



Jerzy Jaskiernia

Uniwersytet Jana Kochanowskiego w Kielcach
jerzyj@hot.pl

THE PROBLEM OF PROPORTIONALITY IN USING DEROGATIONS TO DEAL WITH THE STATE OF EMERGENCY UNDER ARTICLE 15 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS (THE COUNCIL OF EUROPE'S APPROACH)

1. Introductory observations

Professor Krzysztof Drzewicki belongs to the group of the best specialists in the field of human rights protection in Europe. This conclusion is based not only on K. Drzewicki's scholarly achievements of in this area. His most important achievements deal with right to development¹ and the analysis of social rights,² solidarity rights³ and other rights of the third generation.⁴ He is the author of publications dealing with universal human rights law,⁵ humanitarian law⁶ and

¹ K. Drzewicki, *Prawo do rozwoju. Studia z zakresu praw człowieka*, Gdańsk 1988.

² *Social rights in the Council of Europe* [in:] *Polska i Rada Europy*, ed. K. Machińska, 1990–2005, Warszawa 2005, pp. 134–156.

³ *The Right of the Solidarity as a Human Rights. Some Methodological Aspects*, "Nordic Journal of Human Rights" 1988, no. 4.

⁴ *Trzecia generacja praw człowieka*, „Sprawy Międzynarodowe” 1983, nr 10.

⁵ *Prawa człowieka w Karcie NZ i w Powszechnej Deklaracji Praw Człowieka*, „Sprawy Międzynarodowe” 1998, nr 3, pp. 9–24; *Protection of Human Rights and the Formation of Civil Society* [in:] *En Even Larger Union? The Eastern Enlargement In Perspective*, ed. R. Dehouse, Baden–Baden 1998; *Internationalization of Human Rights and their Juridization* [in:] *An Introduction to the International Protection of Human Rights. A Textbook*, eds R. Hanski, M. Suksi, 2nd ed., Turku–Åbo 1999, pp. 25–27.

⁶ *Koncepcja minimalnych standardów humanitarnych*, „Sprawy Międzynarodowe” 1999, nr 3, pp. 59–70; *Międzynarodowe prawo humanitarne: wyzwania u progu XXI stulecia* [in:] *X lat Polski w Unii Europejskiej: doświadczenia i perspektywy*, pp. 255–274.

Polish obligations in the area of human rights protection.⁷ He published several articles on the relations between the Council of Europe and Central and Eastern Europe⁸ and the functioning of the European Convention of Human Rights,⁹ including reforms of the European Court “on Human Rights.”¹⁰ He wrote original publications “concerning the Organization on Security and Cooperation in Europe (OSCE),”¹¹ especially on its activity with regard to minority rights protection,¹² and the functioning of the OSCE High Commissioner on National Minority.¹³ We cannot neglect K. Drzewicki’s activity in the Ministry of Foreign Affairs. He was a successful representative of the Polish Government in the European Court of Human Rights in Strasbourg. He also served, for example, in the office of the OSCE High Commissioner on National Minorities and was a deputy member of the Venice Commission.

These facts invite me to offer a paper dealing with the European system of the protection of human rights. One of the important problems concerning the European Convention on Human Rights is a question of derogations permitted under Article 15 of the Convention.¹⁴ The Parliamentary Assembly of the Council of Europe (PACE) discussed this issue recently in the context of derogations dealing with states of emergency, which was a basis for a resolution¹⁵ and

⁷ *Zobowiązania międzynarodowe Polski w dziedzinie praw człowieka, “Sprawy Międzynarodowe”* 1999, nr 3, pp. 59–70.

⁸ *The Future Relations between Eastern Europe and the Council of Europe* [in:] *Legal Aspects of a New Infrastructure*, eds A. Bloed, W. de Jonge, Netherland Helsinki Committee 1992.

⁹ *Wolność nauczania religii w szkołach publicznych na tle sprawy polskiej przed Europejską Konwencją Praw Człowieka, “Studia Europejskie”* 1997, t. 2, pp. 201–220; *Naczelny Sąd Administracyjny jako „sąd” w rozumieniu Europejskiej Konwencji Praw Człowieka: refleksje na tle wyroku „Potocka i inni przeciwko Polsce”, “Gdańskie Studia Prawnicze”* 2012, t. 28, pp. 99–111.

¹⁰ *Reforma Europejskiego Trybunału Praw Człowieka: filozofia zmian czy zmiana filozofii?, “Europejski Przegląd Sądowy”* 2006, nr 6, pp. 4–13; *Flexibility the Modes of Amending the European Convention on Human Rights: An Idea of a „Statute” for the European Court*, eds A. Eide, J.T. Möller, I. Ziemele, Leiden–Boston, pp. 248–250.

¹¹ *Triada wartości w trójkącie działań organizacji europejskich. Refleksje nad sukcesami i porażkami OBWE* [in:] *20 lat Polski w Radzie Europy. Rada Europy – Unia Europejska wobec wyzwań współczesnego świata*, Warszawa 2012, pp. 68–70.

¹² *Minority Protection within OSCE* [in:] *Managing Diversity Protection of Minorities in International Law*, eds D. Thürer, Z. Kędzia, Basel–Geneva 2009, pp. 103–104.

¹³ *Zalecenia tematyczne Wysokiego Komisarza OBWE do spraw Mniejszości Narodowych* [in:] *Państwo i prawo wobec współczesnych wyzwań. Księga jubileuszowa Profesora Jerzego Jaskierni*, t. 1, *Teoria i filozofia państwa i prawa oraz aksjologia demokracji i ochrony praw człowieka*, eds R.M. Czarmy, K. Spryszak, Toruń 2012, pp. 620–643.

¹⁴ L. Doswald-Beck, *Human Rights in Times of Conflict and Terrorism*, Oxford 2011, p. 89.

¹⁵ PACE Resolution 2209(2018) State of emergency: proportionality issues concerning derogations under Article 15 of the European Convention on Human Rights. Assembly debate on 24 April 2018 (12th Sitting) (see Doc. 14506, report of the Committee on Legal Affairs and Human Rights, rapporteur: Mr Raphaël Comte). Text adopted by the Assembly on 24 April 2018 (12th Sitting).

recommendation.¹⁶ Those documents are worth analyzing because they offer not only the general viewpoints of PACE's attitude to that problem, but this is also discussed in the context of recently claimed derogations by Ukraine, France and Turkey. That observation may lead to important arguments concerning proportionality when derogations are used in states of emergency.¹⁷

2. General attitudes of the Council of Europe towards using derogations under Article 15 of the European Convention concerning times of emergency

The Parliamentary Assembly has previously noted that it is the State's responsibility to take preventive measures to protect the interests of society in time of war or other public emergency threatening the life of the nation.¹⁸ Such situations may even require restrictive measures that exceed what is normally permitted under the European Convention on Human Rights¹⁹ ("the Convention"). Without appropriate guarantees, such measures create serious risks for democracy, human rights and the rule of law. Applying the proportionality test to both negative and positive obligations under the Convention may undermine any margin of appreciation of the Member States. This gives rise to the problem of overdetermination.²⁰ It also opens the way to the question of limits to evolutive interpretation of the Convention.²¹ The question is raised of whether the margin of appreciation doctrine means that European Court is simply waiving its power of review, or is it attributing responsibility to the domestic courts in the interest of healthy subsidiarity?²²

"The Convention is adaptable to any and all circumstances, continuing to regulate the State's actions even in the event of a national crisis. Article 15 of the

¹⁶ CMCE Recommendation 2125 (2018) State of emergency: proportionality issues concerning derogations under Article 15 of the European Convention on Human Rights. Assembly debate on 24 April 2018 (12th Sitting) (see Doc. 14506, report of the Committee on Legal Affairs and Human Rights, rapporteur: Mr Raphaël Comte). Text adopted by the Assembly on 24 April 2018 (12th Sitting).

¹⁷ J. Jaskiernia, *Bezpieczeństwo państwa a ochrona praw i wolności jednostki* [in:] *Świat wobec współczesnych wyzwań i zagrożeń*, ed. J. Symonides, Warszawa 2010, pp. 274.

¹⁸ PACE Resolution 1659 (2009) on the protection of human rights in emergency situations.

¹⁹ ETS No 5.

²⁰ M. Klatt, *Positive Obligations under the European Convention on Human Rights*, "Zeitschrift für ausländisches öffentliches Recht und Völkerrecht" 2011, Nr. 4, p. 693.

²¹ J.E. Helgensen speech: *What are the Limit of Evolutive Interpretation of the European Convention?*, "The European Court of Human Rights Strasbourg", January 28, 2011, p. 2.

²² D. Spelmann, *Allowing the Right Margin: the European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review*, "Cambridge Yearbook of European Legal Studies" 2011/2012, vol. 14, p. 416.

Convention allows States to derogate from certain of their obligations in time of war or other public emergency threatening the life of the nation".²³ "In no circumstances, however, does it allow national authorities to act without constraint. There can be no derogation at all from certain rights, as specified in Article 15; nor may derogations from other rights violate international humanitarian law or peremptory norms of international law, or procedural guarantees in such a way as to circumvent the protection of non-derogable rights. Fundamental safeguards of the rule of law, in particular legality, effective parliamentary oversight, independent judicial control and effective domestic remedies, must be maintained even during a state of emergency. Due democratic process, including separation of powers, as well as political pluralism and the independence of civil society and the media must also continue to be respected and protected".²⁴

Our societies have the choice between two roads: the growth of the extremes, withdrawal behaviour, nationalism, escalation of intolerance, even civil wars between cultural or ethnical or religious groups inside the population – or a multidimensional integration to guarantee security both for the state and human beings, the survival of our freedom-based societies and our values. To help European States to choose the second path, the European Court of Human Rights should be a helpful instrument, because it supposed to put forward measures to control genuine abuses and prevent states from authoritarian drifts. Therefore, it is important to study the case law on states' derogation in time of emergency, to see if it contains the conditions for the European Court of Human Rights to constrain member states to be reasonable.²⁵

Article 15 is a derogation clause. It affords to Contracting States, in exceptional circumstances, the possibility of derogating, in a limited and supervised manner, from their obligations to secure certain rights and freedoms under the Convention.²⁶ The text of Article 15 is based on the draft Article 4 of the United Nations draft Covenant on Human Rights, which later became Article 4 of the International Covenant on Civil and Political Rights (ICCPR).

The Court holds that the practice when lodging a derogation has been for the Contracting State to state that the measures it is taking "may" involve a derogation from the Convention. For this reason, in any case where an applicant complains that his or her Convention rights were violated during a period of

²³ PACE Res. 2209 (2018), B. Latos, *Klauzula derogacyjna i limitacyjna w Europejskiej Konwencji o Ochronie Praw Człowieka i Podstawowych Wolności*, Warszawa 2008, p. 98.

²⁴ PACE Res. 2209 (2018), § 2–3.

²⁵ M. Toulhier, *The European Court of Human Rights' Control over States' Derogation in Time of Emergency: Example of Effectiveness of the Lessons Learned from WW2*, "International Comparative Jurisprudence" 2017, no. 1, p. 18.

²⁶ European Court of Human Rights, *Guide on Article 15 of the European Convention on Human Rights. Derogation in time of emergency. Updated on 30 April 2018*, Strasbourg 2018, p. 3.

derogation, the Court will first examine whether the measures taken can be justified under the substantive articles of the Convention; it is only if it cannot be so justified that the Court will go on to determine whether the derogation was valid (for instance).²⁷ The Court has not been required to interpret the meaning of “war” in Article 15 § 1; in any case, any substantial violence or unrest short of war is likely to fall within the scope of the second limb of Article 15 § 1, a “public emergency threatening the life of the nation”. The natural and customary meaning of “public emergency threatening the life of the nation” is clear and refers to “an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed”.²⁸ The emergency should be actual or imminent; a crisis which concerns only a particular region of the State can amount to a public emergency threatening “the life of the nation”.²⁹ The crisis or danger should be exceptional, meaning that the normal measures or restrictions permitted by the Convention for the maintenance of public safety, health and order are plainly inadequate.³⁰ The Court’s case-law has never, to date, explicitly incorporated the requirement that the emergency be temporary and, indeed, cases demonstrate that it is possible for a “public emergency” within the meaning of Article 15 to continue for many years.³¹ Generally, the Convention organs have deferred to the national authorities’ assessment as to whether such an exceptional situation exists. As the Court stated in *Ireland v. the United Kingdom*: “it falls in the first place to each Contracting State, with its responsibility for ‘the life of [its]nation’, to determine whether that life is threatened by a ‘public emergency’”. By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle better placed than the international judge to decide both on the presence of such an emergency and on the nature and scope of the derogations necessary to avert it. Accordingly, in this matter a wide margin of appreciation should be left to the national authorities. Nevertheless, the Court

²⁷ *A. and Other v. the United Kingdom*, Application no. 3455/05, 19 February 2009, § 161; *Lawless v. Ireland* (no. 3), Application no. 332/57 (A/3), [1961], § 15.

²⁸ *Lawless v. Ireland* (no. 3), § 28.

²⁹ *Ireland v. the United Kingdom*, 18 January 1978, § 205; *Aksoy v. Turkey*, ap. 21987/93, 18 December 1996, § 70.

³⁰ *Denmark, Norway, Sweden and the Netherlands v. Greece* (the “Greek case”). *Denmark v. Greece*, Application no. 3321/67; *Norway v. Greece*, Application no. 3322/67; *Sweden v. Greece*, Application no. 3323/67; *Netherlands v. Greece*, Application no. 3344/67; report of the Commission, vol. 2, p. 1–2, § 153.

³¹ *Ireland v. the United Kingdom*, *Brannigan and McBride v. the United Kingdom*, Eur. Ct. HR, Series A, No. 258-B (1993) at para. 45; *Marshall v. the United Kingdom*, 10 July 2001, Application no. 41571/98) para 18 above; *A. and Others v. the United Kingdom*[GC], § 178.

had emphasised that States do not enjoy an unlimited discretion in this respect. The domestic margin of appreciation is accompanied by European supervision.³²

Beyond these constraints, the overarching principle of proportionality limits the action that may be taken, via the stringent test of what is “strictly required by the exigencies of the situation”. Normal measures or restrictions permitted by the Convention for the maintenance of public safety, health and order must be plainly inadequate before derogatory, emergency measures are permissible. A state of emergency that requires derogation from the Convention must be limited in duration, circumstance and scope. Emergency powers may be exercised only for the purposes for which they were granted. The duration of emergency measures and their effects may not exceed that of the state of emergency.³³

The State must, without any unavoidable delay, inform the Secretary General of the Council of Europe of the measures taken and the reasons for them, and of the date when such measures have ceased to operate and the Convention is again being fully applied.³⁴

3. Derogations used by the Member States and recommendations of the Parliamentary Assembly of the Council of Europe

3.1. Derogation by Ukraine

Ukraine notified the Secretary General of its derogation on 9 June 2015. It stated that the “public emergency threatening the life of the nation” consisted of the “ongoing armed aggression of the Russian Federation against Ukraine,³⁵ together with war crimes and crimes against humanity committed both by regular Armed Forces of the Russian Federation³⁶ and by the illegal armed groups guided, controlled and financed by the Russian Federation”.³⁷ Ukraine’s derogation

³² *Mehmet Hasan Altan v. Turkey*, § 91; *Şahin Alpay v. Turkey*, § 75; *Brannigan and McBride v. the United Kingdom*, § 43. See: *Guide on Article 15...*, p. 6–7.

³³ PACE Res. 2209 (2018), § 4.

³⁴ PACE Res. 2209 (2018), § 5.

³⁵ T. Kuzio, *Russia – Crimea – Ukraine: Triangle of Conflict*, London 1994, p. 48; D. Kiryukhin, *Russia and Ukraine: the Clash of Conservative Projects*, “European Politics and Society” 2016, no. 4, p. 459; D. Averre, *The Ukraine Conflict: Russia’s Challenge to European Security Governance*, “Europe–Asia Studies” 2016, no. 4, p. 721.

³⁶ PACE Resolution 2132 (2016), Political consequences on Russian aggression in Ukraine, Assembly debate on 12 October 2016 (33rd Sitting) (see Doc. 14130, report of the Committee on Political Affairs and Democracy, rapporteur: Ms Kristýna Zelenková). Text adopted by the Assembly on 12 October 2016 (33rd Sitting).

³⁷ PACE Resolution 2145 (2017), The functioning of democratic institutions in Ukraine, Assembly debate on 25 January 2017 (6th Sitting) (see Doc. 14227, report of the Committee on the Honouring of

concerns four specific laws adopted on 12 August 2014. It extends only to certain specified localities in the Donetsk and Luhansk oblasts. The notification specifies the Convention rights from which Ukraine derogates and indicates the nature of the circumstances in which the derogation may be withdrawn.³⁸

In this context, the Assembly reiterated its condemnation of the Russian aggression in Ukraine, in violation of international law and the principles upheld by the Council of Europe, and recalls the credible reports of violations of international human rights and humanitarian law by all sides to the conflict.³⁹ However, the Assembly was concerned about the provision in one of the Ukrainian laws permitting preventive detention for up to 30 days. Whilst it seems that this provision was not applied, its potential duration was assessed as possibly disproportionate. The Assembly was also concerned about the manner in which some of the other laws were applied, in particular administration of and material conditions at the crossing points between government-controlled and non-government-controlled territory, and the functioning of courts transferred from non-government-controlled territory to government-controlled territory.⁴⁰

The Assembly therefore recommended that Ukraine:

- 1) reconsider the utility and hence the necessity of maintaining the provision on 30-day preventive detention, which the Constitutional Court should be given the opportunity of examining;
- 2) make further efforts to enhance material conditions for people in the Donetsk and Luhansk regions using the crossing points between government-controlled territories and territories temporarily under the effective control of the Russian authorities;
- 3) make further efforts to ensure the proper functioning of, and sufficiency of resources for, courts transferred from territories in the Donetsk and Luhansk regions temporarily under the effective control of the Russian authorities;
- 4) ensure that parliamentary scrutiny of the emergency measures is sufficient and effective.⁴¹

Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee), co-rapporteurs: Mr Jordi Xuclà and Mr Axel Fischer). Text adopted by the Assembly on 25 January 2017 (6th Sitting).

³⁸ PACE Res. 2209 (2018), § 7.

³⁹ PACE Res. 2209 (2018), § 8. See also: PACE Resolution 2198 (2118) Humanitarian consequences of the war in Ukraine, Assembly debate on 23 January 2018 (4th Sitting) (see Doc. 14463, report of the Committee on Migration, Refugees and Displaced Persons, rapporteur: Mr Egidijus Vareikis). Text adopted by the Assembly on 23 January 2018 (4th Sitting). See also Recommendation 2119 (2018). PACE Resolution 2231 (2018), Ukrainian citizens detained as political prisoners by the Russian Federation, Assembly debate on 28 June 2018 (25th Sitting) (see Doc. 14591, report of the Committee on Legal Affairs and Human Rights, rapporteur: Mr Emanuelis Zingeris). Text adopted by the Assembly on 28 June 2018 (25th Sitting).

⁴⁰ PACE Res. 2209 (2018), § 9.

⁴¹ PACE Res. 2209 (2018), § 18.1.

3.2. Derogation by France

France notified the Secretary General of its derogation on 24 November 2015. The notification recalls that “on 13 November 2015, large-scale terrorist attacks took place in the Paris region” and asserts that “the terrorist threat in France is of a lasting nature”; later notifications prolonging the derogation refer also to “an imminent danger resulting from serious breaches of public order”.⁴² France’s derogation relates to its application of Law No. 55–385 of 3 April 1955 on the state of emergency (“the 1955 Law”), which grants a range of restrictive powers to the administrative authorities throughout metropolitan France and its overseas territories. The state of emergency has been prolonged on several occasions, sometimes with modifications made to the 1955 Law and its application. The notifications do not specify the Convention rights from which France derogated, this not being a requirement of Article 15.⁴³

The Assembly reiterated its condemnation of these terrorist attacks, which target the very values of democracy and freedom, recalling that since November 2015, France has repeatedly suffered further such atrocities.⁴⁴

“The Assembly noted with concern the various criticisms made of the state of emergency in France, including its use of subjective and insufficiently precise terms to define the scope of application and its reliance on posterior judicial review by the administrative courts, including on the basis of intelligence reports, instead of the prior authorisation by the ordinary courts required under criminal law. It is also concerned about the cases of improper behaviour by police during administrative searches and the application of emergency measures to situations not directly related to the grounds for the state of emergency. It noted that these matters have been carefully examined by the competent domestic courts. It welcomed the structured, continuous parliamentary oversight of the state of emergency and the close scrutiny given to it by national human rights structures, civil society and the media, to whose criticisms the government remained attentive”.⁴⁵

On 30 October 2017, France adopted a new law on “reinforcing domestic security and the fight against terrorism” (“the 2017 Law”), including measures with a similar aim to some of those previously available under the state of emergency, subject to enhanced legal guarantees. This permitted the lifting of the state of emergency and the withdrawal of the derogation. The Assembly, recognising the

⁴² S. Brouard, P. Vasilopoulos, M. Foucault, *How Terrorism Affects Political Attitudes: France in the Aftermath of the 2015–2016 Attacks*, “West European Politics” 2018, no. 5, p. 1084; A. Bogain, *Security in the Name of Human Rights: the Discursive Legitimation Strategies of the War on Terror in France*, “Critical Studies on Terrorism” 2017, no. 3, p. 498.

⁴³ PACE Res. 2209 (2018), § 10.

⁴⁴ PACE Res. 2209 (2018), § 11.

⁴⁵ PACE Res. 2209 (2018), § 12.

legal and political complexities involved, welcomed the end of the state of emergency in France, whose duration had become questionably long. It encourages the French authorities to ensure that the 2017 law is applied in full compliance with Council of Europe standards, including those of the Convention.⁴⁶

The Assembly recommended that France:

- review the 1955 Law, which remains on the statute books and could be used again in future, in light of recent criticisms and the availability of comparable measures under the 2017 Law, examining in particular concerns relating to definitions used in certain provisions, the effectiveness of judicial oversight, individual remedies for damage or misconduct committed by the authorities when implementing emergency measures and the possibility of using emergency measures for purposes without a direct link to the situation that gave rise to the declaration of a state of emergency;
- to this end, conduct a careful review of the implementation in practice of the recent state of emergency, involving representatives of the executive and administrative authorities, the legislature, local authorities, the judiciary and civil society;
- ensure that the 2017 Law is applied in full compliance with Council of Europe standards, in particular those of the Convention.⁴⁷

3.3. Derogation by Turkey

Turkey notified the Secretary General of its derogation on 21 July 2016, stating that the measures taken may involve derogation from the obligations under the Convention, permissible under Article 15. The notification refers to the failed coup attempt of 15 July 2016 and its aftermath, which, “together with other terrorist acts have posed severe dangers to public security and order, amounting to a threat to the life of the nation in the meaning of Article 15 of the Convention”.⁴⁸ Turkey’s derogation relates to the successive emergency decree-laws that have been passed under the state of emergency that was declared on 20 July 2016 and prolonged on several occasions since.⁴⁹ Turkey has notified the Secretary General of all prolongations of the state of emergency and of all the decree-laws. It has not explained whether there were particular circumstances to justify the pro-

⁴⁶ PACE Res. 2209 (2018), § 13.

⁴⁷ PACE Res. 2209 (2018), § 18.2.

⁴⁸ H. Taş, *The 15 July Abortive Coup and Post-Truth Politics in Turkey*, “Southeast European and Black Sea Studies” 2018, no. 1, p. 17.

⁴⁹ PACE Resolution 2156 (2018), The functioning of democratic institutions in Turkey, Assembly debate on 25 April 2017 (12th Sitting) (see Doc. 14282 and addendum, report of the Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee), rapporteurs: Ms Ingebjørg Godskesen and Ms Marianne Mikko). Text adopted by the Assembly on 25 April 2017 (12th Sitting).

longations. The notifications do not specify the Convention rights from which Turkey derogates, this not being a requirement of Article 15.⁵⁰

After the failure of the abortive coup in 2016, Turkey announced that it would derogate from the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights (ECHR) during the pronounced state of emergency. While it was claimed that the derogation was necessary to eliminate the remaining hostile factions, a sweeping purge followed, and human rights organisations have raised concerns over the deteriorating situation. This raises the question of whether human rights can actually be derogated or suspended during coup situations.⁵¹

“The Assembly reiterated its firm condemnation of the criminal attempt to overthrow Turkey’s democratically elected institutions and again fully acknowledges that these events were traumatic for Turkish society. It also reiterates its recognition of the multiple threats and challenges facing Turkey, the existence of a legitimate reason to declare a state of emergency, and Turkey’s right and duty to fight terrorism and address security issues in order to protect its citizens and its democratic institutions. The Assembly also firmly condemns terrorist attacks, which target the very values of democracy and freedom, recalling that since the coup attempt, Turkey has repeatedly suffered further such atrocities”.⁵²

The Assembly recalled the conclusions it reached on the state of emergency in Turkey.⁵³ It also recalls the relevant positions taken by the Congress of Local and Regional Authorities of the Council of Europe, the Council of Europe Commissioner for Human Rights, the Conference of International Non-governmental Organisations and the European Commission for Democracy through Law (Venice Commission), among others. On this basis, it considers that Turkey’s response to the unquestionably serious situation described in the derogation is disproportionate on numerous grounds, in particular:

- “1) the powers granted to the government have been used for certain purposes going beyond what is strictly required by the exigencies of the situation giving rise to the state of emergency;
- 2) the duration of the state of emergency has exceeded what is strictly required;
- 3) emergency powers have been used, without effective parliamentary or judicial oversight, to make permanent changes both to the status and rights of natural and legal persons and to legislation, including in areas of particular political and legal significance;

⁵⁰ PACE Res. 2209 (2018), § 14.

⁵¹ I.Y. Nagraha, *Human Rights Derogation during Coup Situations*, “The International Journal of Human Rights” 2018, no. 2, s. 195.

⁵² PACE Res. 2209 (2018), § 15.

⁵³ PACE Resolution 2156 (2017) on the functioning of democratic institutions in Turkey.

- 4) the overall impact of emergency measures on natural and legal persons has been excessive in scope, by failing to distinguish between different degrees of alleged culpability and by being permanent in effect;
- 5) delays in implementing a timely, effective remedy for such a large number of cases have unduly prolonged the impact of emergency measures on persons who may have been wrongly affected".⁵⁴

"The Assembly also reiterated its concerns about the wider situation in Turkey concerning political pluralism, local democracy, the judiciary, the situation of human rights defenders and civil society and the media, notably in relation to the application of anti-terrorism laws. This background heightens the Assembly's concerns in relation to the disproportionality of measures taken under the state of emergency; the Assembly will continue to follow up this issue. The Assembly is particularly concerned about the fact that on 18 April 2018, the President of Turkey called for the presidential and parliamentary elections, previously expected in November 2019, to be brought forward to 24 June 2018, just hours before the Turkish Parliament renewed the state of emergency for three months. In this respect, the Assembly recalls the clear position of the Venice Commission against the holding of elections or referenda under a state of emergency, when normal democratic freedoms may be severely restricted, as is currently the case in Turkey".⁵⁵

The Assembly recommended that Turkey:

- "1) immediately inform the Secretary General of all outstanding decree-laws introduced under the state of emergency;
- 2) review as a matter of the utmost urgency all dismissals of public officials based only on indirect or questionable evidence, with a view to the immediate reinstatement of those whose dismissal was not justified to a high standard of proof;
- 3) in order to ensure the timely availability of effective domestic remedies, expedite examination of outstanding applications by the Inquiry Commission for State of Emergency Measures, whilst ensuring its independence, impartiality and transparency, and by the administrative and superior courts of any subsequent appeals; and expedite examination by the administrative courts of appeals by other public officials dismissed under the state of emergency;
- 4) refrain from issuing any further decree-laws unless strictly required by the immediate exigencies of the situation as defined in the original notification of derogation;
- 5) use normal administrative and legislative processes for the introduction of any future measures that may be required;

⁵⁴ PACE Res. 2209 (2018), § 16.

⁵⁵ PACE Res. 2209 (2018), § 17.

- 6) continue its expert-level dialogue with the Council of Europe on state of emergency measures with a view to producing further concrete results such as the establishment of the Inquiry Commission for State of Emergency Measures;
- 7) bring an end to the state of emergency at the expiration of the current period, withdrawing the derogation to the Convention and thereafter using normal procedures to adopt any future measures that may be needed to address the security situation in the country, in conformity with Council of Europe standards, including those of the Convention as applied in full".⁵⁶

4. General PACE's recommendation to all parties of the European Convention of Human Rights dealing with using derogations

Beyond the particular cases of Ukraine, France and Turkey, the Parliamentary Assembly offered several general recommendations to all parties of the European Convention of Human Rights dealing with the using of derogations.

The Assembly recommended that all State parties:

- "1) exercise the utmost caution and restraint when adopting measures that might necessitate derogation from the Convention, and before doing so, explore every possibility for responding to the emergency situation using normal measures;
- 2) liaise with the Secretary General, as depository of the Convention, to ascertain whether derogating is necessary and, if so, strictly delimit the scope of any derogation;
- 3) should derogation be necessary, ensure that the Secretary General is notified immediately and, in any case, without any unavoidable delay, not only of the measures taken and the reasons therefore, as required by the Convention, but also of the Convention rights affected; and explain the justification for any extension of a derogation in time, circumstance or scope in the relevant notification to the Secretary General;
- 4) should a state of emergency be declared, constantly review the necessity of maintaining it and any measures taken under it, with, at the expiration of every period, a presumption against extending the state of emergency or, if it is extended, in favour of repealing it or, if not repealed, further limiting the scope of measures taken under it;
- 5) on the basis of such review, periodically provide information to the Secretary General, including in the context of any inquiry under Article 52 of the

⁵⁶ PACE Res. 2209 (2018), § 18.3.

Convention, on the evolution of the emergency situation and the implementation of the state of emergency, with a view to engaging in dialogue on the compatibility of the state of emergency with Convention standards;

- 6) ensure that the normal checks and balances of a pluralistic democracy governed by the rule of law continue to operate to the maximum extent possible, respecting democratic process and the authority of parliament and local authorities, the independence of the judiciary and national human rights structures, and the freedoms of association and expression, especially of civil society and the media.⁵⁷

The Assembly also recommended to the Secretary General of the Council of Europe:

- 1) as depository of the Convention, provide advice to any State Party considering the possibility of derogating on whether derogation is necessary and, if so, how to limit strictly its scope;
- 2) open an inquiry under Article 52 of the Convention in relation to any State that derogates from the Convention;
- 3) on the basis of information provided in response to such an inquiry, engage in dialogue with the State concerned with a view to ensuring the compatibility of the state of emergency with Convention standards, whilst respecting the legal competence of the European Court of Human Rights".⁵⁸

In the recommendation addressed to the Council of Europe's Committee of Ministers the Assembly recommended that the Committee of Ministers examine State practice in relation to derogations from the European Convention on Human Rights (ETS No. 5), in the light of the requirements of Article 15 and the case law of the European Court of Human Rights, the requirements of international law and the Assembly's findings and recommendations in Resolution 2209 (2018), with a view to identifying legal standards and good practice and, on that basis, adopt a recommendation to member States on the matter.⁵⁹

Final comments

Using the derogations in the state of emergency is permitted under the Article 15 of the European Convention of Human Rights. However, this situation brings about potential serious consequences in the area of human rights protection. The European Court of Human Rights has offered very precise interpretation of how to legitimately use those derogations. The activity of the Parliamentary Assembly

⁵⁷ PACE Res. 2209 (2018), § 19.

⁵⁸ PACE Res. 2209 (2018), § 20.

⁵⁹ CMCE Rec. 2125 (2018), § 2.

on the question of using derogations seems to signal that that right may be over-used by the Member States of the Council of Europe. The use of derogations by Ukraine, France and Turkey was carefully analyzed by the Parliamentary Assembly of the Council of Europe, which has offered several precise recommendations not only addressed to the above states, but having general meaning as well. The Assembly stated that all States Parties to the Convention “should a state of emergency be declared, constantly review the necessity of maintaining it and any measures taken under it, with, at the expiration of every period, a presumption against extending the state of emergency or, if it is extended, in favour of repealing it or, if not repealed, further limiting the scope of measures taken under it”. It also has asked the States to “ensure that the normal checks and balances of a pluralistic democracy governed by the rule of law continue to operate to the maximum extent possible, respecting democratic process and the authority of parliament and local authorities, the independence of the judiciary and national human rights structures, and the freedoms of association and expression, especially of civil society and the media”. The most important is that the Assembly has recommended that the Committee of Ministers examine State practice in relation to derogations from the European Convention on Human Rights (ETS No. 5), in the light of the requirements of Article 15 and the case law of the European Court of Human Rights, the requirements of international law and the Assembly’s findings and recommendations in Resolution 2209 (2018), with a view to identifying legal standards and good practice and, on that basis, adopt a recommendation to member States on the matter”.

This activity confirms the role of the Parliamentary Assembly as a “soul of Europe”,⁶⁰ which signal dangerous developments which have occurred in the area of democracy, the rule of law and the protection of human rights. It has also exposed the role of the parliamentarians to control the development in the field of human rights protection. This parliamentary dimension may bring about an important value and help to improve the functioning of the European system of human rights protection.

⁶⁰ J. Jaskiernia, *The Parliamentary Assembly of the Council of Europe*, Information Office of the Council of Europe, Warsaw 2003, p. 59.

Jerzy Jaskiernia

**THE PROBLEM OF PROPORTIONALITY IN USING DEROGATIONS
TO DEAL WITH THE STATE OF EMERGENCY UNDER ARTICLE 15
OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS
(THE COUNCIL OF EUROPE'S APPROACH)**

The Author analyzes the consequences of Article 15 sec. 1 of the European Convention on Human Rights, which stipulates that "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". The application of repeal measures can have serious consequences for the protection of human rights. The case law of the European Court of Human Rights provides precise instructions in this regard. However, research carried out by the Parliamentary Assembly of the Council of Europe indicates that this instrument may be abused in practice. Based on the analysis of its recent application by Ukraine, France and Turkey, the Parliamentary Assembly has made a number of recommendations aimed at preventing the abuse of extraordinary states to derogate from obligations in a way that undermines the essence of human rights protection. In particular, it is important not to undermine the system of checks and balance and to ensure a pluralistic democracy based on the rule of law, the implementation of competences of the parliament and local authorities, independent judiciary, freedom of assembly, information and media.