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BRANNIGAN AND MCBRIDE V. U.K. : A NEW DIRECTION ON ARTICLE 15 DEROGATIONS UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS ? (*)

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The 1993 case of *Brannigan and McBride* v. *U.K.* (1) was a key case heard by the European Court of Human Rights (the Court). The Court had to wrestle with the problem of the United Kingdom's derogation under article 15 of the European Convention on Human Rights (the Convention), and the amount of leeway, or margin of appreciation, which should be given to states to decide on measures to be taken during a public emergency. This was not the first time the Court has faced this problem, but it came at a crucial point in the development of the Council of Europe's institutions.

Article 15 states the following :

> 1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law (2).

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(1) Brannigan and McBride v. U.K., Application Nos. 14553/89 and 14554/89, Report of the Commission adopted on 3 December 1991 ; Judgement of 26 May 1993, Series A Vol. 258B.

(2) The definition of exceptional circumstances in article 15 includes war, natural catastrophes, such as earthquakes, floods, epidemics and economic crises, and anything that puts the security of the state in peril. See Joao de Deus Pinheiro Farinha, « L'article 15 de la Convention » at 521 in Franz Matscher and Herbert Petzold (eds.), Protecting Human Rights : The European Dimension (Koln : Carl Heymanns Verlag KG, 1988) at 524-525. In his thesis on article 15, Rusen Ergec states that an emergency must affect the whole state, not just one province or region. Thus, an emergency in one area would not qualify as a public emergency unless the rest of the state was affected as well. It is possible that a government could argue

> 2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.
>
> 3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.

Article 15 has only been examined in a few cases of the European Commission of Human Rights (the Commission) and the European Court of Human Rights. However, these cases are extremely important.

> From the point of view of human rights those occasions have been ones of critical and often dramatic importance ; just as the power of arbitrary imprisonment is the cornerstone of tyranny, so the limitations on this power form a large part of the foundations of democracy. If the mechanism of the Convention is to operate effectively in this crucial area, the concepts which are adapted must be the subject of continuing analysis (3).

It is vitally important that the concept of margin of appreciation in the context of an emergency be reviewed continually, in order to ensure the protection of basic rights.

Terrorism « constitutes a threat to the very existence of democracy ; the States must have at their disposal adequate weapons to counter organised terrorism, otherwise the rights and freedoms safeguarded by the Convention risk becoming ineffective » (4).

Keeping these considerations in mind, I will examine the case law and doctrine of the Commission and the Court on the margin of appreciation as it relates to article 15. The first section will be background cases where derogations under article 15 were invoked. The next section will provide background on the doctrine of the Commission and the Court regarding the margin of appreciation and proportionality. In the third section, the case of *Brannigan* will be examined. The final section is forward-looking. The adequacy of the margin doctrine in relation to possible future problems will be investigated and various alternatives to the present concept of the margin will be presented and evaluated.

that any unrest or catastrophe which affects one region has had an impact on the rest of the state. For example, most of the violence caused by the Irish Republican Army was confined to Northern Ireland until recent times, but the U.K. has been able to apply emergency measures in Great Britain as well, on the basis that the entire country has been affected and not just one region. The Court has accepted this argument. See Rusen Ergec, Les droits de l'homme a l'épreuve des circonstances exceptionnelles (Bruxelles : Editions Bruylant, 1987) at 170.

(3) E.T. McGovern, « Internment and Detention without Trial in the Light of the European Convention on Human Rights » in J.W. Bridge et al, Fundamental Rights (London : Sweet and Maxwell, 1973) at 230.

(4) Paul Mahoney, « Judicial Activism and Judicial Self-Restraint in the European Court of Human Rights : Two Sides of the Same Coin » (1990) 11 Human Rights Law Journal 57 at 68.

BRANNIGAN AND MCBRIDE V. U.K.

The case concerned the detention of two suspected Irish Republican Army (IRA) terrorists. The normal procedure in Northern Ireland was to detain a person for two days and then apply to the Secretary of State for Northern Ireland for an extension of the detention, lasting no longer than five days, a procedure which required the U.K. derogation under article 15 in 1988. *Brannigan* was the first case to test this derogation. The reason it is such a pivotal case is that the Court had to confront the issue of the right to judicial review, and in doing so, it had to squarely deal with the right of derogation and the extent to which a national government can decide what measures are appropriate during a proclaimed national emergency. The issue is also important because the Council of Europe is extending membership to east and central European states where the experience with human rights and democracy generally has been shorter than in western Europe.

Before continuing, it is necessary to review briefly each of the cases touching on article 15 derogations in order to see the development of the Court's approach. Many of these cases have involved the U.K. and alleged IRA terrorists, so it is possible to follow the thread of interpretation through all of them.

GREECE V. U.K. (5)

This case was important because the Commission was forced to decide what powers it had when article 15 was invoked by a state party. The Commission decided that it was « competent to pronounce on the existence of a public danger, which, under Article 15, would grant to the Contracting Party concerned the right to derogate from the obligations laid down in the Convention » (6). It was also competent to decide whether the measures taken were « strictly required » under the circumstances, but « the Government should be able to exercise a certain measure of discretion in assessing the extent strictly required by the exigencies of the situation » (7). The seeds of the margin of appreciation doctrine were planted in this case. However, the amount of discretion to be left to the state was enunciated more clearly in the next case, *Lawless* v. *Ireland*.

(5) Greece v. U.K., Application No. 176/56, (1958-59) 2 Yearbook of the European Convention on Human Rights 174.
(6) *Ibid.*, at 176.
(7) *Ibid.*, at 176.

LAWLESS V. IRELAND (8)

Lawless was the first significant case for the Convention organs, and provided an opportunity to set out the approach of the Commission and the Court to article 15 cases. One of the most important things that the Commission did was to define the meaning of public emergency.

> The natural and ordinary meaning of « a public emergency threatening the life of the nation » is, we think, a situation of exceptional and imminent danger or crisis affecting the general public, as distinct from particular groups, and constituting a threat to the organised life of the community which composes the State in question (9).

The criteria for an emergency were clear : exceptional and imminent danger ; effects on the general public ; and, a threat to the society as a whole.

The Commission tried to delineate when the particular facts of a situation would fall under this concept, which they admitted was not an easy task. Recognising the government's responsibility to protect its own people, the Commission stated that :

> it is evident that a certain discretion — a certain margin of appreciation — must be left 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 (10).

The majority appeared to recognise that the Convention organs were politically incapable of presuming a wide power of review over state actions during a public emergency. Furthermore, they also believed that there were adequate safeguards against abuse of the power to detain without trial, such as a review committee, regular parliamentary reports, and the ability to be released upon giving an undertaking (11).

The dissenting members thought that a public emergency needed to be as grave as war or pose a threat tantamount to war. These members were not convinced that the situation in Ireland could not have been controlled through the ordinary means of the police and the courts, and stated that

(8) Lawless v. Ireland, Commission Report of 19 December 1959, Series B Vol. 1, 1960-61 ; and Lawless Case (Merits), Judgement of 1st July 1961, Series A Vol. 3.

(9) Lawless v. Ireland, Commission Report of 19 December 1959, Series B Vol. 1, 1960-61, at 82.

(10) *Ibid.*, at 82.

(11) Michael O'Boyle, Inter Arma Leges Silent ? Emergency Government and European Human Rights Law : A Case Study of Northern Ireland (Thesis) (Boston : Harvard Law School, 1975) at 45 and 49-51. O'Boyle claims that there was no public emergency, only a threat to public order which could have been confronted using less severe measures. However, the political realities necessitated a weak interpretation of article 15 which favoured the decisions of states.

danger was posed only to a part of the nation (12). They also underlined the Commission's role as a final reviewer of state action in this sphere.

The lessons appear to be that a state can derogate if the crisis is less than a public emergency as long as safeguards exist, and internment without judicial review is preferable to special courts with different evidentiary rules (13). Some commentators have been uneasy with the idea of allowing safeguards to excuse the lack of prompt judicial review ; the acceptance of such safeguards can involve serious risks of abuse and deviation (14). In her seminal study of emergency situations, Nicole Questiaux concluded that even if a measure is severe, it is proportional as long as extra-judicial guarantees are made (15).

This was the first case on which the Court pronounced judgement. It unanimously confirmed the decision of the Commission. However, the Court did not refer to the margin of appreciation doctrine by name in the judgement, and would only clarify it in a later case.

The Greek Case (16)

This case was brought by Denmark, Norway, Sweden and The Netherlands against Greece in 1967. It is notable for two reasons : a complete definition of public emergency was enunciated ; and, this is the only instance when the Commission has not accepted a state's decision on the existence of a public emergency.

A public emergency was defined to have the following attributes :

(1) It must be actual or imminent.
(2) Its effects must involve the whole nation.
(3) The continuance of the organised life of the community must be threatened.
(4) The crisis or danger must be exceptional, in that the normal measures or restrictions, permitted by the Convention for the maintenance of public safety, health and order, are plainly inadequate (17).

According to this definition, there was no emergency in Greece. The majority stressed that it was the Government which had the burden of

(12) *Ibid.*, at 92-101.
(13) *Ibid.*, at 52.
(14) Subrata Roy Chowdhury, Rule of Law in a State of Emergency (London : Pinter Publishers, 1989) at 183. The author contends that if non-judicial safeguards will excuse the lack of judicial review, then they should be subject to strict limits such as those obtaining in Ireland v. U.K. The author drew on the conclusions in Nicole Questiaux' report to the ECOSOC.
(15) Nicole Questiaux, Study of the Implications for Human Rights of Recent Developments Concerning Situations Known as States of Siege or Emergency ECOSOC Commission on Human Rights, 1982 at 18.
(16) The Greek Case (1969) 12 Yearbook of the European Convention on Human Rights 1.
(17) *Ibid.*, at 72.

proving that the necessary conditions for derogation existed (18). Thus, the margin of appreciation doctrine was used to ensure that *carte blanche* would not be given to states which derogate under article 15.

IRELAND v. U.K (19)

The Commission found that there was a breach of article 5(1)-(4) by the U.K. It agreed that a public emergency existed at the relevant time, a fact which had not been disputed by the parties. Whether the measures were strictly required by the situation then had to be determined. The Commission stated that

> both the direct requirements of the emergency and the more indirect considerations as to how the emergency procedures should be organised in relation to normal processes of law, must be in the first place determined by the State concerned, unless the Commission finds that the reasons given cannot, even in the circumstances, justify the extent of derogation (20).

They proceeded to say that the derogation could become excessive if no other adequate safeguards were put in place.

The Court felt that an emergency situation clearly existed in Northern Ireland, but even when its existence is not questioned, there is no presumption of an emergency. The Court is obliged to review this aspect and decide on its legitimacy (21).

The Court then stated that it was a matter for the state to decide when an emergency threatened its life and to what extent the state should act to overcome the emergency. For the first time, the Court officially recognised the doctrine of the margin of appreciation in the context of article 15.

(18) States of Emergency : Their Impact on Human Rights (Geneva : International Commission of Jurists, 1983) at 451.

(19) Ireland v. U.K., Report of the Commission adopted on 25 January 1976, Series B Vol. 23-I ; Judgement of 18 January 1978, Series A Vol. 25. Technically, Cyprus v. Turkey is the next case. Cyprus had brought the case against Turkey for alleged violations against Greek Cypriots after the Turkish invasion of Cyprus. Because no communication had been made by Turkey to the Council of Europe, and no formal declaration made, article 15 could apply neither to the area under Turkish control in Cyprus, nor to the treatment of Greek Cypriots detained in Turkey. No reasons were given by the Commission. See Cyprus v. Turkey, Report of the Commission adopted on 10 July 1976, Volume 1, part III, at 157 and 161-162.

(20) Ireland v. U.K., Report of the Commisslon adopted 25 January 1976, Series B Vol. 23-I, at 123-124.

(21) P. van Dijk and G.J.H. van Hoof, Theory and Practice of the European Convention on Human Rights, 2nd ed. (Deventer : Kluwer Law and Taxation Publishers, 1990) at 553. Because the maintenance of the Convention legal order is involved, a passive attitude to submissions is improper especially if the measure may lead to the partial suspension of the legal order. This is particularly so in inter-state cases. They do not challenge the finding of the emergency ; they merely want to clarify that an emergency cannot be assumed to exist.

> Nevertheless, the States do not enjoy an unlimited power in this respect. The Court, 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 (22).

There was no elaboration on the meaning of European supervision. However, it appeared to mean that the government would be given a wide margin to declare a state of emergency, with some scrutiny by the Convention organs, and a wide margin to decide what measures were required, although with closer scrutiny by the Commission and the Court to ensure that the state was not straying too far from Convention norms.

The Court stated that

> it is certainly not the Court's function to substitute for the British Government's assessment any other assessment of what might be the most prudent or most expedient policy to combat terrorism...[T]he Court must arrive at its decision in the light, not of a purely retrospective examination of the efficacy of those measures, but of the conditions and circumstances reigning when they were originally taken and subsequently applied (23).

The Court concluded that preventive detention without judicial review was necessary under the prevailing circumstances and that the margin of appreciation had not been overstepped by the U.K. The margin of appreciation doctrine in respect to article 15 was now firmly entrenched in the Court's jurisprudence.

McVeigh, O'Neill and Evans v. U.K. (24)

The U.K. did not invoke article 15 in this case. Consequently, the Commission only considered whether there was a breach under any of the Convention rights, and found no violation of article 5 rights based on the displayed need to combat terrorism. The dissent likened the detention procedures to a « fishing expedition », and gave less weight to the context of terrorism. The McVeigh outcome signalled a willingness to stretch Convention norms to accommodate states in unusual situations (25).

(22) Ireland v. U.K., Judgement of 18 January 1978, Series A Vol. 25, at 78-79.

(23) *Ibid.*, at 82.

(24) McVeigh, O'Neill and Evans v. U.K., Application Nos. 8022/77, 8025/77, 8027/77, Report of the Commission adopted on 18 March 1981. The case was not argued before the Court.

(25) *Ibid.*, at 33. In its opinion, the Commission recognised that « this legislation admittedly involves temporary and abnormal restrictions within the field of Convention rights. There is no question but that the right to personal liberty as normally applied within the United Kingdom has been to some extent circumscribed by the legislation, and by the powers of arrest and detention applied to the present applicants in particular. » The Commission seems to state that the norms can be stretched under unusual circumstances, such as a terrorist threat, which implies a very flexible approach to Convention norms.

BROGAN, COYLE, MCFADDEN AND TRACEY V. U.K (26)

The detention periods ranged from four days and six hours to six days and sixteen and a half hours. The Convention standard for promptness extended only to four days. Article 15 was inapplicable, so this was a test of whether the U.K. legislation was in conformity with the Convention requirements.

The Commission appears to have been willing to go to great lengths to accommodate the state in this case. The majority stated that the promptness requirement had to be assessed according to the circumstances of each case. Thus, the two shortest detention periods were acceptable, but the two longer ones were not. Adequate safeguards existed, so there was no breach of article 5(4).

The dissent strongly disagreed with the majority. « The acceptance of any longer period [of detention] would serve as a precedent and thus weaken the notion of promptness » (27). In the minority's opinion, the need for judicial control is greater during such periods of crisis.

The Court disagreed with the Commission's finding. The Court was concerned that justifying a longer period of detention because of the special circumstances of the case would weaken the procedural guarantee of promptness. Thus, by a vote of twelve to seven, all four periods of detention resulted in a breach of article 5(3).

As Antonio Tanca suggests, the Commission and the Court took two different views in the *Brogan* case. The Commission definitely preferred the flexible approach to the interpretation of the Convention rather than the use of article 15. Having all of the Convention's provisions in place during an emergency was better than suspending certain rights, even in the face of terrorism. The Commission's method would have added another layer of complexity and uncertainty to the interpretation of Convention norms. The Court rejected this approach in favour of the solidity of Convention norms. The judges were wary of creating special situations and changing norms to suit certain states. Member states must adapt to the European rules, not

(26) Brogan, Coyle, McFadden, Tracey v. U.K., Application Nos. 11209/84, 11234/84, 11266/84 and 11386/85, Report of the Commission adopted on 14 May 1987 ; Judgement of 29 November 1988, Series A Vol. 145. France, Norway, Denmark, Sweden and The Netherlands v. Turkey was the next case chronologically. The five states parties brought the case against Turkey for its prolonged use of martial law and the suspension of Convention guarantees as well as the continued existence of article 15 derogations. The Commission formulated an opinion and gave preliminary views, but the opinion was not made public as a resuit of the friendly settlement reached between the parties. See the Report adopted by the Commission on 7 December 1985 pursuant to article 30 of the Convention (Friendly Settlement), (1985) 44 Decisions and Reports 31.

(27) Brogan, Coyle, McFadden and Tracey v. U.K., Report of the Commission adopted on 14 May 1987, at 24.

vice versa (28). The wisdom of the Court's approach is apparent. It has the benefit of keeping the norms intact, while allowing some differentiation depending on the situation.

The implication was clear : the U.K. would have to derogate under article 15 if it wished to keep in place the measures for detention without judicial review. Thus, the U.K. derogated.

Some scholars view the *Brogan* judgement as an invitation to derogate. Another strand of opinion holds that the U.K. blatantly defied the judgement when it chose derogation (29).

With respect, I think that the truth lies somewhere in the middle. The U.K. specifically stated that article 15 did not apply in *Brogan* ; an emergency situation still existed in Northern Ireland, but it could be addressed using measures consistent with the Convention's obligations. Only after the Government discovered that it was not in compliance did the derogation become necessary. However, *Brogan* was not an invitation to derogate. The Court indicated that it would like the U.K. to institute prompt judicial review of preventive detention if this was at all possible (30). Derogation should only be considered as a final option. The U.K. undertook to review its use of preventive detention, but had to derogate until an alternative was found.

Fox, Campbell and Hartley v. U.K (31)

No U.K. derogation under article 15 existed at the time of the complainants' arrest. The Commission majority found that a breach of article 5 had occurred and the arrests were not justified (32).

The Court stressed the need for a « proper balance between the defence of the institutions of democracy in the common interest and the protection of individual rights » (33). The majority decided to take a strong stance and found a violation of article 5(1)(c) due to a lack of reasonable suspicion.

(28) Antonio Tanca, « Human Rights, Terrorism, and Police Custody : The Brogan Case » (1990) 1 European Journal of International Law 269 at 272-276.

(29) Fried van Hoof, « The Future of the European Convention on Human Rights » (1989) 4 Netherlands Quarterly of Human Rights 451 at 454-455. See also van Dijk and van Hoof, at 558.

(30) Case of Brogan and Others v. U.K., Judgement of 29 November 1988, Series A Vol. 145, at 32-33. Although the Court does not specifically state that it would like a change, the strong wording can be interpreted as an indication that if a judicial measure is possible, the Government should use it.

(31) Fox, Campbell, Hartley v. U.K., Application Nos. 12244/86, 12245/86 and 12383/86, Report of the Commission adopted on 4 May 1989 ; Judgement of 30 August 1990, Series A Vol. 182.

(32) Fox, Campbell and Hartley v. U.K., Report of the Commission adopted on 4 May 1989, at 10-13.

(33) Fox, Campbell and Hartley v. U.K., Judgement of 30 August 1990, Series A No. 182, at 15.

Margin of appreciation

Mahoney has described the margin of appreciation as the dividing line between the powers of the state and those of the Court (34). Michael O'Boyle, who has written extensively on the subject of derogations under article 15 and the margin of appreciation, especially with regards to Northern Irish cases, states that the margin of appreciation means that the Court should give way to the Government's decisions because it knows the situation better and can judge what actions are required. If a government acts in good faith, its actions are acceptable, though they might have been mistaken. He offers two ways to look at the test : there should be reasonable grounds for action ; or, a presumption exists in favour of the government and can be rebutted (35). The latter formulation gives the benefit of the doubt to the government. It seems that the Commission and the Court followed this approach in the early cases.

One of the conclusions of O'Boyle's thesis is that « the more politically sensitive the issue, the greater the width of the margin » (36). When the political character of an issue, such as Northern Ireland and terrorism, is well-defined, then international judicial self-restraint and compromise is called for. Keeping this in mind, O'Boyle argues in favour of allowing the state a wide margin on determining the existence of an emergency, and a narrower one on the question of the proportionality of the measures. The phrase « strictly required » implies careful scrutiny. In addition, as the emergency continues in time, the margin should become narrower (37). Later variations in approach to the crisis usually result more from ideological differences than difficulties in dealing with the emergency. Therefore, there is no reason to allow a wide margin on the question of proportionality.

Proportionality

The interpretation of the phrase « strictly required in the exigencies of the situation », the proportionality question, has been the subject of much discussion. The principle of proportionality includes three constraints : severity, duration and scope. The measures must be connected to the emergency, appear suitable to lessen the problem, and be accompanied by safeguards. Other less drastic alternatives must not be available to the

(34) Mahoney, at 81.
(35) O'Boyle, at 69-73.
(36) *Ibid.*, at 80.
(37) *Ibid.*, at 81.

state (38). In addition, these measures should be used only as long as they are necessary and must be confined to the geographic area which the emergency affects. Although these constraints may appear tough, the margin of appreciation doctrine allows the government a wide scope to choose the measures to deal with the emergency. As the cases show, the Court neither undertakes a strict review nor substitutes its assessment of the most appropriate measures.

Mangan is dissatisfied with this approach. Firstly, an emergency situation is the time when the worst human rights abuses may occur. In his opinion, the ease of derogation and the great degree of deference to the government by the Court offers the potential for abuse (39). Secondly, because of the structure of the Convention system, a measure taken during an emergency is not subject to review at the time, but only after years may have passed. During the review, the state is usually given the benefit of the doubt under the margin of appreciation doctrine. After the lapse of time, the issue has lost its urgency and the parties have probably lost interest (40). This is a serious problem and one which commentators have focused on in reform proposals.

Van Dijk and van Hoof challenge the practice of not examining the efficacy of the measures taken. They state that the Court certainly can decide that the measure does not satisfy the article 15 requirements, and if its inefficacy is shown, the state must alter it. This interpretation accords with the idea of a progressive adaptation of measures based on changes in circumstances (41).

Other scholars have stressed the subsidiary nature of the Court's role. The international machinery of the Convention comprises a system of collective enforcement, but it is necessarily secondary to state machinery. The Court's role is to determine if the state's acts were compatible with the Convention requirements, and in doing so, the judges must balance individual and public interests (42). This usually means that the Court cannot examine the results of the measures undertaken, but only the necessity of the original requirements from the point of view of the government acting at the time of the emergency. This outlook can be criticised for unnecessarily restricting the Court's ambit. The measures could be cursorily examined to see that they were not so inadequate that the results were entirely unrelated to the severity of the emergency.

(38) Brendan Mangan, « Protecting Human Rights in National Emergencies : Shortcomings in the European System and a Proposal for Reform » (1988) 10 Human Rights Quarterly 372 at 376.

(39) *Ibid.*, at 373-375.

(40) *Ibid.*, at 380-381.

(41) Van Dijk and van Hoof, at 554.

(42) Sir Humphrey Waldock, « The Effectiveness of the System Set Up by the European Convention on Human Rights » (1980) 1 Human Rights Law Journal 1 at 5 and 8-9.

On the other hand, it is always easier to say after the fact that a measure was wrong than to judge at the time whether it was appropriate. A large margin of appreciation could be left to the government to make errors because mistakes are bound to occur in an emergency situation. Nevertheless, even a salutary examination of the measures would be better than a complete abdication of responsibility in this area. Given the importance of states' acceptance of the Convention system, the Court must be careful not to attempt to overstep its bounds and is unlikely to try to extend its power of review to the results which the measures achieved.

By the time of the *Brannigan* judgement, the proportionality test for article 15 was sufficiently clear. It involved three grounds : 1) ordinary law had to be insufficient to deal with the emergency ; 2) the measure taken should make abatement of the emergency possible, although its efficacy would not be tested ; and, 3) severe measures were acceptable as long as adequate safeguards were introduced or extrajudicial guarantees were substituted (43). The Court followed these guidelines in analysing *Brannigan*.

Brannigan and McBride v. U.K.

In *Brannigan*, two suspected IRA terrorists were detained, one for six days and the other for four days and six hours. Following the *Brogan* case, the European standard for length of detention is four days.

The U.K. Government argued that it was only possible to get enough evidence to convict suspected terrorists at the end of the detention period. As in previous cases, it also emphasised the fact that judicial review of the detention was not appropriate or possible because this would destroy the confidentiality of witnesses' information.

The applicants argued that the Government measures were not strictly necessary and thus did not comply with article 15. Since they had not been brought promptly before a judge, there had been a violation of article 5. Judicial authority, not merely the Secretary of State's executive authority, was needed for an extension. The derogation was merely a response to the Court's *Brogan* judgement.

The Commission addressed two problems : the length of the detention, and the role of the judiciary and the executive. Although the lengths of detention exceeded the European maximum, they were saved by the derogation under article 15. The Commission seemed to be swayed by the argument that assigning the judiciary the role of extending the detention would undermine trust in the judiciary, which is vital in Northern Ireland. On the question of the necessity of judicial review, the majority agreed that

(43) Chowdhury, at 104.

the state had a wide margin of appreciation and should be allowed to decide whether judicial involvement was necessary or possible. They reasoned that the measures for the prevention of terrorism were temporary, and that adequate safeguards against abuse of the measure existed, including reviews by three commissions and annual reviews by Parliament. Thus, there was no violation.

In separate opinions, some concern was expressed at the lack of judicial review. Mr. Loucaides, joined by Mrs. Thune and Mr. Rozakis, stated that he wanted to see a judicial decision made in this context, not an executive one. He asserted that procedures had been designed to deal with the problem of confidentiality, and there was a need for minimum judicial control. Furthermore, the Government had not proven a need for extended detention without judicial supervision. « In short some judicial control is better than none » (44).

Before the Court, the Government stressed the political nature of the problem. The sensitivity of the information used to detain suspects called for the involvement of the executive and not a judge. Because the accused has to be excluded from the determination of the extension of the detention, this would be viewed as an executive decision rather than a judicial one. It would undermine the independence of the judiciary to involve them in what was essentially a political problem. As a result, the Government argued that a procedure under a Magistrates' Court extension would not be appropriate (45). The Northern Irish judiciary itself was quite small and threatened by attacks from terrorists. It would be an added burden to require judicial review. The Government maintained that it had not exceeded its margin of appreciation, and accused the dissenting Commissioners of ignoring the wide margin of appreciation given to states under these circumstances (46).

Included in the Government's Annexes to the Memorial are the Reports to Parliament by Lord Colville. A couple of his comments are worth repeating. Derogation was an inadvisable option, but « the essential problem is that the adversarial approach of the common law does not enable a consideration of a detention to take place before a judicial tribunal of the type envisaged in the Convention » (47). He then asks if it is now « irresistible that some new tribunal be set up to oversee these powers », for « nothing except a bold and new initiative seems likely to deflect a continuing

(44) Brannigan and McBride v. U.K., Application Nos. 14553/89 and 14554/89, Report of the Commission adopted on 3 December 1991 at 25.

(45) Government Memorial, Brannigan and McBride v. U.K., at 12. The entire procedure before a Magistrates' court is outlined. The detainee must be brought before the court and has the right to be legally represented at the hearing. It is this aspect which threatens the confidentiality of witnesses' information.

(46) *Ibid.*, at 48.

(47) Annexes to the Government's Memorial (A-F), Annex B, at 65, para. 4.4.

divergence of procedures between most of the rest of Europe and ourselves » (48).

Few new points were raised in the Applicants' Memorial. They claimed that the derogation was taken solely to circumvent the results of the *Brogan* case and was not required by the exigencies of the situation. Both sides agreed that more than four days was required for detention of suspected terrorists, but under the circumstances, other judicial measures were possible and could have been instituted by the U.K. The Memorial also emphasised the lack of safeguards against abuse in relation to extended detention decisions (49).

The most interesting comments were found in the submissions of the third party intervenors. The Standing Advisory Commission on Human Rights, an independent advisory body, submitted comments on the procedure. It expressed concern at the continued derogation under article 15. Although agreeing that a public emergency did exist, it stated that « the exigencies of the situation are not sufficient to warrant a failure to have judicial review of extensions to detention » (50). The Commission proposed that the Magistrate's Court or a new tribunal was the proper place to review extensions to detention. This would enhance the role of the courts in Northern Ireland rather than destroy their credibility as the Government maintained.

Amnesty International rejected the idea of a wide margin of appreciation, and disagreed with the rule from *Ireland* v. *U.K.*, asserting that deciding on the applicability of the margin should be case-specific and not subject to a general rule.

> It would seriously undermine the effective international protection of human rights if states are routinely granted a wide margin of appreciation over derogations irrespective of circumstances. International standards indicate that special scrutiny must now be given to essential procedural guarantees during any derogation, particularly when the guarantees are directly linked to the protection of non-derogable rights (51).

Amnesty then referred to the non-derogable rights listed in article 15(2). It submitted that « it would be inconsistent with the absolute character of these rights if derogation were permitted to procedural guarantees that are now generally accepted to be important in protecting detainees' rights under Articles 2 and 3 of the Convention » (52). This approach is interesting because it links procedural guarantees and the security of non-derogable rights ; procedural rights are seen as virtually non-derogable.

(48) *Ibid.*, Annex B, at 108, para. 3.3.
(49) Memorial of the Applicant, at 4, 8, 10, 12 and 17.
(50) Comments submitted by the Standing Advisory Commission on Human Rights, at 3, para. 4.
(51) Comments Submitted by Amnesty International, at 6, para. 14.
(52) *Ibid.*, at 9, para. 19.

Liberty and Interrights marshalled some convincing arguments against the lack of judicial review. They contended that there was no method of effective review of the Secretary of State's actions and no real scrutiny of police actions during detention (53). The intervenors threw doubt on the actual implementation of safeguards such as the right of access to a doctor or the right to tell a friend of one's detention. They also urged the Court to make a thorough review of the existence of an emergency and not to leave it solely to the state through the margin of appreciation doctrine. Reference was made to the Queensland Guidelines approved by the International Law Association, which state that an objective determination should be made on the existence of an emergency and the proportionality of the measures taken, and a wide margin of appreciation should not be extended. Also, as the emergency becomes more permanent, the margin should become narrower. The intervenors contended that the Northern Irish situation had become a semi-permanent, quasi-emergency, and as such was unacceptable (54).

The Judgement

In deciding on the validity of the U.K. derogation, the Court indicated that it would follow *Ireland* v. *U.K.* and give a wide margin to the state. It declared that an emergency existed at the relevant time, basing its decision on its own assessment of the materials placed before it, which demonstrates that the Government had the burden of proving the existence of the emergency, even though this burden was not heavy. The Court deferred to the Government on the question of the reinstitution of the derogation, describing it as « a matter within the discretion of the State » (55).

The issue of the necessity of the measures was then examined. The Court looked closely at the applicants' contention that the derogation was unnecessary, and found that extended detention without judicial control and the 1988 derogation were clearly linked to the continuing emergency ; thus, the derogation was a genuine response.

The applicants had also contended that the derogation was premature because the Government continued to consider options during the initial period of the derogation. The Court disagreed and supported the Commis-

(53) Comments Submitted by Liberty, Interrights and the Committee on the Administration of Justice, at 8-11.

(54) *Ibid.*, at 16-18 and 23-24.

(55) Brannigan and McBride v. U.K., Judgement of 26 May 1993, at 18, para. 47. The Court also said it was clear the Government believed its measures for detention between 1984 and 1988 were compatible with the Convention, so the contention that the U.K. had defied the Court's judgement in Brogan on this point is essentially dismissed.

sion's view that continued reflection on emergency measures was necessary and the derogation could not be invalid merely because the Government was trying to find a review process compatible with the Convention.

The next question was whether the lack of judicial control could be justified. The special difficulties associated with terrorist investigations were noted as well as the problems of disclosing information to the detainee. The importance of public confidence in the independence of the judiciary was underlined. The deferral to the Government was clear :

> 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 (56).

This follows the same dicta as in previous judgements. However, the Court indicated that the Government had not exceeded its margin of appreciation « in the prevailing circumstances ». This phrase could very well indicate a subtle shift in policy or the potential for closer scrutiny by the Court in the future. If conditions change, the Court might find that the need for a derogation no longer exists, and thus the measures are no longer necessary.

The Court found the safeguards satisfactory.

> Although submissions have been made by the applicants and the organisations concerning the absence of effective safeguards, the Court is satisfied that such safeguards do in fact exist and provide an important measure of protection against arbitrary behaviour and incommunicado detention (57).

The Court listed these protections : *habeas corpus*, the right to consult a solicitor subject only to reasonable grounds for delay, the ability to inform family or a friend and have access to a doctor, and regular independent review of the legislation. The efficacy of these protective measures had been seriously questioned in the third party submissions, but their objections were given glancing attention only.

In summing up, the Court concluded that the Government had not exceeded its margin of appreciation in deciding that the measures were strictly required by the exigencies of the situation. Consequently, the derogation was valid and the applicants could not « validly complain of a violation » of article 5(3). Wording may be important here. Obviously, it implies that the U.K. had validly derogated under article 15. Unlike previously, the judgement does not state that there was no violation ; it states that these applicants' complaints were not valid. A subtle difference, but

(56) *Ibid.*, at 22, para. 59.
(57) *Ibid.*, at 23, para. 62.

the door remains open to future complaints which may be valid, especially if there is a change in circumstances.

Although the third party submissions were referred to occasionally, the Court tended to make little use of them. This was unfortunate because these materials were very informative and thought-provoking, especially on the issues of the adequacy of the safeguards and the possibility of using a form of judicial review. Given the lack of third party interventions to this point in the Court's history, perhaps it is understandable that little use should be made of their submissions, but surely this will change in the future. The Court, after all, has control over who can make submissions, and so it can be selective.

Brannigan may be seen as a missed opportunity for the Court to clarify its position on the article 15 requirements. It appears that the state has a wide margin to decide on the existence of an emergency, subject to little review. Perhaps if an entirely new type of crisis arose, or the situation in Northern Ireland changed over time, the Court would feel more inclined to examine closely the existence of an emergency and the strict necessity of the measures. No hint of a wide margin was maintained in the case of the necessity of the measures. The criteria are the nature of the threat, the scope of the derogation, the reasons supporting it, and the existence of safeguards. Each of these criteria must be supported by the Government. Some critics might argue that the review still is not strict enough, because the standard of proof favours the Government. However, the direction of the Court is encouraging for those who worry about the lack of supervision by the Convention organs, and it is a change from the judgement in *Ireland* v. *U.K.*, which involved persons imprisoned for years with no right to appear before a judge. Obviously, the Court is worried about the continuation of a semi permanent emergency situation.

The judgement in this case also seems to follow logically the decisions in the more recent IRA cases, where the importance of the procedural rights in article 5 were emphasised. Where these fundamental rights are affected, the Court is more likely to undertake a more detailed review, and derogation will be required to deviate from the European norm in such cases.

Separate and Dissenting Opinions

The number of separate and dissenting opinions indicates that there is some difference of opinion in the Court, and probably many of the majority harbour some doubts about the judgement. I will only examine a few of these separate opinions.

Judge Walsh raised some interesting points in his dissenting opinion. He states that the real purpose of the arrest is to interrogate the person in the

hope that he will incriminate himself. The Convention bars such arrests. Furthermore, the grounds relied on for the derogation are the same as for other more common criminal acts which also rely on informants. For Walsh, failure to observe article 5 procedural guarantees could also lead to a violation of non-derogable article 3 rights. He feels that it is the judge's natural role to be involved in determinations affecting individual liberty, and thinks the Government should have found an alternate procedure. « It is the function of national authorities so to arrange their affairs as not to clash with the requirements of the Convention. The Convention is not to be remoulded to assume the shape of national procedures » (58). He also charges the Court with overlooking the evidence that suggests safeguards are illusory.

Judge Martens concurred with the result. However, he mentioned that he had been affected by the arguments presented by Amnesty and the other intervenors regarding risk of abuses during extended detention. He urged the U.K. Government to find an alternative which introduced judicial review, and underlined the inadequacy of referring to a 15 year old precedent (*Ireland* v. *U.K.*). The situation has changed since 1978, especially with the accession of east European states to the Council of Europe ; the member states are no longer a homogeneous group with a long tradition of democracy. The former view of the margin doctrine is also out of step with international guidelines, such as the Queensland Guidelines. On the question of the existence of the emergency, there is « no justification for leaving them a *wide* margin of appreciation because the Court, being the 'last-resort' protector of the fundamental rights and freedoms guaranteed under the Convention, is called upon to strictly scrutinise every derogation by a High Contracting Party from its obligations » (59). Furthermore, the Court must closely scrutinise whether the derogation is strictly required, and, « there is... certainly no room for a *wide* margin of appreciation » (60).

Martens proposes a wider margin for the state when deciding an emergency, and a narrow margin when deciding on the strict necessity of the measures taken. On this basis, he finds no violation by the U.K. He seemed swayed by the fact that the U.K. is one of the world's oldest democracies with great respect for human rights, by the persistence of the terrorist activity, and by the limited period of the powers allowed by the U.K. legislature.

Judge Makarczyk echoes some of the concerns of Martens. Because derogations affect the entire Convention system, they must be dealt with extremely carefully. He is worried about sending a wrong signal to new and potential member states in eastern Europe. He wanted the judgement to

(58) *Ibid.*, at 36.
(59) *Ibid.*, at 41, para. 4.
(60) *Ibid.*, at 41, para. 4.

set a precise time-limit on the length of the derogation and indicate that it is only a temporary measure. Lastly, Makarczyk criticises the Government for not showing that extended detention helps to combat terrorism. Instead its reasons centred on the effect on the judiciary. He ends by encouraging the Government to try to find a means of judicial control (61). It seems he would prefer a narrow margin on all questions relating to derogations.

Some of the questions raised in *Brannigan* are important for the future of the Convention system. Can article 5 rights realistically be guaranteed in the Northern Irish situation ? Should there be a time limit on the derogation ? Should the derogating government be required to report to the Convention organs ? What role should third party intervenors play, and what weight should be given to their submissions ?

Future Challenges

The Political Context

The Council of Europe is expanding to include the states of central and eastern Europe, which have different historical and political experiences than those of western Europe. Their experience with democracy is far shorter and not as entrenched. As well, the Council is in the process of restructuring its organs. Both of these factors will affect the future application of the Convention rights.

All in all, there should be few serious problems with a revision in the structure of the Convention organs. Although reform measures are not definite, it appears as though there will be one institution with several chambers. Important cases might be heard before a larger chamber to reflect their importance to the system's case law. No real appeal mechanism is likely to exist. If the margin doctrine in relation to article 15 is not clear, variations in interpretation could occur. In this sense, *Brannigan* was a missed opportunity for the Court to specify some criteria for the application of article 15.

As indicated in the separate opinions in *Brannigan*, there is some cause for concern with the entry of east European states to the system. Has the Court provided good guidance for the future ? By allowing a wide margin of appreciation to the government, new members may believe that it is the state's right to decide when an emergency exists and what measures are to be taken, and the Court merely reviews them to ensure that the actions are reasonable. If the Court meant to indicate in *Brannigan* that the margin is narrowing on the question of the strict necessity of the measures, then

(61) *Ibid.*, at 42-43, paras. 1-3.

it was sending the signal that a government will have to justify its actions, especially when it infringes such fundamental rights as the right to liberty in article 5, and the Court will apply a strict standard of review. However, the possibility of abuse still lingers.

Some scholars have urged the Convention organs to avoid the temptation to dilute standards as a response to the situation in east European countries. It is better to maintain a single standard which these countries seem to want to strive for anyway (62). These authors also point out that the Convention may need to adapt. Minority problems figure greatly in virtually all east European states. These problems can produce violent reactions and the possibility of human rights violations is all too real. The example of the former Yugoslavia is regretfully pertinent in this context.

Problems Associated with Article 15 and the Margin

What is it ? Although much has been said and written about the margin, its meaning is still obscure. The actual wording is also obscure. Does it mean that the judges think governments, because of their knowledge of the facts or because of their political legitimacy, are better placed than they to make hard decisions during a public emergency ? Or does it mean that the Court has the power to review measures taken under a derogation but it defers to governments for reasons of political expediency ? Is it a mixture of these two views ? If there really is a need for close scrutiny of government decisions, then when will this occur ? If deference is required, the Court should explain why in each case and not merely apply the margin of appreciation as an excuse. I think that different strands of thought weave their way throughout the opinions and judgements of the Commission and the Court. The vagueness of the concept of the margin of appreciation in article 15 cases is a real problem. At the moment, general principles are urgently needed.

Can discrimination be allowed under article 15 ? Some authors have asserted that, in the *Ireland* v. *U.K.* case, there was discrimination in the application of the emergency powers by the U.K. (63). In their opinion, the internal disturbances were inexorably linked to the denial of human rights by the Government over a period of years. Consequently, no margin of appreciation should be allowed. The judges, however, felt that there were

(62) Rolv RYSSDAL, « The Expanding Role of the European Court of Human Rights », in Asbjorn EIDE and Jan HELGESEN (eds.), *The Future of Human Rights Protection in a Changing World* (Oslo : Norwegian University Press, 1991) at 119. See also Jan E. HELGESEN, « The Road to the New Europe of Human Rights : From Helsinki via Paris — or From Where via Where ? » in the same book at 139-140. For arguments in favour of deferred compliance, see Zdzislaw KEDZIA, Anna KORULA and Manfred NOWAK (eds.), *Perspectives of an All-European System of Human Rights Protection* Vol. I (Kehl : N.P. Engel, Publisher, 1991) at 26-27 and 47-51.

(63) CHOWDHURY, at 119-120 and 125-127. See also O'BOYLE, at 96-97.

justifiable reasons for the Government's policy decision to tackle the bigger problem of IRA violence before turning its attention to Loyalist violence. Eventually, the Loyalists were interned as well.

I think that the Court bowed to political expediency in this case, recognising the difficulties in dealing with the IRA and that a finding of discrimination would cause the U.K. to lose respect for and confidence in the Court. Unfortunately, this justification could result in a similar finding in virtually any case involving article 15 or terrorism. If too much latitude is given, serious instances of discrimination could be condoned. As the Council opens to the east, a clear anti-discrimination policy must be enunciated to forestall any detrimental actions.

Are emergency measures acceptable during a severe economic crisis ? It is conceivable that this situation could arise in certain east European countries. Because there is no case law, there are few clues as to how the Convention organs would respond. If a government thought that the situation was actually an emergency, the Court would likely allow a wide margin of appreciation. Nevertheless, on the question of measures, the Court would likely apply a higher standard of review because this type of emergency differs qualitatively from a period of violence or war. The government would have to offer well-supported reasons for its actions and for the need to suspend the application of certain rights.

Another question which springs to mind is the reaction of the Court to a non-democratic government taking control and imposing emergency measures. The Court has never faced this problem. As the margin doctrine is now constructed, the Court would allow the state to decide when a state of emergency existed without subjecting it to much scrutiny or requiring a high standard of justification. If this approach was strictly applied, a government could be virtually free to declare a state of emergency. If the Greek case is followed, this will not happen. Otherwise, the Court must decide what content to give its review at the second stage on the determination of necessity. A government could be allowed a wide margin to declare the emergency and then have its actions scrutinised minutely. However, when democracy is threatened, it would be better to deny the validity of the emergency, especially where the non-democratic government has caused much of the emergency itself.

I have already mentioned the issue of allowing derogations where appropriate safeguards exist. A government may claim that it has implemented safeguards such as annual policy reviews in order to justify the lack of judicial review of detention. Given that the Court has stated that it is the government's choice of policies which should be respected and not the Court's ideas of appropriate measures which should be implemented, the Court may find it difficult to criticise a state which has provided for safeguards. In *Ireland* v. *U.K.*, the Court said that no exhaustive list

of appropriate safeguards had been made and they should not necessarily be the same in all cases. Review by a judicial authority can be viewed as a minimum safeguard. Without it, a strict review of the replacement safeguards should be done (64).

Should there be a time limit on the article 15 derogation ? As it stands now, derogations can last for years, although they generally are reviewed on an annual basis and often require reenactment after a fixed period of time. Requiring a fixed time limit would provide greater certainty for citizens about the length of time during which the level of protection for their Convention rights would be reduced or suspended. It would also force the government to review the measures at specified intervals and indicate that the problem is temporary. The drawbacks of fixing a limit are that it is virtually impossible to know how long an emergency will last and it removes some power from states to make that assessment for themselves. International standards could be used to establish a reasonable amount of time for a derogation, after which a review would be required before a renewal could occur (65).

Should the derogating government be required to report to the Council of Europe ? Presently, the government is required to notify the Secretary General of the Council of a derogation, and then to report when the Convention rights are fully guaranteed again. Perhaps annual notification by the government to the Council could be required, but, politically speaking, it might be asking too much to require governments to report on the implementation of the emergency measures.

Third party intervention occurs often in common law countries. However, the Court has little experience with such practice. Many well-respected human rights groups in Europe employ international experts ; they can make a valuable contribution. The greater burden imposed on the Court is not a good reason for opposing greater involvement by intervenors, especially since the Court maintains control over the number and identity of such intervenors. Given their reputation, their submissions should also be accorded a proper amount of weight in the final determination of the merits. Too little credit was given to the intervenors in *Brannigan.*

Judicial Review in Northern Ireland

The Court still has not cleared up the issue of the temporary nature of the emergency provisions. These have been applied in Northern Ireland to varying degrees over a period of decades. Is this still an emergency ? A crisis still exists in the region, and recent evidence shows a spread of terror

(64) CHOWDHURY, at 183-185.

(65) *Ibid.*, at 11. A public emergency would be assigned a fixed term, thus limiting the time period of a derogation.

to England (66). Chowdhury sheds some light on the question of the time limits of an emergency.

> The essence of the concept of emergency (with a right to take derogation measures) is its provisional or temporary status ; it therefore follows that it should be terminated as soon as the circumstances which brought it into existence are reasonably controlled or no longer exist ; or where the emergency situation (even if it exists) can be controlled by the normal powers under the Covenant, for example, the termination of the state of emergency in Northern Ireland by the United Kingdom on 22 August 1984 (67).

Clearly the reasons which brought the Northern Ireland crisis into existence still exist. However, if the problems can be controlled in accordance with conventional norms, the derogation should end.

Can article 5 rights realistically be guaranteed in the Northern Irish situation ? The U.K. Government has continually emphasised that a procedure incorporating judicial review after four days detention is not possible in Northern Ireland. The Government's case appears a bit weak. Procedures which protect secrecy already exist in Scotland and the Channel Islands, territories with a civil law heritage. In Scotland, it is the Procurator Fiscal which has inquisitorial powers. Procedures such as a *juge d'instruction* in the French system allow for judicial review. But in the common law, nothing similar exists. Judges do not have inquisitorial powers, and it would be quite a change to allow them to make such determinations. The Government makes a case for protecting the trust of the populace in the judiciary in Northern Ireland. If they are trusted, they should be granted the power to make a judicial decision, based on criteria specified in legislation, which would arguably be viewed with greater respect than an executive one. The chances of confusing this determination with an executive act are unlikely. The number of cases would not unreasonably overburden the small Northern Irish judiciary. The cost of implementing such a measure should not be unreasonably high : no new institution would need to be created because the existing courts and judges could be used. By emphasising the uniqueness of this procedure, the entire common law system would not be undermined. Appropriate safeguards could be implemented to protect witnesses. For example, identities need not be revealed in affidavit evidence. The seriousness of this breach of the adversarial system is perhaps overestimated by the U.K. Government. If the time period were greater, or the right were infringed on a wider scale, then this breach would be a problem. I would argue that the public would

(66) The IRA bombing in May, 1993, destroyed a large block of offices in downtown London. Several other bombings occurred in the spring and summer of 1993. These actions may have reflected frustration with the failure of talks on the future of Northern Ireland between the U.K., Ireland and Northern Ireland. Events in 1994 may indicate some hope for the amelioration of this problem.

(67) CHOWDHURY, at 45.

accept the protection of witnesses as a reasonable grounds for the limitation of the rights of the accused. The procedure would have to be subject to regular review in order to verify its continued necessity. Thus, many reasons can be put forward to justify the feasibility of judicial review in the Northern Irish context.

Alternatives to the Margin

The discussion about the possibility of having a procedure compatible with article 5 in Northern Ireland leads naturally into a discussion of alternatives to the present margin doctrine as applied to article 15.

Ergec discussed some alternatives in his thesis. One suggestion was to make a derogation subject to a two-thirds majority vote of all states parties. However, the procedure would be too political, and few states are willing to censure another state. He rejects the idea of using the advisory opinion process to decide on the derogation's compatibility. Ergec seems to think this procedure would compromise the freedom of the Court, perhaps by binding it later on. Thus, post facto controls are preferable.

Another proposal Ergec considers is leaving the decision in the hands of the Committee of Ministers. A two-thirds vote there would be needed to approve a derogation. Without two-thirds, a three member commission would be appointed to submit a report to the Committee. After a reappraisal, if there still was not two-thirds, article 24 could be used. He rejects this approach as well because it replaces judicial control with political control. The Committee is less well-known and has a lower stature than the other organs. If such powers were to be given, he would prefer they rested with the Parliamentary Assembly, a democratic and representative institution. Another option would give an increased role to the Secretary General (68). Regardless of the choice, I think it would remain too political. The Assembly does not have a high stature either, and the Secretary General is very busy and lacks experience in this area.

Mangan has proposed a protocol providing an advisory opinion procedure for a state considering a derogation. The Commission would create a three member panel to review the proposed derogation and submit an opinion within two months. The proceedings would be confidential. The state would have the choice of referring to the opinion at subsequent Commission and Court proceedings ; under no circumstances could the Commission or the Court refer to it without the state's approval. The opinion would state the proposed derogation's compatibility with article 15 and specify the least intrusive means of derogating as well as safeguards against

(68) ERGEC, at 382-387. He spends only a few pages discussing these alternatives, but they are nonetheless interesting. For more details, please refer to his work.

abuse (69). This proposal is intriguing. It would address the problem of unsatisfactory review of derogations on a post facto basis and would have the added feature of confidentiality for the state. The idea of a three member panel fits with proposals for restructuring of the Commission and the Court. Another benefit would be that a state would know quickly if its measure breached the Convention, alterations could be proposed, and then changes could occur, resulting in compatibility. However, if a state did not refer to the panel report later, a presumption may be held against it as to the measure's compatibility with the Convention. Thus, states might still view this procedure as an infringement of sovereignty, even though they are not bound to take the advice. In addition, a heavy burden of fact-finding could be placed on the government, although it would probably do this anyway. The proposed procedure sounds desirable, but states could be dissatisfied with it.

Procedural Rights as Non-Derogable Rights

In her report on emergency situations, Nicole Questiaux urges that « the list of *rights of absolute inalienability* should be extended by reference to the instrument which specifically confers the most liberal guarantees » (70), while the limits on rights which are subject to limitations should not fall below a certain minimum threshold. The debate has focused on protecting procedural rights associated with other non-derogable rights, and the right to non discrimination. Articles 5, 6 and 14 fall into this category. If this approach was accepted, then no derogation from these articles would be allowed. I agree that there clearly is a link between the violation of procedural rights and the possible violation of nonderogable rights such as freedom from torture and the right to life. If detention can be extended for long periods without judicial review, the chance of torture by unaccountable authorities increases. Also, review by a judicial authority has been proposed as a minimum safeguard in the Paris Minimum Standards (71).

There is some authority for the extension of non-derogability to procedural safeguards. Article 27(2) of the American Convention specifically guarantees the right to due process as a non-derogable right (72). The Inter-American Court of Human Rights has addressed the issue of non-derogability in two advisory opinions. These opinions, entitled « Judicial

(69) MANGAN, at 388-394.

(70) QUESTIAUX, at 45. Other recommendations are made concerning rights to a fair trial and the period of imprisonment, which she states should be a short period.

(71) CHOWDHURY, at 185. See also ERGEC, at 293-294.

(72) Jaime ORAA, *Human Rights in States of Emergency in International Law* (Oxford : Clarendon Press, 1992) at 112.

Guarantees in States of Emergency », were released on 30 January and 6 October 1987. The Court stated that

> the concept of due process of law expressed in Article 8 of the Convention should be understood as applicable, *in the main*, to all the judicial guarantees referred to in the American Convention, even during a suspension governed by Article 27 of the Convention (73).

It is important to protect these procedural guarantees in order to preserve the rule of law during an emergency. It could be argued that procedural guarantees are more important in the Latin American context than they are in Europe because of the abuses which have occurred in the past (74). Judicial restraint has been the norm. Nevertheless, the Court emphasised that in general these procedural rights are important human rights. They are « inherent in representative democracy as a form of government » (75).

The procedural rights which are non-derogable clearly include the right to a judicial hearing ; they imply « the active involvement of an independent and impartial judicial body having the power to pass on the lawfulness of measures adopted in a state of emergency » (76). This involvement requires that the guarantees are effective and not just formally recognised.

The Court has not had any contentious cases dealing with this aspect of article 27 so it is difficult to know how these advisory opinions would be applied in a real emergency situation, or what their practical influence will be (77).

The mere fact that such strong protection has been accorded to procedural rights is a persuasive argument in favour of their protection in other jurisdictions. Given that the Paris Minimum Standards and the Moscow Document of 1991 have recommended that the legal guarantees necessary to uphold the rule of law should remain in force during a public emergency, there is significant authority to support making procedural rights non-derogable, especially when they are associated with other non-derogable rights.

Conclusion — The Challenge

A clearly enunciated approach to article 15 derogations and the margin of appreciation is needed. Replacing the present wide margin with a com-

(73) Thomas Buergenthal, Robert Norris and Dinah Shelton, *Protecting Human Rights in the Americas Selected Problems* 3rd ed. (Kehl : N.P. Engel, Publisher, 1990) at 358.

(74) Oraa, at 112.

(75) Buergenthal, Norris and Shelton, at 360.

(76) *Ibid.* at 356.

(77) Joan Fitzpatrick, *Human Rights in Crisis* Vol. 19 (Philadelphia : University of Pennsylvania Press, 1994) at 193.

pletely narrow margin could lead to a loss of respect for the Convention organs by states. A vague construction of a wide margin will not suffice. While *Brannigan* does not totally fill the requirements, it indicates a step in the right direction. To allow states flexibility in a crisis situation, the margin of appreciation can be left wide on the determination of the existence of an emergency. When determining whether the measures are strictly required by the exigencies of the situation, the Court must allow a narrower margin to the state. These measures directly affect the rights guaranteed under the Convention, and must be carefully scrutinised. For article 5 cases, when determining proportionality, the Court must be careful not to place too much emphasis on the provision of alternate safeguards ; these are not always a good replacement for judicial control. If less drastic measures were available, the Court should examine the feasibility of implementing these under the emergency situation. Although the government has the right to choose its measures, the Court has the responsibility to review them, and can indicate dissatisfaction with the chosen measures. This approach would give real content to the idea of European supervision of derogations made under article 15. The need for certainty is obvious. An unclear interpretation of the margin doctrine in this area will not serve the Convention organs well in the future.

BIBLIOGRAPHY

Books and Articles

Thomas BUERGENTHAL, Robert NORRIS and Dinah SHELTON, *Protecting Human Rights in the Americas Selected Problems*, 3rd ed. (Kehl : N.P. ENGEL, Publisher, 1990).

S.R. CHOWDHURY, *Rule of Law in a State of Emergency : The Paris Minimum Standards of Human Rights Norms in a State of Emergency* (London : Pinter, 1989).

Asbjorn EIDE and Jan HELGESEN (eds.), *The Future of Human Rights Protection in a Changing World* (Oslo : Norwegian University Press, 1991).

Rusen ERGEC, *Les droits de l'homme a l'épreuve des circonstances exceptionelles* (Bruxelles : Editions Bruylant, 1987).

P. EVANS and E. DUBOST, *Derogations Under Article 15 ECHR*, 1992.

Joan FITZPATRICK, Human Rights in Crisis Vol. 19 (Philadelphia : University of Pennsylvania Press, 1994).

Paul HUNT and Brice DICKSON, « Northern Ireland's Emergency Laws and International Human Rights » (1993) 11 *Netherlands Quarterly of Human Rights* 173.

INTERNATIONAL LAW ASSOCIATION, *Report of the 61st Conference Held at Paris (August 26 - September 1, 1984)* (London : 1985).

Zdzislaw KEDZIA, Anna KORULA and Manfred NOWAK (eds.), *Perspectives of an All-European System of Human Rights Protection* (Kehl : N.P. ENGEL, Publisher, 1991). Published as Volume 1 of *All-European Human Rights Yearbook*, KEDZIA, LEUPRECHT and NOWAK (eds.).

Richard B. LILLICH and Frank C. NEWMAN, *International Human Rights : Problems of Law and Policy* (Boston : Little Brown and Company, 1979).

Brendan MANGAN, « Protecting Human Rights in National Emergencies : Shortcomings in the European System and a Proposal for Reform » (1988) 10 *Human Rights quarterly* 372.

E.T. MCGOVERN, « Internment and Detention Without Trial in the Light of the European Convention on Human Rights » in J.W. BRIDGE et al., *Fundamental Rights* (London : Sweet and Maxwell, 1973) at 222.

Theodor MERON, *Human Rights and Humanitarian Norms as Customary Law* (Oxford : Clarendon Press, 1989).

P. NASKOU-PERRAKIS, *L'article 15 de la Convention europeenne des droits de l'homme : approche theorique et jurisprudencielle*, 1987.

Michael O'BOYLE, « Emergency Situations and the Protection of Human Rights : A Model of Derogation Provision for the Northern Ireland Bill of Rights » (1977) 28 *Northern Ireland Legal quarterly*.

Michael O'BOYLE, « *Inter arma leges silent* ? Emergency Government and European Human Rights Law : A Case Study of Northern Ireland », 1975.

Michael O'BOYLE, « Torture and Emergency Powers Under the European Convention on Human Rights : *Ireland* v. *U.K.* » (1977) 71 *American Journal of International Law*.

Jaime ORAA, *HumanRights in States of Emergency in International Law* (Oxford : Clarendon Press, 1992).

Joao DE DEUS PINHEIRO FARINHA, « L'article 15 de la Convention » in Franz MATSCHER and Herbert PETZOLD (eds.), *Protecting Human Rights : The European Dimension* (Koln : Carl Heymans Verlag KG, 1988) at 521.

Nicole QUESTIAUX, « La Convention europeenne des droits de l'homme et l'article 16 de la Constitution du 4 octobre 1958 (article 15 de la Convention) » (1970) 3 *Revue des droits de l'homme* 477.

Allan ROSAS, « Emergency Regimes : A Comparison » in Donna GOMIEN (ed.), *Broadening the Frontiers of Human Rights* (Oslo : Scandinavian University Press, 1993) at 165.

Daphna SHRAGA, « Human Rights in Emergency Situations under the European Convention on Human Rights » (1986) 16 *Israel Yearbook on Human Rights* 217.

States of Emergency : Their Impact on Human Rights (Geneva : International Commission of Jurists, 1983).

Stephanos STAVROS, « The Right to a Fair Trial in Emergency Situations » (1992) 41 *International and Comparative Law quarterly* 343.

Wolfgang STRASSER, « The Relationship Between Substantive Rights and Procedural Rights Guaranteed by the European Convention on Human Rights » in Franz MATSCHER and Herbert PETZOLD (eds.), *Protecting Human Rights : The European Dimension* (Koln : Carl Heymans Verlag KG, 1988) at 595.

Antonio TANCA, « Human Rights, Terrorism and Police Custody : The Brogan Case » (1990) 1 *European Journal of International Law* 269.

P. VAN DIJK and G.J.H. VAN HOOF, *Theory and Practice of the European Convention on Human Rights* (2nd ed) (Deventer : Kluwer Law and Tax Publishers, 1990).

Fried VAN HOOF, « The Future of the European Convention on Human Rights : Judge Martens' Position on questions of Construction : A Dissenting Opinion » (1989) 7 *Netherlands quarterly of Human Rights* 451.

Jacques VELU, « Le Controle des Organes Prévus par la Convention Européenne des Droits de L'homme sur le But, le Motif et L'objet des Mésures d'Exception Dérogeant a Cette Convention » in *Mélanges Offerts à Henri Rolin* (Paris : Pedone, 1964) at 462.

Jacques VELU, « Le Droit pour les États de Déroger à la Convention de Sauvegarde des Droits de L'homme et des Libertés Fondamentales en cas de Guerre ou d'autre Danger Public Menaçant la Vie de la Nation » in *4eme Colloque du Departement des Droits de L'homme* at 71.

Sir Humphrey WALDOCK, « The Effectiveness of the System Set Up by the European Convention on Human Rights » (1980) 1 *Human Rights Law Journal* 1.

Cases

Greece v. U.K., 1956 Commission.

Lawless v. Ireland, 1961.

The Greek Case, 1969 Commission.

Ireland v. U.K., 1978.

McVeigh, O'Neill and Evans v. U.K., 1981 Commission.

Denmark, France, The Netherlands, Norway and Sweden v. Turkey, 1985 Commission.

Brogan, Coyle, McFadden and Tracey v. U.K., 1988.

Fox, Campbell and Hartley v. U.K., 1990.

Brannigan v. U.K., 1993 (including all the background materials for the case).