THE APORIA OF ADJUDICATING EMERGENCIES IN LIBERAL DEMOCRACIES

Lessons learned from the ECtHR, the French Councils and the U.S. Supreme Court

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ABSTRACT

In liberal democratic systems, emergencies bring the judiciary to the forefront. When the separation of powers fades and rights and freedoms are restricted beyond what would normally be acceptable, apex courts are the last institutional resort to contain emergency powers and prevent their abuse. These are some of the premises of the dominant emergency paradigm. This dissertation challenges these premises. It questions the assumption that emergency powers are a necessary evil indispensable to safeguard the state against great perils. Rather, a critical approach highlights the constructed nature of said perils, which in turn raises the question of the subjectivity of emergencies. Behind national security, this critical lens suggests that it is the social order that emergency powers are designed to protect. Consequently, as long as they serve this purpose, the recourse to emergency powers to undermine dissident opinions and claims formed by minorities would actually not be misuses or abuses but the normal implementation of a not-so-exceptional regime. Framing emergency powers in this way has important implications regarding the role of the judiciary. Courts would no longer be meant to limit the concentration of powers nor excessive restrictions on rights and liberties. The new assumption would then be that courts – despite their best efforts – are not capable of effectively reining in emergency powers.

In order to assess this hypothesis, the dissertation offers a comparative analysis of the emergency case law of some of the most established, while very different, courts in liberal democratic systems: the European Court of Human Rights, the French Constitutional Council and Council of State and the United States' Supreme Court. Their case law is first analyzed from the point of view of the institutional impact of emergency powers, assessing whether courts have proved capable (or willing) to resist assaults on the separation of powers. It is then

the scope and degree of the review of emergency powers themselves that is considered: whether or to which extent the very existence of an emergency is reviewed, the degree of scrutiny applied to emergency measures, and the courts' capacity to discern and address their potentially illiberal design and implementation. The analysis includes cases related to terrorism but also the Covid-19 pandemic (and occasionally other emergencies designated as such by the authorities) in order to identify elements that are not characteristic of a specific situation, but which are intrinsic to emergency powers in general. Despite the key differences which set the four courts apart, the comparative analysis indicates more commonalities than diversity in the outcomes of their judgments.

Notwithstanding some variations between the jurisdictions, the analysis points to common and systematic pitfalls in the courts' capacity or willingness to effectively uphold the separation of powers and protect rights and freedoms during emergencies. Although not necessarily in such a systematic manner, some of these weaknesses have been identified in the literature on emergency which counts several suggestions for adjustments. However, these are unlikely to succeed because they fail to address the underlying causes of the flaws of judicial review during emergencies. In contrast, post-liberal theories offer more ambitious avenues to rethink emergency powers and therefore, the function of the judiciary during crises. Nonetheless, the possibility – and maybe desirability – for liberal courts embedded in liberal systems to take these on and advance them might be limited at best.

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À mon père, François Laur, pour sa plume.

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Introduction

On 11 September 2001, two planes crashed into the Twin Towers of the World Trade Center in New York and a third one on the Pentagon. In the aftermath of the attack, global (Islamist) terrorism took center stage of the political discourse and modified the legal frame of counter-terrorism at the international and domestic level worldwide. In 2015, a series of terrorist attacks took place in France starting in January with the attack against the newspaper *Charlie Hebdo* and culminating in November with coordinated attacks in the Paris area. Early 2020, the world was taken by a crisis of another nature, the Covid-19 pandemic which claimed millions of lives worldwide. These are the main crises in which originated the cases examined in this dissertation. Many more occurred.

The thesis was born out of and shaped by these events. However, it does not tell a story of crises but one of emergency powers. Besides the horrific immediate impact of these events, one of their most prominent effects was the exponential increase of emergency powers which deeply transformed the legal orders. In the last couple of decades, as one crisis followed another at an alarming rate, so did the activations of emergency powers lending credence to Agamben's claim that the state of exception is increasingly "the dominant paradigm of government in contemporary politics."[1] The narrative focused on crises which has dominated the political discourse paints emergency powers as a necessary response to these dire circumstances. The

[1] Giorgio Agamben, *State of Exception*, trans. Kevin Attell (Chicago, IL: University of Chicago Press, 2005), 2.

thesis aims to steer away from this perspective and to use a comparative analysis to build a critical alternative narrative[2] centered instead on emergency powers.

The comparison focuses on the United States, France, and the European Conventional system. On the one hand, what formally qualifies as "emergency powers" differs between these jurisdictions. On the other hand, exceptional prerogatives reaching outside what is officially designated as emergency powers, derogation or state of emergency, is one of their common features. Limiting the scope of the research to cases involving powers formally acknowledged as emergency related would amount to surrendering to governments' language choices and exclude one of the most pervasive aspects of emergencies. Therefore, in the thesis, the expression "emergency powers" refers to a wide array of norms and practices independently of their formal denomination. It includes powers which were created or deployed as a response to situations framed as crises and which have the effect of changing the usual separation and balance of powers and/or applying exceptional limitations on fundamental rights and freedoms.[3] In turn, "crises" are not objective elements to be observed but constructed realities which must be analyzed as such. For that reason, from this point onward, the word is used in quotations marks to allow for the necessary distancing.[4]

Because emergency powers disturb the balance of powers and affect fundamental rights, they are in tension with constitutionalism and liberal democratic principles. So much so that they are commonly deemed compatible with these principles only if they are limited, in scope

[2] Günter Frankenberg, *Comparative Law As Critique* (Cheltenham, UK; Northampton, MA: Edward Elgar Publishing Ltd, 2016).

[3] Fionnuala Ní Aoláin, "Exceptionality: A Typology of Covid-19 Emergency Powers," *UCLA Journal of International Law and Foreign Affairs* 26, no. 2 (2022).

[4] This practice is borrowed from Didier Fassin, ed., *La Société qui vient* (Paris: SEUIL, 2022), 18.

and time mainly. Much like Ulysses tied to the mast, emergency powers must be constrained. Those exercising them must be restrained if they are to resist the song of the sirens. Legal provisions presumably act as ropes and courts are tasked with insuring that the nods are sufficiently tight. At the same time, framing a situation as a "crisis" or an emergency tends to depoliticize the matter and preclude democratic debates. Therefore, norms and courts appear to be both the primary and final restraints on emergency powers.

The combination of these elements increases the legitimacy and necessity for apex courts to protect the functioning of democracy. During emergencies especially, apex courts need their "democratic hedge".[5] They have become key institutions – last bulwark against overreaching executives, ultimate arena for individuals to salvage their rights and, possibly, to reclaim participation in the decision-making process. For this reason, the emergency powers are analyzed from the specific angle of their adjudication by apex courts. Ultimately, the thesis seeks to determine whether courts can ensure the compatibility of emergency powers with liberal democracies.

To examine this question, three jurisdictions and four courts where selected: the European Court of Human Rights (ECtHR), the French Constitutional Council and Council of State[6] and the Supreme Court of the United States. These courts were chosen because they operate within established liberal democratic systems in which emergency powers were broadly deployed, thereby offering judges many opportunities to rule. One difficulty should be

[5] Samuel Issacharoff, "Comparative Constitutional Law as a Window on Democratic Institutions," in *Comparative Judicial Review* (Edward Elgar Publishing, 2018), 68.

[6] With regard to France, both councils are included in order to cover the judicial review of statutes (conducted by the Constitutional Council) and that of administrative measures (reviewed by the Council of State), both of which are done by the United States' Supreme Court and the ECtHR.

addressed from the outset. The ECtHR is an international court. It is not a domestic institution operating within a national state. For that reason, considerations pertaining to France and the United States need to be adapted *mutatis mutandis* to the Council of Europe and its member states. The Council of Europe is not a democracy. However, the principles underpinning liberal democracies (pluralism, rule of law or fundamental rights) are deeply embedded in the Convention on human rights and fundamental freedoms (ECHR) and profoundly influenced the development of the Court's case law.

Although the chosen jurisdictions feature among the "overanalyzed usual suspects" of legal studies, including comparative law,[7] they are less commonly compared to each other. Comparative analyses of emergency cases tend to be confined within one tradition of law[8] and rarely compare across various levels of jurisdiction (domestic or supranational).[9] The thesis is deliberately based on the opposite approach. Within systems adhering to liberal democratic principles, these specific jurisdictions were chosen, amongst those accessible to the author – also from a language perspective – for their eclecticism.

The United States are usually described as a common law system offering a diffused model of judicial review whereas France's legal system belongs to the civil law tradition and constitutional review can only be performed by the Constitutional Council. As for the ECtHR,

[7] Ran Hirschl, "Comparative Constitutional Law: Reflection on a Field Transformed," SSRN Scholarly Paper (Rochester, NY, January 15, 2024), 9, https://doi.org/10.2139/ssrn.4694814.

[8] See for example Michel Rosenfeld, "Judicial Balancing in Times of Stress: Comparing the American, British, and Israeli Approaches to the War on Terror," *Cardozo Law Review* 27 (January 1, 2006): 2079–2150 focusing mainly on common law systems; or Karine Roudier, "Le Contrôle de Constitutionnalité de La Législation Antiterroriste : Étude Comparée Des Expériences Espagnole, Française et Italienne" (These de doctorat, Toulon, 2011), https://www.theses.fr/2011TOUL0065 limited to civil law jurisdictions.

[9] See for example F. Fabbrini, "The Role of the Judiciaries in Times of Emergency: Judicial Review of Counter-Terrorism Measures in the US Supreme Court and the European Court of Justice," *Yearbook of European Law* 28, no. 1 (2010): 664–97. There are notable exceptions, for example Stefan Sottiaux, *Terrorism and the Limitation of Rights: The ECHR and the US Constitution* (Oxford: Hart Publishing, 2008).

it is not a domestic but a supranational jurisdiction and its prerogative is essentially limited to reviewing domestic measures against the human rights protected by the ECHR. This entails core differences with the other three courts, including the absence of competence in matters of separation of powers. These differences must be kept in mind in the course of the analysis. Nonetheless, the constitutional dimension of the ECHR and constitutional role of the Court have been argued on many occasions,[10] including by judges at the ECtHR.[11] In light of these arguments and considering the tasks performed by the Court in a context of emergency – assessing the conditions and the adequacy of emergency measures against the Convention – the ECtHR can usefully be compared to the selected domestic courts.

The selection followed the "most different cases" principle[12] in an attempt to go beyond the mere description of how courts perform during emergencies and to infer further whether courts can perform in this context. This selection method highlights the key differences characterizing the four institutions on the one hand and the similarities in the outcome of their judgments on the other. As such, it allows us to test the hypothesis that, in liberal democratic systems, courts cannot adequately fulfill their role during emergencies. Choosing courts presenting such fundamental differences in terms of institutional design and practices mitigates the importance of these variables on the performance of judges during emergencies.

[10] Alec Sweet, "On the Constitutionalisation of the Convention: The European Court of Human Rights as a Constitutional Court," *Faculty Scholarship Series*, January 1, 2009, https://openyls.law.yale.edu/handle/20.500.13051/5105; David Kosař, "Policing Separation of Powers: A New Role for the European Court of Human Rights?," *European Constitutional Law Review* 8, no. 1 (February 2012): 60–61, https://doi.org/10.1017/S157401961200003X and references therein; Lisa Sonnleitner, *A Constitutionalist Approach to the European Convention on Human Rights: The Legitimacy of Evolutive and Static Interpretation* (Oxford ; New York: Hart Publishing, 2022).

[11] Luzius Wildhaber, "A Constitutional Future for the European Court of Human Rights," *Human Rights Law Journal* 23 (2002). See also, *Al-Dulimi and Montana Management Inc. v. Switzerland* [GC], no. 5809/08, 21 June 2016, Concurring opinion of Judge Pinto de Albuquerque, §§ 59-60.

[12] Ran Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law* (Oxford, New York: Oxford University Press, 2014), 253–56.

Conversely, it might highlight a more profound and common difficulty in the relationship between emergency powers and liberal democracies. As such, the thesis aims to move beyond a descriptive analysis and makes a contribution to the conceptual understanding of emergency powers, thereby strengthening the path to a normative argument as to whether emergency powers should be part of liberal democracies' legal arsenal.

This endeavor is grounded in the comparative analysis of the case law of the four courts and informed by a critical perspective. For that reason, the thesis borrows from political sciences and international relations literature, in particular, critical security studies and critical terrorism studies. The comparative dimension allows us to identify common issues irrespective of the intrinsic features of each court. In turn, the critical approach provides a plausible narrative for these shared difficulties. In that sense, the thesis attempts to reconcile the legal scholarship on adjudication of emergency cases – usually focused on the betterment of judicial review – with political sciences' literature which, while addressing structural matters, tends to undermine the role of courts.[13] Consequently, the analysis is not confined to a human rights perspective but includes the courts' findings in relation to the other principal domain impacted by emergency regimes, the separation of powers. Therefore, it addresses the institutional and structural significance of emergency powers underpinning their restrictions on individual rights.

The case law analysis makes up the central part of the thesis (Chapters 2 and 3) and is framed by two more theoretical parts (Chapter 1 and the final considerations). Chapter 1 sets the conceptual and legal frame of emergency powers. The critical lens helps to see through the

[13] The thesis also shares affinities with research on democratic decay and might echo some of the issues addressed in this body of literature. However, the analysis does not venture into this broader domain but remains restricted to emergency powers.

claims of necessity and objectivity which commonly accompany emergency powers. The emphasis is put on the evolution of the various notions in play, in particular (national) security, whose interests were advanced to the forefront, but also the role of the enemy, perpetually redefined yet always reaffirmed to mobilize around governments. The chapter pays special attention to how these various dynamics operated in the context of the most important sources of emergency powers in the last two decades, terrorism and the Covid-19 pandemic. The legal framework of emergency powers in each jurisdiction is then outlined including the conventional/constitutional provisions, the statutory ones but also emergency practices and pseudo-emergency powers. The chapter ends with theoretical considerations about the role of the judiciary in a context of emergency, laying down the main arguments in favor of or against judicial involvement in "crisis" management.

The second chapter analyzes the case law of the four courts from an institutional angle, examining how the judges reacted to the effect of emergency regimes on separation of powers. The first section is dedicated to the collapse of the separation between the executive and the legislative branches. The second part examines the judicial responses to the various attempts to bypass the judiciary whether openly or more subtly as a byproduct of the particular nature of emergency measures. Finally, the third section addresses situations where judges become co-producers of emergency norms.

The third chapter examines how the courts have dealt with the exercise of emergency powers, from the existence of the circumstances which allegedly justified their use to the manner in which they are implemented, their "permanentization" and dissemination in the normal legal order. The chapter addresses the variations in the level of scrutiny but also the different techniques deployed by the courts to avoid the most difficult issues. The last section

focuses on the (in)ability of judges to counter the tendency of emergency measures to target and therefore disproportionately affect the Other.

As Chapters 2 and 3 identify important shortcomings, the final considerations present a critique of existing emergency case law analyses which tend to focus on improving judicial review of emergency powers thereby tightening the legal constraints on them. It further borrows from post-liberal theories to offer alternative framings of "crises" – highlighting the limited yet possible role that courts can play in bringing them forward – to question the necessity and indeed, the very possibility of emergency powers in liberal democracies.

Chapter 1: Revisiting the conceptual and legal frames of the emergency paradigm

When adjudicating emergency cases, courts must navigate a series of ambiguous legal concepts in a context of heightened tensions. Many of the factual circumstances presented as objective as well as the notions used to depict and frame them are more equivocal than commonly assumed. This chapter lays out and questions these assumptions which constitute the background against which emergency powers flourished and which frame their examination by the courts.

The first part examines the conceptual frame within which emergency powers are developed and practiced. It questions the claims of objective necessity which underpin them and aims to identify the possible subjective motives which might drive and sustain their exercise. The second part outlines the legal frame of emergency powers in the three jurisdictions. Finally, the third section is dedicated to the role of courts in the classic emergency paradigm in liberal democracies. It discusses what are commonly considered shortcomings of the judiciary making it unfit for "crisis" management but also various theoretical arguments repelling the possibility to dispense with judicial review.

A. The conceptual frame of emergency

Clarifying the conceptual frame of emergency is necessary to identify the dynamics driving its main two effects: undermining the separation of powers and protection of fundamental rights. In particular, the domain of emergency powers is commonly articulated in objective terms of "crises" and necessity, masking the high level of subjectivity involved and the connected responsibility. This clarification is important for analytical purposes but also

because judges are equally caught between the objective necessity discourse and the danger of more subjective motives, a tension reflected in their judgments.

This first part starts with the question of the *locus* of the state of exception, its politico-legal nature and the connected issue of the subjectivity involved in the decision of what constitutes an emergency. The focus then moves to the main concepts on which emergency powers are built and specifically, how they were redefined to reposition of the state in relation to security, the use of war and construction of the enemy to entrench its extraordinary powers. The "preventive state" is granted ever more powers to quash threats which it itself defined and identified. This first section ends with an overview of the two "crises" which have been the main purveyors of emergency powers in the last two decades. After twenty years of counter-terrorism policies, the authorities found fertile ground in the Covid-19 pandemic which, while spreading throughout the world, brought along a wave of exceptional powers.

1. Exception/emergency: on the nature of a politico-legal notion

When Locke, Schmitt or Agamben discuss the exception, they are contemplating a suspension of the law, zones of anomia, legal blackholes. Yet, contemporary emergency powers are deeply entrenched within the law. Whether legally constrained or facilitated, they are regulated by law. However, this legalization tends to distract from the subjectivity at play in the declaration of the emergency and the exercise of the powers. Acknowledging this subjectivity is important as it sheds the light back on the actors, their goals and crucially, their responsibility.

a. The *locus* of the exception

Is the exception a political or legal concept? Is it situated within or outside the law? The Kantian position holds that the "emergency powers can be governed by general principles of

constitutionalism and the rule of law"[14] whereas the Lockean position considers that "emergencies *per se* require responses which are beyond the confines of liberal constitutionalism."[15] Locke argued that, in emergency, the government should have the unconstrained "power to act according to discretion, for the public good, without the prescription of the law, and sometimes even against it".[16] This prerogative, however, should be "guided by the supreme law of nature – the safety of the people."[17] There is a clear antagonism between Locke's liberal theory and his provision for emergency. This was pointed out by Schmitt who argued that "[t]he exception was something incommensurable to John Locke's doctrine of the constitutional state".[18]

Schmitt went further in arguing that "[t]he exception is that which cannot be subsumed; it defies general codification".[19] For him, the exception is essentially a political, not a legal question. Therefore, it is "obvious" for Schmitt "[t]hat a neo-Kantian like Kelsen does not know what to do with the exception." But in any case, according to Dyzenhaus, "[i]t does not […] matter much, even at all, to Schmitt whether liberals adopt the Kantian, principled stance that the rule of law can and should control politics even in times of great political stress or the more pragmatic, Lockean liberal stance that the liberal state has to respond in such times outside of the law. For the Kantians content themselves with law's form, permitting liberalism's enemies

[14] András Sajó and Renáta Uitz, *The Constitution of Freedom: An Introduction to Legal Constitutionalism* (Oxford University Press, 2017), 417, https://doi.org/10.1093/oso/9780198732174.001.0001.

[15] Sajó and Uitz, 417.

[16] John Locke, *Second Treatise of Government*, Writing in Book édition (Indianapolis: Hackett Publishing Co, Inc, 1980), sec. 160.

[17] David Dyzenhaus, "States of Emergency," in *The Oxford Handbook of Comparative Constitutional Law*, ed. Michel Rosenfeld and András Sajó (Oxford University Press, 2012), 443, https://doi.org/10.1093/oxfordhb/9780199578610.013.0023.

[18] Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, trans. George Schwab (Cambridge, Massachusetts: The MIT Press, 1988), 13.

[19] Schmitt, 13.

to capture politics from within, whereas the Lockeans give to liberalism's enemies the license to capture politics by using extra-legal methods."[20]

The Lockean view still thrives. Following the 9/11 attacks and the subsequent response by the U.S., several prominent authors built on the observation that constitutions have proved incapable of restraining emergency powers.[21] As a result, this time in an attempt to protect the said constitutional order, prevent it from being tainted by the exception, they suggest extra-legal models, where the emergency powers are understood as standing outside the legal order and therefore not subjected to it. Placing the emergency powers outside the legal order would "shield"[22] the constitutional order. However, this entire enterprise is built on a strict separation of emergency and normalcy,[23] which became blurred to the point where it is barely identifiable.

Indeed, the ever-lasting debate about the *locus* of the state of exception – legal or political, inside or outside the legal order – revolves around the idea that the state of emergency's only purpose is to protect and restore the constitutional order, not to amend it, and is therefore necessarily temporary. When the strict separation between emergency and normalcy becomes murky and the state of emergency becomes permanent, it no longer serves its main function – restoring the constitutional order. To prevent such developments, emergency powers are increasingly wrapped in legal binds.

[20] Dyzenhaus, "States of Emergency," 444.

[21] See for example Oren Gross, "Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?," *Yale Law Journal* 112, no. 5 (January 1, 2003): 1011–1134; Mark Tushnet, "Defending Korematsu?: Reflections on Civil Liberties in Wartime," *Wis. L. Rev.*, 2003, 273–307.

[22] Greene uses this term in the context of the derogation model.

[23] David Cole, "Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis," *Michigan Law Review* 101, no. 8 (August 2003): 2587–88.

b. Encasing the emergency within the law

The variation of terminology from "exception" to "emergency" contains a deeper shift. As much as the "exception" in Schmitt and Agamben referred to a suspension of the legal order, the contemporary meaning of "emergency" appears more in line with the Kantian position, meaning that legal norms continue to limit it or at least apply to it. Sajó and Uitz identified five "critical points" if the law is to constrain the emergency: "(a) the constitutional definition of emergency situations; (b) the procedure for declaring an emergency (who and when can proclaim it, and how can a proclamation be prevented, if at all); (c) particular measures which may be taken and which are forbidden in an emergency situation; (d) the length of an emergency period, and the conditions of its extension; (e) follow-up procedures to review and end emergency measures."[24]

Yet, the contemporary emergency powers are not merely inscribed within the law, they are "hypernormatized". They do not create a zone of *anomia* but rather are characterized by a "hypernomia":[25] they produce a profusion of legal norms. For Hennette-Vauchez, this "hypernomia" results from the discourse presenting states of emergency as being in compliance with the rule of law. Extraordinary measures need to be legal, at least formalistically. The states of emergency "are intensely juridical" because the "success of the concept of the rule of law has contributed to impose the idea that the exception ought to fall into democratic lines".[26] Hennette-Vauchez, however, denounces the "the discursive trap of rule of law compatibility"

[24] Sajó and Uitz, *The Constitution of Freedom*, 424–25.

[25] Stéphanie Hennette-Vauchez, "Democracies Trapped by States of Emergency: Lessons from France," *iCourts Working Paper Series*, no. 276 (December 10, 2021): 10, https://doi.org/10.2139/ssrn.3982343.

[26] Hennette-Vauchez, 5.

which creates the risk that instead of taming the exception, the states of emergency corrupt the rule of law principle from the inside.[27]

In this regard, she refers to Harcourt who – reversing the Foucauldian concept of illegalisms – looks at the mechanisms used by the U.S. government to turn its illegal actions into legalities.[28] Boukalas points to a similar mechanism when he argues that in the wake of the 9/11 attacks, "the judicial order was not for a moment cast aside […] Instead, the "sovereign" [sought] to draw draconian, discretionary power from law, and inscribe it into law and to do so through the active involvement of the legislature and, occasionally, the judiciary."[29] The same dynamic took place, he argues, regarding Guantánamo Bay, commonly considered to be a legal blackhole.

c. Subjective necessity

For Boukalas, the "hypernormatization" of emergency powers turns the decisions of the government into "compulsion-ism" where the executive would be forced to act in a certain manner to meet dire circumstances and its actions are immediately normatized. In the process, the decision, and the responsibility it entails are negated.[30] The "decisionist type" was coined by Schmitt for whom "[s]overeign is he who decides on the exception."[31] Schmitt's theory of the sovereign and of the state of exception relies on this fundamental political decision separate from the norm. However, acknowledging the subjectivity of the chain of decisions involved in

[27] Hennette-Vauchez, 5.

[28] Bernard E. Harcourt, *The Counterrevolution: How Our Government Went to War Against Its Own Citizens*, Illustrated edition (New York: Basic Books, 2018), 226.

[29] Christos Boukalas, "No Exceptions: Authoritarian Statism. Agamben, Poulantzas and Homeland Security," *Critical Studies on Terrorism* 7, no. 1 (January 2, 2014): 116–17, https://doi.org/10.1080/17539153.2013.877667.

[30] Boukalas, 117.

[31] Schmitt, *Political Theology*, 5.

the emergency powers does not mean that one has to agree with Schmitt and the dictatorial implications of his theory. Rather, it is about refusing to yield to the pull of objectivity.

According to Agamben, the problem lies in that "[a] recurrent opinion posits the concept of necessity as the foundation of the state of exception."[32] Engaging in an analysis of the legal concept of necessity, he points out that in *Summa Theologica,*[33]

> *"[t]he ultimate ground of the exception […] is not necessity but the principle according to which 'every law is ordained for the common well-being of men, and only for this does it have the force and reason of law […]; if it fails in this regard, it has no capacity to bind […].' In the case of necessity, the* vis obligandi *of the law fails, because in this case the goal of* salus hominum *is lacking. What is at issue here is clearly not a status or situation of the juridical order as such (the state of exception or necessity); rather, in each instance it is a question of a particular case in which the* vis *and* ratio *of the law find no application."*[34]

It is only with the Moderns that this relationship was reversed and that necessity became "the ultimate ground and very source of the law."[35] The "extreme aporia" – in which facts become law and law is reduced to mere factual element – lies on a conception of necessity as an objective situation.[36] "Far from occurring as an objective given, necessity clearly entails a subjective judgment, and […] obviously the only circumstances that are necessary and objective

[32] Agamben, *State of Exception*, 24.

[33] Thomas Aquinas, *The "Summa Theologica" of St. Thomas Aquinas* (London: Burns Oates & Washbourne, 1912).

[34] Agamben, *State of Exception*, 25.

[35] Agamben, 26.

[36] Agamben, 29.

are those that are declared to be so." Not only is necessity the result of a subjective judgment, but this judgment is "relative to the aim that one wants to achieve."[37]

Greene finds value in bringing the decision-maker to the center of necessity. However, to Agamben's complete subjectivism, he prefers constructivism; a compromise between what he sees as two extremes: objectivity and subjectivity. Constructivists acknowledge both an objective reality and its subjective assessment. Applying this to emergencies, Greene considers that "the threat and conditions of the emergency themselves impact upon the decision-maker's assessment of the situation in ways that distort and hamper an objective assessment."[38] Whether one aligns with subjectivists or constructionists, it is important to acknowledge that as soon as events have been the objects of discourse production, what is expressed in that discourse is no longer objective reality. It has been mediated by a subjectivity and that subjectivity has an aim.

Critical security and terrorism studies highlight the role of power in the construction of knowledge and assignment of signified to certain signifiers. "Crises are thus made, they are not objective. And they are extremely productive for political elites".[39] The language of "crises", which in turn can open the way to that of emergency, is a means to a political end. What then is that end?

For Valim, the "state of exception [is] the legal form of neoliberalism".[40] Neoliberalism did not create the states of exception. However, the state of exception imposes an organization

[37] Agamben, 30.

[38] Alan Greene, *Permanent States of Emergency and the Rule of Law: Constitutions in an Age of Crisis* (Hart Publishing, 2018), 48–49.

[39] Charlotte Heath-Kelly, "Critical Approaches to the Study of Terrorism," in *The Oxford Handbook of Terrorism*, ed. Erica Chenoweth et al. (Oxford University Press, 2019), 230, https://doi.org/10.1093/oxfordhb/9780198732914.013.13.

[40] Rafael Valim, "State of Exception: The Legal Form of Neoliberalism," *Zeitschrift Für Politikwissenschaft* 28, no. 4 (2018): 409.

and function of the state which aligns to a great extent with the requirements of a neoliberal system. As the state of exception further separates the representatives from the represented, it weakens the democratic policy-making state and enhances the depoliticization of the society while increasing the control of the state over the population.

"In this sense, the enhancement of the power of economy towards society shall be equivalent to the political impotency towards economy. In the words of Laymert Garcia dos Santos, the market 'need, patently, a week State as a decision body and formulation of policies, but strong as a body who manages population and social control device'. That is, the rupture of the bonds between representatives and represented must be followed by the increase of state violence and the unravelling, open or disguised, of the constitutional weave."[41]

In this theory, the enemy that is confronted through the state of emergency is but an illusion created to deflect from the real goal, hence its perpetual redefinition. According to Valim, "the market defines the enemies and the State fights them."[42] Valim's analysis provides an interesting take on the contemporary modalities of what he calls the state of exception. However, for that same reason, it is also quite reductive in that it limits the exception to its use by neoliberal states. Other scholars have offered reasonings which are more general and therefore more far-reaching. Ní Aoláin, Special Rapporteur on counter-terrorism at the time and writing about Covid-19, asserted that emergency regimes are ultimately dedicated to serve the interests of powers.[43]

[41] Valim.

[42] Valim.

[43] Ní Aoláin, "Exceptionality," 57.

In *Counterrevolution*,[44] Harcourt offers an analysis of post-9/11 government in the U.S. as a domestication of counterrevolution strategies.[45] After identifying the main techniques of counterinsurgency used by the U.S. against anti-colonial uprisings and later in the war on terror, he finds that these very techniques are now used against the U.S.'s own population: a "deadly machine that eliminates the revolutionary minority, terrorizes their neighbors, and projects the power of the US government – in such a way as to convince the general population of their greater strength and dependability".[46] The result is a counterrevolution in the absence of any prior real insurgency or active minority. These emergency powers are designed to silence dissident opinions and preemptively suppress efforts to change the existing order.[47] It is then the preservation of the social order in general, not necessarily the neoliberal system, that is in question.

Boukalas also understands emergency powers as an answer to particular social dynamics. However, his argument offers a more complex understanding of the state as the main agent of the emergency. For Boukalas, the state is neither a thing (Agamben) nor a subject (Schmitt) both of which lead to an extreme reduction of the political. Rather, it is "a particular articulation of, and agency in, social dynamics." The "exception is precisely the moment when social antagonism overwhelms its institutionalized expressions in the state and law". It is the

[44] Harcourt, *The Counterrevolution*.

[45] See also Boukalas, "No Exceptions," 116.

[46] Harcourt, *The Counterrevolution*, 86.

[47] An important caveat should be made at this point that the analysis of the underlying motivations for declaring states of emergency or resorting to emergency powers is necessarily dependent on the jurisdiction in question. My contention is that the above developments are not only valid but of great importance to the role of the judiciary and more specifically of the apex jurisdictions examined here. Possibly, the reasoning could be applied to some degree to other liberal democracies. It might also be relevant in part for other types of governments. However, a mere transposition to jurisdictions which do not fit the liberal democracy criteria would most likely lead to ignoring equally if not more important reasons why these governments resort to emergency regimes.

moment of the forceful defense of the social order.[48] Emergency powers are therefore meant to quash social antagonisms at a time when the state can no longer accommodate them. For that reason, even states which remain democracies take on authoritarian features when resorting to them.

For Boukalas, emergency powers today are a display of "authoritarian statism". He insists that the modalities of emergency powers depend on historically-specific conditions. Thus, he links his analysis to the capitalist state and more specifically to "authoritarian statism", a concept coined by Poulanzas in the 1970s to describe the measures meant to counter the crisis of the Welfare state. Poulanzas defined authoritarian statism as "the expanded and intensified state control over social life, combined with restrictions of democratic freedoms and, more broadly, the ability of the population to influence state power. Authoritarian statism is a normal form of capitalist state, which, nonetheless, incorporates, combines and renders permanent, several authoritarian features".[49]

Therefore, even though Boukalas' analysis is broader than Valim's which is specifically concerned with neoliberalism, it remains historically and socially situated and as such applies not to any state but to the capitalist state that are the contemporary United States. Nonetheless, it is common to all these theories that emergency powers are exercised in order to further the interests of those in power, the state or those dominating the state institutions.

This conclusion is in clear tension with the principles of constitutionalism and liberal democracies where extraordinary powers and limitations on freedoms and rights must be

[48] Boukalas, "No Exceptions," 122.

[49] Boukalas, 124.

justified by some variation of the general interest. Various dynamics combined to coat emergency powers in a veneer of public interest while focusing the public attention on constructed threats, away from the more objective danger of a state whose powers were inflated by emergency.

2. The actors of security: a constructed enemy to relieve the state

In order to access emergency powers, governments must justify a threat. What constitutes a threat and its severity are matters of subjective appreciation, of construction. Adapting to the needs of these governments, a series of semantical shifts aligned key concepts to create the need for emergency powers. This section examines first how the notion of security was reframed so that the state, originally perceived as the source of the threat, would become all at once the shield against it and the thing to be protected. Once the state was established as the main actor of security issues, the "securitization" of nearly every domain transformed potentially all public policies into matters of national security, disseminating emergency-alike prerogatives throughout the legal orders. Lastly, at the acme of the emergency discourse, the martial narrative constructs a necessary enemy to fill the void left by the state as the source of threat.

a. From the security from the state to the security of the state

Originally, the word "security" referred to an excess of trust or confidence.[50] This meaning reveals a distinction between two understandings of security, one original and still operating indicating a subjective feeling and another newer one referring to an objective factual

[50] Thierry Balzacq, "Qu'est-ce que la sécurité nationale ?," *Revue internationale et stratégique* 52, no. 4 (2003): 33–50, https://doi.org/10.3917/ris.052.0033.

situation. Starting in the 16th century only, security became progressively associated with protective means. In the 18th century, for the first time, Webster gave a formal definition of security understood as a protective mechanism against external threat.[51] In this early tradition, security was an "objective common to individuals, groups and States".[52] The state was neither the main referent nor the object of security. Only later, following Hobbes and Smith, did the State become the main actor tasked with the security of the society and individual freedoms became subordinated to the security of the state. With the social contract, the monopoly over security was vested in the state.[53]

This emerging centrality of the state as actor and subject of security raises a fundamental question: the security of whom or what? Indeed, if security is a notion "essentially contested",[54] "national" does not provide much clarity. The French Code of Defense reads: "The purpose of the national security strategy is to identify all the threats and risks likely to affect the life of the Nation, in particular with regard to the protection of the population, the integrity of the territory and the permanence of the institutions of the Republic, and to determine the responses that the public authorities must provide."[55]

This article reveals three referents or subjects of national security: the population, the integrity of the territory and the permanence of the institutions of the Republic. As such, the

[51] Balzacq, 5.

[52] Emma Rothschild, "What Is Security?," *Daedalus* 124, no. 3 (1995): 61.

[53] Balzacq, "Qu'est-ce que la sécurité nationale ?," 37.

[54] Balzacq, 34.

[55] Art. L111-1 al. 1 et 2 du Code de la Défense : « La stratégie de sécurité nationale a pour objet d'identifier l'ensemble des menaces et des risques susceptibles d'affecter la vie de la Nation, notamment en ce qui concerne la protection de la population, l'intégrité du territoire et la permanence des institutions de la République, et de déterminer les réponses que les pouvoirs publics doivent y apporter ». Unless otherwise indicated, translations are mine.

"protection of national security is a superior collective good, which includes but goes beyond the interests of the State".[56] The three elements to be protected, however, although they are connected by "and" rather than "or", and despite the umbrella notion of Nation, are not the components of a single unit. On the contrary, the protection of either might have serious adverse effects on the other.

In the collective imagination, terrorism threatens the population first and foremost. Terrorism is susceptible to strike anytime, anywhere, against anybody. Recent attacks, for example on 9/11 or in 2015 in Paris, were in this way directed against the population with the aim of making as many victims as possible. From that point of view, in the Hobbesian tradition, the state appears as the guardian of the population's safety.

In the context of the fight against terrorism, this understanding led to a shift from national security to a version of human security, where counter-terrorism measures are justified as protecting the people. This shift deserves closer attention. Duroy points out that human security originally stems from the *Magna Carta* and the right to *habeas corpus* and referred to the protection of detainees against the arbitrariness of the state. In political sciences where it emerged, the concept of human security includes this legal meaning as it refers to the security of the person against all threats, including those posed by the state. When analyzed from the point of view of the security of the population, the role of the State is not as one-sided as a

[56] Julie Alix and Olivier Cahn, "Mutations de l'antiterrorisme et émergence d'un droit répressif de la sécurité nationale," *Revue de science criminelle et de droit pénal comparé* 4, no. 4 (2017): 846, https://doi.org/10.3917/rsc.1704.0845.

prima facie national security argument would suggest. Here, the state is not a neutral impartial guardian of security but also one of the sources of threat.[57]

The ambivalence of the meaning and referent of security is emphasized in French by the use of two different concepts. The French language knows two words for security: *sûreté* and *sécurité*. The right to *sûreté* refers to security in the sense of the *habeas corpus* highlighted by Duroy. For Lazerges, it is more broadly the right to the protection of fundamental freedoms, a "guarantee against the state's arbitrariness", and should in no way be confused with the right to *sécurité*. The right to *sécurité*, only recently consecrated in the French legal order by the law, not the Constitution, is a right to the protection against harm to people and goods, more specifically in the context of the fight against organized crime and terrorism.[58] As such, the French lexical dichotomy highlights the distinction pointed by Duroy. However, Lazerges continues, a semantic shift has allowed for some confusion between *sûreté* and *sécurité* and ultimately, led to the supremacy of the latter over the former.[59]

Although the English language also knows two words – safety and security – their meanings do not exactly coincide with the French distinction, as can be observed in the two official versions of the ECHR. Article 5 guarantees the "right to liberty and security", "*Droit à la liberté et à la sûreté*" in French. "Security" appears again in the Convention in the context of "national security", one of the legitimate aims which can justify restrictions to certain rights.

[57] Sophie Duroy, "Remedying Violations of Human Dignity and Security: State Accountability for Counterterrorism Intelligence Cooperation," in *Human Dignity and Human Security in Times of Terrorism*, ed. Christophe Paulussen and Martin Scheinin (The Hague: T.M.C. Asser Press, 2020), 126–27, https://doi.org/10.1007/978-94-6265-355-9_7.

[58] Christine Lazerges, "Le droit à la sécurité a-t-il effacé le droit à la sûreté ? L'exemple de la loi « Sécurité globale »," *La Revue des droits de l'homme. Revue du Centre de recherches et d'études sur les droits fondamentaux*, no. 20 (June 21, 2021): 1–2, https://doi.org/10.4000/revdh.12108.

[59] Lazerges, 1–2.

Confusion arises when Articles 8 and 10 distinguish between "*sécurité nationale"* ("national security") and "*sûreté publique"* ("public safety"), whereas Article 9 mentions the "*sécurité publique"* and the English text reads "public safety".

Duroy, writing about counter-terrorism, argues that rather than accepting a broad notion of national security, three types of security should be differentiated: human security, security as a social good and national security, interpreted as security of governmental institutions. If security is to be understood also as a protection against the powers of the State and to the extent that anti-terrorism measures infringe on human rights, then, Duroy argues, "any talk about trade-offs [between liberty and security] can only have at its core national security, i.e. the security of governmental institutions."[60]

The focus on state institutions can be found explicitly in some national emergency provisions. Article 16 of the French Constitution grants extraordinary powers to the President. The first ground susceptible to trigger these powers is the severe and immediate threat to the institutions of the Republic together with the interruption of the regular functioning of constitutional public authorities. Notably, these are not grounds contemplated by emergency provisions in the ECHR nor the International Covenant on Civil and Political Rights.

The meaning of "security" evolved to increasingly refer, although not necessarily explicitly, to protective mechanisms of state institutions. As a result of this process, the concept aligned to protect the same interests as those served by emergency powers. This alignment found its conceptual outlet in the ever more encompassing notion of national security.

[60] Duroy, "Remedying Violations of Human Dignity and Security," 128.

b. National security: an invasive notion

Focusing on national security in the U.S., Donohue posits a Hamiltonian definition: "the laws and policies directed at protecting the national government in its efforts to aid in the common defense, preserve public peace, repel external attacks, regulate commerce, and engage in foreign relations."[61] She then identifies four main eras in the evolution of the meaning of the term. Originally, national security concerns focused on the creation and strengthening of the Union and to a lesser extent the economic growth of the country. It then developed to support an international policy seeking to "shape the international arena" and internally, "to limit the growing strength of private sources of power." During the third and fourth epochs, roughly from the 1930s until now, national security became an "overriding interest" with all other policy concerns (including education and health for example) seen through its lens. In the past few decades, Donohue argues, national security has become the "United States' most powerful institutional engine". Rare are the domains that still escape the national security infrastructure and the line between foreign and domestic is fading.[62]

If the notion of national security has been a pillar of the U.S. federal policies, it remained largely ignored in France until 2008. Before then, two distinct concepts co-existed. The *défense* was concerned with foreign threats and, more generally, army interventions abroad, whereas domestic security (*sécurité intérieure*) was limited to internal matters.[63] The 2008 White paper[64] introduced the notion of national security in French law, while reorganizing the scope of

[61] Laura Donohue, "The Limits of National Security," *American Criminal Law Review* 48, no. 4 (2011): 1576.

[62] Donohue, 1577; Oren Gross and Fionnuala Ní Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice*, 1st edition (Cambridge: Cambridge University Press, 2006), 208.

[63] Jean Porcher, "Défense versus Sécurité Nationale," *Défense Nationale et Sécurité Collective*, no. 711 (September 2008): 69–76.

[64] Livre blanc sur la défense et la sécurité nationale, 2008.

security and defense. This new "national security" concept shows its American inspiration. Its structural and encompassing characteristics transpire from the 2009 amendment of the Code of Defense, which now states that "[a]ll public policies contribute to national security."[65] The *défense* became subordinated to national security and no longer addresses all foreign threats but only armed aggressions.[66]

Donohue pointed that during the fourth epoch, the U.S. national security's focus shifted to the effects of the threat irrespective of the actor(s), or indeed the presence of any actor. This shift allowed the inclusion of pandemics for example.[67] Similarly, in France, the *défense* strategies were mainly reactive and defensive whereas the national security policy became more pro-active as it requires a detection of all threats and risks. The French national security now includes natural or industrial catastrophes.[68]

In order to address such potential universality of threat, all public policies are involved in national security. This all-encompassing characteristic is further demonstrated in both countries by the composition and competence of the institutional structures. In the U.S., the National Security Council is composed of senior advisers and cabinet officials. Its "function has been to advise and assist the President and to coordinate matters of national security among government agencies".[69] In France, the National Defense and Security Council (*Conseil de Défense et de Sécurité Nationale*), "chaired by the President of the Republic, brings together the Prime Minister, the Ministers of Defense, Interior, Foreign Affairs, Economy and Budget

[65] Art. L111-1 of the Code of Defense: "L'ensemble des politiques publiques concourt à la sécurité nationale."

[66] Frédéric Coste, "L'adoption Du Concept de Sécurité Nationale : Une Révolution Conceptuelle Qui Peine à s'exprimer," *Fondation Pour La Recherche Stratégique, Recherche & Documents*, no. 3 (2011): 14.

[67] Donohue, "The Limits of National Security," 1577.

[68] Coste, "L'adoption Du Concept de Sécurité Nationale," 15.

[69] https://www.whitehouse.gov/nsc/

(as well as, depending on the themes addressed during the sessions, other ministers or personalities depending on their functions and powers). [The Council] deals with all defense and security issues, without any real distinction between interior and exterior."[70]

As a result of these developments, national security became a pervasive notion that infiltrated all aspects of public policy and blurred the lines between domestic and foreign. It drives and enables a securitization logic which Balzacq defines as "the pragmatico-linguistic construction which transforms a given topic, *a priori* without or with limited stakes, into a question of security."[71] It is therefore not surprising that norms originally estrange to security matters are summoned in the name of national security and notably, immigration measures.

Alix and Cahn identified another consequence of the confusion between domestic and international: the modification of the use of force. A soldier shoots to kill whereas a policeman shoots to incapacitate. The army surrounds a group of persons to deprive them of their liberty when the police must maintain a possibility to exit the area. According to the authors, these distinctions are no longer so stark. The principle that a suspect should be arrested in order to bring her to a judge is disappearing in favor of the neutralization of the threat.[72]

Despite its infiltration of virtually all domains of public policy, the prevailing sense remains that matters of national security are special.[73] For that reason, the dissemination of national security contributed in no small part to the normalization of emergency powers. Indeed, powers attached to national security questions tend to display the characteristics of formal

[70] Coste, "L'adoption Du Concept de Sécurité Nationale," 16.

[71] Balzacq, "Qu'est-ce que la sécurité nationale ?," 39.

[72] Alix and Cahn, "Mutations de l'antiterrorisme et émergence d'un droit répressif de la sécurité nationale," 857.

[73] Gross and Ní Aoláin, *Law in Times of Crisis*, 2006, 214.

emergency powers (exorbitant prerogatives, broader limitations of rights and freedoms) while benefiting from weaker scrutiny from the various branches of power. For these reasons, national security creates, supports, and carries with it pseudo-emergency powers in all areas of public policy.[74]

The blurring of the distinction between domestic and foreign and the ensuing militarization of domestic policing were drastically exacerbated in the wake of the 9/11 attacks. If the spread of national security was initiated by the "total war" in the first half of the 20th century,[75] it was entrenched by the "war on terror".

c. The resurgence of the war rhetoric and the necessary enemy

Words make war and war makes meaning.[76] The creation of the "war on terror" after 9/11 was a most successful example of discourse production. The war metaphor and its lexicon are consequential language with significant implications. It might not always be beneficial for the power in place to use it. The Algerian war is a clear example of such avoidance. A whole new emergency regime was created in France to address the situation in Algeria without having to declare a state of siege. Edgar Faure, President of the Council at the time, would later acknowledge: "the simple truth being that the term state of siege irresistibly evokes war and that any allusion to war should be carefully avoided in connection with the affairs of Algeria".[77]

[74] Elizabeth Goitein, "Emergency Powers, Real and Imagined: How President Trump Used and Failed to Use Presidential Authority in the COVID-19 Crisis," *Journal of National Security Law & Policy* 11, no. 1 (October 19, 2020): 30.

[75] Gross and Ní Aoláin, *Law in Times of Crisis*, 2006, 216.

[76] Heath-Kelly, "Critical Approaches to the Study of Terrorism," 229–30.

[77] Dominique Rousseau, "L'état d'urgence, un état vide de droit(s)," *Revue Projet* 291, no. 2 (2006): 21, https://doi.org/10.3917/pro.291.0019.

Conversely, the war narrative can be a powerful tool for politicians. Qualifying specific circumstances as war allows to mobilize the population and state's resources and impose extraordinary restrictions on fundamental liberties and rights while legitimizing the government's actions[78] and strengthening its leadership position. In the U.S., the war rhetoric was strategically deployed in circumstances that bore little resemblance with traditional wars: the war on crime or the war on drugs.

The "war on terror" is only the latest iteration of this political tactic. However, it is unusual in that it proved remarkably efficient and spread across the globe, including the Council of Europe member states, with notable ease. According to Esch, the war on terror is more than a narrative. It is a myth in the sense that it provides significance, it is shared by a group and (re)produced at various levels, and it came to affect the political conditions of the group.[79] It is in turn based on two pre-existing "myths of *American Exceptionalism* and *Barbarism vs. Civilization* and their variations have been reappropriated to make significance of the 9/11 narrative and the threat of "new" terrorism."[80] The fundamental dichotomy on which the *Barbarism vs. Civilization* myth is based is "powerfully intuitive" as it calls on identity.[81] The otherization and antagonism at play in *Barbarism vs. Civilization,* and therefore in the "war on terror" myth, combined easily with an orientalist view of "the Muslim" or "the Arab" and a latent islamophobia.

[78] For example, opinion polls and focus groups revealed that rhetoric emphasizing the "evil" deed of Saddam Hussein were more powerful in justifying the Gulf War rather than economic reasons. (Brandon Rottinghaus, 'Presidential Leadership on Foreign Policy, Opinion Polling, and the Possible Limits of "Crafted Talk"', *Political Communication,* 25:2, 2008, pp. 148–150.)

[79] Joanne Esch, "Legitimizing the 'War on Terror': Political Myth in Official-Level Rhetoric," *Political Psychology* 31, no. 3 (2010): 362.

[80] Esch, 365.

[81] Esch, 370.

War grants power to the executive. Yet to secure them, the population, the institutions need to rally around the necessity of the war and for that, the war needs an enemy. The threat must be incarnated. The clearer the designation of the enemy and the bigger the threat is perceived, the more powers to the executive the public tolerates.[82] Terrorism, unlike traditional wars, does not offer such easily discernible enemy. Terrorism, after all, is a means, not a cause or a (group of) person. Through a series of syncretisms, the Bush administration created the necessary enemy, realizing once more Sartre's words: "If the Jew did not exist, the anti-Semite would invent him."[83]

The enemy constructed for the purpose of the war on terror has the advantage of being (falsely) homogenous while its definition is flexible enough to allow the government to decide who fits in.[84] The terrorist and "the Muslim" were quickly amalgamated, relying on decades of Orientalism and islamophobia. Grosfoguel, building on Said, recalls that "Orientalist views are characterized by racist exotic and inferior essentialist representations of Islam as frozen in time".[85] This perception of Islam was strongly reinforced by the media in the wake of the 9/11 attacks.[86] "The circulation of these stereotypes contributes to the portrayal of Muslims as racially inferior, violent creatures. Thus, its easy association with "terrorism" and representation as "terrorist."[87]

[82] Gross and Ní Aoláin, *Law in Times of Crisis*, 2006, 220–21.

[83] Jean-Paul Sartre and George J. Becker, *Anti-Semite and Jew* (New York: Schocken Books, 1948).

[84] Esch, "Legitimizing the 'War on Terror,'" 383.

[85] Ramon Grosfoguel, "The Multiple Faces of Islamophobia," *Islamophobia Studies Journal* 1, no. 1 (2012): 17–18, https://doi.org/10.13169/islastudj.1.1.0009.

[86] Esch, "Legitimizing the 'War on Terror,'" 381.

[87] Grosfoguel, "The Multiple Faces of Islamophobia," 31.

As Esch points out, the Bush administration was wise enough to claim that the war on terror was not about faith. However, the analysis of the discourse initiated by the Bush administration showed that their speeches were filled with evangelical and millennial Christian imagery and that, although they avoided the word "crusade" at first, the theme of the holy war was omnipresent.[88] As a result of this dichotomic rhetoric, Grosfoguel says, "[t]he events of 9/11 escalated anti-Arab racism through an Islamophobic hysteria all over the world".[89]

Despite, or because of France's fundamentally different approach to (freedom of) religion, both the war-on-terror myth and its Islamophobic foundation were embraced by a wide range of politics and intellectuals and spread in the media. The principle of *laïcité* was consecrated by the 1905 Law on the separation of the Churches and the State. It is currently enshrined in Article 1 of the French Constitution.[90] However, there is no one single definition of *laïcité* and two main opposing conceptions arose.

According to Weil, "the law of 1905 was built around three principles: freedom of conscience, separation of State and Churches and the equal respect of all faiths and beliefs."[91] It bore a liberal understanding of *laïcité* that was primarily meant to counter the influence of the Catholic Church over the State. It was therefore conceived as a protection of the individual against pressure from religious groups – as opposed to the U.S. where freedom of religion is primarily concerned with the protection of religious groups against the State. Furthermore, Weil argues that neutrality towards religious beliefs is not imposed in the public sphere but in the

[88] Esch, "Legitimizing the 'War on Terror,'" 376; Grosfoguel, "The Multiple Faces of Islamophobia," 17.

[89] Grosfoguel, "The Multiple Faces of Islamophobia," 15.

[90] Art. 1 of the French Constitution 1958: « La France est une République indivisible, laïque, démocratique et sociale. », "France shall be an indivisible, secular, democratic and social Republic."

[91] Patrick Weil, "Why the French Laïcité Is Liberal," *Cardozo Law Review* 30, no. 6 (June 2009): 2704.

state sphere, i.e. to the state and civil servants.[92] This argument is indeed in line with a liberal conception of *laïcité*.

However, in view of more recent developments, it would be difficult to argue that this liberal understanding is still dominant in France. For Hennette-Vauchez, the principle can no longer be called liberal as it is now equated with a requirement of religious neutrality imposed on individuals and mainly targeting Muslim women.[93] *Laïcité* is a corner stone of the French republicanism, which in turn, relies on an integration model. The resulting anti-communalism discourse has been at the center of both a hard version *laïcité* and islamophobia (denial).[94] Consequently, in the last few decades, wearing the veil in the public space or requesting halal food in public schools' cafeterias have been denounced as signs of fundamentalism.

Whereas the battle for *laïcité* was originally spearheaded by the anti-clerical left, it was reappropriated, in its hard version, by the right and extreme right and eventually returned in this illiberal form to a part of the left. Across the political spectrum and in the media, *laïcité* became a republican cover for islamophobia.[95] The war on terror found in this Islamophobic background its designated enemy.

The position of the ECtHR in matters involving Muslim minorities and matters of islamophobia is not one-sided and would be difficult to summarize here. However, overall, the court has failed to provide Muslims with the same level of protection that it has other

[92] Weil, 2705.

[93] Stéphanie Hennette-Vauchez, "Is French Laïcité Still Liberal? The Republican Project under Pressure (2004–15)," *Human Rights Law Review* 17, no. 2 (June 1, 2017): 285–312, https://doi.org/10.1093/hrlr/ngx014.

[94] Reza Zia-Ebrahimi, "The French Origins of 'Islamophobia Denial,'" *Patterns of Prejudice* 54, no. 4 (August 7, 2020): 315–46, https://doi.org/10.1080/0031322X.2020.1857047.

[95] Zia-Ebrahimi.

minorities.[96] In one of its most emblematic cases, *S.A.S. v. France*,[97] where the court was called to examine the prohibition of wearing full face veil in public, it showed great deference to France. The Court found no violation of the right to private life, the right to manifest one's religion nor any unconventional discrimination under Article 14. More, the Court accepted that "under certain conditions the "respect for the minimum requirements of life in society" invoked by the Government – or of "living together", […] – can be linked to the legitimate aim of the "protection of the rights and freedoms of others".[98] Although this case had no direct relation with national security or terrorism, upholding these "minimum requirements of life in society" or "living together" as legitimate aims to restrict wearing a full face veil in public bears dangerous similarities with the narrative defending "our way of life" in the context of the war on terror.

Focusing the war on terror on the "Muslim"/"Arab" enemy proved particularly efficient in France and in the U.S. due to the already latent islamophobia. But this tactic also allowed the various governments to depoliticize the debate both on islamophobia and the fight against terrorism. Hafez recalls that "[i]slamophobia is about a dominant group of people aiming at seizing, stabilizing and widening their power by means of defining a scapegoat—real or invented—and excluding this scapegoat from the resources/rights/definition of a constructed 'we'."[99]

[96] Eva Brems, "Islamophobia and the ECtHR," in *Migration and the European Convention on Human Rights*, ed. Başak Çalı, Ledi Bianku, and Iulia Motoc (Oxford University Press, 2021), https://doi.org/10.1093/oso/9780192895196.003.0009.

[97] *S.A.S. v. France* [GC], no. 43835/11, ECHR 2014. See also *Belcacemi and Oussar v. Belgium*, no. 37798/13, 11 July 2007 and *Dakir v. Belgium*, no. 4619/12, 11 July 2017.

[98] *S.A.S.*, § 121.

[99] Farid Hafez, "Schools of Thought in Islamophobia Studies: Prejudice, Racism, and Decoloniality," *Islamophobia Studies Journal* 4, no. 2 (2018): 218, https://doi.org/10.13169/islastudj.4.2.0210.

At the same time, by focusing the debate on a clash of civilizations or of religions, the narrative argues that "they hate us for who we are", not for what we have done or are doing. It removes the need to reevaluate past policies and actions as well as alternative ways to address an issue.[100] As Grosfoguel points out: "it is easier to blame Arab people and use racist Islamophobic arguments rather than to critically examine US foreign policy for the past 50 years."[101] The same analysis applies to France. Considering the absence of discussion of counter-terrorism and emergency laws in parliament, Cahn, following Alix, also argues that since 2001 terrorism has become an almost apolitical topic.[102]

Another consequence of the war-on-terror construction is that "homegrown terrorism", or non-Islamist terrorism do not fit the narrative. Rather than reinforcing the figure of the enemy, "homegrown terrorism" points to the failures of the State. This matter can be accommodated and reintegrated in the narrative when "homegrown terrorism" has an Islamist dimension. The issue can then be externalized by using Islamophobic arguments which designate Muslims as "the Other" and therefore not really "homegrown".

During the state of emergency in France in 2015-2017, one of the exceptional measures allowed the closing of places of worship. This measure, which was predominantly applied to mosques, was then introduced in the normal legal order by the 2017 SILT law.[103] Again, after the assassination of a high school teacher in October 2020, the Great Mosque of Pantin was

[100] Esch, "Legitimizing the 'War on Terror,'" 384.

[101] Grosfoguel, "The Multiple Faces of Islamophobia," 15.

[102] Olivier Cahn, "Contrôles de l'élaboration et de La Mise En Œuvre de La Législation Antiterroriste," *Revue Des Droits et Libertés Fondamentaux* Chron. no. 8 (2016): 4.

[103] Loi n° 2017-1510 du 30 octobre 2017 renforçant la sécurité intérieure et la lutte contre le terrorisme.

closed by an administrative measure.[104] Following this attack, the debate took a new dimension with the introduction on 9 December 2020 of the bill on reinforcing the respect of the principles of the Republic, also called the "law on (Islamist) separatism". The bill aimed to exert some control over the content of the speeches made by imams, to foster an "enlightened" Islam and counter separatist tendencies. This legislative project revealed both the orientalist perception of an Islam which would need the help of the French State to become "enlightened" and its externalization since anything that falls short from integration can be considered separatist, not really French.

Terrorism that cannot be imputed to "Muslims" or "Arabs" is more problematic from the point of view of the war-on-terror narrative. Despite numbers of violent attacks by white supremacists in the U.S., these events are usually not labelled as terrorism. Such attacks are more often referred to as "white supremacist violence", which diminishes the perceived gravity of the act while keeping the war-on-terror narrative intact. Only recently has the White House recognized the terrorist nature of this violence. In June 2021, the National Security Council released the "National Strategy for Countering Domestic Terrorism". This document clearly attempted to mark a turning point in the official rhetoric after the attack on the Capitol on 6 January 2021. In many Western countries, the war on terror found fertile ground in rampant islamophobia and a thriving national security idea. The discourse dominated by this triad was so pervasive, the myth so entrenched, that it almost became factual reality.

The Covid-19 pandemic, a health "crisis", provided an opportunity to shed a different light on the management of "crises". The pandemic fitted comfortably under the overgrown

104 https://www.conseil-etat.fr/actualites/actualites/le-juge-des-referes-du-conseil-d-etat-rejette-la-demande-de-suspension-de-la-fermeture-de-la-grande-mosquee-de-pantin

umbrella of national security. It threatened the population as a whole and the proper functioning of the constitutional order (among others, parliaments were unable to hold sessions in normal conditions and courts faced major challenges in the adjudication process). The war rhetoric resurfaced to mobilize despite the enemy being a virus. Covid-19 entered the list of non-human enemies alongside drug or communism in the U.S. or finance in France.[105]

The "war" metaphor was used by the Secretary General of the United Nations[106] as he exhorted states to adopt more comprehensive measures against the pandemic. Announcing the first lockdown and upcoming legislation through ordinances, President Macron declared: "We are at war, in a sanitary war admittedly. We are not fighting an army or another nation, but the enemy is there, invisible, elusive, and advancing. And that requires our general mobilization. We are at war." [107] Interestingly, President Trump also resorted to martial metaphors. Yet, the aim seems to have focused almost exclusively on his image as a war President and gathering support more than deploying exceptional powers since the attitude of the federal administration during the early months of Covid-19 reflected a holding rather than proactive strategy.[108] After he was elected, President Biden too promised to be a "commander in chief" in the fight against Covid-19.

[105] "L'intégralité du discours de François Hollande au Bourget," *Le Nouvel Obs*, January 26, 2012, https://www.nouvelobs.com/election-presidentielle-2012/sources-brutes/20120122.OBS9488/l-integralite-du-discours-de-francois-hollande-au-bourget.html.

[106] "Assemblée mondiale de l'OMS : 'Nous sommes en guerre' contre le Covid, assure le chef des Nations-Unies," *RTBF*, May 24, 2021, https://www.rtbf.be/article/assemblee-mondiale-de-loms-nous-sommes-en-guerre-contre-le-covid-assure-le-chef-des-nations-unies-10768385.

[107] "« Nous sommes en guerre » : le verbatim du discours d'Emmanuel Macron," *Le Monde.fr*, March 16, 2020, https://www.lemonde.fr/politique/article/2020/03/16/nous-sommes-en-guerre-retrouvez-le-discours-de-macron-pour-lutter-contre-le-coronavirus_6033314_823448.html.

[108] Christopher Griffin, "The American Government and 'Total War' on COVID-19," *Angles. New Perspectives on the Anglophone World*, no. 12 (March 1, 2021), https://doi.org/10.4000/angles.4058; Goitein, "Emergency Powers, Real and Imagined."

3. The "rise of the preventive state"[109]

Examining "constitutions under stress", Sajó and Uitz analyze the defensive modes that are emergency powers and militant democracy. They warn us, however, that these do not paint a full picture. The counter-terror state has reached more broadly and gave rise to the preventive state.[110] Militant democracy is a concept mainly focused on electoral-processes and political parties. It seeks to preventively counter enemies of democracy who attempt to destroy it by rising to power using democratic means.

Loewenstein developed the concept of militant democracies during the rise of fascism in Europe in the 1930s.[111] It is however Van den Bergh who provided a theoretical justification for the concept: "The democratic self-government is […] nothing more than a state of 'permanent self-correction'". "The belief that democracy should be abolished, […] when carried out, constitutes an irreversible fact. This brings this belief into conflict with the 'self-correcting nature' of democracy and thus threatens the essence of democracy."[112]

Van den Bergh also narrowed the scope of his analysis. Contrary to Loewenstein, he was not interested in groups who would seek to abolish democracy through violent means. "[P]olitical parties and individuals who decry, or by their attitude show, that they want to fight the existing law by illegal means, or, to fight it once they please, cannot expect otherwise than

[109] Sajó and Uitz, *The Constitution of Freedom*, 440.

[110] Sajó and Uitz, 416–45.

[111] Paul Cliteur and Bastiaan Rijpkemaa, "The Foundation of Militant Democracy," in *The State of Exception and Militant Democracy in a Time of Terror*, ed. Afshin Ellian and Gelijn Molier (Republic of Letters Publishing, 2012), 228.

[112] Cliteur and Rijpkemaa, 244.

to be considered enemies by the State and to be treated accordingly."[113] Therefore, Van den Bergh focuses on the more difficult question of groups resorting to democratic means – a distinction that Loewenstein did not make. This clarification is important in light of the expansion of the domain of militant democracy in the past few decades.

"The concept of militant democracy becomes ever more fluid"[114] and spread easily to the fight against terrorism. This convergence was enabled by the war-on-terror discourse. "They" are attacking "Us" because of our values: democracy and freedom. Terrorism is nothing but a means and it is used equally in democratic and non-democratic states. Nonetheless, once the war on terror is presented as a battle of democracy against obscurantism, the door is open for militant democracy to legitimate preventive actions. And indeed, "[t]he counter-terror state operates as a preventive state."[115] That is a state where the "presumption of danger" has replaced the presumption of innocence, where "the citizen will have to prove the absence of risk in order to make a liberty claim."[116]

The counter-terrorism legal arsenal is characterized by the rapid multiplication of preventive measures such as surveillance and safety measures. In the context of the war on terror, the prevention of crime is not social but repressive and punitive.[117] Furthermore, fewer

[113] George Van den Bergh, *De democratische staat en de niet-democratische partijen* (De Arbeiderspers, 1936), https://resolver.kb.nl/resolve?urn=MMKB06:000001919:00033 as cited in ; Cliteur and Rijpkemaa, "The Foundation of Militant Democracy."

[114] Sajó and Uitz, *The Constitution of Freedom*, 434.

[115] Sajó and Uitz, 440.

[116] Sajó and Uitz, 440.

[117] "Alongside 'legally organized' prevention, which comes under administrative law, the prevention of delinquency is implemented at various levels of social life, by multiple actors and institutions: promotion of education, health policy public policy, fight against unemployment and precariousness, etc. We then speak of 'social prevention' of crime." (Alix and Cahn, "Mutations de l'antiterrorisme et émergence d'un droit répressif de la sécurité nationale," 851.)

guarantees apply to such preventive and in many cases administrative measures than to more traditional criminal ones. In these characteristics, Giudicelli-Delage sees the development of a "*droit de la dangerosité"* (law of dangerousness).[118]

The combination of the fight against terrorism and militant democracy is all the more worrying as it reveals that counter-terrorism resorts to techniques used both by militant democracy and the very dangers that militant democracy seeks to combat. Counter-terrorism does not mean fascism. However, the war-on-terror narrative and techniques share troubling features with populist movements.

The threat is discursively amplified to justify the need for a centralized and strong governmental response. At the same time, requirements for compromises and inclusivity are presented as weakness of democracy as they lead to indecision.[119] This narrative is deployed against a background of emotionalism, where fear, loyalty and a sense of unity are fed by political discourses.[120] "Democracy cannot be blamed if it learns from its ruthless enemy," said Loewenstein.[121] There is a real danger, however, that it would lose itself in the learning process.

The preventive turn of the counter-terror state and of emergency powers is as ineffective as it is dangerous. It is ineffective because its logic tends towards a suppression of all risks. Lazerges points to the absurdity of such endeavor. Precisely because it is unattainable, the idea

[118] Geneviève Giudicelli-Delage, "Droit pénal de la dangerosité — Droit pénal de l'ennemi," *Revue de science criminelle et de droit pénal comparé* 1, no. 1 (2010): 69–80, https://doi.org/10.3917/rsc.1001.0069.

[119] Cliteur and Rijpkemaa, "The Foundation of Militant Democracy," 232.

[120] Cliteur and Rijpkemaa, 236.

[121] Karl Loewenstein, "Autocracy Versus Democracy in Contemporary Europe, I," *The American Political Science Review* 29, no. 4 (1935): 593, https://doi.org/10.2307/1947789.

of global security is a dangerous illusion that tends toward total security and therefore totalitarianism.[122]

The rise of the preventive state can be better understood when it targets marginalized groups who think differently, worship differently, live differently. Emergency powers are then used preventively to protect the social order against disruptions by minority groups and quash insurgency before any attempt could even take shape.[123] A recent tendency of members of the French government illustrates this logic as they attempted to delegitimate opposition groups by associating them with terrorism. The expressions "ecoterrorism" and "intellectual terrorism" flourished alongside "islamo-leftism" where the reference to Islam is expected to bear terrorist connotations.[124] Divergences of ideas, beliefs, or values from what is required to maintain and reproduce the social order thereby fall within the scope of counter-terrorism and can be repressed.

The preventive state was further strengthened with the self-disciplining of the population. The efficiency of this self-discipline was illustrated during the Covid-19 pandemic. During the lockdown in France, when leaving their home, individuals had to carry with them a self-certificate, drafted and signed by themselves and indicating where they came from, where they were going and for which purpose. A few years later, self-discipline became self-censorship. After the attack perpetrated by Hamas against Israel, countless lectures, conferences or art shows were cancelled throughout Europe and the U.S. because of their assumed or explicit

[122] Lazerges, "Le droit à la sécurité a-t-il effacé le droit à la sûreté ?," para. 1.

[123] Harcourt, *The Counterrevolution*.

[124] Alexandre Truc, "« Écoterroristes » et « terroristes intellectuels » : Retour sur de (pas si) nouvelles pratiques de gouvernement," *La Revue des droits de l'homme. Revue du Centre de recherches et d'études sur les droits fondamentaux*, May 8, 2023, https://doi.org/10.4000/revdh.17221.

pro-Palestinian position or because of the mere participation of Palestinians. These cancellations did not necessitate the direct involvement of the states. When used to undermine or silence dissident opinions, the preventive state and emergency powers weaken the self-correcting possibilities which militant democracy sought to preserve.

4. The "crises" that fuel the emergency

"As Janet Roitman writes, 'the crisis is a blind spot that enables the production of knowledge': it is not 'a condition to be observed', but 'an observation that produces meaning'."[125] "Crises" too are constructed but as Greene highlights with his constructionist model in opposition to Agamben's subjectivist one, "crises" have a direct factual and objective basis. The planes hitting the Twin Towers on 9/11 are undeniable much like Covid-19 is undeniable.

What should be questioned is the manner in which each factual situation is framed. Some qualify as "crises", most do not despite catastrophic consequences sometimes counted in number of lives lost (car accidents, violence against women or poverty to name just a few). Among the "crises", some trigger emergency powers whereas others do not (climate change). Some elements concerning the aim and subjectivity of emergency provide a useful lens to understand why some catastrophes become emergency triggering "crises" while others do not.

This section focuses mainly on two "crises" which have been the main purveyors of emergency powers during the last two decades in Europe and in the U.S.: terrorism and the Covid-19 pandemic. The list does not stop there. The following chapters also examine cases

[125] Fassin, *La Société qui vient*, 18.

and situations related to other "crises" including but non-exhaustively the "migrant crisis", especially in the U.S., the attempted coup in Turkey in 2016 or the 2005 and 2024 states of emergency in France. However, terrorism and Covid-19 stand out, none the least because of the sheer amount of emergency norms and practices they triggered worldwide and the studied jurisdictions. Therefore, it is useful to briefly examine what is understood by these "crises" and what was their impact in terms of emergency powers.

a. Terrorism

i. A purposeful definition

Over the last few decades, terrorism has been an important driver of emergency powers and a cornerstone of the development of national security policies. Yet the notion suffers from an important lack of precision. Even non-legal dictionaries diverge on key elements. Some include a systematic element,[126] others the political dimension of its aim[127] or specific violent actions.[128] The same ambiguity is present in the legal field. The definition of terrorism continues to elude international consensus. In the wake of the 9/11 attacks, the United Nations adopted Resolution 1373 inciting the adoption or amendment of counter-terrorism legislation worldwide.[129] The Resolution, however, still did not provide any definition of terrorism. It was therefore left to each state to adopt its own. If a variety of legal definitions exist, sometimes even within a single national legal system, many have been criticized for their lack of

[126] "The systematic use of terror especially as a means of coercion", Marriam-Webster dictionary, 2020.

[127] The "(threats of) violent action for political purposes", Cambridge dictionary, 2020.

[128] "Terrorism is the use of violence, especially murder and bombing, in order to achieve political aims or to force a government to do something.", Collins dictionary, 2020.

[129] S/RES/1373 (2001).

precision.[130] These malleable definitions combined with the multiplication of accessory crimes leave a wide discretion to national authorities and have the potential to encompass any political dissent.[131]

- *Definitions at the ECtHR, in France and the U.S.*

"Terrorism" is not mentioned in the Convention nor the additional protocols. In one of its early cases, the Court summarily defined terrorism as "organised violence for political ends".[132] However, it appears that the Court would use the term without defining it, merely relying instead on the procedure at the domestic level and/or the submissions made by the parties. Following its established case law, the Court requires that measures imposed at the national level be legal, meaning that they must be imposed according to a law that is sufficiently clear and foreseeable. Therefore, the ECtHR case law does require some definition of terrorism in the domestic legal order. In *Brogan and Others v. United Kingdom*, the Court reiterated that the domestic legislation defined acts of terrorism as "the use of violence for political ends", which includes "the use of violence for the purpose of putting the public or any section of the public in fear". The same definition had already been found by the Court to be "well in keeping with the idea of an offence"[133] in *Ireland v. United Kingdom*[134].

[130] Fionnuala Ní Aoláin, "COVID-19, Counterterrorism, and Emergency Law (Report Prepared under the Aegis of the UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism)," n.d., 10.

[131] Ní Aoláin, "Exceptionality," 76–77; Kim Lane Scheppele, "The Migration of Anti-Constitutional Ideas: The Post-9/11 Globalization of Public Law and the International State of Emergency," in *The Migration of Constitutional Ideas*, ed. Sujit Choudhry (Cambridge: Cambridge University Press, 2007), 362–68, https://doi.org/10.1017/CBO9780511493683.013.

[132] *Ireland v. the United Kingdom*, 18 January 1978, § 12, Series A no. 25.

[133] *Brogan and Others v. the United Kingdom*, 29 November 1988, § 51, Series A no. 145-B.

[134] *Ireland v. the United Kingdom*, § 196.

The word “terrorism” is also not mentioned in the French Constitution. In 2015, the Council of State, in its opinion on the draft “constitutional law for the protection of the Nation”, considered that “it would not be appropriate to introduce the term ‘terrorism’ in the Constitution”.[135] Rather, it recommended that the provisions apply to persons "condemned for a crime constituting a serious attack on the life of the Nation". The definition of terrorism results from a 1986 statute – the first legislative act to specifically target the fight against terrorism and attacks against the security of the State – and is codified in Article 421-1 of the French criminal code. It includes the “destruction, damage and deterioration” which can constitute terrorism if they aim at seriously disturbing the public order. Accordingly, the threshold is quite low, and a vast array of actions could fall within the ambit of this definition.

Finally, the U.S. legal system does not know a unique definition of terrorism, not even at the federal level. According to the U.S. Code, “the term ‘terrorism’ means premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents”.[136] In turn, the Code of Federal Regulations provides that constitutes terrorism “the unlawful use of force and violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives”.[137] Another example is provided by the USA PATRIOT Act, which expended the definition of terrorism to add the possibility of a domestic dimension.[138] In each case, the relevant definition, and therefore scope, will depend on the applicable statute.

[135] CE, Assemblée générale, Section de l’intérieur, Avis sur le Projet de loi constitutionnelle de protection de la Nation, 11 décembre 2015, n°390866.

[136] 22 U.S. Code § 2656f - Annual country reports on terrorism.

[137] 28 C.F.R. Section 0.85.

[138] Section 802 of the USA PATRIOT Act (Pub. L. No. 107-52).

- *Semantic inversion and subversion*

Because of the violent dimension of terrorism, the actions susceptible to falling within its scope are criminalized irrespective of their qualification as terrorism. Creating a specific class of crimes denotes a need to single them out. A critical approach refutes the socially constructed intuition that the severity and scale of terrorism command its special legal treatment.[139] Indeed, the number of victims of terrorism in western countries is relatively low both compared to other causes of death as well as to victims of terrorism in other parts of the world. Thus, the particularity of terrorism does result from an assessment based on the number of its victims

It is commonly said that terrorism is a "crime against democracy"[140] in that the violence seeks to force the state to do or not do something and therefore bypass the democratic process. However, terrorism is used and condemned against both democratic and non-democratic states. Saul recalls that "most regional instruments view terrorism as a crime against the State and its security and stability, sovereignty and integrity, institutions and structures, or economy and development, rather than as a specific anti-democratic crime."[141]

The specificity of terrorism justifying its special treatment would then lie in that it is a crime against the state. However, this is a rather recent evolution of its meaning. The understanding according to which terrorism is perpetrated by non-state actors against a state results from an inversion of the initial meaning of the word. Furthermore, if terrorism is

[139] John Mueller, *Overblown: How Politicians and the Terrorism Industry Inflate National Security Threats, and Why We Believe Them* (New York, NY: Free Press, 2009) cited in ; Heath-Kelly, "Critical Approaches to the Study of Terrorism," 228.

[140] Ben Saul, "Defining 'Terrorism' to Protect Human Rights," in *Interrogating the War on Terror: Interdisciplinary Perspectives*, ed. Deborah Staines (UK: Cambridge Scholars Publishing, 2007), 5.

[141] Saul, 6.

understood as a tactic – to intimidate the audience for political gain – then states would qualify by far as the main perpetrators.[142] Yet, instead "the label of terrorism has been consistently applied to those who oppose the establish order".[143] This shift tells us that "terrorism […] is a construction of power which serves the interests of states, economies, and existing power structures by delegitimating certain actors."[144]

In line with this analysis, Dubuisson identified three functions of the legal notion of terrorism: attaching derogatory criminal rules (both substantial and procedural) to certain infractions, putting a label on the intractable enemy, which allows at once to delegitimize the "terrorist" and legitimize the State and serving as a justification for a permanent emergency allowing the adoption of exceptional measures and limiting fundamental rights.[145]

The creation of the class of terrorism crimes does not aim to penally address horrific actions. For that, it was not needed. However, by reversing the initial meaning of the term, states created a concept the scope of which they can manipulate in order to delegitimize groups and opinions which threaten the social order and target them with derogatory emergency powers. Terrorism has become one of the key elements used by states to draw the line between the constructed friends and foe.[146] Yet, despite this seemingly organic relationship between

[142] Heath-Kelly, "Critical Approaches to the Study of Terrorism," 232.

[143] Noam Chomsky and Edward S. Herman, *The Washington Connection and Third World Fascism* (South End Press, 1979) as cited in; Heath-Kelly, "Critical Approaches to the Study of Terrorism," 232.

[144] Heath-Kelly, "Critical Approaches to the Study of Terrorism," 228.

[145] François Dubuisson, "La définition du « terrorisme » : débats, enjeux et fonctions dans le discours juridique," *Confluences Méditerranée* 102, no. 3 (2017): 36–42, https://doi.org/10.3917/come.102.0029.

[146] Mark Klamberg, "Reconstructing the Notion of State of Emergency," *Stockholm Faculty of Law Research Paper Series*, no. 64 (December 14, 2020): 108.

terrorism and emergency, the former is often presented as being at odds with the latter. Terrorism would not fit the ideal-type emergency.

ii. Terrorism is not ideal

Greene describes the ideal-type emergency as a "crisis identified and labelled by a state to be of such magnitude that it is deemed to cross a threat severity threshold, necessitating urgent, exceptional, and, consequently, temporary actions by the state not permissible when normal conditions exist."[147] Terrorism, in particular since 9/11 and the ensuing war on terror, does not quite match this definition. It challenges the traditional emergency paradigm that is based on a strict distinction between emergency and normalcy.

Partly because it is a tactic which cannot be eradicated or defeated, terrorism does not lend itself to clear delimitations.[148] Contrary to traditional wars, it is almost impossible to determine a geographic zone of terrorism. Geographical demarcation is likely easier in cases of separatism. However, even then, terrorist attacks are susceptible to be perpetrated anywhere outside the concerned territory. International terrorism blurred the geographic lines further as it rendered borders largely irrelevant.

Furthermore, if terrorist attacks are limited in time, the terrorist threat is not. The level of that threat is also difficult to determine, especially for the institutions and general population which are not given access to the intelligence gathered by the executive. Terrorism can be resorted to by organizations or isolated individuals to serve an infinite number of causes. Therefore, even though the threat posed by specific groups or inspired by specific ideologies

[147] Greene, *Permanent States of Emergency and the Rule of Law*, 30.

[148] Gross and Ní Aoláin, *Law in Times of Crisis*, 2006, 366–71.

might recede, the terrorist threat in general will never disappear. The threat is theoretically permanent and so can be the state reaction to it regardless of its level of reality and severity. Several states heightened their counter-terrorism arsenal following attacks against other countries. This was for example the case of the United Kingdom after 9/11 or France after the attack perpetrated in Russia on 22 March 2024.[149]

Terrorism is also multifaceted in the way it manifests itself, from attacking random civilians with a knife to hijacking aircraft or bombing state's buildings. Furthermore, the inflation of the criminalization of terrorism related acts contributes to further blurring the terrorism line as it dilutes more and more the link between the initial terrorist intent and the material act. In addition, contrary to what the war narrative suggests, the identification of the enemy, the terrorist, is rarely the clear result of an objective assessment. Terrorists do not wear uniforms or wave their flag before an attack. This difficulty was capitalized on in the expression "neighbor terrorist"[150] reflecting this idea – quite fictitious – that the enemy is hiding amongst us, everywhere, always ready and unidentifiable.

Finally, maybe the most controversial aspect of terrorism is that it is used in the name of a cause; political, social, ideological. The acknowledgement of the legitimacy of this cause is what famously distinguishes the terrorist from the freedom fighter. However, this acknowledgement is ultimately subjective and will depend on the one who makes it. As a result, each group will accuse the other of terrorism and present its own actions as self-defense. "As Derrida observes '[e]very terrorist in the world claims to be responding in self-defense to a

[149] Following the shooting in Russia, the French government decided on 24 May 2024 to raise the counter-terrorism alert (*Plan Vigipirate*) to its highest level.

[150] Clive Walker, "Neighbor Terrorism and the All-Risks Policing of Terrorism," *Journal of National Security Law & Policy*, no. 3 (2009): 121–68.

prior terrorism on the part of the state, one that simply went by other names and covered itself with all sorts of more or less credible justifications.'"[151]

Terrorism questions the very *raison d'être* of the state of emergency: to restore the *status quo*. If the state of emergency triggered by the threat of terrorism aims to protect the constitutional order – at least officially – it does not purport to restore the *status ante*, a situation in which the State was vulnerable to terrorism.[152] As such, terrorism challenges two of the most fundamental aspects of the state of emergency: its aim (restoring the pre-existing constitutional order) and its temporary character based on a strict distinction between emergency and normalcy. In that regard, former Vice President Cheney's declaration was strikingly honest when he stated that the post-9/11 period should not be considered as an emergency at all but as "the new normalcy".[153]

Terrorism eludes the ideal-type emergency defined by Greene and enters the realm of permanent emergency leading to states' responses that threaten the entire constitutional order. Yet, as mentioned previously, in the last few decades, terrorism has worked hand in hand with emergency powers in a symbiotic rather than conflictual manner. One explanation to this apparent contradiction is that emergency powers are not used – or maybe meant? – to protect the constitutional order but the social order. For that purpose, terrorism is a very useful tool. If terrorism does not fit the ideal-type emergency, it is ideally fitted for the actual emergency practice.

[151] Michel Rosenfeld, "Derrida's Ethical Turn and America: Looking Back from the Crossroads of Global Terrorism and the Enlightenment," *Cardozo Law Review*, no. 27 (December 16, 2005): 822.

[152] Greene, *Permanent States of Emergency and the Rule of Law*, 59.

[153] Cole, "Judging the Next Emergency," 2588.

b. The Covid-19 pandemic: when emergency takes over the world

Contrary to terrorism, the Covid-19 pandemic, at least during its early days, seemed to be a textbook example of the ideal-type emergency. Yet, problematic emergency mechanisms which had been at play in the context of counter-terrorism resurfaced during the pandemic. The emergency powers developed to address the latter reinforced those countering the former.

i. Covid-19: the perfect emergency?

The apparition and rapid spread of Covid-19 starting late 2019 sparked a new wave of emergency measures all over the world. This health emergency differed from the security emergency triggered by terrorism in three main aspects. First, the risk appeared more objective. Whereas the terrorism label is contentious, the threat posed by a pandemic, evidenced by the number of persons infected and the death toll, seemed – at least at first sight – to be a matter of fact, not of judgment. Second, the threat was thought to be temporary and meant to end once the pandemic would be under control. Finally, the threat emanated from a virus, not from people. There was no enemy to target. The emergency measures adopted to contain the virus were applied not to the perpetrator but to the (potential) victims exclusively; and it did so in a facially equal way, irrespective of the characteristics of individuals.

These elements allowed Greene to consider that Covid-19 was the closest example of the ideal-type emergency.[154] Ginsburg and Versteeg added to the differences with terrorism that the quality of government information might not be better than that of the private sector. They concluded that governments were more "bound" during health emergencies than during

[154] Alan Greene, "Derogating from the European Convention on Human Rights in Response to the Coronavirus Pandemic: If Not Now, When?," *European Human Rights Law Review* 2020, no. 3 (July 12, 2020): 262–76.

national security emergencies.[155] These differences between the Covid-19 pandemic and terrorism matter and should be kept in mind when analyzing the case law of the various courts.

However, as the pandemic unfolded and states' response together with it, those differences proved more nuanced than originally thought. First, although Covid-19 is as objective a threat as can be, it is not entirely objective. The evaluation of the danger – including by national authorities – is an important factor that involves a part of data interpretation and therefore of subjectivity. The danger can also be either emphasized or downplayed by politicians or the media. Communication about Covid-19 varied widely from one country to the next but also over time. Maybe more importantly, the disparities in the measures adopted by states confronted with the disease showed that the response is a matter of choice, even when guided by scientific data and knowledge.[156] The temporary character of the "crisis" also proved relative as emergency measures, which were initially adopted for a few weeks, remained in place to various degrees for over a year and will leave lasting marks in the various legal orders.[157]

Finally, Covid-19 was thought to level the playing field. It could infect anyone and the measures, in particular those related to social distancing, applied similarly to everybody. However, it would be foolish to think that Covid-19 operated as a great equalizer. On the one hand, statistics showed a higher number of infection and higher death toll amongst racialized

[155] Tom Ginsburg and Mila Versteeg, "The Bound Executive: Emergency Powers during the Pandemic," *International Journal of Constitutional Law* 19, no. 5 (December 1, 2021): 1511, https://doi.org/10.1093/icon/moab059.

[156] Important discrepancies can be found even within the European Union. Sweden first adopted a strategy based on the called "herd immunity", whereas France and Germany for example followed the path of lockdowns and social distancing.

[157] Ní Aoláin, "Exceptionality," 66.

minorities and other marginalized groups.[158] On the other hand, the adverse effects of anti-Covid measures affected disproportionately vulnerable groups such as students or persons with disabilities. Furthermore, there have been claims that these measures, apparently of general application, were sometimes implemented in a discriminatory manner.[159] It is therefore important to remember, when analyzing matters related to the pandemic, that there is not one objective narrative but a succession of subjective decision-making processes which affected various groups unequally. Overall, the pandemic might not fit the ideal-type emergency as much as initially assumed.

ii. Different "crises", similar practices

From the point of view of emergency powers, analyzing the response to the pandemic separately from security emergencies would undermine the importance of the interactions between the powers used in both contexts. Her position as Special Rapporteur on human rights and terrorism allowed Ní Aoláin to avoid this pitfall. She noted that in the context of the pandemic, states have exercised a "compendium of formal, informal, executive, and counterterrorism and security powers"[160] with little international standards, guidance and oversight. At the national level, they have been recycling security emergency powers, "making disentangling one kind of emergency from another difficult."[161]

[158] Ní Aoláin, 65 and 73; Stéphanie Hennette-Vauchez, *La Démocratie en état d'urgence : Quand l'exception devient permanente* (Paris: SEUIL, 2022), 71.

[159] The NGO, *Ligue des droits de l'Homme*, addressed the French ombudsman (*Défenseure des droits*) claiming that ticketing practices targeting young persons from popular districts amounted to police harassment. Minh Dréan, "Amendes abusives: pendant le confinement, «un acharnement» dans les quartiers populaires," *Libération*, February 7, 2022, https://www.liberation.fr/societe/amendes-abusives-pendant-le-confinement-un-acharnement-dans-les-quartiers-populaires-20220701_AIO2IVNXHJHTVPH4KRI3XDWGVI/.

[160] Ní Aoláin, "Exceptionality," 74.

[161] Ní Aoláin, 54.

Contrary to Ginsburg and Versteeg who found that the executives were more constrained due to the specificities of health emergency,[162] Ní Aoláin sees in the management of Covid-19 as a continuation of counter-terrorism practices. She argues that the absence of clear definition of terrorism resulted in amorphic and fluctuating emergency powers, thereby facilitating their repurposing in the context of the pandemic. This repurposing raised a number of legal challenges as counter-terrorism powers which enabled "sustained violations of human rights"[163] were transposed to fight a pandemic which affected disproportionately vulnerable and marginalized groups.[164]

In that regard, the repurposed powers continued to be practiced following similar modalities in the context of the pandemic. Stiegler pointed out that those holding power drew alone the line between the good activities which were allowed to continue (e.g. going to work) and the bad ones which were prohibited because of the risk of contamination (e.g. going to university).[165] This practice followed the logic of delegitimization observed in the context of national security emergencies.[166]

Furthermore, "[t]he pandemic is creating new patterns and intersections of emergency law practice, some of which build on prior exceptionality and some practices and regulation which are evolving."[167] Consequently, each sector of emergency reinforces the other. While the

[162] Ginsburg and Versteeg, "The Bound Executive."

[163] Ní Aoláin, "COVID-19, Counterterrorism, and Emergency Law (Report Prepared under the Aegis of the UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism)," 4.

[164] Ní Aoláin, "Exceptionality," 64.

[165] Barbara Stiegler, *De la démocratie en Pandémie, Santé, recherche, éducation*, vol. 23, Track (Gallimar, 2021), 22, https://tracts.gallimard.fr/en/products/de-la-democratie-en-pandemie cited in; Hennette-Vauchez, *La Démocratie en état d'urgence*, n. 28.

[166] See for example Truc, "« Écoterroristes » et « terroristes intellectuels »."

[167] Ní Aoláin, "Exceptionality," 78.

pandemic lends enhanced legitimacy to emergency powers, it allowed the security sector "to regularize the use of counter-terrorism and security measures in the ordinary law, to widen their definitional scope and field of application, and to make the exceptional normal."[168] Ní Aoláin points to France, as she denounces states taking advantage of the pandemic to adopt emergency alike norms in the security and counter-terrorism domains.[169]

The rapid spread of Covid-19 taught us that there are no good or bad "crises", ideal or not. There are only emergency opportunities. The historic-socio-political context but also to some extent the legal context determines if and how the power seizes them.[170]

B. The legal frame of emergency powers

Emergency powers come in various shapes and forms. The different models are commonly identified based on the level of the norm which provides the emergency power (most commonly constitutional or legislative) and the distribution of prerogatives among the branches of government.[171] Whereas most constitutions contain emergency provisions, few remain silent.[172] The Constitution of the United States is one of them.

The executive model, where the executive is in charge of both deciding on the existence of an emergency and the way to respond to it, is traditionally distinguished from the legislative model, where the legislative branch is required "to design a legal regime that deals with both

[168] Ní Aoláin, 77.

[169] Ní Aoláin, 64, ft 53.

[170] Christian Bjørnskov and Stefan Voigt, "Why Do Governments Call a State of Emergency? On the Determinants of Using Emergency Constitutions," *European Journal of Political Economy*, Political Economy of Public Policy, 54 (September 1, 2018): 110–23, https://doi.org/10.1016/j.ejpoleco.2018.01.002.

[171] Dyzenhaus, "States of Emergency"; Gross and Ní Aoláin, *Law in Times of Crisis*, 2006, 35–72.

[172] Sajó and Uitz, *The Constitution of Freedom*, 419.

of these issues."[173] Within both these models, Dyzenhaus finds that if the judiciary supervision of emergency powers is extensive, a third model emerges: the judicial model.[174]

Dyzenhaus argues that in times of emergency, it is possible to enter a virtuous legal cycle. He maintains however that the key is not to decide who should be the primary actor. The classification between legislative or executive models is therefore a descriptive tool but only of little help to build a normative argument. Instead, "the legislature, the executive and the judiciary have to participate together in a common constitutional project."[175]

The ECHR does not impose a particular structure of emergency regimes at the domestic level but proposes a derogation model for the rights guaranteed by the Convention. At the national level, the French and American emergency designs appear to be on opposite sides of the spectrum – constitutional for the former, legislative for the latter. However, upon closer inspection, although differences do exist, they might not be as fundamental.

1. ECHR: with or without derogation?

The ECHR contains a derogation mechanism in case of emergency. However, in the same way that, at the domestic level, not all emergency powers are formally identified as such, states do not necessarily derogate to the Convention when faced with "crises". Potential infringements on rights guaranteed by the ECHR are then scrutinized under the normal review procedure of the Court.

[173] Dyzenhaus, "States of Emergency."
[174] Dyzenhaus.
[175] Dyzenhaus, 460.

a. The ordinary mechanism of conventional rights protection

The ECHR does not contain any terrorism specific disposition. National security, on the other hand, is a staple notion in the convention system. The word "security" appears in the Convention in two different contexts. Its first occurrence is in Article 5 on the right to liberty and security. Security here is to be understood in the sense of the *Magna Carta* and right to *habeas corpus*: it is an individual right against arbitrary detention by the State.[176]

Another type of security appears repeatedly throughout the Convention: "national security". In this context, national security is listed amongst the legitimate aims which can justify restrictions on the rights guaranteed by Articles 6 (fair trial), 8 (private and family life), 10 (expression), 11 (assembly and association), 2 of Protocol 4 (freedom of movement) and 1 of Protocol 7 (procedural safeguards relating to expulsion of aliens). From the various lists of legitimate aims, it appears that national security is distinct from "public safety", "territorial integrity", "the economic well-being of the Country" or "the prevention of disorder or crime".

The terms of the Convention have an autonomous meaning. They are interpreted by the Court independently of their meaning in the national legal orders. This does not mean that the meaning they have in national law is completely irrelevant. However, the Court is not bound by it.[177] Consequently, what was qualified by a responding state as a national security issue will not necessarily be so by the ECtHR. Nonetheless, national security matters are sensitive and touch upon the core of national sovereignty. Therefore, in this domain, some restraint can be expected from an international court.

[176] Duroy, "Remedying Violations of Human Dignity and Security," 126–27.

[177] David Harris et al., *Law of the European Convention on Human Rights*, 3rd edition (Oxford, United Kingdom: Oxford University Press, 2014), 19.

Cameron distinguishes two main periods in the jurisprudence of the ECtHR. During the first one, extending roughly from *Klass*[178] until the early 1990s, the Court accepted the national security claims made by the member states. In a second time, at least until 2000, it adopted a more skeptical approach.[179] However, no clear guidelines can help identifying what would qualify as a national security argument for the ECtHR.

With regards to a health "crisis" such as the Covid-19 pandemic, Articles 8, 9[180], 10, 11 and 2 of Protocol No. 4 also list the "protection of health" amongst the legitimate aims for restricting of the conventional rights. Health considerations are also present in Article 5-1 (e), according to which, under certain conditions, a person can be deprived of her liberty "for the prevention of the spreading of infectious diseases". The level of protection of each right varies depending on the circumstances of each case, the importance of the legitimate aim at stake and the margin of appreciation left to the member states.

b. The derogation under Article 15 ECHR

Article 15 of the Convention provides for a derogation mechanism in case of emergency (*état d'urgence*): "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."

[178] *Klass and Others v. Germany*, 6 September 1978, Series A no. 28.

[179] Iain Cameron, *National Security and the European Convention on Human Rights* (Uppsala: Lustu Forlag, 2000).

[180] Article 9 lists the "protection of public health".

Some provisions cannot be derogated to: Articles 2 (right to life), 3 (prohibition of torture), 4 § 1 (prohibition of slavery) and 7 (no punishment without law), Protocol No. 6 (abolition of the death penalty), Article 4 of Protocol No. 7 (right not to be tried or punished twice) and Protocol No. 13 (abolition of the death penalty in all circumstances). Article 15 § 3 further requires that: "Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed."[181]

Following the autonomous meaning principle, the Court will examine whether the conditions invoked by the government to justify the derogation amount to a war or a "public emergency threatening the life of the nation". However, similarly to national security issues, possibly even more, the appreciation of the severity of the situation comes deep into the sovereign domains of the states. Some level of judicial deference is therefore to be expected.

States' practice with regards to Article 15 are varied both in the context of the fight against terrorism and the Covid-19 pandemic. The first case ever adjudicated by the ECtHR[182] involved Article 15 derogations in connection with terrorism. Ireland had derogated to Articles 5 and 6 with regards to the special powers of detention it had adopted to counter the violent activities of the Irish Republican Army (IRA).

[181] Article 30 of the European Social Charter sets out a derogation system in almost identical terms.

[182] *Lawless v. Ireland (no. 3)*, 1 July 1961, Series A no. 3

However, derogating to the ECHR in case of terrorist attack is not a consistent practice. Following the 9/11 attacks in the U.S., the United Kingdom was the only state to derogate under Article 15 although no terrorist attack had been perpetrated on its territory at that time. In contrast, Spain made no derogation despite the terrorist attack in Madrid in 2004.[183] Similarly with regard to the Covid-19 pandemic, the practice of states diverged. In September 2022, ten countries[184] out of 47 had derogated to the ECHR because of the anti-Covid measures they had adopted.

c. "To derogate or not to derogate?"[185]

As a general point, Ní Aoláin noted that "[d]erogation, as a practice among States, has been waning. […] This trend also appears to be holding in respect of derogation based on the Covid-19 health/sanitary emergency."[186] The academic debate pertaining to the necessity to derogate under Article 15 ECHR, especially during Covid-19, has been as fierce as states' practices are diverse. Greene has on several occasions advocated for a derogation model.[187] His argument is based on the observation that the ECtHR is likely to capitulate to states' emergency claims. A derogation model would not counter this risk but would keep its consequences contained to "real" emergency situations, avoiding their spill over into the "normal" legal

[183] Greene, *Permanent States of Emergency and the Rule of Law*, 135.

[184] Albania, Armenia, Estonia, Georgia, Latvia, Moldova, North Macedonia, Romania, San Marino and Serbia.

[185] Martin Scheinin, "COVID-19 Symposium: To Derogate or Not to Derogate?," *Opinio Juris* (blog), April 6, 2020, http://opiniojuris.org/2020/04/06/covid-19-symposium-to-derogate-or-not-to-derogate/.

[186] Ní Aoláin, "Exceptionality," 73–74.

[187] Greene, "Derogating from the European Convention on Human Rights in Response to the Coronavirus Pandemic."

system. The absence of derogation, same as the "business as usual" model, rather than raising the protection of human rights, would actually lead to their permanent downgrading.[188]

Scheinin disagrees precisely with this last point. Indeed, in a direct answer to Greene, he argued that emergency powers are too susceptible to abuse. Therefore, "the safe course of action" would be "to insist on the *principle of normalcy*" and "on full compliance with human rights, even if introducing new necessary and proportionate restrictions upon human rights on the basis of a pressing social need". [189] Although these two pieces dealt with the pandemic, both authors made similar points in the context of the fight against terrorism.[190]

Conversely, for Dzehtsiarou, the two types of "crises" are substantially different. He argues that in case of health "crisis" the proportionality assessment is adequate to assess the restrictions on rights. Therefore, the quarantining effect of Article 15 promoted by Greene would not be that useful because a derogation would not change the reasoning of the Court except maybe to further broaden an already broad margin of appreciation.[191]

Ultimately, what this debate suggests is that the reasonings of the ECtHR and their outcome might not follow a clear demarcation between cases with or without derogation. The following chapters examine various cases of both national security and health emergency – whether labelled as emergency measures at the domestic level or not – and which the Court has

[188] Greene.

[189] Scheinin, "COVID-19 Symposium."

[190] Greene, *Permanent States of Emergency and the Rule of Law*; Martin Scheinin, "Resisting Panic: Lessons about the Role of Human Rights during the Long Decade after 9/11," in *The Cambridge Companion to Human Rights Law*, ed. Conor Gearty and Costas Douzinas, Cambridge Companions to Law (Cambridge: Cambridge University Press, 2012), 293–306, https://doi.org/10.1017/CCO9781139060875.021.

[191] Kanstantsin Dzehtsiarou, "Article 15 Derogations: Are They Really Necessary during the COVID-19 Pandemic?," *European Human Rights Law Review* 2020, no. 4 (January 1, 2020): 359–71.

adjudicated at times under the "normal" mechanism of permissible restrictions on the rights or in the context of Article 15.

2. France: the profusion of emergency regimes

The French legal order contains a plethora of emergency regimes. If the 1958 Constitution is famous for the very broad extraordinary powers contained in Article 16, the government has preferred addressing the latest "crises" through emergency statutes: the 1955 Statute on the State of Emergency and, since the Covid-19 pandemic, the very similar statute on the state of sanitary emergency. Yet, the most remarkable evolution of the past few years has been the introduction in the normal legal order of measures initially adopted as part of the state of emergency.

a. The constitutional emergency provisions

The 1958 French Constitution counts two emergency regimes besides the state of war. The legal framework for war is somewhat similar to the one of the U.S. According to Article 35 of the Constitution, "a declaration of war shall be authorized by Parliament." The President submits a report to Parliament within three days after the beginning of the intervention of the armed forces abroad and the continuation of such intervention after four months must be authorized by the Parliament.[192] However, contrary to the U.S., emergency situations are not so

[192] "Article 35: A declaration of war shall be authorized by Parliament.

The Government shall inform Parliament of its decision to have the armed forces intervene abroad, at the latest three days after the beginning of said intervention. It shall detail the objectives of the said intervention. This information may give rise to a debate, which shall not be followed by a vote.

Where the said intervention shall exceed four months, the Government shall submit the extension to Parliament for authorization. It may ask the National Assembly to make the final decision.

If Parliament is not sitting at the end of the four-month period, it shall express its decision at the opening of the following session."

directly linked to wars outside of France. The state of war is not considered to be among the states of exception by the literature.[193]

The French Constitution provides two different states of exception. Article 36 of the Constitution provides that "A state of siege shall be decreed in the Council of Ministers. The extension thereof after a period of twelve days may be authorized solely by Parliament." The legal framework of the state of siege results from the 1849 law amended in 1878 and now codified in the Code of Defense. It can only be declared "in the event of an imminent danger resulting from a foreign war or armed insurrection."[194] The state of siege is somewhat comparable to martial law in the sense that police powers are transferred from civil to military authorities, military courts are competent to trial crimes against the safety of the State even when committed by civilians and individual freedoms can be severely restricted. This drastic mechanism has never been used under the Fifth Republic.

The 1958 Constitution introduced another state of exception, which had not existed under the previous Republics.[195] The inclusion of Article 16 in the 1958 Constitution reflected de Gaulle's vision of the role of the President. In his famous Bayeux speech, in 1946, he stated: "On him, if it were to happen that the homeland was in danger, the duty to be the guarantor of national independence and of the treaties concluded by France".[196] Article 16 powers were a response to the events of 1940, when President Lebrun was incapable to stop the rise to power

[193] See for example Rousseau, "L'état d'urgence, un état vide de droit(s)," 21.

[194] Art. L2121-1 al. 1 of the Code of Defense.

[195] Sajó and Uitz, *The Constitution of Freedom*, 422.

[196] Bayeux speech, de Gaulle, 16 June 1946.

of Maréchal Pétain.[197] It might then be surprising that Article 16 sets up what is often referred to as a Presidential dictatorship.

Indeed, Article 16 al. 1 reads: "Where the institutions of the Republic, the independence of the Nation, the integrity of its territory or the fulfilment of its international commitments are under serious and immediate threat, and where the proper functioning of the constitutional public authorities is interrupted, the President of the Republic shall take measures required by these circumstances, after formally consulting the Prime Minister, the Presidents of the Houses of Parliament and the Constitutional Council. […] The measures shall be designed to provide the constitutional public authorities as swiftly as possible, with the means to carry out their duties." Therefore, Article 16 keeps with key aspects of the ideal-type emergency: time limit, strict separation between emergency and normalcy and the goal to restore the constitutional order.

Furthermore, few safeguards attempt to constrain Article 16's broad powers. The President is required to consult several authorities (a formal consultation of the Prime Minister, the Presidents of each House of Parliament, and the Constitutional Council before declaring the emergency and consultation of the Constitutional Council with regard to the measures). The provision also guarantees the role of the Parliament during the exercise of Article 16 powers: "Parliament shall sit as of right. The National Assembly shall not be dissolved during the exercise of such emergency powers."[198] However, this check was swiftly sidelined by de

[197] Sébastien Platon, "Vider l'article 16 de son venin : les pleins pouvoirs sont-ils solubles dans l'état de droit contemporain ?," *Revue française de droit constitutionnel* HS 2, no. 5 (2008): 98, https://doi.org/10.3917/rfdc.hs02.0097.

[198] Article 16 al. 5 and 6 of the Constitution.

Gaulle, who prevented the Parliament from discussing any matters related to the exercise of Article 16 powers.[199]

Finally, the 2008 revision of the Constitution added a paragraph to Article 16: "After thirty days of the exercise of such emergency powers, the matter may be referred to the Constitutional Council by the President of the National Assembly, the President of the Senate, sixty Members of the National Assembly or sixty Senators, so as to decide if the conditions" warranting the use of Article 16 still exist. The Constitutional Council makes the same examination, as of right, after sixty days. It should be noted that although the decision of the Council is to be made public, it is unclear to which extent it is binding.

For all the literature and debates that focus on Article 16, it remains a historically marginalized source of power. It was used only once, in 1961, in relation to the attempted putsch in Algeria. This use proved controversial. Although the situation had returned to normal two days after de Gaulle announced resorting to Article 16, on 23 April 1961, he did not relinquish his emergency powers until 29 September 1961. During those five months, de Gaulle made twenty-six decisions on the basis of Article 16, many of which did not concern the situation in Algeria.[200] One activation of Article 16 was sufficient to prove its potential for abuse. The danger that it represents should not be underestimated. However, the mere fact that it was triggered only once since 1958 is also indicative. If Article 16 is a powerful and dangerous provision, it should not overshadow a legislative arsenal that is almost as powerful and potentially as dangerous.

[199] Sophie Boyron, *The Constitution of France: A Contextual Analysis*, ed. Andrew Harding et al. (Oxford ; Portland, Or: Hart Publishing, 2012), 60.

[200] Boyron, 60.

b. The creation of a legislative emergency regime

One might argue that if Article 16 was only used once, it is because the executive already has available all the powers it needs bundled in a less dramatic package. The "state of emergency" in France is not a constitutional but a legislative concept. The Statute on the State of Emergency predates the Constitution of the Fifth Republic. It was adopted under the Fourth Republic to "handle" the rebellion in Algeria. Since its adoption in 1955, the state of emergency was declared six times – including three times during the Algerian War – sometimes for lengthy periods.

Ironically, the Statute on the State of Emergency was adopted in order to avoid the war narrative, which has become omnipresent in today's political rhetoric. Extraordinary powers were already available under the 1878 Statute on the state of siege. However, declaring a state of siege would mean acknowledging that France was at war with Algeria or the existence of an armed insurrection in French departments at a time when avoiding the meddling of the United Nations was paramount. The Algerian "rebellion" had to remain an internal matter.[201] The *raison d'être* of the Statute on the State of Emergency was to provide the executive with extraordinary powers while dissociating them from a war imagery.

In 1985, a state of emergency was declared in New Caledonia. The amended statute was referred to the Constitutional Council before its adoption. Several deputies and senators argued that, under the 1958 Constitution, the Parliament did not have the power to create a state of emergency. The Constitutional Council answered that: "if the Constitution, in its Article 36, expressly refers to the state of siege, it has not however excluded the possibility for the legislator

[201] Rousseau, "L'état d'urgence, un état vide de droit(s)," 21.

to provide for a state of emergency regime to reconcile […] the demands of freedom and the safeguard of public order; thus, the Constitution of October 4, 1958 did not have the effect of repealing the law of April 3, 1955 relating to the state of emergency".[202] The Constitutional Council thereby confirmed the power of the legislator to create a state of emergency and the constitutionality of the 1955 Statute as amended in 1985.

On several occasions, committees working on constitutional amendments proposed to include the state of emergency in the Constitution.[203] The suggestion was brought up again in 2015[204] following a series of terrorist attacks perpetrated in Paris and Saint-Denis on 13 November 2015. A nationwide state of emergency was declared the next day, which was then repeatedly prolonged until November 2017. On 1st December 2015, the government requested the opinion of the Council of State on a Draft constitutional law for the protection of the Nation.[205] This draft proposed to introduce in the Constitution a new Article 36-1 addressing the state of emergency. Two different versions of the proposal had been adopted respectively by the National Assembly and the Senate when President Hollande decided to abandon the revision on 30 March 2016 for lack of political support.

According to the 1955 Statute, "[a] state of emergency may be declared […] either in the event of imminent danger resulting from serious breaches of public order, or in the case of events presenting, by their nature and gravity, the character of public calamity."[206] It is declared

[202] Decision No. 85-187 DC, 25 January 1985, Law on the state of emergency in New Caledonia and dependencies, cons. 4.

[203] Such proposals were made by the Vedel Committee in 1993 and by the Balladur Committee in 2007.

[204] Speech of President Hollande before the Parliament, 16 November 2015.

[205] As a result, the Council of State issued the opinion CE Ass. Gen., no. 390866, Avis sur le projet de loi constitutionnelle de protection de la nation, 11 December 2015. This opinion is analyzed in Chapter 3. See p. 349.

[206] Law No. 55-385, 3 April 1955, on the state of emergency, Article 1.

by decree and, after twelve days, can only be extended by the Parliament. Contrary to the state of siege, during a state of emergency, the police powers remain with civil authorities. Nonetheless, it affects the allocation of competencies, particularly between the legislative and executive powers as well as between the judicial and administrative branches of the judiciary.

The enactment of the 1955 Statute can be analyzed as a shift in the French emergency powers from a constitutional executive model to a legislative one. The state of emergency can only be prolonged by the legislator who decides, in the same statute, on the time limit. The statute also lists the emergency powers and limitations to fundamental freedoms. This list can be amended – in a restrictive or extensive manner – at the will of the Parliament.

Furthermore, the French legislator tried to increase its control over the implementation of the emergency powers with the creation, in 2015, of a parliamentary oversight authority.[207] It should be noted that the creation of this oversight authority has been criticized by some as a way to counterbalance – although poorly – the legislator's abdication of its role in the law-making process.[208] Indeed, Cahn argues that the consensus amongst the biggest parties together with the generally weak role of minority groups led to an absence of real parliamentary debate on the emergency bills – and more generally the anti-terrorism bills – introduced by the government.[209] Alix agrees that following the 9/11 attacks the fight against terrorism became a consensual, almost apolitical topic.[210] Furthermore, the main consequence of the 1955 Statute

[207] Art. 4-1 of the Law of 20 November 2015 amending the Law No. 55-385, 3 April 1955.

[208] Cahn, "Contrôles de l'élaboration et de La Mise En Œuvre de La Législation Antiterroriste," 4–5.

[209] Cahn, 4–5.

[210] Julie Alix, "La lutte contre le terrorisme sous le regard de la CNCDH," in *Les grands avis de la Commission nationale consultative des droits de l'homme*, ed. Christine Lazerges, Grands Textes (Paris: Dalloz, 2016), 427–42.

has been to dramatically increase the police powers and potential limitations on fundamental rights by the executive.

Consequently, in the French legislative model, the legislator appears to be of little importance. Although, *prima facie*, the 1955 Statute ensures a higher degree of checks and balances than Article 16, it remains a process essentially driven by and for the executive under the cover of a legislative process. Finally, because the triggering conditions – in particular the "imminent danger resulting from serious breaches of public order" – lack precision while the emergency powers are extensive, of the three extraordinary regimes, the state of emergency has been described as the most dangerous for the rule of law.[211]

From 1955 until 2005, the declaration of the state of emergency had always been justified by the activities of armed independentist movements: during the Algeria war and in 1985 in New Caledonia. This historical account highlights the peculiarity of the 2005 declaration of emergency in relation to the riots in the suburbs. Until then, major social movements had never been met with a state of emergency.[212] The state of emergency had never been applied on the metropolitan territory either. In November 2015, the state of emergency was declared following the terrorist attacks that killed 130 people. It lasted for two years and provided the executive with such far-reaching powers that a group of experts of the United Nations considered that these measures "impose[d] excessive and disproportionate restrictions on fundamental freedoms".[213]

[211] Rousseau, "L'état d'urgence, un état vide de droit(s)," 23.

[212] Rousseau, 22.

[213] "UN rights experts urge France to protect fundamental freedoms while countering terrorism", Geneva, 19 January 2016, https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16966&LangID=E

Since 1955, the Statute on the State of Emergency has been regularly amended to tailor the emergency powers to the current threat. This, however, was not the path chosen to confront the spread of Covid-19. Instead, the pandemic gave birth to yet a new emergency regime.

c. The state of health emergency, a variation on the 1955 Statute

Despite the three emergency regimes already existing, the French authorities struggled to find the adequate legal framework to address the rapid emergence and spread of Covid-19 in early 2020. On 16 March, the Prime Minister adopted a decree ordering a lockdown on the national territory. Such decree could potentially have been adopted based on the Prime Minister's general police powers.[214] However, it was based on Article 3131-1 of the Public health code, which allocates special police powers not the Prime Minister but to the Minister of health. The legality of the decree was therefore open to criticism. At the same time, the Minister of health adopted a series of *arrêtés*, which on many occasions clashed with measures adopted at the local level,[215] revealing a certain cacophony and confusion amongst the national authorities from the earliest stages. The uncertainty of the legal grounds of the initial measures seemed to call for a dedicated legal framework.[216]

On 23 March 2020, the Parliament granted the executive the (apparently) necessary new range of powers with the adoption of the Statute "to address the Covid-19 pandemic"[217]. This statute, resembling the 1955 Statute, created a new state of health emergency. Declared by

[214] Based on Articles 21 or 37 of the Constitution.

[215] Vincent Sizaire, "Un colosse aux pieds d'argile," *La Revue des droits de l'homme*, March 29, 2020, paras. 6–8, https://doi.org/10.4000/revdh.8976.

[216] Alix, "La lutte contre le terrorisme sous le regard de la CNCDH"; Sizaire, "Un colosse aux pieds d'argile," paras. 5–13.

[217] Statute no. 2020-290, 23 March 2020, "Emergency law to address the Covid-19 pandemic".

decree for a maximum of one month, it can only be prolonged by the Parliament. Article 2 of the statute modified Article 3131-15 of the Public health code in order to allow the Prime Minister to adopt by decree a wide range of measures to protect the public health.[218] This statute, adopted in just a few days, derogated to itself on several occasions, proof that the initial cacophony affected the entire legislative process, in the Parliament as well. In particular, the statute derogated to both the institutional and time limit aspects of the declaration procedure that it itself created. In an attempt to prevent further delays, it circumvented the executive decree and declared the state of health emergency on the entire territory for an initial period of two months.[219]

The haste in which these norms were adopted could partially account for the initial confusion. However, it should be noted that by 11 March 2020, the spread of Covid-19 had already reached the level of pandemic confirmed by the World Health Organization. More importantly, this normative agitation could have been avoided. There is a general consensus that the measures to confront the spread of the disease could have been based on already existing grounds:[220] general police powers of the Prime Minister, special police powers of the Minister of health or even the 1955 state of emergency.[221] Indeed, qualifying the pandemic of "public calamity" does not seem so farfetched.[222]

[218] Olivier Beaud and Cécile Guérin-Bargues, "L'état d'urgence sanitaire : était-il judicieux de créer un nouveau régime d'exception ?," *Recueil Dalloz*, no. 16 (April 30, 2020): 2.

[219] A similar mechanism had accompanied the enactment of the 1955 Statute.

[220] Antonin Gelblat and Laurie Marguet, "État d'urgence sanitaire : la doctrine dans tous ses états ?," *La Revue des droits de l'homme*, April 20, 2020, paras. 4–6, https://doi.org/10.4000/revdh.9066.

[221] The possibility of activating Art. 16 of the Constitution was discussed but generally found to be excessive.

[222] Gelblat and Marguet, "État d'urgence sanitaire," para. 5.

Consequently, some authors considered that only one argument could plausibly justify the creation of a new emergency regime: if resorting to the 1955 state of emergency to address the pandemic, the government could have been accused of using the pandemic as an excuse to reactivate the "security" state of emergency.[223] However, the same authors pointed out that this risk could have been easily mitigated since the 1955 would have necessarily been amended to list the adequate grounds and powers in the context of the pandemic.

The main opposition to the bill introduced by the government emanated from the Senate. Initially, senators would have preferred a temporary regime designed for the sole Covid-19 pandemic.[224] Nonetheless, it is a permanent new emergency regime that was created by the Statute of 23 March 2020. As a result, two legislative states of emergency now co-exist, which raises the question of their possible superposition. If the code of defense prohibits the overlap of the 1955 state of emergency and the state of siege,[225] no such provision applies to the two states of emergency.[226]

d. Outside the emergency: the rise of a national security law

Aside from the multiplication of emergency regimes in France, the rise of a new field of law has been observed in the past decade.[227] This national security law is irreducible to either criminal or administrative law. One of its key aspects is an over-grown criminal repression

[223] Beaud and Guérin-Bargues, "L'état d'urgence sanitaire," 11.

[224] Beaud and Guérin-Bargues, 7–8.

[225] No such prohibition applies to Art. 16 of the Constitution et the 1955 state of emergency. Both exceptional regimes were used concomitantly in 1961.

[226] Beaud and Guérin-Bargues, "L'état d'urgence sanitaire," 11.

[227] Alix and Cahn, "Mutations de l'antiterrorisme et émergence d'un droit répressif de la sécurité nationale."

characterized first by the aggravation of the sanctions when the infraction could be qualified as terrorist and second, the multiplication of independent terrorist infractions.[228]

In the early stages of this development, the traditional logic of criminal law, that of a reactive repression, remained central. However, starting in the mid-1990s, the logic shifted towards a preventive approach.[229] This shift continued developing until now, striving to identify and punish the terrorist intent ever earlier. The several (failed) attempts to criminalize the consultation of online jihadist propaganda is emblematic of this development.[230] This type of prevention, however, remained embedded in the repressive logic of criminal law, far from any conception of social prevention of crime.[231]

While prevention grew from its traditional area – the general administrative police powers – into criminal law, the repressive dimension of counter-terrorism gained administrative law. Measures – such as electronic surveillance, search and seizures or house arrests – which used to be confined to criminal law were made available to the administration. This evolution resulted in part from the transposition in the normal legal order of powers initially adopted within the frame of the state of emergency.[232] According to Alix and Cahn, this dual evolution marked the emergence of a law *sui generis* focused on national security and counter-terrorism.[233]

[228] Over thirty statutes were adopted in matters of counterterrorism since 1986. See: "Trente-cinq ans de législation antiterroriste", at https://www.vie-publique.fr/eclairage/18530-trente-ans-de-legislation-antiterroriste.

[229] Alix and Cahn, "Mutations de l'antiterrorisme et émergence d'un droit répressif de la sécurité nationale," 849.

[230] Alix and Cahn, 849.

[231] Alix and Cahn, 851.

[232] Statute no. 2017-1510, 30 October 2017, "reinforcing homeland security and the fight against terrorism".

[233] Alix and Cahn, "Mutations de l'antiterrorisme et émergence d'un droit répressif de la sécurité nationale," 854.

It follows that when addressing "crises", specifically modern terrorism and Covid-19, the French authorities have at their disposal a panel of formal emergency regimes as well as repressive and preventive powers – both criminal and administrative – which grew exponentially in the last three decades,[234] all of which are, to some extent, detrimental to fundamental rights. In 2015, following the declaration of the state of emergency, France notified the Council of Europe of a derogation according to Article 15 ECHR.[235]

3. The United States: a legislative model?

The United States' Constitution is commonly cited as one of the few constitutional texts which do not contain emergency provisions. Yet, when confronted with "crises", often connected to wars whether formally declared as such or not, U.S. presidents have drawn from their constitutional prerogatives to exercise emergency powers. Furthermore, formal emergency powers are disseminated throughout hundreds of statutes alongside pseudo or informal emergency provisions.

a. The constitutional sources of emergency powers

The U.S. Constitution contains only one provision addressing emergency situations directly. Art. I Sect. 9 provides: "The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." The absence of further constitutional details on the matter is in line with Hamilton's views in the Federalist No. 23: "The circumstances that endanger the safety of nations are infinite, and

[234] Alix and Cahn, 846–47.

[235] Notification - JJ8045C Tr./005-187 - 24/11/2015. The Council of Europe was then informed of that the state of emergency had ended on 1 November 2017.

for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed."[236]

In the absence of special emergency powers or procedure, the classic separation of powers applies. The President can only act in accordance with specific statutes enacted by Congress or based on its own limited powers provided by Art. II of the Constitution.[237] Indeed, Art. II contains several clauses on which the President can rely to draw powers in times of emergency. The President is the Commander-in-Chief of the armed forces.[238] The general Vesting Clause is also sometimes considered an alternative source of emergency powers.[239] This interpretation is based on the different wording between the vesting clause of Art. I (Congress) and that of Art. II (President). From this difference, the tenants of the theory conclude that the executive power has substantive content independent of anything else in Art. II.[240]

Finally, advocates of strong executive powers also find a legal base in the "take Care" clause,[241] which imposes on the President the duty to "take Care the Laws are faithfully executed". They infer from this general duty a correlative duty to preserve the nation.[242] This interpretation finds resonance in Lincoln's speech defending his suspension of the writ of *habeas corpus* during the Civil War: "The whole of the laws which were required to be

[236] Alexander Hamilton, "Federalist No. 23," in *The Federalist (October 1787-May 1788)*, ed. Jacob E. Cooke (Middletown, Conn: Wesleyan Univ Pr, 1961).

[237] See Justice Jackson's concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer* (Steel Seizure case), 343 U.S. 579 (1952).

[238] Art. II Sect. 2.

[239] Art. II Sect. 1.

[240] Mark Tushnet, *The Constitution of the United States of America: A Contextual Analysis*, 1st edition (Oxford: Hart Publishing, 2009), 109–10.

[241] Art. II Sect. 3.

[242] Tushnet, *The Constitution of the United States of America*, 109.

faithfully executed, were being resisted, and failing of execution, in nearly one-third of the States. Must they be allowed to finally fail of execution, even had it been perfectly clear, that by the use of the means necessary to their execution, some single law, made in such extreme tenderness of the citizen's liberty, that practically, it relieves more of the guilty, than of the innocent, should, to a very limited extent, be violated?"[243]

Lincoln breached the Constitution during the Civil War. However, in the more recent history, successive Presidents yielded to the "compulsion of legality".[244] Not only did they argue their position in constitutional terms but more often than not, they sought authorization from Congress,[245] which, due to national security consensus, they almost always received. The Act on the Use of Military Force passed by Congress in the wake of the 9/11 attacks is a good example of such broad *ex-ante* delegation.

In the U.S. context, many situations identified as emergency resulted from or were linked to a war outside the U.S.[246] Art. I Sect. 8 of the Constitution grants Congress the power to declare war. On the other hand, the President is the Commander in Chief of the armed forces, which means that he decides on the conduct of military operations but also can commit military forces in ways that do not quite equate war without Congress' prior approval. In order to regulate this possibility, Congress enacted, over President Nixon's veto, the War Powers Resolution (1973), which requires the president to report to Congress within two days of the

[243] On quote in Mark E. Jr. Neely, *The Fate of Liberty: Abraham Lincoln and Civil Liberties* (New York, NY: Oxford University Press, 1991), 12.

[244] Dyzenhaus, "States of Emergency," 451.

[245] Sajó and Uitz, *The Constitution of Freedom*, 422.

[246] Sajó and Uitz, 421.

involvement of military forces. The Resolution also requires Congress' approval for the continuation of the use of force after 60 days.

Despite presidents regularly questioning the constitutionality of the Resolution, they consistently submitted the reports. Since the adoption of the Resolution, Congress has authorized the use of force more often than it had in the decades before, which led Tushnet to conclude that "the 'declare war' clause […] is no longer a provision that makes a difference in real controversies".[247] Consequently, despite the Resolution, the war powers of the President remained far-reaching. Furthermore, the rally-around-the-flag effect of an efficient war narrative can guarantee the President very extensive powers. Therefore, it is not surprising that many emergency policies were framed in war-like terms.[248]

b. The statutory sources of emergency powers

It should be noted that this analysis applies to foreign and war powers. However, the U.S. Supreme Court explicitly rejected the idea that the field of war could be extended to the national territory.[249] As a result, the legal framework of emergency powers in the United States is composed of presidential powers on foreign policy, war powers and an intricate net of statutes related to foreign and domestic affairs.

The propensity of Congress to grant the president the powers he sought during war can be equally observed regarding measures applied domestically. Cole argues that "the need to be seen as 'doing something' about the threat often translates into legislation that delegates

[247] Tushnet, *The Constitution of the United States of America*, 116.

[248] See above, p. 28.

[249] *Youngstown Sheet & Tube Co. v. Sawyer* (Steel Seizure case), 343 U.S. 579 (1952).

sweeping powers to the executive branch". He illustrates his statement with the "overwhelming approval of the Smith Act and the Internal Security Act during the McCarthy era and of the Antiterrorism and Effective Death Penalty Act and the USA PATRIOT Act in the current era, coupled with [the] appropriation of funds for the Japanese internment in World War II."[250]

In 2020, the United States counted over a hundred and twenty statutes providing emergency powers. The National Emergency Act (NEA) purported to limit their use by conditioning their activation to a formal declaration of national emergency. However, since *Chadha*,[251] this constraint lost most of its efficiency because Congress is no longer in a position to counter the executive's decisions[252] It remains that these provisions can be easily identified as emergency powers. This is not the case with "pseudo-emergency powers".

"Pseudo-emergency powers" are identified by Goitein as powers which are readily available to the executive without prior declaration of emergency but qualify as emergency powers because they "allow the president [or another executive body] to take certain actions – or set aside otherwise applicable limits on presidential action – when necessary for 'national security.'"[253] Goitein uses as examples the Insurrection Act,[254] which allows the president to deploy military forces on the national territory in exceptional circumstances, or the Trade Expansion Act according to which the president can impose certain restrictions when a product

[250] Cole, "Judging the Next Emergency," 2591–92.

[251] *INS v. Chadha*, 462 U.S. 919 (1983).

[252] See below, p. 87.

[253] Goitein, "Emergency Powers, Real and Imagined," 30.

[254] 10 U.S.C. § 253 (2018).

"is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security."[255]

Much like in France, emergency powers in the United States are disseminated throughout and at various levels of the legal order. It would be a mistake to confine emergency to war powers. Ultimately, as Tushnet points out, the extent of the presidential powers in times of emergency will largely depend on his political support, including in Parliament.[256]

The various types of emergency powers, depending on whether they are formally identified as such or not, matter for judicial review, the scope and degree of which might be determined by the emergency provisions. Conversely, in deciding the level of deference they owe to the other branches of government, in particular in matters of national security, judges contribute to determining what constitutes an emergency power or pseudo-emergency power. Yet the breadth of the role the judiciary should play in a context of emergency remains highly controversial.

C. The role of the judiciary during emergencies

In matters of national security but also more generally in situations of "crises", the judiciary becomes more vulnerable to criticism. The very role of the judge in a democratic order is questioned. Criticism focuses on two main lines of arguments: judges' lack of speed and knowledge and their absence of political accountability. Despite these critiques, several

[255] 19 U.S.C. § 1862 (2018).

[256] Tushnet, *The Constitution of the United States of America*, 117–20.

arguments refute the possibility of an emergency model in which the judiciary would play little to no role, at least in liberal democracies.

1. Lack of speed and knowledge

a. Ignorance is no bliss

In matters of terrorism, secrecy tends to prevail. Intelligence gathering, including mass surveillance, is a fundamental part of counter-terrorism operations. In that process, states' agencies strive to maintain a veil not only on what they know but also the means they have developed to acquire information. Secrets must be kept from the enemy and that also requires keeping the population in the dark. As a result, the executive has a monopoly over information.

In the context of litigation, classified material is often kept, at least in part, both from the petitioner – thereby strongly hindering the adversarial process – and from the courts, forcing judges to decide based on incomplete information.[257] *Korematsu,*[258] in which the Supreme Court deferred to the military regarding the internment of American citizens of Japanese descent, was later shown to rely on inaccurate records; the executive having concealed critical information relevant to the assessment of the threat.[259] More recently, when ruling on the authorization of warrants for search and wiretaps under the Foreign Intelligence Surveillance Act (FISA), federal judges denounced the fact that, on previous occasions, the government had presented the court with misleading or inaccurate information seventy-five times.[260]

[257] Cole, "Judging the Next Emergency," 2570.
[258] *Korematsu v. United States*, 323 U.S. 214 (1944).
[259] Cole, "Judging the Next Emergency," 2570.
[260] Cole, 2579.

Scheinin points to another obstacle: the lack of technological knowledge.[261] In particular, terrorism cases often involve surveillance measures using new technologies with which judges are not familiar. However, this argument appears less convincing. Judges are not expected to be experts in every matter on which they are called to adjudicate. Procedural rules in particular are in place to ensure that the necessary technical information and knowledge will be made available to them.[262] Even when critics are raised against particular judgments, they do not argue that surveillance cases turned on (lack of) technological understanding.

Lack of knowledge also played an important role in the adjudication of cases related to anti-Covid measures. In cases involving medical or scientific knowledge more generally, judges may be tempted to rely on scientific expertise. However, Covid-19 being a new and rapidly spreading and evolving disease, expertise would usually bring conjectures rather than reliable scientific knowledge. In this way, Covid-19 and terrorism are similar. The terrorist threat itself, the level of threat to national security and the risk posed by the individual(s) involved in a specific case is very difficult to estimate, even if all available information were disclosed to the judges.[263]

Therefore, in both matters, judges tend to rely on the information and data presented by the government or its interpretation thereof rather than risking making their own assessment or even questioning the objectivity of the material made available to the court. As Cole points out,

[261] Martin Scheinin, "The Judiciary in Times of Terrorism and Surveillance - a Global Perspective," in *Judges as Guardians of Constitutionalism and Human Rights*, ed. Martin Scheinin, Helle Krunke, and Marina Aksenova (Cheltenham, UK: Edward Elgar Publishing, 2016), 192–93.

[262] David Jenkins, "Procedural Fairness and Judicial Review of Counter-Terrorism Measures," in *Judges as Guardians of Constitutionalism and Human Rights*, ed. Martin Scheinin, Helle Krunke, and Marina Aksenova (Cheltenham, UK: Edward Elgar Publishing, 2016), 170–72.

[263] Cole, "Judging the Next Emergency."

"no judge wants to issue an order that actually causes serious harm to the national security".[264] For Scheinin, because of this multiplicity of obstacles to actual knowledge about the specifics of the cases, there is a risk that the "concrete and fact-based balancing" turn into an abstract comparison of societal values "as if it was about setting political priorities."[265]

b. Slow and steady loses the race?

A second argument is repeatedly put forward to undermine the role of the judiciary in times of "crises": the judicial process would be too slow. Both with regards to terrorism and Covid-19, the authorities have to be able to move quickly in order to stop an attack or slow the spread of the virus. When time is of the essence, the judicial process, which requires careful analysis and balancing of the various interests at stake, would hinder the effectiveness of the State's response. This argument is especially weighty concerning measures which require the involvement of a judge prior to their adoption or execution (surveillance measures, search and seizure or house arrest among others).

This argument is problematic on several levels. In the first place, emergency procedures exist precisely to adapt to situations where a speedy decision is required. The *référé-liberté* before the French Council of State is an example of such accelerated procedures. The Council has 48 hours to issue an ordinance and, when necessary, pronounce conservatory measures. Article 61 al. 3 of the French Constitution also allows the government to ask the Constitutional Council to deliver a decision within eight days – instead of a month – in case of emergency.

[264] Cole, 2571.

[265] Scheinin, "The Judiciary in Times of Terrorism and Surveillance - a Global Perspective," 194.

Furthermore, the argument posits that judges cannot fulfil their task with adequate promptness because adjudication requires to carefully balance the various interests. Nonetheless, when considering measures which can severely restrict fundamental freedoms, a similar balancing should be expected both from the executive and the legislative branches. Reviewing this assessment is part of the role of the judge. Arguments based on speed tend to be based on objective necessity and negate the subjective dimension of democratic "crises" management.

Arguments relying on the courts' lack of speed and knowledge are therefore not quite accurate. Neither are they fully relevant. However, they are often combined with a more problematic critique: judges' lack of political accountability.

2. Public opinion and political accountability

Barak stresses that, for some, "democracy – both from a formal and substantial point of view – is too important to be left under the protection of judges who are neither elected nor in any way responsible to the people."[266] Neither in France, the ECtHR, nor at the federal level in the U.S. are judges directly elected. French judges are appointed by various authorities. United States' federal judges are appointed by the President and confirmed by the Senate. The election of ECtHR judges is a complex procedure that involves the national executives, a screening process and a vote by the Parliamentary Assembly of the Council of Europe, which leads

[266] Aharon Barak, "L'exercice de la fonction juridictionnelle vu par un juge : le rôle de la Cour suprême dans une démocratie," *Revue française de droit constitutionnel* 66, no. 2 (2006): 242, https://doi.org/10.3917/rfdc.066.0227.

Björgvinsson to argue that the process is "as democratic as it can be".[267] Yet, none of these judges are directly responsible to the people.

As a regional jurisdiction, the European Court of Human Rights (ECtHR) has been facing specific legitimacy issues. As opposed to national jurisdictions, it cannot ignore the risk that too progressist decisions would result in member States leaving the Convention system. Therefore, as an international jurisdiction, it is to some extent even more sensitive to the (lack of) support from national executive and legislative powers. Furthermore, the purported lack of democratic legitimacy of the judiciary in general is even more problematic for the ECtHR. It is often viewed as very remote and the relationship with the population(s) is too thin to be relied on.[268] Considered as a foreign institution that unduly mingles in national affairs – even more so in sensitive areas such as national security – it can easily be perceived as frustrating the agendas of institutions that enjoy a far greater legitimacy. As a result, the legitimacy of the ECtHR is intrinsically linked to the level of acceptability of its decisions.[269]

The Strasbourg judges are in no way oblivious to the risk the legitimacy of the Court encounters when a member State refuses to comply with one of its judgment.[270] Madsen argues that international courts develop their legitimacy on three external levels: legal, political and societal.[271] Building on this theory, Björgvinsson adds that, when facing heavy criticism on the

[267] David Thór Björgvinsson, "The Role of Judges of the European Court of Human Rights as Guardians of Fundamental Rights of the Individual," in *Judges as Guardians of Constitutionalism and Human Rights*, ed. Martin Scheinin, Helle Krunke, and Marina Aksenova (Edward Elgar Publishing, 2016), 337.

[268] See for example Helle Krunke, "Courts as Protectors of the People: Constitutional Identity, Popular Legitimacy and Human Rights," in *Judges as Guardians of Constitutionalism and Human Rights*, ed. Martin Scheinin, Helle Krunke, and Marina Aksenova (Cheltenham, UK: Edward Elgar Publishing, 2016), 91.

[269] Opening Speech of President D. Spielmann, Comparative law seminar, Strasbourg, 16 May 2014.

[270] Scheinin, "The Judiciary in Times of Terrorism and Surveillance - a Global Perspective," 195.

[271] Mikael Rask Madsen, "The Legitimization Strategies of International Judges: The Case of the European Court of Human Rights," in *Selecting Europe's Judges: A Critical Review of the Appointment Procedures to the*

first two levels (from national jurisdictions and governments) as is currently happening, the ECtHR's legitimacy lies in the third level: in its relations with civil society – what Björgvinsson calls its "social capital".[272] This idea comes close to Krunke's argument that the courts' salvation might be found in their role as "protector of the people".[273]

As they lack control over either the 'sword or the purse'[274], judges might be tempted to find support in the public opinion. Focusing on the Supreme Court, Bassok notices an evolution of the source of legitimacy of the Court. The other branches of government would respect judicial decisions because they "value the Court's judgment" and acknowledge its expertise. However, since the rise of opinion polls in the 1980s, the main reason for compliance with the Court's decisions would be a fear of public reaction.[275] For that reason, according to Karlan, "the judiciary must ultimately depend on the people."[276] On the contrary, Krunke notes that in Europe, courts are not usually associated with opinion polls. This difference with the U.S., she says, might be an illustration of the fact that the myth of objective courts is more vivid in Europe, whereas in the U.S., a higher degree of politicization of courts is accepted.[277] Yet, she claims that "stepping into the role of protector of the people and hence strengthening one's

European Courts, ed. Michal Bobek (Oxford University Press, 2015), 266, https://doi.org/10.1093/acprof:oso/9780198727781.003.0013.

[272] Björgvinsson, "The Role of Judges of the European Court of Human Rights as Guardians of Fundamental Rights of the Individual," 330.

[273] Krunke, "Courts as Protectors of the People."

[274] Alexander Hamilton, "Federalist No. 78," in *The Federalist (October 1787-May 1788)*, ed. Jacob E. Cooke (Middletown, Conn: Wesleyan Univ Pr, 1961), 523.

[275] Or Bassok, "The Changing Understanding of Judicial Legitimacy," in *Judges as Guardians of Constitutionalism and Human Rights* (Edward Elgar Publishing, 2016), 53.

[276] Pamela S. Karlan, "Foreword: Democracy and Disdain," *Harvard Law Review* 126, no. 1 (2012): 1–71.

[277] Krunke, "Courts as Protectors of the People," 78.

popular legitimacy is an effective way for the institutions and institutional actors to gain a stronger (political) platform."[278]

Nevertheless, the claim that judges should base their legitimacy on popular support is problematic and misleading. First, this idea relies on the assumption that judges do not benefit from the necessary democratic legitimacy. However, just like the other two branches of government, the judiciary draws its legitimacy from the Constitution itself.[279] Furthermore, the lack of political accountability – meaning that their ability to hold office does not depend on electoral results – is not a flaw of the judiciary but one of its fundamental characteristics. Only this absence of accountability can guarantee the judicial independence that is essential to the protection of fundamental rights.

In the context of the fight against terrorism, human rights adjudication often leads to balancing public interest and national security on one side with the rights and freedoms of individuals or minority groups on the other. Yet public opinion, as measured by polls, is the opinion of the people, where the people means the majority.[280] This dilemma is highlighted by Bassok who finds a correlation between the growing importance of opinion polls in the U.S. and the change in the way the counter-majoritarian difficulty is understood.[281] Whereas Bickel originally understood this difficulty as a remotely accountable judiciary invalidating decisions

[278] Krunke, 79.

[279] See amongst others Barak, "L'exercice de la fonction juridictionnelle vu par un juge"; Sajó and Uitz, *The Constitution of Freedom*, 354–55; Norman Dorsen et al., *Comparative Constitutionalism: Cases and Materials*, 4th edition (St. Paul, MN: West Academic Press, 2022), 216; Conseil Supérieur de la Magistrature, "Rapport Annuel 2023," 2024, 12, http://www.conseil-superieur-magistrature.fr/actualites/rapport-annuel-dactivite-2023.

[280] Krunke, "Courts as Protectors of the People," 91.

[281] Bassok, "The Changing Understanding of Judicial Legitimacy."

from elected branches, it is now seen as the difficulty arising when the Supreme Court strikes down a statute supported by the public opinion.[282]

Björgvinsson and Krunke are facing the same dilemma: how to strengthen popular legitimacy without sacrificing the protection of individual/minority rights against the opinion of the majority.[283] Barack presided the Supreme Court of Israel at a time when it enjoyed broad popular support. Yet, he insisted on differentiating public trust from popularity. "The necessity to ensure public trust does not mean that one should seek to be popular. Public trust does not imply following general trends or opinion polls. Public trust does not mean being accountable in the sense that the executive and legislative powers are. Public trust does not mean being liked. […] On the contrary, it means ruling according to the law and the judge's conscience, no matter the people's views. Public trust means making room for history not hysteria."[284]

The pressure put on the counter-majoritarian role of the judiciary is at its acme when "crises" can be instrumentalized to galvanize the opinion and emergency powers have a disproportionate negative impact on marginalized groups. Yet it is precisely for these reasons that liberal democracies cannot dispense with judicial scrutiny of emergency powers.

3. Emergency without the judiciary?

Arguments based on the practical limitations and illegitimacy of the judiciary endure. First articulated in practical terms, they then take on a normative dimension to support the

[282] Bassok, 60–63.

[283] Björgvinsson, "The Role of Judges of the European Court of Human Rights as Guardians of Fundamental Rights of the Individual," 350; Krunke, "Courts as Protectors of the People," 91.

[284] Barak, "L'exercice de la fonction juridictionnelle vu par un juge," 252.

primacy of the executive.[285] Already present in Locke and radicalized by Schmitt,[286] the idea that the judiciary (and the legislative power) would impose undue constraints on the executive at a time when speed and effectiveness are required, can still be found in "executive unilateralism" doctrine, "which favors allowing complete discretion to the executive branch without any oversight from any other institution".[287]

Yet three lines of argument present a strong defense in favor of an active judicial power. The first argument is rights-based. The second is a structural one. It argues that judicial review is the only means to prevent the emergency power from making a claim for the constituent power. The last argument focuses on the judiciary as the guardian of the essential conditions for democracy to exist: separation of powers and fundamental rights.

a. The rights-based defense

A classic rights-based argument claims that the judiciary, as the only non-elected branch of government, is the best placed to uphold fundamental rights against the intensified assaults due to the frenzy caused by the emergency. However, the counter-majoritarian difficulty can shake the foundations of this argument.[288] The history of "crises" is paved with judicial decisions giving in to emergency powers. Amongst these are *Korematsu*[289] but also the 1958

[285] Dyzenhaus, "States of Emergency," 443–45.

[286] Dyzenhaus, 443–45.

[287] Rosenfeld, "Judicial Balancing in Times of Stress," 2082.

[288] Greene, *Permanent States of Emergency and the Rule of Law*, 116–19.

[289] *Korematsu v. United States*, 323 U.S. 214 (1944).

decision of the French Council of State upholding the creation of detention camps in Algeria against the explicit wording of the 1955 Statute on the State of Emergency.[290]

Such decisions are dangerous because, in the words of Justice Jackson, "[t]he principle then lies about like a loaded weapon".[291] A position shared by Barak who added that in times of emergency, a mistake made by the judiciary is worse than one made by the other branches of government because it remains entrenched in the case law of the court whereas the decisions of the political branches can be overruled.[292] "If judges fail in their role in time of war and terrorism, they will be unable to fulfil their role in time of peace and tranquility" as their decisions "will linger many years after terrorism is over."[293]

For others, the danger lies in the appearance of legality that such decisions give to unconstitutional emergency measures. Dyzenhaus criticizes them as creating legal grey holes where the principle of legality appears upheld but is devoid of substance.[294] For this reason, he advocates for a derogation model. A formal derogation in times of emergency would not in and of itself strengthen the protection of the of the rule of law and fundamental rights. However, Dyzenhaus and Greene argue, it would act as a shield containing the emergency powers within the derogation and avoid tinting the normal constitutional order.[295]

[290] Council of State, 7 March 1958, Zaquin; Sylvie Thénault, "Assignation à résidence et justice en Algérie (1954-1962)," *Le Genre Humain*, no. 32 (1992): 105, https://doi.org/10.3917/lgh.032.0105.

[291] *Korematsu*, Justice Jackson dissent.

[292] Aharon Barak, *The Judge in a Democracy* (Princeton University Press, 2006), 286.

[293] Aharon Barak, "On Judging," in *Judges as Guardians of Constitutionalism and Human Rights*, ed. Martin Scheinin, Helle Krunke, and Marina Aksenova (Cheltenham, UK: Edward Elgar Publishing, 2016), 33.

[294] Dyzenhaus, "States of Emergency," 456.

[295] Dyzenhaus, "States of Emergency"; Greene, *Permanent States of Emergency and the Rule of Law*.

For similar reasons, Tushnet[296] and Gross[297] proposed a more radical solution: extra-legal models, where it would ultimately be for the people – possibly through their elected officials – not the courts, to decide on these extra-legal or extra-constitutional measures. Another type of decision can make the judiciary appear ineffective. These are cases where the court establishes principles strengthening its role and/or protective of fundamental rights but fails to provide a remedy to the plaintiff – what Cole calls "the Marbury model".[298]

Cole acknowledges these critical shortcomings. However, he defends a broader historical approach and asserts that even when courts failed to protect fundamental rights during the ongoing emergency, their judgments had substantive constraining effects on the way emergency powers were exercised during the next "crises".[299] Furthermore, even though he acknowledges that courts are not perfect in times of emergency, he argues that alternatives are worse.[300] He finds danger in leaving an *a posteriori* judgment of the emergency measures to the people because of the already demonstrated risk of overreaction[301] and the dangers of a majoritarian rule.

Finally, Cole highlights that courts are the only body "obligat[ed] to entertain claims of rights violation".[302] This obligation is especially important in times of "crisis" when minority groups are especially vulnerable to emergency measures. Indeed, for Cole, the strongest defense of judicial review is articulated in Footnote 4. It is "the notion that as an institution insulated

[296] Tushnet, "Defending Korematsu?"
[297] Gross, "Chaos and Rules."
[298] Cole, "Judging the Next Emergency," 2565–66.
[299] Cole, "Judging the Next Emergency."
[300] Cole, 2591.
[301] Cole, 2591–92.
[302] Cole, 2592.

from everyday politics, the Court is best suited to protect the interests of those who cannot protect themselves through the political process, whether they be members of discrete and insular minorities, dissidents, noncitizens, or other vulnerable individuals."[303] This last point brings Cole's argument clause to the third line of defense of the judiciary, namely that it is an arena for groups and individuals to claim against the state. Ultimately, Cole concludes that "[g]iven the salutary role that courts have played in enforcing constitutional limits on emergency responses, and given the paucity of credible alternatives, we should be reluctant to let judges off the hook."[304]

b. Countering the claim for the constituent power

Greene does not disagree with this rights-based defense of the role of the courts. However, he considers that the pitfalls to which courts have regularly succumbed – minimalist review and over-deferentialism – render a right-based argument precarious. For that reason, he proposes a more structural argument in defense of the courts. He argues that judicial review is the only way to resist the claim for constituent power. Greene's main focus is not on emergency measures but on what he identifies as the most problematic aspect of states of emergency: their tendency to become permanent. Permanent states of emergency allow the authority wielding the emergency powers to make permanent changes to the constitutional order in ways that are provided by the Constitution itself. As such, they may allow a claim for the constituent power.

"A permanent state of emergency can amount to an amendment of the constitution by rendering the impinged norms in question invalid by permanently removing their effectiveness.

[303] Cole, 2566–67.

[304] Cole, 2594.

As effectiveness is a necessary condition of validity, one cannot say that the impinged norms are still valid." According to Greene, meaningful judicial review of both the existence of an emergency and of the emergency measures is the main defense to counter this claim.[305]

Greene actually places the judicial review of the decision on the exception at the top of the constitutional hierarchy. He argues that if constitutional hierarchy there is, then constitutional emergency provisions sit at the top because all other provisions apply only as long as we are in normal times, as long as the emergency provision does not apply. However, accepting this vindicates Schmitt's position. But Greene continues, recognizing hierarchy of norms within the constitution creates the possibility of unconstitutional constitutional amendments and the need for interpretation of norms as unconstitutional. Therefore, the emergency provision is not the constitutional apex. Its judicial review and interpretation are.[306]

c. Claiming against the state

The third line of argumentation combines the human rights dimension of the first one and the structural one of the second. It relies on the role of judiciary as protector of fundamental rights in so far as these maintain the popular sovereignty necessary to democracy as opposed to a merely representative system. In *Radicaliser la Démocratie*,[307] Rousseau gives an analysis of the role of the judiciary in a democracy based on the difference between representative and democratic systems in that the former does not automatically imply the latter. Sieyès had

[305] Greene, *Permanent States of Emergency and the Rule of Law*, 127–60.

[306] Greene, 82.

[307] Dominique Rousseau, *Radicaliser la démocratie*, Seuil, 2015.

already pointed to this misconception when he declared that 1789 had established in France not a democracy but a representative state.[308]

Rousseau does not argue against representative systems. On the contrary, he claims that it is in the process of the representation that a person becomes a citizen. However, he also points to the distance which exists and grows between the people and their representatives. Ignoring this distance and equating the will of the former with that of the latter is when democracy gets lost. The judiciary maintains the gap between represented and representatives open by guaranteeing fundamental rights – conditions of the democratic debate – and allowing citizens (the represented) to claim against the state (the representatives). Therefore, not only is the judiciary not non-democratic (because not elected) but without it a system can only be representative, not democratic.

Rousseau's analysis is not specific to emergency. However, in light of the normalization and "permanentization" of emergency powers, the mechanisms of democracy must hold during "crises" or risk being lost permanently – a position ironically substantiated by those who claim that emergency powers abide by the rule of law. It is true of the judiciary as preventing the will of the people from being collapsed into that of their representatives.

The judiciary might suffer from some limitations which make courts less apt to "crises" management. However, on the one hand, these limitations are not necessarily as severe and problematic as sometimes argued. On the other hand, in some respects, they are constitutive of what makes the judiciary an indispensable actor of emergency powers. Without a meaningful

[308] Rousseau, 12.

intervention of courts, Schmitt is vindicated and liberal democracies would be incapable of handling emergency without compromising their very nature away.

Conclusion

The conceptual frame of emergency powers is paved with powerful notions capable of wiping out political disagreements or even political discussions. The redefinition of key notions allowed the power to decide on what/who are the "crises", threats to national security, terrorists or even those undermining the efforts to contain the Covid-19 pandemic. These are not objectively appreciated but defined in relation to one objective: protecting and reproducing the existing social order. Emergency powers can then be deployed against dissidents, civil society or marginalized groups.

The success of this enterprise lies in a careful discourse production grounded in and reinforcing the fear generated by specific events. Terrorism is scary, Covid-19 is scary. For that reason, the (false) promise of security and protection against them is highly appealing. Judges are not immune to this discourse. Furthermore, the necessity argument can be used against them to present their role as superfluous, a luxury that "crises" management cannot afford.

If they want to avoid being sidelined, judges must be able to see through the veil of emergency and continue enforcing the pillars of constitutionalism that are the separation of powers and fundamental rights. The Supreme Court, ECtHR and both French Councils were all directly confronted with these issues. The ensuing case law and principles established in that regard are examined respectively in Chapters 2 (structural aspects) and 3 (substantive matters).

Chapter 2: Separation of powers through the judicial lens in times of "crises"

A recurrent feature of states of emergency is that they alter the separation of powers with a strong tendency to shift powers from the legislative to the executive and weaken the judiciary. Therefore, unchecked emergencies are opportunities for executive self-aggrandizement, power grab, and can quickly become a first step towards authoritarianism. The risk of "political" or "fictitious"[309] states of emergency is high, and the more powers can be gained through emergency, the higher the risk.[310] Or extrapolating from Justice Jackson's words, we may suspect that "emergency powers would kindle emergencies."[311] The concentration of powers in the hands of the executive represents a formidable challenge to the principles which underpin the U.S., French and ECHR systems: democracy, pluralism, rule of law and fundamental rights.

As guardians of these orders, apex courts are called to scrutinize emergency laws also from the point of view of separation of powers. This mandate is very clear with regards to the French Constitutional Council and the U.S. Supreme Court. The former was established precisely to ensure that the separation of the normative function between legislative and executive powers organized by the Constitution was respected. The latter, since *Marbury v.*

[309] The expression is borrowed from Agamben who refers to the political of fictitious state of siege found in French public law theory. Agamben, *State of Exception*, 3–5.

[310] On the correlation between factual conditions, legal elements, and likelihood of a declaration of emergency, see Bjørnskov and Voigt, "Why Do Governments Call a State of Emergency?"

[311] *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), Justice Jackson concurring.

Madison,[312] decides on the constitutionality of statutes which include assessing them against the separation of powers as inscribed in the U.S. Constitution.

The French Council of State does not in principle review the constitutionality of statutes. Nonetheless, it does constitutional review of bills in the context of its consultative functions. It also reviews the legality of executive acts, in which context it addresses matters of separation of powers. Finally, at first glance, the ECtHR does not have a clear mandate to intervene in matters of separation of powers. The Convention is almost silent on this issue and does not require any specific arrangements concerning separation of powers at the domestic level. Furthermore, the Court, being an international body, must respect the choices made by the member states in matters which touch the core of their national sovereignty. Nonetheless, the Court is the guardian of the core values of the Convention as well as the rights enshrined in it, which are likely to suffer when the balance of powers is affected. Therefore, the ECtHR also had to adjudicate matters of separation of powers, even if indirectly at times.

The principle of separation of powers encompasses many realities and constitutional variations. The three systems examined here are usually considered to have Montesquieuian origins. Yet, they offer illustrations of those differences. The French and U.S. versions of separation of powers are often contrasted with one another. On the one hand, the French revolutionaries put a strong emphasis on the pure separation,[313] whereas the drafters of the U.S. Constitution attached more importance to the systems of checks and balances.[314] But the opposition between the two is no longer as stark. The French system evolved to soften the

[312] 5 US 137 (1803).

[313] Sajó and Uitz, *The Constitution of Freedom*, 127–68.

[314] James Madison, "Federalist No. 51," in *The Federalist (October 1787-May 1788)*, ed. Jacob E. Cooke (Middletown, Conn: Wesleyan Univ Pr, 1961).

separation which, in comparison, is now stricter in the U.S. On the other hand, it was argued that the ECtHR, incapable of choosing, hesitates between the two models.[315]

As states of emergency become more normal and permanent, one might expect that alterations of the separation of powers would be less acceptable because less exceptional and circumscribed. Furthermore, the tendency to portray the emergency as in line with the rule of law should strengthen the mandate of the institutions tasked to enforce the separation of powers. However, the normalization of the emergency also affected the methods used to concentrate powers. They became more subtle and diffused and simultaneously more difficult for courts to apprehend.

The chapter broadly follows the order in which the various branches of government are involved in the making of emergency norms, which also matches the logic followed during judicial review in various cases. Therefore, the first section examines the effect of emergency on the separation of the legislative and executive branches. A common dynamic of emergency is the alignment of parliament on the executive. This process, and its specificities during emergency, does not easily lend itself to judicial review because of its primarily socio-political nature. Therefore, the collapse of the separation of these two powers represents a challenge for the courts, which have tackled it with unequal results.

The second section of the chapter turns to the extraordinary limitations put on judicial review during emergency. In all three fundamental texts, the emergency provisions either explicitly – Suspension Clause of the U.S. Constitution and Article 15 ECHR – or implicitly –

[315] Dragoljub Popović, "European Court of Human Rights and the Concept of Separation of Powers," in *Separation of Powers: Global Perspectives*, ed. M. Prabhakar (Hyderabad: ICFAI University Press, 2008), 194–219.

Article 16 of the French Constitution – limit the role of courts. Nonetheless, even when these provisions are not activated the logic according to which judicial review should be lessened in times of "crisis" remains and haunts the alternative emergency regimes.

Finally, the third section focuses on a peculiar dynamic. Courts do not only influence the separation of powers when deciding on the legality of norms adopted by the political branches. They occasionally jump the separation-of-powers fence. They adopt a positive legislator role and actively participate in the production of the emergency norms.

A. The legislative branch: between counter-power and "rally effect"

The drafters of both the U.S. and 1958 French Constitutions were wary of the legislative branch of government, which they anticipated or perceived to be the dominant one. The delegates at the Constitutional Convention saw in the legislature the potential to "reproduce the imperial overreaching",[316] whereas they thought of the President "primarily as an executive or manager of the programs Congress adopted".[317] In France, the 1958 Constitution was designed to constrain the parliament, perceived as the main source of instability during the Third and particularly Fourth Republics.[318] Yet, the executive branch soon proved to be the dominant one, a dominant position much inflated during emergencies. Indeed, emergencies are characterized by a dual movement: the concentration of powers in the hands of the executive and the "rally-

[316] Tushnet, *The Constitution of the United States of America*, 11.

[317] Tushnet, 79.

[318] Boyron, *The Constitution of France*, 57.

round-the-flag effect", which together greatly undermine the powers which remained with the legislature.

Focusing on the U.S., Hetherington and Nelson define the "rally effect" as "the sudden and substantial increase in public approval of the president that occurs in response to certain kinds of dramatic international events involving the United States."[319] According to them, two schools have emerged to explain the causes of the rally effect. The first one, the patriotism school, views the President has the living embodiment of the nation, a living flag in which is deposited the patriotic feeling born out of an international "crisis".

The second school identifies a more precise and limited rally effect. The opinion leadership school argues that a rally effect occurs only when the "opposition opinion leaders", especially in Congress, "refrain from comment [on the president's conduct] or make cautiously supportive statements." In the absence of criticism, the public will be left with the perception that "the president is doing his job well",[320] which in turn leads to a spike in opinion polls. For Hetherington and Nelson, the opinion leadership school is less convincing in explaining the cause of the rally effect because of its circularity. They argue that opinion leaders remain silent or show support precisely because of the risk of backlash from a population already rallied to the President. They find, however, that the opinion leadership school is helpful in understanding the duration of the rally effect.[321]

[319] Marc J. Hetherington and Michael Nelson, "Anatomy of a Rally Effect: George W. Bush and the War on Terrorism," *Political Science and Politics* 36, no. 01 (January 2003): 37, https://doi.org/10.1017/S1049096503001665.

[320] Catherine R. Shapiro and Richard Brody, "The Rally Phenomenon in Public Opinion," in *Assessing the President* (Stanford University Press, 1991), 66, https://doi.org/10.1515/9780804779876-005.

[321] Hetherington and Nelson, "Anatomy of a Rally Effect," 38.

The reason both of these schools explain respectively the initial phenomenon and its longevity "lies in the constitutional design of the Presidency which lodges the normally separate roles of chief of government and chief of state in one office."[322] A similar dynamic manifested in France, in particular since the 1962 and 2002 reforms which increased the likelihood of a presidential majority in parliament and therefore made him *de facto* head of government in addition to his initial role as head of state. Hetherington and Nelson base their analysis on the sudden increase of popular support for the President following various international "crises" involving the U.S. The same dynamic can be observed in France, in the aftermath of each of the 2015 attacks for example.[323]

However, this phenomenon is not limited to presidential or semi-presidential systems and has come to refer more broadly to the increased trust in government during international "crises".[324] The rally effect is not an automatic consequence of any international "crisis". Rather it fluctuates in its occurrence, degree and duration. Yet, its manifestation is frequent enough, both geographically and through time, to make it an essential element of emergency politics in the U.S., France, but also more broadly throughout the Council of Europe's member states.[325]

The paradigm of temporary dictatorship is hardly helpful when analyzing contemporary emergency powers because the latter claim to comply with the rule of law, including its

[322] Hetherington and Nelson, 38.

[323] "Explosion de la popularité de François Hollande dans les sondages," *Le Monde.fr*, December 1, 2015, https://www.lemonde.fr/politique/article/2015/12/01/hollande-conquiert-desormais-la-moitie-des-francais_4821824_823448.html.

[324] Sylvia Kritzinger et al., "'Rally Round the Flag': The COVID-19 Crisis and Trust in the National Government," *West European Politics* 44, no. 5–6 (September 19, 2021): 1205–31, https://doi.org/10.1080/01402382.2021.1925017.

[325] Kai Chi Yam et al., "The Rise of COVID-19 Cases Is Associated with Support for World Leaders," *Proceedings of the National Academy of Sciences* 117, no. 41 (October 13, 2020): 25429–33, https://doi.org/10.1073/pnas.2009252117.

separation of powers dimension. Consequently, both in the U.S. and in France, the legislature does retain, at least theoretically, its legislative function and its function of control over the executive. In this regard, however, it appears that the Supreme Court and the Constitutional Council have adopted different if not opposite stances. As for the ECtHR, being an international court, it is not its role to deliver judgments on the systems of organization of powers in the member states. Nonetheless, it has developed a line of case law pertaining to the separation of powers which gives indications as to the required separation between legislative and executive powers, including in times of emergency.

To my knowledge, none of the courts have taken the opportunity to address the rally effect directly. However, all of them have had to grapple with issues of division of powers between the executive and legislative during emergency. This section examines the ensuing case law, first in terms of enforcing the boundaries of the legislative function, second regarding the fading control of the executive by parliaments.

1. Enforcing the boundaries of the legislative function?

All three jurisdictions adopted a rather flexible understanding of the separation with regard to the legislative power. However, flexible is not inexistent. Confronted with the same phenomenon, namely a tendency of the executive to reach beyond the limits of its normative power and into the prerogatives of the legislative, the four courts adopted different if not opposite positions.

a. The ECtHR's hesitant approach to questions of separation of powers

As a regional court, the involvement of the ECtHR with the separation of powers within member states is more limited than that of a constitutional or supreme court. Furthermore, the Convention counts forty-seven parties and as many different ways of implementing the

separation of powers. In view of this diversity, the Court did not opt for a specific model of separation of powers but is rather respectful of the constitutional choices of each member state since the Convention does not impose "any theoretical constitutional concepts regarding the permissible limits of the powers' interaction".[326]

Nonetheless, since the early 2000s, separation of powers – as an essential component of the rule of law – has acquired an increasingly important role in the Court's case law. Yet, these developments were largely limited to the separation of the judiciary from the other two branches. The Court has rarely referred to the notion with regard to the separation of the executive and the legislative powers.[327]

Notwithstanding, on few occasions, the Court had to address the issue for definition purposes. In the 1970s already, the Commission had agreed that the executive could make "laws".[328] This flexible approach, however, is not to be understood as allowing a confusion of powers. The Court adopted a strict understanding of which institution can qualify as "legislature" for the purpose of Article 3 of Protocol 1 (free elections). The term "legislature" does not refer exclusively to parliaments.[329] However, so far, the Court has excluded heads of state from the scope of Article 3 of Protocol 1,[330] even in cases where they had veto powers.[331]

[326] *Kleyn and Others v. the Netherlands* [GC], no. 39651/98, 39343/98, 46664/99 et al., § 193, 6 May 2003.

[327] Aikaterini Tsampi, "The importance of 'separation of powers' in the case-law of the European Court of Human Rights: an importance that finally … grew?," *blogdroiteuropéen* (blog), June 2, 2022, https://blogdroiteuropeen.com/2022/06/02/the-importance-of-separation-of-powers-in-the-case-law-of-the-european-court-of-human-rights-an-importance-that-finally-grew-by-aikaterini-tsampi/.

[328] *X v. Switzerland*, no. 7754/77, Commission decision, 9 May 1977.

[329] Aikaterini Tsampi, *Le principe de séparation des pouvoirs dans la jurisprudence de la cour européenne des droits de l'homme*, Pedone (Paris, 2019), 220.

[330] Tsampi, 229–30.

[331] *Georgian Labour Party v. Georgia* (dec), no. 9103/04, 22 May 2007.

It is in this context of Article 3 of Protocol 1 that the issue of the extraordinary powers of the executive in times of emergency arose. The Court was called to decide whether decrees adopted by the President of Georgia constituted legislative acts. It found that:

> *"[t]he order, issued by the President in his or her capacity as the Supreme Commander-in-Chief of armed forces, […] did not constitute either a legislative or a subsidiary legislative act. The presidential decree was, in the normative hierarchy, on the same footing as an ordinary statute, yet it could not contravene any organic law passed by parliament. The President could issue decrees only in time of emergency (war, military coup, violation of the country's territorial integrity, etc.), when the State organs were unable to exercise their authority, and, in any case, they were to be submitted to parliament for approval immediately after the latter reconvened. In other words, the President could exercise an interim legislative power of extraordinary character."*[332]

This rather rigid analysis revealed a Court bent on maintaining the distinction – and therefore separation – between legislative and executive powers.

The Court later reiterated the importance of separation of powers between legislative and executive, this time in matters of national security. This attention points towards a Court mindful of the specific risks involved in terms of concentration of powers and ensuing arbitrariness. Indeed, the Court has been careful about legislative habilitations which do not provide enough guidance and as such may lead to arbitrary exercise of power by the executive, in particular in the domain of national security. In *Szabó and Vissy v. Hungary*, it found that "in matters affecting fundamental rights it would be contrary to the rule of law […] for a discretion

[332] *Id.*

granted to the executive in the sphere of national security to be expressed in terms of unfettered power."[333]

Nonetheless, ECtHR cases pertaining to the division of the normative function between executive and legislative remain few and far between. The Court has yet to draw concrete consequences when it comes to the potential overreach of the executive during emergency.

b. The French Councils: constraining the parliament, enabling the executive

Similarly to the U.S. Constitution, the French Fifth Republic attempts to curtail or at least contain the legislature's potential for expansion. Yet, the means deployed by both systems are quite different. Article 34 of the 1958 French Constitution lists statutory domains while Article 37 reserves all other matters to be regulated by the executive. Another example of this shared legislative function is Article 38, which creates, albeit under certain conditions, the possibility for the parliament to delegate its legislative power to the executive in the domains listed in Article 34.[334]

The Constitutional Council was established to guarantee this division of the normative power and ascertain that the parliament did not encroach on the regulatory domain. As happened in the U.S., the President of the Fifth Republic soon became the dominant institution. Its direct election since 1962 reinforced in 2002 by the alignment of the presidential mandate with the election of the National Assembly effectively transformed the parliamentary regime of the Fifth Republic into a semi-presidential one.

[333] *Szabó and Vissy v. Hungary*, no. 37138/14, § 65, 12 January 2016.

[334] Article 38 al. 1 of the Constitution: "In order to implement its programme, the Government may ask Parliament for authorization, for a limited period, to take measures by Ordinance that are normally the preserve of statute law."

Formal emergencies reinforce the domination of the normative process by the executive. Every emergency bill examined by parliament during the 2005 and 2015-2017 security emergencies and the 2020-2022 health emergency was introduced by the government.[335] The "rally-round-the-flag effect" led to little opposition in either chamber of parliament during the 2015-2017 emergency following the terrorist attacks. The first prolongation statute was adopted (quasi-)unanimously. The following five benefited from an overwhelming majority.[336]

The lack of parliamentary resistance to the legislative projects introduced by the government led Saint-Bonnet to conclude that: "for those who defend the contemporary demo-liberal order, the danger is not in the risks it runs in case of necessity but in the lack of fervor to defend it".[337] Indeed, in either chamber, the duration of the prolongation was barely ever questioned or debated and therefore justified[338] and almost every amendment increased the severity of the measures.[339] It should be noted that such a rally effect was not observed in 2005 when the government declare the state of emergency to confront outburst of violence in some cities. One plausible explanation could be the internal nature of the 2005 "crisis". The rally effect was also less pronounced during the pandemic.[340]

Another characteristic of the 2015-2017 emergency was the absence of *a priori* constitutional review. The government asked that the bills not be referred to the Constitutional Council. In a speech to the National Assembly, Prime Minister Valls exhorted the deputies to

[335] 2005: legislative project no. 2673; 2015-2017: legislative projects no. 3225, 356 (2015-2016), 574 (2015-2016), 3968, 4295, and 585 (2016-2017); 2020-2022: legislative projects no. 376, 3733 and 4565.

[336] Stéphanie Hennette-Vauchez, "La fabrique législative de l'état d'urgence : lorsque le pouvoir n'arrête pas le pouvoir," *Cultures & Conflits*, no. 113 (August 19, 2019): 18–19, https://doi.org/10.4000/conflits.20717.

[337] François Saint-Bonnet, *L'Etat d'exception* (Paris: PUF, 2001), 384.

[338] Hennette-Vauchez, "La fabrique législative de l'état d'urgence," 10.

[339] Hennette-Vauchez, 12.

[340] Kritzinger et al., "'Rally Round the Flag.'"

not refer the bill, dismissing such move as "narrowly juridical", all the while acknowledging that the constitutionality of some measures was questionable.[341] Parliament abode. None of the six bills prolonging the state of emergency in 2015-2017 were referred to the Constitutional Council. As noted by Hennette-Vauchez, it soon became a given that emergency bills would not be referred for a constitutionality check.[342] This renunciation signaled an attempt to circumvent the courts as much as a capitulation of parliament in the face of the executive's normative will.

Yet, none of these developments seem to have swayed the Constitutional Council, which, contrary to the role assumed by the U.S. Supreme Court, remained true to its original *raison d'être* and continued to maintain the boundaries of the legislative despite the expansion of the executive powers. If in 2015-2017 the security emergency bills were shielded from *a priori* constitutional review, the Constitutional Council had the opportunity to examine several bills related to the management of the pandemic in 2020-2022 before their adoption by parliament. At a time when a lesser rally effect offered an opportunity for the reactivation of checks and balances in times of emergency, the Council curbed the parliament's velleity to constrain the executive.

The statute creating a state of health emergency[343] was not referred to the Council. However, the one prolonging it was.[344] Article 11 of the law authorized the creation of a database gathering medical personal information. According to the statute, the government was

[341] National Assembly, 19 Nov. 2015 : « Pas de juridisme ! », as he simultaneously acknowledged that « certaines mesures (…) présen[ai]ent une fragilité constitutionnelle », Hennette-Vauchez, "Democracies Trapped by States of Emergency," 24.

[342] Hennette-Vauchez, "La fabrique législative de l'état d'urgence," 22.

[343] Law no. 2020-290, 23 March 2020, « Loi d'urgence pour faire face à l'épidémie de covid-19 ».

[344] Law no. 2020-546, 11 May 2020, « Loi prorogeant l'état d'urgence sanitaire et complétant ses dispositions ».

to adopt the implementing decree after and in conformity with the opinion of the National Commission on Computer Technology and Freedoms.[345] The Constitutional Council considered that the conformity requirement constituted an attempt by the legislator to subordinate the regulatory power of the Prime Minister[346] to another state authority. Consequently, the Council found the terms "in conformity" unconstitutional.[347] In doing so, the Constitutional Council embraced a formal understanding of the separation of powers to the detriment of the protection of private life.

While the Constitutional Council maintained parliament within the boundaries of its prerogatives interpreted narrowly, the Council of State has, on several occasions, gone out of its way to rule in favor of the executive when it had seemingly exceeded its regulatory power. In order to justify a complete breach of the separation of powers by the executive – executive moving into the legislative realm when the Constitution had not provided for it – the Council of State had to give birth to a whole new theory: the theory of exceptional circumstances. In 1918, in *Heyriès*[348], the Council of State found that, "because of the conditions under which, at that time, the public powers were in fact exercised",[349] the President could suspend the application of a law. The exceptional circumstances theory was applied again both during WWI and WWII.[350]

[345] The *Commission nationale de l'informatique et des libertés* is an independant administrative authority.

[346] Article 21 of the Constitution.

[347] Constitutional Council, decision no. 2020-800 DC, 11 May 2020, §77.

[348] Council of State, no. 63412, 28 June 1918, Heyriès.

[349] « à raison des conditions dans lesquelles s'exerçaient, en fait, à cette époque, les pouvoirs publics »

[350] See for example: CE, 28 February 1919, Dames Dol et Laurent; CE, Ass. 7 January 1944, Lecocq; CE, Ass. 16 avr. 1948, Laugier. It was also invoked by the government as the legal basis for the ban of Tiktok in New Caledonia in 2024. See Council of State, no. 494320, 23 May 2024.

The Council of State also resorted to other techniques to legalize the executive's reach for power. In 1958, it delivered a decision which echoed the *Korematsu* judgment of the U.S. Supreme Court. During WWII, the Supreme Court had ruled that the President had the authority, validated by Congress, to order the exclusion of American citizens of Japanese descent from certain areas which then led to their relocation in internment camps.[351] In turn, the Council of State admitted the creation of internment camps in Algeria for those under house arrest.[352] This outcome was based on an eminently creative interpretation[353] of the decree leading to the establishment of the camps.[354] However, contrary to the U.S. case, the French parliament had not endorsed this measure. On the contrary, the creation of camps had been done against the explicit wording of the 1955 emergency Statute, of which Article 6 read at the time: "Under no circumstances may house arrest measures result in the creation of camps to detain the persons concerned".[355]

The Council did not always and exclusively rule in favor of the executive. In 1962, the Evian agreements ending the Algeria War were approved by referendum. The law submitted to the referendum also provided that the President could take any legislative or regulatory measure pertaining to the implementation of the agreements. Using this *ad hoc* mechanism, de Gaulle issued an ordinance creating the Military Court of Justice. Sentenced respectively to death and prison by the Military Court, Canal and two others asked the Council of State to declare the

[351] *Korematsu v. United States*, 323 U.S. 214 (1944).

[352] Council of State, 7 March 1958, Zaquin.

[353] Sylvie Thénault, "Interner en République : le cas de la France en guerre d'Algérie," *Amnis. Revue d'études des sociétés et cultures contemporaines Europe/Amérique*, no. 3 (September 1, 2003), https://doi.org/10.4000/amnis.513.

[354] Decree no. 56-274, 17 March 1956, « Mesures exceptionnelles tendant au rétablissement de l'ordre, à la protection des personnes et des biens et à la sauvegarde du territoire de l'Algérie ».

[355] « En aucun cas, l'assignation à résidence ne pourra avoir pour effet la création de camps où seraient détenues les personnes ».

ordinance, and therefore the Court, illegal.[356] This case presents several similarities with *Hamdan* decided by the U.S. Supreme Court several decades later and discussed below.

The Council of State in *Canal* adopted a restrictive reading of the law submitted to referendum. It concluded that even if the creation of the Military Court could have been implied in the law, only an explicit habilitation could allow a derogation to the general principles of criminal law. But the law did not contain any such express derogation. The Council of State went on to examine whether the exceptional circumstances theory was applicable. It found that the circumstances were indeed particular but that the measure was not strictly necessary.[357] The Council concluded that the ordinance and therefore the Military Court were illegal.

However, the *Canal* judgment is the exception rather than the rule. It stood out after years of little opposition to the executive's endeavors during the Algerian War. The intense reaction to the Council's judgment is a testament to the exceptional nature of the decision. Many, President de Gaulle chief among them,[358] accused the Council of having delivered a political judgment.[359] What was at stake was not the prerogatives of the parliament which was noticeably absent from the discussion since the law which was the basis of the presidential ordinance had been adopted by referendum.

[356] CE, no. 58502, 19 October 1962, Canal, Robin et Godot.

[357] CE, no. 61593, 28 February 1919, Dame Dol et Laurent.

[358] In his memoirs, referring to the Canal judgment, de Gaulle called the Council of State an "abusive body". (see Jean Massot, "Le Conseil d'État face aux circonstances exceptionnelles," *Les Cahiers de la Justice* 2, no. 2 (2013): 38, https://doi.org/10.3917/cdlj.1302.0027.

[359] "Le Conseil d'État est-il " sorti de son domaine " en annulant l'ordonnance créant une cour militaire de justice ?," *Le Monde.fr*, October 29, 1962, https://www.lemonde.fr/archives/article/1962/10/29/le-conseil-d-etat-est-il-sorti-de-son-domaine-en-annulant-l-ordonnance-creant-une-cour-militaire-de-justice_2357074_1819218.html.

What was in question was the scope of the normative powers of a president directly entrusted by the people. The *Canal* judgment was delivered nine days before the referendum which changed to direct the mode of election of the President, effectively transforming the Fifth Republic into a semi-presidential regime. The judgment came at a sensitive time when political passions were running high. Ultimately, the *Canal* judgment – as would *Hamdan* – turned into an argument about the role of the judiciary and the Council of State itself. These aspects will be examined in the following section.

The Council of State's judgments mentioned here go back to the last three wars fought on the French territory. The Council has not since then put its stamp of approval on such blatant executive overreach. Yet, this observation is not enough to infer that the Council changed its stance on these issues. Even though the former Section President Massot admitted that some of these measures "would undoubtedly be less easily accepted today", for him, "none of this reveals any excessive complacency of the Council of State towards the Executive".[360] Rather than a change in the case law, it might just be that the Council of State no longer needs to give its judicial approval. Parliament already provides the executive with the powers it requested.

c. The Supreme Court's preference for process-based institutional approach

i. The need for legislative authorization

The drafters of the U.S. Constitution thought the legislative would be the most powerful branch of government. One way to limit the risk of overreach (in particular *vis à vis* the states) was to list Congress' powers. Yet, as over time the president proved to be the dominant institution, the list became, in the hands of the Supreme Court, a limit on the expansion of

[360] Massot, "Le Conseil d'État face aux circonstances exceptionnelles," 29.

presidential powers. It is no surprise that this development took place in emergency cases, where the presidential claims are the strongest.

From the outset, emergency cases in the U.S. focused on the separation and distribution of powers between the legislative and executive. More specifically, the Supreme Court had to decide whether presidential actions had encroached on Congress' prerogatives. The first case arose during the Civil War as President Lincoln suspended the writ of *habeas corpus* while Congress was in recess and therefore without its authorization. Chief Justice Taney[361] concluded that according to the Constitution's Suspension Clause,[362] the authority to suspend the writ of *habeas corpus* lied exclusively with Congress.[363] Congress later approved the suspension retroactively. It remains that in this first expansion of presidential powers over Congress' prerogatives in the name of war and necessity, the Chief Justice resolutely upheld the distribution of powers as explicitly stated in the Constitution. Over 90 years later, it is a different war which would give the Supreme Court the opportunity to expand on these principles.

Youngstown Sheet & Tube Co. v. Sawyer[364] – or *Steel Seizure* case – is one of the most important cases regarding the separation of the legislative and executive powers in the U.S. Despite the fact that the issue was primarily concerned with labor and strike and the finding of

[361] *Ex parte Merryman* was not a Supreme Court's case. Chief Justice Taney filed his ruling with the United States Circuit Court for the District of Maryland. It remains unclear however whether the decision was that of a circuit court. However, because of its relevance due to its subject, importance and author, the judgment is included in the present analysis. Notably, it was cited in Justice Scalia dissenting opinion in *Hamdi v. Rumsfeld* (542 U.S. 507 (2004)).

[362] Article I Sect. 9 cl. 2.

[363] *Ex parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9487). Lincoln famously ignored the Court's ruling, which raised issues regarding the relation between the executive and the judiciary. These will be examined later in the following section.

[364] *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

the Court that the matter was purely internal, it is also loaded with national security and emergency arguments as the dispute developed in the context of the war in Korea. In the face of a risk of strike which "would immediately jeopardize [the] national defense",[365] the President ordered that most steel mills be seized to continue the production.

Congress, which had been informed, did not react. However, it had previously "rejected an amendment which would have authorized such governmental seizures in cases of emergency".[366] In the absence of statutory authorization, the President's power to issue the Order could only stem from the Constitution itself. The government argued that the President had acted "within the aggregate of his constitutional powers as the Nation's Chief Executive and the Commander in Chief of the Armed Forces" in response to a "grave emergency".[367] In that regard, the Court noted that the executive powers of the President "refutes the idea that he is to be a lawmaker".[368] "The Founder of [the] Nation entrusted the lawmaking powers to the Congress alone in both good and bad times."[369]

This reasoning is in line with the non-delegation doctrine adopted early on by the Supreme Court. The principle was articulated by Locke who argued that the legislative power was "to make laws, and not to make legislators".[370] The Supreme Court expressly recognized that principle in *Field v. Clark*.[371] The doctrine is not without exception. However, when such delegation takes place, it requires that Congress provides the authority receiving the delegated

[365] *Id.* at 590.
[366] *Id.* at 586.
[367] *Id.* at 582.
[368] *Id.* at 587.
[369] *Id.* at 589.
[370] Locke, *Second Treatise of Government*.
[371] *Field v. Clark*, 143 U.S. 649 (1892).

power with "an 'intelligible principle' to guide the exercise of the delegated discretion."[372] These limits are reminiscent of those adopted by the ECtHR in *Szabó and Vissy* over a century later.

Apart from the Court's opinion, the significance of the *Steel seizure* case lies largely in the concurring opinion of Justice Jackson. Not only did he draw the pattern of separation of powers between the political branches which still constitutes "the basics of constitutional doctrine"[373] but he addressed in detail what remain the main arguments in favor of the expansion of executive powers in times of emergency. Justice Jackson delivered an in-depth analysis of the separation between the legislative and executive powers.

"Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress", he wrote.[374] Based on this initial assessment, Justice Jackson offered a schema of the combinations of powers. He distinguished between three possibilities depending on whether the President is acting based on authorization from Congress, in the silence of Congress or against its will. In the latter case, the President's authority is at its lowest, relying only on constitutional presidential powers minus any constitutional powers of Congress. The scrutiny of the Court is then at its highest.

Identifying the matter at hand as the third kind, Justice Jackson then turned to the constitutional sources of presidential powers – executive and war powers – and their interpretation, which still nowadays constitute the basis for the executive unilateralism doctrine.

[372] *Industrial Union Department v. American Petroleum Institute*, 448 U.S. 607 (1980), Justice Rehnquist concurring opinion.

[373] Tushnet, *The Constitution of the United States of America*, 111.

[374] *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) at 635.

He dismissed them all on the ground that the Constitution did not grant the President powers of a totalitarian nature. Therefore, the President did not enjoy unlimited executive powers. Furthermore, "the Constitution did not contemplate that the title Commander in Chief of the Army and Navy will constitute him also Commander in Chief of the country, its industries and its inhabitant. He has no monopoly of 'war powers', whatever they are."[375]

Finally, Justice Jackson addressed the classic argument that "necessity knows no law", a claim which continues to haunt the discourse on emergency today. In order to counter this cornerstone of the emergency rhetoric, Justice Jackson combined historical and teleological approaches. He argued that the absence of express disposition granting extraordinary authority in times of emergency – apart from the suspension of *habeas corpus* – resulted from a deliberate omission of the forefathers. Looking at foreign examples of the use of such exceptional powers – specifically the Weimar Republic, the French state of siege and the system in Great Britain during both World Wars – he concluded that "emergency powers are consistent with free government only when their control is lodged elsewhere than in the executive who exercises them."[376] This is in contradiction with the "inherent powers", which therefore should be seen as a step in the direction of dictatorship.

Engaged in a doctrinal exercise, Justice Jackson found the space to address one of the main issues regarding separation of powers during emergencies: the "rally-round-the-flag effect". Even though he did not use this terminology, Justice Jackson placed the ultimate responsibility in the hands of Congress: "I have no illusion that any decision by this Court can keep power in the hands of Congress if it is not wise in timely in meeting its problems. A crisis

[375] *Id.* at 644.
[376] *Id.* at 652.

that challenges the President equally, or perhaps primarily, challenges Congress. […] We may say that power to legislate for emergencies belongs in the hands of Congress, but only Congress itself can prevent power from slipping through its fingers."[377]

Thus, there is not much that the Court can do if the parliament fails to claim its own powers. This does not mean, however, that the Court should abdicate its role in protecting Congress' authority, even in times of emergency and despite the shortcomings of the democratic process. "With all its defects, delays and inconveniencies, men have discovered no technique for long preserving free government except that the executive be under the law, and the law be made by parliamentary deliberations. Such institutions may be destined to pass away. But it is the duty of the Court to be last, not first, to give them up." Part of the doctrine considers that when the Supreme Court gets involved during emergency, it is usually to insist that executive actions are authorized by Congress.[378] Following in this line, the Supreme Court continued to refute the unilateral executive theory through the Korean and Cold Wars.[379]

The 9/11 attacks and the ensuing war on terror prompted a series of new emergency cases and with it, the resurgence of executive unilateralism arguments. The cases dealing with the detention of enemy combatants are of particular relevance to the issue of separation of powers during emergencies. These judgements raised very important questions regarding the role of the judiciary. For this reason, they will be analyzed in depth later in this chapter.

[377] *Id.* at 654.

[378] Samuel Issacharoff and Richard H. Pildes, "Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights during Wartime Liberty, Equality, Security," *Theoretical Inquiries in Law* 5, no. 1 (2004): 1–46; Ginsburg and Versteeg, "The Bound Executive," 1518.

[379] David Friedman, "Waging War Against Checks and Balances--The Claim of an Unlimited Presidential War Power," *St. John's Law Review* 57, no. 2 (1983): 246–47.

However, they also brought up issues pertaining to the distribution of powers between Congress and the executive, which are discussed here.

In *Hamdi*[380], the plurality quickly evacuated the issue as it found that the detention of a U.S. citizen declared enemy combatant was authorized by a Resolution passed by Congress, the Authorization for Use of Military Force (AUMF). Accordingly, the plurality moved on to issues related to the length of the detention and due process and away from institutional considerations. Nonetheless, interestingly, all the separate opinions turned on the issue of the separation of powers.

Justice Souter did not subscribe to the finding that the detention was authorized by Congress. In laying down the purpose of the requirement that detention be authorized by Congress, he put a strong emphasis on the danger that is the executive in times of emergency. When it repealed the Emergency Detention Act of 1950, "Congress intended to guard against a repetition of the World War II internments".[381] Therefore, it imposed the requirement that detention be authorized by Congress as "internment camps were creatures of the executive".[382] Justice Souter concluded that an act pursuing such goals could only be understood as requiring a clear authorization by Congress. The AUMF was too general to satisfy this condition.

Justice Scalia did not find the basis for the detention in the AUMF either, albeit for a very different reason. Indeed, Justice Scalia in his dissenting opinion adopted a categorical approach. Even if the AUMF presented the necessary clarity to constitute a basis for the detention, it would still not qualify as an implementation of the suspension clause and therefore

[380] *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

[381] *Id.*, Separate opinion of Justice Souter.

[382] *Id.*, Separate opinion of Justice Souter.

could not have the effect of making the detention without judicial review constitutional. Justice Scalia's reasoning was deeply embedded in a separation of powers logic. That the power to suspend the writ of *habeas corpus* was placed in the hands of Congress reflects the "Founders' general mistrust of military power permanently at the executive's disposal."[383]

Furthermore, allowing the legislature to circumvent the suspension clause with an ordinary statute – as the majority did – did not principally augment Congress' powers but the Court's (because it allowed it to dictate the standards of due process). Eventually, Scalia's categorical approach turned into a defense of Congress' prerogatives against the encroachment by the executive (or the Supreme Court itself) as he concluded that "[i]f civil rights are to be curtailed during wartime, it must be done openly and democratically, as the Constitution requires".[384]

Finally, Justice Thomas advocated for what comes close to "executive unilateralism"[385] as he considered that the "detention falls squarely within the Federal Government's war powers"[386] which benefits from "the structural advantages of a unitary Executive".[387] If the separation of powers between Congress and the President was not the turning point of the plurality's opinion, the separate opinions show that it was already central to the issue of the detention of enemy combatants. This was confirmed in the series of Guantánamo cases.

[383] *Id.*, Dissenting opinion of Justice Scalia, p. 16.
[384] *Id.*, Dissenting opinion of Justice Scalia, p. 26.
[385] Rosenfeld, "Judicial Balancing in Times of Stress," 2082.
[386] *Hamdi*, Justice Thomas dissenting, p. 1.
[387] *Id.*, Justice Thomas dissenting, p. 2.

The following "enemy combatant" case, *Hamdan,*[388] bears remarkable similarities with the *Canal* judgment of the French Council of State. The petitioner had been captured in Afghanistan, declared enemy combatant according to the Detainee Treatment Act (DTA) and was detained in Guantánamo. The charges brought against him were "triable by military commission" convened by the President.

One of his claims was that the said commission lacked authority to try him as it had not been legally established. In deciding whether the President had the power to establish military commissions without Congress' sanction, the Supreme Court applied one of its most famous precedents from the Civil War, *Ex parte Milligan,* in which the Court had ruled that the trial of civilians by military courts when civil jurisdictions were operational was unconstitutional.[389] The *Hamdan* Court quoted *Ex parte Milligan* precisely on the separation of power between Congress and the executive: "neither can the President, in war more than in peace, intrude upon the proper authority of Congress […] nor can the President, […] without the sanction of Congress, institute tribunals for the trial and punishment of offences, either of soldiers or civilians, unless in cases of a controlling necessity".

However, the *Hamdan* Court refrained from going beyond what was strictly necessary in the case at hand and decided not to answer definitively "[w]hether Chief Justice Chase was correct in suggesting that the President may constitutionally convene military commissions 'without the sanction of Congress' in cases of 'controlling necessity'"[390] Rather, much like the French Council of State, the Supreme Court interpreted the controlling statute narrowly, not as

[388] *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).
[389] *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866).
[390] *Hamdan*, p. 28.

a "sweeping mandate" for the President but merely as preserving his already existing power to convene military commissions with the express condition that he complied with the law of war.[391]

The commission falling short of that last condition and in the absence of an act of Congress expanding the powers of the President – this statute would only be adopted later – the Court found that the President did not have the authority to convene the military commission. Both the U.S. Supreme Court and the Council of State looked in the habilitating law for an express authorization to derogate from core guarantees (law of war in *Hamdan*, general principles of law in *Canal*). Having failed to find such authorization, both courts concluded that the President had exceeded his powers.

These emblematic cases demonstrate the continued determination of the Supreme Court – from the Civil War until the war on terror – to protect Congress' prerogatives when the executive's ambitions are at their highest: during emergencies and war. However, such cases are necessarily limited to situations where there is a lack of agreement between the legislative and the executive, where Congress – whether actively or through its inaction – has failed to provide the president with the powers he sought. The risk that the "rally-round-the-flag effect" represents was only addressed by the Court on rare occasions and even then, in generic and theoretical terms. When the two political branches align, rather than addressing this collusion, the focus of the court shifts to the remaining power: the judiciary, as protector of fundamental

[391] *Id.*, p. 29.

liberties. As discussed below in the section pertaining to the detention of enemy combatants,[392] *Boumediene*,[393] was the next step in this process.

A similar pattern could already be found in the cases dealing with the passport restrictions applied to members of the Communist party in the late 1950s early 1960s. In *Kent v. Dulles*[394], the Supreme Court found that where the power to regulate citizens' liberty to travel was delegated, it would subject this delegation to adequate standards and construe the delegated authority narrowly.[395] As the relevant act of Congress had not yet become effective, the executive did not have the authority to curtail the applicant's freedom of movement. *Kent v. Dulles* was thus decided following a "process-based institutional approach".[396] Six years later, however, when *Aptheker v. Secretary of State*[397] was decided, the statute mentioned in *Kent v. Dulles* had become effective. Therefore, the Supreme Court had to confirm the serious doubts it had merely mentioned six years earlier as to the constitutionality of such limitation of freedom of travel to find the statute unconstitutional.

ii. When emergency slipped out of Congress' hands

The Supreme Court's case law demonstrates a rather consistent protection of Congress' prerogatives in emergency matters. However, an important counterexample must be mentioned in which the Court gravely undermined the legislature almost inadvertently. The National Emergencies Act (NEA)[398] was adopted in 1976. It contains a list of 136 presidential emergency

[392] See p. 164.
[393] *Boumediene v. Bush*, 553 U.S. 723 (2008).
[394] *Kent v. Dulles*, 357 U.S. 116 (1958).
[395] *Id.*, at 129.
[396] Rosenfeld, "Judicial Balancing in Times of Stress," 2082.
[397] *Aptheker v. Secretary of State*, 378 U.S. 500 (1964).
[398] 50 U.S.C. § 1601–1651.

powers. Since its enactment, the NEA has been invoked over seventy times. Forty emergency declarations were still in effect at the time of writing.[399] The NEA does not contain a sunset clause. Instead, the initial mechanism provided that the President would declare an emergency, but Congress retained the power to put an end to it through a concurrent declaration.

However, seven years later, in *Chadha*, ruling on an unrelated matter, the Supreme Court concluded that legislative vetoes were unconstitutional.[400] Consequently, in 1985, the Act was amended so that an emergency would now be ended by a joint resolution. However, such enacted resolution is subjected to presidential veto. Consequently, whereas Congress had originally retained the power to end an emergency with a majority vote in both houses, it now needs a two-third majority in each house to override a presidential veto. This crucial difference found an illustration in the 2019 National Emergency Concerning the Southern Border of the United States.

In 2019, President Trump declared an emergency[401] in order to reallocate eight billion dollars for the building of a wall at the Southern border of the country, funds the allocation of which Congress had just denied. While describing illegal immigration through the southern border as an "invasion", the President admitted that the declaration of emergency was only meant to have the wall erected "faster".[402] It was the first time that the NEA was used to circumvent Congress' fund allocation.

[399] For a complete list of the emergency orders, see https://www.brennancenter.org/our-work/research-reports/guide-emergency-powers-and-their-use

[400] *INS v. Chadha*, 462 U.S. 919 (1983).

[401] Proclamation 9844.

[402] Peter Baker, "Trump Declares a National Emergency, and Provokes a Constitutional Clash," *The New York Times*, February 15, 2019, sec. U.S., https://www.nytimes.com/2019/02/15/us/politics/national-emergency-trump.html.

A bill to end the emergency was adopted in each house, including by 59-41 votes in the Senate where twelve Republicans joined the Democrats. As he had already announced prior to the votes, President Trump vetoed the bill.[403] He then extended the emergency twice in February 2020 and January 2021. While the reallocation of funds was fought in Congress, several states and private actors contested it in court. In May 2019, the district court found a violation of the Appropriation Clause which reserves for Congress the power to allocate funds and issued an injunction blocking their reallocation.[404] Two months later, the Supreme Court, now counting two justices appointed by President Trump on its bench, granted the president's application to stay the injunction, effectively allowing the construction of the wall to move forward.[405] Among the reasons to grant the stay, the Court questioned "the ability of private parties to enforce Congress' appropriations power."[406] The Court, however, did not rule on this issue.

On 20 January 2020, President Biden, Trump's successor, terminated the emergency declaration and stopped the construction of the wall.[407] The 2019 "immigration crisis" is a textbook illustration of how the Supreme Court drastically altered the balance of powers originally designed by Congress. The two-third majority now required in each house is a difficult threshold to reach which *de facto* rests the power to end the emergency solely in the ends of the same person who exercises the emergency powers, the president. Despite this important caveat, the Supreme Court's approach to the separation of powers during emergency

[403] Ben Jacobs, "Trump Overrules Congress with Veto to Protect Border Emergency Declaration," *The Guardian*, March 15, 2019, sec. US news, https://www.theguardian.com/us-news/2019/mar/15/trump-veto-national-emergency-declaration-resolution-senate.

[404] *Sierra Club v. Trump*, 379 F. Supp. 3d 883 (N.D. Cal. 2019).

[405] *Trump v. Sierra Club*, 588 U. S. (2019).

[406] *Id.*, Justice Breyer concurring in part and dissenting in part.

[407] "Proclamation on the Termination of Emergency with Respect to the Southern Border of the United States and Redirection of Funds Diverted to Border Wall Construction", The White House.

has been rather protective of Congress' prerogatives since the Civil War. The risk of an overreaching executive is not only acknowledged but, in every judgment, mentioned again as the *raison d'être* for the Constitution itself.

It follows that the four courts reacted differently to the effect of emergencies on the division of legislative power. The ECtHR seems aware of the danger, but its institutional setting did not allow it to address it directly. In turn, the French Councils continued to protect the normative scope of the executive as if the constitutional developments, periodically exacerbated by emergencies, had not inversed the dynamic between the two political branches. On the opposite side of the scope, the Supreme Court not only took note of the totalitarian risk posed by the concentration of powers in the hands of the president but actively attempted to oppose Congress being bypassed. These different attitudes towards an overreaching executive can also be observed with regard to the fading checks of the legislative over the executive's emergency powers.

2. The fading parliamentary control over the executive

Courts can only rule on matters that are brought to them. The rules of procedure and admissibility vary widely between the jurisdictions examined here. Nonetheless, it would be difficult to reach any of them to argue a deficit of control over the executive if the legislative branch did not initiate the claim. Consequently, the rally effect prevents the courts from addressing the decreasing control of the legislative over the executive during emergencies. Yet, addressing this issue raises the question of the relations between majority and opposition in

parliament[408] and the role and protection of the latter. This provided the courts with few opportunities to weigh in on these matters from an institutional perspective or from a human rights angle.

a. ECtHR: the uneasy apprehension of checks and balances through the lens of individual rights

The ECtHR did not directly address the control of the executive by parliament. As for the right to political opposition, it was discussed by the drafters of the Convention but did not make its way into the final text.[409] Nonetheless, building on the notions of rule of law[410] and democracy[411] which are at the core of the conventional system,[412] the Court entrenched pluralism in its case law[413] and subsequently elaborated on the role of parliamentarians, in particular those from the opposition, in their relationship with the executive.

The Court stated that it "would distinguish at the outset between loyalty to the State and loyalty to the government. […] In a democratic State committed to the rule of law and respect for fundamental rights and freedoms, it is clear that the very role of MPs, and in particular those members from opposition parties, is to represent the electorate by ensuring the accountability of the government in power and assessing their policies. Further, the pursuit of different, and at

[408] Tsampi, *Le principe de séparation des pouvoirs dans la jurisprudence de la cour européenne des droits de l'homme*, 295; Daryl J. Levinson and Richard H. Pildes, "Separation of Parties, Not Powers," *Harvard Law Review* 119, no. 8 (2006): 2313.

[409] Tsampi, *Le principe de séparation des pouvoirs dans la jurisprudence de la cour européenne des droits de l'homme*, 296.

[410] See the preamble of the ECHR and *Golder v. the United Kingdom*, 21 February 1975, § 34, Series A no. 18.

[411] See the preamble of the ECHR as well as *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, 7 December 1976, § 53, Series A no. 23 amongst many others.

[412] More generally on the "object and purpose" of the Convention, see Harris et al., *Law of the European Convention on Human Rights*, 2014, 7–8.

[413] *Handyside v. the United Kingdom*, 7 December 1976, Series A no. 24, § 49.

times diametrically opposite, goals is not only acceptable but necessary in order to promote pluralism".[414]

The Court expressly recognized further the parliamentarians' "right to criticise the Government".[415] In the same judgment appeared for the first time the idea of "close scrutiny" of the government by the legislative power (amongst others).[416] From those principles derived a line of cases focused on the protection of parliamentarians to ensure the effectiveness of their control over the executive.[417] However, during emergencies, the weakening of this control is not necessarily the consequence of external attacks or pressures. It might also result from self-restraint. It is nevertheless difficult to imagine how the ECtHR could challenge such self-restraint. If the Court has emphasized the importance of the "close scrutiny", there is no corresponding right in the Convention. The protective jurisprudence was developed under Article 10 (freedom of expression).

The Convention does not address directly issues pertaining to checks and balances. In *Szanyi v. Hungary,*[418] the Court found a violation of the right to freedom of expression of a member of parliament. Judge Wojtyczek, dissenting, observed that "[t]he ability to lodge an interpellation is a power granted to [Members of Parliament] in order to ensure the proper balance between the legislative and executive branches."

[414] *Tănase v. Moldova* [GC], no. 7/08, § 166, ECHR 2010.

[415] *Castells v. Spain*, 23 April 1992, § 43, Series A no. 236.

[416] *Id.*, § 46.

[417] Tsampi, *Le principe de séparation des pouvoirs dans la jurisprudence de la cour européenne des droits de l'homme*, 319–23; Harris et al., *Law of the European Convention on Human Rights*, 2014, 630.

[418] *Szanyi v. Hungary*, no. 35493/13, 8 November 2016.

However, he contested that hindering this ability constituted an infringement of the applicant's subjective right. He argued instead that "this part of the application remain[ed] completely beyond the material and personal scope of his Convention rights." For the dissenting judge, "[t]he majority's approach results in the droit-de-l'hommisation of legal relations within the State apparatus. It artificially transforms issues of checks and balances within the organization of the State into alleged human-rights issues."

Yet, the role of the opposition and more broadly the system of checks and balances are essential to the "object and purpose" of the Convention, amongst which "the ideas and values of a democratic society", which in turn supposes pluralism.[419] In 2020, the Court moved away from the narrow individual rights approach to embrace a broader perspective. As time passed after the 2016 attempted coup in Turkey, the scrutiny of the ECtHR intensified. The origins of *Selahattin Demirtaş v. Turkey (no. 2)*[420] were not directly related to the attempted coup. However, the ECtHR judgment was delivered in 2020 after four years of adjudicating cases related to the purge of various groups including the opposition, the judiciary or the media, which possibly had an impact on the reasoning in *Selahattin Demirtaş v. Turkey (no. 2)*.

The applicant was a member of parliament and co-chair of a left-wing pro-Kurdish political party. In 2016, his parliamentary immunity was automatically lifted by a constitutional amendment. He was subsequently arrested and detained for crimes related to terrorism. Following the previous case law, the Grand Chamber, looking at his freedom of expression as

[419] Harris et al., *Law of the European Convention on Human Rights*, 2014, 7.; see also *Merabishvili v. Georgia* [GC], no 72508/13, § 307, 28 November 2017.

[420] *Selahattin Demirtaş v. Turkey (no. 2)* [GC], no. 14305/17, 22 December 2020.

a member of parliament, found a violation of Article 10. However, it then expanded the scope of its review.

For the first time, it examined the deprivation of liberty under Article 3 of Protocol 1. The Court considered that "it is particularly important to protect statements made by [representatives], in particular if they are members of the opposition."[421] Under these conditions, the Court would always conduct "strict review". An important element to be considered by national courts was the possible political basis for bringing charges against the member of parliament.[422]

Then, the Court, building on the link between Article 10 and Article 3 of Protocol 1, asserted a new principle which it explicitly meant to open a new line of cases: "In view of the importance it attaches to the freedom of expression of members of parliament, especially those from opposition parties, in line with the requirements of pluralism, tolerance and broadmindedness, the Court considers that where the detention of a member of parliament cannot be deemed compatible with the requirements of Article 10 of the Convention, it will also breach Article 3 of Protocol No. 1."[423]

The Court concluded that the pretrial detention of the applicant constituted an unjustified interference not only with his own right to be elected and to sit in Parliament but also with the free expression of the opinion of the people. Turning to Article 18, the Court identified a pattern where laws were used to silence the opposition. It noted that the detention of the applicant had prevented him from meaningfully participating in the debate on a crucial

[421] *Id.*, § 384.
[422] *Id.*, § 389.
[423] *Id.*, § 392.

constitutional reform and on the presidential campaign.[424] Still in detention, he was also disadvantaged when he ran in the subsequent presidential elections.

Broadening its reasoning beyond the specific situation of the applicant, the Court then included a long development regarding the collapse of the separation of powers in Turkey with regards to both the legislative and judiciary branches. The Court examined the case from a broad perspective, which allowed it to tie together the weakening of the legislative and judiciary as counter-powers, the pattern of using laws to silence dissent and the state of emergency – even though it had not yet even been declared when the applicant was arrested for the first time.

The Court concluded that "[t]he applicant's initial and continued pretrial detention not only deprived thousands of voters of representation in the National Assembly, but also sent a dangerous message to the entire population, significantly reducing the scope of free democratic debate."[425] It "pursued the ulterior purpose of stifling pluralism and limiting freedom of political debate, which is at the very core of the concept of a democratic society."[426]

Over the years, the Court has recognized a specific role of the opposition in parliament. The distinction "between loyalty to the State and loyalty to the government" is of particular interest in the emergency context and in light of the risk that emergency measures favor the security of governmental institutions rather than that of the population or the state.[427] Yet, only recently did the Court start drawing concrete consequences from the asserted principles. These recent developments constitute an important step forward in the protection of democracy

[424] *Id.*, § 430.
[425] *Id.*, § 436.
[426] *Id.*, § 437.
[427] Duroy, "Remedying Violations of Human Dignity and Security."

through the principle of separation of powers. It remains to be seen how far the Court will carry this new line of cases.

Issues resulting from the consensual alignment of the majority and opposition due to emergencies pose different challenges. It is unlikely that the ECtHR would be called to decide on this question and even more unlikely that it would make a decisive ruling in this area where, as a regional court, it showed extensive respect for and deference to the member states constitutional arrangements. Therefore, chances are that this central element of the undemocratic risk of emergencies will continue to escape the control of the ECtHR. Constitutional and Supreme Courts are more likely to rule on such matters since the institutional angle is for them an additional avenue.

b. The French Constitutional Council: continued protection of the overgrown executive against an already docile parliament

With the 1958 Constitution, the parliament was considerably weakened compared to the Third and Fourth Republics. However, several reforms, in particular the constitutional reform of 2008, aimed to reenable the parliament, and specifically the opposition, as a counter-power.[428] At the same time, the parliamentary function of control of the executive was explicitly added in the Constitution. Since 2008, Article 24 reads: "Parliament […] shall monitor the action of the Government. It shall assess public policies."

These monitoring and assessment missions have led parliament to conduct several inquiries into the effectiveness of the state of emergency in 2015-2017. The ensuing reports

[428] Boyron, *The Constitution of France*, 95–139.

regularly concluded that the emergency measures were only marginally effective[429] and that the effectiveness was rapidly decreasing over time. In 2020, a parliamentary report focused on the emergency powers which had been inserted in the ordinary legal framework by the SILT Statute[430] found that they were applied beyond the legislative framework and for purposes other than counterterrorism.[431] Nonetheless, both chambers continued to pass laws prolonging the state of emergency with an overwhelming majority, thereby confirming the effectiveness of the rally effect.

Rather than accompanying the changes initiated by the 2008 constitutional reform, the Constitutional Council, true to its original function, has on several occasions put limits on them, including during emergencies. Article 11 of the Law prolonging the state of health emergency[432] authorized the collection and treatment of personal data, a measure with a strong potential for violation of private life. As a result, the law included a requirement that parliament be constantly and closely kept informed of the use made of this measure.

The Constitutional Council found this requirement excessive and therefore in breach of the separation of powers.[433] The Council concluded that "by providing for the immediate transmission to the National Assembly and the Senate of a copy of each of the acts taken pursuant to Article 11 of the law referred, the legislator, taking into account the number of acts in question and the nature of the data at stake, disregarded the principle of separation of

[429] Cahn, "Contrôles de l'élaboration et de La Mise En Œuvre de La Législation Antiterroriste," 4; Hennette-Vauchez, "La fabrique législative de l'état d'urgence," 21 and 41.; Report of the Fenech commission, 5 July 2016. Proposition no 32. http://www.assembleenationale.fr/14/pdf/rap-enq/r3922-t1.pdf, 254.

[430] Loi n° 2017-1510 du 30 octobre 2017 renforçant la sécurité intérieure et la lutte contre le terrorisme.

[431] Marc-Philippe Daubresse, "Rapport Au Nom de La Mission de Suivi et de Contrôle de La Loi SILT" (Senate, February 26, 2020).

[432] Law no. 2020-546, 11 May 2020, « Loi prorogeant l'état d'urgence sanitaire et complétant ses dispositions ».

[433] Decision no. 2020-800 DC, 11 May 2020, §§ 79-82.

powers."[434] It is striking that one of the few declarations of unconstitutionality pronounced by a Council who rarely takes issues with emergency measures came to impair a feeble attempt to establish some checks on the government.

c. First steps of the Supreme Court into a traditionally political process

Contrary to France, Congress' oversight over the executive branch is a long-established and important element of the functioning of the U.S. federal state. This control can take the form of inquiry commissions, hearings or others. Yet, even in the absence of such actual endeavor by Congress, the possibility that they might happen is already a constraint on the administration and the President.[435]

However, it has been argued that because of increased polarization and decline of expertise in Congress, the oversight has decreased in matters of foreign policy and national security over the past decades.[436] The "rally-round-the-flag effect" may also be responsible at least in part for the lower degree of oversight. The 9/11 attacks sparked a rally effect of unparalleled magnitude.[437] At the same time, "since 9/11, U.S. foreign policy has been steadily militarized, and Congress has funded the Pentagon at higher and higher levels without increasing oversight concomitantly."[438]

[434] "Il est loisible au législateur de prévoir des dispositions assurant l'information du Parlement afin de lui permettre, conformément à l'Article 24 de la Constitution, de contrôler l'action du Gouvernement et d'évaluer les politiques publiques. Toutefois, en prévoyant une transmission immédiate à l'Assemblée nationale et au Sénat d'une copie de chacun des actes pris en application de l'Article 11 de la loi déférée, le législateur, compte tenu du nombre d'actes en cause et de la nature des données en jeu, a méconnu le principe de séparation des pouvoirs."

[435] Tushnet, *The Constitution of the United States of America*, 117–20.

[436] James Goldgeier and Elizabeth N. Saunders, "The Unconstrained Presidency: Checks and Balances Eroded Long Before Trump," *Foreign Affairs* 97, no. 5 (2018): 146.

[437] Hetherington and Nelson, "Anatomy of a Rally Effect."

[438] Goldgeier and Saunders, "The Unconstrained Presidency," 153.

The Supreme Court's involvement in matters of congressional oversight is uncommon, partly because "[h]istorically, disputes over congressional demands for presidential documents have not ended up in court."[439] When it did, the Court adopted a rather restrained attitude. In a dispute over subpoenas issued by Congress, the Supreme Court noted that despite this kind of disputes arising often, Congress and the executive had so far managed to resolve them amongst themselves. Such longstanding practice imposed on the judges "a duty of care to ensure that [they] not needlessly disturb 'the compromises and working arrangements that [those] branches … themselves have reached.'"[440]

Nonetheless, the Court did acknowledge the importance of Congress' power of inquiry, which despite not being listed in the Constitution, was consecrated by the Supreme Court as "an essential and appropriate auxiliary to the legislative function. […] The congressional power to obtain information is 'broad' and 'indispensable.'"[441] "Unless Congress have and use every means of acquainting itself with the acts and the disposition of the administrative agents of the government, the country must be helpless to learn how it is being served."[442] Yet this power is subjected to limits without which Congress could exert the "imperious control"[443] feared by the forefathers. Eventually, the Supreme Court indicated the criteria to be taken into account by courts when assessing such subpoena so as not to upset the balance between branches nor transform too much the two-hundred-year-old practice.

[439] *Trump v. Mazars USA*, LLP, 591 U.S. (2020).
[440] *Id.*, at II. A.
[441] *Id.*, at II. B.
[442] *Id.*, at II. C.
[443] *Id.*, at II. D.

However, the Court did not have the occasion to express its views on congressional oversight of emergency powers. The closest it came to it was in January 2022. A year before, on 6 January 2021, the Capitol was stormed by hundreds of Trump's supporters who refused to recognize Biden's victory in the presidential elections. A committee was established in the House to investigate the event and the role former President Trump could have played. In the course of the investigation, the select committee tried to access documents from the White House dating back to the incident. President Biden, the incumbent at the time the request was made, waived the executive privilege, and allowed the communication of the documents. Former President Trump tried to have the communication of the documents stopped by the Court. On 20 January 2022, the Supreme Court denied the application for stay of mandate and injunction pending review, effectively allowing the release of hundreds of pages of document to the select committee.[444] On 22 February 2022, it formally rejected Trump's appeal.[445]

States of emergency, formally declared or not, are crucial moments of constitutional time, which can fundamentally transform the separation of powers and therefore the constitutional landscape. The emergency context of cases impacted the role assumed by the courts in different ways. On the one hand, the U.S. Supreme Court seized the opportunities such cases presented in order to shape and enforce the separation between the legislative and executive branches. The French Constitutional Council, on the other hand, refused to acknowledge the specific challenges that emergency poses to the separation of powers and remained true to its original purpose: protecting the executive which is now already dominant and which the Council of State allowed to grow even more powerful during emergencies. As

[444] *Trump v. Thompson*, 595 U.S. ___ (2022).

[445] Order List: 595 U.S., Case no. 21-932 Trump, Donald J. v. Thompson, Bennie G., et al.

for the ECtHR, it obliquely addressed the problem from an individual human rights angle that it couched in structural, separation-of-powers terms.

Strikingly, whereas the U.S. Supreme Court and ECtHR are very explicit about the risk that the executive represents during emergency, especially if not balanced by the legislative branch, none of the French councils made such general acknowledgement. The very concise style of French judgments allowed the Councils to refrain from expressing such considerations. It is, however, unfortunate that stylistic preferences should allow apex courts to shy away from addressing essential emergency and power structure issues.

One specific aspect of emergency has escaped all four courts. The rally-round-the-flag effect is a fairly common element of emergencies which hinders pluralism and therefore any attempt at a democratic debate, thereby further aggravating the imbalance between parliament and executive. Yet, none of the courts have directly addressed this issue. As a purely political process, it is difficult for petitioners and judges to apprehend through litigation. The rally effect means little resistance from parliament and therefore few open controversies. Addressing it would require looking at cases from a broader perspective than the one most commonly adopted by these courts.

Criticizing the political process when both political branches are aligned is a risky endeavor, especially during emergencies when courts are already in a precarious position. Perceived as an obstacle to effective emergency management, the judiciary is confronted with direct attempts to circumvent or neutralize it. However, dealing with the scope of their own powers and procedural rules, courts had more opportunities to address attacks against the judiciary than the attrition of the parliament. They also had better tools to fight back, whether they made use of them or not.

B. Sidelining the Courts?

The emergency provisions inscribed in the foundational text of each jurisdiction – Suspension Clause, Article 16 of the 1958 Constitution and Article 15 ECHR – have in common to decrease or suspend the involvement of the judiciary. However, states have made moderate use of these exceptional provisions. In the last decades, this decline can be partly explained by the contemporary emergency powers, which tend to be normalized and purport to comply with the rule of law. Activating the most exceptional provisions of the legal order would undermine the normalization process. Nonetheless, attempts to weaken or circumvent the courts remain a constant of emergencies, with or without the activation of these provisions.

The interplay of procedural and admissibility rules together with the principles of the rule of law and separation of powers gave courts the opportunity and the tools to define and delineate their own role. For Jenkins, "[f]air procedural rules [among which admissibility rules] have an institutional virtue in protecting the judiciary, as well as the legal process generally, from inappropriate political interferences."[446] "[T]he judiciary cannot be truly independent if the political branches can interfere freely with that essential function by altering procedural rules at will."[447] Therefore, Jenkins argues that the power of courts over their own procedures is "inherent in the judiciary by virtue of its role as the guardian of the rule of law; that role cannot be undermined, disestablished, or disregarded by politicians through unfair procedural changes or shortcuts."[448]

[446] Jenkins, "Procedural Fairness and Judicial Review of Counter-Terrorism Measures," 174.

[447] Jenkins, 175.

[448] Jenkins, 176.

This section examines the apex courts' answers to the various mechanisms used by the political branches to minimize their role during emergencies. The first part analyzes the limitations to judicial review imposed by the emergency provisions in the U.S. constitution, the 1958 French Constitution and the ECHR. The second part focuses on the issue from which derived the greatest number of emergency cases, (lack of) access to court for those deprived of liberty. It encompasses the extrajudicial detention of suspected terrorists, the judicial review of enemy combatant detainees, the creation of ersatz jurisdictions but also the difficulties generated by the Covid-19 pandemic. Finally, the section closes with an analysis of the impact that the increasingly preventive nature of emergency measures has on their judicial review.

1. Limiting judicial review: emergency provisions in the foundational texts

The emergency clauses in the ECHR, French Constitution and U.S. Constitution are of different nature and scope. Nonetheless, all have in common to limit or suspend judicial review. Therefore, these emergency provisions inscribe at the heart of the foundational text of each jurisdiction the idea that, to some extent, judicial oversight is incompatible with the effective management of "crises".

a. Article 15 does not abolish supranational or national judicial review

Contrary to Article 16 of the French Constitution or the Suspension Clause in the U.S. Constitution, member states continue to regularly resort to Article 15 of the ECHR. Although "[l]ooking to the Convention's overall history, the number of occasions when states have relied

on Article 15 has been small",[449] this number has grown in recent years and culminated with ten member states making declaration under Article 15 during the early months of the pandemic.[450]

i. ECtHR review under Article 15

Even though by definition the derogation entails limits on the control exercised by the Court, it does not prevent it completely. Article 15 contains a number of safeguards which the ECtHR reviews if and when a case reaches it. The wording of Article 15 offers the possibility for a rather in-depth review. Even if the applicability condition – the existence of a "war or other public emergency threatening the life of the nation" – is fulfilled, the measures cannot exceed what is "strictly required by the exigencies of the situation". However, Article 15 remains a derogatory disposition. Applying a normal level of scrutiny would render the derogatory mechanism meaningless.

In *A. and Others*, the ECtHR elaborated on the degree of review it applies. The Court "allows the national authorities a wide margin of appreciation to decide on the nature and scope of the derogating measures necessary to avert the emergency. Nonetheless, it is ultimately for the Court to rule whether the measures were 'strictly required'."[451] The combination of these two almost antagonistic elements gives the Court a lot of room to adjust the degree of its review on a case-by-case basis.

[449] David Harris et al., *Law of the European Convention on Human Rights*, 4th edition (Oxford, United Kingdom: Oxford University Press, 2018), 806.

[450] https://www.coe.int/en/web/conventions/derogations-covid-19

[451] *A. and Others v. the United Kingdom* [GC], no. 3455/05, ECHR 2009, § 184.

The recent increase both in the number of notifications under Article 15 and the number of Article 15 cases reaching the Court gave the ECtHR a chance to strengthen its review. As the use of the derogation became more normalized, the Court showed signs of a firmer response. As an emblematic example of this development, in 2021, the Court, for the second time only, found that the conditions of emergency were not met.[452] Previously, such finding had only occurred once when the Commission had concluded that the condition of "imminent" danger was not fulfilled. This ruling however took place in an interstate case. Greece, the respondent state, was governed by a military junta at the time and "it was strongly arguable that the derogation was made in bad faith".[453]

The 2021 judgment occurred in a very different context. The state of emergency had been declared in Armenia after massive opposition demonstration following the announcement of the preliminary results of the presidential elections. Ruling on an individual application, the Court acknowledged that the situation could have constituted a "serious public order situation" but refused that it "could be characterised as a public emergency 'threatening the life of the nation'".[454]

ii. The effect of emergency and Article 15 on the judiciary at the domestic level

The state of emergency and emergency measures adopted in Turkey after the 2016 attempted coup created an important influx of applications to the ECtHR. In particular, it gave the Court the opportunity to address the purge that targeted the judiciary and therefore, the importance of the judiciary and the protection from which it should benefit, even during

[452] *Dareskizb Ltd v. Armenia*, no. 61737/08, 21 September 2021.
[453] Harris et al., *Law of the European Convention on Human Rights*, 2018, 814.
[454] *Dareskizb Ltd*, § 62.

emergency. The very day after the attempted coup, about three thousand judges and prosecutors were placed in police custody.

The applicant in *Alparslan Altan v. Turkey*[455] was a judge at the Constitutional Court arrested on suspicion of membership of an armed terrorist organization. His arrest had occurred before Turkey had notified the Article 15 derogation. His detention was therefore not covered by it. Nonetheless, the ECtHR considered that "the difficulties facing Turkey in the aftermath of the attempted military coup of 15 July 2016 are undoubtedly a contextual factor which the Court must fully take into account."[456]

On the other hand, relying on its established case law, the Court once again "emphasised the special role in society of the judiciary, […] the guarantor of justice, a fundamental value in a State governed by the rule of law". "Given the prominent place that the judiciary occupies among State organs in a democratic society and the growing importance attached to the separation of powers and to the necessity of safeguarding the independence of the judiciary […], the Court must be particularly attentive to the protection of members of the judiciary".[457] The Court found that the national law as it was applied negated the protection of judges from interference by the executive,[458] which was "in no way justified by the special circumstances of the state of emergency."[459]

[455] *Alparslan Altan v. Turkey*, no. 12778/17, 16 April 2019; see also: *Baş v. Turkey*, no. 66448/17, 3 March 2020.
[456] *Id.*, § 147.
[457] *Id.*, § 102.
[458] *Id.*, §§ 112-113.
[459] *Id.*, § 118.

In *Selahattin Demirtaş v. Turkey (no. 2),*[460] the Court would further elaborate on the attacks against the judiciary. Starting from the faulty review of a member of parliament's pretrial detention, the Court embarked on broader considerations with regards to the capture of the Supreme Council of Judges and Prosecutors. In this regard, it is worth noting that this case was delivered at a time when similar developments were taking place in Hungary and Poland. The Court highlighted that part of the Supreme Council of Judges and Prosecutors' members were appointed by the President, who, due to the constitutional reform was no longer "a neutral branch of power but belonged to a political faction". The remaining members of the Council were appointed by the Parliament, where the President was practically guaranteed a majority.

This was then tied to the events which took place under the state of emergency following the attempted coup in 2016: "[g]etting control over [the Supreme Council] thus means getting control over judges and public prosecutors, especially in a country where the dismissal of judges has become frequent and where transfers of judges are a common practice". The Court recalled that this climate could have influenced the decisions of national courts.[461]

With the relatively sudden increase in number of derogations, the Court seems to become more vigilant to the risk that Article 15 be used to abusively undermine judicial review at the regional and domestic levels. This evolution is neither obvious nor radical. But the Court does show signs of decreased deference, in particular in cases where the risk of abuse is the most blatant as described above but also concerning journalists[462] or human rights activists[463].

[460] *Selahattin Demirtaş v. Turkey (no. 2)* [GC], no. 14305/17, 22 December 2020.

[461] *Id.*, § 434.

[462] *Mehmet Hasan Altan v. Turkey*, no. 13237/17, 20 March 2018 and *Şahin Alpay v. Turkey*, no. 16538/17, 20 March 2018 and *Sabuncu and Others v. Turkey*, no. 23199/17, 10 November 2020.

[463] *Kavala v. Turkey*, no. 28749/18, 10 December 2019.

The particulars of the Court's emergency jurisprudence will be analyzed in depth in the following sub-section and following chapter.

b. Article 16: the exceptional powers of the French President

Article 16 of the 1958 French Constitution – the executive state of exception *par excellence* – leaves little to no room for the judiciary. In its original version, it only specified that the Constitutional Council shall be formally consulted before the activation of Article 16. Consulted by President de Gaulle on 22 April 1961, the Constitutional Council delivered its opinion on the activation of Article 16 the following day.[464] In less than a page, the Council concluded that the conditions for the activation of Article 16 – including the immediacy of the danger – were met.

The decision was based on the developments in Algeria where several generals were attempting a coup. Although the Constitution provides that the Council shall be consulted about the measures adopted by the president in the context of Article 16, the original draft did not require further consultations as to the persistence of the conditions which justified the exceptional powers. This shortcoming allowed President de Gaulle to maintain Article 16 far beyond what the conditions noted in the Council's opinion required. The attempted coup was defeated within three days following the activation of Article 16. Yet, de Gaulle retained the exceptional powers for over five months.

Furthermore, if the original draft of the Constitution provided that the Constitutional Council be consulted on several occasions, at the time of drafting, the Council was not

[464] Decision no. 61-1 AR16, 23 April 1961, réunion des conditions exigées par la Constitution pour l'application de son Article 16.

envisioned to be a court in the proper sense, nor was it in 1961 during the one and only activation of Article 16.[465] Therefore, actual judicial review, in a truer sense, could only be provided by the Council of State. The Council, however, negated this possibility, effectively denying any involvement of the judiciary in the Article 16 mechanism.

Called to examine the legality of measures taken by de Gaulle under Article 16, the Council of State considered in the first place that the decision to put Article 16 into effect "has the character of an act of government the legality of which the Council of State has no authority to evaluate or the duration of which application [it has no authority] to oversee".[466] Looking at the measures adopted following this initial decision, the Council then noted that the President had the power to adopt any measure in the realm of both Article 37 (regulatory power) and Article 34 (legislative power). Had the contested measures fallen within the ambit of Article 37, the Council might have reviewed its legality. Yet, it found that the impugned measure was of the kind contemplated by Article 34. Therefore, it had "the character of a legislative act which an administrative court has no authority to review".

The 2008 constitutional reform tried to correct the near absence of judicial review in the Article 16 mechanism by increasing the role of the Constitutional Council. On the one hand, it is now possible, after thirty days, for Parliament – including a minority of deputies or senators – to request that the Council rules specifically on whether the conditions for application of Article 16 still apply. The Council can then carry out such an examination of its own motion

[465] Only in 1971 would the Constitutional Council starts reviewing norms against the *bloc de constitutionnalité*, including human rights; Decision no. 71-44 DC, 16 July 1971, « Liberté d'association ».

[466] CE, 2 mars 1962, Rubin de Servens.

after sixty days and any time after that. The Council should issue its ruling as soon as possible and the decision shall be public.

The 2008 reform is an improvement with regard to the control exercised by the Council. However, the effect of the Council's decisions remains unclear. Their public character would confer upon them a heavy weight in the ensuing political debate, but the Constitution does not expressly make them binding. On the other hand, the 2008 reform also introduced an *a posteriori* review mechanism of legislative provisions which might infringe on human rights. Thus, there is a possibility that, following a referral from the Council of State or Court of Cassation, the Constitutional Council could review Article 16 measures taken in the area covered by Article 34.

The 2008 constitutional reform added some judicial guarantees to an exceptional regime which barely had any. However, the effect and significance of these new checks remain to be seen in practice, which might never happen. Article 16 was activated once only over sixty years ago. Since then, despite the multiplication of the declarations of emergency, the political branches have favored the exclusive use of the legislative state of emergency. The taming of Article 16 powers might remain a footnote in history.

c. The Suspension Clause: acute targeting of judicial review

Contrary to the other two systems, the U.S. Constitution does not contain a general emergency provision. The only "derogatory" provision is the Suspension Clause which reads: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."[467] The Suspension Clause targets

[467] U.S. Constitution Article I Section 9 al. 2.

specifically the judiciary and thus participates to the idea that in case of emergency, courts are an obstacle to efficiency. On the other hand, the suspension is limited to situations of deprivation of liberty. It does not encompass the judicial review of other emergency measures.

The U.S. Supreme Court had several opportunities to consider the Suspension Clause. On these occasions, the Court examined whether the writ of habeas had been suspended by Congress as required by the Constitution. This legislative/executive power dimension was discussed in the previous section. However, the substance of the right potentially suspended – the writ of *habeas corpus* – intrinsically questions the role of the judiciary. Therefore, by ruling on this issue, the Supreme Court engaged with the scope of its own review. This tripartite play was bitterly emphasized by Justice Scalia: "It should not be thought […] that the plurality's evisceration of the Suspension Clause augments, principally, the power of Congress. As usual, the major effect of its constitutional improvisation is to increase the power of the Court."[468]

The discussion of the Suspension Clause in the Supreme Court's case law has often been entangled with other normative approaches to limit or prevent judicial review of deprivation of liberty. These cases built on each other and whether the Suspension Clause is indeed involved or not is part of a broader legal question. Therefore, this series of cases will be analyzed in the following sub-section on deprivation of liberty.

The derogatory provisions discussed here are the most exceptional of what each system allows to deal with emergency, the limits of legality. As such, putting them into effect sends the message that the situation is so dire that the government was forced to shake the very foundations of the legal system. The activation of these provisions may carry the sense that the

[468] *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), Justice Scalia dissenting.

governments are cornered. Something they might not want. Furthermore, these provisions, precisely because they symbolize the anti-normal, also endanger policies relying on more long-term states of emergency and treating exceptional measures as the "new normalcy".[469] Similarly, and for the same reason, they do not fit properly with the contemporary states of emergency which purport to comply with the rule of law. Consequently, in each system, alternative mechanisms were designed by the political branches to limit or avoid judicial review. The apex courts ruled on the legality of these *ad hoc* devices.

2. Deprivation of liberty and access to court

The detention of enemy combatants in Guantánamo is one of the most infamous and emblematic measures of the war on terror. Yet the temptation to lock up those considered enemies of the state, away from the jurisdiction of courts, goes much further back. This continuation tends to indicate that the shift in the meaning of "security" – from the state/by the state – might not reflect a shift in actual dynamics. This sign of distrust towards the judiciary is a recurring pattern of emergency power sometimes accompanied by the establishment of military courts reminiscent of martial law. These attempts to keep detainees away from judges have generally been frowned upon by apex courts protective of their own domain.

In the following analysis, cases are grouped depending on whether the detention took place "in the course of an armed conflict"[470] or not. This distinction is important for the applicable law and the reasoning of the courts. However, the division is somewhat artificial. The two lines of case law are necessarily interlinked because the initial question – whether an

[469] Vice President Cheney Delivers Remarks to the Republican Governors Association, Washington, D.C., October 25, 2001.

[470] *Hassan v. the United Kingdom* [GC], no. 29750/09, § 97, ECHR 2014.

actual war is being waged – is subject to discussion. The same is true about the notions of combatant, especially with the resurgence of the "enemy combatant". Furthermore, the definition of these notions has been central to the possibility of judicial review.

This part examines in turn the extrajudicial detention of suspected terrorists outside of war, the detention of enemy combatants at the limits of the war narrative, the creation of ersatz jurisdictions – military or specialized in immigration matters – and finally the restrictions on the access to court due to the Covid-19 pandemic.

a. Extrajudicial detention of suspected terrorists

i. The extensive caselaw of the ECtHR: decades of increasing standards

The ECtHR started building its caselaw on deprivation of liberty starting from its first case onward. In the 1950s, in the context of increased terrorist activities of the IRA, the Republic of Ireland had created special powers for the executive to detain suspects preventively and with no judicial review.[471] Lawless was detained for several months based on these special detention powers. Relying on the *travaux préparatoires*, the Irish government argued that the obligation to "bring promptly before a judge" did not apply to preventive detentions.

The Court used this very first opportunity to clarify the obligations under Article 5 § 1 (c), including that it should be read in light of Article 5 § 3. Consequently, anyone arrested or detained according to Article 5 § 1 (c) must be presented to a judge in line with Article 5 § 3. The ECtHR added that otherwise, "anyone suspected of harbouring an intent to commit an offence could be arrested and detained for an unlimited period on the strength merely of an

[471] A "Detention Commission" was created to review these detentions, but it did not satisfy the criteria of a judicial body.

executive decision; […] such an assumption, with all its implications of arbitrary power, would lead to conclusions repugnant to the fundamental principles of the Convention".[472]

However, Ireland had made a declaration under Article 15. In its analysis of the strict necessity of administrative detention, the Court mitigated its findings under Article 5, making troublesome comments on the role of courts during emergency. According to the ECtHR, "the ordinary criminal courts, or even the special criminal courts or military courts, could not suffice to restore peace and order".[473] The Court's argument suggests that the intrinsic elements of terrorism – including secrecy and creating fear in the population – impede the gathering of evidence thereby hindering the domestic courts' efficiency.

Thus, the reasoning under Article 15 leaves the impression that courts are inadequate in the fight against terrorism. Eventually, the Court concluded that detention without judicial review was indeed "strictly required by the exigencies of the situation" and that "the detention of [the applicant] was founded on the right of derogation duly exercised by the Irish Government". If the Court had noted the danger of the preventive dimension of counter-terrorism from the onset, this acknowledgment was ultimately undermined by the specificities of terrorism and Article 15 derogation.

Over fifteen years later, the reasoning in *Ireland v. United Kingdom*[474] started on a similar point. The Northern Irish government and later the British government had adopted emergency measures allowing several types of extrajudicial detention. One of these measures even permitted that "a person who was in no way suspected of a crime or offence or of activities

[472] *Lawless v. Ireland (no. 3*), 1 July 1961, § 14, Series A no. 3.
[473] *Id.*, § 36.
[474] *Ireland v. the United Kingdom*, 18 January 1978, Series A no. 25.

prejudicial to peace and order could be arrested for the sole purpose of obtaining […] information". Although the Court asserted that "[t]his sort of arrest can be justifiable only in a very exceptional situation", it found it justified in this case because of the high risk of reprisal which prevented witnesses from testifying. Once again, the Court agreed that the judicial system was not suited for the situation going on in Northern Ireland in the 1970s.

However, regarding the absence of judicial review, the Court tempered its finding slightly. It noted that the "legislation and practice […] evolved in the direction of increasing respect for individual liberty" and that "the incorporation right from the start of more satisfactory judicial, or at least administrative, guarantees would certainly have been desirable".[475] Therefore, the Court hinted that the level of obligation could vary with time passing. More important infringements on human rights could be acceptable in the earlier days of a "crisis". A member state "would be rendered defenceless if it were required to accomplish everything at once […]. The interpretation of Article 15 must leave a place for progressive adaptations."[476]

Out of the seventeen judges, only one dissented with regards to Article 5. The Irish judge, Judge O'Donoghue, argued that the situation was not so that it justified not "providing some means of obtaining a review of the extrajudicial action and release if the reviewing body was not satisfied".[477] Insisting on the use of the word "strictly" (required), Judge O'Donoghue considered that the absence of review did not satisfy the criteria of Article 15.

[475] *Id.*, § 220.

[476] *Id.*, § 220.

[477] *Id.*, Judge O'Donoghue dissenting.

In August 1984, the United Kingdom had withdrawn its declaration under Article 15. The applicants in *Brogan and Others*[478] had been detained after that date. Despite the absence of derogation, the Court maintained that "having taken notice of the growth of terrorism in modern society, [it] has already recognised the need, inherent in the Convention system, for a proper balance between the defence of the institutions of democracy in the common interest and the protection of individual rights".[479] This acknowledgment opened the doors for relaxed guarantees in terrorism cases, including longer periods of detention without judicial review.[480] The idea of *ad hoc* procedural safeguards in case of emergency – strongly criticized by Justice Scalia – can also be found more recently in the case law of the U.S. Supreme Court.[481]

Yet, in a countermove, the Court asserted that "[t]he scope for flexibility […] is very limited." A different interpretation "would import into Article 5 para. 3 a serious weakening of a procedural guarantee to the detriment of the individual and would entail consequences impairing the very essence of the right protected by this provision." Therefore, the Court found that even the shortest length of detention in this case (four days and six hours) with no judicial intervention constituted a violation of Article 5 § 3.[482]

Following *Brogan and Others*, the United Kingdom only had the choice to introduce judicial review or to derogate under Article 15 once again. It chose the latter. The Court examined this derogation in *Brannigan and McBride*.[483] If in *Brogan* the Court had made clear

[478] *Brogan and Others v. the United Kingdom*, 29 November 1988, Series A no. 145-B.
[479] *Id.*, § 48.
[480] *Id.*, § 182.
[481] *Hamdi v. Rumsfeld, op. cit*.
[482] *Brogan and Others*, § 62.
[483] *Brannigan and McBride v. the United Kingdom*, 26 May 1993, Series A no. 258-B.

that extrajudicial detentions were not possible without derogation, in *Brannigan*, it reverted to a rather loose approach of what is "strictly required" under Article 15. This reasoning was somewhat in contradiction with the "progressive adaptations" argument made in *Ireland v. United Kingdom*. Against this background, the government's argument appears rather incongruous that they were still exploring means to get the procedure in line with the Convention but had found no other solution than to derogate for the time being. The Court accepted it nonetheless.[484]

Furthermore, it rejected the argument that the purpose of the derogation was to avoid complying with *Brogan*.[485] On the contrary, the Court acknowledged that the alternative – introducing judicial review of the detention – might have endangered the "public confidence in the independence of the judiciary". The government argued that the counter-terrorism context would force them to adopt judicial procedures with so few guarantees that it would affect the general perception of the judiciary,[486] a problem that it was much less concerned with fifteen years later.[487] Nevertheless, the Court accepted the binary logic according to which no judicial review is better than insufficient review with no third option available. Consequently, the absence of judicial intervention served the purpose of protecting the judiciary.

In a similar time frame as the derogation examined in *Brannigan and McBride*, the state of emergency in South-East Anatolia led Turkey to derogate to Article 5. This declaration gave the ECtHR an opportunity to clarify its case law in a different context than the conflict in

[484] *Id.*, §§ 52-54.
[485] *Id.*, §§ 49-51.
[486] *Id.*, § 31.
[487] *A. and Others v. the United Kingdom* [GC], no. 3455/05, ECHR 2009.

Northern Ireland. For the first time, in *Aksoy*,[488] the Court found a violation of Article 5 § 3 despite the derogation. The Court relied on several differences with *Brogan* and *Brannigan* to justify its finding. It highlighted the longer periods of detention and absence of other guarantees to prevent abuses of extrajudicial detention.[489]

Contrary to the applicants in *Brannigan*, Aksoy could not meet with a lawyer nor a doctor nor could he inform his friends and family of his detention. The Court found this absence of alternative guarantees particularly damaging in that the applicant "was left completely at the mercy of those holding him".[490] Interestingly, this exact point had been raised in *Brannigan* by Amnesty International and noted by Judge Martens in his dissenting opinion but not, at the time, by the majority.

Furthermore, Judge Martens dissenting in *Brannigan* noted:

> *"Since 1978 […] the situation within the Council of Europe has changed dramatically. […] The 1978 view of the Court as to the margin of appreciation under Article 15 was, presumably, influenced by the view that the majority of the then member States of the Council of Europe might be assumed to be societies which […] had been democracies for a long time and, as such, were fully aware both of the importance of the individual right to liberty and of the inherent danger of giving too wide a power of detention to the executive. Since the accession of eastern and central European States that assumption has lost its pertinence."*

[488] *Aksoy v. Turkey*, 18 December 1996, Reports of Judgments and Decisions 1996-VI.

[489] The examination of other guarantees to compensate for the absence of judicial review is in itself problematic and will be examined in the following chapter.

[490] *Aksoy*, § 83.

It is difficult to say whether the opposite conclusions in the series of cases against the United Kingdom and *Aksoy* were based on the factual differences between the cases or on the different treatment of different member states. Regardless, *Aksoy* marked a turn in the Court's case law. Remarkably, the Court no longer referred to the judicial review as a difficulty in itself. Instead, it is "the investigation of terrorist offences [which] undoubtedly presents the authorities with special problems". If the choice of terms might be a detail for some, the underlying assumption and message it conveys are fundamentally different.

A few years later, *Demir and Others*[491] clarified and strengthened the Court's findings in *Aksoy*. The Court found that it was "not sufficient to refer in a general way to the difficulties caused by terrorism and the number of people involved in the inquiries"[492] to justify such lengthy detention – sixteen days at least – without review. Acknowledging the "special problems" raised by "the investigation of terrorist offences" "does not mean, however, that the authorities have *carte blanche* under Article 5 […] whenever they consider that there has been a terrorist offence".[493] The expression "*carte blanche*" appears time and again in the judgments of the ECtHR and U.S. Supreme Court – *blanc seing* in the French case law – as the courts struggle to identify precisely the standards of the fight against terrorism but keep repeating as a mantra that such standards exist nonetheless and their fulfilment should be reviewed by the judiciary.

Eventually, in *Demir*, the ECtHR reiterated that "the eventual conviction of a suspect can at the most serve to confirm that the suspicions which led to his arrest […] were well-

[491] *Demir and Others v. Turkey*, 23 September 1998, Reports of Judgments and Decisions 1998-VI.
[492] *Id.*, § 52.
[493] *Id.*, § 41.

founded" but it has no bearings on the obligations stemming from Article 5 § 3. In other terms, the fact that the suspects were later found guilty of terrorism does not place them outside the scope of the protection of the Convention. It does not release the member states from their obligations related to judicial review.

Over time, the ECtHR has developed a line of case law which leaves little room to bypass the judicial review of detention even in the name of the fight against terrorism and even when states have made a declaration of derogation. Various guarantees are put forward by the Court to justify a violation or non-violation conclusion. However, since *Aksoy,* the outcome seems to turn on a broader question: whether the applicant was "at the mercy" of those detaining him or whether some access to the outside (lawyer, doctor, family or judge) could help prevent the type of ill-treatment which incommunicado detention facilitates. The secretive aspect of the detention appears to play an important role in the decision making of the Court, even if not explicitly so. This argument tends to be confirmed by the cases on extraordinary renditions and those related to the Covid-19 pandemic.

ii. France: a need to reaffirm basic principles post-2015

In France, neither the Constitutional Council nor the Council of State had many occasions to be involved in matters of deprivation of liberty as they are the domain of the judicial judge.[494] Yet, a surprising request from the government gave the Council of State an opportunity to express its views on the matter. On 13 November 2015, several terrorist attacks occurred in the Paris area. The following day, President Hollande declared a state of emergency.

[494] Article 66 of the 1958 French Constitution.

The 1955 Statute was subsequently amended on several occasions in order to prolong the state of emergency and include more stringent measures.

It appears the government was not yet satisfied with the extraordinary powers it had been granted. In what can only be seen as an exercise in testing the boundaries of the rule of law, the Prime Minister requested an opinion from the Council of State regarding the available options for deprivation of liberty. The language of the Prime Minister's letter is disconcerting as it appears to be fishing not for the least restrictive measure, nor even for the most efficient but rather for whatever maximum deprivation of liberty could be "legally" imposed.

In a threefold question, the Prime Minister asked the Council whether the law would allow 1) the preventive detention in specialized centers of radicalized and seemingly dangerous persons even in the absence of any conviction or 2) at the very least, such a detention of those who had already been convicted and served their sentence or 3) failing the possibility to detain them in centers, their placement under preventive electronic surveillance or house arrest. From the most to the less severe, all options contemplated preventive deprivation or restriction of liberty outside any criminal law procedure.

The Council of State assessed the alternatives put forward by the government against statutes, the Constitution and applicable international law, including the ECHR.[495] Several judgements from the ECtHR, including *A. and Others v. United Kingdom*[496], were listed in the legal sources of the opinion. Despite the procedure being consultative, the ensuing opinion stands out as one of the few occasions on which the Council of State indicated – if not

[495] CE, Sect., 17 December 2015, no. 390867, Avis sur la constitutionnalité et la compatibilité avec les engagements internationaux de la France de certaines mesures de prévention du risque de terrorisme.

[496] *A. and Others v. the United Kingdom* [GC], no. 3455/05, ECHR 2009.

imposed[497] – clear boundaries on the government's repressive scheme. To do so, the Council developed a simple reasoning based on the most fundamental principles of French constitutional law.

Regarding the possible preventive detention of persons suspected of being radicalized and dangerous, the Council recalled the prohibition of arbitrary detention and the presumption of innocence – guaranteed by the 1789 Declaration of the Rights of Man and of Citizens – as well as Article 66 of the Constitution according to which the judiciary is tasked with preventing arbitrary detention. It follows that only the judiciary – meaning the judicial judge, not the administrative one – may order or review deprivation of liberty.

The Council conceded that preventive administrative measures are sometimes necessary, but these cannot result in deprivation of liberty. Administrative detention may only occur for very short periods of time and even then, the judiciary judge should intervene as soon as possible. The Council concluded that "the detention of persons presenting risks of radicalization outside any criminal procedure is therefore constitutionally excluded."[498] Turning to the ECHR, the Council observed that the preventive detention envisaged by the government was not among the possibilities listed in Article 5 § 1 and thus not allowed by the ECHR either.

[497] The Council of State can be consulted by the government following three procedures. The consultation might be optional in which case the government chooses to request an opinion or not and does not have to follow it. In some cases, the consultation is mandatory. The government can choose to follow the opinion of the Council or to adopt its original draft. However, it cannot adopt a version of the text which was not submitted to the Council. In fewer cases, the text can only be adopted *sur avis conforme*. This means that the government has no choice but to follow the opinion of the Council. In the case at hand, the consultation was optional. The government did not submit a draft to the Council but merely asked questions.

[498] CE, Sect., no. 390867, 17 December 2015, Avis sur la constitutionnalité et la compatibilité avec les engagements internationaux de la France de certaines mesures de prévention du risque de terrorisme, p. 4 at I. 4.

The next option examined by the Council was to maintain in detention persons convicted for terrorist offenses after they had served their sentence if they were deemed dangerous. This option was based on a similar regime concerning detainees suffering from severe personality disorder. The Council highlighted the guarantees surrounding this "security retention". The same would be required for the retention of terrorists. In particular, the deprivation of liberty would have to be decided and regularly reevaluated by a judge and it should remain exceptional. More importantly, the Council recalled the purpose of the retention regime: to foster treatment by appropriate care with the view of rehabilitation through healing. For this mechanism to be transposed in the terrorism context, some sort of deradicalization program would be needed, which hindered the creation of a security retention regime for persons convicted of terrorist offences.

Finally, should neither of the first two options be possible, the government had suggested placing dangerous radicalized persons under electronic surveillance or house arrest. Regarding house arrest, the Council recalled that the modalities of this measure are variable. Depending on its rigor, house arrest could be comparable to a deprivation of liberty.[499] Similarly to the ECtHR, the 1955 Statute on the State of Emergency, the Council of State and the Constitutional Council all use the limit of twelve hours per 24 hours as the main criteria to differentiate between restriction and deprivation of liberty.

If it did not respect these limitations, the measure would amount to a deprivation of liberty which would have to be ordered by a judiciary judge as part of a criminal procedure.

[499] « Lorsque les contraintes imposées à l'intéressé excèdent par leur rigueur une restriction de la liberté de circulation, au point de le confiner en pratique en un lieu déterminé, fût-il son domicile, l'assignation à résidence est assimilable à une privation de liberté. »

Indeed, as noted earlier, contrary to the judiciary judge,[500] the administrative judge is not the guardian of individual liberty. Finally, the Council of State considered that the electronic surveillance could potentially be set up by the law as it already exists in various contexts and on the condition that the necessary guarantees are provided.

In this opinion, the Council of State reminded the government of the foundational link between the judiciary judge and the protection of individual liberty. No matter the circumstances, deprivation of liberty without the involvement of the judiciary is a red line which cannot be crossed. Even in times of emergency, until now, the 1955 Statute on emergency has complied with this principle. Article 6 provides that administrative house arrest, reviewed by the administrative judge, cannot exceed twelve hours per day. On the other hand, according to the Council, less restrictive measures, which can still constitute an important infringement on individual liberty, may be introduced provided that they are accompanied by certain guarantees. Symptom of the normalization of the exception, these would be reviewed by the administrative judge.

iii. The special cases of extraordinary renditions and black sites: when the CIA enters the scope of the ECtHR

In a series of key cases decided between 2012 and 2018, the ECtHR addressed what became known as extraordinary renditions. This method relied on a cooperation network built by the U.S. to facilitate the arrest and transfer of individuals to the Central Intelligence Agency (CIA) by another state – here states party to the ECHR. In the first of these rendition cases, *El-*

[500] Article 66 of the 1958 French Constitution.

Masri v. the former Yugoslav Republic of Macedonia,[501] the Court had to lift a number of hurdles, including at the fact-finding stage, in order to be able to adjudicate.

The applicant and respondent government did not agree on any aspect of the facts. Therefore, the Court exceptionally took on the role of a first instance judge, in part because of the seriousness of the allegations. Relying on information gathered by third parties, it found "prima facie evidence in favour of the applicant's version of events" and shifted the burden of proof to the government.[502] As the latter failed to adequately explain or counter the allegations, the Court considered them "sufficiently convincing and established beyond reasonable doubt."[503]

This conclusion is important in and off itself as it made the *El-Masri* judgment the first judicial recognition of a rendition.[504] The Court defined this practice as the "extrajudicial transfer of persons from one jurisdiction or State to another, for the purposes of detention and interrogation outside the normal legal system, where there was a real risk of torture or cruel, inhuman or degrading treatment"[505] and which, "by its deliberate circumvention of due process, is anathema to the rule of law and the values protected by the Convention".

The Court found a direct violation of Article 5 by the respondent state for the detention which occurred on its own territory. The Court resorted to its strongest language to condemn this "unacknowledged detention in complete disregard of the safeguards enshrined in Article 5 [which] constitutes a particularly grave violation". Importantly, the Court also found a violation

[501] *El-Masri v. the former Yugoslav Republic of Macedonia* [GC], no. 39630/09, ECHR 2012.
[502] *Id.*, § 165.
[503] *Id.*, § 167.
[504] Duroy, "Remedying Violations of Human Dignity and Security," 142.
[505] *El-Masri*, § 221.

by the former Yugoslav Republic of Macedonia of Article 5 on account of the applicant's detention by the CIA in Afghanistan. Not only had the Macedonian authorities failed to protect the applicant, but they had actively facilitated this part of his detention and were therefore to be held responsible.[506]

This conclusion is interesting in that the Court asserted the responsibility of the government not only for the rendition proper but also for the applicant's detention by foreign authorities outside the territory of the respondent state. The Court reached a similar conclusion in *Nasr and Ghali*[507] where the applicant had been abducted on the Italian territory and transferred and detained in Egypt by the CIA. The Italian government was held accountable for his abduction as well as the subsequent detention.

Four other cases concerned Al-Nashiri and Abu Zubaydah who were abducted and detained in a CIA black site respectively in Romania and Lithuania then transferred to Poland where they were detained in another black site before their transfer to the US Naval Base of Guantánamo Bay. Each applicant filed two applications: one against the member state where they were abducted,[508] the other against Poland.[509] Contrary to the applicants in *El-Masri* and *Nasr and Ghali*, Al-Nashiri and Abu Zubaydah were still in detention at the time the ECtHR delivered its judgment.

[506] *Id.*, §§ 239 and 241.

[507] *Nasr and Ghali v. Italy*, no. 44883/09, § 302, 23 February 2016.

[508] *Al Nashiri v. Romania*, no. 33234/12, 31 May 2018 and *Abu Zubaydah v. Lithuania*, no. 46454/11, 31 May 2018.

[509] *Al Nashiri v. Poland*, no. 28761/11, 24 July 2014 and *Husayn (Abu Zubaydah) v. Poland*, no. 7511/13, 24 July 2014.

Highlighting the goal of extraordinary rendition which is to remove individuals from the reach of the judiciary, the Court condemned the entire scheme:

> *"secret detention of terrorist suspects was a fundamental feature of the CIA rendition programme. […] the rationale behind the programme was specifically to remove those persons from any legal protection against torture and enforced disappearance and to strip them of any safeguards afforded by both the US Constitution and international law against arbitrary detention, to mention only the right to be brought before a judge and be tried within a reasonable time or the habeas corpus guarantees. To this end, the whole scheme had to operate outside the jurisdiction of the US courts and in conditions securing its absolute secrecy, which required setting up, in cooperation with the host countries, overseas detention facilities".*[510]

The difficulties inherent to investigations of terrorism had no bearings in this context. There was no room for secret detention in the case law of the ECtHR.

Another important aspect of the ECtHR case law on rendition is the judicial assertion of the role of the CIA. In order to determine the responsibility of the respective member states, the Court established and qualified in no uncertain terms the actions of the CIA. In both cases against Poland, the Court stated that the CIA had tortured the applicants during their detention in the member state.[511] The U.S. are not party to the ECHR. Consequently, the statements of the Court remain merely declaratory and in no way binding on the United States. Nonetheless,

[510] *Husayn (Abu Zubaydah) v. Poland*, no. 7511/13, § 524, 24 July 2014.

[511] *Al Nashiri v. Poland*, no. 28761/11, § 516, 24 July 2014 and *Husayn (Abu Zubaydah) v. Poland*, no. 7511/13, § 511, 24 July 2014.

they are as "bold" as they are important because the "forever detainees" have no redress avenue in or against the U.S.[512]

At the time of writing, both Al-Nashiri and Abu Zubaydah were still detained in Guantánamo. Al-Nashiri was charged with criminal offenses in 2011. The proceedings were still ongoing in 2024. Abu Zubaydah was never charged. He has been removed from the list of sanctions by the UN Security Council and the U.S. authorities no longer claim that he was even a member of al-Qaeda.[513] Yet, he was not released.

A 2014 Report of the US Senate Select Committee on Intelligence quotes a CIA cable sent from Abu Zubaydah's interrogators at the first black site: "especially in light of the planned psychological pressure techniques to be implemented, we need to get reasonable assurances that [Abu Zubaydah] will remain in isolation and incommunicado for the remainder of his life". The reply was unequivocal: "[Abu Zubaydah] will never be placed in a situation where he has any significant contact with others and/or has the opportunity to be released. While it is difficult to discuss specifics at this point, all major players are in concurrence that [Abu Zubaydah] should remain incommunicado for the remainder of his life."[514] These messages are a concrete example of the link established by the ECtHR since its early cases between secret detention and treatments contrary to Article 3 of the Convention.

The case law of the ECtHR on extraordinary rendition is a cornerstone for the role of the judiciary in the war on terror. The Court delivered judgements of several hundred pages

[512] Duroy, "Remedying Violations of Human Dignity and Security," 145.

[513] Helen Duffy, "Dignity Denied: A Case Study," in *Human Dignity and Human Security in Times of Terrorism*, ed. Christophe Paulussen and Martin Scheinin (The Hague: T.M.C. Asser Press, 2020), 81, https://doi.org/10.1007/978-94-6265-355-9_5.

[514] Both cited in Duffy, 80.

which include extensive statements of facts relying on investigations by national authorities, NGOs and international organizations. The strong language expressed severe condemnation of the rendition program and direct responsibility of the member states involved. By proving the potentialities of a judicial action and the unwillingness of the European judges to look away, these findings could potentially put a halt to or at least undermine current and future cooperation programs which were designed to avoid judicial review. The mere existence of the ECtHR judgments on rendition greatly contributed to acknowledging the existence of the program and the specifics of what had happened to the applicants. It also allowed the Court to address directly the secrecy component of the fight against terrorism.

Against the efforts of the judiciary to uncover the elements necessary for adjudication, governments have often claimed state secret privileges. In *Nasr and Ghali*, the investigation into the allegations of the applicants had been effective and led to the identification and conviction of the persons responsible. However, these convictions were rendered ineffective as the executive decided to invoke state secrets and the persons responsible were not punished. Accordingly, the ECtHR found a violation of the procedural aspect of Article 3 and of Article 13 in conjunction with Articles 3, 5 and 8.[515]

In *Al Nashiri v. Poland* and *Husayn (Abu Zubaydah) v. Poland*, the respondent government invoked state secrets to withhold information from the ECtHR, despite the Court's willingness to adapt its procedure. The Court therefore decided to examine the state's failure to comply with its request under Article 38 as both Articles 34 and 38 "work together to guarantee the efficient conduct of the judicial proceedings".[516] Expressly referring to "the interests of

[515] *Nasr and Ghali v. Italy*, no. 44883/09, 23 February 2016.

[516] *Al Nashiri v. Poland*, § 362.

national security in a democratic society", the Court "gave the Government an explicit guarantee as to the confidentiality of any sensitive materials they might have produced."[517] Amongst others, the submissions of the parties were made confidential and a hearing *in camera* was held to deal with matters of evidence. Yet, the government still did not comply with the Court's request.

The Court appeared especially irritated by the several attempts by the government to dictate the procedure and conditions under which the Court could access certain information. In response, and echoing Jenkins' argument that courts should have control over their procedural rules, the ECtHR reiterated that "the procedure […] is fixed solely by the Court under the Convention and the Rules of Court".[518] Whether national security considerations are involved is mainly for the national authorities to say. However, the Court decides when and knows how to adapt its procedure accordingly. "[O]ver many years the Convention institutions have established sound practice in handling cases involving various highly sensitive matters, including national-security related issues."[519] The Polish government having failed to comply with its obligations to produce documentary evidence despite the Court's accommodations, the ECtHR found a violation of Article 38 in both cases.

It is clear from these cases that if some adjustments can be expected from the courts in order to accommodate state secret privileges, these cannot result in depriving the applicants of effective judicial review or remedy. In stark contrast, the U.S. Supreme Court adopted a much more deferential position towards the government's claim of state secrets privileges. In 2010,

[517] *Id.*, § 367.
[518] *Id.*, § 366.
[519] *Id.*, § 371.

Abu Zubaydah, the same applicant as in both ECtHR cases, started proceedings in Poland seeking to establish the national authorities' responsibility for his treatment at the CIA detention center located in that country. Invoking risks to the national security, the U.S. authorities denied requests for information made by Polish prosecutors. Consequently, Abu Zubaydah filed a discovery application aiming to obtain information confirming the location of the detention facility in Poland. The government opposed state secrets privilege.

In *United States v. Zubaydah*,[520] the Supreme Court acknowledged that some of the information concerned had already appeared in publicly available documents among which the judgement of the ECtHR. Nonetheless, neither the Polish government nor the CIA had ever officially confirmed their cooperation or location of the detention center. The Supreme Court followed its precedents stating that "[t]he court itself must determine whether the circumstances are appropriate for the claim of privilege." In doing so, however, "a court should exercise its traditional 'reluctan[ce] to intrude upon the authority of the Executive in military and national security affairs'".

The Supreme Court accepted the government's claim that even confirming information already publicly available could impair the "clandestine" operations and mutual trust with foreign governments necessary to prevent terrorist attacks. The Court further found that Zubaydah's need was "not great". It concluded that the state secrets privilege applied and dismissed the discovery application. In doing so, the Supreme Court adopted a stance in opposition to that of the ECtHR who had deployed unusual efforts to ascertain the facts and bring to (judicial) light the rendition program.

[520] *United States v. Zubaydah*, 595 U.S. ___ (2022).

However, it would be a mistake to conclude that the U.S. Supreme Court showed a pattern of deference regarding the detention of suspected terrorists. By the time the ECtHR delivered its judgments in rendition cases, the Supreme Court had already seriously hindered the government's (legal) efforts to deprive those captured on the "battlefield" from access to court.

b. Detention of (enemy) combatants in the course of armed conflicts

Contrary to the ECtHR and the French Councils, the U.S. Supreme Court developed its main case law on the detention of suspected terrorists within the frame of war and not as much on emergency. One narrow question at a time, the Court slowly but surely asserted the right to judicial review (writ of *habeas corpus* and/or due process) of each "class" of detainee.

In the context of World War II, the Supreme Court had found that U.S. federal courts had no jurisdiction over aliens detained outside the U.S. sovereign territory.[521] In *Rasul*,[522] the government relied on this case law to argue that U.S. courts similarly lacked jurisdiction over aliens detained in Guantánamo. The Supreme Court, however, found that the case at hand differed from *Eisentrager* among other reasons because the applicants in *Rasul* had "never been afforded access to any tribunal, much less charged with and convicted of wrongdoing". The Court added that *Eisentrager* had been overruled by *Braden*[523] according to which the *habeas* acted upon the detaining person, not the prisoner. The Court also found the citizenship of the

[521] *Johnson v. Eisentrager*, 339 U.S. 763 (1950).

[522] *Rasul v. Bush*, 542 U.S. 466 (2004).

[523] *Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484 (1973).

petitioner as well as the fact that he was in military custody to be irrelevant. It concluded that U.S. courts had jurisdiction to review petitions filed by prisoners in Guantánamo.

Decided on the same day as *Rasul*, *Hamdi*[524] added another stone to the *habeas corpus* wall. The petitioner was captured in Afghanistan, classified as an enemy combatant, and briefly detained in Guantánamo before he was identified as a U.S. citizen and subsequently move to another detention facility on the U.S. territory. The Supreme Court found that Congress had authorized the detention of combatants. The Authorization for Use of Military Force ("the AUMF") "authorizes the President to use 'all necessary and appropriate force' against 'nations, organizations, or persons' associated with the September 11, 2001, terrorist attacks."

However, the plurality also acknowledged the non-traditional character of the war on terror. In particular, it "recognize[d] that the national security underpinnings of the "war on terror," although crucially important, are broad and malleable." "[G]iven its unconventional nature, the current conflict is unlikely to end with a formal cease-fire agreement"[525] and therefore, could lead to indefinite detention. Yet, relying on principles of the law-of-war, the Court considers that detention is acceptable as long as active combat operations take place in Afghanistan.

Absent a suspension by Congress, all parties and the Court agree that the writ of *habeas corpus* remained in force so that Hamdi should be able to have an independent body reviewing his status of enemy combatant. Remained the question of constitutional due process. The government's argument in that regard was one of separation of powers and left very little room

[524] *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).
[525] *Id.*, p. 12.

for judicial review. "Respect for separation of powers and the limited institutional capabilities of courts in matters of military decision-making in connection with an ongoing conflict ought to eliminate entirely any individual process restricting the courts to investigating only whether legal authorization exists for the broader detention scheme".[526]

The Court's response reveals general concerns with the concentration of powers in the hands of the executive. "[T]his approach serves only to condense power into a single branch of government. We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens."[527] Eventually, the Court concluded that a citizen-detainee seeking to challenge his classification as an enemy combatant was entitled to some procedural guarantees.[528] Yet, it endorsed the principle of a "tailored" due process in order to alleviate the burden on the executive in times of war.

This middle ground conclusion opened the judgment to many interpretations. The broad statements of the Court and its insistence of some due process against the executive unilateralism arguments of the government demonstrated some commitment to maintaining the role of the judiciary during emergencies. However, the approved alterations to the due process seriously undermined this endeavor. If they seem to require very little from the government, the standards might be impossible to fulfil for petitioners.[529] From that perspective, the solution adopted by the Court severely hindered both the rights to *habeas corpus* and due process and therefore, the role of the judiciary.

[526] *Id.*, p. 20.
[527] *Id.*, p. 29.
[528] *Id.*, p. 26.
[529] Rosenfeld, "Judicial Balancing in Times of Stress," 2113.

Conversely, according to Justice Scalia, the Court arrogated itself powers it did not possess. Justice Scalia advocated for a categorical approach. According to this reasoning, absent a suspension of the writ, Hamdi should have been charged or released. However, inventing a new procedure was legally unacceptable. "As usual, the major effect of its constitutional improvisation is to increase the power of the Court. […] the plurality then proceeds, under the guise of the Due Process Clause, to prescribe what procedural protections it thinks appropriate."[530]

Hamdi was an important case for the U.S. Supreme Court. However, very few individuals were in a situation similar to that of Hamdi, namely "enemy combatant", U.S. national, detained on U.S. territory. For the hundreds of detainees in Guantánamo, the government had set up a parallel quasi-judicial system, specifically designed to keep them out of federal courts.

c. Creating ersatz jurisdictions: judicial review without the judiciary

During "crises", many attempts were made to keep detainees out of courts. However, judges themselves have resisted such efforts and enforced the detainees' rights to liberty, due process, *habeas corpus* or security. As an alternative and, at first glance, less drastic option, governments, if necessary, with the support of parliaments, created special courts: military tribunals and, more recently, special immigration commissions. These parallel institutions have the double advantage to provide a semblance of judicial review while keeping away from the traditional judiciary and its standard guarantees.

[530] *Hamdi*, Justice Scalia dissenting, p. 23.

i. Judicial push back against military courts

In times of "crisis", and not exclusively during wars,[531] there is a long tradition of political branches redirecting the judicial emergency flow to military courts or commissions – a move upon which apex courts have not usually looked very favorably. This sub-section examines chronologically their push back against military tribunals.

- *The Civil War*

During the Civil War already, the U.S. Supreme Court had declared unconstitutional the trial of civilians by military commissions created by the president while civil courts were functioning. It stated that "martial rule can never exist when the courts are open".[532] Three concurring Justices, however, argued that Congress could have established such military commissions. And indeed, Congress did during WWII. The President subsequently ordered the trial of several German saboteurs by military commission. In *Ex parte Quirin*,[533] the Court noted that Congress had authorized the trial of unlawful belligerents – who had violated the law of war – by military commissions and therefore that the president had not exceeded his powers.

- *The Algerian War*

The question of the competence of the president to establish military commissions is equally important in the case law of the French Council of State. Following the attempted coup in Algiers, President de Gaulle, using his extraordinary powers under Article 16 of the Constitution, established a Military Tribunal to try the participants in the revolt. In *Rubin de*

[531] In France, the *Cour de sûreté de l'Etat* created during the Algerian War endured until 1981.

[532] *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866).

[533] *Ex parte Quirin*, 317 U.S. 1 (1942).

Servens,[534] the Council of State considered that Article 16 allowed the president to take any necessary measures, including those of a legislative nature normally adopted by parliament (Article 34 of the Constitution). Creating a new judicial body and fixing its penal procedural rules belonged to this legislative category. Accordingly, the Council of State, being an administrative court, found that it had no jurisdiction to review this measure. Just a few months later, however, the Council issued a judgment, the practical consequences of which directly contradicted those of *Rubin de Servens*.

Just a few weeks after *Rubin de Servens* was delivered, the French people approved by referendum the Evian Agreements which ended the Algerian War. The referendum also authorized the President to adopt any measure, legislative or regulatory, necessary for the implementation of the Agreements. The wording was very similar to that of Article 16. De Gaulle relied on this habilitation to establish a Military Court of Justice to try the authors of certain infractions committed during the Algerian War and replace the Military Tribunal – contested in *Rubin de Servens* and which had been dissolved a few days earlier. The new Court of Justice followed a derogatory procedure, and its decisions could not be appealed.

Canal, sentenced to death, and Robin and Godot, both sentenced to prison, asked the Council of State to annul the ordinance establishing the Military Court of Justice.[535] The Council considered that the referendum legislation did not confer legislative powers to the President but merely allowed him to use his regulatory powers, exceptionally and within limits, in areas normally reserved to the law. Consequently, the Council was competent. Despite the legal bases being different in each case (Article 16 in one, referendum legislation in the other),

[534] CE, 2 mars 1962, Rubin de Servens.

[535] CE, no. 58502, 19 October 1962, Canal, Robin et Godot.

it is difficult to reconcile the reasonings of the Council in both cases. Nonetheless, this finding was necessary to assert its jurisdiction over the matter.

Once its competence determined, the Council examined whether the President had the powers to establish the Military Court of Justice. It found that the President had indeed this power. However, the setup of the newly established court could only infringe on the rights of the defense to the extent that it was absolutely necessary. The Council considered that the procedure in front of the Court of Justice and the impossibility to appeal its decisions constituted severe infringements of the general principles of criminal law and were not necessary. The ordinance creating the Court was found illegal and annulled.

The *Canal* judgment is an emblematic decision upholding the rule of law and affirming the importance of the judiciary, even in times of emergency. However, several important caveats must be mentioned. First, the *Canal* judgment stands out among decisions usually more deferential to the executive. Second, the timing of the decision is important. Contrary to *Rubin de Servens*, it was delivered after the war had ended and its direct consequences were rather limited. Third, Canal's situation remained uncertain until de Gaulle himself commuted his death penalty into a life sentence a few months later. Fourth, the Military Court of Justice did not disappear definitively. Parliament reinstated it temporarily just a few months later.[536]

The repercussions for the Council however could have been severe. Delivered just a few weeks before the referendum on the election of the President of the Republic, *Canal* sounded like a disavowal. As the Council stepped outside its usual deferent position and affirmed its

[536] Law no. 63-138 of 20 February 1963 amending art. 51 de la loi 63-23 of 15 January 1963, Prorogation du Tribunal militaire et de la Cour militaire de Justice.

independence, its judgment was met with strong criticism. The government issued a press release denouncing "an intervention which clearly falls outside the scope of administrative litigation and is likely to compromise the action of the public authorities with regard to criminal subversion which is not yet reduced".[537]

De Gaulle took personally what he perceived to be a political decision and endeavored to reform the institution. He wrote to his prime minister that a reform was necessary to "regulate the attributions of the Council in such a way as to make impossible […] an encroachment as monstrous as that committed by the Council of State in the Canal affair".[538] A Commission, presided by the president of the Constitutional Council, was appointed to explore the possible transformations of the Council of State. Eventually, the reform was minimal and if anything, the Council came out somewhat strengthened.[539]

With the *Canal* judgment, the Council of State claimed its own independence at the same time that it refused the creation of quasi-jurisdictions to bypass ordinary courts. To do so, it went beyond a purely institutional approach and insisted that even extraordinary courts cannot ignore the most fundamental principles of law.

[537] Le communiqué de presse dénonce « une intervention dont il est clair qu'elle sort du domaine du contentieux administratif et est de nature à compromettre l'action des pouvoirs publics à l'égard de la subversion criminelle qui n'est pas encore réduite ».

[538] Michel Gentot, "L'arrêt Canal, Le Conseil d'État Affirme Son Indépendance," *AJDA*, 2014, 90–93. La réforme devait « régler les attributions du Conseil de telle sorte que soit impossible […] un empiétement aussi monstrueux que celui qu'a commis le Conseil d'État au sujet de l'affaire Canal ».

[539] Jean Foyer, "Après l'arrêt Canal : Le Général De Gaulle et La Non-Réforme Du Conseil d'État," *La Revue Administrative* 59, no. 349 (2006): 6–12.

- *The war on terror*

Some forty years later, the U.S. Supreme Court developed a very similar reasoning in *Hamdan*.[540] The petitioner had been captured in Afghanistan and was detained in Guantánamo. He had been designated enemy combatant by a military commission established by the President and later charged with offenses triable by military commission. Similarly to the Council of State in *Canal*, the U.S. Supreme Court first established its jurisdiction over the matter. Adopting a restrictive reading of the Act of Congress preventing federal courts from hearing *habeas corpus* claims from Guantánamo detainees,[541] the Court concluded that it did not apply to pending cases. It also overcame the government's argument that federal courts should abstain from intervening in pending courts-martial by, among others, emphasizing the extraordinary character of the military commission which was not part of the integrated system of military courts.

Having found that the creation of military commissions was not authorized by Congress, the Court examined whether the President had the power to do so under Art. II of the Constitution. Again, as the French Council of State in *Canal*, the Supreme Court considered that the President possessed the power to convene military commissions but that this power was not unlimited. It had to abide by some fundamental principles, in this case, the Unified Code of Military Justice and the common Article 3 of the Geneva Conventions. The issues flagged by the Supreme Court are akin to those noted in *Canal*: rights of the defense and possibility to appeal. Even assuming that the allegations of the government that Hamdan was dangerous were

[540] *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

[541] Detainee Treatment Act (2005).

true, "in undertaking to try Hamdan and subject him to criminal punishment, the Executive [was] bound to comply with the Rule of Law that prevails in this jurisdiction."[542]

The restrictive reading of the act of Congress which gave the Supreme Court jurisdiction was an unstable basis to secure the writ of *habeas corpus* for Guantánamo detainees. Following the Court's decision in *Hamdan*, Congress, persevering in this whack-a-mole game, passed the Military Commission Act (MCA).[543] The MCA barred U.S. federal courts from hearing *habeas corpus* petitions from Guantánamo detainees. This move forced the Supreme Court to add a last brick to the *habeas corpus* wall and examine the matter from the angle of the constitutional privilege of *habeas corpus* to which, it found, the detainees are entitled.

In *Boumediene*, the Supreme Court emphasized time and again the separation of powers basis for its findings. This attitude illustrates Greene's claim that a human rights-based defense of judicial review is too uncertain. An argument founded in the constitutional structure of the powers offers more solid grounds.[544] Recalling the special place of the writ in the Constitution, the Court considered that this centrality should inform the interpretation of the Suspension Clause. "[T]he Suspension Clause is designed to protect against these cyclical abuses. […] It ensures that, except during periods of formal suspension, the judiciary will have a time-tested device, the writ, to maintain the 'delicate balance of governance'. […] The Clause protects the rights of the detained by affirming the duty and authority of the judiciary to call the jailer to

[542] *Hamdan*, p. 72.

[543] Pub. L. No. 109-366, 120 Stat. 2600 (Oct. 17, 2006).

[544] See above, p. 90.

account. […] The separation-of-powers doctrine, and the history that influenced its design, therefore must inform the reach and purpose of the Suspension Clause."[545]

Examining the question of extraterritoriality, the Court was again very clear that issues of separation of powers motivated its conclusion. A sovereignty-based application of the Suspension Clause would allow "for the political branches to govern without legal constraint. Our basic charter cannot be contracted away like this. The Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, not the power to decide when and where its terms apply."

Finding otherwise would lead "to a regime in which Congress and the President, not this Court, say 'what the law is.' […] These concerns have particular bearing upon the Suspension Clause […] for the writ of habeas corpus is itself an indispensable mechanism for monitoring the separation of powers. The test for determining the scope of this provision must not be subject to manipulation by those whose power it is designed to restrain."[546] These forceful considerations led the Court to conclude that the Suspension Clause had full effect in Guantánamo. Since the MCA deprived the detainees of their right, and the substitute did not offer sufficient guarantees, the MCA operated as an unconstitutional suspension of the writ.

The ECtHR also had several occasions to examine the compatibility with the Convention of military courts or courts composed at least in part of members of the armed forces. It examined whether the said courts offered the guarantees provided by Article 5 and/or 6 of the Convention, paying special attention to the independence and impartiality of the

[545] *Boumediene v. Bush*, 553 U.S. 723 (2008), p. 15.
[546] *Id.*, pp. 35-36.

member(s) of the armed forces.[547] On few occasions, it found that a member state could be found in violation of the Convention for deporting an applicant to a country where s/he would face a "flagrant denial of justice". Such cases are rare because they require a "stringent test of unfairness".

Nonetheless, the Court found a violation of Article 6 both in *Al-Nahiri v. Poland*[548] and *Husayn (Abu Zubaydah) v. Poland*,[549] where the applicants were sent to Guantánamo and faced trial by military commission. In doing so, the ECtHR relied on the U.S. Supreme Court's case law. Examining the military commissions as they were set up at the time of deportation, that is under the configuration reviewed in *Hamdan*, the ECtHR noted three important flaws. The Court noted the lack of impartiality and independence vis-à-vis the executive. Furthermore, following the U.S. Supreme Court's case law, the military commissions could not be considered tribunals "established by law". Finally, there was a sufficient likelihood that evidence obtained through torture could be admissible. Those elements were sufficient to conclude that Poland had violated Article 6 § 1.

The Court reached the exact same conclusion in both cases. However, regarding Abu Zubaydah, the Court noted the situation of the applicant at the time the judgment was delivered, namely that he had not been charged and that the last review of his detention had taken place seven years earlier.[550] This important point highlights the deficiencies of the system but is also indicative of an implementation problem. The Supreme Court and the ECtHR asserted commanding principles expressed in forceful language. However, their practical consequences

[547] See for example, *Incal v. Turkey*, 9 June 1998, Reports of Judgments and Decisions 1998-IV.

[548] *Al Nashiri v. Poland*, no. 28761/11, §§ 561-569, 24 July 2014.

[549] *Husayn (Abu Zubaydah) v. Poland*, no. 7511/13, §§ 551-561, 24 July 2014.

[550] *Id.*, § 559. Al-Nashiri had been charged. His trial was still ongoing at the time of writing.

do not match. Several detainees remain in Guantánamo still awaiting trial after decades. Some, like Abu Zubaydah, were never even charged. Proceedings were reopened in Poland following the ECtHR judgments but have yet to produce a tangible outcome. Courts have been reaffirming the importance of judicial review and denouncing *ad hoc* quasi-judicial bodies which do not abide by the rule of law. Yet when national security is mixed with such high political stakes, to some extent, they seem to be screaming in the void. Lincoln simply ignored *Ex parte Merryman*. De Gaulle considered the *Canal* judgment "inexistant"[551] or "null and void".[552] The more recent landmark judgments examined here failed to produce sizeable effects.

ii. Dangerous aliens and special immigration commission

In the context of the war on terror, the combination of security considerations and protection against ill-treatments created a new configuration of detention without trial: the detention of aliens considered dangerous but who could not be deported because of the risks of ill-treatment they would face in the country of destination. This type of detention gave birth to new procedures and ultimately to a new type of special commission. The ECtHR examined several such cases with regards to Article 5 § 4 which guarantees the right to take proceedings to have the legality of one's detention reviewed.

In *Chahal v. UK*,[553] the ECtHR "recognize[d] that the use of confidential material may be unavoidable where national security is at stake. This does not mean however, that the national authorities can be free from effective control by the domestic courts whenever they choose to assert that national security and terrorism are involved." Due to procedural

[551] Foyer, "Après l'arrêt Canal," 6.

[552] Charles de Gaulle, *Mémoires d'espoir*, vol. Tome 2-« L'effort 1962-… » (Paris: Plon, 1971), 76.

[553] *Chahal v. the United Kingdom*, 15 November 1996, Reports of Judgments and Decisions 1996-V.

shortcomings, neither of the bodies reviewing the detention satisfied the requirements of Article 5 § 4. However, the Court noted that there were techniques capable of accommodating security concerns while guaranteeing the individual procedural justice.[554] Similarly to what the Supreme Court had done in *Hamdi*, the ECtHR embraced an accommodation logic.

The United Kingdom took note of the suggestion. The subsequent amendment to the review proceedings included the creation of Special Immigration Appeals Commission (SIAC). Special procedural rules applied in front of the SIAC among which the possibility to consider "closed" material with the participation of a special advocate. Examining this new arrangement in *A. and Others*,[555] the ECtHR accepted the principle of these derogatory procedural rules because of the "urgent need to protect the population of the United Kingdom from terrorist attack and […] strong public interest in obtaining information about al-Qaeda and its associates and in maintaining the secrecy of the sources of such information".

The Court went on to test the procedure as applied to each individual applicant, ascertaining whether they had had the "possibility effectively to challenge the allegations" against them. It concluded to the violation of Article 5 § 4 in respect of four applicants and no violation in respect of the other five. Finding that the fundamental rights of about half of the applicants had been violated could lead to the broader conclusion that the procedure is overall inadequate. This is not, however, the path the ECtHR decided to take.

The "enemy combatant" and the "dangerous alien" are two different notions. Yet, both ensued from the same logic: creating a group of persons who can be detained based on their

[554] *Id.*, § 131.

[555] *A. and Others v. the United Kingdom* [GC], no. 3455/05, ECHR 2009.

assumed dangerousness without proper judicial review. Confronted with this new genre of detention, the U.S. Supreme Court and the ECtHR adopted similar solutions. If they insisted on the necessity of judicial review of the dangerousness or classification as enemy combatant, in the same movement they admitted the basic principle that the guarantees of due process could be altered, "tailored", so as to alleviate the burden on governments.

d. Deprivation of liberty and lack of access to courts during the pandemic

The Covid-19 pandemic brought its own set of issues regarding deprivation of liberty from the general lockdowns adopted in several countries to the high contamination risk in jails and immigration detention centers due to overcrowding or insufficient protective measures. From the point of view of the separation of powers and role of the judiciary as guarantor of individual freedom, one issue stands out. The pandemic impaired the proper administration of justice, causing important delays in proceedings. These delays had particularly adverse effects for those in pretrial detention or migrants detained awaiting deportation. In the U.S., these questions were dealt with at the state level. Several state apex courts delivered judgments on the matter, but the Supreme Court did not. However, the ECtHR and the French Council did.

i. ECHR

In *Fenech v. Malta* (dec.), the criminal proceedings against the applicants had been suspended and therefore his detention prolonged *sine die*.[556] The Court found that "the purposes of bringing him before the competent legal authority" had remained irrespective of the suspension of the proceedings. The applicant had made four bail requests in five months, all of

[556] *Fenech v. Malta* (dec.), no. 19090/20, 23 March 2021.

which had been speedily and thoroughly examined by the courts, including the possibility to use alternatives to the detention.

The Court noted that the "temporary suspension was due to the exceptional circumstances surrounding a global pandemic which, as held by the Constitutional Court, justified such lawful measures in the interest of public health, as well as that of the applicant." In these circumstances, the authorities had complied with their duty of special diligence. In finding that the claim under Article 5 § 3 was manifestly ill-founded, the Court paid special attention to regular and active judicial review of the detention as well as the conclusion of the Maltese Constitutional Court.[557] Thereby, the ECtHR confirmed the importance of judicial review at the domestic level.

It should be noted that the case was not examined in the context of an Article 15 derogation, which did not prevent the Court from taking into account the special circumstances surrounding a case. However, if "the exceptional circumstances surrounding a global pandemic" can justify a three-months prolongation of pretrial detention outside any declaration of derogation, one might wonder what difference a derogation would make. It might be assumed that Article 15 would be used in case of longer pretrial detention or in the absence of judicial review. Or, as argued by Dzehtsiarou, would it make no difference?[558] Either way, the risk is that the analysis of the need for emergency measures would be diluted in the proportionality assessment of the measure.[559]

[557] The ECtHR also found that Covid-19 could explain a similar 3-months delay in the context of an appeal in extradition proceedings but not the overall length of proceedings – more than a year – before a hearing took place, especially since the applicant had remained in detention during that time. *Khokhlov v. Cyprus*, no. 53114/20, §§ 79-80, 13 June 2023.

[558] See above, p. 60; Dzehtsiarou, "Article 15 Derogations."

[559] See Chapter 3.

ii. France

To cope with this situation, on 25 March 2020, the French government adopted an ordinance[560] which provided for the automatic prolongation of pretrial detention and house arrest under electronic surveillance for several months – two to six months depending on the severity of the alleged offense. The said ordinance was adopted based on the Health Emergency Statute of 23 March 2020. The automatic prolongation of pretrial detention was referred successively to the Council of State, the Constitutional Council, and the ECtHR.

On 3 April 2020, following an emergency procedure, the Council of State was first to adjudicate the matter. It found that the ordinance remained within the boundaries set by the legislative habilitation – the health emergency law.[561] Since the ordinance merely extended the duration of detention before judicial hearing, in view of the circumstances, the infringement on fundamental freedoms was not manifestly illegal. As expected, the Council of State only reviewed the legality of the ordinance. The constitutionality review is the exclusive competence of the Constitutional Council. Conversely, it is within the attributions of the Council of State to check the conventionality of an administrative act. Yet, the ECHR was conspicuously absent from the judgment despite the petitioners explicitly relying on the Convention.

On 11 May 2020, the ordinance was amended so that only pretrial detentions ending between 25 March and 11 May were automatically prolonged. Furthermore, according to the amended ordinance, detentions which had been automatically prolonged for six months should be reviewed by a judge within three months following the prolongation.

[560] Ordinance no. 2020-303, 25 March 2020, portant adaptation de règles de procédure pénale.

[561] Council of State, 3 April 2020, no. 439877.

The automatic prolongation of pretrial detention was also contested in front of the judicial judge, the guardian of individual liberty. The Court of Cassation (apex court of the judicial branch) referred a constitutionality question to the Constitutional Council.[562] The Council acknowledged the constitutional objective of the measure. However, and despite the amendments made to the ordinance, the Council considered that the objective could not justify the withdrawal of automatic judicial review of the detention. Following the accommodation logic encountered in other contexts, the Council added that "the intervention of the judicial judge could, if necessary, be the subject of procedural adjustments." In their current format, however, the contested measures were contrary to Article 66 of the Constitution.

This conclusion is important to maintain the central role of the judicial judge as guardian of individual freedom. Nonetheless, two important caveats need mentioning. First, the provisions declared unconstitutional were no longer applicable at the time the Council delivered its decision. Second, the Council considered that reversing the prolongations which had already taken place would be manifestly excessive. Therefore, the Council specified that these measures could not be contested based on their unconstitutionality. It follows that, here again, the decision asserted an important principle which might guide decisions and law making during future emergencies. However, it was little to no help for those already affected by the unconstitutional provision.[563]

[562] Constitutional Council, no. 2020-878/879 QPC, 29 January 2021, M. Ion Andronie R. et autre [Prolongation de plein droit des détentions provisoires dans un contexte d'urgence sanitaire]

[563] Several applications before the ECtHR claiming various violations of the Convention because of the automatic prolongation of pretrial detention were communicated to the French government in August 2021. *Ait Oufella v. France* and Others, no. 51860/20 et al., Communicated Case, 24 August 2021.

The ECtHR and French judgments stand in contrast with those on judicial review of detention in security emergency cases. Only the French Constitutional Council found the automatic prolongation of pretrial detention to breach fundamental rights. Even then, this finding concerned a limited number of detainees, and the judgement was deprived of direct consequences for them. Several reasons might explain why the Courts showed more leniency with regards to the pandemic measures.

First, the prolongation was rather limited. All three courts found a prolongation of three months not to be excessive. Furthermore, contrary to terrorism cases, the detention was not *ab initio* grounded in emergency powers, which, in the eyes of judges, might lessen the risk of misuse. The (initial) intention could not have been to avoid judicial review. Moreover, the detention had already been reviewed by a judge prior to the extension due to Covid. The deprivation of liberty was neither extrajudicial nor secret. In the case of the pandemic, the extension of detention appeared to be the byproduct of emergency policies trying to cope with the sudden dysfunction of the judicial system. The fact that the measure was applied in an indiscriminate manner and did not target specific groups or individuals supports this idea.

The abundance of cases demonstrates that deprivation of liberty is the primary domain of attack against judicial review during emergency. The assaults have been particularly severe during security emergencies when terrorism suspects were involved, ranging from the creation of parallel quasi-judicial systems to extrajudicial abduction and detention. In all jurisdictions, the apex courts refused to be benched. They presented an almost unanimous front, gradually reinforcing the standards of the right to access to court and pushing back against sub-part *ad hoc* review bodies. However, while defending the principle of judicial review, they compromised, accepting that procedural rules could be bent to satisfy security imperatives and

alleviate the burden on governments. Attempts to weaken judicial review have multiplied also in other domains bolstered by the proliferation of preventive measures.

3. Preventive measures out of the reach of the judiciary?

This subsection does not present a detailed account of the judicial review of preventive measures during emergencies. Rather, it aims to highlight the difficulties that such measures pose to the judiciary specifically because of their preventive nature. It first examines the challenges that preventive measures represent in terms of justiciability and admissibility rules as illustrated by (mass) surveillance and measures based on UN Resolutions. The particularity of French dual judiciary is then examined as the increasingly preventive regime shift the litigation from the judicial to the administrative branch. Finally, the subsection turns to situations in which, confronted with preventive measures, courts have sabotaged themselves thereby denying effective judicial review.

a. The role of justiciability and flexible admissibility rules

i. The surveillance dilemma: everyone and no one

Mass surveillance and the gathering of secret intelligence have become a stapple of national security policy. Usually, individuals under surveillance are not aware of it either because of the secret nature of the measure or, in the case of mass surveillance especially, because they do not know exactly when they themselves might be surveilled. These issues have created admissibility/standing difficulties for claimants to contest the measures in courts.

It is precisely a case related to secret surveillance which gave the ECtHR the opportunity to expand on its interpretation of "victim". To qualify as victim[564] and therefore lodge an application with the Court, "an individual applicant should claim to have been actually affected" by the alleged violation.[565] In principle, an *actio popularis* is not admissible.

In *Klass v. Germany*, the applicants were complaining of the possibility that they would be subjected to surveillance without being informed. The Court was very explicit about the risk of a narrow interpretation of victim in such cases. If applicants were barred from accessing the Commission due to the very secret nature of the measure, the effectiveness of the Convention would be hindered. Therefore, the Court accepted that "an individual may, under certain conditions, claim to be the victim of a violation occasioned by the mere existence of secret measures or of legislation permitting secret measures, without having to allege that such measures were in fact applied to him."[566] In matters of surveillance, the efficacy of the Convention and judicial guarantees justified relaxing the admissibility criteria.

Following *Klass*, two parallel lines of case law developed. One kept true to this open approach whereas the other followed more qualified standards and required that the applicants demonstrate a "reasonable likelihood" that they would be personally affected.[567] The Grand Chamber harmonized the approach in *Roman Zakharov*. Following *Kennedy*[568] where the goal of flexible standards was emphasized – namely "to ensure that the secrecy of such measures

[564] Article 34 ECHR.

[565] *Klass and Others v. Germany*, 6 September 1978, § 33, Series A no. 28.

[566] *Id.*, § 34.

[567] See for example *Halford v. the United Kingdom*, 25 June 1997, Reports of Judgments and Decisions 1997-III. For a comprehensive summary of the caselaw on this issue, see *Roman Zakharov v. Russia* [GC], no. 47143/06, §§ 164-169, ECHR 2015.

[568] *Kennedy v. the United Kingdom*, no. 26839/05, 18 May 2010.

did not result in the measures being effectively unchallengeable and outside the supervision of the national judicial authorities and the Court" – the Court clarified the circumstances under which it might be acceptable to conduct an examination *in abstracto*.

First, whether according to the scope of the legislation the applicant can possibly be affected by it. Second, whether remedies at the domestic level are available and effective. It should be noted that in case such remedies exist, the Court will not revert to its traditional approach of "victim". However, the applicant would have to show that, "due to his personal situation, he is potentially at risk of being subjected to such measures."[569] The consolidation of the case law was then confirmed in *Centrum för rättvisa v. Sweden* [GC][570] and *Big Brother Watch and Others v. the United Kingdom* [GC].[571] Confronted with the risk that surveillance measures could be unchallengeable, the ECtHR resolutely opted for a flexible interpretation of its admissibility rules.

Before the harmonization of the ECtHR case law, the strictest approach would only require a "reasonable likelihood". This exact terminology features in the U.S. Supreme Court cases on surveillance, yet with an opposite outcome. In 2008, the Foreign Intelligence Surveillance Act (FISA) was amended to authorize "the surveillance of individuals who are not "United States persons" and are reasonably believed to be located outside the United States".[572]

[569] *Roman Zakharov*, § 171.

[570] *Centrum för rättvisa v. Sweden* [GC], no. 35252/08, §§ 166-177, 25 May 2021.

[571] *Big Brother Watch and Others v. the United Kingdom* [GC], nos. 58170/13 and 2 others, §§ 467-472, 25 May 2021.

[572] Section 702 of the Foreign Intelligence Surveillance Act of 1978 (FISA),50 U. S. C. §1881a.

The respondents in *Clapper*[573] were individuals and legal persons engaging with individuals who, they argued, were likely to be targeted by such surveillance. As a result, their communications would also be intercepted. The Supreme Court dismissed the case based on the respondents' lack of standing. The Court recalled that "an injury must be 'concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling.' […] '[T]hreatened injury must be 'certainly impending' to constitute injury in fact,' and '[a]llegations of possible future injury' are not sufficient."

The respondents asserted that there was an "objectively reasonable likelihood" that their communications with their foreign contacts would be intercepted. The Court dismissed this argument as it found this standard inconsistent with the "threatened injury requirement". Rather, the Court found that this likelihood relied on a chain of speculations starting with the targeting practices of the government all the way to whether the dedicated court would allow the surveillance and finally whether the respondents' communication would be among those intercepted. In the face of such uncertainty, the court was "reluctant to endorse standing theories that require guesswork as to how independent decisionmakers will exercise their judgment." What the Court pointed to with this argument is the secrecy which surrounds the surveillance measure and the incapacity for the respondents to ascertain whether or not they are or will be subjected to it. These were key aspects leading the ECtHR to depart from its usual standards.

The respondents also argued that they were suffering ongoing injury because of the costly and burdensome measures they had to take to shield their communications. For the Supreme Court, these costs were "simply the product of their fear of surveillance" which was

[573] *Clapper v. Amnesty International*, 568 U.S. 398 (2013).

insufficient to create standing. Again, this argument stands in stark contrast to the reasoning of the ECtHR for whom the mere existence of such legislation "entailed a threat of surveillance [which] affected freedom of communication between users of the telecommunications services and thereby amounted in itself to an interference with the exercise of the applicants' rights […], irrespective of any measures actually taken against them".[574]

Finally, the respondents claimed that if they did not have standing, the legislation would be unchallengeable. Whereas this argument is the cornerstone of the ECtHR's admissibility doctrine with regard to "victim", the Supreme Court plainly stated that this assumption "is not a reason to find standing."[575] In this split judgment, the four dissenting judges argued for a more flexible approach to standing, closer to that of the ECtHR. They recalled that "'imminence' is concededly a somewhat elastic concept," and found that "there is a very high likelihood" that the government would intercept the relevant communications.[576]

In France, thanks to fairly open standing rules, access to court is not the main obstacle on claimants' road to judicial review of surveillance measures. In particular, such measures are regularly contested by non-governmental organizations.[577] For a claim made by an organization to be admissible (*intérêt à agir*), it is enough that the organization has legal capacity and that the object of the claim is related to the goals of the association as declared in its statutes. The organization does not need to show that it is particularly nor concretely impacted by the

[574] *Roman Zakharov v. Russia* [GC], § 168.

[575] The Supreme Court went on to argue its finding actually did not insulate the relevant legislation from judicial review. Yet, this point comes as a second argument, not a rebuttal of its initial statement.

[576] *Clapper*, Justice Breyer dissenting.

[577] For example, non-governmental organizations were among the applicants / respondents in ECtHR, *Centrum för rättvisa v. Sweden* [GC] and *Big Brother Watch and Others v. the United Kingdom* [GC] as well as USSCt, *Clapper*.

measure. For example, the organization "La Quadrature du net" initiated important litigation in front of the Council of State which resulted in key judgments on mass surveillance during emergency[578] and the use of drones to monitor the population during the lockdown due to Covid outbreaks.[579]

As for the Constitutional Council, even though it cannot be directly accessed, it had the opportunity to rule on the constitutionality of mass surveillance measures thanks to several constitutionality questions referred by the Court of Cassation or the Council of State.[580] Several of the cases declared admissible by the ECtHR, Council of State and Constitutional Council resulted in declarations of unconventionality/illegality/unconstitutionality,[581] highlighting the risk that restrictive standing rules would allow illegal measures to remain in force, effectively unchallenged.

ii. Justiciability of measures based on UN Resolutions

Measures of mass surveillance became the epitome of the preventive state, generating a substantial body of case law often raising issues of justiciability. However, other preventive measures present intrinsic issues with regard to access to court. Freezing of assets and travel bans resulting from UN Security Council resolutions exemplify this problem. The ECtHR had the opportunity to rule on both issues. In *Al-Dulimi*,[582] the applicants' assets had been frozen then confiscated by Switzerland implementing United Nations Security Council's (UNSC)

[578] Council of State, no. 393099, 21 April 2021.

[579] Council of State, no. 446155, 22 September 2020.

[580] For example, Constitutional Council, no. 2021-976/977 QPC, 25 February 2022, (M. Habib A. et autre)

[581] Amongst them: ECtHR, *Centrum för rättvisa v. Sweden;* ECtHR, *Big Brother Watch and Others;* Council of State, no. 393099, 21 April 2021; Council of State, no. 446155, 22 September 2020 and Constitutional Council, no. 2021-976/977 QPC, 25 February 2022, (M. Habib A. et autre).

[582] *Al-Dulimi and Montana Management Inc. v. Switzerland* [GC], no. 5809/08, 21 June 2016.

resolutions. The ECtHR concluded that the applicants had not benefited from the guaranties of a fair trial, and in particular access to court, either at the UN or domestic level to ensure that the sanctions were not arbitrary. Accordingly, the Court found a violation of Article 6.

A key element of this case resided in the very nature of the obligations stemming from Article 6. The government argued that UNSC resolutions had primacy over all other international obligations except for *jus cogens* and refuted the applicants' claim that Article 6 was a norm of *jus cogens*. The Court agreed with the government on his last point. "The principle whereby a civil claim must be capable of being submitted to a judge ranks as one of the universally 'recognised' fundamental principles of law. Nevertheless, despite their importance, the Court does not consider these guarantees to be among the norms of *jus cogens* in the current state of international law".[583]

Judge Pinto de Albuquerque, joined by three other judges, authored a separate opinion in which he addressed the status of the right of access to a court in international law. He argued: "Article 15 of the Convention must be read in the light of the development of international humanitarian and criminal law, which warrants the upholding of the right of access to a court in criminal matters as a non-derogable right. Such a reading alone is compatible with the emergence of this right as an intransgressible norm of *jus cogens*."[584]

In *Nada*,[585] the applicant's freedom of movement was severely restricted due to a travel ban enacted based on several UN Security Council Resolutions. After reiterating that "the delisting procedure at United Nations level […] could not be regarded as an effective remedy"

[583] *Id.*, § 136, internal quotation marks omitted.

[584] *Id.*, Judge Pinto de Albuquerque's concurring opinion, § 35.

[585] *Nada v. Switzerland* [GC], no. 10593/08, ECHR 2012.

– a conclusion it had already reached in *Al-Dulimi* – the Court, referencing the *Kadi* judgment from the CJEC,[586] found that implementing a UNSC resolution based on Chapter VII was no reason not to provide an effective remedy. Therefore, it concluded that Switzerland had violated Article 13 (right to an effective remedy) in conjunction with Article 8.

In both cases, the ECtHR found a violation of the applicant's rights. However, these examples demonstrate how preventive measures – based on UNSC resolutions in these last instances – challenge the efficacy of the national judicial systems. In France, the dual structure of the judiciary adds an extra layer of complication to obtaining effective judicial review.

b. The effect of the preventive state on the French dual judiciary

In the French context, the issue might not be to access a court but to access the adequate court. The dual organization of the judiciary with a judicial and an administrative branch is not exclusive to France. However, in the context of the comparison at hand, it creates specific challenges in terms of judicial review and access to court. As the bulk of emergency measures are preventive in nature, they do not belong to the judicial police and criminal domain but are measures of administrative police.

Consequently, they ought to be contested in front of administrative, not judicial, courts. According to a 2018 study,[587] between November 2015 (declaration of the state of emergency) and November 2017 (when the state of emergency was officially lifted), ten thousand

[586] CJEC, joined cases C-402/05 P and C-415/05 P, Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities.

[587] Stéphanie Hennette-Vauchez et al., "Ce que le contentieux administratif révèle de l'état d'urgence," *Cultures & Conflits*, no. 112 (December 31, 2018): 35–74, https://doi.org/10.4000/conflits.20546.

administrative measures were adopted.[588] During the first fourteen months of this period, administrative courts delivered 775 judgments and ordinances, including 47 from the Council of State. These numbers, already high, increased dramatically during the pandemic. During the first year of the state of health emergency – between 17 March 2020 and 17 March 2021 – the Council dealt with 647 emergency procedures.[589]

According to the 1958 Constitution, the judicial authority is the guardian of the freedom of the individual. Administrative courts are not part of the "Judicial Authority" in this context. This is not to say that administrative judges do not protect fundamental rights. However, the various functions of the Council of State – the apex administrative court – as well as its composition can raise legitimate suspicions about its independence and therefore, the proper fulfilment of its role, especially during emergencies.

Despite these structural issues, the ECtHR confirmed the adequacy of the Council of State for the purpose of Article 6 guarantees.[590] Although "the particular status of the Conseil d'Etat among French institutions connects it organically to the executive […], this situation is not sufficient to justify the argument that the Conseil d'Etat lacks independence."[591] The Court recently confirmed this position with regard to preventive measures in a context of emergency. In *Pagerie*, the applicant was placed under house arrest for eighteen months during the 2015-2017 state of emergency. He complained specifically that disputes about this type of measures

[588] These measures included 4,444 administrative searches, 754 house arrest orders, 656 residence bans, 59 protection and security zones (ZPS), 39 bans on demonstrations, 29 closure of rooms or drinking establishments, 6 weapon surrenders and 5,229 orders authorizing identity checks, searches of luggage and vehicles.

[589] "Un an de recours en justice liés à la covid-19. Retour en chiffres sur l'activité du Conseil d'État, juge de l'urgence et des libertés" at https://www.conseil-etat.fr/actualites/covid-19-retour-en-chiffres-sur-un-an-de-recours-devant-le-conseil-d-etat-juge-de-l-urgence-et-des-libertes

[590] *Kress v. France* [GC], no. 39594/98, § 31, ECHR 2001-VI.

[591] *Sacilor-Lormines v. France*, no. 65411/01, § 66, ECHR 2006-XIII.

were assigned to the administrative courts. The ECtHR reiterated that it was not its task to "assess these rules of jurisdictional organization" and that the measures were subject to effective judicial review, offering adequate procedural guarantees.[592]

Unopposed by the ECtHR, the shift towards the administrative courts was not only acknowledged but somewhat encouraged by the Constitutional Council, even after the state of emergency had officially ended. In 2018, the Constitutional Council was asked to review the constitutionality of the law transposing into the normal legal order measures which were initially enacted under the state of emergency.[593] Generally accepting that the measures served "the objective of combating terrorism, which is part of the objective of constitutional value of preventing breaches of public order", the Council embarked on a proportionality test in which review by the administrative judge featured heavily as a main guarantee.

The possibility to close places of worship was considered constitutional because, among others, the measure could be contested in front of the Council of State following an emergency procedure during which the measure is suspended until the Council delivers its judgment.[594] On the other hand, the Constitutional Council expressed reserves concerning the prohibition to meet with certain persons. First, it found that giving the administrative courts up to four months to review the measure was manifestly unbalanced compared to the severity of the interference with fundamental rights. The right to an effective judicial remedy imposed shorter delays. Second, the emergency procedure was only possible in case of manifestly illegal and severe interferences. As a result, there was a risk that the measures could be renewed after six months

[592] *Pagerie v. France*, no. 24203/16, § 190, 19 January 2023.

[593] Constitutional Council, no. 2017-695 QPC, 29 March 2018, M. Rouchdi B. et autre [Mesures administratives de lutte contre le terrorisme].

[594] *Id.*, § 42.

without prior involvement of a judge. This mechanism was therefore found contrary to the Constitution.[595] The Constitutional Council required a faster and more substantial involvement of the Council of State.

Furthermore, the Constitutional Council operates a distinction between restriction and deprivation of liberty. A restriction is not considered a deprivation of liberty if it lasts less than 12 hours per day.[596] According to Article 66 of the Constitution, measures considered deprivation of liberty require the involvement of the judicial judge. Mere restrictions, on the other hand, can be reviewed by administrative courts.[597] This distinction is in line with the case law of the ECtHR.[598] However, it leads to the further fragmentation of the litigation and potentially dissonant case law. Despite the endorsement of both the ECtHR and the Constitutional Council, the specificities of the Council of State make it vulnerable from a separation of power perspective, even more so during emergencies. Some of the ensuing challenges are further developed in the following section.

c. Self-sabotaging courts

Faced with the multiplication of preventive measures, uncertain facts and the risk of entering the realm of public policies, courts have on occasions sidelined themselves, putting hurdles in their own path or not making full – and appropriate – use of the powers they had.

[595] *Id.m,* §§ 53-54.

[596] Decision no. 2015-527 QPC, 22 December 2015, M. Cédric D. [Assignations à résidence dans le cadre de l'état d'urgence], cons. 6.

[597] See for example CE, Assemblée générale, Section de l'intérieur, Avis sur la constitutionnalité et la compatibilité avec les engagements internationaux de la France de certaines mesures de prévention du risque de terrorisme, n° 390867, 17 décembre 2015 and Décision n° 2020-800 DC du 11 mai 2020, Loi prorogeant l'état d'urgence sanitaire et complétant ses dispositions.

[598] Greene, "Derogating from the European Convention on Human Rights in Response to the Coronavirus Pandemic."

The ECtHR took a rather clear stance against such practices at the domestic level. The partial capture of the judiciary after the 2016 attempted coup in Turkey gave rise to a series of judgments under Article 6. In *Pişkin*, the Court concluded that "whereas the domestic courts theoretically held full jurisdiction to determine the dispute between the applicant and the administrative authorities, they deprived themselves of jurisdiction to examine all questions of fact and law relevant to the dispute before them, as required by Article 6 § 1". "[T]herefore […] the applicant was not actually heard by the domestic courts, which thus failed to guarantee his right to a fair trial".[599]

In *Selahattin Demirtaş*, the Court had identified the partial capture of the judiciary.[600] It further noted regarding the lengthy pre-trial detention of an opposition parliamentarian that "[t]he reports and opinions by international observers, in particular the comments by the Commissioner for Human Rights, indicate that the tense political climate in Turkey during recent years has created an environment capable of influencing certain decisions by the national courts, especially during the state of emergency, when hundreds of judges were dismissed, and especially in relation to criminal proceedings instituted against dissenters."[601]

This assessment found further echo in *Yüksel*.[602] This case is at the crossroads between surveillance, emergency and judicial surrender yet not quite fitting into any of these categories. Following the attempted coup in 2016, Turkish intelligence infiltrated an encrypted messaging application called ByLock which they claimed was designed and used by those fomenting the coup. The applicant's use of Bylock was decisive in her conviction for membership in an armed

[599] *Pişkin v. Turkey*, no. 33399/18, §§ 150-151, 15 December 2020.

[600] See above, p. 139.

[601] *Selahattin Demirtaş v. Turkey (no. 2)* [GC], no. 14305/17, § 434, 22 December 2020.

[602] *Yüksel Yalçınkaya v. Türkiye* [GC], no. 15669/20, 26 September 2023.

terrorist organization. The Court found the derogation under Article 15 to be irrelevant. Under Article 46, it noted that the violations of Articles 6 and 7 resulted from the approach of the domestic courts, according to which anyone using Bylock could be convicted of terrorism on that sole basis. At the time the judgment was delivered, eight thousands similar applications were pending in front of the Court, demonstrating the systematic aspect of the violation. Therefore, the ECtHR "required" that domestic courts make the necessary changes.[603]

In France, it is during the pandemic that the French Constitutional Council issued one of its most surprising and questionable decisions, undermining its own authority in several ways. On 18 March 2020, in view of the functioning difficulties created by Covid-19, the government introduced a bill aiming to increase the delay within which the Constitutional Council had to rule on priority questions. According to the priority question procedure, the Court of Cassation or Council of State have three months to decide whether to refer the question to the Constitutional Council or not. Then the Constitutional Council has another three months to rule on the question. The bill suspended all these deadlines until 30 June 2020. It was adopted the day after its introduction in Parliament in violation of the mandatory minimum of two weeks between the introduction and the vote.[604] It was subsequently referred to the Council for constitutionality review by the Prime Minister.

In a demonstration of extreme conciseness, the Constitutional Council dismissed the procedural and substantive challenges. First, it considered that "[g]iven the particular circumstances of the case, there is no reason to judge that this organic law was adopted in violation of the rules of procedure provided for in Article 46 of the Constitution." Second, the

[603] *Id.*, § 418.

[604] Article 46 of the Constitution.

statute merely suspended the delays without questioning the existence of the remedy nor preventing the Council from issuing decisions.[605] With no further justification, the law was therefore declared constitutional.

This decision is problematic for various reasons. On the one hand, the Council relied on "the particular circumstances of the case", not providing any additional qualifications or explanation, to ignore a very clear procedural rule inscribed in the Constitution. This rule is not purely formalistic. It is meant to ensure a minimum democratic engagement with the legislative project introduced by the executive. In effect, it is the quashing of any potential democratic debate on the importance of constitutional review during emergency that the Constitutional Council validated. On the other hand, the suspension of the delays meant that individuals had no guarantee that their constitutionality claims would be heard before 30 December 2020. Since statutes are not systematically checked *a piori*, this measure which the Constitutional Council validated almost casually meant that the state of emergency could be implemented for nine months without any constitutional review.

Apex courts have pushed back times and times again against active efforts of the political branches to escape judicial review, in particular when core rights such as the right to individual liberty – often linked to the risk of ill-treatments – were at stake. However, the idea that judicial review hinders the effective management of "crises" and is therefore inappropriate during emergency still affects the judges' reasonings. Although the importance of judicial review, both with regards to the separation of powers and the protection of fundamental rights,

[605] Decision no. 2020-799 DC, 26 March 2020, §§ 3 and 5.

is regularly reiterated in broad and forceful terms, it often comes out undermined by altered procedural rules or by allowing preventive measures to be subjected to a less strict scrutiny.

Eventually, courts do not seem ready to maintain during emergency the standards valid in normal times and which make the judiciary the ultimate counter-power. If they push back against clear and deliberate attempts to sideline them, they are not prepared to resist the more diffused dynamics of emergency such as concentration of powers or preventiveness, which effectively undermine them. Paradoxically, this approach to emergency, embracing the role of the judiciary as defined in the classic emergency paradigm – rather deferent and self-limiting, equally transpires when these courts step outside the usual adjudication frame and, deliberately or not, endeavor to assist the political branches in the formulation of the emergency measures.

C. Beyond deference or judicial activism: courts as co-producers of emergency norms

States of emergency and in particular the development of the preventive state are domains of legislative creativity where the legislative and executive branches together develop and adopt new norms. Yet the judiciary is not left entirely outside this process. In 1928, Kelsen formulated the idea that constitutional courts are "negative legislators".[606] Then, mirroring Kelsen's notion, the idea of courts as positive legislators emerged. This idea refers both to situations where judges step in to fill a legislative gap but also to particular techniques to which they resort in order to fine-tune norms enacted by the other branches. "This role is performed by the courts, not only acting as the traditional "negative" legislator but also as a jurisdictional

[606] Hans Kelsen, "La Garantie Juridictionnelle de La Constitution (La Justice Constitutionnelle)," *Revue Du Droit Public et de La Science Politique En France et à l'étranger*, 1928, 197–257.

organ of the State designed to complement or assist legislative organs in their main function of establishing legal rules", says Brewer-Carías.[607]

Judges do not merely intervene at the end of the legislative process, striking down unconstitutional/illegal provisions. Interpretation in itself is always a creative activity. Choosing to interpret a statute in a way that would make it compatible with the constitution can easily be construed as a normative endeavor. Furthermore, judicial review comes into play from the very beginning of the legislative process because the perspective of a norm being struck down in the future constraints the legislators in the early stages already. For the French Council of State, the normative function is an important element of the structure and identity of the institution which, as consultative body, delivers advisory opinions on bills prior to their adoption.

This dynamic is not specific to emergency legislation, but it takes a particular color during "crises" when, at the same time, courts tend to adopt a more deferential position towards the political branches while being criticized for their democratic deficit. In different ways and to various degrees, all four courts took on this positive legislator role during emergencies. The first part of this section reviews some concrete examples where they actively took part, deliberately or not, in the creation of emergency norms. The second part examines how some petitioners have tried to use courts as positive legislators to further restrict fundamental rights, thereby reversing the assumed role of the judiciary.

[607] Allan R. Brewer-Carías, ed., "Constitutional Courts' Interference with the Legislator on Existing Legislation," in *Constitutional Courts as Positive Legislators: A Comparative Law Study* (Cambridge: Cambridge University Press, 2011), 73–124, https://doi.org/10.1017/CBO9780511994760.005.

1. When the judiciary goes from counterpower to positive legislator

a. ECtHR

Brannigan and McBride[608] was part of a succession of cases concerning the detention and ill-treatment of suspected terrorists in the context of the violence in Ireland and Northern Ireland. As acknowledged by the Court, "[t]he notice of derogation [involved in this case] was lodged soon after the Court had found the United Kingdom to be in breach of Article 5 § 3 in Brogan and Others." The Court found the derogation valid, and that the applicant could not complain of a violation of Article 5 § 3.

Judge Pettiti, dissenting, raised a point which would feature just three years later in the reasoning of the Court. He said: "The member States of the Council of Europe which went through serious periods of terrorism (for example Italy) confronted such terrorism while retaining judicial involvement in extended police custody. It would be possible to find in comparative law and in criminal procedure examples of judicial mechanisms protecting the use by the police of "informers" who have to remain anonymous. In camera hearings can be envisaged."[609]

In *Chahal*,[610] a similar issue resurfaced, this time in the context of immigration law. The Court reviewed the situation of aliens who could not be deported because of the risk of treatments contrary to Article 3 in the country of destination but who were kept in detention because considered a threat to national security. The Court found a violation of Article 5 § 4 because of the procedural shortcomings of the body reviewing the detention. Indeed, the Court

[608] *Brannigan and McBride v. the United Kingdom*, 26 May 1993, Series A no. 258-B.

[609] *Id.*, Judge Pettiti's dissenting opinion, p. 33.

[610] *Chahal v. the United Kingdom*, 15 November 1996, Reports of Judgments and Decisions 1996-V.

concluded that detainees had a right to effective judicial review although procedural adjustments might be necessary to accommodate the use of confidential material. In this regard, "[t]he Court attaches significance to the fact that […] in Canada a more effective form of judicial control has been developed in cases of this type. This example illustrates that there are techniques which can be employed which both accommodate legitimate security concerns about the nature and sources of intelligence information and yet accord the individual a substantial measure of procedural justice."[611] The Canadian procedure was succinctly explained in the reasoning on Article 13.[612]

This reference to the Canadian system was not indispensable to the Court's reasoning nor did it bear normative consequences in that the Court did not require member states to adopt similar procedures. Nonetheless, as argued by Jenkins, "something like the *Chahal dicta* might also be misconstrued as selective and authoritative". This "can then lead to a mistaken belief that a court has "green-lit" or "rights-proofed" a particular foreign legal solution—a false assumption made by the British government about the *Chahal dicta*, which negatively impacted subsequent policy choices and legislative responses."[613]

Jenkins argues that following *Chahal* and then 9/11, the United Kingdom adopted the system of special advocate that the ECtHR had pointed to. However, the description of the procedure in *Chahal* omitted some of the guarantees in place in Canada. In addition, the transplant in the UK with little regard for the national legal context created further procedural

[611] *Id.*, § 131.

[612] *Id.*, § 144.

[613] David Jenkins, "There and Back Again: The Strange Journey of Special Advocates and Comparative Law Methodology," *Columbia Human Rights Law Review* 42, no. 2 (January 2011): 297.

deficiencies, which the Court later noted in *A. and Others*,[614] where it found a violation of Article 5 § 4 with regards to some applicants (but not all).

Eventually, for Jenkins, "in *Chahal*, the ECHR failed to anticipate that at some point and in some way the British government might, in a sense, "abuse" its suggestion of special advocates in wholly foreseeable ways".[615] The ECtHR's "*dicta* were too brief, too lacking in explication, yet too sweeping in potential application to warn the United Kingdom or other Council of Europe States against uncritical and potentially problematic reliance upon them, even in the pre-9/11 security environment."[616]

b. France

In France, accepting that courts can play a role as positive legislators was complicated by a long-standing conception that judges are mere "mouthpieces of the law".[617] The supremacy of statutes as the expression of the will of the people and a certain mistrust towards judges going back to the monarchy presented further difficulties.[618] However, neither the Council of State nor the Constitutional Council are technically part of the judiciary and the functions and prerogatives assigned to them do not fit squarely with this general representation of suspicion towards judges. If the Constitutional Council's prerogatives under the Fifth Republic were originally very limited, the genesis and evolution of the Council of State made it into a very

[614] *A. and Others v. the United Kingdom* [GC], no. 3455/05, ECHR 2009.

[615] Jenkins, "There and Back Again," 305.

[616] Jenkins, 305.

[617] Montesquieu, *The Spirit of Laws*, Revised edition (Amherst, N.Y: Prometheus, 2002) Bk 11, Chapt. VI.

[618] Michel Troper, "Constitutional Law," in *Introduction to French Law*, ed. E. Picard and G. Berman (The Hague: Wolters Kluwer Law & Business, 2008), 8.

powerful institution which intervenes in one way or another in the shaping of most pieces of legislation.

i. The Council of State

During the Covid-19 pandemic, the Council of State became unusually communicative, attempting to establish its position as protector of fundamental rights.[619] From October 2020 until June 2021, it organized a series of conferences on the state of emergency, the first iteration of which was titled "state of emergency: what it is for?". The tone and approach adopted by the Council was criticized by some academics as reflecting the posture of a government's spokesperson or law-making body rather than that of a judicial body.[620] If the sudden communicativeness of the Council is surprising, its discourse is not.

The Council after all is deeply connected to all branches of the State[621] and one of the most important consultative bodies for both the government and the parliament. The *Sacilor-Lormines*[622] case is representative of this situation where a member of the Council who had taken part in the deliberations on a case was nominated one month later as Secretary general of a Ministry which had clear interests in the Council's decision. Although the ECtHR considered

[619] Stéphanie Douteaud, "Quand l'état d'urgence sanitaire bouscule la communication au Conseil d'État et au Conseil constitutionnel," *JusPoliticum blog* (blog), May 11, 2020, http://blog.juspoliticum.com/2020/05/11/quand-letat-durgence-sanitaire-bouscule-la-communication-au-conseil-detat-et-au-conseil-constitutionnel-par-stephanie-douteaud/.

[620] See for example, [wébinaire alternatif] « Les états d'urgence : le rôle du Conseil d'Etat dans la protection des libertés », Séminaire n°1 – « Etats d'urgence et Conseil d'Etat : contre-pouvoir ou co-producteur ? », 14 octobre 2020.

[621] Bruno Latour, *The Making of Law: An Ethnography of the Conseil d'Etat*, 1st edition (Cambridge, UK ; Malden, MA: Polity, 2009).

[622] *Sacilor-Lormines v. France*, no. 65411/01, §§ 64-69, ECHR 2006-XIII.

that the status of members of the Council presented enough guarantees of independence, in this specific case, it found a violation of Article 6 § 1.

All legislative projects – that is bills introduced by the government – must first be referred to the Council. The government can then present to parliament its own text, or the one amended by the Council. If a third version is drafted, it must go through the consultative procedure again. Since 2008, both chambers of the parliament also have the possibility to submit bills to the Council's opinion.[623] In the exercise of its consultative function, the Council checks the quality of the text as well as its compliance with national and international norms, including the Constitution. The advisory opinions of the Council do not have the force of *res judicata*.

The consultative and judicial sections within the Council are supposedly separated, also in terms of personnel. In *Sacilor-Lormines*, the ECtHR also examined the issues which the dual function of the Council could raise in terms of independence and impartiality. Having regard to the decisions delivered in the consultative and judicial procedures, the composition of both panels and the legal issues in question in each procedure, the Court concluded that "the consecutive exercise by the Conseil d'Etat of judicial and administrative functions has not, in the present case, entailed a violation of Article 6 § 1".[624] If the Court was satisfied in this case with the separation within the Council, it remains that both functions, consultative and judicial, are performed by the same institution which is also deeply connected with the entire state apparatus. Making it the holder of the "administrative science and conscience", the "guardian

[623] Article 39 of the Constitution.

[624] *Sacilor-Lormines*, §§ 70-74.

of the state's identity" or the "institution that is one with the state". It is therefore not surprising that "parliamentarians often rely on the assessment of the Council of State".[625]

Opinion no. 390867 of 17 December 2015 reflects this consultative and almost supporting function where the government, before even drafting a proposal, asked for the opinion of the Council on the feasibility of several measures restricting individual liberty to various degrees.[626] One month earlier, just a few days after the terrorist attacks in the Parisian area, the Council issued an opinion on the state of emergency statute. Overall, the Council found that the bill fulfilled the criteria of necessity and proportionality as applied in the context of emergency and made very few amendments.

However, one of these changes went far beyond a quality and legality check and instead entered the very core of the legislative process. The bill introduced the possibility to dissolve organizations if certain cumulative conditions were met. The Council removed one of these conditions, thereby making it easier for the authorities to impose the measure. In the initial draft, a group could only be dissolved if some of its members or contacts were under house arrest. The Council removed this condition as it considered that "the dangerousness of a group is not necessarily linked to the presence among its members of a person under house arrest".[627] Assessing the causal relation between conditions of application and implementation of a measure is not unusual for a court. Here, however, the link did not appear far-fetched but of the kind the appreciation of which is usually left for the legislator to decide. As is often the case,

[625] Hennette-Vauchez, "La fabrique législative de l'état d'urgence," 21.

[626] CE, Sect., no. 390867, 17 December 2015, Avis sur la constitutionnalité et la compatibilité avec les engagements internationaux de la France de certaines mesures de prévention du risque de terrorisme.

[627] CE, no. 390786, 17 November 2015, Avis sur un projet de loi prorogeant l'application de la loi no 55-385 du 3 avril 1955, § 11.

the Council's recommendation was followed by the Law Commission of the Assembly, which drastically increased the prospect of imposing a measure gravely infringing on fundamental rights.

Contrary to the image it tried to emphasize during the health emergency, the Council has not consistently decided in favor of a stronger protection of human rights. On the contrary, on occasions, it aggravated the emergency measures designed by the political branches. Yet, the Council of State makes its own review of emergency measures a condition of their legality thereby enhancing its own role in the legality cycle of administrative measures. It finds that the general formulation of a measure is proportionate if its individual implementation can be reviewed by the administrative judge.

In December 2015,[628] the Council found that an administrative measure imposing house arrest, in and off itself, constituted an infringement so severe and immediate that it satisfied the condition of urgency necessary to an emergency procedure. The parliament followed suit and in July 2016, the presumption was integrated in the 1955 law on the state of emergency.[629] Following the same logic, the Constitutional Council repeatedly conditioned the legality of infringement on fundamental freedoms on the possibility to petition administrative courts, and when applicable, the Council of State according to the emergency procedure.

[628] Council of State, Section, n° 395009, 11 December 2015.

[629] Art. 14-1 Law of 3 April 1955 on the state of emergency as amended by the fourth prorogation law of 21 July 2016: « the condition of urgency is presumed to be satisfied for the emergency judicial appeal brought against a measure of house arrest ». See also Hennette-Vauchez, "La fabrique législative de l'état d'urgence," 24.

ii. The Constitutional Council

One of the most important contributions of the Constitutional Council to emergency norms was endorsing as measures of administrative police an entire body of norms, which although preventive, presented strong repressive characteristics. This resulted in shifting the related litigation from the judicial to the administrative judge. But the role of the Council as positive legislator extends further. The Council holds a peculiar set of tools which confers it more latitude than its counterparts. When conducting *a priori* review – that is when a bill is referred to it before its promulgation – the Council might declare provisions constitutional or unconstitutional. It might also issue a reserve of interpretation, meaning that a provision is constitutional only if interpreted in a certain way or understood as containing certain limitations or guarantees.

In case the Council finds provisions unconstitutional, it might delay the effect of its decision – for example to allow the parliament to adopt an amended version of the law before the unconstitutional one becomes inapplicable – or specify that the unconstitutionality declaration does not affect the ongoing procedures.[630] Finally, the Council might rewrite certain provisions in order to bring them in line with the Constitution. These powers are extensive and precise, allowing the Council to shape both the effects of its decisions and the law like a sculptor with raw clay.

More unsettling, the Council transposed these powers in the context of *a posteriori* review. After an *a priori* review, the bill would normally go back to parliament for adoption. Thus, the legislative body retains the final saying on the content of the law, at least theoretically.

[630] See for example: Constitutional Council, no. 2020-878/879 QPC, 29 January 2021, M. Ion Andronie R. et autre [Prolongation de plein droit des détentions provisoires dans un contexte d'urgence sanitaire]

In the context of *a posteriori* review, however, a text possibly amputated and/or redrafted in part by the Council becomes the law with no further intervention of parliament. Yet, even then, the Council tends to make use of its unusual powers to salvage the law voted by the parliament – which is often the product of the executive. For Hennette-Vauchez, "[t]he use of modulation or extraordinary reasoning thus enables the Constitutional Council to initiate a process of collaboration with parliament which prevents any direct or frontal questioning of the latter's activity – and the preservation of its possibility of correcting or review its copy."[631]

Decision no. 2016-567/568 QPC exemplifies these techniques. A constitutionality question was referred to the Council regarding the search legal framework in effect between the declaration of the state of emergency and the amendment of the 1955 law a few days later. The Council issued a rather stark condemnation of the regime based on the absence of any conditions or guarantees imposed on searches which rendered the measure disproportionate. This unambiguous finding is surprising coming from an institution which would rather find unconstitutionalities at the margins only.

However, it should be noted that at the time of the decision, the legal regime had already been amended. The political branches had already "reviewed their copy". Thus, there was no need for the Council to postpone the effect of its decision. Nonetheless, the declaration of unconstitutionality affected searches implemented between 14 and 20 November 2015. Using a standard formulation,[632] the Council decided to "cover" the unconstitutionality of these searches. It argued that questioning the acts of criminal procedure undertaken based on the

[631] Hennette-Vauchez, "La fabrique législative de l'état d'urgence," 40–41.

[632] See for example: Constitutional Council, no. 2020-878/879 QPC, 29 January 2021, M. Ion Andronie R. et autre, § 15.

unconstitutional provision would bear manifestly excessive consequences. Therefore, it barred any claims relying on the said unconstitutionality.[633]

The case law of both French Councils reveals an antagonistic combination of deference and "appetite"[634] on the part of the judges. If they tend to preserve the emergency norms produced by the legislative branches from nullification, they also use the full extent of their powers to divert large blocks of litigation towards the administrative judge and intervene directly on the legislative text at various stages of the legislative process.

c. Supreme Court

As discussed in the previous section, the cases concerning the right of *habeas corpus* and due process of enemy combatants can be seen as a succession of hit-and-miss or a game of Battleship between the Supreme Court and the political branches. This dimension is important but does not encapsulate the whole dynamic which took place between the Court and the other powers in these cases.

Deciding Hamdi's right to due process and whether the judiciary should defer to the executive in the determination of the enemy combatant status, Justice O'Connor, writing for the plurality, ended the opinion of the Court in a peculiar way. She answered an unasked question, and brought in, apparently in an unsolicited way, the military tribunals alternative: "There remains the possibility that the standards we have articulated could be met by an

[633] Decision no. 2016-567/568 QPC, 23 September 2016, M. Georges F. et autre [Perquisitions administratives dans le cadre de l'état d'urgence II], §§ 10 and 11.

[634] Bertrand Mathieu, "FRANCE: Le Conseil Constitutionnel 'Législateur Positif.' Ou La Question Des Interventions Du Juge Constitutionnel Français Dans l'exercise de La Function Legislative," in *Constitutional Courts as Positive Legislators: A Comparative Law Study*, ed. Allan R. Brewer-Carías (Cambridge: Cambridge University Press, 2011), 471–96.

appropriately authorized and properly constituted military tribunal. Indeed, it is notable that military regulations already provide for such process in related instances, dictating that tribunals be made available to determine the status of enemy detainees who assert prisoner-of-war status under the Geneva Convention." She seemed to suggest that military tribunals were the one way to bypass federal courts.[635] The advisory dimension of such *obiter dicta* is very similar to that mentioned in relation to the ECtHR's *Chahal* judgment. It was also noted by Justice Souter who felt the need to explicitly withdraw any advisory intent on his part.[636]

Nonetheless, military commissions had already been established by presidential military order to try enemy combatants detained in Guantánamo and little over a year after *Hamdi*, the Detainee Treatment Act (2005) attempted to deprived federal courts of their jurisdiction to hear *habeas corpus* petitions from these detainees. These new arrangements were reviewed by the Supreme Court in *Hamdan.*[637] Concurring with the Court which found the military commissions illegally established, Justice Breyer added: "Congress has denied the President the legislative authority to create military commissions of the kind at issue here. Nothing prevents the President from returning to Congress to seek the authority he believes necessary."[638] One can only assume that the President was aware of this possibility before Justice Breyer suggested it. In any case, he did indeed return to Congress, which led to the adoption of the Military Commissions Act of 2006.[639]

[635] *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) at 31-32.

[636] *Id.*, Justice Souter dissenting at 16.

[637] *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

[638] *Id.*, Justice Breyer concurring at 1.

[639] Pub. L. No. 109-366, 120 Stat. 2600 (Oct. 17, 2006); Section 7 of which was then found unconstitutional by the Supreme Court in *Boumediene v. Bush* (2008).

It would be hasty to claim without a doubt that the ancillary points made by the Court, or individual Justices changed the development of the legal framework. However, it would be equally wrong to assume that these *dicta* are inconsequential. At the very least, they might be perceived by the other branches as a signal of what might be acceptable for the Court.

Whether misinterpreted as normative or as some weak form of pre-approval, *obiter dicta* such as those made by the Supreme Court and the ECtHR bear a strong potential for abuse and have been followed by the implementation of mechanisms with very minimal rights guarantees. Surely, they are not prejudging the ensuing measures. As a matter of fact, in both cases, the apex courts have found the said measures in violation of the Constitution or the Convention. Nonetheless, such *obiter dicta* are problematic in that they guide, whether in good faith or mistakenly, the following conduct and normative activity of the political branches, sometimes to an extent which judges apparently did not contemplate. Those affected can go back to court and have the new measures reviewed but the consequences of the first judgment might already be severe, especially in matters of emergency where measures tend to be very stringent and quickly implemented.

All four courts are involved in the legislative process in various ways and to various degrees – the French Councils more directly and often than the U.S. Supreme Court and the ECtHR. It transpires from the cases examined that, overall, this involvement tends towards an accommodation of the standards and protection of human rights to the benefit of the security interests put forward by the political branches. Rather than merely pronouncing violations or decisions of unconstitutionality, courts are going above and beyond to salvage the illegal texts or offer alternatives to the legislator as to how to impair fundamental rights while successfully passing judicial review. Petitioners appear to have noted and embraced this trend. During the

pandemic, an unusual type of claims appeared where petitioners asked judges to enjoin governments to adopt more restrictive measures.

2. A logic embraced by petitioners

It is not exceptional that individuals would ask courts to give general injunctions to governments in matters of public policy. However, the Covid-19 pandemic saw the growth of a different type of claims. Petitioners asked courts to enjoin governments to adopt more stringent measures to contain the spread of the disease. Claimants requested that judges order more restrictions on fundamental rights.

The *référés (liberté* or *suspension)* are emergency procedures created in 2000. It allows petitioners to obtain a decision quickly – within 48 hours – when one of their fundamental freedoms is affected by the administration or when there is a serious doubt about the legality of an administrative decision. Since 2000, the *référé* has become an important mechanism of judicial review. The Council of State identified a number of fundamental freedoms susceptible to triggering a *référé-liberté*, establishing itself as a protector of fundamental rights.

The emergency procedure acquired a particular significance during the states of emergency due to the sudden increase of administrative measures infringing on human rights. As previously mentioned, on several occasions, the Constitutional Council found measures unconstitutional because the *référé* was not provided as a guarantee.[640] The Council of State

[640] For example, Constitutional Council, no. 2017-695 QPC, 29 March 2018, M. Rouchdi B. et autre [Mesures administratives de lutte contre le terrorisme].

itself insisted on the importance of the *référé* when designing measures infringing on fundamental freedoms.[641]

However, in the early days of the pandemic, the Council received a *référé-liberté* petition of a new kind.[642] The petitioners – a union of doctors – did not claim that the action of the administration was impairing their freedom but instead complained of the state's inaction. Specifically, they argued that the lockdown decided by the government was not strict enough. They did not use the emergency procedure as a protection against the state but as a means of controlling the management of the "crisis" by the state.

De Gliniasty offers an interesting analysis of the ensuing ordinance.[643] Because it did not question the premise according to which stricter measures would be the best way to protect the right to life, the Council of State was forced into accepting the unity of the aims that are public order and protection of individual freedoms. It followed that the entire logic of the review of administrative measures was turned upside-down, which in turn, transformed the Council of State from being the protector of fundamental rights – at least in the logic of the *référé-liberté* – into the protector of public order.

In an attempt to solve this conundrum, the Council of State chose to appreciate the opportunity of the measures, making its review similar to a full remedy action rather than an emergency procedure. As result, in order to save the decree, the judges focused on administrative considerations (which they systematically tried to uphold) rather than the

[641] See for example, CE, Sect., no. 390867, 17 December 2015, Avis sur la constitutionnalité et la compatibilité avec les engagements internationaux de la France de certaines mesures de prévention du risque de terrorisme.

[642] Council of State, ord., no. 439674, 22 March 2020, Syndicat Jeunes Médecins.

[643] Jeanne de Gliniasty, "La gestion de la pandémie par la puissance publique devant le Conseil d'État à l'aune de l'ordonnance de référé du 22 mars 2020," *La Revue des droits de l'homme. Revue du Centre de recherches et d'études sur les droits fondamentaux*, June 1, 2020, https://doi.org/10.4000/revdh.9447.

protection of liberties. Furthermore, the Council of State indicated that a faulty inaction of the state could result from the poor implementation of the measures and enjoined the government to clarify some of them (making them more restrictive yet not as much as requested by the petitioners). A new decree adopted the next day was in line with this order, which brought the Council's ordinance closer to administrative consultation than litigation. De Gliniasty concludes that "[t]he risk of a government by the judges is far […] whereas the one of judges for the government is imminent."[644]

The development of this new type of petition can be reconcile with the French logic where liberty is gained through the state rather than against it. It does not, however, fit well with the role of protector of fundamental rights which the Constitutional Council and, before that, the Council of State have progressively cultivated. The logic is even more difficult to apprehend in the context of the ECtHR. Some applications of a general character and focusing on positive obligations reached the Court. Most of them complained of the inaction of the states but did not argue in favor of measures more restrictive of human rights.[645] However, a minority of Rule 39 requests[646] did ask the Court to order the states to adopt more stringent measures, including full lockdowns of certain cities. As in the French *référé-liberté*, these requests, relied on the urgency of the matter to trigger an emergency procedure and, in the case of the ECtHR, to obtain interim measures. All these requests were rejected by the Court.[647]

[644] de Gliniasty, para. 65.

[645] See for example *Le Mailloux v. France* (dec.), no. 18108/20, 05 November 2020 where the application complained of the lack of protective gears, treatment, etc.

[646] Article 39 of the Rules of the Courts allows the Court to adopt interim measures in exceptional and urgent matters.

[647] ECHR Press Unit, Factsheet on "COVID-19 health crisis".

So far, neither the Council of State nor the ECtHR has given satisfaction to this new type of petitions. However, instead of dismissing the petition at an early stage, the Council of State decided to engage in a full review. This forced the judges to engage with economic considerations and public policy evaluation, which they usually claim are better left to the legislator. More troubling, the judges allowed the logic of the *référé-liberté* to be turned upside down.

Judges as positive legislators is not specific to "crises" management. However, in a context of emergency, adopting this position forces them to step outside their role as protectors of fundamental rights. As they attempt to salvage emergency measures, they look for compromises, offering alternatives which would fit the emergency logic while passing judicial review. In doing so, they give ammunition to the political branches to do away with fundamental rights and freedoms.

Conclusion

None of the four courts offered strong resistance to the decline of the separation of powers during emergencies. The French councils appeared the most lenient. The Constitutional Council continued to apply its guiding principles, notably to constrain the parliament and regarding the distribution of litigation between the judicial and administrative branches of the judiciary, seemingly with no notice of the profound changes caused by the emergency powers. The Council of State on the other hand acknowledged the specificities of the "crises" context. Yet more often than not, it chose to accompany rather counter the problematic dynamics of emergency. In the past, the Council resorted to judicial creativity to validate the incursion of the executive into the legislative realm. More recently, it encouraged the shift of the emergency litigation to itself while participating fully in the repressive momentum. Structural and historical

characteristics might explain the attitude of each council. However, both have built themselves into institutions more akin to traditional courts, relying on and protecting the separation of powers, rule of law and fundamental rights. This evolution needs to be confirmed during emergencies.

The U.S. Supreme Court and the ECtHR present more similarities. Whether from a structural angle or through an individual rights approach, they used their longer judgments and separate opinions, to denounce in a principled manner the dangers that emergency represents for separation of powers. Nonetheless, like the French councils, they failed to take note of the antidemocratic traits of emergency powers – including the "rally-round-the-flag" effect – and continued to base their reasoning on the assumption that the democratic process, specifically in parliament, was fully operative.

As for their own role and that of the judiciary in general, they seemed to remain captive of the classic emergency paradigm. For the most part, they have opposed developments attempting to bypass the judiciary completely. Yet, if they insisted on remaining involved, they then demonstrated a high level of deference. All four courts intervened in the gravest cases – in the case of extrajudicial detention or when their existence as third branch was threatened by the creation of parallel bodies. However, they generally reverted to a more constrained position under less dire circumstances.

This default position could be expected from the ECtHR, a regional court, at times when national interests are – apparently – the most compelling. Yet, the comparison with its national counterparts did not reveal a more restrained institution. Its international character made it difficult to apprehend certain matters such as the separation between the executive and legislative powers. However, to some extent, it was also a shield against political pressure and backlash, which proved particularly important during emergencies.

Overall, the courts tried to contain the most flagrant perturbations of separation of powers – blatant overreach of the executive or institutional attempts to circumvent the judiciary. However, they failed to address the more subtle but pervasive mechanisms which consolidate the concentration of powers in the hands of the executive and disarm the judiciary. These mechanisms, which defeat judicial oversight, are bolstered in the contemporary emergency paradigm, designed to appear in compliance with the rule of law. Courts would have to adapt their current approach during emergencies if they wish to retain their function as counter-power.

The concentration of powers in the hands of the executive impacts the type and breadth of emergency measures. Because the deliberative process is undermined or bypassed all together, the ensuing norms no longer reflect a confrontation of opinions and interests. These uncompromising – or less compromising – measures are often praised as what is necessary in times of "crises". Yet, as discussed in the first chapter, what is necessary is determined by subjective goals. Seeing emergency powers as means to preserve the social order questions the rationale for the measures at the same time that it sheds a new light on their disproportionate effects on marginalized groups and opinions.

These outcomes, incompatible with the requirements of liberal democracies, might be acceptable in the theoretical context of the ideal-type emergency, when they remain truly exceptional because limited in time. However, tolerance must decrease as these effects become the new normal. The decline of the separation of powers, which already shaped the emergency measures before and during their adoption, also impacts their life afterwards. In the absence of actual control by the legislative, only effective judicial review could contain their unacceptable effects. The next chapter examines how the four courts have discharged this aspect of their duty.

Chapter 3: Scope and degree of the review – the weight and usage of security imperatives

Emergency powers are intrinsically antithetical to the normal constitutional/conventional order. They put the foundations of the liberal democratic systems under pressure. Emergencies reverse the system of values. As the perpetuation of the state becomes the primary objective, governments adopt characteristics of a military head quarter, and citizens are increasingly treated as soldiers. Dissenting opinions and political pluralism no longer sit at the top of the values pyramid but are barely tolerated. Restrictions on fundamental rights become the norm when they used to be the exception. Increasingly frequently used to bypass the democratic process, emergency powers constitute a potential first step towards authoritarianism.

Once the state of emergency machine is on, the judiciary is often the last institutional bulwark for democracy. Courts are where citizens can claim against the government's undue assaults against their fundamental freedoms and democratic rights. Courts are where they can try to regain political space to demand a change of government. For these reasons, governments have attempted to stifle the debate, also inside the courtroom. The four apex courts have resisted the creation of mechanisms designed to exclude judicial review. As such they have clearly asserted the importance of the judiciary in the threefold separation of power system, even in times of emergency. However, this principled position is no guarantee that they will effectively resist anti-democratic assaults. That they want to stay on the boat does not mean that they too will not succumb to the call of the emergency sirens. The high level of deference they displayed when faced with less dramatic restrictions of judicial review raises doubts as to the actual

breadth of the role they are willing to assume. To answer this question, the following chapter examines the scope and degree these courts have given to their review.

The first section goes back to the origins of the emergency, the declaration. Abusive declarations of states of emergency mark the initial decoupling of legal emergency from factual emergency. It is therefore crucial that this initial step be reviewed and controlled by independent courts. Yet precisely because the legal emergency is not purely a matter of facts but a subjective decision, the temptation is strong to advocate for efficiency and consider the declaration a political question shielded from judicial review. Depth of scrutiny and level of deference are key if judges are to maintain the emergency within its paradigmatic boundaries, namely a clear distinction, both temporal and material, from normalcy.

The second section then turns to the role courts ascribed to themselves when reviewing the exercise of emergency powers. The analysis focuses on the type of review mechanisms and degree of scrutiny applied by the courts in emergency cases. The last part addresses the issue of misuse of emergency powers, when they are deployed for goals other than those contemplated by the law, and how the courts have mobilized the doctrines available to them to counter such developments. The third section maps and analyses the various techniques to which courts have resorted to avoid the difficult balancing of broad values and principles, liberty and security specifically. As they failed to reframe this dual antagonism, they found methods to escape a dilemma which they considered too political and whenever possible, addressing the issue from the narrowest angle possible instead. Finally, the last section adopts a more critical perspective. It examines how the courts have addressed the targeting of specific groups and disproportionate effects of emergency powers on the Other.

A. Reviewing the existence of an emergency

In all three jurisdictions, the consensus is that the most efficient and reactive institutions should be in charge of declaring the emergency. In France and the U.S., these are considered to be the political branches of government with an important if not dominant position of the executive. According to the ECtHR, the national authorities are "better placed".[648] This means that the assessment of the circumstances and whether they require declaring a state of emergency does not rest primarily with the courts. However, does it mean that this decision – to declare a state of emergency – should be shielded from their scrutiny?

This question is at the heart of the first part of this section. The theoretical battle surrounding this issue was fierce and the courts' answer is neither uniform nor always clear. Deeply connected to this initial assessment is the problem of enduring states of emergency, justified or not by the continuation of the circumstances on which they were based. Therefore, the second part addresses the incapacity of all four courts to impose significant limits on the prolongation of the state of emergency. The last part focuses on the normalization of the emergency as the distinction between the normal legal order and emergency law gets blurred. Normal circumstances trigger declarations of emergency or exceptional circumstances are expected to weigh on judicial review even in the absence of formal derogation. Faced with polymorphic and recurring attempts to normalize emergency powers, with few exceptions, the courts have also failed to counter, or possibly even to see, the danger.

[648] See amongst others *A. and Others v. the United Kingdom* [GC], no. 3455/05, §173, ECHR 2009 and the references therein.

1. A political issue?

In 1932, Schmitt argued in front of the Weimar *Staatsgerichtshof* that the President, not the Court, was the political guardian of the Constitution – the Court's guardianship being confined to legal matters. Consequently, because the declaration of emergency was political in nature, the Court would not have jurisdiction to review it. The *Staatsgerichtshof* disagreed with Schmitt and concluded to the reviewability of the presidential decree but conducted such a weak scrutiny that it left the Presidential emergency powers effectively unconstrained.[649] This key episode in the fall of the Weimar Republic and later the rise of the Third Reich illustrates the danger of Schmitt's decisionist model but also more broadly the necessity to review declarations of emergency. It also shows that the question of the judicial reviewability of the decision to declare an emergency is not just one of opportunity – capacity of the judiciary to deliver an informed opinion in time – but that, as pointed out by Schmitt, it goes back to the very nature of the decision and the emergency: political or legal.

As discussed in the first chapter, the emergency is not a mere set of facts the nature of which is simply acknowledged. Rather, some objective elements are, at least in part, constructed as constituting an emergency by the subjective will and understanding of the one(s) activating the emergency powers. The question which logically ensues is who makes that decision? Whose subjectivity will determine the use of emergency powers? If one considers that the political branches, and more specifically the executive, are better placed to the point where the judiciary should not be allowed to intervene, then the declaration of emergency is truly a "political question" in the U.S. legal sense and Schmitt is vindicated.

[649] Dyzenhaus, "States of Emergency," 449.

Such a conclusion is incompatible with constitutionalism. As argued by Greene, constitutionalism principles open the possibility of unconstitutional constitutional norms or interpretations. This in turn requires the judicial review of the declaration of emergency in order to validate it as constitutional.[650] Furthermore, Greene argues that states of emergency may constitute a claim for the constituent power. On the one hand, they allow modifications to the legal order which would otherwise be unconstitutional. On the other hand, in the absence of a counter-power to maintain the emergency temporary, these changes are potentially permanent. For Greene, the only way to counter this claim is for courts to conduct a genuine review of the existence an emergency (declaration or prolongation) thereby temporally containing the emergency.[651]

A somewhat middle-ground alternative would be that "the judiciary defers in close contestable cases, but decides in clear ones".[652] However, this does not offer much of an alternative since it merely displaces the issue from who decides on the exception to who decides whether it is a clear or contested case. More fundamentally, this option assumes that there are clear cases, an assumption that is in itself contestable. The ECtHR, French Councils and U.S. Supreme Court have adopted three different attitudes when it comes to the reviewability of the declaration or prolongation of the state of emergency. By and large, these various positions reflect their overall posture with regards to the separation of powers in times of emergency discussed in the previous chapter, and in particular, the role of courts.

[650] Greene, *Permanent States of Emergency and the Rule of Law*, 82. See also, p. 91 above.

[651] Greene, 123–25. See also, p. 90 above.

[652] Dorsen et al., *Comparative Constitutionalism*, 1611.

a. ECtHR

The first paragraph of Article 15 of the ECHR poses limits to the circumstances in which a member state can derogate to its obligations. Only "[i]n time of war or other public emergency threatening the life of the nation" may a state party make a derogation notification. The Court first defined what would constitute a "public emergency" in *Lawless*.[653] It then refined this interpretation in the *Greek* case,[654] where it identified four constituting features: the emergency (1) must be actual or imminent, (2) its effects must involve the whole nation, (3) the continuance of the organized life of the community must be threatened and (4) the crisis or danger must be exceptional, in that the normal measures or restrictions, permitted by the Convention for the maintenance of public safety, health and order, are plainly inadequate.[655] These criteria provide a solid basis for reviewing the existence of circumstances allowing a state to derogate. However, in their application, the Court showed a level of flexibility which rendered (some of) them inoperative. For example, despite the requirement that the whole population be affected, derogations were notified which concerned only part of the country. This aspect remained unchallenged.[656]

In *A. and Others*, the Court clarified its approach to assess the level of severity necessary for a danger to be considered a "threat to the life of the nation". At the domestic level, Lord Hoffman, in his dissenting opinion, had considered that Al-Qaeda did not pose a threat to the life of the nation. He differentiated the life of the state from that of its citizens. For Lord

[653] *Lawless v. Ireland (no. 3)*, 1 July 1961, § 28, Series A no. 3.

[654] *Denmark, Norway, Sweden and the Netherlands v. Greece*, nos. 3321/67, 3322/67, 3323/67 and 3344/67, Commission's report of 5 November 1969, Yearbook 12.

[655] Harris et al., *Law of the European Convention on Human Rights*, 2014, 815–16.

[656] *Aksoy v. Turkey*, 18 December 1996, Reports of Judgments and Decisions 1996-VI.

Hoffmann, the question was whether the situation threatened "our institutions of government or our existence as a civil community". The ECtHR on the other hand admitted being "prepared to take into account a much broader range of factors in determining the nature and degree of the actual or imminent threat".[657] Its flexibility in applying the various conditions resulted in broadening the definition of emergency and lowering the threshold for the activation of Article 15.

This approach reflects a strong deferential attitude grounded in the wide margin of appreciation the Court grants member states in determining the existence of an emergency. Initially applied in the context of the review of the emergency measures,[658] the margin of appreciation was quickly extended to the assessment of the circumstances justifying the derogation[659] – against the opinion of a minority of the Commission who considered that the decision as to the existence of an emergency should be purely factual and not take "account of subjective predictions as to future development" and therefore refused the application of the margin of appreciation doctrine in that context.[660] The majority found otherwise and in the following Article 15 cases, the Court systematically reiterated that "because of their direct and continuous contact with the pressing needs of the moment, the national authorities are better placed than the international judge to decide both on the presence of such an emergency and on

[657] *A. and Others v. the United Kingdom* [GC], no. 3455/05, §179, ECHR 2009.

[658] *Greece v. the United Kingdom (Volume I)* (Commission), 176/56, 26 September 1958, Report 31.

[659] *Lawless v. Ireland*, 1 Eur. Ct HR (ser. B) at 56 (1960--1961) (Commission report).

[660] *Id.*, para. 92, at 94, cited in Oren Gross and Fionnuala Ní Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice*, 1st edition (Cambridge: Cambridge University Press, 2006), 272.

the nature and scope of the derogations necessary to avert it. Accordingly, in this matter a wide margin of appreciation should be left to the national authorities."[661]

It remains that despite a generally deferential position, the Court never went back on the principle according to which the existence of the conditions for a derogation is to be reviewed by the regional judge and it did, albeit rarely, concluded that these extraordinary conditions did not exist.[662] Indeed, the ECtHR was confronted early on with what Greene called the expansion of the penumbra,[663] namely attempts to pull within the realm of emergency situations which, although not quite usual, should be addressed through ordinary law.

For decades, the *Greek* case[664] remained the only example of a judicial body of the Council of Europe (the Commission in this case) finding that the conditions necessary to derogate under Article 15 had not been met. One month after it established itself through a coup which was followed by massive violation of human rights, the new government in Greece notified the Council of Europe under Article 15. In the ensuing interstate case, the Commission conducted a thorough review of the factual circumstances and allegations that a coup was being prepared by the Communist Party. It did not leave as wide a margin of appreciation to the Greek government but considered instead that the evidence proved against its allegations.

Although this case provides an interesting example of non-deferential review of the existence of an emergency, many consider that the heightened level of scrutiny – and ensuing

[661] *A. and Others*, §173; *Ireland v. the United Kingdom*, § 207,; *Aksoy v. Turkey*, 18 December 1996, § 68, Reports of Judgments and Decisions 1996-VI

[662] *Denmark, Norway, Sweden and the Netherlands v. Greece* (Commission), nos. 3321/67, 3322/67, 3323/67 and 3344/67, Commission's report of 5 November 1969, Yearbook 12 and *Dareskizb Ltd v. Armenia*, no. 61737/08, 21 September 2021.

[663] Greene, *Permanent States of Emergency and the Rule of Law*, 54.

[664] *Denmark, Norway, Sweden and the Netherlands v. Greece*.

narrower margin of appreciation – were a response to the non-democratic nature of the regime.[665] The decision was perceived as a signal that the Convention could not be used to legitimize undemocratic governments. According to Gross and Ní Aoláin, this undemocratic character ensured moral and political support for the Commission's decision but also shielded future derogations by democratic member states from similar review.[666] And indeed, the Court did not conclude to the absence of public emergency again until 2021 in *Dareskizb Ltd*.

In *Dareskizb Ltd*,[667] the Armenian government had declared a state of emergency – and notified the Council of Europe according to Article 15 – following mass demonstrations in the capital after the results of the 2008 Presidential elections were announced. The applicant company was subsequently prohibited from publishing an opposition newspaper. Reviewing the circumstances which had led to the declaration of the state of emergency – in particular the mass demonstration, the ECtHR noted the absence of planned disorder or attempted coup. It highlighted the attitude of the crowd, generally peaceful, and the "heavy-handed" response of the police. Eventually, it concluded that there was no sufficient evidence that the "opposition protests, protected under Article 11 of the Convention, even if massive and at times accompanied by violence […] represented a situation justifying a derogation."[668]

The decision to conduct a substantive review of the existence of an emergency is all the more surprising that the applicant had not really contested nor even discussed the applicability of Article 15.[669] Furthermore, the Armenian government was not clearly undemocratic as was

[665] James Becket, "The Greek Case Before the European Human Rights Commission," *Human Rights* 1, no. 1 (August 1970): 91–117; Harris et al., *Law of the European Convention on Human Rights*, 2014, 814.

[666] Gross and Ní Aoláin, *Law in Times of Crisis*, 2006, 274–75.

[667] *Dareskizb Ltd v. Armenia*.

[668] *Id.*, § 62.

[669] *Id.*, § 54.

the government in the *Greek* case. The state of emergency had been declared by decree and its necessity had been confirmed by a parliamentary inquiry. However, the Court noted that neither the necessity of the state of emergency nor the emergency measures had been submitted to judicial review at the domestic level. This element was used to mitigate the margin of appreciation.[670] This situation can be contrasted (as the Court invited us to) with *A. and Others*, where the House of Lords had found that there was a public emergency but that the measures were not adequate.[671] Would the outcome of *Dareskizb Ltd* have been different if the domestic judiciary had reviewed and validated the state of emergency? An alternative for the ECtHR would have consisted in conducting its usual deferential review of the existence of an emergency but finding a violation of Article 10 due to the complete – and therefore disproportionate – prohibition to publish the opposition newspaper.

Yet, the Court decided to deviate from its usual line of jurisprudence. The facts dated back to 2008. The ECtHR's judgment was only delivered thirteen years later. It is possible that this long delay could have played a role in allowing for insight and the cooling down of emotional reactions and political interests riding on this case, especially at the domestic level. However, it should also be noted that the Court delivered its judgment in 2021 when states of emergency were more commonly used and democratic backsliding had become a major concern within the Council of Europe.[672] In this context, this judgment could be seen as a signal to other members states. The state of emergency had been declared in response to opposition protests in the context of presidential elections and the measure the applicant had complained of was a

[670] *Id.*, § 58.

[671] *A. and Others v. the United Kingdom* [GC], no. 3455/05, ECHR 2009.

[672] "Democracy is in distress, finds the Council of Europe Secretary General's annual report for 2021", Press release, Secretary General of the Council of Europe, 11 May 2021.

serious encroachment on the opposition's freedom of expression. Therefore, it is not unimaginable that an element of bad faith or ulterior motive – attempt to curtail plurality – may have tipped the balance in favor of narrowing the margin of appreciation and a less deferential approach.

Dareskizb Ltd could be interpreted as a first step towards a new less deferential line of case law under Article 15, where the existence of an emergency would be properly scrutinized. Only future cases will tell. Taking into account the existence of ulterior motives for the declaration of a state of emergency could also prove an interesting development, especially when combined with the increasing jurisprudence on Article 18.[673] Nonetheless, substantial scrutiny of the existence of an emergency should not be limited to cases where the Court suspects bad faith. Ulterior motives are a difficult tool for a Court to maneuver. Beyond this, states of emergency, even when declared in good faith, pose a serious threat to human rights. Only a review of the circumstances justifying them could maintain them within temporal limits.

Reaffirming, against the judgment of the political branches, that circumstances do not amount to an emergency but rather are within the realm of normal times and therefore should be dealt with according to normal law is something that the French Councils and U.S. Supreme Court have yet to accomplish. With ever more developments being framed as "crises" by politicians and the media, it is likely that they will have opportunities to do so. Such findings would require a significant change of case law. However, the ECtHR proved that it is not unconceivable. It is probably not insignificant that the Strasbourg Court was born out of the ravage of a war the genealogy of which can be traced back – although not in a directly

[673] This question is examined further in the second section of this chapter.

consequential manner – to the abuse of emergency powers left unchecked by the *Staadtgerichtshof*.

b. France

In France, emergency powers were closely associated with the man who was generally seen to have saved the country during that same war. Article 16 of the 1958 Constitution was conceived by de Gaulle as a tool enabling the president to prevent developments such as those which brought about and followed the capitulation of France during World War II. The 1955 Statute in turn was used extensively by de Gaulle, again, who had been called back to save the country once more, this time from the war in Algeria. This dynamic, very unlike the one observed in the context of the ECtHR, might have influenced the willingness of the respective courts to trust the institutions responsible for declaring an emergency. An instrument with potential for dramatic abuse in the European collective history, emergency powers were initially perceived as a necessary tool in the hands of a savior in France.

Because of the different nature of the emergency regimes in France – one constitutional, the others legislative – the Constitutional Council and Council of State have different review powers in each case. The acts declaring or prolonging the state of emergency are theoretically all reviewable by one Council or the other. However, between lack of jurisdiction and deferential attitude, so far, neither has conducted a genuine review of the circumstances susceptible to reach a conclusion different from that of the political branches.

i. Article 16 of the Constitution

With regard to the activation of Article 16 of the Constitution, the Council of State had soon asserted its own lack of jurisdiction in the most explicit terms: "this decision [to put into effect Article 16 of the Constitution] has the character of an *acte de gouvernement* whose

legality the Council of State has no authority to evaluate or the duration of whose application [it has no authority] to oversee".[674]

Conversely, the role of the Constitutional Council was explicitly envisioned by the successive versions of the constitutional provision. In its original version, Article 16 only required that the Constitutional Council be consulted before the activation of the exceptional powers by the President, as well as regarding the exceptional measures. Consulted on 22 April 1961 by President de Gaulle, the Constitutional Council issued its opinion the following day. In this very succinct decision, the Council took note of the developments in Algeria, namely that generals were attempting a coup, making it impossible for civil and military authorities to perform their functions. Therefore, the Council considered that "the conditions required by the Constitution for the application of its Article 16 [were] fully satisfied."[675] The circumstances were indeed dire, and the Constitutional Council can hardly be accused of being over deferential. Following the 2008 constitutional revision, the Council would now have further opportunities to address the existence of the emergency situation.

ii. The legislative states of emergency

The procedure for the declaration of the state of emergency under the 1955 and the 2020 statutes includes both a regulatory and a legislative phase. The level of normativity impacts the jurisdiction of each Council differently. The Constitutional Council is not competent to review the initial declaration – an administrative decree. However, it might review prolongation statutes either before their adoption by the Parliament if they are referred to it,[676] or *a posteriori*

[674] Council of State, Rubin de Servens, 2 mars 1962.
[675] Decision no. 61-1 AR16, 23 April 1961.
[676] Article 61 al. 2 of the Constitution.

as an accessory procedure to a litigation pending in front of a court.[677] It follows that constitutional review is not automatic. It is left to the discretion of the authorized institutions in the first instance and to future litigants in the second. Notably, as discussed in the previous chapter, the 2015-2017 emergency was marked by the absence of *a priori* constitutional review. The government asked that the bills not be referred to the Constitutional Council and Parliament abode.[678] On the few occasions where the Council was asked to review the opportunity of declaring or prolonging a state of emergency, it asserted its deferential position and fell back on a minimal proportionality assessment merely controlling that the prolongation was not "manifestly inadequate".[679]

If the Constitutional Council is not competent to review administrative acts, the Council of State, on the other hand, is. However, opportunities for such review are few and its degree is low. The declaration of the state of emergency can only be reviewed by the Council of State during a very short period of time. In 2006, the Council considered that the law prolonging the state of emergency amounted to a legislative ratification of the decree because it provided for the same powers as those included in the decree declaring the state of emergency. Consequently, the legality of the decree could no longer be challenged in front of the Council of State.[680]

It follows that the decree declaring the state of emergency can only be reviewed before the intervention of Parliament and therefore most likely only via the emergency procedures. In 2005, the Council of State had the opportunity to rule in such a procedure before the

[677] Article 61-1 of the Constitution.

[678] See above, p. 104.

[679] See for example Decision no. 2020-808 DC, 13 November 2020.

[680] Council of State, Rolin et Boisvert, no. 286834, 24 mars 2006.

prolongation of the state of emergency, just six days after the decree was adopted.[681] The Council noted that, in the original version of the 1955 Statute (adopted under the Fourth Republic), the parliament and not the executive declared the state of emergency. Nonetheless, the Council did not seem to find any adverse consequences in the removal of this "heteroinvestiture".[682] Rather, it considered that in the current version of the law "the responsibility for this choice lies with the Head of State, subject, in the event of an extension beyond the twelve-day period of this regime, to the intervention of Parliament; it follows that the President of the Republic has wide discretionary power when he decides to declare a state of emergency".[683] Summarily noting the factual circumstances, the Council concluded that there was no "grave doubt" about the legality of the decree.

Therefore, if the declaration/prolongation of the state of emergency is theoretically reviewable. Yet the rare opportunities for judicial review combined with the wide margin of appreciation left to the political branches render the control of the existence of an emergency rather illusory. From that perspective, the Councils appear to be little more than rubber-stamping authorities.

[681] It should be noted here that these emergency procedures *(référé-suspension* (Article 521-1 of the Code of administrative justice) and *référé-liberté* (Article 521-2 of the Code of administrative justice)) do not allow for a full review. In this specific case, the claimant filed a *référé-suspension* which is an accessory procedure allowing the Council of State to suspend the effect of an act only if it has "serious doubts" about its legality. The said legality is to be properly examined and determined later on in the context of the main procedure.

[682] « Where the party declaring an emergency is completely separated from the one that exercises that authority », John Ferejohn and Pasquale Pasquino, "The Law of the Exception: A Typology of Emergency Powers," *International Journal of Constitutional Law* 2, no. 2 (April 1, 2004): 218, https://doi.org/10.1093/icon/2.2.210.

[683] Council of State, no. 286835, 14 November 2005.

c. Supreme Court

The landscape of emergency norms in the U.S. is not conducive to a formal review of the existence of an emergency. In the absence of clear emergency provision in the Constitution, most constitutional questions focus on separation of powers issues, mainly between the President and Congress.[684] Because there is no formal declaration of a state emergency, the nature and gravity of the circumstances is most commonly addressed by the Supreme Court when assessing the overall legality of a measure.

In this context, *Hamdi*[685] stands out because, confronted with a situation of a new type, the Court first assessed its nature before diving into the appropriateness of the contested measure. Indeed, the Court noted that its "understanding is based on long-standing law-of-war principles"[686] whereas the war on terror is "unconventional"[687] and the national security concerns underpinning it, "although crucially important, are broad and malleable."[688] Nonetheless, the Supreme Court found a way to link the then ongoing conflict to its more traditional law-of-war paradigm and moved on to the balancing part of its assessment. Therefore, if the Court struggled with the qualification of the circumstances surrounding the case, it did not question the conclusion that they called for extraordinary restrictions on constitutional rights, irrespective of the assessment of the constitutionality of the measure itself.

At the statutory level, the National Emergency Act (NEA) allows the President to declare a national emergency thereby potentially activating a myriad of emergency powers

[684] These are discussed above in Chapter 2, see p. 109.
[685] *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).
[686] *Id.*, at 13.
[687] *Id.*, at 12.
[688] *Id.*, at 12.

located in various statutes. This declaration lies entirely with the President. Congress is currently not involved in that declaration process nor in any subsequent prolongations. Since the NEA enactment in 1976, every president has declared several national emergencies with an average of six per mandate. To date, the Supreme Court has yet to address those powers from the point of view of the reality of the "crisis" underpinning them.

Despite addressing the issue from different angles, the four courts have unanimously asserted their review power over the declaration of emergency – except, to some extent, with regard to Article 16 of the French Constitution. This initial assessment is not a political question, and the judges can review the factual circumstances which triggered the activation of exceptional powers. However, when doing so, deference is at its acme turning judicial review of the declaration of emergency into little more than a formality. The consequences of such weak review might not be as severe if they could be quickly counterbalanced and neutralized. If the activation of dangerous powers is not solidly guarded, then at least they should be timely and firmly taken away. Unfortunately, courts have done little to offset their initial sin but have left the powerholders free to relinquish them of their own accord and in their own time.

2. No end in sight

An important function of judicial review of the declaration/prolongation of the state of emergency is to ensure that the legal emergency only exists when temporally correlated with circumstantial, factual emergency. In the absence of such review or when it is deficient, the temporal separation between emergency and normalcy is at the mercy of those who benefit from the extraordinary powers. It is then very tempting for them to extend their emergency powers beyond what is necessary, whether the state of emergency outlives the circumstances

which originally justified it, or the said circumstances continue to exist but can no longer be considered an emergency. This practice shows that once emergency powers have been activated, the political branches are unlikely to voluntarily let go of them. If the legislative and executive are sufficiently aligned, periodic or continuous judicial review is the only mechanism that stands in their way. Despite this crucial issue being raised in front of all four courts, none imposed substantial limits on the perpetuation of emergency powers.

a. ECtHR

Early on, the ECtHR refused to impose limits on the duration of a derogation under Article 15 and has kept with that line of case law since then. In *Brannigan*, it stated that "a decision to withdraw a derogation is, in principle, a matter within the discretion of the State".[689] More recently, the Court refused to require that either the emergency or the derogating measures be temporary.[690]

The ECtHR also had to decide on the other end of the temporal limitation, meaning whether a derogation was "premature".[691] This aspect is particularly relevant in the context of the fight against terrorism when a considerable number of restrictions on fundamental rights are imposed preventively. The Court had addressed this issue in the *Greek case* and required that the danger be "actual or imminent".[692] However, its later interpretation severely weakened this guarantee. It found that "[t]he requirement of imminence cannot be interpreted so narrowly

[689] *Brannigan and McBride v. the United Kingdom*, 26 May 1993, § 47, Series A no. 258-B.

[690] *A. and Others v. the United Kingdom* [GC], no. 3455/05, §178, ECHR 2009.

[691] *Brannigan and McBride*, § 52-54.

[692] *Denmark, Norway, Sweden and the Netherlands v. Greece*, nos. 3321/67, 3322/67, 3323/67 and 3344/67, Commission's report of 5 November 1969, Yearbook 12, § 153.

as to require a State to wait for disaster to strike before taking measures to deal with it".[693] This argument led the Court to accept a derogation made by the United Kingdom and justified by the 9/11 events in the United States despite the absence of terrorist attack at the time on the member state's territory[694] and the United Kingdom being the only party having used Article 15.

Starting with criteria imposing rather clear stop signs at the beginning and the end of the emergency, the ECtHR interpreted them so loosely that they lost almost all meaning. It failed to uphold the most basic requirement that the emergency – and therefore the derogation – be temporary. Thus, refusing to control that the temporality of the derogating measures match the actual existence and persistence of an emergency, the ECtHR left the door open to the "permanentization" of the exception.

b. France

On 23 April 1961, President de Gaulle activated his exceptional powers under Article 16 after consultation of the Constitutional Council. However, although the situation had returned to normal within two days, de Gaulle did not relinquish his emergency powers until 29 September 1961. Fifteen years later, Léon Noël, who was President of the Constitutional Council at the time – and a fervent support of de Gaulle – would confirm that as soon as the

[693] *A. and Others v. the United Kingdom* [GC], no. 3455/05, §177, ECHR 2009.

[694] It should be noted that terrorist attacks had occurred in London shortly before the hearing of the case by the ECtHR. These, however, took place more than three and half years after the United Kingdom notified the Council of Europe under Article 15.

attempted coup had been stopped, "from a legal point of view, there was no hesitation possible", "maintaining the regime of Article 16 was contrary to the spirit and the letter of this text".[695]

The 2008 constitutional amendment opened the possibility for the Council to weigh in on the continuation of the circumstances justifying the use of emergency powers. This possibility has yet to be operationalized since Article 16 is a historically marginalized provision: activated – and abused – only once. Furthermore, this new constraint on extraordinary presidential powers makes them even less appealing, especially when the legislative state of emergency is an available alternative.

Indeed, when reviewing the statutes prolonging the state of emergency, the Constitutional Council does not only show the general deference that characterizes its emergency case law but also deference to the legislator. In 2020, several deputies claimed that the prolongation of the state of health emergency proposed in the bill was not necessary and that the four-months prolongation was too long because it meant that the Parliament would not be involved again during that period. The Council objected that it did not possess the same general power of assessment as that of parliament and therefore was not qualified to question its decision regarding the evolution of the pandemic.[696]

The Constitutional Council also noted, as a guarantee in favor of the constitutionality of the law, that "when the health situation allows it, the state of health emergency must be terminated by decree in the Council of Ministers before the expiry of the period set by the law

[695] Léon Noël, *De Gaulle et les debuts de la Ve Republique*, 3e éd. édition (Paris: Plon, 1976), 155 as quoted in; François Saint-Bonnet, "L'état d'exception et la qualification juridique," *Cahiers de la recherche sur les droits fondamentaux*, no. 6 (December 31, 2008): 35, https://doi.org/10.4000/crdf.6812.

[696] Decision no. 2020-808 DC, 13 November 2020, § 6.

extending it."[697] However, this assurance is idle since it only confirms the power of the executive over the decision to end the state of emergency with no review either by the Parliament or a judicial body. Yet, despite refusing to impose temporal limits on the states of emergency, the Constitutional Council also continues to list these very temporal limitation among the necessary guarantees for the constitutionality of emergency measures.[698]

As for the Council of State, its contribution is limited. In 1969, it reviewed the legality of a 1962 decision to confiscate a newspaper based on the 1955 statute.[699] The Council recalled that according to the said statute, the state of emergency lapsed fifteen days after the dissolution of the National Assembly. Accordingly, the state of emergency had ended before the contested decision was adopted and the confiscation was illegal. It should be noted, however, that this decision merely acknowledged the end of the state of emergency irrespective of any circumstantial considerations. It also intervened no sooner than seven years after the extraordinary powers had lapsed.

c. Supreme Court

In the U.S., the question of the duration of emergency (measures) came before the Supreme Court in two different contexts. In *Hamdi*, it was central to the reasoning of the Court. It was precisely the risk of indefinite detention which led the Court to question the paradigm framing the case. If the law of war allowed the detention of soldiers for the duration of the hostilities, what were the implication for the war on terror which "given its unconventional

[697] *Id.*, § 8.

[698] See for example decision no. 2015-527 QPC, 22 December 2015 (M. Cedric D.), § 13.

[699] Council of State, 25 June 1969, no. 73935, Melle Même.

nature, […] is unlikely to end with a formal cease-fire agreement"?[700] The Court resolved this dilemma by anchoring the detention in the ongoing active combat in Afghanistan.[701] The artificiality of this criterion is plain as U.S. troops only pulled out from Afghanistan in 2021, twenty years after Hamdi was captured and subsequently detained. Furthermore, withdrawing from Afghanistan was the result of a contested political decision and not the consequence of the end of a war or conflict. Nonetheless, despite the inadequacy of linking the exceptional power of detention to active combat, it confirms that, for the Supreme Court, the underlying assumption remains the temporary character of the measure.

The National Emergency Act (NEA) does not impose time limits on emergencies. The only constraint is that the president must renew them yearly or they lapse. Since *Chadha*,[702] Congress no longer holds the oversight power initially build into the statute. It follows that the decision to maintain an emergency declaration rests entirely with the president. Emergency powers can then last for several decades as is currently the case of the "national emergency with respect to Iran" which has been ongoing since March 1995.[703]

Finally, *Trump v. Hawaii* raises the question of "pseudo-emergency powers"[704] and their duration. President Trump had relied on a national security claim to severely restrict the entry on U.S. territory of nationals from specific countries. This proclamation, widely known in the media as the "Muslim ban", was based on provision §1182(f) of the Immigration and

[700] *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) at 12.

[701] *Id.* at 13.

[702] *INS v. Chadha*, 462 U.S. 919 (1983). See above, p. 120.

[703] Notice on the Continuation of the National Emergency with Respect to Iran, 10 March 2023, https://www.whitehouse.gov/briefing-room/presidential-actions/2023/03/10/notice-on-the-continuation-of-the-national-emergency-with-respect-to-iran-5/

[704] Goitein, "Emergency Powers, Real and Imagined."

Nationality Act (INA). Looking at the text, the Court agreed "with plaintiffs that the word "suspend" often connotes a "defer[ral] till later," […] But that does not mean that the President is required to prescribe in advance a fixed end date for the entry restrictions."[705] In this context again, even though the Court highlighted the supposedly temporary nature of the measure, it failed to impose any actual temporal limitations on the executive.

Whether they refuse to impose restrictions on the duration of the use of emergency powers or apply the temporary requirement with such leniency that it becomes meaningless, none of the four courts have indicated their willingness to temporally constrain the emergency. Allowing for potentially abusive extensions of the state of emergency can be a first step towards its "permanentization". In the absence of effective counter-powers, extending a state of emergency beyond what is necessary is rather straightforward and not legally sophisticated. However, the longer the prolongation, the more challenging the justification and the more likely it is that the counter-powers, which had initially remained silent, would regain opposing momentum. Consequently, rather than maintaining a full-blown state of emergency likely to raise opposition, an alternative is to dilute the emergency powers in the normal legal order. They remain available but are less likely to attract the stigma attached to states of emergency. For that reason, emergency prerogatives have a better chance to endure when their "permanentization" is supplemented with normalization.

[705] *Trump v. Hawaii*, 585 US ___ (2018), p. 13.

3. Emergency powers in disguise

The normalization of emergency powers can take the form of a tendency to frame ordinary circumstances as emergency in order to access powers which should have remained out of reach. An alternative or complementary approach is the multiplication of pseudo-emergency powers which can be operationalized in the absence of a formal declaration of state of emergency. In both cases, a proper review of the circumstances justifying their activation is necessary to avoid extraordinary powers (and restrictions on fundamental rights) becoming part of the normal prerogatives of the executive. This, however, requires courts to acknowledge the danger of the normalization of emergency powers and step away from their default deferential position. This approach has not been the dominant one among the studied jurisdictions.

Another modality of normalization occurs when emergency provisions start seeping into the normal legal order. These extraordinary powers are then constantly available without any emergency declaration. This practice is problematic because it decouples the emergency measures from the activation of the state of emergency and consequently from the identification of the circumstances constituting an emergency. Distinguishing between emergency and ordinary powers becomes challenging and the risk exists of surrendering to the qualification predetermined by the executive. As noted by Gross and Ní Aoláin, "[h]ere the boundaries between emergency and "ordinary" law become extremely tenuous, and the weakness (from an accountability standpoint) of international judicial accommodation is most evident." This includes the ECtHR and similar statements could be made about the national judicial accommodation in France and in the U.S.

a. ECtHR: Absence of derogation and assumptions of deference

At the domestic level, the Commission had initially required in *Cyprus v. Turkey* that there had been a formal declaration of emergency for the member state to be able to rely on Article 15 ECHR.[706] However, the Court took down this requirement in *Lawless v. Ireland*.[707] At the conventional level, it is clearly established that member states must notify a derogation following the procedure laid down in that article if they want the distinctive standards of review of Article 15 to apply. However, the question of the necessity to derogate arose on two main occasions: the application of the Convention abroad in the context of armed conflict on the one hand, the Covid-19 pandemic on the other.

The first one concerned the application of Article 5 to detention by UK troops in Iraq in the absence of a derogation under Article 15. In *Hassan* ,the Court noted that "[t]he practice of the High Contracting Parties is not to derogate from their obligations under Article 5 in order to detain persons on the basis of the Third and Fourth Geneva Conventions during international armed conflicts."[708] It also considered the "important differences of context and purpose between arrests carried out during peacetime and the arrest of a combatant in the course of an armed conflict".[709] It then concluded that "the lack of a formal derogation under Article 15 does not prevent the Court from taking account of the context and the provisions of international humanitarian law when interpreting and applying Article 5 in this case."[710]

[706] *Cyprus v. Turkey*, 4 EHRR 482, § 527 Com Rep.
[707] *Lawless v. Ireland (no. 3)*, 1 July 1961, § 47, Series A no. 3.
[708] *Hassan v. the United Kingdom* [GC], no. 29750/09, § 101, ECHR 2014.
[709] *Id.*, § 97.
[710] *Id.*, § 103.

This interpretation was met with heavy criticism including from dissenting judges arguing that it "render[ed] Article 15 effectively obsolete within the Convention structure as regards the fundamental right to liberty in times of war."[711] Commentators rightly noted that the accuracy of this criticism depended on how broadly the Court would apply *Hassan*.[712] This interpretation was clearly in contradiction with the intent of the drafters of the Convention[713] and it would not have been needed had the UK derogated. Yet, it might have dramatic consequences which can be better perceived in light of the Covid-19 pandemic.

The circumstances in *Hassan* were very different from those of the pandemic and one might argue that the precedent does not apply. *Hassan* concerned detention during war which is regulated by the Third and Fourth Geneva Conventions on armed conflicts. Nonetheless, the main elements of the reasoning of the Court could be applied *mutatis mutandis* to cases related to Covid-19. The Court noted a practice of the member states not to derogate. Contrary to *Hassan,* the practice during Covid-19 is not unanimous. It is, however, widely spread with only ten countries out of forty-six having notified a derogation. The Court also emphasized in *Hassan* the different context and purpose between the circumstances of the case and ordinary times. It is likely that cases related to the pandemic would easily fulfill this criterion.

This is not to argue that *Hassan* applies to any and all emergency cases, nor even to very exceptional circumstances such as a pandemic. However, the mere fact that the majority of member states did not find it necessary to notify a derogation under Article 15 even though most of them had adopted measures qualified as emergency measures at the domestic level

[711] *Id.*, Partly dissenting opinion of Judge Spano joined by Judges Nicolaou, Bianku and Kalaydjieva, § 16.
[712] Harris et al., *Law of the European Convention on Human Rights*, 2014, 808.
[713] Harris et al., 809.

raises questions. This attitude might be a sign that they expect the ECtHR to take into account the extraordinary circumstances in its proportionality assessment and find that measures which would "normally" amount to a violation of the Convention did not in this case. It assumes that the Court will capitulate to the necessity argument even outside the context of the derogation clause. From that perspective, *Hassan* was a dangerous precedent which comforted them in their assumptions of leniency without derogation, emergency standards without declaration of emergency.

Absent a proper determination of whether the emergency provision can validly be invoked or should be invoked, this initial assessment is collapsed into a global proportionality review. Once the conditions for the derogation have been validated, the idea of exceptional restrictions has been endorsed. Liberty is now pitted against security in a fight where the latter already won the first round. Collapsing the assessment of the existence of an emergency into that of the emergency measure contributes to normalizing the emergency as much as pulling normal limitation clauses into the emergency realm. As the type of review conducted by the Court under Article 15 and the normal limitation clauses come closer to alignment, the distinction between emergency and normalcy disappears. Under Article 15, threshold considerations are brought into the proportionality assessment while special circumstances are taken into account to justify grave restrictions without derogation.[714]

[714] See for example *Ibrahim and Others v. the United Kingdom* [GC], nos. 50541/08 and 3 others, 13 September 2016; in particular the development of the notion of "compelling reasons" (§§258-259) and Judges Sajó and Lafranque dissenting opinion.

b. France: a bubble of emergency prerogatives within the normal legal order

In France, the political branches did not merely wait for leniency from the judiciary but actively amended the normal legal order thereby introducing in it measures which were previously exclusively available during states of emergency. The SILT Statute[715] – on national security and the fight against terrorism – was adopted on 30 October 2017, the day before the state of emergency ended. It effectively resulted in the incorporation in the normal legal order,[716] and with very few amendments, of several measures which had been adopted under the 2015-2017 state of emergency and were, at the time, considered as derogatory and imposing exceptional limitations on fundamental rights. They include the creation of security areas, house arrest, derogatory regime of search and seizure and closing of places of worship. These new measures are administrative which means that they are preventive and reviewed by the administrative judge instead of judiciary courts.[717] Such normalization and "permanentization" of the substance of the state of emergency were denounced by several parliamentarians. It was also clearly identified as such by the UN Special Rapporteur for whom the SILT law "constitutes a *de facto* state of qualified emergency in ordinary French law".[718]

In 2018, the Constitutional Council was asked to review – *a posteriori* – the constitutionality of some of these new measures.[719] It answered the parliamentarians' concerns in the commentary published together with its decision. The commentary stated that although

[715] Loi n° 2017-1510 du 30 octobre 2017 renforçant la sécurité intérieure et la lutte contre le terrorisme.

[716] The measures were codified in the Code of domestic security (*Code de la sécurité intérieure*).

[717] According to Article 66 of the French Constitution, "[t]he Judicial Authority, guardian of the freedom of the individual, shall ensure compliance with this principle in the conditions laid down by statute."

[718] Fionnuala Ní Aoláin, "Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism on Her Visit to France" (Human Rights Council, May 8, 2019), para. 23.

[719] Constitutional Council, Decision no. 2017-695 QPC, 29 March 2018 (M. Rouchdi B. et autre).

the new administrative measures were not purely a transposition of emergency measures into the normal order, they were not ordinary rules either. Even though the impugned measures could not be classified as criminal because of their preventive nature, they did not fit within the ordinary law of administrative police either. Rather, they were "special rules of administrative police, derogatory ones, since their application was limited to the prevention of terrorism acts which were a special kind of public order disruption".[720]

This circumvoluted reasoning highlights the difficulty for the Council to navigate the obliteration of the normalcy/emergency dichotomy. The extraordinary character of the 2015 terrorist attacks justified the declaration of the state of emergency and adoption of derogatory measures. Two years later, the terrorist threat, now presented as permanent, was used to make extraordinary administrative powers permanent. To reconcile these two conflicting logics, the Council created a bubble of exception within the normal legal order.

Yet, at no point did the Council review the opportunity of the adoption of the new measures nor the existence of the terrorist threat in which they were grounded. It did not control the existence or seriousness of the circumstances put forward to justify the creation of the exception bubble. Eventually, the Council based its review on the nature of the measures as decided by the political branches – which included them in the normal legal order – rather than their intrinsic extraordinary features. Consequently, the Council allowed the executive to not only declare the emergency but also frame its boundaries.

[720] Commentary on Decision no. 2017-695 QPC, p. 3.

c. Pseudo-emergency powers in the U.S.

The set up of emergency powers in the U.S. does not allow for a clear demarcation between normal and exceptional powers. Statutory emergency provisions remain identifiable as they require a formal declaration pursuant to the NEA. However, "pseudo-emergency powers" constitute a step further towards the conflation of emergency and normal dispositions.[721] The provision on which President Trump based the "Muslim ban" qualifies as such a "pseudo-emergency power". The Immigration and Nationality Act (INA) allows the president to restrict immigration whenever he finds that aliens' entry "would be detrimental to the interests of the United States."[722] The statute does not explicitly mention national security. However, President Trump justified his Proclamation[723] as "advance[ing] foreign policy, national security, and counter-terrorism objectives" of the United States.[724]

Subsequently, in *Trump v. Hawaii*, the national security argument played an important role in the standard of review adopted by the Supreme Court.[725] The Court of Appeals had affirmed the lower court's decision blocking the Proclamation based on arguments acknowledging the pseudo-emergency nature of the provision which "authorizes only a 'temporary' suspension of entry in response to 'exigencies' that 'Congress would be ill-equipped to address'."[726] The emergency frame of the case is further confirmed by the discussion between Justice Roberts, delivering the opinion of the Court,[727] and Justice

[721] See above, p. 77.
[722] 8 U. S. C. §1182(f).
[723] Proclamation No. 9645.
[724] *Trump v. Hawaii*, 585 US ___ (2018), at 5.
[725] *Ib.*, at 31-32.
[726] *Id.*, at 8.
[727] *Id.*, at 38.

Sotomayor, dissenting,[728] regarding the similarities with *Korematsu* or the repeated references to another emergency case, *Holder v. Humanitarian Law Project*.[729]

Nonetheless, the majority categorically refused to adopt an emergency reading of the impugned provision as it found that "no Congress that wanted to confer on the President only a residual authority to address emergency situations would ever use language of the sort".[730] Yet, emergency characteristics figure prominently in the majority's reasoning, the temporary nature of the measure[731] and even more strikingly the extreme deference to the president. The Court's language is strong as it notes that "[b]y its plain language, [the statute] grants the President broad discretion"[732] and "exudes deference to the President in every clause."[733]

It follows that, on the one hand, the Supreme Court acknowledged and accepted a very high level of deference to the president both from Congress and the judiciary. On the other hand, however, it disregarded the other side of the emergency coin, the danger that such a concentration of power represents and the particular scrutiny which should ensue. In that sense, this case illustrates the specific risk posed by emergency powers in disguise. They grant all the powers while escaping the corresponding accountability. Bypassing the full consequences of the emergency nature of a measure is a likely consequence of a system where there is no clear identification of an emergency regime. "Pseudo-emergency powers" are but its clearest manifestation.

[728] *Id*., at 26-28.
[729] *Holder v. Humanitarian Law Project*, 561 U. S. 1.
[730] *Trump v. Hawaii*, at 18.
[731] See above, p. 238
[732] *Trump v. Hawaii*, at 10.
[733] *Id*.

All three systems have framed emergency powers differently from a textually single option (Article 15 ECHR) to a variety of alternatives in France to no clear delimitation of emergency in the U.S. Despite these important variations, none of the courts were able or willing to uncover emergency powers in disguise and efficiently oppose the dilution of emergency prerogatives into the normal legal order. The more governments make use of emergency measures and states of emergency, the higher the risk that they become ubiquitous and permanent, amending in the long term the ordinary legal order to introduce measures which otherwise would have been considered illegal from a separation of power and/or human rights perspective. Faced with this growing practice, the ECtHR showed early signs of adaptation and heightened scrutiny of the existence of an emergency. The French Councils and U.S. Supreme Court on the other hand have failed to conduct effective review of the circumstances, thereby letting the "permanentization" and normalization of emergency powers run free. The review of the emergency measures offers another occasion to keep extraordinary powers under control. However, from the get-go, this new opportunity is tainted by the original failure to review the existence of an emergency. What should have constituted a first step of the review is collapsed into the general assessment of each measure, adding some yet unexamined and therefore potentially undue weight on the side of security.

B. Assessing the emergency measures

Each of the examined courts structures its assessment in a distinctive manner. Whereas the ECtHR follows a rather fixed structure, the French Councils tend to rely on their traditionally succinct decisions. In turn, the U.S. Supreme Court frequently delivers long judgments, the structure of which is largely informed by the matter at hand and the legal

questions raised. Notwithstanding these differences, if judicial review of emergency measures is to address the specific danger that they represent, some steps of the reasoning appear particularly relevant. The following section addresses key elements in connection with the specific difficulties posed by states of emergency.

The first part focuses on the degree of scrutiny as revealed in the proportionality test. A special emphasis is put on two particular elements: the "least restrictive means" test and its suitability to address the overbreadth of emergency measures and the necessity test – especially as developed by the Constitutional Council – as particularly adequate to counter the emergency "hypernomia".[734] The second part addresses the expansion of the proportionality assessment to domains where it usually was not applied. Finally, the last part focuses on a tool especially important considering the risk of abuse of emergency powers, the *détournement de pouvoir* or misuses of power doctrine. This judicial mechanism or its equivalent would have been particularly indicated to oppose tendencies to take advantage of emergency powers to regulate unrelated matters.

1. Proportionality and degree of scrutiny

Writing about judicial review in times of war and terrorism, Barak wrote that "one cannot balance without a scale, and one cannot use a scale unless the relative weight of the various principles is determined."[735] However, he also clarified that the balancing is not between general principles but between "the marginal social importance in fulfilling one

[734] Hennette-Vauchez, "Democracies Trapped by States of Emergency," 10.

[735] Barak, "On Judging," 34.

principle and the marginal social importance in preventing the harm to another principle."[736] It follows that for Barak, judicial review, including in emergency cases, must necessarily be complete, to the extent that it must include all the steps of the proportionality test. Importantly, in that last step, it is the marginal social benefits that are compared, not the global value attributed *in abstracto* to each principle.

This last point is important since, as noted by Greene, much of the literature on emergency has dwelt on the tension between security and liberty.[737] Some of the most important earlier thinkers, including Kant, Locke and Hobbes, came to the conclusion that there cannot be liberty without security. Nonetheless, already then and maybe even more now, the two notions are conceived as antithetical and including some sort of trade-off. In this understanding, which according to Greene, constitutes the dominant paradigm,[738] the trade-off begins at the global, theoretical level and results precisely in ascribing global value to each principle. The problems derived from this logic were discussed from a theoretical perspective in the first chapter. Nonetheless, it seems to remain the main rationale underpinning judgments on emergencies.

Barak argued that the principles sitting on each side of the scale are incommensurable (hence his efforts to identify a common denominator). In the dominant paradigm, this difficulty was solved by ascribing to one of the principles – security – a trumping significance, a superior magnitude, which placed it on another higher plan. The scales were tipped. Lord Justice Brown pointed to the almost mystical significance of "national security", "the mere incantation of

[736] Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge University Press, 2012), 484.

[737] Greene, *Permanent States of Emergency and the Rule of Law*, 143.

[738] Greene, 143.

[which] instantly discourages the court from satisfactorily fulfilling its normal role of deciding where the balance of public interest lies."[739] This clearly runs counter to the liberal principle according to which "freedom is the rule and police restrictions are the exception".[740] The dilemma is solved by reframing security as a freedom. If there is no liberty without security, security is not merely a competing freedom. It is the "prime freedom".[741]

Although judges do not assert the domination of national security as plainly trumping individual freedoms, its primacy transpires from the courts' language. Emergency judgements almost invariably contain expressions establishing the superiority of security considerations in ways that would strike the reader as unusual in other domains. For example, the Supreme Court stated that "the Executive […] is entitled to appropriate weight, particularly in the context of litigation involving "sensitive and weighty interests of national security and foreign affairs"[742] or that "combating terrorism is an urgent objective of the highest order".[743] The ECtHR indicated that it takes into account the background of cases "particularly the problems linked to the prevention of terrorism", which is an "issue of public interest of primary importance".[744] The Constitutional Council for its part noted "the particular gravity of acts of terrorism".[745] Even when trying to temper the overriding character of security considerations, dissenting judges felt the need to acknowledge their singular importance. Justice Sotomayor recognized that "national security is unquestionably an issue of paramount public importance"[746] while

[739] Brown LJ 'Public Interest Immunity' [1994] Public Law 579, 589, cited in Greene, 109.
[740] Council of State, 10 august 1917, Baldy, no. 59855.
[741] Hennette-Vauchez, *La Démocratie en état d'urgence*, 73.
[742] *Trump v. Hawaii*, 585 US __ (2018), p. 35
[743] *Holder v. Humanitarian Law Project*, 561 US 1. p. 23.
[744] *Rouillan v. France*, no. 28000/19, § 66, 23 June 2022.
[745] Constitutional Council, no. 96-377 DC, 16 July 1996, consid. no. 23.
[746] *Trump v. Hawaii*, Justice Sotomayor dissenting, p. 24.

Judges Sajó and Laffranque started their dissent by affirming: "We understand the primary importance of protecting societies from terrorism."[747]

Besides these now traditional statements, emergency judgments feature more vehement declarations which, because they are somewhat superfluous, highlight further the judges' inclination towards security. In *Ibrahim*, the ECtHR considered that the police's security concern was "quite properly" an "overriding priority".[748] In *Holder*, the majority held that it should defer to Congress' choice "in this area perhaps more than any other"[749] and that "the dissent fail[ed] to address the real dangers"[750] posed by "deadly groups".[751] Some separate opinions in key judgements display fully emotional language. For example, Judges Hajiyev, Yudkivska, Lemmens, Mahoney, Silvis and O'leary discuss lengthily about "innocent people going about the ordinary business of living their lives" who are victims of "atrocities" and "mass murders".[752] Justice Scalia did not hesitate to claim that the majority's opinion "will almost certainly cause more Americans to be killed".[753] The war rhetoric essential for the executive to harness extraordinary powers[754] found its way into unexpected cases. Comparing the training of members of the Partiya Karkeran Kurdistan (PKK) to use international law to

[747] *Ibrahim and Others v. the United Kingdom* [GC], nos. 50541/08 and 3 others, 13 September 2016, Joint partly dissenting, partly concurring opinion of Judges Sajó and Laffranque, § 1.

[748] *Ibrahim and Others*, § 276.

[749] *Holder v. Humanitarian Law Project*, 561 U. S. 1, p. 31.

[750] *Id.*, p. 33.

[751] *Id.*, p. 24.

[752] *Ibrahim and Others*, Joint partly dissenting opinion of Judges Hajiyev, Yudkivska, Lemmens, Mahoney, Silvis and O'leary, § 36.

[753] *Boumediene v. Bush*, 553 U.S. 723 (2008), Justice Scalia dissenting, p. 2

[754] See in Chapter 1.

resolve disputes peacefully with training the Japanese government during World War II seemed neither quite necessary nor compelling.[755]

Because of the very formatted style of French judgments and lack of separate opinions, the French case law is relatively immune to such slippery language. However, as is the case with the other two jurisdictions, the primacy of security transpires from the substance of the judgments.

Lowering the level of scrutiny

The internalization by judges of the primacy of (national) security translates directly in the judgments in the form of a lower level of scrutiny. The mechanisms recruited to lower the requirements of the review operate differently in front of the various courts. Deference to the political branches, national expertise or margin of appreciation do not even exist in the same form in all the jurisdictions. Yet across the board, judges display increased restraint when reviewing emergency measures.

Dyzenhaus denounces such curtailed reviews which he finds even more challenging for the legal order than legal black holes. Contrary to the latter, where judicial review is usually precluded, in what he calls legal "grey holes", judges do review emergency measures according to some legal standards. Yet, these are so minimal that they barely operate as constraints all the while conferring an aura of legality to the emergency powers. These "disguised black holes" allow the government to use emergency powers while garnering the legitimacy of the rule of

[755] *Holder v. Humanitarian Law Project*, 561 U. S. 1, p. 33-34.

law,[756] "to have its cake and eat it too".[757] A similar critique is articulated by Dominique Rousseau for whom emergency measures "can no longer be reviewed in terms of ordinary legality [...] but in terms of the exceptional 'legality' that authorizes them. The basis of control changes: whereas in ordinary times, it allows the judge to sanction serious infringements of a particular fundamental right, in times of emergency, it allows him to declare them justified by the exceptional circumstances. Maintained in theory, the control becomes inoperative in practice".[758]

In light of the risk that represents a lessened judicial scrutiny, it is particularly significant that all four courts repeatedly failed to apply the latest steps of the proportionality assessment. None of them adopted the fourth element as prescribed by Barak. Nonetheless, some elements of necessity or "least restrictive means" test are not unfamiliar to these courts. What the proportionality test itself entails and what its various steps are varies from one jurisdiction to another.[759] Consequently, the breadth and focus of its necessity component differs as well. In comparative constitutional law, the necessity test is commonly understood as the third step of the proportionality assessment following the determination of a legitimate aim and the suitability of the measure but preceding balancing or strict proportionality.[760] At the necessity stage, courts review alternative measures which could be equally or sufficiently effective while

[756] David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency*, 1st edition (Cambridge; New York: Cambridge University Press, 2006), 3.

[757] Dyzenhaus, 42.

[758] Rousseau, "L'état d'urgence, un état vide de droit(s)," 25 cited in; Hennette-Vauchez, *La Démocratie en état d'urgence*, 96.

[759] Bernhard Schlink, "Proportionality (1)," in *The Oxford Handbook of Comparative Constitutional Law*, ed. Michel Rosenfeld and András Sajó (Oxford University Press, 2012), 722–27, https://doi.org/10.1093/oxfordhb/9780199578610.013.0035.

[760] Schlink, 722–27; Aharon Barak, "Proportionality (2)," in *The Oxford Handbook of Comparative Constitutional Law*, ed. Michel Rosenfeld and András Sajó (Oxford University Press, 2012), 742–46, https://doi.org/10.1093/oxfordhb/9780199578610.013.0036.

less restrictive of fundamental rights. In that sense, the necessity test has the potential to address the hyper repressive character of emergency law.

The ECtHR and both French councils count necessity in their vocabulary. Yet, none of them understand it to mean "least restrictive means". In the convention system, the requirement that measures be necessary (in a democratic society) gave birth to a version of the classic proportionality test. On the other hand, the French Constitutional Council has adopted a very literal interpretation of necessity which bears a great (although so far unrealized) potential to address the "hypernomia" of states of emergency. The language of proportionality differs in the U.S., but similar elements of judicial assessment are present, and the degree of scrutiny determines how narrowly tailored a measure must be. Although this degree varies depending on the right at stake, the emergency context of a case also affects it.

a. ECtHR

The ECtHR clarified the meaning of "necessary" in *Handyside* and then further developed the various elements of the necessity requirement in *Sunday Times*: "It must […] be decided whether the "interference" complained of corresponded to a "pressing social need", whether it was "proportionate to the legitimate aim pursued", whether the reasons given by the national authorities to justify it are "relevant and sufficient".[761] It follows that, in the terminology of ECtHR, the necessity test encompasses the proportionality assessment and not *vice versa*. It should also be noted that the Court applies variations of the proportionality or fair balance test in the context of all derogable provisions and not exclusively those including a

[761] *The Sunday Times v. the United Kingdom (no. 1)*, 26 April 1979, § 62, Series A no. 30.

limitation clause.[762] The result is a wide range of standards and degrees of scrutiny which vary depending on many factors including the right at stake, the circumstances of the case or positions of the parties.[763] The Court is routinely accused of lacking clarity and structure when conducting its proportionality assessment.[764]

Among the suggestions to improve the proportionality test is the more systematic use of the means-end or suitability element. The Court occasionally applied this subtest, including in national security cases. In *Soltysyak v. Russia*,[765] a former military officer had been banned from foreign travels in order to prevent the spread of "State secrets". The Court found that the travel ban failed to achieve the aim since the sensitive information could be transmitted in many other ways which did not even require direct physical contact with another person. Nonetheless, as pointed out by Gerards, the Court only explicitly applies the suitability test in rare occasions.[766]

Another possible improvement would focus on the "least restrictive means" test. As an international court, the ECtHR is placed in a particularly unfavorable situation with regards to the "least restrictive means" test. Assessing whether a domestic legal system could have accommodated or already contained alternatives which would be sufficiently effective while less restrictive of rights requires a deep knowledge of the said legal system. It is also a rather

[762] Janneke Gerards, *General Principles of the European Convention on Human Rights* (Cambridge University Press, 2019), 229.

[763] Gerards, 231.

[764] Janneke Gerards, "How to Improve the Necessity Test of the European Court of Human Rights," *International Journal of Constitutional Law* 11, no. 2 (April 1, 2013): 466–90, https://doi.org/10.1093/icon/mot004; Talya Steiner, Liat Netzer, and Raanan Sulitzeanu-Kenan, "Necessity or Balancing: The Protection of Rights under Different Proportionality Tests—Experimental Evidence," *International Journal of Constitutional Law* 20, no. 2 (April 1, 2022): 642–63, https://doi.org/10.1093/icon/moac036.

[765] *Soltysyak v. Russia*, no. 4663/05, 10 February 2011.

[766] Gerards, "How to Improve the Necessity Test of the European Court of Human Rights," 471.

intrusive level of scrutiny which has to be reconciled with the principle of subsidiarity and the margin of appreciation doctrine, as well as the fact that the Convention only sets minimum standards.[767] For these reasons, the Court was found to apply the "least restrictive means" test only in rare occasions, when the applicant made a convincing case that such alternative measures exist or when the state only had a narrow margin of appreciation.[768] In *James*, where the state enjoyed a wide margin of appreciation, the Court refused in explicit terms to read the necessity requirement as a strict one or as a "least restrictive means" test.[769]

Despite this principled rejection, the Court did on occasions apply the "least restrictive means" test, including in cases where it had acknowledged the wide margin of appreciation of the state.[770] The ECtHR also applied it in terrorism related cases. When assessing the proportionality of a travel ban resulting from the implementation of a UN Security Council Resolution targeting terrorism, it stated that "for a measure to be regarded as proportionate and as necessary in a democratic society, the possibility of recourse to an alternative measure that would cause less damage to the fundamental right in issue whilst fulfilling the same aim must be ruled out".[771]

[767] Jonas Christoffersen, *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights* (Brill Nijhoff, 2009), 132–35, https://brill.com/display/title/15442.

[768] Gerards, *General Principles of the European Convention on Human Rights*, 239–40.

[769] *James and Others v. the United Kingdom*, 21 February 1986, § 51, Series A no. 98.

[770] *Mouvement raëlien suisse v. Switzerland* [GC], no. 16354/06, ECHR 2012 analyzed in Eva Brems and Laurens Lavrysen, "'Don't Use a Sledgehammer to Crack a Nut': Less Restrictive Means in the Case Law of the European Court of Human Rights," *Human Rights Law Review* 15, no. 1 (March 1, 2015): 154, https://doi.org/10.1093/hrlr/ngu040.

[771] *Nada v. Switzerland* [GC], no. 10593/08, § 183, ECHR 2012.

The Court further applied this test in two cases concerning a ban on returning bodies of terrorists for burial.[772] Brems and Lavrysen claim that there is a recent affirmation of the "least restrictive means" test as part of the ECtHR necessity assessment. However, it remains to be seen how it will develop and how it relates to the previous case law excluding it as a matter of principle.[773] It also remains to be seen if emergency and national security cases will be included in this trend despite the fact that in these domains, member states tend to enjoy a wide margin of appreciation.[774]

The most common approach of the Court remains a rather general assessment of whether or not the contentious measure struck a "fair balance". *Muhammad and Muhammad* provided a rather classic example of the formulation introducing the proportionality test in terrorism cases: "The Court reiterates that it is acutely conscious of the extent of the danger represented by terrorism and the threat it poses to society, and consequently of the importance of counterterrorism considerations. […] It is also aware of the considerable difficulties currently faced by States in protecting their populations against terrorist violence […]. Accordingly, Article […] should not be applied in such a manner as to put disproportionate difficulties in the way of the competent authorities"[775] This language is very similar to that used by the U.S. Supreme Court when balancing due process guarantees and the "burden" they impose on the

[772] *Maskhadova and Others v. Russia*, no. 18071/05, § 223, 6 June 2013 and *Sabanchiyeva and Others v. Russia*, no. 38450/05, § 133, ECHR 2013.

[773] Brems and Lavrysen, "'Don't Use a Sledgehammer to Crack a Nut,'" 166.

[774] Harris et al., *Law of the European Convention on Human Rights*, 2014, 16.

[775] *Muhammad and Muhammad v. Romania* [GC], no. 80982/12, § 132, 15 October 2020.

government.[776] This pervasive conception that fundamental freedoms are burdens on the state is in itself problematic.

The Court also acknowledged the importance of the individual freedom that is infringed upon. Yet, the language already indicated, on the part of the judges, an inclination in favor of the government's interests which was then reflected in the substance. The majority in *Ibrahim and Others* was very clear: "the public interest in preventing and punishing terrorist attacks of this magnitude, involving a large-scale conspiracy to murder ordinary citizens […] is of the most compelling nature".[777] As pointed out by the dissent, in view of such a statement, what role was left for the rights embedded in the Convention?[778] In the same vein in *Muhammad and Muhammad*, Judges Nussberger, Lemmens and Koskelo, concurring, pointed to the lack of substantiation of the national security claim. They argued that the reasoning should have stopped at that stage without carrying the proportionality test any further.[779] It is striking that in a case characterized by a complete absence of reasons to justify the national security claim both at the national level and in front of the Court, the majority did not reach a similar conclusion.

A more recent case stood in contrast with this line of case law favorable to national security claims. In *Rouillan*,[780] the applicant was a former member of a far-left terrorist group active in France in the 1980s who had served twenty-five years in prison. Soon after the 2015 attacks in Paris, he went on the radio praising the courage of the perpetrators. He was subsequently convicted for publicly defending an act of terrorism. The ECtHR found that the

[776] For example, in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), p. 27 or *Boumediene v. Bush*, 553 U.S. 723 (2008), pp. 67-68.

[777] *Ibrahim and Others v. the United Kingdom* [GC], nos. 50541/08 and 3 others, § 299, 13 September 2016.

[778] *Id.*, Judges Sajó and Laffranque partly dissenting opinion, § 31.

[779] *Muhammad and Muhammad*, Judges Nussberger, Lemmens and Koskelo's concurring opinion, § 10.

[780] *Rouillan v. France*, no. 28000/19, 23 June 2022.

statements constituted "an indirect incitement to the use of terrorist violence" and therefore that the national authorities had a wide margin of appreciation.[781] It even followed the emotional path when noting that the applicant's "remarks were made while the emotion caused by the deadly attacks of 2015 was still present in French society".[782] Yet, the Court noted that a prison sentence imposed in the context of a political or public debate can only be compatible with the Convention in exceptional circumstances. It concluded that it was not the case here and found a violation of Article 10.

This case represented a welcome protection of conventional rights in the context of the fight against terrorism. However, its significance should not be overstated. Indeed, freedom of expression is a domain where the Court is particularly vigilant. This line of case law combines with the tendency noted in the previous chapter whereby the Court is particularly wary of attacks on pluralism. Furthermore, the Court ultimately validated the principle of a criminal sanction for "an indirect incitement to the use of terrorist violence".

Finally, the Court admitted that "the contentious remarks justified a response […] commensurate with the threats they were likely to pose to national cohesion and the public security of the country."[783] With this statement, the Court introduced the unusual concept of "national cohesion". Until then, the expression only appeared in one other judgment[784] but then in connection with immigration issues and only in quotes from national authorities. It was not used by the ECtHR itself.[785] The introduction of this undefined concept is problematic as it

[781] *Id.*, § 66.
[782] *Id.*, §70.
[783] *Id.*
[784] *M.A. v. Denmark* [GC], no. 6697/18, 9 July 2021.
[785] Based on a search of "national cohesion" and "cohésion nationale" in HUDOC on 23 May 2023.

marks an unacknowledged link between immigration and terrorism. One might object that this relation is far-fetched and not intended by the Court. It might be true. Yet, the commonality of ideas needs to be highlighted as "national cohesion" is reminiscent of the infamous "respect for the minimum requirements of life in society" or "living together" endorsed by the Court in *S.A.S.*[786]

The Court's overall favorable attitude towards governments' security claims is complemented in terrorism cases by a form of animosity towards the applicants which is particularly visible when the Court decides on damages to be awarded under Article 41. Filing his third separate opinion in *Ibrahim and Others*, Judge Sajó, together with Judges Karakaş, Lazarova Trajkovska and De Gaetano, regretted the novelty of the majority's formulation which did not find "necessary" to award the applicant any non-pecuniary damages without providing any reason for that decision. Considering the seriousness of the violation, the dissenting judges would have made such an award.

In *A. and Others*, the Court had already decided to make a substantially lower award. To that effect, it referenced *McCann and Others* in which the Court had made no award due to the fact that the three terrorists who had been killed were planning to plant a bomb.[787] However, the circumstances in *A. and Others* were very different and the long reasoning justifying the lower award revealed a bias. The Court highlighted that the detention scheme which created the violation had been devised in good faith by a government trying to reconcile the fight against terrorism with its obligations under Article 3.[788] First, it is unclear why the good faith on the

[786] *S.A.S. v. France* [GC], no. 43835/11, § 121, ECHR 2014.

[787] *McCann and Others v. the United Kingdom*, 27 September 1995, Series A no. 324.

[788] *A. and Others v. the United Kingdom* [GC], no. 3455/05, § 252, ECHR 2009.

part of the state should further penalize the applicants whose right had already been violated. Second, and more importantly, this statement gives the impression that the fight against terrorism cannot be carried out without violating one right or another and that the said violation is therefore less severe. Furthermore, the Court pointed out that as soon as the contentious detention scheme had been replaced, the applicants had been subjected to the new measure. Yet, the applicants had not been found guilty of any crime, nor was it the role of the ECtHR to determine their culpability. The question was not whether the applicants should have been deprived of their liberty but whether the said deprivation had occurred in accordance with the ECHR requirements. It had not. It follows that by using this line of reasoning to justify a lower award under Article 41, the Court was drawing the line between good applicants and undeserving ones.[789]

Theoretically, the necessity standard under Article 15 is stricter. As discussed previously, member states enjoy a wide margin of appreciation regarding the existence of an emergency. However, they can only take derogatory measures "to the extent strictly required by the exigencies of the situation". This wording suggests a strict necessity test. Yet, because of its generally deferential position in emergency cases, the Court moved away from this strict requirement. In *A. and Others*, it confirmed that "it falls to each Contracting State […] to determine […] how far it is necessary to go in attempting to overcome the emergency. […] the national authorities are in principle better placed than the international judge to decide […] on

[789] H. Fenwick and D. Fenwick, "The Role of Derogations from the ECHR in the Current 'War on Terror,'" in *International Human Rights and Counter-Terrorism*, ed. Eran Shor and Stephen Hoadley, International Human Rights (Singapore: Springer, 2019), 20, https://doi.org/10.1007/978-981-10-3894-5_37-1.

the nature and scope of the derogations necessary."[790] Therefore, member states benefit from a wide margin of appreciation.

Even so, the margin of appreciation is not unlimited and is exercised under the supervision of the European judges. In *Mehmet Hasan Altan*, the Court found that the derogation under Article 15 was justified. However, with regard to the proportionality of the measure (detention of a journalist on terrorism charges), the court did apply strict scrutiny and considered the existence of less restrictive alternatives.[791] Yet, this case was particularly problematic from the point of view of safeguarding democracy and pluralism which, as previously noted, seems to trigger the adoption of stricter standards in emergency cases. Furthermore, the domestic constitutional court had already found the applicant's detention disproportionate despite the ongoing state of emergency.[792]

Most of the ECtHR emergency case law is connected to terrorism and the Court has explicitly stated that "terrorist crime falls into a special category".[793] The Covid-19 pandemic offered an opportunity to examine whether the pro-security pool was specific to terrorism or a characteristic of the Court's emergency case law more broadly. Although many cases have yet to be decided, as the ECtHR took into account the circumstances of the cases, drastic limitations on rights were found to not violate the Convention, even in the absence of derogation. It further seems that the Court found several of these applications inadmissible as manifestly ill-founded

[790] *A. and Others v. the United Kingdom*, § 173.

[791] *Mehmet Hasan Altan v. Turkey*, no. 13237/17, § 211, 20 March 2018.

[792] *Id.*, § 140.

[793] *Sher and Others v. the United Kingdom*, no. 5201/11, § 149, 20 October 2015.

when the novelty of the issue and emergency context could have warranted an examination on the merits.[794]

Despite the claims that the Conventional guarantees should not be undermined when balanced against emergency or national security claims, security does seem to carry more weight than other public interests to a point where national authorities do not necessarily need to substantiate their claim very much for the ECtHR to succumb to a form of pro-security bias. In this context, the use of the "least restrictive means" test would seem even more advisable to strengthen the proportionality test and because it is especially well-suited to address the overly repressive features of emergency, its "overbreadth".[795] Yet, despite the recent affirmation of the "least restrictive means" test as part of the ECtHR necessity assessment, it remains the exception rather than the rule.

b. France

The French conception of necessity could have been tailored to confront another excess characteristic of contemporary states of emergency, "hypernomia". Both the Constitutional Council and Council of State have been requiring that measures are somewhat related and proportionate to their aim. However, this proportionality requirement was not always expressly mentioned in the judgments. Under the influence of the ECtHR, the principle gained in definition, intensity and became more pervasive.[796]

[794] *Piperea v. Romania* (dec.), no. 24183/21, 5 July 2022; *Bah v. the Netherlands* (dec.), no. 35751/20, 22 June 2021; in general, see the ECtHR Press Unit's factsheet on "COVID-19 health crisis".

[795] Brems and Lavrysen, "'Don't Use a Sledgehammer to Crack a Nut,'" 152.

[796] Jean Sirinelli and Brunessen Bertrand, "La Proportionnalité," in *L'influence du droit européen sur les catégories du droit public*, ed. Jean-Bernard Auby, 629, accessed August 14, 2023, https://www.lgdj.fr/l-influence-du-droit-europeen-sur-les-categories-du-droit-public-9782247086719.html.

i. Council of State

For decades, the principle of proportionality remained "discrete", while "at the heart of the Council of State's case law".[797] Its origins can be traced back to *Benjamin*[798] where the "least restrictive means" test was crucial for the Council to strike down the measures (prohibiting public meetings). Since 2011,[799] the Council of State followed in the steps of the Constitutional Council[800] and adopted the triple test, a proportionality test in three steps requiring that the measure be adequate, necessary, and proportionate.

Nonetheless, the proportionality test is not always part of the Council of State's review. It constitutes its highest level of scrutiny (full review) and as such, is not systematically deployed. Some distrust remains toward a principle which could grant too much power to the judiciary. In the words of the then Vice-President of the Council of State, the proportionality principle should not allow individual rights to systematically trump the general interest nor endanger the separation of powers.[801]

These considerations might explain that the Council of State made little use of the proportionality principle during emergencies. Until recently, the Council lowered its level of scrutiny during emergencies[802] and would only review "manifest errors of assessment".[803] Since

[797] Jean-Marc Sauvé, "Le principe de proportionnalité, protecteur des libertés ?," *Les Cahiers Portalis* 5, no. 1 (2018): 9–21, https://doi.org/10.3917/capo.005.0009.

[798] Council of State, 19 May 1933, *Benjamin*, no. 17413 and 17520.

[799] Council of State, Ass., 16 October 2011, *Association pour la promotion de l'image*, no. 317827.

[800] Constitutional Council, 21 February 2008, DC 2008-562, Loi relative à la rétention de sûreté et à la déclaration d'irresponsabilité pénale pour cause de trouble mental, pt. 13.

[801] Sauvé, "Le principe de proportionnalité, protecteur des libertés ?"

[802] CE, 28 juin 1918, Heyriès, no 63412 ; CE, 28 févr. 1919, Dames Dol et Laurent, no 61593.

[803] Stéphanie Hennette-Vauchez and Serge Slama, "Harry Potter au Palais royal ? La lutte contre le terrorisme comme cape d'invisibilité de l'état d'urgence et la transformation de l'office du juge administratif," *Les Cahiers de la Justice* 2, no. 2 (2017): 286, https://doi.org/10.3917/cdlj.1702.0281.

2015, however, it started reviewing the proportionality of certain emergency measures.[804] Unfortunately, this declared increase in the level of scrutiny is not reflected in the outcome of the judgements. Rather, amongst the decisions striking down administrative measures, an important number is based on factual errors. In other words, despite the introduction of the proportionality test in the realm of emergency, when the Council of State finds a problem with those measures, it continues to be predominantly on factual grounds (i.e. the facts put forwards by the administration are either wrong or not sufficiently substantiated) rather than on considerations related to individual rights.[805] The adequation of the measure, let alone the existence of less restrictive means remain largely ignored.[806] The adaptation of the review to conditions of emergency was unequivocally acknowledged by the Council of State who referred to "a new calibration" of the proportionality test which, "is not exercised in the same way as in normal times" because "the objectives pursued by the state of emergency [...] weigh more heavily".[807]

In 2015, the Council published its opinion on the law prolonging the state of emergency and strengthening its dispositions in which it checked that the amendments were not unnecessarily stringent and provided sufficient guarantees.[808] In carrying out this review, the Council "took into account the exceptional context of states of emergency". The wording is not very dissimilar to the one that can be found in ECtHR judgments for example. Yet, it resulted

[804] Council of State, Sect., 11 December 2015, C. Domenjoud, cons. 27.

[805] For statistical data, see Hennette-Vauchez et al., "Ce que le contentieux administratif révèle de l'état d'urgence," 62–64.

[806] Hennette-Vauchez and Slama, "Harry Potter au Palais royal ?," 287–88.

[807] Le Conseil d'Etat, "Les états d'urgence : la démocratie sous contraintes," in *Conseil d'État* (La Documentation française, 2021), https://www.conseil-etat.fr/publications-colloques/etudes/les-etats-d-urgence-la-democratie-sous-contraintes quoted in; Hennette-Vauchez, *La Démocratie en état d'urgence*, 96.

[808] Council of State, Section de l'intérieur, Avis sur un projet de loi prorogeant l'application de la loi no 55-385 du 3 avril 1955, 17 November 2015.

in lowering the benchmark so that the Council could validate the most stringent emergency regime to that day. It even lowered the protection of freedom of association by removing one of the conditions foreseen by the legislator to dissolve an association. The Council also validated the more severe sanctions and the administrative character of the search and seizures. Overall, the global and laconic control, deprived of structured proportionality test, allowed the Council to give the appearance of judicial review without imposing any actual limitations on the emergency measures.

ii. Constitutional Council

In 2004, Grewe and Koering-Joulin noted that constitutional review became "more abstract than it is in other areas and is based mainly on the importance of the aim, the extent of the infringements and the guarantees provided. One almost has the impression that in matters of terrorism, the aim is considered so important that only certain very excessive restrictions and the absence of guarantees will be censured."[809] In 2012, Roudier described the Constitutional Council's review during emergency as "elastic".[810] On the one hand, terrorism shaped the control thereby moving the benchmark against which emergency measures were reviewed. On the other hand, the Council remained vigilant and maintained some protection of fundamental rights even during emergencies. Four years later, in the midst of a two-year long state of

[809] Constance Grewe and Renée Koering-Joulin, "De la légalité de l'infraction terroriste à la proportionnalité des mesures antiterroristes," in *Libertés, justice, tolérance, volume 1 : Mélanges en hommage au Doyen Gérard Cohen-Jonathan*, ed. Paul Amselek and Collectif (Bruxelles: Emile Bruylant, 2004), 915 quoted in; Karine Roudier, "Le Conseil constitutionnel face à l'avènement d'une politique sécuritaire," *Nouveaux Cahiers du Conseil constitutionnel*, no. 51 (dossier : La Constitution et la défense nationale) (April 2016): 37–50.

[810] Roudier, "Le Contrôle de Constitutionnalité de La Législation Antiterroriste," 30.

emergency, she confirmed that the Council adopted a "fallback position" pushed to its limits by the perpetuation of a security climate.[811]

Champeil-Desplats pointed out that the Council found some limits to the constitutionality of emergency measures. Nonetheless, the sanctions remained marginal, targeting only a few words or sentences without truly altering the emergency regime. The Council issued some more important decisions of unconstitutionality but then only with some delay.[812] Furthermore, when finding provisions unconstitutional, the Council often made use of its power to delay the effect of its decisions,[813] a possibility which the Council itself had decided should remain exceptional.[814] Although problematic, a delayed sanction can be interpreted as imposing effective constraints, if not on the current emergency, at least on the next one.[815] However, assuming such intentions on the part of the Constitutional Council borders on undue optimism. Hennette-Vauchez analyzed this delaying practice as a way for the Council to "neutralize" its decisions, rendering its control purely "platonic". She highlighted an occurrence where the Council delayed the effect of its decision by six months despite the fact that the state of emergency had already ended. For Hennette-Vauchez, the only possible explanation is that the Council meant to ensure that the full state of emergency – including the unconstitutional provisions – could be reactivated if the political branches so decided.[816]

[811] Roudier, "Le Conseil constitutionnel face à l'avènement d'une politique sécuritaire."

[812] Véronique Champeil-Desplats, "L'état d'urgence devant le Conseil constitutionnel ou quand l'État de droit s'accommode de normes inconstitutionnelles," in *Ce qui reste(ra) toujours de l'urgence*, ed. Stéphanie Hennette-Vauchez, Colloques & Essais (Clermont-Ferrand: Institut Universitaire Varenne, 2018), 108, https://www.lgdj.fr/ce-qui-restera-toujours-de-l-urgence-9782370321770.html.

[813] Champeil-Desplats, 109–10.

[814] Hennette-Vauchez, *La Démocratie en état d'urgence*, chap. 5 ft 35.

[815] Cole, "Judging the Next Emergency."

[816] Hennette-Vauchez, *La Démocratie en état d'urgence*, 97–98.

Furthermore, when emergency measures were adopted to deal with the Covid-19 pandemic, the Council's decisions did not have much more bite. In the early days, it even invoked the "particular circumstances" to validate its own control to be legislated away in violation of parliamentary rules.[817] Rather than "judging the next emergency", the Constitutional Council has adopted an accommodating attitude only focused on the "now", where each emergency is perceived as a whole new threat drastically different from the previous ones and therefore justifying new and ever more severe restrictions on fundamental rights. This incapacity or unwillingness to adjudicate beyond the "here and now", fosters the impact of fright and dread while rendering the Council oblivious to the mid and long-term dynamics that are the normalization and "permanentization" of the emergency. It also hinders the Council effectively wielding one of its best suited tools for emergency, its own version of the necessity test.

Contrary to the Council of State, the Constitutional Council only reviews statutes (not individual measures). As such, it is better placed to address a broader emergency question: are these new measures needed or would the already existing ones suffice? In 1981, in a parliamentary debate on the Security Court,[818] Robert Badinter stated: "I say it very simply but firmly: the principles of ordinary law, except for the convenience and ulterior motives of those in power, make it possible to deal with all situations concerning attacks on State security."[819]

[817] Constitutional Council, decision no. 2020-799 DC, 26 March 2020, « Loi organique d'urgence pour faire face à l'épidémie de covid-19 ».

[818] The *Cour de sûreté de l'Etat* was a special tribunal created in 1963 to try members of the OAS, a terrorist organization fighting against Algeria's independence. Yet, during the eighteen years of its existence and as of 1968, it was used to repress other groups such as the terrorist organization *Action Directe* but also leftist and independentist movements.

[819] Quoted in Vanessa Codaccioni, *Justice d'exception - L'État face aux crimes politiques et terroristes*, CNRS Editions, 2015, 260–61.

The ECtHR alluded to this understanding of necessity in *James* but thanks to a double confusion, it managed to avoid it. First, the Court equated the question of existing sufficient legislation with that of less restrictive means. Now placed on the "alternative solution" ground, the Court relied on legislative discretion.[820] But these two issues – that of already existing law and the possibility of alternative means – are not the same. They do not address the same risks posed by states of emergency. On the one hand, the "least restrictive means" test focuses on enhancing the protection of human rights rather than capitulating to repressive tendencies. On the other hand, whether existing laws are sufficient questions the need for emergency measures all together and as such, addresses the "hypernomia" which characterizes contemporary states of emergency.[821] One of the perverse effects of this immoderate normative activity is that by contamination, these extraordinary measures which severely restrict fundamental rights drag the entire legal system down the repressive road. The principle of necessity as interpreted by the Constitutional Council addresses precisely this question of already existing legislation.

The increased use of both tests – sufficiency of existing law and "least restrictive means" – can be seen as the result of the influence of the ECtHR[822] as well as the "juridicization" of the Council.[823] Until recently, the Council refused to consider less restrictive alternatives. The necessity test was limited to the relevance of the measures to their goal. Reminiscent of the ECtHR's deference to the "legislative discretion" in *James*, the Council considered that it "[did] not have a general power of assessment and decision of the same nature as that of Parliament;

[820] See above p. 257.

[821] Hennette-Vauchez, "Democracies Trapped by States of Emergency," 10.

[822] Sauvé, "Le principe de proportionnalité, protecteur des libertés ?"

[823] Laurie Marguet, "Le triple test est-il vraiment central à la protection constitutionnelle des libertés ? Observations sur un standard de contrôle à géométrie variable," *La Revue des droits de l'homme. Revue du Centre de recherches et d'études sur les droits fondamentaux*, no. 20 (June 21, 2021), https://doi.org/10.4000/revdh.12490.

that it [was] therefore not for it to determine whether the objective set by the legislator could be achieved by other means".[824]

Nonetheless, the application of the Council's version of the necessity test is not novel. In 1996, the Council carried out an *a priori* review of a bill which added helping undocumented migrants to the list of terrorist activities. Despite a difficult climate – the decision was delivered just a few months after a series of terrorist attacks in 1995 – the Council drew both from the necessity principle (the acts, if actually linked to terrorism, were already criminalized) and the increased severity of the penalties and derogatory procedure attached to the terrorist qualification to find the provision unconstitutional.[825]

Noticeably, these limits gave way during the 2015-2017 emergency. On several occasions, the Council, emphasizing the necessity of the aim – the reason which justified the emergency regime – eschewed the examination of the necessity of the measures all together. The review of the SILT statute is emblematic of such incomplete reasoning. The SILT statute incorporated in the normal legal order measures which had first been adopted in the context of the state of emergency. Most of these measures, however, already existed in the ordinary law. The result of the changes introduced by the SILT statute was mainly to relax the constraints and guarantees surrounding their implementation (e.g. allowing administrative authorities to impose individual measures which could previously only be decided by a judge). Furthermore, several

[824] Valérie Goesel-Le Bihan, "Le contrôle de proportionnalité exercé par le Conseil constitutionnel," *Cahier du Conseil constitutionnel*, no. n° 22 (Dossier : Le réalisme en droit constitutionnel) (June 2007), https://www.conseil-constitutionnel.fr/nouveaux-cahiers-du-conseil-constitutionnel/le-controle-de-proportionnalite-exerce-par-le-conseil-constitutionnel.

[825] Constitutional Council, no. 96-377 DC, 16 July 1996, Loi tendant à renforcer la répression du terrorisme et des atteintes aux personnes dépositaires de l'autorité publique ou chargées d'une mission de service public et comportant des dispositions relatives à la police judiciaire, Cons. no. 8 and 9.

reports issued by both institutional and non-institutional sources concluded to the inefficiency of the measures adopted under the state of emergency (and transposed by the SILT statute).[826]

Therefore, on the one hand, the existing legislation already provided similar powers which were also less restrictive of fundamental rights because surrounded by more guarantees. On the other hand, the usefulness of the "new" measures had been repeatedly questioned including by official parliamentary reports. In these circumstances, the Constitutional Council would have had a difficult time justifying the constitutionality of these further encroachments on human rights under the necessity test. Instead, it disregarded this step completely to move to the balance of the two objectives – fight against terrorism and preservation of individual freedom – which it did not find "manifestly disproportionate".[827] This decision, which allowed for the normalization and "permanentization" of emergency measures, reads in stark opposition to the 1996 decision. It denotes a pro-security evolution of the Council's position and its habituation to emergency measures.

Despite these developments, the Constitutional Council continues to occasionally mobilize the necessity test to find limits to the constitutionality of antiterrorism measures. Reviewing the constitutionality of a statute creating a crime of "regular consultation of terrorist websites", the Council clearly differentiated between necessity on the one hand and adequation and proportionality on the other. With regard to necessity, the Council found that the administrative and judicial authorities already had numerous prerogatives allowing them to

[826] In particular, three separate reports issued by law commissions of both chambers of the Parliament. Hennette-Vauchez and Slama, "Harry Potter au Palais royal ?," 282–83.

[827] Constitutional Council, no. 2017-695 QPC, 29 March 2018 (M. Rouchdi B. et autre). For an analysis of "necessity" in this decision, see Vincent Sizaire, "Une question d'équilibre ? À propos de la décision du Conseil constitutionnel n° 2017-695 QPC du 29 mars 2018," *La Revue des droits de l'homme. Revue du Centre de recherches et d'études sur les droits fondamentaux*, May 23, 2018, https://doi.org/10.4000/revdh.3855.

address situations targeted by the new statute.[828] The same wording confirmed this approach in a decision on the creation of a new crime of "apology of terrorism".[829] In 2020, in the context of the Covid-19 pandemic, the Council explicitly applied the "least restrictive means" test to security measures.[830] Even though the Council did not use the term of "necessity" in this case, the "least restrictive means" test is clearly understood as a part of the triple test alongside the appropriate and proportionate requirements.

The Council created an effective tool to address two of the main risks posed by states of emergency and emergency measures. Yet, in the context of claimed extraordinary circumstances, it hesitated to deploy the necessity test and fell back instead on a deferential position and lower degree of scrutiny,[831] leaving the political branches free to adopt plethora of measures of little effectiveness yet very restrictive of human rights.

c. Supreme Court

The U.S. Supreme Court does not display a structured proportionality assessment as can be observed in the ECtHR or even to some extent the French councils. This does not mean that balancing is absent from the Supreme Court's case law. However, the structure of the analysis varies in a rather unpredictable manner.[832] Under rational basis test, the Court does not usually

[828] Constitutional Council, no. 2016-611 QPC, 10 February 2017, M. David P. [Délit de consultation habituelle de sites internet terroristes], cons. no. 13.

[829] Constitutional Council, no. 2020-845 QPC, 19 June 2020, M. Théo S. [Recel d'apologie du terrorisme], cons. no. 22.

[830] Constitutional Council, no. 2020-805 DC, 7 August 2020, Loi instaurant des mesures de sûreté à l'encontre des auteurs d'infractions terroristes à l'issue de leur peine, cons. no. 14.

[831] « Repli » du contrôle de constitutionalité. Roudier, "Le Contrôle de Constitutionnalité de La Législation Antiterroriste."

[832] Davor Šušnjar, *Proportionality, Fundamental Rights and Balance of Powers* (Brill Nijhoff, 2010), 156, https://brill.com/display/title/18146.

conduct a necessity assessment.[833] Cases where the Court applied strict scrutiny contain statements rather similar to those found in ECtHR and Constitutional Council case law. In *Holder*, the majority recalled that "the Legislature's superior capacity for weighing competing interests means that we must be particularly careful not to substitute our judgment of what is desirable for that of Congress."[834] When applying strict scrutiny, the Court requires that the measures are "narrowly tailored", which it interpreted as "further[ing] a compelling state interest by the least restrictive means".[835] The Court, however, does not systematically explicitly consider alternative measures and whether these would be less restrictive.[836]

The level and type of scrutiny applied by the Court depends on the formulation of the claim and singularly the right at stake. Therefore, it is difficult to determine whether the proportionality requirements (understood very broadly) are more relaxed in emergency cases than under "normal" conditions. As analyzed below, in the case of the Supreme Court, other criteria – such as the undue application of balancing or choosing statutory over constitutional review – might be more telling. Nonetheless, it should be noted that on occasions, the Court deviated from the expected level of scrutiny. These variations seem to find their justification in the national security claim made by the government.

In *Holder*, involving matters of free speech, the majority resisted the government's argument in favor of intermediate scrutiny[837] and claimed to apply strict scrutiny. In doing so, however, it explicitly deferred to Congress' and the governmental assessment of facts because

[833] Šušnjar, 151.

[834] *Holder v. Humanitarian Law Project*, 561 US 1. p. 31, (internal quotation marks omitted).

[835] *Id.*, Judge Breyer dissenting opinion p. 7 (internal quotation marks omitted).

[836] For applications of the "narrowly tailored" criteria in emergency cases, see for example *Holder,* p. 20-23 or *Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U.S. ___ (2020), p. 4.

[837] The government argued that the contested statute regulated conduct and not speech.

of the difficulty to obtain information and its own lack of expertise in matters of national security and foreign affairs. For Justice Breyer, dissenting, the Court had "failed to insist upon specific evidence, rather than general assertion."[838] In these conditions, it is difficult to understand how the Court could apply strict scrutiny since what the measures had to be narrowly tailored to was left for the political branches to define. This failure to require that the security claim be substantiated cannot meet the requirements of strict scrutiny and, for Justice Breyer, questions the modalities of application of the First Amendment when national security is at stake.[839]

As is examined further below, in *Trump v. Hawaii*, the applicant claimed that the Proclamation banning nationals from certain countries to enter the U.S. territory violated the Establishment Clause. Yet, the Court did not apply the customary strict scrutiny. Rather, it emphasized that the admission of foreign nationals is largely immune from judicial review and recalled that its "inquiry into matters of entry and national security is highly constrained." Consequently, the majority decided to apply a rational basis test.[840] Setting the level of scrutiny so low necessarily meant, among others, that the Court then dismissed arguments criticizing the overbreadth of the measure compared to the alleged aim.[841] For Justice Sotomayor, dissenting, the majority unduly accepted the government's plea to defer to the President in matters of national security (and immigration) which resulted in the application of "a watered-down legal standard".[842]

[838] *Holder*, Breyer's dissenting opinion, p. 23.
[839] *Id.*, Breyer's dissenting opinion, p. 23.
[840] *Trump v. Hawaii*, 585 US __ (2018), p. 32.
[841] *Id.*, p. 35.
[842] *Id.*, Sotomayor dissenting, p. 13.

Notably, in her dissent, Justice Sotomayor put forward an argument which came very close to the necessity test in its most literal understanding as adopted by the French Constitutional Council. "[T]he Government remains wholly unable to articulate any credible national-security interest that would go unaddressed by the current statutory scheme absent the Proclamation."[843] "[T]he Government's other statutory tools […] already address the Proclamation's purported national-security concerns."[844] The majority too examined this question although for the narrower purpose of determining whether the presidential Proclamation went against the logic of the INA. It concluded that "this is not a situation where 'Congress has stepped into the space and solved the exact problem.'"[845]

The necessity test brings courts close to the political realm, a position which they readily refuse as demonstrated by the formulation repeated time and again by the ECtHR, Constitutional Council and Supreme Court: the legislator and/or executive is better placed, or the Court does not have a general power of assessment of the same nature as that of the legislator. However, considering the gravity of the danger that emergency poses to democracy and fundamental rights, courts should apply higher standards. Unfortunately, they are not adequately equipped. The "least restrictive means" test is not a standard element of the proportionality assessment in any of the jurisdictions despite being particularly suited to address the overly repressive tendencies of emergency. In turn, the necessity test, as understood occasionally by the Constitutional Council, could prove adequate to confront the emergency

[843] *Id.*, Sotomayor dissenting, p. 22.
[844] *Id.*, Sotomayor dissenting, p. 24
[845] *Id.*, p. 18.

hypernomia. Yet, it is not part of the ECtHR's nor the Supreme Court's vocabulary. As for the Constitutional Council, it appears unwilling to apply this most useful tool. Failing to truly rein in emergency powers, the apex courts are granting the political branches significant leeway. Furthermore, the same courts have extended this very forgiving version of the proportionality test to areas which might not be suited for it, thereby giving credit to the critiques who argue that essential guarantees are being balanced away.

2. Proportionality where it does not belong? Balancing procedural rights

If applied strictly enough, proportionality could be an effective tool to contain emergency measures by ascertaining that they do not exceed what is strictly necessary. However, two major counterarguments can be opposed to this statement. The first one has to do with the level of scrutiny within the proportionality test. As discussed in the previous section, only if the review includes the latest steps of the assessment – necessity, "least restrictive means" test, or proportionality in the narrow sense – can it truly impose limits on the emergency.[846] Otherwise, almost any restriction can be found somewhat proportionate and satisfy a loose proportionality test. Another important criticism argues that proportionality is not always appropriate. There are minimum standards with regards to fundamental rights which cannot be bargained away. They should not be subjected to proportionality. This is especially relevant with regards to procedural rights.[847]

This debate finds little resonance in the French context. A reason could be that the vagueness surrounding the proportionality assessment by either of the Councils prevents

[846] Steiner, Netzer, and Sulitzeanu-Kenan, "Necessity or Balancing."
[847] Rosenfeld, "Judicial Balancing in Times of Stress," 2111.

commentators from clearly identifying and articulating arguments pertaining to core or minimum standards. These considerations are not explicit either in the Councils' decisions and judgments. Due to the concise style and lack of systematic explicitness of the various steps of the reasoning, it is difficult to identify the type and level of scrutiny applied by the French jurisdictions and therefore elements which would be shielded from the proportionality test. The absence of separate opinions also contributes to this uncertainty. Conversely, it is in the dissenting opinions of ECtHR judges and Supreme Justices that debates about whether a proportionality assessment is warranted or not are the fiercest and most clearly laid out.

a. ECHR: Essence and core of the rights

The essence or the (absolute) core of a right has been described as the "limit of limits".[848] It supposedly designates elements of a right which cannot be balanced away. The proportionality test stops where the core of the rights begins. However, the inconsistent approach of the Court has raised criticisms. First, the Court applies the essence of the right reasoning to rights accompanied by a limitation clause, but also occasionally to those which are not. Second, the Court does not systematically define the substance of the core and therefore the elements the restriction of which cannot be compensated. Finally, the essence of the right often appears to be an element of language. The Court applies a general proportionality test and will find that the restriction touched the core of the right when it concludes that the restriction was not proportionate.[849]

[848] Esin Örücü, "The Core of Rights and Freedoms: The Limit of Limits," in *Human Rights: From Rhetoric to Reality*, ed. Tom Campbell (New York, NY, USA: Blackwell Publishers, 1986).

[849] Gerards, *General Principles of the European Convention on Human Rights*, 255. For a similar analysis, see *Muhammad and Muhammad v. Romania* [GC], no. 80982/12, 15 October 2020, Judge Pinto de Albuquerque concurring opinion, § 9.

Despite this criticism, the idea remains that some elements of a right are so crucial that if done away with, the right itself would no longer exist. With their overriding tendencies, security considerations test the strength of this limit to the limits. The impossible tension between the "essential" elements of the rights and the "most compelling nature" of national security was central to the debate between majority and dissent in two key cases dealing with procedural rights.

In *Ibrahim and Others*,[850] the Grand Chamber endeavored to "clarify" the stages of the test laid out in *Salduz*[851] with regard to access to a lawyer. In *Ibrahim,* which borders on the ticking bomb scenario, the applicants were arrested shortly after the 2005 bombings in London and subjected to "safety interviews" during which they were denied legal assistance. According to the majority, whether or not there were compelling reasons to conduct an interview without a lawyer would determine the level of scrutiny applied when assessing the overall fairness of the procedure. In this assessment, the use of declarations made in the absence of a lawyer to convict the accused was but one of the elements to be taken into account.

As argued by Judges Sajó and Laffranque, the majority's "interpretation" of *Salduz* actually established new principles which lowered the level of protection under Article 6 ECHR. If the majority recalled that "[t]here can be no question of watering down fair trial rights for the sole reason that the individuals in question are suspected of involvement in terrorism",[852] the dissent found "most disappointing"[853] that the judgment departed from that principle. For the dissenting judges, "the security and public-order concerns invoked by the respondent

[850] *Ibrahim and Others v. the United Kingdom* [GC], nos. 50541/08 and 3 others, 13 September 2016.

[851] *Salduz v. Turkey* [GC], no. 36391/02, ECHR 2008.

[852] *Ibrahim and Others*, § 252.

[853] *Id.*, Judges Sajó and Laffranque's dissenting opinion, § 2.

Government could not justify a provision which extinguished the very essence of the applicants' rights". The essence of the right was clearly identified in *Salduz*: "The rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction."[854] An irretrievable prejudice cannot be compensated by other elements in a global assessment of the overall fairness of the procedure. The essence of the right cannot be balanced away. Yet, the overall fairness approach was adopted by the majority who found no violation with respect to of three of the applicants despite the fact that the declarations they had made in the absence of a lawyer had been admitted as evidence in a trial that led to their conviction. Bowing to "most compelling" security concerns, the Court introduced proportionality where it did not belong, the core of the right, which resulted in lowering the minimum level of protection under Article 6.

Far from an isolated misstep, it did not take long before the overall fairness approach consecrated by the Grand Chamber in *Ibrahim and Others* contaminated other rights. Four years later, the Grand Chamber confirmed its approach, arguably this time against the text of the article involved. In *Muhammad and Muhammad*,[855] the applicants were foreign nationals deported based on national security grounds. They argued that their deportation was not in compliance with the procedural safeguards relating to expulsion of aliens guaranteed by Article 1 of Protocol No. 7. The Court concluded to a violation of the said article with a deeply divided majority as six out of fourteen judges forming the majority filed concurring opinions. The Grand Chamber transposed to Article 2 of Protocol 7 the principles developed in *Ibrahim and Others.* The Court first ascertained that the restrictions were justified then "assess[ed] whether

[854] *Salduz v. Turkey*, § 55.

[855] *Muhammad and Muhammad v. Romania* [GC], no. 80982/12, 15 October 2020.

those limitations were sufficiently counterbalanced, in particular by procedural safeguards, such as to preserve the very essence of the relevant rights".[856]

This transposition in and off itself was criticized by Judges Nussberger, Lemmens and Koskelo as disregarding the particularities of Article 2 of Protocol 7.[857] Contrary to Article 6, Article 2 of Protocol 7 does not lend itself to implied limitations but contains an explicit limitation clause contemplating public order and national security concerns.[858] Yet, the majority completely and inexplicably disregarded it. This first concurring opinion also criticized the overall fairness approach. Judge Pinto de Albuquerque went further into the analysis of this theoretical confusion. "At the end of the day, the majority reveal their unconfessed goal: to import the overall fairness test into the ambit of Article 1 of Protocol No. 7. […] The total dissolution of the guarantee of the "very essence of the rights secured to the alien by Article 1 § 1 of Protocol No. 7" was acknowledged when the majority stated that the Court was required to determine whether that essence was preserved "in the light of the proceedings as a whole"."[859]

Judge Pinto de Albuquerque's main critique of what he called the Court's "utilitarian approach" was that the examination of the essence of the right was not separated from that of the counterbalancing factors. He argued that "the question of proportionality (and its inherent balancing exercise) should only arise 'as a subsidiary issue, in the event that the very essence of the right to a court has not been affected'. It is illogical to claim that a limitation that affects

[856] *Id.*, § 137.

[857] *Id.*, Judges Nussberger, Lemmens and Koskelo's concurring opinion, § 6.

[858] Article 2 of Protocol 7, § 2.

[859] *Muhammad and Muhammad*, Judge Pinto de Albuquerque concurring opinion, § 20.

the "very essence" of a right can be counterbalanced by subsequent procedures."[860] Ultimately, Judge Pinto de Albuquerque denounced "the amalgam in the majority's conclusion, between the overall fairness test, the margin of appreciation, the examination of the counterbalancing factors and the essence of the fair trial right".[861] For the concurring judge, the overall fairness test is an ECtHR version of a grey hole maker and its use is clearly connected to national security issues: "In an environment of consistent expansion of State claim-making around national security, the majority's message provides a regulatory shortcut for pretentiously zealous governments to do whatever they want with alleged terrorists and the like, thereby downgrading the much needed 'European supervision' to a mere rubber-stamping of national choices."[862] "[T]his doctrine will, under the cloak of apparent legality, rob the Convention rights little by little of their substance and the Court of its credibility."[863]

In both cases, instead of resorting to the clauses specifically designed to address security concerns of such a magnitude that the states would have to infringe on the essence of the right – Article 15 in *Ibrahim and Others*,[864] Article 1 of Protocol 7 § 2 in *Muhammad and Muhammad* – the Court subjected the core of the right to proportionality assessment, opening the possibility to balance away the minimum guarantees. The possibility to derogate from the core of a right appears to be what ultimately differentiates a derogation under Article 15 from a classic proportionality assessment, where the circumstances of the case are taken into account.

[860] *Id.*, Judge Pinto de Albuquerque's concurring opinion, § 17.

[861] *Id.*, Judge Pinto de Albuquerque's concurring opinion, § 20.

[862] *Id.*, Judge Pinto de Albuquerque's concurring opinion, § 22.

[863] *Id.*, Judge Pinto de Albuquerque's concurring opinion, § 23.

[864] *Ibrahim and Others v. the United Kingdom* [GC], nos. 50541/08 and 3 others, 13 September 2016, Judges Sajó and Laffranque's dissenting opinion, § 31.

Under Article 15, one would not expect developments on the minimum core of the right but merely about the strict necessity of the derogatory measure. Yet, here again, the language of the Court creates confusion. In *Kavala*, despite Turkey having notified an Article 15 derogation, the Court found a violation of Article 5 and stated that "[t]o conclude otherwise would negate the minimum requirements of Article 5 § 1 (c) […] and would defeat the purpose of Article 5 of the Convention."[865] This logic, if it seems to deprive the scheme of Article 15 of *effet utile*,[866] is however in line with what Judge Pinto de Albuquerque called the "Court's essentialist approach" as he argued that the essence of a right is non-derogable.[867] He claimed that "no legitimate aim can justify the impairment of a Convention right's essence, be it in ordinary times or in troubled times like a state of emergency."[868]

b. Supreme Court: categorical approach

To this day, to the best of my knowledge, the Supreme Court applied some form of balancing in only two emergency cases. In *Roman Catholic Diocese of Brooklyn, New York v. Cuomo*, the reasoning of the Court mainly focused on the fact that the restriction was not neutral and generally applicable. It therefore applied strict scrutiny and concluded that the measure was not narrowly tailored. The bench was divided with regards to the level of scrutiny and

[865] *Kavala v. Turkey*, no. 28749/18, § 158, 10 December 2019.

[866] Rusen Ergec, *Les droits de l'homme à l'épreuve des circonstances exceptionnelles. Étude sur l'article 15 de la Convention européenne des droits de l'homme*, Bruylant, Collection de droit international (Bruxelles, 1987) cited in; Sébastien Van Drooghenbroeck and Cecilia Rizcallah, "The ECHR and the Essence of Fundamental Rights: Searching for Sugar in Hot Milk?," *German Law Journal* 20, no. 6 (September 2019): 908, https://doi.org/10.1017/glj.2019.68.

[867] *Muhammad and Muhammad v. Romania* [GC], no. 80982/12, 15 October 2020, Judge Pinto de Albuquerque's concurring opinion, § 18.

[868] *Id.*, Judge Pinto de Albuquerque's concurring opinion, § 25.

conclusion. However, the overall approach to First Amendment cases is well established and was not subject to controversy.

Conversely, in *Hamdi*,[869] the majority decided to resort to balancing while Justice Scalia strongly rejected this approach and advocated for a categorical one instead. Although this dynamic is reminiscent of the one displayed by the ECtHR in the cases discussed above, one should be careful not to confuse the theory about the core or essence of a right and the categorical approach in the context of the U.S. These follow two very different logics. However, much like in *Ibrahim and Others* and *Muhammad and Muhammad*, *Hamdi* is concerned with procedural rights, specifically procedural rights of suspected terrorists.

Indeed, Hamdi claimed that he was entitled to judicial review of his status as enemy combatant and that all procedural guarantees should apply to this process. The majority agreed with the first part. It reiterated in strong words that "[i]t is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad."[870] Yet, it went on to qualify the guarantees to which Hamdi was entitled. To do so, it applied the balancing test designed in *Mathews v. Eldridge*,[871] a case involving the determination of disability benefits.

As it found crucial interests sitting on both sides of the "Mathews scale",[872] the majority designed a custom made due process aimed to avoid erroneous detention while not imposing

[869] *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).
[870] *Id.*, p. 25.
[871] *Mathews v. Eldridge*, 424 U. S. 319 (1976). See *Hamdi*, p. 22.
[872] *Hamdi*, p. 23.

too heavy a burden on the government. This approach severely undermined due process guarantees. Rosenfeld does not condemn the use of the balancing approach. However, he argues that "when one considers where the balance was struck, the departure from [Executive] unilateralism was limited."[873] Therefore, as he finds that the majority assigned too little weight to individual liberty and too much to security concerns, he wonders if a categorical approach would not have been a better avenue.

A categorical approach is precisely what was advocated by Justice Scalia for whom only three possibilities existed: prosecuting Hamdi in accordance with the requirements of due process, temporarily suspending these guarantees by use of the Suspension Clause or releasing him. Tailoring due process based on the competing interests at stake, however, was not one of them. Since the Authorization for Use of Military Force (AUMF) was not a suspension of the writ – nor did anyone argued it was – the full guarantees of due process applied. The categorical approach advocated by Justice Scalia differs fundamentally from the core of the right in the ECtHR case law. The former grants the full application of the guarantees absent a suspension of the writ whereas the latter only covers the most essential elements of the right. However, Justice Scalia's claim that the only possibility to evade due process guarantees is to make use of the Suspension Clause is similar to Judge Sajó's argument in *Ibrahim* that only through an Article 15 derogation can the core of Article 6 rights be set aside.

During the Covid-19 pandemic, the normal functioning of courts was affected with severe consequences for procedural rights. Many of the accommodations enabled by the emergency powers, including automatic prolongation of pre-trial detention, the possibility of

[873] Rosenfeld, "Judicial Balancing in Times of Stress," 2114.

using videoconferencing at hearings, conducting proceedings without a hearing, or rejecting certain applications for interim relief without an adversarial procedure were validated by the ECtHR[874] and the French Council of State.[875]

These controversial applications of the proportionality assessment or balancing reveal an attempt by the Courts to soften the states' obligations so as not to impose a disproportionate burden on governments. Put differently, courts adjusted procedural guarantees to match the crucial goal that is the fight against terrorism. Yet in other words, judges undermined fundamental rights to accommodate governments' national security claims. Considering the important impact of emergency and security claims on the type and degree of scrutiny, it is crucial that they remain confined to domains for which emergency powers were activated. It is tempting for governments to use these additional powers to address unrelated situations or generally curtail opposition. Courts are equipped to oppose such misuse. It does not necessarily mean that they do.

3. Misuse of power doctrines/provisions

The subjective character of what constitutes an emergency makes the related powers particularly vulnerable to misuse or arbitrary discretion. It puts the emphasis on the intent and motivations on the part of the authorities activating and exercising the emergency powers. Both the ECHR and the French legal order include mechanisms specifically designed to scrutinize

[874] *Bah v. the Netherlands* (dec.), no. 35751/20, 22 June 2021; *Rybár and Veselská v. Slovakia*, no. 60788/21, 31 August 2023.

[875] Council of State, no. 439903 and 439883, 10 April 2020.

the (ulterior) motives of the authorities. These misuse of power article and doctrine are meant to address situations where governments adopt measures or act in ways that are legally permitted but do so for other reasons than those foreseen by the law. Yet, so far, the ECtHR and French Councils have been reluctant to make use of these mechanisms in a context of emergency. In the U.S., it is more difficult to pinpoint an equivalent doctrine at the federal level. The idea of abuse of power more commonly refers to the unrestrained exercise of (discretionary) powers.[876] If there are instances where the Supreme Court addressed the potential ulterior motives of the administration, these remain exceptional, and the Court often refrains from entering this line of reasoning.

Several reasons may explain such restraint. The intention of the legislator (understood here broadly) may be difficult to identify and even more to prove. Judges might also consider that going down the intent road would lead them to overstep their boundaries. Such reasoning can be expected from the Supreme Court, where judicial restraint and separation of power are the cornerstones of several Justices' thinking and therefore, at times, depending on its composition, of the Court itself. In the case of the ECtHR, this idea might be supported by an ingrained fear of a lack of legitimacy[877] rooted in its regional character and reinforced by doctrines such as subsidiarity.[878] As for the French Councils, the lingering mistrust towards judges and ideal of supremacy of the will of the people, although receding, continue to shape the role of their members.[879]

[876] See for example Adrian Vermeule, "Optimal Abuse of Power," *Northwestern University Law Review* 109, no. 3 (April 1, 2015): 673–94.

[877] Krunke, "Courts as Protectors of the People," 91.

[878] Although the normative consequences have yet to be determined, the insertion of the principle in the preamble of the Convention by Protocol 15 is symbolically significant.

[879] Troper, "Constitutional Law," 8.

Justice Scalia's position with regards to intent highlights these difficulties. Indeed, he noted that "Government by unexpressed intent is … tyrannical."[880] Yet, as pointed by Sajó, Scalia argued against judges' involvement with the legislator's intent, which he thought would lead to judicial arbitrariness. He focused instead on the objective intent of the text.[881] This subsection argues to the contrary that objective intent is not sufficient in the context of emergency and that analyzing the intent of the normative authorities – deducted from objective elements – can prove a valuable tool in curbing abuses. When it comes to emergency powers, governmental practices have created a true "playbook of misuse"[882] which courts cannot ignore.

a. ECtHR: Article 18 coming to age

Apart from the various limitation clauses and overall approach of the Court towards limitations of rights,[883] Article 18 focuses on the "[l]imitation on use of restrictions on rights". It reads: "The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed." When it comes to restricting rights, the aim matters. This provision appears largely inspired by the French doctrine of *détournement de pouvoir*.[884] As such, it was meant to address situations

[880] Antonin Scalia, "Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws," in *A Matter of Interpretation: Federal Courts and the Law - New Edition*, ed. Amy Gutmann, The University Center for Human Values Series (Princeton University Press, 1997), 17.

[881] András Sajó, *Ruling by Cheating: Governance in Illiberal Democracy*, Cambridge Studies in Constitutional Law (Cambridge: Cambridge University Press, 2021), 292, https://doi.org/10.1017/9781108952996.

[882] Fionnuala Ní Aoláin, "Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism," October 10, 2023, para. 11, https://www.ohchr.org/en/documents/thematic-reports/a78520-report-special-rapporteur-promotion-and-protection-human-rights.

[883] Gerards, *General Principles of the European Convention on Human Rights*, 225–28.

[884] *Merabishvili v. Georgia* [GC], no. 72508/13, § 154, 28 November 2017. For a historical account of the inclusion of Article 18 in the Convention, see Corina Heri, "Loyalty, Subsidiarity, and Article 18 Echr: How the ECtHR Deals with Mala Fide Limitations of Rights," *European Convention on Human Rights Law Review* 1, no. 1 (May 14, 2020): 25–61, https://doi.org/10.1163/26663236-00101001.

where the letter of the law was not necessarily violated but the normative powers it created were used for a different purpose than the one originally intended. This aspect is reflected in the "bad faith" element which underlines Article 18.[885]

Tsampi goes further. For her, "there are good reasons to suggest that Article 18 is connected to the functioning of the system of *contre-pouvoirs* within a State".[886] This understanding is supported by the judges dissenting in the Chamber judgment in *Navalnyy* and for whom Article 18 "serves to address the abusive limitation of the rights of oppositional actors with the aim of silencing them".[887] This potential of Article 18 is precisely what makes it so precious in a context of state of emergency when the separation of powers is undermined, and non-institutional counter-powers are most at risk.

Yet, although it had been argued on a few occasions,[888] Article 18 had generally been overlooked until the Court found a violation for the first time in 2004.[889] Since then, the case law under Article 18 grew exponentially with a sharp increase since 2016.[890] This developing tendency led the Grand Chamber to clarify the applicable principles in *Merabishvili v.*

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[885] Başak Çali, "Coping with Crisis: Whither the Variable Geometry in the Jurisprudence of the European Court of Human Rights," *Wis. Int'l LJ* 35, no. 2 (2017): 263–69.

[886] Aikaterini Tsampi, "The New Doctrine on Misuse of Power under Article 18 ECHR: Is It about the System of Contre-Pouvoirs within the State after All?," *Netherlands Quarterly of Human Rights* 38, no. 2 (June 1, 2020): 136, https://doi.org/10.1177/0924051920923606.

[887] *Navalnyy v. Russia*, nos. 29580/12 and 4 others, 2 February 2017, Dissenting Opinion of Judges López Guerra, Keller and Pastor Vilanova, § 3. The Grand Chamber would later reverse and find a violation of Article 18 (*Navalnyy v. Russia* [GC], nos. 29580/12 and 4 others, 15 November 2018).

[888] *Kamma v. Netherlands* (1974) 1 DR 4, 9 setting the first principles for the interpretation of Article 18. Arguments under both Articles 17 and 18 had also been made in the *Greek case*.

[889] *Gusinskiy v. Russia*, no. 70276/01, ECHR 2004-IV.

[890] Christiane Schmaltz, "The European Court of Human Rights and Article 18 – An Indicator for the State of Democracy in Europe?," in *Theory and Practice of the European Convention on Human Rights*, 2022, 36, https://doi.org/10.5771/9783748923503-35.

Georgia.[891] Among those principles, the most contentious one deals with the plurality of purposes and highlights the difficulty in navigating the legislator's intent.

Where the contested measure does not serve any legitimate purpose, the Court will find a violation of the main article. This does not render Article 18 redundant, far from it, as demonstrated by the dissenting judges and later the Grand Chamber in *Navalnyy*.[892] However, the Court is facing a more complicated situation when the measure serves a plurality of purposes including some authorized and some prohibited by the Convention. According to the new principle established in *Merabishvili*, the Court will only find a violation of Article 18 if the ulterior motive was the predominant purpose of the measure. This test poses its own difficulties including the fact that "it continues to endorse politically-motivated prosecutions and tolerate bad faith, as long as it is not the predominant purpose of a measure".[893]

Nonetheless, the growing case law under Article 18 shows that the good faith presumption on which the whole convention system is founded is no longer as strong as it used to be.[894] As emergencies multiply, or more accurately, as national authorities more readily frame various issues in emergency terms, they more readily provide a legitimate purpose to justify severe restrictions on human rights. When this legitimate purpose allows the measure to pass under the limitation clause threshold, Article 18 might just be the tool the Court needs to catch the abuse.

[891] *Merabishvili v. Georgia* [GC], no. 72508/13, 28 November 2017.

[892] *Navalnyy v. Russia* [GC], nos. 29580/12 and 4 others, 15 November 2018.

[893] Heri, "Loyalty, Subsidiarity, and Article 18 Echr," 31.

[894] Çali, "Coping with Crisis."

It is unlikely that the Court would ever find a violation of Article 18 in conjunction with Article 15 since Article 18 – similarly to Article 14 – can only be invoked in conjunction with a substantive article. However, it did find violations of Article 18 in emergency contexts, including when a derogation had been notified under Article 15. In *Kavala*, the applicant had been arrested and detained because of his alleged involvement in the "Gezi events" in 2013 and the attempted coup in 2016 which triggered a declaration of state of emergency and a derogation by Turkey under Article 15 ECHR. The Court found a violation of Article 5 § 1 and 5 § 4 with regards to the applicant's detention and lack of speedy review thereof despite the Article 15 derogation. Indeed, it found that the applicant had been detained based on legislation adopted prior to the state of emergency and based on mere suspicion which "did not reach the required minimum level of reasonableness". Consequently, the measures could not have been said to be "strictly required by the exigencies of the situation".[895]

Interestingly, the Court continued to examine the case under Article 18. The applicant had complained of an ulterior purpose behind his detention. The Court considered this complaint to be a "fundamental aspect" of the case not yet examined.[896] Looking at all the circumstances of the cases, it found that the impugned measures "pursued an ulterior purpose, […] namely that of reducing the applicant to silence. Further, [they] were likely to have a dissuasive effect on the work of human-rights defenders." Therefore, the Court concluded that there had been a violation of Article 18.

A year later, it found another violation of Article 18 on similar grounds, this time with regards to the detention of a member of parliament. The origins of the *Selahattin Demirtaş v.*

[895] *Kavala v. Turkey*, no. 28749/18, § 158, 10 December 2019.
[896] *Id.*, § 219.

Turkey (no. 2) case[897] were not directly related to the attempted coup but the ECtHR judgment was delivered after four years of adjudicating cases related to the purge of various groups including the opposition, the judiciary or the media. The applicant was a member of parliament and co-chair of a left-wing pro-Kurdish political party, arrested and detained on terrorism charges. The Grand Chamber found the detention to constitute a violation of Article 10 (freedom of expression) but also, for the first time, of Article 3 of Protocol 1 (right to free elections).

Here again, the Court went on to examine the application under Article 18. After a long development discussing the collapse of the separation of powers in Turkey with regards to both the legislative and judiciary branches, the Court concluded that the applicant's detention "pursued the ulterior purpose of stifling pluralism and limiting freedom of political debate, which is at the very core of the concept of a democratic society."[898] Therefore there had been a violation of Article 18 (in conjunction with Article 5).

Selahattin Demirtaş (no. 2) and *Kavala* offer two interesting examples of how the Court can use Article 18 to identify and address misuses of emergency powers. In particular, the broad and systemic approach developed by the Court in Article 18 cases, especially saliant in *Selahattin Demirtaş (no. 2),* allowed to identify covered intent. At the same time, clarifying the rules regarding contextual evidence[899] and the burden of proof[900] may help alleviating the difficulty in identifying the legislator's intent and accusations of judicial arbitrariness.

[897] *Selahattin Demirtaş v. Turkey (no. 2)* [GC], no. 14305/17, 22 December 2020.

[898] *Id.*, § 437.

[899] Heri, "Loyalty, Subsidiarity, and Article 18 Echr," 37–38.

[900] Çali, "Coping with Crisis," 268.

Nonetheless, Article 18 case law is in the early stages of its development and so far, the Court has only found violations in the most blatant and least contentious cases. Notably, Kavala's prosecution documents listed many of his activities including those he carried out in cooperation with the Council of Europe.[901] It remains to be seen how extensively the Court will be willing to apply Article 18. The *Kavala* judgment quotes at length a speech of the President where he explicitly links the applicant to George Soros reiterating critiques expressed by the Hungarian ruling power.[902] This extensive quote seems purposeful. Yet, to date, the Court has not examined any Article 18 cases with regards to Hungary – including with regards to the state of emergency declared at the beginning of the Covid-19 pandemic.[903]

The aim of a measure remains precarious ground for the Court. A case like *Dareskizb Ltd*[904] testifies to this delicate matter. On the one hand, the Court found that the circumstances were not such as to justify the use of Article 15 and that consequently, the derogation notified by Armenia was not valid.[905] With regard to the contested measure – prohibiting the publication of an opposition newspaper, it considered that "such restrictions, which had the effect of stifling political debate and silencing dissenting opinions, go against the very purpose of Article 10, and were not necessary in a democratic society." These two elements put together are a strong indication that the emergency measure actually pursued ulterior motives. Yet, not only did the Court not explicitly stated any doubts as to the aim of the measure but it was "prepared to accept

[901] *Kavala*, § 223.

[902] *Id*.

[903] The state of emergency declared by the Hungarian government at the beginning of the pandemic has been largely criticized as a disguise for extending governmental powers. See for example Kriszta Kovács, "Hungary and the Pandemic: A Pretext for Expanding Power," *Verfassungsblog* (blog), March 11, 2021, https://verfassungsblog.de/hungary-and-the-pandemic-a-pretext-for-expanding-power/.

[904] *Dareskizb Ltd v. Armenia*, no. 61737/08, 21 September 2021.

[905] *Id*, § 62.

that the measure […] pursued the "legitimate aim" of preventing disorder and crime."[906] The Court's readiness to endorse claims of legitimate aims even when they are so dubious is problematic.

In another Article 15 case, the Court again painted a halftone picture. In *Domenjoud*, the French authorities had used their emergency powers – activated after the 2015 terrorist attacks – to place under house arrest environmental activists during a UN summit in Paris. On the one hand, assessing the legality of the measure, the ECtHR found that there had to be a link between the justification of the emergency power (counter-terrorism) and the measures. However, this link did not have to be direct. During emergencies, the authorities may have to "make operational choices in order to meet all their responsibilities."[907] With this statement, the ECtHR embraced an operational logic according to which the limited resources of law enforcement agencies can be used to justify limitations on rights. Therefore, by a sort of *ricochet* effect, one "crisis" may result in limitations of rights in unrelated contexts. The same argument was endorsed by the French Council of State.[908] These considerations led the Court to conclude that the emergency norm was sufficiently foreseeable.

On the other hand, the measure was found to be unnecessary with respect to one of the applicants. Therefore, the Court moved on to examine the derogation made by France under Article 15. The French authorities had informed the Secretary General of the Council of Europe that the state of emergency had been declared in order to prevent further terrorist attacks. Only measures presenting a sufficiently strong link with this purpose could be covered by the

[906] *Id*, § 75.

[907] *Domenjoud v. France*, no. 34749/16 and 79607/17, § 98, 16 May 2024.

[908] See below, p. 301.

derogation.[909] Such was not the case, and the Court found a violation of the second applicant's right. The tendency to brush over the initial steps of the reasoning – legality and legitimate aim – to focus on the proportionality of a measure will have to be reconciled with the developing line of case law questioning the member states' good faith. As the case law grows, applicants are more likely to make claims under Article 18.[910] The Court will have to answer.

Finally, the case law in its current state only sanctions ulterior motives when the aim is to silence political opponents or human rights activists thereby undermining pluralism and democracy, which are at the core of the convention system.[911] This specific reading of Article 18, confirming Tsampi's argument, seems to be keeping with the *raison d'être* of the provision as transpires from the *travaux préparatoires*.[912] Yet, other questionable ulterior motives exist, for example when emergency powers are used to curtail minority rights for electoral gains. It is uncertain whether the Court will be inclined to examine such cases under Article 18 or will rather follow a more traditional approach, finding no legitimate aim or that the measure was not "necessary in democratic society" as the case may be. Overall, the development of Article 18 case law is encouraging from the point of view of the abuse of emergency powers. However, the Court has used this article cautiously and many questions are still open. Article 18 is indeed a "developing tool in need of sharpening".[913]

[909] *Domenjoud*, § 154.

[910] There is no sign that the applicant in *Dareskizb Ltd* or *Domenjoud* had made any claim under Article 18.

[911] *Handyside v. the United Kingdom*, § 49, 7 December 1976, Series A no. 24.

[912] Tsampi, "The New Doctrine on Misuse of Power under Article 18 ECHR."

[913] Schmaltz, "The European Court of Human Rights and Article 18," 51.

b. France : *détournement de pouvoir*

France is home to the *détournement de pouvoir* doctrine, which inspired Article 18 ECHR. The doctrine, developed by the Council of State, is meant to sanction cases where the administration exercises its powers to pursue goals other than those for which the said powers were granted. Such misuses of emergency powers have been repeatedly documented, including during the 2015-2017 and Covid-19 emergencies.[914] More recently, emergency powers transposed in the normal legal order were used to prohibit or undermine demonstrations hostile to President Macron.[915] Nonetheless, the Council of State has systematically refused to mobilize the tool it had created precisely to sanction this kind of abuses. This attitude is all the more regrettable that the Constitutional Council has adopted an ambiguous position with regard to the aim of the statutes it reviews and, especially concerning emergency measures, appeared to be passing the ball to the Council of State.

i. Constitutional Council

The notion of *détournement de pouvoir* in France is one of administrative law, not of constitutional law. The Constitutional Council does not review the purpose of a law as decided by the legislator[916] because it considers that it would actually be a control of the opportunity of

[914] During the lockdowns ordered to tackle the Covid-19 pandemic, some neighborhoods had been particularly targeted by the police. The *Ligue des Droits de l'Homme* lodged a complaint with the *Défenseure des droits* (Human Rights Ombudsman). Dréan, "Amendes abusives."

[915] "Des lois antiterroristes détournées pour garantir le maintien de l'ordre en France," *Le Monde.fr*, April 30, 2023, https://www.lemonde.fr/societe/article/2023/04/30/des-lois-antiterroristes-detournees-pour-garantir-le-maintien-de-l-ordre_6171579_3224.html; "Commémorations du 8-Mai : la Préfecture de police interdit les manifestations dans un large périmètre autour des Champs-Elysées," *Le Monde.fr*, May 6, 2023, https://www.lemonde.fr/societe/article/2023/05/06/commemorations-du-8-mai-la-prefecture-de-police-interdit-les-manifestations-dans-un-large-perimetre-autour-des-champs-elysees_6172278_3224.html.

[916] Bruno Genevois, "L'enrichissement des techniques de contrôle | Conseil constitutionnel," *Cahiers du Conseil constitutionnel*, no. Hors série 2009-Colloque du Cinquantenaire (November 3, 2009).

the law which is not within its attributions.[917] "Article 61 of the Constitution does not confer on the Constitutional Council a power of appreciation and decision identical to that of Parliament, but only gives it the power to rule on the conformity with the Constitution of the laws referred to it for examination".[918]

Nonetheless, the aim of a measure is central to its constitutionality review by the Council. For example, the Constitutional Council insisted – following the arguments made by the government to the UN Special Rapporteur on counter-terrorism and human rights[919] – that the SILT statute was not a transposition of emergency measures in the ordinary legal order because, amongst others, these measures were only applicable to the prevention of terrorism.[920] The aim of the "emergency" measures was therefore crucial to their constitutionality.

Unsurprisingly, however, the measures introduced by the SILT statute – as were their predecessors during the state of emergency[921] – were used for purposes other than the one inscribed in the law and on which their constitutionality hinged. A Senate report evaluating eighteen months of implementation of the SILT statute noted that some of the measures had been applied outside the legal frame, that is for purposes other than the prevention of terrorism.[922] It follows that the Constitutional Council put itself in an ambiguous position with regard to the aim of emergency measures. While making it a central element of their constitutionality, it was incapable of guaranteeing its reality and respect.

[917] Constitutional Council, no. 84-179 DC, 12 September 1984.

[918] Constitutional Council, no. 74-54 DC, 15 January 1975.

[919] Hennette-Vauchez, *La Démocratie en état d'urgence*, 54.

[920] Constitutional Council, Decision no. 2017-695 QPC, 29 March 2018 (M. Rouchdi B. et autre).

[921] See next sub-section on the Council of State.

[922] Daubresse, "Rapport Au Nom de La Mission de Suivi et de Contrôle de La Loi SILT," 25–26.

The *a priori* review might offer an opportunity to check the aim. For example, the Council controls – of its own motion if necessary – the absence of *cavaliers législatifs*, legislative provisions which are not connected to the purpose of the statute. However, this means is limited. It also supposes that the bill is referred to the Council prior to its adoption which is not always the case, especially concerning emergency statutes.[923] Yet a more obvious shortcoming of *a priori* review is that it takes place before the implementation of the law and therefore before its potential misuse. *A posteriori* review is not better suited because even then the Constitutional Council only conducts a review *in abstracto* of the statute and not of the administrative acts implementing it. Such incapacity for the Council to address the adequacy of the measures to their claimed purpose might partially explain the heavy emphasis it puts on the importance of review by the administrative judge. Unfortunately, this approach requires more robust scrutiny than the one carried out by the Council of State in the context of emergency.

ii. Council of State

Détournement de pouvoir is a classic principle of French administrative law. It is one of the "internal" elements of the legality of an administrative norm which the courts may – but do not always – review. It allows the judge to sanction administrative norms which pursue goals others than those foreseen by the law.[924] The underlying logic is one of popular sovereignty. Parliament adopted a law conferring powers to the administration in order to further certain

[923] The absence of *a priori* constitutional review was especially striking during the 2015-2017 state of emergency. The government asked that the bills would not be referred to the Constitutional Council. In a speech to the National Assembly, Prime Minister Valls exhorted the deputies to not refer the bill, dismissing such move as "narrowly juridical", all the while acknowledging that the constitutionality of some measures was questionable. Parliament abode. None of the six bills prolongating the security state of emergency in 2015-2017 were referred to the Constitutional Council.

[924] Council of State, 26 November 1875, no. 47544, Pariset.

aims. The administration cannot use the said powers for other goals than those contemplated by the legislator.

To conduct this type of review, the judge needs to identify the aims of the law – usually expressly mentioned in the statute, the aim of the administration, and compare the two. For that reason, the control of *détournement de pouvoir* is often considered a subjective one in the sense that courts review the intent of the administration.[925] However, subjective does not mean that judges attempt to read the administration's mind or that they make an arbitrary decision. Rather they take into account the goals listed in the administrative act but also "all of the circumstances" of the case.

In 1960, the Council of State ruled on the seizure of several issues of a newspaper in Algiers.[926] The administrative authority – the *préfet* – had based its decisions on criminal provisions and followed the procedure prescribed therein. However, on the one hand, the aim of these criminal provisions was "to ascertain crimes or offences against the internal or external security of the State and to hand over the perpetrators to the courts in charge of punishing them". On the other hand, the Council considered that "it was clear from all the circumstances of the case" that the goal of the *préfet* was "to prevent the diffusion in Algiers […] of the newspaper". The administrative authority used criminal provisions to achieve preventive goals, a matter of administrative, not criminal, police. The *préfet* should have used its emergency powers instead. Therefore, in 1960, the Council of State encouraged the administration to make use of the proper legal basis, its emergency powers.

[925] Pierre Delvolvé, *Le droit administratif*, 3rd ed., Connaissance du Droit (Dalloz, 2002), 133.

[926] Council of State, Assembly, 24 June 1960, no. 42289, Frampar.

Conversely, the Council was less keen on finding a *détournement de pouvoir* in 2015-2017 when the administration made extensive use of its emergency powers for purposes which were only tenuously connected to the reason for which the state of emergency had been declared. In 2016, a Report of the National Assembly noted that "the state of emergency had made it possible to take measures less to fight directly against the terrorist threat than to achieve a general objective of maintaining order".[927] Indeed, during the two years following the declaration of the state of emergency, emergency measures were used to deal with various protest movements. On various occasions, they prohibited demonstrations, meetings, parking of vehicles used by activist organizations,[928] but also placed individuals (environmental and leftist activists) under house arrest to prevent them from taking part in demonstrations.[929]

This use of emergency powers for other purposes than the one which prompted the declaration of emergency was reflected in the ensuing abundant litigation. For example, *détournement de pouvoir* or a variation of it was argued in 38 out of 65 cases on measures preventing individuals to take part in demonstrations. Yet, the argument was never accepted by the administrative courts.[930] More, the Council of State, ruling on certain of these measures, stated that the fact that the 1955 Statute (on the state of emergency) was used for purposes other than the fight against terrorism, which had triggered its activation, did not render the ensuing measures illegal.[931]

[927] Dominique Raimbourg and Jean-Frédéric Poisson, "Report on the Parliamentary Monitoring of the State of Emergency" (National Assembly, May 2016), 126.

[928] Hennette-Vauchez, *La Démocratie en état d'urgence*, 78.

[929] Stéphanie Hennette-Vauchez et al., "L'état d'urgence Au Prisme Contentieux," Research Report (Défenseur des Droits, February 2018), 147.

[930] Hennette-Vauchez et al., 147.

[931] Council of State, 11 December 2015, no. 394993, no. 394991, no. 395002, no. 395009, no. 394989; Hennette-Vauchez, "Democracies Trapped by States of Emergency," 21.

During the 2015-2017 security emergency, the Council of State validated a reasoning already nascent in 2005: the operational logic – later found in the ECtHR *Domenjoud* case. The Council of State accepted that individuals be placed under house arrest not because they were particularly dangerous or could not be contained through normal police means but because in the specific circumstances – in this case the presence of several foreign heads of state for the COP 21 in Paris – the police could not deal with them because officers were mobilized elsewhere. This logic circumvents the proportionality test since the shortcomings of the administration, in this case the police, may justify just about any measures.[932] The measure is necessary because the administration – due to its own doing – is not capable of adopting less restrictive ones.

When it comes to ascertaining that emergency measures remain true to their proclaimed aim, the Constitutional Council relied heavily on the administrative judge.[933] Indeed, *détournement de pouvoir* is a mechanism well known of the Council of State. Unfortunately, it requires a rather high level of scrutiny on which the Council of State is not keen during emergencies. Putting aside such an effective tool when it is most needed is not only dangerous but in contradiction with the recent dynamic at the ECtHR which increasingly finds the need to resort to the long-overlooked Article 18.

c. Supreme Court: A "reasonable observer" without the Establishment Clause?

The Supreme Court is cautious when treading on grounds related to the truthfulness of the interest put forward by the government to justify its action. An analysis of the various

[932] Hennette-Vauchez and Slama, "Harry Potter au Palais royal ?," 288–89.

[933] See for example the insistence on the role of the administrative judge in Constitutional Council, no. 2017-695 QPC, 29 March 2018 (M. Rouchdi B. et autre).

Justices' positions in *Trump v. Hawaii* tackles the variety of concerns related to the "misuse of power" doctrine. This one case raised the issue of the plurality of goals, the possibility of objectively identifying the real motives of a measure and the combination with the degree of scrutiny. Indeed, in the absence of independent "misuse of power" doctrine, the question of the reality of the motives becomes entwined with the relation between aim and means.

Underlying *Trump v. Hawaii*, referred to as the "Muslim ban case", was the claim that the true reason for the presidential Proclamation was not national security but the severe limitation of immigration, especially of Muslims. The majority considered that the Court's scrutiny was "highly constrained" and decided to only apply a rational basis review.[934] From deciding on this lower degree of scrutiny, the majority went on to find that "[a]s a result, we may consider plaintiffs' extrinsic evidence,[935] but will uphold the policy so long as it can reasonably be understood to result from a justification independent of unconstitutional grounds."[936] In other words, the Court is satisfied as long as the measure can be plausibly related to the Government's stated objective and this stated objective is not unconstitutional. With this statement, the majority made clear that whether the stated objective is truly the reason behind the measure is not for the Court to determine.

Justifying the absence of checks on the misuse of power by the low level of scrutiny is unsatisfying. These are two different questions addressing two separate issues, the degree of discretion in the exercise of power and suitability of the measure on the one hand, the legality of the real aim pursued on the other. Whether the Court's position would have been different in

[934] *Trump v. Hawaii*, 585 U.S. ___ (2018), p. 32.

[935] Referring to evidence supporting ulterior motives for the Proclamation.

[936] *Trump v. Hawaii*, p. 32.

a strict scrutiny case is unclear. Justice Sotomayor, dissenting, argued both for strict scrutiny and the examination of the real motives. However, in this case, both were intrinsically linked since they both derived from an analysis of the case under the First Amendment and rather than in its statutory dimension.

The majority refused to contemplate the possibility of a plurality of goals, being only interested in the one stated by the government. The ECtHR's Grand Chamber devised a new test for such situations, the "predominant purpose" test, where Article 18 ECHR is only violated if the unconventional motive was the main reason for the measure. Justice Breyer appeared to advocate for a more rigorous test. He argued that the Proclamation would be illegal if it was "significantly affected by religious animus against Muslims". Conversely, the measure would be likely legal if "its sole *ratio decidendi* was one of national security".[937] It follows that the existence of the ulterior motive, at any degree, would affect the legality of the Proclamation.

Justice Sotomayor, also dissenting, argued that the "repackaging" of the measure "masquerade[d] behind a façade of national-security concerns" is not enough to "cleanse the appearance of discrimination" created by President Trump.[938] To assess the reality and importance of this ulterior motive, she relied on the "reasonable observer" test and found that the anti-Muslim animus was sufficiently substantiated for the plaintiffs' First Amendment claim to be likely to succeed.[939] However, the "reasonable observer" test, to assess whether the

[937] *Id.*, Justice Breyer's dissenting opinion, p. 1.

[938] *Id.*, Justice Sotomayor's dissenting opinion, p. 1.

[939] *Id.*, Justice Sotomayor's dissenting opinion, p. 1.

government acted with "an ostensible and predominant purpose", is used primarily in Establishment Clause cases. Its transposition to other domains is uncertain if not unlikely.[940]

Finally, in their respective opinions, Justices Breyer and Justice Sotomayor offer considerations on how to discern ulterior motives and the type of proof to take into account. Indeed, discerning the reasons motivating the decisionmakers is a perilous endeavor and courts have to be careful "not to engage in any judicial psychoanalysis of a drafter's heart of hearts."[941] Both dissenting opinions emphasize the way the measure is implemented but also background elements, specifically "the text of the government policy, its operation, and any available evidence regarding the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by the decisionmaker."[942] These standards were developed for the "reasonable observer" test in the context of the Establishment Clause. Nonetheless, they demonstrate that the determination of ulterior motives is not an exercise in clairvoyance but can rely on objective elements.

The Covid-19 pandemic offered yet another opportunity to use emergency powers to regulate immigration. In March 2020, the Trump administration started issuing emergency decrees – "Title 42 orders" – severely restricting immigration allegedly in order to limit the spread of the disease. After initially extending the policy, the Biden administration announced its intention to put an end to it. Two parallel sets of litigations ensued. In the first one, several states which were relying on these emergency decrees to curb immigration at the southern U.S.

[940] See *id*., majority opinion, footnote no. 5, pp. 32-33.

[941] *Id.*, Justice Sotomayor's dissenting opinion, p. 4 (internal quotation marks omitted).

[942] *Id.*, Justice Sotomayor's dissenting opinion, pp. 3-4 (internal quotation marks omitted).

border sought and obtained a national order to extend the policy.[943] In the second, individuals sought and obtained a D. C. district court decree vacating the Title 42 orders as being illegal from the start.[944] States from the first set of litigation tried to intervene in the second litigation in order to defend the Title 42 orders. Their intervention was denied. Consequently, they asked the Supreme Court for expedited review of their intervention and a stay of the D. C. district court decree. The Supreme Court granted both.[945]

Justice Gorsuch filed a statement together with the final decision of the Court.[946] He regretted that in granting the temporary measures, the Court had effectively extended the emergency decrees indefinitely. In doing so, it had vindicated the states' attempt to use norms designed to address one "crisis", the pandemic, for another, the immigration at the southern border. The Court had allowed itself "to be used to perpetuate emergency public-health decrees for collateral purposes, itself a form of emergency-lawmaking-by-litigation."[947]

All four courts have asserted their jurisdiction over emergency cases. In principle, they have refused the argument that declarations of emergency are political questions. They also reviewed emergency measures. Furthermore, they already possess several judicial mechanisms – although they vary from one court to another – which could be particularly effective to counter the dangers specific to emergency powers. A higher degree of scrutiny, the necessity test, or the core of the right are all especially suited to address the overbreadth and "hypernomia" which

[943] *Louisiana v. Centers for Disease Control & Prevention*, 603 F. Supp. 3d 406, 412 (WD La. 2022).
[944] *Huisha-Huisha v. Mayorkas*, 2022 WL 16948610, *15 (Nov. 15, 2022).
[945] *Arizona v. Mayorkas*, 598 U. S. ___ (2022).
[946] *Arizona v. Mayorkas*, 598 U. S. ___ (2023).
[947] *Id.*, p. 6.

characterize emergency powers. Yet, judges have made very little use of them. Only in the gravest of cases have they stepped in. Similarly, all four courts struggle to adopt a test which would adequately address the existence and possible predominance of ulterior and illegal motives. Here again, only the ECtHR has, at times, incorporated the misuse of power in its reasoning to address the risk posed by emergency to democracy and pluralism. As demonstrated by the dissenting opinions, the difficulties to design and carry out effective judicial review of emergency powers are not intrinsic to the law but rest on the way it is applied and interpreted. Further illustrating this point, judges repeatedly deployed various techniques to avoid dealing with general values, an exercise which they deem too political for their mandate.

C. When in doubt, deflect - Avoiding balancing values

"Balancing is one of the fundamental problems that judges have to confront in terrorism and surveillance cases."[948] Scheinin further argues that, due to the many unknowns, "decision-making in sensitive issues is transformed from concrete and fact-based balancing to an abstract comparison between the weight of important societal values on a general level."[949] Although from a different angle, Greene also acknowledges the difficulty in the balancing of general values. As "the security-liberty trade-off […] dominates the normative framework surrounding emergency powers", measures can be criticized constantly and from either side for not assigning the adequate relative weight.[950] Trapped in this normative paradigm, courts refused to be the forum where this political arbitration takes place. Hence the omnipresent reiteration that judges

[948] Martin Scheinin, Helle Krunke, and Marina Aksenova, eds., *Judges as Guardians of Constitutionalism and Human Rights* (Cheltenham, UK: Edward Elgar Publishing, 2016), 23.

[949] Scheinin, "The Judiciary in Times of Terrorism and Surveillance - a Global Perspective," 194.

[950] Greene, *Permanent States of Emergency and the Rule of Law*, 144.

not have a general power of assessment and decision of the same nature as that of the legislative branch.[951]

The fear of the political decision is exacerbated during emergency. The legitimacy of the judiciary, devoid of electoral mandate, seems to hang in the balance alongside the political values and judges' cautiousness increases accordingly. This section focuses on some of the techniques which, alongside the openly acknowledged deference to the political branches to make political choices, have allowed the four courts to avoid the too political balancing of abstract values in emergency cases. With some of them, judges might narrow down the scope of their review, while others circumvent the difficulty all together.

1. Individual rights or general interest?

The conciliation of individual rights and public interest is a stapple in the ECtHR's case law. This approach fits the liberty v. security frame, where the liberty of a few individuals is pitted against the security of the many or of the nation. If individual rights are the bread and butter of the ECtHR, the notion of public or national security is more problematic as it remains ill-defined and seems to involve public policy to a higher degree. Faced with this dilemma, a possible move for the human rights court is to avoid the complex notion of public or general interest by focusing instead on another individual right or freedom. This maneuver is facilitated by the "rights and freedoms of others" part of the limitation clauses.[952] Following this

[951] See above, p. 270.

[952] Jacco Bomhoff, "'The Rights and Freedoms of Others': The ECHR and Its Peculiar Category of Conflicts between Individual Fundamental Rights," in *Conflicts between Fundamental Rights*, ed. Eva Brems (Antwerp-Oxford-Portland: Intersentia, 2008), 619–53.

reframing, the ECtHR addresses the conflict of two concrete rights within an identified set of facts and circumstances. In this familiar situation, the Court can resort to practical concordance.

This way of narrowing one side of the balance from general interest to an individual right, this "de-politicization through micro-management",[953] has specific drawbacks in the context of emergency. First, practical concordance is more likely to be askew. With this technique inspired from the *praktische Konkordanz* of the German *Bundesverfassungsgericht*, the Court, rather than sacrificing one right to make room for the competing one, seeks a compromise between the two and "optimiz[es] each right against the other".[954] However, as discussed in other sections,[955] in a context of emergency, those whose liberty is at stake are often implicitly and possibly even unconsciously perceived as deserving less protection. Furthermore, the competing rights on which the reframing zoomed are those of (potential) victims – of terrorism, Covid-19 or other threat which triggered the emergency. This focus on the figure of the victim tends to heighten the emotional charge of the case as judges and audience can easily identify with the (potential) victims.

The acknowledgement of the victims' rights was present in the Court's case law from the outset. In 1983, the Commission found that Article 2 may give rise to positive obligations of a preventive nature on the part of the State. However, this did not amount to a positive obligation to exclude any possible violence.[956] In *Finogenov*[957] and *Tagayeva*,[958] the Court

[953] Bomhoff, 23.

[954] Olivier De Schutter and F. Tulkens, "The European Court of Human Rights as a Pragmatic Institution," in *Conflicts between Fundamental Rights*, ed. Eva Brems (Antwerp-Oxford-Portland: Intersentia, 2008), 25.

[955] See above "Proportionality" and below "Whose liberty for whose security?".

[956] *W. v. the United Kingdom* (dec.), Commission, no. 9348/81, § 12, 28 February 1983.

[957] *Finogenov and Others v. Russia*, no. 18299/03 and 27311/03, 20 December 2011.

[958] *Tagayeva and Others v. Russia*, no. 26562/07, 14755/08, 49339/08 et al., 13 April 2017.

clarified the type and scope of the obligations under Article 2 as well as the standard of scrutiny to be applied. These vary depending on various elements, most importantly the three stages before (preventive measures), during and after the attack as well as the information available to the authorities. In these two cases brought by victims of terrorist attacks or their relatives, the state's actions were assessed against the applicants' rights as well as national security, public safety and taking into account the difficulties faced by states in protecting their populations from terrorist violence.[959]

From this type of cases brought by victims, the duality of interests (the individual rights of victims and their relatives on the one hand and the public safety or national security on the other hand) migrated to cases brought by terrorists, terrorist suspects and persons potentially dangerous. The interests of (potential) victims were then joined alongside public interest and national security. In *Muhammad and Muhammad*, the applicants' right to procedural safeguards relating to their expulsion was in question. Article 1 of Protocol 7 provides the possibility to limit these rights for public order or national security reasons. In its judgment, the Court highlighted the "importance of counterterrorism considerations", which falls squarely within the scope of the limitation clause. Nonetheless, the judges did not stop there but added considerations of competing individual rights, namely the positive obligations "to protect the right to life and the right to bodily security of members of the public".[960]

In *Sabanchiyeva*, the legislation prevented the bodies of terrorists to be handed over to relatives and the place of burial to be disclosed. The applicants, relatives of armed insurgents killed during an attack and then cremated by the state authorities, complained under Article 8

[959] *Finogenov and Others*, § 212.

[960] *Muhammad and Muhammad v. Romania* [GC], no. 80982/12, § 132, 15 October 2020.

(right to private and family life). The Russian Constitutional Court had confirmed the constitutionality of the measure on the ground that the "burial of those who have taken part in a terrorist act, in close proximity to the graves of the victims of their acts, and the observance of rites of burial and remembrance with the paying of respects, as a symbolic act of worship, serve as a means of propaganda for terrorist ideas and also cause offence to relatives of the victims of the acts in question, creating the preconditions for increasing inter-ethnic and religious tension".[961] The ECtHR accepted these intertwined individual and public interests when it found that "the measure in question could be considered as having been taken in the interests of public safety, for the prevention of disorder and for the protection of the rights and freedoms of others."[962]

Galani's effort to clarify the meaning of security (national or human) illustrates the risk embedded in the narrowing down exercise. Her analysis began by opposing public and individual interest. She argued that in cases such as *Finogenov* and *Tagayeva*, where the national authorities had intervened during hostage situations resulting in the death of many, national security had been used to increase the margin of appreciation of the state and unduly lower the protection of the victims' rights. To avoid this outcome, she narrowed down the definition of security in two ways. First, she argued that "regardless of whether it is the life of the nation, the society as a whole or specific individuals, the referent for security and security policy is ultimately the individual."[963] This logic goes against the idea that public interest is not

[961] *Sabanchiyeva and Others v. Russia*, no. 38450/05, § 128, 06 June 2013.

[962] *Id.*, § 129.

[963] Sofia Galani, "Human Security Versus National Security in Anti-Terrorist Operations: Whose Security Does the Margin of Appreciation Serve?," in *Human Dignity and Human Security in Times of Terrorism*, ed. Christophe Paulussen and Martin Scheinin (The Hague: T.M.C. Asser Press, 2020), 116, https://doi.org/10.1007/978-94-6265-355-9_6 (internal quotation marks omitted).

the mere aggregation of individual interests. As a result, her understanding of security – one where the individual is the ultimate referent – is at an impasse when the interest of the individuals involved clash, rights and interests of the (potential) victim against those of the (alleged) terrorist. Galani escapes this difficulty by taking a second step in the redefinition of security.

She argued that the right to life should encompass security. What is left after this redefinition of security is a conflict of individual rights where the right to life of individuals has replaced national security. It is clear from the cases with which Galani takes issue that she understands the right to life as paramount and specifically, the right to life of (potential) victims. Member states are expected to take further measures in order to maximize the (potential) victims' rights. To some extent, the ECtHR limited the reach of this argument. In *Chennouf and Others*,[964] the applicants argued that, in view of the information available to the national authorities, France should have done more to prevent the terrorist attack perpetrated against their relatives in 2012. The Court did not squarely address this argument but dismissed the application for lack of victim status, based on the fact that the authorities had acknowledged their responsibility and failures and that the applicants had received indemnities.[965]

Building on Dworkin, Bomhoff identified the risk of pro-majoritarian bias in the privatization of the public interest. This danger, he argued, exists when the public interest is not sufficiently distinguishable from the interest of the "other" in the sense of the "rights and

[964] *Chennouf and Others v. France* (dec.), no. 4704/19, 20 June 2023.

[965] The ECtHR also dismissed various applications alleging violations of the Convention due to insufficient actions of the member states during the Covid-19 pandemic. However, the Court found them inadmissible on grounds other than being manifestly ill-founded, thereby passing no judgment on the merits of the claim. See for example *Zambrano v. France* (dec.), no. 41994/21, 21 September 2021.

freedoms of others" part of the limitation clauses. "This danger is one of systematic under-protection of individual fundamental rights by way of an excessive valuation of the opposing 'public interest' itself understood in terms of fundamental rights."[966] This danger is all the more present when the emergency context of a case exacerbates the emotional charge and possibility of identification with the public/other's interest, while making the under-protection of minorities' interests more acceptable.

Furthermore, removing the public interest from the analysis limits the possibilities to reframe the question in order to avoid the liberty v. security dilemma be it at the micro (individual) or macro (public) level. According to De Schutter and Tulkens, practical concordance lacks "any constructivist dimension".[967] In the absence of general interest, it is difficult to develop imaginative solutions to transcend the constant recurrence of the conflict of individual rights. Therefore, rather than saving themselves from stepping into the political dimension of a debate on general values, judges trap themselves in a binary reasoning.

For Bomhoff, the move from general interest to individual rights is a consequence of the "Convention exceptionalism".[968] The conventional system is entirely right based and, as noted in the previous chapter, contrary to the Supreme Court and French Councils, the ECtHR does not have jurisdiction over matters of division of powers. Consequently, according to Bomhoff, the Convention lacks structural perspective to integrate considerations of governmental powers or power relations between majority and minority.[969] As demonstrated

[966] Bomhoff, "Rights in Conflict," 25.
[967] De Schutter and Tulkens, "Rights in Conflict," 25.
[968] Bomhoff, "Rights in Conflict," 15–16.
[969] Bomhoff, 4.

previously, the ECtHR shows a trend of including more systemic elements in its reasoning. However, these remain rather exceptional. Overall, Bomhoff's analysis remains persuasive.

Bomhoff also argued that this Convention exceptionalism explains why domestic courts – he uses the example of the U.S. Supreme Court – resort less often to the conflict-of-rights frame.[970] He argued that domestic courts rarely address a limitation of a right in terms of competing individual rights but would rather frame it as government's powers to limit rights. His observations are valid concerning emergency cases in front of the Supreme Court and the French Councils. Even though competing individual rights might be taken into account, they would more commonly be addressed in terms of governmental interest, legitimate goal or constitutional objectives. Yet, the formulation of legal issues in terms of rights is increasingly pervasive. Therefore, courts should be prepared to see a rising number of cases brought by petitioners claiming that the state did not do enough to protect their right to security, including further curtailing competing rights and freedoms. During the Covid-19 pandemic, a union of French doctors filed a *référé-liberté* asking the Council of State to enjoin the state to impose a stricter lockdown. In the Council's analysis, public health became a component of the right to life.[971] This conceptual shift by which a public interest is subsumed into an individual right is reminiscent of Galani's argument. In the context of emergency where the right to life will often be at stake, the risk is real that it would engulf all and any considerations of general interest.

[970] Bomhoff, 13.

[971] de Gliniasty, "La gestion de la pandémie par la puissance publique devant le Conseil d'État à l'aune de l'ordonnance de référé du 22 mars 2020," para. 13.

Noted at the time as an odd case reversing the logic of the *référé,*[972] this petition could be the premise of such developments.

2. "The most narrow way"[973]

Another way in which courts have narrowed the breadth of their judgments is by limiting their analysis to the specificities of the particular case at hand and excluding broader considerations. Doing so does not require reframing the issue but is rather reminiscent of blinkers put on horses to limit their visual field to what is straight ahead. The limitation can take various forms and adopt different focus depending on the institutional position of the court and the scope of its jurisdiction.

As discussed in the previous subsection, the Convention exceptionalism, entirely right based, makes it difficult for the ECtHR to address, and maybe even perceive, structural issues.[974] Typically, a measure can be found to pursue a legitimate aim and to be proportionate in one individual case, whereas a broader assessment would have revealed its discriminatory application as it is only implemented against one group in the society for example.[975] As states of emergency throw entire legal and political systems off balance, analyses which consistently remain at the mezzo and micro level run the risk of missing the biggest threat they pose.

[972] de Gliniasty, "La gestion de la pandémie par la puissance publique devant le Conseil d'État à l'aune de l'ordonnance de référé du 22 mars 2020."

[973] *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), Justice Jackson concurring opinion at 635.

[974] Similar criticism was raised in various contexts denouncing the incapacity of piecemeal or micro assessments to even identify structural and systemic deficiencies. For example with regard to the rule of law assessment and backsliding in Europe, see Kim Lane Scheppele, "The Rule of Law and the Frankenstate: Why Governance Checklists Do Not Work," *Governance* 26, no. 4 (2013): 559–62, https://doi.org/10.1111/gove.12049.

[975] See for example the analysis of Wingrove v. UK in Bomhoff, "Rights in Conflict," 22.

Such limitations would be particularly prominent with courts which adjudicate individual cases. Yet, they can also be observed in the case law of the French Constitutional Council. The Council assesses statutory provisions *in abstracto* and its decisions have *erga omnes* effect. Furthermore, when reviewing bills *a priori*, the Council considers that it can review the entire text irrespective of the scope of the request it received. Nonetheless, when reviewing emergency provisions, the Council rarely discusses or even considers the overall logic and effects of the state of emergency regime as a whole.

Those in favor of a more limited role of the judiciary could argue that such a broad assessment of measures in context exceeds the courts' prerogatives. However, reviewing an emergency measure independently from its effect, its combination with other norms or the altered system of checks and balances within which it was adopted and/or implemented seems artificial if not vain. A further argument against a review in context could point to its practical difficulty. Nonetheless, despite the limitations resulting from the nature of the Convention, the ECtHR showed that it could include circumstantial and systemic elements in its reasonings.[976]

The U.S. Supreme Court, in turn, has narrowed down the scope and effect of its reasonings in a manner permitted by its specific institutional position. Contrary to the ECtHR or French Councils, the Supreme Court has the possibility to do both legality and constitutionality review of legal measures. As recalled by Sotomayor in *Trump v. Hawaii*, when possible, the Court tends to decide cases on statutory grounds only and "strive to follow a

[976] See the analysis of *Selahattin Demirtaş v. Turkey (no. 2)* [GC], no. 14305/17, 22 December 2020 in Chapter 2 but also the section concerning Article 18 in Chapter 3. Since then, the ECtHR confirmed its systemic approach combining rule of law, separation of powers and independence of the judiciary, including in the context of Article 46 reasonings. Tsampi, "The importance of 'separation of powers' in the case-law of the European Court of Human Rights."

prudential rule of avoiding constitutional questions".[977] The series of Guantánamo detainee cases illustrates this principle.

In *Rasul*, the claimants argued that the absence of review of their detention violated both their statutory and constitutional *habeas corpus* rights. The Court, however, limited itself to decide on a statutory basis.[978] It argued that previous cases had been decided on a constitutional basis because the statutory interpretation had left a gap in the statutory protection. However, this gap had been filled by subsequent decisions and therefore, there was no longer a need to rely on "fundamentals", the Constitution, as the source of the right to federal *habeas* review.[979] Yet, grounding Guantánamo detainees' right in statutory law left it vulnerable to statutory changes. That risk materialized when Congress responded with the adoption of the Detainee Treatment Act of 2005 (DTA)[980] which stripped federal courts of any jurisdiction over claims brought by Guantánamo detainees.

Subsequently, Hamdan argued that Congress had unconstitutionally suspended the writ of *habeas corpus*. Rather than deciding on this constitutionality question, the Supreme Court decided to set the DTA aside by finding that it did not apply to pending cases.[981] It further found that the President did not have the power to establish the alternative commissions to hear detainees' cases as they did not provide sufficient guarantees. As the Supreme Court persevered in deciding the case on the narrow statutory ground rather than the "fundamental" constitutional one, Congress remained in the driving seat. Less than six months after *Hamdan* was decided, it

[977] *Trump v. Hawaii*, 585 U.S. ___ (2018), Justice Sotomayor's dissenting opinion, p. 2 (internal quotation marks omitted).

[978] *Rasul v. Bush*, 542 U.S. 466 (2004), p. 6.

[979] *Id.*, p. 10.

[980] Pub. L. No. 109–148, div. A, tit. X, §§ 1001-1006, 119 Stat. 2680, 2739-44 (2005)

[981] *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), pp. 7-20.

adopted the Military Commissions Act of 2006[982] (MCA) thereby providing the missing statutory basis for the commissions.

Finally, in *Boumediene*, the Supreme Court had no other choice but to address the breadth of the constitutional right to *habeas corpus*. It considered that the detainees had the privilege of the writ and that the Suspension Clause had full effect in Guantánamo. Consequently, since Congress had not acted in accordance with that clause, the MCA constituted an unconstitutional suspension of the writ of *habeas corpus*. In this last case, the Supreme Court adopted a clear and strong position expressed in even clearer and stronger terms. From a human rights perspective, these decisive statements are to be applauded. However, the unequivocal affirmation of the constitutional guarantee intervened after three cases and four years of narrow decisions which allowed for the violation of the right to endure and for Congress to adopt a series of statutes reaffirming time and again the Legislature's commitment to unconstitutional priorities. As highlighted by Justice Sotomayor, the prudential rule is but a "rule of thumb […] far from categorical".[983] In the face of the gravest violations of human dignity, more than prudence, one might hope for courage.

3. Proceduralisation of human rights

"Proceduralisation" or the procedural turn[984] of the protection of human rights is a development which can be observed in the case law of many courts – national and

[982] Pub. L. No. 109-366, 120 Stat. 2600 (Oct. 17, 2006), enacting Chapter 47A of title 10 of the United States Code.

[983] *Trump v. Hawaii*, 585 U.S. ___ (2018), Justice Sotomayor's dissenting opinion, p. 2.

[984] Various authors distinguished between "proceduralisation", "procedural turn" and increased emphasis on a "process-based approach" according to divergent criteria. In the absence of agreement on the terminology, I use these three terms interchangeably. See among others Oddný Mjöll Arnardóttir, "The 'Procedural Turn' under the European Convention on Human Rights and Presumptions of Convention Compliance," *International Journal of Constitutional Law* 15, no. 1 (January 1, 2017): 9–35, https://doi.org/10.1093/icon/mox008; Nina Le Bonniec, "La

international[985] – and which encompasses various practices. As such, it does not necessarily coincide with the narrowing of a case. Two main types of proceduralisation can be identified in emergency cases. The first one consists in the adjunction of procedural obligations pertaining to alleged violations of substantial rights. For example, the ECtHR famously found that Articles 2 and 3 of the Convention include autonomous procedural obligations to conduct adequate investigations into alleged violations of the substantive rights.[986] These were particularly developed in *Finogenov*[987] and *Tagayeva*.[988] Such developments can be seen as broadening the scope of the rights and therefore strengthening their protection.[989]

A second modality of the procedural turn is the adoption of a process-based approach. This process-based approach, in turn, encompasses different types of reasonings. One version of it is the Supreme Court's approach whereby the Court focuses its analysis on whether the institution who restricted the right (Congress or President for example) had the authority to do so. This process-based institutional approach focuses primarily on institutional checks and balances. It can be combined with a subsequent proportionality assessment as was the case in *Hamdi*.[990] However, it has also been deployed as an alternative to a substantial assessment. In

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Procéduralisation Des Droits Substantiels Par La Cour Européenne Des Droits de l'homme. Réflexion Sur Le Contrôle Juridictionnel Du Respect Des Droits Garantis Par La Convention Européenne Des Droits de l'homme" (Université de Montpellier, 2015); Leonie Huijbers, *Process-Based Fundamental Rights Review: Practice, Concept, and Theory*, Human Rights Research Series (Intersentia, 2021), https://doi.org/10.1017/9781780689289; Robert Spano, "The Future of the European Court of Human Rights—Subsidiarity, Process-Based Review and the Rule of Law," *Human Rights Law Review* 18, no. 3 (September 1, 2018): 473–94, https://doi.org/10.1093/hrlr/ngy015.

[985] Angelika Nussberger, "Procedural Review by the ECHR: View from the Court," in *Procedural Review in European Fundamental Rights Cases*, ed. Eva Brems and Janneke Gerards (Cambridge: Cambridge University Press, 2017), 164, https://doi.org/10.1017/9781316874844.007.

[986] See amongst others *McCann and Others v. the United Kingdom* [GC], no. 18984/91, § 161, 27 September 1995 and *Assenov and Others v. Bulgaria*, no. 24760/94, § 102, 28 October 1998.

[987] *Finogenov and Others v. Russia*, no. 18299/03 and 27311/03, 20 December 2011.

[988] *Tagayeva and Others v. Russia*, no. 26562/07, 14755/08, 49339/08 et al., 13 April 2017.

[989] Le Bonniec, "La Procéduralisation Des Droits Substantiels Par La Cour Européenne Des Droits de l'homme."

[990] Rosenfeld, "Judicial Balancing in Times of Stress," 2107.

Trump v. Hawaii, the Supreme Court chose to examine the petition in its statutory dimension only. Consequently, it's review was limited to determine whether Congress had granted the President the power to limit immigration as he did. To Justice Sotomayor's dismay, the majority did not proceed with any assessment of the measure against the rights protected by the First Amendment.

Another type of process-based reasoning assesses the quality of the decision-making process which led to the restriction of the right. This scrutiny can focus on the legislative, administrative or judicial-procedure or a combination of them.[991] In the United States, this type of review was enunciated in 1938 in *Carolene Products*.[992] In the famous Footnote Four, Justice Stone argued that "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, […] may call for a correspondingly more searching judicial inquiry". Here, the process-based review is meant to correct a fault in the democratic process. In *Fullilove*, Justice Stevens, dissenting, argued for the review of the legislative process when fundamental rights are at stake.[993] According to these separate opinions, the process-based approach would be used to broaden rather than narrow the scope of the review. The scrutiny of the process would come as an additional step in the review, not instead of a more substantial approach. However, as noted by Huijber, this broadening approach was defended in separate opinions and the Supreme Court rarely reviews the legislative process.[994]

[991] Huijbers, *Process-Based Fundamental Rights Review*, pt. I.

[992] *United States v. Carolene Products Company*, 304 U.S. 144 (1938).

[993] *Fullilove v. Klutznick*, 448 U.S. 448 (1980), Justice Stevens dissenting.

[994] Huijbers, *Process-Based Fundamental Rights Review*, 29.

On the contrary, the ECtHR increasingly reviews decision-making processes, be they administrative, legislative, or judicial. Such "integrated procedural review"[995] does not necessarily coincide with a weaker protection of rights. In some cases, it might allow the Court to conclude to a violation when it would have been more delicate based on a substantive review.[996] In case of a combined review, finding deficiencies in the decision-making process might also lead the Court to be more stringent when conducting the following substantive review.[997] It should be pointed here that Spano termed the review of the legislative process "qualitative democracy-enhancing approach".[998] This terminology could indicate a logic similar to that formulated in Footnote Four. However, Spano clearly indicates that the focus is on whether the legislative body has carefully examined the various criteria which the ECtHR deems important to reach its conclusion. Therefore, the crucial element is not the one at the core of Footnote Four, the protection of minorities in the democratic process. The lack of attention to this fundamental point is highlighted by Spano's choice to use *S.A.S. v. France* to illustrate his argument.[999]

[995] Thomas Kleinlein, "The Procedural Approach of the European Court of Human Rights: Between Subsidiarity and Dynamic Evolution," *International & Comparative Law Quarterly* 68, no. 1 (January 2019): 96, https://doi.org/10.1017/S0020589318000416.

[996] Huijbers, *Process-Based Fundamental Rights Review*, 151.

[997] See for example *Communauté genevoise d'action syndicale (CGAS) v. Switzerland*, no. 21881/20, § 88, 15 March 2022. Janneke Gerards and Eva Brems, "Procedural Review in European Fundamental Rights Cases: Introduction," in *Procedural Review in European Fundamental Rights Cases*, ed. Eva Brems and Janneke Gerards (Cambridge: Cambridge University Press, 2017), 3–4, https://doi.org/10.1017/9781316874844.001.

[998] Robert Spano, "Universality or Diversity of Human Rights?: Strasbourg in the Age of Subsidiarity," *Human Rights Law Review* 14, no. 3 (September 1, 2014): 497–99, https://doi.org/10.1093/hrlr/ngu021.

[999] Spano, "The Future of the European Court of Human Rights," 489.

In France, the review of the quality of the legislative process[1000] has allowed the Constitutional Council to deliver more technical but also less principled decisions.[1001] In 2020, in the context of the multiplication of statutes focused on security, the Parliament created a new offence of intrusion on university campuses "with the aim of disturbing the peace or good order of the establishment". The Constitutional Council found that disposition unconstitutional.[1002] However, this decision was not motivated by fundamental rights considerations but merely by the irregularity of the legislative procedure.[1003]

Finally, a third aspect of the procedural turn of human rights adjudication is an increased focus on the procedural guarantees surrounding a right restriction. This tendency has been identified in France already during the Occupation when the Council of State created the "general principles of the law".[1004] The "discovery" of these principles which had to be followed by administrative norms focused on procedural more than substantive matters.[1005] Since 2015, a similar narrow procedural focus has been particularly prominent in the case law of the Constitutional Council which relies heavily on the intervention of the administrative judge to validate the constitutionality of emergency measures.[1006] As a result, there seems to be

[1000] It is worth noting that this procedural assessment is only available in the context of *a priori* review. *A posteriori* review focuses on allegedly unconstitutional restrictions on constitutional rights and freedoms.

[1001] Roudier, "Le Conseil constitutionnel face à l'avènement d'une politique sécuritaire."

[1002] Decision no. 2020-810 DC, 21 December 2020 [Loi de programmation de la recherche pour les années 2021 à 2030 et portant diverses dispositions relatives à la recherche et à l'enseignement supérieur], §§ 31-37.

[1003] Hennette-Vauchez, *La Démocratie en état d'urgence*, 82.

[1004] Principes généraux du droit.

[1005] Massot, "Le Conseil d'État face aux circonstances exceptionnelles," 32.

[1006] See above, "The effect of the preventive state on the French dual judiciary", p. 190.

no limit to the possible restrictions on fundamental rights as long as they are accompanied by some minimal procedural guarantees.[1007]

A similar line of reasoning was adopted by the ECtHR in several emergency cases. In *Big Brother Watch*, the Court found that the mass surveillance regime enacted by the United Kingdom violated the ECHR.[1008] However, this conclusion was based merely on the lack of sufficient procedural guarantees. Therefore, this "procedural fetishism" negatively endorsed the logic of mass surveillance schemes.[1009] Similarly, as discussed previously, in *Ibrahim and Others*[1010] and *Muhammad and Muhammad*,[1011] minimal procedural guarantees were used to balance away the adequate protection of procedural rights.[1012]

Therefore, it is no surprise that in *Pagerie v. France*, the Court recognized and validated the procedural focus of the French Councils. In that case, the Court reviewed a thirteen-month preventive house-arrest imposed on a "radicalized Islamist" during the state of emergency. The Court dedicated a full section to the procedural safeguards surrounding the measure.[1013] Following in the footsteps of the Constitutional Council, it highlighted the possibility for the administrative judge to review the measure.[1014] Despite the concerns regarding the protection

[1007] Hennette-Vauchez, *La Démocratie en état d'urgence*, 54; Hennette-Vauchez, "Democracies Trapped by States of Emergency," 17. Several applications of this approach can be found in Decision no. 2017-695 QPC, 29 March 2018 (M. Rouchdi B. et autre).

[1008] *Big Brother Watch and Others v. the United Kingdom* [GC], nos. 58170/13, 62322/14 and 24960/15, 25 May 2021.

[1009] Monika Zalnieriute, "Procedural Fetishism and Mass Surveillance under the ECHR: Big Brother Watch v. UK," *Verfassungsblog* (blog), June 2, 2021, https://verfassungsblog.de/big-b-v-uk/.

[1010] *Ibrahim and Others v. the United Kingdom* [GC], nos. 50541/08 and 3 others, 13 September 2016.

[1011] *Muhammad and Muhammad v. Romania* [GC], no. 80982/12, 15 October 2020.

[1012] See above "ECHR: Essence and core of the rights".

[1013] *Pagerie v. France*, no. 24203/16, §§ 187-191, 19 January 2023.

[1014] *Id.*, § 190.

of rights being put in the hands of the administrative rather than judicial judge,[1015] the ECtHR merely noted that this system had been found constitutional by the Constitutional Council.

As a result, this decision topped off a pyramid of process-based reviews. The administrative judge reviewed the measure based on procedural guarantees inscribed in the law, the Constitutional Council found this review sufficient to conclude that the measure was constitutional, and the ECtHR found that the conclusion of the Constitutional Council was sufficient to find that the measure was conventional. However, the pyramid only holds as long as the procedural guarantees at the base are adequate and adequately applied by the administrative judge. Unfortunately, in this case, the foundations are critically unstable.[1016]

The process-based review grounded in formal procedural guarantees acts as a cloak hiding the substantive issues posed by the measures. Interestingly, the Court itself referenced *Selahattin Demirtaş* as a counterexample.[1017] If the Court was pointing specifically at the procedural guarantees against arbitrary decisions, this comparison highlights the deeper difference of treatment between the two cases: on the one hand a maximalist review in the Turkish case encompassing a broad systemic assessment of the effect of the state of emergency on the separation of powers, and on the other hand a narrow inconsequential process-based approach which allowed the French measure to survive the European scrutiny.

Indeed, the choice of a process-based approach is intrinsically linked to the degree of scrutiny applied by the courts. This relationship is a complex one. In both Supreme Court cases

[1015] See above, p. 190.

[1016] Hennette-Vauchez and Slama, "Harry Potter au Palais royal ?"; Hennette-Vauchez et al., "Ce que le contentieux administratif révèle de l'état d'urgence."

[1017] *Pagerie*, § 189.

mentioned above – *Fullilove* and *Carolene Products* – the process-based approach argued for by the dissenters was combined with an increased degree of scrutiny. However, in Justice Stone's Footnote Four, the flawed decision process caused the scrutiny to be stricter. Conversely, in *Fullilove*, the causal relationship was reversed. Justice Stevens proposed that the decision-making process should be examined when the level of scrutiny is already high because fundamental rights are involved.[1018]

Authors have also established links between the procedural turn in the ECtHR case law and increased focus on the subsidiarity principle.[1019] This is corroborated in the judgments by a connection between the process-based approach and breadth of the margin of appreciation.[1020] The Court would grant a wider margin of appreciation when satisfied by its assessment of the decision-making process while being less deferential when it found it faulty. Conversely, the Court would resort to process-based approach more often in cases where the states enjoy a wide margin of appreciation.[1021] Thus, there is a clear correlation between the use of process-based approach and lower degree of scrutiny. For Huijbers, process-based review can even be a strategy to justify lowering the degree of scrutiny.[1022]

Spano insisted that the ECtHR process-based approach would always be combined with a substantive assessment following, at a minimum, the "parameters of reasonableness".[1023] However, such standards do little to alleviate the risk that the degree of scrutiny becomes so

[1018] Huijbers, *Process-Based Fundamental Rights Review*, 29.

[1019] Spano, "The Future of the European Court of Human Rights"; Kleinlein, "The Procedural Approach of the European Court of Human Rights," 99–104; Nussberger, "Procedural Review by the ECHR," 172.

[1020] Kleinlein, "The Procedural Approach of the European Court of Human Rights," 93 and 96.

[1021] Kleinlein, 93 and 96.

[1022] Huijbers, *Process-Based Fundamental Rights Review*, 149–50.

[1023] Spano, "The Future of the European Court of Human Rights," 488.

low that it falls short of adequate human rights protection. Spano further argued that deference under process-based review can only be granted to Member states whose systems are in compliance with the rule of law.[1024] This element could explain the difference of treatment between France in *Pagerie* and Turkey in *Selahattin Demirtaş*. Yet, the understanding of the rule of law with regard to process-based review would have to be a thin procedural one if drastic restrictions on rights can be justified on the sole basis that they were imposed following a satisfying (majoritarian) process.[1025] Nussberger highlighted this issue when, reversing the famous ECtHR quote, she argued that "[i]t is not sufficient that justice is seen to be done, but that it is done."[1026]

The aim here is not to completely dismiss process-based approaches as undermining human rights. As noted above, such an approach can even, if deployed appropriately and under the right circumstances, enhance the protection of human rights. Huijbers identified three "strategies" pertaining to process-based approach and degree of scrutiny.[1027] The first one, highlighted in *Fullilove,* is one of intensification. However, it is seldom found in emergency cases. The second one is compensation. In this situation, courts adopt a procedural focus to make up for their leniency or incapacity to substantiate negative findings concerning the substance of the measures.[1028] This better-than-nothing dynamic can be found in decisions of the French Councils for example. Furthermore, process-based review has been praised for its flexibility, neutrality and because it provides the courts with some protection by highlighting

[1024] Spano, 493.

[1025] On the relationship between process-based review and rule of law, see Huijbers, *Process-Based Fundamental Rights Review*, 187–92.

[1026] Nussberger, "Procedural Review by the ECHR," 166.

[1027] Huijbers, *Process-Based Fundamental Rights Review*, 150–53.

[1028] See also Kleinlein, "The Procedural Approach of the European Court of Human Rights," 103.

the shared responsibility for the enforcement of human rights between the court and domestic systems or between the courts and the other branches of government.

However, this procedural slope is a slippery one leading towards formal judicial review fostering legal grey holes, a risk that is exacerbated during emergency. Emphasizing the responsibility of the political branches of government at a time when they tend to align and parliamentary debates are heavily constrained can be dangerous, pointless, or at least inappropriate. Similarly, relying on procedural guarantees implemented by courts without a substantive review of the outcome reinforces a purely procedural conception of the rule of law. As discussed previously,[1029] this procedural conception is a threshold which states of emergency have gone to great length to pass. Therefore, courts need to go deeper if they are to adequately protect fundamental rights during emergencies. When they choose process-based approaches to the detriment of higher degrees of substantive review, they might be displaying the third strategy identified by Huijbers, avoidance. This strategy is commonly identified in cases involving unsettled social issues or sensitive matters.[1030] During emergency, all the circumstances align to encourage judges on this avoidance path. The role of expert knowledge, intrinsic uncertainty, deficit of political legitimacy, high risk decisions, complex and extremely sensitive matters related to national security are all elements which would incite judges to deflect. At the same time, it is also during emergencies that this avoidance strategy might have the gravest consequences.

[1029] See above, "Encasing the emergency within the law".

[1030] Huijbers, *Process-Based Fundamental Rights Review*, 150; Kleinlein, "The Procedural Approach of the European Court of Human Rights," 104; Gerards and Brems, "Procedural Review in European Fundamental Rights Cases," 5.

Proceduralisation might further undermine the protection of minority rights which, as discussed below,[1031] is already deficient during emergencies. In other words, the procedural turn of rights adjudication undermines its counter-majoritarian role.[1032] Finally, process-based approaches subvert one of the roles of the judiciary in times of emergency, which is to judge the next emergency or even the next case.[1033] Indeed, this approach allows the political branches to replace the norm which was found procedurally deficient, and simply correct the procedure while indefinitely reproducing the restriction on the substance of the rights. The series of Guantánamo cases is a textbook illustration of this problem where Congress answered the critics of the Supreme Court by adopting new statutes until the Court finally put an end to this back and forth by grounding its reasoning in the constitutional right. This issue is amplified by practices such as the Constitutional Council delaying the effects of its decisions.[1034] The unconstitutional measure is then allowed to endure until the Parliament fixes the procedural flaws.

4. Circumventing the difficult questions

Finally, on occasions, rather than narrowing the scope of their review, courts have found ways to circumvent the difficulty entirely. One of these techniques is the more or less stringent application of standing rules. This is not specific to emergency situations. However, the sensitive nature of these cases has led the courts to resort to it in debatable instances. In the U.S. context, *Clapper* emphasizes the extent to which the interpretation of standing rules allowed

[1031] See below "Whose liberty for whose security?".

[1032] Nussberger, "Procedural Review by the ECHR," 167.

[1033] Cole, "Judging the Next Emergency."

[1034] On this point, see above, p. 268.

judges to refrain from engaging with delicate emergency norms.[1035] In this 2008 case, the Supreme Court had applied standing rules strictly thereby effectively insulating the FISA Amendment Act (authorizing "the surveillance of individuals who are not 'United States persons' and are reasonably believed to be located outside the United States") from judicial review.[1036]

More recently, the ECtHR found several applications concerning anti-Covid measures inadmissible because the applicants had not explained how they had been specifically affected. In *Le Mailloux*, the applicant complained that France had failed to fulfill its positive obligations to protect him against the Covid-19 pandemic.[1037] Conversely, in *Magdić*, the applicant argued that the state had violated its negative obligations by imposing severe restrictions on freedom of religion, assembly and movement.[1038] Both applications were dismissed for lack of victim status. Each time, the Court recalled that the Convention does not contemplate the possibility of bringing *actio popularis*.[1039] The inadmissibility of *actio popularis* and requirement that applicants particularize their claims are consistent with previous case law. Nonetheless, the manner in which the Court applied these principles in time of pandemic raises questions.

On the one hand, the Covid-19 pandemic impacted and threatened the entire population. On the other hand, the measures (or lack thereof) complained of by the applicants applied to the vast majority of the population with very few exceptions. The omnipresence of the disease and pervasiveness of the measures adopted to limit its spread render the exigency of specificity

[1035] *Clapper v. Amnesty International*, 568 U.S. 398 (2013).
[1036] For a more in-depth analysis of the case, see above, p. 186.
[1037] *Le Mailloux v. France* (dec), no. 18108/20, 5 November 2020.
[1038] *Magdić v. Croatia* (dec), no. 17578/20, 5 July 2022.
[1039] *Le Mailloux*, § 11 and *Magdić*, § 7.

almost nonsensical. The Court justified its decisions by arguing that the applicants had made only general claims. One can assume that the applications were formulated in very broad terms and that the applicants should have been careful to individualize their claims further. However, in the context of a pandemic, this requirement borders on a technicality and leads to questionable statements in the judgments. In *Le Mailloux*, the applicant complained that the government did not do enough to curb the spread of the disease and that consequently, he was more at risk of suffering from it. In the context of a pandemic, such a claim seems rather self-explanatory. It is unclear why, as the Court required, he should have justified of a specifically high risk of suffering particular consequences from the disease.[1040]

Similarly, in *Magdić*, some of the specificities requested in the decision seem excessive. For example, the Court regretted that the applicant did not indicate to which religious community he belongs in order to justify his complaint under Article 9 or that he complained of restrictions on his freedom of movement "without mentioning where and when he intended to travel".[1041] It is one thing to state that the applicants did not provide enough details for the Court to be able to adjudicate the case. It is another to dismiss for lack of victim status applications filed by individuals who were obviously directly affected by the measures. Resorting to the latter shows signs of a Court unwilling to pronounce itself in a sensitive and ongoing situation and swiping the claims under the rug instead. The point here is not to argue whether the Court should have adopted a judgment on the merits in one direction or another but that this indirect way of avoiding the difficult questions does little for the credibility of the Court.

[1040] *Le Mailloux*, § 13.
[1041] *Magdić*, § 10.

Finally, courts occasionally have the opportunity to lower the stakes while getting to the heart of the issue. This is precisely such an opportunity that the ECtHR seized with *Vavřička and Others*.[1042] This judgment was delivered at a time when the vaccination against Covid-19 was being imposed in various Member states. This measure was highly contentious and various applications in that regard were pending in front of the ECtHR. It was in this very particular context that the Grand Chamber delivered a judgment laying down the general principles guiding its reasoning when examining issues of mandatory vaccination. The third-party interventions by the French, German and Polish governments emphasized its significance. However, *Vavřička and Others* had no direct link with Covid-19. The applications had been lodged between 2013 and 2015, long before Covid-19 became a pandemic. Choosing to deliver a judgment in this case first allowed the Court to establish key principles on the matter of mandatory vaccination while escaping the additional pressure imposed by the emergency context of a case. Once these guidelines are settled, the ensuing decisions and judgments directly linked to emergency situations can claim to merely apply already existing principles.

As the courts try to avoid engaging with elements of the proportionality test or balancing which they consider to be too political, they disconnect their assessment from the reality of the measures, their implementation and consequences. Hence, they fail to grasp some of the most problematic aspects of emergency powers. Focused on the balance mechanisms, they omit to seriously consider who sits on each side of the scale.

[1042] *Vavřička and Others v. the Czech Republic* [GC], no. 47621/13, 3867/14, 73094/14 et al., 8 April 2021.

D. Whose liberty for whose security? Judging the majoritarian emergency

In order to produce its galvanizing effect in favor of the executive, emergencies and more broadly national security need to be posited against, possibly impersonal dangers such as Covid-19. For maximizing the rallying power, they need an "other".[1043] This antagonization can be articulated around different variables. For the sake of clarity, the following section focuses on four of them: geographic location, nationality, religion and political opinions. Nonetheless, in many cases, all four aspects are deeply interlinked. One of the most emblematic examples is *Trump v. Hawaii*,[1044] where the criterion of nationality was used to physically and geographically keep individuals outside the U.S. territory while concealing anti-Muslim motivations. Walker argued that there were two eras in modern counterterrorism. The first one was characterized by a focus on categories of persons, whereas the second one shifted to places and movement.[1045] Yet, the divide based on geographic location is not new. Rather both aspects complement each other in an attempt to make them coincide.

Focusing on one variable while ignoring that the others are in play allows the underlying discriminatory aspect of emergency to prosper. Emergency measures are then perceived only as isolated necessary responses to a danger rather than parts of an othering legal system designed to perpetuate the existing social order. Ultimately, the balancing of liberty and security relies on a fiction: that the same right holders sit on both sides of the scales. Rather, the liberty

[1043] See in Chapter 1, p. 28.

[1044] *Trump v. Hawaii*, 585 US ___ (2018).

[1045] Clive Walker, "Chapter 4: Exporting Human Security in the Cause of Counter-Terrorism," in *Human Dignity and Human Security in Times of Terrorism*, ed. Christophe Paulussen and Martin Scheinin, 1st ed. 2020 edition (The Hague: T.M.C. Asser Press, 2021), 37–38.

of an identified few is sacrificed for the illusionary security of the many. From that perspective, it is important to note that although anti-terrorism emergencies provide the bulk of the case law, measures adopted in response to other types of emergencies also fit this pattern.

1. The dilution of the geographic "otherization"

Both in France and in the U.S., emergency has a colonial dimension in the sense that a country or, in the case of France, the metropole[1046] designed these derogatory regimes to forcefully impose its rules on another territory. According to this geographic "otherization", the outside was both where the derogatory law would apply and where rights would not be enforced.[1047] Gross and Ni Aolain identified these "anomalous zones" in the context of emergency based on controlling/dependent territories. For example, the normal legal regime could continue to apply in metropolitan France, the controlling territory, while a state of emergency was ongoing in Algeria,[1048] the dependent territory.[1049] But this coexistence is only possible if a strict distinction exists between the two territories. As Gross and Ni Aolain noted much like the temporal dichotomy between normalcy and emergency, the geographic separation is far from watertight. The danger of contamination is important. Gerald showed that derogatory measures in these "anomalous zones" risks undermining fundamental values in the broader

[1046] The French "metropole" refers to the European territory of France including the continental territory and nearby islands. It is commonly used in opposition to overseas France.

[1047] Wars occurring on the national territory are an exception in this regard. But then the territorial border which distinguishes the outside from the inside is precisely what is being contested or negated.

[1048] Since the Constitution of 1848, the official status of Algeria was no longer that of a colony. It had become entirely part of the French territory. Effectively however, Algeria had remained a dependent territory which only obtained its independence in 1962 at the end of the decolonization war.

[1049] Gross and Ní Aoláin, *Law in Times of Crisis*, 2006, 181.

system.[1050] Both in France and in the U.S., emergency measures initially designed to be applied outside the metropolitan territory were domesticated and gradually applied within it.

In France, the 1955 Statute on the State of Emergency was designed to address the situation in Algeria. It was very briefly applied in 1961 in the metropole but still within the context of the Algerian War.[1051] It was then used in New Caledonia in 1984. In 2005, for the first time, the state of emergency was declared to deal with a domestic situation on the metropolitan territory. However, the targets were still "them", the others and the location a version of outside, outside the cities. Riots broke out in Parisian suburbs after the death of two teenagers who tried to hide from the police in an electrical sub-station. In these suburbs, more than in other areas, the population is composed of descendants of immigrants from former colonies. The riots quickly spread to other cities in France. Faced with this "colonial boomerang",[1052] the government triggered the state of emergency.

Eventually, in 2015-2017, the state of emergency was declared on the entire national territory. Arguably, however, this latest step of the domestication process continued to target the same other, minorities and more specifically the Arab-Muslim.[1053] Noticeably, with the Covid-19 pandemic, when it became clear that emergency measures were going to be applied to the entire population and not only minorities, a new state of emergency was created, forming a legal separation between the repressive state of emergency targeting or mostly impacting

[1050] Gerald L. Neuman, "Anomalous Zones," *Stanford Law Review* 48, no. 5 (1996): 1227–28 and 1231–33, https://doi.org/10.2307/1229384 cited in; Gross and Ní Aoláin, *Law in Times of Crisis*, 2006, 181.

[1051] Gross and Ní Aoláin, *Law in Times of Crisis*, 2006, 201.

[1052] Étienne Balibar, "Uprisings in the banlieues," *Lignes* 21, no. 3 (2006): 66, https://doi.org/10.3917/lignes.021.0050 quoting Rada Iveković.

[1053] For a comprehensive reading of the state of emergency through a geographical lens, see Léopold Lambert, *Etats d'urgence: Une histoire spatiale du continuum colonial français*, Illustrated édition (Toulouse: Premiers matins de novembre, 2021).

minorities and the state of health emergency which can be applied to all. The security state of emergency was applied again in New Caledonia in 2024, still in the context of the conflict over the independence and self-determination of the Kanak people.

The domestication of the application of the 1955 Statute was never judicially questioned. Once its existence had been constitutionally validated – on the occasion of its first application in New Caledonia – its "importation" in the metropole was not debated. And indeed, from a legal point of view, there would not be any clear ground for it. At the time the 1955 Statute was applied outside the metropole, each of these territories were legally French territories.

A similar dynamic of domestication can be observed in the U.S. However, the extension to internal matters of the presidential war powers was initially strongly resisted by the Supreme Court.[1054] Justice Jackson, concurring in the *Steel Seizure* case, explicit stated: "no doctrine that the Court could promulgate would seem to me more sinister and alarming than a President whose conduct of foreign affairs is so largely uncontrolled, and often even is unknown, can vastly enlarge his mastery over the internal affairs of the country by his own commitment of the Nation's armed forces to some foreign venture."[1055]

Drawing a distinction between situations of war – in particular wars fought on the national territory – and situations of emergency can help understanding two different geographical dynamics. Although not clearly identified in the U.S. system, the difference is sharper in France where the state of war is usually not understood as part of the domain of

[1054] *Youngstown Sheet & Tube Co. v. Sawyer* (Steel Seizure case), 343 U.S. 579 (1952).
[1055] *Id.*, Justice Jackson's concurring opinion at 642.

emergency. Contrary to the emergency designed for external purposes, it is commonly admitted that where war is raging, rights and freedoms can be severely curtailed. The "where" here is geographical. It does not mean "in times of" war but the location where the war is happening. And indeed, when war is being fought on the national territory, territorial borders are contested. The existence of the "inside" in under threat. This distinction is also in line with Article 15 ECHR. The derogation scheme allows to lower the protection of rights inside the territory of the member states. Yet, the wording of the article – as opposed to its interpretation by the Court – contemplates situations identical or close to war: "In time of war or other public emergency threatening the life of the nation".

Except for situations of war on the national territory, derogatory laws and lower protection of rights were to be confined to the outside as confirmed in the *Steel Seizure* case. Nonetheless, arguments bordering on executive unilateralism did not recede but continued to be put forward by the government, including in cases involving U.S. citizens.[1056] Harcourt traced the transformation of counterinsurgent warfare, which initially appeared as a component of U.S. military strategy, into a counterrevolution system applied internally. He identified some main elements of counterinsurgency. These tactics, inspired by the methods of the French army in Algeria amongst others, were refined in the aftermath of 9/11 and domesticated.[1057] Harcourt noted in particular the militarization of the police dealing with peaceful demonstrations and the

[1056] See for example *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) analyzed in Rosenfeld, "Judicial Balancing in Times of Stress," 2109–11.

[1057] Harcourt, *The Counterrevolution*.

perception of all Muslims as potential terrorists, two elements which can be equally identified in France especially after the 2015-2017 emergency.[1058]

As the external borders became increasingly permeable to emergency laws, the territorial separation took the form of geographic bubbles of emergency. Walker's analysis highlighted the ambivalence of geographical separations in counter-terrorism. On the one hand, external borders remain crucial to the discourse while, on the other hand, specific internal places are designated as sources of vulnerability rather than refuge.[1059] One might think of the "protected areas" created under the 1955 Statute on the State of Emergency in France and then introduced into the normal legal order.

The Covid-19 pandemic marked a further step in the domestication process with emergency measures massively entering the private sphere (regulating gatherings in private homes for example) and, to some extent, bodies (wearing a mask was required in many public spaces and, in several states, vaccination became (quasi-)mandatory to access various essential services). The state of emergency, originally designed to regulate the outside has fully penetrated the national territory all the way to the citizens' living room.

At the same time that derogatory external powers were imported and domesticated, courts had to fight the claim that the protection of fundamental rights should remain a purely domestic matter. At the center of this battle lies the territorial conception of state's jurisdiction.

[1058] Cédric Mas and Sebastian Roché, "Maintien de l'ordre : « Le drame de Sainte-Soline était à la fois résistible et prévisible »," *Le Monde.fr*, April 20, 2023, https://www.lemonde.fr/idees/article/2023/04/20/maintien-de-l-ordre-le-drame-de-sainte-soline-etait-a-la-fois-resistible-et-previsible_6170358_3232.html. For the Islamophobic aspect, see Chapter 1.

[1059] Walker, "Chapter 4: Exporting Human Security in the Cause of Counter-Terrorism."

As the Supreme Court tried to resist the transformation of Guantánamo into a legal black hole, the first stone it put down addressed the territoriality of the notion of jurisdiction.

In *Rasul,*[1060] the government argued that U.S. courts lacked jurisdiction over aliens detained in Guantánamo. The Supreme Court disagreed and stated that, following *Braden,*[1061] the petitioners' presence within the court's territorial jurisdiction was not "an invariable prerequisite" for the application of the statutory right to *habeas corpus*.[1062] Rather, "habeas acts upon the person holding the prisoner, not the prisoner himself, so that the court acts 'within [its] respective jurisdiction' if the custodian can be reached by service of process". The Supreme Court concluded that U.S. courts had jurisdiction to "review of the legality of Executive detention of aliens in a territory over which the United States exercises plenary and exclusive jurisdiction, but not 'ultimate sovereignty.'"

Justice Scalia's dissent was highly critical of this "jurisdiction and control" doctrine. He regretted that "the Court boldly extends the scope of the habeas statute to the four corners of the earth." This solution would mean that "parts of Afghanistan and Iraq should logically be regarded as subject to our domestic laws." These remarks take on a premonitory dimension in the face of the later ECtHR case law. Indeed, the Supreme Court's solution in *Rasul* is reminiscent of the notion of jurisdiction according to the ECtHR. For the purpose of Article 1, "jurisdiction" is to be understood as primarily territorial. However, reviewing the detention of an Iraqi national in Iraq by British soldiers, the Court found that "[t]he internment took place within a detention facility […] controlled exclusively by British forces, and the applicant was

[1060] *Rasul v. Bush*, 542 U.S. 466 (2004).

[1061] *Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484 (1973).

[1062] 28 U. S. C. §§2241(a), (c)(3).

therefore within the authority and control of the United Kingdom throughout".[1063] It follows that both the Supreme Court and the ECtHR have refused a purely territorial reading of the states' jurisdiction, thereby extending the protection of the most basic fundamental rights. However, such protection applies only to a limited number of cases.

As much as territorial boundaries are permeable to emergency powers and allowed for their domestication, they remain central divides in the securitization discourse. They are physical embodiment of the us v. them. To reconcile domestication and "othering", the penetration of the state of emergency postulates the infiltration of the threat. External borders then become one-way gates. Legal obstacles should be lifted to facilitate the removal of the threat while airtight borders are supposedly meant to prevent the entrance of further sources of danger. This dynamic, although strongly reinforced after 9/11, is not specific to the fight against terrorism. Other types of emergencies have also contributed to it, culminating in many states closing their borders as an answer to the Covid-19 pandemic.

Overall, courts have accompanied rather than resisted this movement. The Supreme Court did not oppose the use of emergency powers to build the wall supposed to make the border with Mexico more impassable.[1064] It also validated, supposedly for national security reasons, the so-called Muslim ban[1065] and maintained the executive orders adopted to fight the pandemic but used to regulate immigration more generally.[1066] In turn, the ECtHR hinted in *A. and Others* that Article 3 obligations put states in a difficult situation as they attempt to

[1063] *Al-Jedda v. the United Kingdom* [GC], no. 27021/08, § 85, ECHR 2011. This case was decided on the same day as *Al-Skeini and Others v. the United Kingdom* [GC], no. 55721/07, ECHR 2011, where the Court developed the "authority and control" doctrine.

[1064] *Trump v. Sierra Club*, 588 U. S. ___ (2019).

[1065] *Trump v. Hawaii*, 585 US ___ (2018).

[1066] *Arizona v. Mayorkas*, 598 U. S. ___ (2022).

reconcile the prohibition of deportation with the need to prevent the commission of acts of terrorism.[1067] States were quick to find ways to lift this legal obstacle. In *Othman (Abu Qatada)*,[1068] the Court, for the first time, validated diplomatic assurances as a way to alleviate the risk of treatments contrary to Article 3. The Court then continued to approve of them on various occasions as long as it found that they offered enough guarantees. The use of diplomatic assurances has since spread globally including to the U.S. where the government resorted to them to deport Guantánamo detainees. Governments and courts have embraced this convenient tool to externalize the threat despite strong criticism considering diplomatic assurances to be highly unreliable and a means to circumvent the prohibition of torture.[1069]

Prior to its externalization, the threat must be identified. Since it is assumed to have penetrated the territory, further lines of demarcation had to be found to identify the other within. In this process, the colonial roots of the state of emergency resurfaced as the lines were drawn along nationality and religion.

2. The other nationality

The fight against terrorism and emergency more broadly is deeply embedded in the frame of the nation-state. Within that frame, nationality is an obvious element of delineation between the "us" and the "them". The increasing importance of the articulation between national security, nationality and immigration is reflected in the various attempts to address

[1067] *A. and Others v. the United Kingdom* [GC], no. 3455/05, § 252, ECHR 2009.

[1068] *Othman (Abu Qatada) v. the United Kingdom*, no. 8139/09, ECHR 2012.

[1069] Andrew Jillions, "When a Gamekeeper Turns Poacher: Torture, Diplomatic Assurances and the Politics of Trust," *International Affairs* 91, no. 3 (2015): 489–504, https://doi.org/10.1111/1468-2346.12284; "Diplomatic Assurances against Torture - Inherently Wrong, Inherently Unreliable" (Amnesty International, April 27, 2017), https://www.amnesty.org/en/documents/ior40/6145/2017/en/.

national security concerns through immigration measures or conversely, to decrease resistance to immigration policies by formulating them in terms of national security imperatives.

Nationality is present in the emergency case law of the four courts, although playing different roles. It came in front of the ECtHR under various aspects but most remarkably from a (non-)discrimination angle. In France, the debate focused on the possibility of depriving terrorists of the French nationality thereby using terrorism to redefine the "us". In turn, in the U.S., nationality has been a central element of the emergency case law to determine the rights at stake.

a. ECtHR

The connection between nationality and national security was source of a back and forth between the ECtHR and the United Kingdom. The issue resulted from the United Kingdom resorting to migration law to deport foreigners whom they considered a threat to national security rather than applying criminal law as they would to citizens.

In *Chahal*, the applicant was detained in view of his deportation due to national security concerns. The Grand Chamber found that, "in view of the exceptional circumstances", his 6-year detention complied with the requirements of Article 5 § 1. However, it concluded that his deportation would constitute a violation of Article 3. At the same time, it found that because of the use of confidential material related to national security, the courts had not been able to adequately review the applicant's detention. Consequently, there had been a violation of Article 5 § 4.[1070] Following the ECtHR judgment, the United Kingdom established a new system to

[1070] *Chahal v. the United Kingdom*, 15 November 1996, § 123, Reports of Judgments and Decisions 1996-V.

review the detention of foreigners that they considered threats to the national security. These new arrangements were assessed by the Court in *A. and Others*.

In *A. and Others* again, the applicants, suspected of involvement in terrorism, had been detained in view of their deportation. However, contrary to *Chahal*, the United Kingdom had derogated to Article 5. It follows that the ECtHR was called to review whether the detention was "strictly necessary" according to Article 15. Unlike its approach in *Chahal*, the Court, following the House of Lords, addressed directly the use of immigration measures to deal with security issues. It rebutted the government's argument that non-nationals were the "most serious source" of terrorism and therefore that the government should be able to detain them.[1071] Rather, it found that "the impugned powers were not to be seen as immigration measures, where a distinction between nationals and non-nationals would be legitimate, but instead as concerned with national security."[1072] Choosing "an immigration measure to address what was essentially a security issue had the result of failing adequately to address the problem, while imposing a disproportionate and discriminatory burden of indefinite detention on one group of suspected terrorists."[1073] For these reasons, the Court concluded that the measures discriminated unjustifiably between nationals and non-nationals and were therefore disproportionate.

A. and Others is a pivotal judgment in the ECtHR case law and more broadly in the case law on emergency because it severed the assumed link between foreigners and terrorism and found the discrimination based on nationality grave enough to conclude to a violation of the Convention even when a derogation had been notified. However, several caveats need to be

[1071] *A. and Others*, § 189.
[1072] *Id.*, § 186.
[1073] *Id.*

noted. First, both in the reasoning and the conclusion, the Court followed in the steps of the national apex jurisdiction. One might wonder if the outcome would have been the same had the House of Lords agreed with the executive and parliament. Second, an unfortunate turn of phrase in the reasoning under Article 41 seems to undermine the severity of the violation: "Although the Court […] has found that the derogating measures were disproportionate, the core part of that finding was that the legislation was discriminatory in targeting non-nationals only."[1074] This point is made in order to lower the amount awarded to the applicants, thereby giving a sense that this discrimination is less severe than other potential elements causing the disproportion. Finally, to date, although a welcome protection against discrimination during emergencies, *A. and Others* stands out as a unique occurrence.

The ECtHR had a chance to address the articulation between national security and nationality even more directly when the issue of deprivation of nationality in France came before the Strasbourg court. This judgment and the following cases are examined together with the French case law in the following section.

b. France: Deprivation of nationality redefining the "us" through terrorism.

In France, the possibility to deprive citizens of their nationality exists since the 1791 Constitution. However, it was only extended to individuals found guilty of terrorist crimes in 1996 as a reaction to the 1995 attacks. The bill introducing this measure also included provisions amending immigration law.[1075] Both parts were reviewed *a priori* by the

[1074] *Id.* § 252. In French: "Si la Cour […] conclut que les mesures dérogatoires litigieuses étaient disproportionnées, elle relève que ce constat était principalement fondé sur le caractère discriminatoire du régime de détention, lequel ne s'appliquait qu'aux étrangers. »

[1075] The bill became the Statute no. 96-647 "to reinforce the repression of terrorism and offences against persons holding public authority or entrusted with a public service mission, and including provisions relating to the judicial police" of 22 July 1996.

Constitutional Council.[1076] The first contested part of the bill criminalized the assistance to undocumented migrants as a terrorist crime. The Council found in the first place that this behavior was not directly related to the commission of terrorist acts. It further concluded that this criminalization was unnecessary and disproportionate.[1077] In doing so, much like the ECtHR, the Council resisted an automated connection between immigration and terrorism in what can hardly be understood as anything else but an attempt to further immigration policies via anti-terrorism laws.

The Council applied a much lower level of scrutiny to Article 12 of the bill which provided that individuals found guilty of terrorism could be deprived of their French nationality when the crimes had occurred within ten years after the nationality acquisition. The deprivation could only be pronounced within ten years after the crimes had been committed. The measures could not be applied to those who were born French.[1078] The Council first recalled that reasons of general interest could justify derogating from the principle of equality "provided that the resulting difference in treatment is related to the purpose of the law".[1079] This formulation is reminiscent of the rational basis test in the case law of the U.S. Supreme Court. So is the ensuing reasoning requiring a loose connection between the aim of the statute and the contested measure.

The Council argued that "with regard to nationality law, persons who have acquired the French nationality and those to whom French nationality was granted at birth are in the same situation; however, given the objective of reinforcing the fight against terrorism, the legislator

[1076] Constitutional Council, decision no. 96-377 DC, 16 July 1996.

[1077] See above, p. 271.

[1078] Neither can the deprivation be pronounced when it would result in statelessness.

[1079] Constitutional Council, decision no. 96-377 DC, 16 July 1996, cons. 22.

was able to provide for the possibility, for a limited period, that the administrative authority strip of their French nationality those who have acquired it, without the resulting difference in treatment violating the principle of equality".[1080] Such reasoning is difficult to understand unless one considers that those who were not born French are more dangerous than those who were, or that those who acquired the nationality are not as French as those who got it at birth. The latter would mean that both are not in the same situation but that there are indeed two classes of citizens. The Council further found that the measure was in line with the requirements of necessity.

Interestingly, however, this conclusion was not included in the operative part of the decision. As a result, the Council was not barred from reviewing this provision again *a posteriori* nineteen years later. In the meantime, the law had been amended to include cases where the terrorist crimes had been committed prior to the acquisition of the French nationality and to extend both 10-year limits to 15 years. Despite these modifications, the Council essentially reiterated its reasoning from 1996. With regard to the extension of the time limit to 15 years, the Council specified that a further prolongation would constitute a disproportionate breach of equality.[1081] Nonetheless, the initial five-year extension was found constitutional due to "the particular gravity of the offense".[1082] This decision was adopted soon after a first series of attacks early 2015 but before the November ones which caused a high number of victims. It showed an attempt to impose some limits for the future. Yet, the Council also proved incapable

[1080] *Id.*, cons. 23.

[1081] Constitutional Council, decision no. 2014-439 QPC, 23 January 2015, (M. Ahmed S.), cons. 15.

[1082] *Id.*

of sanctioning the broadening of the scope of the measure, which would have forced parliament to legislate again and would have brought the Council in the spotlight.

In the aftermath of the terrorist attacks in November 2015, President Hollande introduced a constitutional bill in order to constitutionalize the state of emergency and extend the deprivation of nationality to those who were born French.[1083] The proposal created strong divisions within the government and the parliament. The constitutional revision was abandoned in March 2016. Later, as he announced that he would not run for a second mandate, President Hollande stated that proposing to extend the deprivation of nationality was his "only regret".[1084]

The Council of State had the opportunity to issue its opinion on the bill before it was dropped.[1085] In this opinion, it argued that the extension of the deprivation of nationality to those who were born French might go against a putative constitutional principle[1086] prohibiting the deprivation of the French nationality by birth. It further considered that, in specific cases, the ECtHR might find the measure to violate Articles 3 and/or 8 of the Convention. The Council also found that the measure would have a limited impact in practice. The deprivation would probably have little deterrent effect on those determined to commit terrorism crimes and it would only concern a limited number of people. In sum, the Council of State considered that the measure could potentially be unconstitutional or unconventional while being ineffective.

[1083] *Projet de loi constitutionnelle de protection de la Nation*, no. 3381, submitted to the National Assembly on 23 December 2015.

[1084] « je n'ai qu'un seul regret, et je veux ici l'exprimer : c'est d'avoir proposé la déchéance de nationalité parce que je pensais qu'elle pouvait nous unir alors qu'elle nous a divisés. » Speech of President Hollande, 1st December 2016, https://www.vie-publique.fr/discours/201406-declaration-de-m-francois-hollande-president-de-la-republique-sur-le

[1085] Council of State, General Assembly, Section de l'intérieur, no. 390866, Avis sur le Projet de loi constitutionnelle de protection de la Nation, 11 décembre 2015.

[1086] *Id.*, § 5, « Principe fondamental reconnu par les lois de la République ».

Yet, it recalled that the government's objective was to "punish those whose behaviour aimed to destroy the social fabric by committing acts of terrorism".[1087] Their "offences [are] so serious that they no longer deserve to belong to the national community."[1088] Therefore, the Council found the measure appropriate and issued a favorable opinion.

This opinion, drafted in terms of "us v. "them", highlights the symbolic aspect of the exclusionary measure that is the deprivation of nationality. Since it is an "absolute necessity", the fight against terrorism justifies useless and potentially illegal measures as long as they get the citizenry rid of those who are undeserving of the nationality. The Council delivered an opinion centered on security where there is no room for rights. Even though the constitutional revision was subsequently abandoned, the judicial developments regarding the deprivation of nationality continued bringing into focus the rights guaranteed by Article 8 ECHR.

In 2015, five men were deprived of their French nationality. They had been convicted in 2007 for criminal conspiracy to prepare an act of terrorism. The Council of State rejected their petition contesting the deprivation of nationality. In this decision, the Council changed its approach with regard to the impact of the deprivation of nationality on private and family life. Until then, it had consistently stated that the invocation of Article 8 ECHR was inoperative in nationality cases. In its 2015 *a posteriori* review, the Constitutional Council had also confirmed that the "deprivation of nationality does not affect a person's right to privacy; […] consequently, the complaint based on the infringement of respect for private life is inoperative".[1089] Following the recommendations of its rapporteur public, the Council of State aligned its position on the

[1087] *Id.*, § 3. Internal quotation marks omitted.

[1088] *Id..*, § 7.

[1089] Constitutional Council, decision no. 2014-439 QPC, 23 January 2015, (M. Ahmed S.), cons. 22.

ECtHR's. Contrary to the Constitutional Council, it found that the deprivation of nationality "affects an element constituting the identity of the person concerned and is thus likely to infringe the right to respect for his or her private life".[1090] However, it continued to find that the deprivation had no effect on the applicant's presence on the French territory or their ties with family members. Therefore, it did not affect their right to respect for family life.[1091] Overall, the Council found the measure proportionate in light of the nature and seriousness of the acts committed.

All five of the applicants brought their case to the ECtHR. In *Ghoumid and Others*, the Court confirmed that the deprivation of nationality had no effect on the presence on French territory and therefore, did not constitute an interference with the exercise of the applicants' right to respect for their family life.[1092] This approach is theoretically accurate. In that regard, the ECtHR pointed to the applicants' application for residence permits and the fact that they had not yet been notified an obligation to leave French territory. However, this approach disregards the aim of the measure put forward by the government and expressly acknowledged by the Council of State who "took note of the objective of pursuing the removal of dual nationals convicted of terrorist acts, after they have served their sentence and been stripped of French nationality."[1093]

As anticipated by the Council of State, the Court reiterated that "nationality is an element of a person's identity".[1094] It is under this head of Article 8 that it reviewed the

[1090] Council of State, 2ème - 7ème chambres réunies, 8 June 2016, no. 394348, § 15.

[1091] *Id.*

[1092] *Ghoumid and Others v. France*, no. 52273/16, 52285/16, 52290/16 et al., § 42, 25 June 2020.

[1093] Council of State, General Assembly, Section de l'intérieur, no. 390866, Avis sur le Projet de loi constitutionnelle de protection de la Nation, 11 décembre 2015, § 4.

[1094] *Ghoumid and Others,* § 43.

applicants' claim that stripping them of their nationality had a political connotation. They supported their claim by the fact that the national authorities had waited more than ten years after the offenses, seven years after the applicants' appeal. Eventually, the deprivation of nationality had been notified in 2015 after the terrorist attacks in Paris earlier that year. Far from denying this motivation, the government explained this timing by the fact that France was hit by a series of serious attacks that year.[1095] Without condemning the political motive, the Court "accepted that in the presence of events of this nature, a State may take up with greater firmness the evaluation of the bond of loyalty and solidarity with persons previously convicted […] of terrorism, and that it may consequently, subject to strict control by the authorities, take measures against them that it had not initially."[1096]

Furthermore, when considering whether the deprivation of nationality had disproportionate consequences on the private life of the applicants, the Court noted that "the actions which led to the[ir] criminal convictions […] reveal allegiances which show how little importance their attachment to France and its values had in the construction of their personal identity". Consequently, the applicants' criminal behavior displayed more than ten years earlier left them open to a punishment prompted by actions unrelated to theirs. Following a reasoning very deferential to the French authorities, the Court concluded that there had been no violation of Article 8.[1097]

[1095] *Id.*, § 45.

[1096] *Id.*

[1097] The Court had already dismissed as manifestly ill-founded a series of cases where applicants had been deprived of their nationality due to their ties with terrorist activities. See *K2 v. the United Kingdom* (dec.), no. 42387/13, 7 February 2017; *Mansour Said Abdul Salam Mubarak v. Denmark* (dec.), no. 74411/16, 22 January 2019 and *Johansen v. Denmark* (dec.), no. 27801/19, 01 February 2022.

With no exception, both French Councils and the ECtHR not only adopted a deferential attitude with regard to deprivation of nationality but embraced the government's discourse almost exclusively articulated around security. This approach allowed the differentiation of two classes of French people, those deserving protection and those which must be excluded. Rather than questioning their places in society and the responsibility of the state towards them, their involvement in terrorism is used to argue that they never truly belonged. The French people is redefined through terrorism, a notion without clear delineation and which continuously grows to encompass more behaviors. The attitude of the courts is all the more difficult to justify that the impact of the exclusion is mainly ideological. As pointed out by the Council of State, the deprivation of nationality, even in its enlarged version, would have little to no impact on security. This might explain why the measure has been applied on such few occasions but also highlights its symbolic importance.[1098]

c. Supreme Court

In the U.S. too, the question of nationality has played a central role in emergency cases, mainly in two ways. The first is that, possibly more than in other jurisdictions, citizenship defines the scope and content of the rights. The second is the level of scrutiny applied by the Supreme Court when national security meets immigration issues.

[1098] Pauline de Saint Remy, "Aucune déchéance de nationalité sous Sarkozy," *Le Point*, August 3, 2010, https://www.lepoint.fr/politique/aucune-decheance-de-nationalite-sous-sarkozy-03-08-2010-1221719_20.php; "Terrorisme : la déchéance de nationalité française d'une femme franco-turque validée par la justice," *leparisien.fr*, May 5, 2023, sec. /faits-divers/, https://www.leparisien.fr/faits-divers/terrorisme-la-decheance-de-nationalite-francaise-dune-femme-franco-turque-validee-par-la-justice-05-05-2023-J4K5KLPNCRAOTFAPQHLGJCLPGI.php.

On 28 June 2004, the Supreme Court delivered three judgments related to the detention of enemy combatants. Two involved American citizens, Hamdi and Padilla.[1099] The third, *Rasul*, addressed the detention of a foreigner in Guantánamo.[1100] That the geographical divide overlaps with the nationality of the detainees is no coincidence. If Hamdi was initially detained in Guantánamo, he was moved to a detention center on the U.S. territory after the authorities found out that he was an American citizen. Furthermore, his right to due process as determined by the Supreme Court was very much linked to his nationality. The Court required that some system to refute the enemy combatant classification be available for a "citizen detainee".[1101] Justice Scalia's opinion equally turned on Hamdi's nationality and led him to dissent in *Rasul*. Eventually, most of the opinions in these cases, even when asserting the absence of differentiation, operated within the frame of the divide based on the nationality of the detainees, American citizens or aliens.[1102]

Nationality, combined with territoriality, was also central to *Clapper*.[1103] The Foreign Intelligence Surveillance Act had been amended[1104] in order to facilitate the surveillance of individuals who were not "United States persons". The scope of the measure in and off itself is a testament to the way nationality determines the rights of individuals. The applicants who were "United States persons" and thus had more easily access to courts to dispute the statute were denied standing.

[1099] Padilla's case was dismissed on procedural grounds. *Rumsfeld v. Padilla*, 542 U.S. 426 (2004).

[1100] *Rasul v. Bush*, 542 U.S. 466 (2004).

[1101] *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), p. 30

[1102] For an analysis of the various justices' positions in the three cases, see George P. Fletcher, "Citizenship and Personhood in the Jurisprudence of War - Hamdi, Padilla and the Detainees in Guantanamo Bay," *Journal of International Criminal Justice* 2 (2004): 953.

[1103] *Clapper v. Amnesty International*, 568 U.S. 398 (2013).

[1104] FISA Amendments Act of 2008.

It follows that in the U.S., nationality overtly plays a role in determining the scope and content of rights beyond the domains where it is usually expected (voting rights for example). Furthermore, questions of nationality, because they imply considerations related to immigration, also impact the level of scrutiny applied by the court. Indeed, much like in France or the United Kingdom as discussed above, immigration and national security issues are deeply linked, with the latter shaping policy related to the former.[1105] However, in the U.S., the consequences on rights of the citizen/non-citizen divide are deeper, largely because of the "plenary power doctrine".[1106] According to this doctrine, substantive immigration policy made by Congress and the executive generally benefits from a quasi-immunity from judicial review.[1107] It follows that the government has more discretion over the exclusion and deportation of aliens than over the liberty of citizens.[1108]

The application of the plenary power doctrine is not automatic. *Zadvydas v. Davis* is commonly considered an exception to its use. An act of Congress had made the detention of aliens beyond ninety days possible when their deportation could not have been implemented earlier. The Supreme Court adopted a reading of the statute which would limit this "post-removal-period" so that it could not be indefinite in cases where the aliens could not be deported.[1109] This outcome could be viewed as similar to that reached by the ECtHR in *A. and*

[1105] Shoba Wadhia, "Is Immigration Law National Security Law?," *Emory Law Journal* 66, no. 3 (January 1, 2017): 669.

[1106] *Chae Chan Ping v. US (The Chinese Exclusion Case)*, 130 U.S. 581 (1889)

[1107] Shoba Wadhia, "National Security, Immigration and the Muslim Bans," *Washington and Lee Law Review* 75 (January 1, 2018): 1475.

[1108] Fletcher, "Citizenship and Personhood in the Jurisprudence of War - Hamdi, Padilla and the Detainees in Guantanamo Bay," 962.

[1109] Justice Scalia dissented arguing that although it could be "repackaged as freedom from "physical restraint" or freedom from "indefinite detention," [the claim] it is at bottom a claimed right of release into this country by an individual who concededly has no legal right to be here. There is no such constitutional right." *Zadvydas v. Davis*, 533 U.S. 678 (2001), Justice Scalia dissenting at 702-703.

Others. However, it should be noted that *Zadvydas v. Davis* was not an emergency case, nor was a national security claim made. On the contrary, the Supreme Court explicitly stated that it did not "consider terrorism or other special circumstances where special arguments might be made for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to matters of national security."[1110]

The plenary power doctrine continues to dictate deference in judicial review of immigration policy, especially when compounded by national security claims as was the case in *Trump v. Hawaii*. The Court recalled that "the admission and exclusion of foreign nationals is […] largely immune from judicial control."[1111] The way to judicial review is therefore to invoke the rights of U.S. nationals, in which case the Court might conduct a "circumscribed judicial inquiry".[1112] The level of scrutiny is then very low and limited to "facially legitimate and bona fide reasons" which the Court neither tests nor balances. This "narrow standard of review has particular force in admission and immigration cases that overlap with the area of national security."[1113] Consequently, the (self-)constrained Court decided not to extend its review beyond a rational basis test. The combination of immigration matters with national security claims is extremely powerful as it nearly insulates the political branches' policies from judicial review.

In the context of national security issues, differences of treatment based on nationality are often combined with or can offer legal cover for discrimination based on illegal grounds such as race or religion. This confusion is especially visible in the figure of the "Arab-Muslim"

[1110] *Zadvydas,* at 695-696.
[1111] *Trump v. Hawaii*, 585 U.S. ___ (2018), p. 30.
[1112] *Id.*
[1113] *Id.*, p. 31.

which is commonly associated with migration irrespective of individuals' actual status. According to Bertossi, "the distinction between Islam, Muslims, Islamism and terrorism [broke down], as the global fear of Islam [has] transformed the Muslim religion into a global identity, placing [...] terrorist violence against the values of liberal democracy and the hijab as moral violence against the principles of Western citizenship on the same qualitative level."[1114] In turn, the Covid-19 pandemic provided further insight on the treatment of religion during emergencies, still along a minority/majority divide but within a different frame from the Islamist terrorism one.

3. The other religious/ethnic group

Religion, because it can be part of a person's or a group's identity, is also a means of identification and therefore potentially of otherization. According to the common stereotype, the dialectic between religion and emergency is one where some members of a religious minority resort to violence against the majority which they consider oppresses them. The state of emergency is then declared officially to stop the violence. Recent history offers many such examples: the IRA, various Chechens groups, including jihadist ones, perpetrators of the 2015 attacks in France or those of 9/11 on a global scale.[1115] In this process, the need to identify the enemy commonly leads to assimilating the entire minority group with the perpetrators of violence. Emergency powers, bolstering the state's prerogatives, offer more tools for the

[1114] Christophe Bertossi, "Les Musulmans, la France, l'Europe : contre quelques faux-semblants en matière d'intégration," *Migration et Citoyenneté en Europe*, no. 1 (March 2007), https://www.ifri.org/fr/publications/notes-de-lifri/musulmans-france-leurope-contre-quelques-faux-semblants-matiere quoted in; Anne Fornerod, "L'islam, le juge et les valeurs de la République," *Revue du droit des religions*, no. 6 (November 6, 2018): 43–57.

[1115] This list is only intended to provide some concrete examples. It is in no way meant to negate the fundamental differences in the underlying geo-politics and conflicts surrounding the acts of violence.

majority to further oppress the minority. The marginalized minority is then all at once the identified threat grounding the state of emergency and its primary victim. Because of the otherization logic which sustains the state of emergency, the rights of entire minority groups are subjected to extraordinary restrictions independently of the reality of any involvement in violent actions.

More recently, the Covid-19 pandemic wrote a new chapter in the relationship between religion and emergency. Detached from terrorism and violence, the state of emergency did not target religious groups but affected them particularly yet incidentally. In the context of emergencies related to conflicts along religious lines, religion is a means to identify and target the other. Freedom of religion is but one of the many fundamental rights restricted by emergency measures and it did not feature predominantly in the ensuing litigation. Conversely, during the pandemic, when petitioners addressed the courts as members of religious groups, their claims focused on the right to worship.

The four courts examined here operate within systems with drastically different approaches to religious issues. The discomfort of the ECtHR when it comes to discrimination based on religion is patent in its emergency cases. The judges appear almost in denial as they refuse to address the religious dimension. In France and in the U.S., despite a seemingly similar islamophobia haunting emergency measures, cases which arose during the pandemic provided opportunities to better understand how islamophobia is mediated differently in the two countries and in front of their apex courts. In France, *laïcité* demoted freedom of religion and worship to a secondary position while in the U.S., guaranteed by the First Amendment, it remained central to the system of fundamental rights.

a. The figure of the Arab-Muslim terrorist

Even though the question of discrimination against minorities in the fight against terrorism is well documented,[1116] claims based on such difference of treatment were seldom brought to the courts. Depending on the ongoing "crisis", various ethnic and/or religious minorities were targeted by emergency measures. However, especially since 9/11, the figure of the Arab-Muslim has dominated the collective Western imaginary and features predominantly in the case law.

i. ECtHR

In 1978, the Irish government explicitly claimed that an emergency measure – extrajudicial detention – was implemented by the United Kingdom in violation of Article 14 (prohibition of discrimination) of the Convention.[1117] In the Northern Irish conflict, the division along ideological lines (Loyalists against Republicans) followed that of religious communities (Protestants and Catholics). The ECtHR judgment acknowledged that both sides committed assassinations where the victims were chosen for the mere reason that they belonged to the other community.[1118] It follows that no difference of treatment can be discussed independently of its religious dimension. For that reason, even though the Court never examined the difference of treatment in terms of discrimination based on religion, its analysis under Article 14 in this case belongs in this subsection.

The Irish government claimed that the United Kingdom government had used extrajudicial detention almost exclusively against Republicans, and therefore Catholics. In

[1116] Ní Aoláin, "A/78/520."

[1117] *Ireland v. the United Kingdom*, no. 5310/71, 18 January 1978.

[1118] *Id.*, § 53.

examining this claim, the Court identified three different periods. Regarding the first one, the Court found that there were "profound differences between Loyalist and Republican terrorism." The vast majority of the violence were attributed to the Republicans, the Irish Republic Army (IRA) was far more structured than its Loyalist equivalent and "it was as a general rule easier to institute criminal proceedings against Loyalist terrorists than against their Republican counterparts and the former were frequently brought before the courts."[1119] This last point is particularly problematic because the crux of the issue was not any potential impunity for the Loyalists but the exclusion of Catholics Republicans from the normal criminal system. Furthermore, the argument is not substantiated but contradicts some of the facts stated earlier in the judgment.[1120]

During the second period, violence committed by Loyalists drastically increased. Yet almost a year elapsed before any Loyalist was subjected to extrajudicial detention. The defending government argued that ordinary criminal processes continued to be better suited to address Loyalist terrorism than Republican terrorism. The Court considered that it could not deduced the discriminatory intent of the government from the evidence. However, it noted that the reasons which could justify the different treatment during the earlier period became "less and less valid as time went on."[1121] Nonetheless, despite acknowledging a different treatment for which it could not identify an objective and reasonable justification, the Court could "understand the authorities' hesitating about the course to take, feeling their way and needing a certain time to try to adapt themselves to the successive demands of an ugly crisis."[1122] The

[1119] *Id.*, § 228.
[1120] *Id.*, § 53.
[1121] *Id.*, § 229.
[1122] *Id.*, § 229.

Court concluded that employing the emergency powers against the IRA alone did not constitute a discrimination prohibited by Article 14.

Finally, during the last period, extrajudicial detention was used to combat terrorism in general and no longer one specific organization. Yet, as noted by the Court, it remained widely disproportionately used against Catholics (99 detention orders against Protestants and 626 against Catholics). Nonetheless, the Court reiterated the defending government's argument that "Loyalist terrorists could still be brought before the courts more easily than their Republican counterparts."[1123] Once again, this assertion was not substantiated.

Furthermore, the Court added that it could not "reproach the United Kingdom for having attempted to avail itself as far as possible of this procedure under the ordinary law."[1124] This argument missed the mark as the complaint did not criticize the application of ordinary law to Loyalists but that of emergency measures to Republicans. Ultimately, the Strasbourg Court took into account both the emergency and criminal procedures to conclude that the differential treatment had stopped during the last period. Unfortunately, it is not clear why the Court "must" "tak[e] into account the full range of processes".[1125] Rather in doing so, the Court negated the difference in their implementation and therefore the discriminatory treatment. Thus, even though the Court formally addressed the discriminatory dimension of the emergency measure, in practice, it undermined it rather than found valid justification for it.

Interestingly, contrary to the majority, Judge O'Donoghue, the Irish judge in the case, assessed the allegations of discrimination against the broader context of the conflict and not

[1123] *Id.*, § 231.
[1124] *Id.*, § 231.
[1125] *Id.*, § 231.

only the implementation of extrajudicial detention. He framed this analysis in terms of "minority" and "majority", which the Court stayed clear from. He would have concluded to a violation of Article 14 of the Convention.[1126]

The Court had to address again the application of emergency measures to a religious minority in *A. and others*. The case was mainly concerned with a discrimination between nationals and foreigners.[1127] Yet, the United Kingdom government introduced a new argument in front of the ECtHR which explicitly put the emphasis on the religious aspect of the measure. The case dealt with derogatory measures adopted to fight terrorism. The United Kingdom had created a special detention regime for foreigners who were suspected of terrorism but could not be deported. Therefore, theoretically, religious considerations were irrelevant. Nonetheless, in defending the conventionality of the measure, the government focused one of its arguments on Muslims. It argued that "it was legitimate for the State, in confining the measures to non-nationals, to take into account the sensitivities of the British Muslim population in order to reduce the chances of recruitment among them by extremists."[1128]

This argument explicitly admitted the Islamophobic bias in the design and implementation of the measure. It also revealed the orientalist and paternalistic view of Muslims whose sensitivities need to be handled or run the risk that their emotions drive them to terrorism. The Court did not address the problematic argument but merely dismissed it on the ground that the government did not produce "any evidence to suggest that British Muslims were significantly more likely to react negatively to the detention without charge of national rather

[1126] *Id.*, § 231, Judge O'Donoghue's separate opinion, p. 95.

[1127] See previous subsection.

[1128] *A. and Others v. the United Kingdom* [GC], no. 3455/05, §188, ECHR 2009.

than foreign Muslims reasonably suspected of links to al-Qaeda."[1129] Consequently, in both cases, the ECtHR simply turned a blind eye to the religious dimension in the implementation of the counter-terrorism measures.

ii. France: the values of the Republic, **laïcité** *and Islamophobia*

In the French context, religious considerations cannot be understood separately from the concept of *laïcité* which determines the relation between the state, religions, and religious communities but also the content of freedom of religion and worship. The meaning of the concept has evolved since the adoption of the law on the separation of the state and the churches in 1905.[1130] Since 2004 in particular, it is increasingly summoned to serve Islamophobic purposes.[1131] *Laïcité* is among the values of the Republic against which are assessed applications for acquisition of the French nationality. In this body of cases, the practice of rigorous Islam is regularly found to go against *laïcité* and therefore used to deny the acquisition of nationality.[1132] In turn, this value-based approach, which singles out a particular practice of Islam as antinomic to the French Republic, travelled to emergency case law. Fornerod highlighted the terminological similarities between nationality and emergency jurisprudence – singularly during the 2015-2017 state of emergency – when cases involve Muslims.[1133]

[1129] *Id.*

[1130] Loi du 9 décembre 1905 concernant la séparation des Églises et de l'État.

[1131] Hennette-Vauchez, "Is French Laïcité Still Liberal?"

[1132] Fornerod, "L'islam, le juge et les valeurs de la République."

[1133] Fornerod.

Much like 9/11 in the U.S. – and to various extents internationally – the 2015 attacks in France made radical Islam the *raison d'être* of the ensuing emergency measures.[1134] A comprehensive analysis of the administrative case law on emergency measures adopted in 2015-2017 confirms the strong focus on Muslims. The authors identified two main groups represented in the body of emergency cases: those described by the authorities as radicalized Muslims and members of "radical anti-establishment movement",[1135] with the former outnumbering the latter by far.[1136] Furthermore, those belonging to the "radicalized Muslims" group were commonly subjected to several emergency measures cumulatively, whereas unique measures were usually adopted against individuals targeted on other grounds.[1137] Converting to Islam is perceived as an aggravating factor.[1138] This last element reveals a mindset in which converting to Islam is inherently suspicious and cannot result from a rational and deliberate choice but can only be the product of fanatic influence.[1139]

Following this line of thinking, the Council of State inadvertently confirmed one of the implied goals of the emergency measures: disciplining Muslims into a version of their faith that is acceptable to the Republic. Reviewing a measure of house arrest, the judge deduced the dangerous character of the plaintiff from his behavior and the fact that since the beginning of

[1134] Stéphanie Hennette-Vauchez, ed., *Ce qui reste(ra) toujours de l'urgence*, Colloques & Essais (Clermont-Ferrand: Institut Universitaire Varenne, 2018), 181, https://www.lgdj.fr/ce-qui-restera-toujours-de-l-urgence-9782370321770.html.

[1135] The relevance of this second group will be discussed in the following subsection.

[1136] Hennette-Vauchez, *Ce qui reste(ra) toujours de l'urgence*, 181 and 197–98.

[1137] Hennette-Vauchez, 199.

[1138] Hennette-Vauchez, 192.

[1139] Hennette-Vauchez, 192–94.

the measures, "he had shown no willingness to break his ties with radical Islam".[1140] The administrative measures are not only preventive but hopefully redemptive too.[1141]

Finally, national security cases highlight the sentiment of externality which remains attached to the perception of Islam and Muslims by the national authorities.[1142] The above-mentioned study noted the rhizome-like structure of the emergency case law. In part, this link between cases is due to the way targets are identified: because of their link to a mosque or a person or group of persons. The state of emergency targets communities. Cases related to the closure of places of worship and associations are symptomatic in that regard.[1143] This dynamic was prolonged after the end of the state of emergency by the so-called "separatism statute".[1144] Among other measures, the statute created the "Republican Commitment Contract"[1145] which requires associations to respect "Republican" values. Its signature is mandatory when applying for public funding. This measure has been perceived as targeting the Muslim community as well as a dangerous infringement on freedom of association.[1146]

In several instances, when dealing with Muslim associations or organizations purporting to advance the rights of Muslims, the Council of State severely lowered the protection of the freedom of association. In November 2015, the law prolonging the state of emergency included the possibility to dissolve associations "participating in, facilitating or inciting acts seriously

[1140] Council of State, réf., 25 April 2017, no. 409677.

[1141] Hennette-Vauchez, *Ce qui reste(ra) toujours de l'urgence*, 202 and 204.

[1142] Fornerod, "L'islam, le juge et les valeurs de la République."

[1143] Hennette-Vauchez, *Ce qui reste(ra) toujours de l'urgence*, 184–90; Fornerod, "L'islam, le juge et les valeurs de la République," paras. 17–18.

[1144] Loi no. 2021-1109, 24 August 2021 « confortant le respect des principes de la République ».

[1145] Contrat d'engagement républicain.

[1146] Maroussia Kossonogow and Syrine Benaceur, "Projet de loi confortant les principes de la République : le Gouvernement à l'assaut de la liberté d'association ?," *La Revue des droits de l'homme. Revue du Centre de recherches et d'études sur les droits fondamentaux*, February 21, 2021, https://doi.org/10.4000/revdh.11241.

prejudicial to public order". The dissolution could only be pronounced if a second condition was fulfilled: some of the members or contacts of the association had to be under house arrest. The Council of State removed this second condition,[1147] thereby solely conditioning the dissolution on an element the appreciation of which can be highly subjective. The Council further highlighted that this disposition was to operate independently from Article 212-1 of the Code of domestic security which is always applicable irrespective of the state of emergency. Indeed, the dissolutions of associations continued after the state of emergency was lifted.

In September 2021, the Council of State validated the dissolution of the CCIF (Collective against Islamophobia in France).[1148] Contrary to the allegations of the Minister of Interieur, the Council found that "it was not clear from the documents in the file that the CCIF association or its members had engaged in activities to incite acts of terrorism." Therefore, the decree pronouncing the dissolution was an incorrect application of Article 212-1 al. 7 of the Code of domestic security.[1149] However, the Council noted that "the CCIF […] has for several years been making unqualified statements designed to lend credence to the idea that the French public authorities are waging a war against the Muslim religion and its followers, particularly in the context of the fight against terrorism, and that France in general is a country hostile to Muslims."[1150] This critique of the government's policies was one of the elements on which the Council relied to conclude that the CCIF was guilty of "inciting discrimination, hatred or

[1147] Council of State, consultative opinion, no. 390786, 17 November 2015, « Avis sur un projet de loi prorogeant l'application de la loi n° 55-385 du 3 avril 1955 relative à l'état d'urgence et renforçant l'efficacité de ses dispositions »

[1148] Collectif contre l'islamophobie en France.

[1149] "Sont dissous, par décret en conseil des ministres, toutes les associations ou groupements de fait : […] qui se livrent, sur le territoire français ou à partir de ce territoire, à des agissements en vue de provoquer des actes de terrorisme en France ou à l'étranger." Code la sécurité intérieure, art. 212-1 al. 7.

[1150] Council of State, 24 September 2021, no. 449215, § 9.

violence against a group of people because of their origin or their membership or non-membership of a religion, or propagating ideas or theories to justify or encourage them".[1151] With this decision, the Council of State confirmed that organizations can be dissolved even in the absence of any direct link with terrorist activities.[1152]

The perceived externality of (certain) Muslims stood out in the cases related to the repatriation of French nationals held in camps in Syria after the fall of the Islamic State. Both the Council of State and the ECtHR delivered judgments in the same case. The plaintiffs were the parents of two women who had followed their partners when they went to Syria to join the fight of the Islamic State (ISIS). Following the fall of ISIS, the daughters of the applicants and their children born in Syria were detained in camps in conditions which the ECtHR judged "incompatible with applicable standards under international humanitarian law".[1153] Their parents asked that France repatriate their daughters and grandchildren. Their requests were tacitly denied. In April 2019, the Council of State rejected the applicants' petition. Following the lower court's reasoning, the Council considered that the plaintiffs' request would entail actions on the part of the state which "cannot be detached from the conduct of France's international relations. Consequently, a court has no jurisdiction over them."[1154] The Council did not engage in the assessment of the rights of the plaintiffs' relatives. It merely opposed the theory of the *acte de government* and found that the issue was not justiciable.[1155] Consequently,

[1151] Council of State, 24 September 2021, no. 449215, § 11.

[1152] Truc, "« Écoterroristes » et « terroristes intellectuels »," para. 28; Ligue des Droits de l'Homme, "La dissolution du CCIF validée par le Conseil d'Etat : les associations en danger !," October 8, 2021, https://www.ldh-france.org/la-dissolution-du-ccif-validee-par-le-conseil-detat-les-associations-en-danger/.

[1153] *H.F. and Others v. France* [GC], nos. 24384/19 and 44234/20, § 266, 14 September 2022.

[1154] Council of State, réf. 23 April 2019, no. 429701.

[1155] *H.F. and Others*, §§ 53 and 57.

even though the applicants' daughters were French nationals, the issue was considered to be purely one of external relationships dealt with by the Ministry of Foreign Affairs and their claims would not be heard by the French jurisdictions.

The parents of both women brought their case to the ECtHR. Here again, the question of externality was crucial. An extensive part of the judgment is dedicated to issues of jurisdiction. No less than seven member states filed third-party interventions arguing that the applicants' daughters and grandchildren did not fall within the jurisdiction of France.[1156] The ECtHR, looking for "connecting ties", found that "the mere decision of the French authorities not to repatriate the applicants' family members did not have the effect of bringing them within the scope of France's jurisdiction as regards the ill-treatment to which they are subjected in Syrian camps under Kurdish control."[1157] However, the Court argued that certain circumstances may give rise to a jurisdictional link for the purpose of Article 3 § 2 of Protocol no. 4 (right to enter the territory of the State of which one is a national). Here, the Court found that these conditions existed based on the special features of the case, in addition to the legal link between the State and its nationals.[1158]

Moving on to the substance of the right, the Court once more reiterated that it was "acutely conscious of the very real difficulties faced by States in the protection of their populations against terrorist violence and the serious concerns triggered by attacks in recent years." Furthermore, when deciding on the positive obligations created by Article 3 § 2 of Protocol no. 4, the Court should adopt a narrow interpretation. However, the case was

[1156] *Id.*, §§ 169-175.
[1157] *Id.*, § 203.
[1158] *Id.*, § 213.

characterized by exceptional circumstances such as the direct threat to the physical integrity of children in a situation of extreme vulnerability.[1159] Therefore, France had the procedural obligation to offer adequate safeguards against arbitrariness.

This finding was bound to have consequences regarding the use of the *acte de gouvernement* theory. Although the Court reiterated that a general assessment of the balance of powers was out of its purview, access to independent review was not.[1160] The jurisdictional immunity invoked by the domestic courts deprived the applicants of these guarantees.[1161] Therefore, the Court concluded that there had been a violation of Article 3 § 2 of Protocol no. 4. Under Article 46, it even enjoined the French Government to re-examine the requests "in a prompt manner".[1162] In this case, national security and terrorism where only marginally touched upon by the ECtHR and not at all by the French Council of State. Religious considerations were completely absent in both cases. Yet, the combination of these two elements is necessary to make sense of the drastic attempts to externalize the situation. Only the rights-based approach of the ECtHR offered a strong enough counter-position.

As *laïcité* regained rhetorical importance in the last two decades, it provided judges with the cover of neutrality for their values-laden reasoning. Yet, the analysis of the case law shows the continuous bias against Muslims as an external community which can only enjoy fundamental rights as long as they integrate, meaning to embrace the Republican values, the values of the majority. The logic behind the exclusion of Muslims in the U.S. is drastically

[1159] *Id.*, § 261.
[1160] *Id.*, § 281.
[1161] *Id.*, § 282.
[1162] *Id.*, § 295.

different due to the meaning and significance of freedom of religion enshrined if the First Amendment.

iii. The Supreme Court still searching for its anti-Korematsu

Cole argued that the targeting of non-national Arabs and Muslims after 9/11 was but the latest expression of a pattern of governmental overreaction during "crises".[1163] Akram and Karmeli disagree to the extent that they argue that targeting Arabs and Muslims was not a specificity of the post-9/11 era, nor was it limited to non-nationals.[1164] Rather, governmental policies specifically targeting Arabs and Muslims or being enforced against them disproportionately have been a constant through every administrations since President Nixon's "Operation Boulder".[1165] Some events which occurred in the aftermath of the 9/11 attacks vindicate both Cole's and Akram and Karmeli's theses in that they highlighted the special focus on Arab-Muslims among non-nationals. Within weeks after the attacks, over 1200 men, Muslim and/or of Arab origin, were rounded up and detained on various charges mainly related to their immigration status. These detentions varied from a few days to several months. Yet, none of the detainees were charged with activities related to 9/11.[1166]

After their release (and deportation), several of these former detainees, sued various high executive officers and two wardens alleging that they had been detained in "harsh pretrial

[1163] David Cole, *Enemy Aliens: Double Standards and Constitutional Freedoms in the War on Terrorism*, The New Press (New York, 2003).

[1164] Susan M. Akram and Maritza Karmely, "Immigration and Constitutional Consequences of Post-9/11 Policies Involving Arabs and Muslims in the United States: Is Alienage a Distinction without a Difference, Symposium: Immigration and Civil Rights After September 11: The Impact on California," *U.C. Davis Law Review* 38, no. 3 (2005 2004): 609–700.

[1165] Akram and Karmely, 613.

[1166] Kim Lane Scheppele, "Law in a Time of Emergency: States of Exception and the Temptations of 9/11, 22nd Annual Edward V. Sparer Symposium: Terrorism and the Constitution: Civil Liberties in a New America," *University of Pennsylvania Journal of Constitutional Law* 6, no. 5 (2004 2003): 1030–33.

conditions for a punitive purpose because of their actual or apparent race, religion, or national origin, in violation of the Fifth Amendment". The Supreme Court reviewed the possibility to pursue such action in damages.[1167] It should be noted that in its statement of the factual circumstances of the case, the majority only referred to "hundreds of illegal aliens […] taken into custody and held" but did not mention that all of them were Muslim and/or of Arab origin. Furthermore, the case was heard by an unusual bench since neither Justices Sotomayor, Kagan, nor Gorsuch took part.

The Court had to decide whether, considering that Congress had not created an action for damages in this case, the judiciary should do so. Therefore, the legal question was essentially one of separation of powers. Having found that the context differed from those in which the Court had previously authorized damage suits, it moved on to a "special factors" analysis. Among these factors, the Court considered that those claims "challenge […] major elements of the Government's whole response to the September 11 attacks, thus of necessity requiring an inquiry into sensitive issues of national security"[1168] which fall within the prerogatives of the political branches. The "courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs unless Congress specifically has provided otherwise."[1169] The Court acknowledged the "persisting concern" that their decision would lead to "insufficient deterrence to prevent officers from violating the Constitution". Yet, it concluded that there was "a balance to be struck […] between deterring constitutional violations and freeing high officials to make the lawful decisions necessary to protect the Nation

[1167] *Ziglar v. Abbasi*, 582 U.S. ___ (2017).

[1168] *Id.*, p. 19.

[1169] *Id.* (internal quotation marks omitted).

in times of great peril"[1170] and that "the proper balance is one for the Congress, not the Judiciary, to undertake".[1171]

Justice Breyer, joined by Justice Ginsburg, dissented. He considered that the majority should have applied *Bivens* (opening damage actions against federal authorities). He found the context to be essentially the same as in the applicable precedents. The "significant difference" then – and majority's strongest argument – was the crisis-post-9/11 context.[1172] Breyer opposed two main arguments to the emergency one. On the one hand, he claimed that *Bivens* actions were surrounded by sufficient safeguards to prevent undue intervention of the judiciary during emergency. Therefore, he found the abolition or limitation of *Bivens* by the majority to go too far and exhorted the judges, when they are cold, to put on a sweater rather than setting the house on fire.[1173] On the other hand, he highlighted that there might be a particular need for *Bivens* actions in times of emergency. During these trying times, the political branches have provided many examples of what would later be considered abuses to be remedied.[1174] Therefore, Justice Breyer would have allowed the damage action to go forward and the six respondents to sick remedy for their conditions of detention. At this point, however, it should be noted that the most striking aspect of the facts which gave rise to this case – the roundup and detention of hundreds of Muslim/Arab men based on their assumed religion or ethnic origin – remained essentially unaddressed either by the majority or the dissent and, due to this judgment, equally unremedied.

[1170] *Id.*, p. 22.
[1171] *Id.*, p. 23.
[1172] *Id.*, Justice Breyer's dissenting opinion, p. 20.
[1173] *Id.*, p. 22.
[1174] *Id.*, p. 23.

In the following months after 9/11, various programs successively targeted Arabs and Muslims. The "Absconder Apprehension Initiative" for example focused on them almost exclusively.[1175] The National Security Entry-Exit Registration System ("NSEERS") required that nationals of certain countries be fingerprinted, photographed and generally surveilled. The definition of "national" was expanded to include persons born in one of these Arab or Muslim country irrespective of their actual nationality.[1176] Yet, despite the various sources of discrimination, the issue did not come back as clearly in front of the Supreme Court again until *Trump v. Hawaii*.

In *Trump v. Hawaii*,[1177] the plaintiffs' claim was twofold. On the one hand, they complained that the presidential Proclamation restricting access to the U.S. territory for nationals of identified countries violated the Immigration and Nationality Act (INA). On the other hand, they claimed that the Proclamation was motivated by religious animus and that the alleged security concerns were nothing but pretexts to discriminate against Muslims in violation of the Establishment Clause. The Court dismissed the constitutional part of the claim as unlikely to succeed on the merits.[1178] This conclusion resulted from two elements.

First, as discussed previously,[1179] the Court examined this claim under a rational basis test. Although an alleged violation of the Establishment Clause would usually trigger a higher level of scrutiny, the majority decided to follow the immigration route instead which significantly lowered the degree of scrutiny. Second, the Court decided to satisfy itself with the

[1175] Akram and Karmely, "Immigration and Constitutional Consequences of Post-9/11 Policies Involving Arabs and Muslims in the United States," 630.

[1176] Akram and Karmely, 630.

[1177] *Trump v. Hawaii*, 585 U.S. ___ (2018).

[1178] *Id.*, pp. 24-38.

[1179] See above, p. 275.

official purpose of the Proclamation – national security – and ignored the alleged ulterior motive, the discrimination against Muslims.[1180] This choice is particularly difficult to justify in this case where Islamophobic motivations had been explicitly stated by President Trump on many occasions during his campaign and after he was elected.[1181]

It is all the more surprising when the majority acknowledged the impact of presidential statements with regard to religious questions. Indeed, the Court recalled that "The President […] possesses an extraordinary power to speak to his fellow citizens and on their behalf. Our Presidents have frequently used that power to espouse the principles of religious freedom and tolerance on which this Nation was founded."[1182] It then listed a number of examples of presidential addresses to religious communities, only to conclude that "it cannot be denied that the Federal Government and the Presidents […] performed unevenly in living up to those inspiring words"[1183] but ultimately that "the issue before [them] is not whether to denounce the statements".[1184] Instead, the Court focused on the fact that the Proclamation was facially neutral[1185] and systematically dismissed the many unequivocal presidential statements, witnesses and factual elements proving the discriminatory grounds of the measure.

Here again, the Court pretended not to see the religious issue behind a national security measure even when the former had been at the forefront of the presidential endeavor. However, Justice Sotomayor, dissenting, addressed the discrimination based on religion directly and

[1180] For an analysis of the treatment of ulterior motives by the Supreme Court, see above, p. 302.
[1181] For some of the examples recorded by the majority, see *Trump v. Hawaii*, 585 U.S. ___ (2018), pp. 27-28.
[1182] *Id.*, p. 28.
[1183] *Id.*, p. 29.
[1184] *Id.*, p. 29.
[1185] *Id.*, p. 34.

pointed to the externalization effect it had. She recalled that the "Court has long acknowledged that governmental actions that favor one religion inevitably foster the hatred, disrespect and even contempt of those who hold contrary beliefs. That is so […] because such acts send messages to members of minority faiths that they are outsiders, not full members of the political community."[1186]

For the first time in *Trump v. Hawaii*, the Supreme Court explicitly repudiated *Korematsu v. United States*.[1187] In this WWII case, U.S. nationals of Japanese descent were forced to evacuate certain areas and relocate in camps following the attack on Pearl Harbor. The difference of treatment based on race led the Supreme Court to apply strict scrutiny for the first time. Nonetheless, due to the context of war, the Executive order had passed that high threshold.

Justice Roberts, delivering the opinion of the Court in *Trump v. Hawaii*, took "the opportunity [created by the dissent] to make express what is already obvious: Korematsu was gravely wrong the day it was decided, has been overruled in the court of history, and – to be clear – has no place in law under the Constitution."[1188] Yet, the claimed obviousness was undermined when Justice Roberts continued: "Korematsu has nothing to do with this case. The forcible relocation of U.S. citizens to concentration camps, solely and explicitly on the basis of race, is objectively unlawful and outside the scope of Presidential authority. But it is wholly

[1186] *Id.*, Justice Sotomayor's dissenting opinion, p. 3 (internal quotation marks omitted).
[1187] *Korematsu v. United States*, 323 U.S. 214 (1944).
[1188] *Trump v. Hawaii*, p. 38.

inapt to liken that morally repugnant order to a facially neutral policy denying certain foreign nationals the privilege of admission."[1189]

Korematsu differed from *Trump v. Hawaii* in various ways including because one applied to nationals when the other did not. Furthermore, the discrimination in *Korematsu* was based on race whereas a certain religion was targeted in *Trump v. Hawaii*. Maybe more importantly, one explicitly discriminated based on race when the other hid the unequal treatment behind nationality and national security issues. But to claim that these two cases have nothing to do with one another is to negate their main outcome, namely that, in both, the Supreme Court accepted that national security concerns trump the rights of members of the minority which, at the time, was the designated other, thereby resulting in discrimination on prohibited grounds. It follows that in the same movement, the mistake which was officially repudiated was also reproduced.

If not to the majority delivering the judgment, the similarities between *Korematsu* and *Trump v. Hawaii* were clear to many, including President Trump who defended his proposal by referring to the internment of Japanese Americans.[1190] Justice Sotomayor, dissenting, highlighted the parallels between the two cases: the use of "ill-defined national-security threat to justify an exclusionary policy of sweeping proportion" and "rooted in dangerous stereotypes", the recourse to secret intelligence and "strong evidence that impermissible hostility and animus motivated the Government's policy."[1191] Justice Sotomayor concluded that

[1189] *Id.*

[1190] *Id.*, Justice Sotomayor's dissenting opinion, p. 5.

[1191] *Id.*, Justice Sotomayor's dissenting opinion, pp. 26-27.

in the name of superficial national security claims, the Court "replace[d] one gravely wrong decision with another."[1192]

The Supreme Court has not yet found its "anti-Korematsu". Interestingly, it is in a freedom of religion case that Sunstein thought he found it. In the words of Justice Roberts, *Trump v. Hawaii* "differ[ed] in numerous respects from the conventional Establishment Clause claim".[1193] *Roman Catholic Diocese of Brooklyn v. Cuomo* did not. But more than an anti-Korematsu, this Covid-19 case further emphasized the discriminatory outcome of *Trump v. Hawaii*.[1194] More generally, the claims related to religious issues brought to court during the pandemic provided a point of comparison to contrast the treatment of the other religion during security "crises".

b. Freedom of religion during Covid-19

The Covid-19 litigation related to questions of religions differed from the one which developed in the context of the fight against terrorism in two main aspects. The first one has to do with the general profile of the petitioners who were usually not members of minorities but followers of the majoritarian faith. The second is related to the object of the litigation. In the context of counterterrorism, assumed members of a religious or ethnic minority saw a variety of their rights infringed upon because of their supposed religious views or origin. However, their freedom of religion was not necessarily directly targeted. Conversely, during Covid-19,

[1192] *Id.*, Justice Sotomayor's dissenting opinion, p. 28 (internal quotation marks omitted).
[1193] *Id.*, p. 29.
[1194] See the following sub-section.

the petitioners complained of alleged direct infringement on their freedom of religion and worship.

i. ECtHR

The first Covid-19 decisions and judgments of the ECtHR show a Court that was rather reluctant to engage with the manner in which member states handled the pandemic. *Magdić v. Croatia*, which directly dealt with an alleged violation of Article 9 (freedom of thought, conscience and religion), is no exception. The applicants complained about various measures adopted by the Croatian government at the beginning of the Covid-19 pandemic including a suspension of religious gatherings. The Court found that the applicant had failed to provide information about how the measures had affected him particularly. For example, he had not indicated to which religious community he belonged.[1195] This argument allowed the Court to find that the application constituted an *actio popularis* and that the applicant was not a victim for the purpose of Article 34.

The lack of details of the application overall might indeed have prevented the Court from conducting an individual assessment of the applicant's situation.[1196] However, focusing on the failure to indicate the applicant's faith is puzzling. Would the Court have embarked on an appreciation of how important public gatherings are for various religious communities? Would the determination of the applicant's faith have changed the outcome regarding his freedom of religion? Rather it would seem that the lack of details made it difficult for the Court to use this application to take on the difficult questions that were raised. Several other cases are

[1195] *Magdić v. Croatia* (dec), no. 17578/20, § 10, 5 July 2022.
[1196] *Id.*, § 11.

pending at the time of writing which might provide the Court with better opportunities to make clear determinations.[1197] Much like *Magdić*, each one complained of alleged unconventional restrictions on the majoritarian faith in the country.

ii. Council of State

Unlike the ECtHR with whom an application can only be lodged after exhausting domestic remedies, the French Council of State had much earlier opportunities to rule on the legality of the restrictions imposed on freedom of religion due to Covid-19. Religious meetings had been singled out as a cause of the spread of the disease since a gathering of more than a thousand persons had led to many contaminations in February 2020 and was considered to be responsible for the high number of cases in the North-East part of the country. The Council ruled in several emergency procedures. In May 2020, it found that the blanket ban on assemblies or meetings in places of worship – except for funerals – was disproportionate and therefore illegal. The Council reached this conclusion during the easing of the lockdown measures and "while less stringent control measures are possible, particularly with regard to the tolerance of gatherings of fewer than 10 people in public places".[1198]

Some of the same petitioners lodged another complaint at the beginning of the second lockdown in November 2020. They complained that religious gatherings were prohibited again with the exception of funerals. Furthermore, people were not allowed to leave their home except for a limited number of reasons. Going to a place of worship was not one of the prescribed exceptions. With regard to the fundamental freedom, the Council reiterated, as it already had

[1197] *Association of orthodox ecclesiastical obedience v. Greece* (communicated case), no. 52104/20; *Mégard v. France* (communicated case), no. 32647/22 and *Figel' v. Slovakia* (communicated case), no. 12131/21.

[1198] Council of State, ref., no. 440366, 18 May 2020, § 34.

six months earlier, that the freedom of worship is not only individual. One of its fundamental elements is "the right to participate collectively in ceremonies, particularly in places of worship". However, this freedom is to be reconciled with public health which is "an objective of constitutional value".[1199]

This time, the Council found that the measures had been appropriately crafted. In particular, the Council noted that the prohibition had only started after Easter in order not to disturb the related celebrations. Furthermore, the rationale for the measures was only based on health considerations and there had been no discrimination between the religions. The Covid-19 Scientific Council advising the government had relied on an American study showing that places of worship did not present a specific risk of contamination. Yet, the Council noted that the health protocols devised for places of worship had not been consistently applied despite the elderly and therefore frail public taking part in religious ceremonies. Consequently, the Council concluded that the prohibition was proportionate.[1200]

A specific argument gives insight with regard to the place of freedom of religion in the French system. The Council noted that less restrictions were imposed during the second lockdown than the first. In particular, schools remained open,[1201] professional activities which could not be carried out remotely were allowed to continue as much as possible, especially for public services, and means of transportation remained available. This relaxation of the restrictions was meant to "avoid the most harmful economic and social effects that had been

[1199] Council of State, no. 445825, 7 November 2020, Association Civitas et autres, § 10.

[1200] *Id.*, §§ 20-21.

[1201] The underlying reasoning here is that parents have to be able to leave their children at school in order to go to work.

observed during the first containment".[1202] This economic reasoning was deemed sufficient to justify more relaxed measures in some areas but not concerning attendance and meetings in places of worship.

Twenty days after this judgment, based on the decreasing number of Covid-19 cases and number of patients in hospitals, the measures were relaxed again. Shops were allowed to reopen subject to a limit of customers based on the store floor space. Religious ceremonies were also allowed but with a maximum audience of thirty people irrespective of the place of worship. Because places of worship were the only places where the limitations were not correlated to the available space, the Council found the restrictions disproportionate. The government had argued that other places open to the public had remained closed. However, the Council found the argument inoperative as "the fundamental freedoms at stake were not the same".[1203] Finally, the fact that other European countries had adopted similar restrictions was found irrelevant.[1204] Similar arguments would be made more successfully in the context of the United States, a federal country. Eventually, the measure was found manifestly illegal.

It follows that the Council of State adopted a moderated approach where severe restrictions, including a ban on religious gatherings, could be acceptable when the "crisis" was at its worse but not in contexts of general relaxation of the anti-Covid measures.[1205] The adjudication of the fundamental freedom that is freedom of religion appears mediated by *laïcité*. Freedom of religion is one of the protected fundamental freedoms. Yet, among them, it does

[1202] Council of State, no. 445825, 7 November 2020, Association Civitas et autres, § 18.

[1203] *Id.*, § 19.

[1204] *Id.*.

[1205] Anne Fornerod, "Freedom of Worship during a Public Health State of Emergency in France," *Laws* 10, no. 1 (March 2021): 15, https://doi.org/10.3390/laws10010015.

not occupy a special rank as may be the case in the United States. Economic considerations might be sufficient to justify a more favorable treatment of non-religious activities even though no claim was made that human rights were directly affected.[1206]

iii. Supreme Court

In France, religion has to be balanced with public order, public health in the case of Covid-19. The comparison with the treatment of secular activities is only one of the elements taken into account when assessing the proportionality of the measures. Conversely, in the U.S., the neutrality of the measures, that is whether they apply similarly to religious and secular places or activities is a crucial step of the analysis which determines the degree of the review. A non-neutral measure would have to survive much stricter scrutiny.

The implementation of this test in the Covid-19 case law dealing with religious issues reveals two different Supreme Courts. During the first period of the implementation of Covid-19 measures, roughly from March until November 2020, the Court systematically refused to grant injunctions against restrictions on religious gatherings. Conversely, after November 2020, it was much more inclined to grant them. Several explanations could be put forward. One would be the changes in the adequation of the measures to the factual situation which kept evolving. Another would be that the Court was initially less secure and willing to intervene in the decisions of the states' executives early on when it had little knowledge about the new disease. However, the breakdown of the votes in each case points towards another more likely explanation, namely the passing away of Justice Ginsburg and the confirmation of Justice

[1206] Benjamin Clemenceau, "Cette possibilité qu'ont les fidèles d'aller se recueillir dans les établissements recevant du public, une liberté moins « culte » qu'avant ?," *La Revue des droits de l'homme. Revue du Centre de recherches et d'études sur les droits fondamentaux*, January 31, 2021, https://doi.org/10.4000/revdh.10817.

Barrett just one month before the first injunction was granted in *Roman Catholic Diocese of Brooklyn, New York v. Cuomo*.[1207]

The inconsistency of the Court before and after November 2020 is not only reflected in the outcome of the cases but also the reasonings which allowed the justices to reach these conclusions. On the one hand, the attempt to curb the spread of Covid-19 was consistently acknowledged by all justices as a compelling interest. On the other hand, the developments about whether the measures were "narrowly tailored" were generally kept short.[1208] The crux of the matter appeared to reside in the determination of what would constitute a comparable secular place or activity. From that perspective, the comparison has proved rather "malleable". As pointed out by Baldwin, a variation on the comparison test emerged from the Covid-19 case law. Where in some cases the focus is on the type of comparable activities, in others, justices have expressly insisted on the risk entailed by various activities.

In the first *South Bay* case,[1209] the Supreme Court denied the petition for injunction. Chief Justice Roberts wrote a concurring opinion in which he argues that "[s]imilar or more severe restrictions apply to comparable secular gatherings, […] where large groups of people gather in close proximity for extended periods of time. And the Order exempts or treats more leniently only dissimilar activities".[1210] His choice of comparable gatherings was therefore based on what were thought at the time to be factors increasing the risk of contamination. Justice Kavanaugh in turn authored a dissenting opinion in this case in which Justices Thomas and

[1207] *Roman Catholic Diocese of Brooklyn, New York v. Cuomo*, 592 U.S. ___ (2020).

[1208] Guy Baldwin, "The Coronavirus Pandemic and Religious Freedom: Judicial Decisions in the United States and United Kingdom," *Judicial Review* 26, no. 4 (October 2, 2021): paras. 41–42, https://doi.org/10.1080/10854681.2021.2057719.

[1209] *South Bay United Pentecostal Church v. Newsom*, 590 U. S. ___ (2020).

[1210] *Id.*, Chief Justice Roberts' concurring opinion, p. 2.

Gorsuch joined. He deplored that "comparable secular businesses are not subject to a [similar restriction], including factories, offices, supermarkets, restaurants, retail stores, pharmacies, shopping malls, pet grooming shops, bookstores, florists, hair salons, and cannabis dispensaries."[1211] Rather than the risk factor, the frivolity of the activities – supposedly as opposed to "essential businesses" or religious matters – seems to have guided the compilation of this list. Nonetheless, in the majority opinion, the risk element helped narrow the scope of comparable activities and ultimately deny the injunction.

It should be noted that in *Calvary Chapel Dayton Valley v. Sisolak*,[1212] the Court also denied the petition for injunction. Justice Alito, dissenting, joined by Justices Thomas and Kavanaugh, argued that the Governor of Nevada had imposed a maximum of fifty people in places of worship but allowed half of the capacity in casinos, which could mean thousands of people. It is difficult to understand how this discrepancy would survive the test used by Chief Justice Roberts in the first *South Bay* case.

As mentioned previously, the internal dynamic within the Supreme Court changed between these earlier cases and *Roman Catholic Diocese* in which the Supreme Court granted an injunction for the first time. Once again, much disagreement occurred regarding what should be considered comparable. For Justice Sotomayor, dissenting, joined by Justice Kagan, *Roman Catholic Diocese* departs from the previous case law precisely because it abandoned the risk factors. She specifically criticizes Justice Gorsuch, concurring, who "does not even try to square his examples with the conditions medical experts tell us facilitate the spread of COVID–19:

[1211] *Id.*, Justice Kavanaugh's dissenting opinion, p. 1.

[1212] *Calvary Chapel Dayton Valley v. Sisolak*, 591 U. S. ___ (2020).

large groups of people gathering, speaking, and singing in close proximity indoors for extended periods of time."[1213]

Notably, in this case, the impugned measures were no longer in force. However, the *per curiam* did not find the case moot. They considered that the applicants remained under a "constant threat" as more severe restrictions could be imposed on them again at any time and without prior notice. Therefore, "there may not be time for applicants to seek and obtain relief".[1214] The French Council of State had found differently and considered the cases moot whenever the decrees imposing the restrictions had been abrogated before the case was heard.[1215]

Finally, in *Tandon*, the Court granted an injunction against the prohibition of at-home religious gatherings. This judgment was the last of a series where the Supreme Court repeatedly found against the Ninth Circuit with regard to California's restrictions on religious exercise. It recalled that, first, measures are not neutral when they "treat any comparable secular activity more favorably than religious exercise. The fact that some secular activities are treated as badly is no answer." Second, "[c]omparability is concerned with the risks various activities pose".[1216] Despite this apparently clear approach, it is based on the comparability element that Justice Kagan, joined by Justices Breyer and Sotomayor, dissented. She pointed out that "[s]ometimes finding the right secular analogue may raise hard questions. But not today. California […] has adopted a blanket restriction on at-home gatherings of all kinds, religious and secular alike."[1217]

[1213] *Roman Catholic Diocese of Brooklyn, New York v. Cuomo*, 592 U.S. ___ (2020), Justice Sotomayor's dissenting opinion, p. 2.

[1214] *Roman Catholic Diocese*, p. 6.

[1215] Council of State, no. 440361, 18 May 2020.

[1216] *Tandon v. Newsom*, 593 U. S. ___ (2021), pp. 2-3.

[1217] *Id.*, Kagan dissenting, p. 1.

Yet, in this case, the *per curiam* used the risk element of the comparison to broaden the scope of the comparable secular activities, in stark opposition with its use in the first *South Bay* case, and granted the injunction.

Sunstein wondered whether *Roman Catholic Diocese* should be understood as a first step away from judicial deference during emergency or as "a reflection of solicitude for religious institutions in particular".[1218] *Biden v. Nebraska*,[1219] decided in June 2023, two and a half years after *Roman Catholic Diocese*, might lend some support to Sunstein's first option. In this case, the Supreme Court found that the Secretary of Education did not have the authority to cancel some student debts, a measure announced by the Biden administration as a means to ease the extra difficulties resulting from the Covid-19 pandemic. Yet, many other grounds could explain the outcome of this decision better than a will to rein in emergency powers. On the other hand, the confirmation of Justice Barrett to replace Justice Ginsburg appears to be the principal cause of the sudden evolution of the case law. This alone would tend to indicate that Sunstein's second option was more likely accurate, but it is also supported by further elements.

Sunstein suggested that not only did the majority have a particular solicitude for religious institutions, but they reacted to what they perceived as the executive's disrespectful attitude toward religion. Justice Gorsuch's concurring opinion lends credit to this argument. The Justice deployed some "harsh rhetoric"[1220] as he wondered: "Who knew public health would so perfectly align with secular convenience?" and concluded that "[t]he only explanation for treating religious places differently seems to be a judgment that what happens there just

[1218] Cass R. Sunstein, "Our Anti-Korematsu," *Harvard Public Law Working Paper* 21, no. 21 (December 29, 2020), https://doi.org/10.2139/ssrn.3756853.

[1219] *Biden v. Nebraska*, 600 U.S. ___ (2023).

[1220] Sunstein, "Our Anti-Korematsu," 6.

isn't as "essential" as what happens in secular spaces."[1221] The majority, or at least Justice Gorsuch, found a violation of the First Amendment in a forbidden animus against religion or religious groups. This willingness to probe the rationale of the executive's decision stands in contrast with *Trump v. Hawaii* where the majority refused to acknowledge prohibited ulterior motives even when Islamophobic grounds had been explicitly stated by the author of the measure.

As Sunstein explained why he found his anti-*Korematsu* in *Roman Catholic Diocese*, he recognized that the two do not squarely compare. He found differences in the constitutional freedom at stake or the heinous motive in *Korematsu* that was absent in *Roman Catholic Diocese*.[1222] However, what Sunstein neglected – and this made his comparison between the two cases problematic if not "outrageous and even odious" in his own words[1223] – is the majoritarian dynamic in both cases. *Korematsu* was about discrimination against a racial minority whereas *Roman Catholic Diocese* is concerned with limitations imposed on the most represented faiths in the country.

Sunstein insisted that *Roman Catholic Diocese* might reflect a consecration of anti-discrimination over liberty. The discrimination would be – and this was indeed the line of reasoning in the case – between secular and religious. But the case is hardly one where an agnostic or atheist majority would discriminate against a religious minority. Rather, the vast majority in the United States identifies as religious.[1224] Furthermore, the applicants in this case

[1221] *Roman Catholic Diocese of Brooklyn, New York v. Cuomo*, 592 U.S. ___ (2020), Justice Gorsuch's concurring opinion, p. 2.

[1222] Sunstein, "Our Anti-Korematsu," 11–12.

[1223] Sunstein, 11.

[1224] Wall Street Journal and NORC, "WSJ/NORC Poll March 2023," 2023.

were Catholic and Jewish, which are the second and third most represented faiths in the United States and the most represented on the Supreme Court bench. Therefore, when in *Korematsu* the Supreme Court vindicated the use of emergency powers to oppress a minority, in *Roman Catholic Diocese*, it protected the religious freedom of the majority. From that perspective, the two cases are not in opposition. Rather, both display a consistent vindication of majoritarian interests.

In Covid-19 cases involving limitations of religious freedom, the identity of the litigants is as indicative as the content of the ensuing judgments. In the cases available at the time of writing and analyzed above, all petitioners were members of the most represented faiths in their respective country. It is quite telling that even in France, where freedom of religion is mitigated by the concept of *laïcité*, the Council of State displayed positive bias towards the majoritarian faith. Indeed, the Council noted that the measures "d[id] not discriminate against any religion or rite". Yet, when assessing whether they were proportionate, it noted that the limitations had been imposed so as to "take into account the celebration of All Saints and the day set aside to commemorate the faithful departed",[1225] both are important days for Catholics. None of the cases adjudicated at this point had been brought by a member of a religious minority.[1226]

From the two types of emergencies – security or health related – transpire two very different treatments of two religious groups – majoritarian or not. The contrast of these two

[1225] Council of State, no. 445825, 7 November 2020, Association Civitas et autres, § 20.

[1226] For France, see Fornerod, "Freedom of Worship during a Public Health State of Emergency in France," 2.

bodies of cases stresses not only the different approaches towards religious matters depending on the jurisdiction but also the majoritarian bias that they have in common. Those which the authorities assumed to be Arabs and/or Muslims have been repeatedly targeted by the various governments, even more so in the context of emergency and especially counterterrorism. A wide range of their fundamental rights were severely restricted because of their supposed origin or religion. Yet, courts have a poor record protecting them against these majoritarian assaults.

Conversely, in the Covid-19 context, courts were called to rule precisely on alleged discrimination based on religion. Despite fundamental differences with respect to religion and religious freedoms in France and in the U.S., both the Council of State and the Supreme Court proved more protective of fundamental rights than they usually did during other emergencies. One likely explanation is that adjudication of freedom of religion during Covid-19 is one of the few occasions in which these courts were called to protect the rights of the majority in a context of emergency. In this unusual setting, the ECtHR adopted a rather cautious approach.

Whether overtly singling out Muslims as is the case in French courts or refusing to even acknowledge the religious dimension of differential treatment, under cover of nationality for example, as has been the case for the ECtHR and Supreme Court, the outcomes are similar. The apex courts have consistently failed to protect the fundamental rights of religious/ethnic minorities, in particular since 9/11 those of Arabs/Muslims, and not only their freedom of religion.

4. The other opinion

Within all three jurisdictions emergency powers have been used to curtail the reach of the opposition and silence political dissidents. This development marks the ultimate

domestication of the use of emergency.[1227] It is the identification of the other within, the definition of the friend/enemy line not along external and supposedly objective criteria but following ideological divides. If this line of division often overlaps with the others – the 2023/2024 pro-Palestine demonstrations provide an example of this – that is not always the case as demonstrated by the targeting of communists during the 1940-1950s in the U.S. or more recently environmental activists in France.

"Terrorist" or "threat to national security" are terms used to separate the legitimate political opinion from the one which can be silenced. Holding these opinions is presented as contravening the common values of the political community.[1228] Different opinions are accepted as long as they play by the representative democracy rules and do not threaten the existent power. The line between the two is thin and can be manipulated to justify curtailing any sort of opposition, resulting in the shrinking of the civic space. In 2019, the UN Special Rapporteur on counter-terrorism noted that the "robust empirical finding measured from 2005 to 2018 affirms that the targeting of civil society is not a random or incidental aspect of counter-terrorism law and practice." Rather, this misuse is hard-wired into emergency powers.[1229]

a. ECtHR

Emergency measures can easily be misused to remove any kind of opposition from the public space. From that point of view, the Covid-19 pandemic offered clear opportunities since

[1227] This "ultimate step" is to be understood as the final product of a logical progression, not as the latest element of a linear chronological evolution.

[1228] Hennette-Vauchez, *La Démocratie en état d'urgence*, 64.

[1229] Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, "Impact of Measures to Address Terrorism and Violent Extremism on Civic Space and the Rights of Civil Society Actors and Human Rights Defenders" (HRC, March 1, 2019), para. 4, https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/40/52.

states responded with lockdowns and prohibitions of gatherings. Several states adopted blanket bans on demonstrations and public gatherings. Neither the ECtHR nor French Council of State endorsed these blanket bans. In *Communauté genevoise d'action syndicale (CGAS)*, the ECtHR noted that Switzerland had not derogated under Article 15 and was therefore expected to fully comply with Article 11. Yet, a federal ordinance had imposed a blanket ban on public gatherings for over two months. The Court emphasized the insufficiencies of the decision-making process as well as the topics and values promoted by the applicant association to conclude that the blanket ban had constituted a violation of the right to freedom of assembly.[1230]

In June 2020 already, the Council of State had found that a general and absolute ban on public demonstrations was not necessary, adequate and proportionate. It noted specifically that all public demonstrations had to be notified to the administration. Consequently, the circumstances could be assessed in each particular case and the gathering could be prohibited one by one if the sanitary conditions and organization of the event justified it.[1231]

Apart from such general restrictions on the expression of dissenting opinions, emergency measures have been used to target specific groups, holding and expressing specific views. The ECtHR has developed a vast case law on the use of antiterrorism measures to silence dissident discourses. Most of these cases address the overbreadth of antiterrorism law the application of which was expanded by establishing sometimes very tenuous links between certain speeches or organizations and existing terrorist activities or groups.[1232] In particular, the

[1230] *Communauté genevoise d'action syndicale (CGAS) v. Switzerland*, no. 21881/20, § 91, 15 March 2022.

[1231] Council of State, no. 440846, 13 June 2020, § 16.

[1232] For a general overview, see the ECtHR Press Unit's factsheet on "terrorism" under "freedom of expression" and "Issues relating to freedom of assembly and association".

Court delivered key judgments finding violations of freedom of speech because of the way emergency measures were applied after the attempted coup in Turkey in 2016.[1233]

b. France: the abuse of normal statutes enhanced by the state of emergency

The state of emergency in Turkey in 2016 had been declared to target a particular, although large, group of people, those supposedly related to the attempted coup. Similarly, the state of emergency declared in the southeast part of the country targeted the Partiya Karkeran Kurdistan (PKK). Conversely, in France, groups which were not linked to the official justification of the state of emergency have been sucked into the emergency realm. In 2015-2017, the state of emergency was declared after several attacks in the Parisian area perpetrated by Islamist terrorists. Yet, a statistical study showed that a large number of persons subjected to measures during the state of emergency were militants perceived as belonging to "radical protest movements".[1234] Members of an environmentalist group were targeted by individual measures during the twelve days of the COP21 which took place in Paris in 2015. Some were placed under house arrest while others were forbidden from accessing certain areas in order to prevent them from taking part in demonstrations.

Some of them contested these preventive measures in front of the administrative judge. Adopting a very literal interpretation of the amended 1955 Statute, the Council of State noted that its Article 6 – the legal base for house arrest – contained no reference to the imminent danger or public calamity which triggered the emergency. Therefore, the emergency measures

[1233] See among others *Şahin Alpay v. Turkey*, no. 16538/17, 20 March 2018; *Mehmet Hasan Altan v. Turkey*, no. 13237/17, 20 March 2018; *Selahattin Demirtaş v. Turkey (no. 2)* [GC], no. 14305/17, 22 December 2020 and *Ahmet Hüsrev Altan v. Turkey*, no. 13252/17, 13 April 2021.

[1234] Hennette-Vauchez, *Ce qui reste(ra) toujours de l'urgence*, 195–98.

could be used for other purposes.[1235] In that same case, the Constitutional Council validated the constitutionality of the measure with no interpretation reservation. The required link between the emergency and the measure was rather tenuous since the Council merely noted that the measure had to be substantiated "in light of the particular circumstances which triggered the state of emergency".[1236] The case was also examined by the ECtHR. The Court reiterated that the radical nature of the applicant's political convictions was not sufficient to constitute a risk justifying the preventive measure, neither was his family relationship with a person likely to commit offences.[1237] However, as noted previously, the Court accepted that the link between the measure and the reasons underpinning the state of emergency be indirect.[1238]

The idea that emergency measures were an adequate means to deal with "radical movements" endured after the state of emergency had ended. In 2019, reporting on her visit to France, the UN Special Rapporteur had warned against "the danger that exceptional administrative measures designed for the scourge of terrorism will be applied in other contexts, including but not limited to public demonstrations, including environmental protests."[1239] As she had predicted, in the years following the formal end of the state of emergency, the term "terrorist" was used to disqualify environmental activists as well as "leftist intellectuals". If this practice is not new, it was followed by very concrete consequences based on legal provisions adopted in the aftermath of the state of emergency. For example, security perimeters were established on the basis of anti-terrorism statutes in order to protect President Macron from loud

[1235] Council of State, no. 395009, 11 December 2015, § 27.

[1236] Constitutional Council, no. 2015-527 QPC, 22 December 2015, M. Cedric D., § 12.

[1237] *Domenjoud v. France*, no. 34749/16 and 79607/17, § 133, 16 May 2024.

[1238] See above, p. 294.

[1239] Ní Aoláin, "A/HRC/40/52/Add.4," para. 24, footnote 13.

demonstrators.[1240] In March 2023, a demonstration against a land development project, which had been prohibited, was severely repressed resulting in many injured, several of them critically.[1241] Several politicians described the "violence and damage" attributed to the activists as "eco-terrorism".[1242]

In June 2023, the government dissolved *Les Soulèvements de la Terre*, one of the groups which had organized the prohibited demonstration. Much like the 1955 Statute on the State of Emergency, the statute providing for the dissolution of groups and associations, adopted in 1936, was used extensively to quash decolonization struggles. President de Gaulle also resorted to it to dissolve many far-left and some far-rights groups in 1968 which led the Council of State to step in and annul some – very few – of these dissolutions which it found had gone beyond what the statute allowed.[1243] This provision codified in the Code of domestic security,[1244] was then rediscovered by President Hollande,[1245] and used alongside the 2015-2017 state of

[1240] Truc, "« Écoterroristes » et « terroristes intellectuels »," para. 4.

[1241] "Après le lourd bilan humain de la manifestation de Sainte-Soline, le temps des interrogations," *Le Monde.fr*, March 29, 2023, https://www.lemonde.fr/planete/article/2023/03/29/apres-le-lourd-bilan-humain-de-la-manifestation-de-sainte-soline-le-temps-des-interrogations_6167387_3244.html; "Empêcher l'accès à La Bassine Quel Qu'en Soit Le Coût Humain, Sainte Soline, 24-26 Mars 2023" (Observatoires des libertés publiques et des pratiques policières, July 10, 2023), https://www.ldh-france.org/empecher-lacces-a-la-bassine-quel-quen-soit-le-cout-humain-2/.

[1242] Henri Clavier, "La dissolution des Soulèvements de la Terre suscite des réactions contrastées au Sénat," *Public Sénat*, June 21, 2023, https://www.publicsenat.fr/actualites/environnement/la-dissolution-des-soulevements-de-la-terre-suscite-des-reactions-contrastees-au-senat.

[1243] Council of State, no. 76.230-76.231, 76.235, Sieurs Boussel, dit Lambert, Dorey, Stobnicer, dit Berg, 21 juillet 1970; See also Romain Rambaud, "Quel Contrôle Du Conseil d'Etat Sur La Dissolution Administrative d'associations (Art. L. 212-1 Du Code de La Sécurité Intérieure) ? De La Loi Du 10 Janvier 1936 Sur Les Groupes de Combat et Milices Privées Au Projet de Loi Confortant Le Respect Des Principes de La République," *Revue Des Droits et Libertés Fondamentaux*, no. 85 (2020), https://revuedlf.com/droit-administratif/quel-controle-du-conseil-detat-sur-la-dissolution-administrative-dassociations-art-l-212-1-du-code-de-la-securite-interieure-de-la-loi-du-10-janvier-1936-sur-les-groupes-de-com/.

[1244] Article 212-1 du Code de la Sécurité Intérieure.

[1245] "Trente-quatre associations visées par une dissolution sous la présidence Macron, une annulation par le Conseil d'Etat," *Le Monde.fr*, November 10, 2023, https://www.lemonde.fr/les-decodeurs/article/2023/11/10/trente-quatre-associations-visees-par-une-dissolution-sous-la-presidence-macron-une-annulation-par-le-conseil-d-etat_6184932_4355771.html.

emergency to dissolve associations considered to be involved in radical Islamism or terrorist activities.[1246]

The wave of securitization following the end of the 2015-2017 state of emergency saw renewed and increased pressure on non-governmental organizations, associations and groups, including the new requirement that they adhere to Republican values if they received public funds.[1247] The provisions allowing the administrative dissolution of organizations were also amended.[1248] Notably, Article 212-1 1° of the Code of domestic security used to allow the dissolution of groups or associations which "provoked armed demonstrations in the street". In 2021, these terms were amended to read "provoke armed demonstrations or violent acts against people or property". The amending statute also included the creation of an emergency dissolution for up to six months by the Minister of Interior alone, but the Constitutional Council struck down this provision as unconstitutional.[1249] Nonetheless, the amendments widely broadened the scope of the article. At the same time, they revealed a change in the underlying reasoning, moving away from the militant democracy logic which animated the original 1936 provision.

It is based on this amended article that the government dissolved *Les Soulèvements de la Terre*. In an emergency procedure, the Council of State suspended the dissolution.[1250] In

[1246] Rambaud, "Quel Contrôle Du Conseil d'Etat Sur La Dissolution Administrative d'associations ?"

[1247] Decree no. 2021-1947, 31 December 2021 [pris pour l'application de l'Article 10-1 de la loi n° 2000-321 du 12 avril 2000 et approuvant le contrat d'engagement républicain des associations et fondations bénéficiant de subventions publiques ou d'un agrément de l'Etat].

[1248] Article 16 of the Law no. 2021-1109, 24 August 2021 [confortant le respect des principes de la République].

[1249] Constitutional Council, no. 2021-823 DC, 13 August 2021 [Loi confortant le respect des principes de la République], §§ 43-47.

[1250] On the same day, the Council confirmed the dissolution of three other organizations: Council of State, no. 464412, 460457 and 459704, 09 November 2023.

November 2023, it annulled the dissolution against the conclusions of its *rapporteur public*. The Council acknowledged that the group was part of a "radical environmental movement" promoting civil disobedience and violent actions against property.[1251] However, the group was not accused of promoting nor committing violence against people.[1252] This distinction was important since, one month earlier, the Minister of Interior had declared in front of a parliamentary Commission of inquiry that "property is as important as people".[1253] The Council considered that the promotion of violence against property, considering the extent of its impact, was not sufficient for the dissolution of the group to be proportionate.[1254]

During the same period, the Israeli-Palestinian conflict further fueled the terrorism discourse in France and ensuing restrictions on fundamental rights. On 7 October 2023, Hamas perpetrated a terrorist attack against Israel followed by a brutal response by the Israeli government. Several pro-Palestine demonstrations were organized in France, some of which were prohibited. On 12 October, the Minister of Interior sent a telegram to the *préfets* – representant of the state at the local level – concerning "the consequences of the terrorist attacks suffered by Israel since 07 October 2023". In that message, he reminded the *préfets* of the "strict instructions" they had to apply in the following days and clearly stating that "pro-Palestinian demonstrations must be banned because they are likely to disturb public order".[1255]

[1251] Council of State, no. 476384, 09 November 2023, § 10.

[1252] *Id.*, § 9.

[1253] Audition of the Minister of Interior by the Commission of inquiry into violent groups at demonstrations of the National Assembly on 5 October 2023. "Gérald Darmanin : 'Je ne vois pas le rapport entre la défense du climat et jeter un cocktail Molotov sur un gendarme,'" *LCP - Assemblée nationale*, October 5, 2023, https://lcp.fr/actualites/gerald-darmanin-je-ne-vois-pas-le-rapport-entre-la-defense-du-climat-et-jeter-un.

[1254] Council of State, no. 476384, 09 November 2023, §§ 12-13.

[1255] Council of State, ref., no. 488860, 18 October 2023, § 4.

On 18 October 2023, the Council of State addressed the legality of that message. It elaborated on the consequences in France of the hostilities taking place in the Middle East. The Council emphasized the resurging tensions and rise of anti-Semitic acts. Furthermore, the Minister of interior can address instructions to the *préfets* concerning the way they exercise their police powers. However, ultimately, the *préfets* and not the Minister are competent to prohibit demonstrations after assessing the risks for public order in each individual case. The Council further recalled that demonstrations cannot be prohibited on the sole ground that they express support for the Palestinian people. Following this reasoning and in light of the very explicit terms of the Minister sending strict instructions to prohibit pro-Palestinian demonstrations, one could have excepted the Council to suspend the implementation of the Minister's instruction. Yet, a debatable interpretation twist allowed the Council to not frontally contradict the Minister. First, the Council accepted the declarations made by the Minister of Interior at the hearing that he merely meant to remind the *préfets* of the power they had to prohibit demonstrations promoting terrorism, not to impose a rule on them.[1256] Second, in the Council's ordinance, the very explicit phrasing of the telegram became an "unfortunate drafting approximation".[1257] This allowed the Council to formally reject the petition against the Minister's telegram.

This "unfortunate approximation" was not the Minister's first iteration. On 9 May 2023, he had already declared in front of the National Assembly that he had required the *préfets* to prohibit all demonstrations by far-right groups.[1258] Far-right groups also remain the main target

[1256] *Id.*, § 5.

[1257] *Id.*, § 8.

[1258] Serge Slama, "Interdiction des manifestations d'ultra-droite : la liberté de manifestation appartient à tous les citoyens sous réserve de respect de la loi pénale et des valeurs de la République," *Le Club des Juristes* (blog), May 15, 2023, https://www.leclubdesjuristes.com/politique/interdiction-des-manifestations-dultra-droite-la-liberte-de-

of dissolutions based on the 1936 statute which had been adopted precisely with them in mind.[1259] Overall, the evolution over the last twenty years shows an important increase in the total number of dissolution but also a diversification of the "types" of groups with an increasing presence of those labelled "radical Islamists", far-left and since 2023 radical environmentalists.[1260] Since the adoption of the statute, the suspension or annulation of the dissolution decrees by the Council of State have been, and remain despite this sharp increase, marginal.[1261]

The two decisions of the Council – on the dissolution of *Les Soulèvements de la Terre* and the prohibition of pro-Palestinian demonstrations – constitute a semi-victory for fundamental rights. They allowed civil society to regain a little of the freedoms that had been restricted by the government. However, the Council stepped in only in the most extreme cases all the while giving strong signals of its continued deference. If the most blatant violations were stopped, the underlying logic was vindicated.[1262] That message was heard loud and clear. Even though one dissolution was annulled, many groups and associations were targeted[1263] by what should remain an exceptional practice reserved for the gravest cases.[1264] With regard to the pro-

manifestation-appartient-a-tous-les-citoyens-sous-reserve-de-respect-de-la-loi-penale-et-des-valeurs-de-la-republique-703/.

[1259] Nicolas Lebourg, "Usages, effets et limites du droit de dissolution durant la Ve République," in *Les Etats européens face aux militantismes violents - Dynamique d'escalade et de désescalade*, ed. Romain Seze (Paris: Riveneuve, 2019).

[1260] Valentine Fourreau, "Infographie: Le gouvernement accélère les dissolutions d'associations," Statista Daily Data, October 12, 2023, https://fr.statista.com/infographie/31021/gouvernement-dissolution-associations.

[1261] Rambaud, "Quel Contrôle Du Conseil d'Etat Sur La Dissolution Administrative d'associations ?"

[1262] Alexandre Truc, "La labellisation du terrorisme et ses effets : le cas des soutiens à la Palestine en France," *La Revue des droits de l'homme. Revue du Centre de recherches et d'études sur les droits fondamentaux*, July 15, 2024, https://journals.openedition.org/revdh/20295.

[1263] "Trente-quatre associations visées par une dissolution sous la présidence Macron, une annulation par le Conseil d'Etat."

[1264] See among many others *Association of Citizens Radko and Paunkovski v. "the former Yugoslav Republic of Macedonia"*, no. 74651/01, 15 January 2009.

Palestine demonstrations, many took place, on various occasions after a prohibition was annulled by the administrative judges. Yet, in the aftermath of the Council of State's tepid decision several *préfets* continued to prohibit them sometimes despite the repeated judicial decisions quashing their decisions.[1265]

c. Supreme Court: the mitigating effect of a principled protection

Whereas in Europe organizations and parties themselves have been targeted through proscription or dissolution, in the U.S., the repression of subversive opinions has focused more on individuals' activities.[1266] Furthermore, litigation related to freedom of demonstration has been largely subsumed under questions of freedom of expression.[1267] It is based on the First Amendment, in cases related to free speech, that the Supreme Court developed its doctrine protective of the other opinion. During WWI, the Espionage Act of 1917 and the Sedition Act of 1918 aimed to prevent any action and silence any speech interfering with the U.S. war effort. The Supreme Court upheld these statutes, finding that the protection of speech is lower during wartime.[1268] However, it is in one of these cases, *Schenck v. United States*, that for the first time, the Court outlined the "clear and present danger" test.[1269]

[1265] Jérôme Hourdeaux, "Quand il dit non, c'est non : le tribunal administratif retoque encore une interdiction de manifestation du préfet à Nice," *Mediapart*, accessed December 1, 2023, https://www.mediapart.fr/journal/france/241123/quand-il-dit-non-c-est-non-le-tribunal-administratif-retoque-encore-une-interdiction-de-manifestation-du-p.

[1266] Sottiaux, *Terrorism and the Limitation of Rights*, 195.

[1267] The Supreme Court has not decided a single case based on freedom of assembly since 1982. Nick Robinson and Elly Page, "Protecting Dissent: The Freedom of Peaceful Assembly, Civil Disobedience, and Partial First Amendment Protection," *Cornell Law Review* 107, no. 1 (2022 2021): 268 citing; John Inazu, "The Forgotten Freedom of Assembly," *Tulane Law Review* 84 (January 1, 2010): 565–612.

[1268] See *Schenck v. United States*, 249 U.S. 47 (1919) for the Espionage Act and *Abrams v. United States*, 250 U.S. 616 (1919) concerning the Sedition Act.

[1269] *Schenck* at 52.

Nonetheless, this test remained dormant until WWII. Rather the Court applied the "bad tendency" test, illustrated in *Whitney* where the applicant had been convicted for joining and assisting in the organization of a Communist party. The Court found that the statute under which she had been convicted did not violate the First Amendment. Justices Brandeis and Holmes, although concurring, filed a separate opinion arguing for the application of the clear and present danger test requiring that the risk of harm be severe, probable and imminent. They considered that the applicant's behavior, if presenting a danger at all, only did so remotely.[1270] In this case, emblematic of the restrictions on dissident opinions, the Court also found that the discrimination between those advocating for changing industrial and political conditions and those resorting to the same methods but "as a means of maintaining such conditions" did not violate the Equal Protection Clause.[1271]

The second Red Scare rose in the context of WWII and intensified in its aftermath, culminating with what is commonly referred to as McCarthyism in the late 1940s and 1950s. The Supreme Court initially opposed little resistance to the assaults on fundamental rights. Yet, starting in the mid-1950s, the Warren Court was instrumental in dismantling the political repression system. It stated that resorting to the Fifth Amendment (right to not incriminate oneself) when questioned about their membership in the Communist party in front of a parliamentary committee was not an admission of guilt.[1272] It also limited the scope of the powers of the House Committee on Un-American Activities.[1273]

[1270] *Whitney v. California*, 274 U.S. 357 (1927) at 373.

[1271] *Id.*, at 369.

[1272] *Slochower v. Board of Education*, 350 U.S. 551 (1956).

[1273] *Watkins v. United States*, 354 U.S. 178 (1957).

Crucially, in *Yates,*[1274] the Court emptied the "Smith Act" of its substance. This officially called Alien Registration Act,[1275] adopted in 1940 criminalized the overthrowing of the U.S. government by force or violence. It also required that all non-citizen residents register with the federal government. Over two hundred people were prosecuted under the Act. Several Communist Party leaders were trialed under the Smith Act. The Act was originally upheld by the Supreme Court in the early 1950s. In *Dennis,* the Court applied the clear and present danger test. Yet, it considered that advocacy of communist philosophies constituted such a danger even though not necessarily imminent.[1276]

Conversely, in 1957, in *Yates,* the Warren Court adopted a restrictive reading of the "Smith Act" while strengthening the "clear and present danger" doctrine. It considered that the Smith Act was "aimed at the advocacy and teaching of concrete action for the forcible overthrow of the Government, and not of principles divorced from action."[1277] The Court found that "[i]nstances of speech that could be considered to amount to "advocacy of action" [we]re so few and far between".[1278] Consequently, it reversed the convictions of the Communist Party leaders and remanded the case for retrial.

The cases delivered in relation to the first Red Scare or *Dennis,* upholding the Smith Act, were eventually overruled in 1969 in *Bandenburg*. In that case, a leader of the Ku Kux Klan was convicted based on a state criminal syndicalism law which made illegal advocating "crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing

[1274] *Yates v. United States*, 354 U.S. 298 (1957).
[1275] 54 Stat. 670, 18 U.S.C. § 2385.
[1276] *Dennis v. United States*, 341 U.S. 494 (1951).
[1277] *Yates* at 319-320.
[1278] *Id.* at 327.

industrial or political reform" and assembling "with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism." The Court noted that the statute failed to distinguish between mere advocacy and "incitement to imminent lawless action". The Court combined the imminence of the danger and probability that the speech act led to it. It concluded that the statute "purported to punish mere advocacy and to forbid, on pain of criminal punishment, assembly with others merely to advocate the described type of action. Such a statute falls within the condemnation of the First and Fourteenth Amendments."[1279]

In 1967, the Court addressed the constitutionality of the Subversive Activities Control Act, or McCarran Act,[1280] which prohibited members of the Communist Party from working at locations which were named as a "defense facility". The Supreme Court found that the act violated the First Amendment right of association. It noted that "the phrase 'war power'[1281] cannot be invoked as a talismanic incantation to support any exercise of congressional power".[1282] It emphasized further that "this concept of "national defense" cannot be deemed an end in itself, justifying any exercise of legislative power designed to promote such a goal. Implicit in the term "national defense" is the notion of defending those values and ideals which set this Nation apart. […] It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties -- the freedom of association -- which makes the defense of the Nation worthwhile."[1283]

[1279] *Brandenburg v. Ohio*, 395 U.S. 444 (1969) at 449.

[1280] Internal Security Act of 1950, 64 Stat. 987.

[1281] The Subversive Activities Control Act had been adopted pursuant to Congress' war powers.

[1282] *United States v. Robel*, 389 U.S. 258 (1967) at 263.

[1283] *Idem* at 264.

It took several decades for the Supreme Court to develop its protective case law.[1284] Yet, contrary to France, this jurisprudence fundamentally changed the legal landscape and enshrined new legal principles, effectively emptying the impugned statutes, and making it unlikely that similar ones would be adopted, at least not as easily. Yet, it has been argued that the stricter test applied to freedom of expression had prevailed "in a changed social and political climate" once assumed that democracy was "strong enough to resist subversive agitation".[1285] In times of "crisis" or emergency, settled principles might be challenged all over again. An analysis of the Supreme Court's jurisprudence in two lines of political speech cases showed that although both are examined under strict scrutiny, the Court applied a less searching test when the case was related to terrorism.[1286] In *Holder*, decided in 2010, the Court examined the criminalization of speech acts including teaching international law to insurgent groups which could be construed as "knowingly providing material support or resources to a foreign terrorist organization." Although applying strict scrutiny, the Court upheld the act as applied to the plaintiffs.[1287]

Looking at who is affected by the emergency measures and what kind of protection the various courts grant them gives insight not only into the core function of emergency, essentially exclusionary, but also into that of each court. Across the board, all of them have allowed for

[1284] It should be noted that in United States v. O'Brien, 391 U.S. 367 (1968), the Supreme Court placed an important limitation on this protection. When nonspeech and speech elements are combined, the Court applies a lower degree of scrutiny. Therefore, incidental restrictions of First Amendment freedoms might be found constitutional, which would otherwise not have survived strict scrutiny.

[1285] Dorsen et al., *Comparative Constitutionalism*, 1018.

[1286] Aziz Huq, "Preserving Political Speech from Ourselves and Others," *Public Law & Legal Theory Working Papers*, no. 374 (January 1, 2012), https://chicagounbound.uchicago.edu/public_law_and_legal_theory/233.

[1287] *Holder v. Humanitarian Law Project*, 561 U. S. 1. See also Tom Ginsburg and Aziz Z. Huq, *How to Save a Constitutional Democracy* (Chicago, IL: University of Chicago Press, 2020), 136.

the rights of the "other" to be the first victims of emergency powers. However, the ECtHR and the Supreme Court both have developed case law that offers strong guarantees for dissident views. It has imposed important limits to the reach of emergency powers and granted some protection to pluralism of opinions in the civic space. In contrast, this protective line of jurisprudence further emphasizes the division lines these courts have tacitly endorsed by not opposing them: geographical divide, nationality and religious/ethnic groups thereby giving a colonial tint to these courts.

The French councils offer a very different picture. Deeply embedded in the state apparatus, their case law shows institutions which serve the state, not the people. That state is not those currently holding power, but it is not an abstract concept tied to notions of democracy, rule of law or pluralism either. It is a number of institutions and conventions administered and served by a small group of people trained for that very purpose. Those who do not belong to this group and do not follow their rules are excluded from the accepted political game. Emergency powers are used to exclude them while delegitimizing their claims. As integral parts of the state, the councils – here their denomination takes all its meaning – cannot oppose this logic. To do so, they would have to externalize themselves and assume fully a function of judicial counter-power. This development has yet to happen.[1288]

More generally, none of the courts have imposed any significant limits on the targeting of the "other", which is both essential to the state of emergency and one of its gravest consequences. Rather, they continue to allow discriminatory policies to survive their scrutiny

[1288] Bruno Latour, *La fabrique du droit: Une ethnographie du Conseil d'État* (Paris: La Découverte, 2004); Lauréline Fontaine, *La constitution maltraitée: Essai sur l'injustice constitutionnelle*, 1er édition (Paris: Editions Amsterdam/Multitudes, 2023).

in the name of poorly substantiated national security claims. In this light, even the efforts of the ECtHR resemble a lifeline thrown to pluralism *a minima* more than a protection of full-fledged democracy.

Conclusion

The analysis of the scope and degree of the review revealed that the checks imposed by the apex courts on the activation and use of emergency powers are fewer and lesser than the judicial standards held during normal times. Judges tend to narrow the scope of their review thereby performing a partial control. From the outset, they have been very reluctant to examine the reality of the circumstances used by the political branches to justify their extraordinary powers, preferring to focus their analysis on the ensuing measures. Due to this initial shortcoming, courts failed to maintain the emergency within temporal and material boundaries and allowed for its "permanentization" and normalization. The review of the measures did not make up for this original failure. The special circumstances – the reality of which was already surrendered to the political branches in what should have been the first step of the review – enter the analysis again at this second stage to lower the degree of scrutiny. Yet, despite this already weakened review, judges have mobilized techniques to further narrow the scope of their analysis in an attempt to avoid balancing general values – an exercise they find to be out of their purview. As a result, the political branches are free to use, misuse and abuse emergency powers, targeting minorities.

It is important to note that the level of checks imposed by the various courts examined here is not homogenous. Much like a herding dog contains the flock by biting at the margins, the French Councils have accompanied the restrictions on rights and pluralism more than they limited them. The U.S. Supreme Court used grand language to impose boundaries on the most

exorbitant measures, but these limits are few and their impact seems rather minimal. Furthermore, the willingness of the Court to rein in emergency outreach appears to fluctuate greatly depending on the current composition of the bench and the author of the emergency measures. Finally, the ECtHR stands out on two main accounts. First, its judges are more willing than their colleagues to set real limits to emergency powers when these are used to curb political pluralism and silence the opposition. Second, in this area, the judicial review carried out by the ECtHR during emergencies has evolved, indicating that the Court might have identified the growth of emergency powers as a danger and is trying to adapt its case law to counter its most excessive consequences.

Indeed, this chapter did not merely reveal the shortcomings of these courts' judicial review in emergency cases. It also pointed to various means available to the judges – some of them increasingly used by the ECtHR – to strengthen their review and impose much more robust constraints on emergency powers. Yet, despite those possibilities and some encouraging signs, coming from the ECtHR in particular, the analysis comes to an alarming conclusion that judges have failed consistently and across the board to protect the "other". The ECtHR provides guarantees for those playing the electoral game in representative democracies, that is the minority within the majority. However, the "other" is outside those boundaries, physical and immaterial. The "other" is constantly redefined depending on the political necessities of the moment. Regardless of whether the difference is drawn along territorial, national, religious, or ideological lines, their rights and freedoms are left generally unprotected by judicial review.

Self-constrained by what they consider to be the non-political nature of their task, judges were unable to escape the classic terms of the state of emergency. They failed to reach out for either the principles or more practical mechanisms which could empower them to resist the push imposed by the political branches. Consequently, they have proved largely incapable of

protecting human rights and democratic principles, of limiting power during emergencies. They appear powerless while the targeted "other" are defined more and more broadly, and everywhere, civic space shrinks.[1289] If the tools which exist within the current emergency paradigm do not allow courts to fulfill their mission, contain the emergency and preserve constitutionalism, they will have to admit their defeat or be creative and think outside the system that currently constrains them.

[1289] Fionnuala Ní Aoláin, "Impact of Measures to Address Terrorism and Violent Extremism on Civic Space and the Rights of Civil Society Actors and Human Rights Defenders," March 1, 2019, https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/40/52; Ní Aoláin, "A/78/520."

Concluding considerations: Towards a new paradigm?

Emergency powers pose two main and interlinked challenges to liberal democracies. First, powers get concentrated in the hands of the executive. Second, emergency measures infringe on fundamental rights beyond what was accepted during ordinary times. In the classic emergency paradigm, the role of the judiciary is premised on the assumption that emergency powers are used to address exceptional and dire circumstances and remain in place for a limited period of time only. These assumptions justify an increased judicial deference towards the political branches correlated by a lower degree of scrutiny.

However, in the past two decades, the proliferation of states of emergency and emergency measures – elevated according to Agamben to a "new paradigm of government" – highlighted the subjective nature of emergencies. At the same time, the "permanentization" and normalization of emergency powers blurred the line between emergency and normalcy. Consequently, the alterations of judicial review which are postulated in the classic paradigm are no longer suited to the new or extended challenges that emergency poses to liberal democracies. If emergency measures are to be used often, for long periods of time, and to deal with all kinds of circumstances, courts cannot keep assuming deferential positions. They have to adapt their control to this contemporary emergency paradigm or relinquish their position as a counter-power capable of imposing limits on governments.

A. Four courts: many differences, same incapacity

The courts examined here have little in common besides their commitment to liberal democratic principles. From their historical, structural or institutional settings, derive differences in the way they perceive their role and conduct review. Therefore, it might come as

little surprise that they fared differently during emergency. With regard to separation of power issues, the largely process-based approach developed by the Supreme Court allowed it to protect Congress relatively well against the unilateral moves of the presidents, whereas the ECtHR struggled to address similar issues with its individual rights framework. The French Constitutional Council, established for the opposite purpose – to protect the executive against encroachments by the legislative – continues to validate, when it does not initiate – limitations imposed on an already weakened parliament. With regard to the various attempts to do away with the judiciary in times of "crises", the Supreme Court and ECtHR have opposed rather firm resistance. Here again, the French Councils – which are councilors as much as judges and, for some, regarding the Constitutional Council, no court at all[1290] – stand out. They have at times validated their own sidelining and reinforced the shift of emergency litigation from the judicial judges to the administrative one.

Nonetheless, overall, there are more similarities than differences between the emergency case law of these courts. If the four institutions have almost unanimously refused to abandon the question of the existence of an emergency to the political branches, their review in practice is too deferential to amount to an actual check. Similarly, none of them succeeded in, nor indeed attempted to impose time limits on the use of emergency powers. Nor did they oppose meaningful resistance to the use of non-emergency emergency powers, namely prerogatives which have the characteristics of emergency powers but are exercised outside the formal emergency framework.

[1290] Fontaine, *La constitution maltraitée*.

With regard to the protection of fundamental rights, all four institutions lowered the degree of their scrutiny in emergency cases, failing to apply all the stages of the proportionality test or balancing away procedural rights which are usually left out of proportionality considerations. Largely unable to impose meaningful limits on emergency powers, all these courts have occasionally used their creativity to find deflecting mechanisms by avoiding the problem or more commonly by reducing it to a less contentious narrow legal issue. If these techniques allowed them to provide narrow legal answers to narrow legal issues, it also negated any possibility to address the structural problems posed by emergencies. Strikingly, they all failed to protect the rights of minority groups whether this "other" is defined by its geographic location, nationality, religious or ethnic group. An important exception is the protection afforded to minority opinions. Here, the French jurisdictions marked their singularity again. The Supreme Court and ECtHR both have developed high standards which allowed them to maintain some protection during emergency. Conversely, the Council of State offered much more mitigated results.

These mostly similar outcomes should not obscure the different evolutions of the case law of each jurisdiction. The increasing ubiquity of emergency powers poses the question of the responsiveness of the courts. From this perspective, again, the courts diverge. The ECtHR is notably the only one which seems to show signs of adaptation to this new emergency pervasiveness by strengthening its control. Although these signs are still few, they happened at two crucial points of the review. On one occasion, the Court concluded that the circumstances did not reach the threshold for the application of Article 15.[1291] On others, it concluded that the

[1291] *Dareskizb Ltd v. Armenia*, no. 61737/08, 21 September 2021.

derogation did not cover the emergency measure[1292] or made a holistic assessment of the circumstances and found that the emergency powers had been misused – applied for a purpose other than the one claimed – in violation of Article 18.[1293] However, these occasions are still too few to qualify as an evolution of the case law.

Conversely, the other three courts do not appear to have adapted in any noticeable manner to the increasing use of emergency powers. The Supreme Court continues to put a strong emphasis on separation of powers issues. However, this does not necessarily translate into adequate protection of fundamental rights. Rather, the latter appears to fluctuate according to the composition of the bench. As for the French Councils, they are operating in one of the countries where the transformation of emergency into a "new paradigm of government" is the most visible. Yet, far from attempting to control the states of emergency, they have been continuously accompanying its growth, giving the appearance of rule of law compliance to long-lasting and normalized exceptional powers.

B. Rescuing the existing emergency paradigm

The capacity to exercise judicial control over emergency powers is not unilaterally negative and different courts have performed differently during emergencies. Yet, the overall assessment points to deficiencies across time and across jurisdictions. This assessment requires us to look for means to improve the role of the judiciary during emergencies. Suggestions to that effect have flourished over the past two decades especially. The following section briefly looks at the most common ones and offers an explanation of why they have not and cannot

[1292] *Domenjoud v. France*, no. 34749/16 and 79607/17, 16 May 2024.

[1293] *Kavala v. Turkey*, no. 28749/18, 10 December 2019 and *Selahattin Demirtaş v. Turkey (no. 2)* [GC], no. 14305/17, 22 December 2020.

improve judicial review in times of emergency to a satisfactory degree. The first set of proposals focuses on improving the current system without radical changes whereas the second offers alternatives which require more profound modifications. Yet, it is contended that neither can adequately address the current shortcomings.

1. Reinforcing the current system

a. Reforming emergency provisions

A recurrent suggestion to tame emergency powers has been to amend their textual basis. This suggestion does not purport to change the current approach but merely to strengthen the already existing constraints on emergency by making them more explicit and embedding them in the texts. In the U.S., Congress enacted the War Powers Resolution (1973) in order to strengthen its own role and bring more balance between the legislative and the executive in an area where presidential powers are far-reaching and can hardly be opposed by institutional checks.[1294] In France, in 2015, President Hollande proposed to give the state of emergency a constitutional basis. The bill encountered many critiques before it was abandoned. However, the idea of constitutionalizing the state of emergency was not unanimously dismissed by specialists. Several of them considered that it could be beneficial if it helped entrenching limits to that exceptional regime, including regarding the conditions which could trigger it and its maximum length and enhanced judicial review of individual measures.[1295]

[1294] For more details, see above "The U.S.: a legislative model?", p. 73.

[1295] Sophie Bridier, "Constitutionnaliser l'état d'urgence, Les Arguments 'Pour' et 'Contre' Des Professeurs de Droit," *ActuEL Direction Juridique* (blog), January 11, 2016, https://www.actuel-direction-juridique.fr/content/constitutionnaliser-letat-durgence-les-arguments-pour-et-contre-des-professeurs-de-droit.

On occasions, the proposed amendments aimed specifically to strengthen the role of judges. Such was the case of the 2008 amendment of Article 16 of the French Constitution. The changes enhanced the control of the Constitutional Council which can now examine whether the conditions which justified the activation of Article 16 exceptional powers continue to exist. In the same vein, some authors suggested to amend Article 15 of the ECHR.[1296] Wallace argues that such a reform should include periodic review of the necessity of the derogation.[1297] He also suggests improving the procedure so that the notifications would be timelier and more specific.[1298]

However, these suggestions appear rather unfit to address the identified deficiencies for at least two reasons. First, the amendment of fundamental texts such as constitutions or the ECHR is a long and arduous road. It is doubtful that governments would be willing to put in the necessary efforts – whether at the domestic or international level – to limit their extraordinary powers at a time when they are resorting to them more than ever and the tendency is toward circumventing judicial control. The 2015 proposal to constitutionalize the state of emergency in France illustrates this issue. The bill introduced by the government did not enhance the constraints on the state of emergency but rather aimed to entrench vague dispositions leaving widely discretionary powers to the executive.[1299]

[1296] Brendan Mangan, "Protecting Human Rights in National Emergencies: Shortcomings in the European System and a Proposal for Reform," *Human Rights Quarterly* 10, no. 3 (1988): 372–94; R. St. J. MacDonald, "Derogations under Article 15 of the European Convention on Human Rights Chapter 3: Human Rights Inquiries," *Columbia Journal of Transnational Law* 36, no. Issues 1 & 2 (1998): 225–68; Stuart Wallace, "Derogations from the European Convention on Human Rights: The Case for Reform," *Human Rights Law Review* 20, no. 4 (December 9, 2020): 769–96, https://doi.org/10.1093/hrlr/ngaa036.

[1297] Wallace, "Derogations from the European Convention on Human Rights," 787–89.

[1298] Wallace, 791–92.

[1299] « Projet de loi constitutionnelle de protection de la Nation » no. 3318, 23 December 2015, Article 1.

A second reason to look beyond textual reforms is the argument that the problem does not reside in the textual dispositions but rather in their interpretation by the judges. The analysis of the case law does not reveal textual constraints which would force judges into deference but rather judicial interpretation sometimes bordering on *contra legem* in order to substantiate deferential conclusions. An example of this can be found in the 2020 decision of the Constitutional Council validating a clear violation of procedural rules.[1300] Another would be *A. and Others*,[1301] where the ECtHR arguably dropped the condition it had previously laid down that a danger be "actual or imminent".[1302] The Supreme Court's choice in *Trump v. Hawaii*[1303] to decide the case on a statutory basis and leave the constitutional claim unaddressed relies on a different technique but its outcome comes close to the two previous examples. Consequently, since the issue seems to lie in judicial interpretation rather than in the texts themselves, more solace might be found in the case law itself.

b. The culture of justification

The following two arguments do not quite require a shift in the way judicial review is carried out during emergencies. Rather, they adopt a specific point of view to analyze the current approach. The first one focuses on the importance of judicial review in that, regardless of its outcome, it requires the political branches to justify their decisions. Whether courts apply a proportionality test or some version of balancing, governments have to put forward a

[1300] Constitutional Council, decision no. 2020-799 DC, 26 March 2020.

[1301] *A. and Others v. the United Kingdom* [GC], no. 3455/05, ECHR 2009.

[1302] See above, p. 234

[1303] *Trump v. Hawaii*, 585 U.S. ___ (2018).

legitimate interest and argue that the impugned measure was, to various degrees, appropriate to meet that interest.

Formulating proportionality in that way brings a similar perspective to that of the "culture of justification". And indeed, for Cohen-Eliya and Porat, the spread of the proportionality test in all parts of the world pointed to the culture of justification as "the emerging global legal culture."[1304] The expression "culture of justification" was coined by Mureinik to designate an understanding of common law which could make a democratic legal order possible in post-apartheid South Africa.

The main tenets of Mureinik's culture of justification require that every exercise of power be justified procedurally but also substantially and grounded in moral principles. The responsibility for bringing justification about lies primarily with the courts.[1305] Dyzenhaus further summarizes some of the principles that were fundamental to Mureinik, among which the reasonable or nondiscriminatory implementation of policies, the possibility to demonstrate the genuineness of the circumstances justifying the use of discretionary powers and that those powers are "demonstrably related to the purpose of the empowering statute"[1306]

From these elements, the relevance of culture of justification to emergency powers is patent. Conversely, the main features of the constitutional structure of a state considered to have

[1304] Moshe Cohen-Eliya and Iddo Porat, *Proportionality and Constitutional Culture*, Cambridge Studies in Constitutional Law (Cambridge: Cambridge University Press, 2013), 7, https://doi.org/10.1017/CBO9781139134996 cited in; Kai Möller, "Justifying the Culture of Justification," *International Journal of Constitutional Law* 17, no. 4 (December 31, 2019): 1082, https://doi.org/10.1093/icon/moz086.

[1305] Möller, "Justifying the Culture of Justification," 1081 (internal quotation marks omitted).

[1306] David Dyzenhaus, "Law as Justification: Etienne Mureinik's Conception of Legal Culture," *South African Journal on Human Rights* 14, no. 1 (January 1, 1998): 18, https://doi.org/10.1080/02587203.1998.11834966.

a culture of justification – including the absence of black holes[1307] – are regularly undermined during emergency. Insisting on the preservation of a culture of justification during emergency would provide further theoretical ground to counter one of the main difficulties of emergency adjudication: secrecy. Indeed, the "first rule [of a counter-terror state] should be that the government has a duty to show that the restrictions of liberty are actually necessary."[1308] Furthermore, if, as Forst elaborated, it is the right to justification, founded in an understanding of human beings as "justificatory beings", which grounds human rights,[1309] then the latter cannot not be invoked to hinder justification, not even security. The insistence on substantive justification also guards against a purely process-based approach.

Finally, the culture of justification makes a strong argument in favor of judicial review.[1310] For the culture of justification to be operational, "the existence of judicial review is required as a matter of principle".[1311] In that regard, Mureinik argued that by buying into the masquerade of rule of law during the apartheid in South Africa, courts effectively tied the authorities to this image they wanted to project.[1312] Although the general context is very different, a similar reasoning could be applied based on the current claims that emergency

[1307] Möller, "Justifying the Culture of Justification," 1079.

[1308] András Sajó and Renáta Uitz, "Constitutions Under Stress," in *The Constitution of Freedom: An Introduction to Legal Constitutionalism* (Oxford University Press, 2017), 441, https://doi.org/10.1093/oso/9780198732174.003.0012.

[1309] Rainer Forst, *The Right to Justification: Elements of a Constructivist Theory of Justice*, trans. Jeffrey Flynn (Columbia University Press, 2011); Rainer Forst, "The Justification of Human Rights and the Basic Right to Justification: A Reflexive Approach," *Ethics* 120, no. 4 (2010): 711–40, https://doi.org/10.1086/653434; for an analysis of Forst's work on culture of justification, see Möller, "Justifying the Culture of Justification," 1084–85.

[1310] Möller, "Justifying the Culture of Justification," 1093–94.

[1311] Möller, 1096.

[1312] Dyzenhaus, "Law as Justification," 21.

norms are rule of law compliant to expect courts to require a level of justification matching these claims.

Despite these promising theoretical grounds, it is unclear whether the culture of justification could offer practical assistance in the context of emergency. The culture of justification is not a tool which can be applied with parsimony to solve contingent issues. It is an integrated theory grounding the logic of judicial review and human rights. For that reason, arguments insisting that emergency measures be justified, if detached from the much broader claim of the culture of justification, are unlikely to succeed where proportionality did not. Furthermore, proponents of the culture of justification themselves foresee limits to the courts' prerogatives. For example, Möller found a limit to justification when judges defer because of their lack of empirical understanding.[1313] Such a scenario can too easily be abused in emergency cases.

c. Judging the next emergency

Another argument perceiving a positive outcome of the current paradigm of emergency adjudication relies on a shift of temporal perspective. Issues of timing are particularly important in the context of emergency. One might think of such questions in two different yet interrelated ways. The first one is concerned with the contemporaneity of the emergency and the judicial intervention. The second has to do with the timing of the judicial decision's effects. According to general wisdom, it is more difficult for judges to intervene in the midst of an emergency for several reasons: unknown elements, heightened emotions or possible ongoing military

[1313] Möller, "Justifying the Culture of Justification," 1096.

intervention or fear of bearing the responsibility for further victims.[1314] Conversely, the later after the emergency, the less deferential and the more protective of human rights the courts would be.[1315]

For Cole – who focused on the U.S. – the idea that courts perform poorly during emergency must be nuanced. He argues that, when viewed over time, judicial decisions do exert constraints on the executive. Their effects might not be felt immediately but the limits they set will apply to the government during the next emergency.[1316] This argument would suggest increased constraints on governments and improvement of the protection of fundamental rights over several emergencies. Yet, such improvements, even in the long term, are difficult to identify. Rather every time, courts seem to reason as if confronted with dilemmas almost entirely new.

Several factors can contribute to this issue. First, emergencies are usually correlated with circumstances portrayed as unforeseeable and very severe. The extraordinary character of such situations makes it more difficult to transpose existing case law to the current set of facts. This difficulty might be compounded by the heightened emotions and sense of exceptionality experienced by many, including judges, in the midst of unusual circumstances.

The legal norms or arrangements submitted to the courts are also different. The last two decades alone saw the detention of enemy combatants in Guantánamo or the creation of a whole new emergency regime in France to address the Covid-19 pandemic. One might argue that this

[1314] Aharon Barak, "The Judicial Role and the Problem of Terrorism," in *The Judge in a Democracy* (Princeton University Press, 2006), 300; Barak, "On Judging," 49. See also *Boumediene v. Bush*, 553 U.S. 723 (2008), Justice Scalia dissenting, p. 2

[1315] See for example Fabbrini's "dynamic model" in Fabbrini, "The Role of the Judiciaries in Times of Emergency."

[1316] Cole, "Judging the Next Emergency."

normative creativity is triggered by the limits judicially imposed on previous regimes. Yet, even if there was some truth to this assumption, it would do little to alleviate the danger of virtually infinite legal possibilities. Tushnet noted that "[w]e learn from our mistakes to the extent that we do not repeat precisely the same errors, but it seems that we do not learn enough to keep us from making new and different mistakes."[1317]

Furthermore, even in common law systems, where the *stare decisis* doctrine is more directly relevant, changes in composition of benches can fundamentally modify the limits imposed on governments. The Supreme Court offers a particularly salient example of such evolution. The changes in the composition of the bench seem to have drastically affected its understanding of the limits imposed on emergency powers by freedom of religion during the Covid-19 pandemic. In this case, it was initially analyzed as increasing the protection of the right. However, as described above, this analysis might be over-simplistic. The overturning of *Roe v. Wade*[1318] just over a year and a half later was a clear reminder that case law evolution does not always goes towards a stronger protection of rights.[1319] Finally, in a context of "permanentization" of emergency, when situations are more commonly depicted as "crises" and emergency powers are triggered more often and permeate the normal legal order, does it make sense to talk about a next emergency?

The shortcomings of the current approach to adjudication of emergency appear too entrenched to be compensated for by positive outcomes which only come to the forefront when

[1317] Tushnet, "Defending Korematsu?," 292.

[1318] *Roe v. Wade*, 410 U.S. 113 (1973).

[1319] *Dobbs v. Jackson Women's Health Organization*, 597 US _ (2022).

adopting a new point of view or the mainly cosmetic fix of textual revisions. Maybe for that reason, many authors have suggested alternative approaches which require more drastic shifts.

2. Classic alternatives: the need for adjustments

The suggestions presented below are by no means an exhaustive representation of the already existing alternatives. They were chosen for their pervasiveness and the fact that to this day, they continue to find adepts. The first two – "redefining security" and "time of stress" – adopted the current emergency paradigm but offered substantial adjustments. The third alternative, the extralegal model, also embraced the liberty v. security dilemma but suggested that its solution does not belong within the legal realm.

a. Redefining security

The (re)definition of the concept of security has long occupied the field of political sciences and specifically security studies.[1320] The 1990s saw the emergence of the notion of "human security", usually understood as freedom from fear and want.[1321] With the growth of antiterrorism law after 9/11, both the need to rethink security and the notion of human security permeated the legal academic discussion. The volume edited by Paulussen and Scheinin brought together various attempts to (re)introduce the "human" in legal security.[1322]

The premise remains that emergency law, specifically antiterrorism law, which is the focus of that volume, must be found in the articulation of liberty and security. Indeed, for

[1320] See for example David A. Baldwin, "The Concept of Security," *Review of International Studies* 23, no. 1 (1997): 5–26 and the references therein.

[1321] Gary King and Christopher J. L. Murray, "Rethinking Human Security," *Political Science Quarterly* 116, no. 4 (2001): 585, https://doi.org/10.2307/798222.

[1322] Christophe Paulussen and Martin Scheinin, eds., *Human Dignity and Human Security in Times of Terrorism*, 1st ed. (The Hague: T.M.C. Asser Press, 2020).

Scheinin, these two notions provide the proper frame for the counter-terrorism discussion.[1323] However, he advocated for a "terminological shift" and claimed that "much of the seeming tension between security and rights can be resolved if a framework of human security is adopted."[1324]

Scheinin suggested to move away from national or public security – the aim used to justify restrictions on human rights – and focus instead on a holistic understanding where "legitimate security interests, […] must be proven to serve ordinary people and their interests."[1325] In this holistic understanding, a stronger emphasis would be put on the underdeveloped "right to security" and "right to social security". However, the contours of these rights remain unclear. Furthermore, it is difficult to imagine how insisting on a right to security would not circle back to a clash between opposing rights. As discussed in Chapter 3, and seemingly advocated for by Galani in the same volume, this clashing of rights without the mediation of public interest could even lead to further restrictions on rights in the name of security.

Duroy refused this perspective. She denounced the idea according to which the threat from terrorism is on balance with the threat from the state and so, where one rises, the other one diminishes. For Duroy, positive obligations do not lower negative ones. On the contrary, she argued that the extra powers granted to governments increase the threat to human security. Key to her argument is the difference between human security and security as a social good, which

[1323] Martin Scheinin, "Human Dignity, Human Security, Terrorism and Counter-Terrorism," in *Human Dignity and Human Security in Times of Terrorism*, ed. Christophe Paulussen and Martin Scheinin (The Hague: T.M.C. Asser Press, 2020), 13, https://doi.org/10.1007/978-94-6265-355-9_2.

[1324] Scheinin, 19.

[1325] Scheinin, 19.

suffers from the fight against terrorism and national security, interpreted here as security of the institutions of the state. Therefore, although Duroy used the notion of human security, she found an escape to the liberty v. security dilemma by reintroducing a form of general interest, security as a social good, public security.[1326] Redefining security in the direction of an individual right to security or even as freedom from fear and want seems to be of little help if not accompanied by a larger reframing including the social dimension of general interest.[1327]

b. Time of stress: the (judicial) middle way

Five years after 9/11, it had become clear that the war-on-terror did not qualify as a temporary "crisis". Rather Rosenfeld suggests it constituted "conditions of stress" which occupy the middle ground between ordinary times and conditions of crisis.[1328] The identification of conditions of stress would have a direct impact on judicial review. Indeed, Rosenfeld proposes that it be correlated to a new "war-on-terror law paradigm", in which judicial balancing is essential. The war-on-terror law paradigm is evolutive and adapts to the circumstances. Nonetheless, the limitations on human rights should be less than during "crises".

Rosenfeld's proposal is attractive because it appears to answer one of the main difficulties posed by terrorism: the long-lasting nature of the threat and correspondent "permanentization" of emergency measures. It also refuses to grant the executive broad and unchecked extraordinary powers while allowing leeway to address the serious threat. However,

[1326] Duroy, "Remedying Violations of Human Dignity and Security."

[1327] The human security paradigm has been criticized, not the least by critical security studies. On this critique, see for example Edward Newman, "Human Security: Reconciling Critical Aspirations with Political 'Realities,'" *The British Journal of Criminology* 56, no. 6 (2016): 1165–83.

[1328] Rosenfeld, "Judicial Balancing in Times of Stress."

his suggestion also suffers from serious limitations and, eventually, fails to offer an actionable solution.

Rosenfeld's analysis appears more suited to the U.S., where emergency is commonly equated with war powers. Yet, even there, there is no legal void between ordinary times and full-blown wars. The middle ground is already occupied. The National Emergency Act and accompanying hundreds of emergency powers as well as pseudo-emergency powers are available to address a variety of situations. Similarly, in France, the state of emergency is a legal regime distinct from ordinary law but also from the state of war and state of siege or even Article 16 of the Constitution. Conversely, the ECHR only contains Article 15 to address "crises". Yet, the Court's reasoning in derogation and non-derogation cases tends to draw the two closer to one another. This cross-contamination of the two regimes is part of the problem. The fact that, according to Rosenfeld,[1329] the judiciary did not apply an adequate paradigm is not for want of legal options.

Eventually, what Rosenfeld proposes – an adaptable level of scrutiny varying according to the circumstances, not as high as during ordinary times but not as low as during "real" crises, whatever they may be – seems to be what judges have tried to reach with various degrees of success. His suggestion, although principled in theory, does not offer any further clear or concrete guidance to those adjudicating emergency.

c. The extralegal model

The last alternative described here is even more drastic than the previous two. Looking at the difficulties faced by the judiciary in regulating the (ab)use of emergency powers, the

[1329] Rosenfeld, 2083.

extralegal model removes them from the realm of legality, places them outside the constitutional order. The origins of this model can be traced back to Locke's prerogative powers. It found renewed interest after 9/11 based on the premises that constitutional/legal models have failed to constrain emergency powers and that there is an important danger that emergency measures will seep into the normal legal order after the emergency has ended. The extralegal model then suggests that the executive acts outside the law thereby freeing it from inadequate impediments and protecting the legal order which continues to apply fully during normal times. The exercise of such extralegal powers can be subjected to *a posteriori* evaluation, usually of a political nature and carried out by the legislature or the people themselves.[1330] By definition, the judiciary has little to no role in this model.

Nonetheless, a similar logic has notoriously been discussed in *Public Committee Against Torture in Israel*.[1331] The question examined by the Israeli Supreme Court was not that of extralegal actions but of the necessity defense. The legal issue and underlying logic are different. Most importantly, the latter remains deeply entrenched within legality whereas the former aims to escape it. Notwithstanding, both deal with the necessity to use unlawful measures followed by an *a posteriori* evaluation.

In *Public Committee Against Torture*, investigators had recourse to "moderate physical pressure" which they deemed "immediately necessary to save human life". Having found that they had not been allowed to do so by a statute, the Court went on to examine the issue of the

[1330] Gross, "Chaos and Rules," 1096–1033; Oren Gross, "Emergency Powers," in *The Oxford Handbook of the U.S. Constitution*, ed. Mark V. Tushnet, Mark A. Graber, and Sanford Levinson (Oxford University Press, 2015), 785–806; Curtis Bradley, "Emergency Power And Two-Tiered Legality," *Duke Law Journal Online* 63 (January 1, 2013): 1.

[1331] *Public Committee Against Torture in Israel v. The State of Israel*, HCJ 5100/94.

investigators' criminal responsibility. It found that the necessity defense – which is recognized in the Israeli criminal code – can arise when physical interrogation methods are used in 'ticking bomb' cases.[1332] However, the Court rejected the state's argument that an *ex-ante* authorization could be implied from the necessity defense.[1333] Therefore, the Israeli Supreme Court's considerations remained strongly grounded in matters of legality. The use of physical interrogation methods would have to be provided by a statute or individual criminal responsibility could be lifted but only in application of the necessity defense provided by the criminal code.

Recent developments in France are reminiscent of an oxymoronic judicial application of the extralegal model. During WWI, the Council of State introduced a reasoning allowing administrative authorities to dispense with legal constraints – procedural obligations in this case – when "exceptional circumstances" required so.[1334] This theory was developed in 1918, before the adoption of the 1958 constitution and any of the emergency statutes. In 2020, the Constitutional Council referred to "particular circumstances" to validate a statute adopted in the context of Covid-19 in flagrant violation of constitutional procedural rules[1335] thereby creating much debate as to the similarities of these two lines of case law.[1336]

[1332] *Id.*, § 34.

[1333] *Id.*, § 36.

[1334] Council of State, no. 63412, 28 June 1918, Heyriès.

[1335] Decision no. 2020-799 DC, 26 March 2020, § 3. For further analysis of this decision, see above, p. 195.

[1336] Véronique Champeil-Desplats, "Le Conseil constitutionnel face à lui-même.," *La Revue des droits de l'homme. Revue du Centre de recherches et d'études sur les droits fondamentaux*, April 13, 2020, https://doi.org/10.4000/revdh.9029; Maxime Charité, "La Théorie Des « circonstances Particulières » Dans La Jurisprudence Du Conseil Constitutionnel," *Revue Des Droits et Libertés Fondamentaux*, no. Chron. 41 (2020), https://revuedlf.com/droit-constitutionnel/la-theorie-des-circonstances-particulieres-dans-la-jurisprudence-du-conseil-constitutionnel/#_ftn3.

In 2024, the exceptional circumstances theory reappeared, this time for the executive to claim further exceptional powers in addition to an ongoing state of emergency. Violent actions broke out in New Caledonia in the context of the debate on the delineation of the electoral body and more generally the independence of the overseas territory. The state of emergency was declared on 15 May (and lasted until 28 May 2024). On the same day, the government announced its decision to block the social network Tik Tok in New Caledonia. Several organizations initiated an emergency procedure before the Council of State claiming that the 1955 Statute did not confer such powers to the government. In response, the Prime Minister argued that the ban was "exclusively based on the theory of exceptional circumstances".[1337]

Therefore, the government resorted to the theory of exceptional circumstances to cover its decision devoid of any legal basis despite the ongoing state of emergency, resulting in the superposition of several emergency regimes. The Council of State did not rule on this matter but dismissed the case as not justifying an emergency ruling. As invoked in 2024, the theory of exceptional circumstances allows the government to act outside any legal frame with the mere possibility of an *a posteriori* – and not necessarily within short deadlines – judicial review.

Judicial reasoning following the extralegal model would be self-sabotaging since the judiciary is rendered almost irrelevant in this model. Furthermore, the regulatory power of *a posteriori* evaluation is doubtful. In particular, as discussed above, minorities are the main victims of recourse to emergency powers. *A posteriori* evaluation – especially by the people directly or even their elected representatives – would run the serious danger of further reinforcing a majoritarian rule.

[1337] Council of State, no. 494320, 23 May 2024.

The pitfalls of each improvement suggestion or more radical alternative were briefly laid out above. Yet, there is a more fundamental reason why it is unlikely that these rescue attempts could lead to substantial improvements in the regulation of emergency powers. Apart from the extralegal model – which is antithetical to a liberal project and therefore will not be engaged with any further – they all postulate the necessity of emergency powers prescribed by law. Extraordinary prerogatives are considered a necessary evil, the excess of which must be contained by the judiciary as a last resort. This initial assumption pushes to the background what reveals itself to be the main characteristic of emergency powers: an increasingly normalized tool to bypass liberal democratic principles under the cover of necessity and, more recently, the rule of law. Understood in this way, it becomes obvious that the judiciary is not meant to, and therefore cannot, do much more than impose timid limits on emergency powers and contain them at the margins.

C. The need for a post-liberal take on emergency?

Acknowledging that by and large courts have failed to prevent or condemn abusive uses of emergency powers, at least in their targeting of minorities, has broad consequences. In the existing paradigm, courts stand as the last resort, the last bulwark against the authoritarian tendencies of emergency regimes. Consequently, if they are to fail – not occasionally but structurally, this is a strong indication that the whole system is flawed and needs to be rethought.

This reframing effort must start with the very nature of the emergencies. On the one hand, if they are understood as an objective, unforeseeable, catastrophic set of facts, then the reaction to them can be portrayed as equally objective, automatic, and necessary. On the other hand, if they are constructed and politically motivated, then the way they are met can also be

understood as a political choice between many alternatives. This second understanding opens space for discussion on the value of various options.

1. The impossible reconciliation of liberal democracy and emergency

a. Abandoning "crises" categorizations

A first step to disengage from the automaticity required by the current paradigm is to abandon the classification of various types of emergencies which hinges on their more or less objective character. The idea that some emergencies are more "real" and others more fabricated often refers back to the French political[1338] or fictitious[1339] state of siege.[1340] More recently, terrorist threat is commonly portrayed as being less tangible and therefore more easily manipulated, thereby falling on the political side of emergency.[1341] Conversely, the Covid-19 pandemic is compared to natural disasters such as earthquakes and placed in the non-political category.[1342]

Yet even the tenants of such categorization had to admit that "Covid-19 has become so politicized […] that it is fair to ask whether it is indeed a new category of its own."[1343] The need to make up a *sui generis* category to make sense of the classification system is indicative of its inadequacy. An earthquake might not be directly man-made. Nonetheless, its politicization is just as likely as that of the Covid-19 pandemic, if not unavoidable.[1344] Rather than following a

[1338] Sajó and Uitz, "Constitutions Under Stress," 419.

[1339] Agamben, *State of Exception*, 3.

[1340] Klamberg, "Reconstructing the Notion of State of Emergency," 114.

[1341] Dorsen et al., *Comparative Constitutionalism*, 1542–43.

[1342] Dorsen et al., 1543.

[1343] Dorsen et al., 1543.

[1344] The 2023 earthquake in Turkey and Syria is but the latest example. Ruth Michaelson and Deniz Barış Narlı, "'He Works Hard': Voters in Turkey's Quake Zone Backing Erdoğan in Runoff," *The Guardian*, May 26, 2023,

real/fictitious dichotomy, it seems more accurate to acknowledge that all "crises" are created as such through the use of specific language[1345] and, most likely, as a result of a specific political will.[1346]

This acknowledgement severely undermines the necessity thesis portraying emergency measures as an automatic depoliticized response. It also draws further attention to the problematic aspect of the language used by courts, whether it is an unquestioned endorsement of the necessities of anti-terrorism or the occasional dramatic outbursts,[1347] both of which perpetuate the current paradigm while ignoring the structuring and performative role of discourse.

b. Renouncing emergency powers

Once the fallacy of necessity dispelled and the constructed nature of emergency acknowledged, the need for emergency powers has to be justified on a new basis. If courts prove incapable of adequately preventing misuses and protecting minorities, in other words if a properly regulated use of emergency powers is impossible, the need for them must be particularly compelling. Yet, a growing body of literature indicates that their efficiency to address the circumstances they pretend to is often doubtful, and at times almost inexistant.[1348]

sec. World news, https://www.theguardian.com/world/2023/may/26/turkey-quake-zone-voters-backing-erdogan-in-runoff.

[1345] Conversely, many factual situations could be considered as crises but were never framed in this way.

[1346] It appears that the patterns of declaration of emergency and use of emergency powers were no different during the Covid-19 pandemic than during other emergencies. Christian Bjørnskov and Stefan Voigt, "This Time Is Different?—On the Use of Emergency Measures during the Corona Pandemic," *European Journal of Law and Economics* 54, no. 1 (August 1, 2022): 63–81, https://doi.org/10.1007/s10657-021-09706-5.

[1347] See above, p. 252.

[1348] Bjørnskov and Voigt, "This Time Is Different?," 68; Hennette-Vauchez, *La Démocratie en état d'urgence*, 108–10; Stefan Kipfer and Jamilla Mohamud, "The Pandemic as Political Emergency," *Studies in Political Economy* 102, no. 3 (September 2, 2021): 279, https://doi.org/10.1080/07078552.2021.2000212.

Worse, emergency measures have been accused of being counter-productive at times, both in the context of counter-terrorism and the Covid-19 pandemic.[1349]

A rather straightforward conclusion could be that states of emergency involve a high and unsuccessfully contained risk for liberal democracies while not offering an effective solution to the problems they pertain to counter. In that sense, on balance, there is no sufficient reason to justify their use or maybe even their existence. A more pessimistic, yet believable, approach is that states of emergency are not declared to address the circumstances they are portrayed to but to serve other purposes including but not limited to the concentration of powers, control of the population and curtailment of minorities' claims. Seen from this angle, they appear much more successful, which would explain the increasing rate at which they are declared. However, these goals are incompatible with the principles of liberal democracies and in that sense so are states of emergency.

Whether one considers that they are simply not worth the risk or that they are normatively unacceptable, the common conclusion is that there is no room for states of emergency in liberal democracies. Rather than repeated attempts to regulate emergency powers, a more principled suggestion would be a commitment to not cross the line of the exception. The unsurpassable dilemma that keeps confronting courts in emergency cases would then be evacuated and judges could offer more principled answers based on a single set of standards. In 1942, Lord Atkin conceded that laws might be changed during wars. However, he also

[1349] Ní Aoláin, "A/78/520," para. 9; Kipfer and Mohamud, "The Pandemic as Political Emergency," 279; Susan Wilding, "Counter-Terrorism Laws Provide a Smokescreen for Civil Society Restrictions," *Open Global Rights* (blog), January 15, 2020, https://www.openglobalrights.org/counter-terrorism-laws-provide-a-smokescreen-for-civil-society-restrictions/.

insisted that liberty would only be protected if during these times judges did not depart from the standards of interpretation they apply during normal times.[1350]

Such a commitment to renounce emergency powers cannot be made once and for all. It would have to be constantly renewed. Such principled commitments are not unheard of. They are the very basis of the rule of law. A more concrete example would be capital punishment. In the countries where it was abandoned, the prohibition can always be reversed but it remains a red line if permanently reaffirmed as such.

Such a suggestion will most likely be met with skepticism. The claim will inevitably be made again that some circumstances are so exceptional as to require extraordinary powers. The risk then is that, in the absence of dispositions providing for an emergency regime, normal powers will be stretched out of their normal limits and forever distorted. It is this denaturation that the advocates of the derogatory model want to avoid.[1351] It follows that the commitment to renounce emergency powers does not merely mean abandoning formal states of emergency. Rather it is a commitment to address "crises" without resorting to unusual restrictions on freedoms and rights nor undermining systems of checks and balances regardless of the legal means that might be used to do so. Such an undertaking requires looking at both the problem and the solutions from a different angle.

[1350] *Liversidge v Anderson* [1942] AC 206, 244-245.

[1351] Dyzenhaus, "States of Emergency," 451–61; Greene, "Derogating from the European Convention on Human Rights in Response to the Coronavirus Pandemic."

2. Vulnerability, resilience, and security

The normalization of emergency-like measures to deal with "crises" has led to reading all types of difficult situations and the areas of public life involved into a securitization frame. Most recently, during the Covid-19 pandemic, "public health care responses [were] subsumed within a broader nexus of national security".[1352] Yet, national security approaches and infrastructures have been found to fuel the conditions partly responsible of "crises".[1353] In order to escape this repressive and exclusionary circle, "crises" need to be repoliticized.

Especially, if the situations considered as "crises" are not temporary but likely to endure – terrorism, migration or global warming are but a few – states of emergency cannot be the adequate frame. Rather those circumstances must be resituated within a democratic frame. The circumstances, which are subsequently construed as "crises", were shaped by public policies or lack thereof. This also means that they can be influenced preemptively and *a posteriori* by democratically debated policies capable of providing long-term solutions to these long-term problems.

There are several potential alternative frames to that of emergency, most of which have yet to be imagined. The following paragraphs focus on vulnerability theory because it appears particularly suited to the challenges of "crises", while offering a counter-narrative capable of avoiding the pitfalls of emergency powers. However, this is not to argue that other alternatives would be less suited or inappropriate. The point is merely to offer a credible alternative and

[1352] Arun Kundnani, "From Fanon to Ventilators: Fighting for Our Right to Breathe," *Arun Kundnani on Race, Culture and Emmpire* (blog), May 6, 2020, https://www.kundnani.org/from-fanon-to-ventilators-fighting-for-our-right-to-breathe/.

[1353] Judith Butler, "Explanation and Exoneration, or What We Can Hear," *Grey Room*, no. 7 (2002): 57–67; Arun Kundnani, "Abolish National Security" (Amsterdam: Transnational Institute, June 2021), https://www.tni.org/en/publication/abolish-national-security; Boukalas, "No Exceptions."

show how it would impact courts in the face of a dominant frame which denies us the very existence of a choice.

Vulnerability theory is grounded in a redefinition of the (legal) subject. This redefinition is centered on two key characteristics of the subject who is embodied and socially embedded. Fineman elevated the ensuing vulnerability to the universal constant of the subject. In her words, "[t]he ontological body's inescapable susceptibility to change is the core of our vulnerability".[1354] Consequently, "[v]ulnerability constitutes *the* human condition; human beings are universally, consistently, and constantly vulnerable."[1355] From the ontological embodiment and correlative vulnerability follows that the subject is "inescapably dependent on social relationships and institutions" within which she builds resilience.[1356] Therefore, vulnerability theory, especially in the work of Fineman, is a political and legal theory aiming to redesign institutional action.[1357]

"Crises" highlight these two characteristics of the subject which are usually undermined and even combated at times. Part of why "crises" are so shocking is that they suddenly remind us of our constant vulnerability. They can affect our bodies in a negative way anytime anywhere and there is very little we can do, at an individual level, to protect ourselves. Our desire for safety crashed against the unpredictability of terrorism and omnipresence of Covid-19. "Crises" also affect our social relationships. Terrorism, or at least the discourse shaping its experience,

[1354] Martha Albertson Fineman, "Universality, Vulnerability, and Collective Responsibility," *Les Ateliers de l'éthique / The Ethics Forum* 16, no. 1 (2021): 109, https://doi.org/10.7202/1083648ar.

[1355] Albertson Fineman, 106.

[1356] Albertson Fineman, 111.

[1357] Lucia Re, "Vulnerability, Care and the Constitutional State," *Revista de Estudos Constitucionais, Hermenêutica e Teoria Do Direito* 11, no. 3 (2019): 316–17, https://doi.org/10.4013/rechtd.2019.113.01.

tears apart the social fabric.[1358] In turn, Covid-19, a contagious disease, affected social relations in a very material and palpable manner.

Yet, the current emergency paradigm continues to assume the classic liberal rational autonomous subject. Together with this self-sufficient subject comes a quest of invulnerability and a conceptualization of social relationships as private responsibility.[1359] The role of the state is then both minimal – in that it accepts no role or responsibility for the social dimension of the subject – and maximal – as it is willing to deploy all its repressive power (against some) to reach for invulnerability (of others). The resulting emergency measures are geared towards policing individual bodies including through severe restrictions on freedom of movement (security areas, house arrest, expulsion or lockdown to name a few). On the other hand, they fail to address the root causes of the "crises" or build resilience.[1360] Indeed, resilience has a different meaning in the current emergency paradigm and in vulnerability theory. In emergency, it implies reaching for invulnerability, for the suppression of danger through the deployment of ever broader repressive and invasive measures. As this search for the zero-risk further and further limits the public sphere, the state increasingly delegates its duty to protect to private actors.[1361]

[1358] Ernst Hirsch Ballin, "Restoring Trust in the Rule of Law," in *Human Dignity and Human Security in Times of Terrorism*, ed. Christophe Paulussen and Martin Scheinin (The Hague: T.M.C. Asser Press, 2020), 27–32, https://doi.org/10.1007/978-94-6265-355-9_3.

[1359] Albertson Fineman, "Universality, Vulnerability, and Collective Responsibility," 109–10.

[1360] Kipfer and Mohamud, "The Pandemic as Political Emergency," 279.

[1361] Sandra Walklate, Gabe Mythen, and Ross McGarry, "States of Resilience and the Resilient State," *Current Issues in Criminal Justice* 24, no. 2 (November 1, 2012): 185–204, https://doi.org/10.1080/10345329.2012.12035954. One might think of the "If you see something, say something" campaign of the U.S. Department of homeland security or delegation to private companies of the securitization of "security areas" in France during the 2015-2017 state of emergency.

The vulnerability theory scholarship invites us to rethink the role of state institutions as resilience building structures. The normative consequences of this invitation find a striking application in the context of emergency. For Fineman, the universality of vulnerability requires a responsive state committed to substantive equality. "[V]ulnerability theory argues that it is important to develop a universal social-justice project that reaches beyond specific oppressions and marginalization, one that considers state responsibility for injury or harm conceived as general and structural, not only individual or group based."[1362]

This argument has two main consequences for emergency. First, the constant and universal vulnerability goes against understandings of "crises" as temporary moments of weakness. It is then the responsibility of a responsive state to build resilience not as an *a posteriori* rushed reaction but as a planned public policy capable to prevent "crises" (a vast array of literature in various fields offers suggestions to address the root causes of global warming or terrorism among others) and alleviate the effects of difficult circumstances which could not be avoided (a strong public health service during Covid-19 or earthquake-resistant building regulations are mere examples).

The second consequence results from the substantive equality that is the necessary corollary of universal vulnerability.[1363] From that perspective also, most emergency measures fail. Vulnerability theory would require preventing "crises" – by addressing their root causes – whereas the current emergency paradigm predicts and attempts to preemptively block

[1362] Albertson Fineman, "Universality, Vulnerability, and Collective Responsibility," 107.

[1363] Re, "Vulnerability, Care and the Constitutional State," 320.

disturbance to the public order.[1364] One might think of the former as diffusing a bomb while the latter is more akin to emptying a security area around it in anticipation of its explosion.

Counter-terrorism measures targeting minorities cannot be reconciled with vulnerability theory. Rather, it would require policies addressing (preventively) the exclusions and stigmatization of minority groups, thereby lessening one of the factors fueling violence. In the context of the Covid-19 pandemic, measures which overburdened some groups (the poorer and older population most visibly) were equally inadequate from a vulnerability theory perspective. Measures focused on preventing the emergence of new epidemics[1365] and a strong and effective healthcare system would be more in line with a commitment to social justice. Vulnerability theory asks that "emergency planning […] move from a crisis-response to a preparedness-response model".[1366]

Relying on vulnerability theory drives us away from the notions of "crises" and emergency all together. Rather it invites us to look at vulnerability as a constant which requires us to build long-term resilience through public policies committed to substantive equality. At the same time that it palliates the need for emergency powers, it dilutes the incentive to abuse them. Its commitment to substantive equality could also offer protection against the targeting of minorities. Finally, the type of long-term public policy required would hopefully need to be

[1364] Hennette-Vauchez, *La Démocratie en état d'urgence*, 73–76.

[1365] The destruction of biodiversity has been identified as one of the causes of new epidemics. Odette K Lawler et al., "The COVID-19 Pandemic Is Intricately Linked to Biodiversity Loss and Ecosystem Health," *The Lancet Planetary Health* 5, no. 11 (November 1, 2021): e840–50, https://doi.org/10.1016/S2542-5196(21)00258-8; Frank Van Langevelde et al., "The Link between Biodiversity Loss and the Increasing Spread of Zoonotic Diseases" (Luxembourg: European Parliament - Committee on the Environment, Public Health and Food Safety, December 2020).

[1366] Ani B. Satz, "Disability, Vulnerability, and Public Health Emergencies," in *Law, Vulnerability, and the Responsive State*, ed. Martha Albertson Fineman (Routledge, 2023), 236.

democratically debated and adopted. Therefore, vulnerability theory appears to offer a credible alternative to the current emergency paradigm.

Various strands of academic literature have criticized vulnerability theory. Sajó's critique insists that the change of grounds for rights – from autonomous, reasonable subjects of equal dignity to vulnerability – hinders the protection of liberal rights. He argues further that "[t]he underlying interest […] is to provide security, a demand that is elevated to a right. […] The logic of the security fixation leads to demands – a right! – for a 'safe space.'"[1367] Yet, vulnerability theory does not entail a security claim. It does not mean to address the constant and universal vulnerability with a suppression of danger. Neither does it contain a necessary implication that security is a right. Precisely because vulnerability is constant and universal, there is no circumventing it. There is no impulsion towards invulnerability. Rather, vulnerability theory asks social and state institutions to mitigate the consequences of vulnerability, not to counter it.

For Sajó, the shift in the grounding of rights clashes with the aim of rights in liberal systems: protecting people from the state by limiting its powers. "Autonomy vis-à-vis the state is replaced with dependence on the state."[1368] At the same time, the centrality of the state in building resilience, and ensuring what Sajó saw as a decisive right to security allows "dominant powers to avoid criticism and accountability."[1369] The criticism usually addressed to states of emergency in liberal regimes is then turned around against a combination of vulnerability and security. The role of the state in vulnerability theory is where Sajó's critique meets that of some

[1367] Sajó, *Ruling by Cheating*, 212–13.
[1368] Sajó, 212.
[1369] Sajó, 213.

critical scholars. Approaching vulnerability from a different perspective than Sajó's, Kapur also criticized the centrality of the state. Indeed, "in continuing to centralize the role of the state in protecting the vulnerable subject, such interventions continued to run the inevitable risk of subordination and exclusion, and remain confined within a liberal fishbowl."[1370]

It follows that vulnerability is analyzed by some as dangerously undermining the successes of liberalism while for others it remains overly constrained by an outdated liberal paradigm. Nonetheless, vulnerability theory offers useful elements to help rethink the emergency paradigm. However, engaging in a turn towards a mode of governance in line with vulnerability theory is a substantial and global political endeavor. Apart from the broader question of its likelihood, the more specific issue at hand here is whether courts should be involved in that turn or have any role to play in its inception.

3. Can liberal courts carry on a post-liberal agenda?

The assumption endures – clear, internalized and perpetually reasserted in emergency judgments – that courts do not meddle in political matters. In some systems, France is one of them, judges continue to claim that they do not make law, even less public policies. Rossiter argued that "the government of the United States, in the case of military necessity," can be "just as much a dictatorship, after its own fashion, as any other government on earth." The Supreme Court, he added, "will not, and cannot be expected to, get in the way of this power."[1371] The

[1370] Ratna Kapur, *Gender, Alterity and Human Rights: Freedom in a Fishbowl* (Northampton, MA: Edward Elgar Publishing, 2018), 42. For further critique of Fineman's vulnerability theory, see for example Benjamin P. Davis and Eric Aldieri, "Precarity and Resistance: A Critique of Martha Fineman's Vulnerability Theory," *Hypatia* 36, no. 2 (May 2021): 321–37, https://doi.org/10.1017/hyp.2021.25.

[1371] Clinton Rossiter and Richard P. Longaker, *The Supreme Court and the Commander in Chief*, expanded edition (Ithaca, N.Y. usw.: Cornell University Press, 1976), 54.

lack of legitimacy to get involved in political choices takes on a particular meaning for an international court like the ECtHR.

Yet, the meaning of political neutrality for judges is a question much too complex for it to be equated with an expectation that courts should refrain from finding against the political branches, particularly during emergencies.[1372] The norms judicially interpreted and applied are not politically neutral. They are filled with principles, which are themselves imbued with political values, and consequently, provide courts with the legal grounds and potentially the duty to interfere in political matters. When assessing the existence of an emergency or emergency measures, apex courts must review them against the principles contained in the basic texts, amongst which democracy, pluralism, rule of law and fundamental rights.

Emergency powers infringe on these principles. Therefore, by confining themselves to the current paradigm, judges are often placed in an impossible position where they can only insist on these principles and be accused of undermining the effort to address the "crisis" or accept the necessity of the emergency and sacrifice the principles. Yet, as suggested with the example of vulnerability theory, other approaches to difficult circumstances exist. The fundamental principles enshrined in the texts offer judges the opportunity to steer towards them.

a. Democratic process and substantive equality

One possibility would be for courts to insist further on the democratic regulation of emergency responses. Once the veil of necessity dropped, the need to concentrate powers in the

[1372] András Sajó and Renáta Uitz, "Who Guards the Guardians? Constitutional Adjudication," in *The Constitution of Freedom: An Introduction to Legal Constitutionalism* (Oxford University Press, 2017), 341–56, https://doi.org/10.1093/oso/9780198732174.003.0010; Karl E Klare, "Legal Culture and Transformative Constitutionalism," *South African Journal on Human Rights* 14, no. 1 (January 1, 1998): 157–58, https://doi.org/10.1080/02587203.1998.11834974.

hand of the executive is no longer obvious. Furthermore, since the framing of the circumstances and the way to address them result from political choices, the administration of "crises" by the executive, often assisted by experts and technocrats, appears both illegitimate and inadequate. Emergencies need to be repoliticized, redemocratized, and courts could play a role in this evolution. They have already initiated a procedural turn.[1373] The fundamental texts (constitutions and Convention) contain the necessary principles to make the focus of that process-based approach truly democratic and inclusive.

In 2020, the French Constitutional Council validated the adoption of an organic law in complete violation of the procedural rule which guarantees a minimum of political debate before the vote.[1374] This decision represents the exact opposite of what an alternative approach grounded in the democratic administration of emergency would require. At the same time, it illustrates the extent of the freedom judges can demonstrate in their interpretation, including during emergency, and which they could mobilize instead to promote alternative approaches to "crises".

An effort to submit emergency to a truly democratic governance also has the potential of furthering the goal of substantive equality highlighted in vulnerability theory and which could or maybe should be a fundament element of dealing with "crises". Here again, apex courts can find a mandate in the fundamental texts. As Re pointed out, "[i]n the European context […] substantive equality has long been the fundamental value underlying the constitutional state, which is necessarily also the welfare state since the functioning of welfare ensures "the

[1373] See above, p. 317.

[1374] Decision no. 2020-799 DC, 26 March 2020. The first vote on the bill took place 24 hours after its introduction in violation of the minimum period of fifteen days guaranteed by Article 46 of the Constitution.

'material' constitutional framework". The crisis of the welfare state thus translates into a crisis of democracy."[1375]

Article 1 of the French Constitution affirms that "France is an indivisible, secular, democratic and social Republic". Until now, the Constitutional Council has largely ignored the "social" dimension of this provision.[1376] However, nothing prevents it from mobilizing it in the future in the same way it relied on the indivisible and secular aspects. The ECtHR might be treading on less stable grounds, especially since economic and social rights were notoriously left out of the Convention. However, this has not prevented the Court from adopting judgments in those areas, including in times of "crisis".[1377] In turn, the U.S. Constitution might not be as explicitly socially oriented as the French one. Nonetheless, the Supreme Court could find fertile ground in the bill of rights should it look for it.[1378] From a post-liberal perspective, the opportunity for alternative interpretations opened by these principles is not a mere possibility but might constitute a judicial duty.

[1375] Re, "Vulnerability, Care and the Constitutional State," 320.

[1376] Fontaine, *La constitution maltraitée*, 29.

[1377] Jernej Letnar Černič, "The European Court of Human Rights, Rule of Law and Socio-Economic Rights in Times of Crises," *Hague Journal on the Rule of Law* 8, no. 2 (October 1, 2016): 227–47, https://doi.org/10.1007/s40803-016-0035-9; Ellie Palmer, "Protecting Socio-Economic Rights Through the European Convention on Human Rights: Trends and Developments in the European Court of Human Rights," *Erasmus Law Review* 2, no. 4 (2009): 397–425; Liam Thornton, "The European Convention on Human Rights: A Socio-Economic Rights Charter?," in *Ireland and the European Convention on Human Rights: 60 Years and Beyond*, ed. Liam Thornton, Judy Walsh, and Suzanne Egan (Dublin: Bloomsbury, 2014), 227–56; Aoife O'Reilly, "The European Convention on Human Rights and the Socioeconomic Rights Claims: A Case for the Protection of Basic Socioeconomic Rights through Article 3," *Hibernian Law Journal* 15 (2016): 1–26.

[1378] Cass R. Sunstein, "Why Does the American Constitution Lack Social and Economic Guarantees," *Syrause Law Review* 56, no. 1 (2005).

b. Transformative constitutionalism

For Klare, writing about transformative constitutionalism, "a conscientious judge operates within and to some degree authentically accepts legal constraint, yet acts strategically to accomplish freedom and social justice."[1379] Klare describes transformative constitutionalism as a long-term project through processes grounded in law to "transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction".[1380] As such, it shares with vulnerability theory a commitment to democratic processes and substantive equality which are not central in the emergency paradigm.

Transformative constitutionalism is a politico-legal project. A classic liberal understanding of the role of judges, based on a strong divide between legal and political, would deny them any participation in its realization. This is the understanding commonly adopted by judges in liberal democracies and which leads them to restrain themselves whenever they deem a question to be too political, regularly so in emergency cases. For that reason, "the very idea of transformative adjudication seems out-of-place within liberal legalism".[1381]

Klare denounced this apolitical claim. Importantly, he highlights the political nature of adjudication in the liberal frame. "By default, [they] inscribe a status-quo ideological 'spin' on the materials that they do not require or even necessarily permit. The only reason why we do not recognize [them] as a case of resort to external values is that the practice is so conventional as to be unremarked."[1382] Importantly, Klare pointed out that such a judge is "so steeped in

[1379] Klare, "Legal Culture and Transformative Constitutionalism," 148.
[1380] Klare, 150.
[1381] Klare, 157.
[1382] Klare, 162.

traditional values and assumptions that she does not perceive gaps, conflicts and ambiguities that would appear upon more searching analysis".[1383] The glaring conflict between fundamental principles that are democracy, pluralism or equality on the one hand and emergency powers on the other seems to be hidden behind such assumptions.

Hence, for Klare, judges' work is political, and this acknowledgment should bear consequences. Post-liberal interpretation is no more political than the mainstream, traditional one. It follows that judges have a choice. "They are responsible for the social and distributive consequences that result from these choices, and should be judged accordingly."[1384]

It is important to note that Klare wrote about a specific context, South Africa in the late 1990s. Therefore, he has the advantage of grounding his transformative constitutionalism in a brand-new constitution, characterized, as he read it, by its "substantively postliberal and transformative aspirations".[1385] Nonetheless, as noted above, the ECHR, the constitutions of France and of the U.S., for all their liberal inclination and interpretation, also contain principles which clash with this liberal tilt, and open the door for alternative interpretations. The judges implementing these texts are only bound to their liberal interpretation to the extent that they do not acknowledge it for what it is, a political choice.

In the words of former ECtHR judge Tulkens, "[a]s Ricoeur put it, 'the meaning of a text is not behind the text but in front of it'."[1386] The interpretation process "does not, of course,

[1383] Klare, 162.

[1384] Klare, 164.

[1385] Klare, 156.

[1386] Françoise Tulkens, "Judicial Activism v Judicial Restraint: Practical Experience of This (False) Dilemma at the European Court of Human Rights," *European Convention on Human Rights Law Review* 3, no. 3 (August 30, 2022): 295, https://doi.org/10.1163/26663236-bja10048.

mean that the Court can ignore the text of the Convention, but nevertheless allows the Court greater creativity."[1387] And did not "the United States Supreme Court c[o]me very close, in the 1960s and 1970s, to recognizing social and economic rights under the Constitution"?[1388]

c. Structural remedies and injunctions

In practical terms, should judges decide to encourage a different approach to emergency, they are unlikely to be able to – and maybe neither should they – issue general statements on broad choices of public policies. Their appreciation is usually limited to the case at hand. Even in the context of *a priori* constitutional review, the Constitutional Council is generally constrained to examining the referred piece of legislation. Yet, courts can impact situations reaching far beyond the individual case. A potentially effective element in achieving such results are structural remedies and injunctions.

The French Council of State is an excellent candidate in that regard. During the first two years of the Covid-19 pandemic, the number of injunctions pronounced by the Council escalated drastically.[1389] At the same time they became broader in terms of reach and more normative to the point where the Council could be called a "meta-police authority" lecturing other institutions about the operational efficiency of emergency measures.[1390] The Council did not lack judicial creativity to increase its normative power during that period as it successfully used its injunction power *contra legem*. Article 521-2 of the code of administrative justice

[1387] Tulkens, 299.

[1388] Sunstein, "Why Does the American Constitution Lack Social and Economic Guarantees," 24.

[1389] Sarah Schmalian, "L'impact Du Contentieux Covid Sur l'office Du Juge Du Référé-Liberté Du Conseil d'État," *Revue Des Droits et Libertés Fondamentaux*, no. 22 (2023), https://revuedlf.com/droit-administratif/limpact-du-contentieux-covid-sur-loffice-du-juge-du-refere-liberte-du-conseil-detat/#_ftnref13.

[1390] Xavier Dupré de Boulois, "On Nous Change Notre Référé-Liberté," *Revue Des Droits et Libertés Fondamentaux*, no. 12 (2020), https://revuedlf.com/droit-administratif/limpact-du-contentieux-covid-sur-loffice-du-juge-du-refere-liberte-du-conseil-detat/#_ftn44.

which regulates one of the emergency procedures provides that the Council can pronounce an injunction when it finds a violation of a fundamental freedom. In that case, the Council found no such violation but based the injunction on its likelihood. The *rapporteur public* argued that this case law "demonstrates [...] the addition of a preventive logic to the traditional curative dimension of the office of the judge of interim relief".[1391]

Yet, this self-empowerment did not translate into a stronger protection of fundamental rights. Importantly, in the context of petitions claiming that the state had failed to fulfil its positive obligations, the Council consecrated the resources of the administration as one of the criteria taken into account in its assessment. Consequently, the allocation of resources by the government became an objective element external to the administration and independent from its decisions.[1392] This decision depoliticized the question of allocation of resources while justifying failures to fulfil positive obligations and resorting to graver infringement on negative ones instead.

This sharp increase in structural injunctions during the early months of the Covid-19 pandemic should not distract from the common practice of the Council of State which routinely refuses to grant structural remedies on the ground that doing so would constitute an encroachment on the political choices of the other branches of government. A similar aversion for structural injunctions could be found in *Barnes v. Ahlman* where the Supreme Court granted

[1391] A. Lallet, concl. CE, 19 octobre 2020, n°439372. URL : www.conseil-etat.fr/fr/arianeweb/CRP/conclusion/2020-10-19/439372 as quoted in Schmalian, "L'impact Du Contentieux Covid Sur l'office Du Juge Du Référé-Liberté Du Conseil d'État."

[1392] Schmalian.

an application to stay an injunction requiring a prison to implement adequate safety measures against Covid-19.[1393]

The ECtHR's position regarding structural injunctions or remedies is quite different from that of domestic courts. The Court can, based on Article 46, indicate to the responding state not only individual but also general measures necessary for the implementation of its judgment. Although the Court has increasingly used this possibility since the early 2000s,[1394] it does not do so to impose a particular direction to domestic policies. Its legitimacy to do so is much more doubtful than that of domestic apex courts and it would be difficult to defend such an application of Article 46 as proper.

Nonetheless, it is worth noting that during the Covid-19 pandemic, some courts have made an interesting use of structural injunctions combined with an analysis relying on vulnerability. It is crucial to note that the concept of vulnerability used in this context is very different – indeed antithetical – to its homonym in vulnerability theory. Contrary to the latter, the former is premised on the idea that some groups are more vulnerable than others and consequently, deserve more protection. Contrary to vulnerability theory, this conception of vulnerability does not challenge the liberal paradigm but rather acts like a light corrective patch to somewhat alleviate the worst inequalities.

During the pandemic, several courts ordered governments to provide certain groups – usually profession-based – with personal protection equipment.[1395] Some used an analysis

[1393] *Barnes v. Ahlman*, 591 U.S. ___ (2020).

[1394] Linos-Alexander Sicilianos, "The Involvement of the European Court of Human Rights in the Implementation of Its Judgments: Recent Developments under Article 46 ECHR," *Netherlands Quarterly of Human Rights* 32, no. 3 (September 1, 2014): 235–62, https://doi.org/10.1177/016934411403200303.

[1395] Ginsburg and Versteeg, "The Bound Executive," 1524.

based on vulnerability to pronounce farther-reaching injunctions. Ecuador's constitutional court emphasized the state's obligation to take care of the homeless and vulnerable.[1396] The High Court of Malawi held that a general lockdown would be unconstitutional because the state had not adopted the necessary measures in light of the disproportionate burden such a lockdown would impose on the poor and vulnerable.[1397] In turn, the Supreme Court of Nepal, focusing on the poor, "ordered the government to develop a plan to ensure the constitutional right of food to those who were affected by the lockdown".[1398]

These decisions keep with the traditional liberal paradigm. As such, they do not create much space to rethink emergency in the way that vulnerability theory and/or transformative adjudication could. Nonetheless, they show that courts can and have steered governments away from purely repressive and restrictive approaches and advanced substantive equality goals. For the ECtHR, the French Councils, and the U.S. Supreme Court, moving away from the emergency paradigm would require the judges to go directly against the texts they are interpreting or drastically restrain the application of emergency provisions and overturn their own precedents. Such developments are rare in these courts' case law.

D. Conclusion

The antagonistic relationship of liberalism and emergency powers was present in Locke already and famously denounced by Schmitt. But its problematic consequences are becoming more and more salient as emergency powers are increasingly used to regulate normal aspects

[1396] Ginsburg and Versteeg, 1520.
[1397] Ginsburg and Versteeg, 1521.
[1398] Ginsburg and Versteeg, 1524–25.

of political and social life, both a symptom and a cause of liberal constitutionalism's failure.[1399] Consequently, the need to rethink emergency is increasingly urgent. Courts must be involved in this reflection. Emergency is a political issue, but courts are political actors. They can no longer hide behind political neutrality to further enforce mechanisms which are incompatible with the principles they have endeavored to protect. Their continued incapacity to constrain and limit emergency powers should alert normative and legal actors to the impossibility of a rule of law compliant liberal emergency.

Agreeing with Schmitt that liberal constitutional attempts to control emergencies are ultimately vain does not mean agreeing with his decisionist type. If liberal democracies cannot control emergency powers, they can abjure them. Rather than trying to correct the frame at the margins, liberals – and post-liberals alike – need to make a firm commitment to renounce emergency powers. Maybe then, with such drastic commitment, the ties binding Ulysses would be tight enough to prevent him from running again to the sound of the sirens.

[1399] Alan Greene, "Agonistic Constitutionalism and Accountability," *UK Constitutional Law Association* (blog), February 26, 2024, https://ukconstitutionallaw.org/2024/02/26/alan-greene-agonistic-constitutionalism-and-accountability/.

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1. ECHR

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2. France

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