

Testing the current European human rights
emergency framework: through the lens of the
Covid-19 pandemic

180265497

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ABSTRACT

This paper asks whether the European Convention on Human Rights and European Court of Human Rights (ECHR) jurisprudence has developed a clear and coherent enough framework, pertaining to what exactly amounts to a derogation from as opposed to a violation of Convention rights, so that states can understand how and when they may depart from these during ongoing crises. To answer the question, this paper will look at emergency legislation enacted by the Czech Republic and the United Kingdom in response to the Covid-19 pandemic and its compatibility with the requirements set out in Article 15 of the Convention, which regulates derogations from human rights during emergencies.

Up until this point, Article 15 has, for the most part, been enacted in response to state-specific war and terrorist activities. Consequently, ECHR jurisprudence has mostly developed within the ambit of national security. However, the year 2020 has tested Article 15 in a completely new context – one in which the world faces an identical health crisis – Covid-19. Never has the Court had to consider such a severe interference of a myriad of rights and on a global scale such as that brought about by the Covid-19 pandemic in 2020. It is thus an appropriate time to evaluate the suitability of the current human rights framework regulating emergencies to ensure that both states, in responding to them, and the people, being directly affected by them, are offered the best protection possible in the circumstances.

This paper will argue that since Article 15 confers onto states wide discretion to tailor their emergency responses, some Article 15 requirements do best suit a *post hoc* review of emergency measures – which is prescribed by and in line with the current framework. However, as will become evident upon analysis of emergency measures from two different countries facing the same challenge, this paper will suggest that certain standards should be more clearly and firmly entrenched in Article 15 to ensure maximum protection for both states and their citizens.

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Coronavirus Act 2020

Health Protection (Coronavirus, Restrictions) (England) Regulations 2020

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Cyprus v Turkey App no 25781/94 (ECHR, 10 May 2001)

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Lawless v Ireland App no 332/57 (ECHR, 7 April 1961)

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The Belgian Linguistic case App no 1691/62 (ECHR, 9 February 1967)

The Greek Case (Denmark v. Greece App no 3321/67, Norway v. Greece App no 3322/67, Sweden v. Greece App no 3323/67, Netherlands v. Greece App no 3344/67) (ECHR, 5 November 1969)

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INTRODUCTION

Mary is a vivacious law student embarking on her second postgraduate law degree abroad. On 21 March 2020, her university closes indefinitely and one day later, the government declares a state of emergency and within two days, shuts its borders. Mary studies in the Czech Republic but is from South Africa and unable to go back as the seriousness of the events of the Covid-19 pandemic unfolds. Meanwhile in South Africa, Mary's mother has been retrenched but is still taking care of and educating her 6-year-old son who cannot start school full-time, as they are told by the government to stay home indefinitely. Their housekeeper, who comes from a township close by, is expected to quarantine in a 17m² shack with seven family members to prevent the spread of Covid-19. It is April 2021 and Mary is still stuck alone in the Czech Republic; her school remains closed, her family far.

These have been but some of the results of emergency measures taken and regulations enacted globally in response to the Covid-19 pandemic, which prompts us to reflect on the efficacy of the frameworks which regulate such emergencies. For example, Article 15 of the Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention), which 'affords States the possibility of derogating, during times of emergency in a limited and supervised manner, from their obligations to secure certain rights and freedoms under the Convention'.¹

The very fact that I felt the need to write on this topic suggests that the answer is unclear. Rarely in law, however, is the answer clear-cut from the onset – there is always subsequent jurisprudence that fills the legislative 'gaps'. Article 15 of the Convention is no different. Since its inception, there has been rigorous case law from the European Court of Human Rights (ECHR) developing the interpretation and application of Article 15, most pertinently, however, in the context of national security.²

Never has the topic been more relevant than it is today as we delve further into the 'new normal' brought about by the ongoing Covid-19 pandemic, which has triggered a novel global

¹ ECHR, 'Guide on Article 15 of the European Convention on Human Rights' (last updated 31 August) <https://www.echr.coe.int/documents/Guide_Art_15_ENG.pdf> accessed 3 April 2021.

² Joseph Zand, 'Article 15 of the European Convention on Human Rights and the Notion of State of Emergency' (2014) 5(1) Inonu University Law Review <https://heinonline.org/HOL/Page?public=true&handle=hein.journals/inonu5&div=12&start_page=159&collection=journals&set_as_cursor=0&men_tab=srchresults> accessed 26 March 2021.

situation testing the efficacy of the Convention in a completely new context.³ In the past, Article 15 has largely been triggered when states were bombed by their enemies; today, it operates in a context where the bomb came in the form of a deadly virus that was dropped onto the world by nature. This has forced us to reflect on whether the current framework, as developed by legislation and the ECHR thus far, is sufficiently clear and coherent so that states know how and when they may depart from human rights justly in times of *any* crisis.⁴

This paper will begin by conducting a brief analysis of the current framework of Article 15 as developed by the courts since its inception.⁵ Thereafter, the question of whether such framework provides clear direction to states regarding the derogation of rights will be tested through the lens of the Covid-19 pandemic. The answer will be explored from two different perspectives, namely that of the Czech Republic, a post-communist and more recent signatory to the Convention, and the United Kingdom (UK), a founding Convention member from the West.⁶ It will focus on the requirements of notice, proportionality and judicial review contained in Article 15. Being rights-specific, the proportionality analysis will be conducted within the context of the right to education⁷ and the right to freedom of movement.⁸ The paper will then go on to conclude that Article 15 of the Convention does not provide a one-size-fits-all solution to all emergency situations and will propose that further guidelines and

³ Robert Spano, 'The ECHR and the Pandemic – Rule of Law as the Lodestar of the Convention System (Seventh Annual Regional Rule of Law Forum for South East Europe' 16 October 2020 <https://www.echr.coe.int/Documents/Speech_20201016_Spano_7th_Rule_Law_Forum_SE_Europe_ENG.pdf> accessed 12 March 2021.

⁴ Although most states chose rather to limit than to formally derogate from rights, this paper argues that the pandemic did in fact warrant a formal derogation under Article 15 and that the requirement of notice would have worked in states' favour rather than against them.

⁵ From this it will be clear that the ECHR adopts a jurisprudence of altruism in which states are entrusted with authority and have an obligation to pursue the nation's and people's interest and not merely their own.

⁶ It is important to note from the onset of this paper that neither the UK nor the Czech Republic exercised their right to derogate under Article 15 of the Convention – the answer to why goes to the heart of this paper. Both merely used the limitation framework contained in the Convention as, at the time, they did not believe the situation merited a derogation. A derogation analysis, however, inherently includes a limitation analysis as the former is merely a more severe form of the latter plus an additional requirement of notice. This paper, however, will argue that some emergency measures enacted by the UK and the Czech Republic did in fact amount to a derogation from and not merely a limitation of rights and that exercising their right to derogate under Article 15 would have better suited the Covid-19 emergency and worked in the favour, especially if natural and legal persons are to challenge them in the future.

⁷ Article 2 of Protocol 1 of the Convention.

⁸ Article 2 of Protocol 4 of the Convention.

safeguards should be implemented to prevent unjust human rights derogations rather than attempting to resolve these *ex post facto* in the courts.⁹

PART ONE: A BRIEF HISTORY OF ARTICLE 15 AND ITS DEVELOPMENT IN JURISPRUDENCE

Derogations from human rights are exclusively designed for crisis situations in which states are required to notify the Secretary-General of the Council of Europe (COE) of their intention to depart from rights.¹⁰ The mechanism of derogation enshrined in Article 15 of the Convention is designed primarily for states' advantage and not for the protection of individuals' rights. By derogating and formally notifying the Secretary-General of the COE thereof, states acknowledge the graveness of a situation, which may require a temporary deviation from fundamental rights – ultimately giving themselves leeway if subsequent human rights breaches occur.¹¹ Article 15 of the Convention is stated as follows:

1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under [the] 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.
2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (§ 1) and 7 shall be made under this provision.
3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary-General of the Council of Europe fully informed of the measures which it has taken and the reasons therefore. It shall also inform

⁹ In my proposal, I aspired to compare the European system to the systems of Africa and the United States. Throughout the writing process, however, I decided that I would prefer to compare it with Asia's human rights system rather as they performed better throughout the pandemic regarding the number of cases, but perhaps at a higher risk of human rights restrictions compared to Europe. In the end however, I was not able to conduct this comparison due to word constraints, but I look forward to continuing with the research and hope to include it in the future.

¹⁰ Spano (n 3) 2.

¹¹ Interview with Petr Konupka, Office of the Government Agent, Ministry of Justice, Czech Republic (Online, 15 March 2021).

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.¹²

Four requirements must thus be met. First, it must be evident that the rights in question are classified as derogable rights.¹³ Assuming they are, the relevant state must give notice of their intention to derogate.¹⁴ Thereafter, the state must prove that the situation in question constitutes a ‘public emergency’¹⁵ and that derogation measures are strictly required by the extent to which the emergency threatens the life of the nation. Further, measures must be consistent with the state’s supplementary obligations under international law.¹⁶ Lastly, although not explicitly mentioned under Article 15, all emergency measures must be reviewable by the courts.¹⁷ For the purposes of this paper, only notice, proportionality, and judicial review requirements will be elaborated on as these have presented themselves to be the most contentious during the pandemic.¹⁸

(I) Notice given by states to the Secretary-General of the COE expressing their intention to derogate

Article 15(3) of the Convention declares that states wishing to derogate from the Convention must inform the Secretary-General of the COE of their intention to do so prior to enacting any

¹² Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (The Convention) 1950 art 15.

¹³ ECHR (n 1) 11.

¹⁴ *ibid* 3.

¹⁵ *Lawless v Ireland* [1961] ECHR App no 332/57. The ECHR defined an emergency situation as one which affects the population as a whole, threatens the Constitution of a state and its people and ordinary means are inadequate to solve it. The standard in *Lawless* is strict, it requires states to provide tangible evidence as to the seriousness of the threat. In this case, the Irish government challenged the court and Commission’s right to review their actions as they asserted that the questions of whether a public emergency existed, what measures and in what proportion were they required to overcome the threat all fell within the State’s discretion. The court agreed.

¹⁶ ECHR (n 1) 10.

¹⁷ *ibid* 13.

¹⁸ However, it is worth noting in terms of the requirement that the relevant situation constitutes a ‘public emergency threatening the life of the nation’ under Article 15, that, although Covid-19 undoubtedly falls into this definition, the fact that many states refrained from derogating under Article 15, implies that they did not consider Covid-19 to have reached this threshold.

emergency measures as well as keep the Secretary ‘fully informed about the measures the State has undertaken and the reasons for doing so’¹⁹ in order that they can thereafter inform the outstanding Convention members and monitor the state.²⁰

It is evident that this rule is applied in a flexible manner depending on the specific facts of each case. In *Lawless v Ireland*, the ECHR allowed a 12-day delay in declaring a state of emergency to prevent Lawless from becoming aware of his impending arrest and escaping prior to his detention.²¹ Conversely, in *Denmark v Greece*, although no such delay, the court held that the notice was ineffective as it lacked some of the already-enacted emergency legislation.²² The current position is, thus, that if states provide a satisfactory notice, albeit only after declaring a state of emergency and/or enacting emergency measures, the Article 15(3) requirement would be satisfied.²³

Neither the Czech Republic nor the UK exercised their right to derogate throughout the Covid-19 pandemic and thus were not compelled to notify the Secretary-General of the COE of their intention to do so nor to keep the Secretary informed of the extent and scope of enacted emergency measures throughout the development of the pandemic. In Part Three of this paper, it will be argued that Article 15 should strictly compel states, once evident that there is a public emergency affecting the life of the nation, such as Covid-19, to derogate and notify the Secretary in order to ensure consistent supervision of executive conduct and enacted measures.

(II) Proportionality

In order to satisfy the requirement of proportionality, states must show that (i) derogation and the subsequent measures taken are ‘strictly required by the exigencies of the situation’²⁴

¹⁹ Zand (n 2) 163.

²⁰ *Cyprus v Turkey* App no 25781/94 (ECHR, 10 May 2001).

²¹ *Lawless v Ireland* (n 15).

²² *The Greek Case (Denmark v Greece App no 3321/67, Norway v Greece App no 3322/67, Sweden v Greece App no 3323/67, Netherlands v Greece App no 3344/67)* (ECHR, 5 November 1969). Furthermore, there was inadequate information surrounding the proclaimed measures and ultimately, reasons for the enacted measures were only given four months after the declaration of a state of emergency.

²³ In *Aksoy v Turkey* App no 21987/93 (ECHR, 18 December 1996) it was made clear that in relation to the requirement of notice to derogate, it was most important that states provide sufficiently detailed notices regarding the scope of derogation rather than imposing a strict no-delay requirement.

²⁴ ECHR (n 1) 11.

(necessity); (ii) less restrictive means are not available; and (iii) the measures taken are reasonable and foreseeable.²⁵ Furthermore, the measures must be temporary in nature²⁶ – they cannot be justified after the emergency has passed and must also be abolished as soon as they are no longer necessary.²⁷

Developments in case law have shown that the ECHR has become more rule-sceptic to ‘maintain a more standard-based derogation regime’.²⁸ In this regard, the Court in *A and Others v United Kingdom* held that the necessity requirement ‘is not well suited to an *a priori* evaluation outside the context of particular emergencies’²⁹ and thus, the ECHR will consider various factors to determine whether states have gone beyond what is required by the situation.³⁰ Further, Zand notes that courts tend to be less exacting on strict proportionality requirements where measures not only satisfy the exigencies of the threat but also include various safeguards to prevent potential human rights or rule of law violations.³¹ In *Ireland v United Kingdom*, the court was satisfied with the requirement as the government maintained ‘direct and continuous contact with the pressing needs of the moment and are in a better

²⁵ Zand (n 2) 165.

²⁶ *A and others v United Kingdom* App no 3455/05 (ECHR, 19 February 2009).

²⁷ This specific requirement will not be discussed in detail in the subsequent sections of this paper as, although measures seem quite permanent, the pandemic is still ongoing and so the persistence of measures is valid for now. However, after the pandemic has passed (if it ever does), the Czech Republic might face criticism for, in effect, circumventing the temporariness requirement by passing Resolutions under the Ministry of Health as its powers are not linked to declared emergency state periods (which have a determined end date), as the Governments are. In the UK, particularly in the case of *Dolan v Secretary of the State for Health and Social Care* [2020] EWCA Civ 1605, the appellants argued that the five considerations ((i) how the National Health System is coping; (ii) a consistent decrease in the daily death rate; (iii) reliable data showing a decrease in the rate of infection to a manageable extent; (iv) surety that operational measures (i.e. testing and protective equipment) are available and finally, (v) that amendments to existing measures would not increase the risk of a subsequent peak of infection) taken into account by Parliament before existing measures would be annulled, were an inadequate assessment of the epidemiological situation.

²⁸ Evan J Criddle, ‘Protecting Human Rights During Emergencies: Delegation, Derogation and Deference’ (2014) 45(3) Netherlands Yearbook of International Law <<https://www.proquest.com/docview/1689291987?OpenUrlRefId=info:xri/sid:summon&accountid=14565>> accessed 20 December 2020.

²⁹ *A and others v United Kingdom* (n 26).

³⁰ *ibid.* To name a few, the ECHR considers whether ordinary laws would have been sufficient (*Lawless v Ireland* (no.3)); whether enacted measures are a genuine response (*Alparslan Altan v Turkey*, 2019 [118]; *Brannigan and McBride v. the United Kingdom*, 1993 [51]); whether measures were used for the alleged purpose (*Lawless v Ireland* (no.3)); whether the derogation is limited in scope and kept under review (*Brannigan and McBride v the United Kingdom* 1993 [66]).

³¹ Zand (n 2).

position than the Courts to determine both the presence of such an emergency ... and the nature and scope of derogations necessary to avert it.’³²

(III) Judicial review

The doctrine of judicial review ensures that states do not act *ultra vires* upon declaring a state of emergency or enacting emergency legislation. It is an additional safeguard to fundamental rights being derogated from as it provides effective recourse to individuals whose rights are compromised during these times.³³ The Venice Commission states that domestic courts must have unfettered jurisdiction to review emergency measures and ensure they fall in line with Article 15. This internal review should furthermore be supplemented with an external review by international judicial bodies, such as the ECHR.³⁴

In both the Czech Republic and the UK, national courts on various levels have been actively involved in the review of emergency measures brought forward by individuals. In the Czech Republic, an action challenging the Czech Government’s declaration of a state of emergency together with various emergency measures was brought before the Constitutional Court.³⁵ And further, in a Municipal Court case, the plaintiffs accused the Czech Government of abusing the special powers granted to them under the declared state of emergency.³⁶ In both cases, the courts refused to conduct an in-depth substantive review of measures. On the contrary, in the UK, the Court of Appeal and the Supreme Court engaged in a substantive review of emergency measures as well as a review of the government’s use of powers when enacting them. Further, the Joint Committee on Human Rights undertook a review of enforcement mechanisms set out in emergency legislation which imposed disproportionate

³² *Ireland v United Kingdom* App no 5310/71 (ECHR, 13 December 1977. And in *Bas v Turkey* App no 66448/17 (ECHR, 3 March 2020) [224], the ECHR held that as the emergency decreases in intensity, the exigency criterion must be further entrenched.

³³ Stuart Wallace, ‘Derogations from the European Convention on Human Right: The Case for Reform’ (2020) 20 <<https://academic.oup.com/hrlr/article-abstract/20/4/769/6006707?redirectedFrom=fulltext>> accessed 4 April 2021.

³⁴ European Commission for Democracy Through Law (Venice Commission), ‘Interim Report on the Measures Taken in the EU Member States as a Result of the COVID-19 Crisis and Their Impact on Democracy, the Rule of Law and Fundamental Rights’ COM (2020) 995 final.

³⁵ Constitutional Court Judgement of 6 April 2020, file No PI ÚS 8/20 (*Czech Constitutional Court case*).

³⁶ Municipal Court Judgement of 23 March 2020, file No 14 A 41/2020-111 (*Dostál v Ministry of Health*).

and overreaching penalties upon contravention of emergency measures. This will be discussed in further detail in Part Two below.

PART TWO: WHY COVID AS A MEASURING TOOL?

In the past year, it has become evident that the Covid-19 pandemic is unprecedented in all contexts – specifically challenging public health, politics, and legal systems around the world. This is the first time in history that states of emergency have been globally declared at such a scale in response to a pandemic.³⁷ Covid-19 itself is a direct threat to the right to life (Article 2) and the right to health (Article 8 of the Convention) but its effect touches on a myriad of rights, including Article 2 of Protocol 1 (the right to education) and Article 2 of Protocol 4 (the right to freedom of movement).³⁸ This represents the interdependency of human rights and reflects competing interests that are hard to reconcile – highlighting the challenges faced by drafters of the Convention and subsequently judges within the ECHR. It is thus an apt moment in time to consider the challenges faced by the current human rights framework, particularly Article 15 of the Convention, and whether these challenges can be overcome to ensure the fullest possible protection of human rights or perhaps, whether it may be worth revisiting and further developing the current framework.

The fact that neither the Czech Republic nor the UK exercised their right to derogate suggests that they did not recognise Covid-19 as reaching the high threshold of Article 15. However, upon analysis of the emergency measures these countries took (considered in the following sections of this paper) it is evident that they did in fact recognise it – this *prima facie* implies measures were disproportionate.³⁹ The main consequences of this choice include the lack of external scrutiny and monitoring by international judicial bodies, such as the ECHR as

³⁷ What has been most interesting to observe, is how the world never seems to be able to agree on anything but on the severity and seriousness of the impact of the coronavirus. This may be due to the fact that it is evident that the virus and its implications are not merely a phase. The world is gradually beginning to accept this ‘new normal’ brought about by Covid-19 – but how far will this stretch?

³⁸ Steven Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects* (Cambridge University Press 2009).

³⁹ Francis Hoar, ‘A Disproportionate Interference: The Coronavirus Regulations and the ECHR’ (*UK Human Rights Blog*, 2020) <<https://ukhumanrightsblog.com/2020/04/21/a-disproportionate-interference-the-coronavirus-regulations-and-the-echr-francis-hoar/>> accessed 16 February 2021.

well as protection for the state itself against allegations of subsequent human rights breaches.⁴⁰

Preceding a formal derogation under Article 15 of the Convention, is the declaration of a state of emergency under national law. To date, the Czech Republic has declared three states of emergency within which deadlines were extended multiple times.⁴¹ The UK, on the other hand, decided not to do so.⁴² The European Commission on Democracy favours, what they term, ‘constitutional emergency powers’, under which emergency powers are derived from a state’s Constitution (as in the Czech Republic), over ‘extra-constitutional emergency powers’, under which states take action in emergencies according to legislation which does not expressly refer to such and thus, they do not formally declare a state of emergency (as in the UK).⁴³

In light of this, the next section of the paper aims to analyse emergency legislation enacted by the Czech Republic and the UK, which has affected the right to education and the right to freedom of movement and whether it was possible for such legislation to be drafted clearly in line with the Convention’s framework. This analysis will be conducted within the ambit of what have been identified as contested requirements of Article 15 of the Convention during the Coronavirus crisis, namely, notice, proportionality, and judicial review.

PART THREE: ANALYSING EMERGENCY LEGISLATION – THE REQUIREMENT OF NOTICE AND DECLARATIONS OF STATES OF EMERGENCY

(I) The Czech Republic

It is worth noting from the outset that Czech constitutional legislation does not make provision for derogation during states of emergency – only for limitation.⁴⁴ Limitations are

⁴⁰ European Commission for Democracy Through Law (Venice Commission) (n 34).

⁴¹ Government of the Czech Republic, ‘Measures Adopted by the Czech Government against the Coronavirus’ (*vlada.cz*, 25 March 2020) <<https://www.vlada.cz/en/media-centrum/aktualne/measures-adopted-by-the-czech-government-against-coronavirus-180545/>> accessed 15 April 2021.

⁴² Hoar (n 39).

⁴³ European Commission for Democracy Through Law (Venice Commission) (n 34). The reason for this is that in the absence of a formal declaration, states may be impeded in relying to tailored emergency provisions specific to the emergencies they are facing, and which are contained in international human rights instruments, such as the Convention, which requires a formal declaration of a state of emergency before states can formally derogate under Article 15 of the Convention.

⁴⁴ Act no. 110/1998 Sb., On the Security of the Czech Republic and Act no. 240/2000 Sb., on Crisis Management.

often used in respect of specific rights and are a normalised, less severe form of restricting rights even during normal times, to maintain a workable system of human rights.⁴⁵ Derogation, on the other hand, is strictly limited to exceptional situations threatening the life of the nation and is used for groups of non-derogable rights.⁴⁶ Due to these differences, states often avoid derogating from rights as the procedures and requirements are more burdensome and the scrutiny more rigorous. Czech Constitutional law expert, Jan Wintr, asserts that the Czech Republic did not derogate under Article 15 of the Convention because the government believed that domestic legislation dealing only with limitations of rights, was sufficient to tackle the crisis.⁴⁷ If that is the case, it begs the question as to whether there is even a point to Article 15. If states are not compelled to notify under Article 15 during emergencies where their actions so clearly amount to a derogation from rights (which will be proved in the following sections), the intricate safeguards and scrutiny enshrined therein become irrelevant.

(II) The United Kingdom

The UK's domestic law, on the other hand, makes provision for derogation in times of emergency.⁴⁸ However, they refrained from officially derogating in line with both domestic legislation and Article 15 of the Convention.⁴⁹ Further, they have not declared a state of emergency during the pandemic as of yet.⁵⁰ Rather, they used domestic legislation,⁵¹ which delegates powers to the government to enact 'regulations' during emergency situations, to pass the Health Protection (Coronavirus, Restrictions) Regulations 2020 ('the Regulations').⁵²

⁴⁵ Alessandra Spadaro, 'Covid-19: Testing the Limits of Human Rights' (2020) 11 *European Journal of Risk Regulation* 317.

⁴⁶ Diego S Silva and Maxwell J Smith, 'Limiting Rights and Freedoms in the Context of Ebola and Other Public Health Emergencies: How the Principle of Reciprocity Can Enrich the Application of the Siracusa Principles' (2015) 17 *Health and Human Rights* 234.

⁴⁷ Interview with Jan Wintr, 'Lecturer at Charles University, Prague' (15 January 2021).

⁴⁸ Section 14 Human Rights Act 1998.

⁴⁹ Hoar (n 39).

⁵⁰ *ibid.*

⁵¹ Public Health (Control of Diseases) Act 1984.

⁵² Joint Committee on Human Rights, 'The Government's Response to COVID-19: Human Rights Implications' (2020) Seventh Report of Session 2019-2021.

Additionally, Parliament enacted the Coronavirus Act of 2020 which conferred various powers onto Parliament, including the power to close educational institutions.⁵³

Thus, the UK used standard legislative means to enact standard laws and not strictly temporary emergency measures as defined under Article 15. Francis Hoar, a Barrister in the UK and constitutional law enthusiast, argues that their failure to derogate thereunder is due to the fact that such a derogation would be subject to review by both domestic courts and the ECHR.⁵⁴ Further, any restrictions, as secondary legislation, enacted pursuant to such a formal derogation of which the ECHR would have been notified, may be voided by domestic courts if Article 15 requirements are not met.⁵⁵ The reason for such a high level of scrutiny is proportional to the purported threat the severe emergency regulations intend to mitigate. Thus, by not derogating under section 14 of the Human Rights Act and Article 15 of the Convention, it is implied that the UK did not consider this high threshold to be reached during the pandemic. The ECHR has made it clear that such a decision lies in the state's discretion,⁵⁶ however, when a situation so clearly merits a derogation and states do not do so for whatever reason, perhaps the decision should be facilitated by an external body. The fact that the extent of emergency measures arguably amounts to a derogation worth notification, it seems as though some could think that they are thus automatically disproportionate in that they exceed the threshold contained in Article 15 which states enacting them refused to acknowledge.⁵⁷

It is thus evident from the above analysis that the procedural requirement of notice, particularly considering states' discretion therein, would benefit from a firmer establishment in ECHR jurisprudence, otherwise it renders itself irrelevant. This is because many states are reluctant to derogate and notify due to the connotations thereof,⁵⁸ however, the option to

⁵³ Hoar (n 3) 38.

⁵⁴ *ibid* 41.

⁵⁵ Audrey Lebet, 'COVID-19 Pandemic and Derogation to Human Rights' (2020) 7 *Journal of Law and the Biosciences* 1.

⁵⁶ *Lawless v Ireland* (n 15).

⁵⁷ These questions will be explored in Part Four of this paper.

⁵⁸ Joan F Hartman, 'Derogation from Human Rights Treaties in Public Emergencies--A Critique of Implementation by the European Commission and Court of Human Rights and the Human Rights Committee of the United Nations' (1981) 22 *Harvard International Law Journal* 1. Namely, that states concede that their measures in effect breach human rights and must formally recognise the existence of an emergency which threatens the life of the nation.

derogate primarily functions as a safety valve for states in situations where their self-preservation clashes with their human rights obligations. And so, in situations where this is so clearly the case, such as the current pandemic, states should be required to notify the Secretary-General of the COE in order to protect their own intentions and by doing so, also ensure better protection of derogated rights as both citizens and international bodies can monitor the situation.

The next section of this paper will move on to discuss the requirement of proportionality in Article 15, which, unlike the requirement of notice, requires a rights-based analysis.

PART FOUR: ANALYSING EMERGENCY LEGISLATION – PROPORTIONALITY, A RIGHTS-BASED ANALYSIS

The requirement of proportionality will be tested in the context of two highly affected rights throughout the pandemic: the right to education and the right to freedom of movement. A brief history of the interpretation and application of the right to education will first be discussed. This will then be followed by an analysis of emergency legislation affecting it in both the Czech Republic and the UK under the sub-requirements of proportionality: necessity, less restrictive means and foreseeability and reasonableness. Thereafter, the same format will be followed in the context of the right to freedom of movement.

(I) The right to education

The right to education is contained in Article 2 Protocol No. 1 (P1-2) of the Convention and states that:

‘No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.’⁵⁹

⁵⁹ The Convention art 2 protocol 1.

The question that needs to be answered is whether, referring to Article 15 and jurisprudence informing the scope and enforcement of Article 2 of Protocol 1, Governments were able to lawfully enact emergency measures which amounted to a justified and proportionate derogation from it.

According to a guide published by the ECHR on the meaning and scope of the right to education, the Court begins by stating that it guarantees an individual right thereto.⁶⁰ The negative wording of the Article suggests that there is no positive duty on states to provide any particular type of education. Thus, under all circumstances, including public emergencies, it merely has an obligation not to interfere with said right.⁶¹ This also suggests that it is technically not a right qualified by the power and right of the state to limit it for a legitimate aim nor in times of emergency, in the way positive rights are.⁶² Nonetheless, courts will consider any potential breach of the Protocol.⁶³

The ECHR emphasises that the right to education cannot *only* place a negative obligation on states not to interfere with it, so while they do not necessarily have to provide it themselves, there is an inherent positive obligation to ensure that it is protected.⁶⁴ Further, Article 2 of Protocol No 1 concerning elementary, secondary and higher education requires that states who set up such institutions are in fact under a positive obligation to provide an effective right of access to them.⁶⁵ The regulation thereof depends on the 'needs and resources of the community and of individuals' and any limitation of the right cannot threaten the substance thereof.⁶⁶

Although not expressly stated in Article 2 of Protocol No 1, restrictions do still exist as the right 'by its very nature calls for regulation by the State'.⁶⁷ In this context, the ECHR emphasises the need for proportionality between the restrictions and the aims it seeks to achieve. The sub-requirements of proportionality⁶⁸ will now be discussed in the context of

⁶⁰ ECHR, 'Guide on Article 2 of Protocol 1 of the European Convention on Human Rights' (updated 30 December 2020) <https://www.echr.coe.int/documents/guide_art_2_protocol_1_eng.pdf> accessed 21 March 2021.

⁶¹ *ibid* 7.

⁶² Hoar (n 39) 45. This qualification only applies to the second sentence in Article 2 Protocol No 1.

⁶³ ECHR (n 60) 9.

⁶⁴ *The Belgian Linguistic case* App no 1691/62 (ECHR, 9 February 1967).

⁶⁵ *Mursel Eren v Turkey* App no 60856/00 (ECHR, 7 February 2006).

⁶⁶ *Kjeldsen, Busk Madsen and Pedersen v Denmark* App no 5095/71 (ECHR, 7 December 1976).

⁶⁷ *Golder v United Kingdom* App no 4451/70 (ECHR, 21 February 1975).

⁶⁸ Necessity, less restrictive means and foreseeability and reasonableness of measures.

emergency measures adopted by the Czech Republic and the UK restricting the right to education during the pandemic.⁶⁹

i. Necessity

The requirement of necessity includes an evaluation of the shift in powers and emergency legislation enacted during states of emergency (declared or not). Such shifts must only occur to the extent necessary to mitigate the threat and once a return to normalcy is achieved, they must be abolished forever.⁷⁰

a. The Czech Republic

The first set of confirmed Covid-19 cases on Czech soil was announced on 1 March 2020.⁷¹ Ten days later, the Czech Ministry of Health banned events exceeding 100 participants as well as in-person teaching in elementary, primary, secondary and tertiary schools with effect from the following day.⁷² Only two days later, on 12 March was a formal declaration of a state of emergency made.⁷³ On 8 June, the state officially placed an obligation on schools to provide distance learning and made CZK984.5 million (£32 855 749,44) available for the acquisition of technical equipment required for the effective switch to remote learning.⁷⁴ On 5 October, the government formally restricted private schools from increasing tuition for the duration of remote learning and soon after, on 12 October, the presence at schools and universities was

⁶⁹ Please note that the following analysis only includes emergency measures enacted between March 2020 to March 2021.

⁷⁰ ECHR (n 1) 4.

⁷¹ Government of the Czech Republic (n 41).

⁷² Ministry of Health of the Czech Republic, 'Resolutions of the Government of the Czech Republic and Extraordinary and Protective Measures of the Ministry of Health' (*koronavirus.mzcr.cz*, 20 March 2020) <<https://koronavirus.mzcr.cz/en/extraordinary-and-protective-measures-and-recommendations/>> accessed 12 January 2021.

⁷³ Resolution of the Government of the Czech Republic of March 12 2020, ref No. 194 (first declaration of state of emergency).

⁷⁴ Lenka Bušítková and Pavol Baboš, 'Best in Covid: Populists in the Time of the Pandemic' (2020) 8 *Politics and Governance* 456.

‘prohibited’⁷⁵ by Resolution 1022.⁷⁶ However, after only 15 days, the government imposed a total ban on attendance at schools and universities.⁷⁷

The requirement of necessity fundamentally asks whether the extent of the measures implemented was required to achieve the stated aim of reducing the reproductive number of Covid-19 to such an extent, that the health care system of the Czech Republic can manage the pandemic and not have to limit care for patients in order to increase the number of available hospital beds for those with the virus.⁷⁸ The question as to whether a complete closure of schools for extended periods of time is necessary is up for debate and there are strong arguments from both sides. As the aim is to significantly reduce contact between persons, the government argued that the closure of schools was the most effective means of achieving this goal as it is easier to limit the right to education by providing alternative means (online learning) and avoid derogating from the right altogether.⁷⁹ Further, although school and university students between the ages of 5-26 were considered to be a part of the low risk group of contracting Covid-19, restricting contact amongst them would automatically include decreased exposure to their family members – who may be in a higher risk category.

Although this is a reasonable position, its reasonableness deteriorates over time. Czech students have been denied a full year of in-person education to date and their return for the long-haul is uncertain. Thus, although it may be argued that such a restriction on the right

⁷⁵ Zuzanna Vikarská, ‘Czechs and Balances – If the Epidemiological Situation Allows ...’ (*Verfassungsblog*, 20 May 2020) <<https://verfassungsblog.de/czechs-and-balances-if-the-epidemiological-situation-allows/>> accessed 12 March 2021.

⁷⁶ Resolution of the Government of the Czech Republic of 12 October 2020, ref No. 1022 (school and university closures). With exceptions made for clinical and practical education and elementary schools – who were divided into half-classes and returned to school on a rotational basis.

⁷⁷ Resolution of the Government of the Czech Republic of 27 October 2020, ref No. 1112 (total ban on attendance at schools and universities). This was extended until 2 of November. On 30 of November, grades one to five and grade nine returned to campus full-time, while grades six to eight returned in a phased regime. Then on 7 December, the remainder of grades returned in phases. However, soon after, on 27 December the Government announced a return to a stricter regime wherein only primary schools would attend school on a rotational basis and high school and university students were not allowed on campus.

⁷⁸ Government of the Czech Republic (n 41). Up until this point, there has been no direct challenge to the measures restricting the right to education on a domestic court level in the Czech Republic. This is probably due to the fact that the Czech Government was quick to respond and provided immediate alternatives which were made compulsory for schools and universities.

⁷⁹ European Commission, ‘Study in the Czech Republic’ <https://ec.europa.eu/education/study-in-europe/country-profiles/czech-republic_en> accessed 12 February 2021.

was justified in light of the requirement of necessity, the problem lies in the duration of measures and the long-term effects of the prolonged restriction on this fundamental right.

b. The United Kingdom⁸⁰

In *Ali v Head Teacher and Governors of Lord Grey School (Ali)*⁸¹ the House of Lords stated that ‘art 2 of the First Protocol is concerned only with results: [A breach thereof] would have required a systemic failure of the educational system which resulted in the respondent not having access to a minimum level of education’.⁸² Section 37 of the Coronavirus Act 2020 (the ‘2020 Act’) gives power to the Secretary of State, under Schedule 16 of the Act, to *give directions* to close educational premises.⁸³ Such a declaration is reviewable by the courts on various grounds, including that of constituting a disproportionate interference with the right to education.⁸⁴ The words ‘give direction’ in section 37 of the 2020 Act does not expressly imply that the relevant authority may outrightly prohibit or order a shutdown of schools.⁸⁵ This was exactly the point on which the case turned in *Dolan v Secretary of the State for Health and Social Care*.⁸⁶

⁸⁰ This paper considers the fore coming legislation only as it applies to England.

⁸¹ [2006] UKHL 14.

⁸² *ibid* [32].

⁸³ Section 37: Temporary closure of educational institutions and childcare premises

(1) Part 1 of Schedule 16 makes provision enabling the Secretary of State and the Welsh Ministers to give directions for the restriction of attendance at premises used for the provision of education or childcare.

(2) Part 2 of Schedule 16 makes provision enabling the Scottish Ministers to give directions to restrict access to schools and other educational premises.

(3) Part 3 of Schedule 16 makes provision enabling—

(a) the Department of Education in Northern Ireland to give directions requiring the temporary closure of schools;

(b) the Department for the Economy in Northern Ireland to give directions requiring the temporary closure of further and higher education institutions;

(c) the Department of Health in Northern Ireland to give directions requiring the temporary cessation of childcare provision.

⁸⁴ *Dolan v Secretary of the State for Health and Social Care* [2020] EWCA Civ 1605. Further, the wording of the legislation and the powers it expressly confers onto the relevant authority in the UK to close institutions is starkly different to that within the Czech Republic (discussed above).

⁸⁵ In the Czech Republic, this power is evidently given to the Minister of Health as can be seen by Resolution 1289, which ‘prohibits’ presence at schools.

⁸⁶ *Dolan* (n 84).

The claimant contended that in various speeches given by government ministers together with the enactment of Regulation 6,⁸⁷ they were ‘directing or instructing’ schools to close without directly prohibiting them from remaining open.⁸⁸ The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 (the ‘Regulations’), specifically Regulation 6, indirectly prohibits the opening of educational facilities as they impose strict lockdowns on the nation with the exception that those contravening the Regulation with a ‘reasonable excuse’ are excused.⁸⁹ However, Regulation 6 does not consider attending educational premises to be a ‘reasonable excuse’ to leave confinement.⁹⁰ In response, the defendants stated that no power was exercised by government to prohibit schools from remaining open, rather, the government merely requested schools to avoid providing their services in order to prevent the spread of Covid-19 and thereafter, to organise a phased return to campus when the exigencies of the situation allowed.⁹¹

Without going into much depth, the High Court concluded that the government did not enact any regulations specifically prohibiting the attendance of schools and ultimately fulfilled their positive obligation to provide education, just not on school premises.⁹² Further, they stated that Regulation 7, which imposes restrictions on gatherings in public places, specifically exempts schools.⁹³ The Court thus concluded that this did not amount to a disproportionate interference with the right.⁹⁴

In July 2020, the Department of Education published an operational guide in which a full re-opening of schools in September 2020 was planned.⁹⁵ Various safeguards were

⁸⁷ Which prohibited a person from leaving the place where they lived without reasonable excuse. A non-exhaustive list of reasonable excuses was specified. From 1 June 2020, Regulation 6 was replaced by a prohibition on a person staying overnight at any place other than where the person lived without reasonable excuse.

⁸⁸ *Dolan* (n 84) [106].

⁸⁹ The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020, SI 2020/350 (The Regulations), reg 6.

⁹⁰ *Dolan* (n 84) [107].

⁹¹ *ibid.*

⁹² *ibid* [110-112].

⁹³ The Regulations, reg 7.

⁹⁴ *Dolan* (n 84) [110].

⁹⁵ Department of Education, ‘Schools Coronavirus (COVID-19) Operational Guidance’ <<https://www.gov.uk/government/publications/actions-for-schools-during-the-coronavirus-outbreak/schools-coronavirus-covid-19-operational-guidance>> accessed 12 March 2021.

implemented to ensure the safe return of all school students (with the majority of university students remaining online) by means of introducing rigorous Covid-19 testing at schools twice a week.⁹⁶ However, on 14 December 2020, local council (Greenwich), amongst several others, desperately wished to close school premises and move to online learning due to the significant worsening of the epidemiological situation.⁹⁷ Despite this, the government ordered all schools to remain open in midst a Tier 3 lockdown⁹⁸ and consequently, threatened Greenwich with legal action if they chose to close schools.⁹⁹ It is evident that less restrictive means were available.

ii. Least restrictive means

To establish whether less restrictive means exists which would render the same result, the advantages of the enacted measures must be weighed against the impact of other possible

⁹⁶ *ibid.* In addition to this, a notice was issued by the Secretary of Education under section 38 of the Coronavirus Act which compelled schools to ensure the immediate provision of 'high-quality' remote learning where a pupil was in isolation or required to stay at home by law.

⁹⁷ Sky News, 'Greenwich Council Backs down in Fight with Government over Closing Schools' (15 December 2020) <<https://news.sky.com/story/covid-19-greenwich-council-backs-down-in-fight-with-govt-over-closing-schools-12162370>> accessed 14 April 2021.

⁹⁸ Age UK, 'Four-Tier Coronavirus Alert Levels: Tier 1, 2, 3 and 4 Rules Explained' <<https://www.ageuk.org.uk/information-advice/coronavirus/coronavirus-guidance/local-lockdown-tiers/>> accessed 12 March 2021. In October 2020, the UK Prime Minister introduced a Four-tier coronavirus alert system. Tier 3 was classified as a 'very high alert' advising people to stay at home and mix only with those in their household, but allowing others to mix in a maximum group of six people in public spaces.

⁹⁹ Secretary of State for Education, 'The Coronavirus Act 2020 Provision of Remote Education (England) Temporary Continuity Direction – Explanatory Note' <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/923539/Remote_Education_Temporary_Continuity_Direction_-_Explanatory_Note.pdf> accessed 12 March 2021. The Education Secretary stated that the continuity of education was a national priority. As previously mentioned, Schedule 16 of the Coronavirus Act gives the Secretary of State the power to temporarily close educational institutions, it does not expressly give them the power to make an order to keep them open as was done in this case. Section 38 of the 2020 Act allows the Secretary of Education to give directions regarding the provision or continuing provision of education but does not expressly state that this includes the power to order student back onto campus especially if, for example, they do not feel safe doing so amidst a pandemic. To maintain a balance, the Secretary, pursuant to the 2020 Act, made multiple notices throughout the pandemic temporarily relaxing statutory measures regulating education to, for example, disapply provisions relating to offences for non-attendance at learning institutions.

means of attaining the same goal, as well as their subsequent impact on other fundamental rights.¹⁰⁰ If there are less restrictive means, the state's action cannot be justified as necessary.

a. Czech Republic

In order to limit the contact of persons at educational institutions, the Czech Government closed all schools and universities. The alternative, online learning, was not initially required by legislation nor initiated by the government, however, it was an alternative as opposed to a complete denial of the right.¹⁰¹ The implementation thereof also calls into question whether right-holders of Article 2 of Protocol No 1 are being deprived of the effectiveness of the right as a result of the emergency measures enacted – something which is proscribed by the Convention.¹⁰² This prompts us to consider the standard of the right to education demanded by the Convention and whether online learning satisfies it.

Many would argue that it does not and further that because less restrictive means exist such measures are automatically disproportionate. Jan Wintr, for example, believes that a phased return to schools and universities with Covid-19 testing mechanisms and standard Covid-19 precautions would have effectively pursued the same aim while simultaneously protecting students' right to education.¹⁰³

b. United Kingdom

In determining whether there was a breach of Article 2 of Protocol No 1, the House of Lords in *Ali* state that the test to be applied by the Convention is a pragmatic one to be applied case-by-case.¹⁰⁴ It requires the Court to determine whether students were denied access to the basic standard of education provided by the government.¹⁰⁵ The question is whether online learning meets this standard. Unfortunately, evidence shows that some schools have

¹⁰⁰ Lebret (n 55) 7.

¹⁰¹ Government of the Czech Republic (n 41).

¹⁰² The Convention art 15.

¹⁰³ Interview with Wintr (n 47). Precautions such as maintaining social distance, wearing face-coverings and frequently sanitizing hands.

¹⁰⁴ *Ali* (n 81). In this case, the restriction was ruled to be proportionate to its purpose, however, it is important to emphasise that this case reviewed very specific measures.

¹⁰⁵ During the pandemic, the minimum standard requirement particularly comes under inspection, amongst the harsh and sweeping restrictions being imposed on fundamental rights such as the right to education.

systemically failed to provide adequate (if any) online education and that even where they have, students from less-educated families and those with disabilities suffer discrimination as the hands of the enacted emergency measures.¹⁰⁶

In an attempt to address these two issues, the government made efforts to provide technical equipment for students who needed it as well as provide free access to data for families who did not have adequate connection.¹⁰⁷ In addition to this, the Secretary of Education issued a legally binding direction compelling all schools across the UK to provide 'high-quality' remote education for three to five hours per day and that this would be enforced and monitored by the Office for Standards in Education who would conduct thorough investigations if they had any serious concerns.¹⁰⁸

Soon after the announcement initiating the first UK lockdown in March 2020 and the closure of schools, the UK Government unexpectedly cancelled all primary and high school examinations for the 2019/2020 academic year.¹⁰⁹ They did not implement an alternative (that is, online assessments), but merely instructed teachers to predict what students' grades would have been if they were able to write exams – taking into account past performance and assignments completed throughout the course of the academic year.¹¹⁰ This was highly criticised by some as an inadequate means of obtaining a final grade for students and overall across the UK these arrangements did not deliver what was required.¹¹¹ Thus, in January 2021, the Secretary of Education issued a direction pursuant to the Coronavirus Act in which he stated that exams in 2021 would also not be able to take place under normal conditions,

¹⁰⁶ Hoar (n 39).

¹⁰⁷ The Rt Hon Gavin Williamson, 'Education Secretary Statement to Parliament on National Lockdown' <<https://www.gov.uk/government/speeches/education-secretary-statement-to-parliament-on-national-lockdown>> accessed 13 March 2021.

¹⁰⁸ *ibid.*

¹⁰⁹ *ibid.*

¹¹⁰ Office of Qualifications and Examinations Regulation (OFQUAL), 'Consultation Decisions: Decisions on How GCSE, AS and A-Level Grades Will Be Determined in Summer 2021' <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/965005/6747-1_decisions_-_GQ_consultation_on_awarding_grades_in_2021.pdf> accessed 12 March 2021.

¹¹¹ Hoar (n 39).

a uniform alternative for schools in assessing students would be implemented.¹¹² It is arguable that such teacher-assessed grades are less restrictive than online assessments considering the stresses students were placed under during the pandemic.

Overall, the UK, especially when compared to the Czech Republic, has made a return to in-person education one of their top priorities. It thus seems as though they comply with the less restrictive means requirement as they advised schools to close instead of outrightly ordering them to as well as made efforts to return to campus at every opportunity possible, implementing the necessary safeguards while simultaneously ensuring a high level of education was maintained.

iii. Foreseeability and reasonableness of emergency measures

This Article 15 requirement is emphasised due to the fact that quick decision-making affecting fundamental rights is inherent to emergencies. Thus, states must do their best to ensure these are effectively communicated and reasonable in the sense that they do not expect more from citizens than what is necessary and sensible to achieve the specified aim. Citizens are also more likely to abide by them this way.

c. Czech Republic

It is concerning that emergency measures were enacted prior to a formal declaration of a state of emergency as both domestic Czech law¹¹³ and Article 15 of the Convention require all emergency legislation to be enacted after a formal adoption thereof.¹¹⁴ The first emergency measure detailing the extent and scope of the prohibition of the access to education was issued by the Minister of Health on 12 April 2020 ('Regulation 1'), to have effect from the 20 April 2020.¹¹⁵ However, in practice, the government officially denied access to educational institutions following an abrupt and skeletal announcement (having immediate effect) on 10 March 2020.¹¹⁶ The Convention requires that restrictions on rights are clear and timeously made available to the public. It is appreciated that emergency situations call for

¹¹² The Rt Hon Gavin Williamson (n 107). The Secretary called this 'teacher-assessed grades' – which will involve training and support to teachers across the UK to render consistent and fair results.

¹¹³ Crisis Management Act 2002 and the Constitutional Act on the Security of the Czech Republic 1998.

¹¹⁴ Although, it is important to note that states' right to derogate is not contingent on a formal declaration of a state of emergency.

¹¹⁵ Extraordinary measure of the Ministry of Health from 12 April 2020, ref. č. MZDR 16184/2020-1/MIN/.

¹¹⁶ Ministry of Health of the Czech Republic (n 72).

quick decision-making, however, it is arduous to admit that a Court would accept a delay of more than a month.

Further, the planned phased return of primary and high school children in November 2020 was unorganised and inadequately communicated to parents and children. It cannot be reasonably expected that school-goers (largely minors) would follow all the fast-changing emergency measures directly affecting them – and this was exactly the issue. A study conducted in the Czech Republic in December 2020 showed that almost 70% of school-goers under the age of 18 were overwhelmed by the constantly changing measures and were unaware of what exactly was expected of them at a given time.¹¹⁷

The Czech Government did, however, implement the ‘anti-epidemic’ system, containing information about the current epidemiological situation – for example, statistics on death and infection rates across all regions.¹¹⁸ The purpose of the system was to increase foreseeability of measures to citizens as it would predict future measures by looking at what stage of lockdown regions would go into if they exceeded a certain number of daily death and infection rates.¹¹⁹ This seems to be an effective safeguard to avoid sudden and unexpected changes in rights-restrictions in theory, however, in practice, it often had the opposite effect. On many occasions, the measures displayed on the system were different to measures enacted or announced by the government.¹²⁰

d. United Kingdom

On 23 March 2020, just a week after the government confirmed that large sporting events would go ahead and the same day that numbers of people were gathering in parks throughout the UK, the Prime Minister gave the people ‘a simple instruction – [they] must stay home’ –

¹¹⁷ Dominik Feri, ‘Dominik Feri Instagram Page (Choco_afro)’ <https://www.instagram.com/choco_afro/?hl=en> accessed 10 March 2021. Most students relied on information posted on Instagram by one of the youngest Czech Parliamentarians, Dominik Ferry, who took it upon himself to post simplified versions of measures affecting kids on his personal Instagram account. The Czech Government could have done better in this regard and perhaps, could’ve created a system providing simplified information about current measures, accessible to students.

¹¹⁸ Government of the Czech Republic (n 41).

¹¹⁹ Daily News, ‘Most Czechs Deem State Response to COVID Appropriate - Poll’ *Gale OneFile: News* (Prague, Czech Republic, 14 January 2021) <https://go.gale.com/ps/i.do?p=STND&u=ull_ttda&id=GALE%7CA648342844&v=2.1&it=r&sid=summon> accessed 10 February 2021.

¹²⁰ *ibid.*

this included not attending schools.¹²¹ And further, upon failure to do so, the police would enforce the instruction by means of fines and dispersing gatherings.¹²² There was no information provided regarding how long this would last – many were left in the dark and worried about the sudden announcement as there was no accompanying legislation outlining the scope and extent of this order to ‘stay home’.¹²³

Nonetheless, what remained unclear and confusing for those living in the UK was the difference in regulations across England, Northern Ireland, Wales, and Scotland.¹²⁴ Some of the differences are justifiable on the grounds that the situation across the UK varies in terms of infection and death rates at a time and tailored measures need to be adopted accordingly. However, it is not always possible to justify the differences in this way, for example, in the context of education, this was the case for various measures regulating the return of children to school, Covid-19 testing procedures as well as the use of face coverings.¹²⁵

Upon the above analysis of emergency measures affecting the right to education in both the Czech Republic and UK, it is evident that both were not easily able to comply with the

¹²¹ Tom Hickman QC, Emma Dixon and Rachel Jones, ‘Coronavirus and Civil Liberties in the UK’ 25 *Judicial Review* 151.

¹²² *ibid.*

¹²³ Joint Committee on Human Rights (n 52).

¹²⁴ *ibid.* 12. Since health is a devolved matter in the UK, the four nations may make their own health policies as a response to the pandemic, however, this presents itself as a disadvantage to citizens whose families are spread across the UK or travel frequently within the UK for work or other reasons who cannot keep up with the varying measures.

¹²⁵ Department of Education (n 95). Welsh Government, ‘Education and Childcare: Coronavirus’ <<https://gov.wales/education-coronavirus>> accessed 14 February 2021. Scottish Government, ‘Coronavirus in Scotland’ <<https://www.gov.scot/coronavirus-covid-19/>> accessed 14 February 2021. Government of Northern Ireland, ‘Coronavirus (COVID-19): Advice on Schools, Colleges and Universities’ <<https://www.nidirect.gov.uk/articles/coronavirus-covid-19-advice-schools-colleges-and-universities>> accessed 14 February 2021. In 2021, Students in England will be tested three times in the first two weeks back at school and thereafter, each student will be given two tests a week to use at home – this is mandatory. In Scotland, all teaching staff together with senior students (aged 14-16 years) will be offered to two home tests per week – this is voluntary. In Wales, all teachers will be offered home tests twice a week and finally, in Northern Ireland, students and teachers at special schools will be offered these tests weekly. In terms of face coverings, both students and staff in England in secondary schools, colleges and universities must wear face masks when indoors – this includes during teaching time in classrooms – unless two meters can be comfortably maintained between students. In Scotland, all secondary pupils are asked to wear masks indoors. In Wales, secondary school students and all staff members must wear face masks everywhere outside. And finally, in Northern Ireland, secondary school students must always wear a face mask both in and outside of the classroom. This information was taken from the UK Government website on education for England, Wales, Northern Ireland and Scotland.

requirement of proportionality required by Article 15 of the Convention. In both countries, there were less restrictive means available to achieve the same result, rendering a lot of emergency measures unnecessary to the extent that they infringed on citizens' rights. Further, although usually reasonable, most of the emergency measures were not effectively communicated to citizens and did not thus comply with the requirement of foreseeability.

In the next section, the same format testing the requirement of proportionality will be used in the context of the right to freedom of movement. Thereafter, conclusions on the efficacy of the requirement as it functions within Article 15 as a whole will be presented together with possible suggestions aimed at making it more effective.

(II) The right to freedom of movement

The right to education is contained in Article 2 of Protocol No. 4 of the Convention and states that:

- '1 Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
- 2 Everyone shall be free to leave any country, including his own.
- 3 No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of order public, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'¹²⁶

The question which needs to be answered here is whether, referring to Article 15 of the Convention together with jurisprudence informing the scope and enforcement of Article 2 of Protocol 4, Governments were able to lawfully enact emergency measures which amounted

¹²⁶ The Convention art 2 of protocol no 4. As opposed to the right to education, which depends on a country's infrastructure and resources to provide the right, the right to freedom of movement does not place such a burden on the State. It merely places a negative obligation on states not to actively interfere with it. This makes it more controversial in the context of limitation as it often amounts to direct interference with the right. This negative aspect of the right provides a more objective standard of analysing states' emergency legislation affecting it as opposed to the more positive right of education.

to a justified and proportionate derogation from Article 2 of Protocol 1 during the Covid-19 health crisis. *Prima facie*, it seems as though in such a severe situation, the restrictions placed on the right to freedom of movement, such as quarantines and lockdowns, are justified by paragraph three of the above Protocol. However, what remains questionable, is the extent to which this right was restricted – simply, did states go too far? Were their actions concerning the restriction of the right to freedom of movement disproportionate to the threat they attempted to mitigate? To answer this question, it is necessary to appreciate exactly what the right to freedom of movement entails.¹²⁷

A report published by the International Commission of Jurists focuses on the significance of the right within a country as well as between countries and how it is imperative to the protection of the rule of law that it be safeguarded, particularly, against executive abuses of power.¹²⁸ The scope of the right is closely linked to individual liberty in a state and thus also to the necessary development of one's own personality within it – the right to freedom of movement is considered a prerequisite for this.¹²⁹ The right necessarily includes the ability for individuals to move freely both within the borders of their state as well as to leave and return to their country without restriction by a state – this applies to citizens and to any other person who enters the country lawfully.¹³⁰ Reasonable restrictions may be imposed in certain

¹²⁷ Unexpectedly, the research on the scope of the right to freedom of movement is very limited and this may very well be one of the reasons as to why it has been so difficult for states to justifiably derogate from it. There appears to be no recent coherent publications or information provided by the ECHR nor the COE on how this right should be interpreted as there is for most of the other rights in the Convention. However, in 1968, the International Commission of Jurists published an extensive report on the scope of the right as it is expressed in the Universal Declaration of Human Rights, which resembles Article 2 of Protocol No. 4 of the Convention. Further, the Office of the High Commissioner of the United Nations published a general comment on the right to freedom of movement and what exactly it entails.

¹²⁸ International Commission of Jurists, 'Report and Conclusions of the Conference of Jurists on the Right to Freedom of Movement' (1968) <<https://www.icj.org/wp-content/uploads/1968/01/right-to-freedom-of-movement-seminar-report-1968-eng.pdf>> accessed 26 March 2021. This was a result of the communist era in which border closures were implemented for years. This is perhaps why such a severe restriction on the right to freedom of movement is particularly sensitive in the Czech Republic, a post-communist State.

¹²⁹ *ibid.* The freedom to travel as an important aspect of the right – on business trips, to see family and also for educational purposes and leisure.

¹³⁰ OHCHR 'General Comment 27' in 'General Comments on Article 12 (Freedom of Movement)' (1999) UN Doc CCPR/C/21/Rev.1/Add.9. <<https://www.refworld.org/pdfid/45139c394.pdf>> accessed 12 January 2021.

circumstances but must be necessary, unarbitrary and must, under all circumstances, be open to review by the courts.¹³¹

Emergency measures enacted by the Czech Republic and the UK will now be analysed under each of the proportionality requirements in turn. Following this analysis, it will be clear as to whether Article 15 provides an effective framework so that states can be sure that they legislate within its confines.¹³²

i. Necessity

a. The Czech Republic

In the Municipal Court case of *Dostál v Ministerstvo zdravotnictví*¹³³ (*Ministry of Health*), the plaintiff challenged the government's Resolution 203, closing the borders of the Czech Republic with immediate effect.¹³⁴ The resolution was challenged on the grounds that the government could not satisfyingly prove that the extent to which the right to movement was restricted, was necessary in the circumstances.¹³⁵ The government's sole reasoning behind Resolution 203 was that the pandemic was a serious threat and limiting the freedom of movement to such an extent was 'necessary to limit social contact between people in order to eliminate the spread of Covid-19 within communities'.¹³⁶ When asked by the Court to elaborate, the Ministry of Health only repeated the aforementioned statement in different wording. The Court agreed and concluded that the government's 'circular reasoning' behind Resolution 203 was insufficient because they could not prove that the measures fulfilled the

¹³¹ International Commission of Jurists (n 128).

¹³² The following analysis contains emergency measures enacted from March 2020 to March 2021.

¹³³ *Dostál* (n 36).

¹³⁴ *Vikarská* (n 75). Resolution of the Government of the Czech Republic of 13 March 2020, ref No. 203 (closure of borders). This meant that all citizens and residents of Czech Republic were not allowed to exit the country and gave only citizens the chance to return to the Republic immediately (only a few days later were permanent residents also allowed to return immediately). Furthermore, all 'non-essential' movement was prohibited, which meant that only journeys to and from work, grocery shopping, trips to medical facilities and family visits were allowed. Persons over the age of 65 had exclusive access to the grocery shops between 10:00-12:00 every day. All primary, secondary and tertiary education institutions were already closed by this point.

¹³⁵ *Dostál* (n 36).

¹³⁶ *ibid.*

purpose that they intended to achieve.¹³⁷ Thus, the plaintiff was able to prove that these strict government-imposed lockdowns within communities would only cause an increase in the spread of the virus within them and were thus not necessary to curb it.¹³⁸

Perhaps one should be more forgiving when analysing emergency measures enacted at the beginning of the pandemic compared to those enacted more recently considering that states have now had time to better understand the pandemic, the measures implemented to curb its spread (and their effects on society) and ultimately, the best way to legally and clearly derogate from rights. Unfortunately, however, in the Czech Republic, this has not been the case – measures emphasising the necessity to continue to restrict freedom of movement to such a severe extent has not been more coherently justified or outlined by the government. In a press conference in early May 2020, the Czech Minister of Health announced a much faster lifting of restrictions than originally planned due to, what was described as, a good development of the epidemiological situation – new cases were averaging at 8 per day.¹³⁹ Within one month, the most stringent lockdown provisions were completely lifted.¹⁴⁰ However, soon after, in July 2020, the new cases went up with an average of 29 per day.¹⁴¹

Czech Prime Minister, Andrej Babiš, was adamant about the fact that another stringent lockdown was out of the question. The failure to reintroduce stricter restrictions led to chaos in the country – by September 2020 the average number of new cases per day was 306.¹⁴² It seems as though, when stringent restrictions were clearly necessitated by the situation and required action from the state to mitigate an evidently rising threat, no action was taken. Many academics relate this to the fact that the Czech Regional Elections were approaching in October 2020.¹⁴³ This contention is strengthened by the fact that just two days after Babiš

¹³⁷ *ibid.* This was mainly because expert evidence which proved that the virus spreads at the same rate within the workplace and within communities outweighed the Government's argument and ultimately, did not fulfil their goal of significantly reducing contact between persons in communities.

¹³⁸ Vikarská (n 75).

¹³⁹ Government of the Czech Republic (n 41).

¹⁴⁰ *ibid.* People were allowed to leave home for recreational purposes, permitted to move around in groups of up to ten people in public places. Shops, restaurants, hotels, theatres, and zoos were allowed to reopen and most shockingly, foreign travel was permitted subject to providing a negative Covid-19 test and undergoing a two-week quarantine upon return to the Czech Republic.

¹⁴¹ Center for Systems Science and Engineering (CSSE) at Johns Hopkins University, 'COVID-19 Data Repository' <<https://github.com/CSSEGISandData/COVID-19>> accessed 15 January 2021.

¹⁴² *ibid.*

¹⁴³ Interview with Wintr (n 47).

won the majority of the country, on 5 October, the Czech Government declared its second state of emergency, reintroducing old and new restrictions.¹⁴⁴ It thus seems as though the implementation of lockdown measures, at some points, amounted to an abuse of executive power motivated by needs other than those required to mitigate the threats of the virus and safeguard citizens' rights.

b. The United Kingdom

On 26 March 2020, the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 were enacted pursuant to powers contained in the Public Health (Control of Diseases) Act 1984 – these regulations were reviewed and amended numerous times especially since the time of their enactment until July 2020.¹⁴⁵ The measures imposed a severe infringement on rights including detention, isolation and restriction of movement, where the Secretary of State or a registered public health consultant had reasonable grounds to suspect an individual was carrying the virus.¹⁴⁶

Regulation 6, as originally stated, specifically provided that during the emergency period¹⁴⁷ no person may leave their place of residence without reasonable excuse – a non-exhaustive list¹⁴⁸ of such excuses was contained in the regulations.¹⁴⁹ On 1 June 2020, Regulation 6 was replaced by a regulation prohibiting a person to stay overnight at a place other than their private residence without reasonable excuse.¹⁵⁰ Contravention of such measures could lead to a Fixed Penalty Notice of £60, or up to £120 for a second offence and the amount doubles after each offence to a maximum of £10 000.¹⁵¹ Further, Regulation 8(3)(b) and Regulation 4

¹⁴⁴ Government of the Czech Republic (n 41). By this stage, there were 10 000-15 000 new cases per day. These numbers persisted to March 2021.

¹⁴⁵ Joint Committee on Human Rights (n 52). It is argued that such intrusive emergency legislation was the inevitable result of the UK Government's initial inaction at the start of the pandemic and if they had acted earlier (as the rest of Europe did), the extent of subsequent emergency measures would not have been necessary.

¹⁴⁶ The Regulations.

¹⁴⁷ Defined in reg 3 of The Regulations as the period from when the Regulations came into force until the date and time specified by the Secretary of State upon review.

¹⁴⁸ The Regulations, reg 6.

¹⁴⁹ *ibid.*

¹⁵⁰ *ibid.*

¹⁵¹ *ibid.*

gives power to a ‘relevant person’¹⁵² to use physical force to return a person to their home if they are in the opinion that that person is in contravention of Regulation 6 (i.e., that they are outside of their place of living).¹⁵³ It is very difficult to justify that conferring such wide discretionary powers of (physical) enforcement onto persons other than state police is a necessary means to mitigate the threat of the Coronavirus and thus, such a measure is likely to be disproportionate.¹⁵⁴

When considering whether Regulation 6 was necessary, one can refer to the ECHR case of *De Tommaso v Italy*.¹⁵⁵ Here the ECHR stated that when testing whether confinement measures are necessary and proportionate in the circumstances, one must consider the confinement in itself (the conditions and duration thereof) but equally important is to consider the impact of other restrictions outside of the confinement period which affect isolation and social contact.¹⁵⁶ For example, the Court will ask whether both within and outside of an imposed curfew, the individual is capable of having ‘a social life and [maintaining] relations with the outside world’.¹⁵⁷ Regulation 6 primarily restricts people (both healthy and infected) to their homes and allows for very limited circumstances (‘reasonable excuse’) upon which they may leave. People are prohibited from making contact with people outside of their homes, making it very difficult to uphold social relations. It is thus likely that such a harsh restriction might be considered a disproportionate in the context of necessity as it goes beyond what is accepted as a justifiable confinement according to ECHR jurisprudence.

This leads to the next question of whether it can be said that Regulation 6 must necessarily be imposed on both healthy and infected persons – Article 2 of Protocol No. 4 of the

¹⁵² *ibid*, reg 8(12)(a). This includes persons other than police officers, such as a community support officer or other person designated by the Secretary of State. *Hickman QC, Dixon and Jones* (n 121). *Hickman, Dixon and Jones* suggest that these powers are not accompanied by an express requirement of reasonable belief but rather only a consideration that such intervention is necessary. Since this sole requirement ‘consideration’ is not further elaborated on, it is implied that those exercising it are not required to account for their actions.

¹⁵³ Where such use of force is (i) reasonable and (ii) necessary in the exercise of the power to remove that person to the place where they are living.

¹⁵⁴ This is supported by the fact that section 45G(2)(j) of the 1984 Act does not authorise the use of such force as it prohibits the Secretary of State from imposing ‘special restrictions or requirements’.

¹⁵⁵ *De Tommaso v Italy [GC]* App no 43395/09 (ECHR, 23 February 2017).

¹⁵⁶ *Hickman QC, Dixon and Jones* (n 121).

¹⁵⁷ *De Tommaso* (n 155) [49].

Convention is unclear on whether this is justified when potential derogation therefrom is invoked on grounds of public health.¹⁵⁸ During the pandemic, it is not easily discernible who is or is not infected – it would therefore be impractical for emergency measures to apply only to infected persons.¹⁵⁹ Further, it is clear *prima facie* that during a pandemic it is necessary to impose confinement measures on those who have been in contact with infected persons.¹⁶⁰ What may be harder to justify in light of the requirement of necessity is the Welsh rule allowing an individual to leave their home to exercise only once per day, especially due to the fact that this is not present in other regulations.¹⁶¹ This is only one example in which there was a significant discrepancy between measures enacted by the four nations.

The Coronavirus Act 2020 was enacted on 25 March and officially revoked previous regulations on the 3 July 2020, on the grounds that the extent of the restrictions imposed were not proportionate.¹⁶² The 2020 Act contained similar, though less intrusive, measures and greater public oversight, for example, a provision was added making a six-month review by the House of Commons compulsory.¹⁶³

ii. Least restrictive means

Under the requirement of proportionality, if it can be established that less restrictive means existed to achieve the same aim, then measures are automatically disproportionate as this means that rights could have been better protected but were not.

a. The Czech Republic

In their report, the International Commission of Jurists states that one's right to return to the country to which he/she is a citizen and to leave a foreign country, should be recognised at all times without limitation.¹⁶⁴ However, in the interests of public health, states should be

¹⁵⁸ This is because all precedents are based on cases wherein there is an individual or group of infected persons who must be confined – never has there been a case where whole populations are subject to confinement. There are two important considerations for why this may satisfy the necessity requirement.

¹⁵⁹ Hickman QC, Dixon and Jones (n 121).

¹⁶⁰ *ibid.*

¹⁶¹ *ibid.*

¹⁶² Joint Committee on Human Rights (n 52).

¹⁶³ Coronavirus Act 2020.

¹⁶⁴ International Commission of Jurists (n 128) 23.

authorised to detain a citizen upon return to their country for such a period as is necessary.¹⁶⁵ On 16 March 2020, the Czech Government ordered citizens and permanent residents to return to the country within three days at their own cost and thereafter, prohibited them from leaving it for the indefinite future.¹⁶⁶ If such stringent limitations are being placed on the fundamental right to move by the government, should they not bear the cost of repatriation and compensate affected individuals?¹⁶⁷

The latest state of emergency was declared on 27 February 2021 to last until 28 March 2021.¹⁶⁸ Amongst these were the most severe restrictions on the right to freedom of movement to date, including a total ban on movement.¹⁶⁹ It is difficult to support a conclusion that a complete closure of borders prohibiting the citizens of a country to leave and enter it is necessary in order to limit contact of persons within the Czech Republic. It is evident that there are less restrictive means available to achieve the same legitimate goal, such as an allowance of travel on condition that a negative test is provided, and a quarantine imposed (as was done by the majority of European countries).¹⁷⁰ It is also unclear according to domestic Czech law as well as the Convention what powers the government has and further, whether a legal basis exists for the government to totally prohibit movement within the territory.

¹⁶⁵ *ibid.*

¹⁶⁶ Interview with Wintr (n 47).

¹⁶⁷ Buščíková and Baboš (n 74). When heavy restrictions began to be implemented by states, the cost of air travel doubled, even tripled, for some. This was due to an instant panic brought about by the tight time limit in which citizens and residents were compelled to be back in their country of residence. Many were unable to get on the next available flight or find a suitable connecting flight from their destination. Seeing as the Government was unable to organise the return of citizens and residence less restrictively, this is something they should have been liable to compensate them for.

¹⁶⁸ Government of the Czech Republic (n 41).

¹⁶⁹ Resolution 1334 of 14 December extended to 11 January and then again extended on the 30th of Jan and Resolution 1449 of 2 February. On 30 January, contact between members of different household was limited to what is strictly necessary and a curfew was imposed from 11:00pm to 5:00am. On 5 February, movement between regions within the Czech Republic was prohibited and travel abroad was also prohibited for non-essential reasons.

¹⁷⁰ Jeremy McBride, 'An Analysis of Covid-19 Responses and ECHR Requirements' (*ECHR Blog*, 27 March 2020) <<https://www.echrblog.com/2020/03/an-analysis-of-covid-19-responses-and.html>> accessed 12 January 2021.

b. The United Kingdom

In his article, Hoar argues that ordering complete social isolation from friends and family as well as the imposition of 18-hour confinement periods (curfews) is not authorised by the 1984 Act.¹⁷¹ In *R (Jalloh) v Home Secretary 2020*,¹⁷² the Court concluded that confinement for more than 20 hours of the day did in fact amount to a tort of false imprisonment.¹⁷³ This in itself speaks to the fact that less restrictive means are available and must be considered in order to fulfil the requirement of proportionality under Article 15.¹⁷⁴

During Covid-19, on the other hand, scientific evidence regarding the necessity of strict lockdowns over long periods to mitigate the threats of the virus are divided – it is thus not the only available and most obvious solution to the problem to all. Furthermore, in *Budayeva and Others v Russia*, the Court stated that ‘natural disasters, beyond human control, do not call for the same extent of state involvement. Its positive obligations do not necessarily extend as far as in the sphere of dangerous activities of manmade nature’.¹⁷⁵ It is thus evident that, although there is scientific evidence proving that such an interference with individuals’ liberty is the only means of combating the threat of the coronavirus, upon which the UK Government relied when enacting stringent emergency measures, it is difficult to derive from the aforementioned Strasbourg case law that there is a positive obligation on states to impose them to such an extent. Further, many scientists also believe that impositions of strict lockdowns are counter-productive and that less restrictive means such as contact-tracing and regular testing would render better results in terms of regulating the effects of the virus.¹⁷⁶ Such a perspective would also sit better when translated into emergency measures as they would more easily fit the criteria of proportionality.

Hoar argues that the government could have better fulfilled the requirement of less restrictive means by choosing to enact emergency measures under a different legislative

¹⁷¹ Public Health (Control of Diseases) Act 1984, section 45(3)(d).

¹⁷² *R (on the application of Jalloh (Liberia)) v Secretary of State for the Home Department* [2020] UKSC 4.

¹⁷³ *ibid.*

¹⁷⁴ Another case which goes to this point is *Finogenov and others v Russia 2011* App no 18299/03 (ECHR, 20 December 2011), which challenged Russian State measures to intervene to safeguard hostages during terrorist attacks. The ECHR held that since the attack was imminent as the only possibility of saving hostages’ lives was to intervene as they did, the interference was proportionate.

¹⁷⁵ *Budayeva and Others v Russia* App no 15339/02 (ECHR, 29 September 2008).

¹⁷⁶ Ronan Cormacain, ‘Keeping Covid-19 Emergency Legislation Socially Distant from Ordinary Legislation: Principles for the Structure of Emergency Legislation’ (2020) 8 *The Theory and Practice of Legislation* 245.

vehicle.¹⁷⁷ Ultimately, since the government contends that the extent of the measures imposed by the regulations is necessary, they should have enacted them under the Civil Contingencies Act 2004 (CCA 2004), which is more suitable to the Coronavirus crisis and places stricter time limits on emergency measures and rigorous parliamentary scrutiny.¹⁷⁸ According to sections 26 and 27 of the CCA 2004, regulations imposed pursuant to it may not last more than 30 days and they lapse if not approved by both Houses within seven days of being laid in front of them.¹⁷⁹ Although identical regulations may be reintroduced after the original ones expire, they would still require a positive resolution from both Houses.¹⁸⁰ On the other hand, the regulations were passed in the absence of a positive resolution from the Houses as a matter of urgency.¹⁸¹ Under section 45R of the 1984 Act, these regulations remain in force in the absence of parliamentary approval and automatically lapse six months after being enacted.¹⁸²

Thus, using the CCA 2004 would in itself have been a less restrictive means by which the government could limit rights during the pandemic, as it provides for more scrutiny of executive power and stricter time limits placed on emergency measures.¹⁸³ Further, Hoar states that the fact that the government chose not to derogate (implying they believe that the high threshold of threat was not met) but also chose to use the 1984 Act which gives them wider powers with less oversight, contradicts the fact that the regulations constituted a proportionate response to the virus.¹⁸⁴

iii. Foreseeability and reasonableness

If it is proved that emergency measures were not effectively implemented to ensure citizens knew exactly what was expected of them at any given time and that these expectations themselves were unreasonable, then the requirement of proportionality has not been

¹⁷⁷ Hoar (n 39) 14.

¹⁷⁸ Civil Contingencies Act 2004, sections 26 and 27. And further, that the fact that they chose to use powers conferred under the 1984 Act, in itself contradicts the Government's argument that the resulting measures were a proportionate response.

¹⁷⁹ *ibid.*

¹⁸⁰ *ibid.*, section 28.

¹⁸¹ Public Health (Control of Diseases) Act, section 45R.

¹⁸² Hoar (n 39) 17.

¹⁸³ Lebreton (n 55).

¹⁸⁴ Hoar (n 39) 18.

complied with. If measures are not foreseeable and reasonable, states cannot expect their citizens to effectively comply with them.

a. The Czech Republic

In *Dostál*, the plaintiff's most persuasive argument was the fact that the draft of Resolution 203 was not publicised prior to its enactment and was thus closed to commentary and criticism from members of Parliament.¹⁸⁵ Further, he contended that the resolution itself was an incomprehensible document which was confusing and unclear to the public.¹⁸⁶ Czech constitutional law expert, Jan Wintr, stresses that such severe restrictions on fundamental freedoms implemented by the government, must be accompanied by a detailed explanation justifying the limitation as well as make evident that such a decision was well-thought out and carefully analysed in terms of their impact on civil rights.¹⁸⁷ It is also significant to mention that these measures were initially passed by the government in accordance with the relevant Act¹⁸⁸ but then quickly lifted and subsequently re-issued by the Ministry of Health under the Emergency Decrees.¹⁸⁹ One of the effects thereof was that businesses severely affected by the new measures lost their claim to compensation from the government. Furthermore, the consequences imposed for failing to abide by the resolution were fines ranging from CZK5 000¹⁹⁰ to CZK3 million (approximately £167-£100 130), which the plaintiff alleged to be an extremely disproportionate and prejudicial amount in the circumstances.¹⁹¹ Taking all of this into consideration, the Court concluded that Resolution 203 did not fulfil the requirements of reasonableness and foreseeability.¹⁹²

More recently, on 4 January 2021, The Public Opinion Research Centre published a poll which showed that six out of ten Czechs considered the government's response reasonable

¹⁸⁵ *Dostál* (n 36) [9].

¹⁸⁶ *Vikarská* (n 75).

¹⁸⁷ Interview with Wintr (n 47). The Resolution in question did not contain any information as to the reasoning behind such a strict approach nor any evidence that such a harsh extent was required to mitigate the effects of the virus.

¹⁸⁸ Crisis Management Act 2002.

¹⁸⁹ *Vikarská* (n 75).

¹⁹⁰ Czech Crowns – currency of the Czech Republic.

¹⁹¹ *Dostál* (n 36).

¹⁹² *ibid.*

and nine of ten found them ‘hardly or completely incomprehensible’.¹⁹³ This was mostly related to the fast-changing nature of measures and the overall lack of justification that came with them.¹⁹⁴ Thus, it seems as though the Czech Government could have done better in adequately keeping the people informed and ensuring the uniformity amongst announcements made by the government and enacted emergency measures.

b. The United Kingdom

An advantage of emergency legislation is that it can be enacted through a single legislative vehicle to ensure foreseeability as well as scrutiny.¹⁹⁵ Initially, the UK set a good example of this by enacting the Coronavirus Act 2020 – all subsequent (secondary) laws were enacted under the authority of the Coronavirus Act and were easily kept track of. However, as the pandemic progressed, lockdown regulations differed across the UK and within six months, there were over 200 pieces of secondary legislation enacted under various principal acts which threatened the quality of review, accountability and their repeal.¹⁹⁶ As a result, each separate emergency law will have to be repealed individually.¹⁹⁷

Further, on average, there has been a new set of regulations each week in the UK since the end of March 2020.¹⁹⁸ The fact that the government has amended the original regulations over 25 times since their initial enactment in March, has made it extremely difficult for citizens to keep up with the latest measures and effectively abide by them. It is understood that such an unprecedented and threatening situation such as the one brought about by Covid-19 requires regular and fast decision-making, however, as noted by the Joint Committee on Human Rights, the government has a duty to ensure these are clearly laid out and accessible to the public and it was reasonable to expect them to do better than they

¹⁹³ Daily News (n 119). The poll was conducted on a sample of 1,024 people over 18 between November 20 and December 8.

¹⁹⁴ *ibid.* Furthermore, and as previously mentioned under the right to education in the Czech Republic, the PES system implemented with the aim of ensuring foreseeability of measures was also largely ineffective at conveying the correct information.

¹⁹⁵ Cormacain (n 176) 259.

¹⁹⁶ Since, upon repeal of the principal Act, secondary legislation enacted pursuant to the principal Act is automatically repealed.

¹⁹⁷ Cormacain (n 176) 247.

¹⁹⁸ Joint Committee on Human Rights (n 52).

did.¹⁹⁹ For example, the government created a guide²⁰⁰ to the current laws and updates on their website, however, at times communication has been confusing and has led to misunderstandings regarding what exactly is permitted (or not).²⁰¹

Another issue is that the regulations were sometimes published a substantial time after a new lockdown had been announced.²⁰² This is incredibly worrisome and contradictory to the rule of law seeing as enforcement of the announced measures had been carried out prior to their official publication.²⁰³

The right to freedom of movement is a right that we could never have imagined be infringed in the way it was during the Covid-19 pandemic. From the above analysis, it can be concluded that emergency measures affecting the right were harshly disproportionate as there existed less restrictive means to achieve the goal – for example, simply requiring a

¹⁹⁹ *ibid.*

²⁰⁰ Gov UK, 'Coronavirus (COVID-19): Guidance and Support' (*gov.uk*, 2020) <<https://www.gov.uk/coronavirus>> accessed 9 March 2021.

²⁰¹ Joint Committee on Human Rights (n 52). The guidance has often been stricter than the actual restrictions imposed by the law, for example, on 23 March, the Prime Minister made a statement referring to four very limited reasons for being able to leave one's home. Subsequently, these reasons were expanded on the website and three days later, the regulations which came into force contained a non-exhaustive list of 'reasonable excuses' permitting people to leave their homes. Some of the reasons included were not even mentioned in the guidance, such as access to social services, for children of two parents who live apart to travel between homes and to fulfill a legal obligation. This is further illustrated by a report published by University College London, which stated that during the first strict lockdown announced on 23 of March, approximately 95% of UK citizens confirmed having a broad understanding of regulations compared to the end of July 2020, where approximately only 45% confirmed so.

²⁰² *ibid.* For example, the North of England local lockdown was announced on 30 of July but regulations enacting it were drafted on 4 of August and only came into force on the next day.

²⁰³ Article 7 of the Human Rights Act 1998 (no punishment without law):

1 No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

2 This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

Further, In the Government's response to the Joint Committee on Human Rights' contention that communication and enforcement regarding the emergency regulations were not in line with the principles of foreseeability and reasonableness, the Government stated that efforts have been made to ensure synchronicity between the enacted regulations and the guidance provided on the website – specifically in the sense that the guidance provided shall mirror the enacted regulations only in non-technical language.

negative Covid-19 test during travel – and these have been increasingly available and reliable throughout the development of the pandemic.

Further, it is arguable that the requirement of proportionality as a whole in the context of Article 15 best fits a *post hoc* review as opposed to delegations of rule-making functions to them *ex ante*.²⁰⁴ This is because measures must be evaluated within the whole context of the specific emergency and its evolution. Thus, although it seems difficult for states to comply with the requirement of proportionality easily and from the onset, it is hard to concede that there exists a better way to achieve this.

The next section, Part Five of this paper, will move on to discuss the requirement of judicial review and how it operated (or did not) in both the Czech Republic and the UK throughout the pandemic.

PART FIVE: ANALYSING EMERGENCY LEGISLATION – JUDICIAL REVIEW

Judicial review is inherently essential to the regulation of emergencies for obvious reasons. State conduct and measures must always be open to review by domestic courts so that they can be supervised to ensure that, as a huge shift of legislative and decision-making power to the executive occurs, it is exercised within the limits of the law, particularly Article 15, at all times.

(I) The Czech Republic

In the Czech Constitutional Court case,²⁰⁵ an individual challenged the government's declaration of a state of emergency together with a number of crisis measures severely infringing on her freedom of movement.²⁰⁶ The Court dismissed the entirety of her claims solely on procedural grounds: the majority ruled that the Court lacks the competence to review such purely political matters; that only privileged applicants²⁰⁷ may bring such an application forward concerning government-implemented measures; and, furthermore, that

²⁰⁴ Only an *ex ante* approach to the requirement of temporariness of measures is effective and it should be strictly applied to states as there are no circumstances in which emergency measures may exceed the emergency to which they are tied.

²⁰⁵ *Czech Constitutional Court case* (n 35).

²⁰⁶ *ibid.*

²⁰⁷ *Vikarská* (n 75). Such as parliamentary opposition or the ombudsperson.

individuals can only challenge measures adopted by the Ministry of Health in the administrative courts.²⁰⁸ However, rather contradictorily, the Court stated that this immunity from judicial review is not absolute and that in some cases the Court may review such a declaration to ensure that it had the intended constitutional effects and to review the legality of the enacted measures.²⁰⁹ The Court thus did have the competence to review such declaration if it was a potential threat to the democracy of the state, in order to protect the rule of law – Vikarská, lecturer at Oxford University, correctly identifies this as a substantive exception to an otherwise procedural rule.²¹⁰

Due to the uncovering of a procedural flaw, the Court engage in a limited review of the declaration of a state of emergency. According to the relevant Act²¹¹ as well as Article 15 of the Convention, the government must, along with such declaration, identify the precise scope and extent to which affected rights will be limited – this was not done by the Czech Government.²¹² Nonetheless, the court concluded that the declaration was not unconstitutional as in this case, an overly strict application of procedural rules would undermine the severity of the situation.²¹³ It is evident that the court thus held the government's actions to a very weak standard when on review. It thus begs the question that although the requirement of judicial review is a cornerstone of Article 15 of the Convention, should the standard to which government action should be held to also be specified within the Article?

Further interesting to note was the fact that crisis measures enacted by the government were given a different legal status ('other legal acts') as opposed to laws – the former having less legal force.²¹⁴ This precluded them from review from non-privileged applicants, especially because the plaintiff could not prove a direct interference with her rights. The ECHR, on the other hand, outrightly recognises that 'legal acts' can in fact amount to a direct interference

²⁰⁸ As was done in the *Dostál* case. Further, the Constitutional Court emphasised the fact that there is no procedure contained in the Czech Constitution by which a declaration of a state of emergency by the Government may be challenged and that such a matter, being purely political in nature, is strictly outside of the scope of judicial review.

²⁰⁹ *Czech Constitutional Court case* (n 35).

²¹⁰ Vikarská (n 75).

²¹¹ The Constitutional Act on the Security of the Czech Republic 1998.

²¹² *Czech Constitutional Court case* (n 35).

²¹³ *ibid.*

²¹⁴ Vikarská (n 75).

with an individual's fundamental rights.²¹⁵ In relation to this, the Czech Constitutional Court stated that the measures initially enacted by the government, later annulled and enacted by the Minister of Health, were no longer in effect and thus, could not be reviewed at all.²¹⁶ The dissenting judges criticised this and labelled it a procedural trap if it was done to preclude the measures from judicial review.²¹⁷ However, in *Dostál*, the Municipal Court, when confronted with the same issue, outrightly stated that within the first declared state of emergency, the government demonstrated that the standard procedure provided by the general law is insufficient in regulating such declarations and the emergency measures which flow from them.²¹⁸

(II) The United Kingdom

Although the efficacy of parliamentary scrutiny and oversight may have been questionable during the enactment of emergency measures in the UK, it is clear that judicial review is not, especially when compared to the Czech Republic. As opposed to the Czech Constitutional Court in *Dostál*, the UK Court of Appeal in *Dolan v the Secretary of State for Health and Social Care*²¹⁹ stated that although, at the time of the hearing, certain measures being challenged were revoked or amended, that it was still in the public interest to determine their validity.²²⁰ This was especially relevant seeing as the appellants argued that the respondents acted *ultra vires* in enacting measures of such magnitude and duration with little parliamentary scrutiny.²²¹ The Court thus allowed a substantive review of measures and concluded that although the challenged measures were stringent, they were subject to compulsory review by the Secretary of State, and were thus compliant with the requirement of proportionality.²²²

²¹⁵ *ibid.*

²¹⁶ *Czech Constitutional Court case* (n 35).

²¹⁷ *ibid.*

²¹⁸ *Dostál* (n 36). Furthermore, as previously mentioned, immediately prior to municipal elections in October, the Czech Prime Minister severely loosened restrictions at a time when the epidemiological situation was worsening. Just after he won a majority in the elections, the Government re-instated a harsh tightening of restrictions and declared the second official state of emergency on 5 of October.

²¹⁹ *Dolan* (n 84).

²²⁰ *ibid* [67].

²²¹ *ibid* [69] - [71].

²²² *ibid.*

As previously mentioned, Fixed Penalty Notices (FNPs) may be issued by an officer under the regulations where a person has contravened them without reasonable excuse. Fines range anywhere between £200²²³ to £10 000²²⁴ depending on the breach. The Joint Committee on Human Rights stated that their greatest concern regarding the FNPs was that they were not eligible for review nor was there a right of appeal.²²⁵ Further, the Crown Prosecution Service found that an unacceptable percentage of prosecuted cases under both the regulations (6%) and the Coronavirus Act (100%) were wrongly charged.²²⁶

It is thus evident that judicial review by domestic courts is an extremely effective means of ensuring compliance with Article 15 of the Convention and human rights throughout an emergency, making a *post hoc* review of emergency measures less laborious or even unnecessary.²²⁷ Thus, it is hard to concede that procedure should ever be recognised as a ground by which judicial review is refused by the courts as it was in the Czech Republic. If brought to the courts for judicial review, courts should be compelled to conduct a substantive review thereof in order to restrain the executive if necessary and set a standard for the enactment of subsequent emergency measures.

CONCLUSION

Article 15 of the Convention ultimately confers wide discretion on states in terms of which they are entrusted with the responsibility of tailoring emergency measures which best fit the situation while simultaneously doing their best to protect fundamental rights.²²⁸ According to this approach, derogation standards are in effect understood as delegations to international treaty bodies for review as opposed to delegations of rule-making functions to them *ex ante*.²²⁹ The most worrisome aspect about this approach is that derogations last for an

²²³ That is, for failing to stay home without reasonable excuse.

²²⁴ That is, for breaching the early closure requirements for the hospitality sector.

²²⁵ Joint Committee on Human Rights (n 52) 24. This is especially concerning seeing as the National Police Chief's Council reported that FNP's were issued disproportionately amongst racial groups.

²²⁶ *ibid*.

²²⁷ As seen in *Dostál* and *Dolan* wherein emergency measures were abolished and upheld respectively after their review.

²²⁸ *A and others v United Kingdom* (n 26).

²²⁹ The advantages of this *post hoc* review is that it takes into consideration the context sensitive nature of emergency measures and assesses their effectiveness and legality on a case-by-case basis as well as respects

indefinite period of time wherein there is significant potential for abuses of power as more decision and law-making powers shift to the executive.²³⁰

Criddle thus argues that the need for international laws to develop more stringent and concrete rules has been a common thread in legal scholarship,²³¹ particularly because derogation directly entails that constraints imposed by the Convention are lifted in respect of the rights derogated from – this already limits the scope within which the ECHR tests the justification of measures.²³² Thus, perhaps the ECHR would benefit from developing a more rigid interpretation of Article 15 within its jurisprudence – while simultaneously respecting state autonomy.

Overall, what seems to be most unclear about the framework is exactly what threshold justifying derogation must be reached to trigger states to derogate. This is especially visible during Covid-19 where, as seen from the analysis of emergency measures, states have clearly surpassed the threshold necessitating derogation but have not done so – claiming it unnecessary – and states get away with this because Article 15 itself and ECHR jurisprudence is not clear enough on the matter. Thus, this threshold should be better established in Article 15 *ex ante* and subsequent jurisprudence as opposed to states being the ones to decide whether it has been reached.

More specifically, as previously proposed in this paper, the procedural requirement of notice would benefit from a firmer establishment in ECHR jurisprudence otherwise, it renders itself irrelevant as a safety valve for states and citizens. However, it is evident that the requirement of proportionality best fits its current *post hoc* review as measures must be evaluated within the whole context of the specific emergency, its development and how it affects specific rights at any given time – in this case, the right to education and right to

State sovereignty. On the other hand, more stringent rules established *ex ante* have the advantages of predictability, stability and constraint.

²³⁰ This has been evident in our above analysis of both the Czech Republic and the UK, for example, in the Czech Republic, where the Prime Minister postponed the enactment of more stringent emergency measures, required by the exigencies of the situation, due to an upcoming election.

²³¹ Criddle (n 28).

²³² Hickman QC, Dixon and Jones (n 121).

freedom of movement. Lastly, judicial review by domestic courts, if substantive and not overcome by procedural hurdles, ensures a less laborious *post hoc* review.²³³

It is thus evident that the current framework provided by Article 15 of the Convention is not coherent enough for states to know exactly how and when they may depart from human rights during *any* emergency. Specifically, the case law has developed in a very specific context – war and terrorism – and thus, much of the subsequent precedent set does not comfortably fit the new context of Covid-19 and has highlighted the inherent flaws within Article 15.

The consequence of this is that many injustices could have been avoided by a more rigid and compulsory implementation of Article 15 and thus, perhaps a more structured, *ex ante* process should be considered by the ECHR in their interpretation of Article 15 in order to better ensure emergency measures are strictly linked to the emergency in essence and scope.

²³³ As seen in *Dostál* and *Dolan* wherein emergency measures were abolished and upheld respectively after their review.

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