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**Dimensions of Human Rights during COVID 19 Pandemic in  
Europe.**

**Derogations from basic human rights during COVID 19 Pan-  
demic under Article 15 ECHR.**

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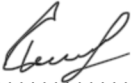


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I, Kumush Suyunova hereby declare that this thesis, entitled “Dimensions of Human Rights during COVID 19 Pandemic in Europe. Derogations from basic human rights during COVID 19 Pandemic under Article 15 ECHR.”, submitted as partial requirement for the MA Programme Euroculture, is my own original work and expressed in my own words. Any use made within this text of works of other authors in any form (e.g. ideas, figures, texts, tables, etc.) are properly acknowledged in the text as well as in the bibliography.

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## **Abstract**

In many legal systems, the state of emergency is a well-known and recognized legal instrument which allows a certain degree of derogation from human rights standards. However, in some cases emergencies provide governments with convenient reasons to strengthen their powers, weaken democratic institutions and repress political opponents. The magnitude and severity of the COVID-19 pandemic has clearly risen to the level of danger to public health and has given rise to a wide range of legal responses across the Council of Europe States which can justify restrictions on certain rights. Many steps taken to slow the spread of the virus and implement social distancing are common across States Parties. However, there is uncertainty about whether States Parties should apply derogation provisions under Article 15 of the European Convention on Human Rights or should rely solely on limitation clauses. In this regard, only 10 of the 47 ECHR Member States issuing a notice of derogation in response to COVID-19 could be a warning sign of Member States disregarding the ECHR's principles. Alternatively, Council of Europe Member States might believe that any restriction on human rights applied as a COVID-19 combatting measure is justified in light of the limited nature of some rights and freedoms. Many scholars believe that when derogation clauses are used, there is a risk of going beyond the principle of proportionality, which may bring to the abusive exercise of power. Nevertheless, while dealing with COVID-19 Pandemic, formal declaration of a state of emergency and the notification of derogations under the Human Rights Treaty may have a positive impact on the constraining of emergency powers within prescribed limits.

**Keywords:** derogation clause, limitation clauses, emergency powers, human rights, COVID-19, Article 15 of the ECHR, a state of emergency, Council of Europe.

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## **Chapter I. Introduction.**

### **1.1. Background and context of the study.**

The magnitude and severity of the COVID-19 pandemic has clearly risen to the level of danger to public health and has given rise to a wide range of legal responses across the Council of Europe Member States. The European Convention on Human Rights (ECHR) contemplates governmental need for health-related emergency measures which may infringe some human rights. In particular, Article 15 of the ECHR provides that States should notify the Secretary General of the Council of Europe of the measures taken and the reasons thereof, if they intend to derogate from their human rights obligations because of a crisis. The power gained through derogation is time limited and provides supervision and transparency<sup>1</sup>.

On the other hand, limitation clauses as, for example, in Articles 8 (right to privacy) and 11 (freedom of assembly) of the ECHR provide that certain rights are not absolute and a given Member State may have a legitimate interest in limiting those rights for the interests of the society. Limitation clauses do not require a declared public emergency, and in such cases, COVID-19-related restrictions do not necessarily have to be time-limited. No notification procedures or additional oversight are required. The ECHR expressly provides that public health needs can justify limitations on the rights articulated by those articles and therefore admits a wide margin of appreciation<sup>2</sup>.

In response to COVID-19, Member States have enacted regulations such as travel bans, stay-at-home orders, quarantines, digital surveillance, bans on public gatherings and many others; but only 10 of the 47 ECHR Member States have informed the Council about derogating under Article 15 of the ECHR<sup>3</sup>.

Many steps taken to slow the spread of the virus and implement social distancing are common across States Parties. As mentioned above, only 10 of the 47 ECHR Member States issuing a notice of derogation in response to COVID-19 could be a warning sign

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<sup>1</sup> Council of Europe Documents, “Guide on Article 15 of the European Convention on Human Rights. Derogation in Time of Emergency,” (European Court of Human Rights, April 30, 2021), [https://www.echr.coe.int/documents/Guide\\_Art\\_15\\_ENG.pdf](https://www.echr.coe.int/documents/Guide_Art_15_ENG.pdf).

<sup>2</sup> William Schabas, *The European Convention on Human Rights: a Commentary* (Oxford, UK: Oxford University Press, 2015).

<sup>3</sup> “Derogations Covid-19. Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 5) Notifications under Article 15 of the Convention in the Context of the COVID-19 Pandemic,” Council of Europe Treaty Office, as of June 30, 2021, <https://www.coe.int/en/web/conventions/derogations-covid-19>.

of Member States disregarding the ECHR's principles. Alternatively, Council of Europe Member States tend to believe that any restriction on human rights applied as a COVID-19 combatting measure is justified in light of the limited nature of some rights and freedoms.

In this regard, some Member States, such as Hungary, did not use the procedure of declaring a state of emergency and derogating under Article 15 of the ECHR and instead imposed a state of emergency based on its constitution only. Countries like Hungary may claim their constitutions provide sufficient protection of human rights and consequently ignore higher standards of protection under the ECHR. Meanwhile, other Member States, for example, the United Kingdom has adopted "emergency powers", but has not declared a state of emergency. In less than a week the government convinced parliament to pass a lengthy law giving it new powers<sup>4</sup>.

This demonstrates that there is some uncertainty about whether a country should or could declare a state of emergency under the ECHR at times of public emergency like COVID-19. Some argue that the country's withdrawal from the ECHR sends the "wrong message" about the government's commitment to human rights. This is due to the fact that countries with a weak human rights record, such as Turkey, tend to frequently declare states of emergency. This may be one of the main reasons why some of the Council of Europe Member States did not derogate under Article 15 of the ECHR, but took a different approach and relied solely on their constitutions or limitation clauses provided in the ECHR to deal with COVID-19 pandemic<sup>5</sup>.

Thus, on the basis of examples of government responses to date in the Council of Europe Member States, the present Master's thesis will provide an overview of the human rights challenges caused by the coronavirus outbreak. In particular, the purpose of this thesis is to analyze why Article 15 of the ECHR can be used to handle the COVID 19 rather than limitation clauses provided in some articles of the Convention and why current pandemic can be described as Alan Greene suggests as an 'ideal state of emergency'<sup>6</sup>.

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<sup>4</sup> Alan Greene, *State of Emergency: How Different Countries Are Invoking Extra Powers to Stop the Coronavirus*, (The Conversation, March 30, 2020), accessed 15 December 2020, <https://theconversation.com/state-of-emergency-how-different-countries-are-invoking-extra-powers-to-stop-the-coronavirus-134495>.

<sup>5</sup> Ibid.

<sup>6</sup> Martin Sheinin, *COVID-19 Symposium: To Derogate or Not to Derogate?*, (Opinio Juris, April 20, 2020), accessed 20 December 2020, <https://opiniojuris.org/2020/04/06/covid-19-symposium-to-derogate-or-not-to-derogate/>.

In our analysis we will rely on different sources to assess whether less extreme interventions could have produced the same outcomes at the time the measures were introduced. The duration of these measures and the need for their reapplication will also be considered. In this regard, we have already witnessed the easing of the strict measures taken at the height of the coronavirus: international border crossings were partially restored, lockdowns and curfews were lifted in most cases. In turn, this kind of facilitation of measures required the adoption of other more adapted measures, the proportionality of which is still difficult to judge<sup>7</sup>.

## **1.2. Problem statement and research objectives.**

As was mentioned above, in this particular work we will focus on the European Convention on Human Rights (ECHR) – an international treaty designed to protect rights and freedoms of individuals and uphold democratic principles and ideals. As W.A.Schabas suggests, the ECHR was the first comprehensive treaty for the protection of human rights to emerge from the post-Second-World-War law-making process<sup>8</sup>.

A section on derogation is included in Article 15 of the ECHR. The essential requirement is that the derogating State must meet two criteria. First, the given State must establish that the exceptional circumstances of a war or other state of emergency actually prevails. Second, the derogating State must establish that the measures taken in response to such an emergency are “strictly determined by the severity of the situation”<sup>9</sup>. Stephen Tierney has usefully referred to these two stages as the ‘designation issue’ and the ‘interference issue’<sup>10</sup>.

This stipulation is explicitly conditioned in order to prevent arbitrary derogation by Member States from the duty to uphold human rights in times of war and/or public emergencies. Thus, the requirements are set as the presence of exceptional state of emergency, clarification of possible duration of the derogation and the measures introduced to resolve

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<sup>7</sup>Cornelius Hirsch, *Europe’s Coronavirus Lockdown Measures Compared*, (POLITICO, April 15, 2020), accessed 21 December 2020, <https://www.politico.eu/article/europes-coronavirus-lockdown-measures-compared/>.

<sup>8</sup> William Schabas, *The European Convention on Human Rights: a Commentary* (Oxford, UK: Oxford University Press, 2015). p.1.

<sup>9</sup> Christopher Michaelsen, “Permanent Legal Emergencies and the Derogation Clause in International Human Rights Treaties: A Contradiction?,” in *Post 9/11 and the State of Permanent Legal Emergency: Security and Human Rights in Countering Terrorism*, ed. Aniceto Masferrer (Dordrecht, Netherlands: Springer, 2012), pp. 287-314. P.291.

<sup>10</sup> Stephen Tierney, “Determining the State of Exception: What Role for Parliament and the Courts?,” *Modern Law Review* 68, no. 4 (2005): pp. 668-673, [https://doi.org/10.1111/j.1468-2230.2005.555\\_3.x](https://doi.org/10.1111/j.1468-2230.2005.555_3.x). P.668.

the immediate danger, as well as compliance with other commitments under international law and notification of other countries on the state of public emergency.<sup>11</sup>

The first significant interpretation of Article 15 of the ECHR was made in 1961 in *Lawless v. Ireland* (No 332/57), which concerned the applicant's extrajudicial detention from July to December 1957. Confirming the European Commission's determination that Article 15 of the ECHR should be interpreted in the light of its "natural and customary" meaning, the European Court of Human Rights (hereinafter, ECtHR) defined "a time of emergency" as "an exceptional crisis or emergency that affects the entire population and threatens the organized life of the community of which it is composed"<sup>12</sup>.

While in "The Greek Case" (*Denmark, Norway, Sweden and the Netherlands v. Greece*) the Commission outlined the criteria for an emergency to be considered a threat to the life of the nation. It reasoned that an emergency must have the following characteristics: (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<sup>13</sup>.

When faced with a state of emergency that poses a danger to the nation's existence, Article 15 of the ECHR allows States Parties to derogate from the defense of some human rights in the best interests of their people. At the same time, these regulations can be seen as a tool to gain more power under the pretext of the best interests of people. Many researchers believe that a state of emergency provides convenient excuses for governments to enhance their powers, dismantle democratic institutions and repress political opponents.

Thus, the requirements of the ECHR derogation provisions and the nature of their application in the context of public emergency like the ongoing COVID-19 pandemic will be examined to infer whether the derogation provisions are adequate or actually necessary during the pandemic. Meanwhile, it must be noted that current question has already

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<sup>11</sup> Audrey Lebret, "COVID-19 pandemic and derogation to human rights", *Journal of Law and the Biosciences*, Volume 7, Issue 1, January-June 2020, Isaa015, <https://doi.org/10.1093/jlb/Isaa015>.

<sup>12</sup> William Schabas, *The European Convention on Human Rights: a Commentary* (Oxford, UK: Oxford University Press, 2015). p.595.

<sup>13</sup> *The Greek Case*, Application Nos 3321/67 *Denmark v. Greece*; 3322/67 *Norway v. Greece*; 3323/67 *Sweden v. Greece*; 3344/67 *Netherlands v. Greece* (European Commission on Human Rights 1969), p. 113.



started to be addressed by different scholars with special focus on Carl Schmitt's 'state of exception' concept.

A 'State of Exception' was described by the German legal theorist and Nazi ideologue Carl Schmitt as the mechanism by which in the name of the public good, a sovereign leader may circumvent the rule of law. Therefore, C. Schmitt considers 'a state of exception' (in our case 'a state of emergency') as a 'zone beyond the law' or rather a 'zone of lawlessness'. Many researchers, in fact, confirm that when emergency powers are in effect, there is a risk of power abuse and going beyond the principle of proportionality.

Present Master's Thesis, therefore, aims to prove that if Member States refer to derogation clause under Article 15 of the ECHR rather than to limitation clauses allowed by ECHR articles, there will be no reference to Schmitt's 'state of exception' due to the fact that provisions of Article 15 of the ECHR are explicitly conditioned and measures taken will be to the extent strictly required by the exigencies of the situation in comparison to limitation clauses.

Dependent variable in this Master Thesis constructed as follows: derogation clause under Article 15 of the ECHR does not lead to Schmitt's 'state of exception' = 'a zone of lawlessness', while by contrast, limitation clauses provided in some articles of the ECHR may lead to the "state of exception" given no time-limit and the wide margin of appreciation, lack of transparency and supervision. Independent variable, on the other hand asserts that "States have a constructive responsibility to uphold the right to life, which may justify derogations from some other fundamental human rights, as they require strict regulations, supervision and transparency and are time limited".

Steaming from the problem identification, the research questions were developed as following: What is a "state of emergency" with regard to pandemics and what is a proportionate response to the emergency situation during pandemics? How to enable more effective and human-rights sensitive responses to pandemics like COVID-19? Why Council of Europe Member States should derogate under Article 15 of the ECHR during COVID-19 pandemic rather than solely rely on limitation clauses?

The aim of the study will be to provide a framework for conducting the research in a legally sensitive manner based on a specific theoretical approach in the context of the three objectives:

(1) to examine and describe the concept of a state of emergency and escape clauses, compare derogation clauses and limitation clauses under the ECHR;

(2) to understand the nature and potential factors of the legal basis associated with the occurrence of the need for derogation and limitation clauses;

(3) to analyze and evaluate the motives and following outcomes of the COVID-19 related measures adopted by Member States.

Therefore, the tasks of the research will be to study the legal basis and understand the political and social legacies of human rights limitations during COVID-19 pandemic. Conducting a research, we do not deny that some countries may fall within the Schmittian theory of a 'state of exception', i.e., go beyond the law by pretending for the good of all. However, with coronavirus pandemic there is a real risk of threat to the life of a nation which justifies derogations under Article 15 of the ECHR.

### **1.3. Methods of research and literature review.**

The methodological basis of the research was built using techniques, methods and cognitive attitudes that are currently known to scientific research and that have been adapted to the specifics of the object under study – derogations as a legal concept. Through reasoned argumentation, the universal dialectical method was used to explain certain aspects of derogation and limitation clauses in regard to our hypothesis (thesis → antithesis → synthesis).

The use of the doctrinal and empirical research methods in complex allowed us to study the concept of a state of emergency and derogation clause in their integrity and comprehensiveness, their relationship and interdependence with legal aspects of human rights and other social manifestations. In accordance with above mentioned methods we conducted a critical, qualitative analysis of legal and social materials to confirm our hypothesis. Therefore, the concept and application of derogation clause were studied in the context of the theory of law, international human rights, as well as international relations, political science and sociology.

In regard to the research question we studied and summarized the research theories that already exist and the relationships between them; critically evaluated to what degree the existing theories have been investigated, and tried to develop a new insight to the issue. Particularly, our work followed the theories of Alan Greene, who claimed that COVID-19 pandemic was an 'ideal state of emergency' and that Article 15 of the ECHR

did not create Schmitt's 'state of exception'. He also claimed that given the severity of COVID-19 pandemic and the rapid spread of the virus, States should better derogate under international treaties in order to properly respond to the emergency situation.

The theoretical basis of the work is composed of the research of scientists who have studied various aspects of derogation clauses from both political and legal aspects. The complex nature of the topic necessitated the reference to diverse scientific sources while conducting the research, including legal, philosophical, political science, sociological, historical, etc. materials.

The works of specialists in the field of general theory of human rights, constitutional and international law, international relations and other disciplines have made a significant contribution to the understanding of the concept of derogations. Therefore, it was fruitful to address certain aspects of derogation clause provided in scientific publications of Emīlie M. Hafner-Burton et al. "Emergency and Escape: Explaining Derogations from Human Rights Treaties"; Francesc Amat et al. "Pandemics meet democracy. Experimental evidence from the COVID-19 crisis in Spain"; Audrey Lebret "COVID-19 pandemic and derogation to human rights" and many others.

Moreover, we thoroughly studied the Guide on Article 15 of the European Convention on Human Rights; "The European Convention on Human Rights: A Commentary" by William Schabas regarding several Articles of the ECHR; as well as the Guide on Article 8 of the European Convention on Human Rights "Right to respect for private and family life, home and correspondence"; the Guide on Article 11 of the European Convention on Human Rights "Freedom of assembly and association"; the Explanatory Report to Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms.

The normative base of the dissertation research consists of international documents, regulations, decisions of the European Court of human rights and others. The given topic was investigated systematically and comprehensively using a significant amount of empirical material in the research process.

The empirical base of the work was constructed using observations of practice, experience and activities of various international, State and public structures, The Council of Europe and the European Court of human rights and others in dealing with public emergencies. Important information about derogations and individual aspects of human

rights was gathered from factual, statistical and sociological publications from various sources.

#### **1.4. Structure of the research.**

The proposed framework of the study is composed of the following chapters: Introduction, Theoretical framework, Findings and Discussion, Conclusion.

In the introduction part we thoroughly described the thesis topic and the background to it. Further, we formed a hypothesis, identified the problem and the research questions. We went on with describing the methods we used to investigate the issue under concern and made small literature review.

The second chapter was devoted to thoroughly discussing the theoretical framework of the research. In particular, we focused on the different definitions of a state of emergency and what consequences it could bring. We also talked about how exceptional situations like states of emergency of different nature require exceptional responses, and how by doing so they trigger exceptional powers. In the last part of this chapter we focused on the possible responses to COVID 19 pandemic - a matter of ongoing debate. The controversies found in Chapter II helped us to clarify the main issues we are addressing in the chapter devoted to findings and discussion.

Further, in the chapter devoted to findings and discussion, we discussed in depth the Article 15 of the ECHR for derogation from the ECHR and other alternative measures used in combatting COVID-19 pandemic. We analyzed the case of COVID-19 pandemic – the latest state of public emergency, and the measures undertaken during this period in relation to the obligations stipulated by the ECHR. In addition, we focused on limitation clauses. In particular, we did analysis of the measures taken by Council of Europe Member States in response to COVID-19 with the special emphasis on the right to liberty and freedom of movement, right to privacy and freedom of assembly and association provided in the ECHR. It was emphasized that there is a need for a concrete theoretical framework for derogation clauses in the field of International law and human rights. We also tried to elaborate on the current structures reflecting the unstable relations regarding human rights in today's societies.

Finally, in the conclusion we summarized the major arguments made in this work and their confirmation through exhibiting our main points. Questions about potential further thinking and research were also proposed in this part.

## **Chapter II. Theoretical framework.**

### **2.1. State of emergency as a concept.**

Referring to the difficulties in defining the term “emergency”, Yoram Dinstein states that “the absence of consensus as to when a public emergency occurs means that it is by no means plain when exactly a State is allowed by international law to derogate from its obligations to respect and ensure human rights.”<sup>14</sup>

According to R.St. MacDonald, the types of situations that may occur in a State range from ordinary, through extraordinary, to the “exceptional” circumstances of a public emergency, although the distinctions are unclear. He claims that the uncertainty in defining public emergency is troublesome, since a declaration of emergency suspends much of the Convention’s (ECHR) assurances and allows the Convention’s organs to offer greater deference to State-led attempts to restore normalcy<sup>15</sup>.

Mohamed M. El Zeidy claims that it is not easy to define a “state of emergency.” The definition of the word “emergency” is expansive enough to include a wide variety of incidents, including conflicts, famines, earthquakes and floods. However, the International Law Association argues that declaring a state of emergency is neither desirable nor possible, since it is impossible to determine what specific forms or types of incidents would automatically constitute a state of emergency within these terms; each case must be determined on its merits, taking into account the general concern for the survival of a democratic society<sup>16</sup>.

Alan Greene defined a state of emergency as “a crisis identified and labelled by a State to be such magnitude that it is deemed to cross a threat severity threshold, necessitating urgent, exceptional, and, consequently, temporary actions by the State not permissible when normal conditions exist”.<sup>17</sup>

Thus, in its most basic sense, the term “emergency” refers to crises of exceptional scale and urgency that determine the priorities of the response, that is, crises of an exceptional

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<sup>14</sup> Yoram Dinstein, “The Reform of the Protection of Human Rights During Armed Conflicts and Periods of Emergency and Crisis,” in *Reform of International Institutions for the Protection of Human Rights: First International Colloquium on Human Rights, La Laguna, Tenerife, 1st-4th November 1992* (Bruxelles, Belgium: Bruylant, 1993), pp. 337-349.

<sup>15</sup> Ronald St.J. Macdonald, “Derogations under Article 15 of the European Convention on Human Rights,” *Colum. J. Transnat'l L.* 225, No. 36, Issues 1&2, (1998), p.p. 225-268. P.233.

<sup>16</sup> Mohamed El Zeidy, “The ECHR and States of Emergency: Article 15 - A Domestic Power of Derogation from Human Rights Obligations,” *San Diego International Law Journal*, No. 4 (2003): pp. 277-318. P.280.

<sup>17</sup> Alan Greene, *Permanent States of Emergency and the Rule of Law: Constitutions in an Age of Crisis*, 1st ed. (Oxford, UK: Hart Publishing, 2018), 256 p. P.33.

nature require immediate actions with the aim of restoring normalcy. The definition of an emergency situation not only defines the events and consequences of a crisis situation, but also implies a set of actions.

Therefore, the term “emergency” is associated not only with the description of the phenomenon that give rise to crises, but also closely related to the reaction towards crises itself. The declaration of an emergency should, moreover, be based on an objective analysis of the facts as they exist at the time when the emergency is declared, at least to the extent to which this is possible<sup>18</sup>.

In 1961 the phrase “public emergency threatening the life of the nation”, which emerges from Article 15(1) of the ECHR, was first defined by the Commission in its report on the Lawless case, as “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.”<sup>19</sup> The European Court of Human Rights (ECtHR), in its judgment, adopted a similar, but not identical definition. It construed the phrase as “an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed.”<sup>20</sup>

The notion of emergency, as such, referred to in Article 15 of the ECHR includes: war; natural or environmental catastrophes, epidemics; economic crises; and indeed, anything that puts the security of the State in peril<sup>21</sup>. According to emergency definitions, the threshold of seriousness is frequently reached only when normal responses to a threat are inadequate. As a result, an “emergency” is described as an occurrence that deviates from the *status quo*, calling for a response that would not be necessary under normal circumstances. As a result, not only the crisis or phenomenon, but also the response to it, are out of the ordinary. Despite the fact that emergency conditions are usually unpredictable and extraordinary in nature, they must be planned for with clear response<sup>22</sup>.

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<sup>18</sup> Alan Greene, *Permanent States of Emergency and the Rule of Law: Constitutions in an Age of Crisis*, 1st ed. (Oxford, UK: Hart Publishing, 2018), 256 p. P.24.

<sup>19</sup> Lawless v. Ireland (No. 3) App. No(s). 332/57 (European Court of Human Rights July 1, 1961).

<sup>20</sup> Mohamed El Zeidy, “The ECHR and States of Emergency: Article 15 - A Domestic Power of Derogation from Human Rights Obligations,” *San Diego International Law Journal*, No. 4 (2003): pp. 277-318. P.283.

<sup>21</sup> Ronald St.J. Macdonald, “Derogations under Article 15 of the European Convention on Human Rights,” *Colum. J. Transnat'l L.* 225, No. 36, Issues 1&2, (1998), p.p. 225-268. P.235.

<sup>22</sup> Alan Greene, *Permanent States of Emergency and the Rule of Law: Constitutions in an Age of Crisis*, 1st ed. (Oxford, UK: Hart Publishing, 2018), 256 p. P.2.

In the case of a state of emergency, it is necessary to be aware of both the objective phenomenon that causes the state of emergency, and the subjective forces that affect the perception of this phenomenon and reactions to it. Thus, ideally, the existence of a state of emergency is an objective question; however, there are powerful subjective forces that influence the perception and final decision of the decision-maker towards the reaction. This problem of subjectivity becomes even more acute when we consider that under most constitutions today, those, who declare a state of emergency often gain power as a result. This incentive creates an acute risk of abuse of power<sup>23</sup>.

Human rights are often the first targets in crises in this regard. In international human rights law, imposing a state of emergency enables a State to deviate from the very human rights commitments that these treaties were intended to protect. The stresses on governments to limit individual rights when faced with emergency threats may be overwhelming. International law scholars have long recognized that “the response of a State to a public emergency is an acid test of its commitment to the effective implementation of human rights”<sup>24</sup>.

Given the variety of events that may cause an emergency, emergency provisions all seem to agree on the obvious need for a response. Declaring a state of emergency has the sole function of authorizing powers that would otherwise be forbidden by the constitution or international treaty. This criterion of exceptionality is what decides whether a phenomenon reaches the threshold of severity and magnitude necessitating the declaration of a state of emergency<sup>25</sup>.

Major human rights agreements take account of these threats by authorizing States to “escape” temporarily from some of their treaty commitments in times of emergency, but subjecting the suspension of rights to a carefully calibrated system of limitations, safeguards, notifications and review procedures<sup>26</sup>. When it is decided that normalcy no longer exists, an emergency must be declared. An emergency is a one-of-a-kind event, an

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<sup>23</sup> Alan Greene, *Emergency Powers in a Time of Pandemic*, 1st ed. (Bristol, UK: Bristol University Press, 2020). 182 p. P. 14.

<sup>24</sup> Dominic McGoldrick, “The Interface between Public Emergency Powers and International Law,” *International Journal of Constitutional Law*, Vol .2, No. 2 (January 2004): pp. 380-429, <https://doi.org/10.1093/icon/2.2.380>. P. 388.

<sup>25</sup> Alan Greene, *Emergency Powers in a Time of Pandemic*, 1st ed. (Bristol, UK: Bristol University Press, 2020), 182 p. P. 19.

<sup>26</sup> Emilie M. Hafner-Burton, Laurence R. Helfer, and Christopher J. Fariss, “Emergency and Escape: Explaining Derogations from Human Rights Treaties,” *International Organization*, Vol. 65, no. 4 (2011): pp. 673-707, <https://doi.org/10.1017/s002081831100021x>. P.673.

exception, a statistical phenomenon that is only discernible against a backdrop of normalcy.

Indeed, it is against this backdrop of normalcy, and its inability to make swift decisions, that emergency forces are able to function for a limited time. As a consequence, the very essence of emergency measures should be to preserve normalcy rather than to alter normalcy in favor of the sovereign<sup>27</sup>.

## **2.2. Escape clauses in time of emergencies.**

When a State faces a threat to its security or continued survival, the pressure to adopt emergency measures – including suspensions of civil and political liberties that the State has previously pledged to uphold – is often overwhelming. The drafters of the European Conventions on Human Rights were well aware of these dangers. They recognized that crises provide convenient excuses for governments to enhance their powers, dismantle democratic institutions and repress political opponents. Yet the drafters also accepted that sovereign nations have a responsibility to protect their citizens and domestic institutions. To balance these competing concerns, the treaty drafters included an escape clause that sanctioned restrictions of certain rights during emergencies, but subjected those restrictions to the strictures of international law<sup>28</sup>.

The escape clauses enable more States to ratify the treaty than would have been possible without them, and they allow for more substantial commitments to be concluded than would have been possible without them. However, by allowing deviant activity at a time when treaty enforcement is most required, escape mechanisms can undermine international agreements. Escape clauses are especially relevant in the context of human rights since they are activated when individual liberties are seriously threatened<sup>29</sup>.

When notification of declaring a state of emergency and derogation is submitted to the relevant treaty body, the State is relieved of its obligation to uphold and defend some human rights in full, in accordance with international human rights law. Thus, international human rights treaties allow for situations in which the principles they seek to create

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<sup>27</sup> Alan Greene, *Permanent States of Emergency and the Rule of Law: Constitutions in an Age of Crisis*, 1st ed. (Oxford, UK: Hart Publishing, 2018), 256 p. P.26.

<sup>28</sup> Ronald St.J. Macdonald, “Derogations under Article 15 of the European Convention on Human Rights,” *Colum. J. Transnat'l L.* 225, No. 36, Issues 1&2, (1998), p.p. 225-268.

<sup>29</sup> Emilie M. Hafner-Burton, Laurence R. Helfer, and Christopher J. Fariss, “Emergency and Escape: Explaining Derogations from Human Rights Treaties,” *International Organization*, Vol. 65, no. 4 (2011): pp. 673-707, <https://doi.org/10.1017/s002081831100021x>.



and uphold may be compromised. This sacrifice is justified by the fact that it must be temporary.

As a result, international human rights treaties view official declaration of an emergency as a defense mechanism in terms of human rights: they empower the State to disregard civil rights and the rule of law that would usually limit them. However, by deciding when such measures are permissible, they also secure and protect human rights when circumstances do not correspond to emergencies. The state of emergency thus increases the State's control over emergency, allowing it to take steps that it would not be able to take otherwise, although within certain limits. In this way, international human rights treaties are evocative of the manner in which the Roman right of *provocatio* was sacrificed upon the appointment of a dictator in order to preserve the very Republic itself<sup>30</sup>.

It is the framework of decision-making under normal conditions that makes it necessary to declare a state of emergency. Thus, in the modern world, emergency powers can be triggered by the need for quick, decisive action, which cannot be achieved through the usual doctrine of separation of powers. Similarly, some human rights obligations can effectively hinder the response to an emergency. The ECtHR recognizes the need as a basis for allowing derogations from the provisions of the treaty. However, the ECHR also uses necessity as a control over the powers of the State, allowing derogations only in proportion to the severity of the situation. The consequentialist view of the lesser of two evils thus prevails<sup>31</sup>.

There is no more sensitive area of the ECHR than states of emergency and the implementation of Article 15's derogation clause. Any deviation from the ECHR's rights should have the goal of ending the crisis and restoring full security under the Convention<sup>32</sup>.

R.St. MacDonald claims that both State officials and human rights activists expressed cynicism and anxiety during the drafting of Article 15 of the ECHR. However, after the Convention had been in effect for a few years, most observers agreed that such a clause was inevitable, entirely consistent with the rule of law, and essential for the

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<sup>30</sup> Alan Greene, *Permanent States of Emergency and the Rule of Law: Constitutions in an Age of Crisis*, 1st ed. (Oxford, UK: Hart Publishing, 2018), 256p. P.19.

<sup>31</sup> *Ibid.* P.26

<sup>32</sup> Jean Allain, "Derogation from the European Convention of Human Rights in Light of Other Obligations Under International Law," *European Human Rights Law Review*, Vol. 11 (2005): pp. 480-498, <https://doi.org/10.2139/ssrn.2778486>. p. 480.

preservation of democracy. Without it, States could and would derogate from the Convention in emergencies, but without supervision and with greater risk of abuse. The inclusion of Article 15 in the ECHR provided a procedure that States must follow and in practice this procedure plays a significant role in ensuring international supervision<sup>33</sup>.

According to Gerald L. Neuman, derogation clauses do not contradict the notion of human rights (hence they are not in a 'zone beyond the law') but can, on the contrary, lead to their effective defense<sup>34</sup>. Indeed, States have a constructive responsibility to uphold the right to life, which may justify derogations from some other human rights.

However, the exception to the duty to protect human rights must be based solely on the presence of a state of emergency. On this rationale, the derogations from human rights in times of public emergency are viewed as a consequence of the severity of the situation and are justified only if they reflect a proportionate response to the situation in question<sup>35</sup>.

As Mohamed M. El Zeidy suggests, the use of extraordinary powers by State agencies is prompted by extraordinary circumstances. The extent of such powers, as well as the danger of intervening with and violating basic human rights and civil liberties, illustrate the need to explicitly identify the circumstances in which they can be used, as well as the limits on the scope of States' powers in such situations. It is not easy to define a "state of emergency." The formulation of the concept necessitates the use of guidelines in order to prevent the authorities from providing a large margin of appreciation, and even though they can be formulated, this does not guarantee that the actual criteria will be met<sup>36</sup>.

Emilie Hafner Burton et al. defined escape clauses as 'a rational response to [the] uncertainty, enabling governments to buy time and legal breathing space from voters, courts and interest groups to combat crises by temporarily restricting civil and political liberties'. More specifically, derogations enable governments facing threats at home to

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<sup>33</sup> Ronald St.J. Macdonald, "Derogations under Article 15 of the European Convention on Human Rights," *Colum. J. Transnat'l L.* 225, No. 36, Issues 1&2, (1998), p.p. 225-268. P.232

<sup>34</sup> Gerald L. Neuman, "Constrained Derogation in Positive Human Rights Regimes.," in *Human Rights in Emergencies*, ed. Evan J. Criddle (Cambridge, UK: Cambridge University Press, 2016), pp. 15-31.

<sup>35</sup> Christopher Michaelsen, "Permanent Legal Emergencies and the Derogation Clause in International Human Rights Treaties: A Contradiction?," in *Post 9/11 and the State of Permanent Legal Emergency: Security and Human Rights in Countering Terrorism*, ed. Aniceto Masferrer (Dordrecht, Netherlands: Springer, 2012), pp. 287-314. P.306.

<sup>36</sup> Mohamed El Zeidy, "The ECHR and States of Emergency: Article 15 - A Domestic Power of Derogation from Human Rights Obligations," *San Diego International Law Journal*, no. 4 (2003): pp. 277-318. p.280.

buy time and legal breathing space to confront crises while, at the same time, signaling to concerned domestic audiences that rights suspensions are temporary and lawful<sup>37</sup>.

However, they also warn us against negative consequences generated by escape clauses. According to Emilie Hafner-Burton et al. the negative effect of escape clauses is that “they officially condone a deviation from preexisting treaty commitments precisely when those commitments are most at risk of being undermined”<sup>38</sup>.

They warn us against insincere participants (Member States) in human rights treaties, which adopt emergency measures without derogating at all. In countries where judicial institutions are weak and voters cannot easily remove leaders from the office, drawing attention of the other Member States or supervisory organ to the violations is not helpful to governments. However, when they do derogate, they have in mind reasons other than buying time and combatting emergency situation<sup>39</sup>.

According to Martin Scheinin, exceptional powers encompass a significant risk of being manipulated mostly for political reasons, such as holding down opposition, dissolving Parliament, postponing elections, etc. He brings as an example the case of Hungary, which shows how this danger even relates to the COVID-19 pandemic – a matter of great urgency<sup>40</sup>. In this regard, it is worth to note that the Hungarian government declared a state of emergency under the Fundamental Law of Hungary with an open-ended mandate, which may raise some concerns, as the government can rule by decree without parliamentary confirmation.

To conclude, States calibrate an overall degree of international engagement by choosing from a variety of options in response to various types of problems and risks. One choice is to use escape clauses when faced with emergencies. Escape clauses minimize ambiguity by allowing for temporary deviations from treaty rules in the event of an emergency for a limited time and under greater supervision. Having paid due attention to the political and social aspects of limitations on human rights during the height of the

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<sup>37</sup> Emilie M. Hafner-Burton, Laurence R. Helfer, and Christopher J. Fariss, “Emergency and Escape: Explaining Derogations from Human Rights Treaties,” *International Organization*, Vol. 65, no. 4 (2011): pp. 673-707, <https://doi.org/10.1017/s002081831100021x>. P.680.

<sup>38</sup> Emilie M. Hafner-Burton, Laurence R. Helfer, and Christopher J. Fariss, “Emergency and Escape: Explaining Derogations from Human Rights Treaties,” *International Organization*, Vol. 65, no. 4 (2011): pp. 673-707, <https://doi.org/10.1017/s002081831100021x>.

<sup>39</sup> *Ibid.* P.684

<sup>40</sup> Martin Scheinin, *COVID-19 Symposium: To Derogate or Not to Derogate?*, (Opinio Juris, April 20, 2020), accessed 20 December 2020, <https://opiniojuris.org/2020/04/06/covid-19-symposium-to-derogate-or-not-to-derogate/>.

COVID-19 pandemic, we can assume, that some countries may cover themselves with the complexity of circumstances and dispose of power for mainly selfish purposes. By doing so, they may reach Schmitt's state of exception.

### **2.3. The controversy between derogation clause and limitation clauses.**

The ECHR contemplates governmental need for emergency health measures which may infringe some human rights. In particular, Article 15 of the ECHR provides that when Member States declare a state of emergency, they also should notify the Secretary General of the Council of Europe of the measures taken and the reasons thereof if they intend to derogate from their human rights obligations because of a crisis. This derogation power is time limited and provides supervision and transparency.

The derogation clause has been considered problematic by scientists. Some pointed to a fundamental paradox: States are allowed to derogate from human rights in emergency situations, precisely at a time when human rights violations may occur. Others noted the weak supervisory role of the European Court of Human Rights in cases of derogation<sup>41</sup>. All of these may be considered as reasons why States preferred not to derogate under Article 15 of the ECHR during COVID-19 pandemic.

According to some experts, most steps taken to prevent the spread of the coronavirus are already protected by international human rights law. The most basic human rights are considered "absolute". The death penalty, torture and forced labor are all prohibited under the ECHR. Most privileges, however, are not absolute, and States may impose restrictions on their exercise for good cause, such as public health emergencies instead of derogating from obligations under the Convention<sup>42</sup>.

In this regard, limitation clauses provided under the ECHR recognize that certain rights are not absolute and that States may have a legitimate interest in limiting those rights for the interests of the society.

Limitation clauses do not require a declared public emergency, and in such cases, COVID-19-related restrictions do not necessarily have to be time-limited. No notification procedures or additional oversight are required. The ECHR expressly provides that public

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<sup>41</sup> Kushtrim Istrefi and Stefan Salomon, "Entrenched Derogations from the European Convention on Human Rights and the Emergence of Non-Judicial Supervision of Derogations," *Austrian Review of International and European Law*, Vol. 22, No. 1 (2019): pp. 5-28, <https://doi.org/10.1163/15736512-02201003>.

<sup>42</sup> Laurence R. Helfer, "Rethinking Derogations from Human Rights Treaties." *American Journal of International Law* 115, no. 1 (2021): 20-40.

health needs can justify limitations on the rights articulated by some articles and therefore admits a wide margin of appreciation<sup>43</sup>.

Four articles of the ECHR expressly provide that public health needs can justify limitations on the rights articulated by those articles: Article 8 of the ECHR “the right to respect for private and family life”; Article 9 of the ECHR “the freedom of thought, conscience and religion”; Article 10 of the ECHR “the freedom of expression”; Article 11 of the ECHR “the freedom of assembly and association”<sup>44</sup>.

If we analyze Article 11 of the ECHR (as well as any of the above-mentioned articles), one of the rights most commonly suspended in response to COVID-19, we can see that a margin of appreciation is quite wide. From the wording of Article 11 of the ECHR we can assume that limitations are permissible as such, if they “... are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others.” Interpreted broadly, this limitations clause arguably provides sufficient flexibility to impose lockdowns and restrictions on public gatherings during pandemics. Differing views over the applicability of such clauses may explain why Member States facing the same threats from COVID-19 adopted similar domestic control measures, but widely divergent approaches to derogations under the ECHR<sup>45</sup>.

In his commentary on the decision of the *Lawless* case, Professor Ermacora strictly outlined the emergency requirements under Article 15(1), stating that as long as the State’s organs are functioning normally and there is no great threat to the organized life of the nation, then any emergency measures taken are not legitimate. Therefore, emergency measures must be the final resort when all normal measures are exhausted and have not been sufficient to deal with the threat. This is a guideline for States that must not overstep; otherwise, they are violating the principle outlined in Article 15 of the ECHR<sup>46</sup>.

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<sup>43</sup> Jizeng Fan and Yuhong Wang, “Precautionary proportionality principle as an instrumental preventive measure from the COVID-19: Can European human rights survive in the state of public health emergency?,” *Przegląd europejski* 2021 (2021): 117-143.

<sup>44</sup> Javier García-Roca, “International Deference, The Vague National Margin of Appreciation and Procedural Review,” *In Fundamental Rights Challenges*, pp. 245-275. Springer, Cham, 2021.

<sup>45</sup> Laurence R. Helfer, “Rethinking Derogations from Human Rights Treaties,” *American Journal of International Law* 115, no. 1 (2021): 20-40.

<sup>46</sup> Mohamed El Zeidy, “The ECHR and States of Emergency: Article 15 - A Domestic Power of Derogation from Human Rights Obligations,” *San Diego International Law Journal*, No. 4 (2003): pp. 277-318. P.285.

In this regard, Kanstantsin Dzehtsiarou claims that derogations under Article 15 of the ECHR are not especially useful in the case of a pandemic and send an unwelcome warning – a signal to citizens that States will begin to limit their human rights. In terms of proportionality, as K. Dzehtsiarou suggests, the magnitude of the pandemic is such that even the most stringent steps will fall within appropriate bounds. For instance, if people are not permitted to leave their homes, Article 5-1 (e) of the ECHR can be applied which provides for the legal detention of people to prevent the spread of infectious diseases. As for the other restrictions, they also fall within the margin of appreciation of limitation clauses. K. Dzehtsiarou claims that this particular emergency situation is virtually similar in all European countries, and a formal split would have little impact<sup>47</sup>.

Nevertheless, while dealing with COVID-19, we have a strong counter-argument in hand by Alan Greene. On the contrary, Greene suggests that formal declaration of exigency state and the notification to international organizations of measures derogating from some of their obligations under the Human Rights Treaty may have a positive impact on the taming of exceptional powers by restricting the State to express its exigency measures on the basis of necessity, proportionality, situation requirements, temporality and commitment to human rights<sup>48</sup>.

In particular, Alan Greene claims that declaring a state of emergency and derogating under Article 15 of the ECHR constitutes a different regime of legality, rather than a zone of lawlessness. This different regime can be used to quarantine exceptional powers to exceptional situations, preventing a recalibration of ordinary legal norms that would be required to accommodate powers that would have been considered impossible prior to the crisis. Alan Greene assesses that if the exigencies of the COVID-19 pandemic require exceptional measures and deviation from some dimensions of the full enjoyment of all human rights, then it is best to introduce those measures through a framework that entails a commitment to legality and to the full restoration of normalcy as soon as possible. This framework precisely provided for in derogation clauses under Article 15 of the ECHR<sup>49</sup>.

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<sup>47</sup> Kanstantsin Dzehtsiarou, *COVID-19 and the European Convention on Human Rights*, Strasbourg Observers, March 30, 2020, <https://strasbourgobservers.com/2020/03/27/covid-19-and-the-european-convention-on-human-rights/>.

<sup>48</sup> Alan Greene, *Permanent States of Emergency and the Rule of Law: Constitutions in an Age of Crisis*, 1st ed. (Oxford, UK: Hart Publishing, 2018), 256 p. P.20.

<sup>49</sup> Alan Greene, *Emergency Powers in a Time of Pandemic*, 1st ed. (Bristol, UK: Bristol University Press, 2020).

He also notes that through reliance on limiting rights, such as that of Article 8 of the ECHR or Article 5 of the ECHR, “we are left with a *de facto* state of emergency that enables the same powers but lacking the transparency, additional oversight and supervision that should accompany a *de jure* state of emergency”<sup>50</sup>.

In addition, E.M.Hafner-Burton et al. claim that derogations provide a safety valve for the enormous pressures that governments face to repress individual liberties during times of crisis. Without this escape option, States facing such emergencies would be more likely to repress derogable rights often surreptitiously in violation of international law<sup>51</sup>

Furthermore, according to Frederick Cowell, derogation orders are rights limiting instruments that States can use in an emergency, but unlike other limitation mechanisms contained in human rights treaties they are based on the facts of the declared emergency. He names two basic theoretical approaches to the categorisation of emergency powers. First, there are the powers which impose a legislative mechanism to control and manage an emergency. Secondly, there are powers that create autonomous spheres of action separate to or beyond the law in times of emergency. F. Cowell consider derogations to be similar to the first group in that they expressly legalize anything that would otherwise be illegal under a human rights treaty or constitutional scheme. Additionally, they are temporary or rather have declared time-limit and restricted to a specific space unlike general limitations imposed by international treaties<sup>52</sup>.

Frederick Cowell presents us basic arguments in favour of the proposition that derogation orders are rights protecting instruments. In this regard, he claims that the use of emergency powers sometimes leads States to create “alegal” zones of operation where their actions are outside the law, making them neither “legal” nor “illegal”. He suggests that these “zones” are often created in response to a crisis defined by the State, and the process of creating such zones can serve as a confirmation of the sovereign’s absolute power over law-making and can make the exception states permanent. This means that derogation clauses are ultimately instruments of limiting above mentioned sovereign with

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<sup>50</sup> Alan Greene, *Emergency Powers in a Time of Pandemic*, 1st ed. (Bristol, UK: Bristol University Press, 2020).

<sup>51</sup> Emilie M. Hafner-Burton, Laurence R. Helfer, and Christopher J. Fariss, “Emergency and Escape: Explaining Derogations from Human Rights Treaties,” *International Organization*, Vol. 65, no. 4 (2011): pp. 673-707, <https://doi.org/10.1017/s002081831100021x>. P.674.

<sup>52</sup> Frederick Cowell, “Sovereignty and the Question of Derogation: An Analysis of Article 15 of the ECHR and the Absence of a Derogation Clause in the ACHPR,” *Birkbeck Law Review* 1, no. 1 (2013): pp. 135-162. P. 137.

absolute power, as they limit the ability of a State to continually increase sovereign's power in response to an emergency. In addition, regional human rights organizations, acting at the supranational level, directly reject the legal capacity of an individual sovereign as a legislator, attributing to him/her the norms of the rule of law that the State should follow, and carefully studying the time and spatial framework of a state of emergency that restricts human rights<sup>53</sup>.

Furthermore, Svensson-McCarthy notes that even though the margin of appreciation purportedly conferred on Member States by Article 15 of the ECHR is exceptionally broad, not only Member States are entitled to determine when they are facing a national emergency or crisis, but they are also under obligation to determine what derogations from the Convention are necessary to avert that emergency. It is true that Article 15 of the ECHR does not provide any guidelines on how Member States have to make their determinations. However, it is not accurate to say that the margin of appreciation conferred by the provision of Article 15 of the ECHR is unlimited – it is in fact accompanied by European supervision and limited in time<sup>54</sup>.

Thus, the state of emergency is a well-known and recognized legal instrument, that may allow a certain degree of derogation from human rights standards. The provisions on temporary derogation are legislative instruments that allow States to suspend certain human rights after the declaration of an official state of emergency.

We can conclude from above-said that, given the nature of some rights and freedoms, due to the fact that provisions of Article 15 of the ECHR are explicitly conditioned and measures taken will be to the extent strictly required by the exigencies of the situation in comparison to limitation clauses, it is better for the ECHR Member States to refer to derogation clause under Article 15 of the ECHR rather than to limitation clauses allowed by other ECHR articles.

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<sup>53</sup> Frederick Cowell, "Sovereignty and the Question of Derogation: An Analysis of Article 15 of the ECHR and the Absence of a Derogation Clause in the ACHPR," *Birkbeck Law Review* 1, no. 1 (2013): pp. 135-162. P. 137. P. 139.

<sup>54</sup> Anna-Lena Svensson-McCarthy, *The International Law of Human Rights and States of Exception* (The Hague, Netherlands: Martinus Nijhoff Publishers, 1998). p. 591.



### **Chapter III. Findings of the research and discussion.**

#### **3.1. Derogation clause under Article 15 of the ECHR.**

##### **3.1.1. Why do the emergency measures related to COVID-19 require derogations?**

As often occurs in times of crisis, States and international institutions adopted emergency measures to address the COVID-19 pandemic. Restricting travelers from countries with high infection rates; preventing inter- and intra-state movement; quarantines; surveillance using mobile telephone data; contact tracing digital apps; stay-at-home-orders; limits on the number of people assembling in one place and other restrictions on public gatherings have all been heralded as important tools for bringing the global pandemic under control. But at the same time, their use raises important questions regarding human rights, including those related to compliance with the ECHR.

The ECHR contemplates governmental need for emergency health measures which may infringe human rights, but also establishes important safeguards, so they do not permanently erode human rights protections. In particular, Article 15 of the ECHR provides the Governments of the participating States, in exceptional circumstances, with the possibility of a temporary, limited and controlled derogation from their obligation to ensure certain rights and freedoms under the Convention. The use of this provision is subject to the following procedural conditions<sup>55</sup>:

- the right of withdrawal may be applied only during a war or other state of emergency that threatens the life of the nation;
- a State may take measures derogating from its obligations under the Convention only to the extent strictly required by the circumstances of the situation;
- any derogations may not contradict other obligations of the State under international law;
- some of the rights provided for in the Convention are non-derogable under any circumstance;
- States should notify the Secretary General of the Council of Europe of the measures taken and the reasons thereof, if they intend to derogate from their human rights obligations because of a crisis<sup>56</sup>.

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<sup>55</sup> Council of Europe Documents, “Guide on Article 15 of the European Convention on Human Rights. Derogation in Time of Emergency,” (European Court of Human Rights, April 30, 2021), [https://www.echr.coe.int/documents/Guide\\_Art\\_15\\_ENG.pdf](https://www.echr.coe.int/documents/Guide_Art_15_ENG.pdf).

<sup>56</sup> *Lawless v. Ireland* (No. 3) App. No(s). 332/57 (European Court of Human Rights July 1, 1961).

This derogation power is not unlimited, as it may seem at first sight, and very few States have issued notices of intent to derogate in relation to their COVID-19 measures. Only 10 of the 47 ECHR Member States have informed the Council about derogating under Article 15 of the ECHR. Some Member States did not use the ECHR procedure of declaring an emergency and derogating under Article 15 of the ECHR and instead imposed a state of emergency based on their constitutions. Meanwhile, other Member States have not declared a state of emergency at all and relied only on limitation clauses provided in some articles of the ECHR and their national laws. This demonstrates that there is some uncertainty about whether and when a country can and should declare a state of emergency under the ECHR<sup>57</sup>. (Fig. 1)

Fig.1

<b>ECHR Member States</b>	<b>Actions taken</b>
Albania, Armenia, Estonia, Georgia, Latvia, North Macedonia, Republic of Moldova, Romania, San Marino, Serbia.	Declared a state of emergency under Article 15 of the ECHR.
Andorra, Bosnia and Herzegovina, Bulgaria, Cyprus, Czech Republic, Finland, Greece, Hungary, Lithuania, Luxembourg, Portugal, Slovakia, Spain.	Declared a state of emergency according to Constitution only.
Austria, Azerbaijan, Belgium, Croatia, Denmark, France, Germany, Iceland, Italy, Ireland, Liechtenstein, Malta, Monaco, Montenegro, Netherlands, Norway, Poland, Russian Federation, Slovenia, Sweden, Switzerland, Turkey, Ukraine, United Kingdom.	Relied on other measures.

It remains unclear whether States that did not notify of a derogation believe the emergency measures they adopted do not substantively infringe human rights, that the measures are lawful when considered on balance in light of the limited nature of the rights being infringed upon, or whether States have simply ignored procedural and substantive requirements of ECHR as a constraint on their regulatory power in a time of crisis, focusing instead on the urgent task of saving lives<sup>58</sup>.

<sup>57</sup> “Derogations Covid-19. Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 5) Notifications under Article 15 of the Convention in the Context of the COVID-19 Pandemic,” Council of Europe Treaty Office, as of June 30, 2021, <https://www.coe.int/en/web/conventions/derogations-covid-19>.

<sup>58</sup> Eric Richardson, Colleen Devine, “Emergencies End Eventually: How to Better Analyze Human Rights Restrictions Sparked by the COVID-19 Pandemic Under the International Covenant on Civil and Political Rights,” *Michigan Journal of International Law*, no. 42.1 (2020): pp. 105-176.

If Member States do not take into account their obligations under the ECHR when implementing their emergency measures in response to COVID-19, individuals may not receive human rights protection, which is the object and purpose of the ECHR. Domestic legislation may protect some rights in the face of emergency measures, but the ECHR sets universal standards<sup>59</sup>.

In the context of public emergencies like COVID-19 pandemic, non-adherence to derogation provisions under Article 15 of the ECHR can cause a number of problems. First, while focusing only on combating the spread of the virus, States may improperly derogate from rights that are considered non-derogable under the treaty. Secondly, not providing the official notifications required by Article 15 of the ECHR may reduce the oversight by the international community over the measures taken by Member States. Third, the measures may not be limited in time and may continue even after their effectiveness in combatting the pandemic has passed. Fourth, it will be hard to analyze whether emergency measures taken by Member States were lawful, necessary, proportionate and complied with the principles of non-discrimination<sup>60</sup>.

We can assume that Member States may be acting in accordance with Article 15 of the ECHR when implementing emergency measures, but not complying with notification procedures as they need to take swift actions. Although this possibility may cause less damage than ignoring the ECHR, since States can still consider the basic principles of necessity, proportionality, non-discrimination and compatibility with other obligations under international law, the separation of essential requirements for derogation from procedural requirements creates other problems<sup>61</sup>.

A notification of derogation to Council of Europe, who then notifies the other Member States, expands the possibilities for monitoring, analyzing and disagreeing with the practice of the State's withdrawal. This keeps the balance provided for in the ECHR, according to which an extraordinary deviation from human rights requires supervision.

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<sup>59</sup> Alan Greene, "Derogating from the European convention on human rights in response to the coronavirus pandemic: If not now, when?", *Forthcoming, European Human Rights Law Review* (2020).

<sup>60</sup> Stuart Wallace, "Derogations from the European Convention on Human Rights: The Case for Reform", *Human Rights Law Review* 20, no. 4 (2020): 769-796.

<sup>61</sup> Oren Gross, "Once More unto the Breach: The Systemic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies," *Yale Journal of International Law* 23, no. 2 (Summer 1998): 437-502.

The notification mechanism is intended to provide other Member States with an opportunity to challenge the derogation, and it provides an opportunity to review and comment on emergency measures during the consideration by a Member State. Without the transparency provided by the notification mechanism that allows commenting on state of emergency measures, judicial practice related to derogation from the ECHR slows down<sup>62</sup>.

Non-compliance with international treaty mechanisms may undermine the systems established not only by the ECHR, but also by other international/regional organizations. This may weaken the power of the treaty as a mechanism that civil society actors can use to put pressure on governments to respect human rights. More broadly, non-compliance with one core human rights treaty can weaken compliance habits and undermine the overall international human rights regime<sup>63</sup>. Thus, if Member States do not recognize the derogation provisions under the ECHR when implementing their emergency measures, this not only damages the legitimacy of the ECHR, but also threatens the observance of the international rule of law in general.

As previously stated, the research shows that derogations serve a variety of purposes. They function as an insurance policy for hesitant governments, assuring them that they may legally withdraw from some contractual responsibilities during a crisis. Negotiations are facilitated by the prospect of termination of the agreement, and ratification is more acceptable for a wider range of countries<sup>64</sup>.

However, many academics stress the possibility for derogation provisions to be abused. They believe, for example, that derogations might jeopardize the fundamental core of human rights accords and should be subject to stringent international norms and oversight procedures. Derogatory provisions can have harmful consequences, since they formally legitimize a departure from pre-existing contractual obligations at a time when

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<sup>62</sup> Council of Europe Documents, “Guide on Article 15 of the European Convention on Human Rights. Derogation in Time of Emergency,” (European Court of Human Rights, April 30, 2021), [https://www.echr.coe.int/documents/Guide\\_Art\\_15\\_ENG.pdf](https://www.echr.coe.int/documents/Guide_Art_15_ENG.pdf).

<sup>63</sup> Eric Richardson, Colleen Devine, “Emergencies End Eventually: How to Better Analyze Human Rights Restrictions Sparked by the COVID-19 Pandemic Under the International Covenant on Civil and Political Rights,” *Michigan Journal of International Law*, no. 42.1 (2020): pp. 105-176, <https://doi.org/10.36642/mjil.42.1.emergencies>.

<sup>64</sup> Alan Greene, *Emergency Powers in a Time of Pandemic*, 1st ed. (Bristol, UK: Bristol University Press, 2020).

such obligations are most vulnerable. However, it is not right to say that derogations completely or partially eliminate the international obligation<sup>65</sup>.

Others argue that sovereign States have a legitimate right to defend their constitutional and democratic regimes in times of crisis. They stress that the derogations compel States to openly declare their policies and to coordinate their activities with international assurances and monitoring procedures – requirements that minimize the frequency and scope of possible human rights violations. Derogations, in this perspective, are not a danger to the international system of human rights protection, but rather an indication of States that take human rights seriously respecting international norms and treaty standards<sup>66</sup>.

Furthermore, the official notification of derogation is a reliable signal for internal actors, many of whom are predisposed to challenge or find fault with such restrictions, that the suspension of rights is necessary, temporary and legal. This is achieved by clearly indicating that the restrictions on rights are substantial and temporary and that the government has publicly committed itself to fully comply with its contractual obligations to protect civil and political freedoms. The official notification on derogation, in particular, reinforces the State's claim that it is in the midst of a genuine crisis, increasing the likelihood that internal actors will support its actions in the near future<sup>67</sup>.

Adherence to the international regime of derogations increases the credibility of the government's statement that the threat is real and serious, which causes greater support and respect from the domestic audience regarding the restriction of rights for a limited period. After receiving this information, public groups can track whether the government is actually suspending only those freedoms that it has been notified about, whether it applies restrictions only in the specified region, and whether the suspension lasts for a more limited period or after the threat has subsided. They can also use the fact to hold the

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<sup>65</sup> Emilie M. Hafner-Burton, Laurence R. Helfer and Christopher J. Fariss “Emergency and Escape: Explaining Derogations from Human Rights Treaties”, *International Organization*, Volume 6, Issue 4 (2011), pp. 673 – 707.

<sup>66</sup> Eric Richardson, Colleen Devine, “Emergencies End Eventually: How to Better Analyze Human Rights Restrictions Sparked by the COVID-19 Pandemic Under the International Covenant on Civil and Political Rights,” *Michigan Journal of International Law*, no. 42.1 (2020): pp. 105-176, <https://doi.org/10.36642/mjil.42.1.emergencies>.

<sup>67</sup> Council of Europe Documents, “Guide on Article 15 of the European Convention on Human Rights. Derogation in Time of Emergency,” (European Court of Human Rights, April 30, 2021), [https://www.echr.coe.int/documents/Guide\\_Art\\_15\\_ENG.pdf](https://www.echr.coe.int/documents/Guide_Art_15_ENG.pdf).

government accountable, if deviations from the conditions of derogation are illegal and when the government should be held responsible for the resulting violations of rights<sup>68</sup>.

The ECHR requires that any emergency measure restricting rights is provided for by law, is necessary, proportionate and non-discriminatory. The obligation to file an official notice of derogation also makes it clear to look back after the end of the emergency to consider whether the measures taken in connection with the emergency were canceled or changed to restore freedoms that may have been violated<sup>69</sup>.

In addition to providing the transparency, the notification mechanism serves to strengthen the essential requirements of Article 15 of the ECHR. Article 15 of the ECHR requires Member States to include in the notification of derogation the information on specific rights and freedoms which were restricted, the reason for the withdrawal and the notification of the termination of the measures. The provision of specific infringed rights and freedoms, as well as the reasons for the derogations, help to ensure that Member States act respectively and proportionately to the emergency situation. In addition, the requirement that States notify the Council of Europe of the termination of the derogation reinforces the time-limited nature of the derogations. Without providing a notice on derogation, these guarantees are reduced.

### **3.1.2. Derogation clause and limitation clauses compared.**

Taking into consideration the number of States derogated under Article 15 of the ECHR, we can assume that most Member States are acting in accordance with the substantive limitation provisions contained in individual articles of the ECHR when they establish emergency measures in response to COVID-19.

As discussed earlier, while using the derogation mechanism, as well as limitation clauses, Member States must continue to adhere to the principles of legality, necessity, proportionality and non-discrimination in order to comply with the treaty standards. However, when using a limitation clause to take an emergency measure, there is no explicit time limit, as in the case with a derogation, and there is no need to officially declare a

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<sup>68</sup> Emilie M. Hafner-Burton, Laurence R. Helfer, and Christopher J. Fariss, "Emergency and Escape: Explaining Derogations from Human Rights Treaties," *International Organization*, Vol. 65, no. 4 (2011): pp. 673-707, <https://doi.org/10.1017/s002081831100021x>.

<sup>69</sup> Council of Europe Documents, "Guide on Article 15 of the European Convention on Human Rights. Derogation in Time of Emergency," (European Court of Human Rights, April 30, 2021), [https://www.echr.coe.int/documents/Guide\\_Art\\_15\\_ENG.pdf](https://www.echr.coe.int/documents/Guide_Art_15_ENG.pdf).

state of emergency. As a result, States can maintain emergency measures that restrict the rights of the ECHR, even after the crisis has passed<sup>70</sup>.

Although the principles of necessity or proportionality may reflect the idea that emergency measures cannot last longer than a state of emergency, since an official state of emergency is not required while applying limitation clauses, in practice, the analysis of limitation clauses does not distinguish when restrictions should be lifted. Without a transparent deadline for restoring rights and freedoms at the end of an emergency, restrictions can easily persist<sup>71</sup>.

Furthermore, unlike a derogation, States do not face a notification requirement when they act under limitation clauses during an emergency. In addition to the loss of control that comes with notification, States are not required to justify their restrictions in writing, as would be the case in the case of a derogation. Without a clearly formulated statement of the need to object, it will be more difficult to indicate the moment when the need for the State to impose a restriction expires. The notification may also serve to limit the extraordinary powers of the State and reflect a positive commitment to the principles of legality and normality, which are lost when acting in accordance with the limitation clauses<sup>72</sup>.

Regardless of whether Member States use a derogation clause under Article 15 of the ECHR or only rely on limitation clauses when imposing human rights restrictions to combat COVID-19, the uncertainty created about how Member States justify their response to COVID-19 in accordance with the ECHR causes its own harm and undermines the Convention, especially in the context of a global crisis<sup>73</sup>.

With regard to rights subject to both a limitation clause and a derogation under Article 15 of the ECHR, there is little indication as to when the scope of the restriction exceeds the boundaries of the limitation clauses and starts requiring a Member State to

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<sup>70</sup> Frederick Cowell, "Sovereignty and the Question of Derogation: An Analysis of Article 15 of the ECHR and the Absence of a Derogation Clause in the ACHPR," *Birkbeck Law Review* 1, no. 1 (2013): pp. 135-162. P. 137-38.

<sup>71</sup> Eric Richardson, Colleen Devine, "Emergencies End Eventually: How to Better Analyze Human Rights Restrictions Sparked by the COVID-19 Pandemic Under the International Covenant on Civil and Political Rights," *Michigan Journal of International Law*, no. 42.1 (2020): pp. 105-176, <https://doi.org/10.36642/mjil.42.1.emergencies>.

<sup>72</sup> Alan Greene, *Permanent States of Emergency and the Rule of Law: Constitutions in an Age of Crisis*, 1st ed. (Oxford, UK: Hart Publishing, 2018), 256 p.

<sup>73</sup> Laurence R. Helfer, "Rethinking Derogations from Human Rights Treaties," *American Journal of International Law* 115, no. 1 (2021): 20-40.

justify its actions by derogation. A Member State cannot invoke a derogation from what it could have achieved with a limitation clause, consequently Member States may tend to interpret the treaty in such a way as to encourage the use of limitations rather than derogation<sup>74</sup>.

However, derogations become necessary the longer the limitations are in effect, since limitations of “a long duration are especially likely to be disproportionate to the legitimate goal pursued”<sup>75</sup>.

The division between limitations and derogations is further confused by the duplication of principles applicable to both proportionality and non-discrimination. The lack of a clear standard leads to Member States sending a notice of derogation in a situation where it may not be necessary, using the derogation as insurance. At the same time, other Member States may extend the boundaries of the limitation clauses to avoid international oversight. In the case of COVID-19, this leads to disparate results, when some States take action, presumably through limitation provisions, for which other States issue official derogation notices<sup>76</sup>.

Given the very small number of States that have sent a notification of derogation related to their emergency response measures to COVID-19, it is not clear whether States are disregarding the principles of the ECHR or considering that any restriction of human rights is justified in view of the limited nature of the right provided in some articles of the ECHR. This situation undermines the ECHR in several ways. First, it violates the progressive structure of the Convention, which provides for increased supervision and restrictions as the scope of limitations expands. Secondly, it creates uncertainty as to whether and when Member States should apply provisions of Article 15 of the ECHR. Third, Member States do not define the scope of the limitation provisions universally, creating definitions of a different nature<sup>77</sup>.

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<sup>74</sup> Alan Greene, *Emergency Powers in a Time of Pandemic*, 1st ed. (Bristol, UK: Bristol University Press, 2020).

<sup>75</sup> Alessandra Spadaro, “COVID-19: Testing the Limits of Human Rights,” *European Journal of Risk Regulation* 11, no. 2 (2020): pp. 317-325, <https://doi.org/10.1017/err.2020.27>.

<sup>76</sup> Eric Richardson, Colleen Devine, “Emergencies End Eventually: How to Better Analyze Human Rights Restrictions Sparked by the COVID-19 Pandemic Under the International Covenant on Civil and Political Rights,” *Michigan Journal of International Law*, no. 42.1 (2020): pp. 105-176, <https://doi.org/10.36642/mjil.42.1.emergencies>.

<sup>77</sup> Oren Gross, “Once More unto the Breach: The Systemic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies,” *Yale Journal of International Law* 23, no. 2 (Summer 1998): 437-502.



The global nature of the COVID-19 pandemic highlights these challenges, as Member States simultaneously struggle using different responses to the same or similar threat. As the world community begins to address other large-scale crises, possibly upcoming new pandemics, the need to strengthen multilateral human rights instruments with clear standards and consistent application becomes increasingly acute.

### **3.1.3. Derogations as a precautionary measure and international signal.**

In the event of an emergency, the European Convention on Human Rights is designed in such a way that States first act within permissible limits before trying to use their right to derogate under Article 15 of the ECHR. In this regard, the Convention provides that State Parties can derogate from human rights and fundamental freedoms protected therein only under strict conditions set out in Article 15 of the ECHR<sup>78</sup>.

However, the ECHR does not provide clear standards for Member States regarding the definition of the permissible scope of limitation clauses. This means that States often apply derogations as a precaution. It may create an incentive for States that want to avoid international surveillance to expand what is properly achieved through limitation clauses. The Convention provides for increased supervision as the scope or severity of restrictions increases, establishing stricter requirements for derogations than limitations. This balance is disturbed due to different interpretations by States of the scope of permissible limitations<sup>79</sup>.

For example, Latvia was one of the first countries to notify the Secretary General of the Council of Europe about derogating under Article 15 of the ECHR in relation to COVID-19 pandemic on March 16, 2020. On 12 March 2020, the Government of the Republic of Latvia declared emergency situation in the entire territory of Republic of Latvia. The aim of the declaration was to ensure epidemiological safety and restrict the spread of COVID-19. The emergency situation started on 13 March 2020 and expected to remain in force until 14 April 2020 (prolonged until 12 May 2020)<sup>80</sup>.

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<sup>78</sup> Alan Greene. “Derogating from the European convention on human rights in response to the coronavirus pandemic: If not now, when?”, *Forthcoming, European Human Rights Law Review* (2020).

<sup>79</sup> Alan Greene, *Emergency Powers in a Time of Pandemic*, 1st ed. (Bristol, UK: Bristol University Press, 2020).

<sup>80</sup> “Derogations Covid-19. Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 5) Notifications under Article 15 of the Convention in the Context of the COVID-19 Pandemic,” Council of Europe Treaty Office, as of June 30, 2021, <https://www.coe.int/en/web/conventions/derogations-covid-19>.

Among the measures adopted by the Government of Latvia, in-class learning at schools was suspended, access of third persons to hospitals, social care institutions and places of detention was restricted, all public events, meetings and gatherings were cancelled and prohibited, as well as movement of persons was restricted, as in most of Council of Europe Member States. The application of these measures gave reasons for the necessity to derogate from certain obligations of Latvia under Articles 8 and 11 of the ECHR, Article 2 of Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, and Article 2 of Protocol No.4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, since it would be impossible to individually assess the limitations during a crisis<sup>81</sup>.

Latvia was not the only State that approached the derogation clause during the COVID-19 crisis as a preventive measure. Among the measures adopted by the Government of Estonia, regular on-site studies in education establishments was suspended, public gatherings were prohibited, additional movement restrictions for several Estonian islands were introduced. On 15 March 2020, it was decided to restrict crossing of the Schengen internal and external border temporarily and reintroduce border controls in order to contain the spread of the coronavirus as of 17 March 2020<sup>82</sup>.

Estonia's notice of derogation stated: "Some of these measures may involve a derogation from certain obligations of Estonia under Articles 5, 6, 8 and 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms, Articles 1 and 2 of Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, and Article 2 of Protocol No.4 to the Convention for the Protection of Human Rights and Fundamental Freedoms."<sup>83</sup>

Furthermore, Armenia's notification on derogation under Article 15 of the ECHR stated: "Measures taken during the state of emergency may include derogations from the

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<sup>81</sup> Permanent Representation of the Republic of Latvia to the Council of Europe. "Notification - JJ9012C Tr./005-225 - 16 March 2020 Declaration Related to the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 5)." Council of Europe Treaty Office. Directorate of Legal Advice and Public International Law, 2020. <https://rm.coe.int/16809ce9f2>.

<sup>82</sup> "Derogations Covid-19. Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 5) Notifications under Article 15 of the Convention in the Context of the COVID-19 Pandemic," Council of Europe Treaty Office, as of June 30, 2021, <https://www.coe.int/en/web/conventions/derogations-covid-19>.

<sup>83</sup> Permanent Representation of Estonia to the Council of Europe. "Notification - JJ9017C Tr./005-229 - 20 March 2020 - Declaration Related to the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 5)." Council of Europe Treaty Office. Directorate of Legal Advice and Public International Law, 2020. <https://rm.coe.int/16809cfa87>.

obligations of the Republic of Armenia under the Convention for the Protection of Human Rights and Fundamental Freedoms. Therefore, the Permanent Representation kindly asks that this Note Verbale be considered as a notification in line with Article 15 of the Convention”<sup>84</sup>.

Also, in this line the notification on derogation of the republic of North Macedonia stated: “The application of these measures may influence the exercise of certain rights and freedoms under the Convention and in some instances give reason for the necessity to derogate from certain obligations of the Republic of North Macedonia under Article 8 and Article 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 2 of the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms and Article 2 of Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms”<sup>85</sup>.

It is clear, that the use of “may” suggested that derogating States may not have intended to suspend the rights and used the derogation clause under Article 15 of the ECHR as a precautionary measure. While this preventive use of derogation respects the ECHR, it is true that it raises questions about whether the derogation was really necessary and appropriate.

However, in this regard, a derogation does not necessarily have to be a concession that the State will not be able to guarantee the rights contained in the Convention. Indeed, the practice of granting a derogation was that a Contracting State indicated that the measures it was taking “may”<sup>86</sup> include a derogation from the Convention. For this reason, in any case where an applicant complains that his or her rights under the Convention have been violated during the period of derogation, the Court (ECtHR) will first consider whether the measures taken can be justified in accordance with the main articles of the Convention; only if this cannot be justified, the Court will continue to determine whether

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<sup>84</sup> Permanent Representation of the Republic of Armenia to the Council of Europe. “Notification - JJ9015C Tr./005-227 - 20 March 2020 - Declaration Related to the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 5).” Council of Europe Treaty Office. Directorate of Legal Advice and Public International Law, 2020. <https://rm.coe.int/09000016809cf885>.

<sup>85</sup> Permanent Representation of the Republic of North Macedonia to the Council of Europe. “Notification - JJ9021C Tr./005-232 - 2 April 2020 - Declaration Related to the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 5).” Council of Europe Treaty Office. Directorate of Legal Advice and Public International Law, 2020. <https://rm.coe.int/16809e1288>.

<sup>86</sup> Alan Greene, *Permanent States of Emergency and the Rule of Law: Constitutions in an Age of Crisis*, 1st ed. (Oxford, UK: Hart Publishing, 2018), 256 p.

the derogation was valid (*A. and Others v. the United Kingdom* [GC], 2009, § 161; *Lawless v. Ireland* (no. 3), 1961, § 15)<sup>87</sup>.

Also, we should bear in mind that governments have used public emergencies as a pretext to justify discrimination, reprisals against political opponents, or increased marginalization of minorities or other vulnerable groups. Relying on derogation clause provided in Article 15 of the ECHR over limitation clauses may help to avoid potential human rights violations which may occur during emergencies<sup>88</sup>.

Furthermore, when States take extraordinary measures without notification of a derogation, it is difficult to determine whether a State is acting under a limitation clause, acting under Article 15 of the ECHR without notification, or ignoring its treaty obligations altogether. This uncertainty, real or imaginary, undermines the treaty as a whole, generating distrust of the degree of its compliance<sup>89</sup>.

The lack of judicial practice and clear standards regarding when an emergency situation requires a derogation also creates useless differences in practice. Without clear guidance on what to do in the face of global threats such as COVID-19, States are more likely to consider or follow what others have done. With COVID-19, for example, Latvia was the first country in March 2020, followed quickly by Armenia, Romania, Moldova, Georgia, Serbia and Estonia. This practice within the framework of Eastern European countries, apparently, can demonstrate a regional understanding of the importance of departing from the restrictions in the COVID-19 situation<sup>90</sup>.

In this regard, the choice to derogate may also be influenced by the State's concern about the message it sends to international actors who may use political instruments to "punish" them for curtailing rights rather than domestic actors who may not have such rights. One such punishment is the loss of foreign financing, trade or other privileges<sup>91</sup>.

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<sup>87</sup> Council of Europe Documents, "Guide on Article 15 of the European Convention on Human Rights. Derogation in Time of Emergency," (European Court of Human Rights, April 30, 2021), [https://www.echr.coe.int/documents/Guide\\_Art\\_15\\_ENG.pdf](https://www.echr.coe.int/documents/Guide_Art_15_ENG.pdf).

<sup>88</sup> Deena Mohammad El-Rashed, "Derogation in Time of Emergency: An Analysis of Counter-Terrorism Measures in France and Their Impact on Human Rights," *Florida Journal of International Law* 30, no. 1 (April 2018): 1-26.

<sup>89</sup> Oren Gross, "Once More unto the Breach: The Systemic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies," *Yale Journal of International Law* 23, no. 2 (Summer 1998): 437-502.

<sup>90</sup> Audrey Lebret, "COVID-19 pandemic and derogation to human rights", *Journal of Law and the Biosciences*, Volume 7, Issue 1, January-June 2020, Isaa015, <https://doi.org/10.1093/jlb/Isaa015>.

<sup>91</sup> Emilie M. Hafner-Burton, Laurence R. Helfer, and Christopher J. Fariss, "Emergency and Escape: Explaining Derogations from Human Rights Treaties," *International Organization*, Vol. 65, no. 4 (2011): pp. 673-707, <https://doi.org/10.1017/s002081831100021x>. P.686.

Countries receiving significant sums of foreign assistance or other types of privileges or exemptions would be particularly vulnerable to other nations' human rights concerns. While dealing with derogations under Article 15 of the ECHR, the European Union (EU) Member States are most likely to provide assistance or use trade and other economic instruments to prosecute human rights violators. Thus, if derogations are a mark of respect for the international system, a country that enjoys trade concessions or receives foreign aid might derogate to provide a legal justification for suspending rights in a crisis. Thus their concern is not pushback from internal actors, but, on the contrary, from the international actors, who could withdraw these benefits<sup>92</sup>.

If derogations are an attempt to deflect international censure during crises, we would expect countries that receive substantial aid from, or that trade heavily with the EU to be more likely than other States to derogate, provide information about the nature and duration of the derogation, and avoid serial derogations. So, if we look to the list of official notifications for derogations under Article 15 of the ECHR, we can see that all the countries are dependent on mutual favorable relations with EU Member States as such being mostly from Eastern Europe and the western Balkans.

#### **3.1.4. Would derogations be effective in all cases?**

Furthermore, some academics believe that derogations are useful only to certain types of regimes – liberal democracies. As a short-run mechanism, derogations are only appealing to governments that are accountable to their citizens, respect human rights, democracy and rule of law. By contrast, derogations serve little purpose in illiberal democracies, where citizens are cut off from knowledge about the activities of those in power. Governments in these countries join human rights treaties and routinely violate treaty norms. They, thus, have little need to derogate because they are unlikely to be held accountable for violations with or without a derogation<sup>93</sup>.

Indeed, for some of these States, a derogation under the international treaty in times of emergency may be more harmful than simply violating the treaty if the derogation draws attention to repression that would otherwise remain hidden. In this regard, we would like to focus on the cases of Hungary, Poland and Russian Federation.

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<sup>92</sup> Emilie M. Hafner-Burton, Laurence R. Helfer, and Christopher J. Fariss, "Emergency and Escape: Explaining Derogations from Human Rights Treaties," *International Organization*, Vol. 65, no. 4 (2011): pp. 673-707, <https://doi.org/10.1017/s002081831100021x>. P.687.

<sup>93</sup> Alan Greene, *Permanent States of Emergency and the Rule of Law: Constitutions in an Age of Crisis*, 1st ed. (Oxford, UK: Hart Publishing, 2018), 256 p.

## *Hungary*

Before the COVID-19 pandemic, Hungary was already on the verge of an “illiberal turn”, experiencing symptoms of democratic disintegration, including attacks on an independent judiciary, NGOs and increased political control over the media. The COVID-19 pandemic has provided an opportunity to further undermine liberal democracy<sup>94</sup>.

In 2009, Viktor Orban declared that the government had started to create a new Constitution, naming the existing democratic Constitution of the Republic (adopted in 1949 and amended in 1989) a series of technocratic legal norms. Within the meantime, through pursuit of its real political goals and taking advantage of the requisite two-thirds majority, the government has amended the 1989 Constitution a number of times<sup>95</sup>.

For example, a decision was taken in November 2010 to limit the constitutional court’s powers to review legal norms. In the same year, the Hungarian Parliament adopted an amendment to the Hungarian Citizenship Act and, in the light of the nation’s ethnic definition, implemented a new process for naturalization of Hungarians living outside Hungary. This gave ethnic Hungarians living abroad extra-territorial citizenship, claiming that the new civil policy acted as a symbolic ‘cultural reunification outside borders’. There was a hidden aim behind the implicit claim that the law served the needs of ethnic Hungarians living abroad to get votes without real representation<sup>96</sup>.

On 18 April 2011, the Hungarian Parliament adopted a new Hungarian Constitution called ‘The Fundamental Law of Hungary’, which came into force on 1 January 2012 and replaced the previous Constitution of 1989. Parliament members who are members of the ruling party Coalition (Fidesz, KDNP) adopted the Constitution and further 7 amendments to it without any support of opposition parties<sup>97</sup>.

By the time the Constitution came into effect, most of the cardinal acts had not yet been enacted, and essential legislative provisions were absent in the case of acts that were

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<sup>94</sup> Lenka Bustikova, Petra Guasti, “The Illiberal Turn or Swerve in Central Europe?,” *Politics and Governance* 5, no. 4 (2017): pp. 166-176, <https://doi.org/10.17645/pag.v5i4.1156>.

<sup>95</sup> Zoltán Fleck et al., “Opinion on the Fundamental Law of Hungary (Amicus Brief),” in *Constitution for a Disunited Nation: On Hungary's 2011 Fundamental Law*, ed. Andrew Arato, Gábor Halmai, and János Kis (Budapest, Hungary: Central European University Press, 2012), pp. 455-490.

<sup>96</sup> Zoltán Fleck et al., “Opinion on the Fundamental Law of Hungary (Amicus Brief),” in *Constitution for a Disunited Nation: On Hungary's 2011 Fundamental Law*, ed. Andrew Arato, Gábor Halmai, and János Kis (Budapest, Hungary: Central European University Press, 2012), pp. 455-490.

<sup>97</sup> Paul Blokker, *New Democracies in Crisis?: a Comparative Constitutional Study of the Czech Republic, Hungary, Poland, Romania and Slovakia* (London, UK: Routledge, 2015). P.75.

enacted before the Fundamental Law was adopted. This has clearly resulted in legal confusion<sup>98</sup>.

Since August 2013, after limiting the powers of autonomous State institutions such as the constitutional court, ombudsmen and the judiciary, the government, along with State bodies, has taken action against NGOs, including tax inspections and criminal proceedings, in the manner used by authoritarian States. Such limitations explicitly contradict the idea of democracy and the ideals of transparency and equilibrium, since NGOs and other organizations of public interest are a prime vehicle for citizens to both engage in policy making and keep institutions accountable.<sup>99</sup> Thus, Hungary turned away from liberal democracy and the rule of law before COVID-19 pandemic started<sup>100</sup>.

On March 30, 2020, the Hungarian National Assembly passed a law imposing a state of emergency for an indefinite period and allowing Prime Minister Viktor Orbán to rule by decree. No elections, by-elections or referendums may be held during a state of emergency. The law also provided for a five-year prison sentence for “hindering efforts to overcome the crisis by spreading misleading information” and a three-year prison sentence for violating quarantine rules<sup>101</sup>. The consequences of the law are frightening – ruling by decree is the ultimate form of strengthening the executive power (Schmittian theory in practice). The vague nature of the law (and the two-thirds majority of the ruling parties) prevents parliamentary oversight (which is carried out by regularly re-introducing a state of emergency). With the parliamentary opposition suspended, prison sentences provide the government with tools against the remaining opposition – the free press and civil society<sup>102</sup>.

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<sup>98</sup> Miklós Bánkuti, Tamás Dombos, and Zoltán Fleck, *Opinion on Hungary’s New Constitutional Order: Amicus Brief to the Venice Commission on the Transitional Provisions of the Fundamental Law and the Key Cardinal Laws*, accessed July 21, 2021, [https://lapa.princeton.edu/hosteddocs/hungary/Amicus\\_Cardinal\\_Laws\\_final.pdf](https://lapa.princeton.edu/hosteddocs/hungary/Amicus_Cardinal_Laws_final.pdf). P.4.

<sup>99</sup> Judith Sargentini, “Report on a Proposal Calling on the Council to Determine, Pursuant to Article 7(1) of the Treaty on European Union, the Existence of a Clear Risk of a Serious Breach by Hungary of the Values on Which the Union Is Founded (2017/2131(INL))” (European Parliament Committee on Civil Liberties, Justice and Home Affairs (Initiative – Rule 45 and 52 of the Rules of Procedure), 2018), accessed June 21, 2021, [https://www.europarl.europa.eu/doceo/document/A-8-2018-0250\\_EN.html](https://www.europarl.europa.eu/doceo/document/A-8-2018-0250_EN.html).

<sup>100</sup> David Landau and Hanna Lerner, eds., *Comparative Constitution Making* (Edward Elgar Publishing, 2019). P.302.

<sup>101</sup> Zsuzsanna Végh, *No More Red Lines Left to Cross: The Hungarian Government’s Emergency Measures*, (ECFR, April 2, 2020), accessed 20 June 2021. [http://www.ecfr.eu/article/commentary\\_no\\_more\\_red\\_lines\\_left\\_to\\_cross\\_the\\_hungarian\\_governments\\_emerge](http://www.ecfr.eu/article/commentary_no_more_red_lines_left_to_cross_the_hungarian_governments_emerge).

<sup>102</sup> Petra Guasti, “The impact of the Covid-19 pandemic in Central and Eastern Europe: The rise of autocracy and democratic resilience”, *Democratic Theory* 7, no. 2 (2020): 47-60.

One of the first measures taken was the introduction of “gender at birth” – a *de facto* ban on gender reassignment by transgender citizens and the redirection of local government revenues to the central government. Thus, Hungarian citizens have lost a significant part of their civil rights and received very weak protection from COVID-19<sup>103</sup>.

As observers suggest, Viktor Orban used the moment of the pandemic to move from his pre-pandemic “illiberal democracy”<sup>104</sup> to authoritarian rule<sup>105</sup>. However, this turn did not make the fight against the COVID-19 pandemic in Hungary effective. Thus, if we refer to previous findings, we can assume that official notification on derogation under Article 15 of the ECHR would bring even more international attention to the measures taken by Hungarian government.

### *Poland*

On March 2, 2020, two days before the official diagnosis of the first case of COVID-19, the Polish Parliament adopted a new special law on the fight against infectious diseases through administrative, budgetary and epidemiological measures. The law strengthened the power of the executive branch by weakening checks and balances, parliamentary oversight and the courts. Unlike the Hungarian law, the Polish law imposed a time-limited state of emergency – 180 days, despite the fact that the constitutional rules of a state of emergency allow only 90 days. Against the background of the COVID-19 pandemic, the Polish Parliament has begun discussing two legislative proposals – additional restrictions on legal access to abortion and criminalization of sexual education (with imprisonment for up to three years for teachers)<sup>106</sup>.

These proposals were deferred bills of the previous parliament, and the deadline for their first reading was May 10 2020. When these civic initiatives were first introduced, they led to nationwide protests. This time, with strict restrictions on protests due to COVID-19, civil society has become more innovative. The protests were held online, on

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<sup>103</sup> Petra Guasti, “The impact of the Covid-19 pandemic in Central and Eastern Europe: The rise of autocracy and democratic resilience”, *Democratic Theory* 7, no. 2 (2020): 47-60.

<sup>104</sup> Lenka Bustikova, Petra Guasti, “The Illiberal Turn or Swerve in Central Europe?,” *Politics and Governance* 5, no. 4 (2017): pp. 166-176, <https://doi.org/10.17645/pag.v5i4.1156>.

<sup>105</sup> László Bruszt et al., *Hungary's Disease Dictator* by László Bruszt, (Project Syndicate, April 16, 2020), accessed May 20, 2021, <https://www.project-syndicate.org/commentary/hungary-covid19-viktor-orban-pandemic-dictatorship-by-laszlo-bruszt-2020-04>.

<sup>106</sup> Portia Kentish et al., *Protests Move Online as Poland Puts Abortion and Sex Education Back on the Political Agenda*, (Emerging Europe, April 16, 2020), accessed May 13, 2021, <https://emerging-europe.com/news/protests-move-online-as-poland-puts-abortion-and-sex-education-back-on-the-political-agenda/>.



balconies and through windows. In cities such as Warsaw, there were passages and crowds of people at the main intersections. People holding placards formed long human snakes around key institutions to distance themselves from society, protesting against the growth of autocracy<sup>107</sup>.

The collapse of democracy in Poland is perhaps most noticeable in the attempt of the ruling party (Law and Justice) to hold presidential elections, originally scheduled for May 10 2020, against the backdrop of a pandemic. After the opposition rejected the proposal of Law and Justice to extend the term of office of the president for two years, Law and Justice decided to switch to voting by mail, ignoring the constitutional restriction on changing the rules of elections less than six months before the elections. The Government also started printing ballots without the approval of the National Election Committee. In preparation for the postal vote, the Polish Post began collecting the personal data of 30 million Polish citizens, violating the General Data Protection Regulation (EU) 2016/679, existing national laws and human rights by requesting information from city councils via unencrypted email<sup>108</sup>.

On May 5, 2020, the Polish Sejm (the Upper House of the Polish Parliament) rejected the government's proposal to hold a vote by mail. The Organization for Security and Co-operation in Europe (OSCE), which monitors the elections, reviewed the proposed amendments to the election law and concluded that they would not contribute to free and fair elections and constitute a violation of the principles of legality and the rule of law<sup>109</sup>.

Eventually, the Polish presidential election was held on 28 June 2020. After the second round of voting on 12 July 2020, the presidential election was completed with A.Duda's 51.03% against R.Trzaskowski's 48,97%, shortly after the Law and Justice Party was again open to cutting legal corners and using the COVID-19 crisis to further strengthen power and undermine liberal democracy. Despite the limitations imposed on

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<sup>107</sup> Claudia Ciobanu, *Poles Find Creative Ways to Protest Despite the Pandemic*, (Balkan Insight, April 23, 2020), accessed May 7, 2021, <https://balkaninsight.com/2020/04/21/poles-find-creative-ways-to-protest-despite-the-pandemic/>.

<sup>108</sup> Miguel Poiars Maduro and Paul W. Kahn, eds. *Democracy in times of pandemic: Different futures imagined*. (Cambridge University Press, 2020).

<sup>109</sup> Jacuński, Michał, Barbara Brodzińska, Anna Pacześniak, and Maria Winclawska. *Party Organization and Communication in Poland*. (Palgrave Macmillan, 2021).

the right of peaceful assembly, Polish citizens held innovative protest actions within the framework allowed by the pandemic<sup>110</sup>.

As such we can notice a similar pattern in Poland in regard to sending a notification on derogation under Article 15 of the ECHR to the Council, as it would bring more international supervision and transparency to the actions taken by the government.

#### *Russian Federation*

As for the third case, the government of the Russian Federation did not declare a state of emergency. Many international observers claim that the government was busy with numerous amendments to the Constitution with the explicit aim of eliminating legal restrictions that could prevent President V.Putin from participating in future presidential elections. When other European countries were trying to stop the spread of the COVID-19 virus, Russia still exerted a strong influence on its closest neighbors, and the Russian occupation of Crimea and other territories continued<sup>111</sup>.

The pandemic of the coronavirus infection has exposed the chronic underfunding of the healthcare system of the Russian Federation. Under the pretext of a pandemic, the authorities continued to fight against all kinds of dissent, including through further amendments to the vaguely formulated legislation on “fake news” and tightening restrictions on public gatherings. Participants of peaceful protests, human rights defenders, civil and political activists were detained and prosecuted<sup>112</sup>.

The right to a fair trial was regularly violated, and new legislative amendments further limited the independence of the courts. During the quarantine announced in connection with the COVID - 19 pandemic, the number of reports of domestic violence increased sharply, while the bill on domestic violence remained without movement in parliament. LGBTI people have faced discrimination and harassment. Thousands of migrant workers lost their jobs due to the pandemic, but could not leave the country due to the closure of borders<sup>113</sup>.

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<sup>110</sup> Jacuński, Michał, Barbara Brodzińska, Anna Pacześniak, and Maria Winclawska. *Party Organization and Communication in Poland*. (Palgrave Macmillan, 2021).

<sup>111</sup> Artem Galushko, *Politically Motivated Justice: Authoritarian Legacies and Their Role in Shaping Constitutional Practices in the Former Soviet Union*. (Springer Nature, 2021).

<sup>112</sup> Ibid.

<sup>113</sup> Joseph Amon and Margaret Wurth, “A Virtual Roundtable on COVID-19 and Human Rights with Human Rights Watch Researchers,” *Health and Human Rights Journal* 22, no. 1 (June 2020): pp. 399-413.

Under the pretext of COVID-19, according to the Federal Law No. 100-FZ of 01.04.2020, amendments to the Criminal Code of Russia established new penalties for violation of quarantine orders, according to which a person who violates the orders can be punished with fines or imprisonment – from 40,000 rubles (460 euro) to 7 years in prison if violation of the quarantine leads to two or more deaths. The amendments also established that the public dissemination of false information that threatens the health of the population during an emergency situation is punishable by imprisonment for up to 3 years or up to 5 years if it leads to “grave consequences”<sup>114</sup>.

To conclude, in all three above mentioned cases (Hungary, Poland and Russian Federation) the official notification would bring undesirable extra attention and supervision from the Council of Europe and other international actors, as the human rights violations were already taking place even before Covid-19 emergency. As such, Hungary would fall within the Schmittian theory perfectly, as by declaring a state of emergency without a clear time-limit, the Hungarian Government used the emergency situation to repress the opposition, to neglect human rights and turned from illiberal democracy to authoritarian regime.

### **3.2. Why derogations under Article 15 of the ECHR are better response in comparison to the limitations imposed by Member States to combat COVID-19?**

The inclusion of limitation clauses in the ECHR recognizes that most human rights are not absolute and require a balance of individual and public interests. As such, these rights may be limited for unlimited time period and still comply with the ECHR.

On the contrary, since derogations may provide broader opportunities for restricting rights than limitation clauses, the Convention restricts their use to narrow circumstances and subordinates them to the notification clause, allowing others to control their implementation. In contrast to the limitation clause, when a derogation is used, it should be limited in time. At the same time, the ECHR categorically prohibits derogation from certain rights, considering the obligation to protect these rights too important to be canceled even in emergency situations. Thus, the ECHR creates a progressive model in which the use of derogations depends on narrower circumstances and stricter supervision.

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<sup>114</sup> Российская Федерация. “Федеральный Закон От 01.04.2020 № 100-ФЗ.” Официальное опубликование правовых актов. Официальный интернет-портал правовой информации, 2020. <http://publication.pravo.gov.ru/Document/View/0001202004010073>.

In response to COVID-19, Member States have adopted rules such as travel bans, stay-at-home orders, quarantines, digital surveillance and bans on public gatherings. As the ECHR does not provide clear standards for Member States regarding the definition of the permissible scope of limitation clauses, we discussed whether the limitations imposed by States are better response in comparison to the right of derogation under Article 15 of the ECHR.

### **3.2.1. Right to liberty and freedom of movement: the scope of limitation clauses in the context of COVID-19 pandemic.**

In this section, we examined the criteria for placing limitation on one's freedom of movement with a focus on quarantines, curfews and travel restrictions imposed by Council of Europe Member States.

In response to COVID-19, Member States used quarantines, curfews and travel bans as public health steps to prevent the virus from spreading. In the case of COVID-19, quarantines, curfews and travel restrictions were expected to protect public health and were mostly aimed at people from virus hot spots at the start of the COVID-19 pandemic; but as the virus spread, restrictions became more broad.

A quarantine is characterized as “the separation of persons (or communities) that have been exposed to an infectious disease” in the public health realm, while isolation is defined as “the separation of persons who are believed to be contaminated”. From the legal point of view, the two words are considered as synonyms and we refer to them as quarantine<sup>115</sup>.

Quarantines have been used to defend coastal cities from the plague since the 14th century, when ships were forced to remain in port for forty days<sup>116</sup>. Quarantines have recently been used to treat Severe Acute Respiratory Syndrome (SARS) and Ebola virus. Quarantines and travel bans are one of the most aggressive and divisive public health tools for managing the spread of infectious disease since they can be used to limit movement of potentially large number of people who show no symptoms of the virus under concern<sup>117</sup>. In response to COVID-19, Member States have adopted a broad range of

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<sup>115</sup> Wendy E. Parmet and Michael S. Sinha, “Covid-19 — The Law and Limits of Quarantine,” *New England Journal of Medicine* 382, no. 15 (2020), <https://doi.org/10.1056/nejmp2004211>.

<sup>116</sup> Centers for Disease Control and Prevention, *History of Quarantine*, (Centers for Disease Control and Prevention, July 20, 2020), accessed June 1, 2021, <https://www.cdc.gov/quarantine/historyquarantine.html>.

<sup>117</sup> Mark A. Rothstein, “From SARS to Ebola: Legal and Ethical Considerations for Modern Quarantine,” *Indiana Health Law Review* 12, no. 1 (2015): pp. 227-280, <https://doi.org/https://doi.org/10.18060/18963>.

quarantine and travel restriction initiatives, ranging from border closures to mandatory quarantines to stay-at-home guidelines.

The key right that is likely to be interfered with during the coronavirus pandemic is the right to liberty. In proclaiming the “right to liberty”, Article 5 of the ECHR contemplates the physical liberty of the person; its aim is to ensure that no one should be deprived of that liberty in an arbitrary fashion. It is not concerned with mere restrictions on liberty of movement, which are governed by Article 2 of Protocol No. 4. The extent of restrictions on freedom of movement varies. However, according to Article 2(3) of the Protocol No.4, States may limit the right to liberty of movement, freedom to choose one’s residence (Article 2(1)), as well as the freedom to enter or leave any country (Article 2(2))<sup>118</sup>.

The concept of liberty under Article 5 of the ECHR in many cases was interpreted narrowly. However, according to ECtHR, a deprivation of liberty is not confined to the classic case of detention following arrest or conviction, but may take numerous other forms. During the COVID-19 pandemic both direct incarceration of (infected) persons under Article 5 (p.1.e.) of the ECHR, as well as general restrictions, such as measures taken to implement and enforce curfews, quarantines, social distancing and isolation took place<sup>119</sup>.

The drafters of the ECHR clearly provided for cases when, for example, according to Article 5 (1.e.) detentions can be carried out in hospitals or other medical facilities (people also can be quarantined in private facilities). According to S.Stark, there are cases, when people have a certain degree of freedom (for example, to go shopping, go to a restaurant, watch TV or engage in hobbies), despite being under constant supervision and control, and curfews or similar restrictions can also lead to incarceration; thus, it is difficult to see any real difference between a locked cell and a police cordon<sup>120</sup>.

Furthermore, in *Guzzardi v. Italy* the ECtHR stated that the distinction between deprivation and restriction of liberty is ‘merely one of degree and intensity, and not one of nature or substance’. A restriction on liberty therefore can constitute a deprivation of

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<sup>118</sup> “Guide on Article 5 of the European Convention on Human Rights. Right to Liberty and Security,” Council of Europe Documents. European Court of Human Rights, April 30, 2021, [https://www.echr.coe.int/documents/guide\\_art\\_5\\_eng.pdf](https://www.echr.coe.int/documents/guide_art_5_eng.pdf).

<sup>119</sup> Ibid.

<sup>120</sup> Shona Stark, “Deprivations of Liberty: Beyond the Paradigm,” *Public Law* 2019, no. April (2019): pp. 380-401, <https://doi.org/https://doi.org/10.17863/CAM.33184>.

liberty if it crosses a specific threshold of interference. In assessing whether this threshold has been crossed, the Court in *Engel v. Netherlands* further stated that ‘a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question’ shall also be regarded.<sup>121</sup>

Consequently, we should examine every case separately, taking into account different factors. For example, a 12-hour curfew under one regime may be considered a proportional response to COVID-19 and not violate the right to liberty under Article 5 of the ECHR, but this does not mean that in every such case limitations fall within the proportionality and necessity principles<sup>122</sup>.

For example, despite orders to stay at home most of the day and travel bans, many Albanians continued to jog in groups, play dominoes on the street and ignore recommendations to keep a distance in queues in March of 2020. The situation led the Albanian government to deploy the army to enforce a strict 40-hour curfew (on 21 March, 2020) to combat the coronavirus after people widely disregarded previous measures aimed at curbing its spread<sup>123</sup>. At first sight, this measure may be considered as a proportionate response, however, there might be individual cases, when the right to liberty was violated disproportionately. Nevertheless, as Albania was in the list of Member States that derogated under Article 15 of the ECHR, it will be easy and clear to track and evaluate the measures taken by Albanian government.

States have acknowledged the potential for quarantines to be essential in their legal frameworks. States found quarantines essential to protect public health, given the widespread use of quarantines worldwide to tackle COVID-19 and the possibility of asymptomatic transmission. According to World Health Organization (WHO), “contacts of patients with laboratory-confirmed COVID-19 should be quarantined for fourteen days

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<sup>121</sup> Alan Greene, *States Should Declare a State of Emergency Using Article 15 ECHR to Confront the Coronavirus Pandemic*, (Strasbourg Observers, April 1, 2020) accessed March 11, 2021, <https://strasbourgobservers.com/2020/04/01/states-should-declare-a-state-of-emergency-using-article-15-echr-to-confront-the-coronavirus-pandemic/>.

<sup>122</sup> Jizeng Fan and Yuhong Wang, “Precautionary proportionality principle as an instrumental preventive measure from the COVID-19: Can European human rights survive in the state of public health emergency?.” *Przeegląd europejski* 2021 (2021): 117-143.

<sup>123</sup> Benet Koleka, *Albania Deploys Troops to Enforce 40-Hour Coronavirus Curfew*, Reuters (Thomson Reuters, March 21, 2020), accessed April 23, 2021, <https://www.reuters.com/article/health-coronavirus-albania-idUSL8N2BE0FB>.

from the last time they were exposed to the patient”<sup>124</sup>. Thus, on the basis of WHO recommendations in terms of using quarantines as COVID-19-related measure, Member States were able to comply with the necessity and proportionality principles under the ECHR.

On the other hand, the World Health Organization has opposed to the use of travel restrictions to fight COVID-19. WHO, in its revised recommendations, warned against imposing travel or trade restrictions on countries with COVID-19 outbreaks. The recommendation stated “[t]ravel bans to affected areas or denial of entry to passengers coming from affected areas are usually not effective in preventing the importation of cases but may have a significant economic and social impact.”<sup>125</sup>

Thus, travel bans can be considered to violate the principles of necessity and proportionality by Member States, which is true if they impose limitations allowed by the nature of the non-absolute rights instead of using derogations under Article 15 of the ECHR. In this regard, it is also important for Council of Europe Member States to consult with public health experts while imposing the limitation clauses for “public health” objectives, especially when the derogation clause could be more effective<sup>126</sup>.

No limitation of the rights contained in the ECHR may be imposed for a discriminatory purpose or applied in a discriminatory manner. Article 14 stipulates that the enjoyment of the rights and freedoms are applied “without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”<sup>127</sup>

While age is not one of the listed protected statuses in Article 14 of the ECHR, it is encompassed by the “any other status” provision<sup>128</sup>. Yet, States may be able to justify age differentiation based on the legitimate aim of public health. Available data suggests that

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<sup>124</sup> World Health Organization, *Considerations for Quarantine of Individuals in the Context of Containment for Coronavirus Disease (COVID-19): Interim Guidance*, (World Health Organization, 2020). [WHO-2019-nCoV-IHR\\_Quarantine-2020.2-eng.pdf \(837.1K6\)](#)

<sup>125</sup> *Updated WHO Recommendations for International Traffic in Relation to COVID-19 Outbreak*, World Health Organization (World Health Organization, 2020), accessed May 13, 2021, <https://www.who.int/news-room/articles-detail/updated-who-recommendations-for-international-traffic-in-relation-to-covid-19-outbreak>.

<sup>126</sup> Jizeng Fan and Yuhong Wang, “Precautionary proportionality principle as an instrumental preventive measure from the COVID-19: Can European human rights survive in the state of public health emergency?.” *Przegląd europejski* 2021 (2021): 117-143.

<sup>127</sup> William Schabas, *The European Convention on Human Rights: a Commentary* (Oxford, UK: Oxford University Press, 2015).

<sup>128</sup> *Ibid.*

older individuals are more likely to experience serious and life-threatening responses to COVID-19. Therefore, Governments have compelling reasons to avoid infection of this high risk groups. For example, the Order of the Minister of Healthcare of Bulgaria - K. Ananiyev stated that persons under 60 were prohibited from visiting shops or pharmacies between 8:30 a.m. and 10:30 a.m., as it was a usual period of time for elderly people over 60 to visit those facilities<sup>129</sup>.

Furthermore, according to the resolution of the Czech Government No. 1029 dated October 12, 2020, all persons, who are provided with social services in accordance with Articles 49 (homes for the elderly) and 50 (special regime homes) of Act No. 108/2006 on social services, were prohibited to leave the premises of the institution in which they are provided with social services, except for those users, to whom this situation poses a serious threat to the mental state or health of a person for the duration of the emergency situation<sup>130</sup>. Despite creating restrictions that differentiate based on age, these types of limitations likely did not contradict the nondiscrimination principle.

In other cases, for example, in Bulgaria and Slovakia, Member States have passed ostensibly neutral regulations, but have applied them in a discriminatory manner<sup>131</sup>. In Bulgaria, checkpoint controls were enforced in two Sofia neighborhoods with a significant Roma population. Bulgaria's application of the restrictions discriminates against Article 14 protected vulnerable groups<sup>132</sup>.

Therefore, while protection of public health satisfies the valid purposes, Member States must also demonstrate that their standards for determining this distinction are fair and objective. In order not to fall under the category of States which use escape clauses to abuse power, States should back any unequal treatment with empirical evidence and demonstrate that it complies with the ECHR's requirements and principles. In such cases,

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<sup>129</sup> Ministry of Healthcare of Bulgaria, Order of the Minister of Healthcare. “№ ПД-01-143/2003 2020г.” Accessed July 21, 2021. [https://www.mh.government.bg/media/filer\\_public/2020/03/20/rd-01-143.pdf](https://www.mh.government.bg/media/filer_public/2020/03/20/rd-01-143.pdf).

<sup>130</sup> Government of Czech Republic. “Resolution № 1029 on the Security and Organization of the Provision of Social Services for the Duration of the State of Emergency-Curfew for Selected Types of Social Services,” October 12, 2020. <https://www.vlada.cz/assets/media-centrum/aktualne/7--zakaz-vychazeni-1029.pdf>.

<sup>131</sup> Reuters, *Rights Group Criticises Quarantine of Roma Settlements in Bulgaria and Slovakia*, (Thomson Reuters, April 21, 2020), accessed March 14, 2021, <https://www.reuters.com/article/health-coronavirus-bulgaria-slovakia/rights-group-criticises-quarantine-of-roma-settlements-in-bulgaria-and-slovakia-idUSL5N2C90TW>.

<sup>132</sup> Krassimir Stanchev, “Administrative Unfairness: The Case of Roma in Bulgaria.” *Публични Политики*. bg 12, no. 2 (2021): 15-32.



once again, we can notice a necessity for official derogations under Article 15 of the ECHR.

### **3.2.2. Digital surveillance tools as COVID-19 related measure and their impact on the right to privacy.**

Digital surveillance tools were another powerful method used by States to combat COVID-19. It is ambiguous, whether the widespread use of digital tools for combatting COVID-19 in the context of the limitations of Article 8 of the ECHR is (or not) justified in accordance with the standards of legality, necessity, proportionality and non-discrimination.

The principle of legality is justified when surveillance tools are allowed by properly enacted laws and regulations; but when it comes to declaring an emergency without using a derogation clause and referring only to limitations allowed by Article 8 ECHR, it is unclear whether all of them were properly allowed or required by law, whether they served a legitimate purpose, and whether the arbitrary and unlawful interference with privacy was prevented<sup>133</sup>.

Even in States that have taken precautions and used legislation or properly adopted regulations to impose digital health surveillance tools, the risks of overreach and long-standing damage to privacy rights remain of concern. Digital surveillance is by its nature broad and can encompass actors or circumstances beyond the originally intended scope. The right to privacy may be violated, as the information gathered from surveillance is often transferred to police and other third-parties, with little regard for the user's privacy or consent to the transfer<sup>134</sup>.

For instance, the Turkish Health Ministry launched the "Pandemic Isolation Tracking Project" to ensure COVID-19 infected patients were following quarantine measures. The app downloading was obligatory for all those patients who had confirmed COVID-19, and those found to be leaving their place of isolation received text messages or direct

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<sup>133</sup> Sharifah Sekalala et al., "Analyzing the Human Rights Impact of Increased Digital Public Health Surveillance during the COVID-19 Crisis," *Health and Human Rights Journal* 22, no. 2 (December 2020): pp. 7-20.

<sup>134</sup> Joint Civil Society Letter, *Coronavirus: States Use of Digital Surveillance Technologies to Fight Pandemic Must Respect Human Rights*, (ARTICLE 19, April 9, 2020), accessed May 25, 2021, <https://www.article19.org/resources/covid-19-states-use-of-digital-surveillance-technologies-to-fight-pandemic-must-respect-human-rights/>.

calls. Those who failed to comply with the warning were notified to relevant law enforcement units to ensure that necessary administrative measures and sanctions were imposed<sup>135</sup>.

In order to meet the principle of proportionality, the use of digital surveillance tools must be intended to the specific COVID-19-related objectives<sup>136</sup>. It may seem that the principle of proportionality was met in the case of Turkey, however, the data transferred to law enforcement units, which imposed administrative measures and sanctions, may raise questions of necessity, and subsequently concerns about human rights violations after the COVID-19 emergency measures come to end.

In evaluating whether COVID-19-related restrictions on privacy are necessary, health authorities find different digital tools relatively more useful at different phases of COVID-19 response. For example, when States seek to flatten the curve and delay the spread of COVID-19, location data that can assist in determining adherence to social distancing policies is particularly useful. At other stages of response, knowledge of an infected cellphone user's proximity to others and details of whom they interacted with become important to contact tracing. Sometimes analysis of anonymized data can aid policymaking, while in other cases, such as contact tracing, knowledge about a named individual's location, movements and identities of those with whom the infected person came into contact are essential. Thus, digital surveillance in general can be deemed necessary, but a more precise analysis would show only some types of digital surveillance necessary at corresponding phases of the pandemic<sup>137</sup>.

Moreover, once a national surveillance program takes on board mobile telephone data and location information, is it necessary to supplement this data with additional privacy invasions from facial recognition artificial intelligence or credit card records. Russia was just one of several countries using high-tech surveillance in the fight against the coronavirus pandemic. The authorities used a network of 100,000 CCTV cameras on the

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<sup>135</sup> *Director of Communications Altun Shares a Post on 'Pandemic Isolation Tracking Project*, The Republic of Türkiye Directorate of Communications, 2020, accessed May 24, 2021, <https://www.iletisim.gov.tr/english/haberler/detay/director-of-communications-altun-shares-a-post-on-pandemic-isolation-tracking-project>.

<sup>136</sup> Sharifah Sekalala et al., "Analyzing the Human Rights Impact of Increased Digital Public Health Surveillance during the COVID-19 Crisis," *Health and Human Rights Journal* 22, no. 2 (December 2020): pp. 7-20.

<sup>137</sup> "COVID-19 Response: Overview of Data and Technology." PRIVACY INT'L, n.d. <https://privacyinternational.org/key-resources/3547/covid-19-response-overview-data-and-technology>.

streets of Moscow (newly installed for COVID-19 purposes), controlled from a centralized COVID-19 control center, to ensure compliance with quarantine measures using facial recognition. Images and personal data of quarantined persons were entered into the database, so that they could be recognized with the help of cameras. According to officials, the center was also used to monitor social networks for “fake news” about the coronavirus and track international arrivals from hot spots of the virus<sup>138</sup>.

The situation was even worse in the case of Hungary, where the Government Decree 179/2020 “Derogations from Certain provisions on data protection and data protection in the event of an emergency” restricted the data protection rights provided for by the General Data Protection Regulation and the Freedom of Information Act. The new rules allowed the government to use citizens’ personal data without clear instructions about when they can use it and for what purposes. Even though the Decree was on effect from 05.05.2020 to 18.05.2020, this time was enough to intrude with citizens’ right to privacy<sup>139</sup>. In this case, we can observe a clear violation of the principle of proportionality, as most essential data for combatting COVID-19 can be gathered in an anonymous form or with the reference only to infected people on the basis of clear objectives. With such decrees in effect, there is no guarantee that the data gathered will be removed after the emergency ends<sup>140</sup>.

Less restrictive alternatives to broad digital surveillance programs appeared to be available that would cause less damage to privacy, but States did not use these less-restrictive solutions that protect private information. Rather, they rushed to deploy new digital tools, often giving themselves and their telecommunications companies blanket authorization to collect and use cellphone users’ location data, proximity data and interaction data, with little oversight. Thus, many digital surveillance tools used for COVID-19 failed the proportionality and necessity test<sup>141</sup>.

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<sup>138</sup> Sam Ball, *100,000 Cameras: Moscow Uses Facial Recognition to Enforce Quarantine*, (France 24, March 24, 2020), accessed June 1, 2021, <https://www.france24.com/en/20200324-100-000-cameras-moscow-uses-facial-recognition-to-enforce-quarantine>.

<sup>139</sup> “Nemzeti Jogszabálytár.” 179/2020. (V. 4.) Korm. rendelet, 2020. <https://njt.hu/jogszabaly/2020-179-20-22.1>.

<sup>140</sup> Wendy K. Mariner, “Mission Creep: Public Health Surveillance and Medical Privacy,” *Boston University Law Review*, no. 87 (2007): pp. 347-395, [https://scholarship.law.bu.edu/faculty\\_scholarship/360](https://scholarship.law.bu.edu/faculty_scholarship/360).

<sup>141</sup> Sharifah Sekalala et al., “Analyzing the Human Rights Impact of Increased Digital Public Health Surveillance during the COVID-19 Crisis,” *Health and Human Rights Journal* 22, no. 2 (December 2020): pp. 7-20.

As introduced above, a significant concern with COVID-19-inspired health surveillance data is that even if an initial intrusion on privacy is justified on balance, the privacy violation does not end when the COVID-19-related emergency ends. Absent rigorous data protection, the information collected for stopping the spread of disease will make its way into other government, law enforcement or third-party uses without consent of those being monitored<sup>142</sup>. This risk of unauthorized transfer existed before COVID-19's outbreak, but has expanded because of the rapid pace and scope at which COVID-19 surveillance data was collected, processed and stored<sup>143</sup>.

For instance, in the past, human rights groups and political opponents have accused the Turkish leadership of cracking down on social networks to limit criticism. The government claimed that strict monitoring of social networks was necessary to ensure public safety, and with COVID-19 the need increased. As such, 410 people were arrested in Turkey for “provocative” posts on social networks about the coronavirus outbreak<sup>144</sup>.

When considering other aspects of interfering with the right to privacy through digital surveillance, information initially collected to combat the epidemic is often subsequently contained in databases, main purpose of which is not necessarily public health objectives and management of the virus spreading. Moreover, the original reason for allowing interference with privacy (patient consent or the priority interests of public health) might be often changed or erased by the time the data was included in other top-down databases. Subsequently, it will be difficult to conclude that the widespread use of data without sufficient guarantees was the least restrictive alternative to achieve public health goals. Preventing arbitrary interference with privacy will also be difficult after overcoming the virus<sup>145</sup>.

Thus, once again, we can confirm that a derogation based approach would be more effective in tracking the measures taken by Member States and their consequences, especially with regard to the right to privacy, as new technologies make it really hard to fully

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<sup>142</sup> Wendy K. Mariner, “Mission Creep: Public Health Surveillance and Medical Privacy,” *Boston University Law Review*, no. 87 (2007): pp. 347-395, [https://scholarship.law.bu.edu/faculty\\_scholarship/360](https://scholarship.law.bu.edu/faculty_scholarship/360).

<sup>143</sup> Wafa Ben-Hassine and Philip Dawson, *4 Rules to Stop Governments Misusing COVID-19 Tech after the Crisis*, (World Economic Forum, 2020), accessed June 2, 2021, <https://www.weforum.org/agenda/2020/05/covid-19-tech-data-usage-privacy/>.

<sup>144</sup> Reuters, *Turkey Arrests Hundreds for 'Provocative' Social Media Posts about Coronavirus*, Haaretz.com (Haaretz, March 25, 2020), accessed June 8, 2021, <https://www.haaretz.com/middle-east-news/turkey/turkey-arrests-hundreds-for-provocative-social-media-posts-about-coronavirus-1.8709336>.

<sup>145</sup> Wendy K. Mariner, “Mission Creep: Public Health Surveillance and Medical Privacy,” *Boston University Law Review*, no. 87 (2007): pp. 347-395, [https://scholarship.law.bu.edu/faculty\\_scholarship/360](https://scholarship.law.bu.edu/faculty_scholarship/360).

ensure this right. In addition, a really wide margin of appreciation provided by limitation clause makes it almost impossible to guarantee full and proper exercise of the right.

### **3.2.3. Limitations on freedom of assembly as COVID-19 related measure: an excuse to undermine democracy?**

COVID-19-inspired restrictions on public gatherings, which in many nations limit the number of individuals outside the same household who can meet at one time or place, create interesting challenges under the ECHR, particularly under Article 11 on Freedom of Assembly. These limitations impact public protests; church and other religious gatherings; opportunities for political candidates to campaign and for voters to cast ballots; cultural, sports and recreational activities, and many other elements of social and political life. Many citizens seem to have accepted the balancing decision that governments have made for them – agreeing to temporary limitations on their exercise of rights in the interest of preserving health and life. In other cases, citizens protest and vocally object to COVID-19-inspired restrictions and demand a return to economic and social life without these public health measures<sup>146</sup>.

The conditions of the ECHR suggest that Article 11 of the ECHR focuses on how the limitation of the freedom of assembly will affect the rights that are central to a democratic society. In the case of limitations related to COVID-19, restrictions that affect the rights necessary for democratic expression should be strictly studied before implementing any measures. As such, priority should be given to certain types of gatherings to ensure a balance of public health interests with human rights. For instance, the limitations imposed should not have an intention of restricting the freedom of peaceful assembly related to political issues, protest messages and elections, which may in fact be ensured through alternative methods (for instance, online, via social media, etc.), rather than meetings for sports or cultural purposes<sup>147</sup>. Thus, the ECHR determines the priority of certain rights as having more weight than others, with a proper analysis of the balance. In fact, this also

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<sup>146</sup> Raphaella Stavrinou, *Public Opinion in Italy, Spain, France in Favour of Lockdown Measures*, (New Europe, March 26, 2020), accessed June 12, 2021, <https://www.neweurope.eu/article/public-opinion-in-italy-spain-france-in-favour-of-lockdown-measures/>.

<sup>147</sup> Eric Richardson, Colleen Devine, “Emergencies End Eventually: How to Better Analyze Human Rights Restrictions Sparked by the COVID-19 Pandemic Under the International Covenant on Civil and Political Rights,” *Michigan Journal of International Law*, no. 42.1 (2020): pp. 105-176, <https://doi.org/10.36642/mjil.42.1.emergencies>.

means that public health restrictions may not correspond to the analysis of balancing limitations, and it is better to introduce them as emergency derogations with a limited time period.

The principles of proportionality and legality of the response to COVID-19 depends on many factual circumstances, including for what purposes the restriction was adopted, how it was applied and what activities were restricted. As such, the limitation of the freedom of assembly may be applied on a neutral basis in all directions after officially derogating under Article 15 of the ECHR, as in Albania, where after introducing a state of emergency and officially derogating under Article 15 of the ECHR, all social, cultural or political gatherings, either in enclosed or open-air spaces, were banned, and violators could be fined up to 5 million lek (40,000 euros)<sup>148</sup>.

On the other hand, it may be specifically aimed at freedom of assembly or other political activities, as potentially in Poland and the Russian Federation to restrict participation in elections, or like in Hungary to limit the ability of protesters to complain about political issues. Moreover, the limitation of the freedom of assembly can be applied to restrict another right protected by the ECHR, such as freedom of religion, or it can be used as a pretext to oust demonstrators from the streets<sup>149</sup>.

When determining the degree of the State's interest in protecting public health, it matters how serious the risk of infection is at the meeting venue. For example, on site religious gatherings, protests or demonstrations (like LGBTI prides) may be allowed to be held in a relatively isolated area of the country with social distancing, where the virus did not spread, while it may be legal to postpone or cancel a similar meeting in a capital city, where hospitals may be overwhelmed by the infected. Many of these controversial issues are at the heart of the analysis of whether restrictions on the freedom of assembly are necessary in a democratic society in the interests of public health<sup>150</sup>.

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<sup>148</sup> Gjergj Erebara, *Albania Adopts Punitive Fines for Breaching Coronavirus Restrictions*, (Balkan Insight, March 16, 2020), accessed June 15, 2021, <https://balkaninsight.com/2020/03/16/albania-mounts-million-aire-fines-against-covid-19/>.

<sup>149</sup> Artem Galushko, *Politically Motivated Justice: Authoritarian Legacies and Their Role in Shaping Constitutional Practices in the Former Soviet Union*. (Springer Nature, 2021).

<sup>150</sup> Ina Virtosu, "How COVID-19 Changed "the Anatomy" of Political Campaigning." *In Central and Eastern European eDem and eGov Days*, pp. 351-369. 2021.

These fact patterns are not hypothetical, but have already emerged in the weeks since the COVID-19 erupted into our social and political lives. Elections have been conducted in some States but more often they have been delayed, as in Poland and Hungary<sup>151</sup>. Protests, anti-COVID-19 related measures have occurred in Belgium, Bulgaria, France, Germany, Hungary, Ireland, Italy, the Netherlands, Poland, Russia, Serbia, Spain, Sweden and United Kingdom<sup>152</sup>.

Restrictions on the freedom of assembly related to COVID-19, which hinder democratic activity and self-expression should be examined with suspicion in accordance with the limitation clause of Article 11 of the ECHR. The drafters of the ECHR stressed that restrictions on assemblies that hinder democratic debate deserve closer attention than restrictions on mass gatherings in general. In the context of COVID-19, restrictions on assemblies that hinder elections and prevent protests about the very restrictions in question during the pandemic are among those that deserve such close attention. Protests over the scale and duration of stay-at-home orders, pay and treatment of workers during COVID-19, as well as their impact on the economy are also important topics for discussion by democracies to make informed political decisions<sup>153</sup>.

The wording of Article 11 of the ECHR and the context of the development of the ECHR as a treaty clearly determine the priority of public assemblies with respect to democratic activities. As such, while introducing restrictions related to COVID-19, limitation clauses on the freedom of assembly should be applied after carefully examining restrictions concerning gatherings which are crucial to political freedoms, elections, public debate, including debates about the democratic nature and permissibility of the restrictions themselves related to COVID-19<sup>154</sup>.

Perhaps most importantly, States need a legally rigorous and transparent analysis of restrictions on principles such as freedom of assembly, since any balance analysis

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<sup>151</sup> *Global Overview of COVID-19: Impact on Elections*, International IDEA (Institute for democracy and electoral assistance, first published: March 18, 2020 (updated on a regular basis)), <https://www.idea.int/news-media/multimedia-reports/global-overview-covid-19-impact-elections>.

<sup>152</sup> Crisis24, *Europe: Anti-Lockdown Activists to Demonstrate in Urban Centers March 20*, (GardaWorld, March 18, 2021) accessed March 20, 2021, <https://www.garda.com/fr/crisis24/alertes-de-securite/457231/europe-anti-lockdown-activists-to-demonstrate-in-urban-centers-march-20>.

<sup>153</sup> Sanja Jovičić, “COVID-19 Restrictions on Human Rights in the Light of the Case-Law of the European Court of Human Rights,” *ERA Forum* 21, no. 4 (June 2020): pp. 545-560, <https://doi.org/10.1007/s12027-020-00630-w>.

<sup>154</sup> Ina Virtosu, “How COVID-19 Changed “the Anatomy” of Political Campaigning.” *In Central and Eastern European eDem and eGov Days*, pp. 351-369. 2021.

should be updated as the circumstances of the virus-related emergency change. In the case of freedom of assembly, if States simply decide that, due to the limited nature of Article 11 of the ECHR, it is permissible to restrict assemblies for public health purposes, these societies may lose the built-in opportunity to review the emergency measures provided for by the derogation clause<sup>155</sup>.

The ECHR's framework for derogations includes the idea that measures should be limited in time and restrictions should be lifted when the emergency situation is resolved. But, if States justify restrictions on the basis of limitation clauses, the law does not provide such an opportunity for revision. It remains important that restrictions are maintained only during the state of emergency and opportunities for public meetings, especially, those related to political rights are quickly and comprehensively restored<sup>156</sup>. One of the main reasons why States are encouraged to deviate from the provisions of Article 15 of the ECHR, rather than simply relying on limitation clauses, is that limitation clauses, once imposed, are often difficult to eliminate<sup>157</sup>.

Even if the priority is given to the rights necessary in a democratic society, the end of the emergency situation means that all rights must be restored, including those that may not be considered necessary in a democratic society. For example, religious parishioners certainly enjoy elements of their rights to freedom of religion and freedom of expression during face-to-face meetings, which may be impossible or less intense if they are held through online platforms. As a result, the existence of videoconferencing and other remote technologies should not serve as an excuse to undermine their freedom of assembly after the end of the emergency.<sup>158</sup>

Delaying the exercise of rights may be justified in a health emergency, but rights should not be permanently restricted just because the State has analyzed the restrictions, and does not follow a clearly time-limited path of derogations. This is just one example

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<sup>155</sup> Ina Virtosu, "How COVID-19 Changed "the Anatomy" of Political Campaigning," *In Central and Eastern European eDem and eGov Days*, pp. 351-369. 2021.

<sup>156</sup> Scott P. Sheeran, "Reconceptualizing States of Emergency under International Human Rights Law: Theory, Legal Doctrine, and Politics," *Michigan Journal of International Law*, no. 34 (2013): pp. 491-499, <https://repository.law.umich.edu/mjil/vol34/iss3/1>.

<sup>157</sup> Laurence R. Helfer, "Rethinking Derogations from Human Rights Treaties," *American Journal of International Law* 115, no. 1 (2021): 20-40.

<sup>158</sup> Eric Richardson, Colleen Devine, "Emergencies End Eventually: How to Better Analyze Human Rights Restrictions Sparked by the COVID-19 Pandemic Under the International Covenant on Civil and Political Rights," *Michigan Journal of International Law*, no. 42.1 (2020): pp. 105-176, <https://doi.org/10.36642/mjil.42.1.emergencies>.



of why full freedom of peaceful assembly should be restored after the COVID-19 emergency passes, and why the analysis of restrictions, if it is deployed, should be reviewed at various stages of the epidemic.

In considering restrictions on right to liberty, right to privacy and freedom of assembly, we came to conclusion that during health emergencies like COVID-19 in future States should always balance public health interests against human rights. It is preferable for States to use a derogation based approach for justifying health emergency related restrictions of human rights rather than a limitations-based one. All emergency restrictions should eventually come to an end, an outcome more easily assured under a derogations analysis than under a limitations analysis.

## **Conclusion.**

Despite the controversy, we can claim that the state of emergency is a well-known and recognized legal instrument that may allow a certain degree of derogation from human rights standards. Nevertheless, the pressure to take emergency measures, including suspensions of civil and political rights that the State has already undertaken to protect, is always daunting when a State faces a challenge to its national safety.

Many scientists do, in fact, stress the potential for misuse of the derogation provisions. Derogations, they argue, may undermine the essential core of human rights accords and should be subject to stringent international rules and supervision processes. Derogations can be damaging because they legitimate a departure from pre-existing treaty commitments at a time when they are most vulnerable. However, it is inaccurate to claim that derogations totally or partially remove an international obligation.

Others, on the other hand, argue that derogations force States to announce their policies openly and coordinate their actions with international assurances and monitoring procedures – requirements that reduce the incidence and scope of potential human rights breaches. Derogations, in this perspective, do not represent a threat to the international system of human rights protection; rather, they demonstrate that States value human rights and adhere to international norms and treaty standards.

In addition, internal actors, many of whom are prone to question or find fault with human rights limitations, can rely on the official declaration of a state of emergency and notice of derogation under international treaty as a trustworthy signal that the suspension of rights is essential, temporary and lawful. This is accomplished by stating unequivocally that the limits on rights are necessary and transitory, and that the government has publicly committed to fully complying with its contractual responsibilities to preserve civil and political liberties.

The formal announcement of derogation, in particular, validates the State's claim of a genuine crisis, raising the chances of domestic actors' support in the time of crisis. Member States, officially derogating under ECHR, improve the credibility of their declaration that the threat is real and severe, resulting in increased domestic support and respect for the temporary restriction of rights. After receiving the information, public interest groups can determine whether the government is suspending only the freedoms for which it has been notified, whether restrictions are imposed only in the specified region,

and whether the suspension is for a limited time or until the threat will pass. They can also use this fact to hold the government accountable if deviations from the conditions of the derogation are illegal and the government should be held liable for the resultant breaches of rights.

The ECHR requires that any emergency measure restricting rights provided for by law must be necessary, proportionate and non-discriminatory. The obligation to file a formal notice of derogation also makes it clear that after the end of the emergency, one should look back to consider whether the measures taken in connection with the emergency were canceled or changed to restore freedoms that could have been violated.

In addition to ensuring transparency, the notification mechanism serves to strengthen the basic requirements of Article 15 of the ECHR. Article 15 requires Member States to include in the notification of derogation: the reference to specific rights and freedoms that were restricted, the reason for the derogation and the notification of the termination of measures. The official reference to restrictions imposed on specific rights and freedoms, as well as the reasons for the derogation help to ensure that Member States act responsibly and proportionately to the emergency situation. In addition, the requirement that States notify the Council of Europe of the termination of the derogation reinforces the time-limited nature of the derogations.

We do not deny that in some cases the States may abuse the emergency powers they gained (Schmittian theory), like in the case of Hungary. Nevertheless, we can claim that the provisions on temporary derogation are legislative instruments that allow States to suspend certain human rights after the declaration of an official state of emergency.

Therefore, we came to conclusion that while dealing with COVID-19 emergency it is better for the ECHR Member States refer to derogation clause under Article 15 of the ECHR rather than to limitation clauses provided by some ECHR articles, due to the fact that provisions of Article 15 of the ECHR are explicitly conditioned and measures taken will be to the extent strictly required by the exigencies of the situation in comparison to limitation clauses.

In the COVID-19 context, relying only on the limitation clauses provided in the ECHR may reduce the supervision by the international community: measures may not be limited in time and may continue even after their effectiveness in combatting the pan-

demic has passed. Without official derogation under the ECHR, it will be harder for Member States to analyze whether emergency measures are legal, necessary, proportionate and comply with the principles of non-discrimination.

Limitations on the full exercise of human rights may be justified during public emergency. However, rights should not be permanently restricted just because the State has relied only on limitation clauses and did not follow a clear time-limited path of derogation clause. As all rights and freedoms should be restored after the end of COVID-19 emergency, the analysis conducted in this Master Thesis demonstrate that derogation clause is more effective under such circumstances.

However, we witnessed that in dealing with COVID-19 there is some uncertainty about whether and when a country could and should declare a state of public emergency under the ECHR. Different approaches in dealing with COVID-19 pandemic applied by Member States might jeopardize the systems established by the ECHR and other international and regional bodies. As a result, the treaty's power as a tool for civil society actors to exert pressure on governments to protect human rights may be weakened. The fact that Member States treated the derogation clause under the ECHR with suspicion when enacting emergency measures during COVID-19 pandemic not only undermines the ECHR's legitimacy, but also jeopardizes the international rule of law as a whole.

Therefore, in the face of future possible pandemics Council of Europe Member States should be ready to consider and come to mutual agreement on whether they will rely on derogation clause under Article 15 of the ECHR or on the limitation clauses provided in other ECHR articles. However, as mentioned above, the derogation based approach would be more preferable in order to avoid human rights violations and abuse of power.

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