

## Human rights must survive terrorism !

**1. Legal background.** *“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 executed”.*

(European Convention on Human rights, article 15).

Similar provisions are included in the International Covenant for Civil and Political Rights (ICCPR – article 4) and, for instance, in the American Convention on Human Rights (article 27).

So, the most important international instruments afford to the governments of the States parties, in exceptional circumstances, the possibility of derogating, in a temporary, limited and supervised manner, from their obligation to secure certain rights and freedoms under the Convention.

To date, nine States parties to the European Convention on Human Rights – Albania, Armenia, France, Georgia, Greece, Ireland, Turkey, Ukraine and the United Kingdom – have relied on their right of derogation. Four of those States have had to justify the measures taken, in the light of Convention requirements, namely Greece, Ireland, the United Kingdom and Turkey.

**2. European Court of Human Rights caselaw.** From the several judgments pronounced by the Strasbourg Court, we can assess that<sup>1</sup> :

- The right of derogation can be invoked only in time of war or other public emergency threatening the life of the nation: that means *“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”*. In the *Aksoy v. Turkey* case (18<sup>th</sup> December 1996), the Court found *“that the extent and particular effects of the PKK terrorist activity in south-eastern Turkey had undoubtedly created, in the region concerned, a public emergency threatening the life of the nation”*. In the *Ireland v. United Kingdom* case, the Court add that *“it falls in the first place to each Contracting State, with its responsibility for ‘the life of the 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”*. It seems no doubt that, for instance, terrorist attempts such as those we have known in France and Belgium in 2015 and 2016, or the failed coup of 15<sup>th</sup> July 2016 in Turkey may be qualified as public emergency threatening the life of the nation.
- A State may take measures derogating from its Convention obligations only to the extent strictly required by the situation. In the *Aksoy* case, the Court observed *“that the Turkish*

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<sup>1</sup> See ECHR – Factsheet – *Derogation in time of emergency*.

Government had not adduced any detailed reasons before the Court as to why the fight against terrorism in South-East Turkey rendered judicial intervention impracticable. While the Court took the view that the investigation of terrorist offences undoubtedly presented the authorities with special problems, it could not accept that it was necessary to hold a suspect for fourteen days without judicial intervention. This period was exceptionally long, and left the applicant vulnerable not only to arbitrary interference with his right to liberty but also to torture. As to the safeguards afforded by the Turkish legal system, the Court took account of the 7 Factsheet – Derogation in time of emergency unquestionably serious problem of terrorism in South-East Turkey and the difficulties faced by the State in taking effective measures against it. However, it was not persuaded that the exigencies of the situation necessitated the holding of the applicant on suspicion of involvement in terrorist offences for fourteen days or more in incommunicado detention without access to a judge or other judicial officer". The answer to the threat must respect the proportionality principle.

- Derogations cannot be incompatible with other obligations in international law, as, for instance, to what concerns prohibition of the death penalty or the international labour conventions.
- Some rights are non-derogable or intangible: right to life, prohibition of torture and inhuman or degrading punishment or treatment, prohibition of slavery and servitude, no punishment without law, right not be tried or punished twice, ...
- On a procedural level, in the context of Article 15 § 3 of the European Convention on Human Rights, a State exercising a right of derogation is bound by a duty to notify the Secretary General of the Council of Europe. Such notice must refer to the measures taken, the reasons justifying them and the date on which they cease to apply. For instance, it is difficult to consider that France fulfilled these obligations after the terrorist attacks of 13<sup>th</sup> November 2015, when it notified a general derogation advice, without any specification of the articles which application was suspended, which measures needed derogation to the Convention and why they were proportional with the state of emergency.

To summarize, we can say with Nicole Questiaux and Leandro Despouy, two consecutive United Nations Special Rapporteurs, that the principles to be observed during a state of emergency are : Principles of Legality, Proclamation, Notification, Time Limitation, Exceptional Threat, Proportionality, Non-Discrimination, Compatibility, Concordance and Complementarity of the Various Norms of International Law<sup>2</sup>.

**3. The Venice Commission's opinion.** On the 12<sup>th</sup> December 2016, the European Commission for Democracy through Law, better known as the Venice Commission issued an *Opinion On Emergency Decree Laws adopted following the failed Coup of 15<sup>th</sup> July 2016*<sup>3</sup>.

The Commission fully agrees with the statement made by its President in the immediate aftermath of the failed coup of 15<sup>th</sup> July 2016, condemning the attempted overthrow of the Turkish Government, where he stressed that "any changes in the government must follow democratic channels". There is no doubt that the Turkish authorities were confronted with a dangerous armed conspiracy, and that they had good reasons to declare a state of emergency and give extraordinary powers to the Government.

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<sup>2</sup> "Question of Human Rights and State of Emergency", E/CN.4/Sub.2/1997/19, at Chapter II.

<sup>3</sup> [http://www.venice.coe.int/webforms/documents/default.aspx?pdfid=CDL-AD\(2016\)037-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdfid=CDL-AD(2016)037-e)

The Commission admit that the provisions of the Turkish Constitution on the declaration of a state of emergency appear to be in line with common European standards in this area.

However, the Government interpreted its extraordinary powers too extensively and took measures that went beyond what is permitted by the Turkish Constitution and by international law.

- Following the declaration of a state of emergency, for over two months, the Government was de facto permitted to legislate alone, without any control by Parliament or the Constitutional Court;
- The Government took permanent measures, which went beyond a temporary state of emergency. Civil servants were dismissed, not merely suspended, organisations and bodies were dissolved and their property confiscated instead of being put under temporary State control. In addition, the Government made a number of structural changes to the legislation, which should normally be done through the ordinary legislative process outside of the emergency period;
- The Government implemented its emergency powers through ad hominem legislation. In particular, tens of thousands of public servants were dismissed on the basis of the lists appended to the emergency decree laws. Such collective dismissals were not individualised, i.e. they did not refer to verifiable evidence related to each individual and described in the decisions;
- Basic rights of administrative due process of the public servants dismissed by the decree laws or on their basis have not been respected;
- Collective dismissals were ordered because of the alleged connections of public servants to the Gülenist network or other organisations considered “terrorist”, but this concept was loosely defined and did not require a meaningful connection with such organisations (i.e. such connection which may objectively cast serious doubt in the loyalty of the public servant);
- Some of the measures associated with the dismissals unduly penalised family members of the dismissed public servants;
- In the area of criminal procedures, extension of the time-limit for pre-trial detention without judicial control up to 30 days is highly problematic; arrests of suspects should be ordered only on the basis of “reasonable suspicion” against them; limitations on the right of access to a lawyer may be imposed only in exceptional situations in individual cases, where the existence of security risks is convincingly demonstrated, for a very limited lapse of time and, ultimately, should be subject to judicial supervision;
- The Government has removed crucial safeguards that protect detainees from abuses, which increases the likelihood of ill-treatment;
- It is unclear whether the Constitutional Court will be able to review the constitutionality of the emergency decree laws *in abstracto* and *in concreto*. The Venice Commission considers that the Constitutional Court should have this power;
- Collective dismissals “by lists” attached to the decree laws (and similar measures) appear to have arbitrarily deprived thousands of people of judicial review of their dismissals.

In conclusion, the Venice Commission recalls that the main purpose of the state of emergency is to restore the democratic legal order. The emergency regime should not be unduly protracted; if the Government rules through emergency powers for too long, it will inevitably lose democratic legitimacy. Moreover, during the course of the emergency, non-derogable rights cannot be restricted, and any other restrictions on rights must be demonstrated to be strictly necessary in light of the exigencies of the stated emergency.

The Office of the United Nations High Commissioner for Human Rights issued similar opinions, first in February 2017<sup>4</sup>, and then in March 2018<sup>5</sup>. Many other institutions or commissions too<sup>6</sup>.

**4. Conclusion.** State of emergency is a powerful weapon. It may be used when a State faces a real threat to its life or to the security of its population.

But it must be used with proportionality.

The longer the state of emergency persists, the more it loses its legitimacy.

But, more important than this. The prolongation of the state of emergency has negative effects.

In France, it has been said that the decree published on the 6<sup>th</sup> December 2016, establishing the state of emergency, was efficient only during few days, maybe a few hours. The measures adopted did not really affect the terrorists and were often counterproductive. The famous antiterrorist judge, Marc Trévidic, said “When you have young people in trouble, if you crash down their door at 4.00 am, if you place them under house arrest for 3 months, they will lose their jobs - can you tell me how this will make them less dangerous afterwards? Every reasonable man understands that, with such methods, you stoke the fire. You would knock anyone down, no matter how ».

A State of emergency also contributes to the stigmatisation of part of the population, Muslims in Europe, the Kurds in Turkey, and this will affect national cohesion.

Another danger is to misuse the derogations to liberties and rights for more common situations, and which gradually abolish the foundations of democracy.

So, the real danger with the state of emergency is that, if used this way, you let the terrorists win.

Terrorists want to abolish liberties, to reestablish discriminations, to eliminate fundamental rights, to kill democracy: no more independent judges, no more lawyers, no more fair trials. And that’s what the state of emergency does. More and more the longer it lasts.

In one of his most famous plea<sup>7</sup>, Eric Dupond-Moretti says : “Terrorism has already anesthetized us. It makes all the populisms free”. And a bit later : “If we denied our own rules, then terrorists have won”.

That’s why a state of emergency must have a limited time period. Because it leads to what we now call in French “démocratures” (let’s try to create the word in English : “democratorship” ?).

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<sup>4</sup> [https://www.ohchr.org/Documents/Countries/TR/OHCHR\\_South-East\\_TurkeyReport\\_10March2017.pdf](https://www.ohchr.org/Documents/Countries/TR/OHCHR_South-East_TurkeyReport_10March2017.pdf)

<sup>5</sup> [https://www.ohchr.org/Documents/Countries/TR/2018-03-19\\_Second\\_OHCHR\\_Turkey\\_Report.pdf](https://www.ohchr.org/Documents/Countries/TR/2018-03-19_Second_OHCHR_Turkey_Report.pdf)

<sup>6</sup> See the International Commission of Jurists (ICJ)’s statement that especially highlight the prosecutions against judges, prosecutors and lawyers <https://www.icj.org/turkey-emergency-measures-have-gravely-damaged-the-rule-of-law/>. So did also the CCBE, see, among others statements : 19/08/2016 [https://www.ccbe.eu/fileadmin/speciality\\_distribution/public/documents/HUMAN\\_RIGHTS\\_LETTERS/Turkey\\_-\\_Turquie/2016/EN\\_HRL\\_20160819\\_Turkey\\_Turkish\\_Lawyers.pdf](https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/HUMAN_RIGHTS_LETTERS/Turkey_-_Turquie/2016/EN_HRL_20160819_Turkey_Turkish_Lawyers.pdf) ; 06/04/2017 [https://www.ccbe.eu/fileadmin/speciality\\_distribution/public/documents/HUMAN\\_RIGHTS\\_LETTERS/Turkey\\_-\\_Turquie/2017/EN\\_HRL\\_20170406\\_Turkey-Concerns\\_regarding\\_the\\_ongoing\\_persecution\\_of\\_lawyers\\_in\\_Turkey.pdf](https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/HUMAN_RIGHTS_LETTERS/Turkey_-_Turquie/2017/EN_HRL_20170406_Turkey-Concerns_regarding_the_ongoing_persecution_of_lawyers_in_Turkey.pdf) ; 16/11/2017 [https://www.ccbe.eu/fileadmin/speciality\\_distribution/public/documents/HUMAN\\_RIGHTS\\_LETTERS/Turkey\\_-\\_Turquie/2017/EN\\_HRL\\_20171116\\_Turkey\\_Concerns-regarding-the-situation-of-lawyers-inTurkey.pdf](https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/HUMAN_RIGHTS_LETTERS/Turkey_-_Turquie/2017/EN_HRL_20171116_Turkey_Concerns-regarding-the-situation-of-lawyers-inTurkey.pdf)

<sup>7</sup> Plea for Abdelkader Merah, brother of Mohammed Merah, who kills three militaries and three Jewish children in Toulouse and Montauban, and who was accused to be his mentor. See E. Dupond-Moretti, *Dictionnaire de ma vie*, Kero, 2018, pp; 101-122.

Contrary to France, although Belgium was in the same situation after the terrorist attacks at Brussels Airport and at Maalbeek metro station, it did not proclaim a state of emergency. Structural measures to fight terrorism were adopted, but they followed the normal parliamentary procedure. Some of them were not voted by the Parliament. Some of them were canceled by the Constitutional Court. That's the regular process.

In French, we have an expression that says: don't throw the baby out with the bathwater.

Human rights must survive terrorism.

Insan haklari terorizme yenilmeyecek.

Direnin !