Rule of law and human rights on hold: the emergence of extreme emergencies in modern states

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***Abstract*:** The purpose of this paper is to discuss new mechanisms of suspension of law and human rights in modern states. Traditionally there are two possible ways of bringing human rights and the rule of law to a standstill: firstly, through the concept of limitations and secondly through that of derogations. Owing to their intrinsic nature that may bring about abuses of all sort including the concentration of powers to the profit of the executive power, the establishment of a totalitarian state such as that of the Nazi Germany under Hitler, the concept of limitations and derogations are currently subject to a strict regulation. With regard to the former not only they have to 'be determined by law', but also only those limitations are permitted which are 'necessary', or 'necessary in a democratic society. Talking about the idea of derogations, it is currently argued that 'in essence derogation clauses express the concept that states of emergency do not create a *legal vacuum*. The derogation regime aims at striking a balance between the protection of individual human rights and the protection of national needs in times of crisis by placing reasonable limits on emergency powers." The idea of emergence of extreme emergency in modern states accounts for the situation where human rights and the rule of law can be brought to a standstill without any procedural rule or constraint. The modern emergency has reached its extremity as the state seems to be operating in an environment where citizens are considered first of all as a mere potential threat to the "society's safety." Unlikely to the classic emergencies strictly framed by domestic and global legal restrictions, the extreme emergency is entirely driven by the executive power in an environment where nothing prevails except guilt and retribution. It is this extreme emergency, this lack of regulation regarding the actual suspension of law and human rights in modern states that the current paper focuses on.

Keywords: state of emergency; state of exception; terrorism; rule of law; violence

Introduction

The purpose of this paper is to discuss new mechanisms of suspension of law and human rights in modern states. Traditionally there are two possible ways of bringing human rights and the rule of law to a standstill; firstly, through the concept of limitations and secondly through that of derogations. Whereas the permanent tension between the protection of individual's rights and the community (state) interests justifies the limitations of rights, the idea of derogations to human rights amounts to their complete or partial elimination as an international obligation in times of emergency threatening the existence and the security of the state. In other words in time of peace human rights may be subject to limitations for the sake of public order, public moral or public health. A *contrario*, human rights are subject to derogations following the enforcement of emergency powers through the declaration of a state of exception or a state of emergency deemed the state's immediate responses to exceptional circumstances such as war, natural cataclysm, insurrection, invasion or nuclear disaster threatening its existence. The concept of limitations highlights the fact that human rights are rarely absolute and unconditional. In general the community's interests as a whole overrides those of individuals. The limitations of rights are subject to some criteria: not only they have to 'be determined by law',[1] but also only those limitations are permitted which are 'necessary', or 'necessary in a democratic society. With regard to derogations, it was reported that 'in essence derogation clauses express the concept that states of emergency do not create a *legal vacuum*. The derogation regime aims at striking a balance between the protection of individual human rights and the protection of national needs in times of crisis by placing reasonable limits on emergency powers." On this account the international legal standards on emergency regimes provides a set of principles that state parties must deal with when confronted to emergency situations.

Unlikely to the concepts of limitation and derogations strictly framed by legal and constitutional restrictions, the extreme emergencies are entirely driven by the executive power in an environment characterised by human rights infringement including the so called non-derogable rights. Today owing to a variety of threats (real or alleged) to state's security, human rights and the rule of law can be brought to a standstill without any procedural rule or constraint at the expenses of individual citizens. The modern emergencies have reached their extremity as the state appears to be operating in an environment where citizens appear first of all as a mere potential threat to the safety of the society. The recent spreading of antiterrorist legislation, the legalisation of mass espionage activity, the concepts of indefinite detention, war on terror and preventive war are an indication

that emergencies in contemporary societies have reached the point of non-regulation characterised by a global civil war where governments have the privilege to confront their own population considered as an alien feature of the statehood. An appropriate understanding of the suspension of law and human rights in extreme emergencies require their assessment through the prism of derogations.

Assessing the extreme emergencies through the concept of derogations

A set of principles that states have to comply with when dealing with a threat to their existence is contained in various international instruments that include the UN Charter, the Geneva Convention, the ICCPR, the ILO, the Convention against Torture. These principles are the principle of severity, the principle of proportionality, the principle of non-derogable rights, the principle of non-discrimination and the principle of good faith motivation.

The principle of severity or exceptional threat

The idea of exceptional threat during a state of emergency is described in the first paragraph of Section 4 of the International Covenant on Civil and Political Rights (ICCPR). The section refers to the concept 'exceptional threat' as 'a public emergency which threatens the life of the nation and the existence of which is officially proclaimed.' The meaning of 'exceptional threat' may vary from one country to another and denotes the seriousness and the level of gravity of a situation which may lead up to the declaration of a state of emergency or a state of exception. Accordingly, minor disturbances cannot justify the enforcement of a state of emergency and human rights restriction under the pretext of saving the state. In addition the concept of 'state' should be understood from a constitutional law perspective. According to this discipline, the state refers to a group of individuals living in a territory and subject to a government. Hence an exceptional threat to the life of the nation means that, some or all of the features that constitute statehood (territory, population and government) should be threatened. It is suggested that a threat to the life of the nation is one that on the one hand affects the whole of the population and either the whole or part of the territory of the state, and on the other hand, threatens the physical integrity of the population, the political independence or the territorial integrity of the state or the existence or basic functioning of institutions indispensable to ensure and protect the rights recognised in the Covenant. It is currently observed that:
While 'the life of the nation' is clearly intended to have a restrictive meaning, its scope is not self-evident. An emergency that threatens the life of the nation must imperil some fundamental element of statehood or survival of the population. [2]

Despite this clarification, the idea of exceptional threat in modern states is most evident through the phenomenon of terrorism. Since the attacks of 9/11 in the US, terrorist threat (real or alleged) has become the major factor justifying the suspension of law and human rights restriction. Amnesty International observes in 2004 that since 11 September, many states have adopted draconian new 'anti-terrorism measures', [3] including new legislation, which are in breach of their international obligations and pose a serious threat to human rights. With regard to the extreme emergencies, one of the most prominent features of the statehood that is the population is constantly assimilated to terrorists. The recent inflation of antiterrorist legislation across the world is implemented at the expenses not of terrorists but people. As it was rightly observed "…it must be recognised that state efforts to curb terrorist activities have also culminated in the abridgment of many rights and freedoms, not only of the 'terrorist' suspects but also of innocent civilians." [4]

Notification and proclamation

A state of emergency entails human rights violations and infringement of the rule of law. Therefore it must be officially proclaimed to inform the population about the new political civil and economic climate surrounding the society. The principle of notification is flexible as a formal notification is admitted. The International Covenant on Civil and Political Rights requires that the other state parties be notified through the intermediary of the secretary general of the UN (section 4(3) of the Covenant). Emergency regimes that are not officially proclaimed remain deprived of any legal attribute and are internationally reprehensible. The principle of notification and proclamation are publicity mechanisms aiming at preventing a *de facto emergency*. The existence of a public emergency must be officially proclaimed, the procedures for the proclamation must be prescribed in national law in advance of the emergency.[5]

However looking at the principle of notification and proclamation within the context of extreme emergencies, it is assumed that there is no longer need to proclaim and notify the emergency situation. The phenomenon of spying and snooping characterised by the (il) legal listening of private phone conversations, the mass espionage among states and even allies is an evidence that the state of exception has lost its exceptional character and have become normal. Then in 2013 a US District Judge William Pauley ruled that the National Security Agency's (NSA) collection of millions of Americans' telephone calls was lawful, rejecting a challenge to the controversial counter-terrorism programme by the American Civil Liberties Union. This organisation contended that the NSA collection of "bulk telephony metadata" violated the bar against warrantless searches under the Fourth Amendment of the U.S. Constitution. Judge Pauley argued that the NSA programme "represents the government's counter-punch" to eliminate al-Qaeda, and observed that the programme's constitutionality "is

ultimately a question of reasonableness."[6] In the same vein, in July 2015 British Prime Minister David Cameron literally called for the end of privacy on the Internet. He has criticised the so called "advanced encryption" methods used by various companies, suggesting they are sophisticated enough and prevent British intelligence services from accessing private conversations without the right code. [7] Similarly on 04 April 2011, Cameroon parliament passed a bill empowering the president to enact "ordinances on the security of intelligence activities in Cameroon" and "on the use of intelligence's technologies in Cameroon". Following the provisions of this legislation the president of the republic is entitled to request access to private emails, monitor the telephone traffic of people across the country, and waive the immunity of the elected parliamentarians at any time. Everyone has become suspect and can no longer be trusted. Governments are scare about their population and population too is afraid of their governments. In these ongoing extreme emergencies, the deal privacy versus security seems to have acquired an unprecedented dimension. Freedoms to privacy and communication are then perpetually subjected to restrictions owing to some potential threats real or alleged. In so doing various international and domestic provisions are simply bypassed by the state.

The principle of proportionality

The principle of proportionality is without a doubt one of the most important in the appreciation of the validity of a state of emergency or a state of exception. This clause 'acquires paramount importance, being the main substantive criterion employed to access the legality of the derogating measures taken by states in situation of emergency.'[8] Fitzpatrick observes the following on the principle of proportionality:
Along with the threshold of severity, the principle of proportionality is the most important and yet most elusive of the substantive limits imposed on the privilege of derogation. [9]

The requirement of proportionality is reiterated by various international instruments. For example the International Labour Organisation (ILO) has come to realise that a state of emergency entails the suspension of public liberties and freedoms, including freedom of association and freedom of assembly, with trade unionists as frequent targets of harsh measures. [10] It is currently reported that 'many governments imposing emergency measures will suspend trade union rights and arrest and subject trade union leaders to torture, arbitrary execution or exile.'[11] The ILO conventions that govern the freedom of association (the right of association and protection of the right to organise convention, 1948 (N° 87) and the right to collective bargaining (the right to organise and collective bargaining convention, 1949 (N° 98)) do not allow derogation from them. Therefore, state parties to these conventions cannot rely on state of emergency measures when they suspend these rights. [12]

The principle of proportionality means that a declaration of a state of emergency would be illegal in a situation where ordinary legislation could bring adequate solutions to the crisis. In other words, the enforcement of draconian measures would be valid only if the existing legal order is inefficient in addressing the situation. The derogation measures shall be such as are strictly necessary to deal with the threat to the life of the nation and should be proportionate to its nature and extend. [13] The government shall have a duty to assess individually the necessity of any derogation measure taken or proposed to deal with the specific dangers posed by emergencies. [14] The events must be particularly serious and unpredictable, meaning that a simple case of urgency should not be assimilated to exceptional circumstances.

Assessing the principle of proportionality through the prism of extreme emergencies entails the idea that the current legal framework is unable to cope with the situation. As a result a new set of rules from the executive power constantly overlaps the ordinary legislation to the extent that such legislation becomes meaningless. What characterises the extreme emergencies in this case is its lack of interest for the traditional mechanisms of human rights protection and the substitution to a society of peace and justice with a society of fear, guilt and retribution. Conor Gearty in his 2009 Hamlyn Lecture Series, "Can Human Rights Survive?" points out that "the single greatest disastrous legacy of the war on terror from a human rights point of view has been the supercession of the criminal model based on justice and due process by a security model based on fear and suspicion." The principle of proportionality which is one of the most important benchmarks of validation of a state of emergency is no longer an issue in modern constitutional states. In the name of terrorism (real or alleged) the rule of law has been turned into a device of social oppression by allowing a lawful infringement of public freedom and liberties. Yet the UN General Assembly resolution adopted on 18 December 2002 affirmed that states must ensure that any measure taken to combat terrorism complies with their obligations under international law, in particular, international human rights, refugee and humanitarian law. [15]

The peculiarity of extreme emergencies is to render what is exceptional to become ordinary and even trivial. It is reported for instance that Australia's national anti-terror laws are striking not just in their volume, but also in their scope. [16] They include provisions for warrantless searches, [17] the banning of organisations, preventive detention, [18] and the secret detention and interrogation of non-suspect citizens by the Australian Security Intelligence Organisation ('ASIO'). [19] Writing in 2002, Lucia Zedner and Janne Flyghed noted the potential for the migration of national security measures to the law and order context. For Zedner, the most serious threats to security provide 'the underlying rationale and licence for measures that tackle much lesser risks but pose no small threat to basic liberties'. [20] Flyghed similarly observed that once new coercive measures have been

introduced to counteract extremely serious forms of crime, such as terrorism, 'there follows a slide towards their employment in connection with increasingly minor offences'. [21]

The principle of non-derogable rights

Non-derogable rights refer to those rights attached to human beings and which cannot be subject to limitation by states, even during emergency situations (Section 4(2) of the ICCPR, Section 2 of Convention against torture). These refer to the right to life, freedom from torture or cruel, inhuman, or degrading treatment or punishment, slavery or being held in servitude, imprisonment on the grounds of an inability to fulfill a contractual obligation, arbitrary detention, right to recognition everywhere as a person before the law, and freedom of thought, conscience, and religion. This requirement was also reaffirmed by the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment in its non-derogation clause in Section 2 which reads:

- Each state party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.
- No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.
- An order from a superior officer or a public authority may not be invoked as a justification of torture

The non-derogable clause provided by Section 2(2) expressly targets emergency situations, which are usually deemed a legal excuse for torture and other gross violation of human rights. The state's experience of an emergency is irrelevant by virtue of non-derogability of the prohibition on torture, but the Committee Against Torture's (CAT) reviews are likely to be influenced by the frequent association of widespread torture practices with public emergencies. [22] It is reported that the ten members Committee Against Torture seek compliance primarily through the review of periodic state reports under Section 19 of the treaty. However, it has already begun to consider confidential allegations of systematic torture practices under Section 20 and individual communication under Section 22. [23]

Similarly, the Geneva Conventions provide one of the most important provisions of international humanitarian and international law that aims to frame the conduct of armed conflict and seeks to limit its effects. It is by its nature designed to be applied during emergency situations involving armed conflict. [24] As contended by Fitzpatrick, the entire body of international humanitarian law, both customary and codified, is highly relevant to the protection of human rights during states of emergency, especially in defining non-derogable rights. [25] The most important standards are set out in Section 3, common to the four Geneva conventions of 1949. The principle of non-derogable rights appears to be a major concern of international instruments regarding the management of crisis situations.

Going back to the context of extreme emergencies, the recent antiterrorist legislation in Cameroon does not take into account the right to life which is a non-derogable right. On this account, four sections of that legislation (section 2, 3, 4 and 5) provide for the death penalty for a variety of acts qualified as 'terrorist' including the perpetration and funding of terrorist activities. Moreover under such legislation demonstrators in Cameroon can also be labelled terrorists and then subject to capital punishment. [26] Similar legislation was recently passed in Chad one of the leading countries along with Cameroon in the fight against the Islamist movement Boko Haram. As a result, only six months following its abolition in the country's legislation, capital punishment was reintroduced within the law by parliament that voted with an overwhelming majority of 46 votes, o against and 0 abstention despite the absence of a significant majority of deputies in that parliamentary session. The death penalty was enforced in Chad for on 29 September 2015 when ten members of the terrorist group Boko Haram were sentenced to death and executed by authorities.

On torture, Israel recently passed a new legislation allowing the force feeding of prisoners. Through this process, a tube is inserted within the nostril of the prisoner to his stomach and the process is said to be very painful. These practices are in line with those of forces feeding of prisoners on hunger strikes perpetrated in Guantanamo the American prison on Cuba Island where various kind of torture have today merged with the ordinary US military practices. It has been reported that tactics approved by Secretary Rumsfeld and implemented by Major General Geoffrey Miller at Guantanamo involved the use of dogs for interrogation, stripping persons naked, hooding for interrogation, stress positions designed to inflict pain, isolation in cold and dark cells for more than thirty days, other uses of harsh cold and heat, and the withholding of food. [27] In a given circumstance, some of these approved tactics might not constitute "torture" or "cruel" treatment; but each tactic, including use of "fear up harsh," could reach such a level of illegality and, in any event, it is quite obvious that each can constitute illegal treatment that is "physical suffering," "inhumane," "degrading," "humiliating," a use of "physical or moral coercion," or a use of "intimidation." A tactic that violates any Geneva proscription is a war crime. [28] Such was already the case in Iraq. Indeed as it is currently reported:
Pictures of outrageous abuse of detainees at Abu Ghraib, Iraq, disclosed in May 2004 demonstrated that some human beings in control of the U.S. military had been stripped naked with hoods placed over their heads and threatened with dogs near their bodies. Were these forms of patently illegal treatment isolated aberrations at the

hands of a few errant soldiers or had the tactics of stripping naked, hooding, and use of dogs been approved at highest levels in the Bush administration and the military? [29]

In 1996, the European Court recognised that where a detainee was stripped naked, with his arms tied behind his back and suspended by his arms such treatment amounted to torture." [30] In another case, the European Court stated that treatment was "'degrading' because it was such as to arouse in its victims feelings of fear, anguish and inferiority capable of humiliating and debasing them." [31] The Committee Against Torture has condemned the use of the following interrogation tactics as either torture or cruel, inhuman, or degrading treatment: (1) restraining in very painful conditions; (2) hooding under special conditions; (3) sounding of loud music for prolonged periods; (4) sleep deprivation for prolonged periods; (5) threats, including death threats; (6) violent shaking; and (7) using cold air to chill. [32] In his statement to the Third Committee of the UN General Assembly, the Special Rapporteur on Torture spoke of reported circumventions of the prohibition on torture in the name of fight against terrorism. These attempts included the legal arguments of necessity and self-defence; attempts to narrow the scope of the definition of torture and arguments that some harsh methods should not be considered as torture but merely as cruel, inhuman or degrading treatment or punishment; acts of torture and ill-treatments perpetrated against terrorist suspects by private contractors; the indefinite detention of suspects (including children) without determination of their legal status and without access to legal representation.[33]

On arbitrary detention, it is strictly prohibited under international human rights law to imprison people without judgment. Indeed as coined by various provisions of the International Covenant on Civil and Political Rights, "all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."(Article 10(1)); "Everyone shall have recognition everywhere as a person before the law." (Article 16); "All persons shall be equal before the law and are entitled without any discrimination to the equal protection of the law . . ." (Article 26). However despite this clarification indefinite and arbitrary detentions within the framework of extreme emergencies and struggle against terrorism remain a fact. It is reported that anti-terrorism legislation passed in the UK, France, Germany and Italy introduced severe restrictions on freedoms including prolonged detention and refusal to grant the right of asylum and immigration on the mere suspicion that the individual or individuals concerned belonged to a terrorist group. [34] In the same vein, in 2003 the UN Working Group on Arbitrary Detention observed that the conditions of people detained by the US as a result of so called War against terror were arbitrary. [35] The Guantanamo prison on Cuba Island, the secret interrogatory spaces of CIA across Europe and the Secondary Prisons in Cameroon amount to the space of arbitrary detention.

The principle of non-discrimination

Certain discrimination clauses may not be imposed in a manner that discriminates on the grounds of race, color, gender, language, religion, or social origin. [36] This principle is entrenched in Section 3 of the Geneva Convention, which states that 'persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed ''*hors de combat*" by sickness, wounds, detention, or any other cause, shall in "all circumstances" be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.' Similar provisions appears in the Covenant that mentions that certain discrimination clauses may not be imposed in a manner that discriminates on the grounds of race, color, gender, language, religion, or social origin (section 4(1)).

In relation to the extreme emergencies, it can be said that some anti-terror laws operate a clear discrimination between the citizens of a country and foreign nationals. In its report for 2004, Amnesty International says that countries have continued to flout international human rights standards in the name of the 'war on terror'. This has resulted in 'thousands of women and men suffering unlawful detention, unfair trial and torture— often solely because of their ethnic or religious background. [37] Similarly it was coined by the UN Special Rapporteur on Religious Intolerance that responses to terrorism have also led to new forms of racial discrimination and a growing 'acceptability' of the traditional forms of racism where certain cultural or religious groups are viewed as terrorist risks. [38]

Conclusion

This paper aims at assessing the suspension of law and human rights through the emergence of extreme emergency in modern societies. It appears that unlikely to the classic emergencies subject to international and domestic restrictions, the concept of extreme emergencies is entirely driven by the executive entity and is characterised by massive human rights violation including so called non derogable rights. In the name of terrorism human beings can be subject to torture, killings and indefinite detention without judgement. In its majority the anti-terror legal arsenal is sets to erode not only human rights and human dignity of individual citizens but also stripping away their humanity.

Paradoxically despite the proliferation and inflation of anti-terror laws and harsh measures across the world, modern states seem to becoming less safe than in the past owing to the emergence of new terrorist organisation such Islamic State or Boko Haram. As Amnesty International stated in May 2003, the 'war on terror', far from

making the world a safer place has made it more dangerous by curtailing human rights, undermining the rule of international law and shielding governments from scrutiny. It has deepened divisions among people of different faiths and origins.

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