

DEROGATION CLAUSE IN THE TIMES OF CORONA CRISIS

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1. Introduction

Important international conventions in the field of human rights protection define the scope of conditions for the protection of human rights within a special regional system. These individual regional human rights protection systems use different range of rules and norms to regulate exceptions during emergency situations. The article presents the normative basis of the international law regulation of different human rights systems in relation to emergency situations. These situations are extremely significant in the human rights perspective as the deviation from the legal order regularly paves the way for the possible systematic human rights violation. There is a bigger chance that during public emergencies, as the Covid19 pandemic, human rights violations will occur. Moreover, grave consequences of the restrictions related to the pandemic showed, that violence and abuse mainly against vulnerable groups were on the increase.¹

Drafters of the human rights conventions assumed, that emergency situation could in the future occur, therefore there were created provision to deviate from the strict provisions of the text and consequently given space for proper state reaction. These provisions are the derogation clauses, which are based on the unilateral act of the state, giving opportunity to exempt from international obligations in time of public emergency. They are however limited, supervised and temporary. Derogation of human rights treaties often establish the legal framework defining the admissibility of such exceptional derogations, as well as the regulation of the procedure, by which the state can take such exceptional steps.

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¹ See Ákos KOZMA: Human Rights: the Right to Education in an Epidemic. *Pázmány Law Review*, Vol. VII. (2019-2020) 72.

However, derogation clauses show, that even in emergency situations the countries bear a duty to guarantee subjects' secure and equal freedom. As a reaction to these situations the drafter had to think about, on the one hand, how to give countries margin of appreciation and on the other hand, how to restrict countries when derogating from certain articles. These clauses set the limitations as a manifestation of the non-absolute character of human rights and the balance between the interests of an individual nature and public interests.

² It is worth mentioning, that there is a difference between limitation and derogation of rights. Derogation, as an aggravated type of limitation,³ should be understood as a complete or partial elimination of an international obligation arising from the human rights convention. This elimination would be otherwise treated as a breach of obligation and the state would be held responsible for such measures.⁴

Moreover, emergency situations also challenge each states' commitment to the rule of law. Since the rule of law had been defined variously, most academics confirm that the notion requires, minimally, public institutions that decide cases impartially and non-arbitrarily according to pre-established legal principles.⁵ Emergencies may influence the legal order by creating political pressure. Some scholars even argue, that courts usually decrease the severity of their judicial review during these emergency periods, as a defense to the executive branch getting more power as usual. However, when the crisis situation has come to the normality emergency powers of the government are not necessary and have to be abandoned.⁶

The number of human rights protection systems, both universal and regional in nature, is characterized above all by the fact, that they overlap with each

² Zoltán NAGY – Attila HORVÁTH et al.: *Emergency Powers in Central and Eastern Europe. From Martial Law to COVID-19*. Budapest, Central European Academy Publishing, 2022. 40.

³ Author's note: Allowed limitations can be in certain emergency circumstances sufficient for application of necessary measures. The ICCPR even persuades the states to use limitations instead of derogation, if it is possible.

⁴ See Erica-Irene DAES: *The individual's duties to the community and the limitations on human rights and freedoms under article 29 of the Universal Declaration of Human Rights: a contribution to the freedom of the individual under law*. United Nations, 1983.; Rosalyn HIGGINS: Derogations under Human rights Treaties. *British Yearbook of International Law*, Vol. 48, Issue 1, 1977.

⁵ See Csaba VARGA: *Rule of Law: Contesting and Contested*. Budapest, Ferenc Mádl Institute of Comparative Law, 2021.; Trevor Robert Seaward ALLAN: *Constitutional Justice: A Liberal Theory of the Rule of Law*. Oxford University Press, 2001; Joseph RAZ: *The Rule of Law and Its Virtue. Authority of Law: Essays on Law and Morality*, Vol. 210. 1979.

⁶ David DYZENHAUS: *The Constitution of Law: Legality in a Time of Emergency*. Cambridge University Press, 2006. 19.

other in the number of protection standards and sometimes in the nature of their provisions as well. However, each of the system has its specifics which when scrutinized thoroughly, can show the characteristics of the human rights system of the region. These characteristics can be presented via the prism of the derogation clauses. Additionally, the aforementioned overlap is also related to the principle of mutual interdependence of human rights, which means that specific human rights can be directly damaged, even if the interference with the rights of an individual is aimed at completely different rights, or conducted with a completely different purpose. Therefore, when analyzing the derogation from certain right, even though done legally, there has to be an analysis related to possible side-effects of these measures.⁷

2. Derogation clause in the European Convention on Human Rights and Fundamental Freedoms

Limitations of the application of the European Convention on Human Rights and Fundamental Freedoms (hereinafter as “ECHR”) are directly derived from the wording of article 58, article 57 or article 15. Art. 58 enables the party to withdraw from the convention under certain conditions, art. 57 is the application of reservations to the convention and art. 15 is the derogation clause, applied for the necessities of extra-ordinary situations. The research at hand is devoted to the analysis of the last.

The regulation of the ECHR is in a materially positive and negative way and procedurally without setting the time limit. The circumstances of derogation in case of an emergency situation are stipulated in three paragraphs of the Art. 15 as follows:

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

⁷ See Evan John CRIDDLE – Evan FOX-DECENT: Human Rights, Emergencies, and the Rule of Law. *Human Rights Quarterly*, Vol. 34, No. 1, 2012. 39.

2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.

3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.”

Explicitly expressed derogatory clause in the ECHR stipulates, that measures in emergency situations, in which obligations in the field of human rights are derogated from, must not be inconsistent with other obligations arising from international law. This is primarily a normative recognition of the non-derogability of *ius cogens* obligations, which therefore bind the state even in the event of an emergency. Secondly, this preserves a stronger standard of human rights protection, as there are rights that cannot be derogated from in the sense of some treaties, while other treaties allow derogation in the given area. Since it is thus noticeable, that even rights that are not clearly enshrined as part of *ius cogens* can be protected by the prohibition of derogation, the consistency between individual international legal obligations ensures that the derogation of one treaty is not used to violate provisions that cannot be derogated from within the framework of another treaty.⁸ At the same time, thirdly, such preservation of the validity of other international obligations puts the state, as well as international law itself, in a difficult position during the pandemic. The result may be a situation where obligations from the ECHR and similar treaties will be derogated from, but at the same time the state will continue to be bound by the provisions of other treaties on human rights, which do not provide for derogation in their wording.

The topic and even the application of the ECHR derogation clause is not new. Derogation clauses has been applied by the UK, Northern Ireland or France with regard to terrorist attacks. Also, it has been already subject to the

⁸ William Anthony SCHABAS: *The European Convention on Human Rights. A Commentary*. New York, Oxford University Press, 2015. 593.

jurisprudence of ECtHR.⁹ The notion of derogation clause has come to the fore in the first case of the Court, *Lawless v Ireland*, where the Commission used the margin of appreciation doctrine. Therefore, the margin of appreciation doctrine made its first appearance in the ECtHR jurisprudence evaluating state responses to situations of emergency. In the pertinent case, the duty of the Court was to determine whether a public emergency threatening the life of a nation had existed. The Court stipulated, that in crisis situations it is evident that the national government and its institutions has to have certain discretion.¹⁰

Temporary derogation from obligations is according to the article of ECHR justified in extraordinary case, for limited period of time and proportionally according to the necessities of the situation. It has to be emphasized, that the declaration of the application of derogation clause for certain allowed provisions does not give a *carte blanche* to apply measures in an unlimited manner. The territorial and material scope as well as the time limitation are important to adhere to. Many organizations, such as the Human Rights Council, emphasize that derogations can be applied just for necessary time and to the necessary scope. However, it can be observed that some countries are in a situation of permanent emergency. Therefore, these human rights bodies urge to adhere to this limitation and end the state of emergency in the pertinent country. Nevertheless, in relation to the ECtHR, it has to be mentioned, that the jurisprudence is flexible and that the sole long duration of the application of the derogation clause is not considered *per se* as violation of the ECHR.¹¹

The author deems it necessary to point out, that it is extremely hard to properly interpret what time frame can be understood under the vague notion of permanent. Additionally, current European situations (refugee crisis, armed conflict, energy crisis) also give rise to questions whether these permanent emergency situations should be considered as something wrong, since there are continuously reasons for exceptional measures, for the application to different exceptional situations which “torment” the European countries the last decade.

Additionally, the case law gives clearer image of how the ECtHR interprets the notion of emergency measures and derogations clauses. In the case of Ireland

⁹ See Guide to Art. 15 European Convention on Human Rights. Available at: <https://www.refworld.org/docid/6048e29816.html> [online], [accessed 20 December 2022].

¹⁰ *Lawless v Ireland*. Commission. Judgment of the European Court of Human Rights. n. 332/57. 1960–1961. para 90. at. 82.

¹¹ Ana Rita GIL: Derogation Clauses of International Human Rights Instruments: protecting rights at the maximum possible extent in times of crisis. *Católica Law Review*, Vol. V. N. 1. January 2021. 25.

v UK, the Court has stipulated that the states have a margin of appreciation when applying derogation clauses and therefore the right to investigate this decision by international court has some limits. The Court stated, that its up to the contracting state itself to decide upon emergency measures which can threaten the life of the nation and how to bear with the occurred situation the most appropriately. National courts are in direct and permanent contact with the actual and emergency needs of the situation at hand. In this sense the national courts are in better position to decide upon such measures than the ECtHR. The Court added, that states are however not unlimited. The Court can consider the scope, reasons, necessity for application of the measures taken as well as to consider whether these measures comply with other international obligations of the relevant state.¹² The mentioned control is extremely important when considering measures which can be abused in a manner to cause direct or even indirect harm to fundamental values as we consider democracy or pluralism.

All of the mentioned were taken into consideration, when the virus of COVID-19 has spread over Europe and when it was important to promptly react with the health measures issued by the governments of states. However, consequently these measures (mainly related to the quarantine) affected and violated rights and freedoms stipulated in the ECHR. The most affected freedoms were the freedom of movement (Prot. 4 Art. 2) and freedom of assembly and association (Art. 11). Based on the emergency situation that has occurred, many states reached toward the application of Art. 15 and therefore these states have correctly informed the secretary generally of their intent and the measures which they intend to derogate from. In the years 2020-2021 ten states have informed the Council of Europe regarding their application of the derogation clause with regard to the Covid19 pandemic: Albania, Armenia, Estonia, Georgia, Latvia, North Macedonia, Romania, San Marino and Serbia. On first glance it looks like most of the Balkan countries used the application of the clause. Nevertheless, it is hard to find the exact reason why these countries were applying the clause and why other countries of the Council of Europe did not decide accordingly.¹³

Different countries apply the derogation clause differently, in most of the cases it is hard to identify the reasons based on which the state applied or not applied the clause. Although, there is commonly used the reason for not applying the

¹² *Ireland v United Kingdom*, Judgment of the European Court of Human Rights, n. 5310/71. 1978. para 207.

¹³ Alessandra SPADARO: COVID-19: Testing the Limits of Human Rights. *European Journal of Risk Regulation*, 2020. 1.

clause that the government's opposition will abuse the situation into showing the ineffectivity of the current government, in case of the pandemic it was obvious that the countries were hazily deciding upon measures which could prevent the spread of the virus.¹⁴

2. Derogation clause in different international human rights system

The International Covenant on Civil and Political Rights (hereinafter referred to as "ICCPR") and its derogation clause in Article 4, sets out the conditions for the possibility of deviating from the articles of the Convention, provided that an extraordinary life-threatening situation has arisen, whereby such deviation must be officially declared and does not mean discrimination.¹⁵ The very inclusion of the derogation clause among the first articles of the pact highlights the theoretical as well as applical importance, which the international community attributes to the clause. In the third paragraph, the article exhaustively defines non-derogable rights, namely the right to life (Article 6), the prohibition of torture (Article 7), the prohibition of slavery (Article 8), the prohibition of imprisonment due to the inability to fulfill a contractual obligation (Article 11), the principle of *nullum crimen sine lege nulla poena sine lege* (Article 15), the right to legal personality (Article 16), the right to freedom of thought, conscience and religion (Article 18). The text of the derogation clause consists of three paragraphs with a length of 10-11 lines (approx. 1000 characters). In the aforementioned derogation clause, there is also an explicit procedural obligation to immediately notify, through the UN Secretary General, the other contracting parties. This process of notification specifies the provisions from which the entity deviated as well as the reasons for the deviation. Such a clearly defined derogation clause limits the possibilities of contracting parties to arbitrarily derogate from the articles of the international pact and therefore significantly strengthens legal predictability, stability and the rule of law. Of course, under the conditions that the contracting party fulfills its notification obligation.

¹⁴ Pavel Šturma – Alla TYMOFEYEVA et. al: *70th anniversary of the European Convention on Human Rights*. Prague, Univerzita Karlovy, 2021. 139.; See David John HARRIS – Michael O'BOYLE – Ed BATES: *Law of the European Convention on Human Rights*. Oxford, Oxford University Press, 32014.

¹⁵ International Covenant on Civil and Political Rights 1966. n. 999 United Nation Treaty Series 171. art. 4.

There are certain formal and essential conditions that authorities must respect when restricting freedoms and rights. The possibility of limitations must be determined by the national law in force at the relevant time. Even if there is a legal basis, restrictions cannot be applied in an arbitrary, unreasonable or discriminatory manner. Each restriction must be necessary to achieve one of the purposes specified in the relevant provision. This condition requires that the individual contracting parties justify in detail not only their decision to declare a state of emergency, but also any used measure based on such a declaration. If states wish to invoke the derogation clause, they must be able to justify each specific measure deviating from the provisions of the ICCPR.¹⁶

In connection to the application of the clause, derogation in emergency situations is legally different from limitations allowed also in non-emergency situations under several provisions of the ICCPR or even in the ECHR. The reason behind this is that this human rights system prefers, if possible, limitation of rights rather than complete derogation from its provisions.¹⁷ In this sense, the ICCPR somehow tries to motivate the states to limit the application of the provision and avoid derogation of the complete provisions even when emergency situations occur. Many states have therefore previously fulfilled the necessity to apply measures distinct from the explicit wording of the convention within the scope of a limitation, e.g. Suriname, Mexico, Iraq or Cyprus.¹⁸

With regard to the Covid19 pandemic and the state of emergency caused by it, the derogation clause of the ICCPR has been invoked by several states with the intention of deviating from Article 21. The first state that fulfilled its notification obligation regarding deviating from the text of the convention was Guatemala, which formally requested an exception on March 9, 2020. Guatemala was followed a few days later by Latvia and 20 other countries.¹⁹

The American Convention on Human Rights (hereinafter referred to as “AmCHR”) provides a derogation clause in the fourth chapter under the name

¹⁶ General Comment. n. 29. State of Emergency.. International Covenant on Civil and Political Rights. 2001. GE.01-44470 (E).

¹⁷ Dominik Mcgoldrick: The interface between public emergency powers and international law. *International Journal of Constitutional Law*, Vol. 2, N. 2, 2004. 384.

¹⁸ United Nations Document, A/34/40. 1979. para. 383.; United Nations Document, A/34/40. 1980. para 297.; United Nation Document, A/46/40. para 618-56.

¹⁹ Exception of Member States from art. 21 ICCPR, art. 11 ECHR art. 15 ACHR based on the COVID-19 pandemic. Available at: <https://tinyurl.com/yc5ed85k> [online] [accessed 7 February 2022].

suspension of guarantees.²⁰ The conditions for deviation are set out in Article 27. The conditions include war, public threat or other emergency circumstance that threatens the independence or security of the contracting state, while the measures by which the subject deviates cannot be discriminatory. Non-derogable rights are similar to the ICCPR set out exhaustively. Just to mention some: the right to jurisdictional personality (Article 3), the right to life (Article 4), the right to humane treatment (Article 5), the prohibition of slavery (Article 6), the prohibition of retroactivity (Article 9), freedom of conscience and religion (Article 19), the right to nationality (Article 20) and the right to vote (Article 23). The text of the clause consists of three paragraphs with a length of 15 lines (approx. 1440 characters). In this regard, however, it should be noted that non-derogable rights are specified by name in the second paragraph, in contrast to the ICCPR, where the pact only mentions the numbers of individual articles of non-derogable rights. The last paragraph also contains the notification obligation for derogation, including the obligation to notify the reasons for such measure to the Secretary General. The scope as well as the content of the derogation clause of the ICCPR and the AmCHR are therefore more or less identical. As part of the state of emergency that arose due to the Covid19 pandemic, 13 states derogated from Article 15 of the AmCHR, the first of which was Ecuador with a request dated March 17, 2020, followed by Colombia two days later.²¹

The Arab Charter on Human Rights (hereinafter referred to as the “ArChHR”) established a derogation clause in Article 4.²² It is stipulated, that in the case of extraordinary circumstances, the contracting states may deviate from the obligations established by the convention. The following rights are considered non-derogable rights: the prohibition of torture and inhuman treatment, the prohibition of returning a person to the state where he is persecuted, the right to political asylum, the principle of *ne bis in idem*, the principle of the legality of a crime and punishment. The length of the article is little bit less than 1400 (1377). The procedural notification obligation for cases of derogation is established through the secretary general of the League of Arab states.

In connection with the application of the ArChHR convention, the third article is also worth mentioning, which explicitly establishes the principle of *pacta sunt servanda*. Compared to other human rights conventions, the placement of

²⁰ Inter-American Convention on Human Rights, 1969. n. 1144. *United Nation Treaty Series*, 123. n. 27.

²¹ Ibid.

²² Revised Arab Charter on Human Rights. 2004. *International Human Rights Report*, 12. 893. art. 4.

the aforementioned Article 3 at the beginning of the text is unusual.²³ Placing Articles 3 and 4 at the beginning of the convention is intended to highlight their importance and the intention of the contracting parties to strengthen their position in the Convention. The decision to strengthen the meaning of the principle of *pacta sunt servanda* and the conditions for derogation is probably justified by the insufficient application of human rights protection in the Arab world, and the subsequent internal urge of the authors to strengthen the application meaning of this convention.

Regarding the issue of international human rights conventions and individual derogation clauses, it is also appropriate to mention the African Charter of Human Rights and Peoples' Rights,²⁴ however, the given document does not contain a derogation clause for extraordinary situations. The absence of a clause in a convention of this kind is not regular, although it cannot be claimed that this is a unique case.²⁵ It is well known that the African continent's transition to democracy is delicate and that many new states have not escaped authoritarian regimes to date. The African Commission on Human and Peoples' Rights therefore decided on the absence of the possibility of derogation, with the intention of avoiding the abuse of this institution. The Commission has repeatedly stated that the declaration of a state of emergency cannot be used as an excuse for violating or allowing violations of the African Charter. However, the silence of the African Charter and the position of the African Commission are sharply criticized by some academics.²⁶ Academics such as Sermet or Heyns consider the system of setting the derogation clause as a special guarantee of protection. According to Sermet, the absence of a derogation clause have even opposite effect as it makes exceptional circumstances common, leading to certain improper solutions. However, in this sense its worth mentioning that, African states regularly refer to national provisions enabling a state of emergency.²⁷ Therefore, it would be probably truly risky to introduce a derogation clause into

²³ Ibid. art. 3.

²⁴ African Charter on Human and Peoples' Rights. 1981. Organization of African Unity.

²⁵ E.g. Universal declaration of Human Rights (1948); International Covenant on Economic, Social and Cultural Rights (1966), Convention on the Rights of the Child (1989).

²⁶ Christof HEYNS.: The African Regional Human Rights System: In Need of Reform? *African Human Rights Journal*, 2001. 155.; Laurent SERMET: The absence of a derogation clause from the African Charter on Human and Peoples' Rights: A critical discussion. *African Human Rights Law Journal*, 2007. 142.

²⁷ Frans VILJOEN: *International Human Rights Law in Africa*. Oxford University Press, 2007. 253.

the African Charter. Some ill-intentioned states could thus simulate a state of emergency to escape their international obligations.²⁸

3. Conclusion

The aim of the contribution was to present the core principles of the derogation clause in different regional and universal systems of human rights as well as to analyze the steps of Member states of the Council of Europe, in relation to the European Convention on Human Rights when emergency situation such as the pandemic occurred. In each of the mentioned cases, it can be concluded that clear conditions are set out for a derogation from the text of the convention. Among the most important part of the derogation clause of each convention is the paragraph establishing the rights that cannot be derogated from under any circumstances.

After analyzing the wording of the mention conventions, we can formulate a test of derogability. This presents which steps has to be followed in order to fulfill the requirements of the derogation clause:

- First the measure has to be checked, if it does not collide with non-derogable rights.
- Second, provided that the relevant human rights standard is derogable, states are required to provide notice regarding the extent of their derogation.
- Third, each of these agreements provides that states may suspend ordinary human rights protection only temporarily, during extraordinary events. Also, the text of the agreements limits the possibility of deviating to circumstances when this extraordinary measure is strictly required by an urgent situation.
- Fourth, the measure must be in accordance with other international obligations.
- Additionally, the ICCPR and AmCHR impose an additional condition of non-discrimination.²⁹

²⁸ Jibril Ali ABDI: Derogation from constitutional rights and its implication under the African Charter on Human and Peoples' Rights. *Law, Democracy and Development*, Vol. 17, 2013. 90.

²⁹ Evan J. CRIDDLE: Protecting Human Rights During Emergencies: Delegation, Derogation, and Defence. In: Monika AMBRUS et al.: *Netherlands Yearbook of International Law 2014*, n. 45, 201.

In their derogation clauses, the aforementioned treaties establish the conditions for derogation in the event of an extraordinary life-threatening situation, war, public danger or state of emergency. However, the content of many of these concepts cannot be unambiguously interpreted and can be easily abused.

The doctrine acknowledges, that applying and enforcing law and order in situations of public emergency is a fragile issue of appreciating complex factors and balancing conflicting interests. The national government can be, in these circumstances, in a superior position to some supranational judicial bodies in its possibilities to deal with the balancing problems, because of its stronger relations with the problems of the country and its nation. Therefore, when applying the derogation clause and its reasons the governments have some kind of scope of moving.³⁰

States have express obligations under international law to guarantee the enjoyment of basic human rights to all individuals under their jurisdiction, and these legal obligations do not expire even in the event of an emergency. Nevertheless, it is generally accepted that when faced with serious public emergencies, states may temporarily suspend their obligations under certain human rights treaties and take exceptional measures to overcome the crisis.³¹ However, as a final remark, the author would like to emphasize that after the proper analysis of the issue at hand, one can deduce that, the text of the mentioned derogation clauses (or their absence) implicitly points to the very nature of the international convention as well as to the nature of the legal system in which these conventions are applied.

³⁰ Oren GROSS – Fionnuala Ní Aoláin: From Discretion to Scrutiny: Revisiting the Application of the Margin of Appreciation Doctrine in the Context of Article 15 of the European Convention on Human Rights. *Human Rights Quarterly*, Vol. 23, No. 3, 2001. 634.

³¹ Emanuele SOMMARIO: Derogation from Human Rights Treaties in Situations of Natural or Man-Made Disasters. In: Andre DE GUTTRY et. al.: *International Disaster Response Law*. Berlin–Heidelberg, Springer, 2012. 325.