
RESEARCH ARTICLE

Legality of Human Rights Restrictions During the COVID-19 Pandemic Under the European Convention on Human Rights

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The European Convention on Human Rights, the regional international treaty adopted in 1950, requires that any restriction, limitation, or interference with the rights and freedoms guaranteed in the Convention should be 'prescribed by law', 'in accordance with the law' or 'provided by law'. In the case-law of the European Court of Human Rights, the assessment of 'legality' requires that the impugned measure have a legal basis in national law, and refers to the quality of law. At the outset of the COVID-19 pandemic, numerous states worldwide rolled out a patchwork of different provisions limiting (restricting) the implementation of human rights and fundamental freedoms. Understandably, the immediacy of the emergency required a quick and efficient reaction from states; therefore, some situationally appropriate, however aggressive, restrictions on the exercise of human rights were imposed without a proper legal basis in national law. The article deals with the concept of the legality of limitations (restrictions) on the implementation of human rights and fundamental freedoms in a public health emergency, and in particular, the question of whether Article 15 of the Convention includes the possibility to deviate from the "classical" legality standard. The 'derogation clause' enshrined in Article 15 and the 'restrictive clause' established in, e.g., the second paragraphs of Articles 8–11, have an essential value in assessing the 'legality' of interference in the exercise of the Convention rights and freedoms during the COVID-19 pandemic, especially in cases where States Parties to the Convention had not used the possibility to derogate from the Convention obligations under Article 15. Relying on the case-law of the ECtHR in respect of the legality of interference in the exercise of human rights, the authors argue that legality in a state of emergency should follow the same logic as in the absence of such a state. This is reflected in the constitutional case-law, although the national dimension of the legality requirement varies depending on different constitutional arrangements in the countries.

Keywords: Human rights; COVID-19 pandemic; legality; quality of law; accessibility and foreseeability of law; derogation clause

1 Introduction

At the outset of the outbreak of the COVID-19 pandemic, numerous states worldwide rolled out a patchwork of different human rights restrictions. The measures touched nearly every aspect of daily life and, as various human rights bodies report, influenced the enjoyment of nearly all fundamental rights.¹ The emergency's immediacy required a quick and efficient reaction; as observed by the Venice Commission, states were expected to anticipate the relevant dangers, be proactive, and take the measures they deemed appropriate in advance by applying the 'precautionary principle'.² Therefore, some situationally appropriate,

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¹ European Union Agency for Fundamental Rights, 'Coronavirus Pandemic in the EU – Fundamental Rights Implications – Bulletin 3' (30 June 2020) 7.

² Venice Commission of the Council of Europe, 'Respect for Democracy, Human Rights and the Rule of Law During States of Emergency – Reflections' (Strasbourg, 26 May 2020) 3.

however aggressive, limitations (restrictions) on the exercise of human rights and fundamental freedoms were imposed without a proper legal basis in national law.

Under the European Convention on Human Rights (hereinafter also referred to as “the Convention” or “ECHR”), three legal regimes can be distinguished, allowing the States Parties to the Convention to place some legitimate restrictions on the exercise of human rights and fundamental freedoms guaranteed under the Convention or its Protocols. First of all, Article 57 of the Convention (‘Reservations’) allows any State to make a reservation regarding a particular provision of the Convention if any law then in force in its territory is not in conformity with the provision. The reservations may be made when signing the Convention or depositing its ratification instrument.³ Secondly, the usual provisions on the rights directly mentioned in the Convention (e.g., Article 5; § 2 of Articles 8–11) or its Protocols (e.g., §§ 3, 4 of Article 2 of Protocol No. 4; Articles 2–4 of Protocol No. 7) establish the conditions for lawful human rights limitations (‘restrictive clause’). Also, under Article 16 of the Convention, the States can impose legitimate restrictions on aliens’ political activity regarding their rights guaranteed in Articles 10, 11 and 14 of the Convention.

Finally, in the time of a state of emergency or war, Article 15 of the Convention can be relied upon by the States to derogate from their obligations under the Convention (‘derogation clause’).⁴ The Council of Europe observes that ‘while some restrictive measures adopted by member states may be justified on the ground of the usual provisions of the ECHR relating to the protection of health <...>, measures of exceptional nature may require derogations from the States’ obligations under the Convention’.⁵ Article 15 incorporates, in effect, the principle of necessity common to all legal systems. Most States have provisions for emergency legislation, empowering them to take measures in a state of emergency which would otherwise be unlawful.⁶

Since the beginning of the crisis, 10 States Parties to the Convention have notified the Secretary General of the Council of Europe of their decision to use Article 15 of the ECHR, namely, Albania, Armenia, Estonia, Sakartvelo, Latvia, North Macedonia, the Republic of Moldova, Romania, San Marino, and Serbia.⁷ Some countries, such as Bulgaria, the Czech Republic, Portugal, and Slovakia, declared a state of emergency without invoking Article 15 of the ECHR and did not follow the notification procedure established in the Convention.⁸ Other similar regimes were declared in some States, for instance, a ‘state of danger’ in Hungary, a ‘declaration of epidemic disease’ in Croatia, a ‘state of alarm’ in Spain, a ‘state of sanitary emergency’ in France, a ‘state of epidemic threat’ in Poland,⁹ and an ‘extreme situation’ in Lithuania. Other States used ordinary legislation or decrees to adopt restrictive measures;¹⁰ however, some of them, namely, Greece, Ireland, the United Kingdom, and Turkey, relied on their right of derogation under the ECHR.¹¹

Sparse pandemic legislation and, in particular, extensive powers given to the executive in different countries prompted a discussion in the early stage of the pandemic on whether the COVID-19-related restrictive measures comply with *inter alia* the legality (legal basis) requirement, established both in the constitutional law and the case-law of the European Court of Human Rights (hereinafter also referred to as the “ECtHR” or “the Court”). The legality of COVID-19-related national measures was challenged before ordinary courts in numerous countries, as well as the constitutional courts in many jurisdictions (e.g., the Czech Republic, North Macedonia, Romania, Croatia). At the time of the research, some of the cases were still pending (e.g., in Bulgaria).

Although legal regimes established in different countries seemingly varied, the restrictions placed on the exercise of human rights and fundamental freedoms were similar in nature and extent. For instance,

³ See the official text of the European Convention on Human Rights <https://www.echr.coe.int/Documents/Convention_ENG.pdf> accessed 12 February 2021. See also Jörg Polakiewicz, ‘Collective Responsibility and Reservations in a Common European Human Rights Area’ in Ineta Ziemele (ed), *Reservations to Human Rights Treaties and the Vienna Convention Regime: Conflict, Harmony and Reconciliation* (vol 17, Martinus Nijhoff Publishers 2004) 95–132.

⁴ Donna Gomien, *Short Guide to the European Convention on Human Rights* (2nd edn, Council of Europe Publishing 2000) 99.

⁵ Council of Europe, ‘Respecting democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis. A toolkit for member states’ (Information document SG/Inf (2020)11, 7 April 2020) <<https://rm.coe.int/sg-inf-2020-11-respecting-democracy-rule-of-law-and-human-rights-in-th/16809e1f40>> accessed 11 October 2020.

⁶ Bernadette Rainey, Elizabeth Wicks and Clare Ovey, *The European Convention on Human Rights* (Oxford University Press 2007) 114–115.

⁷ European Court of Human Rights (ECtHR), ‘Factsheet – Derogation in Time of Emergency’ (April 2021) 2 <https://www.echr.coe.int/documents/fs_derogation_eng.pdf> accessed 10 February 2021.

⁸ Dovilė Gaillūtė-Janušonė, ‘Derogations from the European Convention on Human Rights in the Context of COVID-19 Pandemic’ (2020) 1 Lietuvos teisė 2020: esminiai pokyčiai: COVID-19 pandemijos sprendimai: teisiniai, valdymo ir ekonominiai aspektai 33, 44.

⁹ European Parliament, ‘The Impact of Covid-19 Measures on Democracy, the Rule of Law and Fundamental Rights in the EU’ 2 <<https://www.europarl.europa.eu/cmsdata/207125/Final%20version%20of%20the%20Briefing%20note.pdf>> accessed 10 February 2021.

¹⁰ *ibid.*

¹¹ ECtHR (n 7) 2.

limitations of persons' liberty under Article 5 of the Convention or of their freedom of movement under Article 2 of Protocol No. 2 (placing persons in obligatory confinement for a definite time in hotels or other places, alone or with other people who could have been infected with the virus; mandatory self-isolation period for anyone who tested positive for COVID-19; etc.) were a common State practice both in cases where they had derogated from the obligations under Article 15 of the Convention, and where such a 'derogation clause' was not used. Greatly varying approaches in choosing legal regimes and the hierarchical character of legal measures stimulated the discussion on whether the standard of the legality requirement remains the same if the States Parties to the ECHR decide to derogate from their obligations based on Article 15 in comparison to the regime established for resorting to restrictive clauses allowed in the text of the Convention. Alternatively, is it reasonable to argue that the derogation permitted by Article 15 of the ECHR also includes the possibility to deviate from the principle of the rule of law? Even though the 'legality' requirement is a vital element in assessing the urgency and adequacy of pandemic measures, this question has remained on the outskirts of scholarly discussions. Moreover, it has not yet been approached with sufficient clarity by the ECtHR.

The article deals with the concept of legality of an "interference" with or "limitations" (restrictions) placed on the implementation of human rights and fundamental freedoms in a public health emergency. Based on a critical literature review and systematic content analysis, the authors approach the legality requirement from the perspective of the particular Articles of the Convention (Articles 5, 8–11, etc.), and also Article 15 concerning the measures which were or should be undertaken by the State Party in the case of emergency (the COVID-19 pandemic). The approaches taken by national courts illustrate the diverging interpretations of the legality requirement at the national level. Due to the specific focus on the ECHR and the relevant case-law of European constitutional courts, the research does not cover the analysis of other international human rights instruments, in particular the International Covenant on Civil and Political Rights, which also prohibit States from unlawfully restricting or arbitrarily interfering with human rights and fundamental freedoms.

It must also be observed that the research does not discuss whether the COVID-19 pandemic meets the threshold condition in Article 15(1) of the existence of a 'public emergency threatening the life of the nation' (hereinafter also referred to as a "state of emergency"). The ECtHR considers that the assessment of such threats falls primarily on the States Parties, a matter which has a wide *margin of appreciation*. Therefore, it is foremost for the State to determine if the life of its nation is threatened by a "public emergency"¹² considering the existing factual situation. The article does not, in general, intend to cover the aspects of necessity and proportionality of the interference in the exercise of the Convention rights. Nevertheless, as mentioned by the ECtHR in the case *A. and Others v. the United Kingdom*,¹³ in spite of this wide margin of appreciation to decide on the nature and scope of the derogating measures necessary to avert the emergency, it is ultimately for the Court to rule if the measures were "strictly required". The research will demonstrate that the principle of the strict necessity of emergency measures is, in the authors' view, closely related to the valid and appropriate legal basis (or legality) at the national level. Therefore, 'necessity' will be scrutinized to the extent necessary to reveal the concept of legality and the application of this standard in practice.

Additionally, terms such as 'limitations', 'restrictions', and 'interference with...' mentioned in the text of the Convention will be used as synonyms for the purposes of this article. On this point, it should be observed that, among others, Article 8(2) authorizes 'interference' with the rights to private and family life and to home and correspondence; the paragraph is similar, but not identical, to the corresponding second paragraphs of Articles 9, 10 and 11 of the ECHR. Article 9(2) speaks of 'limitations', Article 10(2) of 'formalities, conditions, restrictions or penalties', and Article 11(2) of 'restrictions'. These differences in terminology do not appear to have had any practical or substantive consequences in their application and interpretation by the Convention organs.¹⁴

2 The 'Classical' Legality Standard

Over the years, the ECtHR has developed a 'largely effective interpretive framework' for the 'rule of law' criterion,¹⁵ which strives to 'ensure that the scope for arbitrary tampering with rights by the executive is lim-

¹² William A Schwabas, *The European Convention on Human Rights. A Commentary* (Oxford University Press 2015) 596. See also, among many others, *Ireland v the United Kingdom* App no 5310/71 (ECtHR, 18 January 1978) para 207; *A and Others v the United Kingdom [GC]* App no 3455/05 (ECtHR, 19 February 2009) para 184.

¹³ *A and Others v the United Kingdom [GC]* App no 3455/05 (ECtHR, 19 February 2009) para 184.

¹⁴ Schwabas (n 12) 401–402.

¹⁵ Steven Greer, 'The exceptions to Articles 8 to 11 of the European Convention on Human Rights. Human Rights Files No. 15' (Council of Europe Publishing 1997) 7 <[https://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-15\(1997\).pdf](https://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-15(1997).pdf)> accessed 10 October 2020.

ited by domestic legislative or judicial authority'.¹⁶ The criterion is associated with the 'legality' requirement established in the expressions: 'in accordance with the law', 'prescribed by law', and 'provided for by law' (§ 2 of Articles 8 to 11 of the Convention; § 1 of Article 1 of Protocol No. 1; § 2 of Article 2 of Protocol No. 4 to the ECHR), and the expression 'under national or international law' contained in Article 7 of the Convention. In Articles 2 and 3 of Protocol No. 7, the legality requirement has been set forth using such expressions as 'governed by law', 'prescribed by law', and 'according to the law'. As early as 1968, the Court accepted the existence, in the text of the Convention, of different but equally authentic versions of the legality requirement expressions, recognizing that they are not exactly the same.¹⁷ Therefore, the Court always felt obliged to interpret them in a way that reconciled them as far as possible and was most appropriate in order to realize the aim and achieve the object of the Convention.¹⁸

Schwabas observes that the legality requirement has both 'a formal or technical sense and a substantive one',¹⁹ or, as highlighted by O'Boyle and Warbrick, a 'national and international dimension'.²⁰ The requirement demands the existence of national law and imposes on law a Convention notion of the essential qualities of law.²¹ The interference must, of course, be authorized by a rule recognized in the national legal order, but there is also a qualitative requirement: the rule must be accessible and foreseeable.²² Additionally, the law must also be subject to mechanisms so that it can be applied in a manner that is genuine and not arbitrary.²³

In the view of Schütze, '[w]ithin the ideal "legislative state", all general norms are adopted by Parliament'.²⁴ However, legal traditions in the States Parties to the Convention vary, and the Strasbourg court 'equips' its practice to different constitutional arrangements. The ECtHR has repeatedly emphasized that it always understood the term 'law' 'in its "substantive" sense, not its "formal" one'.²⁵ As aptly observed by Bychawska-Siniarska, as a rule, 'law' in European practice would usually mean a written and public law adopted by parliament, which decides whether or not a particular restriction should be possible.²⁶ However, the case-law of the ECtHR shows that this may also include unwritten law as interpreted and applied by the courts, public international law, and various forms of delegated legislation.²⁷ The interference must, of course, be authorized by a rule recognized in the national legal order.

In *The Sunday Times v. the United Kingdom*, British common law rules were recognized by the ECtHR as a legal basis for interference with human rights.²⁸ As stated by the Court in this case, holding that 'a restriction imposed by virtue of the common law is not "prescribed by law" on the sole ground that it is not enunciated in legislation' would clearly be contrary to the intention of the drafters of the Convention and would 'deprive a common-law State which is Party to the Convention of the protection of Article 10 (2)'.²⁹

In the cases *Groppera Radio AG and Others v. Switzerland* and *Autronic AG v. Switzerland*, the ECtHR accepted domestically applicable rules of public international law as 'law'.³⁰ Reference to the relevant provisions of the International Telecommunications Convention, which had been published in full, satisfied the requirement of legality in *Groppera Radio AG and Others v. Switzerland*. The Court outlined that the

¹⁶ *ibid* 9.

¹⁷ *Wemhoff v Germany* App no 2122/64 (ECtHR, 27 June 1968) para 8; *The Sunday Times v the United Kingdom (no 1)* App no 6538/74 (ECtHR, 26 April 1979) para 48.

¹⁸ *ibid*.

¹⁹ Schwabas (n 12) 403.

²⁰ David Harris, Michael O'Boyle and Colin Warbrick, *Law of the European Convention on Human Rights* (2nd edn, Oxford University Press 2009) 16, cited by Geranne Lautenbach, *The concept of the rule of law and the European Court of Human Rights* (Oxford University Press 2013) 79.

²¹ *ibid*.

²² Schwabas (n 12) 403.

²³ *ibid*.

²⁴ Robert Schütze, "Delegated" Legislation in the (new) European Union: A Constitutional Analysis' (2011) 74(5) *The Modern Law Review* 661, 661.

²⁵ *Kafkaris v Cyprus [GC]* App no 21906/04 (ECtHR, 12 February 2008) para 139; *Vyerentsov v Ukraine* App no 20372/11 (ECtHR, 11 April 2013) para 56.

²⁶ Dominika Bychawska-Siniarska, 'Protecting the Right to Freedom of Expression under the European Convention on Human Rights: A Handbook for Legal Practitioners' (Council of Europe, July 2017) 39 <<https://rm.coe.int/handbook-freedom-of-expression-eng/1680732814>> accessed 10 October 2020.

²⁷ Schwabas (n 12) 402–403.

²⁸ Bychawska-Siniarska (n 26) 39.

²⁹ *The Sunday Times v the United Kingdom (no 1)* App no 6538/74 (ECtHR, 26 April 1979) paras 47–49.

³⁰ Bychawska-Siniarska (n 26) 39.

relevant provisions of telecommunication law were primarily intended for specialists, who knew, from the information given in the official gazette, how they could be obtained.³¹

Delegated legislation is also recognized by the Court as 'law'.³² Schütze identifies two sources of executive measures – parliamentary legislation and the constitution itself giving 'autonomous' regulatory power directly to the executive. In the first scenario, as observed by the scholar, 'the delegation "distorts" the original balance of power and many constitutional orders therefore impose constitutional safeguards to control "delegated legislation"'.³³ To ensure the supremacy of the legislature, which is one of the modern features of constitutionalism,³⁴ the quality of law, which will be further discussed in more detail, gains essential importance.

In *Vavříčka and Others v. the Czech Republic*, the ECtHR observed that the term "law" is not limited to primary legislation but also includes legal acts and instruments of lesser rank, and accepted the Ministerial Decree to be a proper legal basis for a vaccination duty. The Court concluded that this duty has its specific basis in the relevant sections of the Public Health Protection Act applied in conjunction with the Decree issued by the Ministry in the exercise of the power conferred on it by the Act.³⁵

Since the national dimension of the legality requirement reflects a national perspective, its fulfillment varies depending on specific national constitutional arrangements. In the countries where there is no delegated legislation (e.g., Lithuania³⁶), the fundamental human rights and freedoms may only be limited by law adopted by Parliament. For instance, Lithuanian legal doctrine underlines that the purpose, grounds, conditions, and scope of a restriction on the exercise of a specific human right must be defined in the law with such clarity and specificity as to ensure that there is no doubt that the function of the restriction is not transferred to the executive or judicial authorities.³⁷ In its rulings, the Constitutional Court of the Republic of Lithuania has repeatedly held that the Constitution allows limiting the implementation of human rights and freedoms only if the limitation was 'made by law'.³⁸ In Lithuania, 'law' ('įstatymas' in Lithuanian) is strictly understood as a legislative act adopted by the Parliament of the Republic of Lithuania (*Seimas*); therefore, only Parliament is vested with the above-mentioned power.³⁹

The other essential aspect of legality is the quality of law.⁴⁰ It is associated by the Court with the rule of law, expressly mentioned in the Preamble to the Convention.⁴¹ The case-law of the ECtHR establishes two main requirements that flow from the expression 'prescribed by law' – accessibility and foreseeability. Firstly, the law must be adequately accessible. Accessibility means that a person must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm must be formulated with sufficient precision to enable the person to regulate his conduct. This requirement implies that a person alone or with appropriate advice must be able to foresee, to a degree that is reasonable in the particular circumstances, the consequences which a given action may entail.⁴²

Additionally, if the law confers discretion to regulate, which is particularly relevant to COVID-19 legislation, the Court requires the national law to be formulated with 'sufficient precision, provided that the scope of the discretion and the manner of its exercise are indicated with sufficient clarity, having regard to the

³¹ *Groppera Radio AG and Others v Switzerland* App no 10890/84 (ECtHR, 28 March 1990) para 68.

³² *Goodwin v the United Kingdom* App no 17488/90 (ECtHR, 27 March 1996) para 31.

³³ Schütze (n 24) 662.

³⁴ Venice Commission of the Council of Europe, 'The Rule of Law Checklist' (Council of Europe, May 2016) <https://www.venice.coe.int/images/SITE%20IMAGES/Publications/Rule_of_Law_Check_List.pdf> accessed 11 October 2020.

³⁵ *Vavříčka and Others v the Czech Republic* App nos 47621/13 and others (ECtHR, 8 April 2021) paras 267, 269, 271.

³⁶ Rulings of the Constitutional Court of the Republic of Lithuania of 19 September 2002, 23 October 2002, 24 March 2003, 29 December 2004, 7 December 2020.

³⁷ Remigijus Merkevičius, *Criminal Proceedings: The Concept of a Suspect* (Registrų centras 2008) 87.

³⁸ Ruling of the Constitutional Court of the Republic of Lithuania of 29 December 2004 <<https://www.lrkt.lt/en/court-acts/search/170/ta1281>> accessed 11 February 2021. See also the rulings of the Constitutional Court of the Republic of Lithuania of 9 May 2014, 29 September 2015, 11 July 2019, 11 September 2020.

³⁹ Rulings of the Constitutional Court of the Republic of Lithuania of 1 July 2004, 28 September 2011.

⁴⁰ *The Sunday Times v the United Kingdom (no 1)* App no 6538/74 (ECtHR, 26 April 1979) para 49; *Rotaru v Romania [GC]* App no 28341/95 (ECtHR, 4 May 2000) para 52; *VgT Verein gegen Tierfabriken v Switzerland* App no 24699/94 (ECtHR, 28 June 2001) para 52; *Sindicatul 'Păstorul cel Bun' v Romania [GC]* App no 2330/09 (ECtHR, 9 July 2013) para 153.

⁴¹ *Roman Zakharov v Russia [GC]* App no 47143/06 (ECtHR, 4 December 2015) para 228.

⁴² *The Sunday Times v the United Kingdom (no 1)* App no 6538/74 (ECtHR, 26 April 1979) paras 47–49; *Maestri v Italy [GC]* App no 39748/98 (ECtHR, 17 February 2004) para 30; *Kudrevičius and Others v Lithuania [GC]* App no 37553/05 (ECtHR, 15 October 2015) paras 108–109.

legitimate aim in question, to give the individual adequate protection against arbitrary interference'.⁴³ As observed by Schwabas, the Court 'is not prescriptive in this respect, acknowledging that States have a "margin of appreciation" in deciding upon the legal mechanisms by which they limit or restrict the rights set out in the Convention'. In effect, the expression 'in accordance with the law' or similar refers to 'the broad, general notion of the "rule of law"'.⁴⁴

Often the Court will find a violation of the Convention relying on the fact that the interference was not 'in accordance with law' or not 'prescribed by law' without further legal analysis on the issue whether the impugned measure can be considered as being 'necessary in a democratic society' and proportionate to the legitimate aim pursued by the imposed restriction.⁴⁵ Interestingly, in some cases regarding measures of secret surveillance, such as *Roman Zakharov v. Russia*, *Kennedy v. the United Kingdom*, and *Kvasnica v. Slovakia*, the Court found that the lawfulness of the interference was closely related to the question of whether the 'necessity' test was complied with, and therefore addressed jointly the requirements of 'in accordance with the law' and 'necessity'.⁴⁶ In the Court's view, 'the "quality of law" in this sense implies that the domestic law must not only be accessible and foreseeable in its application, it must also ensure that secret surveillance measures are applied only when "necessary in a democratic society", in particular by providing for adequate and effective safeguards and guarantees against abuse'.⁴⁷

It is understood that national laws cannot in any case provide for every eventuality; therefore, the Court notes that the level of precision required of domestic legislation depends 'to a considerable degree on the content of the instrument in question, the field it is designed to cover and the number and status of those to whom it is addressed'.⁴⁸ Since many laws are inevitably couched in terms which, to a greater or lesser extent, are vague, the ECtHR clearly recognizes the importance of the role of adjudication vested in national courts to interpret national regulation, including its legality, and to apply the laws in practice.⁴⁹ The interpretation and application by national courts is accompanied by European supervision.⁵⁰

3 Legality in a State of Emergency – Does the Standard Differ?

As mentioned above, the ECHR foresees a special regulation for the time of war or other public emergency threatening the life of the nation of any State Party. In these circumstances, Article 15 grants the possibility to the States Parties to derogate from certain obligations under the Convention in a *temporary, limited, and supervised* manner.⁵¹ The use of this provision is governed by the following procedural and substantive conditions: the right to derogate can be invoked only in time of war or other public emergency threatening the life of the nation; a State may take measures derogating from its obligations under the Convention only to the extent strictly required by the exigencies of the situation; derogations must be consistent with the State's other obligations under international law; the State availing itself of this right of derogation must fully inform the Secretary-General of the Council of Europe of the measures taken at the national level and

⁴³ *Goodwin v the United Kingdom* App no 17488/90 (ECtHR, 27 March 1996) para 31; *Maestri v Italy [GC]* App no 39748/98 (ECtHR, 17 February 2004) para 30.

⁴⁴ Schwabas (n 12) 403.

⁴⁵ See, among many others, the case *Vyerentsov v Ukraine* App no 20372/11 (ECtHR, 11 April 2013) where the Court found a violation of Article 11 that the interference with the applicant's right to freedom of peaceful assembly was not prescribed by law and stated that there was no need to verify whether the other two requirements (legitimate aim and necessity of the interference) set forth in Article 11(2) were complied with. Also see the case of *Hashman and Harrup v the United Kingdom [GC]* App no 25594/94 (ECtHR, 25 November 1999) paras 31–41.

⁴⁶ *Kennedy v the United Kingdom* App no 26839/05 (ECtHR, 18 May 2010) para 155; *Kvasnica v Slovakia* App no 72094/01 (ECtHR, 9 June 2009) para 84; *Roman Zakharov v Russia [GC]* App no 47143/06 (ECtHR, 4 December 2015) para 236.

⁴⁷ *Roman Zakharov v Russia [GC]* App no 47143/06 (ECtHR, 4 December 2015) para 236.

⁴⁸ *Vogt v Germany* App no 17851/91 (ECtHR, 26 September 1995) para 48; *Kudrevičius and Others v Lithuania [GC]* App no 37553/05 (ECtHR, 15 October 2015) para 110.

⁴⁹ *Kopp v Switzerland* 13/1997/797/1000 (ECtHR, 25 March 1998) para 59; *Mkrtchyan v Armenia* App no 6562/03 (ECtHR, 11 January 2007) para 43.

⁵⁰ *Vyerentsov v Ukraine* App no 20372/11 (ECtHR, 11 April 2013) para 54; *SAS v France [GC]* App no 43835/11 (ECtHR, 1 July 2014) paras 129–131. See, among others, the Interlaken Declaration and the principle of "shared responsibility" between States Parties and the ECtHR: 'Interlaken Declaration' (19 February 2010) <https://www.echr.coe.int/Documents/2010_Interlaken_FinalDeclaration_ENG.pdf> accessed 17 February 2021.

⁵¹ ECtHR, 'Guide on Article 15 of the European Convention on Human Rights. Derogation in time of emergency' (31 August 2020) 5 <https://www.echr.coe.int/documents/Guide_Art_15_ENG.pdf> accessed 29 December 2020.

the reasons therefor, as well as when such measures cease to operate.⁵² Paragraph 2 of Article 15 also provides a list of non-derogable rights under the Convention.⁵³

The Council of Europe observes that ‘while some restrictive measures adopted by member states may be justified on the ground of the usual provisions of the ECHR relating to the protection of health <...>, measures of exceptional nature may require derogations from the states’ obligations under the Convention’.⁵⁴ Each state must assess if the measures it adopts require such a derogation, ‘depending on the nature and extent of restrictions applied to the rights and freedoms protected by the Convention’.⁵⁵ As the Court ruled in, *inter alia*, *Ireland v. the United Kingdom*, the national authorities are, in principle, in a better position than the international judge, by reason of their direct and continuous contact with the pressing needs of the moment, to decide on the nature and scope of derogations necessary where they enjoy a wide margin of appreciation.⁵⁶ Nevertheless, under Article 15, such measures are subject to the control of the organs of the Convention.⁵⁷

Since the language of Article 15 of the Convention does not explicitly include the phrase ‘prescribed by law’ or a similar reference to the legality requirement, it is important to discuss whether this requirement remains relevant in case a State Party decides to rely on Article 15. Can States rely on a derogation without a formal notification? If the legality requirement is implicit in the text of Article 15, does the standard differ given the specific substantive conditions for using this provision?

3.1 Relying on Derogation without a Formal Notification

In this context, the question of whether a State Party to the Convention can rely on a derogation without following the above-mentioned procedural requirement is important. Lately, this question has been widely discussed by scholars. Commentators are split into two camps in this regard. Some argue that there can be no derogation without a formal notification that details the measures taken. Others claim that a notification is not a prerequisite for Article 15 since the existence of a state of emergency has not yet been discussed in the COVID-19 situation.

Holcroft-Emmess asserts that the question of whether ‘a notification at the international level is a condition precedent for a State to be able to rely on derogation to preclude violation of its Convention obligations’ was recognized but consistently not definitively answered by the ECtHR.⁵⁸ In *Brogan and others v. United Kingdom*, the Court examined the case on the basis of the usual articles of the Convention in respect of which complaints had been made. When the applicants’ arrest took place, the UK Government had already withdrawn its notice of derogation under Article 15. Thus, although the Court paid particular attention to the circumstances surrounding the arrest, particularly a terrorist campaign in Northern Ireland, it expressly ruled out the application of Article 15 in this case.⁵⁹ It is true that in this case, the United Kingdom did not request to rely on Article 15 in the absence of a notification of derogation. Therefore, in addressing this question, the latest ECtHR’s judgments in *Hassan v. the United Kingdom*⁶⁰ and *Georgia v. Russia (II)*,⁶¹ in particular the former, should be discussed.

Hassan v. the United Kingdom is referred to as an extremely important judgment allegedly creating ‘a new ground for detention under Article 5(1) in international armed conflicts and modifying the procedural guarantees in Article 5(4)’.⁶² The case concerned the detention of an Iraqi national Tarek Hassan by the British army in Iraq in 2003. The applicant argued that the United Kingdom was responsible for the unlawful

⁵² ECtHR, ‘Factsheet – Derogation in time of emergency’ (n 7) 1.

⁵³ As stated by William A. Schwabas, ‘in declaring that some rights may never be subject to derogation, Article 15 implies a hierarchy of rights’ and also that ‘the non-derogable status of certain rights is also associated with their claim to be *jus cogens* or peremptory’. Schwabas (n 12) 592–593.

⁵⁴ Council of Europe (n 5).

⁵⁵ *ibid.*

⁵⁶ *Ireland v the United Kingdom* App no 5310/71 (ECtHR, 18 January 1978) para 207; *A and Others v the United Kingdom [GC]* App no 3455/05 (ECtHR, 19 February 2009) paras 180, 184.

⁵⁷ Rainey, Wicks and Ovey (n 6) 115.

⁵⁸ Natasha Holcroft-Emmess, ‘Derogating to Deal with Covid 19: State Practice and Thoughts on the Need for Notification’ (*EJIL:Talk!*, 10 April 2020) <<https://www.ejiltalk.org/derogating-to-deal-with-covid-19-state-practice-and-thoughts-on-the-need-for-notification/>> accessed 11 February 2021.

⁵⁹ *Brogan and others v United Kingdom* App nos 11209/84, 11234/84, 11266/84 and 11386/85 (ECtHR, 29 November 1988) para 48.

⁶⁰ *Hassan v the United Kingdom* App no 29750/09 (ECtHR, 16 September 2014).

⁶¹ *Georgia v Russia (II) [GC]* App no 38263/08 (ECtHR, 21 January 2021) paras 92–95.

⁶² Elizabeth Stubbins Bates, ‘Hassan v The United Kingdom (Eur. Ct. H.R.)’ (2015) 54(1) *International Legal Materials* 83, 83–129.

detention, ill-treatment, and death of Hassan. The key legal question before the ECtHR was to which extent the context of an international armed conflict impacted the interpretation of the State's human rights obligation under Article 5 if the State concerned had not made a derogation under Article 15 of the ECHR.

In its analysis, the ECtHR paid attention to the practice of States Parties to the ECHR not to derogate from Article 5 to detain persons pursuant to the Third and Fourth Geneva Conventions during international armed conflicts.⁶³ In paragraph 103, the Court accepted the respondent's argument that the lack of an Article 15 derogation does not preclude the Court from taking International humanitarian law into account when interpreting and applying Article 5 of the ECHR. Aligning its case-law with the practice of the International Court of Justice, the ECtHR sought the interpretation and application of the Convention in a manner which is consistent with other rules of international law.⁶⁴ The Court accepted that even in situations of international armed conflict, the safeguards under the Convention continue to apply, albeit interpreted against the background of the provisions of International humanitarian law.⁶⁵ However, the Court emphasized that in the absence of a clear indication that a State intends to modify its commitments under the Convention by making a derogation under Article 15, it would only take account of International humanitarian law in interpreting Article 5 where the respondent State specifically pleads.⁶⁶

Although the *Hassan* judgment is regarded as encompassing a novel limitation of security detention in international armed conflict without the State's derogation under the Convention,⁶⁷ this case may not be regarded as confirming that the States Parties may avoid making a formal derogation under Article 15 of the ECHR where conflicts between international law norms do not arise. The Court, as Milanovic observes, could have taken the approach 'more faithful to the text of Article 15 ECHR' by stating that 'the interpretation of Article 5 in line with IHL [International humanitarian law] can only go up to a certain point, beyond which a derogation from Article 5 would be necessary'.⁶⁸ However, the Court chose a more constructive approach of trying to align the different international obligations of States Parties in the state of war, having regard to the well-established practice of the States not to make particular derogations. Therefore, one may rather agree with Milanovic calling the *Hassan* judgment 'yet another incremental decision, with the Court deciding only what it absolutely needed to on the facts of the case, but providing only limited guidance for the future',⁶⁹ in particular in the context of the COVID-19 pandemic.

3.2 The Legality Standard in Duly Notified Emergency Situations

So far, the ECtHR has had only a few possibilities to equip its practice on the legality standard to the measures taken during a duly notified emergency situation. The judgments in the cases *Ireland v. the United Kingdom*, *A. and Others v. the United Kingdom*⁷⁰ and *Mehmet Hasan Altan v. Turkey* leave no doubt that the Court reviews the legality of the measures adopted by the State during the state of emergency. However, in some instances, it is addressed implicitly.

In *Mehmet Hasan Altan*, the Court was called to evaluate whether the pre-trial detention for expressing critical views of governments and the publication of information considered by a country's leaders as endangering national interests may be regarded as a violation of Article 10 of the Convention. In approaching this question, the Court resorted to the traditional structure of assessing an alleged violation, starting from the legality requirement. By reference to the previous case-law on the formal and substantive elements of this requirement, the ECtHR concluded that the applicant's pre-trial detention had a legal basis,⁷¹ and expressed serious doubts as to the foreseeability of the applicant's initial and continued pre-trial detention based on

⁶³ *Hassan v the United Kingdom* App no 29750/09 (ECtHR, 16 September 2014) para 101.

⁶⁴ *ibid* 102.

⁶⁵ *ibid* 104.

⁶⁶ *ibid* 107.

⁶⁷ Holcroft-Emmess (n 58).

⁶⁸ Marko Milanovic, 'A Few Thoughts on Hassan v United Kingdom' (*EJIT:Talk!*, 22 October 2014) <<https://www.ejiltalk.org/a-few-thoughts-on-hassan-v-united-kingdom/>> accessed 11 February 2021.

⁶⁹ *ibid*.

⁷⁰ *Ireland v the United Kingdom* App no 5310/71 (ECtHR, 18 January 1978) para 214: 'It is certainly not the Court's function to substitute for the British Government's assessment any other assessment of what might be the most prudent or most expedient policy to combat terrorism. The Court must do no more than review the lawfulness, under the Convention, of the measures adopted by that Government from 9 August 1971 onwards. For this purpose, the Court must arrive at its decision in the light, not of a purely retrospective examination of the efficacy of those measures, but of the conditions and circumstances reigning when they were originally taken and subsequently applied'.

⁷¹ *Mehmet Hasan Altan v Turkey* App no 13237/17 (ECtHR, 20 March 2018) paras 202–204.

the established legal basis.⁷² However, the Court did not expressly deal with this question due to its findings that the measure was not necessary, even given the circumstances surrounding the case brought before it, in particular, the difficulties facing Turkey in the aftermath of the attempted military coup.⁷³

In considering possible violations of Article 5 of the Convention during the state of emergency, the Court often places more emphasis on the need for adequate standards against arbitrariness and any possible abuse in the national emergency legislation rather than the legality of the legislation. For instance, in the *Lawless* case, the Court examined the provisions of Irish law governing detention without trial, and, taking into account the safeguards established, decided that the applicant's detention for almost five months was founded on the right of derogation duly exercised by the Irish Government in July 1957 in pursuance of Article 15 of the Convention.⁷⁴ In the *Brannigan and McBride* case, the Court concluded that the Government had not exceeded its margin of appreciation in detaining the applicants for up to seven days without any judicial control. Such measures established by law contained necessary safeguards (*inter alia* habeas corpus act, access to a solicitor, regular independent review of the applicable emergency legislation); therefore, they had not gone beyond the strict exigencies of the emergency situation (established for the fight against terrorism).⁷⁵ In *A. and Others v. the United Kingdom*, the applicants complained *inter alia* that the non-disclosure of some evidence to them in the proceedings before the Special Immigration Appeals Commission and the use of special advocates with security clearances who could not communicate with their clients were contrary to the due process requirements established in Article 5(4) of the Convention.⁷⁶ The Court found that several applicants were unable to effectively challenge the allegations against them taking into account the terrorist threat posed by al-Qaeda and its associates to the United Kingdom, although the country had not particularly derogated from Article 5(4) of the Convention.⁷⁷ In the *Aksoy v. Turkey* case, the ECtHR concluded that detention without any judicial supervision for fourteen days was not strictly required in the circumstances and no reasons were provided by the Turkish Government to justify it.⁷⁸

On the other hand, in the recent case of *Alparslan Altan v. Turkey*, the Court separately examined whether the applicant's detention complied with Turkish law from the perspective of both the formal and substantive aspect of the legality requirement.⁷⁹ The ECtHR concluded that an extensive interpretation of the concept of discovery in *flagrante delicto*, expanding the scope of that concept so that judges suspected of belonging to a criminal association are deprived of the judicial protection afforded by Turkish law to members of the judiciary, negated the procedural safeguards which members of the judiciary were afforded in order to protect them from interference by the executive. Therefore, as the Court outlined, the regulation was not only problematic in terms of legal certainty, but also appeared manifestly unreasonable.⁸⁰ In the view of Jovicic, the 'Court required the "lawfulness" criterion of Article 5 to be respected in the same way as in normal situations, where the necessary clarity and foreseeability of the law must be preserved'.⁸¹ Additionally, the Court observed that the application in the present case did not strictly involve the measures taken to derogate from the Convention during the state of emergency (the legislation applicable in the applicant's case was not amended during the state of emergency).⁸² However, even considering the special circumstances of the state of emergency, the Court found no way to justify such regulation.⁸³

The above-mentioned case-law demonstrates that even if Article 15 does not expressly refer to the legality of measures during an emergency and the Court does not expressly address it, in the authors' view, the principle of strict necessity also encompasses a rigorous examination of the legality of such measures (their legal basis) at the national level. Such scrutiny of legality involves, as demonstrated by the case-law of the ECtHR, an examination of the effectiveness of the safeguards that States should place to compensate for the suspension of the Convention rights in respect of which the concrete derogation is made.

⁷² *ibid* para 205.

⁷³ *ibid* paras 210–213.

⁷⁴ *Lawless v Ireland* App no 332/57 (ECtHR, 1 July 1961) paras 31–38.

⁷⁵ *Brannigan and McBride v the United Kingdom* App nos 14553/89 and 14554/89 (ECtHR, 26 May 1993) paras 61–66.

⁷⁶ *A and Others v the United Kingdom [GC]* App no 3455/05 (ECtHR, 19 February 2009) para 195.

⁷⁷ *ibid* paras 217, 223.

⁷⁸ *Aksoy v Turkey* App no 21987/93 (ECtHR, 18 December 1996) paras 77–78, 84.

⁷⁹ *Alparslan Altan v Turkey* App no 12778/17 (ECtHR, 16 April 2019) paras 105–106.

⁸⁰ *ibid* paras 111–115.

⁸¹ Sanja Jovicic, 'COVID-19 restrictions on human rights in the light of the case-law of the European Court of Human Rights' (2021) 21 ERA Forum 545, 554.

⁸² *Alparslan Altan v Turkey* App no 12778/17 (ECtHR, 16 April 2019) para 117.

⁸³ *ibid* 119.

This view is in line with the recommendations of the Council of Europe. The organization observes that even in time of emergency, 'any derogation must have a clear basis in domestic law in order to protect against arbitrariness'.⁸⁴ In this context, the Council emphasizes the importance of checks on executive action during a state of emergency. It notes that 'parliaments must keep the power to control executive action, in particular by verifying, at reasonable intervals, whether the emergency powers of the executive are still justified, or by intervening on an *ad hoc* basis to modify or annul the decisions of the executive'.⁸⁵ Thus, the control of the legality of 'extraordinary' regulation *per se* can be as follows: the legislator itself can adjust the regulation, and, where applicable, such regulation may be subjected to review by the courts.

Here it is also important to mention the suggestion that the Convention imposes no explicit requirement that declarations of derogations be subject to some form of effective domestic scrutiny.⁸⁶ As the Council of Europe Commissioner for Human Rights has pointed out, 'the requirement is, however, easily discerned'.⁸⁷ It is common ground that even in an emergency situation, the rule of law must prevail.⁸⁸ According to the Commissioner, effective domestic scrutiny by the legislature and the judiciary represents 'essential guarantees against the possibility of an arbitrary assessment by the executive and the subsequent implementation of disproportionate measures'. Mere parliamentary approval is not sufficient because 'the effectiveness of the parliamentary scrutiny of derogations depends in large measure on the access of at least some of its members to the information on which the decision to derogate is based'.⁸⁹

The role of the courts in this extraordinary period is the strongest counterweight to the executive; it concerns both the general courts and the constitutional courts.⁹⁰ When special legal regimes apply, in particular a state of emergency, the judiciary not only resolves individual disputes over emergency policies but also checks the executive and clarifies these likely imperfect policies.⁹¹ As was foreseen by the researchers, the era of hectic standardization of human behavior, with many restrictions of freedom in favor of public health, resulted in the questioning of the legality and constitutionality of individual restrictions before national courts.⁹² As will be demonstrated below, the lack of a proper legal basis and of adequate standards against arbitrariness were important legal issues during the early stages of the COVID-19 pandemic.

4 Addressing Legality at the National Level

This section aims to give an overview of the legal approaches taken by courts of last instance, i.e. mostly constitutional courts, in cases related to different COVID-19 measures. As mentioned above, the legality question was scrutinized in a number of European jurisdictions that established different regimes to cope with the pandemic. Although the COVID-19-related measures were similar in nature and extent, the legal regimes varied from an officially declared state of emergency to the application of health-related legal acts. Only a handful of states made an official derogation under Article 15 of the ECHR.

The Government of the Czech Republic declared a state of emergency by its decision of 12 March 2020 based on Articles 5–6 of the Constitutional Law on Security, which was extended twice until 17 May 2020.⁹³ The Czech Republic did not formally derogate from the ECHR, as the Czech Charter of Fundamental Rights and Freedoms does not contain any provisions allowing to derogate from the rights and freedoms enshrined in this constitutional document.⁹⁴

The follow-up emergency measures adopted by the Czech Republic Government and the Ministry of Health were subject to judicial review, revealing the issue of *ultra vires* legislation. On 1 April 2020, in its decision No. 19/2019-12, the Supreme Administrative Court declared null and void the decision of the

⁸⁴ Council of Europe (n 5) 3.

⁸⁵ *ibid* 4.

⁸⁶ Schwabas (n 12) 593–594.

⁸⁷ *ibid*.

⁸⁸ Venice Commission of the Council of Europe, 'Opinion on the protection of human rights in emergency situation' (CDL-AD(2006)015) para 13, cited in Council of Europe (n 5).

⁸⁹ Schwabas (n 12) 593–594 (with reference to the Opinion of the Commissioner for Human Rights, Mr. Alvaro Gil-Robles, on certain aspects of the United Kingdom 2001 derogation from Article 5 para. 1 of the ECHR, CommDH(2002)7, para 5).

⁹⁰ Martina Gajdošová, 'Legal and Paralegal Measures as the Response to an Extraordinary Situation' in Ewoud Hondius and others (eds), *Coronavirus and the Law in Europe* (Intersentia 2021).

⁹¹ Jan Petrov, 'The COVID-19 emergency in the age of executive aggrandizement: what role for legislative and judicial checks?' (2020) 8(1–2) *The Theory and Practice of Legislation*.

⁹² Gajdošová (n 90).

⁹³ Venice Commission of the Council of Europe, 'Observatory on emergency situations. Czech Republic' <<https://www.venice.coe.int/files/EmergencyPowersObservatory/CZE-E.htm>> accessed 27 January 2021.

⁹⁴ *ibid*.

Government to suspend the by-elections. The Court concluded that the competence to suspend elections was reserved to Parliament and that the right to vote cannot be limited by virtue of provisions relating to other human rights.⁹⁵ In the view of the Court, it is not possible to abandon a fundamental rule established by the constitutional legal act even for such exceptional situations as pandemics. The Court emphasized that 'it is necessary to protect not only health, lives and economy, but also the democratic constitutional Rechtsstaat'.⁹⁶

Relying on the Law on the Protection of Public Health, the Ministry of Health adopted several extraordinary measures further limiting certain rights. Additionally, it replaced some of the crisis measures of the same content that were issued earlier by the Government acting under the Crisis Management Act, while other extraordinary measures set new restrictions and obligations.⁹⁷ On 23 April 2020, in its decision No. 14 A 41/2020, the Prague Municipal Court abolished two acts of the Ministry of Health related to restrictions on the right to freedom of movement, and two acts related to restrictions on the right to property. The Court ruled that in a state of emergency, the constitutional guarantees of the division of powers require Government interventions to take precedence over interventions by the Ministry of Health. While acting under the Crisis Management Act, the Government was under continuous supervision of the Chamber of Deputies. Such supervision was excluded for the challenged measures by the Ministry of Health, which had acted pursuant to the Act on the Protection of Public Health.⁹⁸ In its reasoning, the Court also referred to Article 15 of the ECHR and ruled that even in a state of emergency, restrictions on fundamental rights can only be adopted on the basis of the law. Thus they must correspond to the legal framework laid down in the Constitution, constitutional laws and "ordinary" laws.⁹⁹ Acknowledging and leaving aside the fact that the Czech Government had not formally activated the notification procedure, the Court referred to *Mehmet Hasan Altan v. Turkey*, emphasizing that 'only measures corresponding to the extent strictly required by the urgency of the situation may be taken'.¹⁰⁰

However, the constitutional complaint regarding the *ultra vires* measures of the Ministry of Health before the Constitutional Court of the Czech Republic was rejected for lack of *locus standi* of the applicant. In its decision issued on 28 April 2020 (Pl. ÚS 8/20), the Court ruled that governmental decisions as legal acts of general normative nature may be challenged only by privileged applicants, and complaints about the measures of the Ministry of Health may only be lodged after the remedies available in administrative justice have been exhausted. Thus two of the contested legal acts could not be reviewed as they had already been annulled by the Prague Municipal Court.¹⁰¹

In North Macedonia, the state of emergency lasted from the 18th of March until the 13th of June 2020¹⁰² based on Article 125 of the Constitution. During this time, Parliament was in a state of dissolution. In April 2020, North Macedonia made a derogation under Article 15 of the ECHR from Article 8 (the right to respect for private and family life), Article 11 (freedom to assembly and association), Article 2 of Protocol No. 1 (the right to education) and Article 2 of Protocol No. 4 (the freedom of movement).¹⁰³ Under the Constitution, during a state of war or emergency, the Government, in accordance with the Constitution and the law, issues decrees with the force of law. The Government's authorization to issue decrees with the force of law lasts until the termination of the state of war or emergency, which is decided by the Assembly.¹⁰⁴

The question of the legal basis for governmental decrees was a matter of controversy from the beginning of the COVID-19 crisis.¹⁰⁵ Since there is no special law on the state of war or emergency, the formulation that

⁹⁵ *ibid.*

⁹⁶ *ibid.*

⁹⁷ Czech Republic, 'Decision Pl. ÚS 8/20 – Certain measures adopted amid Covid-19 pandemic' <<https://www.usoud.cz/en/current-affairs/decision-pl-us-8-20-certain-measures-adopted-amid-covid-19-pandemic>> accessed 24 January 2021.

⁹⁸ Venice Commission, 'Observatory on emergency situations. Czech Republic' (n 93).

⁹⁹ Decision of the Prague Municipal Court of 23 April 2020, 129 (14 A 41/2020) <https://www.justice.cz/documents/14569/0/14+A+41-2020+%28Dostál_mimořádná+opatření%C3%AD%29_final2A/0c4f37b8-fd5f-4670-a306-0c5fedaa568b> accessed 25 October 2021.

¹⁰⁰ *ibid.*

¹⁰¹ Czech Republic (n 97).

¹⁰² Venice Commission of the Council of Europe, 'Observatory on emergency situations. North Macedonia' <<https://www.venice.coe.int/files/EmergencyPowersObservatory/MKD-E.htm>> accessed 27 January 2021.

¹⁰³ Vesna Stefanovska, 'Divergences from the separation of powers in times of emergency with special emphasis to the Republic of North Macedonia' (2021) 6(3) *Journal of Liberty and International Affairs* <https://www.ssoar.info/ssoar/bitstream/handle/document/71161/ssoar-jlibertyintaff-2021-stefanovska-Divergences_from_the_separation_of.pdf?sequence=1&isAllowed=y&lnkname=ssoar-jlibertyintaff-2021-stefanovska-Divergences_from_the_separation_of.pdf> accessed 27 January 2021.

¹⁰⁴ Venice Commission, 'Observatory on emergency situations. North Macedonia' (n 102).

¹⁰⁵ *ibid.*

'the Government, in accordance with the... law issues decrees with the force of law' was confusing.¹⁰⁶ Article 35 of the Law on Government empowers the Government to adopt decrees with the force of law for the purpose of implementing laws (as opposed to amending them).¹⁰⁷ Article 36 of the Law covers the legislative lacuna in case of no possibility of convening the Assembly by giving the power to the Government to regulate issues within the area of competence of the Assembly in a state of emergency by means of a decree with the force of law.¹⁰⁸

During the state of emergency, the Constitutional Court of North Macedonia was actively forming its constitutional jurisprudence by making explicit references in its decisions to the state of emergency regime established by the ECHR, which is of particular relevance to the question of the legality of regulatory acts targeting the COVID-19 pandemic.¹⁰⁹ By decisions U. No. 44/2020 and No. 50/2020-1, the regulation regarding the reduction of salaries of elected and appointed officials in the public sector was annulled. The Constitutional Court ruled that in time of emergency, the Government is authorized and even obliged to regulate the functioning of the system in the state; however, the regulation must be in line with the existing constitutional and legal order.¹¹⁰ As explained by Shasivari and Nuhija, the above-mentioned compliance requirement indicates that such decrees can be adopted 'only in order to operationalize the constitutional and legal provisions, and not to standardize a certain situation that is not provided by the Constitution or the laws'.¹¹¹ Accordingly, the Constitutional Court found that in these cases, the Government restricted citizens' labor rights without any constitutional and legal basis since the salaries of the public-sector officials were determined by the stated special laws,¹¹² and there were no specific provisions in the Constitution on the basis of which these rights could be limited in a state of war or emergency.¹¹³

By another decision No. 56/2020-1, Article 3 of the Decree on the deadlines of judicial proceedings in a state of emergency and work of the courts and public prosecutions was nullified. Article 3 established that the term of office of the lay judges, whose mandate was to expire during the state of emergency, would be prolonged until the proceedings were completed. The Constitutional Court ruled that, first of all, this issue was already addressed by existing regulation, which led to legal uncertainty and double regulation, and was thus contrary to the principle of the rule of law established by the Constitution.¹¹⁴ Additionally, the Government took over the competence of the Judicial Council to decide on the mandate of lay-judges, thus interfering with the principle of the separation of powers.¹¹⁵

In some countries, some emergency measures remained even after the withdrawal of formal states of emergency¹¹⁶ since special emergency laws were adopted.¹¹⁷ In Bulgaria, amendments to the Health Act established a legal definition of an 'emergency epidemic situation' which was introduced by the Government the day after the state of emergency ended. During an emergency epidemic situation, fundamental rights can be restricted by orders of the Ministry of Health without a parliamentary decision or a specified maximum duration.¹¹⁸ These legislative arrangements have raised the issue of the legality of the above-mentioned decisions, but the question was pending before the Constitutional Court of Bulgaria at the time this research was completed.¹¹⁹

Some states have complemented their existing laws on infectious diseases with additional powers,¹²⁰ raising the same question of the existence of a proper legal basis. The Constitutional Court of Romania ruled that the Government was 'in breach of the constitutional limits of legislative delegation', i.e., the impugned

¹⁰⁶ *ibid.*

¹⁰⁷ *ibid.*

¹⁰⁸ *ibid.*

¹⁰⁹ Decision of the Constitutional Court of the Republic of North Macedonia of 14 May 2020 No 45/2020-1.

¹¹⁰ Jeton Shasivari and Bekim Nuhija, 'Challenges of constitutional judicial control of the delegated legislative power during the COVID-19 Pandemic in the light of international standards: the case of North Macedonia' (2020) 10(3) *Juridical Tribune* 384 <<http://www.tribunajuridica.eu/arhiva/An10v3/2.%20Shasivari,%20Nuhija.pdf>> accessed 27 January 2021.

¹¹¹ *ibid.* 385.

¹¹² *ibid.*

¹¹³ Venice Commission, 'Observatory on emergency situations. North Macedonia' (n 102).

¹¹⁴ Shasivari and Nuhija (n 110) 386.

¹¹⁵ Venice Commission, 'Observatory on emergency situations. North Macedonia' (n 102).

¹¹⁶ FRA (n 1) 16.

¹¹⁷ Venice Commission, 'Respect for Democracy, Human Rights and the Rule of Law During States of Emergency – Reflections' (n 2) 8.

¹¹⁸ FRA (n 1) 16.

¹¹⁹ *ibid.*

¹²⁰ Venice Commission, 'Respect for Democracy, Human Rights and the Rule of Law During States of Emergency – Reflections' (n 2) 8.

ordinance increasing the fines for administrative offences committed during the state of emergency against the imposed measures was regarded as 'wholly unconstitutional'.¹²¹ In its argumentation, the Court made no reference to the case-law of the ECtHR.

In Croatia, the Civil Protection System Act and the Act on the Protection of the Population from Infectious Diseases authorized the Civil Protection Headquarters to render decisions and guidelines to be implemented by the civil protection authorities of the local and regional governments to protect the lives and health of citizens in case of specific circumstances involving an unpredictable or uncontrollable event or state endangering the lives and health of citizens.¹²² Arguments alleging the illegality of the measures taken by the Civil Protection Authority to fight the pandemic were rejected by the Constitutional Court of the Republic of Croatia.¹²³ In its reasoning, the Court focused on the powers delegated to the Headquarters and the control over its decisions. First of all, the Court ruled that Parliament itself had vested in the Headquarters the authority to take relevant measures in particular circumstances. Furthermore, the Headquarters operated under the Government's direct supervision; therefore, it was subject to executive, legislative and judicial control, including review by the Constitutional Court. The Court also emphasized that Parliament, as the legislative body, has the exclusive power to choose the proper legal basis. Therefore, the fact that the challenged legal measures were not enacted based on Article 17 of the Constitution (which refers to times of war or an imminent threat to the independence and unity of the state, and major natural disasters) did not in itself make those laws unconstitutional.¹²⁴ In its reasoning, the Court made no reference to the well-established practice of the ECtHR.

Based on the Law for the prevention and fighting against infectious diseases and the Law on health, the Government of Kosovo restricted the right to freedom of movement by limiting it to specific times. In its judgment in case KO54/20, the Constitutional Court of Kosovo ruled that the restrictions imposed were not in accordance with the law since Article 55 of the Constitution states that 'fundamental rights and freedoms guaranteed by this Constitution may only be limited by law'. According to the Court, the above-mentioned laws did not authorize the Government to limit the constitutional right to freedom of movement. The Court generally accepted that the Ministry of Health had the authority to make decisions to fight against pandemics; however, this authority did not cover the power to limit the movement of people at the state level, and so a new law would have to be adopted by Parliament.¹²⁵ As to the reference to the ECtHR's legality standard, the Constitutional Court made it clear that the question under consideration concerns a limitation of a fundamental right but not a derogation from the obligation under the Convention. Having observed the absence of ECtHR case-law specifically addressing interferences with and limitations on fundamental rights and freedoms during the COVID-19 pandemic, the Court resorted to the 'classical' concept of the legality requirement.¹²⁶

As the constitutions of different states often provide for a special legal regime (or regimes) increasing the powers of the executive authorities, governments may receive a general power to issue decrees having the force of law, enabling them to act quickly and efficiently.¹²⁷ Jan Petrov regards as a logical consequence the fact that among the three branches it is the executive that has a 'hierarchical structure with a clear division of ranks and responsibilities, access to expertise, and qualities that allow for swift and decisive action for protecting the nation' and is better designed to manage emergencies.¹²⁸ The above-mentioned examples of cases decided before national courts demonstrate the courts' intention to adhere to the conventional standard of the rule of law, considering the specificities of national constitutional regulation. Independently of the legal regime in place in a particular state, the courts scrutinize whether the constitutional safeguards to

¹²¹ Bianca Selejan-Gutan, 'Romania in the Covid Era: Between Corona Crisis and Constitutional Crisis' (*VerfBlog*, 21 May 2020) <<https://verfassungsblog.de/romania-in-the-covid-era-between-corona-crisis-and-constitutional-crisis/>> accessed 27 January 2021.

¹²² Nika Bačić Selanec, 'Croatia's Response to COVID-19: On Legal Form and Constitutional Safeguards in Times of Pandemic' (*VerfBlog*, 9 May 2020) <<https://verfassungsblog.de/croatias-response-to-covid-19-on-legal-form-and-constitutional-safeguards-in-times-of-pandemic/>> accessed 27 January 2021.

¹²³ FRA (n 1) 17.

¹²⁴ Codices <<http://www.codices.coe.int/NXT/gateway.dll?f=templates&fn=default.htm>> accessed 24 October 2021.

¹²⁵ Drini Graždani, 'Kosovo's Constitutional Court finds COVID-19 Measures Unconstitutional' (*Oxford Human Rights Hub*, 1 June 2020) <<https://ohrh.law.ox.ac.uk/kosovos-constitutional-court-finds-covid-19-measures-unconstitutional/>> accessed 27 January 2021.

¹²⁶ Ruling of the Constitutional Court of the Republic of Kosovo of 6 April 2020 <https://gjk-ks.org/wp-content/uploads/2020/04/ko_54_20_agj_ang.pdf> accessed 25 October 2021.

¹²⁷ Council of Europe (n 5) 3–4.

¹²⁸ Petrov (n 91).

control 'delegated legislation' or the discretion to regulate are met, considering constitutional rules governing specific regimes. Therefore, given the regime established and the relevant constitutional arrangements, the national dimension of the legality requirement – the existence of a national legal basis – may vary greatly. However, even in the absence of a state of emergency and of a (valid) derogation under Article 15 ECHR, courts also tend to emphasize that the measures must be strictly required by the exigencies of the situation, sometimes even addressing the former and the latter questions jointly.

It is expected that the ECtHR case-law elaborating on the application of Article 15 of the Convention will harmonize a patchwork of national approaches and will bring more clarity to the application of the legality standard in the future.

5 Conclusions

1. The research demonstrates that States Parties to the ECHR have different legal tools in their hands to legitimately limit or restrict the exercise of the rights and freedoms of the Convention during the COVID-19 pandemic. Such restrictions can be placed under the conditions prescribed in different Articles of the Convention (e.g., § 2 of Articles 8–11); States also have the possibility to derogate from their international obligations under Article 15 of the Convention. In both cases, the question of the legality of interference with the exercise of human rights and fundamental freedoms understood through national and international dimensions remains of particular importance. It demands the existence of national law and requires the law to possess such essential qualities as *inter alia* publicity of law, accessibility, predictability, and foreseeability.
2. The principle of the strict necessity of national measures taken in time of emergency established in Article 15 also encompasses a rigorous examination of such measures' legality even in the absence of an express reference to legality in Article 15. Such scrutiny should also involve, as demonstrated by the case-law of the ECtHR, an examination of the effectiveness of the safeguards that the States place to compensate for the suspension of the Convention rights in respect of which the concrete derogation is filed. In the absence of a derogation under Article 15, the Court also takes into account the exceptional circumstances of an emergency. However, States Parties may then face more difficulties proving the necessity of the restrictive measure, particularly in relation to the guarantees found in Article 5.
3. The illegality of human rights restrictions during the pandemic is a common issue both for the countries that had derogated from the obligations under Article 15 of the Convention and those that had not used this possibility. Relying on the case-law of the ECtHR in respect of the legality of interference in the exercise of human rights, the authors argue that legality in the state of emergency should follow the same logic as in the absence of such a state. This is reflected in the constitutional case-law, although the national dimension of the legality requirement varies depending on different constitutional arrangements in the countries. The research demonstrates that numerous states have been confronted with the issue of illegality of restrictive measures adopted to fight the COVID-19 pandemic. Most of the problems are related to constitutional safeguards to control the executive's discretion to regulate.
4. Therefore, the role of national courts (including Constitutional Courts) and the European supervision implemented by the ECtHR remain vital to ensure *inter alia* the legality of human rights restrictions during the COVID-19 pandemic. The authors hope that this question will soon be addressed by the ECtHR with sufficient clarity, either under Article 15 of the Convention or under other Articles of the Convention which contain appropriate limitation clauses.

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Competing Interests

The authors have no competing interests to declare.

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