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**Topic: STATE OF EMERGENCY AND ITS PROVISIONS IN THE
SUPREME CONSTITUTION**

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Resume:

This essay gives a global vision of the provision of the state of emergency in the constitutions from an historical, theoretical, legal, and practical perspective. The state of emergency is a contemporary measure broadly spread and used all around Europeans democracies. The objective of this work is to show how far the rights protected in the Constitution can be suspended in times of emergency.

This topic stress the supremacy and the function of the Constitution, as the supreme norm of the legal order. The internationalization and constitutionalization of the emergency provisions reveals the paradigm of the Constitution, the coexistence of constitutional core values and international law. The notion, the elements and the effects of the state of emergency are studied in this essay through the analysis of various examples in Spain, France and Turkey.

Este ensayo da una visión global de las previsiones del estado de emergencia en las constituciones desde una perspectiva histórica, teórica, jurídica y práctica. El estado de emergencia es una medida contemporánea largamente extendida y utilizada a través de numerosas democracias europeas. El objetivo de este trabajo es mostrar en qué medida los derechos protegidos en la Constitución pueden estar suspendidos en tiempos de emergencia.

Este tema pondrá de relieve la supremacía y la función de la Constitución, como norma suprema del ordenamiento jurídico. La internacionalización y constitucionalización de las medidas de emergencias subrayan el paradigma de la Constitución, que es la coexistencia de un cuerpo de valores constitucional y el derecho internacional. La noción, los elementos y los efectos del estado de emergencia están estudiados en este ensayo a través de la análisis de varios ejemplos en España, Francia y Turquía.

Table of Contents

INTRODUCTION

1. THE PROVISIONS OF EMERGENCY IN SUPREME CONSTITUTION	8
1.1. The historical idea of Constitutions	8
1.2. The constitution as a fundamental norm	11
1.3. Constitutional review and the principle of the rule of law	13
1.4. The constitutionalization and internationalization of emergency provisions	16
1.5. Coexistence of constitutional core values and international law	19
2. THE EXCEPTIONAL STATE OF EMERGENCY	20
2.1. The theories around the notion of state of emergency.....	21
2.2. Elements of the State of emergency in the European Convention of Human Rights	25
2.3. The non-derogable rights	28
2.3.1. Non-derogable rights in European Convention on Human rights	29
2.3.2. Non-derogable rights in International Covenant on civil and political rights	32
2.4. Effects of the State of Emergency	33
3. ANALISIS OF EMERGENCY PROVISIONS IN SPANISH, FRENCH AND TURKISH CONSTITUTIONAL SYSTEM.....	36
3.1. Spain and the evolutive regimes of exception.....	36
3.2. France, when the exception becomes the norm.....	39
3.3. Turkey: emergency provisions and fundamental rights	43
3.3.1. The constitutional provisions of the emergency measures	43
3.3.2. Parallel with European and international emergency provisions	44
3.3.3. State of emergency in Turkey and lack of judicial review	45
3.3.4. The effect of the state of emergency on human rights.....	47

CONCLUSION

METHODOLOGY

At the first sight I thought It will be hard to find in off information about the regulation of the state of emergency and It will be hard to redact sufficient amount of pages. But after few working sessions, I realized how large was my topic and how many information were available. The hardest part was to limit my work, stay focus on one direction and don't miss the objectives of my essay.

I tried to use an important variety of resources, to make my essay as rich as possible. I found a lot of legal references and university books in the library of my own university but as well in others universities (UPF Barcelona and UT1 Toulouse). I used different search engine, like Trobador, Dialnet etc. I have also been help with different article of juridical review from universities all around the world.

As I am French, I was really interested by the events that happened in France in the last 10 years and also really confused by state of emergency there. I wanted to know more about it and understand its functioning and compare it with other system. Compare it with Spain, because it is the country where I study and I thought that the two legal system has a lot in common and could be easily compared. And a comparison with Turkey because of the last recent events and because it is so different context.

I decided to write my essay in English because It was more challenging for me and I wanted to add an international dimension. I thought It could be an interesting idea to redact my essay in English in order to share it and have a bigger impact. As my thematic involves a lot of different international aspect and global problematics I found much more documents in English than in other languages.

My tutor, the PhD. Nuria Saura, helped me a lot as well, through her various corrections, and also by reminding me to stay focus on my objectives, limiting me and helping me to find the structure of my work.

Abbreviations:

- Art.: Article
- COE: Council of Europe
- ECHR: European Convention on Human Rights
- EU: European Union
- ICCPR: International Covenant on civil and political rights
- No.: Number
- UN: United Nations

INTRODUCTION

“There is more to life than simply increasing its speed.”¹

MAHATMA Gandhi

As said, speed is not always the good answer for peace, time is also necessary to get out of a problematic situation. The State of emergency or state of exception has referred to the situation in which a state is confronted by a mortal threat and responds by doing things that would never be justifiable in normal times, given the working principles of that state. The state of exception uses justifications that only work in extremis, when the state is facing a challenge so severe that it must violate its own principles to save itself².

The topic that we are going to develop is the provisions on emergency measures in the Constitution. In democratic regimes, we see the Constitution as a fundamental norm, the norm of the norms, the one that nothing can affect. A Constitution is at the top of the legal order but also at the base of all the other one. This “super norm” is the results of history and a background of a state and its society. Constitution also finds its legitimacy in the popular approval required to be adopted. In all constitutions we can find a series of values that are considered the “core” of the Constitution and cannot be derogated. During time of danger for the safety of the nation, or when some events or elements can threaten the political order, the Constitution sets some measures to prevent this kind of threats. Those are the “emergency measures”, they allow the authorities to declare the State of emergency and permits a reorganization of the repartition of powers in order to face those security issues. Those measures can be dangerous and lead to

¹ MAHATMA Gandhi and ATTENBOROUGH Richard, *The words of Gandhi*, Newmarket Words Of Series, 2001

² SCHEPPELE Kim, ‘The International State of Emergency : Challenges to Constitutionalism after September 11,’ , *Journal of Constitutional law* 2006

authoritarian consequences because it allows a new repartition of power, empowering the executive. That's why it needs to be used in the respect of the principle of necessity and proportionality and to be limited by a judicial review. The measures adopted during the state of emergency can sometimes affect some values and principles set in the Constitution approved by the people.

The point in the essay will be to see how a Constitution can forecast emergency measures, measures that can affect and in some cases suspend some principles of the Constitution. I decided to develop the topic of the state of emergency, because in the last 2 decades we seemed to enter in the security era. The security is a priority and justify all the measures taken. However, there are still a lot of armed conflicts and acts of terrorism. In reaction to an external threat, the answers of some states seem to be to adopt emergency measures. The problem now is to identify when the declaration of the state of emergency is justified. The major threat for contemporary democracies is terrorism. However, terrorism is a permanent threat, this war against terrorism leads to abuses and permanent state of emergency. The emergency becomes the norm. We are going to see how far the rights protected in the Constitution can be suspended when the state integrity is threatening.

This is the great paradox of the exceptional measures, how some aspects of the supreme norm and highest norm of the legal order can be suspended. In recent movement of internationalization of Constitution, this one must respect and protect a certain standard of human rights. There is multilevel protection of a series of non derogable rights. To make all these observations more concrete we are going to see some examples of state of emergency practices trough the presentation of the relevant practical example of Spain, France and Turkey.

1. THE PROVISIONS OF EMERGENCY IN SUPREME CONSTITUTION

Analyzing the development from the ancient to the modern concept of constitution reveals elements which have also been brought to light in the current discussion on an international constitutional law: giving the community a legal framework and continuity guaranteed by the constitution; the constitution's high authority; its function to maintain freedom; and its supremacy, but also its procedural character. The actual concept of constitution emerges in the modern age only.³

1.1. The historical idea of Constitution

Before to enter in the emergency provisions issues, I thought appropriate to remind the basics of the construction of the Constitution and the constitutional ideology.

Because the term Constitution literally means "*creation or foundation*", in the Constitution the people create and found a government, which has no legitimate power apart from the people's will expressed in the Constitution⁴. The Constitution is a document, according to which the country carries out its operations and also used to protect the rights of the citizens. That's why as the foundation of the society it is important to present it, to understand the provisions of emergency measures in the Constitution.

The theory of John Locke in *Ensayo sobre el gobierno civil* (1690)⁵ is based on the idea of the transition between a "State of nature" to a "Social state". He explains through contractual analogy, that society politically organized was built on the acceptance of the social contract, "*le contrat social*". The construction of this social contract was necessary to build a society able to guarantee the

³ KLEINLEIN Thomas, *Constitutionalization in International Law*, Max Planck Institut, 2012

⁴ CENTER FOR CONSTITUTIONAL DEMOCRACY, *The importance of democratic constitution*, Center for Constitutional democracy, *Indiana University Review*, 2012

⁵ LOCKE John, *Dos ensayos sobre el gobierno civil*, S.L.U Espasa libros, 1997

protection of the rights of citizens. In this struggle against the state of nature, the first constitutions were born as the *agreement of the people* during English revolution (1640-59). The idea of this document was to represent the power of the community and the importance to take decision with majority.

Latter, Sieyes⁶, one of the first constitutional theorists, talked about the national sovereignty which belongs to the Nation as a social body composed by individuals sharing the same collective identity (with a common history, with common costumes ...). The National sovereignty is when political legitimation is turned into legal legitimation. Rousseau⁷ used the concept of the popular sovereignty represented by the idea of the general will, the idea that the interest of the collective must sometimes have precedence over individual will. Rousseau's central argument in *The Social Contract* is that government attains its right to exist and to govern by "the consent of the governed." He saw the legislative powers as established in the people itself, because the laws in their express the general will.

Following these ideas *The Declaration of the Rights of Man and of the Citizen*, in French, *Déclaration des droits de l'homme et du citoyen* of 1789 of the French Revolution declare that the rights of man are held to be universal: valid at all times and in every place, pertaining to human nature itself. It became the basis for a nation of free individuals protected equally by law. The new role of the Constitution is to set a series of rights that are guaranteed by the Constitution and that have to be respected in the society in order to protect the individual's rights of citizens. The Constitution is used as a way to protect rights in the State and not only as a way to organize the repartition of power in the State.

The role of a Constitution in the repartition of power in the society is governed by two principles: the separation of powers and the idea of the subordination of

⁶ RUBINELLI Luci, *How to think beyond sovereignty: On Sieyes and constituent power*, SAGE journals, *European Journal of Political Theory*, 2016

⁷ ROUSSEAU Jean-Jacques, *Le contrat social*, Collection complète des œuvres Genève, 1762

power to the Law. Locke was the first one to defend the idea of the division of power in legislative, executive and judicial power. Montesquieu in “*L’Esprit des lois*”⁸ of 1748 promote the need of checks and balance of power, for him the different powers should limit each other’s and It is necessary to guarantee the rights of the citizens. The principle of the subordination of power to the Law was first was first exposed in the *Bill of rights* 1689, It represents the necessary conditions to limit the absolute power, protect democracy and prevent arbitrary decisions. We saw from an historical and theoretical perspective the formation of the ideology behind the construction of a Constitution. The constitution was created as a social contract to protect the rights of citizens, It represents the national sovereignty found in the people and organize the repartition of power in the society.

The Austrian author Hans Kelsen published in 1934 the influent book “*Pure Theory of Law*”⁹. In his theory of positive law, as forming a hierarchy of laws which start from a basic norm (*Grundnorm*) where all other norms are related to each other by either being inferior norms, when the one is compared to the other, or superior norms. To observe the validity of different norms in the legal order, Kelsen defined a pyramid of norm, the norms of inferior rank is valid it respected the legal process set by its superior norm. At the top of this pyramid, we have the basic norm, the fundamental norm. All legal norms of a given legal system ultimately derive their validity from one basic norm.

The hierarchical structure of the legal order of a State presupposes the basic norm, the constitution as the highest level within national law. The Constitution in the material sense consists of those rules which regulate the creation of the general legal norms. For him, the Constitution contains a lot of different norms, norms which are no part of the material Constitution. But it is in order to safeguard the norms determining the organs and the procedure of legislation that a special solemn document is drafted and that the changing of its rules is made especially difficult.

⁸ MONTESQUIEU, *L’esprit des lois*, GF Flammarion, edition 2013

⁹ KELSEN Hans, *The pure theory of Law*, University of California Press, 1934

1.2. The constitution as a fundamental norm

The vast majority of contemporary constitutions describe the basic principles of the state, the structures and processes of government and the fundamental rights of citizens in a higher law that cannot be unilaterally changed by an ordinary legislative act. This higher law is usually referred to as a Constitution.

The Constitution is characterized by the principle of supremacy. This principle shouldn't be mixed up with the idea of hierarchy. The supremacy refers to the condition of the constitution as the norm which found and create legally the State and the organized political community. The supremacy exists between the Constitutions and the Law, in other words between the constitution and all the legal decisions, authorities and norms. Its supremacy is a unique characteristic and has 3 manifestations:

- the efficacy of the Constitution: as a founding norm of the State and the community which compose it, which make it exist by the Law. It sets the process of creation of others norms in the legal system and allows the interpretation of the other norms.
- the quality of the Constitution: it is the fundamental norm of the State.
- the position of the Constitution: as the superior norm, the Constitution prevail on the other norms in the legal system. It has the capacity to impose criterion and standards that the other norms should respect and be conform with. It also has the aptitude to make the nullity of unconstitutional acts and base the invalidity of norms which contradict it.

What is really relevant of the supremacy of the Constitution is its direct application, it can be alleged in front of all the judges. This need of direct applicability of the Constitution came after the World War II, when the feeling that the lack of recognition of the applicability of the constitutions had facilitated

the rise of forces against the constitutional order during the fascist and totalitarian regimes. The point was to reaffirm the supreme position of the Constitution to prevent abuses and violations of basic constitutional principles.

To emphasize the primacy of the Constitution let's introduce the German constitution as an example. The failure of the Weimar Republic and the experience of the totalitarian Nazi regime did not only induce the framers of the new constitution called the *Basic Law* to cast human rights and freedoms as enforceable subjective rights. They put the *Basic Law*¹⁰ at a special rank and explicitly orders that the basic rights shall bind the legislature, the executive and the judiciary as directly applicable law. A relevant example of this will to put the protection of the human dignity in the Constitution as a priority can be observed in the first article of the *Basic Law*: *“Article 1(1) Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.*
(2) The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world.
(3) The following basic rights shall bind the legislature, the executive and the judiciary as directly applicable law.”

As Dieter Grimm who, as justice serving on the German Constitutional Court redaction rightly said: *“It was the firm consensus of all political forces active in the constitutional assembly to prevent another failure of representative democracy in Germany and to establish effective safeguards against dictatorship and disregard of human rights. The constitution should therefore be the paramount law of the land and claim priority over any government act”*.¹¹

The Constitution has been built in order that the basic constitutional principles which structure the State such as democracy, separation of powers, the rule of law and respect for human dignity may not be altered at all. The aim was to prevent

¹⁰ *The basic Law for the Federal Republic of Germany*, Grundgesetz für die Bundesrepublik Deutschland, Language Service of the German Bundestag, 1949

¹¹.DIETER Grimm, ‘Human Rights and Judicial Review in Germany’ , *Human Rights and Judicial Review*, 1994

the enemies of democracy from overturning it using its own instruments, like majority rule.

1.3. Constitutional review and the principle of the rule of law

The manifestation of the supremacy of the Constitution is also the possibility of constitutional review. The constitutional review is the ability of judges to supervise the Constitution. The centralized model of constitutional review was born in Europe after World War I.¹² Most European countries have established special constitutional courts. An ad hoc court that are uniquely empowered to set aside legislation that runs counter to their constitutions. Only the constitutional court is empowered to hold that a norm is constitutional or not. If it is not constitutional the court may invalidate the norm with general effects (effects *erga omnes*) because it contravenes the constitution. There are basically two ways used in order to ask for a constitutional review of legislation:

- constitutional challenges: brought by public institutions (Parliament, ombudsman, government etc).
- constitutional questions: are raised by ordinary judges, when he has to decide a particular case, if the judge believes that the applicable norm is unconstitutional or doubts its validity, he can refer the question to the constitutional court. The constitutional court will only answer on the constitutionality of the statute not on the resolution of the case itself.

The possibility to have a judicial review included in the Constitution (in the Spanish Constitution in the Title 9 “Del tribunal constitucional”¹³) gives a legal certainty. To create a special and single court in charge of constitutional review of legislation is necessary to foster a legal certainty and avoid contradictions

¹² COMELLA Victor, *The European model of constitutional review of legislation: Toward decentralization*, Oxford University Press and New York University school of law, 2004

¹³ *Constitución Española de 1978*, BOE núm. 311, de 29 de diciembre de 1978, Título IX.

between the courts. On that point the European model is different from the American one who doesn't adopt such a centralized constitutional review.

Judicial review give rise to a "democratic objection" because the legislation in question was the product of a democratic legislature. But the members of this special court are selected in a democratic way and has to be often renew.

Legal order need stable constitutions protecting the division of power, but they also need constitutional flexibility to adjust to changing social and political conditions. Constitutional Rigidity is usually considered a necessary condition for "strong constitutionalism". To ensure this normative superiority, the Constitution includes an amendment procedure making it impossible for parliamentary majorities to change the Constitution by means of the ordinary legislative procedure. The rigidity of the Constitution is also part of the supremacy of the Constitution because it reaffirms the concept of legal stability and security and allows its protection in front of abusive constitutional changes.

Government should not be free to take any kind of decision it wants, it should be constrained by enduring legal principles. The rule of law has to be the ultimate ruler and not the government. It is a necessary principle in order to protect, to establish and defend enduring legal principles to limit the government. To protect this principle in the best way it has to be consecrate in an entrenched, written constitution.

For democratic constitutions, the people create the Constitution, so the people define the exact meaning of the rule of law for their country. This popular creation will help protect the rule of law, much better than if the rule of law were imposed from above.¹⁴ The people will be more likely to be devoted to the rule of law and to rally to its defense if it is their own creation. A popularly adopted constitution will inspire more protective loyalty; because the Constitution cares for the people, the people will want to care for it.

¹⁴ CENTER FOR CONSTITUTIONAL DEMOCRACY , *The rule of law and Constitutions*, Center for Constitutional democracy, *Indiana University Review*, ccd.indiana.edu/file_download/31/vruleoflaw_12.pdf, 2012

A good Constitution should respect the principle of checks and balances which means that the Constitution will divide power among various office-holders, so that it will be very difficult for any one person or body to dominate. As a result, if one person or body tries to violate the Constitution, the others will be able to push back.

Then a good Constitution, not only defines and adopts the rule of law; it also provides a governmental structure to protect it. There is no universally agreed meaning of the rule of law, but It is admitted that in a rule of law country, the government must be subject to enduring legal principles, but not all the countries agreed about which principles. As, we saw it earlier It also depend on the historical, social and political background of this country, its past will define what will be its priorities now.

The most common principles admitted are:

- The legal regularity: Legal regularity refers to the idea that laws must be made in such a way that the people can know the rules that will apply to them and so can plan accordingly. To ensure that the people can know the law and plan, legal regularity requires that laws must be published, prospective (not applying to acts done before the law was adopted), clear and general (applying to all alike, both rich and poor, weak and powerful, etc.).
- Democracy: refers to a political system in which the people govern, most commonly by choosing their representatives in free, fair, multiparty elections. But although the rule of law mandates democracy in general, it does not specify a particular form of democracy (presidential systems, parliamentary systems etc)
- Individual rights: Governments may not intrude on these rights without extraordinary need, such as the safety of the country or the prevention of mass murder, it may not restrict these rights merely in the interest of

“public order”. The individual rights are areas of autonomy of every countries and establish a set of rights considered to be the most important to individuals as citizens. to individuals as citizens. But different countries will appropriately choose to protect different sets of individual rights according to their particular circumstances.

To make the rule of law a reality, countries need a system of courts or court-like bodies that are independent, professionally trained, and faithful to the law.

1.4. The constitutionalization and internationalization of emergency provisions

The constitutionalization of emergency provisions began in revolutionary France, was first introduced in her 1795 constitution and took off from there to Latin America via the Iberian Peninsula. It is the Constitution of the Year III is the constitution that founded the Directory, it established that the central government retained great power, including emergency powers to curb freedom of the press and freedom of association.¹⁵ Historians of emergency constitutions such as Rossiter (2009)¹⁶ or Friedrich (1968)¹⁷ have stressed the differences between the (French) *état de siège* and the (British) martial law tradition. This ties in well with the legal origins literature that separates three civil law origins (French, German, and Scandinavian) from the common law tradition.

Latter the majority of the countries set in their constitutions some measures of emergency in response to perceived crisis for the nation. The Constitution operates in normal times, in peacetime, and in difficult times, that is in times of war, times of national security crises, times of emergency is employed. This

¹⁵ SUTHERLAND, *The French Revolution and Empire: The Quest for a Civic Order*, D.M.G 2nd edition, 2003

¹⁶ HONIG Bonnie, *Emergency Politics: Paradox, Law, Democracy*, Princeton University Press, 2009

¹⁷ BJORNSKOV Christian and VOIGT Stefan, *The Determinants of Emergency Constitutions*, University of Hamburg, Institute of Law and Economics, March 23 of 2016

provision of emergency measures in the national Constitution has been influenced by the international legal order. We understand that this provision is thought at different level of legal framework (multi-level approach). At the international law level, the Security Council of the United Nations (UN) starts legalizing for global security after the Cold War. The events of the 9/11 provided the occasion for a new discourse of a global state of emergency, and the need for a permanent war on terror. The security council adopted a Resolution¹⁸ where states are ordered to prevent and combat terrorism, to strengthen border security and prevent the movement of terrorists in part by tracking migrants and refugees, and to become parties to the UN.'s anti-terrorism conventions and protocols. Most remarkable is that states are required to change their domestic laws to criminalize terrorism and its financing as a separate offense in national codes with harsher punishments than those attached to ordinary crimes. Each nation is called upon to upgrade its legislation and executive machinery to “fight terrorism.”

Kim Scheppele¹⁹ criticizes this “global state of emergency” because this version of global governance undermines the domestic separation of powers in favor of domestic executives and greatly strengthens the executive power by attenuating the parliament role (setting of surveillance program, moves toward preventive detention and aggressive interrogation by security-minded domestic forces). But emergency governance is not lawless, the Council's emergency governance involves rule making, and legislation that is technically legal.

According to the Charter²⁰, the Security Council have the possibility to invoke the concept of implied powers, and the principle of effectiveness to justify the resolutions as the necessary exceptional response to the emergency situation created by transnational terrorism. In other words, the Security Council can suspend some Charter rules and norms, assuming plenary powers, abrogating the

¹⁸ UN, Resolution 1373 of the Security Council of the United Nations at its 4385th meeting, September 2001

¹⁹ SCHEPPELE Kim, *The International State of Emergency : Challenges to Constitutionalism after September 11*, September , *Journal of Constitutional law*, 2006

²⁰ UN, Article 29 of the United Nations Charter of 26 of June of 1945

rudimentary separation of powers and existing constitutional guarantees of due process and other human rights of suspects in the war on terror, so as to act effectively in the face of threats to the basic order and to restore it once the threats are dealt with.

After all, the Security Council is an emergency executive, established to identify and respond to crises, to declare the exception and to protect international peace and security, on the treaty reading, and the order created by the Charter and public international law, on the constitutional interpretation.²¹ But this justification for deviating from existing norms would have to fit in the framework of the exceptional and temporary nature of police enforcement measures.

The legislative powers deduced from the implied powers are questioned by some member's states arguing that this is not a function envisaged in the Charter and that the Council is structurally inappropriate to legislate for the U.N. because it is not a representative body.

In my perspective, I am not convinced that transnational terrorism poses the kind of existential threat to the world order that could justify instituting a general state of emergency rule or the self-attribution of plenary powers on the part of the Security Council to legislate and institute a new form of global law. The constitutionalization of the Public International Law regulating the global political system has to be understood as the institutionalization of a new dualistic sovereignty regime, in which states retain their legal and political autonomy and constituent authority but within which the supra-national legal order of a revised U.N. Charter is also construed as autonomous and constrained by constitutionalism. The challenge here is to create a new form of global law by constitutionalizing the international law in a world of sovereign states with different characteristics and respecting their own constitutions.

²¹ ALVAREZ Jose, *International Organizations as Law Makers*, Oxford Monographs in International Law, 2006

1.5. Coexistence of constitutional core values and international law

The point here is to determine the coexistence of constitutional core values and international law. It is a really important that we are going to stress here because we will understand how the international law has influenced the content of the constitutions and how the constitutions adapted to this international provisions. To understand we can use the jurisprudence of the Court of Justice of the European Union (CJEU) with the *Kadi* Case.²² The Court essentially had to decide whether a UN Security Council resolution should enjoy primacy over European Union (EU) law. The case is about *Kadi*, identified as a supporter of Al-Qaida and he was sanctioned for an assets freeze. The EU transposed this UN sanction by a regulation which *Kadi* then attacked before the EU Courts. After the examination of the respect from the Security Council of the *ius cogens*, in particular certain fundamental rights, the General court concluded that there was no infringement of this standard. The CJEU had to review the lawfulness of the EU regulation transposing the resolution. Its central argument was that the protection of fundamental rights forms part of the very foundations of the Union legal order. Accordingly, all Union measures must be compatible with fundamental rights. In the case of *Kadi*, the CJEU considered that detainee's rights were not respected, because "had not been informed of the grounds for his inclusion in the list of individuals and entities subject to the sanctions. Therefore he had not been able to seek judicial review of these grounds, and consequently his right to be heard as well as his right to effective judicial review and the right to property had been infringed."²³

The conclusions of the CJUE in *Kadi* case defend the autonomy of EU Law. In this perspective "obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the European Community

²² Case C-402/05 P and C-415/05, P. *Kadi and Al Barakaat International Foundation v. Council and Commission*, on the 3rd of September of 2008

²³ KOKOTT and SOBOTTA, *The Kadi Case – Constitutional Core Values and International Law – Finding the Balance? The European Journal of International Law*, 2012, <http://www.ejil.org/pdfs/23/4/2343.pdf> [Last visited 1 May 2017]

Treaty”²⁴. The choice of a somewhat dualist approach in this particular context has to be understood as a reaction to a specific situation that may occur in multilevel systems. In such systems it is possible that the level of protection of fundamental rights guaranteed by a higher level does not attain the level of protection the lower level has developed and considers indispensable.

The insufficient protection of fundamental rights at UN level therefore required the adoption of a dualist conception of the interplay of EU law and international law²⁵. Basically, the CJEU gives proper consideration to the measures against terrorism but to find a balance between constitutional core values and effective international measures against terrorism is not easy.

2. THE EXCEPTIONAL STATE OF EMERGENCY

After World War II, the horror of the Holocaust and the concentration camps led the international community to develop universal human rights, grouped under a solemn declaration, in order to prevent that tragedy from happening again. However, in the last twenty years the world has, according to Giorgio Agamben, witnessed a renewed emergence of violation of human rights.

These violations are illegal, they are not completely outside the law, but they are permitted under the extraordinary circumstance of the “War on Terror”. The first decade of the new millennium can be understood as a security decade. The terrorist attacks of 9/11 are the symbol of the threat and the legitimization of the reaction of the international community to these attacks. The security challenge is affecting constitutional values.²⁶What Agamben has rightly stressed is that the concept of a “state of exception” under which the legal order is not valid, that a lot of countries implicitly adopt in the fighting against terrorism, is the same behind the concentration camps²⁷. Nazi Germany, in fact, did not operate in violation of

²⁴ Opinion of Advocate General Poiares Maduro *Kadi and Al Barakaat*, *supra* note 1, at para. 285, on the 3rd of September of 2008

²⁵ SCHEININ Martin, ‘*Is the ECJ Ruling in Kadi Incompatible with International Law?*’, Terrorism and human rights, Cheltenham, 2009

²⁶ Proceedings of the 4th Vienna Workshop on international Constitutional Law, 2008

²⁷ GIORDANENGO Davide, “The State of Exception”, *E-international relations students review*, 2016

the Weimar Constitution, but within the framework of its articles that allowed the government to suspend individual rights in case of necessity. Thus, “from a juridical perspective, the entire Third Reich can be considered a state of exception that lasted twelve years”.²⁸

A state of emergency can lead to abuse and can be dangerous. It threatens to turn the “basic democratic structures into mere appendages of an arbitrary authority” and creates a situation where the “temptation to disregard constitutional freedoms is at its zenith, while the effectiveness of traditional checks and balances is at its nadir.”²⁹ There is a tragic tension “between democratic values and responses to emergencies” where states have to question whether the violation of fundamental rights can be justified in the name of the continued existence of the democratic state.³⁰

In our essay we will discuss about the notion of state of exception as paradigm of government for contemporary international politics. We will center our analysis around an European perspective and the term “state of emergency” will be understood as it is defined by the European Convention on Human Rights.

2.1. The theories around the notion of state of emergency

The notion of the state of emergency is plural and could be defined differently according to the perspective adopted. In the following part, we will see few various authors debating on this notion. Historically, the state of emergency was intended to settle massive internal conflicts posing a threat to the state. Today, many authors describe the state of emergency a legal means of fighting the dangers emanating from global terrorism. This definition is not so clear because the concept of the state of emergency is an attempt to legally explain and regulate

²⁸ AGAMBEN Giorgio, *The State of exception*, University of Chicago Press, 2005

²⁹ GROSS Oren , “Chaos and Rules: Should Responses to Violent Crises Always be Constitutional?”, *Yale Law Journal* ,2003

³⁰ LAZAR, Nomi Claire, *States Of Emergency In Liberal Democracies* , Cambridge University Press, 2009

phenomenon whose main characteristic is the deregulation of legally regulated fields.

According to the Carl Schmitt's theory the state of emergency is the original source of sovereignty.³¹ The author uses the term of "state of exception" called in German, *Ausnahmezustand*, as a concept in his legal theory, similar to a state of emergency, but based in the sovereign's ability to transcend the rule of law in the name of the public good.

This concept is developed in Giorgio Agamben's book *State of Exception* of 2005.³² Schmitt argues that attempts to legalize the exceptional situation are doomed to failure. It is impossible to anticipate the nature of future emergencies and to determine in advance what means might be necessary to deal with them. As a result, the positive law can at best determine who is to decide whether there is an emergency that requires a wholesale suspension of the law. But the sovereign decision cannot be guided by existing material law. For him, the sovereign is the one who decides on the state of emergency. Its authority to suspend the law does not stand in need of positive legal recognition, since the law's applicability itself depends on a situation of normality secured by the sovereign. We understand that to declare the state of emergency in a situation of abnormality is a sovereign prerogative of the authorities and they are legitimate by the positive law itself.

For Agamben, the sovereign exception gives rise to the juridical order. 'The rule, suspending itself, gives rise to the exception' – that is, the juridical order, suspending its own validity, produces the exception of bare life – 'and, maintaining itself in relation to the exception, first constitutes itself as a rule'³³

³¹ SCHMITT Carl, *Political Theology. Four Chapters on the Concept of Sovereignty* (1922), trans. by G. Schwab, Chicago: University of Chicago Press, 2005.

³² AGAMBEN Giorgio, *The State of exception*, University of Chicago Press, 2005

³³ AGAMBEN Giorgio, 1998. *Homo Sacer: Sovereign Power and Bare Life*. Translated by D. Heller-Roazen. Stanford, California: Stanford University Press

The state of exception is the recognition of law's outside but it simultaneously suggest sovereign attempts to include that very outside within the law³⁴.

The first decade of the new millennium can be understood as a security decade where the war against terrorism is one of the main priority. That's why the notion of the state of emergency change as well.

In a more contemporary perspective we have the theory of Ackerman, for him the legitimacy of the state of emergency is based on the social and political effects of terrorists attacks. The basis of his concept lies within what he calls the "reassurance function". In times of panic and disorder the way to avoid slow dissolution of public order and society the government should dispose strong instruments to restore confidence in public authority quickly. In Ackerman's words : " The best way for government to respond to these fears is to do something large and dramatic to reassure the populace that the breach of sovereignty was only temporary and that the state is taking every plausible step to prevent a second strike".³⁵ Ackerman mainly proposes a system of concentration of power but the necessity of checks and balances to control the state of emergency.

According to the theory of Depenheur in front of terrorist threats we discovered a new legitimacy for emergency measures³⁶. For him, the Islamic terrorists have left the ground of legality and are out of the social contract. The "war on terror" takes place within a functioning society and is extraterritorial. Consequently, it leads to a parallelism of normality and exception. He sees the exceptional conditions a way to enable the state to react immediately. In front of this new "hidden threat", the State of emergency does not to be declared but shall be inherent in the constitutional order.³⁷ For him, the enemy has decided freely to

³⁴ AGAMBEN Giorgio, *The State of exception*, University of Chicago Press, 2005

³⁵ ACKERMAN Bruce, *The Emergency Constitution*, Yale Law School Legal Scholarship Repository, 2004

³⁶ DEPENHEUR Otto , *Selbstbehauptung des Rechtsstaats*, Schoningh, 2007

³⁷ DEPENHEUR Otto , *idem*, 61-65

stand beyond the law, so there is no reason why a state ruled by law should owe the benefits of the rule of law for people whose goal is the annihilation of this system. We understand that for him a terrorist cannot be a subject of fundamental rights or a legal subject because of the goal that is pursuing. But he recognizes that this model can represent dilemma to a democratic state between more legal guarantees or more security. It will have a permanent struggle fight of life and death which can only be won if the state gives up some of its special guarantees.

We can notice that Ackerman and Depenheur have the same conception of the state of emergency whose purpose is to restore public order after terrorist attacks and protect society further attacks but that could be only achieved on an empirical perspective of the origin of the danger. But on that last point they propose two different theories. For Depenheur, as terrorism pursue the destruction of the system, the democratic state in a permanent struggle of life and death has to give up some of its special guarantees in order to prevent the destruction of its foundations. For Ackerman, even a major terrorist attack cannot lead to the collapse of the state. For that reason, the state of emergency should only serve to reassure the trust and the confidence of the people of its government in order to avoid the slow erosion of society which would allow authoritarian tendencies to gain in strength and finally take over.

In my perspective, the actual terrorism suffered in western countries has not destabilized the democratic system and cause a loss of confidence in the government sufficient to justify a need of the elaboration of emergency constitution for preventing and fighting terrorist attacks.

According to the risk based theory of Beck³⁸, global risks are producing 'failed states' who lead to "failed constitutions". In a world risk society, Beck distinguish between ecological and financial dangers, which can be conceptualized as side effects, and the threat from terrorist networks as intentional

³⁸ BECK Ulrich, « Living in the world risk society », *Economy and Society* , Volume 35 Number 3, Routledge, August 2006

catastrophes; the principle of deliberately exploiting the vulnerability of modern civil society replaces the principle of chance and accident. Beck is using in his theory of risks, all the elements justifying the adoption of exceptional measures. According to him, uncertainty, insecurity and lack of safety undermine and reaffirm state power beyond democratic legitimacy. The state structure evolving under the conditions of world risk society could be characterized in terms of both inefficiency and post-democratic authority, authoritarian state regimes.

2.2. Elements of the State of emergency in the European Convention on Human Rights

The State of emergency could be defined as an instrument which can be used against an enemy whose goal is the destruction of the democratic system, as its concept is to deal with extreme situations.

When a state of exception is put into force, the balance of the relationship among individual rights and freedoms and the authority of State organs or administrative agents is altered and human rights, as a consequence come under pressure. Moreover, the balance in the relationship between state organs is significantly changed and executive organs gain more power.

Article 15 of the European Convention on Human rights (ECHR)³⁹, adopted in 1950,⁴⁰ allows states to derogate some rights and freedoms of the Convention:

“ In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.”

³⁹ COE (Council of Europe), *European Convention on Human Rights*, Rome, 1950

⁴⁰ *Idem*, art 15.

In such a way, the emergency must be of a particular magnitude to justify derogation. In addition, the state is bound by the principle of proportionality in that the measures taken must be “strictly required by the exigencies of the situation”. Article 15 is a derogation clause. It affords to Contracting States, in exceptional circumstances, the possibility of derogating, in a limited and supervised manner, from their obligations to secure certain rights and freedoms under the Convention. The text of Article 15 inspired the article 4 of the International Covenant on Civil and Political Rights (ICCPR)⁴¹ which give some provision on the state of emergency at the international level. Article 15 is divided in 3 parts:

- Article 15 § 1 defines the circumstances in which Contracting States can validly derogate from their obligations under the Convention. It also limits the measures they may take in the course of any derogation
- Article 15 § 2 protects certain fundamental rights in the Convention from any derogation
- Article 15 § 3 sets out the procedural requirements that any State making a derogation must follow.

The first paragraph of the article 15 list 3 conditions for a valid derogation:

- it must be in time of war or other public emergency threatening the life of the nation;
- the measures taken in response to that war or public emergency must not go beyond the extent strictly required by the exigencies of the situation; and
- the measures must not be inconsistent with the State’s other obligations under international law.

⁴¹ UN, *International Covenant on Civil and Political Rights*, adopted on the 16th of December of 1966

To interpret the meaning of the first condition, the Court assume that It 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” according to an important case in this topic, *Lawless vs Ireland*.⁴² The emergency should be actual or imminent. At the geographical level, a crisis which concerns only a particular region of the State can amount to a public emergency if It threatens “the life of the nation”. The crisis or danger has to be exceptional in that the normal measures permitted by the Convention for the maintenance of public safety, health and order are plainly inadequate.⁴³

When the Strasbourg Court examines the designation issue, was there an emergency situation? Under Article 15 it affords a wide margin of appreciation to the assessment by the national authorities subject to a European supervision. The national authorities are in a good position to decide on the presence of such emergency and on the nature and scope of derogations necessary to avert it. According to the famous case of *Lawless vs Ireland*, terrorism in Northern Ireland met the standard of a public emergency, since for a number of years it represented a “particularly far-reaching and acute danger for the territorial integrity of the United Kingdom, the institutions of the six counties of Northern Ireland and the lives of the province’s inhabitants”⁴⁴. However, this general approach of deference towards the national authorities’ assessment, it is not unlimited: for instance, in the “Greek case” the case brought against Greece in response to the coup in 1967, the Commission found that, on the evidence before it, there was no public emergency which justified the derogation made (*Denmark, Norway, Sweden and the Netherlands vs Greece*)⁴⁵.

⁴² *Lawless vs Ireland*, ECHR, Application no 332/57, 1 July 1961, para. 28

⁴³ *Denmark, Norway, Sweden and the Netherlands vs Greece*, nos. 3321/67, 5 November 1969

⁴⁴ *Ireland v. United Kingdom*, paras 205 and 212, 18 January 1978 *A and others v. United Kingdom*, para. 176., no. 3455/05, ECHR 2009

⁴⁵ *Denmark, Norway, Sweden and the Netherlands vs Greece*, ECHR, nos. 3321-44/67, 16th July, 1970

About the second condition, the fact that exceptional measures were strictly required by the exigencies of the situation. the States do not enjoy an unlimited power in this respect. The European Court is charged to rule on whether the States have gone beyond what is strictly required by the exigencies of the crisis. To determine this situation, the Court will argue on different factors such as the nature of the rights affected by the derogation, the circumstances leading to, and the duration of the emergency situation, that what it was concluded in the *Brannigan and Mc Bride vs the United Kingdom* ⁴⁶.

As a third condition, such measures are not inconsistent with other obligations under international law. The derogation should be valid under Article 4 of the International Covenant on Civil and Political Right. The European Court can rely on the observation of the United Nations Human Rights Committee (*Marshall v. the United Kingdom*)⁴⁷ or on the principles of international humanitarian law (*Hassan vs the United Kingdom*)⁴⁸.

2.3. The non-derogable rights

All rights are universal, indivisible, interdependent and interrelated. While international human rights law allows for legitimate limitations, derogations and reservations, they must be exercised under strict circumstances. Even in exceptional situations, certain core human rights must apply at all times. Those core rights are the non-derogable rights, there are protected at the European and International level.

⁴⁶ *Brannigan and Mc Bride vs the United Kingdom*, Application no. 14553/89, 26 May 1993

⁴⁷ *Marshall vs the United Kingdom* , no. 41571/98, 10 July 2001

⁴⁸ *Hassan vs the United Kingdom [GC]*, no. 29750/09, ECHR, 16 September 2014

2.3.1. Non-derogable rights in European Convention on Human rights

A series of rights are just untouchable, there are situated upon from the national, European or international legal order. Those rights have to be protected and provided in any circumstances.

Article 15 paragraph 2 protects certain rights from derogation. It provides that there can be no derogation from the right to life (except in respect of deaths resulting from lawful acts of war) or from the Article 3 prohibition of torture, inhuman and degrading treatment or punishment, the Article 4 prohibition of slavery and the principle of the non- retroactivity of the criminal law under Article 7.

Three of the additional protocols to the Convention also contain clauses which prohibit derogation from certain of the rights contained in them. The prohibition of the death penalty (Protocols 6 and 13) and the right not to be tried or punished twice for the same offence (Protocol 7) or also called the “ne bis in idem principle”.

The right to life is a fundamental right protected in the ECHR. The convention “safeguards the right to life and sets out the circumstances when deprivation of life may be justified, ranks as one of the most fundamental provisions in the Convention, from which no derogation is permitted”⁴⁹. In the famous case of *McCann and Others v. the United Kingdom* which involves the use of lethal force by the State it was reminded that the exceptions to the right to life only when it is “absolutely necessary”, a term indicating “that a stricter and more compelling test of necessity must be employed than that normally applicable when determining whether State action is “necessary in a democratic society” under paragraphs 2 of Articles 8 and 11 of the Convention”⁵⁰.

⁴⁹ COE, Article 2, *European Convention on Human Rights*, Rome, 1950

⁵⁰ *McCann and others v. the United Kingdom*, no. 18984/91, 27 of September 1995, para. 149.

The principle of the proportionality for the right to life has to be respected as we can see it in the case *Wasilewska and Kalucka v. Poland*⁵¹. The case concerned the death of a suspect during an anti-terrorist operation and the observation of the violation of Article 2. The Polish Government had failed to submit any comments regarding the proportionality of the level of force used by the police, the organization of the police action and whether an adequate legislative and administrative framework had been put in place to safeguard people against arbitrariness and abuse of force⁵². The effects of the rights of the article 15 § 2 continue to apply during any time of war or public emergency, irrespective of any derogation made by a Contracting State. In the case the Court confirmed that these rights were inviolable even in time of conflict. In the context of invasion of Iraq, British authorities transferred two Iraqis soldiers accused of involvement in the murder of British soldiers in custody. The British authorities were found in violation of Article 3 (prohibition of inhuman or degrading treatment) of the Convention, concluding that the applicants' transfer to Iraqi custody had subjected them to inhuman treatment. They violated as well article 13, right to an effective remedy and Article 34, right to individual petition) of the Convention.⁵³

But there are some exceptions to these exceptions of the right to life, as regards of the article 2 which allows the use of force when it is absolutely necessary in the circumstances given by the same article. The defense of any person from unlawful violence, to effect a lawful arrest or prevent escape of a person lawfully detained, action lawfully taken for the purpose of quelling a riot or insurrection or a lawful act of war⁵⁴.

A vital procedural safeguard is also contained in Article 15 para 3 that the Secretary General of the Council of Europe shall be kept fully informed of the

⁵¹ *Wasilewska and Kalucka v. Poland* no. 28975/04, 23 of February of 2010

⁵² ECHR, « *Factsheet-Right to life* », Press unit ECHR, June 2013, http://www.echr.coe.int/Documents/FS_Life_ENG.pdf [Last visited 3 may 2017]

⁵³ ECHR, « *Factsheet about Armed conflicts* », Press unit, February 2017 http://www.echr.coe.int/Documents/FS_Armed_conflicts_ENG.pdf [Last visited 3 may 2017]

⁵⁴ COE, Article 2, *European Convention on Human Rights*, Rome, 1950

measures taken and the reasons therefor and, of course, when the measures cease to operate. It is when the derogation becomes public. It is through the Secretary General that other Contracting Parties, as well as the Committee of Ministers and Parliamentary Assembly Council of Europe, are kept informed when another Party lodges a derogation so that other states are kept fully aware of what is happening. All of the above-mentioned conditions in Article 15 are reviewable by the Strasbourg Court. That breakthrough was what the Court decided in the *Lawless* case. More, the prohibition of no punishment without law, as regards Article 7 should always be respected according to the general principles of law recognized by civilized nations.

To prevent the attacks to the democratic order and the rule of law, the European Court of Human Rights, the Commission has developed the tradition to apply the article 17 ECHR, the so-called abuse clause. This article stipulates that “nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.” The first reason for the existence of this clause is to give democracy the legal weapons necessary to prevent the repeat of history, in particular the atrocities committed in the past by totalitarian regimes of national-socialist, fascist or communist persuasion.

2.3.2. Non-derogable rights in International Covenant on civil and political rights

From an international law's perspective, article 4 of the International Covenant on civil and political rights (ICCPR) afford states parties the possibility of derogating from most obligations in times of public emergency threatening the life of the nation to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with other obligations under international law. It implicitly includes a requirement of necessity and proportionality. According to Article 4.2 of the ICCPR, no derogation is permitted from, inter alia :

- the right to life (Article 6)
- freedom from cruel, inhuman or degrading treatment or punishment (Article 7)
- freedom from slavery and servitude (Article 8.1 and .2)
- prohibition of debtor's prison (Article 11)
- non-retroactivity of the law (Article 15)
- the right to be recognized as a person before the law (Article 16)
- and the freedom of thought, conscience, religion or belief (Art. 18)

The list of non-derogable rights of the ICCPR is longer than the ECHR one.

On the non-derogable right to life, Depenheur work⁵⁵ deals with the right to life under emergency conditions , not the right to life for suspected terrorists, but the right to life for civilians who lose their lives as a consequence of anti-terror measures. That the example of airplane hijacked by terrorists heading for a skyscraper with no chance for the passenger to regain control over the plane with the only chance to avoid the collision to shoot the plane down before the colliding skyscraper. In 2006, the German Constitutional Court revoked the air security act which had given the permission to shoot down a plan under these circumstances. The Court⁵⁶ held that such measure was not compatible with the fundamental

⁵⁵ DEPENHEUR Otto , *Selbstbehauptung des Rechtsstaats*, Schoningh, 2007

⁵⁶ BUNDESVERFASSUNGSGERICHT, no. 357/05, February 15th , 2006

guarantee of human dignity in conjunction with the right to life of the German Basic Law.

2.4. Effects of the State of Emergency

Acts of terrorism are undoubtedly a formidable challenge. They put citizens and political leaders into a state of fear. This fear is especially powerful because the perpetrators are not visible, because there is no state of war because what is being sought is far beyond disputes over territory or interests. For democratic regimes, the challenge is especially difficult because they must oppose terrorism and not losing sight of the reasons why a democracy exists. In contrast with the aims of acts of terrorism, the challenge for democracies is not to fear their opponents nor to destroy them, but rather to maintain security and preserve their values.⁵⁷

A study called “The Determinants of Emergency Constitutions” realized by Christian Bjornskov and Stefan Voigt⁵⁸, two professors at the University of Munich aimed to know which factors cause the inclusion of particular emergency provisions into constitutions. They give us a really interesting perspective because It is comparative study which show the differences between the emergency constitutions and their provisions. They introduce an Indicator of Emergency Provisions which represents both the benefits and the inconvenients of a state of emergency. The INEP takes into account six dimensions, namely (1) the degree to which the right to declare a state of emergency is concentrated in a single person – or very few – or limited by multiple veto players; (2) the need to get the emergency approved by other players; (3) how many different situations are explicitly mentioned in the constitution and can be used to justify the declaration of a state of emergency; (4) whether fundamental civil and political rights can be suspended during a state of emergency; (5) whether parliament can be dissolved

⁵⁷ INTERNATIONAL FEDERATION FOR HUMAN RIGHTS, *When the exception becomes the norm*, Counter-terrorism measures & human rights, France International fact-finding mission report, International Federation for Human Rights, June 2016

⁵⁸ BJORNSKOV Christian and VOIGT Stefan, *The Determinants of Emergency Constitutions*, University of Hamburg, Institute of Law and Economics, March 23 of 2016

during a state of emergency; and (6) whether the government can introduce censorship of the media and expropriate property during an emergency.

They could observe that conversely, constitutions implemented after the collapse of communism clearly tend to be less likely to allow expropriation and censorship and include more conditions under which a state of emergency can be declared. Royal dictatorships have the strongest declaration rights while presidential democracies tend to include the most conditions that allow for declaring a state of emergency. Historically, mixed democracies have been less prone to allow suspension of rights, expropriation and censorship, but at present, all types of democracies now appear similar on average.

About the motives included in the Constitution to declare the State of Emergency according to this study. These motives are provided or are inspired by some provisions of the constitution.

The “benevolent” motives for purely pragmatic reasons. as to save lives after a natural disaster, the respective constitutional provisions should contain mechanisms against their misuse. It should further exclude the possibility that government can “create” the precondition for calling a state of emergency which could then be used for political reasons.

The second motive assumes politicians to be power-maximizers and observes that ample emergency powers might help politicians to stabilize or even extend their actual power.

The third motive is based on the insight that regime transitions often presuppose the capacity of the bargaining partners who negotiate constitutional change to credibly commit themselves to their promises.

In many cases, once the state of emergency is declared by the authorities it is ruled by emergency laws. The real problematic here in our study of state of

emergency in a democratic state, is to identify of we should rule by law something which is outside the scope of the law. If we follow the Dephenheur theory we shouldn't apply the law for someone who commit an abuse of law which lead to the state of emergency, the state of emergency is outside the application of legal provision. However, this is contrary to supremacy of fundamental Rights provided in Constitution. Those emergency laws are here to bring more precision on the application of the emergency according to the constitutional provisions. So there are totally submitted to the Constitution and should respect it. The state of emergency is not outside the constitutional order because it is set by the Constitution itself.

As we saw it, for Schmitt, the decision on exception is above the normative framework in that it consists in the temporary suspension of the legal constraints on sovereignty, but that at the same time the exception is what defines the condition of possibility for the law to exist. In Jef Huysmans' words, "the norm does not define the exception but the exception defines the norm".⁵⁹ We can deduce that in his conception, the declaration of the state of emergency is outside the legal system and represent a sovereign decision.

For Agamben, who propose a more contemporary reading of the state of emergency, the state of exception is coterminous with the law, since it defines the borders of the normative order. According to Agamben, "the state of exception is neither external nor internal to the juridical order, and the problem of defining it concerns precisely a threshold, or a zone of indifference, where inside and outside do not exclude each other but rather blur with each other"⁶⁰. The state of exception is about a distinction, since it legitimizes itself in reference with an external threat which has to be dealt with through exceptional measures, and at the same time it strengthens national identity by depicting the enemy as inhuman,

⁵⁹ HUYSMANS Jef, "The Jargon of Exception – On Schmitt, Agamben and the Absence of Political Society", *International Political Sociology*, Vol. 2, No 2, 2008

⁶⁰ HUMPHREYS Stephen, *Legalizing Lawlessness: On Giorgio Agamben's State of Exception*, University of Chicago Press, 2005

and thus unworthy of being treated as other than “bare life”. According to this conception the measure of state of emergency is legitimized but It institutionalizes fear of the enemy as the constitutive principle for society. That is precisely what happened in the detention camp at Guantanamo Bay, or at the Abu Ghraib prison in Iraq, where prisoners were denied both the rights to be put on trial according to the status of prisoners of war as stated by the Geneva Convention.

To conclude, a lot of factors have to be taking into account to justify the legality of the state of emergency. The emergency provisions are regulated by the Constitution itself, but in time of emergency, the necessity will create its own law. That’s why for some theorists or States, this external threat can justify the non-application of basic human rights for the enemy of the nation. I don’t really agree on that point of view because It weakens the protection for human rights by creating exceptions and can generate a lot of abuses.

3. ANALISIS OF EMERGENCY PROVISIONS IN SPANISH, FRENCH AND TURKISH CONSTITUTIONAL SYSTEM

I decided to study 3 cases of legal provisions and practice of the measure of the “State of emergency”. We will the examine the case of Spain, France and Turkey. In this 3 contemporary examples we will see that even if It looks to present a similar approach of the term of legal and constitutional concept of State of emergency, in practice the 3 cases don’t provide the same legal control, guarantee for the people and affectation on human rights.

3.1. Spain and the evolutive regimes of exception

The article 116 of the Spanish Constitution determine 3 different exceptional regimes:

- state of alarm (*estado de alarma*)
- state of emergency (*estado de excepción*)
- state of siege (*estado de sitio*)

According to article 116 of *Spanish Constitution*, it's necessary a legal development of this constitutional provision: "An organic act shall make provision for the states of alarm, emergency and siege (martial law) and the powers and restrictions attached to each of them."⁶¹

The state of alarm⁶² has to be declared by the Government through decree issued by Council of Ministers. The Parliament (Congreso de los diputados) just has to be informed of the adoption of this measure, gathered immediately. The state of emergency cannot last more than 15 days but It can be extended with the authorization of the Parliament. The decree will define the territorial scope where the state of emergency will be applied.

The state of exception will be declared by the Government through decree issued by Council of Ministers with the previous authorization of the Parliament. The authorization must specifically state the effects, the rights which can be suspended, the territory to which it is to apply and its duration, which may not exceed thirty days, subject to extension for a further thirty-day period, with the same requirements.⁶³We can observe a major review of the Parliament, because this measure is more restrictive in rights than the state of alarm.

The state of siege will be declared with the absolute majority of the Parliament after the proposal of the Government. The Parliament will be the one to define the territorial scope of this measure, the duration and its conditions⁶⁴.

The Congress may not be dissolved while any of the states referred to in the present section remains in force. Proclamation of states of alarm, emergency and siege shall not affect the principle of liability of the Government or its agents as recognized in the Constitution and the laws⁶⁵.

⁶¹ Constitución Española de 1978, BOE núm. 311, de 29 de diciembre de 1978, article 116.1

⁶² *Idem*, Article 116.2.

⁶³ *idem*, Article 116.3

⁶⁴ *idem*, Article 116.4

⁶⁵ *idem*, Article 116.6

The legal provision of these regimes are also developed through the Law of 1st of June of 1981.⁶⁶ According to this law the states of alarm, exception and siege “when extraordinary circumstances made it impossible to maintain a normal situation through the ordinary powers of the competent authorities”⁶⁷.

The state of alarm can be activated “in all or part of the national territory” when there are “catastrophes, calamities, public misfortunes such as earthquakes, floods, forest or urban fires or large-scale accidents” as well as to face health crises, situations of shortage or stoppage of public services⁶⁸.

A state of emergency can be activated “when the free exercise of rights and freedoms of citizens, the normal functioning of democratic institutions, the public services essential to the community, or any other aspect of public order should be so seriously altered that the ordinary exercise of powers is insufficient to maintain it”.⁶⁹

The declaration of a state of siege can be carried out when “an insurrection or act of force occurs or threatens the sovereignty or independence of Spain, its territorial integrity or the constitutional order, and the situation cannot be restored by other means”. In this case, the government “will designate the military authority” that “under its leadership will have to execute the measures that must be carried out in the territory the state of siege applies to”⁷⁰.

Since then, Spain only declared the state of emergency once during the strike of air traffic controllers which paralyzed the Spanish air space for a few days in December 2010⁷¹. An emergency Royal Decree was signed ordering the Ministry of Defence to take control of Spain’s air space and move all the military into all

⁶⁶ *Law on the state of alarm, emergency and siege*, BOE, no. 134, 1st of June of 1981

⁶⁷ Article 1, *Law on the state of alarm, emergency and siege*, BOE, no. 134, 1981

⁶⁸ *idem*, Article 4

⁶⁹ *idem*, Article 13

⁷⁰ *idem*, Article 32

⁷¹ OWEN Edward, *Spain to declare State of Alert over air traffic control strikes*, *The Telegraph*, December 2010

control centers and control towers in Spain. It was the first time a State of Alert has been declared under the 1978 Constitution. It allows the authorities to take over in cases of major disasters or the paralyzation of public services. Air traffic controllers refused to carry out minimum service and refused to work under military. AENA said that since the sudden walkout started, 1,686 of 5,032 flights scheduled for Friday in Spain had been cancelled affecting 330,000 passengers.

The particularity of the Spanish legal system is that it is progressive. So depending on the political situation and the threats that the State has to face, a different exceptional regime will be adopted. More the integrity of the Spanish territory is threatening, more the parliamentary review will be needed and more rights could be suspended, according to article 55 of the Spanish Constitution.

But compared to France and Turkey, the two other examples that we are going to develop, Spain never derogates from its obligations of the European Convention on Human Rights.

3.2. France, when the exception becomes the norm

To see the example of France is interesting because it is known as one of the democracies most respectful of human rights. Its constitution and its legislation are very complete to regulate the State of emergency. In the last years, the country has been affected by the threat against terrorism, and the state of emergency has been used to face these issues.

Over the course of this decade, France has been the scene of numerous acts of terrorism:

- In March 2012, 7 people were killed in a Jewish school in Toulouse
- On the 7th of January 2015 the attacks at the offices of the newspaper *Charlie Hebdo*

- The events of 13 of November 2015 that led to the declaration of a state of emergency after the shooting attacks simultaneously in *Stade de France* and in the concert hall *Le Bataclan* where 130 died.

The French President declared a state of emergency applicable to the entire country on the night of the 13 November attacks. On 20 November 2015, the French Parliament voted by an overwhelming majority to extend the state of emergency for a period of three months. On 16 February 2016, a second extension was approved. On 20 April, the government announced its intention to ask Parliament to vote on a new law authorizing the extension of the state of emergency by an additional two months; the law was adopted by the Senate on 10 May and by the National Assembly on 26 May⁷².

Historically, the Law of 3 April 1955⁷³ on state of emergency, adopted to deal with the situation in Algeria, had been applied on seven occasions before the attacks on 13 November 2015. On 20 November 2015, the French Parliament approved Law no. 2015-1501⁷⁴, prolonging the application of the Law of 3 April 1955 on state of emergency and reinforcing the effect of its provisions.

The text extended the scope of measures applicable in a state of emergency

- it allowed the three-month extension
- It sets out the conditions in which individuals can be placed under house arrest, if there are “serious reasons to believe that their behavior represents a threat to public safety and order”⁷⁵
- the possibility of seizing computer files during searches, even in a person’s home, both during daytime and at night⁷⁶
- the possibility to prohibit organized public demonstrations “of a nature which may provoke or sustain disorder”⁷⁷.

⁷² INTERNATIONAL FEDERATION FOR HUMAN RIGHTS, *When the exception becomes the norm*, Counter-terrorism measures & human rights, France International fact-finding mission report, International Federation for Human Rights, June 2016

⁷³ *Law on the State of Emergency*, no. 55-385 of the 3rd of April of 1955

⁷⁴ *Law on the State of Emergency*, no. 2015-1501 of the 20th of 2015

⁷⁵ *Idem*, Article 6: house arrest

⁷⁶ *Idem*, Article 11: searches and seizures of computer files

⁷⁷ *Idem*, Article 8 : bans on public demonstrations

- it allowed the Council of Ministers to dissolve by decree any associations and de facto assemblies that “participate in the commission of acts that can seriously disturb public order or whose activities facilitate or incite commission of such acts”.⁷⁸

The actual and potential threat to human rights is real in the case of exceptional regimes and this necessitates, particularly judicial, but also political control, both at the national and supranational level, on the practices of power. The French legal system, provides a parliamentary control in order to prevent to excesses of the measures under the state of emergency.

According to the article 4.1 of the Law of 1955, it stipulates that the National Assembly and the Senate “shall be informed without delay of the measures taken by the government during the state of emergency. They can request any additional information for the purposes of oversight and evaluation of these measures.”⁷⁹

This type of parliamentary oversight, however, does not include the ability to impose

restrictions or sanctions. By creating a posteriori controls that are exclusively in the hands of administrative court judges, ordinary court judges have been dispossessed of the ability to exercise any control over the measures taken, in complete disregard of Article 66 of the French Constitution, which provides: “The Judiciary, guardian of individual liberty, shall ensure this principle is respected in legislation”. The administrative courts have exclusive oversight of measures implemented under the state of emergency gives rise to many problems of principle.

About the consequences of state of emergency measures, we can conclude from that, the application of the state of emergency, in terms of the measures implemented under it, confers near total impunity upon agents of the State. Many of the state of emergency measures, and searches in particular, were used for reasons other than counter-terrorism. However, it became evident that legislation

⁷⁸*Idem*, Article 6-1: dissolution of associations and assemblies

⁷⁹ Article 4.1 of the *Law of 1955*, revised by the Law of 20 November 2015

already in effect was sufficient and that a new law was superfluous. In fact, all of the state of emergency measures could already have been implemented under the supervision of ordinary courts. Clearly, the purpose of this law is the mass collection of information that intelligence agencies must then sort through. No tangible effects on the fight against terrorism have been observed, we can easily doubt of the effectiveness of the State of emergency.

The problem of the implementation of the State of emergency measures is that there were implemented without due consideration of the effects on individual freedom and social cohesion. The problem now is that the exception look to be the norm. France does not know how to quit its state of emergency even though it has become clear that maintaining it erodes the rule of law and fosters human rights abuses while not keeping the country safer.⁸⁰ It is mainly due to confusion by politicians about the purpose of a state of emergency. Many have said that it is justified by an ongoing terrorist risk. Under this reasoning, a state of emergency is needed as long as there is a high security risk. This reasoning is dangerous on many levels. By suggesting that regular laws, procedures, and oversight mechanisms are not sufficient to counter threats, it weakens the premise of the rule of law and relegates it to a luxury for “normal” times. But as the risk of future terrorist attacks cannot be predicted, there is a permanent risk for security, should it justify a permanent state of emergency?

⁸⁰ HOURY Nadim, *Breaking France's Addiction to its State of Emergency*, Human Rights Watch in Open Democracy, March 2017, <https://www.hrw.org/news/2017/03/13/breaking-frances-addiction-its-state-emergency> [Last visited on the 3rd of May 2017]

3.3. Turkey: emergency provisions and fundamental rights

During the last thirty years Turkey has been faced with three coups d'etat: on May 27, 1960, March 12, 1971, September 12, 1980.⁸¹ The existence and practice of the states of exception in the case of Turkey is required to categorize as «de facto» exceptional regimes. This is a misleading use of the same concept of “state of exception”, terminology and institutions, which are in essence completely different from each other. Even though human rights violations also occur under democratic states of exceptions, victims may make use of legal instruments against arbitrary and illegal use of power. But in the de facto case, victims do not have any legal guarantees, because that situation has been established by the overthrow of the democratic system and the seizure of political power in an unconstitutional and illegitimate way. According to the Turkish legal system, states of exceptions have four categories:

- a state of emergency,
- a state of siege
- a state of military mobilization
- a state of war.

3.3.1. The constitutional provisions of the emergency measures

The scope and effects of these regimes are different. As a rule, state of emergency is a type of exceptional regime which is the result of a crisis in the existing politico-juridical system that leads to the adoption of emergency measures to tackle this crisis. It is also be important to remember that, just considering the State of Emergency Law in addition to the Constitution itself, may not be sufficient enough to examine state of emergency in Turkey. Very important decrees having force of law related to this field were issued by the Council of Ministers. These decrees having force of law amended the content and dimensions of state of emergency and spread a serious doubt with regard to legality and constitutionality even within the framework of the existing regime. According to

⁸¹ GEMALMAZ Mehmet Semih, *State of emergency rule in the Turkish legal system: perspectives and texts*, Faculty of Law, Istanbul, 2016

the 1982 Constitution, the state of emergency can be declared in the event of natural disaster, dangerous epidemic diseases and serious economic crisis⁸². The second set of conditions encompass of the emergence of serious indications of widespread acts of violence aimed at the destruction of the free democratic order established by the Constitution or of fundamental rights and freedoms, or the serious deterioration of public order through acts of violence⁸³.

3.3.2. Parallel with European and international emergency provisions

The article 121⁸⁴ of the Constitution is on the rules and procedures relating to the state of emergency. And the State of Emergency Law (SEL) contains detailed rules on the application of this regime.⁸⁵ It is also important to mention the article 15 of the 1982 Constitution which is relevant to understand the state of emergency regime. It regulates the suspension of the exercise of fundamental rights and freedoms. According to this provision, the state of emergency regime, as parallel as the other types of exceptional regimes, have an effect on rights and freedoms. Here, there is a «suspension» of the application of human rights or a “derogation” of the guarantees embodied in the Constitution.

According to this article “In times of war, mobilization, martial law, or a state of emergency, the exercise of fundamental rights and freedoms may be partially or entirely suspended, or measures derogating the guarantees embodied in the Constitution may be taken to the extent required by the exigencies of the situation, as long as obligations under international law are not violated. Even under the circumstances indicated in the first paragraph, the individual’s right to life, the integrity of his/her corporeal and spiritual existence shall be inviolable except where death occurs through acts in conformity with law of war [...]”.

This article provides a list of non-derogable rights, there are right to life, the inviolability of the in f the integrity of an individual’s material and spiritual

⁸² Article 119, *Constitution of Republic of Turkey* adopted on the 18, October 1982

⁸³ *Idem*, Article 120

⁸⁴ *Idem*, Article 121

⁸⁵ *State of Emergency Act*, number 2935, Published in the Official Gazette on 27 October 1983

entity, the freedom of conscience, religion and opinion, the non-retroactivity of penalties, the principle of innocence.

We can recognize here the conformity of the Turkish Constitution with the European Convention on Human Rights with the same non derogable rights in times of emergency (right to life), but in a larger and more flexible perspective. When we compare it with the “derogation clauses” of the supranational human rights instruments (ECHR, ICCPR, ACHR)⁸⁶, the article 15 generally interpreted and applied in a way that, it allows the derogation from :

- the substance of fundamental rights
- the exercise of these rights
- the guarantees of human rights which are in fact, essential in order to protect them.

That’s why this suspension opens the door, by deleting constitutional guarantees recognized for individual, to the unsecure regime. More, Turkey's governmental traditional policy with regard to the supranational human rights instruments may be characterized by an «unwillingness» to be bound with international law obligations.

3.3.3. State of emergency in Turkey and lack of judicial review

At the judicial level, the practice of the ordinary and higher courts of Turkey there has been also a general unwillingness to apply the provisions of human rights treaties.⁸⁷ The President of the Republic provides that, the President is entitled “to proclaim martial law or state of emergency, and to issue decree having force of law, in accordance with the decisions of the Council of Ministers under his

⁸⁶ COE, Article 15 of the European Convention on Human rights, op.cit. 1953; Article 4 of the International Covenant on civil and Political rights, op.cit. 1966; Article 27 of the American Convention on Human Rights, op.cit. 1969

⁸⁷ *Constitutional Court of Turkey* Judgement 1 of July of 1963, No: 1963/207, 1963/175, The Court found that the death penalty was not unconstitutional, by referring to the ECHR.

chairmanship” according to the article 104 of the Constitution.⁸⁸ About the procedures and rules everything is regulated in the constitution⁸⁹:

- the decision on the declaration shall be published in the Official Gazette
- this decision shall be submitted immediately to the Turkish Grand National Assembly for approval
- the National Assembly is entitled to
 - a) alter the duration of the state of emergency
 - b) extend the period for a maximum of four months each time at the request of the Council of Ministers
 - c) lift the state of emergency
- during the state of emergency, the Council of Ministers meeting under the chairmanship of the President of the Republic, may issue decrees having force of law
- the subject of these decrees having force of law is limited by the matters necessitated by the state of emergency
- these decrees shall be published in the Official Gazette and shall be submitted to the National Assembly on the same day for approval.

The judicial review of a state of exception is known another fundamental problematic subject that needs to be examined. This control should be exercised at 3 levels, ordinary courts, the Constitutional court and the supranational human rights organs' judicial. But the Turkish Constitution fails to provide any effective oversight mechanism to ensure that limits on derogations from human rights.

In practice, we can make parallel with the very recent events happened in Turkey, in order to compare the practice of the State of emergency with this legal and theoretical approach.

⁸⁸ Article 104 of the *Constitution of Republic of Turkey* adopted on the 18, October 1982

⁸⁹ *Idem*, Article 121

3.3.4. The effects of the state of emergency on human rights

An attempted coup in July 2016 allowed the Council of Minister to declare a state of emergency in Turkey, which has been extended for the period between October 19, 2016, January 19, 2017 and April 19, 2017.⁹⁰ After that, the Council of Ministers issued several emergency decrees with the force of law (*Kanun Hükmünde Kararname*), granting unlimited discretionary powers to the executive and administrative authorities. Turkey also notified the Council of Europe and the United Nations of its intentions to derogate from certain obligations under the European Convention on Human Rights and the International Covenant on Civil and Political Rights.

A number of measures taken after the declaration of the state of emergency raise very serious concerns under Turkish constitutional law and international human rights law, despite the fact that Turkey has chosen to derogate from a number of its obligations. In many cases, the proportionality of the measures taken to the scale and extent of the public emergency, and the necessity of the measures taken, is questionable, as recently iterated by the Human Rights Commissioner of the Council of Europe⁹¹.

The decrees adopted pursuant to the State of emergency have far-reaching consequences for human rights. One of the most contentious measures concerns the extension of police powers to detain suspects for up to thirty days without judicial review.⁹² The same decree also allow for the review of detention, objection to detention, and requests for release to be conducted solely on the basis of the case file, which cannot be reconciled with the principle of habeas corpus,

⁹⁰ BAGLAYAN Basak, *The Turkish State of emergency Under Turkish Constitutional Law and International Human Rights Law*, American Society of International Law January 03, 2017, https://www.asil.org/insights/volume/21/issue/1/turkish-state-emergency-under-turkish-constitutional-law-and#_edn1 [Last visited 5 May 2017]

⁹¹ COE COMMISSIONER FOR HUMAN RIGHTS, *Statement of the Council of Europe Commissioner for Human Rights, implications of the Measures Taken Under the State of Emergency in Turkey*, (October 7, 2016), <http://www.coe.int/ru/web/commissioner/-/situation-in-turkey>; [Last visited 5 May 2017]

⁹² *Decree with Force of Law* No. 667, article 6.1 a), July 23, 2016

entitling anyone deprived of his liberty by arrest or detention to proceedings before a court in order to determine the lawfulness of the detention and inconsistent with the right to be considered innocent until proven guilty by a court ruling⁹³. The decrees have been applied to, among others, civil society organizations, private educational institutions, trade unions, hospitals and clinics, the media, as well as business and financial establishments. More than a thousand NGOs and trade unions, and more than a hundred media establishments have been dissolved and liquidated without judicial proceedings.

Many of Turkey's actions or decision goes against freedom of expression and freedom of association. Turkish police have raided the offices and detained the editor and twelve senior staff members of one of Turkey's oldest, left-leaning newspapers, alleging that they had published content that attempted to legitimize the coup.⁹⁴ In addition to opposition press, opposition parties have also been targeted. Twelve deputies of the People's Democratic Party, the third largest party in Turkey's parliament, have been detained for "making propaganda for a terrorist organization."⁹⁵ Since July 15, between approximately 70,000 and 110,000 civil servants have been suspended or dismissed without any investigation or possibility of legal challenge. These individuals are banned for life from working in the public sector and their titles, ranks, and licenses⁹⁶. Additionally, those who are dismissed are being stigmatized when their names are listed in annexes to the decrees, which may constitute interference with their private life and "unlawful attacks on their honor and reputation"⁹⁷. All of these measures are being applied with an alarming level of arbitrariness.

⁹³ *Constitution of Republic of Turkey*, Article 38, op. cit.

⁹⁴ HUMAN RIGHTS WATCH, « Turkey Detains Editor and Staff at Opposition Cumhuriyet Newspaper », *The Guardian*, October 31, 2016, <https://www.theguardian.com/world/2016/oct/31/turkey-detains-editor-and-staff-at-opposition-cumhuriyet-newspaper> [Last visited 5 May 2017]

⁹⁵ AMNESTY INTERNATIONAL, *Amnesty International Press Release, Turkey: HDP Deputies Detained Amid Growing Onslaught on Kurdish Opposition Voices*, November 4, 2016, <http://www.amnestyusa.org/news/press-releases/turkey-hdp-deputies-detained-amid-growing-onslaught-on-kurdish-opposition-...> [Last visited 5 May 2017]

⁹⁶ *Decree with the Force of Law No. 672*, article 2.2, September 1, 2016

⁹⁷ Article 20 of the *Constitution of Republic of Turkey* op. cit.

The measures are aimed at those who “belong to, connect to, or contact with” alleged terrorist organizations.⁹⁸

To conclude, it will be for the domestic courts, the Human Rights Committee, and the European Court of Human Rights to consider whether the proper balance is achieved or whether Turkey has violated its international legal obligations during the state of emergency. The situation currently prevailing in Turkey, however, suggests that it will be difficult for the authorities to justify the necessity and proportionality, and thus the continuation, of the existing measures. The international community and human rights organizations denounce the excess of the measures under the state of emergency and ask to put an end to the wave of political repression. But the future of Turkey looks even darker after the winning of the presidential referendum on the April 16, 2017 for a new political system. The campaign took place under a state of emergency and in a highly repressive climate. This reform will lead to a new division of powers where the President will gain an enormous centralized power⁹⁹.

⁹⁸ *Decree with the Force of Law* No. 668, article 2, art. 2(c), July 27, 2016

⁹⁹ HUMAN RIGHTS WATCH, *Turkey: End State of Emergency after Referendum*, *Human Rights Watch*, April 17 of 2017, <https://www.hrw.org/news/2017/04/17/turkey-end-state-emergency-after-referendum> [Last visited 5 May 2017]

CONCLUSION

To answer to the question how far the rights protected in the Constitution can be suspended when the state integrity is threatening.

We saw the provisions of emergency measures in the supreme constitution. First we reminded how the constitution was identified has the supreme norm of the legal system. In a theoretical perspective, the concept of constitution has been created as a social contract necessary to build a society able to guarantee the protection of the rights of citizens and to organize the repartition of power in the State. The constitution as a fundamental is characterized by the principle of supremacy. As Kelsen's vision, the constitution is the basic norm and the top of the pyramid norm. The position of the constitution in the legal order and its direct applicability has been reaffirmed after the World Wars. The constitution and the rights that It contains have to be strictly respected because of the primacy of the constitution. The formation of the Constitution is the result of the history, culture and international standards which form a series of rights which are no-derogable. The supremacy of the constitution is also guaranteed by the constitutional review organized by an ad hoc court. The written constitutions protect the principle of rule of law. This principle is really important because it sets other basic principles as the legal regularity, democracy and individual rights.

The constitution includes also the emergency provisions. These provisions were influenced by international law and resolutions of the security council. Because the appearance of terrorism opens a new discourse of a global state of emergency, and the need for a permanent war on terror. Then, we understand that the use of emergency for global security is not only a national issue but an international issue and multi-level issue. But as noticed the CJUE in the Kadi's case, the states need to find a balance between constitutional core values and effective international measures against terrorism when they adopt emergency measures.

Many authors have debated on the notion of state of emergency. But a single legal definition cannot be found because the concept of the state of emergency is an attempt to legally explain and regulate phenomenon whose main characteristic is the deregulation of legally regulated fields. In a contemporary perspective, the

purpose of state is to restore public order after attacks, mainly terrorists and protect society from further attacks and to reassure the trust and the confidence of the people of its government in order to avoid the slow erosion of society.

The article 15 of European Convention on Human rights defines the circumstances in which Contracting States can validly derogate from their obligations under the Convention. It must be in time of war or other public emergency threatening the life of the nation, the measures taken in response to that war or public emergency must not go beyond the extent strictly required by the exigencies of the situation.

It also limits the measures they may take in the course of any derogation. The article protects certain fundamental rights in the Convention from any derogation. It provides that there can be no derogation from the right to life, the prohibition of torture, inhuman and degrading treatment or punishment, the prohibition of slavery and the principle of the non- retroactivity of the criminal law.

The International Covenant on civil and political rights set a longer list of non-derogable rights in times of emergency.

The article 15 sets out the procedural requirements that any State making a derogation must follow.

We understood that the state of emergency cannot suspend the Constitutions but allows governments to suspend some rights protected in the Constitutions. The challenge for the authorities is to maintain security and preserve democratic values in time of emergency. To measure the effects of the state of emergency we can refer to the degree to which the right to declare a state of emergency is concentrated in a single person or very few, the need to get the emergency approved by other players, how many different situations are explicitly mentioned in the constitution and justify the state of emergency, whether fundamental civil and political rights can be suspended during a state of emergency, whether parliament can be dissolved during a state of emergency; and whether the government can introduce censorship of the media and expropriate property during an emergency.

We saw through different constitutional provisions of state of emergency in other states.

In Spain with a progressive legal system with different exceptions regimes according to the circumstances that have to face the State. More the integrity of the Spanish territory is threatening, more the parliamentary review will be needed and more rights could be suspended.

In France, with a strong regulation to rule the state of emergency and the provision of a political control, both at the national and supranational level, on the practices of power. But in a permanent war against a non-concrete threat as terrorism, France has to face the challenge to know if it can justify to maintain the state of emergency even though it has become clear that it erodes the rule of law and fosters human rights abuses while not necessarily keeping the country safer.

In Turkey, is an example the constitutional provisions of the state of emergency and the international guarantee were not able to prevent abuses on human rights during the practice of state of emergency. This is due to the lack of judicial review of the measures taken during the state of emergency and the measure itself by centralizing executive power and allowing derogation to certain rights. Turkey is the example that If the principle of necessity and proportionality are not observed by the authorities during time of emergency we cross the line upon an authoritarian regime.

To prevent the abuses of the state of emergency measures a strong system of protection of rights has to be established. In the context of plurality of systems protecting fundamental rights and the rule of law the legal order is converting in a multilevel protection of rights. For European democracies, there are a lot of different spheres of rights protection, from the role of local and regional authorities until the role of the international actors.

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