

# Democracy in a State of Emergency

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*Dedicated to my beautiful, little step daughter Noa, in the hope that she grows up in a better world where violence and war have no place.*

## Executive summary

Inspired by the recent terrorist attacks in Europe and France, this paper focuses on the consequences of the suspension of the full enjoyment of citizens' rights and freedoms, as well as the administration of justice in a state of emergency. The research question is: What are the dangers for France when violating the trias politica during a state of emergency?

The goal of the study is to evaluate the range of possible results of emergencies, based on the lessons from the past and the dynamic political environment in Europe. The study aims at offering strategies for the effective and constructive management of a state of emergency.

The declaring of a state of emergency interferes with the valuable enjoyment of human rights and fundamental freedoms. Some activist groups and non-governmental organizations express concerns about the violation of the principle of separation of powers. Throughout the dissertation, the behavioral patterns and responses of French citizens to emergencies are taken into account and outlined. An evaluation of the challenges for France identifies the European principle of social cohesion as the most optimal approach to order in the society. Social cohesion is the first necessary step towards successful conflict management in the state.

A state of emergency requires the concentration of powers, which questions the integrity and legality of the temporary measures. The analysis proves that even though human rights are the foundation of freedom, justice and peace in a society, it is necessary to derogate from certain citizen's rights for the greater goal of safeguarding the state. It is mandatory that all of the limitations measures are strictly required by the situation. The government is expected to give a complete explanation and justification of the emergency. Yet, the time for that may vary and a full openness will most likely be achieved after the end of the emergency.

The conclusion of the dissertation supports the argument that full enjoyment of human rights and freedoms comes from a well functioning state. Similarly, the existence and the well being of the state strictly depend on functional institutions. Thus, in emergency situations, the protection of rule of law, which guarantees the functioning of the institutions, has priority over citizens' rights. It is a process, which requires the right actions at the right time.

Even though the government suffers from criticism for its actions, it manifests the concern to preserve the space of liberty, equality and fraternity. With the end of the emergency comes the restoration of the environment for human rights. The post-emergency future of Europe depends on the political reaction to the French period of crisis.

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## Introduction

Human rights are more likely to be violated when a state of emergency is declared. Nation states may at times experience confrontational circumstances and crisis conditions, such as wars or civil unrest, which may require the curbing or suspension of certain citizen rights and freedoms in order to re-establish peace and safety. Frequently, threats come from internal social conflicts and international terrorist organizations. In order to overcome these threats, constitutions generally contain clauses for exceptional situations allowing States to deviate from their set laws, even though the constitutions set out rules for the government and rights of the citizens. This situation, generally referred to as a “state of emergency”, allows the retraction of all constitutional power from different structures in order to concentrate the power into a single authority. Such conditions may have devastating effects on civil society and justice. According to the first preamble paragraph of the International Covenant on Civil and Political Rights, human rights are “the foundation of freedom, justice and peace in the world” (UN, 1966).

This paper studies the system of derogation in emergency situations, and is oriented towards answering the research question: What are the dangers for France when violating the trias politica during a state of emergency?

The first chapter of the thesis analyses the lessons history offers on the development of the concept *state of emergency* over time. Beginning with the earliest examples of emergency in the Roman Empire, the paper presents a quick review in time over the risks of concentration of power and the tragic choices of states. Based on the theory of Giorgio Agamben, the thesis supports the argument that the main threat for democracies is the radical makeover of the traditional structures and forms, and the transformation of the democratic regime. Although the political environment and dynamics differ widely in every country, some general conclusions can be extracted.

In the second chapter, the relationship between the citizen and the state is evaluated. This relationship is crucial for the political and communal stability and is a central topic in political theories. The paper suggests that limitations and derogations from citizens’ rights in a state of emergency highly affect the community’s attitude towards the governing authorities, which inevitably leads to destabilization.

The paper further continues to examine the international instruments for the application and interpretation of Human Rights. Special attention is given to defining the absolute and the irrevocable rights during emergency. The legal framework analysis aims at further explaining the risk of suspending the principle of separation of powers.

The separation of powers is the point of focus of the study. The merge of powers during a state of emergency gives authorities the possibility of seizing the power. Most political theories deal with domineering legislative majorities. Contrary to those theories, this paper focuses on the responsibility of the executive branch in power.

The current case of France's maintained state of emergency poses questions for the risks and dangers of announcing the restrictive measures. The last chapter is dedicated to forming a projection into the future and making suggestions over the possible post-emergency effects on France. Consequently, recent innovative thinking gives several recommendations that suggest an effective management of states of emergency and justice.

## Methodology

In the form of a research question, the problem discussed in this paper is “What are the dangers for France when violating the trias politica during a state of emergency?”

The chosen research methods in the first part of the dissertation include a document analysis, theoretical base and the supporting literature. A qualitative technique was applied for collecting data and information from existing texts and articles. All sources of information – treaties, conventions, books, and academic and journalist articles – are reliable and properly referenced.

The introduced hypothesis and the ideas in the dissertation are based on existing documents. The main points of reference are the European Charter of Fundamental Rights, the International Covenant on Civil and Political Rights and the Universal Declaration on Human Rights. To aid the research, the theories from authors Charles Montesquieu, John Locke, Carl Schmitt and Giorgio Agamben are discussed. All documents presented in this paper are from public domains, such as The Hague University Library, and are publicly accessible.

The in-depth qualitative research is meant for generating theory, and it adopts a realistic and constructive approach to the empirical study. It is important to underline that France’s state of emergency is a current problem and the course of its development is not certain, but rather suggestive.

In the second part of the dissertation, the case study of France is debated. The qualitative analysis in the case study provides valuable figures and information. The conclusions and recommendations are made on the basis thereof. The secondary data collection reviews a range of information sources from Internet search engines.

Additionally, to support the thesis, an interview is used. This was chosen as the most flexible way of gaining qualitative information. For this, the former Dutch Minister of Defense, Prof. Dr. Ir. Joris Voorhoeve was selected. The conversation between him and the researcher was conducted in a semi-structured format. The interviewee has been informed in advance of the topic, which needs to be covered. The interview is structured on the base of some particular practical questions regarding the accountability of the executive authorities in France’s state of emergency.

The dissertation’s main goal is to test the current practice of emergency against the historical record of previously experienced emergencies. The qualitative research includes descriptive extracts from legal documents, theory books and from the interview. The author draws systematic, yet random conclusions on the range of post-emergency consequences for France.

## History and development of the state of emergency

When governments announce a state of emergency, the measures they take are rather conservative. The purpose of emergencies is to preserve the basic constitutional order from hostile peril. Yet, history proves that despite the necessity for the declaration of a state of emergency for safeguarding the state and its citizens, such means generally lead to a degree of destabilization.

Early examples of the use of a state of emergency can be traced back to the Roman Empire in the Fifth Century B.C., where the constitution allows the Senate to temporarily appoint a single person, who independently raises an own army and makes independent decisions. In a sense, this person may be considered a dictator who has the right to suspend rights or legal processes without being liable (Hornblower & Spawforth, 2014, p. 236). This all would be done in the name of victory. The threat to constitutional order requires an absolute separation between the Senate and the head of state. Therefore, the head of state is restricted from any legislative power.

The idea that the government can use repressive means in the name of the "common good" was theoretically explained for the first time by Machiavelli in "The Prince", 1532. Unlimited power can seem justified in the context of contemporary events. Therefore, "the end justifies the means" (Machiavelli, 1988).

The practice of justifying all governmental acts which are contrary to morality and law, in the name of national interest, is supplemented during the 30 year war (1618 – 1648) as *raison d'Etat*<sup>1</sup>. A typical example is the support that Catholic France gives to the Protestant Princes to counteract the hegemony of the Holy Roman Empire (Dooley & Patten, 2015). It can be stated that the end of the 30 year war marked the beginning of the modern international relations, in which the strength of the state is a priority. Additionally, secularism overcomes religion and a new understanding of international stability and balance of power emerges (Dooley & Patten, 2015).

With the end of the Eighteenth Century, the French revolution put the absolute monarchy to an end, and a limited government came to power. This marks the beginning of the new era of *trias politica* as an essential principle of modern democracies. The new post-revolution Constitution provides article 92 which allows derogation from the constitution rules. In the following centuries, increasingly more French laws include similar clauses (Cropf & Bagwell, 2016).

The points discussed in this chapter suggest that public international law lacks a concrete definition of the term *state of emergency*.

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<sup>1</sup> *Raison d'Etat*: The national interest is the reason for a political action, and the common interest is its justification.



In his books "Dictatorship" and "Political theology", Carl Schmitt makes perhaps the closest statement to this effect. Schmitt's aim is to place the concept of emergency into a legal context. In "Political Theology" (1922), he establishes an essential proximity between the concepts of emergency and sovereignty. The author defines the term sovereign as "the one who decides on the state of emergency" (Schmitt C. , 2010). With that, he shows that sovereignty ensures its grounding in the legal order. According to Schmitt, states of emergency and states of exception cannot be ruled by any legal model. Thus, emergency remains outside the normally valid legal order, yet it still belongs there. It is important to keep in mind that emergencies need a solid legal base, in order to avoid abuses of power.

The state of emergency may be enforced in different forms. Usually, during war, the dictatorial rights are delegated to a third party. Offensive public authorities against civil society are especially acute in the period between the two World Wars, whose main characteristic is the crisis of parliamentary democracy (Schmitt & Kennedy, *The Crisis of Parliamentary Democracy*, 1988, pp. 15-16). In many countries, the imposition of totalitarian, authoritarian or just dictatorial regimes, leads to the degeneration of the Parliament as a public institution.

"Dictatorship" and "Political theology" are supplemented by the second part of Giorgio Agamben's book "Homo Sacer". According to Agamben, a main feature of the state of emergency is the merge of executive and legislative acts. A typical case is the Nazi regime, which constantly repeats that "the words of the Fuhrer have the force of law." From a juridical perspective, it can be stated that the Third Reich as a whole represents a single state of emergency lasting 12 years. To illustrate, in response to the severe economic emergencies, cultivated by the Versailles reparations regime and the overall war depression, the Weimar Constitution endowed emergency powers. Even though article 48 of the Constitution guaranteed regulations by law, the protracted use of emergencies did not allow such measures to be taken. This provision served as a great tool for Hitler to usurp unregulated powers. (Agamben, 1998, pp. 95-97)

In many modern democracies, it is a regular practice to create laws through governmental decrees, which are later ratified by the Parliament. In accordance with Agamben's theory, it can be argued that contemporary Republics are no longer parliamentary but governmental. From such perspective, a state of emergency is more likely to be considered an isolation of the "power of law" by law, than a merge of powers.

This historical analysis supports the thesis of Agamben, that the state of emergency is located right on the border of interaction between the legal and the political realms. It represents a point of disequilibrium between public law and political act. If the exceptional measures of a state of emergency are the result of a political crisis, they will fall into the paradoxical situation to be legal measures that cannot be understood legally. Threats to national security strengthen the powers of

the executive authorities, while violating the principle of separation of powers and limiting civil rights and liberties in peacetime. These threats require the development of a conceptual framework and regular updating of the legal framework regarding emergency. Consequently, institutional design brings changes to the political culture, which in turn changes the institutional design. Emergencies are severe threats to the constitutional order, due to the limitations on the monitoring and controlling of the executive branch of government. Because of the resulting absence of interdependency between powers, a temporary minority usurps the political power. Therefore, even if a state of emergency is required for security measures, the weak point remains to be that the public pressure for justice and the authorities' desire for power eventually lead to the rise of conflicts.

The challenges to having clear boundaries for the necessary emergency measures are both time and subject related. Emergencies tend to provoke the violation of human rights violations and the limitation of individual liberties, justified by the existence of new more serious threats. The terrorist acts and upheavals are meant to shift the balance between security and liberty. However, this is not a zero-sum game, meaning that less liberty does not in essence increase the level of security. Many measures are also disproportionate, mainly with respect to minorities. For instance, in the aftermath of the Nine-eleven events in the USA, mainly Arab-Americans and Muslims continue to be targeted. Such an imbalance in the distribution of rights and freedoms allows the liberties of the few to be traded in too quickly for the purpose of increasing the security of the many.

In conclusion, analyzing the history of declared states of emergency teaches people that temporary measures may last longer than the emergency itself. The concentration of power and the derogations from rights might become part of the legal system and be used against the set legal order.

## Civil Society versus Political State

In the realm of political culture and political stability, the relationship between the citizen and the state plays a central role. Such relationship is one of the oldest matters of discussion amongst political theorists. It is already present in one of the foundations of modern European Political Science – the book “Politika” by Aristotle in 335 – 323 B.C.E.

Aristotle’s main point is that people are by nature political creatures; therefore, people are created to live in a community. Unlike family, in which procreation is the purpose, the state is formed for the purpose of moral communication between people. The state is an expression of consensus on the virtues. The state, in that sense, is actually a point of interaction and communication between people for achieving a better life. Aristotle writes:

*“A citizen is one of a community, as a sailor is one of a crew; and although each member of the crew has his own function and a name to fit ... The aim of all the citizens, however dissimilar they may be, is the safety of the community, that is, the constitution of which they are citizens.”*

Aristotle implies that citizens should at all times wish for the well being of the community and should at all times be a necessary part of safeguarding the community. Similarly, the community may impinge on the citizen – through rules, compulsions, restrictions and enforced behavior. (Garver, 2011, p. 81)

In “A Discourse on Inequality”, Rousseau suggests that such rules and limitations inevitably affect the individual’s liberty and lead to conflicts:

*“Natural Man is everything to himself; he is a numerical unity, a complete entity, who has no sympathy except with himself or his mate. Man in civil society is only a fractional unity which belongs to its denominator and whose value is in his sympathy with the whole, the social body ... He who wishes to preserve in the civil order the primacy of natural desires, does not know what he wants. Always in contradiction with himself, always floating between his desires and his duties, he can never be either man or citizen; he can seem good neither to himself nor for the others.”*

(Scott, 2006, p. 77)

An acute clash between an individual’s freedom and the community’s needs may lead to citizen’s disaffection or even hostility associated to rebellious attitude and acts. Like Rousseau, Hegel and Marx also support the theory that the power of alienated citizens is in enforcing radical changes in the political and social systems through revolution (Savio, Walker, & Dunayevskaya, 2014). Communal stability, therefore, is highly dependent on the attitude of the citizens towards the political system, and vice versa.

In conclusion, when discussing the theory and the practical application of modern constitutionalism, it is of fundamental importance to make a distinction between the political state and the civil society. The political state embodies the unity of a nation around the idea of the common good. The civil society furthers the interests of various private and public actors. (Scott, 2006, p. 59)

The distinction is based on the understanding that the state, as a political and a legal system, cannot always be fully equated with legal order. The distinction, political state versus legal order, is especially seen in a state of emergency, in which the general rules cannot be applied to overcome the crisis and an enactment of essentially unlimited power is needed. In such situations, the existing legal order is to some extent extinct, for the benefit of the continued existence and stability of the state.

Declaring a state of emergency is a restrictive measure aimed at protecting the basic design of constitutional order from specific threats. Even though emergencies are necessary, they may cause destabilization or even destructive results.

## **Instruments for interpretation and application of Human Rights**

The problem of the legal status of citizens is of particular importance in terms of the creation and strengthening of the civil society. At the core of every society stands the citizen with his rights and legitimate interests. Therefore, the nature and the amount of provided citizen rights and freedoms are a way of measuring the development of democracy.

Constitutions outline the legal status of citizens by following a number of principles, one of which is the equality of citizens. The idea of equality among members of society emerges from the theory of natural rights, according to which every person is born with the inalienable rights of life, liberty and property. The main idea this concept brings is that in the natural state of society all individuals are free and equal. Natural freedom inherently implies natural equality, which was conceived as the equality in the right to freedom. Over time, the concept has acquired the contemporary content, namely the equality of rights of all individuals. Similarly, equality of all citizens before the law is a fundamental principle of any democratic society. The Constitution is the supreme law. It is the basis of the existing legal system and the foundation upon which the state order is built. The Constitution legally enshrines basic principles and values in the state.

The principle of equality is proclaimed in all international human rights instruments. Article 1 of the Universal Declaration of Human Rights, adopted by the UN in 1948, reads: "All human beings are born free and equal in dignity and rights". (UN, 1948)

Article 2(1) of the International Covenant on Civil and Political Rights (ICCPR) states: "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status". (UN, 1966)

The Convention for the Protection of Human Rights and Fundamental Freedoms, which was adopted by the Council of Europe, states that "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status". (ECHR, 2010)

The ICCPR, the European Convention on Human Rights and the American Convention on Human Rights all specify rights from which no derogation is possible.

Whether it is caused by natural disaster, internal or external threat for the community, the state of emergency is the most vulnerable period of time for human rights. A state of emergency requires the limitation or derogation from citizen's rights, as declared in article 4 of the ICCPR, article 15

of the European Convention on Human Rights and article 27 of the American Convention on Human Rights. After the adoption of the first international tool establishing and protecting Human Rights – The Universal Declaration of Human Rights (1948), the ICCPR became the first human rights tool that contains a derogation clause: Article 4. The clause outlines procedural and substantive protecting measures, in order to guarantee the absence of abuses. The sole purpose of the clause is to protect individuals and the state in times of solemn emergency. (UN, 1966)

Sovereign countries, which are signatories to those conventions, can derogate from certain compulsions and responsibilities when a national state of emergency is declared. The only admissible reason for which the State is allowed restrain from obligations is danger for the safety and life of citizens or danger for the independence of the country.

It is argued that some states, however, undergo states of emergency to maintain power, to repress threatening minorities' upheavals or to prove domination (Sajo, 2006). The unilateral process of decision making and derogation from citizen's rights endangers the preservation of human rights. For that reason, it is crucial to outline an effective management of emergencies. According to international law, the scale of derogation from obligations is restricted and only temporary. The restriction depends on the nature of rights derogated from.

It is generally acknowledged that all human rights are equally important and equally protected. Hence, in the situation of emergency this understanding is no longer applicable. For that reason, some basic rights are considered to be fundamental rights. Fundamental rights are non-derogable rights, for the purpose of ultimate protection in all situations (UN, 1966).

To steer clear from confusions, it is crucial to underline that international law recognizes non-derogable rights and absolute rights as two different aspects. This separation is important for the correct interpretation of human rights. Absolute rights are not a subject of limitation on any grounds, at any times and by any means. To exemplify, the right to life is not absolute, it is a fundamental right. This means that the right to life can be limited in some situations under the strict conditions of necessity and proportionality. The right to life is a non-derogable right, which means that even if limited, it cannot be suspended under a state of emergency.

The following table presents the absolute rights listed in the ICCPR:

Article	Description
Article 7	Freedom from torture and other cruel, inhuman or degrading treatment or punishment
Articles 8(1) & 8(2)	Prohibition on slavery, slave-trade and servitude
Article 11	Freedom from imprisonment for failure to fulfill a contractual obligation
Article 15	Prohibition on the retrospective operation of criminal laws
Article 16	Recognition as a person before the law
Article 6(3)	Prohibition on genocide
Article 9(1)	Prohibition on prolonged arbitrary detention
Article 2(1) & 26	Freedom from systematic racial discrimination

(UN, 1966)

All other rights are non-absolute and might experience limitations or suspensions, where necessary, proportionate and justified.

Fundamental rights bind the legislative, executive and judicial branches of government. The law enforcement organs, and especially the courts, are obliged to monitor the respect of fundamental rights in every case, within the overall control on legal order. In legal theory and in constitutional practice, it is believed that judicial control regarding fundamental rights is *conditio sine qua non*<sup>2</sup> (Federico, 2011). In the concept of basic and constitutional rights, only the rights which can be directly protected by the court have the character of individual rights and genuine fundamental rights.

Constitutions allow the restriction of fundamental rights by law, but in some states they do not contain the necessary constitutional guarantees to preserve the fundamental core of law, which should not be undermined by legislative or Constitutional permitted limits. This legal requirement is a guiding principle of fundamental rights in the developed countries – it is known as the “Principle of proportionality and the guarantee of essential content”. (Bogdandy & Sonnevend, 2015)

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<sup>2</sup> Conditio sine qua non (lat.) : An indispensable condition

After examining the international legal instruments for application and interpretation of Human Rights, it is concluded that contemporary legal theory formulates the following basic requirements in the nature of guarantees:

1. The core of the fundamental rights must be clearly delineated and within these limits it should not be affected;
2. Permissible limit in the fundamental rights should match the public interest as a reason for the restriction;
3. The restriction of the fundamental rights should be measurable in order to have scale and subsequent judicial review. All this affects another key principle, namely the principle of proportionality within an acceptable limitation.

The Constitutions of democratic countries provide with rules and principles for possible temporary restriction on certain citizens' rights. The parameters of this limitation, however, are strictly defined in all recognized conventions:

1. The limitation is only temporary;
2. Temporary restriction is permissible only in explicitly mentioned cases of war, martial law or a state of emergency;
3. Restriction is permissible only by law:
  - The Constitution should not allow limitations on the rights to life, private trial, privacy, the freedom of conscience and religion.

The list of non-derogable rights under Article 4 of the ICCPR is somewhat related to *jus cogens*<sup>3</sup>. In international law, the principle of peremptory norms is recognized by the international community as a whole, which guarantees the invincibility of fundamental rights (Nieto-Navia, 2001). Next to the fundamental rights, Article 4 of the ICCPR includes the right to freedom of thought, conscience and religion as non-derogable. Similarly, the suspension of non-derogable rights cannot be justified in emergencies.

As explained earlier, all rights that are absolute are by nature non-derogable, therefore, they cannot be suspended as a response to grave public threats. In addition to the absolute rights, under article 4(2) of the ICCPR, the following table presents other non-derogable rights, which have to remain intact even during a state of emergency:

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<sup>3</sup> Jus cogens (lat.): Peremptory norms



Article	Description
Article 6(1)	The right to life
Article 6(2)	Prohibition on re-introduction of death penalty once it has been abolished
Article 7	Prohibition on torture and medical or scientific experimentation without consent
Article 9(1)	Prohibition on taking hostages, abductions or unacknowledged detention
Article 10	The right of persons deprived from liberty to treatment with humanity and respect
Article 18	Freedom of thought, conscience and religion
Article 20	Prohibition on propaganda for war and advocacy of national, racial, religious hatred that constitutes incitement to discrimination, hostility of violence

(UN, 1966)

The purpose of both derogation and limitation clauses is to preserve the rights of citizens. The difference is in the context in which they are used. While derogations are strictly used in states of emergency, limitations are applicable in peaceful situations. Under the limitation clause, it is clear that rights are not absolute and they are meant to keep the equilibrium between personal and community needs. In particular, the principles of public order, welfare, morality and mutual respect in democratic states require limitations. Limitations are therefore, embodied in human rights, whereas derogations may fully suspend those rights.

A primary risk for abuses and violations of human rights is in the fine difference between the two clauses in times of emergency. Limitations on rights are considered by states as ordinary, legal, and can be permanently enforced by law. Consequently, in a state of emergency, authorities may legitimately impose abusive derogations by the means of limitations.

## The Separation of Powers

The separation of powers is a denial of concentration of power in the hands of an absolute monarchy. For the first time, Montesquieu separates the power in legislative, judicial and executive branches in his book “The spirit of the laws”, 1748. They represent different bodies – the parliament, government, and the courts. The legislature is realized by political representatives of the nation, the executive power is given to the rulers and the judicial matters are realized in the name of the state. Montesquieu outlines the necessary mechanisms for controlling and limiting the branches interrelation. The different branches are not authorized to involve in the functioning of the others. Such separation, however, does not mean a rivalry between those branches. In order for the State to function properly, the three powers have to cooperate and balance each other. Mechanisms for balancing the interaction between the three branches are necessary. The essence of *trias politica* is to differentiate the functions between various bodies. (Cohler, Miller, & Stone, 1989)

Constitutions proclaim the principle of peoples’ sovereignty and the power of the people. In democracies, the State and the governmental bodies are obliged to express the will of the people. As explained in the chapter Civil Society versus Political State, the will of the people (the civil society) is defined by the interests of different social groups and political powers. The state is comprehensive, sovereign and unitary. The comprehensive nature of governmental power is clearly embodied in its authority to bring together all members of the society and it influences every structure of the social system. The sovereignty of the state can be observed in the interaction with other non-governmental authorities, where the state is always superior (Krasner, 2001). Hereby, separation of powers should be understood as separation of the functions of different organs of the State and not as the opposite of unity.

The executive power is based on coercion, authority and influence. Coercion finds place in the enforcement of legal, administrative and disciplinary sanctions, as well as economic measures. It is important to keep in mind that the authority of the executive power occurs in the accord of the legal subjects to voluntarily cooperate; therefore, the source of the power is the people. Naturally, in the implementation of state power, relationships of domination of one entity over another subordinate entity are observed. (Sagos, 2015)

The risk during a state of emergency is that the temporary expulsion of democratic rules and rights may lead to a political take-over of power, turning the executive branch into an abusive organ that may disregard human rights. For that reason, states of emergency may be truly dangerous for democracies which exist to preserve those rights and freedoms.

Furthermore, the greatest risk falls on the executive branch, because it is the one offering the greatest opportunity for usurpation of power. The executive branch is unitary and possesses the power of decision-making. Nonetheless, the executive branch is in charge of the military and the governmental resources of the state. These characteristics make the executive branch so powerful, that a very limited number of courts or legal norms may prevail over it, even though legislative and judicial branches are of major importance prior to emergencies. (Sagos, 2015)

## Case study: France 2015 – 2016

### 1. Introduction

This chapter studies the significance that France gives to the terrorist attacks in Paris, which put the year 2015 in a black frame. The first series of violence began with the terrorist act against the weekly satirical “Charlie Hebdo” on January 7, 2015. During the same year, the capital became the target of multiple public attacks on November 13, which resulted in 130 fatal casualties and many more injured. On that day, French President François Hollande announced a national state of emergency in response to the threat. The emergency gives the executive authorities the power to enforce house raids, searches and arrests without the necessary judicial oversight. In addition, the regulation places restrictions on public gatherings and events. In accordance with the Parliament, the temporary measures have been prolonged twice and a third extension is being discussed. (Chrisafis, France seeks to extend state of emergency until end of July, 2016)

The multiple extensions of the current state of emergency of France naturally lead to concerns about the preservation and the violation of human rights in democratic France. The dilemma is whether the Islamic radicals, who do not accept the basic principles of democracy, or the strong fist of the state, which prevents threats at the cost of limiting civil liberties, is more harmful and dangerous for the civil society.

### 2. Constitutional footing

The state of emergency is a rarely used mechanism in France that gives broad powers to the executive branch. The measure has been applied for the first time since the end of the Second World War. A special law, established during the Algerian War of Independence (1954-1962), allows the prohibition of the free movement of people and vehicles, the introduction of security areas with limited access and the prohibition of access of persons interfering with the activities of public authorities. The law also allows displacement of citizens, searches without the necessary court order and control over the media. (Chrisafis, France seeks to extend state of emergency until end of July, 2016)

In order to boost the emergency police powers, it is necessary that President Hollande guarantees the constitutionality of these powers. The asset that France needs for a solid legal grip on the situation is the use of constitutional amendments enshrining the state of emergency. Under the French law, the decision of the National Assembly prevails in case of disagreement on standard governmental legislations. Yet, when it comes to alteration of the *sacrosanct*<sup>4</sup> Constitution, both

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<sup>4</sup> Sacrosanct (Fr.): Extremely sacred

the Senate and the Assembly are required to voice their consent on an identical bill before the Congress in Versailles votes on it. (Severson, 2016)

Constitutional amendments, however, may put the President in a vulnerable position. As the recent past shows, the initially proposed package with controversial changes in the Constitution, including the deprivation of French nationality from persons with a dual nationality convicted on the count of terrorism, has been abandoned by Hollande (Nossiter, 2016).

The first challenge for the President appears in the left wing criticism for an implied division between the “indigenous” people and the ones with foreign background. During her resignation from office in protest of the bill, Minister of Justice Christiane Taubira speaks of an uprising Socialist class (Chrisafis, 2016). In this matter, the measure enshrining emergency can be interpreted as an act against the essential pillar of French citizenship and identity.

Even though the bill is finally modified to refer to deprivation of nationality from all French citizens convicted in crimes of terrorism, the principle of statelessness opens a new front for an opposition from the right wing (BBC, Paris attacks: Hollande drops plans to strip nationality, 2016). Internal conflicts among both right and left wing political sides are expected to obstruct constitutional changes.

Furthermore, the unrest of human rights activists, who are concerned about the expansion of mass surveillance, abusive police powers and impingement on civil liberties, puts the government in an additional difficulty. The doubt that emerges is whether Hollande’s concentrated security efforts will actually unite the nation or divide society.

### **3. Liberal democracy in a state of emergency**

While France is in a national state of emergency, the government bares criticism for undermining democracy. Human rights activist groups and non-government organizations remain worried about disproportionate limitations and power abuses. Yet, it is of major importance for the French citizens to be prepared to comply with some limitations on individual liberties, in return for security and the protection of future liberties.

In a communiqué with the French government, United Nations human rights experts convey their concerns for ambiguity and imprecision of some of the provisions of the state of emergency (UNOHCHR, 2016). These include the freedom of opinion and expression, the rights to freedom of peaceful assembly and of association and the right to privacy.

“While exceptional measures may be required under exceptional circumstances, this does not relieve the authorities from demonstrating that these are applied solely for the purposes for which

they were prescribed, and are directly related to the specific objective that inspired them.” (UNOHCHR, 2016)

In an interview for this thesis, Dutch former Minister of Defense Professor Dr Joris Voorhoeve (Appendix 1) explained that the most important facet for assuring the credibility and legality of the emergency measures is a good emergency legislation. The emergency legislation should be fully justified by the government or a parliamentary committee. Yet, the time for a complete justification may vary and a full openness will most likely be achieved after the end of the emergency.

Human rights remain important and under the principles of liberal democracy they have to be guaranteed. Full enjoyment of human rights and freedoms comes from a well functioning state. Similarly, the existence and the well being of the state strictly depend on the functioning of its institutions. Thus, in emergency situations, the protection of rule of law, which guarantees the functioning of the institutions, has priority over citizens' rights. It is a process, which requires the right actions at the right time. (Appendix 1)

Differentiating human rights from citizen rights in a state of emergency is challenging, yet necessary for the society. At first glance it seems that there is no difference, but the difference is fundamental. Replacement of the focus from guaranteeing the individual rights to protecting the collective interests is an essential course in emergency situations.

With the terrorist attacks, the spirit of Europe suffered a heavy blow, but managed to mobilize people to go on the streets. At some point, the citizens realize that the attack is against their own values. Therefore, it is crucial that the citizens understand the shift towards the protection of collective rights and future freedoms. The key for an effective management of the public anxiety is a complete legal basis for actions and full explanation for the taken measures in the emergency (Appendix 1).

Even though the government suffers from negative and critical reactions to its actions, it manifests the concern to preserve the space of liberty, equality and fraternity. With the end of the emergency comes the restoration of the environment for human rights.

Liberal democracy has faced many crises and has come out victorious in the First World War, Second World War and the Cold War (Furedi, 2014, pp. 118-119). Other regimes have collapsed in the meantime under external threat or internal weight. In fact, in the modern world there is a different model of democracy, rather than liberal democracy, namely Constitutionalism, which represents the combination of sovereignty and the protection of individual rights and freedoms.

Schmidt supports the theory that the inability to solve extraordinary situations makes a constant authoritarian regime necessary (Dyzenhaus, 1998, p. 194). However, the last hundred years have

not confirmed this theory, nor it is likely for the state of emergency in France to slide into authoritarianism.

#### 4. The war on terrorism in united Europe

The metaphor "war on terrorism" was introduced for the first time in the United States after the events of September 11, 2001 (GPF, 2011). The war on terrorism mobilizes people to create an idea of a clear enemy. For France, the face of terrorism is DAESH, located in Syria and Iraq. It seems to follow that France and Europe should organize forces against DAESH. However, as the US experience shows, an escalation of ground operations may have unintended consequences if they are not well secured. The main issue is not in the feasibility of expeditionary forces, but in the effectiveness and the results of such a war on Europe. No matter how great the temptation is for a radical response to violent threats, it must be carefully considered in all of its complexity. Moreover, it is questionable whether such measures will automatically reduce the terrorist peril, due to the fact that the extremists in France are European citizens (Farmer, 2016). The strategy of the US and NATO in the Middle East operations needed to be reviewed and the tragic events in Paris serve as a ground for the international community to do so as quickly, intelligently and efficiently as possible.

The term "war" does not fully cover the complexity, durability, and the multilateral nature of the threat which France currently faces. Terrorism is one of the largest decadences of the human race. Regardless of the cause, terrorism is never justified or understandable. What distinguish Europe from the radical organizations are the democratic fundamental values and rights to dignity, freedom, life, cohesion and well being.

Many analysts say that the terrorist attacks of November 13 for the first time include suicide attacks on the territory of France (BBC, 2015). In 1897, Emile Durkheim publishes the book "Suicide" (Sennett, 2006). When Durkheim makes his typology of a suicide, he introduces a form of suicide called anomic suicide. The term introduced by Durkheim is the most developed concept in sociology (Sennett, 2006). Anomic suicide and anomic terror try<sup>5</sup> to counteract the system of norms, values and rules in an operational European state.

When it comes to institutional Europe, it reacts to threats in the scale of its own capabilities. On the one hand, it is of vital importance for France to receive full institutional support from the European Union in the management of the emergency. On the other hand, the European institutions may considerably change after the terrorist attacks in Paris. The ideological and liberal Europe is likely to transform also because of the reactions of the political Europe.

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<sup>5</sup> "Atentat" comes from the Latin *tento*: trying; attempts to intimidate.

In regard to the state of emergency, the political parties in Europe tend to pull towards the center-right course, which naturally imposes on France the image of a nationalistic state (Chrisafis, 2016). This is in a profound controversy with what is actually a European project. The strength of the European project is that it can never be finalized, due to its dynamics and diversity. The European political model functions because of its incompleteness. It continues to operate only until all tasks are completed and its borders are defined. For that reason it can be stated that Europe is not likely to collapse before it is fully accomplished.

The French response to the terrorist attacks is to shift the balance between civil liberties and security. Despite the fact that the French authorities ensure perpetual entry and exit from the country, they severely test the idea of common Schengen area, proof of which is the re-introduction of border control with Belgium (EMN, 2016).

The refugee crisis undoubtedly intensifies the discomfort of countries in Western Europe. Schengen provided the refugees with an easy channel of access from territories in the Middle East and Africa. After the attacks in Paris, French Interior Minister Bernard Cazeneuve requested "coordinated and systematic controls" on the borders between European members (Holehouse, 2015). As Marine Le Pen could argue, no border controls means no security, but it is important to underline that the idea of common external borders is fundamental to the European Union. It is questionable how effective the return of border checks will be in the war on terrorism.

The temporary suspension signals a stressful situation, yet, it is not something that can put the EU into question. Moreover, the terrorist acts should not frighten Europeans; on the contrary, they should rather strengthen the solidarity and the feeling that social cohesion is much stronger.

The attacks in Paris bring questions, the answers of which will depend on the immediate post-emergency future of Europe. The first political consequence for the continent may lead to partial and temporary change in the freedom of movement in the Schengen area. As a result, the EU is likely to remain divided on the issue of refugees. Similarly, the terrorist attacks on November 13<sup>th</sup> 2015 create an effect with unpredictable political chain reactions.

Another result is the newly formed consensus on the war against the self-declared Islamic State of Iraq and the Levant (ISIL) between major powers like the US, EU, Russia, Saudi Arabia and Turkey (Sikka, 2016). On a forum in Antalya, President Barack Obama announced that he would "redouble" the US military efforts against ISIL (Schmitt E. , 2016). France expects its only aircraft carrier "Charles de Gaulle" to strike on Islamists in Syria and Iraq (Pellerin, 2015).

More troubling, however, are the long-term consequences of the state of emergency. It is a matter of political effect that may reverberate long and on many levels. The war on terrorism in Germany



in the 1960s and in the 1970s experienced the application of standard protective measures – the so called "militant democracy" (Hanshew, 2014, pp. 33-37). The challenge for France here is that the adoption of similar measures in the just anger caused by the unfortunate events may lead to harmful consequences. Some of the measures adopted in the US after September 11, and in Germany in the 1970s, have proved too restrictive and counterproductive. Yet, both democracies - and France - have enough internal political mechanisms to correct such imbalances. Terrorism, in this regard, is not expected to change the French freedoms and lifestyle characteristic. It is possible for the radical right-wing parties to "win" supporters, but the political culture in France is very high, and such an act of terrorism can only mobilize the center.

The real problem is that the mechanisms for "emergency" are completely at a national level in Europe. Therefore, it is advisable for the EU to develop supranational mechanisms for emergencies. Furthermore, emergency meetings of the European Council and coordinated measures across the EU may prove necessary. As well, the European Council should be a forum for a clear request for solidarity with France. In the future, it is good for such mechanisms, including amendments in the treaties, to be institutionalized.

## **5. Social polarization versus social cohesion**

With the refugees, France is the home of Europe's biggest Muslim minority (Heneghan, 2015). It is a secular state and its principles evade the politicization of religion, which is also a main European position. The pressure for "Christianization" of Europe is somewhat paradoxical, because the avoidance of direct politicization of religion is a basic Christian value. The danger for France lies in the state of emergency resulting in the systematic targeting of the French Muslim communities.

In Europe, everyone is entitled to their own identity and preservation of the community (ECHR, 2010). Since the XVII century, Europe pushes for political and civil defined belonging to a community, instead of a religious one (Church, 1972). In this sense, anyone who adopts the political and the civil requirements may in principle be a member of the community. The large population professing Islam in Europe serves as a signal that its members are not second-class citizens. In fact, by stigmatization and by undermining Schuman's principle of social cohesion, states benefit the cause of the terrorists.

A very important stage of analyzing the emergency is to point out the magnitude of fear achieved by the terrorist attacks. Since the objective of any terrorist act is to create fear, people's interest shifts from independence to a model of social integration when fear is achieved. This promotes a model of justice and solidarity in the societies and is based on the rights of every person and their equality before the law. Therefore, terrorism has nothing to do with Islam or with statehood.

Europe needs a global strategy for integration and social cohesion, in which it is important to include the Muslims who are victims of the fear planted in Europe.

## Conclusion

The state of emergency is one of the most puzzling cases of modern constitutionalism. By itself, the term "constitution" is linked to the modern idea of limitation of power, regulation of the relationship between political institutions and establishment of mechanisms to control the political environment. When the very existence of the constitutional system is called into question, a successful management of emergencies is crucial for bettering the state. At the same time, it is controversial to speak of limitation of power when the massive and forceful action seems the only alternative to political decay in crisis. It is logical to insist that in their actions, policymakers must comply with constitutional texts when they have to do everything possible and necessary to guarantee the survival of the political community. It is clear, that an opportunity for power actions, regardless of constitutional prohibitions, very soon leads to the fall of constitutional order. It is difficult indeed to find a way out of this constitutional dilemma: in order to preserve the Constitution, fundamental principles need to be suspended; but if the principles of the Constitution are suspended, there is no guarantee that the Constitution will be preserved.

The opponents of constitutionalism naturally believe that the formulation of a constitutional solution to this problem is simply impossible. Thinkers like Machiavelli and Carl Schmitt for example, are of the opinion that any attempt at legal regulation of political conflicts is doomed to failure and that ultimately the escalation of forceful confrontation inevitably culminates in violation of constitutional norms (Bamforth & Leyland, 2003). Similar concerns are present to the creators of modern constitutionalism too. For example, John Locke argues that part of the ruler's prerogative is the power to breach rules and laws, if due to unforeseen circumstances the common good is jeopardized (Locke, 1960). Montesquieu stresses that in times of crisis, it may be necessary that the "Statue of Liberty is covered with a veil" – therefore, the guarantee for privacy has to be temporarily removed (Montesquieu, 1989). Whether interpreted as an integral essence of politics or as an exceptional event that cannot be regulated by constitutional rules, the issue of emergency is a very sensitive aspect of contemporary constitutionalism.

Such theoretical and practical arguments do not lead to any precise wording of constitutional texts, but to a common strategy to the problem of emergency. Regardless of what the corresponding text is in the constitution, the state of emergency is subject to many conflicting interpretations. A possible approach is the proclamation of certain civil rights "inalienable" and therefore not subject to suspension. Undoubtedly, this is a necessary step, but by itself it is powerless in solving the problem. It cannot be expected that protection of the individual rights of citizens is a priority for those who make a radical challenge to the existing constitutional order and for those who are willing to take extreme measures to protect it.

The most optimal strategy for solving some of these problems is to approach the state of emergency as a problem associated primarily with the functioning of the political institutions. The question is whether it is possible to preserve some of the inherent principles of Constitutionalism. In some situations it might be necessary to institutionalize the dynamic relationships between the various authorities in the context of a sharp strengthening of the executive functions. In other words, for the purpose of safeguarding the constitutional order, it is not only important the way emergencies treat citizens, but the way political institutions interact during constitutional crisis.

It is undisputable that the refugee crisis is not only a humanitarian issue, but a major challenge for the security services. However, the refugee situation in Europe is too multilateral to carry the blame for the terrorist attacks. The rational approach to the current situation is to treat the issues of refugees and of terrorism as two separate issues.

A prolonged state of emergency brings two key challenges:

- Successful management of public anxiety;
- A meaningful improvement of security in public areas, such as airports, train stations and busy streets.

Perhaps the trickiest aspect of a state of emergency is the right time for its end. France has announced another extension of the emergency through the month of June 2016, in order to cover the European Championship football tournament. The prolongation brings concerns whether the emergency is sufficient for countering terrorism. Undoubtedly, Europe has changed after the terrorist attacks in France. The question is how and how fast.

## Recommendations

Without being exhaustive, this paper identifies four principles that are essential in the development of such a strategy against the abuse of emergencies:

1. When deciding on a state of emergency, several institutions with conflicting interests are involved. A classic example of this is the Roman dictatorship: the consuls decide on introducing a state of emergency, and then they are obliged to appoint a dictator and to transfer all the state's powers. The ones, who have interests in the decisions, cannot make them, and the ones who make the decision actually lose their power. Such a "separation of functions" creates obstacles to irresponsible behavior on the part of the political elite.

2. It is important to ensure the functioning of the legislature and judiciary after the declaring of an emergency. The constitution creates barriers to the natural desire of all dictators to eliminate legislative bodies and jeopardize the independence of the judiciary. This can happen, for example, if the constitution expressly stipulates that during an emergency the Parliament cannot be dissolved (a similar idea can be drawn from the texts of the Bulgarian Constitution, according to which the mandate of MPs is automatically extended until the end of the state of emergency).

That way, the supreme legislative body allows itself to determine which of its prerogatives will be delegated to the emergency authorities. It can also be stated that the activity of the Constitutional Court cannot be suspended and emergency authorities are unable to remove and/or appoint judges.

It is important to eliminate any suspicion regarding who may suspend rights and freedoms (the very vague norm in this matter is one of the major defects of the US Constitution). It should be stated explicitly that such an act is a solely responsibility of Parliament, thus to force the emergency power to seek the assistance of the legislative branch. In the case of absence of such provisions, the emergency power will fiercely dominate.

It is important to note that the Parliament in Weimar Germany did not survive because the executive branch is given the opportunity to introduce a state of emergency and rule by decree, and because this power has been exploited in combination with the right of the President to dissolve the Reichstag every time when parliamentarians criticize the decrees of the Chancellor.

3. It is essential to ensure the access of political opposition to representative institutions. Historical experience shows clearly that the "attack" of those who abuse emergency power is not directed to ordinary citizens, but to the leaders of the opposition. The need for unusual measures is routinely used as a pretext for a crackdown on political opponents and the main method in this case is the removal of parliamentary immunity. This is exactly what Robespierre did and it was the preferred means by Hitler after the fire in the Reichstag.

Therefore, it is absolutely necessary that the constitution foresees that parliamentary immunity cannot be withdrawn during emergency. Only this way political pluralism can be preserved, at least to some extent, as a functional feature of representative institutions.

4. The basic rules cannot be arbitrarily changed. It is inevitable that in an emergency a significant number of legal norms will be either suspended or modified. But basic rules should not be permanently changed by those who under the circumstances possess unlimited power. Along with the prohibition on amendments to the constitution, it is important to consider the forming of a group of laws that cannot be “touched” during emergency. It is also vital to have a constitutional text stating that all acts issued during this period will be in effect only for the period of emergency.

The main idea of this approach to emergency is to preserve the political institutions as pillars of organized political interest and as a potential source of constitutional “power”. Therefore, an opposition to the dictatorial ambitions is a matter of institutional survival. What the Constitution can do is to outline the form of partial correlation between political institutions in times of acute crisis and thus prevent the continued monopolization of power by emergency authorities.

The institutional dilemmas that come into effect when declaring a state of emergency make it essential to determine who will participate in the decision making process. It also requires, in a modified form, balance between the various authorities and to keep intact the legal basis of the constitutional order. There is no guarantee that a similar attempt to “constitutionalize” a state of emergency will be successful, as every constitutional norm can be trampled on.

It is possible, however, through careful constitutional engineering to raise further institutional barriers against the attempts for normal power to be replaced by emergency and thus make the unconstitutional nature of certain actions of potential dictators even more visible. And ultimately, whether the constitution survives, is out of the control of the constitution itself.

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## Appendices

### Appendix A: Summary of the interview

This research includes an interview with a specialist in the field of national emergencies. The interviewee, Prof. Dr. Ir. Joris Voorhoeve is a former Dutch Defense Minister (1994 – 1998) and a faction leader of the liberal- Democratic Party D66. He currently works as an International Law lecturer at The Hague University of Applied Sciences.

Mr. Voorhoeve was invited to participate in the research, to which he agreed. Together with the invitation, the participant received information about the topic and the purpose of the study, as well as a guide to the questions of interest. The interview took place in the Light house of The Hague University of Applied Sciences on May 12, 2016.

The interview began with an introduction to the research question “*What are the dangers for France when violating the trias politica during a state of emergency?*”. Mr Voorhoeve was further introduced to the content of the study and some of the results of the analysis. In order to aid the thesis, the interviewee was asked two questions:

1. How to make sure the French executive branch is effective in the protection of human rights during the emergency?
2. How the executive branch takes responsibility as transparent as possible for its actions immediately after the end of the emergency?

Mr Voorhoeve started the discussion by explaining that the most important tool for an effective management of crises is a good emergency legislation. It should be justified by the Parliament, which means that it is necessary for the French government to give a full explanation of the measures that are taken. Full openness, however, may be a secret or only provided after the end of the emergency. Sometimes instead of the government, it is a parliamentary committee who is responsible for holding accountability for the legislation procedures in crisis.

According to Mr Voorhoeve, the key to justifying the state of emergency is in the legal basis, which should always be given. The challenge for France is whether a complete explanation of all measures taken will arrive at the right time.

When discussing human rights, Mr Voorhoeve underlined the importance of those rights and fundamental freedoms, guaranteed in a democracy. Yet, in a state of emergency, the protection of the rule of law prevails over citizens rights. The reason is in the importance of the proper functioning of the institutions, which is the only way to an operational stable state.

In order to guarantee the legality of actions in an emergency, the State Prosecutor and the Courts should be intellectually independent from the government.