

THE RELATIONSHIP BETWEEN STATES OF EMERGENCY, POLITICS AND THE RULE OF LAW

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ABSTRACT

The relationship between states of emergency, politics and the rule of law, has been long been debated amongst law scholars and political theorists. Most of these debates have focused on the effect of states of emergency on the rule of law and State sovereignty. This article infers that difficulties still exist in identifying the relationship between politics, the law, human rights and states of emergency. This article's intention is to simplify the understanding of the political and legal aspects of states of emergency. The comparative methodology used throughout this article has allowed for data collection, involving the analysis of various sources, including the opinions of the world's top legal and political theorists.

I. INTRODUCTION

History reveals that states of emergency can greatly affect the political and legal aspects of an ordinary citizen's life. Indeed, repercussions may include instances of suspension of some normal governmental functions or authorisation for government agencies to limit, or suspend, civil liberties. Such actions are considered to be political and to have a great effect on the citizen's basic human rights. Regarding this, Agamben cited Ernesto Laclau when he expounded that:¹

[S]ociety requires constant efforts at re-grounding ... and if the plurality of demands requires a constant process of legal transformation and revision, the state of emergency ceases to be exceptional and becomes an integral part of the political construction of the social bond.

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1 Giorgio Agamben *Sovereign Power and Bare Life* (Stanford University Press, Palo Alto, 1998) at 16.

II. THE RELATIONSHIP BETWEEN STATES OF EMERGENCY AND POLITICS

Agamben acknowledged the relationship between emergency, politics and law, when he said that:²

States of emergency depends on the relationship between two elements - heterogeneous and antithetical, Nomos and Anomie, the law and the forms of life whose articulation is to be guaranteed by the State in times of emergency as long as the law and the forms of life remain separated.

Here we can see how he divided the condition itself into two contradictory elements which could merge together at certain moments. According to him, their dialectic works when they merge into a unique power with two sides.³ As such, when the state of emergency becomes the general rule, the political system transforms into an apparatus for discrimination.⁴ While he cited the possibility that both elements of an emergency could merge together, he warned that this action might result in deterioration in human rights.⁵

In spite of the consequences of states of emergency on the rights of citizens, especially their legal rights, one can note that emergency conditions exist in all political and legal systems of the world, which might be due to the political need of States to establish order and to supplement the objects of law, at times of stress. This principle applies generally, regardless of whether the ruling regime is a premature political regime or a modern one. The authorities which control legal institutions and are responsible for the creation or review of laws in a premature regime are generally politically motivated. Similarly, in modern States it may be said that the authorities are also politically motivated, since the ruling party in a modern democratic state has a majority in Parliament and, therefore, has the power to pass laws compatible with its general political policies. The major difference between a premature political system and a democratic or modern one can be summarised in two words: public interest.

In theory, the emergency conditions should be those which are needed to reflect the gravity of the situation, without unduly affecting the legal rights of the individual. Conversely, in practice, and especially in non-democratic or premature regimes, the sovereign has the power to suspend, not only political order, but also the legal system.⁶ States of emergency, therefore, affects the

2 Giorgio Agamben "The State of Emergency" Extract from a lecture given at the Centre Roland-Barthes (University of Paris VII, Denis-Diderot, 2002) <www.generation-online.org> at 9.

3 At 16

4 At 16.

5 At 16.

6 This definition follows Carl Schmitt's definition of an emergency in Carl Schmitt *Political Theology* (University of Chicago Press, Chicago, 2005) at 12.

balance of power. This refers to the empowering of the executive to name officials to deal with emergencies, which, consequently, results in the normal administrative and legal processes being overridden, regardless of the normal administrative rules inherent in democratic States.⁷ In political practice, the executive could exercise extraordinary powers in an emergency without abusing his power. This would depend on the character of the executive and whether or not he would supplement his institutional powers. However, the majority of cases have proved that the imposition of the states of emergency, or exceptional legislation such as counter-terrorism acts, have led to many negative impacts on the rule of law, since authorities have found those conditions convenient in controlling the country's political and economic activities. Moreover, police forces and security services find it easier to work in the presence of emergency legislation, since they will not be bound by restrictions on their activities imposed by codes of criminal procedure or by constitutional safeguards.⁸

The misuse of the condition by administrative authorities has long been a concern for classical political scholars, including Walter Benjamin, who stated that:⁹

... states of emergency has become, in our modern history, a rule of life and not an exception anymore, as can be seen through our recent history, especially in the history of the rise of Fascism which flourished in the name of progress.

Benjamin went on to justify his opinions by evidence from our recent political history. He cited Hitler's administrative authorities during the Nazi era and how they eroded and violated the human rights standards during the proclamation of states of emergency,¹⁰ excusing their acts by the famous, undefined, expression, "the Public Good". In this respect; John Locke had a conservative opinion with regard to the application of emergencies, when he argued that it is necessary, in certain situations, that the executive can exercise a broad discretion, "he meant the application of emergency legislation" in which "the legislative power and the normal law provided no relief", since this power is limited to wartime or to great urgency.¹¹

7 See for example, the Egyptian Emergency Law 58/62 art 7,11.13.

8 Article 7,11.13.

9 Walter Benjamin, Gershom Scholem and Theodor W Adorno *The Correspondence of Walter Benjamin* 1910/1940 (University of Chicago Press, Chicago, 1994) at 6465.

10 At 6465.

11 John Locke *The Second Treatise on Civil Government* (Prometheus Books, Amherst, New York, 1986) at 203/207. See also Edward S Corwin *The President, Office and Powers* (New York University Press, New York, 1957) at 147/148.

According to Clement Fatovic:¹²

... the main cause of conflict between Emergency legislation and the rule of law could be related to the fundamental principles of the rule of law, which seeks to place limits on what the government may do, by substituting the arbitrariness and unpredictability of extemporary decrees with the impartiality and regularity of impersonal rules promulgated in advance.

This principle fails to function during emergencies, since the imposition of states of emergency leaves the executive with no formal obligations. Some countries, however, do impose obligations in respect of formal consultation, as well as notification and approval of the legislature.¹³ In France, for instance, the President is not required to obtain prior approval from either his cabinet or from the Parliament before declaring an emergency, although he is expected to consult the Prime Minister and the *Conseil Constitutionnel*.¹⁴ In other countries, such as Hungary and Germany, approval must be obtained from the parliament before the states of emergency can be declared.¹⁵

Various opinions have emerged recently, examining the legality of states of emergency. One of those who has expressed an opinion in this respect is Bruce Ackerman, who tried to identify a way to reconcile the demands of the emergency and the procedures of legality.¹⁶ Others opined that emergencies relax the legal and constitutional structure of the state (and even, perhaps, partially suspend it)¹⁷ and pointed out that the common systems of legal and institutional checks and balances tend to be destabilised during the state of emergency.¹⁸ These opinions are important for legislators and jurists to understand the extent to which states of emergency could affect the rule of law.

Another issue which presents itself, when discussing the relationship between states of emergency and the rule of law, is the superior role of politics protected by sovereignty. All countries consider the topic of sovereignty to be a national subject, which would lead us to believe that during the declaration of emergency, and likewise during the application of counter-terrorism legislation, it is unlikely, in practice, that there will be an effective body to review the executive's decisions. Even Carl Schmitt thought that the rule

12 Clement Fatovic *Outside the Law* (Johns Hopkins University Press, Baltimore, 2009) at 3.

13 French Constitution, arts 16(1) and 19. See also John Bell *French Constitutional Law* (Clarendon Press, Oxford, 1992) at 16.

14 Above, n 13.

15 See the Constitution of Hungary, Germany.

16 Bruce Ackerman "The Emergency Constitution" (2004) 113 The Yale LJ 1029.

17 Oren Gross and Fionnuala Ní Aoláin *Law in Times of Crisis* (Cambridge University Press, Cambridge, 2006) at 17.

18 Eric A Posner & Adrian Vermeule "Accommodating Emergencies" (2003) 56 Stanford L Rev 605, at 607.

of law might be undermined in a modern democratic system at a time of emergency.¹⁹

According to a basic understanding of the function of the roles of the executive in “guaranteeing the basic human rights”, it is acceptable to authorise derogations during emergencies, but such restrictions often require constitutional guarantees within the diverse legal regulations. Such regulations may be found in the Constitution, which, as a general rule, is the highest authority, followed by the Code of Criminal Procedure and administrative regulations. All such guarantees may be breached by the executive under the provisions of the states of emergency. Hitler’s emergency system is a good example. The systems of some countries contain a notable defect, in that they cannot guard their constitutional provisions with efficient legal supervision during emergencies. Indeed, supreme judicial authorities within non-democratic regimes cannot control the behaviour of the executive, especially within the period of the declaration of states of emergency.²⁰

The above explanations would lead us to an important question: do states of emergency belong to law?

Agamben responded to that question when he stated that “states of emergency contradicts the basic aspect of law and is more related to politics than to law”.²¹ It was his opinion that the states of emergency condition is a kind of barbaric act, that cannot even belong to logic and that it is an insane condition that should be considered as outside the law. Agamben added that “[t]he structure of the states of emergency is an inverted figure”. Indeed, he compared it with anomic festivals, like the Roman Saturnalias, the charivari and the medieval carnival, which suspend and invert the legal and social relations defining normal order:²² “Men dress up and behave like animals; bad habits and crimes that would normally be illegal are suddenly authorised”.²³

Agamben pointed to evidence from our recent history in order to confirm his opinion. He recalled the history of the Nazi regime when, just after Hitler came to power on 28 February 1933, he suspended all the Articles of the Weimar Constitution.²⁴ Since his decree was never revoked, we can state that the entire Third Reich, from a legal point of view, was under states of emergency legislation for 12 years.²⁵ He continued, arguing that the 1933 Decree for the Protection of People and the State was a clear example of how modern totalitarianism can be defined as the institution, by way of a states of emergency, of a legal civil war that permits the elimination of political

19 John P McCormick “The Dilemmas of Dictatorship: Carl Schmitt and Constitutional Emergency Powers” (1997)10 *CJLJ* 163–187.

20 Supreme State Security Emergency Court of Damanhour, “Memorandum No 5631/2005” (Supreme State Security Emergency Court of Damanhour 2005) at 2327.

21 Agamben, above n 2, at 40.

22 At 8.

23 At 8.

24 At 8.

25 At 8.

adversaries.²⁶ Furthermore, Agamben explained that “it is not necessary that the technicality of declaration of states of emergency itself is not bound by sense of the term”.²⁷ He might have meant by this, that the *de facto* states of emergency, or other exceptional legislation including counter-terrorism legislation, which has recently become established in some constitutions²⁸ could have negative effects on the rule of the law and on society as a whole.²⁹ In this respect it seems that he disagreed with Carl Schmitt’s thinking that the declaration of an emergency is a sovereign power, since, according to Agamben, the proclamation, in itself, allows the removal of a subject from the purview of “regular” law. In the use of such terminology, he had drawn on Schmitt’s famous definition that “the sovereign is he who decides on the state of exception”.³⁰ Since Schmitt understood the exception in relation to states of emergency as an associated feature that facilitated the economic and political crises that imperilled the State and, therefore, would require the suspension of regular law and rules to resolve those crises.³¹

It may be noted that the philosophical thoughts of Agamben regarding states of emergency were influenced by Swiss philosopher, Karl Meuli. This influence can be seen as Agamben described the Roman anomic festivals as examples of the negative effect of emergency conditions on the rule of law.³² The opinion of Meuli with regard to social exceptionalism could be interpreted in relation to states of emergency through the connection between anomic festivals and the situation of suspended law that characterises certain archaic legal institutions.³³ Agamben was influenced by Meuli’s opinion of the anomic festivals, when he argued that it is:³⁴

... possible to kill a man without going to trial, to destroy his house and to take his belongings. Far from reproducing a mythological past, the disorder of the carnival and the tumultuous destruction of the charivari re-actualise a real historical situation of anomy.

He further explained that:³⁵

26 At 8.

27 At 2.

28 See, for example, art 179 of the Egyptian Constitution 1972. See also the American Patriot Act 2001.

29 See above.

30 Schmitt, above n 6, at 2324. See also Agamben, above n 1, at 57.

31 Nasser Hussain “Thresholds: Sovereignty and the Sacred” (2000) 34 (2) Law and Society Review 495.

32 Agamben, above n 2.

33 Ibid.

34 Ibid.

35 At 63.

... ambiguous connection between law and anomy is thus brought to light: the state of emergency is transformed into an unrestrained festival where one displays pure violence in order to enjoy it in full freedom.

Other scholars, such as Clement Fatovic, evaluated the relationship of states of emergency with law in terms of its purpose.³⁶ Fatovic explained that “the purpose of law is to create order where it does not exist and to stabilise it where it does exist”.³⁷ In his opinion:³⁸

... in justice there are many conflicting aims including the pursuit of equality, the protection of individual rights, the expression of communal values, the preservation (or transformation) of the *status quo* and the consolidation (or dispersion) of power. In this respect, he has reduced the Law to its basic aim, which is order.

He explains how the specific kind of order that law produces or preserves can be defined by its substantive aims.³⁹ Moreover, although the establishment of order, as such, is independent of any particular set of substantive aims, “the law accomplishes this aim primarily by specifying rules that minimise the variability and arbitrariness associated with discretionary action”.⁴⁰

Indeed, many cases in our recent past have dealt with the above-mentioned situations. Differences of opinion between scholars with regard to the point may also be seen, especially with regard to the basic values of a constitution and its relationship with emergencies. It is not only scholars and philosophers who have been concerned about this topic, but also judges, politicians and human rights activists. In this respect, Lincoln’s Martial Law program created a significant legal and theoretical battle, not only in the USA, but also worldwide. Referring to that, former Justice Benjamin Curtis objected to Lincoln’s theory of implied powers and explained that such implied powers were contrary to a strict reading of the American Constitution.⁴¹ Amid such criticism, Lincoln accepted the *Habeas Corpus* Act of 1863 and endorsed congressional authority, retrospectively, to impose constitutional limitations on the Martial Law program.⁴² Citing the 1863 Act, Ernest Fraenkel argued that military power would disturb the principle of legality, where the executive power does not commit to the principle of legality, or where the authorities have vested in the state of exception a pretext for the continued imposition

36 Fatovic, above n 12, at 1.

37 At 1.

38 At 1.

39 At 1.

40 At 1.

41 Chandler Robbins *Memoir of the Hon Benjamin Robbins Curtis, LLD* (J Wilson and Son, Cambridge, MA, 1878) at 280281.

42 At 280281

of exception.⁴³ Such expansion could suspend the rights of *habeas corpus*.⁴⁴ Fraenkel called it the “dual state”, whereby officials have the authority to displace legal controls whenever they deem this appropriate.⁴⁵

III. THE CONSTITUTIONALITY OF STATES OF EMERGENCY

Debates between law scholars have emerged since Carl Schmitt introduced his theory of exception. These debates have focused on whether states of emergency have sufficient constitutional credibility.⁴⁶ One of those opinions is that of Fathi Sorour who emphasised that there was enough credibility to support states of emergency from the constitutional legal point of view.⁴⁷ He confirmed his opinion arguing that: “Indeed, this is particularly so, given the fact that states of emergency create a separate judicial system which means, in fact, that it gains credibility from constitutional corroboration”.⁴⁸

One could assume that a country’s constitution would describe the circumstances that could lead to the declaration of a state of emergency, identify the procedures to be followed and specify the limits to the emergency powers and the rights which can be suspended. While each country defines its own practices, many national constitutions have been influenced by the Universal Declaration of Human Rights, which has led to great improvements in human rights standards. Indeed, this can be noted in the articles contained in most modern constitutions, which contain references to human rights standards. Such modern constitutions, for example those of India, Venezuela, Brazil and Italy, have all confirmed the right of *habeas corpus*.⁴⁹

While those modern constitutions have acknowledged human rights standards, one can note that most of them also acknowledge states of emergency. The American constitution, for example, provides that in times of emergencies “[t]he privilege of *Habeas Corpus* shall not be suspended, except in certain and exceptional cases, such as Rebellion or Invasion”.⁵⁰ None of the other American constitutional clauses gives special powers to any branch of government in the event of such exigencies.⁵¹ For example, Clause 2 states

43 Ernst Fraenkel *The Dual State. A Contribution to the Theory of Dictatorship* (Oxford University Press, Oxford, 1941) at 1112.

44 At 1112.

45 At 1112.

46 Fathi Sorour *Legitimacy and Criminal Procedure* (House of the Arab Renaissance, Cairo, 1977) at 285.

At 285.

47 At 285.

48 At 285.

49 Italian Constitution, art 4.

50 See the American Constitution, art1 s8 cl15 and art1 s9 cl2 e.

51 Henry Monaghan “The Protective Power of the Presidency” (1993) 93 Colum L Rev 1, 3238. See also George Winterton “The Concept of Extra-Constitutional Executive Power in Domestic Affairs” (1979) 7 Hastings Const LQ1 2435. See also the Egyptian Constitution (1923), arts 154, Egyptian Official Gazette (18 January 2014).

that the privilege of the right of *habeas corpus* shall not be suspended.⁵² One can suggest that International Human Rights Treaties may have influenced the writers of the American Constitution. Other constitutions, such as the Egyptian Constitution, specify in general wording the definition of the states of emergency.⁵³

Another example of the acknowledgment of the emergency condition within liberal democratic constitutions, “which permit a fairly broad suspension of constitutional provisions during times of emergency”, is to be found in the constitution of the Swiss Confederation. Under the doctrine of *régime des pleins pouvoirs* (regime of plenary powers⁵⁴), the Swiss federal government can act to safeguard the Confederation’s security, independence, neutrality or economic interests, by declaring states of emergencies when the legislature cannot meet the required guarantees for the safety of the federation, or when the legislative process can no longer function.⁵⁵ While such an extreme assumption of power by the federal government would, under normal conditions, be deemed unconstitutional, under exceptional circumstances it becomes operational.⁵⁶ The doctrine places practically no limits on the power of the federal executive, apart from Switzerland’s obligations under the ECHR.⁵⁷

Meanwhile, the Constitution of the Irish Republic contains an article (article 28(3.3)) which permits the suspension of the Constitution’s fundamental rights in times of emergency.⁵⁸ It should be noted, with regard to that point, that the only legal limitation on the declaration of an emergency is the existence of a “grave emergency”,⁵⁹ in which event the government is allowed to virtually rewrite the constitution through emergency measures.⁶⁰ Another modern constitution, the Algerian Constitution, provides in its Article 96(1) that, during the period of a state of war, the Constitution is suspended and the President assumes all powers.⁶¹ Meanwhile, in India, due to the Indian system having developed a unique system of constitutional distribution of powers, the Indian Constitution gives pre-eminence to the Union over the States and places the President of India in a unique position.⁶² Although the President of India is a titular figure according to the Indian democratic system, under certain circumstances the Constitution gives him

52 The American Constitution, cl 2.

53 Egyptian Constitution (1923), arts 62, 72.

54 See the Constitution of the Federal Government of Switzerland at 23.

55 At 23.

56 At 23.

57 At 23.

58 Irish Republic Constitution, art 28.3.3.

59 Asanga Welikala *State of Permanent Crisis* (Centre for Policy Alternatives, Colombo, 2008) at 81.

60 At 81.

61 The Algerian Constitution, art 96 (1).

62 *SR Bommai v Union of India* [1994] ([1994] 2 SCR 644; AIR 1994 SC 1918; (1994) 3 SCC1).

the power to impose direct rule, including declaring states of emergency, but he can only act on the advice of the Prime Minister.⁶³

It may be noted that, in the above examples of modern constitutions, the constitutional provisions for declaring a state of emergency fall into three groups. The first of these groups comprises those that vest the power of declaration in the legislature (usually parliamentary systems), followed by those that empower the executive to make the declaration (generally presidential systems) and, lastly, the remainder which are hybrids. Among the countries that vest the power of declaration in the legislature (although initiation of the process rests with the executive) are South Africa,⁶⁴ Germany⁶⁵ and Israel,⁶⁶ which are all, essentially, parliamentary systems.⁶⁷ However, in the interest of a rapid response, these jurisdictions may give a limited power of declaration, and even rule-making, to the executive, subject to ratification by the legislature.

Indeed, states of emergency represents a challenge for democratic constitution-makers to provide for the exercise of power, particularly executive power, that facilitates strong and efficient government, whilst simultaneously ensuring safeguards against abuse. This problem seems to have been partly solved by modern constitution-makers,⁶⁸ since many constitutions seek implicitly to limit or explicitly to prevent judicial review at times of emergency,⁶⁹ while many others are silent on the matter.⁷⁰ Here, the consequences of a declaration of states of emergency on the constitutional order vary, since the fundamental rights, constitutionally protected under normal circumstances, can be limited or derogated from during an emergency and, consequently, the institutional framework and balance of constitutional order undergoes change. Indeed, this is why modern constitutional provisions often prohibit executives or parliamentary bodies from modifying any articles of the constitution during an emergency.⁷¹

The legal consequences of applying states of emergency can also be seen in the expansion of the executive role within the institutional framework of the State.⁷² Most modern constitutions offset the conferral of power through procedural mechanisms, such as legislative approval or consultation

63 Indian Constitution, art 352.

64 Halton Cheadle, Dennis Davis and Nicholas Haysom *South African Constitutional Law* (Butterworths, Oxford, 2002) at 11. See also South African Constitution, art 34(1).

65 German Basic Law art 115a.

66 Israeli Basic Law, art 38(a).

67 Greek Constitution, art 48(1); Italian Constitution, art 78, 87.

68 See, for example, South African Constitution, s 37(3).

69 See, for example, the Malaysian Constitution, art 150(8); see also Irish Constitution, art 28.3.3.

70 See, for example, Sri Lankan Constitution prior to the Tenth Amendment, art 155. See also Stephen Ellman, "Constitution for All Seasons: Providing Against Emergencies in a Post-Apartheid Constitution, A" [1989] New York Law School <<http://digitalcommons.nyls.edu>>.

71 For example, French Constitution, art 89(4); Belgian Constitution, arts 187, 196. See also Gross and Ní Aoláin, above n 17, at 6061.

72 Locke, above n 11, at 159160.

requirements, and time limits on the validity of the declaration. Thus, some constitutions provide that Parliament must be summoned immediately upon the declaration of a state of emergency,⁷³ and others that the legislature may not be dissolved⁷⁴ or that its term of office is extended during the currency of a state of emergency.⁷⁵ Meanwhile, the impact on the constitutions of countries that adopt federal systems can be judged according to the constitutional evolution of those countries.⁷⁶ Even very different federal constitutional cultures and practices, such as those in Canada and Australia, demonstrate some specified articles which deal with emergencies.⁷⁷ The constitutions of other federations, such as Germany, India and Russia, provide explicitly for the suspension of fundamental federal constitutional principles during times of emergency.⁷⁸

IV. OREN GROSS AND FIONNUALA NÍ AOLÁIN'S MODELS OF ACCOMMODATIONS

Various scholars have made great efforts to try to facilitate a more systematic understanding of "law, politics and 'theory and practice of states of emergency'".⁷⁹ However, in the opinion of this author, Oren Gross and Fionnuala Ní Aoláin are among the best scholars who have interpreted states of emergency. They organised its fundamental aspects on an academic basis, divided it into broad conceptual models in order to facilitate their understanding, and arrived at three categories of accommodation, namely, constitutional, legislative and interpretive.⁸⁰ Gross and Ni Aoláin argued that states of emergency are generated from the constitutional rule of law and,

73 Sri Lankan Constitution, art 155(4).

74 French Constitution, arts 16 and 89. See also Portuguese Constitution art 289; Spanish Constitution arts 169 and 116(5).

75 See German Basic Law, art 115(h).

76 See for example, the Swiss Federal Constitution.

77 Herbert Marx "The Emergency Power and Civil Liberties in Canada" (1970) 16 Mac Gill Law Journal 39 at 5761. See also Christopher D Gilbert "There will be Wars and Rumours of Wars: A Comparison of the Treatment of Defence and Emergency Powers in the Federal Constitutions of Australia and Canada" [1980] 18 Osgoode Hall Law Journal 307. See also Donald G Creighton *Dominion of the North: A History of Canada* (Houghton Mifflin, Boston, USA, 1944) at 439. See also Patricia Peppin "Emergency Legislation and Rights in Canada; The War Measures Act and Civil Liberties" [1993] 18 Queen's LJ 129 at 131. See also Jeffrey Goldsworthy *Australia* (Oxford University Press, Oxford, 2006) at 6466, 85, 102 and 138.

78 German Basic Law, art 53(a)(2). See also Egyptian Constitution (Egyptian Official Gazette, 26 March 2014). David P Currie *The Constitution of the Federal Republic of Germany* (University of Chicago Press, Chicago, 1994) 134 at 138-39. See also Donald P Kommers "Germany: Balancing Rights and Duties" in Jeffrey Goldsworthy (ed) *Interpreting Constitutions* (Oxford University Press, Oxford, 2006) at 163, 167, 169 and 185. See also the Indian Constitution, arts 353, 356 and 360. See also Durga Das Basu *Introduction to the Constitution of India* (9th ed, Prentice-Hall, New Delhi, 1982) 302-16. See also the Russian Constitution art 88.

79 Gross and Ní Aoláin, above n 17, at 1127.

80 At 1127.

therefore, they developed models to be followed in order to understand the nature of it.⁸¹ These models, which Gross and Ní Aoláin called constitutional emergency regime models, are based on the premise that constitutional norms and legal rules control governmental responses to emergencies and terrorist threats.⁸² Gross and Ní Aoláin called it “the assumption of constitutionality”⁸³ and, according to them, the analytical framework of states of emergency may be expressed as follows;

- (1) The model of legal accommodation, with particular focus on the Roman model of constitutional accommodation and other classical concepts, including the Roman dictatorship, the French *état de siege* and the British concept of Martial Law.⁸⁴ This approach seeks to accommodate a regime of emergency powers within the constitutional order of the institution of dictatorship, as found in the Roman Republic.⁸⁵ Models which were inspired by the Roman prototypes, such as the French *état de siege* and the British concept of Martial Law, could be classed within this model.⁸⁶ These models have formed legal arrangements for emergency powers in both the civilian and common law traditions.⁸⁷
- (2) The libertarian model of constitutional perfection - the “business as usual” model based on “notions of constitutional absolutism and perfection” - entertains no deviation from ordinary rules and norms of legal conduct,⁸⁸ even in times of emergency.⁸⁹ This model embodies theories of constitutional absolutism and constitutional perfection and involves unconditional commitment to the constitutional instrument as a fortress of rights.⁹⁰ This means that, whatever measures a government may take, they cannot, under any circumstances, diminish or suspend the constitutionally protected rights.⁹¹ This model differs from the interpretive accommodation model, which contemplates the emergency-sensitive judicial interpretation of ordinary laws.⁹² Conversely, in this model, there is no difference in the interpretation of ordinary laws between times of emergency and normalcy.⁹³

81 At 1127.

82 At 1127.

83 At 86.

84 Welikala, above n 60, at 34.

85 At 34.

86 At 34.

87 At 34.

88 Oren Gross “Chaos and Rules: Should Responses to Violent Crises always be Constitutional?” (2003) SSRN Electronic Journal <www.ssrn.com> at 112.

89 At 112.

90 Welikala, above n 60, at 49.

91 At 49.

92 At 49.

93 See American Convention on Human Rights (*Habeas Corpus* in Emergency Situations), arts 27(2), 25(1), 7(6).

- (3) The extra-legality model, with particular reference to the work of Carl Schmitt.⁹⁴ Extra-legal measures models are those that are ready to contemplate extra-legal, or even extra-constitutional, actions during times of crisis.⁹⁵ Such models are based, in particular, on a precise view of political morality and ethical conduct.⁹⁶ Gross and Ní Aoláin introduced this model on the basis of some principles drawn from the quasi-religious Jewish law of Halakha, which permits derogation from the fundamental norms of the Torah and Talmud in exceptional circumstances.⁹⁷ With regard to this point, John Locke, in his “theory of the executive prerogative”,⁹⁸ came very close to the Gross and Ní Aoláin model, as did Albert Venn Dicey.⁹⁹ This model has an inherent conceptual requirement of institutional morality and legitimacy since, in their view, “public officials may act extra-legally when such action is necessary for protecting the nation and the public”.¹⁰⁰ This is another example of the thoughts of the above scholars being based on this model.

From the normative, extra-legalist, perspective, Oren Gross and Fionnuala Ni presented five different approaches to the issue of necessity and its relationship with law.¹⁰¹ These five views were divided into two constitutional approaches and three approaches “operating outside the constitutional sphere”.¹⁰²

The two constitutional approaches are:

- (1) Necessity as a source of law.
- (2) Necessity as a “meta-rule of constitutional construction”.¹⁰³

The three extra-constitutional approaches were set out as follows:

- (1) Political necessity, rendering legal issues irrelevant.
- (2) Necessity as suspending law but not creating new law.
- (3) Necessity as excusing illegal conduct without rendering it legal or suspending it.¹⁰⁴

94 Welikala, above n 60, at 33.

95 At 33.

96 At 33.

97 Gross and Ní Aoláin, above n 17, at 113119.

98 Jeffrey Friedman, *Two Treatises of Government: John Locke* (Legal Classics Library 1994) at 67.

99 Gross and Ní Aoláin, above n 17, at 130132.

100 At 112.

101 At 47.

102 At 47.

103 At 47.

104 At 47.

Oren Gross and Fionnuala Ní Aoláin introduced a Modern Comparative Context, in which they enabled states of emergency to be categorised according to whether the accommodation was constitutional, legislative or interpretive.¹⁰⁵

According to them, constitutional accommodation is based on the presumption of temporal separation between emergency and normalcy and seeks to provide a constitutional framework of general application to be put into operation in times of crisis.¹⁰⁶

Legislative accommodation may fall into one of two separate categories:

- (1) Legislation in response to a crisis which may modify the existing law to deal with specific challenges presented by the crisis.¹⁰⁷
- (2) Special emergency legislation, whereby the emergency must be met under the umbrella of the law.¹⁰⁸ This type of emergency regards ordinary laws as inadequate to deal with specific emergencies.¹⁰⁹ It suggests that supplementary emergency norms that pertain to the particular exigency (or to potential future exigencies), should be created.¹¹⁰ The interpretive approach has been particularly significant in jurisdictions with older constitutions, such as in the USA, which do not contain expressive and detailed rules regarding emergency powers.¹¹¹ In such countries, judges are required to resolve competing claims of institutional responses to emergencies without much textual guidance.¹¹²

Interpretive accommodation is the response in which judiciaries may interpret the constitutional and legal provisions in a way that addresses the challenges of a crisis and facilitates the government's reaction.¹¹³ Gross and Ní Aoláin defined this situation as existing constitutional provisions, in which laws and regulations are given new understanding by way of context-based interpretation, without any explicit modification or replacement.¹¹⁴ Additional powers should be able to deal with dangerous threats which may be accommodated by judges exercising "the elastic power of interpretation".¹¹⁵

105 At 47.

106 Bruce Ackerman "The Emergency Constitution" (2004) 113 *The Yale Law Journal*. Faculty Scholarship Series. Paper 121<<http://digitalcommons.law.yale.edu>>.

107 Ackerman, see above n 110.

108 Welikala, above n 60, at 47.

109 At 47.

110 Gross and Ní Aoláin, above n 17, at 67.

111 Welikala, above n 60, at 49.

112 At 49.

113 Gross and Ní Aoláin, above n 17, at 72. See also Richard A Posner *Law, Pragmatism, and Democracy* (Harvard University Press, Cambridge, MA, 2003) at 295.

114 At 295.

115 At 295.

Gross and Ní Aoláin pointed out two broad problems regarding the classification approach to the structuring of emergency powers, stating that “such classification and categorization are viable projects”.¹¹⁶ They, moreover, opined that creating a “sliding scale of emergency regimes” may encourage governments to resort, more readily, to some states of emergency, because the perception that they are “not so serious” makes them “more readily accepted by legislatures, courts and the general public”.¹¹⁷ The danger here is that:¹¹⁸

[t]his can also act to condition people to live with some types of emergency, as, once a kind of emergency regime becomes accepted as the normal way of life, it will be easier for the government to “upgrade” to a higher-level emergency regime.

They added that:¹¹⁹

... the argument is made that the benefits of accommodation exceed the potential costs of invoking such models of emergency rule, therefore, the models avoid constitutional and legal rigidity in the face of crisis, allowing governments to act responsibly, within a legal framework, against threats and dangers; operating within the confines of a legal system also means that mechanisms of control and supervision against abuse and misuse of powers - such as judicial review and Parliamentary oversight over the actions of the executive government - are available and functioning.

According to Eric Posner & Adrian Vermeule, the normative expectations of the accommodative approach, which relies on practical experience, suggest that, when confronted with the exigencies of a crisis, the models have not always been able to withstand the depredations of assertive executives, rendering them meaningless, apologetic and unprincipled.¹²⁰

One could note from the above analysis that scholars have dedicated great efforts to explain emergencies and their relationship with law and politics. Some of these efforts have been recognised as inspirations in legal and political fields, although, in practice, these efforts have not introduced practical tools to ensure official and political compliance with the letter and the spirit of these theories. Thus, the experience whereby judges and legislators have been unable to assert their institutional role to give meaningful effect to

116 At 45.

117 At 4546.

118 At 46.

119 At 81.

120 Eric A Posner & Adrian Vermeule “Accommodating Emergencies” (2003) 56 Stanford Law Review 605 at 607.

constitutional safeguards during times of emergency is as much a matter of politics as of law. As Friedrich observed:¹²¹

There are no ultimate institutional safeguards available for ensuring that emergency powers be used for the purpose of preserving the constitution ... All in all, the quasi-dictatorial provisions of modern constitutional systems, be they martial rule, state of siege or constitutional emergency powers, fail to conform to any exacting standard of effective limitations upon a temporary concentration of powers. Consequently, all these systems are liable to be transformed into dictatorial schemes if conditions become at all favourable to it.

V. THE EFFECTS OF EMERGENCIES ON THE RULE OF LAW

Modern democracies have generally maintained their legitimacy by claiming that the law rules over particular leaders or interests. Indeed, this explains why Victorian jurist, Albert Venn Dicey, articulated a distinctive rule of law.¹²² While Dicey's rule of law was derived from the unwritten English constitution and common law heritage, in America the rule of law was inseparable from what legal historian Willard Hurt called the constitutional ideal¹²³ that all power should be accountable to a power outside of itself, whatever its constitutional form.¹²⁴ The rule of law was vulnerable during wartime emergencies, since nation-state authorities demanded unilateral power.¹²⁵ This resulted in the introduction of the Alien and Sedition Acts of 1798, by which¹²⁶ Lincoln suspended the writ of *habeas corpus* during the Civil War.¹²⁷

In 1917, other exceptional acts were also ratified by Congress, including the Espionage Act, which gives the power to the authorities to confiscate property, wiretap, search and seize private property, censor writings, open

121 Carl J Friedrich *Constitutional Government and Democracy* (Blaisdell Pub Co, Waltham, MA, 1968) at 570. See also Gross and Ní Aoláin, above n 17, at 81.

122 Albert Venn Dicey, *Lectures on the Relation between Law and Public Opinion in England during the Nineteenth Century* (Macmillan London 1914) at 12.

123 James Willard Hurst *Law and Markets in United States History* (University of Wisconsin Press, Madison, 1982) at 9798. See also Richard A Cosgrove *The Rule of Law* (University of North Carolina Press, Chapel Hill, 1980). See also Joseph Margulies *Guantánamo and the Abuse of Presidential Power* (Simon & Schuster, New York, 2006) at 33. See also Harold H Bruff *Bad Advice: The Presidential Lawyers in the War on Terrorism* (University of Kansas, Lawrence, 2009) at 89.

124 Hurst, above n 128.

125 At 9798.

126 Alien Enemies Act 1798, Sec 2, 4,5.

127 Ibid.

mail and restrict the right of assembly.¹²⁸ A famous example of the use of this act can be found in the case of *Debs v United States*, where “the socialist leader and presidential candidate, Eugene Debs, was prosecuted and convicted for his criticism of World War I”.¹²⁹

Following the end of the Second World War, “and after the perceived emergency was over, several people were convicted of violating the Sedition Act”.¹³⁰ Justice Black referred to the Court’s opinion, when affirming Korematsu’s conviction for disobeying his internment order during World War II, saying: “Indeed, this decision was supported by civil libertarians such as William O’Douglas, Felix Frankfurter and Harlan Stone”.¹³¹

One can see the negative effects of Emergency Conditions on the rule of law, and especially on guaranteeing the right to a fair trial. These negative effects have motivated the international community to introduce some important international rules, such as the four Geneva Conventions of 1949 and the two Additional Protocols of 1977. These include similar provisions with regard to the right to a fair trial, hence:

- (1) The right for trial in front of an independent and impartial court.
- (2) The right to have access to a lawyer and to an interpreter.
- (3) The right to be informed, without delay, of the particulars of the offence alleged against the accused.¹³²
- (4) The right not to be convicted of an offence except on the basis of individual penal responsibility.¹³³
- (5) The right to be tried in one’s presence, and not to be compelled to testify against oneself.¹³⁴
- (6) The right to examine, or to have examined, the witnesses against him and to attend and examine witnesses on his behalf under the same conditions as witnesses against him.¹³⁵
- (7) The right to have the judgment pronounced publicly.¹³⁶

128 William C Banks and ME Bowman “Executive Authority for National Security Surveillance” (2000) 50 American University Law Review 1<<http://digitalcommons.wcl.american.edu>>.

129 *Debs v United States* (1919) 249 US 211. See also *Frohwerk v United States* (1919) 249 US 204, 39 S Ct 249, 63 L Ed 561 US. See also *Schenck v United States* (1919) 249 US 47.

130 Gary R Wills *A Necessary Evil: A History of American Distrust of Government* (Simon & Schuster, New York, 2002) at 135140.

131 *Korematsu v United States* (1944) 323 US 214.

132 Ibid.

133 See Additional Protocol to the Geneva Conventions of 12 August 1949 (Protocol I) 8 June 1977.

134 Protocol I.

135 Protocol I.

136 Protocol I.

(8) The right to be able to submit an appeal to superior courts.¹³⁷

It may be noted that the function of the legal system during an emergency, and especially the role of judges in ensuring the effective protection of human rights in emergency situations and during the application of counter-terrorism legislation, could lead to a crucial situation for the legal rights of a citizen. The rule of law may be affected and the normal legal status quo circumvented, leading to interference by the executive in the functions of other authorities, especially the judiciary. Such interference may influence the independence of the judiciary and unbalance the principle of the three independent authorities - legislative, executive and judiciary - so that the three cease to be separate, since orders and decisions issued by States under the states of emergency provisions may cause the executive branch to intervene in some of the functions of the judiciary. These issues will be discussed briefly and can be summarised as follows;

A. Initial Investigation and Interrogation

Under normal circumstances, investigation, interrogation and prosecution are duties and responsibilities of the judiciary. In accordance with this, guarantees exist to ensure that defendants enjoy all essential safeguards. Such guarantees are represented, inter alia, in the function of police officers, who may arrest a person only once evidence has become available. Moreover, while directly charging the accused after his or her arrest is essential, detaining a person without charging them is forbidden. However, following the proclamation of states of emergency, the powers of the judiciary are transferred to the military ruler, including the power to issue arrest warrants, which presents the possibility for a person to be detained without being charged. In addition to this, a person's collateral rights could be neglected during the initial investigation and interrogation, for example by a failure to observe the confidentiality of the investigation, or the failure to appoint a defence lawyer.¹³⁸ Moreover, under emergencies, the Minister of Defence or Interior or the Head of State, have the authority to order the arrest of the accused, or release him or her before or after the trial, or issue a pardon. Sentences are final and are not subject to the control of the supreme courts.

States of emergency provisions may also set up special tribunals, which may involve discrimination contrary to Article 26 of the ICCPR.¹³⁹ These points were quoted in the case of *Kavanagh v Ireland*,¹⁴⁰ with reference to

137 See Geneva Convention (1949) art 49, 50, 10508, 7173, art 3. See also Protocol II to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art 6.

138 See the Egyptian Emergency Law 58/62 art 6, 8 and 9. See also the US Patriot Act 2001.

139 See arts 14 and 26 of the ICCPR.

140 Communication No819/1998 *Kavanagh v Ireland* (Views adopted on 4 April 2001) in UN doc GAOR A/56/40 (vol. II)133 para10.1.

the “Special Criminal Court created in Ireland”.¹⁴¹ In this case, Kavanagh complained that he had been the victim of a violation of article 14(1) of the ICCPR, by being subjected to the Special Court, “which did not afford him a jury trial and the right to examine witnesses at a preliminary stage”.¹⁴²

In the same manner, the Human Rights Committee confirmed that “trial before courts other than the ordinary courts is not necessarily, per se, a violation of the entitlement to a fair hearing” and added that “the facts in the Kavanagh case did not show that there had been such a violation”.¹⁴³ On the other hand, it stated that the decision of the Director of Public Prosecutions to charge the complainant before an extraordinarily constituted court deprived him “of certain procedures under domestic law, distinguishing the author from others charged with similar offences in the ordinary courts”.¹⁴⁴ The Committee then noted that the Offences Against the State Act set out a number of specific acts which could be tried before a Special Criminal Court “if the DPP is of the view that the ordinary courts are inadequate to secure the effective administration of justice”.¹⁴⁵ However, the Committee considered it problematic that:¹⁴⁶

...No reasons are required to be given for the decision that the Special Criminal Court would be “proper”, or that the ordinary courts are “inadequate”, and no reasons for the decision in the particular case have been provided to the Committee. Moreover, judicial review of the DPP’s decisions is effectively restricted to the most exceptional and virtually indemonstrable circumstances.

In this it was referring to the condition where countries are facing terror threats.

In this case, the conclusion of the Committee was that Ireland had failed to demonstrate that “the Special Criminal Court was based upon reasonable and objective grounds”.¹⁴⁷

B. Trial and Verdict

When proclaiming states of emergency, the establishment of exceptional courts has become a common practice. Such exceptional courts have different names in different countries, including Emergency Courts, State Security Courts and Military Courts. These courts usually consist of a judge and

141 The Irish government proclamation of 26 May 1972, pursuant to s 35(2) of the Offences Against the State Act 1939.

142 Communication No819/1998 *Kavanagh v Ireland* (Views adopted on 4 April 2001) in UN doc GAOR A/56/40 (vol II)133 para10.1.

143 At para 10.1.

144 At para 10.1.

145 At para 10.1

146 At para 10.2.

147 Lawless Case ECtHR (1961) Series A no3 56 para 28.

security officers from the armed forces or National Guard. The formation of those courts casts a doubt as to whether the members of the courts have the necessary legal qualifications to take their positions as judges. Indeed, it is usually the case that these courts do not require their members to be legally qualified. An example of this is found in of Article (7) of the Egyptian Emergency law, which authorises the President to form the State Security Courts from military personnel, but does not specify any legal requirements for the chosen military personnel.¹⁴⁸ This might breach the right to a fair trial by a competent, independent and impartial tribunal and an example of such a violation can be found in the case of *M González del Río v Peru*, where the Committee held that “the right to be tried by an independent and impartial tribunal is an absolute right that may suffer no exception”.¹⁴⁹ However, the Committee also admitted that “it would simply not be feasible to expect that all the provisions of Article 14 must remain fully functional in any kind of emergency”.¹⁵⁰ It seems clear from the various comments and views of the Human Rights Committee that an accused person should be tried by an independent and impartial court, in any circumstances, including times of public emergencies.¹⁵¹

VI. EXCEPTIONAL EMERGENCY COURTS

Exceptional Courts are those courts which are formed to deal with the exceptional situations, amongst which are the declaration of states of emergency, or the country being subjected to terror attack and resolving to pass counter terrorism legislation. These exceptional courts handle different crimes and include State Emergency courts, Emergency Courts, and Martial Courts. The states of emergency investigative procedures, such as pre-trial detention, interrogations and searches, are completely different from those to be found in the codes of criminal procedures. In his book, *Constitutional Theory*, Carl Schmitt stated that Constitutional Law can be suspended during the state of exception and be violated by measures of the state of exception.¹⁵² This is because the legal regulations that control restrictions on the freedom of the individual may require proper coordination between the society and the executive branch.¹⁵³

In the above situation, the task of the legislator is to establish safeguards to ensure that prejudice to the rights and freedoms of the individual are of

148 Egyptian Emergency Law 58/62 art 7.

149 Communication No 263/1987M *González del Río v Peru*(Views adopted on 28 October 1992) GAOR A/48/40 (vol II) 20 para 5.2.

150 See the Committee’s reply to the Sub-Commission on the question of a draft third Optional Protocol to the Covenant in UN doc GAOR A/49/40 (vol I) annex XI.

151 Ibid, see also United Nations Compilation of General Comments 123 para 4 and Communication No 263/1987M, above n 155, at para 5.2.

152 Carl Schmitt and Jeffrey Seitzer *Constitutional Theory* (Duke University Press 2008) at 80.

153 Clinton Rossiter *The Supreme Court and the Commander in Chief* (Da Capo Press 1970) at 81.

the lower order, as suggested by Dyzenhaus. In addition to this, there must also be cooperation among the constitutional branches of government, rather than unilateral action by one branch,¹⁵⁴ as can be seen in the case of *Lambdin P Milligan*.¹⁵⁵ Here, the executive branch had power to override the rule of law during states of emergency, giving the chance for politicians to interfere in legal work. Milligan was a peace democrat activist, who believed in the idea of the right to independence of the Confederate states and was charged in 1864 with various crimes, all punishable before the federal courts. A political decision was made by the executive to try him before a military commission, which had been established on 24 September 1862 by President Lincoln to try those accused in accordance with Martial Law.¹⁵⁶

Such behaviour of executives during emergencies caught the attention of the UN Human Rights Committee, which did not entirely prohibit trials of civilians by State Security or Military Courts.¹⁵⁷ However, in contrast to this, the Committee stated that “the Criminal Code [may] be amended so as to prohibit the trial of civilians by military tribunals *in any circumstances*”.¹⁵⁸ In its General Comment No 13 on Article 14, the Committee emphasised that this article prohibited the trials of civilians in front of Military Courts.¹⁵⁹

Other commentaries by the ICCPR advise States to avoid violating their citizens’ rights during Emergencies. They emphasise that “the State party should adopt the necessary legislative measures to restrict the jurisdiction of the military courts to trials of members of the military accused of military offences”.¹⁶⁰ Indeed, in effect, military tribunals are designated to try military personnel and not civilians.¹⁶¹ Even if it was deemed appropriate to try a civilian in front of a military court, certain rights have to be observed. According to a judgment of the ECtHR, military courts in such exceptional cases should preserve the rights of the individual to a hearing by a competent, independent and impartial tribunal, previously established by law, and his due process rights should not be violated.¹⁶² In the general principle of law, every person has the right to be tried by regular courts.

This principle could be described as the rule of judicial independence, in which the courts follow procedures previously established by law. The creation of “tribunals that do not use the established procedures of the legal process ... to displace the jurisdiction belonging to the ordinary courts or

154 Tony Allan Freyer *Little Rock on Trial* (University Press of Kansas 2007) at 69.

155 Charles Fairman and others, *History of the Supreme Court of the United States* (Macmillan 1971) at 182252. See also Charles Warren, *The Supreme Court in United States History* (Cosimo Classics 2011) at 140176.

156 Rossiter, above n 159, at 2627.

157 UN doc ICCPR A/52/40 (vol I) [1997] 58 para 381.

158 UN doc GAOR A/52/40 (vol I) 60 para 381.

159 ICCPR Article 14, see also UN doc GAOR A/56/40 (vol I) 47 para 12.

160 UN doc GAOR A/56/40 (vol I) 47 at 6162 para 15.

161 *Castillo Petruzzi et al v Peru* [1999] IACtHR Series C no 52 162 para 86.10 (IACtHR)

162 At para 86.10.

judicial tribunals”¹⁶³ is considered to violate the right of an individual to a fair trial under international law. For example, under Article 8(1) of the American Convention on Human Rights, a presiding judge must be competent, independent and impartial. Moreover, under military law, judicial members of military courts are appointed by the executive, who also have authority to decide which military judges will be promoted, which places the independence of the military judges in doubt.¹⁶⁴

The European Court of Human Rights also examined the competence of Martial Law and its conformity with Article 6(1) of the ECHR. In *Yalgin v Turkey* for instance, two of the applicants submitted that their right to a fair hearing had been breached as a consequence of their conviction by the Ankara Martial Law Court.¹⁶⁵ The court noted that the Martial Law Court had been “set up to deal with offences aimed at undermining the constitutional order and its democratic regime”. It concluded, however, that it was not its task:¹⁶⁶

... to determine *in abstract* whether it was necessary to set up such courts in a Contracting State or to review the relevant practice, but to ascertain whether the manner in which one of them functioned infringed the applicants’ right to a fair trial.

In reviewing this case, it should be noted that the Martial Law Courts in Turkey comprise five members - two civilian judges, two military judges and an army officer - and that the military judges chosen, were appointed by a decree of the Minister of Defence. The army officer, however, was appointed on the proposal of the Chief of Staff, and in accordance with the rules governing the appointment of military judges.¹⁶⁷

With regard to the existence of safeguards to protect the members of the Martial Law Court against external pressure, the European Court, in the case of *Yalgin v Turkey*, noted that “the military judges undergo the same professional training as their civilian counterparts”.¹⁶⁸ Therefore, it stated that they:¹⁶⁹

... enjoy constitutional safeguards identical to those of civilian judges. They may not be removed from office or made to retire early without their consent; as regular members of a Martial Law Court they sit as individuals. According to

163 American Convention on Human Rights (General Secretariat, Organization of American States 1970) art 8(1).

164 *Castillo Petruzzi et al v Peru* above n 167, at paras 128-131; in para 129, the Court quoted Principle 5 of the United Nations Basic Principles on the Independence of the Judiciary.

165 *Yalgin v Turkey* ECtHR (2001) at paras 43-44 <<http://echr.coe.int>>.

166 At para 4344. See also UNCHR, “Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers. Professional Training No 9” (UNCHR 2003).

167 *Yalgin*, above n 171, at para 40. See also *Mehmet Ali Yilmaz v Turkey* TCtHR 29286/95.

168 *Yalgin*, at para 40.

169 At para 41.

the Constitution, they must be independent and no public authority may give them instructions concerning their judicial activities or influence them in the performance of their duties.

However, according to the European Court, there are other aspects which could undermine the credibility and independence of military tribunals, which could be listed as follows:

- (1) The military judges are servicemen who take orders from the executive.
- (2) The military judges are subject to military discipline and promotion reports from their administrative superiors.
- (3) The military judges' appointments are made by the military administrative authorities.
- (4) The army officer in the Martial Law Court is "subordinate in the hierarchy to the commander of the army corps and not independent of these authorities".¹⁷⁰

Therefore, the European court observed that:¹⁷¹

Even appearances may be of some importance. What is at stake is the confidence which the courts in a democratic society must inspire in the public and above all, as far as criminal proceedings are concerned, in the accused. When deciding whether, in a given case, there is a legitimate reason to fear that a particular court lacks independence or impartiality, the standpoint of the accused is important without being decisive. What is decisive is whether his doubts can be held to be objectively justified.

VII. CONCLUSION

The analysis conducted above has revealed that the relationship between law and politics is based on the respect that the executive has for the rule of law. The politics of emergency are embedded in an on-going political struggle. Additionally, the more respect that the executive shows for the rule of law, the more independence the judiciary has, and the higher the likelihood that justice can be achieved. One of the most severe results of the declaration of states of emergency is the exposure of civilians to accusations in front of military, or exceptional, courts.

¹⁷⁰ At para 41- 42.

¹⁷¹ *Yalgin*, above n 171.