Chapter 3. Human rights in times of emergency: COVID-19 taking the United Kingdom into uncharted territory

Ben Stanford and Steve Foster

Introduction

Having rapidly escalated into a global crisis, the COVID-19 pandemic has challenged the ability of states throughout the world to respect and uphold certain human rights. In light of similar threats faced by all states on the one hand, and the similar obligations imposed upon states via international and regional human rights treaties on the other, it might be reasonable to expect states to respond to such a common and truly transnational threat in similar ways. In Europe however, which is the focus of this chapter, the response of states has been somewhat inconsistent. A small but significant minority of European states have sought to treat the pandemic as an emergency situation and as a threat to the life of the nation, derogating from some of their human rights obligations under the European Convention on Human Rights (ECHR). The majority of European states, including the United Kingdom, have not however resorted to such measures and have instead sought to rely upon the ordinary legal framework.

Although Article 15 of the European Convention allows for derogations from the member states' human rights obligations in times of war and emergency, and there is a growing jurisprudence from the European Court of Human Rights (ECtHR) relating to the limitations of such derogations,[1] previous derogations have related to cases of civil war or unrest or acts of terrorism.[2] The recent COVID-19 pandemic is clearly distinguishable from previous cases in terms of its threats and the motive behind the state's emergency measures. Yet the impact on civil liberty and the enjoyment of Convention rights is enormous and potentially damaging to both the tenets of the Convention and judicial supervision of these measures. Consequently, clarity is required in these extraordinary times.

This chapter will first outline the rationale and legal framework governing restrictions to human rights, including derogations, before examining the response of the Council of Europe and the various European states (including the United Kingdom) to ascertain what similarities and differences can be identified. Given the sweeping lockdown restrictions imposed in the United Kingdom engaging numerous fundamental rights, not least the right to liberty and security, privacy and rights pertaining to free speech, questions can inevitably be raised about the legality and proportionality of such restrictions that seek to limit such conditional or limited, yet fundamental, rights. The chapter will thus explore the impact of recent emergency measures on the framework of derogations and other emergency measures in order to assess the efficacy of the supervision normally carried out by the Convention machinery.

[1] See *Lawless v Ireland (No 3)* (1961) 1 EHRR 15; *The Greek Case* (1969) 17 YB 170; *Ireland v United Kingdom* (1979-80) 2 EHRR 25; *Brogan v United Kingom* (1989) 11 EHRR 117; *Brannigan and McBride v United Kingdom* (1993) 17 EHRR 15; *Aksoy v Turkey* (App. no. 21987/93) ECtHR, 18 December 1996; *Sakik and others v Turkey* (App. nos. 23878/94 to 23883/94) ECtHR, 26 November 1997; *Ocalan v Turkey* (2003) 37 EHRR 10; *A v United Kingdom* (2009) 49 EHRR 29; *Alpay v Turkey*; [2018] ECHR 253 *Altan v Turkey* [2018] ECHR 251.

[2] See the cases listed in n 1, above. Article 5(3) of the European Convention of Human Rights (ECHR) 1950 allows for the lawful detention of persons for the spreading of infectious diseases, but most recent restrictions in the pandemic will be justified by reference to the state's duty to protect the rights of others, in particular its duty to protect life under Article 2.

The rationale and legal framework for restricting human rights

In this section we will examine the reasons for lawfully restricting (conditional) rights, together with the legal framework to enable states to restrict the fundamental rights of its citizens; especially in times where the state is facing an emergency or extraordinary threat. This will involve drawing a distinction between formal derogation measures and those imposed without formal derogation, but nevertheless passed to deal with serious crime and public disorder.

Restrictions in ordinary and non-emergency situations

Human rights are generally classified as absolute rights, meaning that they cannot be restricted (e.g. Article 3 ECHR covering the prohibition of torture or other ill treatment), or conditional rights, where they can be restricted in normal or peaceful times provided that certain criteria are met (e.g. Article 10 ECHR freedom of expression).[3] When restricting conditional rights the ECtHR has made it clear in its extensive body of jurisprudence that the restriction must be prescribed by law, must pursue a legitimate aim and must be necessary in a democratic society, i.e. the restriction must correspond to a pressing social need and be proportionate to the aim sought to be achieved.[4] These qualifying provisions are particularly appropriate given the measures adopted by the UK government to aid its battle against the pandemic; such measures restricting rights such as freedom of association and assembly (including political and religious assemblies), private and family life, liberty of the person and freedom of movement. Moreover, as shall be discussed in the following section, rights are framed as derogable, meaning that they can be suspended in certain, exceptional circumstances, or non-derogable, meaning that they can never be suspended in any circumstances.[5]

It is also important to stress that even outside formal derogation measures, considered below, the European Court will provide a greater margin of appreciation, or discretion, with respect to measures intended to combat terrorism or serious crime.[6] This will result in an in-built deference on behalf of the Court, making it less likely that it will interfere with measures that are intended to achieve peace, order and security, and which do not fundamentally depart from the notions of justice enshrined in the Convention.[7] This recognition will allow us to contextualise the recent arguments for and against the United Kingdom government's refusal to adopt derogation measures to combat the pandemic.[8]

Several human rights are already framed in such a way which allow restrictions in order to respond to health crises and emergencies. For example, the right to liberty and security,

---

[3] See Steve Foster, *Human Rights and Civil Liberties* (3rd edn, Longman 2011) 58-67.
[4] See for example *Handyside v UK* (1976) 1 EHRR 737; *Sunday Times v UK* (1980) 2 EHRR 245. In *Handyside*, the Court stressed that to be necessary, the restriction does not have to be indispensable, or absolutely necessary, but *neither is it acceptable that the restriction is useful or convenient*, para 48 (emphasis added).
[5] See Article 15(3) ECHR, which prohibits derogations from the right to life (apart from deaths arising from lawful acts of war, freedom from torture and inhuman and degrading treatment and punishment, freedom from slavery and servitude, and the protection from retrospective criminal law.
[6] See *O'Hara v United Kingdom* (2002) 34 EHRR 32, where the European Court took into account the real threat of terrorism during the troubles in Northern Ireland in judging the reasonableness of suspicion for arrest.
[7] Contrast the ruling in *O'Hara v United Kingdom* (n 6), on the question of reasonableness of suspicion, with *Brogan v United Kingdom* (n 1), where the European Court held that the delay in bringing terrorist suspects before a court following arrest was in breach of Article 5(3), and the requirement of promptness, notwithstanding the circumstances of terrorism. *Brogan* was followed in *O'Hara* on this point.
[8] See the arguments for and against derogation in the section: *European responses to the COVID-19 pandemic: To derogate or not to derogate?*

protected under Article 5 ECHR, allows for restrictions to contain contagious diseases.[9] The well-established conditional rights comprising the right to respect for private and family life, freedom of thought, conscience and religion, freedom of speech and freedom of assembly and association, protected under Articles 8-11 ECHR respectively, all allow for restrictions to protect health.[10] In addition, the freedom of movement, protected under the Fourth Additional Protocol to the ECHR, similarly allows restrictions to protect health.[11]

It could also be argued that taking measures to restrict human rights may be necessary to combat the spread of a contagious disease in the pursuit of other, less obvious, objectives. For example, Articles 8-11 ECHR all allow restrictions to protect public safety or for the protection of the rights of others. Indeed, the clear rationale of the current regulations is to safeguard the life and health of the state, thus reflecting every member state's positive obligation to protect life under Article 2 of the Convention.[12] This in turn opens up the possibility of derogation measures under Article 15, where the life of the nation is under threat, and this will obviously attract a deferential approach from the courts, both European and domestic, whether Article 15 has been invoked or not.

Derogations in emergency situations

In addition to invoking permitted restriction to Convention rights, above, states may go further and restrict certain rights, or particular aspects of a right, in exceptional situations by derogating from such guarantees in order to respond to situations of national emergency. Under Article 15 ECHR, as well as other international human rights instruments such as Article 4 of the International Covenant on Civil and Political Rights (ICCPR), states are permitted to temporarily suspend certain aspects of their international human rights obligations in emergency situations which threaten the life of the nation.[13]

The declaration of a public emergency in order to derogate from certain aspects of a state's obligations under international human rights law is one of the most serious and radical decisions a state can make to legitimately react to a crisis and as such a great body of academic commentary on this issue exists.[14] The courts can, of course, challenge the declaration that a state of emergency threatening the life of the nation exists, although they would be expected to show a great deal of deference to the political institutions.[15] Primarily, 'the derogation articles

[9] Article 5(1)(e) ECHR.
[10] Articles 8(2), 9(2), 10(2), and 11(2) ECHR.
[11] Protocol 4 Article 2(3) ECHR. The UK is currently not a party to that Protocol; thus it will be necessary for a victim to prove that current restrictions on freedom of movement engage Article 5, or other Convention rights such as the right to private and family life (Article 8) or freedom of assembly (Article 11).
[12] See *Osman v United Kingdom* (2000) 29 EHRR 245 on the state's positive duty to protect individual life from the acts of other individuals, and *LCB v United Kingdom* (1999) 27 EHRR 217 concerning environmental hazards.
[13] This right of derogation is also included under s.14 of the UK's Human Rights Act 1998, allowing derogation subject to the same restrictions as apply under Article 15 ECHR.
[14] See for example Alan Greene, *Emergency Powers in a Time of Pandemic* (Bristol University Press 2020); Oren Gross and Fionnuala Ní Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge University Press 2006); International Commission of Jurists, *States of Emergency — Their Impact on Human Rights: A Comparative Study by the International Commission of Jurists* (Geneva: International Commission of Jurists, 1983).
[15] In *A v Secretary of State for the Home Department* [2005] AC 68, the majority of the House of Lords found that the Government were entitled to conclude that the threat of terrorist attacks against and in the United Kingdom constituted an 'emergency threating the life of the nation', labelling that decision as primarily a political one that the courts should be reluctant to interfere with (Lord Bingham, paras 28-29). Lord Hoffmann dissented on this

embody an uneasy compromise between the protection of individual rights and the protection of national needs in times of crisis.'[16] As such, it is vital to reflect upon what exactly a public emergency entails.

According to Richard Burchill, derogations may be viewed in two contrasting ways: 'The first view is that derogation provisions demonstrate the continued primacy of state sovereignty in international human rights law' as they 'allow for state interest to prevail over human interest'.[17] On the other hand, 'derogation provisions are necessary to ensure states sign up to the treaty regime, as it is unlikely that any state would accept restraints upon the ability to act in all circumstances'.[18] In this sense, Burchill emphasises that a particular legal path is laid out which both respects and limits sovereignty: it is better to commit to the rule of law by means of a lawful channel than to unilaterally and unconditionally suspend legal rights.[19]

Going further, the power of a state to derogate from its human rights obligations can be so drastic that the UN Human Rights Committee (HRC) has stated that '[t]he restoration of a state of normalcy where full respect for the Covenant can again be secured must be the predominant objective of a state party derogating from the Covenant'.[20] With a contagious disease there is of course only so much within the control and ability of a state, and so achieving this objective may be a protracted task, as indeed the COVID-19 pandemic has proven to be.

The derogations framework

The legal regimes governing derogations contain, expressly or impliedly, a number of conditions that must be satisfied in order for a derogation to be permissible. These concern both procedural and substantive requirements, which have been approached and interpreted in different ways by scholars.[21] In essence, a state must notify the relevant authorities of its derogation, there must be a public emergency which threatens the life of the nation, the derogating measures must not go beyond the exigencies of the situation, and the measures must not conflict with a state's other international obligations.[22]

Before analysing the requirements that a state must satisfy for a derogation to be lawful, it is important to bear in mind a number of issues. First, under Article 15(2) ECHR, certain rights can never be derogated from, namely, Article 2 (right to life) except in respect of deaths resulting from lawful acts of war, Article 3 (prohibition of torture), Article 4(1) (prohibition of slavery) and Article 7 (no punishment without law). This represents the drafters' intention that

---

issue, believing that the government had equated a threat of serious physical damage and loss of life with one where there was a threat to the life of the nation (paras 91-95).

[16] Joan Hartman, 'Derogation from human rights treaties in public emergencies – A critique of implementation by the European Commission and Court of Human Rights and the Human Rights Committee of the United Nations' (1981) 22 *Harvard International Law Journal* 1.

[17] Richard Burchill, 'When does an emergency threaten the life of the nation? Derogations from human rights obligations and the war on international terrorism' (2005) 9 *Yearbook of New Zealand Jurisprudence* 95, 96.

[18] ibid.

[19] ibid.

[20] Human Rights Committee, *General Comment No. 29: States of Emergency (Article 4)* (72nd session, 31 August 2001) UN Doc. CCPR/C/21/Rev.1/Add.11, para 1.

[21] See for example Jaime Oraá, *Human Rights in States of Emergency in International Law* (Clarendon Press; OUP 1992); Nicole Questiaux, 'Study of the Implications for Human Rights of Recent Developments Concerning Situations Known as States of Siege or Emergency', UN Doc. E/CN.4/Sub.2/1982/15, 27 July 1982.

[22] See Article 15(1) ECHR and *A v Secretary of State for the Home Department* [2005] 2 AC 68, considered below.

the basic rules of humanity, freedom and the rule of law will be not be compromised even in times of war or other emergency situations.

Article 4 ICCPR goes further and states that the measures taken by a state pursuant to a derogation must also not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin. Although, in contrast to Article 4 ICCPR, Article 15 ECHR does not expressly state that derogations must not be discriminatory, the general prohibition of discrimination in the enjoyment of Convention rights is, of course, contained within Article 14 ECHR. Indeed, this was one of the main reasons why the House of Lords declared the UK's laws on detention without trial as incompatible with Articles 5 and 15 ECHR.[23] Further, the fact that a derogation under the ECHR must not be inconsistent with a state's other international obligations will include a state's obligations under the ICCPR, which expressly prohibits derogations that are discriminatory.

Once a state has opted to derogate from its obligations, it must inform the appropriate treaty institutions pursuant to Article 15(3) ECHR and Article 4(3) ICCPR. As a minimum, a state party derogating from the ECHR must keep the Secretary-General of the Council of Europe fully informed of the measures which it has taken and the reasons for this, and must inform the Secretary-General when the measures have ceased to operate.[24] The reason for this is to ensure transparency and to allow other contracting states, as well as monitoring bodies, to assess the extent of the derogation measures, their necessity and proportionality.[25]

The substantive requirements for a derogation to be lawful are somewhat more complex. The first, pursuant to Article 15(1) ECHR as well as Article 4(1) ICCPR, is that there must be a 'public emergency' which threatens 'the life of the nation'. The ECtHR, as well as the now obsolete European Commission of Human Rights (ECmHR), have commented on this requirement on numerous occasions, finding that a number of characteristics must be shown for an emergency to exist.[26]

The first characteristic for a state of emergency to exist is that the occasion must amount to an 'exceptional situation'. In *Lawless v. Ireland*,[27] the first ever judgment issued by the ECtHR, in 1961, the Court considered the legality of a derogation made by Ireland. The Court referred to the 'natural and customary meaning' of the words 'public emergency threatening the life of the nation', and stated that they 'refer to an exceptional situation of crisis or emergency'.[28] In 1969, the ECmHR built upon the *Lawless* judgment in *The Greek Case*,[29] which still stands as one of the most important cases on the matter. Four states filed applications to the ECmHR in September 1967, alleging that the Greek military government which seized power in April 1967 had violated its obligations under the ECHR. The ECmHR indicated that states of emergency may be seen to have, in particular, four characteristics, the first being that the emergency must be actual or imminent, and the fourth being that:

[23] *A v Secretary of State for Home Department* (n 15), Lord Bingham, paras 68-73.
[24] *Lawless v Ireland (No. 3)* (n 1) para 42.
[25] United Nations, Economic and Social Council, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, (UN Doc. E/CN.4/1985/4, 41st session, 28 September 1984) para 45.
[26] See cases in n 1.
[27] *Lawless v Ireland (No. 3)* (n 1).
[28] ibid para 28.
[29] *The Greek Case* (n 1).

> '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'.[30]

The second characteristic of a state of emergency, as the ECtHR and ECmHR held in *Lawless* and *The Greek Case* respectively, is that the exceptional situation must affect the whole population, regarding either the entire nation, or the specific area to which the state of emergency applies.[31] Finally, according to *Lawless* and *The Greek Case*, the third characteristic is that the exceptional situation, which affects the whole population, must constitute a threat to the organised life of the community.[32]

When determining whether a public emergency exists pursuant to these three characteristics, states are afforded a wide margin of appreciation which the Court has asserted on numerous occasions, beginning with the landmark *Ireland v. UK* ruling.[33] The Chamber had no difficulty in finding that 'the existence of such an emergency is perfectly clear from the facts', citing the numerous deaths, injuries and property damage during the Troubles.[34] The Court held:

> 'It falls in the first place to each contracting state, with its responsibility for 'the life of [its] nation', to determine whether that life is threatened by a 'public emergency' and, if so, how far it is necessary to go in attempting to overcome the emergency. By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it. In this matter, Article 15(1) leaves those authorities a wide margin of appreciation'.[35]

Although the House of Lords in *A* took a robust approach in assessing the proportionality of the UK government's detention without trial provisions, see below, the majority of their Lordships took a deferential approach with respect to the question of whether there existed a public emergency threatening the life of the nation. Thus, Lord Bingham and the majority of the House of Lords labelled that decision as primarily a political one that the courts should be reluctant to interfere with. In his Lordship's view, therefore, great weight should be given to the judgement of the Home Secretary and to Parliament because they had to exercise a pre-eminently political judgement.[36] Although Lord Hoffmann dissented on this issue, believing that the government had misinterpreted the phrase 'threat to the life of a nation',[37] the majority's view is in line with the European Court's jurisprudence in this area, including the European Court's ruling in the subsequent appeal.[38]

As will be argued later, this more robust judicial approach may be limited to cases where the measures in question attack fundamental notions of justice, the rule of law and due process. This might be contrasted with the measures introduced in the recent pandemic, which may amount to less obvious and serious attacks on these principles, and are introduced for largely

[30] ibid para 153.
[31] *Lawless v Ireland* (n 1) para 28; *The Greek Case* (n 1) para 153.
[32] ibid.
[33] *Ireland v UK* (n 1).
[34] ibid para 205.
[35] ibid para 207. This was the first time the ECtHR expressly relied upon the margin of appreciation doctrine.
[36] *A v Secretary of State for the Home Department* (n 15), Lord Bingham, paras 28-29.
[37] ibid paras 91-95.
[38] *A v United Kingdom* (n 1).

preventative and safety reasons, rather than to introduce an alternative justice regime for dealing with criminal activities that threaten national security and public safety.

The second substantive requirement for a derogation to be valid is that the measures taken must not go beyond the 'exigencies of the situation'.[39] Whereas the ECtHR has adopted, for the most part, a predominantly deferential approach to the question of whether a state of emergency exists, the Court has not shown the same level of deference to this second requirement. For example, in *Ireland v. UK*, after granting a wide margin of appreciation to the UK in determining the emergency, the Court noted:

> 'Nevertheless, the states do not enjoy an unlimited power in this respect. The Court…is empowered to rule on whether the states have gone beyond the 'extent strictly required by the exigencies' of the crisis. The domestic margin of appreciation is thus accompanied by a European supervision'.[40]

The most helpful commentary on what the limits of the exigencies may be comes from the UN HRC which stated that 'this requirement relates to the duration, geographical coverage and material scope of the state of emergency and any measures of derogation resorted to because of the emergency'.[41] In essence, when determining whether the measures taken are required by the exigencies of the situation, a state must be able to justify them with regard to the specific duration, geographical coverage and material scope of the emergency at issue.

Furthermore, the UN HRC has insisted that states have a legal obligation to 'narrow down all derogations to those strictly required by the exigencies of the situation [which] establishes both for states parties and for the Committee a duty to conduct a careful analysis under each article of the Covenant based on an objective assessment of the actual situation'.[42] Insofar as the geographical constraint of a derogation is concerned, it is apparent that a state cannot rely upon a derogation to take action in a region outside of the scope of the original derogation.[43] As such, the courts will assess the necessity and proportionality of the measures when assessing whether action taken is within the 'exigencies of the situation'.

Despite the wide margin of appreciation offered by the European Court in this area, the Court did approve of the UK House of Lords' robust defence of the rule of law and Convention rights in the case of *A*.[44] In that case, the majority of the House of Lords found that the government's detention without trial provisions, introduced by s. 21 of the Anti-Terrorism, Crime and Security Act 2001, were incompatible with both articles 5 and 15 of the Convention as they were both discriminatory (under article 14 ECHR) and disproportionate. Defending that finding from charges of undemocratic judicial activism, Lord Bingham stated that even in terrorist situations, judicial control of the executive's interference with individual liberty was essential, and the courts were not precluded by any doctrine of deference from scrutinising such issues.[45] Although the European Court in *A* was not called on to rule on the question of proportionality – the Court merely found no reason to disagree with the House of Lords – subsequent case law

[39] Art. 15(1) ECHR; Art. 4(1) ICCPR.
[40] *Ireland v UK* (n 1) para 207. See also *Aksoy v* Turkey (n 1) para 68; *Brannigan and McBride v UK* (n 1) para 42.
[41] HRC, *General Comment No. 29* (n 20) para 4.
[42] ibid para 6.
[43] *Sakik and others v Turkey* (n 1) para 39.
[44] *A v Secretary of State for the Home Department* (n 15).
[45] ibid, Lord Bingham, para 42.

from the European Court seems to suggest that it is not prepared to offer a state an unrestricted area of discretion in restricting fundamental rights in times of emergency.[46]

Finally, in order for a derogation to be lawful, the measures taken must not be inconsistent with a state's other international obligations.[47] As already mentioned, the UN HRC has drawn particular attention to the rules of international humanitarian law which any potential derogation cannot be inconsistent with,[48] whereas the Siracusa Principles stress the importance of the various Geneva and International Labour Organisation Conventions.[49] The particular emphasis placed upon the rules of international humanitarian law clearly reflects the fact that historically, many emergencies arose in times of armed conflict, thus triggering the application of the sub-branch of international law.

European responses to the COVID-19 pandemic: To derogate or not to derogate?

A lack of European consensus

As already discussed, European practice has not been consistent on the question of whether to resort to derogating measures to combat COVID-19, with a small but significant minority of states resorting to derogations. They include Albania, Armenia, Estonia, Georgia, Latvia, North Macedonia, Moldova, Romania, San Marino, and Serbia.[50] Thus, 10 out of 47 member states of the Council of Europe have resorted to derogations, with the remainder choosing to respond to the global pandemic, if at all, using the ordinary human rights legal framework.

At the outset, it is not doubted or disputed that COVID-19 has constituted a public emergency which threatens the life of the nation. The substantive requirements explored earlier for a situation to amount to a public emergency have clearly and alarmingly been demonstrated through the course of 2020 and early 2021. As of 13 April 2021, the UN World Health Organisation revealed that there have been 136,115,434 confirmed cases of COVID-19 worldwide, including 2,936,916 deaths reported by states, with Europe accounting for over 47 million of those confirmed cases and over 1 million deaths.[51] Rather, the real point of contention in academic discourse has focused on whether a resort to derogations is, in fact, appropriate and legally required to be able to take the necessary measures restricting human rights in response to the pandemic, or whether the ordinary human rights framework is sufficiently able to deal with the pandemic.

---

[46] See the more recent cases of *Alpay v Turkey* [2018] ECHR 253 and *Altan v Turkey* [2018] ECHR 251, concerning Turkey's measures restricting liberty of the person and freedom of expression, where the Court refused to give the Turkish authorities unlimited discretion and found that measures involving detention without trial and restrictions on freedom of expression were disproportionate.

[47] Art. 15(1) ECHR; Art. 4(1) ICCPR.

[48] HRC, *General Comment No. 29* (n 20) para 9.

[49] Siracusa Principles (n 25) para 66.

[50] For the full and comprehensive account of derogations lodged by member states of the Council of Europe see Council of Europe, Reservations and Declarations for Treaty No.005 – Convention for the Protection of Human Rights and Fundamental Freedoms <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/declarations?p_auth=fexSYgTO> accessed 13 April 2021.

[51] World Health Organization, WHO Coronavirus Disease (COVID-19) Dashboard <https://covid19.who.int/?gclid=Cj0KCQiA9P__BRC0ARIsAEZ6irjWNIw-8nn2-MNzFFl2vmcr4V8lrrKhillD_D1UOa2gmTzJJ-Y4juEaAvXjEALw_wcB> accessed 13 April 2021.

One line of argument has suggested that the global pandemic represents an 'ideal state of emergency', and that states should resort to derogations during the widespread 'lockdown' phases, which engage for example the right to liberty and security under Article 5 ECHR. In that regard, Alan Greene has argued that states should use Article 15 ECHR to derogate when imposing lockdown measures as this would have the effect of 'quarantining' exceptional powers, and that not resorting to derogations risks normalising exceptional powers.[52] In a similar vein, Stuart Wallace has criticised the general behaviour of states when it comes to derogations, arguing that 'normal situations are being subjected to emergency measures and emergency situations are being subjected to normal measures'.[53] Wallace goes on to say that COVID-19 is a 'textbook example of an emergency warranting derogation', yet the response of states has not been consistent.

Others have argued that derogations are not necessary when states resort to lockdown measures, as the ordinary legal framework is sufficiently robust to deal with emergencies of this nature. For example, Dzehtsiarou argues that derogations are unnecessary as health emergencies such as the COVID-19 pandemic are unique and substantively different to military crises, and that the human rights engaged and restricted during the pandemic have a 'natural quarantining effect' whereas derogating actually changes little in terms of court scrutiny.[54] Tom Hickman has argued that Article 5(1)(e) is sufficiently flexible to allow for the confinement not just of infectious individuals, but also healthy people too, and therefore that derogating from Article 5 ECHR would not be strictly required by the exigencies of the situation, nor would it be advantageous in terms of political and legal scrutiny.[55]

One advantage of derogation measures is that they create a constitutional face-off between the courts and the political institutions, necessitating the courts taking a close look at measures which have been subjected to the exceptional measures, and taking a more robust judicial approach in challenging the political and legal justifications put forward by the legislature and the executive. This was seen in *A*, where the majority of the House of Lords were quick to defend the courts' constitutional right and duty to decide whether emergency provisions were proportionate and in breach of fundamental notions of justice and the rule of law.[56] On the other hand, the UK domestic courts appear to accept that there is an emergency situation, and are displaying a reticence to interfere that would normally be accepted with derogation measures; such measures, naturally going further than in normal circumstances, but being subject to judicial suspicion and intensive review because they are exceptional. In short, therefore, we may receive the worst of both worlds in terms of judicial review.

However, casting some doubt upon the need for states to even consider derogations when implementing a lockdown and restricting movement, the ECtHR declared as inadmissible a complaint on Article 5 grounds concerning strict curfew measures in Romania.[57] The Court found that the prohibition of movement outside the home except in a limited number of

[52] Alan Greene, 'Derogating from the European Convention on Human Rights in response to the coronavirus pandemic: If not now, when? (2020) 3 EHRLR 262; Alan Greene, 'On the value of derogations from the European Convention on Human Rights in response to the COVID-19 pandemic: A rejoinder' (2020) 5 EHRLR 526.
[53] Stuart Wallace, 'Derogations from the European Convention on Human Rights: The case for reform' (2020) 20(4) *Human Rights Law Review* 769.
[54] Kanstantsin Dzehtsiarou, 'Article 15 derogations: Are they really necessary during the COVID-19 pandemic?' (2020) 4 EHRLR 359.
[55] Tom Hickman, 'The coronavirus pandemic and derogation from the European Convention on Human Rights' (2020) 6 EHRLR 593.
[56] See David Feldman, 'Human rights, terrorism and risk: The roles of politicians and judges' [2006] PL 364.
[57] *Terheş v Romania* (App. no. 49933/20) ECtHR, 20 May 2021.

circumstances did not amount to house arrest and a restriction of liberty, which therefore did not engage Article 5. This judgment should be viewed with some caution, however, given the fact that the applicant did not rely upon the freedom of movement pursuant to Article 2 of Protocol 4 to the European Convention, which Romania had in fact derogated from. This prompted the ECtHR to expressly comment that the applicant was arguing that the 'general lockdown imposed had constituted a deprivation of liberty and not simply a restriction of the right to freedom of movement'.

The response in the United Kingdom

The United Kingdom, like the majority of European states, has not resorted to the derogations framework, nor has it sought to exercise domestic emergency powers under the Civil Contingencies Act 2004. Instead it has fast-tracked new legislation in the form of the Coronavirus Act 2020, whilst also imposing drastic measures by means of statutory instruments, which have been subject to numerous amendments over time drawing criticism on various fronts. For example, Adam Wagner has documented that restrictions in England have changed at least 64 times since March 2020.[58]

Given the complexity, scale, duration and implications of the restrictions, it is not surprising that the British Government has faced numerous legal challenges throughout the course of the pandemic. What follows is by no means an exhaustive account of these, but a brief account and reflection over some of the most significant challenges raising human rights issues, most of which have had very limited success.

Before examining the scope and success of judicial review of the UK's government's measures to deal with the pandemic, it is worth examining the decision of the Court of Protection in *BP v Surrey CC*,[59] a case where the Court of Protection had to consider the best interests of an 83-year-old man suffering from Alzheimer's where his care home had suspended all family visits in the wake of the coronavirus pandemic. In reviewing that restriction the judge noted that Article 15 of the Convention permitted derogation from those rights in situations of public emergency which threatened the life of the nation, and that this was such a time.[60] In the judge's view, Article 5 required powerful reasons to justify any derogation, and those reasons had to be confirmed on solid and compelling evidence before any court found them to be established. The spread of an insidious viral pandemic particularly threatening to the elderly, and those with underlying co-morbidity, established a solid foundation upon which a derogation became not merely justified but essential.[61] Interestingly, it was stated that the court did not have to signal in advance a notification of derogation to the Council of Europe. However, it had to state that the derogation was to cover a limited period and was necessary in consequence of an unprecedented pandemic public health crisis. Fundamental rights and freedoms had to be protected as vigilantly in times of crisis as in less challenging circumstances. The Statement of Principles by the Council of Europe relating to the treatment of individuals deprived of their liberty in consequence of the coronavirus pandemic emphasised that any restrictions should be necessary, proportionate and respectful of human dignity. The

[58] Rajeev Syal, 'English Covid rules have changed 64 times since March, says barrister' *The Guardian* (12 January 2021).
[59] [2020] EWCOP 17.
[60] *BP v Surrey CC* [2020] EWCOP 17, Hayden J at para 27.
[61] ibid.

court then concluded that the plan ultimately put together was a balanced and proportionate way forward which respected B's dignity and kept his raft of needs at the centre of the plan.[62]

The court's decision on the facts seems unexceptionable, but there is clear confusion as to the application of Article 15 to these circumstances. No derogation has been lodged and thus Article 15 is being applied simply because there is an undoubted emergency. As stated above, it is acceptable for a court to have regard to matters such as the fight against serious crime, and thus, arguably, to consider exceptional challenges facing the state and public authorities. Yet to use the wording and spirit of Article 15 when there has been no formal derogation is both confusing and damaging to the rule of law.

Most of these challenges to the pandemic regulations and their impact on human rights have been somewhat narrow and specific in scope, for example *R (Hussain) v Secretary of State for Health and Social Care*,[63] as one of the very first cases heard during the initial and most severe lockdown in March 2020. In this case, relying upon Article 9 ECHR, the chairman of a mosque sought interim relief in respect of the decision to close places of worship, as the claimant was particularly mindful of the importance of holding prayers during Ramadan. Mr Justice Swift refused an application for interim relief, finding that the interference with Article 9 ECHR was not disproportionate and the closure of places of worship was rationally connected to the objective of protecting public health. In particular, it was stated that the Secretary was allowed a suitable margin of appreciation in deciding the order in which to lift restrictions. In the judge's view, there were complex political considerations, and the court should not second-guess them. The question was whether the decisions, in so far as they interfered with ECHR rights, struck a fair balance with societal interests, and the Secretary had been entitled to adopt a cautionary stance.[64]

In contrast however, one successful legal challenge on a similar issue arose in Scotland. In *Philip v Scottish Ministers*,[65] various Christian church leaders sought to challenge via judicial review the applicable Regulations in Scotland concerning the enforced closure of places of worship. The petitioners argued that the Scottish Government did not have the constitutional power at common law to restrict the right to worship in Scotland, and also that the closure of places of worship was an unjustified infringement of their rights to manifest their religious beliefs and to assemble with others, as guaranteed by Articles 9 and 11 of the ECHR respectively. The Court of Session held that the Regulations did constitute a disproportionate interreference with the right to manifest religious beliefs pursuant to Article 9 of the ECHR, and thus the Scottish Ministers had acted beyond *ultra vires* by imposing the enforced closure of religious premises.

Another specific challenge in March 2020 concerned immigration detention and the impact of COVID-19 upon detainees. In *R (Detention Action) v Secretary of State for the Home Department*,[66] the charity 'Detention Action' sought interim relief in a judicial review, seeking the release of detainees with particular medical conditions placing them at greater risk to the pandemic. Relying upon the right to life and the prohibition of torture, protected under Articles 2 and 3 ECHR respectively, the charity sought to challenge their detention and especially those with increased vulnerability to the pandemic, and the absence of an effective system for

[62] ibid para 36.
[63] *R (Hussain) v Secretary of State for Health and Social* Care [2020] EWHC 1392 (Admin).
[64] ibid, Swift J, paras 24-25.
[65] *Philip v Scottish Ministers* [2021] CSOH 32.
[66] *R (Detention Action and another) v Secretary of State for the Home Department* [2020] EWHC 732 (Admin).

protecting detainees in the pandemic more generally. The High Court rejected the plea for interim relief, pointing to the fact that the Home Office had already released several hundreds of detainees during the pandemic and the Home Secretary was taking 'sensible, practical and precautionary steps to address the possible effect of the COVID-19 pandemic in immigration detention centres' In particular, it was stressed that it was the role of the court to assess the legality of the secretary of state's actions, not to second-guess legitimate operational choices.[67] This reflects traditional judicial deference in issues of policy, but is of extra concern where Convention rights are at issue.

The impact of COVID-19 in care homes has attracted considerable public interest due to its severity and the high death toll of residents. In that respect a challenge was brought in June 2020 by an individual, Dr Cathy Gardner, against the Department for Health and Social Care, NHS England and Public Health England following the death of her father to the virus. The claimant argued that certain policies and decisions were to blame for the significant death toll in care homes in violation of several human rights, namely the right to life, the prohibition of torture, inhuman and degrading treatment, the right to respect for privacy, and the prohibition of discrimination, protected under Articles 2, 3, 8 and 14 ECHR respectively. In November 2020, Mr Justice Linden gave permission for a full hearing which is expected to take place by summer 2021.[68]

Arguably the most significant challenge came in July 2020 in *Dolan and others v Secretary of State for Health and Social Care*,[69] which involved an application for judicial review of the legality of the general lockdown Regulations in England and the decision to stop providing education on school premises. The claimants argued *inter alia* that the Regulations had been issued *ultra vires*, that the Health Secretary had acted irrationally in making them, and that he had acted disproportionately by not terminating them. The claimants also raised objections on human rights grounds, arguing *inter alia* that the restrictions on movement, gatherings and the closure of places of worship breached various rights. The application was rejected by the High Court, with Lewis J holding that the Regulations were lawful, that some of the grounds for complaint were now academic following the amendment of the Regulations, and that there was no remedy of any practical purpose in respect of school closures given the Government pledge to re-open them in September 2020.

The case was subsequently appealed to the Court of Appeal which granted the application in part, but dismissed the claim on its merits.[70] The Court of Appeal held that the Secretary of State had not acted *ultra vires* by making the Regulations under his powers under the Public Health (Control of Disease) Act 1984, as amended by the Health and Social Care Act 2008, that that the other public law grounds for challenge were flawed or unarguable, and finally that the various human rights arguments put forward were flawed, unarguable or merely academic given the subsequent developments. In particular, it was noted by the Court that it was impossible to conceive that there was a disproportionate interference with the right to property (Article 1, Protocol 1) given that the margin of discretion to be afforded to the executive is particularly wide in this context, because this was a 'control of use' case and not a deprivation of property case. Furthermore, the balance to be struck when restricting this right would have to take account of the well-known measures of financial support which the Government

[67] ibid paras 17-20, 22-25 and 27.
[68] BBC News, 'Covid: Judge allows legal challenge into care home deaths' (19 November 2020) <https://www.bbc.co.uk/news/uk-england-devon-55007355> accessed 13 April 2021.
[69] *Dolan and others v Secretary of State for Health and Social Care* [2020] EWHC 1786 (Admin).
[70] *R (Dolan and others) v Secretary of State for Health and Social Care & another* [2020] EWCA Civ 1605.

introduced in the exceptional situation created by the pandemic.[71] Thus, the limited impact on Convention rights and extended judicial deference in these circumstances combined to offer a hands-off approach by the courts despite any formal derogation.

Overall, the courts have shown a clear reluctance to employ the principles of necessity and proportionality in challenging measures which have impacted on various conditional civil and political rights contained in the Convention, although there has been success in challenging measures that have impacted on equality and the government's duties under the Equality Act 2010. Thus, recently the High Court found that the Government may have unlawfully discriminated against black and minority ethnic people under the Equality Act 2010 with its policy, introduced in December 2020, of ordering public houses to serve alcoholic drinks only with 'substantial meals'.[72] Again, we would expect a similar approach if regulations impact on fundamental aspects of the right to liberty and fair trial. Thus, recently the High Court ruled that ministers had failed to provide adequate legal advice to people held under immigration powers in jails after man was left without lawyer for 10 months and forced to represent himself. The High Court held that the legal aid provision for immigration detainees held in prisons was unlawful, after accepting the claim that the legal aid arrangements for immigration detainees held in prisons were less favourable than those in place for people held in immigration removal centres.[73]

Conclusions

The fact that states have faced the same crisis and similar challenges but have acted in different ways is significant. Although the European Court has accepted that a state has the discretion to deal with an exceptional situation by not derogating under Article 15, but rather exploring other measures to deal with the situation,[74] the inconsistency of the reaction among European states has caused at least confusion, and probably a reduction in the effectiveness of judicial review of state measures passed in reaction to the pandemic. The danger is, of course, that the hands-off approach adopted by the UK courts might be extended beyond the pandemic and herald a new era of judicial deference.

It must also be stressed that the cases dealt with by the courts during the pandemic deal with rights that do not necessarily require derogation; as opposed to the rights of liberty, fair trial and due process, which have been the target of previous derogations, and which the courts have defended fairly robustly. Cases in the UK have concerned claims where we would expect the courts to show a good deal of judicial deference, although the lack of robust examination of those measures is a cause of concern with respect to the effective recognition and defence of Convention rights in domestic law. Failure to derogate has caused a good deal of confusion as to the appropriate role of the courts and has led to the courts applying derogation standards to non-derogation measures. Had the measures interfered with fundamental aspects of liberty and due process, then derogation measures would have been passed, and we may have witnessed a more coherent and appropriate form and level of judicial supervision. For the future, this lesson

[71] ibid para 110.
[72] Ewan Somerville, 'Substantial meal policy may have discriminated against BAME customers in pubs, High Court rules' *Daily Telegraph* (1 March 2021). The case did not proceed to trial as the rule was no longer in place.
[73] See Mary Bulman, 'Lack of access to lawyers for immigration detainees being held in prison is unlawful, High Court rules' *The Independent* (25 February 2021).
[74] *Brannigan and McBride v United Kingdom* (n 1).

must be learnt if there is to be a rational and legitimate reaction to emergency situations, and an appropriate level of supervision form the courts.

References

BBC News, 'Covid: Judge allows legal challenge into care home deaths' (19 November 2020) <https://www.bbc.co.uk/news/uk-england-devon-55007355>.

Bulman M, 'Lack of access to lawyers for immigration detainees being held in prison is unlawful, High Court rules' *The Independent* (25 February 2021).

Burchill R, 'When does an emergency threaten the life of the nation? Derogations from human rights obligations and the war on international terrorism' (2005) 9 *Yearbook of New Zealand Jurisprudence* 95.

Council of Europe, Reservations and Declarations for Treaty No.005 – Convention for the Protection of Human Rights and Fundamental Freedoms <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/declarations?p_auth=fexSYgTO>.

Dzehtsiarou K, 'Article 15 derogations: Are they really necessary during the COVID-19 pandemic?' (2020) 4 EHRLR 359.

Feldman D, 'Human rights, terrorism and risk: The roles of politicians and judges' [2006] PL 364.

Foster S, *Human Rights and Civil Liberties* (3rd edn, Longman 2011).

Greene A, 'Derogating from the European Convention on Human Rights in response to the coronavirus pandemic: If not now, when?' (2020) 3 EHRLR 262.

Greene A, 'On the value of derogations from the European Convention on Human Rights in response to the COVID-19 pandemic: A rejoinder' (2020) 5 EHRLR 526.

Greene A, *Emergency Powers in a Time of Pandemic* (Bristol University Press 2020).

Hartman J, 'Derogation from human rights treaties in public emergencies – A critique of implementation by the European Commission and Court of Human Rights and the Human Rights Committee of the United Nations' (1981) 22 *Harvard International Law Journal* 1.

Hickman T, 'The coronavirus pandemic and derogation from the European Convention on Human Rights' (2020) 6 EHRLR 593.

Human Rights Committee, *General Comment No. 29: States of Emergency (Article 4)* (72nd session, 31 August 2001) UN Doc. CCPR/C/21/Rev.1/Add.11.

Gross O & Ní Aoláin F, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge University Press 2006).

International Commission of Jurists, *States of Emergency — Their Impact on Human Rights: A Comparative Study by the International Commission of Jurists* (Geneva: International Commission of Jurists, 1983).

Oraá J, *Human Rights in States of Emergency in International Law* (Clarendon Press; OUP 1992)

Questiaux N, 'Study of the Implications for Human Rights of Recent Developments Concerning Situations Known as States of Siege or Emergency', UN Doc. E/CN.4/Sub.2/1982/15, 27 July 1982.

Somerville E, 'Substantial meal policy may have discriminated against BAME customers in pubs, High Court rules' *Daily Telegraph* (1 March 2021)

Syal R, 'English Covid rules have changed 64 times since March, says barrister' *The Guardian* (12 January 2021).

United Nations, Economic and Social Council, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, (UN Doc. E/CN.4/1985/4, 41st session, 28 September 1984).

World Health Organization, WHO Coronavirus Disease (COVID-19) Dashboard <https://covid19.who.int/?gclid=Cj0KCQiA9P__BRC0ARIsAEZ6irjWNIw-8nn2-MNzFFl2vmcr4V8lrrKhillD_D1UOa2gmTzJJ-Y4juEaAvXjEALw_wcB>.

Wallace S, 'Derogations from the European Convention on Human Rights: The case for reform' (2020) 20(4) *Human Rights Law Review* 769.