HUMAN RIGHTS AND NATIONAL SECURITY. LIMITS AND CHALLENGES IN THE CONTEXT OF EMERGENCY MEASURES

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Abstract

In a global context marked by increasingly complex threats to national security, states face a fundamental dilemma: how can they protect collective security without violating fundamental human rights? This paper examines the intersection of fundamental human rights and national security measures, with a particular focus on their impact on individual freedoms. Specifically, it explores the limitations imposed on civil rights in the name of national security, with special attention to emerging legislation in the fields of counter-terrorism, mass surveillance, and crisis regulations.

The findings suggest that, while there is an international legal framework protecting human rights, many of the security measures adopted by modern states often exceed the boundaries of this framework, citing arguments related to the need to prevent external threats. However, this approach raises critical questions about the proportionality and transparency of restrictive measures, as well as their impact on public trust in state institutions. The paper aims to contribute to theoretical and practical discussions in the field of human security, offering perspectives on the need for more rigorous regulation of the balance between security and fundamental rights, in order to protect both public order and individual freedoms.

Keywords: human rights; national security; derogation; proportionality

Introduction

In any contemporary constitutional framework, the interplay between national security and human rights is a basic contradiction within public law. Governments have a dual responsibility: to ensure the safety and integrity of the state and its citizens, while simultaneously upholding and protecting individual fundamental rights, even during crises. These imperatives frequently intersect most prominently during public emergencies, when authorities exercise extraordinary powers that allow for temporary deviations from human rights standards. The ensuing conundrum, whether security can be augmented without compromising liberty, persists in shaping both theoretical and practical discussions in international human rights law.

This inquiry transcends mere academic interest. The global security landscape in the twenty-first century has been characterised by increasingly intricate threats, including transnational terrorism, cyber warfare, mass migration, hybrid conflicts, and, most recently, global pandemics. Each of these crises has compelled nations to implement emergency measures that substantially curtail individual liberties, frequently rationalised as essential for safeguarding the nation's survival. As Stuart Wallace observes, these reactions have resulted in the formation of “entrenched emergencies” – intervals during which extraordinary

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measures endure much beyond the resolution of the initial crisis, consequently obscuring the boundary between normalcy and exception.[1] This phenomenon prompts significant enquiries about the proportionality, necessity, and legitimacy of state actions, together with the sufficiency of international mechanisms intended to oversee such measures.

Doctrine notes that the ECHR, despite being regarded as the most advanced regional human rights legislation, possesses an intrinsically flexible derogation system.[2] The Convention designates several non-derogable rights, like the right to life, the prohibition of torture, and the principle of legitimacy in criminal law; however, the majority of other rights may be restricted or suspended during emergencies. A strand of the doctrine observes that these rules have engendered "new tendencies" in the European practice, wherein derogation is increasingly utilised to tackle not only conventional military emergencies but also domestic crises such as terrorism or pandemics.[3] The European Court of Human Rights (ECtHR), tasked with interpreting and enforcing the Convention, has chosen a predominantly deferential stance, allowing states considerable latitude in assessing the existence of an emergency and the requisite steps to resolve it.

This judicial deference, however ostensibly rooted in respect for state sovereignty, carries substantial repercussions. Some authors argue that the Court's restraint has enabled the establishment of entrenched emergencies, permitting states to retain extraordinary powers for extended durations and to incorporate emergency legislation into standard law.[4] The landmark case of Lawless v Ireland (No 3), the inaugural instance in which the ECtHR scrutinised a derogation under Article 15, characterised a "public emergency threatening the life of the nation" as "an extraordinary circumstance of crisis or emergency that impacts the entire populace and poses a threat to the structured existence of the community".[5] Subsequent judgements, such as The Greek Case and A and Others v United Kingdom, emphasised that nations possess considerable discretion in evaluating the presence of an emergency and the appropriateness of their response.[6] This methodology has faced criticism for favouring state discretion at the expense of the consistent enforcement of human rights protections, so compromising the protective intent of the Convention.

Outside of Europe, analogous challenges arise within various constitutional and political frameworks. A part of the legal doctrine assert that the majority of democratic constitutions, including those of EU and NATO member nations, clearly permit the limitation of human rights for the sake of national security or public order.[7] They contend that such limits frequently expose the "preeminence of national interests over individual interests", a premise that jeopardises the constitutional equilibrium between the person and the state.[8] This

[1] Stuart Wallace, *Derogations from the European Convention on Human Rights - The Case for Reform*, Human Rights Law Review, Vol. 20, No. 4, 2020, p. 769, https://doi.org/10.1093/hrlr/ngaa036 (01.11.2025)
[2] Aleksandra Toroman, *Restriction on human rights under the European Convention of Human Rights and Fundamental Freedoms – New tendencies*, Zbornik Radova Pravnog Fakulteta u Novom Sadu, Vol. LVI-4, 2022, p. 1192, doi: 10.5937/zrpfns56-41253
[3] *Idem*
[4] Stuart Wallace, *Op. cit.*, pp. 773-775
[5] Article 15 ECHR, https://hudoc.echr.coe.int/eng?i=001-57518, (20.11.2025)
[6] Case The Greek Case and A and Others v United Kingdom, https://hudoc.echr.coe.int/eng?i=001-49209, https://hudoc.echr.coe.int/eng?i=002-1647, (20.11.2025)
[7] Valentina Stetsensko, Tetiana Havronska, Olena Makarova, Valentyna Konchakovska, Derkachova Nataliia, *Balance of Private and Public Interest Law in Matters of Restricting Human Rights for the Purposes of National Security*, Academic Journal of Interdisciplinary Studies, Vol. 12, No. 4, 2023, DOI: https://doi.org/10.36941/ajis-2023-0091, p. 17
[8] *Ibidem*, p. 19

is especially pronounced in nations where national security is regarded as an existential need, rendering any restrictions on civil liberties seemingly essential and warranted. The primary difficulty, consequently, is not the possibility of restricting rights, but rather the conditions, amount, and oversight under which such restrictions occur.

The Legal Framework of Emergency Derogations

The concept of deviation from human rights duties is among the most contentious elements of international and regional human rights law. It permits states, under rigorously delineated conditions, to suspend the enjoyment of specific rights to address an extraordinary crisis jeopardising the nation's existence. Derogation clauses are intended to balance two essential yet conflicting imperatives: safeguarding state security and upholding individual liberties.

A part of doctrine notes that derogation provisions do not negate human rights; instead, they acknowledge that the complete exercise of those rights may temporarily defer to paramount public interests.[1] This flexibility, although crucial for state survival, has inherent hazards. The lack of explicit boundaries may result in the abuse or normalisation of emergency powers. The history of contemporary constitutionalism illustrates that when exceptional actions are integrated into the standard legal framework, they can irrevocably undermine the assurances of the rule of law.

Consequently, international human rights law seeks to articulate clear limitations and conditions governing the exercise of derogation powers. Instruments such as the European Convention on Human Rights (ECHR), the International Covenant on Civil and Political Rights (ICCPR), and regional frameworks including the American Convention on Human Rights (ACHR), adopt a broadly similar structure: states may depart from certain obligations only in genuinely exceptional circumstances, and solely to the extent strictly required by the exigencies of the situation.[2]

Article 15 of the European Convention on Human Rights constitutes the foundation of the regional legal framework regulating derogations in Europe. It stipulates that: “In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law”.[3]

The provision explicitly states that no exceptions are allowed for specific non-derogable rights, which encompass the right to life (except for fatalities arising from lawful acts of war), the prohibition of torture and inhumane or degrading treatment or punishment, the prohibition of slavery, and the principle of legality in criminal law.[4] The concluding paragraph mandates that any state using the right of derogation must tell the Secretary General of the Council of Europe about the measures implemented and the rationale behind them, as well as notify when such measures have been terminated.[5]

Article 15 introduces substantive and procedural limitations. The measures must be implemented just “to the extent strictly required” and must adhere to the state's other international obligations. The notification obligation guarantees transparency and international oversight. Nonetheless, these protections have failed to avert considerable

[1] Aleksandra Toroman, *Op. cit.*, pp. 1193-1194
[2] Stuart Wallace, *Op. cit.*, p. 771
[3] *Article 15 (1) ECHR*, https://hudoc.echr.coe.int/eng?i=001-57518, (20.11.2025)
[4] *Ibidem*, article 15 (2)
[5] *Ibidem*, article 15 (3)

variation in state practices, nor have they consistently been enforced with rigour by the European Court of Human Rights (ECtHR).[1]

The expression "public emergency threatening the life of the nation" is intentionally ambiguous, demonstrating the framers' aim to grant governments the latitude to address unexpected catastrophes. The ECtHR, in its seminal interpretation in Lawless v Ireland (No 3), characterised such an emergency as "an exceptional situation of crisis or emergency that impacts the entire population and poses a threat to the organised life of the community of which the state is comprised".[2]

This term, while succinct, permits substantial interpretation. In The Greek Case, the European Court of Human Rights specified that an emergency must be "actual or imminent", impact "the entire nation", and possess a severity that renders the standard remedies allowed by the Convention "clearly insufficient".[3] The Court has subsequently reinforced these requirements in later judgements, including Brannigan and McBride v United Kingdom, underscoring that states possess a "wide margin of appreciation" in assessing the existence of such an emergency.[4]

The margin of appreciation concept embodies the notion of subsidiarity, positing that national authorities are more suitably positioned to evaluate the real conditions of an emergency. Nonetheless, as some author observe, excessive deference to state authority jeopardises the Court's supervisory function.[5] In reality, the Court seldom challenges the existence of a public emergency once proclaimed by a state, instead concentrating on the proportionality and temporal limitations of the actions implemented.[6]

Derogations under Article 15 ECHR

The development of derogations under the European Convention on Human Rights (ECHR) is closely linked to Europe's post-war efforts to harmonise liberal constitutionalism with the exigencies of political and security crises. Article 15 was incorporated into the Convention as a compromise between the necessity of safeguarding individual rights and the acknowledgement that exceptional circumstances – such as warfare or insurrection – may necessitate extraordinary measures.[7] What was once designed as an emergency safety valve has transformed into a persistent element of the European legal framework.[8]

Since its implementation, article 15 has been invoked by various states in reaction to terrorism, political violence, and civil unrest. Initial derogations – by Ireland in 1957 amid its campaign against the Irish Republican Army (IRA), by the United Kingdom during the Northern Ireland conflict, by Turkey following attempted coups, and by France after the 2015 terrorist attacks – illustrate a consistent trend: states frequently invoke Article 15 not solely in existential crises but also in contexts of enduring instability.[9] This strategy has produced what

[1] Stuart Wallace, *Op. cit*, pp. 778-780
[2] *Case Lawless v Ireland (No3)*, https://hudoc.echr.coe.int/eng?i=001-57518, (20.11.2025)
[3] *Case The Greek Case and A and Others v United Kingdom*, https://hudoc.echr.coe.int/eng?i=001-49209, https://hudoc.echr.coe.int/eng?i=002-1647, (20.11.2025)
[4] *Case of Brannigan and McBride v The United Kingdom*, https://hudoc.echr.coe.int/eng?i=001-57819, (20.11.2025)
[5] Aleksandra Toroman, *Op. cit.*, p. 1197
[6] Stuart Wallace, *Op. cit.*, p. 786
[7] Ed Bates, *The Evolution of the European Convention on Human Rights*, Oxford University Press, 2010, p. 241
[8] Stuart Wallace, *Op. cit.*, p. 771
[9] *Ibidem*, pp. 773-775

Wallace refers to as "entrenched emergencies", in which transitory exceptions become ingrained in standard governance.[1]

A part of legal doctrine observes that derogations have progressively transitioned from exceptional measures for existential threats to conventional instruments of state governance in tackling intricate security issues.[2] This development signifies an extension of the margin of appreciation theory, since the European Court of Human Rights has regularly yielded to state authorities in evaluating both the presence of an emergency and the proportionality of the measures implemented.[3] The outcome has been a disparate jurisprudence that frequently favours governmental discretion at the expense of individual protection.

The terrorist attacks in Paris in November 2015 represented a significant turning point in the development of derogations in Europe. The French government established a state of emergency pursuant to its 1955 legislation, conferring extensive authority to the executive, encompassing warrantless home inspections, curfews, limitations on gatherings, and the ability to disband organisations considered a menace to public order.[4] France informed the Council of Europe of its deviation from the ECHR pursuant to Article 15, citing the necessity to avert other assaults.

The French case highlights the issue of cumulative emergency practices throughout Europe. When one state normalises derogation, others may emulate this action, citing analogous grounds of necessity and proportionality. This diffusion effect compromises the Convention's collective guarantee system, substituting a uniform norm of rights protection with a fragmented array of national exceptions.

The ECtHR's function in overseeing derogations is both essential and contentious. The Court theoretically serves as a custodian of the Convention's integrity, safeguarding against nations' misuse of Article 15 to erode the rule of law. In practice, it has demonstrated exceptional restraint. A primary factor is the principle of the margin of appreciation. The doctrine, first established in Lawless and further extended in Brannigan and McBride, allows states some discretion in evaluating emergencies and deciding on suitable actions.[5] This method adheres to the idea of subsidiarity but may diminish the Court's supervisory role to a mere ceremonial review. Furthermore, the Court's approach to evaluating proportionality under Article 15 is devoid of a logical framework. The outcome is a jurisprudence that fluctuates between prudent intervention and total acquiescence, resulting in ambiguity for states on the boundaries of their discretion.

Recent advances have broadened the settings in which derogations are applied. The emergence of international terrorism, extensive migration, and public health emergencies like COVID-19 have compelled states to reassess the definition of "public emergency".[6] While traditional emergencies were characterised by violent conflict or insurrection, modern crises are widespread, global and persistent.

The COVID-19 pandemic exacerbated these patterns. Doctrine reports that a minimum of ten European nations, including Latvia, Romania, Armenia, and Georgia, informed the Council of Europe of their derogations pursuant to Article 15, but others like

[1] *Ibidem*, p. 776
[2] Aleksandra A. Toroman, *Op. cit.*, p. 1198
[3] *Ibidem*, p. 1199
[4] Audrey Lebret, *COVID-19 pandemic and derogation to human rights*, Journal of Law and the Biosciences, Vol. 7, Issue 1, 2020, p. 2, https://doi.org/10.1093/jlb/lsaa015
[5] Aleksandra A. Toroman, *Op. cit*, p. 1201
[6] *Ibidem*, p. 1202

France and Germany enacted limits without formal notification.[1] The resulting gap demonstrated both the adaptability and vulnerability of the derogation regime. The epidemic, while undeniably an emergency, prompted issues regarding the proportionality of prolonged and extensive limitations, as well as the lack of judicial control.[2]

Conclusions

The interplay between human rights and national security constitutes a fundamental dilemma in contemporary constitutional and international law. This study illustrates that the relationship, frequently depicted as a zero-sum conflict between liberty and safety, is more accurately viewed as a matter of governance through law: how can the state fulfil its sovereign duty to protect while adhering to legal principles that prevent abuse?

Since the establishment of the European Convention on Human Rights in 1950, Article 15 has been designed as an exceptional provision – a specifically constrained safeguard for existential emergencies. However, derogations have evolved into frequent policy tools rather than infrequent constitutional occurrences.[3]

The fundamental conclusion of our study is that rights and security are not opponents but collaborators. Every emergency action that upholds legality strengthens the state's legitimacy; every abuse that circumvents it erodes national cohesion. The balance between protection and liberty cannot be static in philosophy; it must be perpetually negotiated through transparent institutions and an informed citizenry.

Recent derogations show that Article 15 has gone from being a last resort to a standard tool for managing crises. During the COVID-19 pandemic, at least ten Council of Europe member states, including Latvia, Romania, Armenia, and Georgia, officially told the Secretary-General about derogations under Article 15 ECHR. This is in addition to the equivalent clause in Article 27 ACHR that several governments in the Americas relied on. These notices were often used at the same time as broad "ordinary" restrictions put in place by public health laws. This made it hard to tell the difference between a derogation and a restriction, and it raised questions about whether Article 15 was really needed during the crisis.[4] Legal doctrine maintains that derogations should only be used in rare cases and not as a replacement for the normal limitation regime. This is because international human rights law already allows for wide-ranging restrictions when they are legal, necessary, and proportionate.[5] However, the constitutional practice of North Macedonia shows that emergency decrees often give the executive more power over the legislature, which means that constitutional courts are the only way to stop actions that limit rights.[6] These examples show that when there is an emergency, state practice usually gives the executive more power and lessens the power of the courts and parliament. This makes it more likely that, once the crisis is over, temporary measures will become permanent parts of the legal system.

The development of Strasbourg case law demonstrates that emergency powers have been progressively integrated into the Convention system rather than strictly limited. Classic

[1] Audrey Lebret, *Op. cit.*, pp. 3-4
[2] *Ibidem*, p. 6
[3] Stuart Wallace, *Op. cit.*, p. 771
[3] *Case Lawless v Ireland (No3)*, https://hudoc.echr.coe.int/eng?i=001-57518 (20.11.2025)
[4] Audrey Lebret, *Op. cit.*, pp. 3-4
[5] *Ibidem*, p. 3
[6] Osman Kadriu, *States of emergency and the legal questions over human rights restrictions*, "SEER Journal for Labour and Social Affairs in Eastern Europe", Vol. 1, 2021, pp. 56-60

cases like Lawless v. Ireland and Brannigan and McBride v. United Kingdom accepted long detention without charge as long as there was a valid derogation.

This gave a clear meaning to the idea of a wide margin of appreciation in deciding whether there was an emergency and what measures were "strictly required" by it. Subsequent rulings regarding Turkey's counter-terrorism policies, such as Aksoy v. Turkey and Nuray Şen v. Turkey, indicate that the Court is generally inclined to identify violations of Article 5 when incommunicado detention is excessively prolonged or lacks judicial oversight; nevertheless, these determinations have not deterred states from persistently employing preventive detention as a primary emergency measure.[1] Mariniello demonstrates that in the recent derogations by Ukraine, France, and Turkey, specific laws have considerably expanded administrative and preventive detention, frequently undermining habeas corpus protections and diminishing judicial scrutiny.[2]

At the admissibility stage, the Court has also used a very formal definition of "exhaustion of domestic remedies", even when mass dismissals of judges and widespread political pressure make national courts less independent and effective.[3] When you put all of these things together, they support the idea that the ECtHR has too often put national security assessments made by governments ahead of its own role as protector of basic rights. This may have unintentionally led to the problem of "entrenched emergencies".

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