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# COVID-19 AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS\*\*

Our life has changed. The main if not the only topic that everyone is interested in is the ongoing pandemic. The World Health Organisation is one of the most popular international organisations at the moment. This crisis will undoubtedly have a significant impact on how we live, travel and perceive our governments. These long-term effects will clearly be a subject of numerous dissertations, articles and monographs. This blogpost will make a very brief overview of the role of the European Convention on Human Rights in assessment of this crisis. In recent days a number of states (for example, Georgia, Estonia, Armenia, Romania, and Latvia) submitted their derogations from the ECHR under Article 15. When the situation calms down it would be very interesting to analyse the exact wording and utility of these declarations. Here, I will start by considering implications of Article 15 to the situation at hand. I will then briefly analyse how other Articles of the Convention can be engaged in the COVID-19 crises. Of course, this is only a suggestion, the real impact of COVID-19 will be seen in 5-6 years when measures taken by the Governments now will be analysed in judgments of the European Court of Human Rights.

## ARTICLE 15 DEROGATION IN CASE OF EMERGENCY

Article 15 allows the Contracting Parties to derogate in case of emergency. The COVID-19 pandemic will clearly fall within the definition of emergency. However, the most important aspect here is that Article 15 does not allow the Contracting Parties to interfere with any rights the way they wish during the emergency. These interferences should be clearly linked to the pandemic, limited in time and strictly necessary. The Court reserves the competence to review the measures. I argue that in case of pandemic, Article 15 derogations are not particularly useful and they send an unnecessary

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message to people that states will start limiting their human rights. I will now explain why deployment of Article 15 will not make too much difference in the context of the COVID-19 crisis.

According to Article 15, all substantive rights of the Convention are divided into derogable and non-derogable. The latter ones can never be derogated from and include the right to life, prohibition of torture, prohibition of slavery and retrospective implementation of criminal punishment. Therefore, Article 15 derogations will have absolutely no impact on these rights. However, I argue that the impact of Article 15 will be very limited on all other rights as well. Articles 8-11 allow limitations for protection of health and public order even without any emergency. However, these limitations need to be legal and proportionate. Article 15 might help to overcome the legality requirement and loosen the scrutiny in proportionality analysis but the practical impact of Article 15 might be very limited. In terms of legality – most states make some form of emergency legislation and this will perhaps satisfy the Court to accept that these measures are legal. That said, national laws that transfer unlimited powers to the executives might be deemed unlawful under the Convention but Article 15 derogation will not be able to convert an unlawful action into a lawful one in this context. In relation to proportionality – the extent of pandemic is such that fairly restrictive measures will nevertheless fall within the scope of allowed limitations. Article 5 for example might be applicable if people are not allowed to leave their homes but here again the ECHR enshrines Article 5-1(e) which allows the lawful detention of persons for the prevention of the spreading of infectious diseases. Again Article 15 might be considered in the Court's analysis of Article 5 but I do not think that formal derogation will have any significant effect on this assessment. This emergency is almost equal in all European states and formal derogation will make little impact on the ECtHR.

Another example of the right in relation to which Article 15 can have some impact is Article 6 (right to a fair trial). At the moment, it is not clear how Article 6 can really be involved. This is not impossible but one needs to see how the crisis develops; for instance, in some countries courts and tribunals either stopped working at all or decide cases behind closed doors. This leads to multiple violations of national procedures. In these circumstances, Article 15 can be helpful but more information is needed to consider this possibility.

## ARTICLE 2 RIGHT TO LIFE

Since people die in significant numbers, Article 2 of the Convention can be engaged. Initially, the UK government has adopted the strategy which can be called the herd immunity. According to this strategy a significant number of population would have to get sick but develop immunity to the virus. As a side effect some vulnerable people (elderly and with pre-existing conditions) would pass away. Quickly this plan was rejected and more stringent measures protecting the population were put in place. Even if the initial strategy was left intact it would be necessary to prove that the victim

had died as a direct result of the state actions or omissions, alternatively one would need to prove that the state failed to protect people's life. Although not outside of the realm of possibilities, such causal link is difficult to establish. The Court will probably recognise the difficulty of the current situation and only find violations of Article 2 if there was discriminatory treatment or flagrant denial of medical help.

## ARTICLE 3 PROHIBITION OF TORTURE

Lack of medical treatment can fall under the definition of Article 3 of the Convention. This Article is absolute and non-derogable and, if the State fails to provide proper medical help, a violation is possible. Two criteria need to be satisfied here: the treatment or lack thereof needs to reach the minimal level of severity and the state's involvement should be proved. While involvement of the state is easier to establish – proving the minimal level of severity will be a much more complex task. Many illnesses lead to significant sufferings and some can even be lethal. The Court cannot blame the state for that; the state is obliged to provide adequate care. In the circumstances of pandemic and sheer numbers of potential victims the meaning of adequate care can be significantly changed. For example, if a state cannot ensure a proper medical treatment in prison, it is under the obligation to transfer a person to a civilian hospital. That said, if a patient is already in a civilian hospital and other options are unavailable then the Court will unlikely to find a violation of the Convention. Proving that the state policy was a reason for overcrowded hospitals is a futile exercise at the ECtHR in times of pandemic.

## ARTICLE 4 FORCED LABOUR

Article 4 case law of the ECtHR is very sparse and it is very rarely invoked by the applicants. Section 1 of Article 4 is absolute, and therefore the government will not be able to enslave people even in time of emergency. When it comes to forced labour, the government can make people to get involved in removing the consequences of an emergency but the measures in place should be clearly linked and proportionate to the danger faced by the public. Needless to say, this Article will only apply to forced labour; if the state calls for volunteers and members of the public agree to participate it will not fall within the ambit of Article 4.

## ARTICLE 5 RIGHTS TO LIBERTY AND SECURITY

As I have already argued this Article may be interfered with by the measures that prevent the pandemic from spreading. Strict house arrests fall within the definition of a “deprivation of liberty” under Article 5. That being said, there are two crucial issues that need to be discussed here. First, the degree of limitations should be significant. In other words, if a person is prescribed to stay within 1 kilometre from her home this will be arguably not enough to trigger Article 5. Second, Article 5-1e allows legal detention of those who can spread infectious diseases. This provision and the case law of the ECtHR talks about the conditions when such detention will be in compliance with the ECHR: it should be made in accordance with national law, it should be limited in time and it should serve the purpose it is initiated for – namely, preventing spreading of infectious diseases. Otherwise, such detention will be arbitrary and hence in violation of the ECHR.

## ARTICLE 8 RIGHT TO PRIVACY

Perhaps, the COVID-19 crisis poses a huge challenge to the right to privacy and other qualified rights. In order to prevent spreading the pandemic the state needs to know whether people comply with the quarantine, it needs to have a major amount of medical data, it also needs to know who people infected were in contact with etc. This information falls within the scope of privacy understood by the ECtHR. Even measuring your temperature and reporting about your international travels is an interference with Article 8 rights. Article 8 allows legal interferences, the key challenge here is their proportionality. Although, this emergency might be able to justify many things, it will not justify all of them. This crisis might lead to changes in interpretation of the Convention and perhaps, some decrease of the level of protection is possible but only the ECtHR can rule on how this crisis will really impact the scope of Article 8.

## ARTICLES 9 AND 11 FREEDOM OF RELIGION AND FREEDOM OF ASSOCIATION

Many states have already banned all public gatherings to prevent the rapid spread of COVID-19. These measures include religious masses, political rallies, concerts, sport events and all other meetings of a major number of people. These measures are perhaps justifiable if they are used for the

purpose of preventing spreading of the virus. If these measures are not necessary and the virus is used as a pretext for silencing the opposition, for example, then the Court can find a violation of the Convention. That said, it is safe to suggest that the prohibition of rallies in countries with a significant threat of pandemic will be found in compliance with the Convention. It will be close to impossible to prove that it was not necessary in a democratic society.

## ARTICLE 10 FREEDOM OF EXPRESSION

Although those forms of freedom of expression that require public gatherings can be limited, this right is extremely important during any crisis and the Court is likely to apply a high level of scrutiny if states unjustifiably limit freedom of expression. Free speech keeps governments accountable, free speech prevents authorities from trying to “crack a nut with a sledgehammer”. Freedom of expression allows us to access information that the state tries to keep secret and access to such information is crucially important in the circumstances of emergency. Therefore, although some aspects of free speech can be limited the core of this right should stay intact and should be fiercely protected.

## ARTICLE 2 OF PROTOCOL 4 FREEDOM OF MOVEMENT

The right provided by Article 2 of Protocol 4 is clearly engaged if any quarantine measures are introduced. That said, these interferences can be in compliance with the ECHR if they are introduced in accordance with national law for the protection of health. Unless these limitations are disproportionate it is difficult to see how the Court will find a violation of this Article in the context of COVID-19 pandemic.

## CONCLUSION

This short snapshot overview of potential engagement of the ECHR in the context of the COVID-19 pandemic is of course incomplete. Prohibition of discrimination, right to property, right to education and other rights can also be involved. What this overview clearly shows is that human rights as a whole and the ECHR in particular are not the obstacles to effective governmental measures targeting the pandemic. It also shows that it is especially crucial in case of emergency to hold on to human rights, to keep the authorities accountable and within certain limits because the crisis legislation giving new extensive powers to the executive branch can have long-lasting disproportionate effects on our lives, our freedoms and our societies.