In the fight against terrorism, does Article 15 of the ECHR constitute an effective limitation to states' power to derogate from their human rights obligations?

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1. Derogation in time of emergency.

1.1. Reasons behind derogations.

How can democratic states face terrorism? When it comes to challenge a great threat, as terrorism, states tend to adopt a number of counter-terrorism measures, for instance by passing a special law, entrusting extraordinary powers to the executive or declaring a state of emergency. Most international and regional treaties contain a specific provision which allows states to derogate human rights obligations in exceptional circumstances. Apparently, it seems a contradiction, since these treaties have been drafted with the main purpose of protecting human rights. However, the existence of derogation clauses can be historically explained with reference to the tragedy of the Second World War.[1] The necessity to combat totalitarian regimes was considered a valid reason to restrict states' sovereignty, by including in the human rights treaties a mechanism to secure public order and to avoid the suspension of individuals' rights for reasons of state.[2] Indeed, the Latin expression *salus populus suprema lex* indicates that one of the fundamental aims of law is to ensure the safety and welfare of the nation as a whole.[3] Actually, this motivation has often concealed grave violations of human rights. Derogation provisions are of crucial importance at least for three reasons. Firstly, it is better to decide in advance what measures have to be adopted in time of emergency or crisis; secondly, these clauses establish specific limitations to restrain states' action; finally, for a derogation to be adopted, states are required to

[1] F Cowell, 'Sovereignty and the question of derogation: an analysis of the Article 15 of the ECHR and the absence of a derogation clause in the ACHPR' (2013) 1 *Birkbeck Law Review* 135.
[2] R McDonald, 'Derogations under article 15 of the European Convention on Human Rights' (1997) 36 (1-2) *Columbia Journal of Transnational Law* 225.
[3] C Landa, 'Executive power and the use of emergency' in Salinas de Frias et al (eds), *Counter-terrorism International Law and Practice* (OUP, 2012).

provide a valid justification, that is related to the safety of the nation, not to the pursuit of their own interests. There was no doubt on the utility of a derogation clause during the drafting of the European Convention, the International Covenant on Civil and Political Rights (ICCPR) and the American Charter on Human Rights (ACHR). On the purpose of this clause, the Inter-American Court of Human Rights affirmed that in some cases derogation clauses represent the only means to face the state of emergency and to preserve the democratic society. However, measures of this kind may result in abuse of power.[4] Despite the content of the derogation provisions provided by these treaties is slightly different, the rationale underlying this clause is undoubtedly the same: states are permitted to legally derogate from certain rights, with the purpose to re-establish a state of normalcy and ensure the protection on fundamental human rights. Nevertheless, it is in times of emergency that there is a greater risk for human rights violation, due to the possible abuse of the derogation powers by states. It must be argued that, in this context, states' freedom of action is not unlimited. Indeed, it is restricted by the identification of non-derogable rights, which cannot be suspended even in state of crisis, and by the strict substantive and procedural conditions required to derogate. It must be suggested that, in states of emergency, even without a specific provision, states would derogate the application both of human rights obligations and the ordinary law, due to its inadequacy. For this reason, it is better to coordinate the way in which states respond to these extraordinary circumstances and to control whether they restrict only derogable rights.

1.2. Derogations v limitations.

In order to strike a balance between individuals' rights and needs of the society, different mechanisms are provided by international human rights treaties. In this regard, it may be useful to take into account the nature of derogations compared to limitations. The two terms must not be confused. In fact, both these clauses aim to interfere with the respect of human rights, but they pursue a different purpose. According to the General Comment no. 29 on Article 4 ICCPR, "Derogation from some Covenant obligations in emergency situations is clearly distinct from restrictions

[4] *Habeas Corpus in Emergency Situations* (Arts. 27.2, 25.1 and 7.6 American Convention on Human Rights), Advisory Opinion OC-8/87, Inter-American Court of Human Rights Series A No 18 (30 January 1987).

or limitations allowed even in normal times under several provisions of the Covenant".[5] Firstly, it must be observed that the requirements that have to be met for limitations are undoubtedly less stricter than the standard of necessity required for derogations. Indeed, in order to tackle exceptional circumstances, national authorities are given special powers, whose exercise may violate human rights. Unlike derogations, limitations are used in time of peace and they allow an interference with human rights on the basis of collective exigencies, specifically included in the provision itself. In peaceful times, derogations would be considered unlawful, while in states of emergency they may be justified. According to Schreuer, a derogation consists in a suspension, not abrogation, of certain rights in time of public emergency.[6] Indeed, the ground justifying the adoption of derogation clauses is the declaration of an exceptional and temporary state of emergency threatening the life of nation.[7] It must be clarified that derogations are considered an extrema ratio instrument for the restoration of peace and order. This means that states, before adopting a derogation, can interfere with human rights by relying on limitation clauses. The distinction between derogations and limitations, to some extent, refers to the division of rights in derogable and non-derogable. Limitation clauses highlight that the right concerned is not absolute, since it may be balanced with the exercise of rights by other people, while derogations may completely suspend the enjoyment of certain individual rights to meet the exigencies of the situation of crisis[8].

2. Which rights can be derogated from?

When counter-terrorism actions are such as to impede the application of ordinary laws and the full enjoyment of certain rights, states are permitted to adopt derogation clauses. As mentioned above, states' right to derogate is limited by the categorisation of human rights in derogable and non-derogable. This distinction is of great importance, since it reduces the risk of arbitrary denial of rights in time of emergency.

[5] UN Human Rights Committee, 'General Comment 29 Article 4: derogations during a state of emergency' (2001) UN Doc CCPR/C/21/Rev1/Add11 para 4.

[6] C Schreuer, 'Derogation of human rights in situations of public emergency: the experience of the European Convention on Human Rights' (1982-1983) 9 *Yale Journal of World Public Order,* 113.

[7] E Bates, 'A 'public emergency threatening the life of nation'? The United Kingdom's derogation from the European Convention on Human Rights of 18 December 2001 and the 'A' case' (2006) 76 (1) *The British Year Book of International Law* 245.

[8] L Doswald-Beck, *Human rights in time of conflict and terrorism* (OUP, 2011).

Within the international framework, the major human rights treaties, with the exception of the African Charter on Human and People's Rights, admit that some human rights may be suspended in time of crisis. In distinguishing rights in different categories, the issue is twofold: firstly, the lists of non-derogable rights contained in the human rights treaties do not match with each other; secondly, by reading the derogation provisions, it would seem that non-derogable rights are only those explicitly enumerated. However, the reality is more complex, since there exist a number of other rights which may be defined as non-derogable by implication. These two aspects make the identification of this category particularly controversial.

2.1 Expressly non-derogable rights.

Relevant legal provisions containing the list of non-derogable rights are Article 15 (2) ECHR, Article 4 (2) ICCPR and art 27 (2) ACHR. There is agreement on the impossibility to suspend, whatever the emergency, the so called jus cogens rights, for instance, the freedom from torture. These are absolute in nature and considered fundamental principles of international law by the international community. As for the other non-derogable rights, it is worth noting that, although they cannot be derogated in time of emergency, limitations are admitted according to the specific formulation of the right concerned.[9] While the lists of non-derogable rights of the two most recent treaties, ICCPR and ACHR, are wide, the ECHR contains the most restrictive. All of them include the right to life, the prohibition of torture and inhuman or degrading treatment, the freedom from slavery and the prohibition of retrospective criminal punishment. The ICCPR expands this catalogue, by adding other essential rights, namely the right to recognition as a person before the law, the freedom of thought, conscience and religion and the right not to be imprisoned merely for failure to fulfil a contractual obligation. Finally, the American Convention includes rights which are not 'necessarily fundamental, but whose suspension cannot be justified by an emergency'.[10] It must be argued that also the list of the European Convention can be

[9] A Conte, *Handbook on human rights compliance while counter-terrorism* (Centre on global counterterrorism cooperation 2008) <http://globalcenter.org/wp-content/uploads/2008/01/human_rights_handbook.pdf> accessed 3 January 2016.
[10] McDonald (n 4) 231.

seen as including more rights than those explicitly enumerated.[11] For example, there is no doubt that the right to recognition as a person before the law has been implicitly recognized of fundamental importance under the ECHR. Indeed, it is the prerequisite to be considered a human being, endowed of rights and duties. In terms of other rights, such as the freedom of thought, conscience and religion, although important, they are considered qualified rights under the Convention and permit limitations necessary in a democratic society. It is arguable that a wide list of non-derogable rights is not desirable, since it may include rights which are not that fundamental and, in case of their derogation, it may be difficult to satisfy the proportionality test.

2.2. Non-derogable rights by implication.

For the above mentioned non-derogable rights to be effectively protected, procedural safeguards, for instance judicial control and due process guarantees, must be applied. As Landa pointed out, it is possible to identify a list of rights considered non-derogable by implication, whose respect is indispensable for the protection of those explicitly defined as non-derogable.[12] In this view, the Human Rights Committee, in the General Comment No 29, highlighted the importance of these procedural safeguards, by stating that they are essential to secure the protection of rights explicitly recognized as non-derogable.[13] With particular reference to the essential judicial guarantees, the Inter-American Court of Human Rights held that states 'also have the obligation to protect and ensure the exercise of such rights and freedoms by means of the respective guarantees'. [14] Moreover, it stressed that the judicial protection provided by the habeas corpus must be respected in time of emergency, since it is essential to protect the right to life and physical integrity. Indeed, to bring a detainee before a judge means that the lawfulness of the detention can be verified.[15] In times of crisis states tend to use special powers of arrest and detention arbitrarily. In this context, judicial guarantees are the key for protection individual right to liberty.

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[11] J Hartman, 'Derogation from human rights treaties in public emergencies: a critique of implementation by the European Commission and Court of Human Rights and the Human Rights Committee of the United Nations' (1981) 22 *Harvard International Law Journal* 1.
[12] Landa (n 5) 212.
[13] General Comment 29 (n 7) para 15.
[14] Advisory Opinion (n 6) para 25.
[15] ibid para 35.

This view has been accepted by the European Court. In the case *Brogan and others v United Kingdom* (1989) 11 EHRR 117, it highlighted the essence of the Article 5 (3) ECHR, which aims to guarantee the arrested to be promptly brought before a judge or released, can never be compromised.[16] However, its jurisprudence on Article 15 has showed that in some cases the arrest and detention without judicial review has been admitted, on the basis of the seriousness of the emergency situation and the safeguards available. It must be observed that, in *Marshall v United Kingdom* App no 41571/98 (ECtHR 10 July 2001), the Court justified a detention of seven days without judicial intervention, since appropriate safeguards existed, whereas, in *Aksoy v Turkey* (1997) 23 EHRR 553, a long detention of fourteen days, without access to a judge, could not be justified by the exigencies of the situation.[17] The same rationale has been applied in relation to the right to a fair trial, which is qualified as derogable, but whose safeguards are considered non-derogable during a state of emergency.[18] An issue may arise on whether the inderogability applies to all or some elements of this right. With reference to the General Comment No 29, it can be stated that the guarantees contained in the right to a fair trial constitutes a minimum standard, which cannot be undermined at any time, including in case of public emergency, in order to protect non-derogable rights.[19] It must be argued that some human rights derogable in theory, have become non-derogable in practice, and they cannot be suspended in case of public emergency, in order to ensure the protection of those rights expressly defined as non-derogable.

3. Article 15 ECHR: preconditions for a valid derogation and the problem of the margin of appreciation.

Although the existence of a state of emergency must be determined on a case-by-case basis, given its unpredictability, there are some conditions which must be satisfied for a derogation to be valid. As observed earlier, at least three relevant human rights treaties have a derogation clause for the protection of non-derogable rights. In

[16] *Brogan,* para 62.
[17] *Aksoy,* para 84.
[18] J M Lehmann, 'Limits to counter-terrorism: comparing derogation from the International Covenant on Civil and Political Rights and the European Convention on Human Rights' (2011) 8 *Essex Human Rights Review* 103 <http://projects.essex.ac.uk/ehrr/V8N1/Lehmann.pdf> accessed 3 January 2016.
[19] General Comment 29 (n 7) para 16.

analysing the circumstances in which the right to derogate can be used, particular attention is paid on the Article 15 ECHR. As Harris *et al* pointed out, Article 15 ECHR on the one hand endows the political branch of states with the extraordinary power to derogate from human rights obligations, on the other hand it 'subjects its exercise to various kind of limitation'.[20] It is possible to identify textual restrictions, concerning the determination of the existence of a time of war or other public emergency threatening the life of the nation and the necessity that the adoption of the derogation measures are strictly required by the exigencies of the situations. Furthermore, this provision prohibits the suspension of non-derogable rights, as intended above. Finally, a procedural safeguard is established, namely the notification to the competent authority of the measure taken and the reasons therefor. It is worth noting that there are some dissimilarities in the wording of these conditions among the treaties, but the underlying meaning is the same. As far as the emergency concept is concerned, the only difference is that the ICCPR does not include the term war, because to admit derogations from the obligations under the Covenant in time of war, would have been a contradiction, since the establishment of the United Nations was founded on the purpose of maintaining peace and preventing war.[21] As for the procedural requirement, the ICCPR establishes a further condition, that is a formal proclamation of the state of emergency. Are these limitations effective in practice? In the analysis of the conditions to derogate, which should limit the states' freedom of action in situations of emergency, it is relevant to take into consideration the margin of appreciation doctrine. It must be noticed that it has assumed a crucial role in the European Court's jurisprudence involving Article 15. This doctrine is considered the means to balance states' sovereign power with the respect of the obligations under the Convention.[22] The Court has recognized to each state a margin of discretion to assess whether a state of emergency exists and whether the derogation measures imposed are proportionate. This on the assumptions that contracting states are founded on values such as democracy and protection of human rights and that they are in a better

[20] D Harris, M O'Boyle, C Warbrick, *Law of the European Convention on Human Rights* (3rd edn, OUP 2014) .
[21] Cowell (n 3) 145.
[22] O Gross and F Ní Aoláin, 'From discretion to scrutiny: revisiting the margin of appreciation doctrine in the context of article 15 of the European Convention on Human Rights' (2001) 3 *Human Rights Quarterly* 625.

position to decide than the Convention organs. Additionally, the principle of subsidiarity inherent in the Convention gives states the role of primary guarantor of human rights, while the court has a mere subsidiary function of supervising the respect of the Convention itself. As Gross pointed out, the first enunciation of this doctrine can be dated back to the *Cyprus case*.[23] The Court, then, applied this concept in the subsequent case law, by expanding its scope. Indeed, originally it has been used only to assess the necessity and proportionality of the derogation measures, while, starting from *Lawless v Ireland* (No 3) (1961) 1 EHRR 15, it has been also applied to verify the existence of a situation of emergency. In *Klass and others v Germany* (1978) 2 EHRR 214, although the Court acknowledged a margin of appreciation to domestic authorities when taking counter-terrorism actions, it specified that this discretion is not limitless. Indeed, 'Contracting states may not, in the name of the struggle against espionage and terrorism, adopt whatever measures they deem appropriate'.[24] However, it is arguable that in a situation of crisis, when individual human rights are particularly vulnerable, the wide leeway left to contracting states is likely to turn into an abuse of power.

3.1. Public emergency test.

The first condition that must be satisfied under Article 15 ECHR is that the derogation order must be adopted in time of war or other public emergency. Since no cases have been based on the notion of war, questions are: what is meant for public emergency? It has been observed that when the Convention was adopted, the drafters did not directly refer to the emergency caused by terrorism. However, it must be suggested that it represents an exceptional situation, which cannot be addressed by the application of the ordinary law. When it comes to examine the grounds on which a respondent state claimed the existence of an emergency, the principle of good faith is of particular importance. This is clear from the European jurisprudence. Only in the *Greek case* (1969) 12 YB EComHR the Commission held that the public emergency invoked was insufficient to justify the recourse to the derogation clause. Indeed, when a revolutionary government, which created itself the state of emergency, adopts a

[23] ibid 631. See also Bates (n 7) 295.
[24] *Klass,* para 49.

derogation clause, it must be considered in bad faith.[25] It must be said that it is not easy for the Court to evaluate if the declaration of a state of crisis pursues the protection of the democracy and the national order. Despite this difficulty, it has consistently ruled in favour of governments' claim.

As for the definition of public emergency threatening the life of nation, in *Lawless* it has been stated that it 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'.[26] This definition was subsequently expanded in the *Greek case,* where the Commission specified that the emergency must be actual or imminent, involve the whole nation, threaten the continuance of the organized life of the community and be exceptional.[27] It must be underlined that this case is not of particular relevance when it comes to examine states' margin of appreciation in determining the existence of an emergency. In fact, as already highlighted, the respondent state did not persuade the Commission on this point. Instead of justifying the derogation in terms of well-being of the society, the Greek government argued that there was a threat of Communist takeover and a crisis of the constitutional government and public order.[28] In the other leading judgements the existence of a public emergency has not been questioned by the Court, which relied on the states' discretion. Although in *Lawless* there is no mention of the margin of appreciation at all, it seems that it has been applied by the majority of the Court. The derogation was justified by the Irish government on the basis that the Irish Republican Army (IRA) had caused a warlike situation. The presence of a secret army involved in violent unconstitutional activities, also outside the Republic of Ireland, and the increase in terrorism have led the Court to deduce that there was a state of emergency threatening the life of the nation. However, it has been argued that, in this judgment, the Court set out an high threshold, since the level of violence, at the time of derogation, was not such to justify the measure adopted. As Bates pointed out, by looking at the context, it seems that the there was an imminent, not actual, danger

[25] Schreuer (n 8) 125. See also J Becket, 'The Greek case before the European Human Rights Commission' (1970) 1 (1) *Human Rights* 91.
[26] *Lawless* para 28.
[27] The *Greek case,* para 153. See Harris (n 25) 830.
[28] Schreuer (n 8).

during which public institutions continued to function normally.[29] In *Ireland v United Kingdom* (1978) 2 EHRR 25, the exceptional circumstances were identified in the situation of violence and fear created by IRA at the expenses of the United Kingdom, its institutions and its inhabitants.[30] The use of extrajudicial powers of arrest and detention was not challenged, since the ordinary legislation was considered inadequate to face terrorism in Northern Ireland. The perpetuation of this threat was used to declare the state of crisis also in *Brannigan and McBride v United Kingdom* (1993) 17 EHRR 539. The Court, referring to the previous cases and to government statistics, held that 'a public emergency still existed at the relevant time'.[31] No importance was given to the counter-argument provided by the non-governmental organisation Liberty, which suggested that 'at the relevant time there was no longer any evidence of an exceptional situation of crisis', proved by the fact that the government withdrew its derogation.[32] On the margin of appreciation point, the Court restated that national authorities are in a better position to assess the presence of a state of crisis, 'by reason of their direct and continuous contact with the pressing needs of the moment'.[33] However, the extension of this margin appeared problematic. Judge Martens argued that there is no reason to give states a wide discretion, since the Court maintains its power to scrutinize whether the derogation has been lawfully adopted.[34] Moreover, it has been argued that the longer the emergency, the narrower the margin of appreciation. As for *Aksoy,* the claim put forward by the government was justified with reference to the PKK terrorist threat in South-East Turkey, which created a state of public emergency. In this regards, the Court simply agreed with the respondent government 'in the light of all the material before'.[35] The concept of the margin of appreciation has been used also at a national level, in order to determine the existence of an emergency. In this regard, it is remarkable the *Belmarsh* case. The UK government, given the 9/11 terrorist attacks in the US, considered the close

[29] Bates (n 7) 301.
[30] *Ireland*, para 212.
[31] *Brannigan,* para 47.
[32] ibid para 45.
[33] ibid para 43.
[34] ibid, concurring opinion of judge Martens para 4. See also E Crysler, 'Brannigan and McBride v UK' (1996) 65 (1) *Nordic Journal of International Law* 91, 112.
[35] *Aksoy,* para 70.

relationship between these countries and the presence of suspected terrorist in the territory, concluded that a public emergency might exist, although not immediate. The majority of the House of Lords agreed on this view basically on two grounds highlighted by Lord Bingham. Firstly, according to the European Courts' jurisprudence, governments are granted a wide margin of discretion to decide on the existence of a public emergency. Secondly, this decision is political in nature. This means that it is for the political body of states to resolve the issue, not for the judges.[36] The only dissenting voice on the public emergency point came from Lord Hoffman. He argued that the Strasbourg jurisprudence has been of no help, since a too wide margin has been left to national authorities and, therefore, to the national courts. Moreover, the meaning of a danger threatening the life of the nation has been misinterpreted. Indeed, despite the gravity of the threat posed by Al-Qaeda terrorists, 'Terrorist violence, serious as it is, does not threaten our institutions of government or our existence as a civil community'.[37] This dissenting opinion did not find consensus at European level, where the Court confirmed the conclusion of the highest domestic court and, by referring to its previous jurisprudence, held that an emergency exists also when the institutions of a state are not threatened.[38] From this analysis, it is evident the reluctance of the Court to rule against respondent states on the emergency test.

3.2. Strictly required test and the judicial supervision.

As for the second requirement under Article 15 ECHR, the question to be answered is: are the measures employed strictly required by the exigencies of the situation? As Harris *et al* pointed out, at least two aspects must be considered. Firstly, the necessity to exercise extraordinary powers through the adoption of the derogation, rather than using the ordinary law to tackle the emergency. Secondly, the proportionality between the measures adopted and the exigencies of the situation.[39] When analysing these factors, the European Court has taken into account the existence, in the domestic

[36] *A v Secretary of State for the Home Department* [2004] UKHL 71, paras 28, 29.
[37] ibid paras 92, 96. See also A Tomkins, 'Readings of A v Secretary of State for the Home Department' (2005) *Public Law* 259.
[38] *A and others v United Kingdom* (2009) 49 EHRR 625, para 181.
[39] Harris (n 22).

legislation, of adequate safeguards, in order to prevent that the suspension of the enjoyment of certain rights and procedural guarantees, may result in an abuse of power. Moreover, it has evaluated the suitability of the measures to face the crisis and whether they have been adequately applied in the instant case. It has been observed above that, while limitations must be simply necessary in a democratic society, derogations require stricter conditions to be satisfied, since it is intended as an extrema ratio measure.[40] It is worth mentioning that *Aksoy* is the first case in which this condition has not been met. In fact, the Court ruled that the long detention of fourteen days, without access to a judge, made the applicant likely to be subject to torture.[41] It is arguable that the proof that exceptional measures must be strictly required should limit states' right to derogate. However, it has turned out to be ineffective, since the Court has recognized to states a wide margin of appreciation also in the assessment of the legality of derogations.[42] While in *Lawless* no reference has been made to this concept, it seems that the wording used in the *Ireland v UK* case, according to which the derogating measures 'reasonably have been considered strictly required for the protection of public security', implicitly referred to it.[43] In *Brannigan*, the government justified the derogation on a number of questionable grounds, by focusing on the political nature of the issue and the role of the judiciary. In particular, it stated that the involvement of the judiciary, in order to control the legality of the prolonged detention would 'undermine their independence'.[44] The reason is based on the fact that the arrest and detention of suspected terrorists relies on sensitive information, which cannot be disclosed to the court, without jeopardizing the investigations. As Crysler observed, when it comes to decide on the judicial scrutiny of derogations in the fight against terrorism, states have a wide discretion.[45] The government approach, accepted by the Court, has been criticised. Indeed, the dissenting judge Makarczyk argued that the government, instead of proving that the exceptional measures were necessary to prevent and combat terrorism, focused its argument on the fact that the judicial review would have affected negatively the

[40] Landa (n 5).
[41] *Aksoy*, para 83.
[42] Crysler (n 36).
[43] *Ireland* para 213.
[44] *Brannigan*, para 56.
[45] Crysler (n 36) 106.

judiciary power. In his opinion, 'any form of judicial control could be beneficial'.[46] Furthermore, Amnesty International counter-argued by referring to the absolute nature of non-derogable rights. Indeed, as noted above, procedural safeguards, such as the judicial review, are considered non-derogable rights by implication. It must be argued that the Court has been too deferential, by affirming that 'the government did not exceed the margin of appreciation (...)' and that this discretionary decision was not subject to a judicial review.[47] It is evident that the Court did not strictly scrutinize whether the measures adopted were necessary and proportionate and it did not even identify more appropriate measures. In the *Belmarsh* case, the government complained before the Court the finding of the House of Lords, according to which the derogating measures did not comply with the proportionality principle. It argued that the highest national court did not acknowledge to the executive and the legislature a wide discretion in a matter of political nature, in accordance with the European Court's jurisprudence. Surprisingly, the Court upheld the House of Lords' decision. This does not mean that it reversed its jurisprudence on the margin of appreciation issue. Indeed, it merely clarified that this doctrine regulates the relationship between the Strasbourg Court and the national authorities, in the light of the subsidiarity principle, not between the different branches of a state. For this reason, although contracting states are endowed with a wide margin of discretion, the Court retains the role to scrutinize whether they are strictly required under Article 15 ECHR. In other words, it is for the judicial body to assess the proportionality of derogations when individual human rights are at stake.[48] What is, in the context of derogations, the role of the European supervision? Due to the political nature of the issue and the governments' responsibility for the protection of national security, it has been observed that a close scrutiny by the Court would not be desirable. Indeed, it may be seen as an intrusion in a political matter. The Court itself stated that it is for the government to strike the balance between the fight against terrorism and the protection of individuals' rights, by adopting in states of emergency those exceptional measures considered necessary and proportionate.[49] However, the recognition of a

[46] *Brannigan* dissenting opinion of judge Makarczyk, para 3.
[47] *Brannigan,* paras 57, 60, 66.
[48] *A and others,* para 184.
[49] *Ireland,* para 124; *Brannigan,* para 59.

wide discretion to national authorities 'represents a lost opportunity for the Court to play an engaged role in relation to the issue before it'.[50] It must be argued that, since the declaration of a state of emergency may entail violations of non-derogable rights, it should be for the Court to evaluate whether the counter-terrorism actions adopted by the executive are necessary and proportionate.

4. Conclusion.

It is well-established that the derogation clauses are considered indispensable in the fight against terrorism, to guarantee minimum standards for the protection of human rights and to prevent the right to derogate from being used arbitrarily by states. In this regard, the qualification of certain rights as non-derogable limits states' freedom of action. However, they enjoy a wide discretion to determine the circumstances in which certain human rights can be derogated from. Although Article 15 ECHR establishes that strict conditions must be met for a derogation to be valid, it has been noted that the acknowledgment of this wide discretion may thwart their effectiveness. The Court should recognize to states a narrower margin, in order to undertake a stricter scrutiny and an independent review of the conditions under Article 15 and to ensure an effective protection of human rights. Although states have freedom of action in case of emergency, the pretext of the urgency to take counter-terrorist actions cannot justify an abuse of power.

[50] S Marks, 'Civil liberties at the margin: the UK derogation and the UK Court of Human Rights' (1995) 15 *Oxford Journal of Legal Studies* 69, 93.