# FROM STRICT NECESSITY TO IRRESISTIBLE TEMPTATION: STATE OF EMERGENCY AND ARTICLE 15 OF THE ECHR DURING COVID-19

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May 27th, 2021

# Abstract

Ever since COVID-19 has been announced as a global health crisis, one of the major dilemmas before the state parties to the European Convention on Human Rights (*hereinafter*, Convention) was whether there is a need to invoke Article 15 of the Convention allowing the states to derogate from their obligation under the treaty. The current debate brings us to different opinions such as that, on one hand, the impact of Article 15 on Convention rights is minimal, and on the other hand, without invoking Article 15 we are risking losing stricter supervision that comes with the derogation clause. In contrast, by analyzing how Article 15 of the Convention has been interpreted and applied in the previous case law, this paper aims to reveal the challenges and systemic deficiencies that the Court will have to deal with while addressing future potential cases. Drawing on identified patterns of the Strasbourg Court such as the redundant margin of appreciation in cases concerning the state of emergencies and Article 15 of the Convention, the paper argues that in the long run the activation of Article 15 during COVID-19 renders the fate of future potential complaints vulnerable.

# Acknowledgments

First and foremost, I want to thank my capstone project supervisor Prof. Eszter Polgári who has been supportive and patient with me throughout the project. Thank you for your consistent guidance, thoughtful comments, and recommendations that immensely contributed to my research. Thank you for always encouraging me to make this work be indeed my work by allowing me to experiment with it in different directions!

Finally and most importantly, I would like to acknowledge my mom for being my only source of motivation, encouragement, and comfort throughout this extremely challenging year. Thank you for always reminding me why I choose to be a human rights advocate!

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# Introduction

Since the COVID-19 has been announced as a global health crisis, one of the major dilemmas before the state parties to the European Convention on Human Rights (hereinafter, Convention) was whether there is a need to invoke Article 15 of the ECHR allowing the states to derogate from their obligation under the treaty. COVID-19 is one of the unpredictable events, which was also referred to as an "ideal state of emergency", for which Article 15 of the Convention was designed.[1] However, does that automatically justify the application of Article 15 of the Convention? This question has been the subject of the debate too, which brings us to different opinions such as that, on one hand, the impact of Article 15 on Convention rights is minimal, and on the other hand, without invoking Article 15 we are risking losing stricter supervision that comes with the derogation clause.[2] However, this paper argues that in the long run, the activation of Article 15 during COVID-19 renders the fate of future potential complaints vulnerable.

This paper is divided into three parts. The first part deals with the substantive conditions and safeguards applicable to Article 15 of the Convention in light of the jurisprudence of the European Court on Human Rights (ECtHR). The second part analyzes the ECtHR's approach to cases involving the state of emergencies and Article 15. Moreover, it will try to unveil some patterns and usual lines of argument accepted in case law, that substantiate the suspicion that Article 15 during COVID-19



[1] Alan Greene, *States Should Declare a State of Emergency Using Article 15 ECHR to Confront the Coronavirus Pandemic* (Strasbourg Observers, April 2020), available at: https://strasbourgobservers.com/2020/04/01/states-should-declare-a-state-of-emergency-using-article-15-echr-to-confront-the-coronavirus-pandemic.

[2] Compare Kanstantsin Dzehtsiarou, *COVID-19 and the European Convention on Human Rights* (Strasbourg Observers, March 2020) with the article of Alan Greene, *States Should Declare a State of Emergency Using Article 15 ECHR to Confront the Coronavirus Pandemic* (Strasbourg Observers, April 2020)

may be used as a strategic movement of the state to weaken the position of the Court. The third and last chapter analyzes the implications of using Article 15 or failing to do so in the context of the COVID-19 taking into consideration that only a small number of European States invoked Article 15 of the ECHR. This part will compare the *Brogan (1988)* and *Brannigan (1993)* cases to demonstrate how the Court's approach changed when Article 15 of the Convention was used.

The practical component of this Capstone Project is a fictional case concerning Articles 6 and 10 of the Convention. The memorandum was initially meant to be used in the Moot Court exercise. However, due to limitations caused by the pandemic situation and the lack of time, the exercise did not take place. The purpose of the case was to demonstrate what kind of cases can potentially appear before the Court and how Article 15 of ECHR can radically change the standards the Court will apply when adjudicating the case. This paper complements the case as theoretical support and a line of arguments the applicants could use to call for closer scrutiny by the Court. The case is attached to the Annex

# Chapter 1: Defining Article 15 of the Convention

The current pandemic situation made it clear that the states might face circumstances where they are not capable of securing all rights and fundamental freedoms along with their international obligations and therefore, have a legal mandate to depart (temporarily) from their usual human rights standards.[3] This is practically manifested in the provisions of derogation incorporated into the European Convention on Human Rights,[4] the American Convention on Human Rights,[5] or the International Covenant on Civil and Political Rights.[6] These derogation clauses are meant to be used as a method "to buy time and legal breathing space."[7] The derogation clauses can be considered to be a core or "skeleton" of their respective Conventions because during the state of emergencies individual rights that are usually protected by those Conventions become more vulnerable in the hands of states. Therefore, for example, the UN Secretary-General emphasized during the drafting process of Article 4 of ICCPR that states should never be allowed to decide independently when and how emergency powers should be exercised.[8] The terms and conditions of the derogation are stipulated in Article 15 of the European Convention which says:

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[3] OREN GROSS AND FIONNUALA NI AOLÁIN, LAW IN TIMES OF CRISIS: EMERGENCY POWERS IN THEORY AND PRACTICE (CAMBRIDGE UNIVERSITY PRESS, 2006), p. 257; 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*, 1 Birkbeck L. Rev. 135 (2013), p. 137

[4] Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950), Art. 15

[5] Organization of American States (OAS), American Convention on Human Rights, "Pact of San Jose", Costa Rica (22 November 1969), Art. 27

[6] UN General Assembly, International Covenant on Civil and Political Rights (16 December 1966), UN, Treaty Series, Art. 4

[7] Emilie M. Hafner-Burton, Laurence R. Helfer and Christopher J. Fariss, *Emergency and Escape: Explaining Derogations from Human Rights Treaties*, 65 International Organization (2011), p. 675

[8] Extract from the annotation on the Draft International Covenants on Human Rights prepared by the United National Secretary General, available at http://www.echr.coe.int/library/DIGDOC/Travaux/ECHRTravaux-ART15-DH(56)4-EN1675477.pdf, p. 13.

> *In times of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.*
>
> *No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.*
>
> *Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefore. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.*

The provision is composed of several conditions the states should follow when applying Article 15: 1) there should be war or other public emergency threatening the life of the nation; 2) the measures should be strictly required by the exigencies of the situation, and; 3) the derogation must be consistent with other obligations of the state under international law. The second paragraph of the provision [Article 15(2)] lists rights such as the prohibition of the arbitrary deprivation of life (Article 2), prohibition of torture (Article 3), slavery [Article 4 (1)], and prohibition of the punishment without the law (Article 7), that cannot be derogated from under any circumstances, even in the state of emergency.[9] The last paragraph requires the states, which intend to derogate from the Convention during a state of emergency, to inform the Secretary-General of the Council of Europe by sending a notification with the measures and justifications.

This paper will focus only on what circumstances fall within "*other public emergency threatening the life of the nation"* and what measures are *"strictly required by the exigencies of the situation"*.

[9] In protocols to the ECHR the list has been extended to the prohibition of capital punishment and the principle of ne bis in idem.

### *1.1. "Other public emergency threatening the life of the nation"*

First and foremost, the state should demonstrate that the situation it is facing is indeed the one that threatens the life of the nation. The wording of Article 15 of the Convention suggests that war is one of them. The reference to "other public emergency" leaves it open to other possible hardships a state may have to tackle. What falls within the definition of an emergency is quite "stretchy" and it obviously encompasses situations beyond armed conflicts. Generally, a state of emergency, public emergency, or state of siege refers to those exceptional circumstances resulting from temporary factors such as major economic or political disturbances, *i.e.* terrorism or armed conflicts and force majeure situations, *i.e.* natural disasters that can not be predicted.[10] During such exceptional circumstances, the states have a difficult task to take all reasonable measures to rectify the situation while making sure that all fundamental rights of people are respected and protected.[11]

As stipulated in the *Lawless case (1961),* the effect of such exceptional circumstances must extend to the whole population and threaten the organized life of the community that constitutes the state.[12] The Court recognized several factors that the Irish Government used for its own assessment of the existence of the emergency: (1) the existence of the armed ground engaged in violent unconstitutional activities in the territory of Ireland; (2) large scale activities carried out by the armed group within and outside of the territory of Ireland, and; (3) "steady and alarming increase" of



[10] DAVID HARRIS, MICHAEL O'BOYLE, AND COLIN WARBRICK, LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS (BUTTERWORTHS: LONDON, 1995), pp. 489-490
[11] Mohamed M. Zeidy, *The ECHR and States of Emergency: Article 15 - A Domestic Power of Derogation from Human Rights Obligations*, 4 San Diego Int'l L.J. (2003), p. 278
[12] *Lawless v. Ireland (No.3) (merits)*, Appl. No. 332/57 (01/07/1961), par. 28.

terrorist activities within its territories between 1956 and the first half of 1957.[13]

In another case - *Denmark and others v. Greece (1969)* - the permanent representative of Greece sent a letter to the Secretary General of the Council of Europe claiming that Greece was in a state of emergency due to the political unrest caused by public demonstrations and strikes of trade unions and communist supporters against the Regime of the Colonels which was established through the coup d'état of 21 April in 1967.[14] The Greek government tried to argue that the derogation was necessary as the measures implied (dissolution of the Parliament, state censorship on the media, suspension of trade unions, rewriting the Constitution, establishing military courts, etc.) - that are usually not acceptable - served as the only possible means to protect Greece from the Communist activities.[15] However, the Commission found that the threat posed by the Communist activities could have been controlled by using normal measures, meaning existing judicial, executive, and legislative order.[16] In the same case, the Commission expanded the definition given in the *Lawless case (1961)*. It established the following characteristics of the public emergency: (1) it must be actual and imminent; (2) its effects need to involve the whole nation; (3) the continuance of the organized life of the community must be threatened; (4) the danger must be exceptional.[17]

This elaborated definition reflects the Court's evolution because the *Lawless case*



[13] Ibid; see also Daphna Shraga, *Human Rights in Emergency Situations under the European Convention on Human Rights*, 16 Isr. Y.B. Hum. Rts. (1986), p. 220. DAVID HARRIS ET AL.(1995), p. 368.
[14] *Denmark and others v. Greece*, App. Nos. 3321/67, 3322/67, 3323/67 and 3344/67 (the "Greek Case"), Commission report of 5 November 1969, para. 36
[15] *Greek case,* para. 278
[16] Greek case, para. 142-144;
[17] Greek case, paras. 112-113, see also Venice Commission, Opinion on the protection of human rights in emergency situations, CDL-AD(2006)015, par. 10.

*(1961)* did not have the criteria of imminency.[18] This means that the state can not derogate from its international human rights obligations in response to the situation that did not occur yet, *i.e.* the state can not derogate with the purpose of prevention.[19] The Commission also made it clear in the *Greek case (1969)* that the criterion of actuality or imminency results in limitation in time.[20] Hence, one of the questions to be asked while assessing the measures of the state is whether there exists an actual and imminent public emergency at that date of derogation. The second requirement, which requires that the situation must affect the whole nation for it to be considered as an emergency, has been softened in practice.[21] Indeed if the public emergency is actual and imminent only in one part of the state, it would be illogical to extend the measures to the whole territory. It has been argued that the emergency should affect either the whole population or the whole territory or certain parts of it.[22] For example, in *Ireland v the United Kingdom* (1978) and *Aksoy v. Turkey* (1996) the Court has accepted the derogation of the United Kingdom and Turkey, even though the activities of the IRA took place mostly in Northern Ireland and the PKK carried out its operations mostly in South-East Turkey respectively.[23]

However, It is not enough that the situation affects the whole nation or territory or only part of it, but also there should be a threat to the organized life of the community. The organized life of the community was generally referred to as "constituting the

[18] P. VAN DIJK AND G.J.H. VAN HOOF, THEORY AND PRACTICED OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS (KLUWER LAW AND TAXATION PUBLISHERS, 2ND ED. 1990), p. 552
[19] Nicole Questiaux, *Question of the Human Rights of Persons Subjected to any Form of Detention or Imprisonment: Study of the Implications for Human Rights of Recent developments concerning situations known as states of siege or emergency*, U.N. Doc. E/CN.41Sub.2/1982/15, p 15, para. 1.
[20] Greek case (Report of the Commission), para. 117
[21] *Lawless v. Ireland*, Appl. No. 332/57 (19/12/1959) Report of the Commission, para. 28 (hereinafter, *Lawless Report)*; The public emergency was referred to as "exceptional situation of crisis or emergency which affects the whole population."
[22] Nicole Questiaux (1982) p 15, para. 3.
[23] IAN PARK, EFFECT OF DEROGATION IN THE RIGHTS TO LIFE IN ARMED CONFLICT (UNIVERSITY OF OXFORD, 2016), p. 200

basis of the State, whether this means the physical integrity of the population, territorial integrity or the functioning of the organs of the State."[24] The ineffectiveness of national laws and courts and the escalating panic and fear among the population can be possible examples.[25] It follows that the Court expects states to demonstrate that the measures and restrictions applied in the normal legal order are not sufficient and appropriate to address the situation.[26] The whole idea of derogation is to survive in an unusual state of affairs which is not possible by deploying the usual measures that proved effective in normalcy. Thus, the only legitimate purpose and justification of emergency measures and derogation is to return to the situation of normalcy as soon and effectively as possible.[27] Once the existence of the public emergency is beyond any doubt, the next major question is how far it is necessary to go in attempting to overcome the underlying extraordinary situation.

### *1.2. "Strictly required by the exigencies of the situation"*

When assessing compliance with this criterion, the Court takes into account different factors such as necessity, proportionality, and relevance.[28] In several cases the Court has given weight to other factors such as the nature of the rights concerned, duration of the exceptional situation, and the availability of certain safeguards against abuse.[29] Moreover, the Council of Europe has prepared a list of questions that can be asked

[24] Nicole Questiaux (1982), p 16, para. 4.
[25] *Lawless v. Ireland (1961)*, para. 37;
[26] *Lawless v. Ireland (1961)*, para. 36; *Ireland v. the United Kingdom (merits)* Appl. No. 5310/71 (18/01/1978), para. 212
[27] Oren Gross and Fionnuala Ní Aoláin, *From Discretion to Scrutiny: Revisiting the Application of the Margin of Appreciation Doctrine in the Context of Article 15 of the European Convention on Human Rights*, 23 Hum. Rights Q. (2001), p. 644
[28] P. VAN DIJK AND G.J.H. VAN HOOF (1990), p. 553
[29] *A. and Others v the United Kingdom*, App. no. 3455/05 (19/02/2009), para. 173; see *Ireland v. the United Kingdom* (1978), para. 207; *Brannigan and McBride v. the United Kingdom* (Judgment), App. no.14553/89 & 14554/89 (25/05/1993), paras. 43 and 61-66; *Aksoy v. Turkey* (merits), App. no. 21987/93 (18/12/1996), para. 68

when determining whether a State has gone beyond what is strictly required.[30]

Based on the case law, two important aspects merit a brief explanation. First, any measures taken by the states should correspond to the critical situation which it intends to address. The state should clearly explain why the means employed are necessary, in other words, irreplaceable, to mitigate or prevent the harm the event poses. The case of *A. and Others. v. The United Kingdom (2009)* is illustrative as to what type of measures are not acceptable. In this case the Court rightly pointed out, in support of the earlier decision of the House of Lords, that the immigration control measure - the introduction of a detention scheme - that was designed for non-nationals and aimed to address the threat to security resulting from terrorist attacks potentially posed by nationals and non-nationals, is disproportionate, irrational, unnecessary and discriminatory.[31] It is important to draw a logical connection between the issue and the solution developed to that end. Second, the measures are meant to be interim, meaning, as long as the situation persists.[32] It is equally important to highlight that as the emergency powers are convenient for states to abuse their power, they must be subject to some sort of review by domestic courts.[33]

The interpretation of the second requirement - *i.e.* "strictly required" - suggests a stricter or comparatively more demanding standard of review than qualified rights, for example, Article 10 of the Convention which, on the other hand, requires that limitation should be "prescribed by law and necessary in a democratic society..."[34]



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[30] To see the list of question go to page 8 in *Guide on Article 15 of the European Convention on Human Rights - Derogation in Time of Emergency* (updated on 31 August 2020), available at: https://www.echr.coe.int/documents/Guide_Art_15_ENG.pdf

[31] *A. and Others v the United Kingdom (*2009), paras. 20 and 186.

[32] BERNADETTE RAINEY, ELIZABETH WICKS AND CLAIRE OVEY, EUROPEAN CONVENTION ON HUMAN RIGHTS (OXFORD UNIVERSITY PRESS, 7TH ED. 2017), p. 119

[33] European Commission for Democracy through Law (Venice Commission), *Rule of Law Check-list*, 106th Plenary Session, CDL-AD(2016)007, par. 51

[34] DAVID HARRIS ET AL.(1995), p. 631

While this is merely a textual analysis, the case-law of the Court does not provide a clear-cut answer either and moreover, leads to the opposite conclusion as the Court has been pleased when the state merely showed that the measures were necessary rather than strictly required.[35] This invalidates the exceptional nature that Article 15 of the Convention seems to reflect. The next chapter will provide some explanation for this conviction.



[35] Y. ARAI-TAKAHASHI, THE MARGIN OF APPRECIATION DOCTRINE AND THE PRINCIPLE OF PROPORTIONALITY IN THE JURISPRUDENCE OF THE ECHR (INTERSENTIA, 2002), p. 172

# Chapter 2: Tendencies of Strasbourg Court

It should be noted that the ultimate goal of the Strasbourg Court is not and never was to diminish the sovereignty and authority of the states. Accordingly, it respectfully gives a certain level of discretion, also known as the margin of appreciation, to national authorities, because it holds the opinion that the national authorities are better placed to manage matters they know more about.[36] Thus, the task of the Court is limited to assessing whether the measures comply with the conditions discussed in the previous chapter and have remained within the margin of appreciation afforded to states.[37] This is one of the reasons among many why this function of the Court should remain effective. As rightly pointed out by Peter Kempees, Article 15 does not serve as a "switch-off button" that controls the power of the Court to decide upon the case.[38] Yet, it does not mean that the impact of the provision is minimal to the outcome of the decision or the Court's scrutiny. Invoking Article 15 does not cancel the jurisdiction of the Court but it does influence the scope of its review which ultimately has a serious impact on human rights under the Convention are protected in exceptional situations. Discussing some of the cases mentioned above in greater detail, such as the *Lawless* case (1961), the *Greek* case (1967), *Ireland v. United Kingdom* (1978), the *Brogan* case (1988), and *Brannigan* case (1993), this chapter sheds light on the Court's review power and scrutiny in Article 15 cases.



[36] Mohamed M. Zeidy, *The ECHR and States of Emergency: Article 15 - A Domestic Power of Derogation from Human Rights Obligations*, 4 San Diego Int'l L.J.(2003), p. 301
[37] *Lawless case* (1961), para. 22
[38] PETER KEMPESS, HARD POWER AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS (LEIDEN UNIVERSITY, 2019), p. 62; see also Joseph Zand, *Article 15 of the European Convention on Human Rights and the Notion of State of Emergency*, (5) J. FAC. L. INONU U. (2014), p. 161

### *2.1. Challenging Margin of Appreciation: Does the Government Know Best?*

The doctrine of the margin of appreciation has appeared first in the context of derogations.[39] Some scholars believe that the margin of appreciation has been the widest in states of emergency and Article 15.[40] The national authorities are thus left with a margin of appreciation regarding both the existence of the public emergency and the applicable measures strictly required to avert the exceptional situation.[41] In the case of *Lawless v. Ireland* (Report, 1959), the Commission made it clear that the margin of appreciation granted to states is balanced by the supervisory power of the Court.[42] Yet, this acknowledgment was later criticized because the supervisory power in the same case has been exercised weakly. Michael O'Boyle argued that there was no public emergency but only a threat to public order which could have been restored by utilizing measures that would be less detrimental to the rights of individuals.[43] Moreover, he noted that the detention without trial has been accompanied by several safeguards, such as that the detention Commission had the power to review the charges and order an immediate release if the detention was unjustified.[44] O'Boyle argued that the state could introduce administrative detention with such safeguards

[39] Michael O'Boyle, *The Margin of Appreciation and Derogation under Article 15: Ritual Incantation or Principle?*, 19 HRLJ (1998), p. 23; see also Bart van der Sloot, *Is All Fair in Love and War? An Analysis of the Case Law on Article 15 ECHR*, 53/2 Military Law and the law of War Review (2014), pp. 325-326

[40] Michael O'Boyle (1998), p. 25, see also Oren Gross and Fionnuala Ní Aoláin, *From Discretion to Scrutiny: Revisiting the Application of the Margin of Appreciation Doctrine in the Context of Article 15 of the European Convention on Human Rights*, 23 Hum. Rights Q. (2001), p. 633; ANNA-LENA S.MCCARTHY, THE INTERNATIONAL LAW OF HUMAN RIGHTS AND STATES OF EXCEPTION (MARTINUS NIJHOFF PUBLISHERS, 1998), p. 591

[41] Waseem Ahmad Qureshi, *The Concept of European Supervision of Derogations under Article 15 is Theoretical Rather than Real,* 10 Bocconi Legal Papers (2018), p. 368; See also *Ireland v. the United Kingdom* (1978), par. 207 (the role of the Court); *Greek Case* (Report of the Commission), para 114; *Brannigan and McBride v. the United Kingdom* (1993), par. 43

[42] *Lawless Report,* para. 90

[43] Mohamed M. Zeidy (2003), p. 305

[44] *Lawless v. Ireland (No.3),* para. 36-37

without declaring the state of emergency.[45] However, the Commission did not come to such conclusions. Another case where the Court showed flexibility towards the existence of the emergency is the case of *A. and others v. the UK* (2009) because to do otherwise would be second-guessing the decision of the House of Lords.[46] The Court said: "The national authorities enjoy a wide margin of appreciation under Article 15."[47] What is strange is that even when the Court admitted that the UK was the only country to avail itself with the right of derogation when the danger was posed to many, it did not reject the derogation. However, does not it already question the validity of the derogation not even speaking about the measures imposed? Yet, the Court decided not to dig into that question either. One of the limitations set by the Court was that it will interfere if it is shown that the domestic courts clearly "misinterpreted or misapplied Article 15 or the Court's jurisprudence under that Article or reached a conclusion which was manifestly unreasonable."[48]

### *2.2. Politics and Restraints*

A radically different approach was taken by the Commission in the *Greek case (1969)*. The *Greek* case is one of the rare cases where the Commission demonstrated a stronger interest to scrutinize the actions of the state in emergencies. The Commission had to assess whether the application of Article 15 is justified, meaning, whether an emergency situation existed in Greece in the first place. After conducting an assessment of the factors that qualify an emergency, the Commission concluded that the state of emergency was not justified, as well as the act of derogation.[49]

[45] Mohamed M. Zeidy (2003), p. 305
[46] ibid; *A. and others v. the United Kingdom* (2009), par. 180
[47] *A. and others v. the United Kingdom* (2009), par. 180
[48] *A. and others v. the United Kingdom* (2009), para. 174
[49] *Greek case* (Report of the Commission), para. 145

Surprisingly, the Commission did not limit itself to the government's contention. It is not quite clear why the Commission's approach is evidently different in the *Greek* case and why it decided to continue its assessment of the measures even after it had already been found that there was no public emergency. Some suggest that it can be due to the well-known anti-democratic character of the Greek government which generated suspicion in the Commission.[50] Perhaps, the Commission decided to conduct a comprehensive and detailed assessment of the measures to reveal the bitter truth that the state might use Article 15 of ECHR as a shield to hide the nature of its acts. Even though the Commission said that the Convention applied equally both to the anti-democratic and revolutionary states as to the democratic one, the behavior of the Court in the Greek case was extremely rare.[51] The Commission and the Court have shown a noticeable tolerance when the state that is perceived by the international community as the one that usually respects democratic principles, human rights, and rule of law suspended its obligations towards the Convention.[52] Therefore, Oren Gross and Fionnuala Ní Aoláin suggested that the Court "detached and further removed from the immediate turmoil, reviewing the relevant issues post facto rather than at the time of their occurrence, is able to judge matters more clearly and more accurately."[53] The superficial (previous or current) democratic appearance of a state and the past good behavior should not automatically be assumed in all subsequent cases. It can be argued at least for one reason. The mere naive assumption that there was and will not be any evidence of bad faith on the part of the so-called



[50] Ronald St. John Macdonald, *Derogations under Article 15 of the European Convention on Human Rights*, 36 Colum. J. Transnat'l L. (1997), p. 249
[51] *Greek case* (Report of the Commission), para. 49 (Opinion of the Sub-Commission)
[52] OREN GROSS AND FIONNUALA NI AOLáIN (2006), p. 275; also see Brendan Mangan, *Protecting Human Rights in National Emergencies: Shortcomings in the European System and a Proposal to Reform*, 10 Hum. Rights Q. (1988), p. 382; MARIE-BéNéDICTE DEMBOUR, WHO BELIEVES IN HUMAN RIGHTS?: REFLECTIONS ON THE EUROPEAN CONVENTION (2006), p. 52
[53] Oren Gross and Fionnuala Ní Aoláin (2001), at p. 639

"democratic" states gives a long-lasting effect of immunity which will be very hard to challenge. If the Court does not intentionally approach states with skepticism in cases concerning Article 15, it may never realize that the measures, either in light of the emergency or generally, are carried out in bad faith as the Court will not bother assessing the measures once the condition of the emergency situation has been satisfied. Similarly, even though the assessment of the existence of emergencies in cases concerning the COVID-19 related derogations should not, ideally, take much time, it is important to make sure that the political image of the state will not block further extensive evaluation of the measures imposed, *i.e.* whether they were "strictly required by the exigencies of the situation" [Art. 15(1)]. There is a risk, as it is likely that the premeditated skeptical approach puts the Court in a position where it can lose its political support from states.[54] Yet, we should always remember the main purpose behind the existence of Courts, which is, in the case of the ECtHR, is to protect the human rights of people under the jurisdiction of the member states of the Council of Europe.

There is also a plausible explanation behind the mild interpretation of the derogation clause in the case *Lawless v. Ireland* (1959) mentioned above. It was argued that due to the political situation at that time, namely the fact that only a few states had ratified the Convention and accepted the jurisdiction of the Court, it could not afford closer scrutiny.[55] Deferring to the decision of the state was more favorable both to the state and to the Commission. When dealing with sensitive political questions and



[54] FIONNUALA NI AOLáIN, THE EUROPEAN CONVENTION ON HUAMN RIGHTS AND ITS PROHIBITION ON TORTURE, IN: S. LEVINSON (ED): (OXFORD UNIVERSITY PRESS, 2004), pp. 222-224.
[55] Edward Crysler, *Brannigan and McBride v. U.K. A New Direction on Article 15 Derogations Under the European Convention on Human Rights*, Revue Belge De Droit International (1994), p. 606; See also Mohamed M. El Zeidy, *The ECHR and States of Emergency: Article 15-A Domestic Power of Derogation from Human Rights Obligations*, 4 San Diego Int'l L.J. 277 (2003), p. 305

nuances such as a rapid withdrawal from the ECHR, the Court has to act carefully. This explains why it has been concluded previously that "the more politically sensitive the issue, the greater the width of the margin"[56] However, some compromise or a balance should be established. Bearing in mind the existence of complicated political issues, it is reasonable to suggest that the Court should grant a wide margin of appreciation in determining the existence of public emergency but not when it comes to the measures to be used to restore order – in line with the text of Article 15 – stricter scrutiny shall be applied to assessing the suitability and necessity of the means. However, this suggestion is not safe either, considering the extent of leeway the Court grants to "visibly democratic" states.

### *2.3. The Danger of Permanent Emergencies*

Another concern is that the Court demonstrated that it will not question the measures that have proven to be ineffective over time.[57] In the case of *Ireland v. the United Kingdom* (1978), as part of the emergency powers necessary to combat terrorism in Northern Ireland British the authorities introduced the extrajudicial measures of arrest, interrogation, detention, and internment of those who were suspected of terrorism.[58] In addition to the alleged violation of Article 3 of the Convention, the Irish Government argued that the extrajudicial measures did not prove to be effective and absolutely necessary in the given situation.[59] The discussion on this was short. The Court did not accept this argument and claimed that it is not its function to decide what rules and policy might be more effective when fighting terrorism. It went further and said that "the Court must do no more than review the lawfulness, under

[56] Michael O'Boyle (1998), p. 80
[57] See *Ireland v. The United Kingdom* (1978)
[58] *Ireland v. The United Kingdom* (1978), paras. 11-12
[59] Ibid, see paras. 42, 44 and 47-48

the Convention, of the measures adopted by that Government."[60] As a result, the Court concluded that "limits of the margin of appreciation left to the Contracting States by Article 15 (1) were not overstepped by the United Kingdom."[61] It is not rational to expect the derogating state to put measures only if they know for sure that they will be effective. That is a huge burden on states during crises. Therefore, the necessity and proportionality of such measures should not depend on their positive results. Nevertheless, the requirement should not be loose to the point as to free the states from any worries of its measures and their outcomes. The states should work towards improving their measures by monitoring the outcomes of the present measures. Unfortunately, the judgment of the Court in *Ireland v. the United Kingdom* (1978) did not to make this message clear. What was made clear is that the Court will assess the efficacy of measures in light of the circumstances prevailing when the measures were introduced. In the context of a pandemic situation, this standard of assessment is extremely dangerous as the pandemic situation can last for many more years with frequent waves. Therefore, we run the risk of being in a situation of permanent emergency. At the same time, the Court can not be criticized for failing to assess whether the emergency exists, as in the case of COVID-19, it inevitably does. What could be the possible "way out" is for the Court to develop a stricter approach. The longer the emergency persists, the narrower the discretion should be as to the matter of the existence of the public emergency and the necessity and proportionality of measures.[62]



[60] Ibid, para. 214
[61] ibid
[62] Michael O'Boyle (1998), p. 81

### *2.4. Pulling a Magic Card*

The states can invoke Article 15 specifically because they want to weaken the position of the Court. With all these favoring conditions for states, it is almost impossible to prevent the abuse of the derogation clause. This has happened before. An evident example can be the strategic move of the United Kingdom.[63] To explain briefly, the European Court of Human Rights decided the *Brogan* case (1988) that the British law that allowed the detention of the person to be kept in custody for a maximum of seven days without bringing the person to the judicial authority violated Article 5(3) of the Convention which requires the state to bring the person detained before the judge or any other officer authorized to exercise judicial power. The only thing that could have allowed the UK to keep this measure in place in the future was to derogate under Article 15 of the ECHR, which, the UK, unsurprisingly did only in the next case - the *Brannigan case* (1993).[64] The lesson was learned, but, at the same time, the UK failed the "the acid test of its commitment to the effective implementation of human rights" as such response to the decision of the Court can not be called ideal.[65] In other words, the UK used Article 15 of the ECHR as a shield or as a very convenient way to first, justify its violation of Article 5 in a previous case and, second, make sure that the Court does not find any violation in the upcoming cases.[66] If this happened before, how can we be sure that during COVID-19 Article 15 is not being used as a way to bypass the scrutiny of the Court unnoticed.



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[63] Fried van Hoof (1989), *The Future of the European Convention on Human Rights*, 4 Neth. Q. Hum. Rights (1989), pp. 454-455

[64] MOWBRAY, A. R., CASES, MATERIALS AND COMMENTARY ON THE EUROPEAN CONVENTION ON HUMAN RIGHTS (OXFORD UNIVERSITY PRESS, 3RD ED. 2012), pp. 850-851

65 Dominic McGoldrick, The Interface between Public Em*ergency Powers and International Law*, 2 (2) Int. J. Const. Law (2004), p. 388.

[66] EVAN J. CRIDDLE, HUMAN RIGHTS IN EMERGENCIES (CAMBRIDGE UNIVERSITY PRESS, 2016), p. 48.

## Chapter 3: Does Article 15 of the Convention Make any Difference?

As predicted, there is a debate on the desirability and necessity of invoking Article 15 of the European Convention on Human Rights during the COVID-19 pandemic. Kanstantsin Dzehtsiarou, on one hand, believes that Article 15 will not have any impact on Convention rights as most of them are already subject to limitations and therefore, acquiescent enough to accommodate all the necessary measures states need to take to fight the implications of the pandemic situation.[67] To be clear, he concluded that whether or not the state formally availed itself with the right to derogate does not matter, even though Article 15 of the ECHR might help to overcome the legality requirement and weaken the scrutiny of the Court. On the other hand, Alan Greene took a different position and advocated for the necessity to derogate under the Convention. Besides arguing that, even when Article 15 is activated, the Court will still be able to scrutinize the proportionality of measures used and that the danger imposed by the de jure states of emergency can be the same as in de facto emergencies. He explained further that: "failure to use Article 15 ECHR risks normalizing exceptional powers and permanently recalibrating human rights protections downwards."[68] But when it is used it will be easier to control the immediate return to the usual state of affairs, thus avoiding the risk of having a 'concealed' state of emergencies.

While this is an interesting debate and we can agree that there is a valid point in each of these positions, we should also pay attention to the fact that the majority of the

[67] Kanstantsin Dzehtsiarou, *COVID-19 and the European Convention on Human Rights* (Strasbourg Observers, March 2020), available at: https://strasbourgobservers.com/2020/03/27/covid-19-and-the-european-convention-on-human-rights/

[68] See Alan Greene, *States Should Declare a State of Emergency Using Article 15 ECHR to Confront the Coronavirus Pandemic* (Strasbourg Observers, April 2020)

contracting states did not derogate under Article 15, even though they had the opportunity. As of January 4, 2021, the list of countries that declared the state of emergency and notified the Secretary-General of the Council of Europe about their will to derogate from the Convention under Article 15 of the Convention includes only 10 out of 47 states: Albania (1 April 2020), Armenia (20 March 2020), Estonia (20 March 2020), Georgia (23 March 2020), Latvia (16 March 2020), North Macedonia (2 April 2020), Moldova (20 March 2020), Romania (18 March 2020), San Marino (14 April 2020) and Serbia (7 April 2020).[69] The most commonly suspended rights inevitably were freedom of movement, assembly, and association. Among restricted rights were also the right to a fair trial, the right to liberty, education, and freedom of speech.[70] Most of these rights already have the limitation clauses in the second paragraph of their provisions, such as Articles 2 of Protocol 4, 8, 9, 10, and 11 of the ECHR. A further category is those states that declared the state of emergency domestically, yet decided not to invoke Article 15 of ECHR. Whether the State invokes Article 15 of ECHR or not, the state of emergency can be abused and aimed at other purposes other than tackling the issue that caused the state of emergency in the first place. For example, Hungary did not derogate during the pandemic, yet on 30 March 2020, Hungarian Parliament authorized the government and the Prime Minister with an Enabling Act to rule with decrees.[71] The act authorized the government to take special measures, including suspension or cancellation of certain norms without parliamentary approval, even though the parliamentary sessions have not been interrupted and could function as usual.

[69] See https://www.coe.int/en/web/conventions/full-list/-/conventions/webContent/62111354
[70] Niall Coghlan, *Dissecting Covid-19 Derogations* (VERFASSUNGSBLOG, May 2020), available at https://verfassungsblog.de/dissecting-covid-19-derogations; See Figure 2. (Updated May 9, 2020)
[71] Renáta Uitz, *Hungary's Enabling Act: Prime Minister Orbán Makes the Most of the Pandemic* (April 2020), available at:https://constitutionnet.org/news/hungarys-enabling-act-prime-minister-orban-makes-most-pandemic

COVID-19 was a convenient pretext.[72] Therefore, we should establish at this point that Article 15 is not a shield that can protect from arbitrary and excessive powers.

But the question still stands: whether the formal derogation under Article 15 of the ECHR has any significant influence on the protection of human rights and the scope of judicial scrutiny? In other words, will the Court treat the case of violation of human rights during COVID-19 differently depending on whether the state derogated or not? In attempting to find the answer to this question, this paper will analyze how the Court applies the standards with and without derogation.

### *3.1. Brogan and Others v. the UK and Brannigan and McBride v. the UK*

*Brogan* and *Brannigan* are the cases that touch upon the same law and the same events, however, only in the latter one the derogation was used. Both of these cases involve the alleged violation of Article 5 of the Convention which guarantees the right for liberty and security.

Even though in the *Brogan* case (1988) there was no valid derogation by the UK as it had been previously withdrawn by the British Government in 1984, the Court emphasized the role of the context which practically brought the Court to the same scope of margin it would grant if there was a derogation.[73] The Court said the absence of derogation can not mean to cancel the proper consideration of political context in Northern Ireland.[74] This means that even if there was a formal derogation it would have little or no impact on the approach of the Court as it decided to afford a

[72] Selam Gebrekidan, *For Autocrats, and Others, Coronavirus Is a Chance to Grab Even More Power*, (N.Y. TIMES, March, 2020), available at: https://www.nytimes.com/2020/03/30/world/europe/coronavirus-governments-power.html.
[73] Fionnuala Ni Aolain, *The Emergence of Diversity: Differences in Human Rights Jurisprudence*, 19 Fordham Int'l L.J. 101 (1995), p. 119; See also *Brogan and others v. the United Kingdom*, App. no(s).11209/84, 11234/84, 11266/84, 11386/85 (29/11/1988), para. 48 (General Approach)
[74] *Brogan and Others v. United Kingdom* (1988), para. 48

wide discretion to the state anyway.[75] However, in the absence of a formal derogation, the provisions of the Convention must be interpreted and applied under the standards stipulated in the provision affected.

One of the ways to see whether the Court indeed treated the case as if it was examining the case involving Article 15, we can look at the case of *Brannigan case* (1993). As mentioned previously, following the *Brogan* case, the UK has availed itself of the right of derogation under Article 15.[76] Even though it is clear that the derogation was issued as a direct response to the judgment, *i.e. Brogan (1988)*, rather than to any upsurge in violence or increased threat to the security of the state, the Court simply concluded: "However, both the measures and the derogation were direct responses to the emergency with which the United Kingdom was and continues to be confronted."[77] Even though the applicant tried to highlight the issues concerning the validity of the derogation in the first place, the Court did not find it suspicious that first, the derogation was once already withdrawn in 1984 even though the same situation prevailed that time and second, in the case of Brogan the UK handled the situation without availing itself of the right of derogation.[78] Yet, none of these reasons, and even the mere fact that the Court itself did not find the existence of public emergency in the *Brogan case (1988)* earlier, prevented the Court to acknowledge the existence of public emergency in *Brannigan case (1993)* that concerned the same rights and the same law, only now the derogation was used.[79] Therefore, the impact of Article 15 is evident. It did not only change the outcome of



[75] Mohamed M. Zeidy (2003), p. 312
[76] *Brannigan and McBride v. United Kingdom* (1993), para. 31
[77] *Brannigan and McBride v. United Kingdom* (1993), para. 50
[78] ibid, paras. 49 and 52
[79] ANTOINE HOL AND JOHN A.E. VERVAELE, SECURITY AND CIVIL LIBERTIES: THE CASE OF TERRORISM (INTERSENTIA, 2005), pp. 58-60

the case but also granted the state the amount of discretion that was enough to justify the Court neglecting very crucial controversies.

# Conclusion

The approach of the European Court of Human Rights towards cases concerning Article 15 and the state of emergencies seems to grant a wide margin of appreciation both in regards to the existence of the exceptional situation and the proportionality and necessity of the emergency measures. This is despite the fact the wording of the derogation clauses seems to give significantly narrower discretion when it comes to the measures the state implied. The Court also rarely second-guesses the existence of an emergency "threatening the life of the nation." As demonstrated in Chapter 2, the Greek case has been an exceptional occasion when the Court went beyond its usual standard of review. However, the reason for the skeptical approach in the Greek case is itself very politicized and renders so-called democratic countries in an "immunity zone".

The case law also demonstrates that the Court prefers to focus more on the second requirement of Article 15 which is for the measures imposed during the state of emergency to be strictly required. Unfortunately, the Court has failed to show, first, how this requirement is any different from the usual standard of review such as proportionality or necessity test under qualified rights by lowering its demands in a number of cases and second, how the scope of the discretion granted to states is narrower than that granted to states when it comes to the existence of the emergency. What was clear, however, is that the mere implication of Article 15 can influence the outcome of the decision as shown through the comparison of *Brogan* and *Brannigan* cases.

Moreover, the rhetoric of the Court that any margin of appreciation is subject to supervision has lost its real effect in practice as it was demonstrated through the cases

such as *Lawless v. Ireland (1961)*, *Ireland v. the UK (1978)*, and *A. and Others v. the UK (2009)*. The Court's scrutiny of the derogation from human rights obligations is very limited, thus, it is reasonable to assume that the current standard of review is critically inefficient to protect human rights during COVID-19.

It can be concluded that the mechanism that was initially designed to control the manner in which the state suspend their obligations under the treaty, has ironically evolved to be the one that puts individual rights at risk during COVID-19 and public emergencies overall. There are no credible reasons to suggest at this point that the approach will take another direction in the cases involving COVID-19. We do not have any precedents at this point, therefore, this conclusion is only a hypothesis. However, bearing in mind the magnitude of the pandemic situation we can assume that the margin of appreciation will be even wider. Therefore, we can only hope that the Court will use the chance in future cases to design a more individualized and manual application of the doctrine of margin of appreciation rather than automatically granting it because Article 15 of ECHR has been used.

# ANNEX

## Case concerning COVID-19 pandemic
## (Badam Oskar v. The Republic of Lemfazwe)

The Republic of Lemfazwe is a democratic, prosperous, secular, and developed country. On January 9, 1995, the Republic of Lemfazwe became an independent sovereign nation. The Republic of Lemfazwe is a member of the Council of Europe and ratified the European Convention on Human Rights on June 21, 2002. It borders the Republic of Dobraya to the south, Pumano to the west, Ramidia to the north, and Zima to the east.

In March 2020 health authorities in the Republic of Lemfazwe expressed their concern about a large number of patients suffering from a health condition similar to pneumonia. Common symptoms of patients were severe coughing, bone pain, high fever, systematic suffocation, and difficulty in breathing. The testing results showed that the cause of the disease was the mysterious virus also known as a COVID-19. Already at the beginning of April, 87 countries in the world have reported 17,867 confirmed cases of COVID-19, and 1,574 of them died during the first week since the symptoms appeared. This led to classifying the spread of the virus as a pandemic by the WHO.

In response to the global outbreak and rapid spread of the COVID-19 virus in the region, on April 15, the President of the Republic of Lemfazwe, Simud Weran, declared a state of emergency for a period of six months. Special emergency legislation was adopted and entered into force on April 21, 2020. The rules obliged the citizens to observe social distancing, weak face masks everywhere, keep a minimum distance of 1.5 m between two people in public places, and quarantine for

14 days in case any of the symptoms appear. The state also imposed additional restrictions on the working hours of public transportation, stores, and public venues including restaurants and coffee shops. The bordering countries in the region banned entry into their territories from any countries that are classified as “red zone”. The Republic of Lemfazwe did not impose such measures.

As of May 18, 4,877 cases of COVID-19 have been confirmed in the territory of Lemfazwe, and it did not have any confirmed cases of death related to COVID-19 at that time. However, over the following weeks, the number of confirmed cases increased slowly by single-digit or lower double-digit figures per day.

The Republic of Lemfazwe notified the Secretary General of the Council of Europe of their intention to derogate from Articles 5, 6, and 11 of the European Convention on Human Rights in accordance with Article 15 of the Convention.

Meanwhile, one of the major goals of the Republic of Lemfazwe was to invest a large amount of its national budget to form a team of biologists and research scientists to learn more about the nature of the virus and if possible, to create a vaccine.

The applicant, Badam Oskar, is a national of the Republic of Lemfazwe born on September 14, 1964, in Umute, the city in the Southern part of Lemfazwe. He is a research scientist by profession, well-known for his books on infectious human diseases and his research focusing on developing medicines. One of his former colleagues invited him to join the national research team to develop a vaccine.

Within two weeks after starting to work on the project along with 7 other scientists, Mr. Oskar developed symptoms of COVID-19. Therefore, he promptly notified the director of the research with the expectation that the latter will postpone the project and request other members of the team to isolate themselves. The director thanked

Mr. Oskar for notifying him and told him to return to work once he feels better. Moreover, he asked Mr. Oskar to keep this a secret from the team so that they do not panic. It is also known now that only those who were in close contact with Mr. Oskar were tested; the main reason for their testing was not revealed to them. All of his colleagues tested negative.

On November 15, 2020, the Ministry of Health issued a press release:

> *Our national team of scientists is working very hard on understanding the virus and finding a way to develop the vaccine that could normalize the situation to some extent. For now, the positive sign is that for almost two weeks we have the lowest number of confirmed cases of COVID-19 in the region. We are the only state in the region that does not have a single case of death. In the next couple of months, we will be able to conduct the first tests of the COVID-19 vaccine and if the results are successful, we will start registration for vaccination. Meanwhile, we request everyone to continue to conform to the lockdown measures.*

The same day, President Weran spoke to the nation via national television. He said: "We are supporting the team as much as we can, and we do our best to make sure that their lives are safe as well."

A couple of hours after the President's speech, Oskar made a post in his personal SafeZone profile, a leading social media platform in the region. The post was accessible not only to his "friends" on the social network but also to the general public. A post was shared by over 2,000 people. It reads:

> *I was asked to keep my symptoms a secret so that those who stand behind all these measures imposed during the pandemic appear to be the national heroes. As rightly pointed out, we have the lowest number of confirmed cases. But it is not because people do not get sick. It is because they are asked to be silent about it. The government should stop giving empty hopes about vaccines and start being true to the nation that deserves to know the reality of the whole situation!*

During the pandemic situation, Mr. Oskar enjoyed wide popularity and authority among his followers due to his extensive work in the field. A great number of angry

comments criticizing the government's communication and measures were posted on Mr. Oskar's profile. They included, for example, "how dare the government lie about this to us?", "hypocrites", "how can we trust the government after all this?", etc. Mr. Oskar did not react to any of these comments.

Oskar remained absent from work for the next three weeks. On December 5, 2020 he was arrested by the police in his residence and was brought to the police station for questioning. He was informed that the reason for his detention was his inaccurate and provocative post in SafeZone. The prosecution brought charges against him on the basis of Article 319 of the Law on Manipulating Information passed on April 21, 2020. His computer and phone have been seized by the police. Despite the officer's several attempts to question him, Oskar invoked his right to remain silent and refused to answer any questions without the presence of his lawyer who was not allowed to enter the police station where he was detained.

In his defense, in the Court of First Instance Mr. Oskar argued that his personal post was his reflection of what he had been told by his director at the national laboratory. Moreover, he argued that his post was not capable of causing public disorder or undermining the efficiency of protection offered by the state during the pandemic as no violent movements or riots took place since the post was made. Mr. Oskar also pointed out that, in his opinion, the population at large had minimal reaction to it.

The prosecution argued that the applicant shared fake information when he confidently stated that people with symptoms were asked to keep it secret. The prosecution said that such strong allegations need to have proof and the single request of a director to Mr. Oskar to stay quiet about his symptoms can not be the proof for that. Moreover, Mr. Oskar is a well-known professional who should know more than

anyone how important it is to keep order and peace among citizens, and how essential trust in the health care system and the state is – ultimately the success of the fight against the virus depends on that. Such a blatant move from Mr. Oskar is unfortunate and unexpected yet can not be excused.

The Court of First Instance concluded that simply because Mr. Oskar was asked to keep his symptoms a secret does not mean that it has been done systematically to everyone. Moreover, nobody in the laboratory got sick and his close contacts have been tested in line with the WHO protocol. During the pandemic situation, everyone should be extremely careful about making radical conclusions such as the one presented in the post because any inaccurate statements can cause public disorder and undermine the efforts of the state to alleviate the suffering of the population during COVID-19. The Court of First Instance also added that the relevant national legislation was clear, accessible, and foreseeable and that it was designed to protect against the spreading of false, inaccurate, and provocative information that could make the job of the state to protect its citizens during an exceptional situation even harder than it is already.

On February 3. 2021 the Court of First Instance found Oskar in violation of Article 319 of the Law on Manipulating Information passed by the state on May 28, 2020 in its entirety.

Not satisfied with the decision of the first instance court, the applicant appealed to the Regional Court of Lemfazwe and argued that the content of his post was not examined at all, did not examine properly the facts of the case, applied the national law by default without unpacking what public order or undermining the protection could mean. The applicant argued it was highly suspicious that the number of

confirmed cases of COVID-19 in this country was lower than in other countries with closed borders. This alone could have been a reason why the national courts could have given the benefit of the doubt to the applicant and should have held the state to a higher standard. Moreover, by accepting the argument of the state regarding the evidence, the first instance court completely shifted the unrealistic burden of proof to the applicant.

The decision and reasoning of the first instance court were fully upheld by the Regional Court of Lemfazwe on March 7, 2021. No further remedy against the judgment was available. He was sentenced to two years of imprisonment the implementation of which was suspended for four years.

Due to the pandemic situation, all hearings were conducted via video where the applicant was wearing the handcuffs inside of the designated rooms. To be safe, his lawyer was asked to be in a separate room also connected to the online hearing. Overall, the applicant and the lawyer met twice and each time they had only 40 minutes to prepare. Due to the pandemic situation, visits to the detention center were restricted in duration and numbers. In addition to that, Mr. Oskar's lawyer was absent during the initial interrogations. As to the quality of the online procedure, the Republic of Lemfazwe invested 10000 EURO in June 2020 to make sure that the courts are fully operational.

## THE LAW ON MANIPULATING INFORMATION OF APRIL 21, 2020

The law prohibited "posting or sharing fake, inaccurate or provocative information that is capable of causing public disorder and undermining the efficiency of protection offered by the state during the emergency situation"(Article 319).

Mr. Oskar lodged an application with the European Court of Human Rights on February 14, 2021, and claimed that the Republic of Lemfazwe violated his right under Articles 6 and 10 of the European Convention on Human Rights.

# Bibliography

## PRIMARY SOURCES

A. and Others v. the United Kingdom [GC], App. No. 3455/05 (19/02/2009)

Brigand and McBride v. The United Kingdom (Judgment), App. No.14553/89 & 14554/89 (25/05/1993)

Brogan and others v. the UK, App. No(s). 11209/84 11234/84 11266/84 11386/85 (29/11/1988)

Denmark and others v. Greece, App. No(s). 3321/67, 3322/67, 3323/67 & 3344/67, (05/11/1969), Report of the Commission.

Ireland v. The United Kingdom (Merits), App. No. 5310/71 (18/01/1978)

Lawless v. Ireland (No.3), App. No. 332/57 (01/07/1961)

Lawless v. Ireland, App. No. 332/57 (19/12/1959) Report of the Commission

## SECONDARY SOURCES

Alan Greene, *States Should Declare a State of Emergency Using Article 15 ECHR to Confront the Coronavirus Pandemic* (Strasbourg Observers, April 2020)

ANTOINE HOL AND JOHN A.E. VERVAELE, SECURITY AND CIVIL LIBERTIES: THE CASE OF TERRORISM (INTERSENTIA, 2005)

ANNA-LENA S.MCCARTHY, THE INTERNATIONAL LAW OF HUMAN RIGHTS AND STATES OF EXCEPTION, MARTINUS NIJHOFF PUBLISHERS (1998)

Bart van der Sloot, *Is All Fair in Love and War? An Analysis of the Case Law on Article 15 ECHR*, 53/2 Military Law and the law of War Review (2014)

BERNADETTE RAINEY, ELIZABETH WICKS AND CLAIRE OVEY, EUROPEAN CONVENTION ON HUMAN RIGHTS (OXFORD UNIVERSITY PRESS, 7TH ED. 2017)

Brendan Mangan, P*rotecting Human Rights in National Emergencies: Shortcomings in the European System and a Proposal to Reform*, 10 Hum. Rights Q. (1988)

Council of Europe: European Court of Human Rights, *Guide on Article 15 of the European Convention on Human Rights - Derogation in Time of Emergency* (31 August 2020)

Daphna Shraga, *Human Rights in Emergency Situations under the European Convention on Human Rights*, 16 Isr. Y.B. Hum. Rts. 217 (1986)

DAVID HARRIS, MICHAEL O'BOYLE, AND COLIN WARBRICK, LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS (BUTTERWORTHS: LONDON, 1995)

Dominic McGoldrick, *The Interface between Public Emergency Powers and International Law*, 2 (2) Int. J. Const. Law (2004)

Edward Crysler, *Brannigan and McBride v. U.K. A New Direction on Article 15 Derogations Under the European Convention on Human Rights*, Revue Belge De Droit International (1994)

Emilie M. Hafner-Burton, Laurence R. Helfer and Christopher J. Fariss, *Emergency and Escape: Explaining Derogations from Human Rights Treaties*, 65 International Organization 673 (2011)

EVAN J. CRIDDLE, HUMAN RIGHTS IN EMERGENCIES (CAMBRIDGE UNIVERSITY PRESS, 2016)

FIONNUALA NI AOLáIN, THE EUROPEAN CONVENTION ON HUAMN RIGHTS AND ITS PROHIBITION ON TORTURE, IN: S. LEVINSON (ED): (OXFORD UNIVERSITY PRESS, 2004)

Fionnuala Ni Aolain, *The Emergence of Diversity: Differences in Human Rights Jurisprudence*, 19 Fordham Int'l L.J. 101 (1995)

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*, 1 Birkbeck L. Rev. 135 (2013)

Fried van Hoof (1989), *The Future of the European Convention on Human Rights*, 4 Neth. Q. Hum. Rights (1989)

IAN PARK, EFFECT OF DEROGATION IN THE RIGHTS TO LIFE IN ARMED CONFLICT (UNIVERSITY OF OXFORD, 2016)

JAMES ORAA, HUMAN RIGHTS IN STATES OF EMERGENCY IN INTERNATIONAL LAW (CLARENDON PRESS, 1992)

Joseph Zand, *Article 15 of the European Convention on Human Rights and the Notion of State of Emergency*, 5 J. FAC. L. INONU U. (2014)

Kanstantsin Dzehtsiarou, *COVID-19 and the European Convention on Human Rights* (Strasbourg Observers, March 2020)

MARIE-BéNéDICTE DEMBOUR, WHO BELIEVES IN HUMAN RIGHTS?: REFLECTIONS ON THE EUROPEAN CONVENTION (2006).

MERRILLS, J. G., THE DEVELOPMENT OF INTERNATIONAL LAW BY THE EUROPEAN COURT OF HUMAN RIGHTS (MANCHESTER UNIVERSITY PRESS, 2ND ED. 1993)

Michael O'Boyle, *The Margin of Appreciation and Derogation under Article 15: Ritual Incantation or Principle?* 19 HRLJ (1998)

Mohamed M. Zeidy, *The ECHR and States of Emergency: Article 15 - A Domestic Power of Derogation from Human Rights Obligations*, 4 San Diego Int'l L.J. 277 (2003)

MOWBRAY, A. R., CASES, MATERIALS AND COMMENTARY ON THE EUROPEAN CONVENTION ON HUMAN RIGHTS (OXFORD UNIVERSITY PRESS, 3RD ED. 2012)

Niall Coghlan, *Dissecting Covid-19 Derogations* (VERFASSUNGSBLOG, May 2020)

Nicole Questiaux, Study of the Implications for Human Rights of Recent developments concerning situations known as states of siege or emergency, U.N. Doc. E/CN.41Sub.2/1982/15

OREN GROSS AND FIONNUALA NI AOLáIN, LAW IN TIMES OF CRISIS: EMERGENCY POWERS IN THEORY AND PRACTICE (CAMBRIDGE UNIVERSITY PRESS, 2006)

Oren Gross and Fionnuala Ní Aoláin, *From Discretion to Scrutiny: Revisiting the Application of the Margin of Appreciation Doctrine in the Context of Article 15 of the European Convention on Human Rights*, 23 Hum. Rights Q. (2001)

P. VAN DIJK AND G.J.H. VAN HOOF, THEORY AND PRACTICED OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS (KLUWER LAW AND TAXATION PUBLISHERS, 2ND ED. 1990)

PETER KEMPESS, HARD POWER AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS (LEIDEN UNIVERSITY, 2019)

Renáta Uitz, *Hungary's Enabling Act: Prime Minister Orbán Makes the Most of the Pandemic* (CONSTITUTIONNET, April 2020)

Ronald St. John Macdonald, *Derogations under Article 15 of the European Convention on Human Rights*, 36 Colum. J. Transnat'l L. (1997)

Rule of Law Checklist, adopted by the Venice Commission at its 106th Plenary Session (Venice, 11-12 March 2016)

Selam Gebrekidan, *For Autocrats, and Others, Coronavirus Is a Chance to Grab Even More Power* (N.Y. TIMES, March, 2020)

Vassilis P. Tzevelekos and Kanstantsin Dzehtsiarou, *Normal as Usual? Human Rights in Times of COVID-19*, 1 (2) European Convention on Human Rights Law Review (2020)

Waseem Ahmad Qureshi, *The Concept of European Supervision of Derogations under Article 15 is Theoretical Rather than Real*, 10 Bocconi Legal (2018)

Y. ARAI-TAKAHASHI, THE MARGIN OF APPRECIATION DOCTRINE AND THE PRINCIPLE OF PROPORTIONALITY IN THE JURISPRUDENCE OF THE ECHR (INTERSENTIA, 2002)