Parliamentary Assembly
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COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

Resolution 2209 (2018)[1]

State of emergency: proportionality issues concerning derogations under Article 15 of the European Convention on Human Rights

Parliamentary Assembly

1. 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, as the Parliamentary Assembly has previously noted in Resolution 1659 (2009) on the protection of human rights in emergency situations. Such situations may even require restrictive measures that exceed what is normally permitted under the European Convention on Human Rights (ETS No. 5, "the Convention"). Without appropriate guarantees, such measures create serious risks for democracy, human rights and the rule of law.

2. 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 Convention allows States to derogate from certain of their obligations in time of war or other public emergency threatening the life of the nation. In no circumstances, however, does it allow national authorities to act without constraint.

3. 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.

4. 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.

5. 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.

6. Three States have or, until very recently, had derogations in force: in chronological order, Ukraine, France and Turkey.

7. 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, together with war crimes and crimes against humanity committed both by regular

1. *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).
See also Recommendation 2125 (2018).

Armed Forces of the Russian Federation and by the illegal armed groups guided, controlled and financed by the Russian Federation". Ukraine's derogation 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.

8. The Assembly reiterates 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.

9. The Assembly is concerned about the provision in one of the Ukrainian laws permitting preventive detention for up to 30 days. Whilst this provision seems not to have been applied, its potential duration may be disproportionate. The Assembly is also concerned about the manner in which some of the other laws have been 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.

10. 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". 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.

11. The Assembly reiterates 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.

12. The Assembly notes 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 notes that these matters have been carefully examined by the competent domestic courts. It welcomes 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.

13. 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 legal and political complexities involved, welcomes 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.

14. 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". 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. Turkey has notified the Secretary General of all prolongations of the state of emergency and all of the decree-laws. It has not explained whether there were particular circumstances to justify the prolongations. The notifications do not specify the Convention rights from which Turkey derogates, this not being a requirement of Article 15.

15. The Assembly reiterates 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.

16. The Assembly recalls the conclusions it reached on the state of emergency in Resolution 2156 (2017) on the functioning of democratic institutions in Turkey. 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:

16.1. 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;

16.2. the duration of the state of emergency has exceeded what is strictly required;

16.3. 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;

16.4. 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;

16.5. 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.

17. The Assembly also reiterates 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.

18. The Assembly therefore recommends that:

18.1. Ukraine:

18.1.1. 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;

18.1.2. 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;

18.1.3. 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;

18.1.4. ensure that parliamentary scrutiny of the emergency measures is sufficient and effective;

18.2. France:

18.2.1. 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;

18.2.2. 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;

18.2.3. ensure that the 2017 Law is applied in full compliance with Council of Europe standards, in particular those of the Convention;

18.3. Turkey:

18.3.1. immediately inform the Secretary General of all outstanding decree-laws introduced under the state of emergency;

18.3.2. 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;

18.3.3. 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;

18.3.4. 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;

18.3.5. use normal administrative and legislative processes for the introduction of any future measures that may be required;

18.3.6. 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;

18.3.7. 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.

19. The Assembly recommends that all States Parties to the Convention:

19.1. 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;

19.2. 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;

19.3. 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 therefor, 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;

19.4. 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;

19.5. 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 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;

19.6. 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.

20. The Assembly recommends that the Secretary General of the Council of Europe:

20.1. 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;

20.2. open an inquiry under Article 52 of the Convention in relation to any State that derogates from the Convention;

20.3. 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.