HUMAN RIGHTS AND JUDICIAL REVIEW IN TIMES OF EMERGENCY OR CRISIS

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The article analyses the role of courts in upholding fundamental rights during emergencies and other crises. It identifies grounds for special judicial restraint in emergencies or crises: the stakes are extraordinarily high, and the need for action is urgent; the Government (with the legislature) has primary responsibility for protecting the nation and its citizens and will also typically be best placed to decide what is useful and necessary to address the emergency or crisis. Therefore, courts should generally exercise more restraint as regards assessing the situation or threat, than reviewing the measures taken; exercise more restraint on factual aspects where courts are generally not in a good position to second-guess the assessment of the executive (situation, necessity of measures) than on normative aspects which are judicial in nature (rationality, arbitrariness, discrimination, proportionality); and exercise more restraint on substance than on procedure (due process). Examples from, notably, Strasbourg case law, but also certain national jurisdictions, indicate that courts act more or less accordingly.

1 INTRODUCTION

'Sovereign is he who decides on the state of exception'.[1] With this famous statement the German constitutional theorist Carl Schmitt introduces his work Politische Theologie (1922).

In a constitutional democracy no single state organ can claim to be the sovereign in so far as constitutional democracy is based on the separation of powers, where Parliament has the legislative power, the Government the executive power, and the judiciary has judicial power and is entrusted with upholding the rule of law, including fundamental rights. As is well known, this separation of powers creates checks and balances as a bulwark against abuse of power, including ensuring that the judiciary will keep the political organs within the limits of the law. At least this is so in normal times. Perhaps this ordinary state of affairs is somehow suspended during a public emergency or other serious crisis giving way to a concentration of power in the hands of the executive power, in particular. This is what Carl Schmitt's famous quote implies: the state of exception reveals the real essence of state authority.

Clearly, the existence of an emergency or other acute crisis creates a need for swift and decisive action, which affects the ordinary relationship between the political organs, notably the executive, and the judiciary. If, however, the executive power could freely decide that an emergency or other crisis existed (and for how long) and was free to take the measures deemed necessary to cope with it, without being constrained by the Courts, then the executive would be truly sovereign in the sense of Carl Schmitt. History tells us that such kind of power concentration is dangerous.

The aim of this article is to provide a general analysis of the role of courts in upholding

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[1] Translation from original German text: 'Souverän ist, wer über den Ausnahmezustand entscheidet'.

fundamental rights during emergencies or other crises: to what extent and on what issues should courts exercise judicial restraint during public emergencies or other crises when they review the conformity of political measures with fundamental rights?

The article deals in principle with any type of emergency or crisis, including war, internal unrest or coup attempts, terrorism, immigration, pandemics, natural disasters etc.

The analysis is, above all, normative in the sense that the arguments are based on general considerations relating to the role and competence of courts in a constitutional democracy based on the rule of law. However, the analysis is supported by and illustrated with examples from European case law, notably from the European Court of Human rights (ECtHR or the Strasbourg Court) but also, to a lesser extent, from the European Court of Justice and from national jurisdictions – Great Britain, Norway and Denmark.

As a precursor to the analysis a few remarks are offered pertaining to the notion of judicial restraint (Section 2). The starting point of my analysis is the principle of constitutional democracy that courts have the power to review acts of the executive and the legislature (Section 3). A deviation from this normal state of affairs needs justification, and so we must look for those characteristics of an emergency or crisis which provide special grounds for judicial restraint or deference vis a vis the political organs, notably the executive (Section 4). Having identified those grounds, the analysis is divided into issues of judicial review relating to the situation (Section 5), the measures taken (Section 6), and conformity with due process guarantees (Section 7). Finally, a conclusion is offered along with some final remarks on the relevance of declaring a 'public emergency' (Section 8).

2 THE NOTION OF JUDICIAL RESTRAINT

Judicial restraint[2] is generally described as an approach by which courts, based on constitutional considerations concerning the function and competence of the different state organs, allow the political branches a 'margin of appreciation', or a 'scope of discretion' so that the courts will not necessarily enforce their own understanding of the best interpretation of fundamental rights. It thus concerns the strictness of the courts' scrutiny, the extent to which they will review the assessments made by the political organs, including both normative assessments and factual assumptions and forecasts about future events.

Accordingly, judicial restraint or deference is not only a matter of how much; it is also a matter of what kind. Notably, judicial restraint may be exercised with regard to both legal questions based on fact (such as evidence, threat, or necessity) and legal questions based on norms (such as interpretation or proportionality). Furthermore, judicial restraint may relate to both procedural and substantive legal issues or rights.

In principle, one should distinguish between the material human rights norm (based on interpretation) and the standard of judicial review (based on considerations of relative constitutional competence). In practice, however, this distinction may not always be

[2] The doctrine of 'judicial self-restraint' as such originates from American constitutional law, where it was originally conceived in the context of judicial review of legislation, cf. James B Thayer, 'The Origin and Scope of the American Doctrine of Constitutional Law' (1893) 7(3) Harvard Law Review 129, 129 et seq (135), arguing that courts should respect that the legislature has *'a wide margin of consideration'*. The doctrine first gained traction in the US Supreme Court in 1936, when Justice Stone stated concurred, stating that *'the only check upon our own exercise of power is our own sense of self-restraint'*, United States v Butler, 297 U.S. 1, 78 (1936).

clear-cut. For instance, the Strasbourg Court has sometimes recognised a lower human standard than would normally apply, with reference to the crisis at hand.

Thus, when in *Khlaifia and Others*[3] the Grand Chamber of the Strasbourg Court was called upon to assess whether in 2011 Italy had deprived asylum seekers of their liberty under conditions contravening Article 3 ECHR (prohibiting torture and other inhuman or degrading treatment), the Court took into account the fact that, at the time, Italy was experiencing an exceptional influx of asylum seekers. The Court recognised that the massive influx had placed the Italian authorities in an extremely difficult situation. Accordingly, while reaffirming that Article 3 ECHR is absolute and allows for no exception or derogation, the Court nevertheless took the exceptional situation into account:

> While the constraints inherent in such a crisis cannot, in themselves, be used to justify a breach of Article 3, the Court is of the view that it would certainly be artificial to examine the facts of the case without considering the general context in which those facts arose. In its assessment, the Court will thus bear in mind, together with other factors, that the undeniable difficulties and inconveniences endured by the applicants stemmed to a significant extent from the situation of extreme difficulty confronting the Italian authorities at the relevant time.[4]

Against this background, the Grand Chamber (unlike the chamber previously) concluded that despite problems with overcrowding, bad hygiene and other conditions which were, in the words of the Court 'far from ideal',[5] the applicants had not suffered inhuman and degrading treatment during their detention at Lampedusa. The case of *M.A. v. Denmark*[6] provides a somewhat similar example. The Strasbourg Court had to decide whether the so called 'waiting periods' for family reunification (suspending the right to apply for family reunification for three years) established in Denmark by law in response to a massive influx of asylum seekers from Syria in 2015 was in conformity with Article 8 ECHR (the right to respect for i.e. family life). Previous case law suggested a right to family reunification, if refugees and others seeking protection have no other option of upholding family life. However, the Strasbourg Court held that the exceptional crisis made a difference and could justify a temporary suspension of the right to family reunification (although not for three years):

> [D]uring periods of mass influx of asylum seekers and substantial resource restraints, receiving States should be entitled to consider that it falls within their margin of appreciation to prioritise the provision of Article 3 protection to a greater number of such persons over the Article 8 interest in family reunification of some.[7]

[3] *Khlaifia and Others v Italy* App no 16483/12 (ECtHR, 15 December 2016).
[4] ibid para 185.
[5] ibid para 188.
[6] *M.A. v Denmark* App no 6697/18 (ECtHR, 9 July 2021).
[7] ibid para 145.

3 THE ROLE OF JUDICIAL REVIEW IN A CONSTITUTIONAL DEMOCRACY

In any democratic constitution based on the rule of law, courts are entrusted with interpreting and enforcing the law. This judicial function of courts extends to the protection of constitutional rights and liberties (as well as international human rights). While political branches have a democratic mandate and are thus in general pre-eminently responsible for balancing security and liberty (as they are with regard to balancing other basic societal interests), this does not hold true whenever the balancing encroaches upon constitutional and international human rights.[8] Behind the basic constitutional principles of human rights, the rule of law and the separation of powers lies the suspicion – based on historical experience – that unlimited and unchecked powers of government may lead to abuse and unwarranted encroachments on individual rights. This holds especially true in times of a public emergency or other crisis, when far-reaching restrictions of rights are often employed. In the final analysis, there can be no rule of law and no protection of fundamental rights, unless the power of the political organs is limited, and even no democracy unless the power of the executive is limited, even in times of emergency or crisis. Those limits only exist to the extent they are enforced by the judiciary.

Therefore, the legal starting point for any discussion of judicial deference is the presumed competence of courts to review acts of the political branches for their conformity with constitutional and international rights. Any judicial deference must be justified on constitutional and institutional grounds. This also holds true whenever the executive or legislature encroaches upon individual rights and liberties during emergencies or other crises. Even in those very serious situations, the burden of justification is on those demanding judicial restraint, not on those favouring unrestricted judicial review.

4 WHAT GROUNDS FOR SPECIAL JUDICIAL RESTRAINT DURING EMERGENCIES AND CRISES?

It is well established that some judicial restraint may be called for even in normal times, based on considerations relating to the constitutional distribution of responsibility and competence between the political organs and the judiciary. Of interest here, however, is whether the existence of an emergency or crisis might justify *special* judicial restraint, having regard to the respective constitutional responsibilities and competences of the political branches and the courts – what has been labelled 'relative institutional competence'.[9]

There are at least four basic arguments for exercising special judicial restraint during an emergency or crisis, notably vis-à-vis the executive:

1) The stakes are high: In an emergency or serious crisis the stakes are extraordinarily

[8] This point was strongly emphasised by Lord Bingham on behalf of the House of Lords in *A and Others v Secretary of State* [2004] UKHL 56 at para. 42.

[9] See David Dyzenhaus, 'Deference, Security and Human Rights' in Benjamin J Goold and Liora Lazarus (eds), *Security and Human Rights* (Hart 2007) 125–139; see also *A and Others v Secretary of State* (n 8) at para 29 (*per* Lord Bingham).

high, so that the cost of failure may be serious, perhaps even disastrous.[10] This is a general argument for judicial restraint the strength of which will vary with the level and urgency of the crisis, regardless of whether an emergency has been declared or could be said to exist.[11]

2) *There is urgent need for action:* In normal situations, governments and politicians will have plenty of time to consider different options and means to achieve political objectives, based on thorough surveys. Not so during an emergency or other crisis. Time is of the essence; there is an urgent need for action (also because the stakes are high), and sometimes on the basis of limited knowledge.[12] So the executive will often have to act without knowing the exact scope of the emergency or crisis and the best means to counter it.

3) Government's first responsibility: The executive (with the legislature) has primary responsibility for national security and protecting the life of the nation. Although the political branches have many primary responsibilities in political matters, protecting the state and the security of its people is arguably the very first responsibility of government, and an original *raison d'etre* of state power and legitimacy. Thus, this argument seems especially relevant in the face of serious threats to national security and other emergencies.[13] By its nature, it is a general argument for judicial deference and restraint.

4) Government's expertise: It is a classic argument that the executive with its expertise is better equipped than courts to assess serious risks and threats to society and decide on what steps are necessary to counter it.[14] No doubt, this claim is credible. It is primarily an argument for some judicial restraint when it comes to reviewing substantial legal requirements based on fact (including predictions), rather than normative assessments.

In sum, what characterises an emergency or crisis is the seriousness of the situation and the urgent need for action. The obvious actor is the executive which not only has preeminent responsibility for the life and safety of the nation but is also better equipped than other state organs (especially the courts) to make informed decisions in this regard. All of these characteristics may provide, in different ways, grounds for special judicial restraint.

We can now turn to the question of how these grounds should affect the judicial review of emergency/crisis measures restricting fundamental rights: to what extent should and will courts review the assessment of the political branches, notably the executive, as to whether the requirements for restriction of fundamental rights have been fulfilled? First, we look at

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[10] See Eric A Posner and Adrian Vermeule, *Terror in the Balance. Security, Liberty and the Courts* (Oxford University Press 2007) 119; see also *Secretary of State v Rehman* [2001] UKHL 47 para 62 (*per* Lord Hoffmann); *A and Others v Secretary of State* (n 8) paras 29 (*per* Lord Bingham), 79–80 (*per* Lord Nicholls), 112 and 116 (*per* Lord Hope), 154 (*per* Lord Scott), and 226 (*per* Baroness Hale).

[11] See *Brogan and Others v United Kingdom* App no 11209/84 (ECtHR, 29 November 1988) para 48; *A and Others v United Kingdom* App no 3455/05 (ECtHR, 19 February 2009) para 216.

[12] See e.g. *Communauté genevoise d'action syndicale v Switzerland* App no 21881/20 (ECtHR, 15 March 2022) para 84 (the ECtHR Grand Chamber subsequently on 'appeal' rejected the case as inadmissible due to non-exhaustion of domestic remedies, Judgment of 27 November 2023).

[13] See *Ireland v United Kingdom* App no 5310/71 (ECtHR, 18 January 1978) para 207.

[14] See, for example, the House of Lords in *Secretary of State v Rehman* (n 10) paras 26 (*per* Lord Slynn), 57, and 62 (*per* Lord Hoffmann).

judicial review of the situation as one justifying special measures – i.e. determining that an 'emergency', 'threat', 'danger', etc. exists (Section 5). Second, we look at how courts review the measures taken to confront it – i.e. determining the (lawfulness), rationality, necessity, and proportionality of the specific measures taken to counter it (Section 6). Third, we look at judicial review of the process by which those measures are implemented, including the existence of safeguards against abuse (Section 7).

5 JUDICIAL REVIEW OF THE SITUATION (EXISTENCE OF AN EMERGENCY, THREAT, DANGER ETC.)

In order to justify extraordinary restrictions on fundamental rights an extraordinary situation must exist. Notably, the existence of a 'public emergency threatening the life of the nation' can justify derogation from ordinary human rights obligations, cf. Article 15 ECHR. However, also in less extreme circumstances, the restriction of rights may depend on the existence of, as it were, a 'threat to public safety', a 'danger to national security', a 'serious risk to public health' etc. The characterisation of the situation depends on factual information and assumptions, including forecasts about the future. While such a determination is subject to judicial review, the abovementioned grounds suggest the need for some judicial restraint. Accordingly, although courts consider themselves competent to review such legal categorisation, it seems they will generally defer to the assessment of the authorities, unless on the facts their categorisation appears arbitrary or indefensible.

5.1 'PUBLIC EMERGENCY THREATENING THE LIFE OF THE NATION' (ARTICLE 15 ECHR)

Article 15 ECHR allows states to derogate from most Convention rights[15] in time of war or other public emergency, to the extent strictly required by the situation:

> 1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under the Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

According to the wording of Article 15 the emergency at hand must be 'threatening the life of the nation'. This indicates a high threshold. The Strasbourg Court in *Lawless* – the first and leading case on derogations – confirmed that there must exist an exceptional and very serious situation affecting the whole population:

> In the general context of Article 15 of the Convention, the natural and customary meaning of the words 'other public emergency threatening the life of the nation' is sufficiently clear; they refer to an exceptional situation of crisis or emergency which

[15] Article 15(2) precludes derogation from the right to life (with the exception of lawful acts of war), and the prohibitions on torture and others inhuman or degrading treatment, slavery and retroactive punishment, cf. Articles 2, 3, 4(1) and 7. In addition, no derogation can be made to the prohibition on the death penalty, cf. Additional Protocol No. 6, Article 3, and Additional Protocol 13, Article 2.

> affects the whole population and constitutes a threat to the organised life of the community of which the state is composed.[16]

In concrete cases, however, the Strasbourg court has been more flexible, at times accepting national declarations of a 'public emergency' even if it was at least questionable whether the circumstances met the high threshold. This is due to the wide margin of appreciation which according to the Strasbourg Court must be left to the States in this respect. In *Ireland v United Kingdom,* the Strasbourg Court stated – and has often since repeated – that the national authorities enjoy a wide margin of appreciation as regards the existence of a public emergency within the meaning of Article 15:

> The limit on the Court's powers of review are particularly apparent where Article 15 is concerned. It falls in the first place to each Contracting State, with its responsibility for 'the life of [its] nation', to determine whether the life is threatened by a 'public emergency' and, if so, how far it is necessary to go in attempting to overcome the emergency. By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it. In this matter, Article 15(1) leaves those authorities a wide margin of appreciation.[17]

Thus, many have questioned whether such a public emergency existed in Ireland in the late 1950'es due to sporadic IRA operations from Ireland into Northern Ireland. According to the critics, the IRA operations clearly damaged relations between Ireland and Great Britain but could hardly be said to threaten Irish state institutions.[18] Nevertheless, the Strasbourg Court unanimously accepted Ireland's declaration of an emergency in the *Lawless* case.[19]

The same could perhaps be said about the terrorist threat against the United Kingdom emanating from Al Qaeda following the events of 11 September 2001. As a response to this threat, the UK government declared a public emergency and detained foreigners suspected of terrorist activities indefinitely, until such time as they could be expelled to their countries of origin. The terrorist threat was real, but could it be said to threaten the life of the nation, also considering that the UK was the only European country to rely on Article 15? In *A and Others*[20] the Strasbourg Court answered this question in the affirmative referring to the wide margin of appreciation left to national authorities by the Convention:

> As previously stated, the national authorities enjoy a wide margin of appreciation under Article 15 in assessing whether the life of their nation is threatened by a public emergency. While it is striking that the United Kingdom was the only Convention State to have lodged a derogation in response to the danger from al-Qaeda,

[16] *Lawless v Ireland* App no 332/57 (ECtHR, 1 July 1961) para 28; *A and Others v United Kingdom* (n 11) para 176; *Dareskizb LTD v Armenia* App no 61737/08 (ECtHR, 21 September 2021) para 59.
[17] *Ireland v United Kingdom* (n 13) para 207.
[18] Among others Aly Mokhtar, 'Human Rights Obligations v. Derogations: Article 15 of the European Convention on Human Rights' (2004) 8(1) International Journal of Human Rights 65, 69.
[19] *Lawless v Ireland* (n 16).
[20] *A and Others v United Kingdom* (n 11).

> although other States were also the subject of threats, the Court accepts that it was for each Government, as the guardian of their own people's safety, to make their own assessment on the basis of the facts known to them. Weight must, therefore, attach to the judgment of the United Kingdom's executive and Parliament on this question. In addition, significant weight must be accorded to the views of the national courts, which were better placed to assess the evidence relating to the existence of an emergency.[21]

Even more interesting in this case is the previous decision in the United Kingdom by the House of Lords[22] (now Supreme Court) containing deep reflections regarding the extent to which national courts can review a declaration of an emergency by the executive. Leading the majority, Lord Bingham stated that great weight must be attached to the government's assessment that an emergency exists, as it is 'a pre-eminently political judgment', where predictions of future events are uncertain. He also recognized that the Government should enjoy the benefit of doubt, a right 'to err […] on the side of safety'.

> I would accept that great weight should be given to the judgment of the Home Secretary, his colleagues and Parliament on this question, because they were called on to exercise a pre-eminently political judgment. It involved making a factual prediction of what various people around the world might or might not do, and when (if at all) they might do it, and what the consequences might be if they did. Any prediction about the future behaviour and human beings […] is necessarily problematic. Reasonable minds may differ, and a judgment is not shown to be wrong or unreasonable because that which is thought likely to happen does not happen. It would have been irresponsible not to err, if at all, on the side of safety.[23]

Accordingly, although several Law Lords were sceptical about the government's assessment, they allowed the government 'the benefit of the doubt'.[24] Only Lord Hoffmann rejected outright that there was a national emergency qualifying for derogation under Article 15.[25]

Baroness Hale in the case defined the outer limit of judicial deference as to the existence of an emergency as the situation where there is a manifest abuse of the emergency declaration:

> Protecting the life of the nation is one of the first tasks of a Government in a world of nation states. That does not mean that the courts could never intervene. Unwarranted declarations of emergency are a familiar tool of tyranny. If

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[21] *A and Others v United Kingdom* (n 11) para 180.
[22] *A and Others v Secretary of State* (n 8).
[23] ibid para 29 (*per* Lord Bingham). See also paras 79–80 (*per* Lord Nicholls), 112, 116 (*per* Lord Hope), 154 (*per* Lord Scott), 166 (*per* Lord Rodger), and 226 (*per* Lord Hale).
[24] ibid paras 26 (*per* Lord Bingham) 'the appellants have shown no ground strong enough to warrant displacing the Secretary of State's decision'; 154 (*per* Lord Scott): 'I would […] allow the Secretary of State the benefit of the doubt on this point'; 165-66 (*per* Lord Rodger).
[25] ibid para 96: 'I do not underestimate the ability of fanatical groups of terrorists to kill and destroy, but they do not threaten the life of the nation. Whether we would survive Hitler hung in the balance, but there is no doubt that we shall survive Al-Qaeda […]. Terrorist violence, serious as it is, does not threaten our institutions of government or our existence as a civil community'.

> a Government were to declare a public emergency where patently there was no such thing, it would be the duty of the court to say so.[26]

So far there is only one example in Strasbourg case law where the ECtHR rejected a Government's reliance on Article 15 to derogate from the Convention: *Dareskizb*.[27] This was a case of manifest abuse of Article 15. The Government wanted to silence the opposition by declaring a public emergency after anti-government demonstrations had resulted in violence. The violence emanated from a small group of demonstrators and was, above all a result of the heavy-handed response by the police to peaceful demonstrations; the demonstrators had not planned for any violent uprising, which might have justified declaring a public emergency.

5.2 OTHER CATEGORISATIONS: 'THREAT', 'DANGER', 'RISK' ETC.

The Strasbourg Court has held that in cases concerning national security, the executive's assessment of what constitutes a threat to national security 'will naturally be of significant weight'.[28] However, they do not enjoy a free discretion. National courts must be competent to review whether that characterisation has a 'reasonable basis in the facts' and is not 'arbitrary'.[29] Accordingly, the Court in *Al-Nashif*[30] found a violation of Articles 5(4), 8 and 13 ECHR, because a foreigner had been detained and subsequently expelled for posing a threat to national security, but without being able to challenge that assessment before the national courts, since the authorities kept the intelligence on which it was based secret.

National courts have taken the same approach. The U.K. House of Lords held in *Rehman*[31] that while considerable deference is owed to the expertise of the executive, the notion of national security remains a legal construction subject to review. The Norwegian Supreme Court, in a 2007 expulsion case, held that courts should show restraint when considering the question of whether the evidence merits the conclusion that a person poses a threat to national security; nevertheless, courts must still review whether evidence supports that view.[32] The Danish Supreme Court in 2008[33] examined on its own whether a person planning to kill the "Muhammed cartoonist" could rightly be considered a 'danger to national security'; the Court upheld the authorities' assessment, finding that trying to kill a man because he had made a controversial cartoon could be considered an attempt to scare and intimidate the public and thereby undermine freedom of speech and public debate.

6 JUDICIAL REVIEW OF THE MEASURES (RATIONALITY, NECESSITY, PROPORTIONALITY)

If an extraordinary situation or threat exists, the next question is whether the measures taken

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[26] *A and Others v Secretary of State* (n 8) para 226 (*per* Lord Hale).
[27] *Dareskizb LTD v Armenia* (n 16) paras 60-62.
[28] *Al-Nashif v Bulgaria* App no 50963/99 (ECtHR, 20 June 2002) para 124. *Piskin v Turkey* App no 33399/18 (ECtHR, 15 December 2020) para 225.
[29] ibid.
[30] *Al-Nashif v Bulgaria* (n 28).
[31] *Secretary of State v Rehman* (n 10) paras 29 (*per* Lord Slynn), 50, 53, and 56 (*per* Lord Hoffmann).
[32] Norwegian Supreme Court, judgment of 8 November 2007, Norsk Retstidende 2007, p. 1573, paras 51–58.
[33] Danish Supreme Court, judgment of 2 July 2008, Ugeskrift for Retsvæsen 2008, afdeling B, p. 2394.

to counter it can be justified. Even during a public emergency, measures taken in derogation of human rights must be 'strictly required' under Article 15 ECHR. Essentially, this requirement is no different from the ordinary requirement that (most) rights restrictions must not only be rational and non-discriminatory but must also be necessary and proportionate to the aim pursued (we here talk about relative rights only, i.e. those which are subject to restriction, not absolute rights). These requirements have factual as well as normal aspects and so, while all subject to judicial review, may not all be subject to the same level of scrutiny by the courts.

6.1 'MEASURES […] STRICTLY REQUIRED BY THE EXIGENCIES OF THE SITUATION' (ARTICLE 15 ECHR)

As already mentioned during a public emergency as defined in Article 15 ECHR states may derogate from (most) human rights obligations, but only 'to the extent strictly required by the exigencies of the situation', cf. Article 15(1) ECHR. On its face, this is a strict requirement of necessity (and proportionality) of any measure derogating from Convention rights.

However, as mentioned earlier, the Strasbourg Court stated in *Ireland v United Kingdom* – and has repeated since – that the Convention leaves a broad margin of appreciation to the national authorities also as regards what measures are necessary, to address the emergency:

> The limit on the Court's powers of review are particularly apparent where Article 15 is concerned. It falls in the first place to each Contracting State, with its responsibility for 'the life of [its] nation', to determine whether the life is threatened by a 'public emergency' and, if so, how far it is necessary to go in attempting to overcome the emergency. By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it. In this matter, Article 15(1) leaves those authorities a wide margin of appreciation.[34]

Despite this stated broad margin, the Strasbourg Court has found on numerous occasions, that national measures taken during an emergency could not be considered to be 'strictly required' by the emergency and were thus not covered by Article 15.[35] One explanation for this may be that the Strasbourg Court seems increasingly to focus on a broad and normative assessment of proportionality rather than a more narrow and factual assessment of the necessity of measures taken.[36]

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[34] *Ireland v United Kingdom* (n 13) para 207. See also *Brannigan and McBride v United Kingdom* Apps nos 14553/89 and 14554/89 (ECtHR, 25 May 1993) para 43; *Aksoy v Turkey* App no 21987/93 (ECtHR, 26 November 1996) para 68; *A and Others v United Kingdom* (n 11) para 184; *Sahin Alpay v Turkey* App no 16538/17 (ECtHR, 20 March 2018) para 75.

[35] See among others *Aksoy v Turkey* (n 34) (incommunicado detention for 14 days); *Nuray Sen v. Turkey*, ECtHR judgment of 17 June 2003, Appl. no. 41478/98 (detention for 11 days). *A and Others v United Kingdom* (n 11) (indefinite detention of foreign terrorist suspects); *Sahin Alpay v Turkey* (n 34) (journalist detained on remand without reasonable suspicion of being member of a terrorist organisation); *Piskin v Turkey* (n 28) (dismissal from public service without access to a fair trial).

[36] See in this context the debate in *Brannigan and McBride v United Kingdom* (n 34), with dissenting opinions.

All in all, the review of emergency measures by the Strasbourg Court can thus be characterised as real, while not strict or intensive, especially not as regards the question of whether the State could have chosen less intrusive means. It may thus also be concluded that while the Strasbourg Court clearly exercises judicial restraint in the face of a national declaration of an emergency, it is less pronounced as regards reviewing the measures when compared to the restraint exercised in reviewing the existence of the emergency.

6.2 NON-ARBITRARINESS (RATIONALITY AND NON-DISCRIMINATION)

As a minimum, restrictive measures chosen by the authorities to counter emergencies or crises must not be arbitrary; they must be rational[37] and non-discriminatory. These basic requirements are normative and there is no reason why courts should not strictly enforce them, even during emergencies or other serious crises. And case law suggests they will.

In *A and Others* ('the Belmarsh Case'), the British Parliament had enacted legislation allowing indefinite detention of alien terrorist suspects, but not of British citizens posing a similar threat. The House of Lords [now the Supreme Court] held this detention to be discriminatory on grounds of national origin, as there was no justification for the difference in treatment between aliens and citizens. This sufficed to strike down the indefinite detention scheme as incompatible with Articles 5 and 14 of the ECHR. By excluding British terrorist suspects who posed just as much of a threat, the measure was not rationally tailored to its purpose of preventing terrorism. Accordingly, the discrimination against alien suspects was unnecessary, a conclusion that Lord Bingham found to be 'irresistible'.[38] The ECtHR subsequently agreed.[39] An even clearer example of an arbitrary measure during an emergency was dealt with by the Strasbourg Court in *Sahin Alpay*: following the attempted military coup in Turkey, the authorities had detained a journalist on remand for alleged membership of a terrorist organization. There was, however, no reasonable suspicion of that membership, which made the detention utterly arbitrary. The Strasbourg Court sided with the Turkish Constitutional Court in turning against it:

> Turning to the derogation by Turkey, the Court observes that the Constitutional Court expressed its position on the applicability of Article 15 of the Turkish Constitution, holding that the guarantees of the right to liberty and security would be meaningless if it were accepted that people could be placed in pre-trial detention without any strong evidence that they had committed an offence […].[40]

6.3 NECESSITY

Whether a non-arbitrary measure is also necessary to achieve its aim depends on factual assessments of the emergency or threat and of the effectiveness of less intrusive alternatives. Considering the primary responsibility and expertise of the executive, as well as the urgent need for action in a high stakes situation, courts should be cautious not to second-guess the

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[37] See e.g. *A and Others v Secretary of State* (n 8) para 30 (*per* Lord Bingham).
[38] ibid paras 35, 43, and 68 (*per* Lord Bingham), 76–77 (*per* Lord Nicholls), 97 (*per* Lord Hoffmann), 129–32 (*per* Lord Hope), 155–56 (*per* Lord Scott), 188–89 (*per* Lord Rodger), 228, and 231 (*per* Lord Hale).
[39] *A and Others v United Kingdom* (n 11) para 186.
[40] *Sahin Alpay v Turkey* (n 34) para 119.

executive on the necessity of measures taken, unless there is a solid basis for doing so.

Accordingly, case law would seem to suggest that, generally, courts considerably defer to the executive in this regard. They allow the executive the benefit of the doubt, unless there appears prima facie to be less intrusive alternatives. In *Rehman* concerning national security, Lord Slynn of the British House of Lords justified this cautious approach, remarking that the government

> is undoubtedly in the best position to judge what national security requires even if his decision is open to review. The assessment of what is needed […] is primarily for him.[41]

In the same vein, the House of Lords in *A and Others* concerning anti-terrorism measures during an emergency indicated that, faced with an urgent and complex crisis, the Government is allowed to act out a principle of caution, Lord Bingham stating that for the Government 'it would be irresponsible not to err, if at all, on the side of safety'.[42] Similarly, the Strasbourg Court in *Communauté genevoise* concerning the margin of appreciation left to the Swiss Government in the early days of the Covid-19 pandemic, stated as follows:

> [The Court] acknowledges the very serious threat to public health from COVID-19, and that information about the characteristics and dangerousness of the virus was very limited at the beginning of the pandemic; accordingly, States had to react swiftly during the period under consideration in the present case. […][43]

Similarly, the Norwegian Supreme Court has held that the courts must generally leave the necessity of expulsion to the final decision of the executive in national security cases, intervening only in case of an outright abuse of authority.[44]

Occasionally, when there appears prima facie to be less intrusive alternatives to a government's chosen measures, the necessity requirement has been more strictly enforced. In such cases, a court would require the executive to prove that less intrusive measures would be insufficient to meet the security threat. The House of Lords did this, for example, in *A and Others* ('the Belmarsh Case') concerning detention of foreign terrorist suspects.[45] Lord Scott was among the several judges underlining the burden of the government in this case:

> [The Secretary of State] should at least, in my opinion, have to show that monitoring arrangements or movement restrictions less severe than incarceration in prison would not suffice.[46]

The same held true in *Communauté genevoise d'action syndicale*,[47] concerning restrictions on freedom of assembly in Switzerland in the early days of the Covid-19 pandemic – including

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[41] *Secretary of State v Rehman* (n 10) para 26 (*per* Lord Slynn).
[42] *A and Others v Secretary of State* (n 8) para 29 (per Lord Bingham).
[43] *Communauté genevoise d'action syndicale v Switzerland* (n 12) para 84.
[44] Norwegian Supreme Court, judgment of 8 November 2007, Norsk Rettstidende 2007, p. 1573, paras 56–58.
[45] *A and Others v Secretary of State* (n 8) paras 35, 44 (*per* Lord Bingham), 76–77 (*per* Lord Nicholls), 121, 126 (*per* Lord Hope), 155 (*per* Lord Scott) 167 (*per* Lord Rodger), and 228 (*per* Lord Hale).
[46] ibid para 115 (*per* Lord Scott). See also paras 44 (*per* Lord Bingham), 167 (*per* Lord Rodger).
[47] *Communauté genevoise d'action syndicale v Switzerland* (n 12).

a prohibition on demonstrations, which precluded the applicant trade union from arranging 1 May meetings. While acknowledging the very serious threat to public health facing the authorities and the complexity of the situation, the Court majority (4-3), nevertheless, found a violation of Article 11 ECHR (freedom of assembly), noting that it was difficult to accept that an outright prohibition of political demonstrations was the least intrusive measure, when the authorities continued to allow people to go to work indoors in factories and offices, provided necessary precautions were taken to prevent dissemination of the virus.[48]

6.4 PROPORTIONALITY

Proportionality is about weighing interests – i.e. whether a measure restricting fundamental rights is proportionate to the legitimate aim pursued. This is a normative exercise, and so there is no strong reason for courts to defer to the political branches to a wider extent than they would normally do. That being said, during a crisis the weighing of interests may be more complex than in normal situations. Accordingly, the Strasbourg Court in *Communauté genevoise d'action syndicale* recognised the serious threat to public health facing the authorities (the Government had not declared an emergency, cf Article 15 ECHR), and the very complex circumstances where competing interests and rights had to be considered:

> [T]he Court takes note of the competing interests at stake in the very complex circumstances of the pandemic, especially with regard to the positive obligations on the States Parties to the Convention to protect the lives and health of the persons within their jurisdiction, notably under Articles 2 and 8 of the Convention [para. 84].

Accordingly, courts review emergency and crisis measures restricting individual rights as to their proportionality. Presumably, however, a court will rarely strike down on proportionality grounds a measure which it accepts as a rational and necessary response to a serious threat. However, this is due to the weight of the societal interest during an emergency or serious crisis, rather than an exercise of judicial restraint. In an emergency or crisis, while the normative weight of rights remains constant, the weight of the colliding societal interest increases with the seriousness and urgency of the threat or risk. It follows from the proportionality principle that the weightier the national security interest, the more likely it will outweigh the individual rights in question. This analytical exercise has nothing to do with judicial restraint.

In any case, courts generally deem themselves competent to review proportionality even in emergencies and crises. The Strasbourg Court in *A and Others* agreed with the House of Lords that 'the question of proportionality is ultimately a judicial decision'.[49]

There were indications in *A and Others* ('the Belmarsh Case') that even confronted with a public emergency due to serious terrorist threats against the UK, the House of Lords would not have accepted the scheme of indefinite detention of terrorist suspects without trial, even if it had been applied to all without discrimination.

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[48] *Communauté genevoise d'action syndicale v Switzerland* (n 12) para 87.
[49] *A and Others v United Kingdom* (n 11) para 184.

In the same vein, while not employed during an emergency within the meaning of Article 15 ECHR but during a violent clash between the authorities and the opposition, the Strasbourg Court in *Dareskizb* (2021) took a strong stand against censorship of the press. Finding a violation af Article 10 ECHR in the specific case, the Court implied that censorship will not be easily justifiable even during an emergency:

> [D]emocracy thrives on freedom of expression […]. In this context, the existence of a 'public emergency threatening the life of the nation' must not serve as a pretext for limiting freedom of political debate, which is at the very core of the concept of a democratic society. In the Court's view, even in a state of emergency the Contracting States must bear in mind that any measures taken should seek to protect the democratic order from the threats to it, and every effort must be made to safeguard the values of a democratic society, such as pluralism, tolerance and broadmindedness […].[50]

7 JUDICIAL REVIEW OF DUE PROCESS GUARANTEES

Regardless of the restraint exercised on the substantial issues, courts – in accordance with international human rights law – uphold basic procedural safeguards against arbitrariness even in times of an emergency or other crisis. As the Strasbourg Court stated in *Piskin* where during the emergency in Turkey following a failed coup attempt the applicant had been dismissed from his public position without access to a fair trial:

> [I]n the Court's view, even in the framework of a state of emergency, the fundamental principle of the rule of law must prevail. It would not be consistent with the rule of law in a democratic society or with the basic principle underlying Article 6 § 1 – namely that civil claims must be capable of being submitted to a judge for an effective judicial review – if a State could, without restraint or control by the Convention enforcement bodies, remove from the jurisdiction of the courts a whole range of civil claims or confer immunities from civil liability on large groups or categories of persons […].[51]

Similarly, the Strasbourg Court has confirmed on numerous occasions that basic due process guarantees must be available, even where national security is at stake, with the necessary adjustments to protect the secrecy of classified information.[52] In *Al-Nashif*[53] – concerning a foreigner who had been detained and subsequently expelled for posing a threat to national security, without, however, having any way to defend himself, since the relevant intelligence was classified and unavailable to him or his lawyer – the Strasbourg Court found a violation of Article 5(4), Article 8 and Article 13, stating among others:

> 123. Even where national security is at stake, the concepts of lawfulness and the rule

[50] *Dareskizb LTD v Armenia* (n 16) para 77.
[51] *Piskin v Turkey* (n 28) para 153.
[52] See, for example, *Chahal v United Kingdom* App no 22414/93 (ECtHR, 15 November 1996) para 131; *Al-Nashif v Bulgaria* (n 28) paras 136–37; *A and Others v United Kingdom* (n 11) para 205.
[53] *Al-Nashif v Bulgaria* (n 28).

> of law in a democratic society require that measures affecting fundamental human rights must be subject to some form of adversarial proceedings before an independent body competent to review the reasons for the decision and relevant evidence, if need be with appropriate procedural limitations on the use of classified information […].
> 124. The individual must be able to challenge the executive's assertion that national security is at stake. […] Failing such safeguards, the police or other State authorities would be able to encroach arbitrarily on rights protected by the Convention.[54]

In the same vein, the European Court of Justice (ECJ) in *Kadi*[55] held that the principle of effective judicial protection also applies in the field of counter-terrorism (with restrictions necessary to ensure the efficiency of the measures and the secrecy of intelligence sources). The case concerned the freezing of assets belonging to suspected terrorist individuals and organisations, without those affected being informed of the reasons for the suspicion. The Court held that the rights of defence, in particular the right to be heard, had not been respected.[56]

The Danish Supreme Court has also upheld the European Convention requirements of due process in terrorism cases, despite post-9/11 legislative attempts by the Danish government to limit judicial review. The Danish parliament enacted legislation in 2002 empowering the executive to detain and deport aliens whom the intelligence service considered a danger to national security, without providing the alien or the courts access to the factual basis for this danger assessment (secret intelligence). This was an apparent violation of Articles 5(4) and 13 of the ECHR. Therefore, the Danish Supreme Court has decided that the authorities are required to provide some substantiation (to a standard of reasonable probability) that there is a factual basis for characterising an alien as a danger to national security. The authorities were required to present the evidence necessary for such substantiation in an adversarial process, so as to preclude arbitrary detention.[57] Similarly, the Norwegian Supreme Court, in a case concerning the expulsion of an alien considered to be a terrorist threat, held that it was also competent to review the factual evidence on which the decision to expel was based. It could also determine whether the executive's assessment of the facts had been defensible. The fact that national security was involved justified only some limited judicial restraint in this respect.[58]

8 CONCLUSIONS – AND SOME FINAL REMARKS

In constitutions based on the rule of law, the courts are called upon to review the acts of the political branches to ensure their compatibility with constitutional and international human rights norms. This power of judicial review also encompasses measures during an emergency or other crisis. Accordingly, even during emergencies and crises, it is not judicial review, but judicial restraint that needs justification. Too much judicial restraint might

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[54] *Al-Nashif v Bulgaria* (n 28) paras 123-124. See also *Piskin v Turkey* (n 28) paras. 223 and 227.
[55] Joined cases C-402/05 P and C-415/05 P *Kadi & Al Barakaat International Foundation v Council and Commission* EU:C:2008:461.
[56] ibid at paras 335–53.
[57] Danish Supreme Court, judgment of 2 July 2008, in *Ugeskrift for Retsvæsen* 2008, pp. 2394 et seq.
[58] Norwegian Supreme Court, judgment of 8 November 2007, in *Norsk Retstidende* 2007, p. 1573, at para 49. See also *Secretary of State v Rehman* (n 10) para 54 (*per* Lord Hoffmann).

be as dangerous as too little, because it might reduce the constitutional function of courts into rubber-stamping political action, thereby providing the latter with a legal legitimacy it may not deserve.[59]

In addition to general constitutional considerations concerning the function and relative competence of the political organs and the judiciary, there are grounds for special judicial restraint in emergencies and crises: the stakes are extraordinarily high, and the need for action is urgent. The Government (with the legislature) has primary responsibility for protecting the nation and its citizens and will also typically be best placed to decide what is useful and necessary to address the emergency or crisis.

From this starting point the above analysis suggests a differentiated approach by courts when they review respect for fundamental rights during emergencies or other crises. In very general terms courts should exercise more restraint as regards assessing the *situation or threat*, than reviewing the *measures* taken; exercise more restraint on *factual* aspects where courts are generally not in a good position to second-guess the assessment of the executive (situation, necessity of measures) than on *normative* aspects which are judicial in nature (rationality, arbitrariness, discrimination, proportionality); and exercise more restraint on *substance* than on *procedure* (due process) – the latter being the providence and raison d'etre of courts.

The examples from case law in this article indicate that courts act more or less accordingly. They clearly exercise restraint when reviewing factual questions relating to the existence of an emergency, threat orrisk etc. and the necessity of the measures taken to counter it (benefit of the doubt). However, they will ensure that restrictions are non-arbitrary (rational and non-discriminatory) and also uphold real proportionality review even in times of emergency, to avert government excesses. Finally, they uphold basic due process guarantees regardless of the situation (including access to independent review and adversarial proceedings), if necessary, adjusted to take into account a need for secrecy.

So, who decides on the 'state of exception'? The Government above all (with Parliament) but fenced in by the judiciary which upholds the rule of law and essential human rights protection even in times of an emergency or other crisis. Judge Krenc of the Strasbourg Court summed it up nicely in his opinion in *Communauté genevoise*:

> In times of (public-health or other) crisis, when successive rounds of far-reaching restrictions to freedoms may be enacted under the banner of urgency, access to independent and effective judicial review is a fundamental safeguard against the risk of excess and abuse, a possibility that can never be overlooked. The courts are not there to take the place of the competent authorities – they can make no such claim and do not have the necessary legitimacy for that purpose – but to verify the lawfulness and proportionality of those restrictions […].[60]

This begs a final question: In terms of judicial review of fundamental rights does it make any real difference whether, during a crisis, the Government declares a 'state of exception' (meaning here a public emergency, cf. Article 15 ECHR) or not? It does make a difference, of course, if one contemplates restrictions that cannot be justified during normal

[59] See also *A and Others v Secretary of State* (n 8) para 41 (*per* Lord Bingham).
[60] *Communauté genevoise d'action syndicale v Switzerland* (n 12), Concurring opinion of Judge Krenc joined by Judge Pavli para 18.

times, such as administrative detention without usual guarantees of judicial review, indefinite detention without trial or censorship of the media. More frequent during a crisis, however, is a need to restrict rights, which themselves allow necessary and proportionate restrictions, in a more far-reaching manner than during normal times. In that case, recourse to Article 15 ECHR with a declaration of a public emergency is not necessary and it is not even obvious that it would make any material difference.

First, even during a public emergency, measures restricting human rights must be necessary and proportionate (even 'strictly' so!). Second, the existence of a crisis (even below the threshold of a public emergency) will in any event impact the proportionality assessment, i.e. more restrictive measures may be justified than in normal times. In that sense, emergency and crisis is rather a sliding scale than concepts with strict limits – the worse the situation, the more restrictive measures can be justified. In the proportionality assessment during an emergency or crisis, the societal interest behind restricting individual rights will carry considerably more weight and can thus justify more far-reaching restrictions than during normal times, in order to protect 'national security', 'public safety/order', 'public health' etc. This is likely one explanation the vast majority of European states did not invoke Article 15 ECHR to derogate from the Convention during the Covid-19 pandemic and that only the United Kingdom relied on Article 15 after 9 September 2001.

In *Communauté genevoise*, the Strasbourg Court (majority), before concluding that the Swiss prohibition on demonstrations during Covid-19 was not proportionate and therefore in violation of Article 11 ECHR, noted that Switzerland had not declared a public emergency under Article 15 ECHR which would have allowed it to derogate from the right to freedom of assembly to the extent strictly necessary in the situation.[61] In light of the above remarks, however, one might ask, whether that would have changed anything. Would it not still have been regarded as disproportionate to prohibit political meetings outdoors, while at the same time allowing people to meet by the hundreds in workplaces all over the country? The only possible difference would be if declaring an emergency (in good faith) is such a serious statement from a government that it might trigger some additional restraint from the courts.

[61] *Communauté genevoise d'action syndicale v Switzerland* (n 12) para 90.

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