DEROGATING FROM THE EUROPEAN CONVENTION ON HUMAN RIGHTS IN RESPONSE TO THE CORONAVIRUS (COVID-19) PANDEMIC

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EXECUTIVE SUMMARY

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- *Article 15 ECHR should be used to accommodate 'lockdown' powers necessary to confront the coronavirus pandemic.*
- *Failure to use Article 15 ECHR risks normalising exceptional powers and permanently recalibrating human rights protections downwards.*
- *The UK has introduced "emergency powers" but has not declared a state of emergency.*
- *In not declaring a state of emergency, the "quarantining effect" of the special powers is lost and states can pretend that the exceptional measures are perfectly compatible with the normal legal framework.*
- *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.*
- *History shows us that emergency powers often outlive the phenomenon that triggers their introduction in the first instance. For this reason, their impact should be as clearly defined and limited as possible.*

Introduction

The 2020 pandemic caused by Sars-Cov-2 (hereinafter, the coronavirus pandemic), has triggered an array of legal responses across Council of Europe States. Many measures taken by states to slow the spread of the virus by 'flattening the curve' and enforce social distancing are similar across states. That stated, one key fault-line opening up is on the question of whether to derogate from the European Convention on Human Rights (ECHR) under Article 15.1 This briefing paper argues that Article 15 ECHR should be used to accommodate what has become known as 'lockdown' powers necessary to confront the coronavirus pandemic. This is the closest we shall get to an 'ideal state of emergency'—the very thing it was designed for. In contrast, far from protecting human rights, failure to use Article 15 ECHR risks normalising exceptional powers and permanently recalibrating human rights protections downwards.

Article 15: Derogation in time of emergency

Concerns about declaring a state of emergency under Article 15 ECHR to deal with the coronavirus pandemic have been raised by a number of MEPs and even a spokesperson for the Council of Europe (COE). This concern is understandable given the dark history emergency powers have from a human rights perspective. Most states of emergency, however, are not 'zones of lawlessness'. Most emergencies, in fact, have lots of law. Article 15 ECHR creates such an emergency regime.

Article 15 permits states to derogate 'in time of war or other public emergency threatening the life of the nation' but only 'to the extent strictly required by the exigencies of the situation.' Article 15.2 further lists a number of rights that cannot be derogated from. Some rules – such as the prohibition on torture – can never be abandoned.

An Article 15 emergency 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.

In response to the pandemic, at least six ECHR nations have declared a state of emergency under Article 15 (Armenia, Estonia, Georgia, Latvia, Moldova and Romania). Others, like Italy and Spain, have not used the ECHR mechanism but have declared states of emergency in accordance with their constitutional provisions.

The UK, meanwhile, has introduced what has been described as "emergency powers" but has not declared a state of emergency. The government convinced parliament to pass lengthy legislation allowing extra powers in less than a week.

Accountability

Failing to declare a state of emergency via the ECHR may leave these nations less accountable to the international treaties they themselves signed.

Officially declaring a state of emergency allows exceptional powers in exceptional circumstances, which means the mechanism is also supposed to prevent such powers from being enacted in a time of "normalcy". If a state of emergency is not declared, this "quarantining effect" of the special powers is lost. Instead, states can pretend that the exceptional measures they have invoked are perfectly compatible with the normal legal framework.

At most, de jure states of emergency can amount to legal black holes—zones of discretion created by law but within which there is little to no legal constraints on the decision maker; or legal grey holes—zones of discretionary power were, ostensibly there appears to be legal oversight and judicial review of this discretion but such judicial oversight is so light touch as to be nonexistent.

Legal black holes and legal grey holes can give rise to serious human rights and rule of law concerns. Legal black holes reduce the capacity of judicial oversight of emergency powers. Legal grey holes, however, risk legitimising exceptional powers by cloaking them in a thin veil of legality that is the result of an overly deferential judiciary and light-touch review. This can further increase the propensity of such powers becoming permanent. Failure to utilise Article 15 ECHR could give rise to such concerns as human rights provisions are recalibrated downwards. When this happens, the quarantining effect of a de jure state of emergency is lost. 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.

It will be some time before the European Court of Human Rights (ECtHR) definitively rules on whether a state of emergency is needed to authorise the emergency pandemic powers under the ECHR. By then, the crisis will hopefully be over. However, emergency powers have a worrying tendency of becoming permanent.

Declaring a state of emergency under Article 15 of the ECHR and expressly acknowledging the unpalatable and temporary nature of these measures is best practice. It ensures that other states and international human rights organisations can monitor and even police how powers are being implemented.

The impact of powers enacted to confront coronavirus on human rights

Here we focus on some key human rights concerns and, from this, illustrate the fundamental problems that arise from accommodating exceptional powers under the parameters of 'normalcy' without the quarantining effect of a de jure state of emergency.

Article 5: The Right to Liberty and Security

A key right that is likely to be subject to interference during the coronavirus pandemic is Article 5 and the right to liberty and security of the person. This may take the form of 'paradigmatic' deprivations of liberty of infected persons, or less-paradigmatic interferences such as measures enacted to implement and enforce social-distancing and lockdowns. In this latter instance, it is unclear whether Article 5 is even engaged. However, this failure to trigger Article 5 only serves to underline the problematic human rights concerns that arise through attempts to accommodate exceptional powers under the ordinary parameters under the ECHR.

The concept of liberty under Article 5 has been interpreted narrowly, with the ECtHR finding that the additional caveat of 'security of person' provides no further protection. Article 5 only protects liberty in the classical sense of physical liberty but does not confer a right to do what one wants or go where one pleases. Article 5 thus only pertains to deprivations rather than restrictions of liberty, with the latter instead falling under Article 2 of Protocol 4 and the right to freedom of movement.

Any deprivation of liberty must fall within the discrete categories outlined in Article 5.1 (a)-(f) for it to be compatible with the ECHR. The most obvious candidate for accommodating enhanced detention powers for the pandemic is Article 5.1(e) which permits 'the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants.'

It is unclear whether Article 5.1(e) allows for the deprivation of liberty of healthy people to prevent the spread of infectious diseases. Even within Article 5.1(e), there are specific person classifications—persons of unsound mind, alcoholics, drug addicts or vagrants— outside of the ground of 'to prevent the spread of infectious diseases'. This is not a mere technical consideration; it constitutes a fundamental dispute as to the scope of state power permissible under Article 5.1(e): a restrictive, narrow understanding of Article 5.1(e) limited only to infected persons or persons who may be infected (with necessary safeguards regarding the burden of proof required to fall under this category); or an infinitely more expansive conception of Article 5.1(e) authorising the deprivation of liberty of everybody within a state's jurisdiction and with no burden of proof whatsoever required.

This is important as there are fundamental safeguards in place with regards to assessing whether a person has committed, or that there is reasonable suspicion that they have committed a certain conduct; or that they fall within a certain class of persons. If the ECtHR were to agree that Article 5.1(e) permits the deprivation of liberty of healthy persons, this lack of a person-specific limitation needs to be factored into account when assessing whether the measures enacted constitute a restriction or deprivation of liberty.

If these powers are found to be simply restrictions rather than deprivations of liberty so that Article 5 ECHR is not even triggered, this principle would be open to legitimating similar measures for other crises represented by the state as necessitating them. Such emergencies may be 'less objective' than the current pandemic, for example terrorism, and are fertile grounds for human rights abuses. While these measures would still fall under the ambit of Article 2 of Protocol 4 and the qualified right of freedom of movement, it is important to note that states such as the UK and Turkey have not ratified Protocol 4.

For these reasons, any additional lockdown powers should not be seen as compatible with Article 5, regardless of how necessary we consider these measures. Instead, a derogation under Article 15 should be issued.

In this regard, the ECtHR will not be forced into the awkward situation of having to pronounce on the conformity of these measures with Article 5. Instead, by using Article 15, any jurisprudence of the ECtHR that may be affected by undue deference in a time of crisis can be quarantined to the exceptionality of the situation.

Other rights affected

Prohibition of Discrimination

Further concerns also arise with regards to Article 14 and the prohibition on discrimination. While it may be the case that the powers used to enforce a lockdown affect us all equally and that we may all be potential vectors for coronavirus, it does not take much imagination to see a scenario where such powers may be used against a particular race or group.

The conferral of vast discretionary power may facilitate their discriminatory application as officials use their intuition or 'hunch' to identify individuals to whom they should apply the powers to. Lessons from UK counter-terrorist laws are illustrative here as statistics show the use of counter-terrorist powers that can be exercised without reasonable suspicion tend to be targeted at specific minority groups or 'suspect communities'. While the courts have refused to say whether this makes the measures incompatible with Article 14 due to the fact that they were designed to be used in proportion to the 'terrorist community' rather than society as a whole', this should only serve to underline the risks of placing courts in the tricky situation of trying to vindicate human rights in the face of a threat represented by the political branches as necessitating draconian powers. The ECtHR may end up capitulating to state arguments about the necessity and proportionality of such powers which could, in turn, be used to legitimate similar permanent powers without the need for derogation. While a der-

ogation under Article 15 would not lessen the possibility of the ECtHR capitulating to state arguments it would, at least, quarantine such problematic jurisprudence to exceptional situations.

Freedom of Expression and Freedom of Association

Article 5 is not the only Convention right that may be affected by emergency coronavirus measures. Powers to restrict gatherings and the use of public spaces will impact on the right to freedom of association under Article 11. These interferences are particularly problematic in a democratic society if those powers can be used against political parties and trade unions. This can also impact on public protest which can, in turn, give rise to Article 10 and freedom of expression concerns.

Of course, such rights are not absolute and qualified rights under the Convention may be expressly interfered with for the purposes of protecting public health. Here, the Court's role is to apply a proportionality test to assess whether the infringement of the right is justified by the legitimate aim being pursued. The case can certainly be made that the proportionality test can be used to accommodate the emergency coronavirus measures. However, the argument that everything can and should be accommodated through the proportionality test reduces Article 15 to a dead-letter and, in so doing, eradicates its quarantining effect and potentially increases the possibility of exceptional powers becoming normalised.

The end of the emergency?

It may be tempting to insist that the measures enacted to confront the coronavirus pandemic are compatible with ordinary human rights obligations owing to the objective necessity of such measures and the need to reassure people that the state does not wish to exercise its new powers in a draconian fashion. Indeed, the coronavirus pandemic is possibly the closest we have ever seen of a phenomenon that can objectively be categorised as necessitating exceptional measures. The objectivity of a threat, however, needs to be given legal recognition through the declaration of a state of emergency. History shows us that emergency powers often outlive the phenomenon that triggers the introduction of emergency powers in the first instance. While the need for exceptional powers may be obvious at the outset of the emergency, assessment of the point where these powers are no longer needed is considerably more problematic.

A further problem with relying on the objective, tangential nature of the crisis to limit emergency powers is that emergencies have the propensity to evolve and trigger further crises. This public health emergency has already triggered an economic emergency and economic emergency measures. In turn, economic emergencies are fertile breeding grounds for social unrest which can trigger other 'less objective' emergencies that may be represented as requiring additional police and state security powers. In the context of the coronavirus pandemic, it is not unforeseeable that the aforementioned powers enacted above are reframed as necessary to confront these more subjective crises, creating the precise conditions for egregious human rights abuses.

Conclusions: The dangers of emergency powers

The point of this briefing paper is not to downplay the dangers that de jure states of emergency pose for human rights. However, draconian measures taken in response to a crisis are no less dangerous simply because they are not expressly labelled as emergency powers or are taken under the assumption that they are compatible with the ordinary requirements of human rights law. If anything, these measures are more dangerous as they are not expressly quarantined to exceptional situations.

The story of emergency powers since the Twentieth Century and, particularly since 11 September 2001 has not been one of abuse of officially declared states of emergency; rather, it has been the story of permanent emergency powers enacted without such declarations. Ultimately, emergency powers have strange, unpredictable after-lives. For this reason, their impact should be as clearly defined and limited as possible.

RECOMMENDATIONS

The **UK Government should derogate from the European Convention on Human Rights** in response to the COVID-19 pandemic because:

- **It is unclear whether lockdown measures are compatible with Article 5 ECHR and the right to security and liberty of the person. Article 5 ECHR should be interpreted as narrowly as possible in order to best protect human rights.**

– Although Article 5.1(e) ECHR permits deprivation of liberty for the prevention of spreading of infectious diseases, it is unclear whether this allows the detention of *healthy* persons to prevent the spread of diseases or only persons who are knowingly infected or that there is a reasonable suspicion that they may be infected.

– While Article 5.1(e) ECHR only pertains to deprivations rather than restrictions of liberty so it is not clear whether lockdown measures constitute merely restrictions of liberty, the distinction between both concepts is one of degree, rather than substance. Given the fact that lockdown measures apply to all, this should be interpreted strictly and therefore they should be considered to amount to deprivation, rather than restriction of liberty.

– Furthermore, insisting that they amount to deprivation of liberty will prevent states claiming similar measures enacted to deal with non-pandemic threats (e.g. terrorism) do not trigger Article 5 ECHR. This, therefore, will enhance human rights protections.

- **Derogating from the ECHR using Article 15 can actually enhance rather than diminish human rights protections.**

– States of emergency can damage human rights by permitting measures that would otherwise be prohibited under the ECHR. However, states of emergency also quarantine such exceptional powers to exceptional situations. This quarantining effect of Article 15 ECHR can ensure that we do not permit lockdown measures outside of an officially declared state of emergency under Article 15

– In contrast, failing to derogate and instead interpreting Article 5 ECHR in such a way as to view lockdown measures as compatible with human rights, risks permanently calibrating human rights protections downwards.

- **Derogating does not mean suspending human rights**

– When a state declares a 'public emergency threatening the life of the nation' under Article 15, states are not given 'carte blanche' to do what they like. The measures must still be 'proportionate to the exigencies of the situation'. This requirement of proportionality still means that human rights obligations must be adhered to during an emergency.

– This requirement of proportionality means that an emergency under Article 15 ECHR is very different to other forms of emergency powers that have resulted in egregious abuses of human rights.

- **Emergency powers must stay temporary**

– The ultimate justification of emergency powers is that they are only temporary.

– Lessons from history show us, however, that emergency powers have a worrying tendency of becoming permanent.

– Introducing emergency powers but without an official declaration of a state of emergency has been a worrying trend seen in recent decades. These measures often become permanent due to the lack of a quarantining effect that you see with an officially (de jure) declared state of emergency.

– Simply because an emergency has not been officially declared does not make the new powers enacted any less problematic. We should not be re-assured by the lack of an officially declared state of emergency.

– Lockdown powers are absolutely necessary to control the virus but we must make sure that they continue for no longer than they are needed and that they are not applied in circumstances outside of the pandemic.

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About the author

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