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From Discretion to Scrutiny: Revisiting the Application of the Margin of Appreciation Doctrine in the Context of Article 15 of the European Convention on Human Rights

Oren Gross & Fionnuala Ní Aoláin***

I. INTRODUCTION

The margin of appreciation doctrine has come to occupy a central position in the jurisprudence of the European Court of Human Rights ("Court") operating under the European Convention on Human Rights ("European Convention").[1] Not mentioned anywhere in the European Convention itself or in the Convention's *Travaux Préparatoires*,[2] the doctrine has developed in the case law emanating from the Court and the European Commission of Human Rights ("Commission").[3]

* *Oren Gross* is Assistant Professor of Law, Tel Aviv University, Faculty of Law. S.J.D. 1997, LL.M. 1992, Harvard Law School; LL.B. 1986, Tel Aviv University. Grosso@post.tau.ac.il

** *Fionnuala Ni Aoláin* is Professor of Law, University of Ulster, School of Public Policy, Economics and Law. Ph.D. 1997 The Queens University of Belfast, LL.M. 1996 Columbia Law School; LL.B. 1991 The Queens University of Belfast. F.NiAolain@ulst.ac.uk

1. European Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature 4 Nov. 1950, 213 U.N.T.S. 221, Europ. T.S. No. 5 (*entered into force* 3 Sept. 1953) [hereinafter European Convention]. *See* Ronald St. J. Macdonald, *The Margin of Appreciation in the Jurisprudence of the European Court of Human Rights, in* INTERNATIONAL LAW AT THE TIME OF ITS CODIFICATION—ESSAYS IN HONOUR OF ROBERTO AGO 187, 208 (1987) ("The margin of appreciation is at the heart of virtually all major cases that come before the Court, whether the judgments refer to it explicitly or not.").
2. *See, e.g.*, HOWARD C. YOUROW, THE MARGIN OF APPRECIATION DOCTRINE IN THE DYNAMICS OF EUROPEAN HUMAN RIGHTS JURISPRUDENCE 14 (1996).
3. Both institutions were established under Article 19 of the European Convention. A major reform in the existing institutional structure took place with the entry into force of Protocol 11 on 1 November 1998. Under the Protocol, the Commission and the Court were replaced by a single, permanent European Court of Human Rights.

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Its origins found in the context of the continental legal systems' judicial review of administrative decisions, the margin of appreciation doctrine has been adopted by the Strasbourg organs and transplanted into the regional level of adjudicating human rights issues.[4] Generally speaking, the doctrine stands for the notion that the authorities of each state party to the European Convention ought to be allowed a certain measure of discretion in implementing the standards enshrined in the Convention. Using the margin of appreciation, the Court gives the state coming before it a certain leeway in choosing the appropriate regulatory response to matters affecting rights protection within that state's territorial boundaries. A feature of a supranational judicial system,[5] the margin of appreciation doctrine is an interpretative tool designed to balance the sovereignty of the states parties with the need to ensure "the observance of the engagements undertaken by the High Contracting Parties" under the European Convention.[6]

In this Article we focus on the application, by the Court and the Commission, of the doctrine within the context of the derogation regime under Article 15 of the European Convention. We note the expansion and extension of the doctrine by the Court and the Commission, both in the context of defining what constitutes a "public emergency threatening the life of the nation" as well as the substantive oversight brought to the actual practice of emergency powers by states. We then argue the negative effects of ceding to state-centered claims in situations of exigency for both the substantive protection of rights and the integrity of international oversight. In particular we suggest the problematics of reliance on the margin of appreciation when examining situations of entrenched emergency.

We follow this analysis by offering an alternative to the lax application of the margin of appreciation by the Court. We argue for a heightened level of judicial scrutiny of, a less deferential judicial attitude towards, states' resort to the derogation power. Suggesting to treat emergencies in general as "suspect situations" meriting a stricter judicial attitude towards states' claims, we establish the desirability of giving special attention and treatment

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4. *See, e.g.*, Eva Brems, *The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights*, 56 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 240, 240–41 (1996); YOUROW, *supra* note 2, at 14–15; FRANCIS G. JACOBS, THE EUROPEAN CONVENTION ON HUMAN RIGHTS 201 (1975).
5. *See* Laurence Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 316–17 (1997); see also, Brems, *supra* note 4, at 298–312.
6. European Convention, supra note 1, at art. 19; *see* Ronald St. J. Macdonald, *The Margin of Appreciation*, *in* THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS 83, 123 (Ronald St. J. Macdonald et al. eds., 1993) ("The margin of appreciation gives the flexibility needed to avoid damaging confrontations between the Court and Contracting States over their respective spheres of authority and enables the Court to balance the sovereignty of Contracting Parties with their obligations under the Convention.").

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to entrenched emergencies of the sort that has come before the Court and the Commission. The function of this heightened scrutiny lies in ensuring protection for fundamental rights in situations of emergency when human rights protections are most fragile. Emergencies are extraordinary events. They require extraordinary scrutiny and a willingness to confront the potentially abusive practices of states that may lead to systematic denials of rights, concentration of state power in narrow executive structures and the subversion of democratic principles by legal means.[7]

II. MARGIN OF APPRECIATION: A "REALISTIC AND APPROPRIATE TOOL" OR "SLIPPERY AND ELUSIVE AS AN EEL"?

The margin of appreciation doctrine has been the subject of heated debates. Those endorsing the doctrine view it as a realistic and appropriate tool by which an international court facilitates its dialogue concerning sensitive matters with national legal and political systems and with their unique values and particular needs. Seen from this perspective, the margin of appreciation reflects the existing cultural diversity among the states parties to the European Convention.[8] Supporters of the doctrine draw attention to the role of the Convention system as subsidiary to domestic legal systems.[9] Accordingly, it is the state parties to the Convention that serve as the primary guarantors of human rights. Further control and supervision by the Court is subsidiary to that primary duty of states. The margin of appreciation doctrine is seen to reflect the twin aspects of subsidiarity and cultural diversity. Thus, it has often been noted, that national authorities are, generally speaking, in a better position than a supranational entity to adequately balance individual rights with national interests. As Brems puts it, "the margin of appreciation is the 'natural product' of the distribution of powers between the Convention institutions and the national authorities, who share the responsibility for enforcement. The primary responsibility is

7. Clinton Rossiter, Constitutional Dictatorship: Crisis Government in the Modern Democracies 288–90 (1948); Harold H. Koh, The National Security Constitution 117–49 (1990); James Madison & Alexander Hamilton & John Jay, The Federalist (Clinton Rossiter ed., 1961), no. 64 (J. Jay), at 392–93; *Id.* no. 75 (A. Hamilton), at 451–52.

8. *See, e.g.*, Paul Mahoney, *Marvellous Richness of Diversity or Invidious Cultural Relativism?*, 19 Hum. Rts. L.J. 1 (1998); Yutaka Arai, *The Margin of Appreciation Doctrine in the Jurisprudence of Article 8 of the European Convention on Human Rights*, 16 Neth. Q. Hum. Rts. 41 (1998); Brems, *supra* note 4, at 307–12.

9. Herbert Petzold, *The Convention and the Principle of Subsidiarity*, *in* The European System for the Protection of Human Rights 41 (Ronald St. J. Macdonald et al. eds., 1993); Brems, *supra* note 4, at 300–04; Paul Mahoney, *Judicial Activism and Judicial Restraint in the European Court of Human Rights: Two Sides of the Same Coin*, 11 Hum. Rts. L.J. 57 (1990).

with the member states, but the last word is for the Court."[10] In addition it is argued that the margin of appreciation is a valuable doctrine both as a matter of prudent judicial policy and as a necessary recognition by the Court of the domestic democratic processes of the states parties to the European Convention.[11]

The critics point to the pervasive and pernicious effects of the margin of appreciation doctrine on the substantive protection of fundamental rights, brought about by a judicial attitude of undue deference to the concerns of states over individuals, the protection of whose rights is the main concern of the European Convention.[12] Thus, for example, Lord Lester of Herne Hill has stated that:

> The concept of the "margin of appreciation" has become as slippery and elusive as an eel. Again and again the Court now appears to use the margin of appreciation as a substitute for coherent legal analysis of the issues at stake. . . . The danger of continuing to use the standardless doctrine of the margin of appreciation is that . . . it will become the source of a pernicious "variable geometry" of human rights, eroding the *acquis* of existing jurisprudence and giving undue deference to local conditions, traditions, and practices.[13]

Indeed, some commentators have argued that the deferential attitude assumed by the Court and reflected in the margin of appreciation doctrine has resulted in an abdication by the Court of its responsibility to adjudicate complex and sensitive cases, leading it to accept without sufficient independent reflection the respondent government's claims.[14] The margin of

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10. Brems, *supra* note 4, at 304.
11. *See, e.g.*, Mahoney, *supra* note 8; R.A. Lawson & H.G. Schermers, Leading Cases of the European Court of Human Rights 38 (1997).
12. *See*, for example, the scathing critique of the margin of appreciation doctrine by Judge De Meyer:

    > [W]here human rights are concerned, there is no room for a margin of appreciation which would enable the States to decide what is acceptable and what is not.
    >
    > On that subject the boundary not to be overstepped must be as clear and precise as possible. It is for the Court, not each state individually, to decide that issue, and the Court's views must apply to everyone within the jurisdiction of each state.
    >
    > The empty phrases concerning a State's margin of appreciation—repeated in the Court's judgments for too long already—are unnecessary circumlocutions, serving only to indicate abstrusely that the States may do anything the Court does not consider incompatible with human rights.
    >
    > Such terminology, as wrong in principle as it is pointless in practice, should be abandoned without delay.

    Z v. Finland, 1997-I 323, 25 E.H.R.R. 371 (1997) (Judge De Meyer, partly dissenting).
13. Lord Lester of Herne Hill, Q.C., *Universality Versus Subsidiarity: A Reply*, Eur. Hum. Rts. L. Rev. 73, 75–76 (1998); citing Lord Lester of Herne Hill, Q.C., *General Report*, Proceedings of the 8th International Colloquy on the European Convention on Human Rights 227, 236–37 (1995).
14. Fionnuala Ni Aolain, *The Emergence of Diversity: Differences in Human Rights Jurisprudence*, 19 Fordham Int'l L.J. 101, 115 (1995) ("The margin of appreciation

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appreciation doctrine has been criticized for injecting a strong subjective element into the interpretation of the European Convention,[15] weakening the Court's authoritative position vis-à-vis national governments by undermining its ability to invoke seemingly objective criteria when reviewing decisions by those governments. This may, in turn, undermine any hope of effective regional supervision and enforcement of rights protected by the European Convention.[16] Rather than trying to formulate rules based on strict requirements, the Court opted for more vague standards that increased the leeway for discretion and flexibility. In fact, the actual use of the margin of appreciation doctrine by the Court has been attacked for allowing the Court to abdicate its responsibility to articulate reasons for not intervening in the case at hand and ruling in favor of the respondent government.[17] The process of giving reasons, in and of itself, commits the judges. Such a public commitment further enhances their responsibility and accountability, which is all the more important with respect to a supranational judicial organ.[18] It has also been argued that the margin of appreciation doctrine is fraught with moral and cultural relativism which runs contrary to any notion of universal human rights.[19]

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doctrine has been a crucial aspect of the retreat from substantive scrutiny."); Oren Gross, *"Once More unto the Breach": The Systemic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies*, 23 YALE J. INT'L L. 437, 497 (1998) ("The practice of the Court and the Commission demonstrates the pernicious use of the doctrine to avoid conducting an independent examination of the evidence and the tendency to succumb to the position of the relevant national government."); Karen C. Burke, *Secret Surveillance and the European Convention on Human Rights*, 33 STAN. L. REV. 1113, 1134 (1980–1981) (suggesting that "deference" too frequently means abdication of independent roles for Court and Commission); Cora S. Feingold, *The Doctrine of Margin of Appreciation and the European Convention on Human Rights*, 53 NOTRE DAME L. REV. 90, 98–99 (1977–1978) (citing example in which "the Commission examined only the reasonableness and the good faith of the English courts"); Rosalyn Higgins, *Derogations Under Human Rights Treaties*, 48 BRIT. Y.B. INT'L L. 281, 314 (1976–1977) (recounting case in which "[t]he Commission has used margin of appreciation as self-denying ordinance against its own review of all evidence before [a national] court").

15. Nicholas Lavender, *The Problem of the Margin of Appreciation*, EUR. HUM. RTS. L. REV. 380, 380–81 (1997).
16. Feingold, *supra* note 14, at 91; Joan F. Hartman, *Derogation from Human Rights Treaties in Public Emergencies*, 22 HARV. INT'L L.J. 1, 3 (1981) (discussing margin of appreciation doctrine as facilitating establishment of vague and inconsistent standards under article 15); *see also*, Eyal Benvenisti, *Margin of Appreciation, Consensus, and Universal Standards*, 31 N.Y.U.J. INT'L L. & POL. 843, 844 (1999).
17. Macdonald, *supra* note 6, at 85 ("If the Court gives as its reason for not intervening simply that the decision is within the margin of appreciation of the national authorities, it is really providing no reason at all but is merely expressing its conclusion not to intervene, leaving observers to guess the real reasons which it failed to articulate.").
18. On the commitment entailed by the giving of reasons, see Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633 (1995). For the argument that the requirement of reasoned judgment can constrain judicial power, see, e.g., David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 737 (1987).
19. *See, e.g.*, Benvenisti, *supra* note 16, at 844–45.

In recent years, many commentators have focused extensively both on the theory underlying the margin of appreciation doctrine and its justifications and on its application by the Court under particular provisions of the European Convention. This article belongs, primarily, to the latter category in so far as it focuses on the application, by the Court and the Commission, of the doctrine within the context of the derogation regime under Article 15 of the European Convention.

The next section analyzes the evolution of the margin of appreciation doctrine in the case law concerning the derogation clause of the European Convention. It demonstrates the expansion and extension of the doctrine by the Court and the Commission both in the context of defining what constitutes a "public emergency threatening the life of the nation" as well as with respect to the substantive oversight brought by the Court and Commission to the actual practice of emergency powers by states.

III. THE CASE LAW UNDER ARTICLE 15

A. From a "Certain Measure of Discretion" to a "Wide Margin of Appreciation"

The margin of appreciation doctrine made its first appearance in the European Convention's jurisprudence evaluating state responses to situations of emergency.[20] Since making its debut, the margin of appreciation has come to play a central role in those few cases that involved Article 15 type of questions.

Article 15 of the European Convention deals with state power to derogate from individual rights that are otherwise protected under the Convention.[21] For a state derogation to be in conformity with the dictates of the derogation clause it has to satisfy two major components, namely (1) the existence of a "war or other public emergency threatening the life of the nation," and (2) that the measures which are in derogation of otherwise protected rights are so taken "to the extent strictly required by the exigencies of the situation."[22]

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20. *See, e.g.*, Yourow, *supra* note 2, at 15–21; *see also*, Michael O'Boyle, *The Margin of Appreciation and Derogation under Article 15: Ritual Incantation or Principle?*, 19 Hum. Rts. L.J. 23 (1998); Ni Aolain, *supra* note 14, at 112.
21. Article 15(1) of the European Convention states:

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

See European Convention, *supra* note 1.
22. Gross, *supra* note 14, at 448–54.

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The concept of national margin of appreciation was first enunciated in the *(First) Cyprus Case*[23] when the Commission adopted a doctrine not presented to it by the parties to the case at hand, according to which a state exercising the derogation power enjoyed "a certain measure of discretion in assessing the extent strictly required by the exigencies of the situation."[24] In its initial articulation, this "measure of discretion" applied only to the second constitutive element of Article 15, namely, that the emergency measures taken by the government be strictly proportionate to the crisis faced. In this case, while the Commission took the view that it had the competence to review state actions and claims that invoked the derogation powers, it limited the scope of such review by according a margin of discretion to state parties.[25] If governmental measures were to fall within the confines of that margin, it was not for the Commission to substitute its own views on the matter for those of the respondent government.

In the first individual application to come before the Court—*Lawless v. Ireland*[26]—the Commission once again returned to the margin of appreciation doctrine. Here its ambit was extended to determining whether a "public emergency threatening the life of the nation" had existed:

> [H]aving regard to the high responsibility which a government has to its people to protect them against any threat to the life of the nation, it is evident that a certain discretion—a certain margin of appreciation—must be kept to the Government in determining whether there exists a public emergency which threatens the life of the nation and which must be dealt with by exceptional measures derogating from its normal obligations under the Convention.[27]

The new concept of the "margin of appreciation" was further described and explained by Sir Humphrey Waldock—the then President of the Commission—in his submissions to the Court in this case:

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23. Greece v. United Kingdom, 1958–1959, Y.B. EUR. CONV. ON H.R. 174 (Eur. Comm'n on H.R.).
24. *Id.* at 176. For an excellent critical analysis of the case and review of its history, see A.W.B. Simpson, *Emergency Powers and their Abuse: Lessons from the End of Empire*, 30 ISR. Y.B. HUM. RTS. (2001, forthcoming) (one file with authors); A.W.B. Simpson, *Round Up the Usual Suspects: The Legacy of British Colonialism and the European Convention on Human Rights*, 41 LOYOLA L. REV. 629, 691–704 (1996).
25. For the view that the margin of appreciation doctrine was used originally not to limit the review powers of the Commission and the Court, but rather to enhance them, see Clovis C. Morrisson, Jr., *Margin of Appreciation in European Human Rights Law*, 6 HUM. RTS. J. 263, 267 (1973) (suggesting that "exceptions to rights provided for in the Convention left wide discretion in the hands of governments and parliaments from the beginning. And they required the Commission to find a technique for exercising its own discretion in determining whether the states had, in fact, used an exception wrongly to deny a right. It was in this general balancing framework that the concept 'margin of appreciation' was born.").
26. Lawless v. Ireland [Commission], 1 Eur. Ct. H.R. (ser. B) at 56 (1960–1961); Lawless v. Ireland [Court], 3 *Eur. Ct. H.R. (ser. A) (1960–1961).*
27. Lawless [Commission], *supra* note 26, § 90, at 82 (1960–1961).

> The question of whether or not to employ exceptional powers under Article 15 involves problems of appreciation and timing for a Government which may be most difficult, and especially difficult in a democracy. . . . Article 15 has to be read in the context of the rather special subject-matter with which it deals: the responsibilities of a Government for maintaining law and order in a time of war or any other public emergency threatening the life of the nation. The concept of the margin of appreciation is that a Government's discharge of these responsibilities is essentially a delicate problem of appreciating complex factors and of balancing conflicting considerations of the public interest; and that, once the Commission or the Court is satisfied that the Government's appreciation is at least on the margin of the powers conferred by Article 15, then the interest which the public itself has in effective Government and in the maintenance or order justifies and requires a decision in favour of the legality of the government's appreciation.[28]

Two further points ought to be noted in this context. First, a minority of the Commission members rejected the margin of appreciation doctrine, arguing that evaluation of the existence of a public emergency ought to be based solely on existing facts without regard to any "account of subjective predictions as to future development." They also argued that the Commission ought to review *de novo* the existence of a public emergency in a given situation without assuming *a priori* deferential attitude towards the respondent government.[29] Second, although the Court itself made no specific mention of the margin of appreciation doctrine in *Lawless*, its opinion contained language to that effect. Thus, the Court concluded that "the existence at the time of a 'public emergency threatening the life of the nation,' was *reasonably deduced* by the Irish Government from a combination of several factors . . . ."[30]

Since the *Lawless* judgment the margin of appreciation doctrine has appeared in practically all cases coming before the Court and Commission concerning derogation by states. Most disturbingly, the margin of appreciation has been extended and expanded in these cases, increasingly eating away the Court's ability to exercise meaningful and effective supervision over the actions and measures undertaken by state parties in circumstances of alleged public emergency. This trend received an emphatic expression in *Ireland v. United Kingdom*, where the Court made its opinion clear that:

28. *Id.* at 395–96, 408 (Verbatim Report of the Public Hearing Held by the Chamber of the Court on 7, 8, 10, & 11 Apr. 1961).
29. *Id.* § 92, at 94 (Commission member Eustathiades, dissenting). The same position was also entertained by the dissenting members of the Commission with respect to the question of whether the measures taken by the Irish government were "strictly required by the exigencies of the situation" or not. *Id.* at 135–36 (Commission member Eustathiades, dissenting); *id.* at 152–53 (Commission member Süsterhenn, dissenting).
30. Lawless [Court], *supra* note 26, § 28, at 56 (emphasis added); Higgins, *supra* note 14, at 298.

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> [I]t falls in the first place to each Contracting State, with its responsibility for "the life of [its] nation," to determine whether that life is threatened by a "public emergency" and, if so, how far it is necessary to go in attempting to overcome the emergency. By the reasons of their direct and continuous contact with the pressing need 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 the derogations necessary to avert it. In this matter article 15 paragraph 1 leaves the authorities a *wide margin of appreciation*. Nevertheless, the States do not enjoy an unlimited power in this respect. The Court, which, with the Commission, is responsible for ensuring the observance of the States engagements (article 19), is empowered to rule on whether 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*.[31]

The Court's decision in *Brannigan and McBride*[32] cemented this sweeping version of deferential attitude towards actions of, and claims made by, a national government that uses its power to derogate under the Convention:

> [I]t falls to each Contracting State, with its responsibility for "the life of [its] nation," to determine whether that life is threatened by a "public emergency" and, if so, how far it is necessary to go in attempting to overcome the emergency. By reason of their direct and continuous contact with the pressing needs of the moment, *the national authorities are in principle in a better position than the international judge* to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it. Accordingly, in this matter *a wide margin of appreciation* should be left to the national authorities . . . .[33]

This deferential attitude towards the national authorities both with respect to their decisions as to the presence of an emergency and as to the nature and scope of the measures necessary to avert that situation has since become a common staple of judicial rulings on matters involving Article 15.[34] In fact, as noted by Ronald St. John Macdonald, a former member of the Court, "it is possible to say that the margin [of appreciation] is probably at its widest when the Court is considering whether derogations are strictly

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31. Ireland v. United Kingdom, 25 Eur. Ct. H.R. (ser. A) § 207, at 78–79.
32. Brannigan & McBride v. United Kingdom, 258 Eur. Ct. H.R. (ser. A) (1993).
33. *Id.* § 43, at 49 (emphasis added); *see also id.* § 59, at 54 ("It is not the Court's role to substitute its view as to what measures were most appropriate or expedient at the relevant time in dealing with an emergency situation for that of the Government which have direct responsibility for establishing the balance between the taking of effective measures to combat terrorism on the one hand, and respecting individual rights on the other . . . .").
34. *See, e.g.*, Aksoy v. Turkey, 23 Eur. H.R. Rep. 553 (1996), § 68, at 586–87; Demir & Others v. Turkey, Reports, 1998–VI 2640 (1998), § 43.

required at a time of grave public emergency and at its narrowest when there is alleged violation of a person's very private and personal life."[35] While this statement presents an accurate description of the case law of the Court, we would argue below that, with all due respect, it demonstrates the inherent weakness of the Court's jurisprudence in the context of emergencies and derogation claims under Article 15.

B. "Wide" but not "Unlimited": The Rhetoric of Supervision

Expansive as its scope may be, the margin of appreciation has never been considered by the Court to confer an unfettered discretion on the derogating government. In the very first case coming before it—the *Lawless* case—the Court established unequivocally its competence to review the actions and claims of state parties under Article 15 and asserted itself as having the final and decisive say on such matters when it stated that "it is for the Court to determine whether the conditions laid down in Article 15 for the exercise of exceptional right of derogation have been fulfilled in the present case."[36] That "[t]he domestic margin of appreciation is . . . accompanied by a European supervision,"[37] has since become a common staple of the Court's formulation of its position concerning the margin of appreciation doctrine in particular cases coming before it.

Thus, notwithstanding the carving out of a wide domestic margin of appreciation, the Court confirmed its supervisory responsibilities in *Ireland v. United Kingdom* stating that:

> [T]he States do not enjoy an unlimited power in this respect. The Court, which, with the Commission, is responsible for ensuring the observance of the States engagements, is empowered to rule on whether 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.[38]

In the context of the derogation clause, the margin of appreciation doctrine recognizes that maintaining law and order in the face of public emergency is a delicate problem of appreciating complex factors and balancing conflicting interests. The national government may be superior to supranational judicial bodies in its ability to resolve this balancing problem because of its closer familiarity with the particular relevant circumstances.

35. Macdonald, *supra* note 1, at 207.
36. Lawless [Court], *supra* note 26, § 22, at 55.
37. Ireland v. United Kingdom, *supra* note 31, § 207, at 78–79 (1978); *Brannigan and McBride v. United Kingdom, supra* note 32, § 43, at 50.
38. Ireland v. United Kingdom, *supra* note 31, § 207 at 78–79.

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Still, the Court retains, at least rhetorically, its supervisory power in order to ensure that "public emergencies" do not become a pretext to unwarranted deviations from the guarantees provided by the European Convention.

In resorting to the margin of appreciation doctrine the Court has frequently been satisfied with making a laconic mention of the doctrine without further explanation of the way it was applied to the particular circumstances of the case at hand. In yet other cases the doctrine has not even been mentioned or discussed explicitly, but is rather implicit in the Court's analysis and judicial reasoning. There are few cases, relatively speaking, in which the Court has made any real effort to delineate the criteria and parameters that are taken into consideration when deciding the actual use of the doctrine in a given case.[39]

The right of supervision by the Court is settled law. Yet more significant is the question of what *effective* supervision means in practice when a state is faced with internal crisis, and when the Court has ceded the question of primary judgment to the national authorities. The extremely broad view of the margin of appreciation doctrine that the Court has adopted in the context of its Article 15 jurisprudence casts grave doubts as to the possibility of a real meaningful and effective "European supervision."

The derogation regime under the European Convention, and indeed under each of the major international human rights documents,[40] is designed to accommodate the needs of the state with the rights of individuals. It seeks to allow governmental action infringing recognized individual rights in a period of extreme emergency beyond that which governments could lawfully do in times of normalcy. At the same time, the basic rationale underlying that regime is that human rights are susceptible to incursions and infringements during acute pressures of emergency and crisis, more so than at any other time. Thus, the regime is structured to limit significantly the ability of states to use it unnecessarily. For its part the Court must remain attuned to the danger of dilution and nullification of human rights in such circumstances and must ensure that "emergency" and "crisis" do not become expedient tools in the hands of governments to facilitate transgressions of individual rights. In fulfilling its assigned part in the protection of human rights under the Convention, the Court should remain aware that its responsibility for supervision is capable of nuanced and pinpointed application.

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39. *See, e.g.,* Brems, *supra* note 4, at 256.
40. Practically identical derogation clauses to that incorporated in Article 15 of the European Convention are found in article 4 of the International Covenant on Civil and Political Rights, 16 Dec. 1966, 999 U.N.T.S. 171, 6 I.L.M. 368, & art. 27 of the American Convention on Human Rights 22 Nov. 1969, O.A.S. Official Records OEA/ser. K/XVI/ 1.1, doc. 65 rev. 1 corr. 1, 9 I.L.M. 673 (1970).

While supervision is not intended to second-guess the responses of the national system to internal exigency, it still retains a separate and substantial oversight function in its own right. Just as emergencies are not monochrome entities, but manifest unique and varying aspects and features, supervision is also capable of flexibility and versatility. The need for nuanced supervision is most evident when emergencies extend past a limited temporal duration and manifest characteristics of immutability that pose greater risks to the protection of human rights than in earlier embryonic forms. Thus, effective international supervision is especially crucial as the emergency prolongs.

Supervision need not be regarded as a "one size fits all" scenario. Indeed, the jurisprudence of the Court itself amply demonstrates this point. The Court has adopted different judicial attitudes, a scale of levels of scrutiny over state actions and decisions, depending on a wide range of considerations. As Macdonald suggests: "[t]he exact width of the margin of appreciation in any particular case is difficult to specify in advance . . . because it varies in accordance with the precise balance of the . . . principles that the Court thinks is appropriate in the case at hand."[41] So far so good. Yet the Court's treatment of the margin of appreciation doctrine in the particular context of Article 15 is deficient in two major ways. First, at present the Court accords the widest margin of appreciation to states when Article 15 is invoked as a defense to an otherwise violation of a protected human rights. We would argue that this is putting the pyramid on its head and going the wrong way about ensuring an effective protection for human rights as envisioned under the European Convention. If not doing away completely with the margin of appreciation doctrine when considering whether derogations are strictly required at a time of public emergency (and indeed whether such an emergency exists in the first place), the Court must at least give the narrowest of margins to the respondent government in such cases. The level of judicial scrutiny of that government's claims must be at its peak, not its ebb. Second, not all emergencies are of the same ilk. We would argue that certain features of particular emergencies may necessitate special attention and even more rigorous review than others. Such level of judicial high alertness is called for in the context of entrenched emergencies, namely prolonged, de facto, institutionalized or complex states of emergency.[42] Such emergencies may pose a danger to the protection of human rights that is qualitatively greater and more ominous than that resulting from short-term, exceptional emergencies. In fact, that such special attention to the duration of the emergency under review ought to be given has been openly and clearly acknowledged by the Court itself.[43] Unfortu-

41. Macdonald, *supra* note 1, at 207.
42. *See infra* note 75 and the accompanying text.
43. *See infra* note 83 and the accompanying text.

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nately this recognition has all but failed to bear a real impact on the actual decisions of the Court.

IV. THE CHALLENGE OF EMERGENCIES TO HUMAN RIGHTS AND THE NEED FOR A NARROW MARGIN OF APPRECIATION

The deep reasons for the Court according the widest margin of appreciation to states in Article 15 related claims are not explicitly stated in the Court's judgments. These seem to include, *inter alia,* (1) the recognition of the difficulty in replicating the conditions that the government faced in dealing with the exigencies of the time while acknowledging the need for swift action in the face of an emergency that may have left little time for deliberation; (2) considerations of the Court's own legitimacy particularly as a supranational body seeming to intervene in matters so close to the raw nerves of national sovereignty. The issues involved in emergency-related cases go to the very heart of a state's autonomy. These cases raise extremely sensitive and complex political questions that require the understanding and balancing of such explosive extralegal issues as the socioeconomic, cultural, political and historical backgrounds of various conflicts; and (3) the realization that proper functioning of the Convention system depends on the cooperation of states in the absence of meaningful enforcement mechanisms.[44] These considerations lead to the triple-pronged formula of national governments being "in a better position" to evaluate the situation and the nation's particular needs, bearing the "primary responsibility" for protecting human rights, while their decisions and actions are being subjected to "European supervision." The result of this formula when applied to Article 15 scenarios is that of "wide margin of appreciation."

States of emergency present the most significant challenge to the protection of human rights and civil liberties.[45] Indeed, exigencies and acute crises directly challenge the most fundamental concepts of a constitutional democracy. Take, for example, the notion that a government must be of limited powers, a government of laws, not of men (or women).[46] When an extreme exigency arises it leads, almost invariably, to the strengthening of

44. Gross, *supra* note 14, at 492–94.
45. *See, e.g.*, Andreas Zimmermann, *The Right to a Fair Trial in Situations of Emergency and the Question of Emergency Courts, in* THE RIGHT TO A FAIR TRIAL 747 (David Weissbrodt & Rüdiger Wolfrum eds., 1997) ("Emergency situations must be considered the litmus test for human rights protection . . . . This is due to the fact that in practice, it is during such states of emergency—whether formally declared or not—that the most serious violations of human rights occur.").
46. This idea traces its origins to Aristotle who suggested that "[w]here laws do not rule, there is no constitution." ARISTOTLE, THE POLITICS, BK. IV (Ernest Barker trans., rev. ed. 1995).

the executive branch of government at the expense not only of the other two branches, but also that of the citizenry at large. The government's ability to act swiftly, secretly and decisively against the threat to the life of the nation becomes superior to the ordinary principles of limitation on governmental powers and individual rights.[47] Crises tend to result in the expansion of governmental powers, concentration of powers in the hands of the executive and the concomitant contraction of individual freedoms and liberties.[48] Enhanced and newly created powers are given to, or asserted by, the government as necessary to successfully meet the challenge to the community.

Against the background of these general insights we argue that there are compelling reasons for the European Court to accord the narrowest of margins to national governments raising before it a defense claim under Article 15 to a petition brought against them.

A. National Authorities are not in a "Better Position" than the Court

The Court's concession of a wide margin of appreciation to national governments is based on its perception that "the national authorities are in principle in a better position than the international judge to decide both on the presence of . . . an emergency and on the nature and scope of the derogations necessary to avert it."[49] We would argue that this assumption ought to be critically reviewed and rejected.

Emergencies exert great pressures against continued adherence to protection of human rights. In times such as these, governments often consider protecting human rights and civil liberties to their fullest extent as a luxury that must be dispensed with if the nation is to overcome the crisis

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47. *See, e.g.*, William J. Brennan, Jr., *The Quest to Develop a Jurisprudence of Civil Liberties in Times of Security Crises,* 18 Isr. Y.B. Hum. Rts. 11 (1988). Brennan notes:

> There is considerably less to be proud about, and a good deal to be embarrassed about, when one reflects on the shabby treatment civil liberties have received in the United States during times of war and perceived threats to its national security. . . . After each perceived security crisis ended, the United States has remorsefully realized that the abrogation of civil liberties was unnecessary. But it has proven itself unable to prevent itself from repeating the error when the next crisis came along.

Id. at 11. *See also* Michael Linfield, Freedom Under Fire—U.S. Civil Liberties in Times of War (1990); Itzhak Zamir, *Human Rights and National Security,* 23 Isr. L. Rev. 375 (1989); Jules Lobel, Emergency Power and the Decline of Liberalism, 98 Yale L. J. 1385, 1386 (1989); Frederick M. Watkins, *The Problem of Constitutional Dictatorship,* 1 Pub. Pol'y 324, 343–344 (C.J. Friedrich & E.S. Mason eds., 1940).

48. *See* Arthur S. Miller, *Constitutional Law: Crisis Government becomes the Norm,* 39 Ohio St. L.J. 736, 738–41 (1978); Koh, *supra* note 7, at 117–49; Rossiter, *supra* note 7, at 288–90.

49. *See supra* notes 31–33 and the accompanying text.

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it faces. Moved by perceptions of physical threat both to the state and to themselves as individuals, motivated by growing fear and by hatred toward the "enemy," the citizenry may support and even goad the government to employ more radical measures against the perceived threats. Aroused emotions frequently overshadow rational discourse both among ordinary citizens and among their leaders. In these circumstances, notions of the rule of law, rights, and freedoms take a back seat, considered as legalistic niceties that bar effective action by the government. Exigencies tend to provoke the "rally 'round the flag" phenomenon, in which governmental actions perceived as necessary to fight off the crisis garner almost unqualified popular support (at least in the short run).[50] A crisis mentality can seize a whole nation and transform an otherwise peaceful community into a "nation in arms."[51] In the process, constitutional structures may be ignored. Governmental efficiency and expediency become paramount, and fundamental constitutional principles may come tumbling down when the trumpets of emergency blow.[52] Such circumstances do not seem to us conducive to rational and calm consideration and an appropriate balancing of the competing interests at stake. It is likely that interests and considerations that are branded "legal niceties" would not be accorded their due weight in such balancing whereas interests aligned with the government's case for more powers and curtailment of rights may be over emphasized.

Thus, it may well be that the supranational Court, detached and further removed from the immediate turmoil, reviewing the relevant issues post facto rather than at the time of their occurrence, is able to judge matters more clearly and more accurately.[53] It is the Court, therefore, that is in a better position than the national government to decide both on the presence of such an emergency and on the nature and scope of the derogations necessary to avert it.

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50. *See* Bruce Russett, Controlling the Sword: The Democratic Governance of National Security 34 (1990).
51. On the concept of "nation in arms," *see* Dan Horowitz & Moshe Lissak, Trouble in Utopia: The Overburdened Polity of Israel 28–29 (1990); Samuel P. Huntington, The Soldier and the State: The Theory and Politics of Civil-Military Relations 37 (1957).
52. *See, e.g.*, Edward S. Corwin, Total War and the Constitution 178–79 (1947) (noting that federalism, separation of powers, and judicial review are primary structural elements of peacetime constitution, but that powers of courts are limited during war and emergency).
53. *See* George J. Alexander, *The Illusory Protection of Human Rights by National Courts During Periods of Emergency*, 5 Hum. Rts. L.J. 1, 3 (1984) (suggesting that "[i]t is entirely possible that superior courts whose relevant executive authority is not threatened may in fact effectively place limits on subordinate executives.").

B. The Principle of Subsidiarity

Another basic rationale underlying the margin of appreciation doctrine emerges from the perceived role of the European Convention judicial system as subsidiary to domestic legal systems. It is the state parties to the Convention that serve as the primary guarantors of human rights. Further control and supervision by the Court is to be subsidiary to that primary duty of states.

However, this argument runs into substantial difficulties when assessed against the background of emergencies and derogations. For reasons explained above it is questionable to what extent national governments are able to fulfill the primary duty of states as guarantors of human rights in times of emergency. Neither are other domestic structures, mechanisms and institutions able to adequately perform that duty. Emergencies are, by and large, a matter for the executive branch of government. It is the executive that takes the lead with the judicial and legislative branches either acquiescing or actively supporting it.[54] Emergencies bring about a break down of effective domestic mechanisms of supervision and of judicial and legislative balancing. Thus, for example, much has been written about the consistent failure of domestic courts to function as an effective check on the executive in times of emergency and to protect human rights and civil liberties under such circumstances of crisis and exigency.[55] Faced with national crises, domestic judicial institutions tend to "go to war,"[56] much like the community in which they operate. They, too, "like[] to win wars."[57] In states of emergency, national courts may respond to the "herd instinct" by assuming a highly deferential attitude when called upon to review governmental actions and decisions.[58]

54. *See, e.g.*, KOH, *supra* note 7.

55. *See, e.g.*, JOHN HART ELY, WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH 54–60 (1993); THOMAS M. FRANCK, POLITICAL QUESTIONS/JUDICIAL ANSWERS: DOES THE RULE OF LAW APPLY TO FOREIGN AFFAIRS? 10–30 (1992); KOH, *supra* note 7, at 134–49 (1990); LAURENCE LUSTGARTEN & IAN LEIGH, IN FROM THE COLD: NATIONAL SECURITY AND PARLIAMENTARY DEMOCRACY 320–59 (1994); Alexander, *supra* note 53, at 15–27.

56. Michal R. Belknap, *The Supreme Court Goes to War: The Meaning and Implications of the Nazi Saboteur Case*, 89 MIL. L. REV. 59 (1980).

57. CLINTON ROSSITER & RICHARD P. LONGAKER, THE SUPREME COURT AND THE COMMANDER IN CHIEF 91 (expanded ed. 1976) (referring to US Supreme Court).

58. In a famous letter to Zechariah Chafee, Judge Learned Hand described his rejection of the "clear and present danger" test that had previously been developed by Justice Holmes in *Abrams v. United States*, 250 U.S. 616, 628–30 (1919) (Holmes, J., dissenting). Judge Hand's criticized the test, stating: "Besides even their Ineffabilities, the Nine Elder Statesmen have not shown themselves wholly immune from the 'herd instinct' and what seems 'immediate and direct' to-day may seem very remote next year even though the circumstances surrounding the utterance be unchanged." Letter from

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Under such circumstances it is up to the supranational Court to assume primary responsibility for the protection and safeguarding of human rights under the European Convention. In this ultimate litmus test for the protection of rights it is the Court, not the states, that acts as the protector of the Convention.

C. Protecting the Rights of "Others"

Emergency measures are often seen to be directed against a clear enemy of "others." The contours of conflict are drawn around groups and communities rather than individuals. The clearer the distinction between "us" and "them" and the greater the threat "they" pose to "us," the greater in scope may the emergency powers be. A bright-line separation of "us" and "them" allows for the piercing of the veil of ignorance.[59] We allow for more repressive emergency measures when we believe that we possess the key to peek beyond the veil and ascertain that such powers will not be turned against us.

The distinction between us and them is not unique to the sphere of emergency powers. Such notions are fundamental to the understanding of our individual as well as group consciousness. An integral part of our definition as individuals or as members of certain distinct groups is tied to the drawing of boundaries between the ins and the outs.[60] Group consciousness is, to a large extent, about an affirmative, internal organizing communitarian symbol which serves as the core around which the identity of the group is structured and constructed.[61] It is also about distinguishing those who are in—members of the group—and those left outside.[62]

Crises inevitably lead to heightened individual and group consciousnesses. Allegiance to the community and the willingness to sacrifice (in certain situations, the willingness to sacrifice one's own life) for its sake receive a higher premium and attention in times of peril that endanger the

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Learned Hand to Zechariah Chafee (2 Jan. 1921), *quoted in* Gerald Gunther, Learned Hand: The Man and the Judge 169 (1994). Chafee himself wrote that "the nine Justices in the Supreme Court can only lock the doors after the Liberty Bell is stolen." Zechariah Chafee Jr., Free Speech in the United States 80 (1941).

59. John Rawls, A Theory of Justice 17–22 (1971).

60. Jean-Paul Sartre, Being and Nothingness: a Phenomenological Essay on Ontology (Hazel E. Barnes trans., 1992).

61. Frederick Schauer, *Community, Citizenship, and the Search for National Identity*, 84 Mich. L. Rev. 1504, 1513–17 (1986).

62. W.A. Elliott, Us and Them: a study of group consciousness 6–10 (1986) ("People only display attitudes of *us* due to an acquired sense of *we-ness* determined largely by a sense of *theyness* in relation to others. So-called ingroup and outgroup behaviour therefore merely reflects the two sides of group consciousness." *Id.* at 8).

group.[63] The lines of *ins* and *outs* are more clearly and readily drawn and marked. Stereotyping is often employed both with respect to insiders (emphasizing good, noble, worthy attributes) and outsiders (pointing out to contrary traits). Collective derogatory name calling and identification of the others as "barbarians," are symptoms of that trend.[64] Internal conformities within the community are exaggerated while divergence from "outsiders" is emphasized.[65]

In times of crisis when emotions run high the dialectic of "us–them" may serve several functions. It allows people to vent fear and anger in the face of (actual or perceived) danger and direct negative emotional energies towards groups or individuals clearly identified as different. The same theme also accounts for the greater willingness to confer emergency powers on the government when the "other" is well-defined and clearly separable from the members of the community.

As we have seen above, emergencies challenge the protection of human rights. This is exacerbated further when dealing with the rights of "others," such as members of minority groups and foreign nationals. If we suspect the state's ability to adequately balance its needs in times of crisis against the protection of human rights, we ought to be even more circumspect when the rights of such "others" are at stake. The political price to be paid for infringing on their rights may seem negligible when viewed against the perceived benefits of being seen as protecting the nation from threat and danger.

The United States Supreme Court developed the strict scrutiny test, discussed in the next section, in order to protect "discrete and insular minorities" when ordinary political processes cannot be relied upon to achieve this end.[66] Strict scrutiny represents judicial energizing and commitment to vulnerable groups and minorities.[67] Though a different context to the one we are concerned with here one cannot ignore the fact that

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63. Schauer, *supra* note 61, at 1504 ("a meaningful sense of community exists only insofar as the individuals who comprise that community are willing to take actions on behalf of the community not only that they would not take on their own behalf, but that are quite possibly detrimental to their own interests . . . . we cannot think about a meaningful sense of community without thinking of some sense of sacrifice.").
64. ELLIOTT, *supra* note 62, at 9 (mentioning the use, by the Allies during WWII of such nicknames as Krauts, Nips, Wops, Wogs, and Gooks). *See also* J. GLENN GRAY, THE WARRIORS: REFLECTIONS ON MEN IN BATTLE, ch. 5 (1967).
65. ELLIOTT, *supra* note 62, at 9.
66. United States v. Carolene Products Co., 304 U.S. 144, 152–53 n.4 (1938).
67. Benvenisti, *supra* note 16, at 847 (arguing that "no margin [of appreciation] is called for when the political rights of members of minority groups are curtailed through, for example, restrictions on speech or on association, when their educational opportunities are restricted by the State, or when the allocation of resources creates differential effects on the majority and the minority.").

situations of emergency bear a disproportionately heavier burden on political outsiders, minorities, critics of the government, trade unionists, defense lawyers and even critical insiders (such as independent judges). A more critical view towards a derogation-based argument would strengthen the protection afforded to these groups.

D. Emergencies as "Suspect Situations"

For the reasons mentioned above, in evaluating the twin questions of the presence of an emergency and the nature and scope of the derogations necessary to avert it, the Court must accord the narrowest margin of appreciation to the derogating government. The Court should assume a critical, rather than deferential, attitude towards the respondent government's arguments. It ought to subject these arguments to rigorous analysis. It needs to run such claims under the test of a stricter scrutiny. An argument from emergency must be critically reviewed as emanating from a "suspect situation," that is a state of affairs that, in and of itself, casts grave doubts about the adequate protection of the rights enumerated in the Convention and guaranteed by it. A government's attempt to justify or excuse a perceived violation of human rights in terms of exigency and derogation ought to be treated as a suspect classification that calls for a stricter scrutiny of the government's case.

Under the jurisprudence of the Supreme Court of the United States a strict scrutiny is applied to cases involving either a classification deemed suspect, such as racial classification, or governmental interference with a fundamental right.[68] Thus, the strict scrutiny test is inherently linked to particular substantive rights or to specific types of classifications that are considered suspect due to political or historical reasons. Indeed, in as much as a stricter scrutiny is applied when fundamental rights are involved, this has also been the case under the jurisprudence of the European Court.[69]

However, we suggest a somewhat different conception of stricter scrutiny in the context of the European Convention. Rather than being linked to substantive rights or to particular classifications, strict scrutiny will

68. *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 11 (1967); Palmore v. Sidoti, 466 U.S. 429, 432–33 (1984) (racial classifications must be "subject[ed] to the most exacting scrutiny; to pass constitutional muster, they must be justified by a compelling governmental interest and must be 'necessary . . . . to the accomplishment' of their legitimate purpose."); Griswold v. Connecticut, 381 U.S. 479 (1965).

69. Thomas A. O'Donnell, *The Margin of Appreciation Doctrine: Standards in the Jurisprudence of the European Court of Human Rights*, 4 Hum. Rts. Q. 474, 484 (1982) ("If the right is considered fundamental, the Court exercises apparently stricter oversight and invokes a narrower margin of appreciation.").

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be situational. An argument for derogating from otherwise protected rights which is grounded in a state of public emergency is to be considered under a stricter scrutiny standard by the Court. It is the emergency rather than the substantive content of the right derogated from that invokes that need for a far less deferential judicial attitude. As the next section demonstrates the adoption of such an attitude is all the more compelling when the emergency involved is an entrenched one. The retention of emergency powers by a state for a prolonged period of time should function as a pronounced red light signal to the Court.

V. ENTRENCHED STATES OF EMERGENCY

The derogation regime is premised—as the name "derogation" itself indicates—on the aberrational nature of emergencies.[70] The regime is a product of a distinction between normalcy, which is considered to be the general state of affairs, and emergency, which is deemed the exception. Derogation from rights protected under the European Convention is made possible only in the most extreme circumstances. Derogation measures must be of a relatively short temporal duration, and their ultimate purpose ought to be that of bringing about a rapid return to normalcy.[71] "[A]bove and beyond the rules [that constitute the general principles of the derogation system] . . . one principle, namely, the principle of provisional status, dominates all the others. The right of derogation can be justified solely by the concern to return to normalcy."[72] Only a truly extraordinary crisis that lasts for a relatively brief period of time can be a derogation-justifying emergency. Moreover, to be legitimate, emergency measures employed by the state must be proportionate in both degree and duration to the particular threat.

In the previous section we argued for a heightened level of judicial scrutiny of derogation claims made by national governments. The case for

70. Gross, *supra* note 14, at 454–55.
71. *See* Rossiter, *supra* note 7, at 306 (arguing that return to status quo ante is only legitimate purpose of emergency measures).
72. Nicole Questiaux, *Study of the Implications for Human Rights of Recent Developments Concerning Situations Known as States of Siege or Emergency*, U.N. ESCOR, 35th Sess. § 69, at 20, U.N. Doc. E/CN.4/Sub.2/1982/15 (1982) [hereinafter "*Questiaux Report*"]; Subrata Roy Chowdhury, Rule of Law in a State of Emergency 45 (1989); Macdonald, *supra* note 1, at 241–42 ("It is inherent in theory and practice that the declaration of an emergency represents a temporary measure."). For example, derogation measures must be limited to the duration of the particular emergency. This is explicitly recognized by the American Convention, but it is also implied by the derogation clause of the European Convention. *See e.g.*, De Becker v. Belgium, [1962] App. No. 214/56, Eur. Ct. H.R. (ser. B) at 11 (Commission report).

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such stricter scrutiny of governmental claims is further strengthened when the state of emergency under review is not of the kind envisioned by the drafters of the European Convention in the framework of Article 15, but is rather an entrenched emergency, *i.e.*, a de facto, permanent, complex or institutionalized state of emergency.[73] Such emergencies pose a danger to the protection of human rights which is far greater and more ominous than that resulting from short-term, exceptional emergencies. Legal mechanisms designed to deal with exigencies are premised, much like the derogation regime itself, on the duality of normalcy and emergency.[74] Entrenched emergencies undermine that basic rationale and blur the demarcation lines between the two spheres. They facilitate the transformation of emergency government into the norm.[75]

Rather than being hypothetical phenomena, entrenched emergencies constitute practically the entire class of cases coming before the European Court and Commission in which issues concerning the application of Article 15 have been raised. The jurisprudence of the Court has, by and large, evolved around petitions brought against two countries—the United Kingdom and Turkey. In both cases a state of emergency has been the norm in the relevant jurisdiction. Its judicial statements notwithstanding, it does not seem to us that the Court has given any real, meaningful attention to that special state of affairs. Until recently the United Kingdom has had a continuous derogation in place, linked to the Northern Irish conflict, with little respite since 1971.[76] As a result, Northern Ireland has experienced

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73. A *de facto state of emergency* arises in circumstances where "there is no proclamation or termination of the state of emergency or . . . the state of emergency subsists after it has been officially proclaimed and then terminated." *Questiaux Report, supra* note 72, § 103, at 26. *Permanent emergencies* include those states of emergency that are "perpetuated either as a result of *de facto* systematic extension or because the Constitution has not provided any time-limit *a priori*." *Id.* § 112, at 28. While not defining a "*complex state of emergency*," Questiaux finds a common feature shared by all emergency regimes falling into this category, namely "the great number of parallel or simultaneous emergency rules whose complexity is increased by the 'piling up' of provisions designed to 'regularize' the immediately preceding situation and therefore embodying retroactive rules and transitional regimes." *Id.* § 118, at 29. *Institutionalization of emergency regimes* refers to situations in which emergencies facilitate an institutional transformation of a democratic regime into an authoritarian or "restricted" democratic regime. *See id.* §§ 129–45, at 31–32.
74. Oren Gross, Theoretical Models of Emergency Powers (S.J.D. Dissertation, Harvard Law School, 1997).
75. *See* Senator Frank Church's observation that "[e]mergency government has become the norm" in *A Brief History of Emergency Powers in the United States*, Working Paper Prepared for the Special Committee on National Emergencies and Delegated Emergency Powers, U.S. Senate, 93d Cong., 2d sess., at v.
76. *Derogation of 20 Aug. 1971*, 14 Y.B. Eur. Conv. on H.R. 32 (Eur. Comm'n on H.R.); *Derogation of 23 Jan. 1973*, 16 Y.B. Eur. Conv. on H.R. 24 (Eur. Comm'n on H.R.); *Derogation of 16 Aug. 1973*, 16 Y.B. Eur. Conv. on H.R. 26 (Eur. Comm'n on H.R.);

emergency rule for a combined period of some thirty years.[77] Another member of this infamous club is Turkey. Turkey has invoked Article 15 of the European Convention for most of the period between June 1970 and July 1987, including a continuous stretch of almost seven years from September 1980 to May 1987.[78] In August 1990, the Turkish government re-invoked derogations under Article 15 and has maintained them to date.[79] Since 1987, most of the provinces of southeastern Turkey continuously have been subjected to an emergency regime.[80]

On a number of occasions since the United Kingdom presented its first derogation to the Secretary-General of the Council of Europe, the European Court has had the opportunity to review the compatibility of such derogations with the fundamental obligations of the state under the Convention. As we have undertaken a detailed analysis of this jurisprudence elsewhere,[81] it is sufficient for the purposes of this article to note that while emphasizing the dual requirements of exceptional threat and temporal duration of the emergency under Article 15, neither the Court nor the Commission has rigorously applied these criteria to the prolonged state of emergency in Northern Ireland. Thus, for example, in its report in *Ireland v. United Kingdom*, the Commission had this to say about the Northern Irish conflict: "[t]he *lasting* crisis in Northern Ireland gave rise to the present application . . . . The present emergency is not as such in dispute between the parties. *It began in 1966* with the first use of violence for political ends in Northern Ireland in recent years."[82] The Court's readiness to grant a wide margin of appreciation to the British government with respect to that

Derogation of 18 Dec. 1978, 21 Y.B. EUR. CONV. ON H.R. 22 (Eur. Comm'n on H.R.); *Derogation of 23 Dec. 1988*, 31 Y.B. EUR. CONV. ON H.R. 15 (Eur. Comm'n on H.R.). The United Kingdom withdrew its derogation on 19 February 2001.

77. *See* Oren Gross & Fionnuala Ni Aolain, *To Know Where We Are Going, We Need to Know Where We Are: Revisiting States of Emergency*, *in* A HUMAN RIGHTS AGENDA FOR THE 21ST CENTURY 79 (A. Heggarty & S. Leonard eds., 1999).
78. Turkey invoked Article 15 from 16 June 1970, to 5 August 1975; from 26 December 1978, to 26 February 1980; and from 12 September 1980 to 25 May 1987. *See* 30 Y.B. Eur. Conv. on H.R. 19 (1987); 23 Y.B. Eur. Conv. on H.R. 10 (1980); 22 Y.B. Eur. Conv. on H.R. 26 (1979); 21 Y.B. Eur. Conv. on H.R. 18 (1978); 18 Y.B. Eur. Conv. on H.R. 16 (1975); 13 Y.B. Eur. Conv. on H.R. 18 (1970).
79. 33 Y.B. Eur. Conv. on H.R. 14 (1990) (reporting derogation from Articles 5, 6, 8, 10, 11, & 13 of the European Convention); 35 Y.B. Eur. Conv. on H.R. 16 (1992) (limiting scope of existing derogation so as to apply only with respect to article 5 of European Convention).
80. To date, a declared state of emergency persists in six provinces. Six other provinces are under an "adjacent province" status which grants the provincial governors and the security forces certain special powers. Emergency rule was lifted in October 1997 from three provinces—Bingol, Batman, and Bitlis—although this has had only minimal effects on the extensive powers granted to the provincial governors. *See Turkey and the Kurds, By the Gun Alone*, ECONOMIST, 11 Oct. 1997, at 57.
81. Gross, *supra* note 14, at 459–83; Ni Aolain, *supra* note 14, at 110–26.
82. Ireland v. United Kingdom [Commission], *supra* note 31, at 512 (emphases added).

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government's Article 15 claims was unaffected by that entrenchment of the emergency, despite its clear contradiction to the very basis of Article 15. Moreover, the Court itself stated, on more than one occasion, that "in exercising its supervision the Court must give appropriate weight to such relevant factors as the nature of the rights affected by the derogation, the circumstances leading to, and *the duration of*, the emergency situation."[83]

Similar statements were made by the Court in cases coming before it concerning Turkey.[84] Yet, at the same time, the Court dispensed with the question of the existence of a public emergency threatening the life of the nation in terse statements that did not reflect a serious critical attempt to come to grips with the prolonged state of emergency in the jurisdiction. Thus, for example, the Court's *full* treatment of this issue in *Aksoy v. Turkey* reads as follows: "[t]he Court considers, in light of all the material before it, that the particular extent and impact of PKK terrorist activity in South-East Turkey has undoubtedly created, in the region concerned, a 'public emergency threatening the life of the nation.'"[85]

The case for stricter scrutiny, for invoking the narrowest possible margin of appreciation to a derogating government's arguments is at its zenith when the state of emergency under consideration is such an entrenched emergency. We suggest that it is incumbent upon the Court to redraw the boundaries of the margin of appreciation accorded to national governments in situations of entrenched emergency around the narrowest conception of that margin, while rejecting the Court's existing jurisprudence that confers upon governments a "wide margin of appreciation" under such circumstances. An inverse connection should exist between the scope of the margin of appreciation allowed to a derogating government in a particular case and the length of the emergency situation.[86] All other things being equal, the longer the emergency, the narrower, not wider, ought the margin of appreciation to be.[87]

VI. A NECESSARY CHANGE IN JUDICIAL ATTITUDE: CONCLUDING REMARKS

States of emergency accentuate the tensions between "the man (*sic*) of action" and the legal scholar.[88] The former may seek to emphasize the need

83. Branningan & McBride, *supra* note 32, § 43 (emphasis added).
84. Aksoy v. Turkey, *supra* note 34, § 68, at 587; Demir & Others v. Turkey, *supra* note 34, § 43.
85. Aksoy v. Turkey, *supra* note 34, § 70.
86. Ni Aolain, *supra* note 14, at 125.
87. Gross, *supra* note 14, at 482.
88. *The Greek Case*, 1 European Court of Human Rights, The Greek Case: Report of the Commission (1969) (Commission member Delahaye, dissenting opinion) (emphasizing the distinction

for swift action, secrecy, broad powers and ample discretion in order to respond successfully to the exigency. The latter points to the need to abide by constitutional structures and principles, even in the face of crisis. The man of action may accuse the scholar of sticking by legal niceties and by a utopian view of the world facilitated by the fact that it is not she who must be responsible and accountable for the actions taken. The scholar may retort that the greater danger from the emergency lies not in the physical threat to the nation but rather in the danger inherent in over-reaction that may smooth the transition into governmental authoritarianism even when the particular emergency is removed. The man of action's claim for broader powers subject to less supervision and control, is seen as a precursor to an apologetic argument which attempts to justify whatever measure is taken by the government.

The jurisprudence of the Court with respect to Article 15 of the European Convention demonstrates the willingness of this supranational judicial body of scholars to accord a wide margin of discretion to the men of action, namely national governments. The Court is mindful of the need for government to respond expeditiously, efficiently and decisively to acute crises facing the nation and that the time available to that government may not allow for the in-depth review in which the Court itself may engage with the calm of hindsight. It also accepts that the man of action has "the feeling" for the circumstances and for the most effective way of dealing with them which is based, *inter alia*, on his "direct and continuous contact with the pressing need of the moment."[89] Implicit in this judicial attitude is a trust between the state party to the European Convention and the Court with the former being trusted to fulfill its role as the primary protector of the human rights guaranteed by the Convention.

We do not believe that the margin of appreciation doctrine should completely be done away with. When carefully and critically applied it may serve certain useful functions. Yet, in this article we argue that the particular formula selected by the Court as suitable for Article 15 purposes—that of "wide margin of appreciation" accorded to derogating governments—is utterly misguided and has created certain spheres in which governments are all but immune from an effective European supervision over their actions and decisions. A certain margin of appreciation ought to be given to governments dealing with exigencies and acute crises. Yet the scope of such

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between the scholar, *i.e.*, the Commission, who enjoys the benefit of detachment in time and place from the actual or imminent crisis, and the man of action, i.e., the national government, who is faced with concrete facts and is required to respond promptly to those facts as they arise. *Id.* § 166, at 86.

89. *See supra* notes 31–33 and the accompanying text; *The Greek Case* (Commission member Delhaye, dissenting opinion), *supra* note 88, § 166, at 86.

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margin must be kept to the bare minimum. Only the narrowest of margins should be accorded the derogating government. The full force of this position is revealed when the particular emergency is of an entrenched nature.

The European Convention was not designed to promote governmental efficiency. Rather, "[t]he central concern of the founders of the European human rights system was to prevent re-occurrence in any state of a process similar to Germany's slide into totalitarianism . . . ."[90] Paraphrasing Justice Brandeis' celebrated statement concerning the purpose of the drafters of the Convention of 1787 in introducing the doctrine of separation of powers into that document, one can say that the purpose of the European Convention is not to promote governmental efficiency but to preclude the exercise of arbitrary power.[91] In times of national emergency, when the danger of arbitrary power being used is very much a real one and the specter of authoritarianism looms large, it falls to the supranational Court to exercise special protection of the rights protected under the European Convention. Rather than being content with playing a supporting, subsidiary role to that played by the states parties themselves in protecting human rights, the Court must assume a primary responsibility for such protection. In order to fulfill its responsibility the Court must reject latitudinarian constructions of the margin of appreciation doctrine.

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90. O'Donnell, *supra* note 69, at 484. *See also* Lavender, *supra* note 15, at 383.
91. Myers v. United States, 272 U.S. 52, 293 (1926) (Justice Brandeis, dissenting).

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