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1. Summary

This contribution argues that first, it was correct not to derogate from the European Convention on Human Rights (ECHR) as Article 15 of the Convention is a right and not an obligation of the UK and such derogation would not change the scope of human rights obligations significantly.

Second, the government needs to constantly review its actions regarding the fulfilment of positive and procedural obligations of non-derogable rights such investigation of death, provision of personal protective equipment and measures available in closed institutions such as mental hospitals, prisons etc.

Third, the government should only restrict the rights under Article 5 and 6 to the extent that can be justified by the circumstances of pandemic. More extensive interference will lead to violations.

Forth, the government needs to review the measures adopted in the fight against the pandemic from the perspective of their proportionality to the aim pursued.

Fifth, it is recommended that the government set an independent quasi-judicial committee that would review the proportionality of the measures.

This short report is based on the following article: Kanstantsin Dzehtsiarou, Article 15 Derogations: Are They Really Necessary during the COVID-19 Pandemic? *European Human Rights Law Review* (2020) (forthcoming).

1. Impact of the COVID-19 Pandemic on Human Rights

The following sections observe how the situation of emergency influences human rights and the Court's approach to human rights protection in times of emergency. It shows that the government was correct in not invoking Article 15 as it does not make a sufficient difference in the scope of allowed measures the pandemic. It also shows that the measures need to be strictly proportionate and adequate to the exigencies of the situation.

2.1 Non-Derogable Rights

I will now consider the possible avenues of impact of emergencies on the rights enshrined in the Convention. All rights enshrined in the Convention are divided onto derogable and non-derogable. The right to life, prohibition of torture and slavery, non-retrospectivity of criminal penalty cannot be affected by any derogations.¹ Therefore, they are called non-derogable. So, any derogations under Article 15 cannot influence their interpretation by the European Court of Human Rights (ECtHR). However, it does not mean that the COVID-19 pandemic will have no impact at all on the non-derogable rights. Let's take Article 2 – the right to life as an example. The scope of this right includes negative,² positive³ and procedural⁴ obligations.

¹ Article 15-2.

² Prohibition of killing by the state agents. See, *McCann and Others v. the United Kingdom*, 27 September 1995, Series A no. 324.

³ Prevention and protection of potential victims. See, *Osman v. the United Kingdom*, 28 October 1998, Reports of Judgments and Decisions 1998-VIII.

The COVID-19 pandemic might affect the latter two types of obligations. Positive obligations prescribe the state to take all possible measures to protect life. The state is provided with some margin of appreciation in fulfilling these obligations. The COVID-19 pandemic might force the states to reallocate certain resources and the Court will have to take this into account when dealing with alleged failures by the states to protect life. These obligations are not absolute and they often depend on specific circumstances of the case.⁵ Procedural obligations mean that the state has to arrange a prompt and independent investigation of suspicious deaths. The circumstances of the COVID-19 pandemic might interfere with what is normally considered as a prompt investigation by the Court. Justifiable delays in inquiries can be to some extent explained by the circumstances of the pandemic. However, successful applications are possible in these areas and the government needs to ensure that adequate investigation of deaths is conducted. Moreover, it is crucial that the state fulfils its positive obligations especially in closed institutions such as mental hospitals and prisons.

2.2 The Right to Liberty and Security and the Right to a Fair Trial

Article 5 guarantees the right to liberty and security. The ECtHR has developed a very technical test of what can be considered as a violation of Article 5. First of all, the ECtHR will decide whether a particular type of restrictions would fall within the definition of restriction of liberty.⁶ In the circumstances of the pandemic the Court can accept that most of the severe restrictions of liberty related to COVID-19⁷ do fall within Article 5 but then proceed to consider if these restrictions are necessary.

After the Court is satisfied with the fact that the issue falls within the ambit of Article 5, it would ask if the measure is legal. Here, the legality means that it was imposed in accordance with the national law and procedure. It is important to note, that Article 15 does not exclude the requirement that the measure should be legal and the choice for the Court is binary, the measures are either legal or not. The measure can be introduced by a national law which is adopted as a part of an emergency package but it should be lawful. The judgment in *Alparslan Altan v. Turkey* suggests that the emergency situation does not justify an overly broad interpretation of the national law.⁸ In this case, the Constitutional Court Judge was arrested in suspicion of his connection with the coup d'état. According to the national law such an arrest could be made only when the judge has committed *in flagrante delicto*.⁹ In such a case the judge cannot enjoy his immunities. However, having a suggested connection to a coup d'état does not qualify normally as *in flagrante delicto*. The ECtHR agreed with the applicant that the national courts extensive interpretation of the term "*in flagrante delicto*" is problematic from the point of view of legal certainty and was manifestly unreasonable.¹⁰ The

⁴ Obligation to investigate suspicious deaths. See, *Trubnikov v. Russia*, no. 49790/99, 5 July 2005.

⁵ See, *Budayeva and Others v. Russia*, nos. 15339/02 and 4 others, ECHR 2008.

⁶ See, *Guzzardi v. Italy*, 6 November 1980, Series A no. 39; *Austin and Others v. the United Kingdom* [GC], nos. 39692/09 and 2 others, ECHR 2012.

⁷ I am describing the most severe restrictions; general unsupervised quarantine would perhaps not trigger Article 5.

⁸ *Alparslan Altan v. Turkey*, no. 12778/17, 16 April 2019

⁹ The concept of *in flagrante delicto* is linked to the discovery of an offence while or immediately after it is committed. *Ibid.*, para. 111.

¹⁰ *Ibid.*, para. 115.

Court found a violation of Article 5 and stated that Article 15 is effectively incapable of changing this situation.

This means that the measure adopted by the State needs to be legal irrespective of derogation under Article 15. It can be introduced by the emergency legislation but it nevertheless needs to be accessible and done according to a proper procedure.

If a state in question introduced emergency legislation allowing to detain people during the pandemic, the Court will then consider if such detention would comply with other requirements of Article 5. The most relevant subsection of Article 5 in the context of a health emergency is 5-1(e) ECHR which allows the Contracting Parties to the Convention to detain persons ‘for the prevention of the spreading of infectious diseases, persons of unsound mind, alcoholics or drug addicts or vagrants’.¹¹ The case law under this Article is very scarce and the only relevant judgment deals with the spreading of HIV¹² which is significantly different to COVID-19. What is known about 5-1(e) is that the Court will consider the aim of detention, namely whether detention “is the last resort in order to prevent the spreading of the disease, because less severe measures have been considered and found to be insufficient to safeguard the public interest”.¹³ Article 15 also enshrines a comparable standard that the measures are ‘strictly required by the exigencies of the situation’.¹⁴

It means that as soon as the pandemic is over any detention under 5-1(e) will be illegal irrespective of whether Article 15 is invoked or not. This is so because both Article 15 and Articles 5-1(e) provide for a similar requirement that the state actions should be strictly connected with the necessities of the health emergency. There is no legal ground to say that the measures that are legal during the pandemic will continue to be legal when it is over.

What might be more concerning in the context of the COVID-19 pandemic is the compliance of the Contracting Parties with other subsections of Article 5-1. For instance, if a person is arrested on a suspicion of committing a crime then she should be brought promptly before a judge.¹⁵ In this case Article 15 might be of some assistance for the states as it can legalise the extension of the time limit between the actual arrest and the moment when the arrested person is brought before a judge.¹⁶ However, the difference here will be calculated in hours and days not months or years. Article 15 might broaden the scope of margin of appreciation of the state in these cases but this margin will not be unlimited and it will be under the supervision of the ECtHR.¹⁷ Having argued in the previous section that the margin of appreciation of the Contracting Parties to the Convention will already be quite significant due to the evident lack of consensus and magnitude of the crisis, one can suggest that the impact of Article 15 on the scope of this margin will be quite limited.

¹¹ Article 5-1(e) ECHR

¹² *Enhorn v. Sweden*, no. 56529/00, ECHR 2005-I.

¹³ *Ibid.*, para. 44.

¹⁴ See, for example, *Kavala v. Turkey*, no. 28749/18, 10 December 2019, para. 158. Other human rights mechanisms also require the adopted measures to be strictly required by the exigencies of the situations. UN Human Rights Committee General Comment No. 29.

¹⁵ Article 5-3.

¹⁶ Compare the judgments: in *Brannigan and McBride v. the United Kingdom*, 26 May 1993, Series A no. 258-B where Article 15 was triggered with *Brogan and Others v. the United Kingdom*, 29 November 1988, Series A no. 145-B.

¹⁷ See, for example *Bayatyan v. Armenia* [GC], no. 23459/03, ECHR 2011, para. 121.

Article 15 can possibly impact on the Court's analysis of Article 6 which enshrines the right to a fair trial.¹⁸ There is however hardly any case law dealing with Article 6 in conjunction with Article 15. So, the following analysis is mostly based on common sense rather than the case law. Article 6 violations rarely happen overnight. The Court often considers if the proceedings as a whole can be seen as fair.¹⁹ That means that some drawbacks on the initial stages of the investigation can be remedied at the later stage of the proceedings. The COVID-19 crisis might delay some proceedings which can fall under the right to be tried within a reasonable time. I would argue that the Court will take the circumstances of the pandemic into account when considering alleged violations of the length of proceedings. The ECtHR itself for the first time in its history changed its time-limits allowed for the submission of the applications and memoranda by the parties²⁰ and of course, the Court will take into account the time of the pandemic when considering the reasonableness of the length of proceedings. Article 15 in this case will not allow the States to completely remove the safeguards of Article 6 because they will hardly be strictly linked to the COVID-19 pandemic. Having said that, the Court will consider the difficulty that states face in organising their judicial system in the time of the crisis.

2.3 Qualified Rights

I will now examine the extent to which Article 15 can influence the Court's analysis of the qualified rights such as Articles 8-11 ECHR or Articles 1-3 of Protocol 1 ECHR. The authorities can legally interfere with these rights. For instance, the police can wiretap certain phone communications if this is done under judicial supervision for investigating a crime within strict time limits.²¹ Such wiretapping undoubtedly interferes with the right to privacy but might not violate it if this interference is proportionate to the legitimate aim of combatting crimes. The ECtHR uses the proportionality analysis²² to consider if the state interference was necessary in a democratic society. I argue here that the proportionality analysis can "naturally" accommodate the measures adopted to fight health emergencies and its mechanism can account for the special circumstances of the COVID-19 pandemic. However, an oversight is crucial in ensuring that the state does not do more than what is proportionate in the circumstances. Article 15 does not change much of the legal analysis here except broadening an already broad scope of the margin of appreciation. In other words, the Court will consider the circumstances of the pandemic and as soon as these circumstances are over – they will stop influencing the proportionality analysis of the ECtHR.

Proportionality is a legal fiction as it is hardly possible to quantify and then compare such values as privacy, religious freedoms, public interest²³ etc. Having said that, the test of proportionality creates an analytical framework for the analysis of the depth of the state interference. It does not exclude judicial discretion but instead proportionality structures it along the steps of a test. The test of proportionality can "naturally" accommodate those

¹⁸ Article 6 ECHR.

¹⁹ See, for example, *Ibrahim and Others v. the United Kingdom* [GC], nos. 50541/08 and 3 others, 13 September 2016, para. 257.

²⁰ A Press Release by the ECtHR is available here: <http://hudoc.echr.coe.int/eng-press?i=003-6666795-8866184>

²¹ See, *Klass and Others v. Germany*, 6 September 1978, Series A no. 28.

²² See, F de Londras and K Dzehtsiarou, *Great Debates on the European Convention on Human Rights* (Palgrave, 2018), chapter 5.

²³ See, Fontanelli, F. 'The Mythology of Proportionality in Judgments of the Court of Justice of the European Union on Internet and Fundamental Rights' (2016) 36 *Oxford Journal of Legal Studies* 630, 632.

measures that are necessary to limit the negative consequences of the pandemic. Moreover, proportionality is not only applied in relation to qualified rights in the situation of normalcy but it is also applied to the measures adopted under emergency.²⁴

The proportionality test consists of a number of steps,²⁵ I will discuss these steps now in turn. First, the Court considers whether there is an interference with the rights enshrined in the Convention. It has been argued that there are plenty of aspects of qualified rights that are affected by the measures aimed to stop the pandemic.²⁶ It suffices to offer just a couple of examples. Development of various contact tracing web applications by the state authorities²⁷ might be considered as an interference with the right to privacy, however whether this interference is justified is to be determined on the further stages of the test of proportionality. Prohibition of church services and other religious gatherings might be an interference with the right to freedom of religion under Article 9 ECHR. Various restrictive measures against the spread of fake information related to COVID-19 might be an interference with the right to freedom of expression under Article 10 ECHR. The list of possible measures interfering with qualified rights can be quite long. Not all of these interferences violate the relevant rights; some of them are necessary and proportionate. Needless to say – Article 15 has no impact on the analysis of whether a particular measure constitutes an interference or not.

Then the Court considers the legality of a particular measure. This measure needs to be at least plausible under the national law. Article 15 itself cannot make illegal acts legal as I have already argued when discussing Article 5. A Contracting Party can have emergency legislation and still satisfy the proportionality requirements without resorting to derogation under Article 15. The Court has developed certain rules that govern the quality of laws²⁸ according to which the restrictions can be provided only by accessible and relatively clear legislation. However, it does not mean that such restrictions cannot be introduced by emergency legislation. So, if the emergency rules are introduced in accordance with the national procedure they will likely pass the test of legality.

The next step of the proportionality test is that the measures should have a legitimate aim. The Court has been quite deferential in its assessment of a legitimate aim. It finds a violation of the Convention on this stage only when no logical aim can be connected to the measure at

²⁴ See, for example what the Venice Commission stated in relation to the state of emergency in Turkey: “The Venice Commission also points to the importance of the principle of proportionality. This requirement must apply both to curfew decisions and to their implementation, and to related measures capable of affecting other rights and freedoms, which may consist of additional restrictions that may be imposed on the population during the curfew, such as the closure of schools or businesses, restrictions on the provision of public services or bans on public events, or of security operations carried out in this context by the authorities. Like curfews themselves, all of these measures must be proportionate to the threat and its immediacy, must not last any longer than the threat itself and must only apply to the regions affected by it.” CDL-AD(2016)010, Turkey - Opinion on the Legal Framework governing Curfews, adopted by the Venice Commission at its 107th Plenary Session (Venice, 10-11 June 2016), para. 81.

²⁵ de Londras and Dzehtsiarou, *supra* n. 22, 96-104.

²⁶ See, K Dzehtsiarou, COVID-19 and the European Convention on Human Rights, Strasbourg Observers blog, <https://strasbourgobservers.com/2020/03/27/covid-19-and-the-european-convention-on-human-rights/>; J McBride, An Analysis of Covid-19 Responses and ECHR Requirements, ECHRblog, <http://echrblog.blogspot.com/2020/03/an-analysis-of-covid-19-responses-and.html>.

²⁷ See, I Siatitsa and I Kouvakas, Indiscriminate Covid-19 location tracking (Part I): Necessary in a democratic society?, Strasbourg Observers blog, <https://strasbourgobservers.com/2020/05/04/indiscriminate-covid-19-location-tracking-part-i-necessary-in-a-democratic-society/>.

²⁸ See, *Roman Zakharov v. Russia* [GC], no. 47143/06, ECHR 2015.

issue.²⁹ In the context of the COVID-19 pandemic it will be relatively easy for the Contracting Parties to argue that they were in pursuit of a legitimate aim; protection of public health is recognised as one of the legitimate aims for the interference with the qualified rights enshrined in the Convention.³⁰ Article 15 derogation will not change much on this stage of the proportionality test either. Article 15 measures should also be introduced in pursuit of a legitimate aim of prevention of the spread of health emergency. In fact, these aims coincide here. Effectively, if the Contracting Parties fail to show that there was a legitimate aim in limiting human rights as a part of the test of proportionality, Article 15 will not be able to change that and to shield the state's interference from scrutiny.

Perhaps, the biggest impact Article 15 can make on the last two stages of the proportionality test, namely necessity and proportionality *strictu sensu*. At the stage of necessity³¹ the Court considered the extent to which the measure was appropriately connected and not excessive to the aim pursuit. At this stage the Court will examine whether the alternative less intrusive solutions were available to the state. For example, in *Alekseyev v. Russia* the Court had to decide if the Russian ban of a 'Gay Pride' parade in Moscow was necessary in a democratic society.³² The authorities argued that they could not guarantee the safety of the participants of this parade and therefore they had to ban it. The Court did not accept this argument and pointed out that there were less intrusive alternatives that could have achieved the same aim, such as better security and the increased number of policemen. The Court allows the states some margin of appreciation in selecting the measures that can be effective in achieving a particular legitimate aim.³³ The Court also considers the context and the difficulty of the situation. So, in the high point of the health emergency the state can use more "drastic" measures than when the pandemic is over. Such analysis is capable of quarantining certain measures to a particular period of time. The Court compares the measures with the seriousness of the ongoing situation in a Contracting Party. Here, an independent oversight is particularly important to show the ECtHR that the state has taken its obligation to adopt only necessary measures seriously.

Article 15 can indeed influence the scope of the margin of appreciation here. The Court normally first considers whether a particular measure would satisfy the necessity criterion disregarding the derogation under Article 15; if the Court decides that the respondent state exceeded its margin of appreciation the Court then looks at this situation taking Article 15 into account. However, irrespective of whether the formal derogation was declared the Court will consider the challenges that the Contracting Parties faced during the pandemic. Since proportionality does not have a fixed set of criteria, a broad scope of circumstances can influence the analysis of the Court. So, the severity of the crisis will impact the Court's decision of what was necessary in a democratic society. The margin of appreciation will be understandably broad. There will be a very narrow number of cases (if any) in which the Court will find that certain measures were not justified by the circumstances of the pandemic but instead they were justified by a formal act of derogation from the Convention. Therefore, the necessity stage allows the Court to take the severity of the circumstances of the COVID-

²⁹ See, for example *Bayev and Others v. Russia*, nos. 67667/09 and 2 others, 20 June 2017; *Catan and Others v. the Republic of Moldova and Russia* [GC], nos. 43370/04 and 2 others, ECHR 2012.

³⁰ See sections 2 of Articles 8-11 ECHR.

³¹ Here the Court considers whether the measure under review was necessary in a democratic society.

³² *Alekseyev v. Russia*, nos. 4916/07 and 2 others, 21 October 2010.

³³ *Handyside v. the United Kingdom*, 7 December 1976, Series A no. 24.

19 pandemic into account when analysing the appropriateness of the state actions. When the circumstances become less severe, the level of interference will have to be reduced too.

The final stage of the test of proportionality is proportionality *strictu sensu* or a balancing exercise. On this stage the Court compares competing interests and values that are prioritised by the state. For instance, whether the right to freedom of expression is more important in a particular case than the right to privacy.³⁴ The Court can also compare if the state struck the right balance between private and public interests.³⁵ This part of the proportionality discussion will be particularly difficult in the circumstances of health emergencies. The states will be again given quite a broad margin of appreciation. The states will have to make hard choices as to their priorities between public health, privacy, freedom of expression and public order. Of course, the Court will be able to interfere when for example a respondent state focused too much on the public health disregarding all other considerations. Having said that, formal derogation cannot change the scope of acceptable proportionality significantly. For example, if a state develops a contact tracing app, forces everyone to use it and makes some of its information public, the formal state of emergency will unlikely make this policy compatible with the Convention. Again, some adjustment of the margin of appreciation is possible due to the declaration of emergency but this adjustment will be minimal.

18/07/2020

³⁴ See, for example, *Von Hannover v. Germany*, no. 59320/00, ECHR 2004-VI.

³⁵ See, for example, *Osmanoğlu and Kocabaş v. Switzerland*, no. 29086/12, 10 January 2017.