



Title	<u>Constitutions under Stress: states of emergency and militant democracy</u>
Lecturer(s): Contact email address:	Mariam Begadze Begadze.Mariam@phd.ceu.edu
Brief description	<p>Constitutions are not suicide pacts. Temporary exceptions from the normalcy of the constitutional order are accepted through the state of emergency regimes and militant democracy measures. These exceptions are unevenly present. Whereas the US Constitution only permits suspension of habeas corpus in cases of rebellion or invasion; the French Constitution equips the President with the virtually unlimited power under the state of emergency. The culture of using states of emergency also differs. While the constitutional state of emergency was invoked only once in France in 1961, it has been more common in democracies of Latin America, Turkey and Israel, to name a few. In response to fears that emergencies can be manufactured, needlessly prolonged and/or abused, independent apex courts have developed review powers over the declaration and scope of emergency powers. In the age of growing illiberalism, even the non-political crisis such as the COVID-19 pandemic has become politicized. Meanwhile, emergency logic has penetrated into the constitutional normalcy. Emergency measures have normalized most prominently in the post-9/11 anti-terrorism context. A similar trajectory of normalization and abuse is to be observed with the exceptional regime</p>

	<p>of militant democracy naturally more familiar to post-authoritarian states such as Germany.</p> <p>The course will study these dilemmas of constitutionalism – <i>de jure</i> and <i>de facto</i> states of emergency and militant democracy - through state practice and relevant court decisions. Both political and legal solutions made under such stressful situations will be analyzed in light of their short- and long-term consequences.</p> <p>Learning outcomes</p> <p>By the end of the course students will be able to analyze:</p> <ul style="list-style-type: none"> • Inherent limitations of the constitutional order when faced with crisis. • Abuses of <i>de jure</i> or <i>de facto</i> states of emergency. • Normalization of extraordinary measures. • Precommitments aimed at counterbalancing the risks of abuse. • Emerging judicial standards on states of emergency and other extraordinary measures. • Judicial (in)capacity to counteract normalization of extraordinary measures. • Concept of Militant Democracy, its strengths and weaknesses, such as risks of its abuse by autocrats.
<p>Schedule</p>	<p>Class 1. Emergencies as Exceptions</p> <ul style="list-style-type: none"> • Dorsen (2022) Comparative Constitutionalism: Cases and Materials, 1541 – 1549. • Sajó, András, and Renáta Uitz, 'Constitutions Under Stress', <i>The Constitution of Freedom: An</i>

Introduction to Legal Constitutionalism (Oxford 2017), 1-9, 14- 15 [from PDF].

- Tom Ginsburg, Mila Versteeg, The bound executive: Emergency powers during the pandemic, 2021 [excerpt], 1506--1509

Class 2. Abuse of Emergencies

- Tom Ginsburg, Mila Versteeg, The bound executive: Emergency powers during the pandemic, [excerpt], pp. 1531 - 1533
- Kovács, Kriszta: Hungary's Orbánistan: A Complete Arsenal of Emergency Powers, VerfBlog, 2020/4/06
- Karsai, How the Hungarian Government misuses its power in their political fight against opposition-led municipalities
- Alparslan Altan v. Turkey [excerpt]

Class 3. State of Emergency Jurisprudence: Deference

- Sajó, András, and Renáta Uitz, 'Constitutions Under Stress', *The Constitution of Freedom: An Introduction to Legal Constitutionalism* (Oxford 2017), 1-9, 14- 15 [from PDF].
- Dorsen (2022) *Comparative Constitutionalism: Cases and Materials*, 1556 – 1565.
 - Ex Parte Milligan [SCOTUS]
 - Liversidge v Anderson [UK House of Lords]
 - Lawless v. Ireland [ECtHR]

Class 4. Emergency Jurisprudence:

- Sajó, András, and Renáta Uitz, 'Constitutions Under Stress', *The Constitution of Freedom: An Introduction to Legal Constitutionalism* (Oxford 2017), 12 -13, 16- 22 [from PDF].

- Dorsen (2022) Comparative Constitutionalism: Cases and Materials, 1566 – 1569
 - S. R. Bommai v. Union of India [Indian Supreme Court]

Class 5. Non-political Emergencies

- Tom Ginsburg, Mila Versteeg, The bound executive: Emergency powers during the pandemic, [excerpt], pp. 1499-1502, 1509 – 1513, 1518 – 1531, 1533- 1535.
- From Dorsen (2022) Comparative Constitutionalism: Cases and Materials, 1626 – 1633
 - Law Society of Kenya v. Mutyambai [High Court of Kenya]
 - Vavricka v. Czech Republic [ECtHR]
 - Roman Catholic Diocese of Brooklyn v. Cuomo

1st Mandatory Assignment:

Choose a jurisdiction from CoE member states and critically assess at least one improper uses of the states of emergency with reference to the [Venice Commission standards](#) and/or [Siracusa Principles](#) [pp 4-10]. **3-5 pages double-spaced**

Class 6. Targetted Killings

- McCann and Others v. the United Kingdom
- Drone Killing Withstands challenge <https://www.scotusblog.com/2014/04/drone-killing-policy-withstands-challenge-2/> (Al-Aulaqi v. Panetta) [7]

- From Dorsen (2022) Comparative Constitutionalism: Cases and Materials, 1621-1625

- PAC v. Israel

Group Presentation I on Carter v. Russia, 20914/07, 2021 [ECtHR]

Class 7. Emergencies/Ticking bomb situations and Torture

- Gäfgen v. Germany ECtHR GC [summary]
- From Dorsen (2022) Comparative Constitutionalism: Cases and Materials, 1573 – 1582.

- Ireland v. United Kingdom

- Public Committee Against Torture v. State of Israel

- Aydin v. Turkey

- Nasr v. Italy

Class 8. Combatting Terrorism

- From Dorsen (2022) Comparative Constitutionalism: Cases and Materials, 1584 – 1610

- Beit Sourik

- Hamdi v. Rumsfeld [cf Boumediene v. Bush]

- A(BC) v. Secretary of State 2004

- Aviation Security Case 2006

Group Pr. II: Present both majority and dissenting opinion in *Boumediene v. Bush*

Class 9: Combatting Terrorism continued

- *A. and Others v. the United Kingdom [GC] [summary]*
- From Dorsen (2022) Comparative Constitutionalism: Cases and Materials, 1612 - 1615

- Ibrahim v. UK

➤ *Othman (Abu Qatada) v. the United Kingdom* 2012

Group III: present *Kadi v. Council and Commission, Joined Cases* ([322], [323]).

Class 10. Mass Surveillance and Stop and Searches

- Sajo, Uitz – 29 - 34
- Gillan and Quinton v. the United Kingdom [summary]
- From Dorsen (2022) *Comparative Constitutionalism: Cases and Materials*, 1615 – 1621

➤ Szabó and Vissy v. Hungary

Group IV: present *Zakharov v. Russia* ECtHR, standards and their application to facts.

Class 11. Militant Democracy

- Sajó, András, and Renáta Uitz, 'Constitutions Under Stress', *The Constitution of Freedom: An Introduction to Legal Constitutionalism* (Oxford 2017), 1-9,
- From Dorsen (2022) *Comparative Constitutionalism: Cases and Materials* – 1549-1552, 1565-1566
 - United Communist Party of Turkey
- Militant Constitutionalism – 195-203

Class 12: Transnational Militant Democracy

- Carlo Invernizzi Accetti and Ian Zuckerman, *What's Wrong with Militant Democracy?* [190-195]
- Ulrich Wagrandl, *Transnational militant democracy*, 165 - 172

Group V: Present court decision on Art. 18 in *SELAHATTİN DEMİRTAŞ v. TURKEY* (No. 2)

Final Assignment: Identify and critically assess (either defend or reject) measures of militant democracy on the basis of specific examples. As you identify them, substantiate why a specific state action qualifies as a

	militant democracy measures. As you defend or reject the militant democracy measures, give examples of its effectiveness in defense of democracy or its abuse for purposes other than such defense (5-10 pages).
Materials/Recommended readings	
Assessment/Exam	There are 2 written assignments (70%) for this course. 1 mini essay (3-5 pages) is assigned 30% and the Final paper takes up 40% of the grade. 30% of the grade will be formed based on group presentation and in-class participation. .