Oñati Socio-Legal Series (ISSN: 2079-5971)
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Applying old tools to new challenges: The necessary adaptation of the French and ECtHR judges to emergency as a new paradigm of government

OÑATI SOCIO-LEGAL SERIES VOLUME 15, ISSUE 2 (2025), 484-506: JUDGES UNDER STRESS: INSTITUTIONS, IDEOLOGY AND RESISTANCE
DOI LINK: HTTPS://DOI.ORG/10.35295/OSLS.IISL.1891
RECEIVED 22 OCTOBER 2023, ACCEPTED 19 JANUARY 2024, FIRST-ONLINE PUBLISHED 7 FEBRUARY 2024, VERSION OF RECORD PUBLISHED 1 APRIL 2025

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Abstract

As states of emergency are becoming increasingly pervasive, courts can no longer rely on deferential approaches based on the assumption that emergencies are exceptional and temporary. This article investigates two mechanisms of judicial review in the case law of the ECtHR, French Constitutional Council and Council of State. The first mechanism is the review of the existence of the circumstances justifying the exceptional powers and restrictions on human rights. The second is the misuse of power or *détournement de pouvoir* doctrine. The article argues that both these elements of judicial review are under exploited while presenting the advantage of being readily available – therefore requiring no judicial creation – and offering strong bases to curb abuses of emergency powers. Examined at two different levels, national and regional, these two lines of reasoning, if deployed appropriately, might inspire further jurisdictions faced with similar emergency challenges.

Key words

Emergency; judicial review; ECHR; France

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Resumen

A medida que los estados de excepción se están volviendo cada vez más frecuentes, los tribunales ya no pueden confiar en enfoques deferentes basados en el supuesto de que las situaciones de excepción son excepcionales y temporales. Este artículo investiga dos mecanismos de revisión judicial en la jurisprudencia del TEDH, el Consejo Constitucional francés y el Consejo de Estado. El primer mecanismo es la revisión de la existencia de las circunstancias que justifican los poderes excepcionales y las restricciones a los derechos humanos. El segundo es la doctrina del abuso de poder o *détournement de pouvoir*. El artículo sostiene que esos dos elementos de la revisión judicial están infrautilizados, al tiempo que presentan la ventaja de estar fácilmente disponibles -por lo que no requieren creación judicial- y ofrecen bases sólidas para frenar los abusos de los poderes de excepción. Examinadas en dos niveles diferentes, nacional y regional, estas dos líneas de razonamiento, si se utilizan adecuadamente, podrían inspirar a otras jurisdicciones que se enfrentan a retos de emergencia similares.

Palabras clave

Emergencia; revisión judicial; TEDH; Francia

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1. Introduction

Initially dominated by wars and then terrorism, the emergency frame and rhetoric in the global north has expanded in parallel and together with the notion of national security to incorporate some new types of crises. Emergency is slowly becoming a "new normalcy" (Cheney 2001). During the past two decades, several Member States of the Council of Europe declared states of emergency, culminating in 2020 with ten Members notifying derogations under Article 15 of the European Convention on Human Rights (ECHR) during the pandemic.[1] Such developments can equally be observed in France, which remained under state of emergency for three and a half years during the past decade.

The judicial approach during emergency, marked by increased deference towards the political branches, was traditionally justified by the temporary and extraordinary character of the situation (Rosenfeld 2005). However, if emergency is indeed becoming a new paradigm of government (Agamben 2005), judges must adapt and reclaim their review privileges or risk permanently abdicating their prerogatives. A more hands-on judicial approach is even more justified as contemporary states of emergency are purported to be in line with the rule of law, regulated by it (Hennette Vauchez 2021).

This article focuses on the European Court of Human Rights (ECtHR), the French Constitutional Council and the French Council of State, three courts which dealt with an extraordinary number of emergency cases in the past few years.[2] The French Councils and the ECtHR share some very similar mechanisms to address emergency cases. Although dealing with a national system on the one hand and a regional one on the other, the mutual influence is patent. Despite their fundamental differences – institutional setting, composition or competence to name a few – the three jurisdictions supposedly perform similar tasks during emergencies: protecting the democratic order, rule of law and fundamental rights. The fact that they mobilize similar tools in dissimilar ways sheds an interesting light on the said tools but also on the courts themselves. Rather than an overall assessment of their emergency case law, the article concentrates on two review mechanisms which have the benefit of existing already and therefore are readily available. It argues that both tools could be efficiently mobilized to circumscribe some of the main dangers of emergency, while limiting accusations of judicial activism because they do not require much judicial creation.

The first mechanism is the review of the existence of an emergency. The ECtHR and French Councils have traditionally showed a high level of deference in that regard when they did not consider it a non-reviewable political question. Yet, substantive review of this first fundamental element is most adequate to circumscribe the emergency and maintain the normalcy / emergency dichotomy. The article then turns to misuse of power or *détournement de pouvoir*. This notion, which exists in very similar versions in both jurisdictions could, if applied more systematically, empower judges to sanction

[1] Albania, Armenia, Estonia, Georgia, Latvia, Moldova, North Macedonia, Romania, San Marino and Serbia.
[2] Both French jurisdictions are included because the Constitutional Council is competent to review the constitutionality of statutes whereas the Council of State reviews the legality of administrative norms and conventionality of statutes. The Council of States may also review the constitutionality of statutes in the context of its advisory function to the government and Parliament.

situations where emergency powers are used for other purposes than those which justified their activation.

2. The existence of an emergency

Most emergency regimes require that some sort of severity threshold be crossed for a formal state of emergency to be declared or extraordinary powers to be activated. Even though the importance for courts to review the actual existence of an emergency has been highlighted by various authors (see amongst others Dyzenhaus 2012, Greene 2020b) and occasionally judges themselves (*A v Secretary of State for the Home Department*, 2005, (Lord Hoffmann); *Brannigan and McBride v the United Kingdom*, 1993, Judge Martens' dissenting opinion, § 4), arguments remain strong that courts should be deferential in that regard or even that the existence of an emergency should not be submitted to judicial review at all.

Emergencies are commonly presented as objective circumstances which are merely acknowledged by the state's authorities and can only be addressed by extraordinary measures. However, this objectivity needs to be reassessed if one is to take Schmitt's "decisionist type" (1988, p. 5) seriously and effectively address his claim that "[s]overeign is he who decides on the exception." For Agamben (2005, p. 30) not only is necessity the result of a subjective judgment, but what drives and guides this judgment is the aim of the decision-maker. To Agamben's complete subjectivism, Greene (2020b, pp. 48–49) prefers constructivism, which acknowledges both an objective reality and its subjective assessment.

The subjective nature of the emergency (or of the decision to declare one) combined with the extraordinary powers it confers create a great potential for abuse. One way of curbing such abuse is to maintain the temporary character of the state of emergency. This requires a substantial judicial review of the circumstances justifying the state of emergency (Greene 2020b, chap. 3). Yet, the ECtHR and the French Councils have seldom taken this task seriously and when they have, their assessment generally remained superficial.

2.1. The ECtHR: between deference and increasing vigilance

Article 15 of the ECHR provides the possibility for States to derogate from their obligations under the Convention. From its early days, the Court (and Commission at the time) had the opportunity to develop its case law regarding both the conditions which could be invoked by a member state to trigger Article 15 and the content of the derogatory measures (*Lawless v Ireland (no. 3)*, 1961). The vast majority of Article 15 cases were connected to terrorism, and more recently, the COVID-19 pandemic (Wallace 2020). The first paragraph of Article 15 defines the scope of its application. Only "[i]n time of war or other public emergency threatening the life of the nation" may Member States notify a derogation. The interpretation of this provision offers grounds for judicial review. Yet, since its early days, the ECtHR has shown a high level of deference to national authorities, lowering even the threshold it initially imposed.

The Court first defined what would constitute a "public emergency" in *Lawless v Ireland (no. 3)* (1961) (§ 28). It then refined this interpretation in *Denmark, Norway, Sweden and the Netherlands v Greece* (1969) (the *Greek case*), where it identified four constituting features:

the emergency (1) must be actual or imminent, (2) its effects must involve the whole nation, (3) the continuance of the organized life of the community must be threatened and (4) the crisis or danger must be exceptional, in that the normal measures or restrictions, permitted by the Convention for the maintenance of public safety, health and order, are plainly inadequate (Harris *et al.* 2014, pp. 815–816).

These criteria provided a solid basis for reviewing the existence of circumstances allowing a state to derogate. However, when applying them, the Court showed a level of flexibility which rendered (some of) them inoperative. For example, the limited scope of the state of emergency remained unchallenged in *Aksoy v Turkey* (1996). With regard to the condition that the danger be actual or imminent, the Court reasoned that "[t]he requirement of imminence cannot be interpreted so narrowly as to require a State to wait for disaster to strike before taking measures to deal with it" (*A. and Others v the United Kingdom*, 2009, §177). This argument led the Court to accept a derogation made by the United Kingdom and justified by the 9/11 events in the United States despite the absence of terrorist attack at the time on the Member State's territory[3] and the United Kingdom being the only party having used Article 15.

A. and Others also shed light on the level of severity necessary for a danger to be considered a "threat to the life of the nation". Indeed, at the domestic level, Lord Hoffman, dissenting, had considered that Al-Qaeda did not pose a threat to the life of the nation. For Lord Hoffmann, the question was whether the situation threatened "our institutions of government or our existence as a civil community". The ECtHR on the other hand admitted being "prepared to take into account a much broader range of factors in determining the nature and degree of the actual or imminent threat to the 'nation'" (§ 179).

In relaxing the conditions which aimed at keeping the emergency exceptional and temporary, the Court endorsed the prevention logic which animates the fight against terrorism and contributes to a large extend to blurring the distinction between emergency and normalcy. Its flexibility in the application of the various conditions resulted in broadening the definition of emergency and lowering the threshold for the activation of Article 15.

Furthermore, contrary to the United Nations Human Rights Committee, the Court refused to require that either the emergency or the derogating measures be temporary (*A. and Others*, 2009, §178). In the same logic, the Court had already stated that "a decision to withdraw a derogation is, in principle, a matter within the discretion of the State" (*Brannigan and McBride*, 1993, § 47). This attitude was denounced by several judges including Judge Russo, concurring, and Judge Makarczyk, dissenting, for whom the Court should have made clear that the emergency has to be limited in time. Otherwise, it cannot be compatible with the guarantees of the Convention. Indeed, by refusing to control that the temporality of the derogating measures match the actual existence and persistence of an emergency, the Court opened the door to the "permanentization" of the exception.

[3] Terrorist attacks had occurred in London shortly before the hearing of the case by the ECtHR. These, however, took place more than three and half years after the United Kingdom notified the Council of Europe under Article 15.

The Court continues to take the specific circumstances into account in the remaining steps of its review. However, absent a proper determination of whether the emergency provision can validly be invoked, this threshold assessment is collapsed into a global proportionality review. Once the conditions for the derogation have been validated, the idea of exceptional restrictions has been endorsed. Liberty is now pitted against security in a fight where the latter already won the first round.

Collapsing the assessment of the existence of an emergency into the review the emergency measures contributes to normalizing the emergency as much as pulling normal limitation clauses into the emergency realm. As the type of review conducted by the Court under Article 15 and the normal limitation clauses come closer to alignment, the distinction between emergency and normalcy disappears. Under Article 15, threshold considerations are brought into the proportionality assessment while special circumstances are taken into account to justify grave restrictions absent any derogation (see for example *Ibrahim and Others v the United Kingdom*, 2016).[4]

This question was central to the debate regarding derogation during the early days of the COVID-19 pandemic (Sudre 2020, Scheinin 2020). In practice, the vast majority of the Member States did not find it necessary to notify the Council of Europe despite the imposition of broad restrictions on several rights guaranteed by the Convention. This attitude might be a sign that Member States expect the ECtHR to take into account the extraordinary circumstances in its proportionality assessment and find that measures which would "normally" amount to a violation of the Convention did not. It assumes that the Court will capitulate to the necessity argument even outside the context of the derogation clause (Greene 2020a).

The flexibility demonstrated by the Court – both in assessing the threshold question of Article 15 and "all the circumstances" in non-derogation cases (see for example *Brogan and Others v the United Kingdom*, 1988, § 61 or *Ibrahim and Others*, 2016) – results from a strong deferential attitude relying on the wide margin of appreciation it gives Member States in assessing the existence of an emergency and in national security matters more broadly. Initially applied in the context of the review of the emergency measures (*Greece v the United Kingdom*, 1958), the margin of appreciation was quickly extended to the assessment of the circumstances justifying the derogation (*Lawless v Ireland* (Commission report) at 56) - against the opinion of a minority of the Commission who considered that the decision as to the existence of an emergency should be purely factual and not take "account of subjective predictions as to future development" (*Lawless v Ireland* (Commission report) (1960-1961), § 92, at 94 (as cited in Gross and Ní Aoláin 2006, p. 272). However, the majority found otherwise, and its reasoning persisted in the following Article 15 cases (*A. and Others*, 2009, §173; *Ireland v the United Kingdom*, 1978, § 207; *Aksoy*, 1996, § 68). Only on two occasions did the Court find that the threshold of Article 15 had not been reached. In both cases, one could suspect that a certain level of bad faith on the part of the respondent state played a role in the conclusion of the Court.

For decades, the *Greek case* remained the only example of a judicial body of the Council of Europe (the Commission in this case) finding that the conditions necessary to derogate

[4] In particular the development of the notion of "compelling reasons" (§§ 258-259) and Judges Sajó and Lafranque dissenting opinion.

under Article 15 had not been met. One month after it established itself through a coup followed by massive violation of human rights, the new government in Greece notified the Council of Europe under Article 15. The Commission conducted a thorough review of the factual circumstances and allegations that a coup was being prepared by the Communist Party. It did not leave as wide margin of appreciation to the Greek government but considered instead that the evidence proved against its allegations.

Although this case provides an interesting example of non-deferential review of the existence of an emergency, many consider that the heightened level of scrutiny was a response to the non-democratic nature of the regime (Becket 1970, Harris *et al.* 2014, p. 814). The decision was perceived as a signal that the Convention could not be used to legitimate undemocratic governments. According to Gross and Ní Aoláin, this undemocratic character ensured moral and political support for the Commission's decision but also shielded future derogations by democratic Member States from similar review (Gross and Ní Aoláin 2006, pp. 274–275). And indeed, the Court did not conclude to the absence of public emergency again until 2021.

In *Dareskizb Ltd v Armenia* (2021), the Armenian government had declared a state of emergency – and notified the Council of Europe under Article 15 – following mass demonstrations in the capital after the results of the 2008 Presidential elections were announced. The applicant company was prohibited from publishing an opposition newspaper. Reviewing the circumstances which had led to the declaration of the state of emergency – in particular the mass demonstration, the ECtHR noted the absence of planned disorder or attempted coup. It highlighted the attitude of the crowd, generally peaceful, and the "heavy-handed" response of the police. Eventually, it concluded that there was no sufficient evidence that the "opposition protests (…) even if massive and at times accompanied by violence (…) represented a situation justifying a derogation." (§ 62)

The decision to conduct a substantive review of the existence of an emergency is even more surprising since the applicant had not directly contested nor even discussed the applicability of Article 15 (§ 54). Furthermore, contrary to the *Greek* case, the Armenian government was not clearly undemocratic. The state of emergency had been declared by decree and its necessity had been confirmed by a parliamentary inquiry. However, the Court noted that neither the necessity of the state of emergency nor the emergency measures had been submitted to judicial review at the domestic level. This element was used to mitigate the margin of appreciation. (§ 58) This situation can be contrasted (as the Court invited us to) with *A. and Others* (2009), where the House of Lords had found that there was a public emergency but that the measures were not adequate. Would the outcome of *Dareskizb Ltd* (2021) have been different if the domestic judiciary had reviewed and validated the state of emergency? An alternative for the ECtHR would have consisted in conducting its usual deferential review of the existence of an emergency but finding a violation of Article 10 due to the complete – and therefore disproportionate – prohibition to publish the opposition newspaper.

It remains that the Court decided to deviate from its usual and problematic line of jurisprudence. In a context where states of emergency are more commonly used and democratic backsliding has become a major concern within the Council of Europe (Secretary General of the Council of Europe 2021), this judgment could be seen as a signal

to other Members States. In particular, the state of emergency had been declared in response to opposition protests in the context of presidential elections and the contested measure was a serious encroachment on the opposition's freedom of expression. Therefore, it is not unimaginable that an element of bad faith or ulterior motive – attempt to curtail plurality – may have tipped the balance in favor of narrowing the margin of appreciation and a less deferential approach.

Dareskizb Ltd (2021) can be interpreted as a first step towards a new less deferential line of case law under Article 15, where the existence of an emergency would be properly scrutinized. Only future cases will tell. Taking into account the existence of ulterior motives for the declaration of a state of emergency could also prove an interesting development, especially when combined with the increasing jurisprudence on Article 18.[5] Nonetheless, substantial scrutiny of the existence of an emergency should not be limited to cases where the Court suspects bad faith. Even when declared in good faith, states of emergency pose a serious threat to human rights. Only a review of the circumstances justifying them could maintain them within temporal limits.

2.2. Acte de gouvernement *or minimal review: the deferential attitude of the French judges*

If the ECtHR might be giving indications that it is trying to adapt to the increasing use of emergency, such signs, even small ones, are sorely lacking in the case law of the French Councils. Although in different contexts, the Constitutional Council and the Council of State had the opportunity to review the circumstances which led to a declaration of emergency. Both fully embraced a highly deferential logic. The following section analyses this problematic approach in the context of the different types of emergencies: constitutional, legislative and "ordinary".

2.2.1. Article 16 of the Constitution

Article 16 of the 1958 Constitution endows the President with extraordinary powers when "the institutions of the Republic, the independence of the Nation, the integrity of its territory or the fulfilment of its international commitments are under serious and immediate threat, and where the proper functioning of the constitutional public authorities is interrupted". In its original version, Article 16 only required that the Constitutional Council be consulted before the activation of the exceptional powers as well as regarding the exceptional measures.

Consulted on 22 April 1961 by President de Gaulle, the Constitutional Council issued its opinion the following day. In this very succinct decision, the Council took note of the developments in Algeria, namely that generals were attempting a coup, making it impossible for civil and military authorities to perform their functions. Therefore, the Constitutional Council considered that "the conditions required by the Constitution for the application of its Article 16 [were] fully satisfied" (Decision no. 61-1 AR16, 23 April 1961). The circumstances were indeed dire, and the Constitutional Council could hardly be accused of being over deferential.

[5] See part II of this article.

However, although the situation had returned to normal two days after de Gaulle announced resorting to Article 16, on 23 April 1961, he did not relinquish his emergency powers until 29 September 1961. During those five months, de Gaulle made 26 decisions on the basis of Article 16, many of which did not concern the situation in Algeria (Boyron 2012, p. 60). Yet, the design of Article 16 at the time did not allow the Constitutional Council to review its continued application.

As for the Council of State, it asserted its own lack of jurisdiction in the clearest terms: "this decision [to put into effect Article 16 of the Constitution] has the character of an act of government whose legality the Council of State has no authority to evaluate or the duration of whose application [it has no authority] to oversee" (2 March 1962, *Rubin de Servens*).

Precisely in order to avoid the type of abuse which occurred in 1961, the 2008 constitutional revision added a paragraph to Article 16 introducing the possibility for the Parliament to request the review of the existence of an emergency by the Constitutional Council. The latter makes the same examination, as of right, after sixty days. This new paragraph establishes the judicial review of the existence of an emergency as the preferred means to avoid abuses. Its impact, however, should not be exaggerated. Indeed, Article 16 is a historically marginalized provision. Activated – and abused – only once.

2.2.2. The legislative states of emergency

Since 1962, the 1955 Statute (Loi du 3 avril 1955) was always preferred to Article 16. This legislative state of emergency was created to deal with the situation in Algeria. It was applied on several occasions during the Algeria war, including concomitantly with Article 16, then again in 1985 in New Caledonia, in 2005 and 2015-2017 in the metropole. In 2020, in the context of the COVID-19 pandemic, the Parliament used it as a model to draft the Statute on the state of health emergency (Loi du 23 mars 2020). According to both laws, the state of emergency is declared by the executive for a maximum of 12 days – 1 month for the state of health emergency. It can only be prolonged by Parliament.

The Constitutional Council is not competent to review the initial declaration – an administrative decree. However, it might review the prolongation statute(s) either before its adoption by the Parliament if it is referred to it (Article 61 al. 2 of the Constitution), or *a posteriori* as an accessory procedure to a litigation pending in front of a court (Article 61-1 of the Constitution). Therefore, constitutional review is not automatic. It is left to the discretion of the authorized institutions in the first instance and to future litigants in the second.

Notably the 2015-2017 emergency was marked by the absence of *a priori* constitutional review. The government asked that the bills would not be referred to the Constitutional Council. In a speech to the National Assembly, Prime Minister Valls exhorted the deputies to not refer the bill, dismissing such move as "narrowly juridical", all the while acknowledging that the constitutionality of some measures was questionable (Assemblée nationale, 19 Nov 2015, cited in Hennette Vauchez 2021, p. 24). Parliament abode. The six statutes prolongating the security state of emergency in 2015-2017 were adopted without being referred to the Constitutional Council. As noted by Hennette

Vauchez (2019, p. 22), it soon became a given that emergency bills would not be referred for a constitutionality check.

On the few occasions where the Council was asked to review the opportunity of declaring or prolonging a state of emergency, it asserted its deferential position and fell back on a minimal proportionality assessment merely controlling that the prolongation was not "manifestly inadequate". In 2020, for example, several deputies claimed that the prolongation of the state of health emergency was not necessary and that the four-month prolongation was too long because it meant that the Parliament would not be involved again during that period. The Council objected that "[i]t is not for the Constitutional Council, which does not have a general power of assessment and decision of the same nature as that of Parliament, to question the legislator's assessment of the existence of a health disaster and its foreseeable persistence over the next four months" (no. 2020-808 DC, 13 November 2020, § 6). The Constitutional Council also noted, as a guarantee in favor of the constitutionality of the law, that the Council of Minister must end the state of emergency when the health situation allows it. (§ 8). However, this assurance is no guarantee as long as the decision to end the state of emergency remains with the executive with no review either by Parliament or a judicial body.

If the Constitutional Council is not competent to review administrative acts, the Council of State, on the other hand, is. However, both the scope and degree of this review are narrow. The declaration of the state of emergency can only be reviewed by the Council of State for a very short period. In 2005, the Council considered that the law prolonging the state of emergency, because it provided for the same powers as those included in the decree declaring the state of emergency, amounted to a legislative ratification of the decree. Consequently, the legality of the decree could no longer be challenged in front of the Council of State (*Rolin et Boisvert*, 24 March 2006).

Consequently, the decree declaring the state of emergency can only be reviewed before the intervention of Parliament and therefore only through the emergency procedures which does not allow for a full review. The Council of State had the opportunity to rule in such a procedure before the prolongation of the state of emergency, just six days after the decree was adopted. The Council noted that in the original version of the 1955 Statute (adopted under the Fourth Republic), the Parliament and not the executive declared the state of emergency. Nonetheless, the Council did not seem to find any adverse consequences in the removal of this "heteroinvestiture".[6] Rather, it considered that in the current version of the law "the responsibility for this choice lies with the Head of State" which confers him "wide discretionary power when he decides to declare a state of emergency" (14 November 2005, no. 286835). Summarily noting the factual circumstances, the Council concluded that there was no "grave doubt" about the legality of the decree. The rare opportunities for judicial review combined with the wide margin of appreciation left to the President render the control of the existence of an emergency rather illusory, turning the Councils into little more than rubber stamps.

[6] "Where the party declaring an emergency is completely separated from the one that exercises that authority" (Ferejohn and Pasquino 2004, p. 218).

2.2.3. Emergency norms without emergency – which circumstances to review?

This last subsection briefly addresses situations where emergency measures are allowed to enter the normal legal order because, while adopted during a state of emergency, they continue to be applied even after it has been lifted. This aspect of the normalization of the emergency is problematic precisely because it decouples the emergency measures from the activation of the state of emergency and consequently from the identification of the circumstances constituting an emergency.

The SILT Statute (Loi n° 2017-1510) - on national security and the fight against terrorism – was adopted on 30 October 2017, the day before the state of emergency ended. It effectively resulted in the incorporation in the normal legal order, and with very few amendments, of several measures which had been adopted under the 2015-2017 state of emergency and were, at the time, considered derogatory as imposing exceptional limitations on fundamental rights. They include the creation of security areas, house arrest, derogatory regime of search and seizure and closing of places of worship. These new measures are administrative which means that they are preventive and reviewed by the administrative judge instead of judiciary courts.[7] This normalization and "permanentization" of the emergency were denounced by several parliamentarians.

In 2018, the Constitutional Council was asked to review – *a posteriori* – the constitutionality of some of these new measures (no. 2017-695 QPC, 29 March 2018). It answered the parliamentarians' concerns in the commentary published together with its decision. The commentary stated that although the new administrative measures were not purely a transposition of emergency measures into the normal order, they were not ordinary rules either. Even though the impugned measures could not be classified as criminal because of their preventive nature, they did not fit within the ordinary law of administrative police either. Rather, they were "special derogatory rules of administrative police because their application was limited to the prevention of terrorism acts, which were a special kind of public order disruption" (Commentary on Decision no. 2017-695 QPC, p. 3).

This circumvoluted logic highlights the difficulty for the Council to navigate the obliteration of the normalcy / emergency dichotomy. The extraordinary character of the 2015 terrorist attacks justified the declaration of the state of emergency and adoption of derogatory measures. Two years later, the terrorist threat, now presented as permanent, was used to make extraordinary administrative powers permanent. To reconcile these two conflicting logics, the Council created a bubble of exception within the normal legal order.

Yet, at no point did the Council review the opportunity of the adoption of the new measures nor the existence of the terrorist threat in which they are grounded. It did not control the existence of the very circumstances put forward to justify the creation of the exception bubble. Eventually, the Council based its review on the nature of the measures as decided by the political branches – which included them in the normal legal order – rather than their intrinsic extraordinary features. Consequently, not only did the executive declare the emergency but it also shaped its boundaries.

[7] According to article 66 of the French Constitution, "[t]he Judicial Authority, guardian of the freedom of the individual, shall ensure compliance with this principle in the conditions laid down by statute."

The more governments make use of emergency measures and states of emergency, the higher the risk that they become ubiquitous and permanent, amending in the long term the ordinary legal order to introduce measures which otherwise would have been considered illegal from a separation of power and / or human rights perspective. Faced with this growing practice, the ECtHR showed early signs of adaptation and heightened scrutiny of the existence of an emergency. The French Councils on the other hand have failed to give such indications in a country where for the past eight years, emergency has become the alternative mode of governance.

As mentioned with regards to the ECtHR case law, the necessity to review the existence of an emergency beyond the assessment of the political branches lies in part in the risk that an emergency would be declared in bad faith, for ulterior motives. The same risk exists at a more micro-level with regard to the imposition of each individual measure. A state of emergency should only be declared to address an actual emergency situation and emergency measures should only be imposed to confront the situation which triggered the initial declaration. If states of emergency are not to become easy exercises in power grab, the aim must matter.

3. Why the aim matters – Mobilizing misuse of power doctrines

Because emergency is based at least partially on subjective considerations, it raises the question of intent and motivation on the part of the authorities declaring the state of emergency and adopting the emergency measures. This problematic persists during the entire duration of the state of emergency and potentially after it ended. Both the ECHR and the French legal order include mechanisms to scrutinize the (ulterior) motives of the authors of the norms or actions. Yet, so far, the ECtHR and French Councils have been reluctant to make use of these mechanisms in a context of emergency.

Several reasons may explain such restraint. The intention of the legislator (understood here broadly) may be difficult to identify and even more to prove. Judges might also consider that going down the intent road would lead them to overstep their boundaries. In the case of the ECtHR, this idea might be supported by an ingrained fear of a lack of legitimacy (Krunke 2016, p. 91) rooted in its regional character and reinforced by doctrines such as the subsidiarity principle. As for the French Councils, the lingering mistrust towards judges and ideal of supremacy of the will of the people, although receding, continue to shape the role of their members (Troper 2008, p. 8).

Justice Scalia's position with regards to intent highlights these difficulties. Indeed, he noted that "Government by unexpressed intent is… tyrannical" (Scalia 1997, p. 17). Yet, as pointed by Sajó (2021, p. 292), Scalia argued against judges' involvement with the legislator's intent, which he thought would lead to judicial arbitrariness. He focused instead on the objective intent of the text. The second part of this article argues to the contrary that objective intent is not sufficient in the context of emergency and that analyzing the intent of the normative authorities – deduced from objective elements – can prove a valuable tool in curbing abuses.

3.1. Increased recourse to Article 18 by the ECtHR

Apart from the various limitation clauses and overall approach of the Court towards limitations of rights (Gerards 2019, pp. 225–228), the Convention includes a provision

which focuses precisely on the aim. Article 18 prohibits restrictions on the rights and freedoms "for any purpose other than those for which they have been prescribed."

This provision appears largely inspired by the French doctrine of *détournement de pouvoir (Merabishvili v Georgia* [GC], 2017, § 154).[8] As such, it was meant to address situations where the letter of the law was not necessarily violated but the normative powers it created were used for a different purpose than the one originally intended. This aspect is reflected in the "bad faith" element which underlines Article 18 (Çali 2017, pp. 263–269). But Tsampi goes further. For her, "there are good reasons to suggest that Article 18 is connected to the functioning of the system of *contre-pouvoirs* within a State" (2020, p. 136). This understanding is supported by the judges dissenting in the Chamber judgment in *Navalnyy* and for whom Article 18 "serves to address the abusive limitation of the rights of oppositional actors with the aim of silencing them" (*Navalnyy v Russia*, 2017, Dissenting Opinion of Judges López Guerra, Keller and Pastor Vilanova, § 3).[9] This potential of Article 18 is precisely what makes it so precious in a context of state of emergency when the separation of power is undermined, and non-institutional counter-powers are most at risk.

Yet, although it had been argued on a few occasions,[10] Article 18 had generally been overlooked until 2004 (*Gusinskiy v Russia,* 2004). Since then, the case law under Article 18 grew exponentially with a sharp increase since 2016 (Schmaltz 2022, p. 36). This developing tendency led the Grand Chamber to clarify the applicable principles in *Merabishvili v Georgia [GC]* (2017). Among those principles, the most contentious one deals with the plurality of purposes and highlights the difficulty in navigating the legislator's intent.

Where the contested measure does not serve any legitimate purpose, the Court will find a violation of the main article. This does not render Article 18 redundant (*Navalnyy [GC],* 2018, §§ 163-176). However, the Court is facing a more complicated situation when the measure serves a plurality of purposes including some authorized and some prohibited by the Convention. According to the new principle established in *Merabishvili*, the Court will only find a violation of Article 18 if the ulterior motive was the predominant purpose of the measure. This test poses its own difficulties including the fact that "it continues to endorse politically-motivated prosecutions and tolerate bad faith, as long as it is not the predominant purpose of a measure" (Heri 2020, p. 31).

Nonetheless, the growing case law under Article 18 shows that the good faith presumption on which the whole convention system is founded is no longer as strong as it used to be (Çali 2017). As emergencies multiply, or more accurately, as national authorities more readily frame various issues in emergency terms, it becomes easier to find a legitimate purpose to justify severe restrictions on human rights. When this legitimate purpose allows the measure to pass the limitation clause threshold, Article 18 might just be the tool the Court needs to catch the abuse.

[8] For a historical account of the inclusion of article 18 in the Convention, see Heri 2020.

[9] The Grand Chamber would later reverse and find a violation of article 18 *(Navalnyy v Russia* [GC], 2018).

[10] *Kamma v Netherlands* (1974) setting the first principles for the interpretation of article 18. Arguments under both articles 17 and 18 had also been made in the *Greek case*.

It is unlikely that the Court would ever find a violation of Article 18 in conjunction with Article 15 since Article 18 can only be invoked in conjunction with a substantive article. However, it did find violations of Article 18 in emergency contexts, including when a derogation had been notified under Article 15. In *Kavala*, the applicant had been arrested and detained because of his alleged involvement in the "Gezi events" in 2013 and the attempted coup in 2016 which triggered a declaration of state of emergency and a derogation by Turkey under Article 15 ECHR. The Court found a violation of Article 5 § 1 and 5 § 4 with regards to the applicant's detention and lack of speedy review thereof despite the Article 15 derogation (*Kavala v Turkey*, 2019, § 158).

Interestingly, the Court continued to examine the case under Article 18. The applicant complained of an ulterior purpose behind his detention. The Court considered this complaint to be a "fundamental aspect" of the case not yet examined (§ 219). Looking at all the circumstances of the cases, it found that the impugned measures "pursued an ulterior purpose (…), namely that of reducing the applicant to silence. Further, [they] were likely to have a dissuasive effect on the work of human-rights defenders." Therefore, the Court concluded that there had been a violation of Article 18.

A year later, it found another violation of Article 18 on similar grounds, this time with regards to the detention of a member of Parliament. The origins of the *Selahattin Demirtaş v Turkey (no. 2)* (2020) case were not directly related to the attempted coup, but the ECtHR judgment was delivered after four years of adjudicating cases related to the purge of various groups including the opposition, the judiciary or the media. The applicant was a member of Parliament and co-chair of a left-wing pro-Kurdish political party arrested and detained on terrorism charges. The Grand Chamber found the detention to constitute a violation of Article 10 (freedom of expression) but also, for the first time, of Article 3 of Protocol 1 (right to free elections).

Here again, the Court went on to examine the application under Article 18. It decided to include a long development regarding the collapse of the separation of powers in Turkey with regards to both the legislative and judiciary branches. Starting from the narrow issue of the undue return of the applicant in pretrial detention, the Court embarked on much broader considerations with regards to the capture of the Supreme Council of Judges and Prosecutors, which "seriously endanger the independence of the judiciary". This was then tied to the events which took place under the state of emergency following the attempted coup in 2016 (§ 434). The Court concluded that the applicant's detention "pursued the ulterior purpose of stifling pluralism and limiting freedom of political debate, which is at the very core of the concept of a democratic society" (§ 437). Therefore, there had been a violation of Article 18 (in conjunction with Article 5).[11]

Selahattin Demirtaş (no. 2) (2020) and *Kavala* (2019) offer two interesting examples of how the Court can use Article 18 to identify and address misuses of emergency powers. In particular, the broad and systemic approach developed by the Court in Article 18 cases, especially saliant in *Selahattin Demirtaş (no. 2)* (2020), allowed to identify covered intent. At the same time, the clarification of the rules regarding contextual evidence (Heri 2020,

[11] Since then, the ECtHR confirmed its systemic approach combining rule of law, separation of powers and independence of the judiciary, including in the context of article 46 reasonings (Tsampi 2022).

pp. 37–38) and burden of proof (Çali 2017, p. 268) may help alleviating the difficulty in identifying the legislator's intent and accusations of judicial arbitrariness.

Nonetheless, Article 18 case law is in the early stages of its development and so far, the Court has only found violations in the most blatant and least contentious cases. Notably, Kavala's prosecution documents listed many of his activities including those he carried out in cooperation with the Council of Europe (§ 223). It remains to be seen how extensively the Court will be willing to apply Article 18. The *Kavala* (2019) judgment quotes at length a speech of the President where he explicitly linked the applicant to George Soros reiterating critiques expressed by the Hungarian ruling power (§ 223). This extensive quote seems purposeful. Yet, to date, the Court has not examined any Article 18 cases with regards to Hungary – not even with regards to the state of emergency declared at the beginning of the COVID-19 pandemic.[12]

The aim of a measure remains precarious ground for the Court. A case like *Dareskizb Ltd* (2021) testifies to this delicate matter. On the one hand, the Court found that the circumstances were not such as to justify the use of Article 15 and that consequently, the derogation notified by Armenia was not valid (§ 62). With regards to the contested measure prohibiting the publication of an opposition newspaper, it considered that "such restrictions, which had the effect of stifling political debate and silencing dissenting opinions, go against the very purpose of Article 10, and were not necessary in a democratic society." These two elements put together are a strong indication that the emergency measure pursued ulterior motives. Yet, not only did the Court not make its doubts as to the aim of the measure explicit but it was "prepared to accept that the measure (…) pursued the "legitimate aim" of preventing disorder and crime" (§ 75).

The Court's readiness to endorse claims of legitimate aims even when they are so dubious is problematic. This tendency to brush over the legitimate aim element to focus on the necessity of a measure will have to be reconciled with the developing line of case law questioning the Member States' good faith. As the case law grows, applicants are more likely to make claims under Article 18.[13] The Court will have to answer.

Finally, the case law in its current state only sanctions ulterior motives when the aim is to silence political opponents or human rights activists thereby undermining pluralism and democracy, which are at the core of the convention system (*Handyside v the United Kingdom*, 1976, § 49). This specific reading of Article 18, confirming Tsampi's argument, seems to be keeping with the *raison d'être* of the provision as transpires from the *travaux préparatoires* (Tsampi 2020). Other questionable ulterior motives exist, for example when emergency powers are used to curtail minority rights for electoral gains. It is uncertain whether the Court will be inclined to examine such cases under Article 18 or will rather follow a more traditional approach, finding no legitimate aim or that the measure was not "necessary in democratic society" as the case may be.

Overall, the development of Article 18 case law is encouraging from the point of view of the abuse of emergency powers. However, the Court has used this article cautiously and

[12] The state of emergency declared by the Hungarian government at the beginning of the pandemic has been largely criticized as a disguise for extending governmental powers (see for example Uitz 2020).
[13] There is no sign that the applicant in *Dareskizb Ltd* (2021) had made any claim under Article 18.

many questions are still open. Article 18 is indeed a "developing tool in need of sharpening" (Schmaltz 2022, p. 51).

3.2. Détournement de pouvoir *in front of the French Council*

3.2.1. The Constitutional Council's struggle with the aim

The notion of *détournement de pouvoir* in France is one of administrative law, not of constitutional law. The Constitutional Council does not review the purpose of a law as decided by the legislator (Genevois 2008) because it considers that it would actually be a control of the opportunity of the law which is not within its attributions (no. 84-179 DC). "Article 61 of the Constitution does not confer on the Constitutional Council a power of appreciation and decision identical to that of Parliament, but only gives it the power to rule on the conformity with the Constitution of the laws referred to it for examination" (no. 74-54 DC).

Nonetheless, the aim is central to the Council's constitutionality review. For example, the Constitutional Council insisted – following the arguments made by the government to the UN Special Rapporteur on counter-terrorism and human rights (Hennette Vauchez 2022, p. 54) – that the SILT statute was not a transposition of emergency measures in the ordinary legal order because the measures therein were only applicable to the prevention of terrorism (no. 2017-695 QPC). The aim of the "emergency" measures was therefore crucial to their constitutionality. Unsurprisingly, however, the measures introduced by the SILT statute – as were their predecessors during the state of emergency – were applied outside the legal frame, that is for purposes other than the prevention of terrorism (Daubresse 2020, pp. 25–26).

It follows that the Constitutional Council put itself in an ambiguous position with regard to the aim of emergency measures. While making it a central element of their constitutionality, it is incapable of guaranteeing that it is respected. The *a priori* review might offer an opportunity to check the aim. For example, the Council controls – of its own motion if necessary – the absence of *cavaliers législatifs*, legislative provisions which are not connected to the purpose of the statute. However, this means is limited. It also supposes that the bill is referred to the Council prior to its adoption which is not always the case, especially concerning emergency statutes.

The more obvious shortcoming of *a priori* review is that it takes place before the implementation of the law and therefore before its potential misuse. *A posteriori* review is not better suited because even then the Constitutional Council only conducts a review *in abstracto* of the statute and not of the administrative acts implementing it. Such incapacity for the Council to address the adequacy of the measures to their claimed purpose might partially explain the heavy emphasis its members put on the importance of review by the administrative judge. Unfortunately, this approach supposes a more robust scrutiny than the one carried out by the Council of State in the context of emergency.

3.2.2. Council of State: to be ignored in one's home

Détournement de pouvoir is a classic principle of French administrative law. It is one of the "internal" elements of the legality of an administrative norm which the courts may – but

do not always – review. It allows the judge to sanction administrative norms which pursue goals others than those foreseen by the law (26 November 1875, no. 47544, *Pariset*). The underlying logic is one of popular sovereignty. Parliament adopted a law conferring powers to the administration in order to further certain aims. The administration cannot use the said powers for other goals than those contemplated by the legislator.

To conduct this type of review, the judge needs to identify the aims of the law – usually expressly mentioned in the statute, the aim of the administration, and compare the two. For that reason, the control of *détournement de pouvoir* is often considered a subjective one in the sense that courts review the intent of the administration (Delvolvé 2002, p. 133). However, subjective does not mean that judges attempt to read the administration's mind or that they make an arbitrary decision. Rather they take into account the goals listed in the administrative act but also – with a terminology reminiscent of the ECtHR's – "all of the circumstances" of the case.

In 1960, the Council of State ruled on the seizure of several issues of a newspaper in Algiers (24 June 1960, no. 42289, *Frampar*). The administrative authority – the *préfet* – had based its decisions on criminal provisions and followed the procedure they prescribed. However, the Council considered that "it was clear from all the circumstances of the cases" that the goal of the *préfet* was "to prevent the diffusion" of certain writings. The *préfet* used criminal provisions to achieve preventive goals, which is a matter of administrative, not criminal, police. He should have used his emergency powers instead.

In 1960, the Council of State encouraged the administration to make use of the proper legal basis, its emergency powers. However, the Council was less keen on finding a *détournement de pouvoir* in 2015-2017 when the administration made extensive use of its emergency powers for purposes which were only tenuously connected to the reason for which the state of emergency had been declared. In 2016, a Report of the National Assembly noted that "the state of emergency had made it possible to take measures less to fight directly against the terrorist threat than to achieve a general objective of maintaining order" (Raimbourg and Poisson 2016, p. 126). Indeed, during the two years following the declaration of the state of emergency, emergency measures were used to deal with various protest movements. On various occasions, they prohibited demonstrations, meetings, parking of vehicles used by activist organizations (Hennette Vauchez 2022, p. 78), but also placed individuals (environmental and leftist activists) on house arrest to prevent them from taking part in demonstrations (Hennette Vauchez 2018, p. 147).

This use of emergency powers for other purposes than the ones which prompted the declaration of emergency was reflected in the ensuing abundant litigation. For example, *détournement de pouvoir* or a variation of it was argued in 38 out of 65 cases on measures preventing individuals to take part in demonstrations. Yet, the argument was never accepted by the administrative courts (Hennette Vauchez 2018, p. 147). More, the Council of State, ruling on certain of these measures, stated that the fact that the 1955 Statute (on the state of emergency) was used for purposes other than the fight against terrorism, which had triggered its activation, did not render the ensuing measures illegal (11 December 2015, no. 394993 *et al*.) (Hennette Vauchez 2021, p. 21).

When it comes to ascertaining that emergency measures remain true to their proclaimed aim, the Constitutional Council relies heavily on the administrative judge.[14] Indeed, *détournement de pouvoir* is a mechanism well known of the Council of State. Unfortunately, it requires a rather high level of scrutiny which the Council of State is not keen on during emergency. Putting aside such an effective tool when it is most needed is not only dangerous but in contradiction with the recent dynamic at the ECtHR which increasingly finds the need to resort to the long-overlooked Article 18.

4. Conclusion

This article has focused on mechanisms which are already available to the ECtHR and the French Councils to argue that during emergency more than ever, courts' reasonings need to retain a high level of clarity, depth and structure. In particular, judges need to resist the "pull of deferentialism" (Scheinin 2016, p. 191) which too often leads them to avoid essential steps of the review or amalgamate them into a blurred overall assessment in which emergency and security considerations are allocated exaggerated weight.

Conducting a serious review of the existence of the claimed emergency and ascertaining that emergency measures are only used for their asserted purpose have the potential to curtail their abuses. Either enshrined in the foundational text or resulting from decades of jurisprudential developments, these mechanisms have the advantage of banality. They are already available and require little more than can be expected from properly structured and substantiated judicial review. For that reason, judges should feel comfortable using them without fear of accusations of judicial activism. Furthermore, the article showed that although requiring adaptation to the systems' idiosyncrasies, both lines of reasoning can be efficiently mobilized both in a national and regional context. If deployed appropriately, they might inspire further jurisdictions faced with similar emergency challenges.

These two mechanisms further have in common that they cannot be properly applied except as part of a broad and systemic analysis. Emergency measures are highly vulnerable to abuse and therefore likely to operate in covered manners. For too long, during emergency, courts have resorted to lower degrees of scrutiny justified by the exceptional character of the circumstances and avoided addressing the main issues by focusing on the specificities of each case. This deferential position is no longer tenable when emergency has become a new paradigm of government. If states of emergency are to be in line with the rule of law, the separation of powers has to hold, and judges must fulfil their role.

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[14] See for example the insistence on the role of the administrative judge in no. 2017-695 QPC, 29 March 2018.

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