The Derogation Jurisprudence under European Convention on Human Rights

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ABSTRACT

Human Rights are those essential rights which every human being is entitled to merely as being a human. These are such rights which flow directly through the very birth of a person and cease only when he dies. It is the responsibility of the state to respect, protect and fulfil their enjoyment. However, there exists certain circumstances when the enjoyment of human rights entitlement is provisionally suspended by the affected state by invoking the relevant derogation provision from a treaty guaranteeing and enabling such rights. This article is intended to analyse the issue of the ‘derogation jurisprudence’ as has been evolved by the European Court of Human Rights (ECtHR/the Court) over the years. It essentially aims to analyse the Article 15 of European Convention on Human Rights (ECHR/the Convention) in depth by relying on the various decisions of ECtHR and try to discover whether or not the true purpose of the adoption of the Convention has been fulfilled.

INTRODUCTION

Under the European Convention on Human Rights (formally the Convention for the Protection of Human Rights and Fundamental Freedoms), there is an express mention of the provision of Derogation under Article 15. This Article allows the state parties to this Convention to derogate under certain specific circumstances enumerated therein.\(^1\)

‘Article 15 enables a state to unilaterally derogate from some of its substantive Convention obligations in certain exceptional circumstances. This provision is therefore of great importance to the Convention’s general integrity and in practice, the protection of human rights in the situations where individuals may be especially vulnerable to the authoritarian actions of the state. Accordingly, Article 15, subjects the measures of derogation to a specific

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1 See, Article 15, Protection of Human Rights and Fundamental freedoms, 1950. Available at: https://goo.gl/sbzCwx (accessed on 15/12/2016).
regime of safeguards that may be monitored by the Court, though only in applications reaching it’.\(^2\)

The text of Article 15\(^3\) clearly envisions to bring in the balance between State’s right to denounce from the treaty obligations at the time of the crisis and emergent situation, on the one hand and on the other hand, it contemplates to put certain restrictions on the astounding power of the States by subjecting their power to “the time of war or other public emergency threatening the life of the nation” and allowing the states to take only such action as is “strictly required by the exigencies of the situation. Moreover, the power to derogate is subject to substantive restrictions in that no derogation is permitted in the case of specific Articles referred to in Art 15 (2). And nor from those covered by the sixth and thirteenth Protocols to the Convention. Also, derogating state must not contravene other international law obligations. Besides, there are certain procedural conditions as provided in Art 15 (3) which attend recourse to the derogation power and which have the important consequences of drawing attention to these special situations and are also a source of information which will be useful in the pursuit of any applications in Strasbourg.\(^4\) This article will only cover the first clause of the Article 15.

Article 15 (1) writes that “in time of war or public emergency threatening the life of the nation any High Contracting Party may take measures derogating from the its obligations under this Convention to the extent strictly required by the extent required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.”

In order to fully grasp the meaning this clause in its right perspective the ECtHR, through the process of extraversion, has come up with various interpretations, which will be examined in this paper.

**PERMISSIBLE CONDITIONS FOR DEROGATIONS UNDER ARTICLE 15**

Permissible derogations under Article 15 must meet the following three substantive conditions:

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\(^3\) See, Article 15 ECHR.

a) There must be a War or public emergency threatening the life of the nation;
b) Any measures taken in response must be "strictly required by the exigencies of the situation", and
c) The measures taken in response to it, must be in compliance with a state's other obligations under international law.

**a) WAR OR PUBLIC EMERGENCY THREATENING THE LIFE OF THE NATION:**

There has been no case before the Strasbourg organs when a respondent state has claimed that it has derogated from the Convention on the basis that a state of war exists.\(^5\) As for as the Public emergency threatening the life of the nation is concerned, it has been suggested that “the question whether a threat to life of the nation exists is capable of objective answer but precisely what is meant by ‘threat to the life of the nation’ and in particular, the severity of the violence, harm or threat required to trigger Article 15 (1) is still unclear from the jurisprudence."\(^6\) However, the ECtHR from time to time has attempted to expound it, albeit, in a very narrow and cautious manner.

In *Lawless v Ireland* \(^7\) the ECtHR adopted the language of Commission and held that, “in the general context of Article 15 of the Convention, the natural and customary meaning of the words ‘other public emergency threatening the life of the nation’ is sufficiently clear…….they refer to an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed”.

Attempting to explain this in more detail, the ECtHR in the *Greek Case* \(^8\) noted that an emergency may be not just actual but also ‘imminent’. It described the qualifying features of such an emergency as follows:

- It must be actual or imminent.
- Its effects must involve the whole nation.
- The continuance of the organised life of the community must be threatened.

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5 *Ibid*, at 625.
6 *Ibid*, at 617.
7 A 3 (1961); EHRR 15, para 28.
The crisis or danger must be exceptional, in that the normal measures or restrictions, permitted by the Convention for the maintenance of Public safety, health and order, are plainly inadequate.9

However, the fundamental question still remains as to what are the instances when we can say with confidence that whether the emergency is imminent, involve whole nation, and threaten organised community and public safety? Besides, who is it that has the last word of authenticity in that behalf? Is it the State authorities or the ECtHR that can decide it? To this end, the ECtHR through its various decisions has attempted to answer these questions as well. However, because of their lack of clarity, these decisions have come under severe criticism and public discussion.10

In Ireland v United Kingdom11, the ECtHR noted that the primary responsibility for determining whether the life of the state was threatened rests with the state party. In this case, the Court directly relied on government’s assessment that there was a public emergency without making its own inquiries and assessment. The ECtHR asserted that: “By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it. In this matter Article 15 para 1, leaves those authorities a wide margin of appreciation.”

Again, the similar view has been taken by the ECtHR in Brannigan and McBride v UK12 but, apparently with much more cautiousness this time around. The ECtHR recalled that, “It falls to each Contracting State, with its responsibility for the life of its nation, to determine whether that life is threatened by a public emergency and if so, how far it is necessary to go in attempting to overcome the emergency. By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judges to decide both on the presence of such emergency and on the nature and scope of derogation necessary to avert it.

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9 Ibid.
10 See, A and others V Secretary of state for Home Department [2004] UKHL 56, para 96.
11 A 25 (1978); 1 EHRR 15 para 20-77 PC.
12 A 258-B (1993); 17 EHRR 539 para 60 PC.
Accordingly, in this matter a wide margin of appreciation should be left to the national authorities.”

The ECtHR further went on to say, “nevertheless, Contracting Parties do not enjoy an unlimited power of appreciation. It is for the Court to rule on whether, inter alia, the states have gone beyond the ‘extent strictly required by the exigencies’ of the crisis. The domestic margin of appreciation is thus accompanied by a European supervision….At the same time, in exercising its supervision the ECtHR must give appropriate weight to such relevant factors as the nature of the rights affected by the derogation, the circumstances leading to, and the duration of the emergency situation.”

Even the cursory perusal of the above cases would reveal that a ‘wide of margin of appreciation’ is left with State authorities regarding the assessment of the existence of an emergency. In essence, it grants the domestic courts and institutions a measure of discretion to deal with a particular issue in accordance with their own moral, political, ideological and legal point of view. Therefore, the judgement of the court (as previously mentioned) has come under the focus of criticism from Commentators and was the subject of controversy within the Court.

Judge Martens, in this case stated that; “The first question is whether there is an objective ground for derogating which meets the requirements laid down in the opening words of Article 15. Inevitably, in this context, a certain margin of appreciation should be left to the national authorities. There is, however, no justification for leaving them a wide appreciation because the ECtHR, being the last-resort protector of the fundamental rights and freedom guaranteed under the Convention, is called upon to strictly scrutinise every derogation by High Contracting Party from its obligations.”

This case initially came before the Commission and the Commission said that it had to make its own assessment of the situation. However, in reality it was kept very limited and the existence of emergency situation was concluded by relying on the cumulative government statistics. “This degree of scrutiny is hardly different from accepting the respondent governments own view of the situation. Therefore, the assessment of the

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14 A 258-B (1993); 17 EHRR 539 para 23.
commission seems to be shallow at its very core. Although, the brief of the intervening parties, the NGO Liberty, argued that there was not an emergency of sufficient seriousness for Art 15 to be relied upon. However, the ECtHR briefly endorsed the Commission’s conclusion.\textsuperscript{15}

Similar comments may be made regarding the assessment of the existence of a public emergency in the case of \textit{Aksoy V Turkey}.\textsuperscript{16} In this case the judgement of the ECtHR simply stated that it considered that, “…in the light of all the material before it, that the particular extent and impact of PKK terrorist activity in south-east Turkey has undoubtedly created, in the region concerned a public emergency”.

b) \textbf{MEASURES TAKEN, STRICTLY REQUIRED BY THE EXIGENCIES OF THE SITUATION:}

The ECtHR has worked out a series of factors to be taken into account to determine whether measures taken are strictly required by the exigencies of the situation. The first inquiry is into the \textit{necessity for the measures} at all by examining why the ordinary law or action otherwise compatible with the convention is not adequate to meet the emergency and why the exceptional measures are.\textsuperscript{17}

In \textit{Lawless v Ireland},\textsuperscript{18} the ECtHR accepted that neither ordinary nor special courts in Ireland were able to meet the dangers to public order occasioned by the secret, terrorist character of IRA, in particular, the near impossibility of obtaining evidence necessary to convict suspects by judicial proceeding. Internments or detention without trial did have the effect of meeting this problem.

Again, in \textit{Ireland v UK},\textsuperscript{19} the ECtHR held that ‘the British government was reasonably entitled to consider’ that the ordinary criminal procedure was inadequate to meet the far reaching and acute danger presented by the massive wave of violence and intimidation, characterising the IRA’s activities in Northern Ireland. Extrajudicial deprivation of liberty, even for the purposes of interrogating witnesses otherwise, contrary to Art 5(1)

\begin{itemize}
    \item \textsuperscript{15} Harris, O’ Boyle & Warbrick, Law of the European Convention on Human Rights, 627 (2nd edn, OUP 2009).
    \item \textsuperscript{16} 1996-VI; 23 EHRR 553, para 70.
    \item \textsuperscript{17} Harris, O’ Boyle and Warbrick, Law of the European Convention on Human Rights, 632 (2nd edn, OUP 2009).
    \item \textsuperscript{18} A 3 (1961); EHRR 15, para 28.
    \item \textsuperscript{19} A 25 (1978); 2 EHRR 25 Para 212 PC
\end{itemize}
and the removal of procedural guarantees to regulate deprivation of liberty otherwise, in violation of Art 5(4), were necessary to meet the emergency situation.

Similarly, in *Brannigan and McBride v UK*, the ECtHR acceded to the government’s argument that, in a common law system, it was not feasible to introduce a judicial element into the detention process at an early stage. It accepted also that extended detention was necessary to investigate successfully terrorist crimes when some of the suspects would have been given training in resisting interrogation and where extensive forensic checks might be required. The Court, therefore, held that the UK government had not exceeded its margin of appreciation by derogating from the obligations under Art 5(3) of the convention to the extent that individuals suspected of terrorist offences were allowed to be held up to seven days without judicial control.

In *Aksoy v Turkey*, the Court, however, took a different course of action. In this case a person was held for more than fourteen days in *incommunicado* detention without access to a judge or judicial officer. The ECtHR went on to condemn the insignificant nature of safeguards available to the applicant viz, the denial of lawyer, doctor, relative/friend and the absence of any realistic possibility of being brought before a court to test the legality of the detention. The Court, therefore held that there had been a violation of Art 5(3). This is the first time that the ECtHR had concluded that measures taken by a state pursuant to a public emergency were not strictly required by the exigencies of the situation.

Establishing the necessity for having some emergency measures will not always be sufficient to demonstrate that the measures employed are strictly required. In *De Becker v Belgium*, the ECtHR said, it may go on to inquire into the *proportionality* between the need and the response. The greater the need, the greater would be the permissible derogation. However, it has been argued that the proportionality does not imply some arithmetic calibration. Instead, the ECtHR takes into account whether the measure is less draconian than the others which might have been contemplated.

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20 A 258-B (1993); 17 EHRR 539.
21 1996-VI; 23 EHRR 553.
22 B 4 (1962); 1 EHRR 43 Para 271 Com Rep.
Again, under this heading also the margin of appreciation for assessing the “measures strictly required” given to the states is wide enough. For example, in Ireland v UK, the ECtHR said “matters of prudence or expediency are not for the Court” and that internment could reasonably have been considered strictly required by the emergency.

The word used in Brannigan and McBride v UK couched in the negative, further underline the primacy of state’s assessment of what is strictly required. At one stage, the Commission was of the opinion that government had not overstepped their margin of appreciation… and it cannot be said that the government have exceeded their margin of appreciation… and again; the ECtHR takes the view that the government have not exceed their margin of appreciation.

Merrills, in his book, states that the negative review of the Court, which takes into account matters of evidence, necessity, proportionality, adequacy of safeguards, individually and together, does not amount to particular intrusive form of review, despite the strong words of Article 15(1).

c) STATE’S OTHER OBLIGATIONS UNDER INTERNATIONAL LAW:

Even if the measures of derogation can be justified by invoking Art 15, a state is precluded from relying on them if their introduction would breach other international obligations of state. The source of other treaty obligation are: International Covenant on Civil and Political rights (ICCPR) and Geneva Red Cross Conventions 1949 along with its additional protocols, to which nearly all the High contracting parties are signatories also. It will be necessary for the European Court to interpret the other treaty to identify the state’s obligation. In practice, this provision has been of little significance. In Lawless and Ireland cases, the ECtHR decided that the measures of derogation did not conflict with the defendant state’s obligations, if any, under international law.

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23 A 25 (1978); 1 EHRR 15 para 207 and 214.
24 A 258-B (1993); 17 EHR 539 para 57 PC.
26 Harris, O’ Boyle and Warbrick, Law of the European Convention on Human Rights, 637 (2nd edn, OUP 2009).
27 Ibid.
Also, in *Brannnigan and McBride v UK*\(^{28}\), it was argued that the more stringent provisions of Art 4 ICCPR – that the existence of the emergency be ‘officially proclaimed’ – had not been satisfied. However, the Court, disclaimed any responsibility to resolve it authoritatively but was satisfied that parliamentary statement by British minister were sufficient in terms of their certainty and publicity to comply with Art 4 of ICCPR.

In a similar manner, the ECtHR in *Marshall's case* was quick to dismiss the ICCPR’s Human rights Committee’s adverse comments regarding the measures taken pursuant to emergency situation in Northern Ireland.

**THE ERA OF NEW EMERGING NON-DEROGABLE HUMAN RIGHTS**

It has been argued by many commentators and international lawyers that the Strasbourg Court's evaluation of Art.15 in light of the “other obligations under international law”, should require a fundamental re-writing of what is allowed under a state of emergency within the Council of Europe.\(^{29}\)

Beyond Art.15 (2), a number of non-derogable rights have emerged which will have fundamental implications on the jurisprudence of the Court. For example, presumption of innocence, right to communicate with an attorney “at any time after detention”; the right to have a case reviewed within 30 days by a “judicial or quasi-judicial body, right to be informed promptly and in detail” of charges etc.\(^{30}\) Therefore, International Law Association (an NGO) has argued that, “the denial of certain rights fundamental to human dignity can never be strictly necessary in any conceivable emergency”.\(^{31}\)

Also, UN Sub-Commission on the Promotion and Protection of Human Rights undertook studies regarding states of emergency under the stewardship of its Special Rapporteur,

\(^{28}\) A 258-B (1993); 17 EHRR 539 para 68.


\(^{30}\) *Ibid.*

Leandro Despouy. Mr. Despouy's 1997 Report, indicated that a number of judicial guarantees, such as *habeas corpus*, the right to fair trial, and the right to liberty, have indeed become non-derogable.\(^{32}\)

Similarly, on July 24, 2001, the UN Human Rights Committee adopted General Comment 29 entitled *Derogations from Provisions of the Covenant during a State of Emergency* which sets out a number of recently emerged non-derogable rights. The Committee noted the following non-derogable rights:\(^{33}\)

(a) All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person” (Art.10 ICCPR);
(b) The prohibitions against taking of hostages, abductions or unacknowledged detention;
(c) Protection of specific minority rights such as prohibition against genocide;
(d) The deportation or forcible transfer of populations which would constitute a crime against humanity; and
(e) The engaging in propaganda for war or advocacy of “national, racial or religious hatred that would constitute incitement to discrimination, hostility or violence” (R, General Comment 29, para 13.)

Likewise, the provisions of Common Article 3 of the 1949 Geneva Conventions would apply in a state of emergency which was precipitated by an “armed conflict not of a international character”, that is to say a civil war. As to peremptory or *jus cogens* norms, such norms are, by reference to provisions of the Vienna Convention on the Law of Treaties, those which are “accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted”\(^{34}\).


\(^{33}\) Human Rights Committee, General Comment Number 29: States of Emergency (article 4), UN. Doc.CCPR/C/21/Rev1/Add.11, August 31, 2001, para 6. Note that General Comment 29 replaces General Comment 5 of July 31, 1981. For the provisions of Art.4 (2) ICCPR.

CONCLUSION

In conclusion, it can be said that in the European Convention on Human Rights’ jurisprudence under Article 15, a wide margin of appreciation is left with State authorities regarding the assessment of the existence of an emergency or any measures taken in response to it or whether it is to see if the measures are strictly required by the exigencies of the situation. This trend seems more dominant in the wake of counter-terrorism measures that authorities take as a major excuse in order to absolve themselves from the obligations imposed by the Convention. Therefore, the decisions of the ECtHR have come under the focus of criticism from various commentators and international lawyers. The concern has been articulated that the ECtHR, being the last hope for the victims of human rights abuse of the State authoritarianism, which tendency is more conspicuous in the time of crisis, should be more careful in its inquiry for accessing the situation with help of independent reports and not only heavily relaying on government statistics, alone. Moreover, the ECtHR, should also give a due consideration to state's other obligations under international law. There are some rights in the Convention which have assumed the character of Jus Cogens. It means, even if State derogates, pursuant to Art 15, there would be still these rights which the State would be debarred from derogation and the job of the ECtHR should be to interpret the convention in light of these latest developments in rights regime at international level and that many believe would serve the true purpose of the Convention as is enshrined in its preamble.