The State of Emergency and Terrorism

A legal and ethical analysis of the state of emergency as a counter-terrorist measure

Candidate number: 8015
Submission deadline: 15th of May, 2017
Number of words: 19,992
**Abbreviations**

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Full Name</th>
</tr>
</thead>
<tbody>
<tr>
<td>AI</td>
<td>Amnesty International</td>
</tr>
<tr>
<td>ECHR</td>
<td>European Convention on Human Rights</td>
</tr>
<tr>
<td>ECtHR</td>
<td>European Court of Human Rights, also referred as “the Court”</td>
</tr>
<tr>
<td>HRW</td>
<td>Human Rights Watch</td>
</tr>
<tr>
<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
</tr>
<tr>
<td>JWB</td>
<td>Journalists Without Borders</td>
</tr>
<tr>
<td>OCSE</td>
<td>Organization for Security and Co-operation in Europe</td>
</tr>
<tr>
<td>UN</td>
<td>United Nations</td>
</tr>
</tbody>
</table>
Table of contents

Abbreviations ............................................................................................................................................... 2

1. Introduction ........................................................................................................................................... 5
  1.1. Research Question .......................................................................................................................... 5
  1.2. Background ....................................................................................................................................... 6
  1.3. Methodology ...................................................................................................................................... 7

2. The French And The Turkish Cases .................................................................................................. 10
  2.1. France .............................................................................................................................................. 10
    2.1.1. Emergency Powers ................................................................................................................... 10
    2.1.2. Critiques of the measures ......................................................................................................... 11
  2.2. Turkey .............................................................................................................................................. 14
    2.2.1. Emergency Measures .............................................................................................................. 15
    2.2.2. Critiques of the Measures ......................................................................................................... 16

3. The State Of Emergency ..................................................................................................................... 19
  3.1. The Legal Provisions ...................................................................................................................... 19
  3.2. Restoration of Normality .............................................................................................................. 20

4. Terrorism As A Threat To The Life Of The Nation ........................................................................... 22
  4.1. Threat to the Life of the Nation ...................................................................................................... 22
  4.2. Threat to the Life of Nation in France ............................................................................................. 23
  4.3. Threat to the Life of Nation in Turkey ............................................................................................ 24
  4.4. Definitions of Terrorism .................................................................................................................. 25
  4.5. Exceptional and Imminent .............................................................................................................. 29

5. Terrorism And The Time Limitation .................................................................................................. 31
  5.1. The Principle of Time limitation ...................................................................................................... 31
  5.2. The Effects of the Terrorism Justification on the Time Limitation ................................................... 32

6. Principle Of Necessity .......................................................................................................................... 34
  6.1. Necessity of the Extensions .............................................................................................................. 34
  6.2. Effective Ways to Fight Terrorism ................................................................................................. 37
  6.3. National Security ............................................................................................................................. 39
    6.3.1. The Content of National Security ........................................................................................... 39
    6.3.2. The Subjects of National Security ............................................................................................ 42
6.4. Counter-productive Effects of Lasting Emergency Measures ........................................... 43

7. EXTENDED STATE OF EMERGENCY THREATENS THE LIFE OF DEMOCRATIC NATIONS ........................................................................................................ 46

7.1. The division of powers .................................................................................................. 47
7.2. Reform of the Political Democratic Systems .............................................................. 49
7.3.Normalization of the Exception .................................................................................. 52

8. Conclusions.................................................................................................................. 55

Table of References ....................................................................................................... 57
1. Introduction

1.1. Research Question

The September 11 terrorist attack and the counter-terrorism measures implemented by the US government, brought into public and international debates issues such as terrorism, national security and the role of human rights in counter-terrorism strategies.

Yet, perhaps not enough research and investigations have been dedicated to the impacts of the state of emergency on counter-terrorism strategies and on the functioning of the human rights regime. Instead, the lack of adequate debate about such themes suggests that the state of emergency has become a generally accepted background, like an ordinary or normal *status quo* or, a ‘new normal’.

However, the state of emergency, being an institution of the rule of law that allows the derogation from the respect and protection of human rights, does have consequences not only for those directly involved in the human rights regime (which effects have been studied¹), but also for the implementation of counter-terrorism measures and the democratic functioning of the government branches.

From which, the legitimacy of using the state of emergency as a response to terrorism, which is indeed the aim of this thesis.

I propose to do so answering the following research question:

*Does and should terrorism constitute a legitimate justification for the activation and extension of the state of emergency?*

This question implies an investigation at two different levels of analysis and it could be deconstructed in two different questions.

Form a *lex lata* perspective – namely the law as it is:

*Does terrorism constitutes a legitimate justification for the activation and the extension of the state of emergency?*

The answer(s) to this question will require a legal analysis in the sense of investigating whether the terrorist justification fulfils the legal requirements for the activation and the extensions of the state of emergency.

¹ For instance the Report by the UN Special Rapporteur, Mr Leandro Despouy, on the Question of Human Rights and State of Emergency, 23 July 1997, para 8
On the other hand, from a *lex ferenda* perspective – the law as it should be:

*Should terrorism constitute a legitimate justification for the activation and extension of the state of emergency?*

This discussion will entail an ethical perspective and the implication of moral reasoning.

The question implies that there is a difference between the activation and the extension of the state of emergency. It may be thought that the reasons that allow its activation could automatically legitimate its extension(s) and thus such a distinction is primarily formal. However, from a legal and procedural point of view states are called to prove the necessity of each extension, meaning that the extension needs to be necessary *per se* and that there is, in fact, a difference between activation and extension.

This distinction requires a separate evaluation of the two elements, since if activated, but not extended, the state of emergency would be more limited in time and so it would have different consequences than an extended state of emergency. Therefore, some considerations related to the effects of a lasting state of emergency are not necessarily true also for its activation.

### 1.2. Background

The institution of the state of emergency allows states to derogate from the respect of some of their human rights obligations in extreme crisis situations “which threatens the life of the nation.” These emergency situations could be a natural disaster, civil unrest, or following a declaration of war or situation of international/internal armed conflict.

Currently three countries in the European continent are under a state of emergency, France Turkey and Ukraine. France and Turkey activated and then extended their states of emergency as a response to deadly terrorist attacks. As the terrorist threat within Europe increases, as showed by the number of terrorist attacks in recent times, it is possible to foresee, or at least suspect, a possible increase in the number of countries resorting to such derogation measures in the European continent.

The perpetration of state of emergency is one of the main anomalies that has been occurring in history and it endangers deeply the human rights regime and people’s chances to enjoy their rights. It is enough to remind that in previous decades this was one of the most common irregularities in Latin America that transformed the state of emergency into the “legal

---

2 Article 4 ICCPR
instrument used by many dictators to suppress the human rights of most of the population and to crush any form of political opposition.”

Furthermore, extensions of the state of emergency make it more likely for other anomalies to occur and accumulate impairing human rights and eventually increase the risks to democracy and the human right regime.

I will in the text allude to the extensions of the state of emergency as over lasting, or long-term or even “too” long. For a matter of clarity, there is not a legally binding or authoritative definition on when the state of emergency has to be considered “too long”. However, I base this interpretation on the temporary length (as respectively France and Turkey have been in state of emergency for 18 and 10 months) and also on the historical context of these countries (signed for instance by the first Presidential elections under the state of emergency in French history and by one of the most important constitutional reforms in Turkey).

Therefore, the necessity to analyze the legal aspects and the effects of extended states of emergency in France and Turkey appears significant. This is so also in the light of the fact that these two countries could set a dangerous precedent for other countries, within and outside the European continent, that may have to face a similar terroristic threat. Consequently, the focus of this paper will be on the state of emergency employed as a counter-terrorism measure, in specific in France and Turkey.

### 1.3. Methodology

As the research question implies different levels of analysis and the consideration of different elements, a multidisciplinary methodology is best suited.

A legal method will first be employed as the first sub-question demands an analysis of the legal requirements for the activation and extension of the state of emergency to ascertain whether the terrorist justification fulfils them. To do so, I will first adopt a *lex lata* approach, considering the state of emergency as it is enshrined in primary international sources – namely the ICCPR and the ECHR – and then in the legislative national systems - Constitutions and relevant laws. This analysis will be enriched and supported by the consideration of related secondary sources, such as UN Reports, General Comments and court rulings, to offer a more complete understanding of such a complex topic.

---

3 Report by the UN Special Rapporteur, Mr. Leandro Despouy, *on the Question of Human Rights and State of Emergency*, 23 July 1997, para 5
4 *Ibid*, para 156
However an exclusively “black-letter law” methodology – which refers to the law-itself with little reference to the world outside the law⁵ - would not be adequate for the purposes of this research as I am interested also in the implications and effects in real life of the state of emergency. For this reason, I also employ a “law in context” approach, which investigates issues in society which may be caused or contributed to by the law. Therefore, I propose two case studies, the states of emergency in France and Turkey.

Given the general nature of my research question, which does not contain any reference to specific cases, the choice to use study cases may seem odd. However, as the focus of this thesis is the terrorism justification for the state of emergency, these study cases illustrate this issue, being the case that they both use the terrorist justification for the state of emergency. In this manner, the consideration of these cases, will help me provide a more complete answer partially based on real and practical examples, rather than a purely theoretical one. These cases will be particularly helpful in answering the normative part of my question, the *lex ferenda* question, since I base my answers on the observation of the effects and consequences occurring in these countries. I do not intend to suggest that such risks will always arise in every similar case of extended state of emergency. Yet, even just the possibility should be carefully evaluated and borne in mind by national authorities when extending emergency measures as well as by courts (at the national and at the international level) when evaluating the necessity and proportionality of emergency measures.

I will, therefore, use a ethical/philosophical approach insofar as I will examine the consequences in reality of extended states of emergency and draw some ethical evaluations which poses the foundation of my *lex ferenda* question. For instance, the normalization of the exception that could derive from the continuous extensions of the state of emergency, endanger the democratic system to a degree that may prevent a return to “normality”. Thus, from an ethical perspective, the threat related to these risks exceeds the potential beneficial effects of the emergency measures questioning the necessity of such extensions.

A main contributor for the formulation of the normative and ethical considerations is the Italian philosopher Giorgio Agamben, as he has conducted one of the most complete theoretical and systematic investigations of the institution of the state of emergency in recent

---

⁵ Mike McConville and Wing Hong Chui, *Introduction and Overview in Research Methods for Law*, Edinburg University Press, 2007, p.1
years. His primary claim is our current political system is a constant state of emergency as a result of the employment of the state of emergency as an ordinary technique of government becoming the norm, which leads to a confusion between the nomos (the law, the norm) and the anomie (the exception). I do share his reflections and concerns on the effects of long lasting state of emergency.

In order to evaluate whether the consequences of the state of emergency are acceptable, I will look at the notion of national security as a way of understanding its aim. In doing so I refer to Jeremy Waldron’s definition, which is one of the most comprehensive interpretations of the definition and of the contents of this notion. Waldron is an eminent professor of law and philosophy in different universities and he is regarded as one of the world’s leading legal and political philosophers.

Moreover, because of the lack of first hand observations of the realities in the two study cases I base the description of the emergency measures primarily on NGO reports. I consider these reports a reliable source as founded on empirical researches, interviews, and investigation conducted by human rights experts.

To conclude, the main element that shapes this research, which could arguably be defined as a limitation, is the impossibility for me to detach myself from my personal beliefs and assumptions. As, for instance, the assumption that every suspension of the human rights entails potential dangers for the human rights regime in general and for everybody’s enjoyment of human rights in specific, even when allowed and regulated by law. Or assumptions as the idea that the overarching narrative around state security has been narrowed down to mainly physical security as a result of the widespread conviction that terrorism threatens the nation. Rather, I strongly believe and agree with Waldron, that there is a need to adopt a more comprehensive definition of security to include all its nuances before even considering the necessity of a trade-off of human rights for allegedly better security.

---

6 He projected a four-volume “Homo Sacer” series, two of which are used in this thesis: *Homo Sacer: Sovereign Power and Bare Life* and *State of Exception*. 
2. The French and the Turkish Cases

2.1. France

The day after the coordinated terrorist attack across Paris on the 13th of November 2015, the French president François Hollande declared a nationwide state of emergency via three decrees activating Law no. 55-385 of 3 April 1955, which defines the contents of the emergency measures.

Since then, the state of emergency has been extended four times (in February, May, July 2015), and the last time in November 2016 to cover the national elections in April-May 2017, making this the longest state of emergency in France since the Algerian War in the 1950s.

Even though the institution of the state of emergency is regulated by ordinary law, the Constitution contains two provisions related to it. First, Article 16 states the prerogative of the President of the Republic to invoke the state of emergency by decree when facing a “serious and immediate” threat to the “institutions of the Republic, the independence of the Nation, the integrity of its territory, or the execution of its international commitments.” Second, Article 36 states that a parliamentary endorsement is needed to extend this status beyond 12 days.

Indeed, the initial declaration was confirmed by law no. 2015-1501 of 20 November 2015 which extended the state of emergency for three months, as of 26 November 2015.

2.1.1. Emergency Powers

The 1955 law relative to the state of emergency mainly entitles law enforcement forces and the Minister of Interior to wider powers that usually would require a juridical authorization. For instance, French authorities are entitled to set curfews, limit the movement of people, forbid protests and public gatherings, establish secure zones, close public spaces. Further, the Minister of Interiors’ powers are significantly increased as he can also take, without previous juridical authorization, “any measure to ensure the interruption of any online public

7 Decree No.2015-1475; No. 2015-1476 and No. 2015-1478 of 14 November 2015
8 French Constitution Article 16
10 Ibid, Article 8
communication service that incites the commission of terrorist acts or glorifies them”\textsuperscript{11} now criminalized with the introduction of apology for terrorism by the anti-terrorism law.\textsuperscript{12}

The Minister of Interiors can also place under house arrest anyone “against whom there are serious reasons to believe his or her behavior constitutes a threat to public order and security.”\textsuperscript{13}

Similarly, also the prerogatives of the prefects (government representatives in each department) are broadened as now they have the power to order house, business and place of worship searches at any time and without judicial warrant “when there are serious reasons to believe that the place is frequented by a person whose behavior constitutes a threat to public order and security.”\textsuperscript{14}

2.1.2. Critiques of the measures

The French decision to prolong the state of emergency and the measures that have been implemented under this regime have been admonished for different reasons: inter alia the extent to which they are necessary to prevent further terrorist attacks, their impact on the rights of those targeted, the discreional power to which police are entitled, the potential for human rights abuses, the breaching of the absolute prohibition of discrimination.

Any kind of place of association, especially “worship places in which take place activities aiming to cause hate or violence or to incite terrorist acts or that make apology for such acts”\textsuperscript{15}, can be closed down by administrative authorities. Moreover, public demonstrations can be banned when authorities are not in a position to ensure public order and security.\textsuperscript{16}

The offence of “apology to terrorism” has been criticized and debated since its introduction even by the Constitutional Court which in 2012 expresses its questions about how criminalizing such online activity was an unnecessary, disproportionate restriction to freedom of expression.\textsuperscript{17}

\textsuperscript{11} Ibid, Article 11
\textsuperscript{12} Law no. 2006-64, 23 January 2006
\textsuperscript{13} Loi 55-385, Article 6
\textsuperscript{14} Ibid, Article 8
\textsuperscript{15} Ibid, Article 3
\textsuperscript{16} Ibid, Article 8 « Les cortèges, défilés et rassemblements de personnes sur la voie publique peuvent être interdits dès lors que l'autorité administrative justifie ne pas être en mesure d'en assurer la sécurité compte tenu des moyens dont elle dispos »
\textsuperscript{17} Amnesty International, \textit{Dangerously Disproportionate - The Ever-Expanding National Security State in Europe}, 2017, p. 40
The extension law of the emergency power of November 2015 also emended the Law on National Security, extending the surveillance powers of the Prime Minister over the collection and analysis of international electronic communications of individuals suspected of being a threat or being associated with someone that could be a threat with the aim of preventing terrorism, without prior judicial authorization. 18 A group of United Nations human rights experts warned that this “law on surveillance of electronic communications imposes excessive and disproportionate restrictions on fundamental freedoms.” 19

Major concerns and accusations of human rights abuses have been raised by some International NGOs.

For instance, both Amnesty International and Human Rights Watch have released reports which documented cases of abuses of emergency powers, employed to violate human rights such as the right to liberty, privacy, or freedom of movement, association and expression. And the vast majority of those targeted were Muslims. Moreover, Human Rights Watch has criticized particularly the search powers and assigned residency affirming that “France has carried out abusive and discriminatory raids and house arrests against Muslims under its sweeping new state of emergency law”, concluding that “the police have used their new emergency powers in abusive, discriminatory and unjustified ways”. 20

Responding to accusations of carrying out discriminatory measures, authorities justified their measures asserting that “those targeted were either a threat because of their religious practices or supposed “radicalization”, or had connection with Muslims who were allegedly radicalized.” 21

The French human rights ombudsperson received 73 complaints about abuses of these measures and last year called the government to “come to its senses.” 22 Similar concerns were also raised by UN Special Rapporteurs that “stressed the lack of clarity and precision of several provisions of the state of emergency and surveillance laws, related to the nature and scope of restrictions to the legitimate exercise of right to freedom of expression, freedom of

---

18 Ibid, p. 31
19 UN Special Rapporteurs on Freedoms of Opinion, Expression, Assembly and Privacy, UN Rights Experts Urge France to Protect Fundamental Freedoms While Countering Terrorism, Geneve, 19 January, 2016
21 AI, Dangerously Disproportionate, p. 50
22 Constance Hubert, France 2015: the End of Innocence, the SAIS Journal of Global Affairs, 1 April 2016
peaceful assembly and association and the right to privacy.” They also reaffirmed that “ensuring adequate protection against abuse in the use of exceptional measures and surveillance measures in the context of the fight against terrorism is an international obligation of the French State.” The Special Rapporteurs also pointed to the necessity to ensure prior judicial control over all anti-terrorism measures.

According to French authorities, “the outcome of the measures taken within the framework of the state of emergency since 14 November 2016 confirmed the necessity of these measures to prevent other attacks and disorganise terrorist networks.” They support the extensions of the state of emergency since it “has proven its effectiveness by enabling measures to be used which have a real destabilizing effect on individuals directly implicated in the jihadist movement and on the criminal rings that fuel terrorism.” They suggest that these measures prove their effectiveness “since the last extension of the state of emergency, the police and gendarmerie services have carried out 500 searches [and] more than 110 house arrests have been ordered since the last extension of the state of emergency.” However, French authorities do not refer to how many of those searches and house arrests have resulted in criminal persecutions. According to data provided both by Amnesty International and Human Rights Watch in February 2016, between November 2015 and February 2016 “as a result of the 3,289 searches, only five investigations into terrorism-related offences were being conducted by the Paris prosecutor’s office.” In another report released by HRW in December 2016 the number of warrantless raids increased to 4,292 and 61 terrorism-related criminal investigations. Moreover, a French Commission of inquiry into the November attack concluded in July 2016 that “the state of emergency had “limited impact” on improving security.”

For all these reasons, Amnesty International, among others, concluded that the emergency measures “have been applied in an overly-broad manner and, in some instances, arbitrarily

---

23 UN Special Rapporteurs
24 Ibid
25 French Council of Ministers, Bill presented to extend France’s state of emergency, published 15 December 2016
26 Ibid
27 Ibid
28 HRW, France: Abuses Under State of Emergency p. 3 and AI, Dangerously Disproportionate, p.16
29 HRW France: Abuses Under State of Emergency, p. 2
30 Ibid
[and] in a discriminatory manner. Some Muslims were targeted mainly on the basis of their religious practice, with no evidence pointing to their involvement in any criminal offence.”

2.2. Turkey

On the night of the 15th of July 2016 a sector of the army attempted a Coup d’Etat deploying tanks in the streets of Istanbul and Ankara, bombing the parliament with fighter jets, and opening fire on the people demonstrating in the streets resulting in the death of 241 citizens. Shortly after that night, on the 20th of July, the Turkish President Recep Tayyip Erdoğan declared a nationwide state of emergency by the Decree No. 667 pursuant to Article 120 of the Constitution and Article 3/1b of the Law no. 2935. The decision was endorsed by the Turkish Parliament on 21st July 2016. As for the French case, since then the Turkish authorities have been periodically (in October 2016, January and March 2017) extending it to date.

The Turkish state of emergency legislation dates back to 1983 and Article 121 of the Constitution accords the Council of Ministers, meeting under the chairmanship of the President of the Republic, to issue decrees having the force of law necessitated by the state of emergency. These emergency decrees do not need the authorization of the Parliament by law and their constitutionality as to their form or substance cannot be challenged before the Constitutional Court.

Turkish authorities blamed the cleric Fethullah Gülen, Erdogan’s former ally who turned into his fiercest adversary after the corruption scandal at the end of 2013 who is currently based in the USA, and its supporters (defined as Gülenist Terror Organisation - Fethullahçı Terör Örgütü, FETÖ) for having “carried out a terrorist attempt under the leadership of its military members within the armed bureaucracy in order to overthrow the democratically-elected government [and] this foiled terrorist action is the most important act revealing the danger

---

32 Constitution of Turkey, Article 121 (3)
33 Ibid, Art. 148 (1)
posed by FETÖ."³⁴ Accordingly, this organization “poses a grave threat to survival and security of the nation through its clandestine infiltration to state mechanisms.”³⁵

Since 2014 FETÖ has been officially recognized as a terrorist organization whose aim is “to overthrow the Government of the Republic of Turkey or prevent it from performing its duties partially or completely by using force, violence or other illegal methods, to exert, pressure on, undermine or direct the state authority, to create an alternative authority, and thus to seize the state authority.”³⁶

2.2.1. Emergency Measures

During the first operations held to investigate the “terrorist attempt to stage a coup, more than 10,000 members of FETÖ have been taken into custody.”³⁷ The government has treated any expression of sympathy for the Gülen movement as evidence of direct complicity in the abortive coup and it started a purge.

The first emergency Decree ordered the immediate dismissal of tens of thousands of public employees including judges, prosecutors soldiers, bureaucrats and also teachers, journalists, academics with no evidentiary requirements besides to be considered to be member or be in relation or in contact with terrorist organizations.³⁸ Further, the decree contains a list of hundreds of schools, hospitals, foundations, associations, unions, confederations, newspapers, television and radio stations that because accused to be linked to US-based cleric Fethullah Gülen, or to terrorism in general, have to be immediately closed, their assets confiscated and deprived of the possibility to claim damages.

With each new Decree and extensions of the state of emergency the powers of the police and of the President of the Republic have been extended and each time more people have been arrested, dismissed from their public offices and organizations and newspapers shut down.

³⁴ Permanent Representation of Turkey to the Council of Europe, Information on the terrorist attempt on 15 July 2016 and the Investigations Conducted against the Judges and Public Prosecutors, registered at the Secretariat General on 24 July 2016
³⁵ Permanent Representation of Turkey to the Council of Europe, State of Emergency Declared in Turkey following the Coup Attempt on 15 July 2016, registered at the Secretariat General on 24 July 2016
³⁶ Permanent Representation of Turkey to the Council of Europe, Information on the terrorist attempt on 15 July 2016 and the Investigations Conducted against the Judges and Public Prosecutors, registered at the Secretariat General on 24 July 2016
³⁷ Ibid
³⁸ Decree with Force of Law No. 667, July 23, 2016
Furthermore, surveillance emergency measures “grant police the authority to access information on the identity of Internet subscribers for purposes of investigating crimes committed online.”

2.2.2. Critiques of the Measures

A number of Turkish emergency measures raise numerous and serious concerns about their necessity, proportionality, legality and conformity with the international and national human rights standards.

One of the most controversial emergency measures concern the authorization of detention without access to a judge up to thirty days not only of people suspected of involvement in the attempted coup but of all people suspected for terrorist related acts and organized crime. Also restrictions to the right of access to a lawyer for up to five days was introduced.

This is not the first time that Turkey has been criticized for similar measures. In the case Aksoy v Turkey the European Court of Human Rights, albeit accepting the existence of a public emergency resulting from a terrorist threat, held that the length of the juridical unsupervised detention of suspects for 14 days was “exceptionally long, and left detainees vulnerable not only to arbitrary interference with his right to liberty but also to torture.”

Alarmingly, concerns about the realization of such risks are expressed in a recent Human Rights Watch Report which documented at least 13 cases of torture and ill-treatment of detainees to varying degrees of severity. This report concludes that the emergency measures have in practice removed key safeguards that protect detainees from torture and ill-treatment to an extent exceeding the permissive level granted them under the emergency decrees.

The prohibition of torture and ill treatment is contained in Article 17 of the Turkish Constitution, Article 7 of the ICCPR and Article 3 of the ECHR and it is also listed among the non-derogable provisions in Article 4 of the ICCPR that regulates and limits the application of the state of emergency. Furthermore, this prohibition is commonly accepted as a peremptory norm of international law and as such it can never be necessary and even less legitimate to

39 Decree with the Force of Law No. 680 which amends the Law on Police Duties and Responsibilities
40 Decree with the Force of Law 667
41 Human Rights Watch, A Blank Check – Turkey’s Post-Coup Suspension of Safeguards against Torture, October 2016, p.2
43 Ibid, para 78
44 HRW A Blank Check, p. 3
45 Ibid, p. 16
derogate from it. Related to this is the right of people to be treated with humanity and with respect for the inherent dignity of the human person which is, according to the Human Rights Committee “a norm of general international law not subject to derogation”. 46

Therefore, if such accusations of torture should be officially proved true by an international or national Court, this would be particularly severe.

Removing the two main safeguards against its arbitrary application, the Decree also introduces impunity for administrative authorities acting within the decree and it eliminates the judiciary authorization for the execution of the emergency measures, even when the court consider such measures unlawful. 47

Freedom of expression has been heavenly curtailed by the emergency powers so far as to make Journalists Without Borders affirm that “arbitrary practices and disproportionate sanctions against the media, which are incompatible with the rule of law, have become institutionalized.” 48

Emergency provisions have made journalists particularly vulnerable to be silenced as authorities are allowed to ban “the printing and distribution of certain newspapers, magazines, brochures, books, leaflets and other printed material” if they pose a “threat to national security.” 49 In fact, the second emergency decree 50 “ordered the closure and expropriation of 45 newspapers, 16 TV channels, 23 radio stations, three news agencies and 15 magazines (plus 29 publishing houses) on suspicion of “collaborating” with the Gülen movement 51 - which in turn is equated to complicity to the coup attempt 52, dramatically weakening freedom of speech and media pluralism.

Since July 15, between approximately 70,000 and 110,000 civil servant journalists “have been jailed without any reason being given, media outlets have been closed with the stroke of pen, and punitive measures have been taken without any form of trial violating their right of free

47 Statement of the Council of Europe Commissioner for Human Rights, Situation in Turkey, Strasbourg, 20 July 2016
49 Ibid, p.5
50 Decree 667
51 JWB, p. 9
52 Ibid
speech, the right to safety and the right to a fair trial, legal defense and effective legal recourse.”

Also the political opposition has been targeted. Twelve deputies, including two co-chairs of the People’s Democratic Party, the third largest party in Turkey’s parliament, have been detained for “making propaganda for a terrorist organization.”

The first emergency Decree was defined as “arbitrary, discriminatory, and unjustified as a response to the violent coup attempt or other public order concerns” also by HRW.

According to the Turkey director at HRW this

[D]ecree goes well beyond the legitimate aim of promoting accountability for the bloody July 15 coup attempt. It is an unvarnished move for an arbitrary, mass, and permanent purge of the civil service, prosecutors, and judges, and to close down private institutions and associations without evidence, justification, or due process.

Even the Human Rights Commissioner of the Council of Europe questioned the proportionality and the necessity of the measures taken to the extent of the public emergency. Particularly, concerns are expressed about the arrest or dismissal of one fifth of all the members of Turkey’s judiciary because suspected to be involved in the coup attempt, which may challenge the existence of an independent judiciary. He concludes that “the combination of […] extremely wide and indiscriminate administrative powers affecting core human rights, and the erosion of domestic judicial control may result in a situation where the very foundations of rule of law are put in jeopardy.”

In August 2016, 19 UN experts and three UN working groups called the Turkish government’s attention to the fact that “the derogation provision under Article 4 does not give a carte blanche to ignore all obligations under the ICCPR and furthermore the invocation of Article 4 is lawful only if there is a threat to the life of the nation, a condition that arguably is not met in this case.”

---

53 Ibid, p. 3
55 HRW, Turkey: Rights Protections Missing From Emergency Decree Orders to Purge Civil Servants, Judges Close Groups Down, 26 July 2016
56 Ibid
57 Commissioner for Human Rights, Situation in Turkey
58 Ibid
59 HRW, A Blank Check, p. 13
Concluding, Turkish emergency measures have attracted heavy criticism from all sides about their proportionality and necessity especially in light of the consequences in reality for a large part of the population to enjoy their human rights and more generally for the protection of the rule of law.

3. The State of Emergency

3.1. The Legal Provisions

The derogation provision is provided at the international level in Article 4 of the ICCPR, and at the regional level in Article 15 of the ECHR. The two articles are quite similar in affording States Parties the possibility to “take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation.”60 The ICCPR provision adds also a non-discriminatory clause so that these derogations shall “not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin”.

The European provision prescribes that such derogation is permitted “in time of public emergency threatening the life of the nation.”61 Similarly, the ICCPR establishes the same criteria, only differing in the use of the terms “which threatens” instead of the gerund “threatening”.

Both articles list a series of non-derogable articles, from which it can never be necessary to derogate even in cases of emergency situations. These are the prohibition of torture62, prohibition of slavery63 and prohibition of punishment without law.64 The ICCPR also includes the right to life65, the prohibition of imprisonment because of inability to fulfil contract obligations66, the right to recognition as a person before the law67 and the freedom of thought, conscience and religion.68 This list is not an exhaustive list and as such it does not imply that in cases of emergency all other rights can automatically be derogated. Rather, this institution is regulated by legal principles and requirements which establish guarantees against

60 Article 4.1. ICCPR and 15.1. ECHR
61 Article 15 ECHR
62 Article 7 ICCPR and 3 ECHR
63 Article 8 ICCPR and 4.1 ECHR
64 Article 15 ICCPR and 7 ECHR
65 Article 16 ICCPR
66 Article 11 ICCPR
67 Article 16 ICCPR
68 Article 18 ICCPR
its arbitrary application. These are: “the threat to the life of the nation” test, time limitation and the principle of necessity which will be analyzed in the next chapters.

Neither of the conventions include the human value of non-discrimination among non-derogable rights. However, this value is a fundamental rule of international law and as such its compliance is due even when not openly affirmed. Besides, its non-derogable nature is proven by its incorporation in Article 4 of the ICCPR itself. The Human Rights Committee - providing an authoritative but non-legally-binding interpretation of the ICCPR provision – affirms that the respect of the non-discrimination value is “one of the conditions for the justifiability of any derogation.” 69

Both articles conclude with the procedural requirement of the official communication through which the derogating state has to inform other members and relevant organs of the international system of their decision to and from which provisions they intend to derogate, providing their reasons to do so. A separate communication should be sent when such derogation ceases to exist.70

3.2. Restoration of Normality

The Human Rights Committee illustrates in General Comment no. 29 the purpose of the derogation as “the restoration of a state of normalcy where full respect for the Covenant can again be secured.”71 Even though the Committee offers an interpretation of the ICCPR provision, the reasoning and the ethos of provisions contained in the two Covenants are very similar and thus this interpretation is also relevant for the ECHR provision, even though not directly linked.

It might seem paradoxical to suspend human rights in order to protect human rights, and some cases from all over the world 72 show how this paradox has been exploited to justify human rights violations. Although some states have confused the practice of the state of emergency with a state in which governments are not under the obligation to protect, respect and fulfil human rights, this is not the ethos of the provision. On the contrary, states are granted in limited time, space and scope wider powers to enable the reestablishment of a state of a normalcy in which citizens can fully enjoy all their human rights. Therefore, whenever the actions of governments or measures implemented act against the restoration of an order

---

69 General Comment 29, para 8
70 Article 4.3 ICCPR and 15.3 ECHR
71 General Comment 29
72 For instance Latin America countries during the 1950s,
respectful of human rights, those actions or measures are unlawful under Article 4 of the ICCPR and 15 of the ECHR.

This concept is strengthened by the principle of concordance, contained in Article 5 of the ICCPR and 16 of ECHR, which similarly stipulate that no provision in these conventions might be interpreted as legitimizing any activity aimed at the destruction of any of the rights and freedoms set in the international order. Therefore, no derogation can legally and legitimately aim at the destruction of human rights.

More precisely, there has been a tendency from the international monitoring bodies to link the activation of the state of emergency with the defense of democracy, interpreted not “as particular form of political organization but as a system that lays down absolute limits for the unfailing observance of certain essential human rights.”73

In order to ensure the realization of such purpose and avoid degenerations in arbitrary exercise of powers and “being the state of emergency an institution of the rule of law, it must satisfy certain conditions and requirements ensuring legal guarantees to safeguard human rights in situations of crisis.”74

These legal requirements will be examined in the following chapters and they will be applied to the specific study cases to answer whether or not the justifications put forward by the study cases are and should be legitimate to invoke the activation of the state of emergency.

I will begin, in the next chapter, from the analysis of the “threat to the life of the nation” test.

---

73 Despouy, para 44
74 Ibid, para 8
4. Terrorism as a Threat to the Life of the Nation

4.1. Threat to the Life of the Nation

The *conditio sine qua non* for the proclamation of the state of emergency is the existence of “public emergency which threatens the life of the nation”. The term “public emergency” encompasses both armed conflict and states of internal tension or disturbance, and in extreme circumstances natural disaster. However, besides recognizing the responsibility of states to “consider the justification and why such a measure is necessary and legitimate in the circumstances” in situations other than armed conflict, international law does not clearly specify what counts as a “threat to the life of a nation”.

This could be because, as noted by Chile in the drafting process of the ICCPR provision “it was difficult to give a precise legal definition of the life of the nation [but it] was significant that the text did not relate to the life of the government or of the state.”

At the European level, in the *Lawless* case the Court held that “the natural and customary meaning of the words ‘other public emergency threatening the life of a nation’” is clear and refers to “an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organized life of the community of which the state is composed.”

This definition was also employed by the Special Rapporteur Mr. Despouy on the Question of Human Rights and State of Emergency, when he defines the nature of the emergency situation as an actual or imminent threat which endangers the whole community organized in the State system.

The ECtHR grants national authorities a wide margin of appreciation in identifying emergency situations. In fact, given their responsibility for the life of the nation and their closer contact with the specificity of the context, national authorities are in a better position to

---

75 *Ibid*, para 39
76 General Comment no.29, para 3
79 Despouy, para 34
80 For instance, *Ireland v. the United Kingdom*, (1979-80) 2 EHRR 25, para 207
decide on the existence of an emergency and on “the nature and scope of derogations necessary to avert it.”\textsuperscript{81}

Some may criticize this approach and the lack of clear criteria in the legal provisions that makes it too vague. But this space for maneuvering for states to assess their specific situations could be necessary in such a delicate scenario where a list would have not been appropriate to embrace the complexity of reality.

In the next paragraphs I will refer to the official justifications that both France and Turkey provided for their proclamation of the states of emergency in order to analyze whether these justifications pass “threat to the life of the nation” test.

4.2. Threat to the Life of Nation in France

In the first communication to the other states parties to the ECHR, French authorities state that the activation of the state of emergency was a “direct consequence of the coordinated terrorist attacks occurred in Paris”\textsuperscript{82}, leaving alone the direct definition of what exactly is the threat to the life of the nation, they directly pass to explain that the terrorist threat is “of a lasting nature, having regard to information from the intelligence services and to the international context.”\textsuperscript{83}

Accordingly, measures derogating from the obligations under the Convention for the Protection of Human Rights and Fundamental Freedoms appeared “necessary to prevent the commission of further terrorist attacks.”\textsuperscript{84}

At the time of the second extension of the state of emergency in February 2016, the authorities affirmed that “the terrorist threat, characterizing ‘an imminent danger resulting from serious breaches of public order,’ which justified the initial declaration and the first extension of the state of emergency remains at a very alarming level, as demonstrated by both national and international news.”\textsuperscript{85}


\textsuperscript{82} Declaration contained in a Note Verbale from the Permanent Representation of France, 24 November 2015, registered at the Secretariat General on 24 November 2015

\textsuperscript{83} Ibid

\textsuperscript{84} Ibid

\textsuperscript{85} Declaration Contained in a Note Verbale from the Permanent Representation of France, 25 February 2016, registered at the Secretariat General on 26 February 2016
From the documents related to the declaration of the state of emergency emerges that the threat of the life of the nation (being its existence the prerequisite for the activation of the state of emergency) in France is strictly linked to, even though not clearly individuated in, the terrorism phenomenon.

Form a strictly legal and procedural point of view, the threat that terrorism poses to the life of the nation can be considered to fulfill the legal requirement for the activation of the state of emergency.

### 4.3. Threat to the Life of Nation in Turkey

In the official notification to the EU institutions Turkish authorities affirmed that “the coup attempt and its aftermath together with other terrorist acts have posed severe dangers to public security and order, amounting to a threat to the life of the nation in the meaning of Article 15 of the Convention for the Protection of Human Rights and Fundamental Freedoms.”

The necessity of the implementation of the state of emergency is therefore strictly linked to the terrorist threat.

In order to face this threat Turkish authorities resort to emergency measures that “may involve derogation from the obligations under the Convention” and that may limit “the exercise of certain rights to the extent strictly required by the exigencies of the situation,” not specifying which rights are directly to be affected. However, authorities take care to remind that “the purpose of the declaration of the state of emergency is not to restrict fundamental freedoms but to eliminate the FETÖ terrorist organization in a more speedy and effective manner.”

The conditions created by the attempted Coup d’Etat and other terrorists constitutes in the states’ authorities view a public emergency that requires the adoption of the state of emergency.

The fact that such proclamations have been accepted by European and UN authorities seems to suggest that the terrorist justification does in practice represent a legitimate justification.

---

86 Declaration Contained in a Letter from the Permanent Representative of Turkey, 21 July 2016, registered at the Secretariat General on 21 July 2016
87 Ibid
88 Permanent Representation of Turkey, Information on the terrorist attempt, Supra Note 35
89 Ibid
under the legal definition of “threats to the life of the nation” for the purpose of Article 4 of the ICCPR and Article 15 of the ECHR.

However, form a strictly legal point of view, this issue will definitively be solved by an international or regional court, as the ECtHR. Based on the fact that “to date, apart from the Greek case, […] the Strasbourg Court has accepted the existence of a Contracting Party’s assessment of the existence of a public emergency threatening the life of the nation”\(^90\) it is likely to conclude that such approach will be assumed for these two cases as well.

From the legal facts at my disposal at this point and in consideration of the approach that the Court has adopted in its history, except only for the Greek case, in which case the public authorities declaring the state of emergency were the military who took power as a result of a Coup D’Etat, the answer to my research question on the legality of the terrorist justification for the activation of the state of emergency, is yes.

To discuss the legality, in the sense of accordance with the law by the book, is only partially the scope of this thesis. In the following part of this thesis, I propose to look myself into the ethical justifications and validity of the justification. I do so adopting a *lex ferenda* approach in analyzing the law for how it *should* be. I propose to do so starting from the definition of terrorism.

4.4. Definitions of Terrorism

Since France and Turkey both refer to the threat posed by terrorism as a justification of their proclamation of the state of emergency, the necessity to analyze the notion of terrorism emerges because only if terrorism is a threat to the life of the nation, it can legitimately be a justification for the state of emergency.

To provide a clear and definitive definition of terrorism appears to be an almost impossible task. Such definition is missing in international legislation so that the only definition of terrorism is to be found at the specific national levels. Often though, definitions of terrorism put forward by states attempt to include all the elements potentially related to this phenomenon, resulting in vague and ambiguous definitions.

---

The Turkish legislation, for instance, defines terrorism as:

Any kind of act done by one or more persons belonging to an organization with the aim of changing the characteristics of the Republic as specified in the Constitution, its political, legal, social, secular and economic system, damaging the indivisible unity of the State with its territory and nation, endangering the existence of the Turkish State and Republic, weakening or destroying or seizing the authority of the State, eliminating fundamental rights and freedoms, or damaging the internal and external security of the State, public order or general health by means of pressure, force and violence, terror, intimidation, oppression or threat.91

In the French legislation, Law no. 1020 of 1986 is the first attempt to define terrorism and related acts. This law does not offer a single definition of terrorism but rather it contains a list of thirty-nine offences defined as terrorist if “linked to an individual or common enterprise with the aim of seriously disrupting public order through intimidation or terror.”92

Interestingly, despite having two quite different definitions and notions of terrorism and facing two different kind of terrorism acts both countries were legitimated to activate the state of emergency under the same “fight against terrorism” reasons.

It emerges that a single agreed upon definition of terrorism does not exist in the international context. The vagueness of the definition reflects the vagueness of this concept, which is a fluid phenomenon that can take different shapes and forms. In fact, Hubert argues that “the concept of terrorism as a whole enabled a symbolic construction of a homogeneous threat, while the reality is a lot more complex and does not allow for the unification of political violence under a single label.”93

It could, rightly, be argued that terrorism, being an elusive phenomenon, makes it likely that states will activate their state of emergency responding to different kinds of situations that would eventually fall in the realm of terrorism. Or also that this concept has so wide an extension that it covers many different phenomena. I do not necessary disagree with this position.

---

91 Anti-Terror Law Act No. 3713: Law to Fight Terrorism, Published in the Official Gazette on 12 April 1991, article 1
92 Loi 86-1020, 9 Septembre, 1986
93 Constance Hubert, France 2015: the End of Innocence?, in the SAIS Journal of Global Affairs, 1 April 2016
Moreover, sometimes, concepts in international law are not precisely defined in order to allow states to adapt them to their specific contexts and situations. This may be the case with terrorism.

The fact that European and international institutions have accepted the derogations of these two countries seems to imply that the terrorism justification is in fact accepted as a “threat to the life of nation” and it passes the test for the activation of the state of emergency.

However, the role of the terrorism justification deserves more attention for numerous reasons.

First, the lack of agreement at the international level on the definition of terrorism means that in activating the state of emergency states parties are not only entitled to decide when terrorism threatens the life of the nation but also what this terrorist threat is, in fact. Under the vague national definitions of terrorism, states are somehow granted the power to define a wide range of acts as terrorism. Such acts are normally criminal acts, but arguably terrorism, and as such do not necessarily require the suspension of human rights. For instance, the man who stabbed a French police commander to death in Paris, committed clearly a criminal offence but less clearly and surely a terrorist act.94

Second, it concedes to states the prerogative to define as terrorist whatever group of people, community or organization is perceived by the authorities as a menace. In the Turkish case, for instance, the vague and open–ended language of the decree, which targets all those who “belong to, are connected to, or in contact with” terrorist organizations meant the identification as terrorist of any political opponent – perceived or real – alleged to be in contact with members of terrorist organizations but with no need for an investigation to offer any evidence in support of it.” 95

This wide space of maneuvering conferred to states could leave a door open to arbitrary exercise of powers in face of whatever threat the states perceive and define as terrorism.

Even the Human Rights Commissioner of the Council of Europe expressed his fears that the combination of the wide scope of the decree, “which concerns not only the coup attempt, but the fight against terrorism in general, […] extremely wide and indiscriminate administrative

94 14th of July 2016
95 Sinclair-Webb, HRW, Turkey: Rights Protections Missing, Supra Note 56
powers affecting core human rights, and the erosion of domestic judicial control may result in a situation where the very foundation of rule of law are put in jeopardy.” 96

In the French case, similarly, the decrees identify as terrorists “any person in respect of whom there are reasonable grounds to believe that his conduct constitutes a threat to public order and security.” An entire dissertation could be written on the meaning, interpretations and issues related to the expression “reasonable grounds to believe”, which is beyond the scope of this paper. For the sake of my argument, it is enough to say that it does not offer clear indications and criteria on how to identify a terrorist, as far as it implies a certain degree of arbitrariness of the “believer”, how eloquently pointed out by Agamen.97

In fact, if the assessment on whether or not a crisis amounts to an emergency for the purpose of the state of emergency is a subjective and a political decision. The process that makes “an issue become a security issue not because it constitutes an objective threat to the State, but rather because an actor has defined something as an existential threat to some objects survival” has been defined by the Copenhagen School as “securitization”.98

Moreover, the terrorist threat requires making assumptions about the future based on disputable facts about the present.99 Further, the facts are never presented in a neutral way but they come with evaluations from the authorities who justify whatever case for actions is being made.100 Also, “even when we agree on the facts, we may still disagree whether the risks justify abridgement of liberty.”101 This makes it problematic to agree on the degree of risk that terrorism actually presents.

All these elements point to the need to more carefully evaluate the legitimation of terrorism as a valid justification to activate the state of emergency. The vague nature of its definitions seems unfit as a justification for the activation of the state of emergency. However, clearly and unmistakably deciding whether or not such phenomenon threatens the life of the nation is not an easy task. In doing so it may be helpful to search in the existing jurisprudence for some

96 Statement of the Commissioner for Human Rights of the Council of Europe, Measures Taken Under the State of Emergency in Turkey, Strasbourg, 26 July 2016
97 Giorgio Agamben, De l’Etat de Droit à l’Etat de Sécurité [From the Rule of law to the State of Security], Le Monde, 23 December 2015 – mine translation
98 Hubert
100 Ibid
101 Ibid
elements or criteria that may direct us toward the right evaluation. The *Lawless* case, for instance, proves particularly useful in doing so.

### 4.5. Exceptional and Imminent

The *Lawless* case is often considered a landmark case in defining the elements characterizing the threat to the life of the nation and the nature of the public emergency. The Court defines a public emergency as “an *exceptional* situation of crisis”\(^{102}\) referring to a situation in which the ordinary measures allowed under the Convention are not adequate to deal with the situation.

Interesting in the French version of the same judgement, which is the original text, the crisis situation is characterized by its *exceptional* as well as *imminent* nature.\(^{103}\) This term implies that that the threat has to be occurring or about to happen and that a hypothetical crisis cannot justify the invocation of the derogation provision, at least not at the European legal level.\(^{104}\)

Applying this argument to the study cases, in order for their proclamations to be legitimate for the activation and then extensions of the states of emergency, this question has to be answered: “does terrorism amount to an *exceptional* as well as *imminent* threat?”

From a common perspective, the terrorism threat is considered one of the worst threats to democratic systems and to the lives of people living in them. Nevertheless, terrorism has been a long lasting menace present throughout all of modern history and virtually in every part of the world, as per the definition that the aim of terrorism is to spread terror targeting random people. The facts that despite all efforts carried out to defeat it, terrorism is still a menace puts in question its exceptionality.

Moreover, we seem not to fear the threat that terrorism poses to our lives and security in our everyday life until the moment that this threat manifests, and becomes a destructive force through attacks. These attacks become the exceptional and imminent manifestation of the broader and general phenomenon.

Therefore, the exceptional and imminent menace for which these countries activated their state of emergency derives from specific terrorist actions carried out by specific terrorist

\(^{102}\) *Lawless v Ireland*, para 28

\(^{103}\) Ibid, French version «en effect, une situation de crise ou de danger *exceptionnel* et *imminent* qui effecte l’ensemble... », para 28. Emphasis added

\(^{104}\) UNOCHR, Supra Note 78, p. 828
groups. Even if in theory terrorism threatens the life of the nation, what does so, on the empirical level, is specific terrorist acts.

A complete and comprehensive analysis of the phenomenon of terrorism is beyond the scope of this thesis. Rather, my intention here is to draw attention to the difference between the threat deriving from the broader phenomenon of terrorism and the threat deriving from its manifestations in reality – the terrorist attacks that occurred in France and the Turkish attempted Coup d’État.

What is problematic, in my view, is not so much the practice to activate the state of emergency as a response to the exceptional and imminent terrorist acts, which is legitimate and necessary as it is the right and duty of states to protect its citizens from these kind of threats and the state of emergency is one of the instruments that the international legal system provides states to do so. Rather, the issue here is whether the broad and general justification of terrorism, provided by the France and Turkey, does actually count as an exceptional and imminent threat. To be clearer, the terrorist acts that occurred in these two countries may require and legitimate the activation of the states of emergency to deal with their consequences but I disagree with the justifications put forward by these countries. For example, in their official communications mentioned above, for these activations which refer to fight terrorism in general and prevent further attacks.

This may seem like a smaller detail, a matter of wording or just a formal matter.

Yet, it is not. In fact, this same terrorism motivation has been employed to justify the necessity of the extensions, in time and scope, of the states of emergency affecting especially their time limitation, as will be further analyzed in the next chapter.

Based on the fact that terrorism in general is arguably exceptional and imminent, and that it is such a vague concept that provide states with excessive space for arbitrary exercise of powers, I believe that the justification for the activations of the states of emergency should be more precise and clearly linked to that specific situation that required its activation, namely to the terrorist attack and not to terrorism in general.

The state of emergency presupposes the suspension of human rights which carries risks for everybody’s enjoyment of human rights. In order to avoid the realization of such risks, the justifications provided should be as clear and precise as possible, form a formal as well as a practical level (as the formal may affect the practical level).
All this considerations lead me to answer my research question whether or not terrorism should be a legitimate justification for the state of emergency. The threat deriving from specific terrorist attacks may amount to a threat, in the meaning of the state of emergency, only on the condition that its activation is clearly and strongly linked to those exceptional and imminent situation, and not the general phenomenon of terrorism.

Now, in order to answer the second lex ferenda question, related to the extensions of the state of emergency based on the terrorist threat, I will look into the time limitation legal requirement and how in practice this has been affected by the terrorist justification.

5. Terrorism and the Time Limitation

5.1. The Principle of Time limitation

The principle of time limitation is one of the main features and legal requirements as this “is inherent by nature in the state of emergency.” Its correct application prevents the illegitimate perpetration of the state of emergency and reflects its “exceptional and temporary nature.”

According to the Special Rapporteur Mr. Despouy, when “the threat upon which it was based assumes such proportions that the restrictions permitted by the Constitution and laws under normal circumstance are sufficient for a return to normality” the state of emergency this should be withdrawn, so to remain in only for the time that is strictly necessary.

The duration depends on the justification for the activation and the extensions of the state of emergency as it can only lawfully remain in force as long as the circumstances of its proclamation exist, yet not as long to become institutionalized in the country’s legal system. Precisely because of continuous extensions of the states of emergency some South American countries in the 1950s (Haiti, Paraguay, Uruguay and Argentina) and also Israel have been strongly criticized and invited to withdraw their state of emergency.

This element guarantees the limitation in time of the exercise of extra-ordinary powers and consequently it reduces the space for arbitrary exercise of emergency prerogatives employment. To respect and enforce this principle is of paramount importance for the

---

105 Despouy, para 69
106 General Comment no.29, para 2
107 Despouy, para 74
protection of the human rights regime and to prevent arbitrary exercise of emergency measures. Authoritarian, but also democratic governments may fall into the temptation to employ emergency powers to strengthen their prerogatives and powers, free from the obligations and limitations for the arbitrary use of power deriving from human rights Conventions. Therefore, the significance of limiting in time these measures clearly and strongly to their scope. All of this aims to reduce the consequences of a status in which human rights are suspended and to secure the possibility of a return to normality.

In the next paragraph I will analyze how the time limitation principle has been challenged in the implementations of the states of emergency in France and Turkey by the use of the terrorism justification.

5.2. The Effects of the Terrorism Justification on the Time Limitation

As the justification of the activation of the state of emergency affects its time limitation, in cases in which the activation of the state of emergency is based on a terrorist threat, the time limitation could be interpreted as allowing the state of emergency to remain in force as long as terrorism is a threat to the life of the nation.

If, already, the arguably imminent and exceptional nature of the terrorism phenomenon makes it a disputably fit justification for the activation of the state of emergency, as discussed in the previous chapter, further doubts may be raised concerning the ways that terrorism affects the time limitation of the derogation.

The fact that in spite of all efforts terrorism is still such a serious menace proves that the complete eradication of terrorism in a short-term perspective is not a practicable option, at least not for now, and suggests that terrorism is a long-lasting phenomenon.

However, the numerous extensions of the states of emergency of France and Turkey have been based on the permanent presence of the terrorist threat in these countries which requires exceptional measures to be dealt with.

This seems to produce a paradox: the state of emergency is by nature limited in time yet at the same time it is extended on the basis of a long-lasting threat. This paradox does in fact affect the time limitation of the state of emergency that this is expanded, potentially, until the day terrorism will cease to exist.
Importantly, the European Commissioner for Human Rights illustrated the risks related to such attitudes in an article he wrote for *Le Monde*, where he affirms that

> it is an illusion to think we can win the terrorist menace in the short time” and that therefore it is not a question of legitimizing the extension of the state of emergency which would be “a renounce to democracy and thus the victory of terrorists.  

In practice, given the impracticability to defeat of terrorism in the short term, or perhaps at all, the fight against terrorism justification may lead to a process of the indefinite perpetuation of the state of emergency.

The perpetration of state of emergency is one of the main anomalies that have been occurring in history and it endangers deeply the human rights regime and people’s chance to enjoy their rights. As previously referred, the occurrence of this irregularity in some of the Latin America countries transformed the state of emergency in the legal instrument to repress human rights and political opposition. Referring to the repeated renewal and extensions of the state of emergency, Special Rapporteur Leandro Despouy writes:

> Such anomalies are particularly serious because they disregard the principles of time limitation which establishes the temporary nature of state of emergency. They also disregard the principle whereby the danger or crisis must be either current or imminent. Discretionary power supplants proportionality. In a word, what was temporary becomes definitive, what was provisional constant and what was exceptional permanent, which means that the exception becomes the rule.

All these anomalies seem to be incorporated in the terrorism justification, as it challenges the application of the principle of time limitation and the imminent nature test. For these reasons, because of the risks related to the perpetuation of the state of emergency (which will be presented later in more detail), and because of the fact that the nature of terrorism is incompatible with the nature of the state of emergency, I believe that such justifications endanger the human rights regime and, therefore, its validity as a justification for the extensions of the state of emergency is highly disputable.

This argument will be further supported by other considerations related to the necessity of emergency measures in such contexts that will be provided in the next chapter.

---


109 Despouy, para 5

110 *Ibid*
6. Principle of Necessity

Another important characteristic and legal requirement of the state of emergency is the principle of necessity, according to which derogations must be limited “to the extent strictly required by the exigencies of the situation” 111 “[in its] duration, geographical coverage and material scope.”112

This principle tests the necessity of each emergency measure (which is not the point of this chapter) and it also applies to the extensions of the state of emergency, which have to be proved necessary to the realization of its scope, are here analyzed.

The analysis in this chapter aims to answer my lex ferenda question: “Should terrorism constitute a legitimate justification for the extension of state of emergency?” I will do so considering the necessity of the extension to the realization of the scope of the states of emergency of the study cases: the fight against terrorism.

6.1. Necessity of the Extensions

As previously illustrated, the Lawless case defines a public emergency as an exceptional situation for which the ordinary legal system is not sufficient and adequate to deal with.113 Therefore, the necessity of the emergency measures adopted by these two countries has to be found in a lacuna within their ordinary legal and criminal systems in managing a terrorist threat.

French authorities affirm that “the measures allowed in the framework of the state of emergency remain indispensable to deal with the threat status and are more complementary than competing with general/ordinary law measures. (Emphasis added)”114

The interpretation that French authorities propose for emergency measures seems to not fully include the meaning of the derogation provision, as explicated in the Lawless case. In fact, the state of emergency offers a limited time and space alternative to the ordinary legal system, when this is not adequate to manage a crisis situation, and not a complementary measure that strengthens the existing system. This different interpretation has important consequences as it could assimilate the state of emergency to a normal or ordinary response to terrorism instead of an exceptional and last resort option.

---

111 Article 4 ICCPR
112 General Comment no. 29, para 4
113 Lawless v Ireland, para
114 Declaration from the Permanent Representative of France, 21 December 2016
Moreover, France, like most European countries, had a long term counter-terrorism strategy even before the deadly attack in Paris. In fact, right after the attack against the satirical magazine Charlie Hebdo, the French authorities activated a national security alert system, Plan Vigipirate, which contains more than 300 safety measures. This plan was reinforced by the Operation Sentinelle, which deployed on national territory a number of soldiers superior to those serving in external operations. This system was perpetuated on April 2015 to manage the terrorist menace. All these measures rely on the existing ordinary legislation, confirming that a counter-terrorist framework do and did exist.

The existence of a counter-terrorism strategy does not necessarily mean that it is sufficient and adequate for its scope. The occurrence of terrorist attacks may rather prove the opposite. However, the state of emergency is an exceptional and limited in time and space institution which, because of its nature, cannot replace a long-term strategy, nor be evoked as an ordinary means to fight terrorism.

For this reason, twenty French personalities in January asked for the cessation of the state of emergency in France, whose measures “could have been implemented exclusively in the frame of the ordinary criminal procedures, without any reference to the state of emergency – that, precisely, has not prevented the occurrence of further terrorist attacks since its proclamation.”¹¹⁵

Similar concerns about the necessity of the extensions of the state of emergency could be raised in regards to Turkey. The state of emergency was activated “to take required measures in the most speedy and effective manner in the fight against FETÖ terrorist organization.”¹¹⁶

Once the exceptional crisis linked to the attempted Coup d’Etat terminated and responsible parties were arrested (which happened within 24 hours) the emergency measures shifted their attention in “cleaning” all sectors of society from the Gülen’s supporters.

However, as mentioned above, the FETÖ movement has been officially recognized as a terrorist organization since 2014 and under the ordinary legal system terrorists or those suspected can be put under trial and persecuted with criminal charges. As for the French case, this suggests that the legal lacuna that the state of emergency is supposed to remedy does not exist or at least not to a degree that would require the extension of the state of emergency.

¹¹⁵ Le Monde, Non à la pérennisation de l’état d’urgence! [No to the Perpetuation of the State of Emergency!], 15 January 2017, mine translation
¹¹⁶ Permanent Representation of Turkey, Information on the terrorist attempt on 15 July 2016
In conclusion, since from a normative point of view the legitimation of the state of emergency leans on the existence of a lacuna in the ordinary legal system to address an exceptional situation to which the executive is required to remedy, the existence of policies predated the declaration of the state of emergency and were tailored to address the same issues suggests that this lacuna does not exist in the cases here examined. Therefore, this calls into question the “strict necessity” of the extensions of the state of emergency in France and Turkey.

Moreover, if such lacunas in both countries should exist, to resort to extra-ordinary remedies instead of filling those gaps seems an ineffective choice. In fact, if the added value of those emergency measures, whatever that is, would be incorporated in the ordinary policies instead of replacing them, such value would be long lasting and include the respect and protection of human rights rather than their suspension. France’s Council of State said in its binding opinion on the second law prolonging the state of emergency that “when, as it seems to be the case, the “imminent danger” that gives rise to a state of emergency is based on a permanent threat, we must counter it using permanent instrument.”

Also, François Hollande on the 14th of July 2016, a few hours before the Nice attack, asserted “we can’t prolong the state of emergency forever. That would make no sense, it would mean that we were no longer a republic with laws which can apply in all circumstances.”

To be clear, what I am suggesting is that the counter-terrorism strategies and ordinary measures should be updated so that these can be implemented in contexts that comply with the human rights framework. Not to modify the general ordinary legal system nor the Constitution, which as further discussed in paragraph 7.2. could have deleterious consequences. The paramount importance and effectiveness of the protection and promotion of human rights in counter-terrorism strategies will be further explored in the next paragraph.

---

118 News Wires, *French State of Emergency to be Lifted July 26, Hollande Confirms*, France 24, 14 July 2016
6.2. Effective Ways to Fight Terrorism

Given the aim of the derogations to fight against terrorism, it might be insightful to consider what authoritative institutions at the international level have been suggesting as effective ways to fight against terrorism.

For instance, the UN proposes a comprehensive “Global Counter-Terrorism Strategy”[119] which is composed by four pillars: one “addressing the conditions conducive to spread terrorism”, two “preventing and combatting terrorism”, three “building states’ capacity and strengthening the role of the United Nations”, and four “ensuring human rights and the rule of law”.

The importance of the protection of human rights in counter-terrorism efforts aiming to address the causes and conditions of terrorism is further reiterated by the General Assembly which affirms that “the promotion and protection of human rights for all and the rule of law is essential to all components of the Strategy, recognizing that effective counter-terrorism measures and the protection of human rights are not conflicting goals, but complementary and mutually reinforcing.”[120]

An European organization, OSCE, to which France and Turkey are states parties, maintains that to respect human rights in law enforcement efforts to counter terrorism does not only prevent innocent people being wrongly convicted but, essentially it is the fundamental condition to effectively prevent terrorism, as failure to respect human rights has been proved to create conditions conducive to terrorism.[121] Therefore, in counter-terrorism operations, as in all other kind of police operations, human rights should not only be protected but also integrated in their formulation as “they are the allies of effective police work.”[122]

It is important to include protection and respect for human rights and freedoms in counter-terrorism strategy also because “strong democratic institutions and rule of law play an important role in preventing threats from arising. Weak governance, and a failure by States to

---

[120] Ibid
[122] Ibid, p. 13
secure adequate and functioning democratic institutions that can promote stability, may in themselves constitute a breeding ground for a range of threats.”\textsuperscript{123}

Importantly, the Venice Commission also notes that tension between the different elements of the rule of law is the aim of terrorism. Therefore, there is a need to protect these rights and freedoms from threats and not to restrict them.\textsuperscript{124}

All these strategies and opinions include the protection and promotion of human rights as one of the fundamental elements for effectively and sustainably combatting terrorism. It is undeniable that these elements that are valid for a long-term strategy may not be included in emergency measures, which are more a short term and temporary means designed to deal with the manifestations rather that with the causes of terrorism. And while in the short run the suspension of some human rights may be necessary, in the long run “only a strong democracy and fully guaranteed rule of law constitute a legal, political and social climate in which states security and public safety may be secured.”\textsuperscript{125}

Further, a similar approach has been confirmed by the Venice Commission in explaining that the best way to ensure security and public safety it is not “primarily and in all situations to give more power to the executive authorities and restrict personal rights and freedoms, but to strengthen democracy and the rule of law, which are precisely meant to protect the individual against arbitrary and disproportionate restrictions of his human rights and freedoms by the authorities.”\textsuperscript{126}

It follows that “respect for human rights should be seen as essential part of the effective counter-terrorism strategy, not an impediment to it”\textsuperscript{127} as “state security and fundamental rights are not competitive values: they are each other precondition.”\textsuperscript{128}

In assessing the necessity of the extensions of the state of emergency, these elements may guide us toward an answer. In fact, since in a long term perspective the protection and promotion of human rights is an essential element to obtain the definitive defeat of terrorism,

\textsuperscript{123} OSCE, \textit{Strategy to Address Threats to Security and Stability in the Twenty-First Century}, Maastricht 2003, para. 4
\textsuperscript{124} Ibid, para 34
\textsuperscript{126} Ibid, para 29
\textsuperscript{127} Ibid, para 31
\textsuperscript{128} Ibid, para 31
the necessity of the extensions of the state of emergency, which implies a suspension of human rights for long time, may be an ineffective measure.

Furthermore, since the underlying justification of fighting against terrorism appears to be the achievement of national security, I will briefly describe the definition of this concept as theorized by Waldron and accordingly I will assess the necessity of the extensions to achieve such a goal.

6.3. National Security

The threat to the life of the French and Turkish nations posed by terrorism could be understood in different ways. One could translates it in positive terms suggesting that the aim of the state of emergency is to ensure national security. For clarity purposes, in neither of the official proclamations or documents related to the state of emergency is national security mentioned.

6.3.1. The Content of National Security

The assessment of the necessity of emergency measures heavily relies on the interpretations and definitions of the reference terms. Emergency measures have been admitted as necessary to achieve national security, yet the nature of the measures will change when adopting different definitions of national security. The concept of national security, in fact, is not a fixed one but its definition depends on what security requires at a particular moment or situation.\textsuperscript{129}

Commonly, the term “security” has been connected to physical security and integrity of the nation and of its citizens. This conception reflects Hobbes’s political theory that people give up their natural liberties to the sovereign in order to have their security – against outsiders and against each other – ensured. He asserts that “[A] man may... account himself in the state of security, when he can foresee no violence to be done unto him.”\textsuperscript{130} This is what Waldron defines as the concept of “pure safety”.

This interpretation of security is valid in the aftermath of a terrorist attack or a Coup d’Etat, when what people seek security for is their physical safety and, thus, the demand for national security refers to physical safety. However, if this interpretation could be incorporated in the

\textsuperscript{129} Waldron, p. 445
\textsuperscript{130} \textit{Ibid}, p. 457-458
short-term prospective, like in the case of the activation of the state of emergency as a prompt response to a terrorist attack, the perspective here assessed is a long-term one related to the extensions of the states of emergency.

Even Ignatieff, among the main supporters of the lesser evil position\textsuperscript{131}, remarks that “in emergency, we have no alternative but to trust our leaders to act quickly, when our lives may be in danger, but it would be wrong to trust them to decide the larger question of how to balance liberty and security over the long term.”\textsuperscript{132}

Therefore, the scope of this paragraph is to offer an alternative notion of national security to the traditional “pure safety”, namely the interpretation proposed by Waldron, partially supported by the OSCE’s “human dimension” of security.

In defining national security in a long-term perspective, Waldron poses the question “is a population more secure simply by virtue of people being safer?”\textsuperscript{133} This question reveals the mistaken common tendency to treat security and safety as two synonymous concepts. Evidently, these are connected, yet distinct. It follows that, in order to rightly and completely define national security we have to address the question of whether or not the mere physical safety (or survival) is the only element of security.

In Waldron’s perspective it is not. Relying on Bentham’s notion of security - as legal constancy, certainty and predictability so far as property rights are concerned – Waldron interprets security as the guarantee that we can enjoy other rights and liberties.\textsuperscript{134} He notices that the word security also contains an element of assurance that the pure safety concept does not adequately appreciate. This element provides a new interpretation in which security supports other rights: “I may enjoy certain liberties, such as the practice of my religion or the freedom to express my political views, securely.”\textsuperscript{135}

Therefore, Waldron proposes that in order to have a correct definition of national security we have to enrich the concept of security in depth - what constitutes a person’s security - so that it is not just a matter of probability of bodily harm but it becomes more clearly linked to the

\textsuperscript{131} In Ignatieff, the Lesser Evil. Supra Note 97. This position mainly support the idea that in facing the evil of terrorism governments may be legitimized to recur to a certain extent of evil – namely measures that in a normal situation could be legally and/or morally questionable.

\textsuperscript{132} Ibid, p. 2
\textsuperscript{133} Ibid, p. 46
\textsuperscript{134} Ibid, p. 471
\textsuperscript{135} Ibid, p. 462
idea of security as a guarantee of the goods it protects.\textsuperscript{136} This is necessary because “we may be thankful for our survival, but we cannot use our safety if survival is simply the fortuitous outcome of a long process of shivering terror.”\textsuperscript{137}

In fact, Waldron sustains that what people value is not just life but their “mode of life” the aspirations people have for their lives. A situation in which one’s daily routine is protected at the expenses of her aspiration for life should not be considered a situation of security.\textsuperscript{138} “What people want to secure is not just life but their American way of life, which has traditionally been associated with the enjoyment of certain liberties. What people want is secure liberty and not just liberty left open to abuse and attack.”\textsuperscript{139}

Waldron is not the only one to propose a broader interpretation of security. Interestingly, the European security agency OSCE bases its action on a comprehensive definition of security that includes the “human dimension”. This term describes “the set of norms and activities related to human rights, democracy and the rule of law, which is regarded within the OSCE as one of three dimensions of security, together with the politico-military, and the economic and environmental dimensions.”\textsuperscript{140}

As an agency whose aim is to implement security, OSCE recognizes that in order to realize durable and sustainable peace, the lack of violent conflict is not sufficient.\textsuperscript{141} Rather, there is a need to protect human rights and freedoms to tackle violence at its roots and not only in its effects. Therefore, any efforts to counter security threats should be undertaken in all three OSCE dimensions of security\textsuperscript{142} which are complementary and mutually reinforced.

If the interpretation of security as the security to enjoy other rights, to have a “mode of life” guaranteed and the protection of human rights are valid interpretations of security, the necessity to extend a state of suspension of human rights to realize national security cannot be accepted.

\textsuperscript{136} Ibid, p. 472
\textsuperscript{137} Ibid, p 471
\textsuperscript{138} Ibid, p. 466
\textsuperscript{139} Ibid, p 463
\textsuperscript{140} OSCE Human Dimension Commitments, Volume 1, Third Edition, Warsaw, 2011, XVI
\textsuperscript{141} For a more complete analysis of the difference between positive and negative peace refer to Cecilia Marcela Bailliet and Kjetil Mujezinović Larsen, Promoting Peace Through International Law, Oxford University Press, Oxford, 2015
\textsuperscript{142} OSCE, Human Rights in Counter-Terrorism Investigations, Warsaw 2013, p. 11
6.3.2. The Subjects of National Security

Waldron also addresses the question of whether or not security should be considered as a distributive good and in doing so, his interpretation also aims to enrich the concept of security in breadth – enlarge it to the whole community.\(^{143}\) In his perspective, since we treat security as a right and the precondition for the enjoyment of other rights we should follow the same principle which governs human rights and apply an egalitarian approach to security, rather than a maximizing one.\(^{144}\) For instance, as we value democracy as such only when everybody can enjoy democratic rights (and not only white men, for example) in the same way we should not accept cases in which the security of some is realized at the expenses of others’. This idea is further supported by the fact that our entire legal system is based on the principle of equality which suggests that this is a feature that we value as important and just that should, as such, be applied to the notion of national security as well.

This notion could contest the necessity of the whole institution of state of emergency, which entitles states to restrict certain rights of those who have committed, or are suspected of having committed, or are about to commit acts against public safety in order to protect the safety of the whole population.\(^{145}\) However, to analyze the normative and legal justifications for the existence of the derogatory provision in the international legal system would certain be interesting, but beyond the scope of this thesis. Rather, I move from the premise that such a measure does in facts exist – regardless of its moral and legal justification – and that in some exceptional cases the limited in time and space suspension of some human rights may be necessary to ensure national security. Yet, the issue here is rather to consider the necessity of the extensions over long periods of time of the suspensions of human rights.

If the egalitarian nature of security is accepted, the legitimacy and the necessity to extend the suspensions of some people’s human rights to achieve national security would be contentious. In fact, emergency measures implemented by France and Turkey may compromise the security of some people to safeguard the security of the majority.

For instance, In the French case, the security of people matching a vague terrorist profile is reduced in order to increase the security of other French citizens. It results that members of

\(^{143}\) *Ibid*, p 464

\(^{144}\) *Ibid*, 479

\(^{145}\) Venice Commission, para 6
the Muslim community are potentially much less secure against deadly attacks by the
governments or hate crimes or deprivation of their liberty than non-Muslim people.

Similarly, in the Turkish case the security from imprisonment, and of other connected rights
as work, access to education and free movement, and even more the right to hold different
political opinions of the people that bear different political positions than the government’s is
second to the security of people supporting the government’s line. People that match the
profile of terrorists, for which it is enough to have an alleged contact with any member of the
Gülen movement, are deprived of their security in order to guarantee what the government
define as national security.

Since states are called to implement the security of all people in its territory, even those
considered as “outsiders”, to extend the length of measures that deny or reduce some people’s
security cannot be strictly necessary.

6.4. Counter-productive Effects of Lasting Emergency Measures

The necessity of the extensions of the emergency measures could also be contested on the
basis of some potential detrimental effects that the extensions over long periods of time could
bear. This paragraph is mainly speculative, in the sense that it is not based on the observation
of phenomena that are occurring, the lack of first hand data and insights of the real effects of
the emergency measures in these two countries prevents such a thing. Moreover, it is not
based on any sociological research or any theory. These are possible concerns over potential
phenomena. However, the possibility that such effects could, and to a certain extent are
already occurring, deserves to be part of the evaluation of the necessity of extensions of the
derogations.

The implementation for long periods of time of measures targeting specific communities or
sections of society could undermine the cooperation between police enforcement and targeted
communities as such measures could give rise to feeling of injustice and therefore defiance
toward public authorities, alienating the targeted communities and menacing the cooperation
between the two. As important information may come from informers within that particular
community, it is important to strengthen the relations between the police and the communities
under investigations and not weaken it.

Even the Commissioner of Human Rights of the Council of Europe expressed his
preoccupation about possible negative effects of the extensions in France in putting into
question human rights, in stigmatizing the Muslim and migrant communities and, in jeopardizing social cohesion. 146

In fact, the counter-terrorism policies targeting the Muslim and Migrant communities could stigmatize these communities as responsible for terrorism and associated with it. A similar phenomenon could also occur in the Turkey as the names of people and of the organizations dismissed are listed in the annexes to the decrees. This could have negative effects for their reputation and honor as they may negatively associate these people with terrorism, even when officially they are only suspected of it.

Measures targeting specific communities may also be perceived as discriminatory and this may increase alienation feelings in the targeted communities which, in turn, could fuel extremisms that may strengthen terrorism instead of combatting it.

All these elements may contribute to weaken the social cohesion within a country as the numerous house searches, arrests and all other sorts of similar policies could instill mistrust from the rest of society toward that targeted community. This endangers the social cohesion and eventually security as, according to Waldron, “security is something that we provide for each other by enjoying together the social order of activity and interaction that defines our way of life and by acting in solidarity with one another to ensure that the benefit of this system is available to all.”147

Emergency measures could also bear indirect effects on non-targeted’s enjoyment of human rights. For instance, the broadening of surveillance powers over communications can make people less willing to engage in online activities and conversations, aware that their messages, tweets, and web researches could be used as evidence of their engagement or sympathy for terrorist organizations. The same applies for joining in public demonstrations or the frequenting of public places, such as worship, political, or cultural places that could be identified by authorities as “suspicious spaces”. Moreover, the climate of intimidation resulting from the criminalization of journalists work in Turkey could encourage self-censorship and so deprive the public of a free and pluralist debate148 which affects people’s right to seek and receive information.

146 Le monde, *Prolonger l’état d’urgence, un « risque » pour la démocratie*
147 Waldron, p. 500
148 JWB, p.14
Moreover, as has been importantly remarked by Waldron that witnesses to the suspension of other people’s rights, even when to enact our safety, indirectly shakes our sense of security because we are aware that we could receive the same treatment in order to ensure someone else’s security.  

It may be argued that some targeting measures could be necessary. For instance, it could be argued that since terrorist attacks, at least some of them, have been pursued by members of ISIS or other Jihad related organization which are strictly linked to extremist Muslims, those responsible for such acts and suspects for future attacks have to be found within the Muslim community. From a lesser evil perspective it seems legitimate to discriminate against this community, reducing their freedoms and rights in order to ensure the security of the rest of the population. However this argument presents two main issues. First, French authorities never clarify that what they are fighting is this specific kind of terrorism. Instead they just refer to terrorism in general. Yet, since the general phenomenon of terrorism is not exclusively linked to ISIS and Jihad and it could come virtually from all sides and communities a veritable counter-terrorism strategy should fight all forms of terrorism. Indeed, if the aim of the emergency measures is to fight terrorism, it should fight all forms of it and not only the Muslim related one.

Second, in the light of Waldron’s conception of security as a distributive good, these measures decrease this community’s security in order to potentially ensure the majority’s security. This is not a theoretical question to ensure that the definition of security that we seek to realize is compatible with our moral values. Rather it bears pragmatic consequences. Since terrorism hits indiscriminately, the Muslim community faces exactly the same fears as non-Muslims and deserves the same level of security as the rest of the population. Further, most victims of terrorism, also of Jihad or ISIS’s terrorism, are Muslims and such discriminatory measures are targeting the community that is more vulnerable to this threat. In this light, the most vulnerable community to the threat of terrorism is also stripped away of the protection deriving from the human rights regime by virtue of the extension of the state of emergency.

The longer the state of emergency, the consequent suspension of human rights and, the implementation of measures targeting specific communities remain into force, the more

149 Waldron, p. 495

150 “In cases where the religious affiliation of terrorism casualties could be determined, Muslims suffered between 82 and 97 percent of terrorism-related fatalities over the past five years” US National Counter-Terrorism Center, Report on Terrorism, 2011, p. 14
chances that these risks could actually become reality. The possible occurrence of such risk, should be taken into account and counter-balance the arguments supporting the necessity of the extensions of the states of emergency, so that counter-terrorism measures tackling the manifestation of terrorism do not endanger the human rights regime, our security or even the success of counter-terrorism strategies themselves.

In this chapter I have discussed the disputable existence of a legal lacuna that the states of emergency are supposed to remedy, the effectiveness and significance to fight against terrorism through the promotion and protection of human rights, which also plays a role in more completely interpreting the notion of national security. These elements challenge the necessity of the emergency measures and consequently of the extensions of the state of emergency in order to fight against the terrorist threat.

The fight against terrorism is the specific scope of the states of emergency of France and Turkey. Yet, before providing a definitive answer to the *lex ferenda* question - should terrorism be a legitimate justification for the extensions of the state of emergency? – I will also analyze the more general scope of the institution of the state of emergency, namely “the restoration of a state of normalcy”, before referred in paragraph 3.2.. In this frame, I will consider whether these extensions may be necessary to pursue this objective.

Counter-productive effects of extended states of emergency are not limited to the specific instruments to fighting against terrorism, rather they can extend and affect the entire democratic system, as will be analyzed in more detail analyzed in the following chapter.

7. Extended state of emergency threatens The Life of Democratic Nations

The continuous extensions of the states of emergency in France and Turkey that expands the time limitation of this institution and the effects illustrated in this chapter could lead to a modification of the democratic systems.

Specifically, in this chapter I will analyze the effects on the balance between powers and the actual modification of the constitution under the emergency status. I will conclude the chapter with a discussion about the realization of a process of normalization of the exception and its
consequences for the democratic system, but also, for the more general purpose of the derogation provision, namely the restoration of normalcy.

These elements are taken into consideration as they provide the moral basis to answer my lex ferenda sub-question should the state of emergency be extended under the terrorist threat?

7.1. The division of powers

The Special Rapporteur Mr. Despouy explains that the state of emergency always leads inevitably to a modification of the balance between democratic institutions, usually with a gradual expansion of the executive power to the detriment of the judiciary, replacing the concept of separation of powers with that of hierarchy of powers.\textsuperscript{151}

The extension of the executive into the legislative sphere, noted by Agamben, results particularly evident from the use of “decrees with force of law” which grants the executive with a broad regulatory power to modify or abrogate by decree the laws in force.\textsuperscript{152} This decree is the legal instrument through which the executive enact emergency measures and even though, strictly speaking, it is not a law, it has the same effects as if it were granted force of law. In Agamben’s view, this instrument challenges particularly the principle of division of powers, being the executive absorbing the legislative power.\textsuperscript{153}

Therefore, such instruments provide governments with the possibility to change the implementation of the law without formally changing the legal system, namely the Constitution. Decrees with the force of law are particularly problematic in that they can change the legal system skipping the democratic process issued to ensure the constitutionality (and therefore the compatibility with human rights) of the law. Agamben observes that in this way these decrees conflict with normal hierarchy of powers, and delegate to executives powers that normally are in the legislative’s hands.\textsuperscript{154}

Not just the democratic process is challenged, but also the entire concept of division of powers. Referring to the study of Tingsten on the effects of state of emergency on the balance and division of powers which concludes that “a systematic and regular exercise of the institution necessarily leads to the liquidation of democracy”, Agamben notes a gradual

\textsuperscript{151} Despouy, para 150
\textsuperscript{152} Agamben, \textit{State of Exception}, p. 7
\textsuperscript{153} \textit{Ibid}, p 18
\textsuperscript{154} \textit{Ibid}, p. 7
erosion of the legislative powers of parliament which today is often limited to ratifying measures that the executive issues through decrees having the force of law.”\textsuperscript{155}

In fact, Agamben observes from a theoretical point of view, and it has been agreed by twenty French personalities, that the state of emergency alters the balance of powers introducing accelerated procedures for voting law, reducing the parliamentary debate at the minimum; a modification of prorogation law with the aim of lastingly reinforce surveillance measures; a recession of the judiciary judges’ constitutional role as guardians of individual liberties; a reduction of the role of the counter-powers, particularly judiciary.\textsuperscript{156}

The state of emergency suspends human rights but it does not eliminate them. It derives that, human rights are formally in force but they are emptied of their meaning, being prevented from protecting people against government’s abuses. This leads to the establishment of a sort of double legal system where there are two parallel systems, the ordinary one and the emergency one, that existing at the same time may create confusion which challenges the predictability of law.

European history provides examples of the effects of this confusion. Both the Italian Fascist and the German Nazi regimes were characterized by the fact that from a formal point of view they were perfectly legal as they both maintained their Constitutions. However, following a paradigm defined as “dual state”\textsuperscript{157} they installed a new legal system parallel to the pre-existing one which did not officially modify the Constitutions but it emptied them of their meaning and purpose. For instance, Hitler’s first act after his nomination was the activation of the state of emergency which was never revoked for the following 12 years. Paradoxically, all atrocities occurred under the Nazi regime were allowed – and formally legal - because of the Decree for the Protection of the People and the State, which activated the state of emergency and suspended the articles of the Weimar Constitution related to individual liberties.\textsuperscript{158}

The point here is not to draw similarities between the Nazi and Fascist regimes and the two countries here analyzed. Rather, it is to learn from history and to point out dangers related to extended state of emergency.

\textsuperscript{155} Ibid
\textsuperscript{156} Le Monde, Non à la pérennisation de l’état d’urgence!
\textsuperscript{157} Agamben, State of Exception, p. 48
\textsuperscript{158} Agamben, De l’Etat de Droit à l’Etat de Sécurité
If, by definition, the state of emergency entails a modification in the balance between the powers, as it grants mainly the executive with wider powers to effectively overthrow a crisis situation, when such modification is kept in place for a long time it could progressively become accepted and interiorized in the political system. This phenomenon is particularly dangerous and puts into question not only the democratic functioning of the public institutions but also the underlying concept of division and check and balance of powers, which is one of the main elements that regulate the democratic systems.

This change in the balance between powers, maintained and reinforced by the numerous extensions of the states of emergency, could modify the democratic political system to a degree that would prevent a real return to normality, as such normality would not exist anymore.

The process of modification of the existing legal system becomes evident and is taken a step forward by the introduction of modifications in the Constitutions themselves, analyzed in the following paragraph.

**7.2. Reform of the Political Democratic Systems**

Different and conflicting positions on the effects of the inclusion of the emergency provision in the Constitutions are equally valuable. For the sake of my argument, I will address the position that consider the negative aspects and effects of such reform.

The Special Rapporteur Mr. Despouy notes that one of the principal and most dangerous anomalies in the implementation of the state of emergency is its institutionalization in the normal legal system “which it aims to legitimize and consolidate by comprehensively reorganizing the country’s legal and institutional system.” This would lead to exceptional norms replacing the normal constitutional and legal order.

This tendency is particularly evident in Turkey, where the referendum held in April 2017, defined by some as “arguably one of the most controversial political changes in a generation” signed the change of the constitutional order turning the country from a parliamentary to a presidential republic. This reform grants the President of the Republic of the role of head of the executive, being the figure of the prime minister eliminated. The

---

159 For instance, see: Venice Commission, Opinion On The Draft Constitutional Law On "Protection Of The Nation" Of France, Venice, 11-12 March 2016
160 Despouy, para 133
161 Ibid, para 130
162 BBC News, Why did Turkey hold a referendum?, 16 April 2017
president is conferred new sweeping powers such as appointing ministers, preparing the
budget, choosing the majority of senior judges and enacting certain laws by decree.
Particularly relevant it is the fact that the president alone will be able to announce the state of
emergency and dismiss the parliament and that in order to impeach the president it will
require a two-thirds majority of the MPs in Parliament.163

Some may think that the fact that this question was decided through a referendum implies that
this reform necessarily reflect the public’s will and is therefore necessarily democratic. Yet,
unfortunately history provides numerous examples164, of “dictatorial governments [that] have
resorted to pseudo-consultations of the people, in the form of plebiscites or referendums,
generally against a background of severe restrictions on the exercise of civil and political
rights and public freedoms.”165 The atmosphere resulting from the wide emergency measures,
the dismissal of public servants, the arrest and accusations of terrorism for tens of thousands
of journalists, judges and common people in Turkey (for more see paragraph 2.2.2.), recalls
more a context of restrictions than a free and democratic space. Moreover, the percentage of
people voting in favor of the constitutional reform was quite narrow (51,37% according to
official figures provided by the state run agency Anadolu166). The point here is that the
context of the consultation, characterized by the state of emergency could be not the best one
for such a fundamental public consultation.

On the other hand, in France a similar process was launched by the “draft constitutional law
for the protection of the nation” presented to the National Assembly in December 2015. This
proposal contained two major changes of the Constitution: the introduction of an article
concerning the state of emergency (to be introduced alongside the existing provision on the
state of siege) in the Constitution and a provision that would make possible to revoke the
French citizenship of people holding double-nationality in case convicted of terrorism related
acts. Due to the lack of agreement between the National Assembly and Senate on the second
provision, this draft was revoked at the end of March 2016.167 Significantly, there was a
general agreement on the necessity to introduce a state of emergency related article in the
Constitution. Therefore, if agreement on the issue of the revocation of citizenship should be

163 Ibid
164 Philippines in 1973 and again in 1979, Chile under Pinochet and attempted in Uruguay in 1980
165 Despouy, para 134
166 The Guardian, Turkey Referendum: Erdoğan Wins Vote Amid Dispute Over Ballots – As It Happened, 17
April 2017
167 Jean-Claude Paye, Sovereignty and the State of Emergency – France and the United States, Monthly Review,
Volume 68, Issue 08, January 2017
reached, the state of emergency could officially be included in and regulated by the Constitution.

This constitutional reform was strongly opposed by the CNCDH which emphasized that as “the end of the state of emergency is a difficult political decision, […] it should not be accompanied by a legislative reform, especially a constitutional reform, which is impossible to carry out in an exceptional context and under the pressure of emotions, regardless of how legitimate they are.”

On the contrary, President Hollande strongly advocated for the introduction of this new article which would provide an appropriate means to take exceptional measures without resorting to the state of emergency and without compromising the exercise of public liberties. Indeed, since the state of emergency is by nature temporary, and could not meet the need of a long-term war against terrorism, he advocated the urgency of introducing such a measure that would permit, in his view, to fight terrorism in the respect of the rule of law.

The CNCDH further noted that “constitutionalizing the state of emergency amounts to placing it at the same level in the normative hierarchy as fundamental rights and freedoms.” The Constitution is the place where our rights are guaranteed and limits the government’s powers, but such reform would introduce punitive measures that limit our freedoms and the related guaranteed against the abusive and arbitrary exercise of state power.

From a procedural point of view, the modification of the Constitution in an emergency context, which as illustrated in the previous paragraph entails a hierarchy of powers, challenges the democratic process for the constitutional review. Briefly, the ordinary process of constitutional reform in democratic systems requires a long process of evaluation and debates which involves different organs and parties of the political system. This is partially so to ensure the political (and other) opinions about the reform and also the compatibility of the reform with democratic values and principles, among which are human rights. Moreover, this system should prevent a Constitutional reform under the impetus of exceptional circumstance,

---

169 Le Lab Europe 1, Les contours encore flous de la réforme constitutionnelle voulue par Hollande, 16 November 2015
170 Ibid
171 CNCDH, Avis sur le projet de loi constitutionnelle de protection de la Nation [Advise on the Draft Constitutional Law on the Protection of the Nation], 18 November 2016, (mine translation), para 10
172 Paye
which may be valid arguments but not necessarily applicable and necessary in a non-emergency context.

In the case of state of emergency, this process is absorbed mainly by the executive and the debate is reduced to the minimum, as the situation requires speedy measures. This is not only problematic merely form a procedural point of view, as such the constitutional review process is altered. It further challenges the validity of this kind of reform due to the political nature of the executive that as such is constantly pressured by the public and the media to take strong and resolute measures, especially in a post-terrorist attack context. This pressure could result in the adoption of constitutional reform that may satisfy the public demand on the surface but not necessarily the democratic values. This is exactly the problem that the ordinary constitution reform process tries to solve including non-political organs in the lawmaking or reforming process.

Lastly, but not less importantly, one of the effects of terrorist attacks is the threat that people feel over what Waldron defined as “ways of life”. The inclusion of emergency measures in the ordinary legal system “may it-self be experienced as a disruption of the very way of life we say we are trying to protect.” Extensions of the suspension of our human rights for long periods as in Turkey and France may be perceived as that disruption that governments are trying to prevent.

### 7.3. Normalization of the Exception

Agamben notes that, from a normative perspective, the state of exception is the device that keeps together the two constitutive elements of western political systems: legal-juridical system and reality, nomos and anomy, law and chaos, in our specific cases, normality and terrorism. It does so linking them to each other and, at the same time, maintaining them as separate. As long as these two elements remain correlated yet distinct, the state of emergency has the beneficial role to bring within the legal system the chaos related to exceptional situations. Yet, when the exceptional powers are incorporated in the Constitution, the exception becomes an integral part of the norm, fading the distinction between the two. This signs the moment in which “the juridico-political system transforms itself into a killing machine” in Agamben’s perspective, as “in the measures that the state of emergency

---

173 Waldron, p. 499
174 Agamben, *State of Exception*, p. 86
175 *Ibid*, p. 86
becomes state of rule, the political class is caught in the trap of the banalization of the exception.” 176

The long lasting states of emergency and their institutionalization in the ordinary legal systems is becoming the new normal. Normal not only because these emergency measures have been in place for such long time to make the public accustomed to them, but also because these have become the normal counter-terrorism means in the practice of these countries. Due to this transformation of our democratic legal systems into a constant state of exception in which police operations replace progressively the juridical power, according to Agamben’s provisions, we must expect a rapid and irreversible degeneration of the public institutions. 177

Importantly, the CNCDH

[W]ants to remind how much the state of emergency, and in general all juridical measures aiming at its perpetration, intrinsically bring effects for liberties and fundamental rights inherent to the rule of law. Paradoxically, crisis reinforces the state and at the same time it disrupts it, the risk is that the provisory limitation of some liberties goes beyond the strictly necessity of the exigencies. […] The simple invocation of a larger effectivity cannot justify the adoption, immediate and without discussion, of measures unnecessarily repressive. The biggest victory of the enemies of the human rights (terrorists and others) will be to actually endanger the rule of law through the emergence and the consolidation of an illusory security, which would be legitimized by the adoption of measures more and more intrusive of fundamental rights and liberties. 178

According to the twenty French personalities that asked to lift of the state of emergency, the corrosive and lasting effects related to the normalization of the state of emergency as an ordinary means to fight are often underrated because these effects are not always visible to the whole population and because the political debate wants to convince us of its harmlessness for the rule of law. 179

As “we judge right and wrong against the baseline of whatever we have come to consider “normal” behavior”180 a shift toward the normalization of the state of emergency could to lead to an acceptance of the notion that human rights are an impediment to combat whatever

176 Le Monde, Non à la pérennisation de l’état d’urgence!
177 Giorgio Agamben, De l’État de Droit à l’État de Sécurité
178 CNCDH, Déclaration sur l’état d’urgence et ses suites, para 6
179 Le Monde, Non à la pérennisation de l’état d’urgence!
180 Luban, 1451
threatens national security. This could put into question the inalienability of human rights\textsuperscript{181} as, in fact, governments become authorized to derogate from them for such long periods when facing what they consider as the threat to the life of the nation posed by terrorism.

The normalization of the state of emergency, and so the normalization of the new balance between power and the installation of a new legal-juridical system, could be equal to a threat to the life of the nation. In fact, Amnesty International defines the threat to the life of a nation as a threat to social cohesion, to the functioning of democratic institutions, to respect for human rights and the rule of law. Such threat “does not come from the isolated acts of a violent criminal fringe - however much they may wish to destroy these institutions and undermine these principles – but from governments and societies that are prepared to abandon their own values in confronting them.”\textsuperscript{182}

For instance, in a public discourse, Hollande affirms that France prides itself on the idea of being “the country of freedom, the homeland of human rights.”\textsuperscript{183} But “in its attempt to provide security to its citizens and to place itself as a symbol in the fight against Islamist fanaticism, France is sacrificing civil liberties on the altar of public safety, threatening social cohesion and impinging on the same human rights of which it claims to be an advocate.”\textsuperscript{184}

The elements examined in this chapter – namely the modification of the balance between powers and the reform of the legal-juridical system – become institutionalized by the process of perpetration and normalization of the exception as result of a considered lasting threat posed by terrorism. The very same emergency powers, which were originally invoked for the salvation of the nation and the continuation of its existence, paradoxically become the means that endanger the democratic life of the nation. The normalization of the exception, therefore modifies the democratic functioning of the institutions to a degree that could prevent a return to normality since the exception (the suspension of human rights) becomes the normality, the return to the previous situation, the old normality in which human right are protected and promoted in not evidently and surely possible.

However, as previously illustrated in chapter 3, according to the Committee, the purpose of the state of emergency is “the restoration of a state of normalcy where full respect for the

\textsuperscript{181}World Conference on Human Rights, Vienna Declaration and Programme of Action, Vienna on 25 June 1993, Article 5 states that “All human rights are universal, indivisible and interdependent and interrelated.”

\textsuperscript{182}AI, \textit{Dangerously Disproportionate}, p. 8

\textsuperscript{183}Le Lab Europe 1

\textsuperscript{184}Hubert
Covenant can again be secured.”185 This is not a legally binding interpretation as much as it is undeniably illustrative of the ethos of the provision. That being said, the normalization of the state of emergency, with all the related dangers above illustrated, may prevent such return to a situation in which human rights can regain their primary role.

Since this process of normalization is mainly caused by the terrorist justification, because vaguely defined in its contents (paragraph 4.4.) and debatable equal to an “exceptional and imminent” threat to the life of the nation (paragraph 4.5.), the answer to the lex ferenda question related to the extension of the state of emergency – namely, should terrorism constitute a legitimate justification for the extension of state of emergency? – is no.

8. Conclusions

The fact that the declaration of the activation and extensions have been accepted by the European and international institutions implies that these fulfill the legal requirements, inter alia the existence of a “threat to the life of the nation” posed by terrorism.

Also, the practice of the Court has been to accept the evaluations of the national institutions in respect of the existence of such threat and on the definition – or better decision – of what constitutes such a threat (except for the military Coup junta declared in the Greek case). As the Court considers the national authorities in a better position to evaluate the contingencies of their socio-historical contexts, it is unlikely, although not impossible, that this will be the case also with these two countries. Moreover, in the past the Court has usually accepted the notion that terrorism represents a threat to the life of the nation.186 The Court establishes the legality, being the holder of the judiciary power. In light of all these considerations, the activation and following extensions of the state of emergency in France and Turkey is legal. This means that the answer to the first sub-question concerned with the lex lata level (does terrorism constitute a legitimate justification for the activation and extensions of the state of emergency?) is yes.

However, we still have the prerogative to dissent with the Court. By virtue of this dissent, I believe that the wide space that is allocated to countries, being left independently to evaluate when there is a threat, what that threat is (terrorism), what is defined as terrorism and who is a

185 General Comment no. 29, para 8
186 For instance, Brannigan and McBride v. the United Kingdom; Marshall v. the United Kingdom; Aksoy v. Turkey; A. and Others v. the United Kingdom
terrorist. This space comes directly from the state of emergency which also allows states to suspend our guarantees against states’ arbitrariness, namely our human rights. The combination of all these elements is a threat to the functioning, and potentially the very existence of democracy.

On the other hand, I recognize that terrorist attacks are the despicable manifestations of the more broad and general terrorism phenomenon. These attacks hit the lives of innocent people and threaten, in the reality, the life of the nation. This reasons leads me to the final answer to the lex ferenda question should terrorism constitute a legitimate justification for the activation of the state of emergency? Yes, but only on the condition that the state of emergency was limited to the imminent and exceptional circumstance (the attacks) and not to the general and vague threat of the terrorist phenomenon.

This answer already suggest the answer to the lex ferenda question on the extension, given that since the general phenomenon of terrorism is unfit for the activation, it seems unlikely that could be legitimate for the extensions. But this is not the only element that I considered for my answer. The temporary extensions jeopardize the democratic functioning of the government, in terms of procedures, and eventually of the values at its core. This modification may deeply undermine the possibility to return to a status of normal enjoyment of our human rights, which is the ethos of the state of emergency provision.

Moreover, terrorism is a vague concept that does not fit the imminent and exceptional definition of public emergency. It also challenges the application of the time limitation principle which is possibly the most important guarantee against the arbitrary exercise of the state of emergency. Further, I discussed how the most effective way to fight in a durable and effective way terrorism is through the respect, protection and fulfilment of human rights, rather than their suspension.

In the light of all these elements, terrorism should not be considered a legitimate justification for the extension of the state of emergency.
Table of References

International Conventions

Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950

UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966

List of Judgements


Branningam and McBride v. the UK Series A no 258 (1993)


General Comment and Advisory Opinions

Commission Nationale Consultative des Droits de l’Homme, Avis sur le projet de loi constitutionnelle de protection de la Nation [Advise on the Draft Constitutional Law for the Protection of the Nation], 18 November 2016 (mine translation)


Report by the UN Special Rapporteur, Mr. Leandro Despouy, on the Question of Human Rights and State of Emergency, 23 July 1997


Laws, Decrees and Proposed Draft

France

Loi 55-385, 3 Avril 1955, relative à l'état d'urgence (version consolidée au 29 Mars 2017)

Loi 86-1020, 9 Septembre, 1986
Loi 2006-64, 23 January 2006

Decree No. 2015-1475; Decree No. 2015-1476; and Decree No. 2015-1478, 14 November 2015


Turkey

Anti-Terror Law Act No. 3713: Law to Fight Terrorism, Published in the Official Gazette on 12 April 1991

Decree with Force of Law No. 667, July 23, 2016.

Decree with Force of Law No. 668, July 27, 2016

Decree with the Force of Law No. 680 which amends the Law on Police Duties and Responsibilities

Literature

Giorgio Agamben, Homo Sacer, Sovereign Power and Bare Life, Stanford University Press, Stanford, 1998


Michael Ignatieff, The Lesser Evil – Political Ethics in an Age of Terror, Edinburg University Press, 2004

Jacobs, White and Ovey, the European Convention on Human Rights, Oxford University Press, New York, 2010


Books Chapters

Mike McConville and Wing Hong Chui, Introduction and Overview in Research Methods for Law, Edinburg University Press, 2007


Articles

Giorgio Agamben, De l’Etat de Droit à l’Etat de Sécurité [From the Rule of law to the State of Security], Le Monde, 23 December 2015 – mine translation

Giorgio Agamben, the State of Emergency, extract from a lecture given at the Centre Roland-Barthes (Universite Paris VII, Denis-Diderot) in 2002. Available at http://www.generation-online.org/p/fpagambenschmitt.htm


Constance Hubert, France 2015: the End of Innocence?, in the SAIS Journal of Global Affairs, 1 April 2016


News Articles/Web resources


Le Lab Europe 1, Les contours encore flous de la réforme constitutionnelle voulue par Hollande, 16 November 2015. Available at: http://lelab.europe1.fr/les-contours-encore-flous-de-la-reforme-constitutionnelle-voulue-par-hollande-2621427

**Reports**


**Documents Related to the Official Proclamation of the Stata of Emergency**


Permanent Representation of Turkey to the Council of Europe, *Information on the terrorist attempt on 15 July 2016 and the Investigations Conducted against the Judges and Public Prosecutors*, registered at the Secretariat General on 24 July 2016. Available at: https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168069538c

Permanent Representation of Turkey to the Council of Europe, *State of Emergency Declared in Turkey following the Coup Attempt on 15 July 2016*, registered at the Secretariat General on 24 July 2016

Declaration Contained in a Letter from the Permanent Representative of Turkey to the Council of Europe, 21 July 2016, registered at the Secretariat General on 21 July 2016

Declaration contained in a Note Verbale from the Permanent Representation of France, 24 November 2015, registered at the Secretariat General on 24 November 2015. Available at:
Declaration Contained in a Note Verbale from the Permanent Representation of France, 25 February 2016, registered at the Secretariat General on 26 February 2016. Available at: 
http://www.coe.int/en/web/conventions/full-list/-
/conventions/treaty/005/declarations?p_auth=N5hF4XrW

Declaration from the Permanent Representative of France, 22 July 2016, registered at the Secretariat General on 22 July 2016

Declaration contained in a Note Verbale from the Permanent Representation of France, 25 February 2016, registered at the Secretariat General on 26 February 2016

Declaration from the Permanent Representative of France, 21 December 2016, registered at the Secretariat General on 22 December 2016

Statements

Statement of the Commissioner for Human Rights of the Council of Europe, Situation in Turkey, Strasbourg, 20 July 2016. Available at: 
http://www.coe.int/ru/web/commissioner/-/situation-in-turkey

Statement of the Commissioner for Human Rights of the Council of Europe, Measures Taken Under the State of Emergency in Turkey, Strasbourg, 26 July 2016. Available at: 

Press releases


UN Special Rapporteurs on Freedoms of Opinion, Expression, Assembly and Privacy, UN Rights Experts Urge France to Protect Fundamental Freedoms While Countering Terrorism, Geneve, 19 January, 2016

Counter-Terrorism Strategies

UN Global Counter-Terrorism Strategy. Available at: 

OSCE, Strategy to Address Threats to Security and Stability in the Twenty-First Century; Threats to security and stability in the twenty-first century, Maastricht 2003