Derogating from the European Convention on Human Rights in response to the Coronavirus pandemic

Greene, Alan

DEROGATING FROM THE EUROPEAN CONVENTION ON HUMAN RIGHTS IN RESPONSE TO THE CORONAVIRUS PANDEMIC: IF NOT NOW, WHEN?

Alan Greene[i]

INTRODUCTION

The 2020 pandemic caused by Sars-Cov-2 (hereinafter, the coronavirus pandemic), has triggered an array of legal responses across Council of Europe states. Many measures taken by states to slow the spread of the virus by 'flattening the curve' and enforce social distancing are similar; that stated, one key fault-line opening up is on the question of whether to derogate from the ECHR under Article 15.[1] The purpose of this article is to demonstrate why Article 15 ECHR should be used to accommodate what have become known as 'lockdown' powers necessary to confront the coronavirus pandemic. This is the closest we shall get to an 'ideal state of emergency'—the very situation it was designed for.[2] In contrast, far from protecting human rights, failure to use Article 15 ECHR risks normalising exceptional powers and permanently recalibrating human rights protections downwards.

Part 1 outlines why the work of Carl Schmitt has distorted perceptions of states of emergency, emphasising their antagonistic relation to the extant legal order while ignoring their potential to protect legal norms in a time of normalcy by quarantining exceptional powers to exceptional situations. Part 2 then discusses illustrative examples of rights that may be affected by lockdown measures, arguing that ambiguity as to the scope of the right to liberty in Article 5 ECHR should be resolved in favour of as narrow an interpretation of Article 5 as possible, conceptualising lockdown measures as deprivations of liberty falling outside the scope of Article 5.1(e)—deprivation of liberty to prevent the spread of infectious diseases. Part 3 then addresses some of the critiques of derogations, arguing that the real risk of emergency powers is their propensity to become permanent. This risk is amplified by failure to declare a de jure state of emergency. Ultimately, this article asks: if not now, when?

1. ARTICLE 15 AND THE SCHMITTIAN SPECTRE

It is useful to set out Article 15 in its entirety:

> 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. 14 15
>
> 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.

[1] Article 15, Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended).

[2] A. Greene *Permanent States of Emergency and the Rule of Law: Constitutions in an Age of Crisis* (Oxford: Hart Publishing, 2018) Ch. 1.

> 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.

Article 15 is an archetypal emergency provision. It is largely similar to Article 4 of the International Covenant on Civil and Political Rights (ICCPR) and Article 27 of the American Convention on Human Rights.[3] Many constitutions also make similar provisions for the declaration of a state of emergency.[4] Article 15 thus allows states to take measures that would not be permitted under the ordinary parameters of the Convention and in this regard, the dangers that states of emergency pose for human rights is obvious. Such emergencies should be clearly and ex ante declared, with the obligation to notify and inform international treaty monitoring bodies constituting an important constraint on exceptional powers.[5] Consequently, the UN High Commissioner for Human Rights has stated that the declaration of a state of emergency is 'essential for the maintenance of the principles of legality and rule of law at times when they are most needed.'[6] The importance of a public declaration of emergency has been specifically reasserted in the context of the coronavirus pandemic with a number of UN human rights experts, stating that:

> 'The use of emergency powers must be publicly declared and should be notified to the relevant treaty bodies when fundamental rights including movement, family life and assembly are being significantly limited.'[7]

In contrast, the African Charter on Human and Peoples' Rights, contains no derogation clause. Neither does the US Constitution, despite—or perhaps because of—the Founding Fathers' familiarity with the constitution of the Roman Republic. These documents instead take what Oren Gross terms a 'business as usual' approach to emergency powers.[8] This is encapsulated by US Supreme Court stating in *Ex Parte Milligan* that 'the same law applies in war as in peace'.[9] Ostensibly, it would appear that a business as usual model would provide a better protection for human rights

---

[3] The principle difference between Article 15.1 ECHR and Article 4 ICCPR is that Article 4 ICCPR does not expressly mention 'war'.

[4] See A. Greene 'Types and Effects of Emergency' in *Max Planck Encyclopaedia of Comparative Constitutional Law* (Oxford: Oxford University Press, 2019).

[5] R. Lillich, 'The Paris Minimum Standards of Human Rights Norms in a State of Emergency' (1985) 79 *American Journal of International Law* 1072, 1073; 'The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights' (1985) 7(1) *Human Rights Quarterly* 3, 7.

[6] UN Human Rights Committee (HRC), 'CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency', (31 August 2001), *CCPR/C/21/Rev.1/Add.11*, *https://www.refworld.org/docid/453883fd1f.html* [accessed 27 April 2020]

[7] 'COVID-19: States should not abuse emergency measures to suppress human rights—UN Experts' (16 March 2020) *United Nations Human Rights: Office of the High Commissioner*' https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25722&LangID=E [Accessed 24 April 2020]

[8] O. Gross, 'Chaos and Rules: Should Responses to Violent Crises always be Constitutional?' (2003) 112(5) *Yale Law Journal* 1011, 1042-1053

[9] (1866) 1 US (4 Wall) 2, 120-21.

and other norms than an express clause for emergency powers. In the context of the coronavirus pandemic, Martin Scheinen refers to this idea of handling crises 'through normally applicable powers and procedures and insist[ing] on full compliance with human rights, even if introducing new necessary and proportionate restrictions upon human rights on the basis of a pressing social need' as 'the principle of normalcy.'[10] Scheinen argues that this is due to the fact that emergency powers 'carry a grave risk of being abused'. Scheinen's concerns have also been echoed by a number of MEPs.[11]

However, while it would appear that 'business as usual' provides a greater protection of human rights and other legal norms given the express insistence that there is no exception, history demonstrates that far from raising human rights in a time of emergency, business as usual models result in the existing legal parameters of normalcy being recalibrated downwards and the measures that would previously have been conceptualised as being exceptional and unlawful, being reinterpreted as lawful. Thus, in *Re Korematsu*, the US Supreme Court found the detention of US Citizens of Japanese descent for the duration of World War II to be perfectly compatible with the US Constitution and its Bill of Rights.[12] In a famous dissent, Robert Jackson J excoriated the majority for creating a principle that:

> 'lies about like a loaded weapon, ready for the hand of any authority that can bring forward a plausible claim of an urgent need. Every repetition imbeds that principle more deeply in our law and thinking and expands it to new purposes.'[13]

Other egregious constitutional abuses can also arise as a result of insistence on business as usual. The USA's constitutional silence on emergency powers did not preclude Abraham Lincoln from unconstitutionally enlarging the size of the army and navy, calling forth the militia, blocking southern ports, all without ex ante congressional approval.[14] That it was 'honest Abe' who acted as an unlawful dictator at the outbreak of the US Civil War, should be of small comfort to constitutionalists.

Of course, ex ante declarations of a state of emergency also have a long history of abuse. The most infamous example of this is undoubtedly the use of Article 48 of the Weimar Constitution which ultimately paved the way for Hitler's ascension to power following the Enabling Act enacted in the immediate aftermath of the Reichstag fire. This abuse of Article 48 was given legal legitimation by Carl Schmitt—the pre-eminent scholar on states of exception and once referred to as the 'Crown Jurist of the Third Reich'.[15] Schmitt's analysis was influenced by his own theory of states of exception,

---

[10] M. Scheinen, 'Covid-19 Symposium: To Derogate or Not to Derogate?' (6 April 2020) *Opino Juris,* https://opiniojuris.org/2020/04/06/covid-19-symposium-to-derogate-or-not-to-derogate/ [Accessed 8 April 2020]

[11] V. Makszimov, 'Coronavirus derogations from Human Rights Send the Wrong Signal, say MEPS' (24 March 2020) *Euractiv.com,* https://www.euractiv.com/section/justice-home-affairs/news/coronavirus-derogations-from-human-rights-send-wrong-signal-say-meps/ [Accessed 9 April 2020]

[12] (1944) 323 US 214.

[13] ibid p. 246.

[14] See C. Rossiter, *Constitutional Dictatorship: Crisis Government in the Modern Democracies* (London: Transaction Publishers, 2002) pp.224-30.

[15] A. Kalyvas and J. Müller, 'Symposium - Carl Schmitt: Legacy and Prospects - An International Conference in New York City: Introduction' (2000) 21 (5) *Cardozo Law Review* 1.

derived from his diatribe against liberal constitutionalism.[16] Schmitt proffered an expansive reading of Article 48, arguing that the express limitations it contained were rendered meaningless by the scope of implied powers that would be necessary to make the Article effective.[17] There is some debate as to whether Schmitt sought to facilitate the destruction of liberalism and democracy, or whether he was simply highlighting their defects in a constructive manner during the political turbulence of the short-lived and ill-fated Weimar Republic.[18] The case that his embrace of the Third Reich was unenthusiastic and simply a matter of self-preservation is considerably weakened, however, by articles of his celebrating the infamous Night of the Long Knifes and retrospective legalisation of murder.[19] Regardless, of Schmitt's intentions, his theory of emergency powers is one of the most influential in the field. Indeed, its potency and consequences for a constitutional order where all state power is exercised through law is precisely why those defending such an order must engage and respond to the Schmittian Challenge.

For Schmitt, states of emergency or exception constitute 'zones beyond law'. In such crises, liberal constitutions are incapable of saving themselves. Instead, a power not prescribed by law reveals itself. This power is the same power that was exercised in order to create the stability necessary to establish the legal order in the first instance by distinguishing friend from enemy. This power reveals itself again in a time of crisis to restore stability and ultimately, it is from this that Schmitt gets his famous definition of sovereignty: Sovereign is he who decides on the exception.[20] Schmitt's principal objective was not, however, to articulate a theory of emergency powers per se; rather, his goal ultimately was to proffer a critique of liberalism and parliamentary democracy. For Schmitt, liberalism was incapable of creating the stability necessary upon which a legal order could be founded as liberalism was incapable of making the clear-cut distinction between friend and enemy; nor could liberalism defend itself when stability within the state broke down, again because of its unwillingness and inability to distinguish friend from enemy. Liberalism, according to Schmitt is 'the enemy of enemies'; nevertheless, the liberal legal order is entirely dependent upon this distinction between friend and enemy as that decision was necessarily exercised in order to establish the legal order in the first instance.[21] According to Schmitt, liberal legal theorists such as Hans Kelsen, Schmitt's principal interlocutor, can only contend that the state is synonymous with the legal order by establishing their theory *after* the

[16] See C. Schmitt, *Political Theology* trans G Schwab (Chicago: University of Chicago Press, 2007) p.1.
[17] C. Schmitt, Dictatorship, trans Michael Hoelzl and Graham Ward (Cambridge: Polity Press, 2014) pp.183–86; M. de Wilde, 'the State of emergency in the Weimar Republic: Legal Disputes over Article 48 of the Weimar Constitution (2010) 78 *Legal History Review* 135, 141.
[18] O.Gross, 'The Normless and Exceptionless Exception: Carl Schmitt's Theory of Emergency Powers and the "Norm-Exception" Dichotomy' (2000) 21 (5) *Cardozo Law Review* 1825
[19] D. Vagts, 'Carl Schmitt's Ultimate Emergency: The Night of the Long Knives' (2012) 87(2) *The Germanic Review* 203; D. Dyzenhaus, 'Schmitten in the USA' (4 April 2020) *Verfassungsblog* https://verfassungsblog.de/schmitten-in-the-usa/ [Accessed 27 April 2020]
[20] Schmitt, fn 16, p.1.
[21] D. Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar* (Oxford: Oxford University Press, 1997) p.41.

friend-enemy distinction has been made by the Sovereign.[22] Schmitt's key goal—a critique of liberalism—must be borne in mind when considering the degree to which we allow his conception of emergency powers to shape and frame legal analysis.

Article 15 and the (ir)relevance of Carl Schmitt

Ultimately, Schmitt's famous maxim of 'Sovereign is he who decides on the exception' has tainted the debate on emergency powers, emphasising their antagonistic relation to the legal order they are supposed to protect and downplaying their protective potential. This is not to say that the destructive potential that de jure states of emergency can have on a legal order should be ignored; rather, it is the case that more nuance is needed when analysing emergency powers. All states of emergency are not the same. Most states of emergency are not 'zones of lawlessness'. Most are not expressions of the brute, raw sovereign power that was, in Schmitt's view, necessarily exercised before a legal order could be established.[23] Most states of emergency are not this power revealing itself again, unbound by law, and exercised in order to defeat the threat and restore normalcy in the manner that powers prescribed by law could not. Most emergencies, in fact, have lots of law. Article 15 ECHR creates such an emergency regime.

Article 15 permits states to derogate 'in time of war or other public emergency threatening the life of the nation' but only 'to the extent strictly required by the exigencies of the situation.' Article 15.2 further lists a number of rights that cannot be derogated from. It should be clear therefore that Article 15 ECHR does not create a Schmittian state of exception. An Article 15 emergency instead constitutes a different regime of legality, rather than a zone of lawlessness. This different regime can be used to quarantine exceptional powers to exceptional situations, preventing the need or temptation recalibrate ordinary legal norms to accommodate powers considered to be necessary to confront the crisis at and.

Schmitt's utility in analysing emergency responses to the pandemic arises if there does not appear to be any legal authority authorising government action. If there is law, Schmitt is not very helpful at all. At most, de jure states of emergency can amount to legal black holes—zones of discretion created by law but within which there is little to no legal constraints on the decision maker; or legal grey holes—zones of discretionary power were, ostensibly there appears to be legal oversight and judicial review of this discretion but such judicial oversight is so light touch as to be non-existent.[24] Legal black holes and legal grey holes are not zones beyond law, however. Or at the outset of the emergency, at least, they are not. Legal holes can, however, evolve into Schmittian 'zones beyond law' and in this regard, Schmitt is relevant as a

[22] D. Dyzenhaus, '"Now the Machine Runs Itself": Carl Schmitt on Hobbes and Kelsen' (1994)16(1) *Cardozo Law Review* 1, 10-14.
[23] Schmitt, fn 16.
[24] D. Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge: Cambridge University Press, 2006) pp. 41-43.

cautionary tale regarding the dangers of permanent, transformative states of emergency.[25]

Schmitt's theory is also relevant for analysing the degree to which those empowered under de jure emergency powers are actually bound by law. To simply reduce rule of law constraints to rule by law, for example, would be to empty the rule of law of any useful purpose, leaving just the façade of a legal order. Rather than confronting the Schmittian challenge, this would be to capitulate to it. Consequently, Schmitt can be helpful for analysing and critiquing undue deference towards the executive by the other branches of government. However, this qualified relevance of Schmitt is wholly separate to the idea that all states of emergency create states of exception. Moreover, undue deference can occur without a de jure state of emergency too. Indeed, it is my very argument that this form of deference is considerably more dangerous than undue deference under Article 15.

Legal black holes and legal grey holes can thus give rise to serious human rights and rule of law concerns. Legal black holes expressly reduce the capacity of judicial oversight of emergency powers.[26] Legal grey holes, however, risk legitimising exceptional powers by cloaking them in a thin veil of legality that is the result of an overly deferential judiciary and light-touch review.[27] This can further increase the propensity of such powers becoming permanent. As we shall see, failure to utilise Article 15 ECHR could give rise to such concerns as human rights provisions are recalibrated downwards. When this happens, the quarantining effect of a de jure state of emergency is lost. We are left with a de facto state of emergency that enables the same powers but lacking the transparency, additional oversight, and supervision that should accompany a de jure state of emergency.

2. 'LOCKDOWN' AND RECALIBRATING RIGHTS IN A PANDEMIC

The key risk therefore of emergency powers in the context of the coronavirus pandemic is the recalibration of rights protections downwards but without the quarantining effect of a state of emergency. The purpose of this section is not to provide an exhaustive list of the different human rights concerns raised by the various measures taken by states to confront the coronavirus pandemic. Rather, the goal is to focus on some key human rights concerns and, from this, extrapolate the fundamental problems that arise from accommodating exceptional powers under the parameters of 'normalcy' without the quarantining effect of a de jure state of emergency. Such accommodation is often the product of overly deferential judicial scrutiny in a time of crisis, giving rise to an aforementioned legal grey hole. Focus here will be on the various measures enacted by states to implement and enforce what has become known as 'lockdowns'. While 'lockdown' does not have any specific legal definition, the term generally refers to state steps taken to reduce social interactions between people by legally restricting persons' movements. These 'social distancing' measures

[25] Greene, fn 2, Ch 3.
[26] Dyzenhaus, fn 24; N. Ben-Asher, 'Legal Holes' (2009) 5 *Unbound* 1, 3-6.
[27] Dyzenhaus ibid.

often take the form of requiring persons to stay at home and only to leave in certain discrete circumstances: for example, to travel to or from essential work, or for a limited period of exercise. Persons should also stay at last two metres apart from anybody not in their household. Lockdowns have also been accompanied with additional police powers and criminal sanctions to enforce them. A provision of the ECHR that may be affected and recalibrated therefore is Article 5 and the right to liberty and security of the person. Furthermore, the scope of discretionary authority afforded to police to enforce lockdown raises issues as to how the powers are being exercised. This can give rise to non-discrimination concerns under Article 14. Again, however, other rights will certainly be affected.

Article 5: The Right to Liberty and Security

As noted, Article 5 protects the right to liberty and security of the person. Any deprivation of liberty must fall within the discrete categories outlined in Article 5.1 (a)-(f) for it to be compatible with the ECHR. The most obvious candidate for accommodating enhanced detention powers for the pandemic is Article 5.1(e) which permits '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.' Interferences with the right to liberty may take the form of 'paradigmatic' deprivations of liberty of infected persons where an individual is very clearly detained in a state-run institution, or less-paradigmatic interferences such as the measures enacted to implement and enforce social-distancing and lockdowns.[28]

The UK's response to the coronavirus pandemic serves as an illustrative example of similar measures taken across Europe. The Coronavirus Act 2020 enables police and immigration officers to detain a person for a limited period who is or may be infectious and to take them to a suitable place to enable screening and assessment.[29] The UK has also introduced lockdown measures largely through the Section 45R of the Public Health (Control of Disease) Act 1984. These regulations make it a criminal offence for persons to leave their homes 'without reasonable excuse'. Similar measures have also been taken elsewhere in Europe, for example, in Ireland.[30] In these latter instances of 'less-paradigmatic' interferences with liberty, it is unclear whether Article 5 is even engaged. In the UK, for example, section 14 of the Human Rights Act 1998 (HRA) empowers a Secretary of State to notify the Council of Europe of a derogation; however, no such derogation was issued for any of the measures enacted in response to the coronavirus pandemic. Indeed, in the context of the Coronavirus Act 2020, the Health Secretary Matt Hancock made a statement in accordance with section 19(1)(a) HRA that the provisions of the act were compatible with the ECHR.[31] Ireland has also not derogated from the Convention.

---

[28] See S. Wilson Stark, 'Deprivations of Liberty: Beyond the Paradigm' [2019] *Public Law* 380.
[29] Coronavirus Act 2020, Schedule 21.
[30] The Health Protection (Coronavirus) Regulations 2020.
[31] Coronavirus Bill 2020 as introduced, (19 March 2020) https://publications.parliament.uk/pa/bills/cbill/58-01/0122/20122.pdf [Accessed 27 April 2020].

The concept of liberty under Article 5 has been interpreted narrowly, with the ECtHR finding that the additional caveat of 'security of person' provides no further protection; rather, Article 5 only protects liberty in the classical sense of physical liberty but does not confer a right to do what one wants or go where one pleases.[32] Consequently, Article 5 only pertains to deprivations rather than restrictions of liberty with the latter instead falling under Article 2 of Protocol 4 and the right to freedom of movement. That stated, it is well established in the caselaw of the ECtHR that the distinction between deprivation and restriction of liberty is 'merely one of degree and intensity, and not one of nature or substance.' [33] A restriction on liberty therefore can constitute a deprivation of liberty if it crosses a specific threshold of interference. In assessing whether this threshold has been crossed, the Court further stated in *Engel v Netherlands* 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.'[34] Therefore, one cannot simply examine analogous measures previously found by the ECtHR to constitute restrictions rather than deprivation of liberty. For example, simply because a 12-hour curfew under one regime did not constitute a deprivation of liberty, does not mean that a 12-hour curfew under another regime with fewer safeguards or additional restrictions factored in will also not fall within the ambit of Article 5. The variables in each regime need to be factored in.

Lawful detention of persons for the prevention of the spreading of infectious diseases

This distinction between restriction and deprivation of liberty needs to be addressed when understanding the scope of Article 5.1(e) and the lawful detention of persons for the prevention of the spreading of infectious diseases. As this is the first pandemic the ECtHR has had to grapple with, case law on Article 5.1(e) is sparse. The clearest test we have for lawful detention for Article 5.1(e) is *Enhorn v Sweden* where the ECtHR held that the criteria for determining the lawfulness of detention under Article 5(1)(e) in relation to infectious diseases is, firstly, 'whether the spreading of the infectious disease is dangerous for public health or safety', and secondly 'whether detention of the person infected is the last resort in order to prevent the spreading of the disease because less severe measures have been considered and found to be insufficient to safeguard the public interest.[35] The threshold for lawful detention under Article 5.1(e) therefore is high and in *Enhorn*, the ECtHR found a violation of Article 5.1 on the basis that less sever measures had not been considered and found to be insufficient to safeguard the public interest.[36]

However, even *Enhorn v Sweden* is of minimal help with regards to the compatibility of lockdown measures to tackle the pandemic as Enhorn was known to be HIV positive. Moreover, HIV is a communicable disease, with the manner in which it spreads being substantially different to coronavirus. HIV requires close intimate

[32] *P v Cheshire West & Chester Council; P & Q v Surrey County Council* [2014] UKSC 19
[33] *Guzzardi v Italy* (App. No. 7367/76), judgment of 6 November 1980.
[34] *Engel v Netherlands* (App. No. 5100/71), judgment of 8 June 1976.
[35] *Enhorn v Sweden* (App. No. 56529/00), judgment of 25 January 2005.
[36] Ibid [55].

contact between two individuals, or exposure to contaminated products directly injected into a person or unclean needles.[37] Consequently, social distancing measures are unnecessary to control its spread. What is unclear, however, is whether Article 5.1(e) allows for the deprivation of liberty of *healthy* people to prevent the spread of infectious diseases. If Article 5.1(e) permits the detention of healthy people to prevent the spread of infectious disease, this will be the *only* class of deprivation authorised by Article 5 that is not based on the specific category of a person or their prior conduct. Even within Article 5.1(e), there are specific person classifications—persons of unsound mind, alcoholics, drug addicts or vagrants— outside of the ground of 'to prevent the spread of infectious diseases'.[38] This 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.

Attempting an originalist interpretation of Article 5.1(e) to try and gauge what was in the minds of the drafters is unhelpful too. Aside from the theoretical problems that plague originalism, there is nothing in the *travaux preparatoires* indicating either way the correct interpretation of Article 5.1(e). Nor is it possible to extrapolate from history what *may* have been in the minds of the drafters. Lockdown measures on this scale are wholly unprecedented. The most recent pandemic of a similar if not larger scale to the coronavirus pandemic is that of the Spanish flu from 1918-1920. This occurred, however, at a time when virology was a relatively under-developed science. Vast social distancing measures such as those in force today were not implemented. Some states in the US did attempt social distancing measures but these were mostly limited to closing schools, churches, and limiting public gatherings. Again, there was no criminalisation of leaving a person's home without 'reasonable excuse'. In Europe, however, no such measures were taken.[39] There is thus no historical precedent for the lockdown measures in force today.

If the ECtHR were to agree that Article 5.1(e) permits the deprivation of liberty of healthy persons, this lack of a person-specific limitation needs to be factored into account when assessing whether the measures enacted constitute a restriction or deprivation of liberty. This is important as there are fundamental safeguards in place with regards to assessing whether a person has committed, or that there is reasonable suspicion that they have committed a certain conduct; or that they fall within a certain class of persons. In this regard, the lack of a person-specific limitation to Article 5.1(e)

---

[37] See G. Colthart, 'HIV and Hepatitis C infection from contaminated blood and blood products'(13 July 2011) *House of Commons Library: Science and Environment Section,* https://researchbriefings.files.parliament.uk/documents/SN05698/SN05698.pdf [Accessed 24 April 2020]

[38] For example, in *Winterwerp v the Netherlands* (1979-80) 2 E.H.R.R. 387 the ECtHR stated that it must 'reliably be shown' that a person is of unsound mind for detention to be lawful under Article 5.1(e).

[39] See M. CJ. Bootsma, and Neil. M. Ferguson, 'The effect of public health measures on the 1918 Influenza Pandemic in US Cities' (2007) 104(18) *Proceedings of the National Academy of Sciences of the United States of America* 7588, 7588.

is similar to cases such as *Gillan and Quinton v UK* and *Beghal v UK* where counter-terrorist stop and search powers, and powers of examination and detention at ports and airports respectively had been conferred without a requirement of 'reasonable suspicion'.[40] While the Court side-stepped the Article 5 question in both these cases to focus on Article 8 and the right to privacy, the principle remains that the burden of proof question must feed into assessment of whether the measures enacted constitute restriction or deprivation of liberty. Consequently, the lack of a burden of proof distinguishes lockdown powers from cases such as *Guzzardi v Italy* and *De Tommaso v Italy* wherein both cases involved person-specific thresholds.[41] Consequently, even if Article 5.1(e) permits the detention of healthy persons, this lack of a person-specific safeguard should mean that lockdown powers must be much less intrusive on an individual so as not to cross the threshold between restriction and deprivation. For the ECtHR not to find this would be to recalibrate the protection afforded by Article 5 downwards.

Restrictions v deprivation of liberty: Beyond the Pandemic

This argument for a narrow reading of Article 5.1(e) that limits authorised detention to persons with or suspected of having an infectious disease, is not a predictive account of how the court will decide this issue; rather, it is a normative one advocating how the ECtHR ought to decide such a case. Indeed, the side-stepping of Article 5 issues by the ECtHR in cases such as *Gillan* and *Beghal* does not bode well for any future cases where it will be called upon to review powers enacted in response to the pandemic. This, however, is an argument in favour of the use of Article 15. Using Article 15 and judging the measures under the 'proportionate to the exigencies of the situation' requirement of Article 15 rather than under the ordinary ambit of Article 5, quarantines this jurisprudence to instances where an Article 15 derogation is in effect. This is particularly important due to the dangers inherent in a judgment of the ECtHR finding lockdown powers simply amounting to restrictions rather than deprivations of liberty. If Article 5 ECHR is not even triggered, this principle would be open to legitimating similar measures for other crises represented by the state as necessitating them. Such emergencies may be 'less objective' than the current pandemic—for example, terrorism— and are fertile grounds for human rights abuses. While these measures would still fall under the ambit of Article 2 of Protocol 4 and the qualified right of freedom of movement, it is important to note that states such as the UK and Turkey—two states with extensive experience of counter-terrorist powers— have not ratified Protocol 4.[42]

For these reasons, any additional lockdown powers should not be seen as compatible with Article 5, regardless of how necessary we consider these measures. Instead, a

[40] *Gillan and Quinton v UK* (App. No. 4158/05), judgment of 12 January 2010; *Beghal v UK* (App. No. 4755/16), judgment of 28 February 2019.
[41] *Guzzardi* (n 33); *De Tommaso v Italy* (App, No. 43395/09), judgment of 23 February2017.
[42] Council of Europe, 'Chart of Signatures and Ratifications of Treaty 046', (Status as of 27 April 2020) *Council of Europe Treaty Office* https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/046/signatures?p_auth=34QuLPT1 [Accessed 10 April 2020]

derogation under Article 15 should be issued. In this instance, the ECtHR would not be forced into the awkward situation of having to pronounce on the conformity of these measures with Article 5. They would not be tempted to state that lockdown measures either do not amount to a deprivation of liberty or that even if they do, they fall under Article 5.1(e) which permits the deprivation of liberty of all individuals for the purposes of preventing the spread of infectious diseases. Instead, by using Article 15, any jurisprudence of the ECtHR that may be affected by undue deference in a time of crisis can be quarantined to the exceptionality of the situation. Moreover, the requirement that measures taken must still be proportionate to the exigencies of the situation does not obviate the possibility of the Court scrutinising the proportionality of the state's response. Ultimately, the most dangerous risk to human rights arising from lockdown measures is not the prospect of a Schmittian 'zone beyond law' created by derogating using Article 15 ECHR; it is the risk of a legal grey hole arising from an overly deferential judicial interpretation of the Convention in a time of crisis. This jurisprudence is then left up for grabs, incentivising and legitimising infringements on human rights in less objective crises.

Implementing Lockdown and the Discriminatory Application of Discretionary Power

This threat of a legal grey hole is further amplified by the breadth of discretionary power afforded to officials in order to enforce the lockdown. This raises further concerns with regards to Article 14 and the prohibition on discrimination. Indeed, the breadth of discretion conferred on officials and the lack of legal checks on this power, may even be described as a legal black hole.[43] While it may be the case that the powers used to enforce a lockdown affect us all equally and that we may all be potential vectors for coronavirus, it does not take much imagination to see a scenario where such powers may be used against a particular race or group. Already, some political leaders emphasise the 'foreign' nature of the coronavirus, with US President Donald Trump insisting on calling it the 'China virus'.[44] From Jews being blamed for the Black Death;[45] to AIDs being described by Ronald Reagan's Press Secretary as the 'Gay Plague';[46] to syphilis being referred to as the 'Italian disease', the 'French disease' or the 'Spanish disease' depending upon what part of Europe you were from; the spread of diseases has a long history of being attributed to minority groups or non-citizens.[47]

---

[43] Ben-Asher, fn 26.

[44] M. Vazquez and B. Klein, 'Trump again defends use of the term "China Virus"' (19 March 2020), *CNN*, https://edition.cnn.com/2020/03/17/politics/trump-china-coronavirus/index.html [Accessed 14 April 2020]

[45] See S. K. Cohn, 'The Black Death and the Burning of Jews' (2007) 196(1) *Past and Present* 3.

[46] R. Lawson, 'The Reagan Administration's Unearthed Response to the Aids Crisis is Chilling' (1 December 2015), *Vanity Fair*, https://www.vanityfair.com/news/2015/11/reagan-administration-response-to-aids-crisis [Accessed 14 April 2020]

[47] See A. A. Kousoulis, N. Stavrianeas, M. Karamanou, and G. Androutsos, 'Social aspects of syphilis based on the history of its terminology' (2011) 77(3) *Indian Journal of Dermatology, Venereology and Leprology* 389.

The conferral of vast discretionary power may facilitate their discriminatory application as officials use their intuition or 'hunch' to identify individuals to whom they should apply the powers to. Lessons from UK counter-terrorist laws are illustrative here as statistics show the use of counter-terrorist powers that can be exercised without reasonable suspicion tend to be targeted at specific minority groups or 'suspect communities.'[48] While the courts have refused to say whether this makes the measures incompatible with Article 14 due to the fact that they were designed to be used in proportion to the 'terrorist community' rather than society as a whole', this should only serve to underline the risks of placing courts in the tricky situation of trying to vindicate human rights in the face of a threat represented by the political branches as necessitating draconian powers.[49] The ECtHR may end up capitulating to state arguments about the necessity and proportionality of such powers which could, in turn, be used to legitimate similar permanent powers without the need for derogation. Such powers would be, in the eyes of Lord Kerr's dissenting judgment in *Beghal,* 'entirely at odds with the notion of an enlightened, pluralistic society all of whose members are treated equally.'[50] While a derogation under Article 15 would not lessen the possibility of the ECtHR capitulating to state arguments it would, at least, quarantine such problematic jurisprudence to exceptional situations.

THE DANGER OF DE FACTO STATES OF EMERGENCY

Ostensibly, insisting that the measures enacted to confront the coronavirus pandemic are compatible with ordinary human rights obligations is inherently attractive. The objective necessity of such measures at the outset of the crisis, coupled the need to reassure people that the state does not wish to exercise its new powers in a draconian fashion have strong persuasive appeal. However, states of emergency are rarely objective phenomena. There will certainly be core or paradigmatic instances of a crisis that will constitute a state of emergency and the coronavirus pandemic is possibly the closest we have ever seen of a phenomenon that can objectively be categorised as necessitating exceptional measures. It is an 'ideal state of emergency'.[51] In contrast, most other claims as to the existence of an emergency will be questionable. The vast majority of derogations under Article 15 have been of this latter kind, declared in the context of a national security crisis.[52] In these contexts, an Article 15 derogation can certainly be more harmful towards human rights than a failure to derogate.[53] This is

---

[48] See P. Hillyard, *Suspect Community: People's Experience of the Prevention of Terrorism Acts in Britain* (London: Pluto Press, 1993).
[49] *Beghal v DPP* [2015] UKSC 49, [25].
[50] ibid [104] (Lord Kerr).
[51] Greene, fn 2.
[52] See O. Gross and F. 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', (2001) 3 Human Rights Quarterly 623; A. Greene 'Separating Normalcy from Emergency: The Jurisprudence of Article 15 of the European Convention on Human Rights' (2011) 12(10) *German Law Journal* 1764.
[53] See for example, *Isayeva v Russia* (App. No 57950/00), judgment of 24 February 2005, [191] where the Court noted the lack of a derogation under Article 15 ECHR in finding that use of military bombs with a damage radius exceeding 1,000m outside wartime and without prior evacuation of civilians 'is

not an argument against derogations per se, however; it is an argument against questionable derogations. What is unique about the coronavirus pandemic, however, is not that there is a dispute as to whether a public emergency threatening the life of the nation exists; the dispute instead is on whether such an emergency should be *de jure* declared. Much disagreement centres on the aforementioned symbolism of such a declaration and whether or not to expressly acknowledge the draconian nature of the powers introduced. For instance, Tom Hickman, Emma Dixon and Rachel Jones argue that there are 'good reasons' for 'confining the power to derogate to the most exceptional of circumstances':

> Derogation means that the constraints imposed by the ECHR are lifted in respect of the rights subject to derogation, thereby limiting the scope for courts to test the justification of measures. Moreover, from a political perspective, derogating from ECHR rights may have significant downsides, both because it concedes that measures taken by Governments breach the human rights that are normally observed and because it requires States to declare that they are subject to a national emergency threatening the life of the nation – which they are understandably reluctant to do. Such considerations are likely to be factored into any assessment made by a domestic court of the ECtHR.[54]

Aside from the suggestion that a pandemic on a scale not been seen for more than one hundred years does not constitute 'the most exceptional of circumstances,' there are a considerable number of issues with this analysis of derogations. Firstly, derogation does not limit 'the scope for courts to test the justification of measures.' As noted, Article 15 does not give a state carte blanche to do as it sees fit in response to a crisis. Courts must still assess whether the measures taken are 'proportionate to the exigencies of the situation'. This has been the aspect of Article 15 that has had the most effect on controlling and constraining state power in a period of de jure emergency.[55] Moreover, non-derogable rights are still in effect and a number of substantial positive obligations arising, for example, from Article 2 and Article 3 that are relevant to confronting the pandemic, are still applicable.[56]

Secondly, political concerns regarding the fact that the measures taken to respond to the emergency breach or damage human rights obligations does not somehow alleviate the concerns that arise as a result of states claiming that the measures are perfectly compatible with human rights. The measures stay the same, regardless of

---

impossible to reconcile with the degree of caution expected from a law-enforcement body in a democratic society.' That stated, it is unclear that even if a derogation had been in place that the use of such a weapon would have found to have been proportionate to the exigencies of the situation. Indeed, the Court's comments referring to the 'massive use of indiscriminate weapons' suggests that such acts were not 'lawful acts of war' and thus could not be subject to an Article 15 derogation owing to Article 15.2 prohibiting derogations from Article 2 and the right to life 'except in respect of deaths resulting from lawful acts of war'.

[54] T. Hickman, E. Dixon and R. Jones, 'Coronavirus and Civil Liberties in the UK' (6 April 2020), *Blackstone Chambers Covid-19: Legal Insights,* https://coronavirus.blackstonechambers.com/coronavirus-and-civil-liberties-uk/ [Accessed 14 April 2020]

[55] See, for example, *A v UK* (App No. 3455/05), judgment of 19 February 2009; *Askoy v Turkey* (App. No. 21987/93), judgment of 18 December 1996.

[56] See N. Mavronicola, 'Positive Obligations in Crisis' (7 April 2020), *Strasbourg Observers,* https://strasbourgobservers.com/2020/04/07/positive-obligations-in-crisis/]Accessed 14 April 2020]

whether an emergency is declared or not. Furthermore, 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.[57] 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.[58]

That a state of emergency has not been de jure declared therefore should be of small comfort. The story of emergency powers since the Twentieth Century and, particularly since 11 September 2001, has not been one of abuse of officially declared states of emergency; rather, it has been the tale of permanent emergency powers enacted without such declarations. It has been a cautionary parable of de facto emergencies arising as a result of the introduction of powers that should be antithetical to the status quo ex ante but enacted instead without a de jure state of emergency. Nevertheless, some indication that they are supposed to only be temporary may be given; for example, through the political rhetoric surrounding their introduction or the inclusion of express time-limits. Such an approach to emergencies, however, have demonstrated a worrying propensity of becoming entrenched.

The end of the Emergency

Key to this propensity of emergency powers becoming permanent lies in the difficulty in assessing when the emergency is over. Ideally, emergency powers negate the necessity of their own existence through successive confrontation and neutralisation of the threat that triggered their enactment in the first instance. While the need for exceptional powers may be obvious at the outset of the emergency, assessment of the point where these powers are no longer needed is considerably more problematic. The waning of the threat may be represented either as proof that the emergency powers are no longer needed or, conversely, that their success provides justification for their continued existence. Moreover, relying on the objective, tangential nature of the crisis to limit emergency powers ignores the fact that emergencies have the propensity to evolve and trigger further crises. The public health emergency caused by the coronavirus pandemic has triggered an economic emergency, perceived as

[57] 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

[58] A rather striking example of this in the context of the coronavirus pandemic can be seen from *BP v Surrey County Council* [2020] EWCOP 17, [27] where Hayden J erroneously stated that an emergency did not have to be ex ante declared under Article 15 ECHR for a public emergency threatening the life of the nation to exist and for courts to factor this into their legal reasoning when deciding the outcome of a case.

necessitating an exceptional response.[59] However, the objective necessity of economic crisis measures is inherently contested, making any justification for additional emergency powers much more suspect.[60] In turn, economic emergencies are fertile breeding grounds for social unrest which can trigger other 'less objective' emergencies that may be represented as requiring additional police and state security powers. In the context of the coronavirus pandemic, it is not unforeseeable that the aforementioned powers enacted above are reframed as necessary to confront these more subjective crises, creating the precise conditions for egregious human rights abuses. Without an express de jure declaration of a state of emergency, emergency powers enacted to deal with the pandemic may have a greater propensity to be applied in these 'less objective' crises.

This is not to downplay the dangers of a de jure emergency or hold up Article 15 as some sort of panacea of human rights protection. Even where de jure states of emergency have been declared, their ending frequently has not resulted in a return to the status quo ex ante; instead, many of the emergency powers are re-enacted as ordinary, permanent laws. This is often the result of an overly deferential approach taken by courts as they attempt to decide cases on minimalist grounds.[61] The UK's indefinite detention for non-UK citizens without trial saga is one example of this. Ultimately, these measures were found to be disproportionate to the exigencies of the situation; however, neither the UK House of Lords nor the ECtHR interrogated whether there actually existed a 'public emergency threatening the life of the nation'. Instead, the House of Lords' finding that a public emergency threatening the life of the nation did in fact exist was utilised by the Government to justify the introduction of control orders. Control orders were, in turn, replaced by Terrorism Investigation and Prevention Measures (TPIMs) which, while were a liberalisation to an extent of the control order regime, were, nevertheless, far from the status quo ex ante being restored.[62] The key lesson here, however, is not that de jure states of emergency fail to quarantine exceptional powers to exceptional situations; rather, it is the case that undue judicial deference towards state claims to exceptionality can be utilised to legitimate and normalise exceptional powers beyond these de jure states of emergency.

Furthermore, excessive deference to the political branches of government in a time of crisis is not exclusive to de jure states of emergency. It is seen in de facto emergencies too. Indeed, it is even more dangerous here given the lack of clear demarcating lines around the principles declared by the judiciary. From *Re Korematsu* in the US to *Liversidge v Anderson* in the UK, the most infamous cases of judicial capitulation to

---

[59] H. Stewart, '"Whatever it takes": Chancellor announces £350bn Aid for UK Businesses'(17 March 2020), *The Guardian,* https://www.theguardian.com/uk-news/2020/mar/17/rishi-sunak-pledges-350bn-to-tackle-coronavirus-impact [Accessed 14 April 2020]

[60] See A. Greene, 'Questioning Executive Supremacy in an Economic State of Emergency' (2015) 35(4) *Legal Studies* 594.

[61] Dyzenhaus, fn 24, pp. 42–50; C. Sunstein, 'Minimalism at War' [2004] Supreme Court Review 47; Greene, fn 2, pp. 129-130.

[62] For a discussion of the evolution of control orders into TPIMs see H. Fenwick, 'Terrorism and the control orders/TPIMs saga: a vindication of the Human Rights Act or a manifestation of 'defensive democracy'? [2017] *Public Law* 609.

executive power in a time of crisis are of this kind.[63] Far from protecting human rights, arguing against the necessity for derogations to ensure lockdowns are compatible with the ECHR recalibrates the protection of rights downwards in order to accommodate lockdown measures under the ostensible banner of 'normalcy.' Refusing to call a spade a spade does not make it any less of a spade.

Derogations as too restrictive of state power in a time of emergency

A further argument against derogations in the case of pandemics is that it may unduly restrict a state's ability to respond to the crisis at hand. While most arguments regarding the utility of derogations noted above stem from a pro-human rights perspective, this argument stands as an outlier in the sense that it can be conceptualised as one aimed against the necessity of certain checks on state power in a time of crisis. Hickman et al, for example, argue that:

> …it is perfectly possible to imagine outbreaks which require measures to isolate non-infected persons but which are locally confined, or are taken in the early stages of an outbreak, when the national threat levels remain low or moderate. Even if the current situation permits derogation under Article 15, such local or limited situations would not. This would mean that States were precluded from taking necessary targeted or early action to combat the spread of contagious disease at potentially great cost to health and life.[64]

It is unclear, however, why Hickman et al believe that local outbreaks of an infectious disease or measures taken in the early stages of a pandemic cannot be accommodated using Article 15. It is possible that they are basing their analysis on the *Greek Case* where the Commission stated that the effects of an emergency 'must involve the whole nation.'[65] While this could be interpreted as meaning that localised epidemics cannot be accommodated through Article 15, in *Askoy v Turkey*, the ECtHR found that Turkey's declaration of a state of emergency under Article 15 was in line with the Convention, notwithstanding the fact that the emergency powers in effect were only in operation in the south-east part of Turkey rather than the state as a whole:

> The Court considers, in the light of all the material before it, that the particular extent and impact of PKK terrorist activity in South-East Turkey has undoubtedly created, in the region concerned, a "public emergency threatening the life of the nation. [66]

Moreover, simply because directly affected infectious diseases are localised in a particular area does not mean that the 'effects' of this disease do not involve 'the whole nation'. This pandemic has taught us that the effects of a disease can spread as a result of the interconnected nature of the world we live in today. These effects can include restrictions on traveling to or from an affected area; interruptions to supply chains, economic deprivation, the necessity to allocate resources to respond to an emerging threat. Consequently, simply because a disease is only located in a particular area does

---

[63] *Korematsu* (n 9); *Liversidge v Anderson* [1942] AC 206.
[64] Hickman et. Al., fn 54.
[65] *The Greek case (Denmark, Norway, Sweden and the Netherlands v Greece),* Commission's report of 5 November 1969, Yearbook 12, p.70.
[66] *Askoy v Turkey,* fn 55, [70].

not mean that its effects do not affect the whole nation. It should also be noted that in *Askoy*, the measures taken were found not to be proportionate to the exigencies of the situation, thus demonstrating that Article 15 does not afford *carte blanche* to a state in terms of their commitments under the Convention.

A final issue with this argument is the assertion that insisting on derogation would prevent a state from being able to react early on in a crisis. While, in theory, states of emergency are supposed to be reactive, the Commission did state in *The Greek Case* that a 'threat to the life of the nation' must be 'actual or imminent'.[67] The idea of 'imminence' extends the scope of Article 15 ECHR to allow a degree of pre-emption when declaring a state of emergency, thus obviating any concerns of a state having to confront a threat with one hand tied behind its back. This can be seen all more starkly by the ECtHR upholding the UK's declaration of a state of emergency in response to 11 September 2001, despite the fact that the UK had not suffered a direct attack itself at the time at which it derogated. Ultimately, states are afforded a wide margin of appreciation by the ECtHR when assessing whether a public emergency threatening the life of the nation exists:

> …the Court accepts that it was for each Government, as the guardian of their own people's safety, to make their own assessment on the basis of the facts known to them. Weight must, therefore, attach to the judgment of the United Kingdom's executive and Parliament on this question. In addition, significant weight must be accorded to the views of the national courts, which were better placed to assess the evidence relating to the existence of an emergency.[68]

It is extremely unlikely therefore that the arguments put forward by Hickman et al. would actually preclude a derogation for an emergency pandemic situation outlined above. A considerably more worrying argument in the above analysis is the idea that the requirement for an ex ante declaration of a state of emergency somehow impedes a state's ability to respond to a threat 'at potentially great cost to health and life.' This requirement essentially equates to the idea that 'notice' the most minimum of procedural requirements poses too much of a barrier to an effective emergency response. Likewise, the requirement that law be ex ante prescribed is also too severe a restriction. This is a dangerous argument to make and certainly not one, if acceded to, that could be limited wholly to pandemic situations alone.

CONCLUSIONS

We absolutely should be sceptical of governments who declare states of emergency. However, the principal lesson to take from Schmitt is the dangers of permanent transformative emergency powers, rather than temporary, defensive ones. This message is further underlined by lessons from history. If there is a signal that we should be concerned about, it is using the ordinary constitutional trappings to mask exceptional power. Again, the history of emergency powers is rife with such warnings. If was for this very reason that Augustus refused the title of dictator due to the damage

[67] *The Greek Case,* fn 65.
[68] *A v UK,* fn 55, [180].

done to the legitimacy of that office, first by Sulla and then by Caesar. Augustus ruled instead through the culmination of power delegated to him as a result of the various offices conferred on him by the Senate and people of Rome. This, coupled with his vast wealth and masterful exploitation of the all important patron-client relationship in Rome helped reinforce his autocratic rule. All this was done while the trappings of the old Republic stayed intact.[69] Simply because he called himself *Princeps*—first citizen— rather than dictator, did not make his power any less absolute. So too while Hungary's Victor Orbán may use a constitutional—as distinct from a derogation under Article 15 ECHR—state of emergency as a power-grab to usurp the constitutional order, one only needs to stay within the borders of Europe and look to Moscow to see how autocracy can be implemented within the ambit of the ordinary constitutional order.[70]

The case can certainly be made that the proportionality test can be used to accommodate the emergency coronavirus measures. However, insisting that everything can and should be accommodated through the proportionality test reduces Article 15 to a dead-letter and, in so doing, eradicates its quarantining effect. In turn, this increases the possibility of exceptional powers becoming normalised. A de jure state of emergency under Article 15 cannot prevent undue deference towards national authorities from the ECtHR; however, such undue deference is likely to occur, whether or not Article 15 is invoked. If Article 15 is invoked, any problematic jurisprudence of the Court can be limited to the circumstances in which it was proclaimed in a manner that accommodation through the ordinary parameters of normalcy cannot. In contrast, while the claim can be made that the absence of a derogation suggests that a state has to be more careful to focus its response to the emergency so that rights remain protected, it is often the case that courts adapt human rights principles to accommodate these new powers; however, attempting to limit and contextualise the jurisprudence in question is infinitely more difficult without a declaration of emergency. Context can often fall on deaf ears with the headline principle winning out. Already, we can see instances of problematic judgments of the ECtHR 'seeping' beyond the exceptional situation in which they were drafted. Jeremy McBride, for example, argues that the ECtHR has indicated that it could accept extensive interference with a right in response to 'the existence of an exceptional crisis without precedent'.[71] In that case, the ECtHR found that extreme austerity measures were compatible with the ECtHR. While not endorsing this argument per se, Mc Bride's suggestion demonstrates how a legal principle can seep beyond the exceptional, unprecedented conditions in which it was conceived. A much more sinister example of this can be seen from the consequences of *Ireland v UK* the ECtHR's finding that the so-called 'Five Techniques' constituted inhuman and degrading

[69] See E.T. Salmon, 'The Evolution of Augustus' Principate' (1956) 5(4) *Historia: Zeitschrift für Alte Geschichte* 456.

[70] For a discussion of Orbán's use of emergency powers in response to the coronavirus pandemic as a power-grab see R. Uitz, 'Pandemic as Constitutional Moment: Hungarian Government Seeks Unlimited Powers' (24 March 2020), *Verfassungsblog*, https://verfassungsblog.de/pandemic-as-constitutional-moment [Accessed 14 April 2020]; K.L. Scheppele, 'Orban's Emergency' (29 March 2020), *Verfassungsblog*, https://verfassungsblog.de/orbans-emergency [Accessed 14 April 2020]

[71] *Koufaki and Adedy v Greece* (App. No. 57665/12), judgment of 7 May 2013 [37].

treatment but not torture.[72] While this may not have made any material difference in the case at hand due to the fact that a breach of Article 3 was identified regardless; this genuflection to state authority out of fear of embarrassing a contracting party was subsequently relied upon in the infamous US 'torture memos' by lawyers to argue that proposed methods of interrogation did not amount to torture.[73]

Ultimately, emergency powers have strange, unpredictable after-lives. For this reason, their impact should be as clearly defined and limited as possible. Article 15 permits exceptional powers to be introduced in exceptional circumstances. Likewise, it also prohibits such powers in conditions that do not amount to 'a threat to the life of the nation.' If Article 15 is not used now, it will demonstrate that it is only to be utilised for less objective emergencies. It will only to be utilised when the state wishes to diminish the scrutiny its emergency measures should be subjected to. It will ensure Article 15 only has a damaging effect on human rights.

---

[i] Senior Lecturer, Birmingham Law School. Aspects of this article first appeared on the Strasbourg Observers blog. I would like to thank Laurens Lavrysen, Jonathan Cooper and the anonymous reviewers for their extremely helpful comments and feedback.

---

[72] *Ireland v United Kingdom* (1980) 2 E.H.R.R. 25.

[73] J. Bybee, 'Memorandum for A Gonzales … [re:] Standards for Conduct for Interrogation under 18 USC 2340–2340a', United States, Department of Justice, Office of Legal Counsel (1 august 2002).