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The European Convention on Human Rights and Private Law

*Comparative Perspectives from
South-Eastern Europe*

Edited by

Mateja Durovic

and

Cristina Poncibò

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ECHR and the Derogation in a Time of Emergency – The Case of the Republic of North Macedonia

JULIJA BRSAKOSKA BAZERKOSKA AND ALEKSANDAR SPASOV

1. Introduction

Derogation clauses are an important part of the international human rights instruments. Like most human rights treaties,¹ the European Convention on Human Rights contains an emergency derogation clause in Article 15. This clause defines the conditions of derogation from the human rights obligations in case of emergency. It is also designed to limit the suspension of rights in those particular times of emergency. The importance of this clause rests within the need to effectively protect the right to life, without contradicting the mere notion of human rights in the context of a public emergency, as was the COVID-19 pandemic.²

The complexity of the situation created by the COVID-19 global pandemic in European societies, brought numerous challenges when it comes to implementation of Article 15 of the Convention. The exceptional circumstances brought by the COVID-19 pandemic led to more extensive restrictions of human rights than in normal times – both in duration and in scope.³ According to the ECHR, states can

¹ See eg: International Covenant on Civil and Political Rights (ICCPR), American Convention on Human Rights (ACHR), Arab Charter on Human Rights.

² C Binder, M Nowak, JA Hofbauer and P Janig (eds), *Elgar Encyclopedia of Human Rights* (Cheltenham, Elgar Online, 2022); F 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' (2013) 1 *Birkbeck Law Review* 135; A Buyse and M Hamilton (eds), *Transitional Jurisprudence and the European Convention on Human Rights: Justice, Politics and Rights*, (Cambridge, Cambridge University Press, 2011); E Hafner-Burton, L Helfer and C Fariss, 'Emergency and Escape: Explaining Derogations from Human Rights Treaties' (2011) 65 *International Organization* 673, 707.

³ A Lebre, 'COVID-19 pandemic and derogation to human rights', (2020) 7(1) *Journal of Law and the Biosciences* available at: doi.org/10.1093/jlb/lisaa015; VV Horodovenko, LG Udovyya, and HO Dichko, 'Ensuring Respect for Human Rights and Freedoms in the Context of States' Measures Introduction to Combat the COVID-19 Pandemic: European Experience' (2020) 73 *Wiadomości Lekarskie* (12 cz 2)

limit the exercise of most human rights if it is necessary to protect the rights of others or collective interests. During the COVID-19 pandemic, it was a real challenge to establish conditions for a legitimate derogation and to ensure that the general measures adopted by the states do not disproportionately harm vulnerable people.

This chapter will examine the case of the Republic of North Macedonia and its use of Article 15 of the ECHR in an attempt to limit some of the rights of its citizens because of the public emergency created by the COVID-19 pandemic. It will elaborate on the manners and procedures used by the Republic of North Macedonia in defining the public emergency, in outlining the extent of derogation and the manner of informing the Secretary General of the Council of Europe. The analysis should provide insight whether the interference in the case of the Republic of North Macedonia in its attempt to limit the human rights in the case of COVID-19 pandemic could be justified by the state of emergency, and whether the Convention was implemented in a proper manner.

The following part of this chapter will provide an analysis of the ECHR derogation clause under Article 15 along with the connected case law of the European Court for Human Rights. The third part will look into the challenges in defining the COVID-19 pandemic as a public emergency, while the final part will examine the case of the Republic of North Macedonia, elaborating on the specific cases of derogation in times of emergency in the country.

2. European Convention on Human Rights: The Importance of Article 15

The European Convention on Human Rights contains a powerful derogation clause under Article 15 of the Convention. This is a complex legal provision comprised of various components. Article 15 gives, in exceptional circumstances, the possibility of derogating, in a limited and supervised manner, from the contracting states' obligations to secure certain rights and freedoms under the Convention. The article defines the circumstances under which states can validly derogate from their obligations under the Convention. It also limits the measures they may take in the course of any derogation. At the same time, it protects certain fundamental rights in the Convention from any derogation and sets out the procedural requirements that any state making a derogation must follow.⁴

2773, 2779; J Dos Santos, P Stein Messetti, F Adami, I Bezerra, P Maia, E Tristan-Cheever, and L de Abreu, 'Collision of Fundamental Human Rights and the Right to Health Access During the Novel Coronavirus Pandemic' (2021) *Frontiers in Public Health* 8; RO Alsawalqa, AS Al Qaralleh, and AM Al-Asasfeh, 'The Threat of the COVID-19 Pandemic to Human Rights: Jordan as a Model' (2022) 7(3) *Journal of Human Rights and Social Work* 265, 276.

⁴See more in: A Mokhtar, 'Human rights obligations v. derogations: Article 15 of the European Convention on Human Rights' (2004) 8(1) *The International Journal of Human Rights* 65, 87; S Wallace, 'Derogations from the European Convention on Human Rights: The Case for Reform' (2020) 20(4) *Human Rights Law Review* 769, 796.

Three important conditions for a valid derogation are set out in Article 15:

1. it must be in time of war or other public emergency threatening the life of the nation;
2. the measures taken in response to that war or public emergency must not go beyond the extent strictly required by the exigencies of the situation; and
3. the measures must not be inconsistent with the state's other obligations under international law.

According to the European Court of Human Rights,⁵ the natural and customary meaning of 'public emergency threatening the life of the nation' is clear and refers to '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'.⁶ The Court's case-law has never indicated that the emergency should be temporary in its duration.⁷ On the contrary, the cases demonstrate that it is possible for a 'public emergency' to continue for many years.⁸ As the Court stated in *Ireland v the United Kingdom*:⁹ '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"'. Since national authorities are in direct and continuous contact with the pressing needs of the moment, they are in a better position to decide whether there is an emergency and what should be the nature and scope of the derogations necessary to prevent it. Considering this matter, there is a wide margin of appreciation that is left to national authorities.

⁵ See more on case law connected to Art 15 ECHR in: AR Gil, 'Derogation Clauses of International Human Rights Instruments: protecting rights at the maximum possible extent in times of crisis', (2021) 1 *Catolica Law Review* 11, 42. In the past, the ECtHR and the ECHR bodies have dealt with declarations of 'state of emergency' in two important cases connected with the United Kingdom, regarding the situation in Northern Ireland, and Turkey, as regards the Kurdish Separatist Movement (PKK) in the south-east region of the country. Generally, it was considered that these measures were adequate, bearing in mind the seriousness of the threats concerned. The decision was different in the so-called *Greek Case*, where a revolutionary government, relying primarily on considerations of power, declared the state of emergency after a takeover. The European Commission agreed with the applicant's argument, who affirmed that a revolutionary government could hardly justify a derogation based on an emergency which it had created itself. Moreover, contrarily to the other cases, the *Greek Case* involved the suspension of an extensive group of human rights – not only the protection against arbitrary detention, but also the rights to a fair trial, private home, freedom of expression, freedom of thought, conscience and religion, freedom of assembly and association, free elections, and to a remedy against human rights violations. Also, there were interferences with non-derogable rights.

⁶ *Lawless v Ireland* no. 3 (1961) 1 EHRR 15. The case *Lawless v Ireland*, was the first case in which it was ruled what constitutes an emergency by the ECtHR. The emergency, defined in this case 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' is determined by the state which makes the derogation according to Art 15. With regards to this element, the Court most often accepts the assessment of the state, even though this assessment may be sometimes too broad.

⁷ More on the relevant case law in: Guide on Art 15 of the Convention – Derogation in time of emergency, Council of Europe, latest update on 31 August 2022.

⁸ *Ireland v the United Kingdom*, 1978, *Brannigan and McBride v the United Kingdom*, 1993, *Marshall v the United Kingdom*, 2001.

⁹ *Ireland v the United Kingdom*, 1978.