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**(VENICE COMMISSION)**

**COMPILATION**

**OF VENICE COMMISSION**  
**OPINIONS AND REPORTS**

**ON STATES OF EMERGENCY**

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## 1. INTRODUCTION

This document is a compilation of extracts taken from reports/studies adopted by the Venice Commission on emergency powers and states of emergency and of country-specific opinions on relevant constitutional provisions and/or (draft) emergency laws.

The compilation is intended to serve as a source of reference for drafters of constitutions and of legislations on the judiciary, researchers, as well as the Venice Commission's members, who are requested to prepare comments and opinions concerning legislation dealing with such issues. When referring to elements contained in this draft compilation, please cite the original document but not the compilation as such.

The compilation is structured in a thematic manner in order to facilitate access to the general lines adopted by the Venice Commission on various issues in this area. It should not, however, prevent members of the Venice Commission from introducing new points of view or diverge from earlier ones, if there is a good reason for doing so. The compilation should be considered as merely a frame of reference.

The reader should also be aware that most of the opinions from which extracts are cited in the compilation relate to individual countries and take into account the specific situation there. The citations will therefore not necessarily be applicable in other countries. This is not to say that recommendations contained therein cannot be of relevance for other systems as well.

Venice Commission reports and studies quoted in this compilation seek to present general standards for all member and observer states of the Venice Commission. Recommendations made in the reports and studies will therefore be of a more general application, although the specificity of national/local situations is an important factor and should be taken into account adequately.

Each citation in the compilation has a reference that sets out its exact position in the opinion or report/study (paragraph number, page number for older opinions), which allows the reader to find it in the opinion or report/study from which it was taken. In order to shorten the text, most of further references and footnotes are omitted in the text of citations; only the essential part of the relevant paragraph is reproduced.

The compilation is not a static document and will be regularly updated with extracts of recently adopted opinions by the Venice Commission. The Secretariat will be grateful for suggestions on how to improve this draft compilation ([venice@coe.int](mailto:venice@coe.int)).

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## **I. BENCHMARKS**

Principle of legality –

### **6. Exceptions in emergency situations**

Are exceptions in emergency situations provided for by law?

- i. Are there specific national provisions applicable to emergency situations (war or other public emergency threatening the life of the nation)? Are derogations to human rights possible in such situations under national law? What are the circumstances and criteria required in order to trigger an exception?
- ii. Does national law prohibit derogation from certain rights even in emergency situations? Are derogations proportionate, that is limited to the extent strictly required by the exigencies of the situation, in duration, circumstance and scope?
- iii. Are the possibilities for the executive to derogate from the normal division of powers in emergency circumstances also limited in duration, circumstance and scope?
- iv. What is the procedure for determining an emergency situation? Are there parliamentary control and judicial review of the existence and duration of an emergency situation, and the scope of any derogation thereunder?

[...] 51. The security of the State and of its democratic institutions, and the safety of its officials and population, are vital public and private interests that deserve protection and may lead to a temporary derogation from certain human rights and to an extraordinary division of powers. However, emergency powers have been abused by authoritarian governments to stay in power, to silence the opposition and to restrict human rights in general. Strict limits on the duration, circumstance and scope of such powers is therefore essential. State security and public safety can only be effectively secured in a democracy which fully respects the Rule of Law. This requires parliamentary control and judicial review of the existence and duration of a declared emergency situation in order to avoid abuse.

52. The relevant provisions of the International Covenant on Civil and Political Rights, of the European Convention on Human Rights and the American Convention on Human Rights are similar. They provide for the possibility of derogations (as distinguished from mere limitations of the rights guaranteed) only in highly exceptional circumstances. Derogations are not possible from "the so-called absolute rights: the right to life, the prohibition of torture and inhuman or degrading treatment or punishment, and of slavery, and the nullum crimen, nulla poena principle" among others. Item II.A.6.i summarises the requirements of these treaties.

[Rule of Law Checklist, [CDL-AD\(2016\)007](#)]

The following points can be made in order to suggest certain legal standards for public emergencies:

- a. The emergency situations capable of giving rise to the declaration of states of emergency should clearly be defined and delimited by the constitution. In other words, the existence of a real and imminent danger should be clearly specified. The above condition is expressed in the three main human rights treaties (ECHR, ICCPR, ACHR) as an "exceptional threat". According to the principle of exceptional threat, the derogation from human rights standards in emergencies is legitimate only in case of "war or public emergency threatening the life of the nation".

- b. De facto state of emergency should be avoided, and emergency rule should be officially declared. The corresponding condition in the three main human rights treaties is the requirement of notification, whereby the other states party shall be informed of the provisions derogated from and the reasons therefor.
- c. The constitution should clearly specify which rights can be suspended and which rights do not permit derogation and should be respected in all circumstances. The lists of non-derogable rights in the three main human rights treaties (ECHR, ICCPR, ACHR) contain four such rights: the right of life, the right to be free from torture and other inhuman or degrading treatment or punishment, the right to be free from slavery or servitude, and the principle of non-retroactivity of penal laws. These four non-derogable rights which constitute the "irreducible core" of human rights should be explicitly phrased and sanctioned in the constitution. The inclusion of minimum guarantees against arbitrary detention and other guarantees protecting the right to a fair trial would also be important; furthermore, recourse to courts against acts and actions of the emergency rule authorities should be permitted. The foregoing rights and guarantees should be enjoyed by all without discrimination.
- d. The emergency measures and derogations from fundamental rights and liberties should be proportionate to the danger. In other words, derogations, restrictions and suspensions are acceptable only in case of war or a public emergency threatening the life of the nation; furthermore, such measures should be proportionate to the emergency. The principle of proportionality also includes what ACHR has called "the principle of temporariness" which means that emergency measures cannot last longer than the emergency itself, and the limitations that they bring about should be applied only in those geographical areas affected by the emergency. On the other hand, many of the measures taken under emergency rule do not imply any derogation from human rights standards. This is especially true of measures at the lower level of emergency. Quite often, such measures only regulate the behaviour of people or the use of their property, or the executive may be authorised to take measures which otherwise would require legislative action.
- e. Even in a state of public emergency the fundamental principle of the rule of law should prevail. In other words, no-one should be put to trial before a court other than one previously determined by law.

[CDL-STD\(1995\)012](#), Emergency Powers

## **II. Declaration of state of emergency: definition and substantive requirements**

Public emergency situations involve both derogations from normal human rights standards and alterations in the distribution of functions and powers among the different organs of the State. Derogations from fundamental human rights are an especially crucial problem since experience has shown that the gravest violations of human rights tend to occur in the context of states of emergency. Nevertheless, the principal international human rights instruments of our time contain a derogation clause with regard to emergencies. The European Convention of Human Rights and Fundamental Freedoms (ECHR, Article 15) allows derogation in cases of "war or other public emergency threatening the life of the nation". The International Covenant on Civil and Political Rights (ICCPR, Article 4) refers to a "public emergency which threatens the life of the nation", while the American Convention on Human Rights (ACHR, Article 27) refers to a "war, public danger, or other public emergency that threatens the independence or security of a State party".

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Most constitutions contain provisions on emergency situations. In a minority of countries there is no emergency rule as such, but there are provisions to be applied in the event of war, danger of war, or other emergency situations. [...]

In a minority of countries [...] there is only one type of emergency rule. [...] In a majority of cases, however, there are different types of emergency rule to deal with different kinds of emergencies in proportion to the gravity of the situation. [...]

[CDL-STD\(1995\)012](#), Emergency Powers

244. [...] A state of emergency derives from a declaration made in response to an extraordinary situation posing a fundamental threat to a country. Examples include natural disasters, civil unrest, an epidemic or an economic crisis. The declaration may suspend certain normal functions of government or may authorise government agencies to implement emergency preparatory measures, and to limit or suspend civil liberties and human rights. In some situations, martial law is declared, allowing the military greater authority to act. The defence department acquires special powers through the declaration of a state of emergency, which allows the Ministry of Defence to bypass most of the parliamentary procedures. For this reason, mechanisms for preventing the abuse of emergency powers by national authorities should be provided for in legislation. This fundamental principle is reaffirmed in Parliamentary Assembly of the Council of Europe Recommendation 1713(2005), stating that ‘exceptional measures in any field must be supervised by Parliaments and must not seriously hamper the exercise of fundamental constitutional rights.

245. Each country has its own definition of the circumstances that might give rise to a state of emergency, the procedures to be followed, the limits on the emergency powers or the rights that can be suspended. However, international norms have been developed that can provide useful guidance.

[CDL-AD\(2008\)004](#), Report on the Democratic Control of the Armed Forces adopted by the Venice Commission at its 74th Plenary Session (Venice, 14-15 March 2008)

36. In the *Lawless* case, the ECtHR gave the following definition of a “public emergency threatening the life of the nation”: “an exceptional situation or crisis of emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed”. Later the Court stated in the *Brannigan and McBride* case that “by reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it. Accordingly, in that matter a wide margin of appreciation should be left to the national authorities. Nevertheless, Contracting Parties do not enjoy an unlimited power of appreciation. It is for the Court to rule on whether inter alia the States have gone beyond the ‘extent strictly required by the exigencies’ of the crisis. The domestic margin of appreciation is thus accompanied by a European supervision.”

[CDL-AD\(2016\)037](#), Turkey - Opinion on Emergency Decree Laws N°s667-676 adopted following the failed coup of 15 July 2016, adopted by the Venice Commission at its 109th Plenary Session, 9-10 December 2016.

“27. The former European Commission of Human Rights has defined the characteristics that must present a situation to qualify as a state of emergency:

- the danger must be actual or imminent;

- its effects must involve the whole nation;
- the organized community life must be threatened;
- the crisis or danger must be exceptional, i.e that the normal measures or restrictions permitted by the ECHR for the protection of safety, health and public order must be totally insufficient. In 1961, the ECtHR had already stressed that the situation had to be a "threat to the organized life of the community."

28. Similar principles are laid down in Article 4 of the International Covenant on Civil and Political Rights. The Special Rapporteur of the UN on human rights and states of exception affirms that States must respect the following principles:

- temporality, i.e the exceptional nature of the declaration of a state of emergency; the exceptional nature of threat, which requires that the crisis presents a real, current or at least imminent danger for the community;
- declaration, i.e. the need to publicly announce the state of emergency; communication, namely the obligation to inform other states and monitoring bodies of the relevant treaties of the content of the measures adopted; proportionality, which requires that the measures adopted to address the crisis are proportionate to its seriousness;
- legality: the restrictions on human rights and fundamental freedoms during a state of emergency must remain within the limits set by the national and international law instruments; moreover, a state of emergency does not involve the temporary suspension of the rule of law and does not allow those in power to act so that the law is violated, as they are bound by these principles permanently
- inviolability/intangibility fundamental rights which are not subject to any derogation, even during time of emergency: the right to life, the prohibition of torture, the prohibition of slavery, the non-retroactivity of the law and other judicial guarantees, the right to recognition of one's legal personality and the freedom of thought, conscience and religion.

29. The Venice Commission refers in particular to its "Rule of Law Checklist", in which it identified the criteria for exceptions in emergency situations [...]

[CDL-AD\(2016\)006](#), Opinion on the Draft Constitutional Law on "Protection of the Nation" of France adopted by the Venice Commission at its 106th Plenary Session (Venice, 11-12 March 2016).

[CDL-AD\(2006\)015](#), Opinion on the Protection of Human Rights in Emergency Situations, para. 10

18. Article 1(1) of the draft law contains the definition of state of emergency that reads:

State of emergency is a special legal regime regulating activities of public administration and local self-government bodies, legal entities (irrespective of their legal form) and their officials, which is declared pursuant to the Constitution of the Republic of Armenia throughout the territory of the Republic of Armenia or in certain territories thereof.

19. In the opinion of the Venice Commission, this definition would benefit from further clarification. The concept of "activities of public administration" is rather vague. From the second paragraph of Article 7 of the draft, it appears that this concept does not include laws and judicial acts. Does the latter restriction apply to laws adopted and judicial decisions taken only, or also to future legislative and judicial activities? The concept of "legal entities (irrespective of their character and legal form)" would also seem to be not specific enough.

[CDL-AD\(2011\)049](#), Opinion on the draft law on the legal regime of the state of emergency of Armenia adopted by the Venice Commission at its 89th Plenary Session (Venice, 16-17 December 2011).

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58. The Venice Commission acknowledges that it is hard to predict and describe an emergency situation exactly; a degree of vagueness in the definition would thus appear unavoidable. The preconditions which the Constitution imposes in order for a state of emergency to be declared must at any rate be interpreted in the light of the definitions contained in the ECHR and in the ICCPR. The definition contained in Article 36-1 can be interpreted with due regard for European standards. Nevertheless, the text could usefully be improved to make it clear that both "the imminent threat resulting from serious breaches of public order" and "events tantamount to a public disaster" must be "such as to potentially threaten the life of the nation".

[CDL-AD\(2016\)006](#), Opinion on the Draft Constitutional Law on "Protection of the Nation" of France adopted by the Venice Commission at its 106th Plenary Session (Venice, 11-12 March 2016).

73. The President alone would decide on the declaration of a state emergency, as well as on the issuing of decrees "on the matters necessitated by the state of emergency", having the force of law (Art. 119). The current Turkish Constitution provides for three types of states of emergency: the state of emergency proclaimed by the Council of Ministers under the chairmanship of the President (Article 119), the state of emergency in case of widespread acts of violence and serious deterioration of public order, also proclaimed by the Council of Ministers under the chairmanship of the President (Article 120) and martial law also proclaimed by the Council of Ministers under the chairmanship of the President (Article 122). These regulations of the Turkish Constitution on the state of emergency are in line with common European standards concerning the state of emergency. The differentiation of different kinds of states of emergency is a common solution in many countries, and a positive one: different types of states of emergency need the utilisation of different means.

74. The draft amendments do not operate any more a distinction between different states of emergency; they repeal articles 120, 121 and 122 and make it possible for the President to declare the state of emergency "in the event of war, the emergence of a situation necessitating war, mobilization, uprising, strong and actual attempt against homeland and Republic, widespread acts of violence of internal or external origin threatening the indivisibility of the country and the nation, emergence of widespread acts of violence which are aimed at the destruction of the constitutional order or the fundamental rights and freedoms, severe destruction of public order due to acts of violence, and emergence of natural disaster, dangerous pandemic disease or severe economic crises" (Amended Article 119).

[CDL-AD\(2017\)005](#), Turkey - Opinion on the amendments to the Constitution adopted by the Grand National Assembly on 21 January 2017 and to be submitted to a National Referendum on 16 April 2017, adopted by the Venice Commission at its 110th Plenary Session (Venice, 10-11 March 2017)

34. (...) derogations from human rights and freedoms may only be made upon "the official proclamation" (see articles 121 and 122 of the draft constitution) of the state of war or other public emergency "threatening the life of the nation". They are only possible "to the extent required by the exigencies of the situation" (the expression "within the limits required" is not sufficiently clear).

35. This provision should also specify the articles in the Constitution that are not affected during war or emergency.

[CDL-AD\(2007\)017](#), Interim Opinion on the Draft Constitution of Montenegro adopted by the Venice Commission at its 71st Plenary Session (Venice, 1-2 June 2007).

68.(...) In the Venice Commission's view, it would be important (...) to mention, first of all, that there are rights from which no derogation is possible and that any law on emergency powers



must safeguard these. The Constitution should also require that any declaration of a state of emergency must include a list of the rights to be derogated from.

69. In the opinion of the Venice Commission, it is also important that Article 36-1 also stipulate that the civil authorities can take (administrative policing) measures in order to avert this imminent danger or deal with these events only "to the extent strictly required by the exigencies of the situation".

[CDL-AD\(2016\)006](#), Opinion on the Draft Constitutional Law on "Protection of the Nation" of France adopted by the Venice Commission at its 106th Plenary Session (Venice, 11-12 March 2016).

95. Articles 200 and 201 define the state of emergency and the state of war. The regulations on the state of war do not give rise to doubts. The state of war on the territory of given country is, as a rule, proclaimed as a consequence of the war, i.e. as a consequence of a situation existing at the international level. The situation with respect to the state of emergency is more differentiated. General constitutional law knows different kinds of a state of emergency. The state of emergency or better the extraordinary measures can be introduced in several situations: 1. In the case of external threats to the State, acts of armed aggression against the territory; 2. When an obligation of common defence against aggression arises by virtue of an international agreement; 3. In the case of threats to the constitutional order of the State, to the security of the citizens or public order; 4. In order to prevent or remove the consequences of a natural catastrophe or a technological accident exhibiting characteristics of a natural disaster.

96. Article 200 regulates that the state of emergency shall be proclaimed "when the survival of the state or its citizens is threatened by a public danger". This comes closest to the situation described above under 3. The conditions under which the state of emergency could be proclaimed are however described in a very general way. Admittedly this is also the case in other constitutions. It would, however, been preferable to at least add another qualification at the end of Art.200.1: "if ordinary constitutional measures are inadequate".

97. This Article [202] regulates the derogation from human and minority rights in the state of emergency and war. It would have been preferable to keep the differentiation between the state of war and the state of emergency with respect to the derogation from fundamental rights. The situation in both cases are different and for that reason the scope for derogation should be differentiated as it was the case in the previous draft Constitution. The general wording used "permitted only to the extent deemed necessary" seems far too vague. A stricter wording as in Article 15 ECHR "to the extent strictly required by the exigencies of the situation" should be used.

98. There are also some gaps in the list of non-derogable rights in Section 4 of this Article. In the light of Article 202.2 Article 44 on churches and religious communities should have been included. One may also have doubts why for example Articles 33 and 65 are not included in the list.

[CDL-AD\(2007\)004](#), Opinion on the Constitution of Serbia adopted by the Commission at its 70th plenary session (Venice, 16-17 March 2007).

33. The list of rights which can be restricted in emergency situations is excessively long. The conditions required for declaring a state of emergency or martial law are nowhere defined in the draft.

[CDL-AD\(2009\)024](#), Opinion on the Draft Law of Ukraine amending the Constitution presented by the President of Ukraine adopted by the Venice Commission at its 79th Plenary Session (Venice, 12-13 June 2009)

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21. It is to be emphasised that, to the extent that the declaration of the state of emergency entails human rights derogations, (...), the circumstances where the state of emergency may be declared must also fulfill the criteria of the condition of a “public emergency threatening the life of the nation” established by Article 15 of the ECHR and Article 4 of the ICCP (...).

[CDL-AD\(2011\)049](#) Opinion on the draft law on the legal regime of the state of emergency of Armenia adopted by the Venice Commission at its 89th Plenary Session (Venice, 16-17 December 2011).

41. Article 10(2) of the draft law lays down that “under state of emergency the measures and temporary limitations provided for by this Law shall be in line with the international commitments of the Republic of Armenia on derogating from obligations in emergency situations”. This is also a most welcome provision. However, it is to be recommended that an explicit reference to the rights and freedoms that, (...), Article 15 of the ECHR and Article 4 of the ICCP, may not at all be derogated from be included (...).

[CDL-AD\(2011\)049](#), Opinion on the draft law on the legal regime of the state of emergency of Armenia adopted by the Venice Commission at its 89th Plenary Session (Venice, 16-17 December 2011).

44. The concept of emergency rule is founded on the assumption that in certain situations of political, military and economic emergency, the system of limitations of constitutional government has to give way before the increased power of the executive. However, even in a state of public emergency the fundamental principle of the rule of law must prevail. The emergency measures and derogations, restrictions and suspensions of fundamental rights are acceptable only in case of a public emergency threatening the life of the nation; furthermore, such measures should be proportionate to the emergency and should only last as long as the emergency itself. The rule of law further means that governmental agencies must operate within the framework of law, and their actions must be subject to review by independent courts. The legal security of individuals must be guaranteed.

[CDL-AD\(2011\)049](#), Opinion on the draft law on the legal regime of the state of emergency of Armenia adopted by the Venice Commission at its 89th Plenary Session (Venice, 16-17 December 2011).

34. The rule of law consists of several aspects which are all of eminent importance and have to be maintained in an integral way. These elements are the legality principle, separation of powers, division of powers, human rights, the State monopoly of force, public and independent administration of justice, protection of privacy, right to vote, freedom of access to political power, democratic participation in and supervision on public decision making, transparency of government, freedom of expression, association and assembly, rights of minorities as well as the majority rule in political decision making. ...

[CDL-AD\(2006\)015](#), Opinion on the Protection of Human Rights in Emergency Situations

117. However, there is no reference to the possibility of and conditions for exceptions to the rights and freedoms guaranteed in Chapter II in a situation equating to a “public emergency which threatens the life of the nation” (see Article 4 ICCPR).

[CDL-AD\(2013\)032](#), Opinion on the Final Draft Constitution of the Republic of Tunisia, adopted by the Venice Commission at its 96th Plenary Session (Venice, 11-12 October 2013)

95. This article [53] is of key importance for the effective enjoyment by all of fundamental rights and freedoms. Its provisions should indicate more clearly which rights and freedoms may be restricted and include a list of non-limitable rights. The limitation clauses should be brought into harmony with those of the ECHR, including as regards permissible derogations in time of emergency and legal effects of a state of emergency on the enjoyment of fundamental rights and freedoms.

[CDL-AD\(2014\)010](#), Opinion on the Draft Law on the Review of the Constitution of Romania, adopted by the Venice Commission at its 98th Plenary Session, (Venice, 21-22 March 2014)

### III. Derogation from human rights obligations

30. Derogation from treaty-based human rights obligations is provided by Article 15 of the European Convention on Human Rights (ECHR) and by Article 4 of the International Covenant on Civil and Political Rights (ICCPR), which are expressed in very similar terms – they permit derogation in time of public emergency which threatens the life of the nation. [...]

[CDL-AD\(2016\)037](#), Turkey - Opinion on Emergency Decree Laws N°s 667-676 adopted following the failed coup of 15 July 2016, adopted by the Venice Commission at its 109th Plenary Session, 9-10 December 2016

33. The mechanism of derogation allows the Turkish authorities to temporarily reduce the scope of its obligations under treaty-based human rights instruments. However, there are certain conditions for the exercise of the derogation powers under the ECHR and the ICCPR:

- the right to derogate can be invoked only in emergency situations (time of war or other public emergency threatening the life of the nation);
- the State availing itself of this right of derogation has to comply with certain procedural conditions (see Article 15 para. 3 of the ECHR, Article 4 para. 3 of the ICCPR), like the proclamation and notification requirements, as well as its national law;
- the State may take measures derogating from its obligations “only to the extent strictly required by the exigencies of the situation”, both with respect to scope and duration, and the necessity and proportionality of those measures are subject to supervision by the European Court of Human Rights (ECtHR) and monitoring by the Human Rights Committee (HRC);
- certain rights do not allow any derogation;
- the derogation may not be discriminatory or inconsistent with the State’s other obligations under international law;
- the predominant objective must be the restoration of a state of normalcy where full respect for human rights can again be secured.

[CDL-AD\(2016\)037](#), Turkey - Opinion on Emergency Decree Laws N°s 667-676 adopted following the failed coup of 15 July 2016, adopted by the Venice Commission at its 109th Plenary Session, 9-10 December 2016

67. The Venice Commission has already pointed out in previous opinions that in international law, states have a margin of discretion to assess whether a public emergency exists and derogations are needed. It is for the national authorities to assess, in view of the seriousness of the situation and taking account of all the relevant factors, if and when there is a public emergency threatening the existence of the nation and if a state of emergency needs to be declared to combat it. Likewise, it is for the state authorities to decide on the nature and extent of the derogations needed to overcome the emergency. However, although states have a wide margin of discretion in this area, their powers are not unlimited and the European Court of Human Rights exercises some supervision over these powers.

[CDL-AD\(2016\)010](#), Turkey - Opinion on the Legal Framework governing Curfews, adopted by the Venice Commission at its 107th Plenary Session (Venice, 10-11 June 2016).

29. ... the best way to fight those who threaten State security and public safety is not primarily and in all situations to give more powers to the executive authorities and restrict personal

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rights and freedoms, but to strengthen democracy and the rule of law, which are precisely meant to protect the individual against arbitrary and disproportionate restrictions of his human rights and freedoms by the authorities.

[CDL-AD\(2006\)015](#), Opinion on the Protection of Human Rights in Emergency Situations

11. When an emergency situation pertains and a Contracting State wishes to use its power of derogation, it is imperative for the State in question to make a formal derogation under Article 15 ECHR indicating the rights and the territory to which the derogation applies... Article 15 requires that the State concerned keep the Secretary General of the Council of Europe fully informed of the measures that it has taken and the reasons therefore...

[CDL-AD\(2006\)015](#), Opinion on the Protection of Human Rights in Emergency Situations

39. Outside the scope of Article 15 ECHR and Article 4 paragraph 1 ICCPR, qualified human rights and fundamental freedoms cannot be subject to implied limitations. ...

[CDL-AD\(2006\)015](#), Opinion on the Protection of Human Rights in Emergency Situation

Derogations [from Article 4(1) ICCPR] may only last for as long as, and may only have a scope that is "*strictly required by the exigencies of the situation*". Their necessity and proportionality must be subject to domestic and international supervision. ...

[CDL-AD\(2006\)015](#), Opinion on the Protection of Human Rights in Emergency Situations

**IV. Constitutional entrenchment of the state of emergency**

It may be recommended that the emergency situations capable of giving rise to the declaration of states of emergency should be clearly defined and delimited by the constitution and in all cases there should be a parliamentary monitoring mechanism on the declaration and extension (and termination) of states of emergency. Almost all constitutions contain provisions on a parliamentary control mechanism, and in some constitutions there are also special procedures for legislative control.

[CDL-STD\(1995\)012](#), Emergency Powers

35. The protection of national security and public safety may justify restrictions of the full enjoyment of certain human rights, and even derogations from certain human rights obligations. Restrictions of human rights and freedoms, and derogations must, however, be regulated by law and preferably have a foundation in the Constitution. This constitutes a vital guarantee of the maintenance of democracy and the rule of law. The law must indicate in which cases limitations may be justified and preferably should define the states of emergency that may justify derogating measures ...

[CDL-AD\(2006\)015](#), Opinion on the Protection of Human Rights in Emergency Situations

51. The Venice Commission points out that a state of emergency entails both derogations from the normal rules on human rights and changes to the way in which responsibilities and prerogatives are apportioned to the various organs of State. The issue of derogations from fundamental human rights is especially crucial; experience has shown that the gravest breaches of human rights tend to occur in the context of a state of emergency. The Parliamentary Assembly has said that "The need for security often leads governments to adopt exceptional measures. These must be truly exceptional, as no State has the right to disregard the principle of the rule of law, even in extreme situations. At all events, there must be statutory guarantees preventing any misuse of exceptional measures".

52. Many constitutions contain provisions specifically relating to states of emergency, while others do not. This is the case notably in Austria, Belgium, Italy, Denmark, Luxembourg, Norway, Sweden and Switzerland. Certain legal regimes possess a tradition of non-written constitutional emergency law. The Venice Commission, however, given that constitutions normally contain provisions to safeguard fundamental rights and freedoms, has already expressed the view that provision for situations of emergency rule should be made in the form of express constitutional rules. Accordingly, the French initiative in seeking to constitutionalise states of emergency is to be welcomed.

[CDL-AD\(2016\)006](#), Opinion on the Draft Constitutional Law on "Protection of the Nation" of France adopted by the Venice Commission at its 106th Plenary Session (Venice, 11-12 March 2016)

54. The Venice Commission underlines that the constitutionalisation of the state of emergency should aim at strengthening the guarantees against possible abuse in the form of declaring or prolonging the state of emergency without genuinely aiming at protecting the life of the nation or of taking police measures which are not directly linked to, nor justified by the state of emergency. The provisions on the state of emergency will have to be interpreted in a systemic manner, in compliance with the other constitutional provisions, notably fundamental rights and freedoms. Under no circumstances should the constitutionalisation result in a "blank cheque" in favour of the legislator, even less so in favour of the majority in power, which would otherwise have the power to introduce very substantial derogations from the protected freedoms, including after the declaration of the state of emergency. For this reason, it seems necessary to avert this risk by enshrining in the Constitution not only the possibility of declaring (and prolonging) any exceptional regime, including the state of emergency, but also the formal, material and time limits which must govern such regimes.

[...] 100. The constitutionalisation of the state of emergency should aim at strengthening the guarantees against possible abuse in the form of declaring or prolonging the state of emergency without genuinely aiming at protecting the life of the Nation or taking police measures which are not strictly justified by the state of emergency. Under no circumstances should the constitutionalisation result in a free hand for the legislator, which would otherwise have the power to introduce very substantial derogations from the protected freedoms, including after the declaration of the state of emergency. For this reason, it seems necessary to avert this risk by enshrining in the Constitution not only the possibility of declaring (and prolonging) any exceptional regime, including the state of emergency, but also the formal, material and time limits which must govern such regimes.

[CDL-AD\(2016\)006](#), Opinion on the Draft Constitutional Law on "Protection of the Nation" of France adopted by the Venice Commission at its 106th Plenary Session (Venice, 11-12 March 2016).

35. The protection of national security and public safety may justify restrictions of the full enjoyment of certain human rights, and even derogations from certain human rights obligations. Restrictions of human rights and freedoms, and derogations must, however, be regulated by law and preferably have a foundation in the Constitution. This constitutes a vital guarantee of the maintenance of democracy and the rule of law. The law must indicate in which cases limitations may be justified and preferably should define the states of emergency that may justify derogating measures ...

[CDL-AD\(2006\)015](#), Opinion on the Protection of Human Rights in Emergency Situations

38. The Constitution, in its proposed amended form, contains provisions on the proclamation of a state of emergency or a state of war, as well as on the imposition of martial law (...). These provisions seem to secure in an adequate way the position of the Jogorku Kenesh.

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However, the legal effects of the proclamation of a state of emergency or a state of war or the imposition of martial law are not regulated in a comprehensive way.

[CDL-AD\(2002\)033](#), Opinion on the Draft Amendments to the Constitution of Kyrgyzstan, adopted by the Venice Commission at its 53rd Plenary Session (Venice, 13-14 December 2002)

## **V. Declaration of state of emergency: competences**

248. The constitutions of certain states, such as Denmark, contain no provision for states of emergency. However, most States have legal mechanisms governing the declaration of a state of emergency and the implementation of derogations in their constitution. As concerns the prerogative to declare a state of emergency, the three most common approaches are the following: [...]

249. The executive declares the state of emergency without parliamentary involvement. [...]

250. The executive declares the state of emergency but must have this ratified by Parliament before it can proceed with emergency measures [...]

251. Parliament itself declares the state of emergency [...]

[CDL-AD\(2008\)004](#), Report on the Democratic Control of the Armed Forces adopted by the Venice Commission at its 74th Plenary Session (Venice, 14-15 March 2008)

Emergency rule may or may not involve changes in the distribution of powers among organs of the State or shifts in the competences of such organs. In some cases (eg in Spain and Portugal) the normal functioning of the constitutional organs is not affected by the emergency rule. [...] Normally, the declaration of a state of emergency involves the transfer of additional powers to the executive.

[CDL-STD\(1995\)012](#), Emergency Powers

## **VI. Oversight of the declaration and prolongation of the state of emergency**

13. Even in genuine cases of emergency situations the rule of law must prevail. ... a domestic supervisory mechanism must remain operational 'whereby, subject to the inherent limitations of the context, the individual can secure compliance with the relevant laws'...

[CDL-AD\(2006\)015](#), Opinion on the Protection of Human Rights in Emergency Situations.

12. Derogations [from Article 4(1) ICCPR] may only last for as long as and may only have a scope that is "strictly required by the exigencies of the situation". Their necessity and proportionality must be subject to domestic and international supervision. ..."

[CDL-AD\(2006\)015](#), Opinion on the Protection of Human Rights in Emergency Situations.

22. In relation to the state of emergency, the Venice Commission recalls that it is essential that the constitution and the legislation provide mechanisms – notably parliamentary and judiciary oversight over the executive - for preventing the abuse of emergency powers by national authorities. This fundamental principle is reaffirmed in Parliamentary Assembly of the Council of Europe Recommendation 1713(2005), stating that 'exceptional measures in any field must be supervised by Parliaments and must not seriously hamper the exercise of fundamental constitutional rights.

[CDL-AD\(2011\)049](#), Opinion on the draft law on the legal regime of the state of emergency of Armenia adopted by the Venice Commission at its 89th Plenary Session (Venice, 16-17 December 2011).

### a. Parliamentary oversight

In most countries, the power to declare emergency rule is divided between the legislative and executive branches. Normally, the executive proposes and the legislature approves the declaration of emergency rule.[...] Some constitutions require a qualified parliamentary majority for the declaration of emergency rule. [...]

Legislative control over the acts and actions of emergency rule authorities and special procedures for such control are important for the realisation of the rule of law and democracy. In most of the democratic constitutions the executive has the right to declare emergency rule, subject to parliamentary approval. The question of by whom, how and when an emergency rule is to be terminated cannot also be left to executive enjoying its increased power. It must be the function of the Parliament. This implies a continuity of parliamentary life during the period of emergency. For that reason, some constitutions explicitly state that the legislature cannot be dissolved during the exercise of emergency powers.

[CDL-STD\(1995\)012](#), Emergency Powers

252. It is crucial that Parliament and the judiciary exercise oversight over the government, so as to avoid abuses. The first available control mechanism is to provide for parliamentary ratification of the decision of the executive to declare a state of emergency.<sup>197</sup> As a general rule, governments must provide a well-considered justification both for their decision to declare a state of emergency and the specific measures to address the situation. Most Parliaments also have the power to review the state of emergency at regular intervals and to suspend it as necessary. Furthermore, the post hoc general accountability powers of Parliament, i.e. the right to conduct inquiries and investigations on the execution of Emergency Powers are extremely important for assessing government behaviour.

[CDL-AD\(2008\)004](#), Report on the Democratic Control of the Armed Forces adopted by the Venice Commission at its 74th Plenary Session (Venice, 14-15 March 2008)

62. Parliamentary scrutiny of acts by the authorities in connection with a state of emergency and the special procedures for such scrutiny are important guarantees of the rule of law and democracy. Most democratic constitutions vest the right to declare a state of emergency in the executive – but subject to parliamentary assent. The question of who should end a state of emergency, when and how, cannot be left to the judgement of an executive which is exercising increased powers. It is a question for Parliament; hence, the need for parliamentary life to continue throughout a state of emergency. It is for this reason that some constitutions expressly state that Parliament cannot be dissolved during the exercise of emergency powers.

[CDL-AD\(2016\)006](#), Opinion on the Draft Constitutional Law on "Protection of the Nation" of France adopted by the Venice Commission at its 106th Plenary Session (Venice, 11-12 March 2016)

23. (...) the draft law repeats (...) that the President consult the Chairperson of the National Assembly and the Prime Minister before declaring a state of emergency and that, after the declaration, a special sitting of the National Assembly must be immediately convened. The words "in consultation with" in the English translation are not totally clear: they could mean "in agreement with", but also "after consultation with". If the original text creates the same lack of clarity, it is advised to clarify the text, since these words are highly important for the democratic basis of the declaration concerned.[...]

27. The Venice Commission recalls that parliamentary control of the decision of the executive to declare a state of emergency is the first available control mechanism. As a general rule, the executive must provide a well-considered justification both for their decision to declare a state

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of emergency and for the specific measures to address the situation. Most Parliaments also have the power to review the state of emergency at regular intervals and to suspend it as necessary. Furthermore, the post hoc general accountability powers of Parliament, i.e. the right to conduct inquiries and investigations on the execution of Emergency Powers are extremely important for assessing government behaviour.

[CDL-AD\(2011\)049](#), Opinion on the draft law on the legal regime of the state of emergency of Armenia adopted by the Venice Commission at its 89th Plenary Session (Venice, 16-17 December 2011).

28. (...) the draft law provides that the National Assembly may terminate the state of emergency. It also provides that the National Assembly may revoke individual actions taken in a state of emergency. This is welcome from the point of view of parliamentary control of the use of emergency powers. Since (...) the draft law (like (...) the Constitution) provides that in case of a declaration of a state of emergency, a special sitting of the National Assembly shall be immediately convened, a provision should be added according to which the Presidential Decree declaring a state of emergency or its prolongation shall be immediately submitted to the National Assembly, which will decide on whether the Decree as a whole or its individual provisions will remain in force.

[CDL-AD\(2011\)049](#), Opinion on the draft law on the legal regime of the state of emergency of Armenia adopted by the Venice Commission at its 89th Plenary Session (Venice, 16-17 December 2011).

121. Many constitutions provide for the possibility of the executive to legislate in emergency situations. Parliament should be involved in this process through the approval of the declaration of the state of emergency, and/or through ex post scrutiny of the emergency decrees or any extension of the period of emergency. Participation of the opposition in those matters may be ensured by requiring a qualified majority for the prolongation of the state of emergency beyond the original period ([CDL-AD\(2016\)006](#), para.63). It may also be useful to limit the legislative powers of the executive in emergency situations to certain specific matters, so that the executive cannot use its legislative functions to suppress opposition rights. The Venice Commission has emphasised that parliamentary life should continue throughout a state of emergency, and indicated that Parliament should not be dissolved during the exercise of emergency powers ([CDL-AD\(2016\)006](#), para 62). It is recommended not to undertake constitutional amendments during situations of emergency ([CDL-AD\(2017\)005](#), para 29). These limitations prevent the executive from using an emergency as a pretext for curtailing the rights of the opposition.

[CDL-AD\(2019\)015](#), Parameters on the Relationship between the Parliamentary Majority and the Opposition in a Democracy: a checklist

93. Paragraph 2 of Article 103 lists the Laws that have to be adopted at “at least three fifths of the total number of Parliamentarians”. Laws on the legal regime of martial law and state of emergency should be added to this list, especially if these laws are supposed to be of a general character.[...].

[CDL-AD\(2015\)037](#), First Opinion on the Draft Amendments to the Constitution (Chapters 1 to 7 and 10) of the Republic of Armenia endorsed by the Venice Commission at its 104th Plenary Session (Venice, 23-24 October 2015)

81. The Commission fully understands that in practice, such an important decision [concerning curfews] will not be taken unilaterally by the governor. As has been confirmed by the authorities, governors (as the local representatives of the state) will generally consult with the Ministry of the Interior and other government bodies (particularly the security department) before taking any such decision. Their discussions undoubtedly cover the necessity of curfew measures, their extent (in geographical area and time) and the measures needed for their



application. The authorities see this as an application of the principles of subsidiarity and proportionality, which are quite clearly very important in the case of exceptional measures. In the Commission's opinion, however, these are isolated discussions, which cannot replace the general implementing conditions prescribed by the law or be equivalent to the supervision exercised by the parliament over exceptional measures, making it possible in particular for a parliamentary debate to be held on any such measures planned by the executive before their approval.

[CDL-AD\(2016\)010](#) Turkey - Opinion on the Legal Framework governing Curfews, adopted by the Venice Commission at its 107th Plenary Session (Venice, 10-11 June 2016).

53. (...) The Turkish Constitution places the emergency decree laws under the ex post control of the Grand National Assembly. Such control should be effective; a long delay between the enactment of the emergency decree laws and their examination by Parliament means that such measures were being implemented in the meantime unilaterally without such parliamentary control. Furthermore, in the case at hand, the lack of timely control of the emergency decree laws is all the more problematic as there was no judicial review of the decree laws during the period under examination, and the Constitutional Court may review the emergency decree laws in abstracto only once they have been approved by the law (...)

[CDL-AD\(2016\)037](#) Turkey - Opinion on Emergency Decree Laws N°s 667-676 adopted following the failed coup of 15 July 2016, adopted by the Venice Commission at its 109th Plenary Session, 9-10 December 2016.

191. (...) the constitutional situation which emerged after the declaration of the state of emergency is a source of concern for the Venice Commission. The declaration itself did not define the scope of the Government's emergency powers. Similarly, Parliament, when approving the declaration, did not circumscribe in any manner the Government's mandate. The Constitution contains certain general principles which should not be contravened even in the times of emergency, but since Parliament did not give general instructions to the Government and did not exercise its controlling functions over specific decree laws until October, the Government, during this period, had unfettered power to rule the country without any checks and balances but its own good will. This situation is dangerous for a democratic legal order, especially in view of the virtually irreversible character of measures taken by the Government.

[CDL-AD\(2016\)037](#) Turkey - Opinion on Emergency Decree Laws N°s 667-676 adopted following the failed coup of 15 July 2016, adopted by the Venice Commission at its 109th Plenary Session, 9-10 December 2016.

72. Art. 118 No. 5 leaves some questions open. It is not clear what happens if the Senate does not approve the decrees. The use of armed forces is possible even without any approval of another constitutional organ. In this context the previous comment of the Venice Commission has to be recalled: "There are no objections to defining the President's role in situations of war and emergency as predominant. Nevertheless the division of roles in item 6 is not quite clear. The Verkhovna Rada has to approve the decrees introducing martial law or a state of emergency. But it is not explained what are the consequences if the Verkhovna Rada declines to approve them. It seems advisable to grant to the President only a power of "first reaction" and to clarify that such a decree loses its validity if it is not approved by the Verkhovna Rada. According to the wording of the provision, the use of the armed forces in the event of a military aggression does not have to be confirmed by the Verkhovna Rada. It is recommended to grant to the parliament a right of approval also in this area."

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73. Neither Art. 118 No. 5 nor Art. 100 No. 7 granting to the Senate the power to approve the President's declaration does include any provision on the situations where martial law or a state of emergency could be declared. Art. 68(2), in turn, provides for the possibility of restricting enumerated fundamental rights under martial law or in a state of emergency. Therefore it is recommended to include such a provision in the text.

[CDL-AD\(2009\)024](#), Opinion on the Draft Law of Ukraine amending the Constitution presented by the President of Ukraine adopted by the Venice Commission at its 79th Plenary Session (Venice, 12-13 June 2009)

30. The President still has the right of immediate reaction in the case of emergencies and war. But in all those cases it is necessary "to provide prompt notification to the Jogorku Kenesh", which has the right to confirm or to abrogate the decrees of the President (Article 74).

31. All these changes are very positive, as they considerably reduce the excessive powers the President had under the 2007 Constitution. The scope of powers now assigned to the President is still large enough for securing stability in the country, especially in view of the possibilities of immediate reaction to emergency situations.

[...] 46. The changes of the chapter on the competences of the Jogorku Kenesh are complementary to the changes of the powers of the President and clearly show that the newly established system is a parliamentary one. [...]. As already stated above, the Jogorku Kenesh also has the power to confirm or abrogate the decrees of the President in case of emergencies and war.

[CDL-AD\(2010\)015](#), Opinion on the Draft Constitution of the Kyrgyz Republic (version published on 21 May 2010) Adopted by the Venice Commission at its 83rd Plenary Session (Venice, 4 June 2010)

116. The President also has the right to take exceptional measures "in the event of imminent danger threatening the nation's institutions, security or independence and impeding the proper functioning of the public authorities" (Article 79). This provision would appear to be inspired by Article 16 of the French Constitution. Nonetheless, these exceptional powers appear to be well circumscribed by the text, politically through the action of the Assembly and legally through the intervention of the Constitutional Court. This provision is to be welcomed.

[CDL-AD\(2013\)032](#), Opinion on the Final Draft Constitution of the Republic of Tunisia, adopted by the Venice Commission at its 96th Plenary Session (Venice, 11-12 October 2013)

114. Article 119 provides for the grounds and the procedure for declaring Martial Law and resorting to the use of the Armed Forces. The procedure is described in detail, making possible expedient decisions by the Government or the Prime Minister and including the necessary consecutive approval of measures by the Parliament. However, it does not provide for any ex post control by the National Assembly of the measures taken under martial law or a state of emergency. This shortfall should be remedied.

[...] 116. Article 120 on State of Emergency seems to present the same shortfall as the previous Article. Paragraph 2 reads: "In case of declaration of a state of emergency, a special sitting of the National Assembly shall be immediately convened by virtue of law. The National Assembly may terminate the state of emergency or cancel the implementation of measures by majority vote of the total number of parliamentarians". This immediate consultation of the National Assembly is welcome, but the powers of the Assembly to control measures taken during the State of Emergency should be possible at a later stage.

[CDL-AD\(2015\)037](#), First Opinion on the Draft Amendments to the Constitution (Chapters 1 to 7 and 10) of the Republic of Armenia endorsed by the Venice Commission at its 104th Plenary Session (Venice, 23-24 October 2015)

## b. Judicial review

The concept of emergency rule is founded on the assumption that in certain situations of political, military and economic emergency, the system of limitations of constitutional government has to give way before the increased power of the executive (including military power in a martial law). However, emergency rule is a legal regime governed by the principles of legality of administration, based on the rule of law. The rule of law means a system where governmental agencies must operate within the framework of law, and their actions are subject to review by independent courts. In other words, the legal security of individuals should be guaranteed.

[CDL-STD\(1995\)012](#), Emergency Powers

The domestic courts must have full jurisdiction to review measures of restriction and derogation for their legality and justification, and for their conformity with the relevant provisions of the ECHR.

[CDL-AD\(2006\)015](#), Opinion on the Protection of Human Rights in Emergency Situations, para. 36

253. Next to Parliament, the judicial system plays a crucial role in the control of the executive's prerogatives during states of emergencies, taking decisions on the legality of a declaration of a state of emergency as well as reviewing the legality of specific emergency measures. Moreover, the judicial system must continue to ensure the right to fair trial. It must also provide individuals with effective recourse in the event that government officials violate their human rights. In order to guard against infringement of non-derogable rights, the right to take proceedings before a court on questions relating to the lawfulness of emergency measures must be safeguarded through the independence of the judiciary.

[CDL-AD\(2008\)004](#), Report on the Democratic Control of the Armed Forces adopted by the Venice Commission at its 74th Plenary Session (Venice, 14-15 March 2008)

185. (...) the Venice Commission agrees that "since in a parliamentary democracy the executive is normally composed of party leaders and other leading party figures, [...] legislative control may not be sufficiently effective in practice to curb the abuse of executive power. Therefore, in a State based on the rule of law, legislative control must be supplemented by appropriate and effective means of judicial control".

[CDL-AD\(2016\)037](#), Turkey - Opinion on Emergency Decree Laws N°s 667-676 adopted following the failed coup of 15 July 2016, adopted by the Venice Commission at its 109th Plenary Session, 9-10 December 2016.

Article 13, which regulates the procedure of arresting persons violating the rules of curfew, includes a provision which lays down that "a natural person may appeal the decision on the arrest in higher instances or through judicial procedure". Especially where the right of habeas corpus is at stake, but also more in general the right of access to court has to be guaranteed. It is recommended to include a general provision to that effect (...). In this respect, the Venice Commission recalls that "next to Parliament, the judicial system plays a crucial role in the control of the executive's prerogatives during states of emergencies, taking decisions on the legality of a declaration of a state of emergency as well as reviewing the legality of specific emergency measures. Moreover, the judicial system must continue to ensure the right to fair trial. It must also provide individuals with effective recourse in the event that government officials violate their human rights. In order to guard against infringement of non-derogable rights, the right to take proceedings before a court on questions relating to the lawfulness of emergency measures must be safeguarded through the independence of the judiciary.

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[CDL-AD\(2011\)049](#), Opinion on the draft law on the legal regime of the state of emergency of Armenia adopted by the Venice Commission at its 89th Plenary Session (Venice, 16-17 December 2011), para. 41.

In the light of this information, it is uncertain whether a decree intended to impose curfew measures can be subject to a review of legality. The Commission refers to the comments it made in its Opinion on the draft Constitutional Law on “Protection of the Nation” of France as to the primary importance of judicial supervision of derogating measures and decisions taken by the authorities during a state of emergency. It recommends that the Turkish authorities set up a suitable system to enable an effective review of the legality, including the necessity and proportionality, of all measures taken by the authorities under states of emergency.

[CDL-AD\(2016\)010](#), Turkey - Opinion on the Legal Framework governing Curfews, adopted by the Venice Commission at its 107th Plenary Session (Venice, 10-11 June 2016), para. 49.

In his report on the question of Human Rights and the State of Emergency (1997), the UN Special Rapporteur makes the following recommendations (with regard to the principle of proportionality, italics added): “When a state of emergency affects the exercise of certain derogable human rights, administrative or judicial measures shall be adopted to the extent possible with the aim of mitigating or repairing the adverse consequences this entails for the enjoyment of the said rights”.

Examples from other jurisdictions confirm that certain procedural rights may be seen as implicitly non-derogable. Thus, the American Convention on Human Rights explicitly prohibits the suspension of “the judicial guarantees essential for the protection of such rights” which are underogable (Article 27 para. 2 of the ACHR). The Inter-American Court of Human Rights in its advisory opinion on “Habeas Corpus in Emergency Situations”<sup>106</sup> has advised that the states may not suspend the rights to a judicial remedy to test the lawfulness of detention (Article 7 para. 6 of the ACHR) and the right to judicial protection (Article 25 para. 1 of the ACHR).

[CDL-AD\(2016\)037](#), Turkey - Opinion on Emergency Decree Laws N°s 667-676 adopted following the failed coup of 15 July 2016, adopted by the Venice Commission at its 109th Plenary Session, 9-10 December 2016, paras. 159 and 160.

The Venice Commission does not see any reason to doubt that the control exercised by the French administrative judge, notably by means of interim measures (*référés*), over emergency measures represents an effective remedy. It considers that adding in Article 36-1 that only measures which are strictly necessary may be taken by the civil authorities would represent an additional guarantee.”

[CDL-AD\(2016\)006](#), Opinion on the Draft Constitutional Law on "Protection of the Nation" of France adopted by the Venice Commission at its 106th Plenary Session (Venice, 11-12 March 2016), para. 74.

86. Further, according to Section 23 only provisional exceptions to basic rights and liberties which are compatible with Finland's international obligations may be provided by an Act, if they are deemed necessary in the case of an armed attack or if an Act declares the emergency so serious that it can be compared with an armed attack. Also this provision seems to imply primacy of treaties in the field of human rights over national (ordinary) legislation.

87. As a consequence, the Finnish judicial authorities may exercise judicial review in view of guaranteeing compliance with international obligations in the field of basic rights and liberties.

[CDL-AD\(2008\)010](#), Opinion on the Constitution of Finland adopted by the Venice Commission at its 74th plenary session (Venice, 14-15 March 2008).

115. It could be wise to explicitly entrust the President to refer to the Constitutional court the laws adopted under Martial Law.

[...] 118. Finally, it could be wise to explicitly entrust the President to refer to the Constitutional court the laws adopted under the State of Emergency

[CDL-AD\(2015\)037](#), First Opinion on the Draft Amendments to the Constitution (Chapters 1 to 7 and 10) of the Republic of Armenia endorsed by the Venice Commission at its 104th Plenary Session (Venice, 23-24 October 2015)

## **VII. Duration of the state of emergency**

Many constitutions provide a time-limit for emergency rule. [...] These periods are normally renewable.

[CDL-STD\(1995\)012](#), Emergency Powers

A state of emergency is by definition a state which must be exceptional and temporary. So it must also be provisional. Emergency rule must be time-limited. It must last no longer than the emergency itself and cannot become permanent.

Like the European Court of Human Rights, the Venice Commission stresses that a state of emergency can be extended only on the basis of a "process of continued reflection [...] which requires permanent review of the need for emergency measures." Parliament must decide whether to extend the state of emergency, in full cognisance of the facts which may warrant it. The Venice Commission notes that France's Council of State said in its binding opinion on the second law prolonging the state of emergency that "the state of emergency must remain temporary. [...] Exceptional powers have effects which in a state governed by the rule of law must necessarily be limited in time and in space. [...] State of emergency remains "a state of crisis" which by its nature is temporary. It may therefore not be prolonged indefinitely. [...] When, as it seems to be the case, the "imminent danger" that gives rise to a state of emergency is based on a permanent threat, we must counter it using permanent instruments. The Government must therefore start preparing to end the state of emergency". The Venice Commission considers therefore that, despite the absence of a specific provision that a state of emergency must be limited in time, this principle is enshrined in the case-law of the State Council. In addition, the Venice Commission recommends reflecting on the possibility of providing that, as of the second prolongation of the state of emergency, parliament decide by a qualified majority.

[CDL-AD\(2016\)006](#), Opinion on the Draft Constitutional Law on "Protection of the Nation" of France adopted by the Venice Commission at its 106th Plenary Session (Venice, 11-12 March 2016), paras. 65 and 67.

[...] the Venice Commission recalls that the main purpose of the state of emergency is to restore the democratic legal order. The emergency regime should not be unduly protracted; if the Government rules through emergency powers for too long, it will inevitably lose democratic legitimacy. Moreover, during the course of the emergency, non-derogable rights cannot be restricted, and any other restrictions on rights must be demonstrated to be strictly necessary in light of the exigencies of the stated emergency."

[CDL-AD\(2016\)037](#), Turkey - Opinion on Emergency Decree Laws N°s667-676 adopted following the failed coup of 15 July 2016, adopted by the Venice Commission at its 109th Plenary Session, 9-10 December 2016, para. 229.

Article 133 (Proclamation of the state of emergency)

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According to the last paragraph of this Article, the state of emergency shall last until the circumstances that have caused it have ceased to exist. The issue which organ, and in which procedure, determines whether these circumstances continue to apply is not addressed.”

[CDL-AD\(2007\)047](#), Opinion on the Constitution of Montenegro adopted by the Venice Commission at its 73rd Plenary Session (Venice, 14-15 December 2007), para. 102.

Article 14 of the draft law correctly sets out the obligation for the authorities which issued measures under the state of emergency to repeal them immediately upon the termination of the state of emergency. The provision should indicate that the “relevant acts” should be taken promptly.

[CDL-AD\(2011\)049](#), Opinion on the draft law on the legal regime of the state of emergency of Armenia adopted by the Venice Commission at its 89th Plenary Session (Venice, 16-17 December 2011), para. 42.

More generally, in the opinion of the Venice Commission, the prolongation of a state of emergency is not always the best solution to re-establish public security and restore the rule of law. Experience in certain other countries shows that the longer the emergency regime lasts, the further the State is likely to move away from the objective criteria that may have validated the use of emergency powers in the first place. The longer the situation persists, the lesser justification there is for treating a situation as exceptional in nature with the consequence that it cannot be addressed by application of normal legal tools. Under the ICCPR, the HRC has emphasised that derogations must be temporary and has criticised lengthy emergencies (see, for example, the concluding observations of the Committee on Israel (1998) and on Egypt (2002)).

[CDL-AD\(2016\)037](#), Turkey - Opinion on Emergency Decree Laws N°s 667-676 adopted following the failed coup of 15 July 2016, adopted by the Venice Commission at its 109th Plenary Session, 9-10 December 2016, para. 41.

### **VIII. Duration of the emergency measures**

As to structural (general) measures, the provisions of emergency decree laws should lose their legal effect with the expiry of the state of emergency. Permanent changes to legislation should not be introduced through such decree laws, but must be left to ordinary legislation. This is particularly important for the existence of effective remedies: aspects of the procedures for providing remedies may be altered, but effective remedies may not be completely abolished. The Government should not be allowed to exclude judicial review of its own actions or to change procedural rules so as to make this review ineffective. Equally, the Government should not be able to enact such rules that weaken the position of other independent State institutions, change their composition, principles of functioning etc.

[CDL-AD\(2016\)037](#), Turkey - Opinion on Emergency Decree Laws N°s667-676 adopted following the failed coup of 15 July 2016, adopted by the Venice Commission at its 109th Plenary Session, 9-10 December 2016, para. 80.

As to the “time” criterion, requiring that any such measure must be limited and temporary, whereas on the ground there were curfews of varying length (lasting from a few hours up to, in extreme cases, permanent curfews lasting several weeks), there is a similar lack of any provision on this subject in the Provincial Administration Law. Nor is the length of curfews set down in governors’ decisions.

[CDL-AD\(2016\)010](#), Turkey - Opinion on the Legal Framework governing Curfews, adopted by the Venice Commission at its 107th Plenary Session (Venice, 10-11 June 2016), para. 79.

76. It should be welcomed however that, contrary to the current Constitution, amended Article 119 explicitly provides that emergency presidential decrees that are not “debated and concluded’ by the TGNA within three months shall ex officio cease to have effect.

[...] 83. During the state of emergency, the President may issue presidential decrees with the force of law (draft Article 119). These decrees are not subject to the limitations foreseen by Article 104(17), so they can relate to any matter, including human rights. The guarantees enshrined in Article 15 would however apply here as well. The decrees with the force of law should be submitted to the TGNA, on the day of their publication, for approval. The Assembly should discuss and approve them within three months. If this does not happen, the decrees shall ex officio cease to have effect. This provision is clearer than the one on presidential decrees adopted outside the state of emergency.

[CDL-AD\(2017\)005](#), Turkey - Opinion on the amendments to the Constitution adopted by the Grand National Assembly on 21 January 2017 and to be submitted to a National Referendum on 16 April 2017, adopted by the Venice Commission at its 110th Plenary Session (Venice, 10-11 March 2017)

## **IX Scope of the emergency measures**

The main effect of a declaration of a state of emergency/derogation is that the Government may take certain measures which would not be acceptable under normal circumstances. In terms of the European human rights system, this regime significantly extends the Government’s margin of appreciation as to how to cope with the emergency (...).

[CDL-AD\(2016\)037](#), Turkey - Opinion on Emergency Decree Laws N°s 667-676 adopted following the failed coup of 15 July 2016, adopted by the Venice Commission at its 109th Plenary Session, 9-10 December 2016, para. 59.

### **a. Principles of necessity and proportionality**

The analysis of the necessity and proportionality of emergency measures and their compliance with the rule of law requires a dynamic approach. The ECtHR has found that Article 15 para. 3 implies a requirement of permanent review of the need for emergency measures and that interpretation of Article 15 must leave a place for progressive adaptation. The same concerns more specific analysis of proportionality and necessity of particular measures - what is justified in the immediate aftermath of a major public crisis may not be needed several months later.

[CDL-AD\(2016\)037](#), Turkey - Opinion on Emergency Decree Laws N°s667-676 adopted following the failed coup of 15 July 2016, adopted by the Venice Commission at its 109th Plenary Session, 9-10 December 2016, para. 62.

The Venice Commission also points to the importance of the principle of proportionality. This requirement must apply both to curfew decisions and to their implementation, and to related measures capable of affecting other rights and freedoms, which may consist of additional restrictions that may be imposed on the population during the curfew, such as the closure of schools or businesses, restrictions on the provision of public services or bans on public events, or of security operations carried out in this context by the authorities. Like curfews themselves, all of these measures must be proportionate to the threat and its immediacy, must not last any longer than the threat itself and must only apply to the regions affected by it. The importance of the proportionality principle is confirmed by (...) Constitution.

[CDL-AD\(2016\)010](#), Turkey - Opinion on the Legal Framework governing Curfews, adopted by the Venice Commission at its 107th Plenary Session (Venice, 10-11 June 2016), para. 81.

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### **b. Permanent effects**

The most important characteristic of any emergency regime is its temporary character. This is stressed in the Paris Minimum Standards of Human Rights Norms in a State of Emergency, Section A, p. 3 (a)45 adopted by the International Law Association in 1984. This was also emphasised by the Special Rapporteur of the UN on human rights and states of exception, cited above. The Venice Commission affirmed this in its Opinion on the Draft Constitutional Law on “Protection of the Nation” of France. In the same vein, General Comment No. 29 on Article 4 of the ICCPR points out that measures derogating from the provisions of the Covenant must be of “an exceptional and temporary nature”.

A difficult question is to what extent individual measures taken under the emergency regime may have permanent effect (i.e. whether their effects may go beyond the emergency period). Here, a distinction should be made between individual measures and structural (general) provisions. Individual measures may sometimes be irreversible, when the danger may only be averted by an irrevocable action. That being said, during the emergency regime the Government should try, to the maximum extent possible, and whenever the danger may be averted otherwise, to take provisional individual measures, i.e. those which are of limited duration or may be later revoked or amended, since the ultimate goal of any emergency should be for the State to return to a situation of normalcy.

[CDL-AD\(2016\)037](#), Turkey - Opinion on Emergency Decree Laws N°s 667-676 adopted following the failed coup of 15 July 2016, adopted by the Venice Commission at its 109th Plenary Session, 9-10 December 2016, paras. 78 and 79.

In its previous opinions, the Venice Commission underlined, with reference to relevant international norms and principles, that the most important characteristic of any emergency regime is its temporary character. What is justified in the immediate aftermath of a major public crisis may not be considered as necessary several months later. Moreover, permanent changes to the national legislation must be introduced in the framework of the normal democratic political process, by ordinary laws, carefully prepared and properly deliberated in Parliament before adoption.

[CDL-AD\(2017\)021](#), Turkey - Opinion on the Provisions of the Emergency Decree-Law N° 674 of 1 September 2016 which concern the exercise of Local Democracy, adopted by the Venice Commission at its 112th Plenary Session (Venice, 6-7 October 2017), para. 58.

### **c. Specific matters**

121. [...]It may also be useful to limit the legislative powers of the executive in emergency situations to certain specific matters, so that the executive cannot use its legislative functions to suppress opposition rights. [...] These limitations prevent the executive from using an emergency as a pretext for curtailing the rights of the opposition.

[CDL-AD\(2019\)015](#), Parameters on the Relationship between the Parliamentary Majority and the Opposition in a Democracy: a checklist



#### d. Interpretation

In addition, since the curfew system is by its very nature an exceptional measure entailing restrictions to fundamental rights, the texts governing it must be interpreted narrowly, in terms both of substance and of competence and scope.

[CDL-AD\(2016\)010](#), Turkey - Opinion on the Legal Framework governing Curfews, adopted by the Venice Commission at its 107th Plenary Session (Venice, 10-11 June 2016), para. 73.

#### e. Constitutional amendment

A substantial number of constitutions have provisions limiting constitutional amendment in times of war, emergency or similar situations (see above, Section III, Para. 52-53). While this represents a restriction on constitutional amendment, it is *temporal* by nature, and the rationale is very different from that of substantial unamendability. In this regard, the Commission wishes to emphasize that it should preferably be for the constitutional legislator itself to decide when such an extraordinary situation exists. It may be problematic if such rules result in providing the executive power with the possibility to block legitimately proposed reform by declaring a state of emergency. Thus for example, the concept of “war” should be understood restrictively, such as not including national participation in international military conflicts.

[CDL-AD\(2010\)001](#), Report on Constitutional Amendment, Para. 224

29. There is no formal rule in international law that prevents constitutional amendments during situations of emergency such as times of war, application of martial law, state of siege or extraordinary measures. Yet, such a prohibition is contained in several constitutions (Albania, Estonia, Georgia, Lithuania, Moldova, Montenegro, Poland, Portugal, Romania, Serbia, Spain, Ukraine). For example, Article 228 para. 6 of the Polish Constitution states clearly that: “during the period of introduction of extraordinary measures, the following shall not be subject to change: the Constitution, the acts on elections to the Sejm, the Senate and organ of local government (...)”. Similarly, Article 147(2) of the Constitution of Lithuania provides that “During a state of emergency or martial law, amendments to the Constitution may not be made” and Article 157 of the Constitution of Ukraine provides that “The Constitution of Ukraine shall not be amended under the conditions of martial law or a state of emergency”. There is no such provision under the Turkish Constitution.

30. This prohibition reflects the importance of protecting the fundamentals of the political system, notably the Constitution and the electoral system. It stems from the consideration that a state of emergency may entail limitations to the normal functioning of parliament (especially for the role of the opposition) as well as, very often, limited functioning of mass media and ,limitations on the exercise of political freedoms such as freedom of assembly. Under these conditions, the democratic process of constitutional amendment may not be fully guaranteed.

[CDL-AD\(2017\)005](#), Turkey - Opinion on the amendments to the Constitution adopted by the Grand National Assembly on 21 January 2017 and to be submitted to a National Referendum on 16 April 2017, paras. 30-31

121. [...]It is recommended not to undertake constitutional amendments during situations of emergency ([CDL-AD\(2017\)005](#), para. 29). These limitations prevent the executive from using an emergency as a pretext for curtailing the rights of the opposition.

[CDL-AD\(2019\)015](#), Parameters on the Relationship between the Parliamentary Majority and the Opposition in a Democracy: a checklist

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#### **f. The powers in respect of local self-governing bodies**

In some federal States, the declaration of emergency rule may involve the shift of competences from the State and local authorities to the central government.

[CDL-STD\(1995\)012](#), Emergency Powers

Paragraph 2 of Article 7 provides for the power of the President, during a state of emergency, “to suspend the legal acts of state and local self-government bodies, with the exception of laws and judicial acts”. The powers of the President are too broadly defined. In addition, these powers, too, should be used through Presidential Decrees. The scope and consequences of the exception concerning “laws and judicial acts” is not very clear: several of the measures listed in the first paragraph of Article 7 of the draft and several of the powers listed in Article 9 of the draft imply a temporary derogation from the law, which amounts in fact to a partial suspension of the law concerned. It is advised to reconsider or clarify this issue.

[CDL-AD\(2011\)049](#), Opinion on the draft law on the legal regime of the state of emergency of Armenia adopted by the Venice Commission at its 89th Plenary Session (Venice, 16-17 December 2011), para. 34.

In the view of the Venice Commission, such an enhanced control by the governorship amounts to a far-reaching, discretionary power of the state representatives over the municipality, its elected authorities, staff and resources. Moreover, this power, although instituted only in relation with suspected terrorism-related activities, is not limited to the exceptional situations characterizing the state of emergency. Thus, the changes introduced by the Decree law to the Municipality Law may indeed be seen, as noted by the Congress, as the reflection of a more general move, going beyond the exigencies of the state of emergency, towards a new sort of “recentralisation” of Turkey’s local public administration. This is problematic both from the perspective of the international and national rules on the state of emergency and that of Turkey’s commitments in terms of local self-government under the European Charter of local Self-Government.

[CDL-AD\(2017\)021](#), Turkey - Opinion on the Provisions of the Emergency Decree-Law N° 674 of 1 September 2016 which concern the exercise of Local Democracy, adopted by the Venice Commission at its 112th Plenary Session (Venice, 6-7 October 2017), para. 92.

#### **g. Military tribunals, authorities and armed forces**

116. Armed forces may provide support to civilian authorities when they can no longer maintain law and order.<sup>76</sup> Military assistance in law enforcement is a particularly controversial area, and the extent to which armed forces may provide support varies greatly between Council of Europe member States. The scope of potential military roles in this area is often dependent upon the (non)existence of militarised police forces. In States where intermediary forces exist, the armed forces are generally more restricted in this area. In most States, the use of the armed forces in maintaining public order is governed by strict laws and in many cases an official ‘state of emergency’ is required before troops can be deployed. [...]

125. In the case of disaster relief operations, some constitutions explicitly regulate the use of the military. In other States, such as Denmark, even in the absence of specific constitutional provisions to delineate the military’s role in domestic crisis situations, the Minister of Defence is authorised to instruct the armed forces to provide ‘humanitarian help at home.’ Other legal systems authorise armed forces to take part in mitigating the effects of natural disasters, extraordinary threats to the environment and to participate in search and rescue missions through an act. In the United Kingdom, the armed forces have the same powers and

obligations as any citizen, to provide support when the civil power requires assistance in combating disasters. In addition the government can invoke powers under the Emergency Powers Act (as well the more recent Civil Contingencies Act, see above) to proclaim a state of emergency. Finally, some States have special units within the military to comply with these assistance tasks. One example of this is Spain, with its Emergency Military Unit.

126. Armed forces can also be called upon to assist public authorities in case of biological disasters, i.e. the outbreak of pathogenic micro-organism and toxins.<sup>93</sup> Biological threats may originate from attacks of States, non-state actors, or more likely as a result of natural developments. Most States have a clear legal framework in place which stipulates when and how various protagonists should be involved in the management of biological risks, these provisions normally including provisions for civil-military cooperation. [...]

132. Parliaments mainly exercise ex ante control by passing laws that define and regulate the security services and their powers, and by adopting the corresponding budgetary appropriations. The participation of Parliament in the creation of the national legal framework for security represents the proactive function of Parliament, oriented towards future policies and activities of the executive. Ex ante control may encompass granting prior authorisation of, for example, sending troops abroad, or army intervention in an emergency or siege state when the police and other internal security forces are not available in sufficient numbers. Ex ante control is primarily the preserve of the executive. The executive is responsible for the day-to-day management of the armed forces (delegated to military leadership) as well as policy and strategies for the armed forces. [...]

[CDL-AD\(2008\)004](#), Report on the Democratic Control of the Armed Forces adopted by the Venice Commission at its 74th Plenary Session (Venice, 14-15 March 2008)

In some cases, the establishment of military tribunals is specifically prohibited by the constitution (Russia). In others, military tribunals may be established, particularly in times of war.[...]

In some countries (Portugal, Greece, and Turkey) the state of siege also involves the transfer of certain police powers to the military authorities. In others (Germany, Finland, Russia, Poland, Hungary, Latvia and Malta) this is not possible. [...]

[CDL-STD\(1995\)012](#), Emergency Powers

## **X. Elections during states of emergency**

### **a. General**

31. There is no formal rule in international law which would prevent States from holding elections or referendums during emergency situations either. Yet, under several constitutions an extraordinary situation will postpone, or provide an opportunity to postpone upcoming elections, for example by extending the term of parliament (Croatia, Italy, Germany, Greece, Poland, Lithuania, Slovenia, Spain, Hungary and Canada). Similarly, a situation of emergency may prohibit the dissolution of parliament (Germany, Spain, Portugal, Poland, Hungary, Russia). In Turkey, a declared state of war causes elections to be postponed (Article 78 of the Constitution).

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32. This rule reflects the concern that during situations of emergency states may not be able to meet the constitutional and international standards on free and fair elections, including the standards which were codified by the Venice Commission in the Code of Good Practice on Referendums. Under these standards, referendums have to be based on the principle of universal, equal, free and secret suffrage. The question(s) put to the referendum has(ve) to be clearly formulated. The referendum has to be organized by an independent body. The authorities must provide objective information and they must not influence the outcome of the vote by one-sided campaigns. The public media have to be neutral, in particular in news coverage. Fundamental human rights – especially freedom of expression, freedom of assembly, right to security – have to be fully respected.

33. The Venice Commission has previously stressed that “The holding of democratic elections and hence the very existence of democracy are impossible without respect for human rights, particularly the freedom of expression and of the press and the freedom of assembly and association for political purposes, including the creation of political parties. Respect for these freedoms is vital particularly during election campaigns. Restrictions on these fundamental rights must comply with the European Convention on Human Rights and, more generally, with the requirement that they have a basis in law, are in the general interest and respect the principle of proportionality”.

34. In the opinion of the Venice Commission, there is clearly a danger that democratic process will be encumbered when there are restrictions on the ‘normal’ rule of law processes. There is also a risk that fundamental electoral principles will be undermined during a state of emergency, in particular the principle of equality of opportunity. Similarly, it is axiomatic that derogation from individuals’ civil and political rights creates a risk that the results are not democratic.

35. Indeed, the Commission favourably considered a constitutional provision in Georgia which provided that there could be no elections during a state of emergency or period of martial law and no election could be held until 60 days had expired from the lifting of the state of emergency, because “elections require a peaceful political atmosphere and the complete fruition of all the freedoms and human rights and a condition of full guarantee of public order and security”.

[CDL-AD\(2017\)005](#), Turkey - Opinion on the amendments to the Constitution adopted by the Grand National Assembly on 21 January 2017 and to be submitted to a National Referendum on 16 April 2017, adopted by the Venice Commission at its 110th Plenary Session (Venice, 10-11 March 2017)

[...] The - not very clear - amendment would give Parliament the possibility of deciding to hold early elections even during a state of emergency or under martial law. It seems unlikely that the conditions for the holding of free and fair elections can be met during a state of emergency or under martial law.

[CDL-AD\(2004\)008](#), Opinion on the Draft Amendments to the Constitution of Georgia adopted by the Venice Commission at its 58th Plenary Session (Venice, 12-13 March 2004), paras. 9 and 10.

**b. Constitutional referendums**

36. This analysis applies with, at least, equal force in respect of proposed constitutional referendums, and in particular to referendums on the change of the political system, although, admittedly, a complete collapse of the existing constitutional order might require a constitutional referendum during a state of emergency. Whether permanent constitutional change should occur during a state of emergency is dependent on whether the circumstances

are such that democratic principles will prevail. The following paragraphs proceed on this basis.

[...] 42. There are two possibilities which are in line with democratic standards: if a constitutional referendum must absolutely be held during a state of emergency, restrictions on political freedoms have to be lifted, or, if the restrictions may not be repealed, the constitutional referendum should be postponed until after the state of emergency or at least when the restrictions no longer apply.

[CDL-AD\(2017\)005](#), Turkey - Opinion on the amendments to the Constitution adopted by the Grand National Assembly on 21 January 2017 and to be submitted to a National Referendum on 16 April 2017, adopted by the Venice Commission at its 110th Plenary Session (Venice, 10-11 March 2017)

### **c. Extraordinary presidential elections during military and emergency situations**

Article 72 of the draft amendments introduces a paragraph to Article 91 of the Code which prohibits extraordinary presidential elections during military and emergency situations. Extraordinary presidential elections shall take place on the 40th day after the end of the military or emergency situation. While it can be regarded as appropriate not to conduct elections in the context of military “and emergency situations, there is the danger that such situations might be provoked or abused in order to prevent the realisation of extraordinary elections by constitutional means.

[CDL-AD\(2006\)026](#), Joint Opinion on Draft Amendments to the Electoral Code of the Republic of Armenia para. 51

34. In case of a state of emergency or state of martial law, extraordinary presidential elections are prohibited, and shall take place on the 40th day after the cessation of the emergency or military situation (Article 91 of the Code, amended by Article 80 of the amendments). The former Joint Opinion, Paragraph 51, cautioned that there could be a danger of provoking or abusing this provision to prevent the realisation of extraordinary elections. The exact time of the end of the emergency or military situation is also unclear, considering that the 40 days deadline is determined on the basis of this time.

[CDL-AD\(2007\)013](#) Final Joint Opinion on Amendments to the Electoral Code of the Republic of Armenia by the Venice Commission and the OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR) adopted by the Venice Commission at its 70th plenary session (Venice, 16-17 March 2007)

### **d. Postponing elections**

#### **D. Emergency powers**

51. The legitimate aim of maintaining the constitutional order may justify the postponement of elections in exceptional situations, such as a state of war or natural catastrophes. When a severe crisis affects a country, elections might indeed exacerbate political conflicts and it may be necessary to seek a solution to the crisis. In very exceptional conditions, it can be the duty of the authorities to postpone elections with a view to reducing tensions and giving voters the possibility of expressing their will in a safe and well-ordered context.

54. The Venice Commission ... can explore the question of emergency situations in legal terms given that, without referring to this type of specific danger, the Reasoning of Decree no. 11199 does refer to the “risk of a civil conflict” as well as a danger to the “stability to public order, which could also be a threat to the national security”. Admitting, for the sake of

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argument, that there might have been such a danger, the question is therefore who is entitled to take such a decision according to the national constitution?

55. According to Article 86(1) of the Constitution the President “represents the unity of the people”. Extraordinary situations often require special measures, and a President, whose primary mission is representation of the unity of the people, has the constitutional mandate to contribute to the normal operation of the State. This mandate certainly includes appeals for dialogue to the State actors and political parties and the President repeatedly called upon the political actors to engage in dialogue. From this starting point, it needs to be examined whether the President has specific powers relating to a state of emergency, which would provide a constitutional and legal basis for postponing elections in such a case.

56. The President’s Reasons do not refer to Article 170 of the Constitution, nonetheless it is important to examine whether this provision could have served as a basis for the decree of 10 June.

57. According to Article 170(1) of the Albanian Constitution: “Extraordinary measures can be taken due to a state of war, state of emergency, or natural disaster and last for as long as these states continue.”

58. In turn, Article 170(2) requires that “the principles of the activity of public bodies, as well as the extent of limitations on human rights and freedoms during the period of the existence of situations that require extraordinary measures, are defined by law”. This means that, even in emergency situations, extraordinary measures have to be based on the law.

59. According to Article 170(6) of the Albanian Constitution, “During the implementation period of extraordinary measures, there may not be held elections for local government bodies, there may not be a referendum, and a new President of the Republic may not be elected. The elections for the local government bodies can be held only in those places where the extraordinary measures are not implemented.” This means that indeed elections should not be held during a state of emergency.

62. [...] the emergency powers of Article 170 cannot serve as the legal basis for postponing elections by the President. The President can only refer to a crisis situation that is below the level of warranting action under Article 170 of the Constitution. However, the Constitution explicitly links the non-holding of elections to a state of emergency. A “lower level” of crisis can therefore not justify the cancelling or postponing of elections by a public body not empowered to do so.

[CDL-AD\(2019\)019](#), Albania - Opinion on the powers of the President to set the dates of elections, adopted by the Venice Commission at its 120th Plenary Session, (Venice, 11-12 October 2019)

#### Comparative overview concerning the fixing of the date of elections

10. ... For some States, the Parliament has the power to change the date of elections in case of a state of emergency (Czech Republic, Slovenia).

11. In some countries elections have been postponed or there is a specific legal basis for that:

- In case of a flood, fire or other disasters (Canada, Costa Rica in 2002 for some municipal elections, Iceland 1958, Slovenia<sup>1</sup>);

12. Often there are no specific provisions on postponing elections. Constitutional Act No. 110/1998 Coll., on the Security of the Czech Republic, is rather an exception when it provides

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<sup>1</sup> Parliament could postpone elections during a state of emergency.

the possibility of postponing the elections in the following terms: “If during a period of a state of emergency, a condition of threat to the State, or a state of war, the conditions in the Czech Republic do not permit the holding of elections by the deadline prescribed for regular electoral terms, the deadline may be extended by statute, however for no longer than six months.”

13. Similarly, according to Article 196 of the Public Official Election Act of the Republic of Korea, the President may postpone an election (for President or National Assembly) and the head of the competent regional election commission (for a local election) may postpone an election in the case of a natural disaster, terrestrial upheaval or any other [un]avoidable circumstances.

15. Norway is currently in the process of revising its 2002 Election Act inter alia to introduce an emergency clause in the event of natural disasters, terrorist attacks, or other extraordinary events interrupting the election (pandemics, or a major break-down in communications for example due to a cyber-attack or due to a break-down in the energy supply) and which require the election to be postponed or extended. It seems that there are only a few countries that have such emergency clauses in their election laws, but in view of the risk of cyber-attacks or massive disinformation campaigns in elections, it may be prudent to have one.

*In summary: Only a few Venice Commission member states provide in their Constitution or legislation for the possibility to postpone elections in the case of state of emergency, and a few others in case of natural disaster or other extraordinary events. A comparative research showed that such postponements took place occasionally.*

[CDL-AD\(2019\)019](#), Albania - Opinion on the powers of the President to set the dates of elections, adopted by the Venice Commission at its 120th Plenary Session, (Venice, 11-12 October 2019)

#### **e. Amendments to electoral law**

28. Adding to the concerns over the timing of the amendments, it is problematic that the March and April amendments were adopted in a hasty manner without a proper consultation of the relevant stakeholders, including the opposition parties and civil society. In numerous opinions, the Venice Commission and ODIHR have stressed the importance of a comprehensive and inclusive public consultation when adopting legal frameworks on issues of major importance for society, such as major amendments to electoral law. In the current case, the amendments were moreover made in a State of Emergency, limiting the space for democratic debate and the free expression of a plurality of views. While some amendments are technical, several amendments may have significant consequences for the exercise of suffrage rights (passive and active), the electoral result or the administration of elections. As emphasised by ODIHR and the Venice Commission on previous occasions, considering the importance of these amendments, as well as the 2017 constitutional reform’s effect on the existing electoral system (see 3 and 4 below), it is vital that they take place following an inclusive and thorough process of public consultation. Hasty and non-inclusive amendments to fundamental elements of the electoral law such as in the 2018 amendments, challenge the very legitimacy of the Turkish electoral system.

[CDL-AD\(2018\)031](#), Turkey - Joint Opinion of the Venice Commission and ODIHR on Amendments to the electoral legislation and related "harmonisation laws" adopted in March and April 2018, adopted by the Council for Democratic Elections at its 64th meeting (Venice, 13 December 2018) and by the Venice Commission at its 117th Plenary Session (Venice, 14 and 15 December 2018)

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## **XI. Dissolution of parliament**

In some countries, the term of the legislative assemblies is extended during the emergency period: Italy (in a state of war), Germany (in a state of defence), Turkey (in a state of war), Poland, Lithuania (in a state of war), Slovenia, Hungary and Canada (if more than one-third of deputies do not oppose it). In many countries (Germany, Spain, Portugal, Greece, Poland, Hungary, Russia and Croatia) the dissolution of parliament during the period of emergency is prohibited.

[CDL-STD\(1995\)012](#), Emergency Powers

121. [...]The Venice Commission has emphasised that parliamentary life should continue throughout a state of emergency, and indicated that Parliament should not be dissolved during the exercise of emergency powers ([CDL-AD\(2016\)006](#), para. 62). [...]These limitations prevent the executive from using an emergency as a pretext for curtailing the rights of the opposition.

[CDL-AD\(2019\)015](#), Parameters on the Relationship between the Parliamentary Majority and the Opposition in a Democracy: a checklist

14. In most of the States parliament can be dissolved before the expiration of the normal term of the legislature. In only a few states, pre-term dissolution and extra-ordinary elections are not at all possible. In many states the Constitution explicitly forbids dissolution of parliament during a state of war (state of martial law) or a state of emergency.

[CDL-AD\(2007\)037](#), Report on choosing the date of an election, adopted by the Council for Democratic Elections at its 22nd meeting (Venice, 18 October 2007) and the Venice Commission at its 72nd plenary session (Venice, 19-20 October 2007)

42. The Convention foresees the possibility of restrictions on electoral rights and freedoms, including election postponement, in extreme situations such as state of emergency or martial law (Article 6, paragraph 5). There should be provisions to guarantee against unjustified prolongation or adjournment because of emergency situations.

[CDL-AD\(2007\)007](#), Opinion on the Convention on the Standards of Democratic Elections, Electoral Rights and Freedoms in the Member States of the Commonwealth of Independent States adopted by the Venice Commission at its 70th plenary session (Venice, 16-17 March 2007)

[CDL-AD\(2004\)010](#), Opinion on the draft ACEEEO Convention on Election Standards, Electoral Rights and Freedoms adopted by the Venice Commission at its 58th Plenary Session (Venice, 12-13 March 2004) para. 37

(...) This new section permits the reconvening of the dissolved parliament if a state of emergency or martial law is declared. In cases where the new Parliament is already elected, anticipating the date of the first session of the new Parliament would be preferable.

[CDL-AD\(2004\)008](#), Opinion on the Draft Amendments to the Constitution of Georgia adopted by the Venice Commission at its 58th Plenary Session (Venice, 12-13 March 2004), paras. 9 and 10.

## **XII. Activities of political parties**

2. Any limitations to the exercise of the above-mentioned fundamental human rights through the activity of political parties shall be consistent with the relevant provisions of the European Convention for the Protection of Human Rights and other international treaties, in normal times as well as in cases of public emergencies.



[...] 7. No State can impose limitations based only on its internal legislation, ignoring its international obligations. This rule should be applied in normal times as well as in cases of public emergencies. This approach is confirmed by the practice of the European Court of Human Rights.

[...] 16. Obviously, the general situation in the country is an important factor in such an evaluation. At the same time, standards of the developing European democratic practice must also be taken into consideration as already observed in previous paragraphs. Even in the case of a state of emergency, international obligations of the State should be observed and any measures of exceptional character should have a clearly defined temporary effect in compliance with Article 15 of the European Convention on Human Rights.

[CDL-INF\(2000\)001](#), Guidelines on prohibition and dissolution of political parties and analogous measures adopted by the Venice Commission at its 41st plenary session (Venice, 10 – 11 December 1999)

Article 7(1.13) authorises “the suspension or termination of activities of the political parties obstructing the elimination of the circumstances having served as a ground for declaration of state of emergency, pursuant to Article 80 of the Law of the Republic of Armenia “On Constitutional Court”. This provision is problematic. It must be stressed at the outset that “the prohibition or dissolution of political parties as a particularly far-reaching measure should be used with utmost restraint” and that “the prohibition or enforced dissolution of political parties may only be justified in the case of parties which advocate the use of violence or use violence as a political means to overthrow the democratic constitutional order, thereby undermining the rights and freedoms guaranteed by the constitution”. While under Armenian law the dissolution of a political party is possible in general pursuant to Article 28 of the Constitution, reference in this law to the possibility of doing so seems to suggest that the state of emergency provides an additional and specific ground for terminating a political party. This would be incompatible with the exceptional and temporary nature of the state of emergency, which calls for temporary measures, not for final ones.

[CDL-AD\(2011\)049](#), Opinion on the draft law on the legal regime of the state of emergency of Armenia adopted by the Venice Commission at its 89th Plenary Session (Venice, 16-17 December 2011), para. 30.

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### **General reports**

- Emergency Powers (1995) - [CDL-STD\(1995\)012](#)
- Report on the Democratic Control of the Armed Forces - [CDL-AD\(2008\)004](#)
- Opinion on the Protection of Human Rights in Emergency Situations - [CDL-AD\(2006\)015](#)
- Opinion on the Convention on the Standards of Democratic Elections, Electoral Rights and Freedoms in the Member States of the Commonwealth of Independent States - [CDL-AD\(2007\)007](#)
- Report on choosing the date of an election - [CDL-AD\(2007\)037](#)
- Report on Constitutional Amendment - [CDL-AD\(2010\)001](#)
- Rule of Law Checklist - [CDL-AD\(2016\)007](#)
- Parameters on the Relationship between the Parliamentary Majority and the Opposition in a Democracy: a checklist, - [CDL-AD\(2019\)015](#)

### **Country-specific opinions**

- Armenia - Opinion on the draft Law on the legal regime of the state of emergency of Armenia - [CDL-AD\(2011\)049](#)
- Armenia - First Opinion on the draft Amendments to the Constitution (Chapters 1 to 7 and 10) of the Republic of Armenia - [CDL-AD\(2015\)037](#)
- Armenia - Joint Opinion on Draft Amendments to the Electoral Code of the Republic of Armenia by the Venice Commission and OSCE/ODIHR - [CDL-AD\(2006\)026](#)
- Finland - Opinion on the Constitution of Finland - [CDL-AD\(2008\)010](#)
- France - Opinion on the draft Constitutional Law on "Protection of the Nation" of France - [CDL-AD\(2016\)006](#)
- Georgia Opinion on the draft Amendments to the Constitution of Georgia - [CDL-AD\(2004\)008](#)
- Kyrgyzstan - Opinion on the draft Amendments to the Constitution of Kyrgyzstan - [CDL-AD\(2002\)033](#)
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- Montenegro - Interim Opinion on the Draft Constitution of Montenegro - [CDL-AD\(2007\)017](#)
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- Tunisia - Opinion on the Final draft Constitution of the Republic of Tunisia - [CDL-AD\(2013\)032](#)
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