Derogations, deprivation of liberty and the containment stage of pandemic responses

Greene, Alan

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Alan Greene[i]

ABSTRACT

In a recent article in this journal, Professor Tom Hickman defends the UK government's decision not to derogate from the ECHR in its response to the COVID-19 pandemic. In making this argument, Hickman engages with my previous article in this journal where I advocated for derogations in response to the pandemic. The purpose of this article is to respond to Hickman's arguments. Firstly, I contend that a narrow interpretation of Article 5.1(e) ECHR to allow deprivation of liberty only of those who are infected or may be infected would not unduly restrict state action in the early—or containment—stage of a disease outbreak. Secondly, requiring derogation for emergency powers in the containment stage of a disease outbreak does not water down the definition of a 'public emergency threatening the life of the nation' in Article 15 ECHR. Finally, I dispel the contention that my original argument was based upon a conception of Article 15 as discretionary; rather, my argument is based upon how states ought to act when the law in question is unclear. To that end, legal analysis must remain acutely aware of how law ought to be interpreted and not simply focused on predicting what courts may decide.

INTRODUCTION

In a recent article in this journal, Professor Tom Hickman defends the UK government's decision not to derogate from the ECHR in its response to the COVID-19 pandemic.[1] Notably, Hickman expressly refers to the UK government's decision not to derogate, rather than the general approach taken by the majority of contracting parties not to derogate from the Convention.[2] That stated, many of the arguments he makes can be extrapolated as being applicable for all contracting parties given that they raise questions as to the proper interpretation of Article 5.1(e)—lawful detention for the prevention of the spreading of infectious diseases— and Article 15 ECHR—derogation in response to a public emergency threatening the life of the nation'. In making this argument, Hickman engages with my previous article in this journal where I advocated for derogations in response to the pandemic.[3] Rather than interpreting Article 5.1(e) to facilitate lockdowns, I argued instead that derogations should be used in order to ensure that these exceptional powers are quarantined to exceptional situations. Article 5.1(e) should instead be interpreted narrowly, permitting the deprivation of liberty only of those 'who are infected or may be infected

[1] Tom Hickman QC, 'The Coronavirus Pandemic and Derogation from the European Convention on Human Rights'. [2020] (6) E.H.R.L.R 593.

[2] Only 10 of 47 the contracting parties to the Convention chose to derogate from various provisions of the Convention in response to the pandemic. See '*OSCE Human Dimension Commitments and State Responses to the Covid-19 Pandemic*' (OSCE Office for Democratic Institutions and Human Rights, 2020) 28.

[3] A Greene, 'Derogating from the European Convention on Human Rights in Response to the Coronavirus Pandemic: If Not Now, When?' [2020] (3) E.H.R.LR 263. I followed this article up with a further piece: A Greene, 'On the Value of Derogations from the ECHR in Response to the COVID-19 Pandemic: A Rejoinder' [2020] E.H.R.L.R 526-532.

with necessary safeguards regarding the burden of proof required to fall under this latter category.'[4] Lockdowns, I contended, fell outside this narrow interpretation of Article 5.1(e) and so should be dealt with through derogation in accordance with the provisions of Article 15.

Hickman proffers several critiques of this argument and the purpose of this article is to respond to these critiques. His first critique pertains to my interpretation of Article 5; and his second critique focuses on my interpretation of Article 15. There is also a third critique that pertains to the function and effects of legal analysis that I shall also address. Before engaging with these critiques, however, it is worthwhile to establish common ground between the two competing perspectives. We both, I believe, are coming from the perspective of concern as to what is the best way to protect human rights during a pandemic while still allowing the states the necessary powers to respond to the threat. Neither of us is questioning the necessity of lockdowns; they are vital to controlling the pandemic and, as I argued elsewhere, an over-libertarian conception of human rights that would prevent a state responding effectively to a pandemic would not be a conception of human rights of any value whatsoever.[5] In essence, we are both on the same side. We also agree that lockdown powers should be conceptualised as 'deprivations' rather than 'restrictions' of liberty and so Article 5 ECHR is triggered.[6] The advantage of this is that it prevents similar measures from being introduced outside of a pandemic to deal with what I have termed 'less objective threats', thus facilitating the normalisation of the exception. Indeed, this was my primary motivation for authoring my original blogpost and subsequent article on Article 5 ECHR and lockdown. I will therefore not deal with the distinction between deprivation and restriction of liberty here and will instead assume that Article 5 is triggered. That stated, it is important to acknowledge that in *Terheş v Romania*, the European Court of Human Rights in chamber formation found an application to challenge Romania's lockdown provisions inadmissible on the grounds that a 'general lockdown' could not be deemed to constitute a deprivation of liberty.[7] As such, the Court has fallen at the first hurdle when resisting the normalisation of the exception.

LOCALISED OUTBREAKS, DEPRIVATION OF LIBERTY, AND ARTICLE 5

In my original article, I argued that Article 5.1(e) which allows for the 'lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants' should be interpreted narrowly to allow the deprivation of liberty only of those who are infected or may be infected with necessary safeguards regarding the burden of proof required to fall under this latter category.[8] Article 5.1(e) should not, I contended, be interpreted to allow for the deprivation of liberty of healthy persons or, in short, *everybody*, which is what many lockdown regimes across Europe in response to COVID-19 enabled. This

[4] Ibid 269.
[5] Alan Greene, *Emergency Powers in a Time of Pandemic* (Bristol: Bristol University Press, 2020) pp.42-3.
[6] Ibid 269; Hickman (n 1) 602
[7] App no 49933/20 judgment of 20 May 2021.
[8] Greene (n 3) 269.

lack of what I termed a 'person-specific safeguard' would have to be factored in to appraising the compatibility of a detention regime with Article 5. I argued that this lack of a person-specific safeguard:

> …is not a mere technical consideration; it constitutes a fundamental dispute as to the scope of state power permissible under Article 5.1(e): a restrictive, narrow understanding of Article 5.1(e) limited only to infected persons or persons who may be infected (with necessary safeguards regarding the burden of proof required to fall under this category); or an infinitely more expansive conception of Article 5.1(e) authorising the deprivation of liberty of everybody within a state's jurisdiction and with no burden of proof whatsoever required.[9]

Instead, lockdowns should be facilitated under international human rights law through derogation. By utilising Article 15 ECHR, any exceptional powers can be 'quarantined' to the exceptional conditions of a 'public emergency threatening the life of the nation'.[10] This will also re-enforce the temporary nature of these powers and, further, prevent their introduction from being used to justify similar powers in circumstances outside of the COVID-19 pandemic. The requirement under Article 15 that emergency measures are only permissible 'to the extent strictly required by the exigencies of the situation' and that non-derogable rights are unaffected by derogation ensures that human rights assessments such as a proportionality assessment can still be applied. The state is not afforded carte blanche to respond to the crisis as it sees fit. The quarantining potential of Article 15 demonstrates that derogations can also protect rather than simply harm human rights by ensuring higher human rights standards in situations outside of a public emergency threatening the life of the nation. We should not be assuaged by the lack of a formal declaration of emergency or derogation that the powers enacted are not exceptional. We must look at the substance, not just the form of these powers.

This argument has prompted a number of responses in this journal; notably, from Professor Kanstantsin Dzehtsiarou and Professor Tom Hickman.[11] I have responded to Dzehtsiarou's criticisms elsewhere.[12] Here, I will focus on Hickman's response. Firstly, Hickman contends that were Article 5.1(e) ECHR interpreted so as to preclude the deprivation of liberty of healthy persons, states' ability to respond to a deadly disease would be dramatically reduced 'in situations where there is no national emergency.'[13] To illustrate this, Hickman proposes the following scenario:

> Imagine an outbreak of a serious disease in a particular workplace or factory, where the authorities consider that it would be justified to confine all workers and their families to their homes for a temporary period (perhaps even a small community), but that if they do so there is no significant chance that the disease will spread further and no present concern that the disease will spread throughout the country or any region.

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[9] Ibid.

[10] Greene (n 3) 263.

[11] K Dzehtsiarou, 'Article 15 Derogations: Are They Really Necessary during the COVID-19 Pandemic?' [2020] E.H.R.L.R 259; Hickman (n 1).

[12] Alan Greene, 'On the Value of Derogations from the ECHR in Response to the COVID-19 Pandemic: A Rejoinder' [2020] E.H.R.L.R 526.

[13] Hickman (n 1) 603.

> This might be a local health emergency, but it would not be a national emergency threatening the life of the nation.[14]

This argument makes two claims: firstly, that such a scenario (what I will term the 'localised outbreak scenario') could not fall under my interpretation of Article 5.1(e); and secondly, that such an outbreak could not constitute a 'public emergency threatening the life of the nation' under Article 15 ECHR.

Localised outbreaks and Article 5.1(e)

The localised outbreak scenario raises a substantial number of issues that need to be addressed in order to assess whether it would be compatible with a narrow interpretation of Article 5.1(e). How do authorities come to the decision that it would be justified? Who are these authorities? How are these powers prescribed? Are there review mechanisms in place? What is the geographical scope of this order? For how long will persons be deprived of their liberty for? Is there a sanction—criminal or other— that may attach to a person who breaches this order? This is not an exhaustive list of potential questions that this scenario raises.

Importantly, my original argument was not that healthy persons could *never* be deprived of their liberty under Article 5.1(e); my argument instead was that Article 5.1(e) should only allow for the detention of 'infected persons or persons who may be infected with necessary safeguards regarding the burden of proof required to fall under this category'.[15] Consequently, persons that 'may be infected' could certainly include some healthy persons. Circumstantial evidence beyond a person showing symptoms could amount to relevant considerations that could be taken into account when assessing whether a person 'may be infected'; for instance, close proximity to somebody showing symptoms may be sufficient, as was the case in the UK during the COVID-19 pandemic where a stricter deprivation of liberty regime was required for persons who were a 'close personal contact' of somebody who had tested positive for COVID-19.[16] Consequently, Hickman's concerns that a narrow interpretation of Article 5.1(e) as being not practicable due to the feasibility or availability of testing, particularly in the early stages of an epidemic is unfounded.[17]

This question of relevant considerations requires us to circle back to the first question: how do authorities consider that it would be justified to deprive people of their liberty under Article 5.1(e)? If, for example, the power was defined in such a way as to give the authorities absolute discretion to assess whether people in a given area could be subject to such an order, then I would probably agree that such a power would not be compatible with Article 5.1(e). However, if the power were prescribed as the public authorities in question requiring 'reasonable cause to believe', that individuals in a

[14] Ibid 604.
[15] Greene (n 3) 269.
[16] See 'NHS Test and Trace: what to do if you are contacted' *Department of Health and Social Care* 27 May 2020 [last updated 20 May 2021] < https://www.gov.uk/guidance/nhs-test-and-trace-how-it-works> accessed 25 May 2021.
[17] Hickman (n 1) 602-603.

specific area should be deprived of their liberty, then it is quite possible that this construction may be compatible with Article 5.1(e), although much would depend upon how the regime as a whole is constructed.[18] This probability of such a power being compatible with Article 5.1.(e) is likely to increase as the burden of proof threshold also increases; e.g, moving from 'reasonable cause to believe' to 'balance of probabilities' to 'beyond all reasonable doubt.' Were the European Court of Human Rights to interpret Article 5.1(e) as requiring the latter, this *may* lend weight to Hickman's contention that this could hamper an effective response to an emerging threat to public health. Again, much would depend on how the rest of the scheme is constructed.

Another factor that will have to be evaluated is the purpose of the detention regime and the degree to which this affects the intrusiveness of the deprivation regime. In Hickman's localised outbreak scenario, we have a potential blurring of the distinction between 'lockdowns' and 'quarantines' and, consequently, whether such a scenario can fall under the ambit of Article 5.1(e). As I argue elsewhere:

> Essentially, quarantine consists of separating and isolating infected or suspected infected individuals from the healthy population. Often, this may occur at 'choke points'– points of entry into a state or area where flows of people converge– such as at ports airports and border crossings. Quarantines may also be established around certain designated infected areas, preventing people from entering or exiting these areas. What is key to a quarantine is this separation of infected or potentially infected persons from the rest of the population.[19]

Quarantines are thus an attempt to *contain* the spread of a disease, preventing it from taking root in a community. They often fall within what the World Health Organisation (WHO) terms the 'containment' stage of pandemic response where states are attempting to prevent the establishment of community transmission in the first place.[20] Quarantines are closer in formulation to paradigmatic situations of deprivation of liberty with much more restrictive deprivation regimes. This is offset to an extent by stricter safeguards and limitations built into the system. For this reason, quarantines almost certainly fall within the core of settled meaning of Article 5.1(e) although much would depend upon how this regime is constructed.[21] Lockdowns such as those seen during the COVID-19 pandemic in Europe, however, are different to quarantines in that they as a whole do not attempt to distinguish healthy persons from infected or possibly infected individuals. Instead, lockdowns are introduced, not to contain the spread of the disease but at what the WHO terms the 'mitigation stage' of pandemic responses—to temper the disease's spread once in-community transmission of the disease is evident and containment is no longer possible.

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[18] In *Engel v Netherlands* (1976) 1 E.H.R.R. 647, the Court stated that regard must be had to 'a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question'.

[19] Greene (n 5) 63.

[20] 'Managing Epidemics: Key Facts about Major Deadly Diseases' *World Health Organisation* (2018) < https://www.who.int/emergencies/diseases/managing-epidemics-interactive.pdf >accessed 25 May 2021, 28.

[21] S Wilson Star, 'Deprivations of Liberty: Beyond the Paradigm' [2019] *Public Law* 380.

Lockdowns are designed to 'flatten the curve' of a epidemic rather than preventing an epidemic from erupting in the first instance.[22] Lockdowns therefore:

> … are more porous than quarantines; they do not necessarily require confining people behind physical barriers. Lockdowns thus look different to classic or 'paradigmatic' models for depriving individuals of their liberty. Under this human rights lens, lockdown measures may appear less draconian than quarantines for the people subjected to them; however, in another way, they are stricter, applying to all persons rather than just specific persons.[23]

This is not to say that lockdowns cannot be introduced in the containment stage of a pandemic to prevent community transmission. Certainly, the form of lockdowns seen in Australia and New Zealand would amount to containment measures. For these lockdowns to be effective, they tend to be at the more draconian end of liberty deprivation and, again, stray more closely towards 'quarantines' rather than 'lockdowns'. The point of this discussion is that Hickman's localised outbreak scenario raises questions as to the severity of the deprivation of liberty which, in order to be effective, would have to look more like a quarantine than a lockdown. Such a scenario could potentially fall under the 'may be infected' category of persons I acknowledge could be detained under Article 5.1(e); however, again, this requires us to circle back to the aforementioned issues regarding the authorities making this decision, how they make such a decision and the relevant safeguards in place. Again, one single factor in the detention regime cannot be considered in isolation.

Another factor that will have to be evaluated is the geographical scope of the area in question affected by the localised outbreak scenario. In Hickman's scenario, we move from a 'workplace or factory' to 'perhaps even a small community'. We move from individuals within a specific building or complex of buildings to a 'small community' the size of which is unspecified. The geographical scope of a power has been relied upon heavily by the UK government when justifying certain police powers that can be exercised without reasonable suspicion. In *Gillan v UK*, the applicants challenged the compatibility of sections 44 and 45 of the Terrorism Act 2000 with Articles 8 and 5 ECHR.[24] These powers allowed for the stop and search without reasonable suspicion of individuals or vehicles in a specified place for the purpose 'of searching for articles of a kind which could be used in connection with terrorism'.[25] The authorisation of a specified area of place could be made by 'a police officer of a certain high rank, with the title of the rank depending upon the police force in question.[26] This authorisation could last for a maximum of 28 days and was subject to confirmation by the Secretary of State within 48 hours of it being authorised. A number of safeguards of geographical extent, duration, and authorisation were thus ostensibly built into the decision-making pertaining to the identification of a 'specified place.' Nevertheless, the London Metropolitan Police operated a 'rolling programme' of renewal of the

[22] Rachel P Walensky and Carlos del Rio, 'From Mitigation to Containment of the COVID-19 Pandemic: Putting the Sars-CoV-2 Genie Back in the Bottle' (2020) 323(19) *Jama Network* 1889,1889.
[23] Greene (n 19) 63-64.
[24] *Gillan and Quinton v UK* (2010) 50 E.H.R.R. 45.
[25] S44(1) TA 2000.
[26] S44(4) a-d)

specified place, essentially negating these safeguards. Unfortunately, the European Court of Human Rights did not pronounce upon whether Article 5 had been breached in this case as the Court decided it upon Article 8 instead—a point which shall be returned to below.[27] Indeed, the Court did not even rule upon the first order question of whether the applicants had been deprived of their liberty; i.e. whether Article 5 had even been interfered with.[28] Nevertheless, the Court's assessment of the Article 8 question reveals how geographical and temporal safeguards on authorised specified places' may be appraised under Article 5. The Court noted that:

> … many police force areas in the United Kingdom cover extensive regions with a concentrated population. The Metropolitan Police Force Area, where the applicants were stopped and searched, extends to all of Greater London. The failure of the temporal and geographical restrictions provided by Parliament to act as any real check on the issuing of authorisations by the executive are demonstrated by the fact that an authorisation for the Metropolitan Police District has been continuously renewed in a 'rolling programme' since the powers were first granted.[29]

The geographical extent and duration of an area where liberty can be deprived, coupled with the procedural safeguards on such a power are therefore integral to the compatibility of a power with the Convention. This geographical extent, in turn, affects the reasonableness by which one can consider the possibility that a person may be infected and thus that their deprivation of liberty is justified. By extension, this needs to be factored into the localised outbreak scenario under Article 5.1(e). This point is further underlined in *Beghal v UK*, where the UK Government sought to distinguish the power to examine and detain individuals at ports and airports under Schedule 7 of the Terrorism Act 2000 from *Gillian*.[30] The UK Government emphasised that Schedule 7 powers were applicable only to a limited category of people: namely, travellers in confined geographical areas.[31] The Supreme Court endorsed this submission although Lord Kerr's dissent is relevant here. Lord Kerr stressed the lack of safeguards such as an authorisation requirement, temporal limitation to schedule 7 and the lack of geographical limitation save that they were to be used at a port of entry into or exit from the UK. This, coupled with the arbitrary and discriminatory potential of Schedule 7 resulted in Lord Kerr not being persuaded that Schedule 7 was a 'necessary' interference with the applicants' rights under Article 5 and 8 ECHR.[32]

What *Beghal* and *Gillan* show is that much will depend upon how the power is drafted for it to be compatible with Article 5.1(e). The narrower this power is drafted and the greater the procedural safeguards, the more likely it will be found to be compatible. My concern pertaining to lockdown measures introduced across Europe was whether the lack of any geographical limitation (or broad geographical limitation) to these powers, coupled with the lack of person-specific criteria, and duration of detention, could be read as compatible with Article 5.1(e). Moreover, I was—and still am—

[27] Text to n 51 below.
[28] *Gillan* (n 24) [57].
[29] Ibid [81].
[30] *Beghal v UK* (2019) 69 E.H.R.R. 28.
[31] Ibid [20].
[32] *Beghal v DPP* [2015] UKSC 49 [104] (per Lord Kerr).

deeply concerned as to how such a precedent may be applied in circumstances outside of a pandemic and the degree to which these principles could migrate to other aspects of the Convention, thus watering down their protection. Instead, I advocate for the use of the quarantining potential of Article 15 ECHR so as such principles cannot be deployed in circumstances where a public emergency threatening the life of the nation has not been deemed to exist.

My response to Hickman therefore on whether a narrow interpretation of Article 5.1(e) could accommodate a localised outbreak scenario is that *it depends*; it depends on how the power is constructed and how it is used. This may not be a satisfactory answer to some, but detail and context matters with regards to understanding the nature and scope of human rights and measures that may potentially violate them. For this reason, thought experiments and hypothetical scenarios may not be the best method to use to extrapolate general insights pertaining to the scope of a right.[33] Further, to reiterate, I reject the contention that my preferred interpretation of Article 5.1(e) could *never* permit deprivation of liberty in the broad circumstances outlined above. As my original argument made clear, my interpretation of Article 5.1(e) would allow for the deprivation of liberty 'of those who are infected or may be infected with necessary safeguards regarding the burden of proof required to fall under this latter category.' Hickman has ignored this category of persons 'who may be infected' in his response.

WATERING DOWN ARTICLE 15

If a localised outbreak scenario was not compatible with my narrow reading of Article 5.1(e), the option may still be open for a state to use Article 15 to derogate from the Convention. Hickman is also critical of this, however:

> Although the European Court of Human Rights has extended the scope of the definition of a national emergency, it would nonetheless require further watering-down of that concept for it to be applicable to a situation in which an outbreak of disease is confined to a specific locality or to a situation in which the state itself claims that the threat to persons remains "low".[34]

This extract addresses my contention that a reading of the Article 15 jurisprudence of the European Court of Human Rights allows for localised emergencies. Hickman focuses on my reading of *Askoy v Turkey* where the Court upheld the existence of a public emergency threatening the life of the nation despite only part of Turkey's territory being subject to the derogation.[35] Notably, Hickman does not engage with my reading of *The Greek Case* or *A v UK* which I used in conjunction with *Askoy* to demonstrate how the Court has injected the concept of 'imminence' into its reading of

[33] See Danielle Celermajer, 'The tick-tick-ticking time bomb and erosion of human rights institutions' (2019) 24(4) *Angelaki* 87.
[34] Hickman (n 1) 603-604.
[35] *Askoy v Turkey* (1997) 23 E.H.R.R. 533.

Article 15, allowing an emergency to be declared when a crisis is imminent.[36] In this way, states can respond in anticipation of a crisis, preventing it from occurring in the first instance, rather than having to wait until the crisis actually erupts.

This concept of 'imminence' can certainly give rise to human rights concerns, particularly in national security emergencies where the imminence a threat may be contested or non-verifiable. Often, these 'emergencies' boil down to trust in the executive and that it is being sincere when it asserts that it has credible information that it cannot disclose for national security reasons that such a threat does in fact exist and that it is about to erupt. Hackles should certainly be up in the face of such assertions. However, pandemics such as the COVID-19 pandemic are different. The threat is not some amorphous, clandestine terrorist group. It is a virus, the existence of which is a much more objectively verifiable concept that, without intervention will spread exponentially in accordance mathematical models. Early reaction in response to an imminent threat with the potential to grow exponentially therefore is of paramount importance in response to a possible viral epidemic. However, it is also the case that legal and political modes of accountability for such decisions are better suited to scrutinising such decisions in contrast to national security crises. There is no privileged national security information that cannot be disclosed to the legislature or judiciary to justify executive decision-making. The COVID-19 pandemic has also shown us that legislatures and the courts can continue to function during a pandemic, notwithstanding social-distancing rules. It is for this reason that I have argued elsewhere against deference towards the executive during a pandemic.[37] Consequently, the risks from a human rights perspective of an executive using Article 15 in response to a virus, the threat of which has been exaggerated or even manufactured is much less of a concern than in a national security emergency. Coupled with the wide margin of appreciation the European Court of Human Rights affords to contracting parties when assessing whether a public emergency threatening the life of the nation exists, Article 15 is likely to be able to accommodate a localised outbreak scenario.

However, this serves to raise the further question as to whether states *should* use Article 15 in this manner. Here, we reach the normative dimension of Hickman's argument where he contends that to deploy Article 15 in such a manner would be to 'require further watering-down of that concept' [a public emergency threatening the life of the nation]. The dangers of ratcheting up a threat so as to constitute an emergency is one that should not be overlooked. From organised crime to financial crises, recent decades have seen an increasing array of phenomena described as emergencies— be it de facto or de jure— and responded to by states in an emergency fashion.[38] Concern over the breadth of a definition of emergency is similar to my concern regarding the stretching of the meaning of other provisions of the Convention to accommodate exceptional responses to the pandemic. On this point, however,

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[36] Greene (n 3) 275; *The Greek Case,* Commission's report of 5 November 1969, Yearbook 12; *A v UK* (2009) 49 E.H.R.R. 29.

[37] Greene (n 5) 117.

[38] Alan Greene, *Permanent States of Emergency and the Rule of Law: Constitutions in an Age of Crisis* (Oxford: Hart Publishing, 2018) pp.54-61.

facilitating early intervention to prevent an epidemic would not amount to a 'watering down' of the concept of a 'public emergency threatening the life of the nation'. What matters is not just the situation at the time the public emergency threatening the life of the nation is declared; what is also key is the magnitude of the crisis that may emerge without the state taking the necessary response it wishes to enable through its declaration of emergency. Again, this is reflected in the aforementioned concept of 'imminence' acknowledged in *The Greek Case* and *A v UK* but not addressed by Hickman. Furthermore, the magnitude of a threat facing the state, coupled with the urgency of the response required are two key factors that are relevant in assessing whether a phenomenon constitutes a 'public emergency threatening the life of the nation.[39] Here, the threat from a virus that spreads similar to COVID-19 far exceeds the threat to life posed by terrorism. At the time of writing, the official death toll from COVID-19 within 28 days of a positive test in the UK as a whole is almost 130,000 people.[40] From 13-22 January 2021, over 1,200 deaths within 28 days of a positive COVID-19 test were recorded *each day*.[41] Meanwhile, COVID-19 is mentioned on over 152,000 death certificates.[42] To put these figures in perspective relative to other threats that have been considered to constitute a 'public emergency threatening the life of the nation', 92 terrorism-related deaths were recorded in Britain from April 2003 to March 2019.[43] This total does not include Northern Ireland whose figures for terrorism-related deaths are recorded separately. That stated, COVID-19 deaths on the island of Ireland as a whole also exceed the total number of approximately 3,623 deaths that occurred during the 'The Troubles' from 1969-2001 in both Ireland and the UK.[44] The United States also saw COVID-19-related recorded deaths in a single day exceeding the recorded number of deaths from the 9/11 attacks.[45] Undeniably, the effects of terrorism are not solely limited to the body count but also to other injuries and harm inflicted on people, and the damage caused to the legitimacy of state institutions;[46] however, this also true of a pandemic. A catastrophic handling of a pandemic and

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[39] Ibid 1.

[40] 'Coronavirus (COVID-19) in the UK: Deaths in United Kingdom' *Gov.UK* < https://coronavirus.data.gov.uk/details/deaths> accessed 25 May 2021).

[41] ibid

[42] Ibid.

[43] See Grahame Allen and Esme Kirk-Wade, 'Terrorism in Great Britain: The statistics' House of Commons Library Briefing Paper No CBP7613) (26 March 2020) < https://researchbriefings.files.parliament.uk/documents/CBP-7613/CBP-7613.pdf> accessed 25 May 2021.

[44] Michael McKeown, ' Post-Mortem: An examination of the patterns of politically associated violence in Northern Ireland during the years 1969-2001 as reflected in the fatality figures for those years' *CAIN: Conflict Archive on the Internet* (2001; revised 2009) <http://cain.ulst.ac.uk/victims/mckeown/mckeown01.pdf> accessed 25 May 2021, 6.

[45] Madeline Holcombe and Dakin And one, 'The US reported more than 4,000 COVID-19 deaths in one day for the first time ever' *CNN* (8 January 2021) < https://edition.cnn.com/2021/01/07/health/us-coronavirus-thursday/index.html> accessed 14 May 2021; Ankita Rao, 'US records more than 5,000 Covid deaths in single day after data audit' *The Guardian* (5 February 2021) < https://www.theguardian.com/us-news/2021/feb/05/us-covid-coronavirus-death-toll> accessed 14 May 2021.

[46] See Ehud Sprinzak, 'The Process of Delegitimization: Towards a Linkage Theory of Political Terrorism' (1991) 3(1) *Terrorism and Political Violence* 50.

resulting loss of life can result in profound questions regarding the legitimacy of the state and its ability, in blunt Hobbesian terms, to ensure the security of the people.[47]

The threat posed by a pandemic similar to COVID-19 therefore is several orders of magnitude greater than that posed by terrorism. To permit derogations in order to prevent an imminent eruption of an epidemic is not to water down the meaning of a 'public emergency threatening the life of the nation'. As I argued in my original article, the COVID-19 pandemic is the closest we have come to an 'ideal state of emergency'.[48] It is an event that should lie clearly within the core of settled meaning regarding what constitutes a 'public emergency threatening the life of the nation'. Including within this the facilitation of early action to prevent an imminent epidemic does not constitute the watering down of Article 15. Indeed, our experience of exponential growth of infections from the COVID-19 pandemic serves to underlie the importance of such early intervention. This can be contrasted with the threat to terrorism where causal connection between the lack of state intervention and a subsequent terrorist attack is not clear-cut.

The quarantining effect of Article 15

Even if states were to derogate using Article 15 in response to a pandemic, Hickman further questions whether this would in fact have any quarantining effect as the Court would still have to

> …consider the scope of art.5(1)(e) and pronounce upon whether there is a violation of that right in the context of lockdown measures even if a state has derogated from the ECHR.[49]

For this reason, Hickman questions whether the European Court of Human Rights' approach to Article 15 is consistent with the derogation model. Certainly, the Court has acknowledged this approach of dealing with the scope of the Convention right in question before turning to the Article 15 questions. In *A v UK* for example, the Grand Chamber stated that:

> The Court must first ascertain whether the applicants' detention was permissible under Article 5.1(f), because if that sub-paragraph does provide a defence to the complaints under Article 5.1 I, it will not be necessary to determine whether or not the derogation was valid.[50]

The difficulty with this approach, however, is that the opposite is also true. If the Court were to ascertain that a public emergency threatening the life of the nation were to exist and, further, that the measures taken were proportionate to the exigencies of the situation, there would be no need to address the hypothetical question as to whether the measures were permissible under the ordinary ambit of Article 5. In essence, this

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[47] Thomas Hobbes, *Leviathan* (first published 16511; Richard Tuck (ed) Cambridge: CUP, 1996) pp.117-120.
[48] Greene (n 3) 272.
[49] Hickman (n 1) 607.
[50] *A v UK* (n 36 [161].

approach avoids the Court having to pronounce upon a moot point. There is therefore no logical reason why the Court *must* consider the extent of Article 5 first before it considers the Article 15 issues and the Court's reasoning above is begging the question to an extent.

By approaching the Article 15 question first, the Court would be keeping its powder dry, reserving its judgment for a case where the scope of Article 5.1(e) is a live issue. Even where the scope of a right is a live issue, the Court has a track record of avoiding pronouncing upon the scope of a Convention right if at all possible. This is particularly notable in the context of Article 5, with courts—not just the European Court of Human Rights but domestic courts also— often going to exceptional lengths to avoid doing so. This may take the form of the Court deciding a case upon one Convention provision over another. In *Gillan*, for example, the European Court of Human Rights decided the case on Article 8 grounds rather than Article 5.[51] Finding a breach of Article 8, the Court stated that there was no reason to consider whether there was a breach of Article 5; however, there was also no logical reason given as to why the Court decided the Article 8 question before the Article 5 question and not vice versa. A similar approach was taken by the Court in *Beghal*, finding a breach of Article 8 but then refusing to rule upon Article 5 issue.[52] In contrast, the majority of the UK Supreme Court in *Beghal* did not avoid the Article 5 question as it had found no breach of Article 8; however, it also found no breach of Article 5.[53] Nevertheless, its approach to the question as to the scope of Article 5 is illuminating. Despite tackling the Article 5 issue head-on, the majority judgment was constructed in such a way as to be unclear as to whether Article 5 was even triggered:

> Whether that period [the period of time the applicant was in custody'] was sufficient to constitute a deprivation of liberty for the purposes of Article 5 is a question to which the answer is not clear… in the present case, the Secretary of State, as intervener, disputed that the appellant had suffered a deprivation of liberty. However, in the court below, the Crown conceded that she had'.[54]

The Supreme Court then went on to consider whether detention—if there was any—would be proportionate:

> To the extent that there was any deprivation of liberty in the present case, it seems clear that it was for no longer than was necessary for the completion of the process. There was no requirement to attend a police station. Accordingly, there was in this case no breach of article 5.[55]

The only thing clear from this judgment is that the Supreme Court did not definitively answer whether the applicant was deprived of her liberty. However, if she was, it was 'for no longer than was necessary for the completion of the process.'[56] The UK

[51] *Gillan* (n 24).
[52] *Beghal* (n 30)
[53] *Beghal* (n 32).
[54] Ibid [53]
[55] Ibid [56]
[56] Ibid [56]

Supreme Court, like the subsequent European Court of Human Rights judgment, thus side-stepped the Article 5 question, albeit in a different way.

Consequently, even if the Court were to approach the Article 5.1(e) question in the first instance before considering the Article 15 issues, *Beghal* demonstrates that there are ways in which a judgment can be constructed so as to avoid ruling on certain issues. This point is particularly pronounced in instances where the issue in question is moot, as would be the case regarding the scope of Article 5.1(e) in a situation where a derogation is in effect. It would be perfectly acceptable for the Court to state similar to *Beghal* that 'having regard to the findings relating to Article 15, the Court considers that it is not necessary to examine where, in this case, there has been a violation of Article 5 had there been no derogation in effect' or similar to *Gillan*, 'In the event, however, the Court is not required finally to determine this question as to the scope of Article 5.1(e) in the light of its findings below in connection with Article 15 of the Convention.' In this way, the quarantining effect of Article 15 could be ensured.

Considering the Article 15 questions first would also be in line with an understanding of the Convention as a floor and not a ceiling of rights protection across the contracting parties. Rather than pronounce upon the compatibility of a measure with Article 5.1(e) when a derogation is in effect, the Court could simply state that it acknowledges the Contracting Party's own assessment that the measures in question were not compatible with the ordinary scope of Article 5.1(e) as it operates in that state. Here, the margin of appreciation would operate to *increase* rather than decrease rights protection in the case in question. In sum, there is no logical reason why the Court should approach the Article 5 question before the Article 15 question; conversely, there are strong reasons why it should address the Article 15 question first. Furthermore, even if the Court were to address the Article 5 question first, there are ways in which the Court could creatively construct its judgment and avoid pronouncing definitively on a question that would not be a live issue in the case before it.

TO DEROGATE OR NOT: LAWYERS AS METEOROLOGISTS

Hickman's final criticism of my approach in favour of the use of Article 15 is that:

> …Greene's argument appears to proceed on the assumption that states are free to choose whether to derogate or not whenever the conditions amount to a national emergency arise.[57]

He continues:

> The idea that states observing their obligations as articulated by the Court in *Brannigan* could properly tailor their lockdown laws to be compatible with ECHR rights and conclude that they are so compatible but *nonetheless derogate from those rights* would run counter to the approach mandated in that case.[58]

[57] Hickman (n 1) 605.
[58] Ibid 606.

If that were my argument, then Hickman would be correct to criticise me. Indeed, I would criticise myself, not just because it would jar with the pre-existing case law on Article 15 but because it would also constitute a stunning volte face on my part. As I have stated previously, I found myself at the outset of the COVID-19 pandemic of being in the very strange situation of arguing in favour of the use of derogations.[59] My research on emergency powers has always taken a sceptical approach towards executive claims regarding the existence of an emergency. This approach, far from assuming 'that states are free whether to derogate or not' has resulted in me arguing instead for courts to scrutinise much more vociferously the first limb of Article 15 and whether a 'public emergency threatening the life of the nation' exists.[60] Consequently, I argue precisely the opposite of Hickman's interpretation of my position. States are not free to pick and choose whether or not to derogate and when they do, the question as to the existence of a public emergency threatening the life of the nation is one that domestic courts and the European Court of Human Rights must scrutinise. Hickman's representation of my position is also completely inconsistent with my previous work where I have argued that the key to emergencies are not necessarily the phenomena that tigger them but the response that the state wishes to enact to confront the threat:

> Despite the variations in the phenomena that can trigger a state of emergency, emergency provisions all agree on the apparent necessity of the response. The entire purpose of declaring a state of emergency is to enable powers not ordinarily permissible under the constraints of the constitution. It is this necessity of exceptionality that identifies when a phenomenon crosses the 'threat severity threshold' thus warranting the declaration of a state of emergency.[61]

The link between phenomenon and response is fundamental to my analysis of states of emergency and one that I have made in almost every publication of mine on emergency powers; to suggest therefore that I contend that a state could derogate even though derogation would not be necessary to enable a response is completely inconsistent with this. Hickman thus misrepresents my argument as to the necessity of Article 15. I am not contending, as Hickman suggests that I am, that states 'could properly tailor their lockdown laws to be compatible with ECHR rights and conclude that they are so compatible but nonetheless derogate from those rights'.[62] What is key here is Hickman's assumption that states 'could properly tailor their lockdown laws to be compatible with ECHR rights'. How can states do this is in the absence of any clear case law as to the scope of Article 5.1(e) or the scope of other rights pertaining to their application in a pandemic? No lawyer can definitively advise a government that the unprecedented lockdown measures they introduced are compatible with Article 5.1(e) because, quite simply, until we get a definitive ruling on the scope of Article 5.1(e) from the European Court of Human Rights, we cannot know. We are thus in the penumbra of possible meanings as to the scope of Article 5.1(e).[63] Likewise, no lawyer can confidently advise a government that blanket closures of places of worship are

[59] Greene (n 12) 526.
[60] See Alan Greene 'Separating Normalcy from Emergency: The Jurisprudence of Article 15 of the European Convention on Human Rights' (2011) 12(10) *German Law Journal* 1764.
[61] Greene (n 38) 19.
[62] Hickman (n 1)606.
[63] HLA Hart, 'Positivism and the Separation of Law and Morals' (1958) 71 *Harvard Law Review* 593, 607.

compatible the right to freedom of thought, conscient and religion under Article 9, or forced closures of businesses for months are compatible with the protection of property under Article 1 of Protocol 1.

In these circumstances where we lie in the penumbra of possible meanings, contrary to what the legal realists may insist, the lawyer is not a weather forecaster, trying to predict what a court *might* decide.[64] A weather forecaster's prediction has no impact on whether or not it will rain. Law, however, is not simply a descriptive exercise and it is the *prescriptive* dimension of law that underlies my analysis of Article 5.1(e) and my contention that derogations are preferable to accommodating COVID-19 powers under the limitations outlined in Article 5.1 ECHR. Legal analysis must be acutely aware of what law ought to be and not simply focus on predicting what judges may say what the law is. This is particularly heightened when the law is vague and there is disagreement as to what the law ought to be and how the law ought to be interpreted. This analysis can, in turn, can have an impact on what the judge in question may decide. This is in stark contrast to the weather forecaster who cannot influence whether it will rain or not with their prediction. Hickman is himself acutely aware of this potential of legal analysis to influence the outcome of a case given his prominent work on the question of Parliament's role in triggering Article 50 of the Lisbon Treaty.[65] Court may thus be the ultimate arbiter as to the scope of a legal norm but they do not make this decision in a vacuum. Descriptive analyses of the law must nevertheless be aware of their prescriptive consequences, particularly when this description is being carried out by influential voices.

My position therefore is that the meaning of Article 5.1(e) is vague and contested. My preferred interpretation is that it *should* be given a narrow reading, permitting the deprivation of liberty of infected persons or persons who may be infected with the necessary safeguards in place for assessing whether a person falls within this latter group. Many lockdown regimes across Europe at particular moments in time during the pandemic have not met this standard owing to their lack of person-specific limitations, their geographical extent, and the lack of procedural and other checks on these powers. In order to introduce these measures that are required to respond to an exceptional threat, states *should* derogate from the ECHR using Article 15. At no point have I argued that states are free to pick and choose whether or not to derogate.

CONCLUSIONS

Like Dzhetsiarou who points to the 'symbolic and political cost' of derogating, Hickman stresses the 'real and substantial political disadvantages to a state doing

[64] For the view of the prediction theory of law, see Oliver Wendell Holmes, 'The Path of the Law' (1897) 10 *Harvard Law Review* 457.

[65] Nick Barber, Tom Hickman, and Jeff King, 'Pulling the Article 50 Trigger': Parliament's Indispensable Role' *UK Constitutional Law Blog* (27 June 2016) < https://ukconstitutionallaw.org/2016/06/27/nick-barber-tom-hickman-and-jeff-king-pulling-the-article-50-trigger-parliaments-indispensable-role/ > accessed 17 June 2021.

so'.[66] This argument as to the political signal sent by derogating is one I have addressed elsewhere on several occasions:

> '…by worrying about the 'political impact' of a declaration of a state of emergency under Article 15, we overplay the actual political impact of such a declaration while ignoring or downplaying the negative legal consequences of such a lack of declaration. Law's ability to shape and frame political debate is questionable; rather, it is the case that the opposite occurs and how the political branches—in particular, the executive—frame an event as a crisis, dictates how others view and interact with this event.[67] Political use of the term emergency therefore will affect both public perception of the coronavirus pandemic and judicial scrutiny of such powers, regardless of whether a de jure state of emergency has been declared.[68]

With regards to the practical and legal complications that derogation may cause, Hickman's analysis here is centred on the UK's domestic legal response to the pandemic:

> if the court concludes that a derogation is valid it will not go on to test domestic measures against the ECHR rights. This has two undesirable consequences. First, it means that the courts will be applying a more deferential approach to domestic measures under art.15 than they would adopt if they were applying the ECHR rights themselves, unless they determined that a derogation was wholly or partly invalid. Secondly, since each and every domestic challenge would need to raise art.15 as the first and primary issue to be determined, the additional complexity that would be involved in courts judicially reviewing coronavirus laws would be considerable, particularly given that the derogation would not be limited to a specific law as it was in 2001 but would relate to a changing corpus of coronavirus law.

On the first point, this is essentially the contention that courts are more deferential when formal declarations of emergency are in effect than in de facto emergencies. I disagree and have argued extensively in my initial argument as to why this is not the case.[69] As to the second point, I also disagree that additional legal complexity is a sufficiently strong argument to justify broader accommodation of exceptional powers under the ordinary ambit of Convention rights which is essentially what this argument amounts to. Further, domestic difficulties concerning derogation should not affect the interpretation of the Convention by the European Court of Human Rights as these are not factors applicable across all contracting parties. Again, Hickman's article expressly focuses on the UK's decision not to derogate and so his criticisms in this regard are exclusive to the UK. It should also be noted that in *Ireland v UK*, the European Court of Human Rights allowed for a delayed derogation after the UK introduced internment without trial in order to prevent suspects from having notice of these powers being enacted and escaping.[70] Derogation therefore can be ex-post

[66] Dzehtsiarou (n 11) 371; Hickman (n 1) 607.
[67] O. Gross and F. Ní Aoláin, 'The Rhetoric of War: Words, Conflict, and Categorisation Post-9/11 (2014) 24 *Cornell Journal of Law and Public Policy* 241, 247
[68] Greene (n 3) 273; Greene (n 5) 29-33.
[69] Greene (n 3) 274.
[70] *eland v United Kingdom* (1960–61) 3 ECHR (Ser.A).

facto if there is good reason for this delay, thus mitigating substantially any possibility of the requirement to use Article 15 ECHR hampering an emergency response.

Notably, only Estonia and Georgia expressly derogated from Article 5 ECHR in response to the COVID-19 pandemic, suggesting that all other Contracting Parties believed their lockdown provisions to be compatible with the ordinary ambit of Article 5.[71] This suggests that most states believe that their lockdown regimes either did not amount to deprivation of liberty, or that if they did, they were justified under Article 5.1(e). This perceived consensus, however, should not be taken to mean that their interpretation of Article 5.1(e) and the compatibility of their response with Article 5 is correct. Arguably, the most clear-cut breach of Article 5.1(e) was Spain's detention of children within their home for six weeks.[72] The broadest possible reading of Article 5.1(e) should not be deployed to accommodate such measures and Spain should have derogated using Article 15. Even with such derogation in effect, it would still be questionable whether such a blanket measure was 'proportionate to the exigencies of the situation.' Article 15 therefore does not bestow on states carte blanche to respond to an emergency as they see fit. Human rights still matter.[73]

Ultimately, Hickman is correct that I am motivated by my concern over the normalisation of the exception and it is this concern that influences both my interpretation of Article 5.1(e) and my contention that derogations are the preferred method for confronting the pandemic. This concern has been heightened by the Court's admissibility decision in *Terheş v Romania.*[74] Finding that general lockdowns do not even trigger Article 5 is the worst possible outcome for those concerned about the normalisation of the exception as it means that Article 5 is inapplicable to similar measures even if they are deployed outside of a pandemic. Moreover, neither the UK nor Turkey has ratified Article 2 of Protocol for which contains the qualified right of freedom of movement which would further limit the potential for the Convention to check lockdown measures deployed outside of the pandemic. Other rights are certainly affected by lockdowns or curfews such as freedom of assembly under Article 11 or, the right to privacy under Article 8; however, using Article 8 in particular could feed criticism of 'rights inflation' levied at the Court who often point to Article 8 as a textbook example of where its meaning has expanded far beyond what the drafters originally intended.[75] Only time will tell whether the European Court of Human Rights avoids normalising the exceptional pandemic response through interpretation of the ordinary ambit of Convention provisions, rather than requiring states to derogate using Article 15; however, the fact that one of its chambers has fallen at the

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[71] Ibid. It is also possible to infer that Armenia derogated from Article 5 although this was not made explicit in the notification it lodged with the Council of Europe.

[72] EU Fundamental Rights Agency, 'Country Study for Spain - Coronavirus pandemic in the EU – Fundamental Rights Implications' (4 May 2020) < https://fra.europa.eu/sites/default/files/fra_uploads/es_report_on_coronavirus_pandemic-_may_2020.pdf> accessed 25 May 2021, 3.

[73] Greene (n 3) 265-266.

[74] *Terheş* (n 7).

[75] Jonathan Sumption, 'The Reith Lectures 2019: Law and the Decline of Politics Lecture 3' *BBC Radio 4* (4 June 2019) < http://downloads.bbc.co.uk/radio4/reith2019/Reith_2019_Sumption_lecture_3.pdf> accessed 25 May 2021.

first hurdle is deeply concerning. I am still convinced that the best approach to confront the pandemic is through derogations. Interpreting the Convention in this manner does not restrict a state's ability to respond to an emerging epidemic, nor is it to water down the concept of emergency. It is the best way to ensure that these exceptional powers are quarantined to exceptional situations.

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[i] Senior Lecturer, Birmingham Law School.