crimes only. The rules that were applicable to them would have been closer to those currently in force for persons with dual nationalities become French. Following the constitutional revision, an ordinary law would have been necessary to set the terms of application of these provisions, including the list of crimes that could lead, if convicted, the forfeiture of nationality.

<sup>37</sup> Jean-Jacques Gandini Lawyer, former president of the Union of Lawyers of France (Gandini, 2016): According to proponents of this idea, constitutionalise the exception would allow managing exceptional circumstances in a legal framework: a constitution must anticipate every situation that could undermine the guarantee of freedom of the citizens, they argue. Prejudicing a number of his colleagues, Professor of Constitutional Law, Olivier Beaud, said he agreed that "the opposition between constitutionalism and the state of exception is irreducible," because "the Constitution serves to organize and limit the power, while any exception « blow out » the constitutional order by entering derogations". Moreover, he adds, "the state of emergency has two serious dangers of arbitrary misuse of emergency powers granted to the police and the repeated extension of several state of emergency at risk to make it a permanent condition". The Council of State does not share this view. In its opinion delivered on 17 December, it considers that the amendment proposed by the government produces a "useful effect" for two reasons: it gives "an indisputable basis for administrative police measures" and "frames the declaration and conduct of the state of emergency". However, the state of emergency remains a "state of crisis", renewals should not succeed indefinitely. Another part of the constitutional reform announced by President of the Republic to Congress on November 16: the possibility of disqualifying the nationality of the persons with dual nationalities born French and sentenced for terrorism. It has inspired to the Council of the State a statement of the obvious: this measure - sought too long by the right and the extreme right" corresponds to a legitimate objective", but includes a "risk of unconstitutionality "; hence the importance to include in the Constitution.



executive powers far from the temptation of enlarging security to the detriment of freedom turning out in favour of terrorists and fundamentalists.

The Court seems to be aware of it, as we can notice an evolution in the control established by the Court: from very mild control at the beginning (*Ireland v. UK* where the Court was recalling for realism), it came to a stricter control a “prompt judicial intervention may lead to the detection and prevention of serious ill-treatment, which (...), is prohibited by the Convention in absolute and non-derogable terms (*Ireland v. the United Kingdom*, 1978, *Aksoy v. Turkey*, 1996, para. 76).

The Court refuses to accept everything in the framework of the derogation: it is keeping improvements under continuous scrutiny during the evolution of the situation. In that, it seems to have learned lessons from WW2.

It is probably necessary that the Court will increase the rigor of its control to make sure that states don't use the same violence and undemocratic means as the terrorists are using against us, in a word make sure they are wise, a thought very much inspired by Gandhi philosophy...

Even if it is a very unfair fight, and sometimes, as a Parisian, and so the favourite target of DAESH in the whole world, the idea of democratic answers is fragile in front of the fear, but we have to fight against that fear and work on ourselves because changing the world can't be done elsewhere then inside ourselves! And specifically work on tolerance to what is different from us and cultivate our national unity, always under threat!

Studying these case law and the situations linked to them, one question appears: is the strong repression against the enemies of the democracy and the general diminution of the rights and freedoms of the whole population the right answer to illegitimate violence? But if not this solution what else? A deep, long, onerous social work would it be efficient? Apart that few persons seem to be ready to invest in such a huge work, would it be sufficient? If probably both solutions have to be combined, priority has to be given to Human rights and democracy as Norwegian Prime Minister said after the attacks in Oslo and Utoya island the in July 2011: “(...) We never give up our values. We must show that our open society can pass this test too, that the answer to violence is even more democracy, even more humanity, but never naivety. That is something we owe the victims and their families” (Kvile, 2014).

## References

- Amnesty International. (2016). Retrieved from <https://www.amnesty.ch/fr/pays/europe-asie-centrale/france/docs/2016/>.
- Amnesty International. Retrieved from [http://www.amnesty.fr/sites/default/files/rapport\\_oeu\\_final.pdf](http://www.amnesty.fr/sites/default/files/rapport_oeu_final.pdf).
- Amnesty International. (2016). Retrieved from [http://www.amnesty.fr/sites/default/files/amnesty\\_international\\_etat\\_durgence.pdf](http://www.amnesty.fr/sites/default/files/amnesty_international_etat_durgence.pdf).
- Audouin, C. (2016). L'état d'urgence en chiffres et en débat. Retrieved from <http://www.franceinter.fr/depeche-letat-durgence-en-chiffres-et-en-debat>.
- Convention for the Protection of Human Rights and Fundamental Freedoms (Council of Europe, 1950).
- Constitution of 4th October 1958, consolidated version of 27th January 2017. Retrieved from <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000006071194>.
- Constitutional Council. (2008). Priority Preliminary rulings on the issue of constitutionality. Retrieved from <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/english/priority-preliminary-rulings-on-the-issue-of-constitutionality-qpc/texts-and-presentation/priority-preliminary-rulings-on-the-issue-of-constitutionality.48002.html>.
- Constitutional Council. (2015). Decision n° 2015-527 QPC. Retrieved from <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2015/2015-527-qpc/decision-n-2015-527-qpc-du-22-decembre-2015.146719.html>.
- Council of Europe. (2017). Reservations and Declarations for Treaty No. 005 - Convention for the Protection of Human Rights and Fundamental Freedoms. Retrieved from [https://www.coe.int/fr/web/conventions/full-list/-/conventions/treaty/005/declarations?p\\_auth=IRgBNXHj](https://www.coe.int/fr/web/conventions/full-list/-/conventions/treaty/005/declarations?p_auth=IRgBNXHj).
- Council of Europe. (2015). France informs Secretary General of Article 15 Derogation of the European Convention on Human Rights. Retrieved from [http://www.coe.int/en/web/secretary-general/news/-/asset\\_publisher/EYIBJNjXtA5U/content/france-informs-secretary-general-of-Article-15-derogation-of-the-european-convention-on-human-rights](http://www.coe.int/en/web/secretary-general/news/-/asset_publisher/EYIBJNjXtA5U/content/france-informs-secretary-general-of-Article-15-derogation-of-the-european-convention-on-human-rights).
- ECtHR, *Lawless v. Ireland*, 1 July 1961 - application no 332/57.
- ECtHR, *A and others v. UK*, 19 February 2009 (Grand Chamber), application no. 3455/05;
- ECtHR, *Ireland v. the United Kingdom*, 18 January 1978, application no 5310/71;
- ECtHR, *Brannigan and McBride v. the United Kingdom*, 26 May 1993, 5/1992/350/423-424;



- ECtHR, *Aksoy v. Turkey*, 18 December 1996, application no 21987/93.
- ECtHR, *Brogan and Others case v. the United Kingdom*, 29 November 1988, application no 11209/84; 11234/84; 11266/84; 11386/85.
- ECtHR, *Klass and Others v. Germany*, 6 September 1978, Series A no. 28, application no. 5029/71.
- ECtHR, *Ibrahim and Other v. the United Kingdom*, 13 September 2016, application no. 50541/08, 50571/08, 50573/08 and 40351/09.
- ECtHR, *Demir and others v. Turkey*, 23 September 1998, application no. 71/1997/855/1062–1064.
- ECtHR, *Lavents v. Latvia*, 28 November 2002, application no. 58442/00.
- ECtHR, *Guzzardi v. Italy*, 6 November 1980, Series A No. 39, application no. 7367/76.
- ECtHR, *Freimanis and Lidums v. Latvia*, 9 February 2006, application no. 73443/01 and 74860/01.
- ECtHR, *Villa v. Italy*, 20 April 2010, application no. 19675/06.
- ECtHR, *Sher and Others v. the United Kingdom*, 20 October 2015, application no. 5201/11.
- ECtHR, *Saadi v. Italy*, 28 February 2008, application no. 37201/06.
- France Inter Radio. (2016). *Etat d'urgence: bilan pitoyable, mensonges avérés*. Retrieved from <https://fr.sott.net/Article/27740-Etat-d-urgence-bilan-pitoyable-mensonges-averes>.
- Gandini, J. J. (2016). *Vers un état d'exception permanent*. Retrieved from <https://www.monde-diplomatique.fr/2016/01/GANDINI/54469>.
- Hervieu, N. (2016). *État d'urgence et CEDH: de la résilience des droits de l'homme*. Retrieved from <http://www.dalloz-actualite.fr/chronique/etat-d-urgence-et-cedh-de-resilience-des-droits-de-l-homme#.VyMYwMf3KQs>.
- Human Rights League decision no. 2016-535 QPC of 19 February 2016. Retrieved from <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2016/2016-535-qpc/decision-n-2016-535-qpc-du-19-fevrier-2016.146999.html>.
- Internal Security Code of French Republic. Consolidated version of 22 January 2017. Retrieved from <https://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000025503132&dateTexte=20170127>.
- Jacquin, J.B. (2015). *L'assignation à Résidence de Militants Écologistes devant le Conseil d'Etat*. Retrieved from [http://abonnes.lemonde.fr/societe/Article/2015/12/10/la-constitutionnalite-de-l-etat-d-urgence-mise-en-cause\\_4828792\\_3224.html](http://abonnes.lemonde.fr/societe/Article/2015/12/10/la-constitutionnalite-de-l-etat-d-urgence-mise-en-cause_4828792_3224.html).
- Law No. 55-385 of 3 April 1955 regarding the state of emergency. Consolidated Version 30 November 2015 amended version (title) May 19, 2011 and November 21, 2015. Retrieved from <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000031500831&categorieLien=id>.
- Law 2015-1501 of 20 November 2015 extending the application of Law No. 55-385 of 3 April 1955 regarding the state of emergency and strengthening the effectiveness of its provisions. Consolidated version of 7 December 2015. Retrieved from <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000031500831&categorieLien=id>.
- Law No. 2012-410 of 27 March 2012 on the protection of identity, which mentioned the date of restraint and return conditions of the selected document. Retrieved from <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000025582411&categorieLien=id>.
- Law N° 2013-403 of 17 May 2013. Retrieved from <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000027414225&categorieLien=id>.
- League of Human Rights. (2016). *Vers une cinquième prolongation de l'état d'urgence? Lettre ouverte aux parlementaires*. Retrieved from <http://www.ldh-france.org/vers-cinquieme-prolongation-letat-d-urgence-lettre-ouverte-aux-parlementaires/>.
- Blogs, M. (2016). Retrieved from <http://delinquance.blog.lemonde.fr>.
- Penal Code of French Republic. Consolidated version of 27 January 2017. Retrieved from <https://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006070719&dateTexte=20170127>.
- Tubiana, M. (2015). *Libération*. Retrieved from <http://www.liberation.fr/auteur/2005-afp>.
- Lochak, D. (November 28, 2015) *Le Monde*.
- Yearbook of the European Convention on Human Rights. (1971), 14.
- Yearbook of the European Convention on Human Rights. (1973), 16.
- Yearbook of the European Convention on Human Rights. (1975), 18.
- Yearbook of the European Convention on Human Rights. (1978), 21.
- Yearbook of the European Convention on Human Rights. (1985), 28.
- Kvile, R. (2014). *Statement on Responding to Terrorist Attacks*. As delivered by Ambassador Robert Kvile to the Permanent Council, Vienna, 5 June 2014. Retrieved from: <http://www.osce.org/pc/120195?download=true>.

---

Copyright © 2017 by author(s) and Mykolas Romeris University

This work is licensed under the Creative Commons Attribution International License (CC BY).

<http://creativecommons.org/licenses/by/4.0/>

