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or Not to Derogate (and
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Question!**

An Analysis of the Legal Framework of
the COVID-19 State of Emergency in the
Republic of Bulgaria and ECHR Practice

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Abstract

This paper examines the challenges that States face in times of emergency as regards their constitutional framework, the imposition of restrictive measures such as lockdowns and the challenging balance to uphold and fulfil human rights obligations and the rule of law. Bulgaria has responded to the COVID-19 pandemic with the promulgation of the Law of the State of Emergency in March 2020. The State powers in emergency circumstances are not unlimited. The legal framework of the Bulgarian public health emergency is analyzed through the dual lens of constitutional limitations and the Article 15 ECHR derogation regime. The work provides a comparative analysis of the procedural notification practice of various States under the ECHR and ICCPR. The derogation regime and relevant principles such as proportionality and margin of appreciation are thoroughly examined. States should strike the proportionate balance to protect public health and apply the widest possible array of human rights protections.

Keywords: COVID-19 public health emergency, Bulgaria, Article 15 ECHR derogation

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To Derogate (and Notify), or Not to Derogate (and Not to Notify), that is the Question! An Analysis of the Legal Framework of the COVID-19 State of Emergency in the Republic of Bulgaria and ECHR Practice

Stoyan Panov¹

Introduction

Bulgaria has responded to the COVID-19 pandemic by altering its legal framework with the promulgation and entry into force of the Law on Measures and Actions during the State of Emergency ('Law of the State of Emergency') on 23 March 2020. The following paper evaluates the constitutional framework that allows for the state of emergency to be proclaimed, the recently adopted Law of the State of Emergency and various selected executive orders in light of their compliance with rule of law standards and the procedural human rights obligations of the State in times of emergency according to the European Convention on Human Rights ('ECHR'). The scope of the paper is on the period of the officially proclaimed state of emergency in Bulgaria.

The state of emergency on protection of public health grounds connotes that the promulgation would facilitate state actions that are less procedural and more pertinent in comparison to normal functioning. Nonetheless, the expected restrictive measures can also affect the upholding and fulfillment of various human rights, so a proportionate balance needs to be achieved. The paper first examines the constitutional framework of the Republic of Bulgaria as regards the proclamation of the state of emergency. The legislative framework in the ordinary Law of the State of Emergency along with the subsequent amendments is introduced and analyzed. A selected set of orders by the Ministry of Health is reviewed. In the second part of the paper, it is emphasized that the powers of the State in emergency circumstances is not unlimited. The Constitution restricts the limitation of certain fundamental rights. Moreover, the legal framework of how Bulgarian authorities responded to the public health emergency is considered through an additional lens, namely the derogation regime under Article 15 of the ECHR. The last section of the work examines the procedural notification-related obligations of the State according to the ECHR and other international instruments. A comparative analysis is performed based on the publicly accessible derogation notification by the High Contracting Parties under the ECHR. In this manner, the paper aims to examine from various angles the fundamental principles behind the state of emergency and its correlation with the rule of law.

1. Domestic Legislative Framework to Respond to the COVID-19 State of Emergency

Constitutions function as checks on the exercise of power as "these checks reflect a kind of distrust of those who wield the authority of the state, at least with respect to protection of individual rights, and that distrust is at its greatest when it comes to the exercise of executive power."² It is reasonable that if public health or life of the nation is threatened, state organs should be able to respond quickly and resolutely, sometimes beyond or within a specific, temporary application of the ordinary constitutional design. For this, various

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² John Ferejohn and Pasquale Pasquino, 'The Law of the Exception: A Typology of Emergency Powers' (2014) 2(2) I.CON 210.

constitutions such as Article 16 of the 1958 French Constitution allow for emergency powers to be utilized in temporary extraordinary situations with the ultimate goal to restore “the conditions to a state in which the ordinary constitutional system of rights and procedures can resume operation.”³ In this sense, the aim of the emergency power is to conserve the ordinary model and to restore the status *quo ante* as soon as the emergency does not necessitate any extraordinary legal response.⁴

1.1 The Bulgarian Constitution and the State of Emergency

The Bulgarian constitutional procedure for the invocation and declaration of a state of emergency is regulated by Article 84(12) of the Constitution of the Republic of Bulgaria (“Constitution”). The clause stipulates that “the National Assembly shall on a motion from the President or the Council of Ministers, introduce martial law or a state of emergency on all or part of the country’s territory.”

For the first time in Bulgarian recent history since 1989, at the onset of the COVID-19 pandemic, the procedure was followed as per motion of the Council of Ministers, the National Assembly introduced a state of emergency by passing a legislative framework in the form of the Law of the State of Emergency on 23-24 March 2020. The initial duration of the Law of the State of Emergency was temporarily restricted for one month: from 13 March until 13 April 2020. The National Assembly subsequently amended the Law of the State of Emergency on 6 April 2020. The temporal scope of the state of emergency was extended until 13 May 2020. In this manner, the national Constitutional framework provides for the declaration and invocation of specific provisions applicable in emergency situations as the supremacy of the Constitution is recognized by explicitly containing the necessary procedure for the proclamation of the state of emergency in an extraordinary context.

Bulgaria responded to the COVID-19 pandemic emergency by introducing an ordinary legislation. In this regard, the Bulgarian legal framework resembles the UK approach in the UK Coronavirus Act as the source of the executive authority is to be delegated by an ordinary act of Parliament.⁵ The Law of the State of Emergency was passed under an ordinary legislative procedure as stipulated in Articles 87 and 88 of the Constitution of Bulgaria.⁶ The National Assembly acted in timely manner due to the urgency of the situation to pass the legislation in several long sittings with open and public debates. Additionally, it is noteworthy that the legislative history of the Law of the State of Emergency includes the participation of the President of the Republic of Bulgaria.

On 22 March 2020, the President under Article 101 of the Constitution imposed a veto and returned the bill of the Law of the State of Emergency to the National Assembly for further deliberations. His veto motives broadly concerned three principled positions on the content of the bill: first, the redefinition and restructuring of the procedure of imposing heavy fines of up to 10000 Levs (5000 Euro) and imprisonment for up to three years for spreading “false information” which as originally proposed may have restricted disproportionately the freedom of speech and expression; second, the removal of the proposed cap on pricing of goods to respond to speculative economic activities as such economic measures “should not result in blocking the industrial activities” and access to medicines and products; and third, restrictions on the ability to utilize the services of

³ Ferejohn and Pasquino, *Law of the Exception*, 212.

⁴ See Ferejohn and Pasquino, *Law of the Exception*, 235.

⁵ UK Coronavirus Act 2020 (25 March 2020) <<http://www.legislation.gov.uk/ukpga/2020/7/enacted>> accessed 11 May 2020. See also, Ferejohn and Pasquino, *Law of the Exception*, 212.

⁶ Under Article 87(1) of the Constitution of the Republic of Bulgaria, “Any Member of the National Assembly or the Council of Ministers shall have the right to introduce a bill.” Under Article 88(1) and (3) of the Constitution, “Bills shall be read and voted upon twice, during different sessions. By way of exception, the National Assembly may resolve to hold both ballots during a single session” and “Each passed act shall be promulgated in State Gazette within 15 days of being passed.”

the armed forces to help the public in order “to minimize the risk of abuse of power”.⁷ In a swift and rare political moment of consensus between the two institutions, the National Assembly amended the pending bill by incorporating the vetoed parts by the President on 23 March 2020 and adopted the bill by 118 members with 14 nays and 56 abstentions out of 240 MPs.⁸

The Law of the State of Emergency aims to delegate the requisite authority to the executive, and is temporarily restricted.⁹ Most measures were made operative and legally binding under orders by the Minister of Health, pursuant to the rather broad discretionary powers provided in Article 2 of the Law of State of Emergency: the Minister of Health, besides his powers regulated by the Law on Public Health, can introduce other temporary measures and restrictions, as stipulated in law. In this manner, the Law of the State of Emergency along with the relevant amendments to various laws and codes serves as the legal basis for the ability of the public authorities to act in the state of emergency. For example, Article 63 of the Law on Public Health was correspondingly amended to allow for certain measures to be applied for restricting the free movement of people as well as to suspend certain administrative services provided to the general public.¹⁰

Another noticeable introduction in the Law of the State of Emergency concerns the ability of the armed forces, pursuant to a decision by the Council of Ministers, to participate or assist in the application of the epidemiological lockdown measures and relevant restrictions on the territory of the Republic of Bulgaria, including the checkpoints run by the Ministry of the Interior or restricting certain individual rights such as the freedom of movement or use of physical force when absolutely necessary, pursuant to Article 9 and 10 of the Law of the State of Emergency.

Particularly relevant for the principles of legal certainty and foreseeability of the law, the Law of the State of Emergency amends that Criminal Code as regards the applicable penalties for violating the state of emergency to sanctions of deprivation of liberty from one to three years and a monetary fine initially set from 5000 to 10000 Levs (approximately 2500 to 5000 Euro), which was subsequently decreased to 300 to 1000 Levs (approximately 150 to 500 Euro).¹¹ Although the Law of the State of Emergency was officially published on 24 March 2020, the entry into force of some provisions was backdated to 13 March 2020. Nonetheless, because of the legal principle that measures should not have retroactive effects, the criminal code amendments in § 3 of the Emergency Law did not retroactively enter into force but were effective as of the time of the official State Gazette publication of the Law of the State of Emergency on 24 March 2020.¹² Other privacy rights provisions such as the amendment in the Law on Electronic Communication as regards collection of data for compulsory quarantine or confinement due to medical and epidemiological reasons were not retroactively enforced either along with various tax relief measures or extensions of deadlines for tax purposes.¹³

The functioning of the judiciary is also affected by the COVID-19 measures as various civil and administrative hearings and deadlines were postponed or extended as of 13 March 2020. During the state of emergency, various deadlines and terms were inapplicable such as the procedural temporal requirements for judicial or enforcement proceedings as well as prescription periods as established by statute along with the relevant terms for implementation of decisions or instructions by the administration with the applicable exceptions to

⁷ Statement made by President Rumen Radev on the occasion of the adopted by Parliament State of Emergency Measures Act (22 March 2020) <<https://m.president.bg/en/news5437/izyavlenie-na-prezidenta-rumen-radev-po-povod-prietiya-ot-parlamentazakon-za-merkite-i-deystviyata-po-vreme-na-izvanrednoto-polozhenie.html>> accessed 11 May 2020.

⁸ Reuters, ‘Bulgarian Parliament Amends State of Emergency Law after President’s Veto’ (23 March 2020) <<https://www.reuters.com/article/us-health-coronavirus-bulgaria/bulgarian-parliament-amends-state-of-emergency-law-after-presidents-veto-idUSKBN21A2MN>> accessed 11 May 2020.

⁹ Up to a period of 2 months until 13 May 2020 at the time of the writing this paper.

¹⁰ The Law on Measures and Actions during the State of Emergency (‘Law of the State of Emergency’) of 23 March 2020, Section 22.

¹¹ The Law of State of Emergency, Section 3.

¹² See Section 52 of the Law of the State of Emergency.

¹³ See Section 41 of the Law of the State of Emergency, and Sections 25-31, for example.

such suspensions.¹⁴

The Law of the State of Emergency was recalibrated, especially in the clauses related to the functioning of the judiciary via the Law of the Amendment of the Law of the State of Emergency of 6 April 2020. The amendment Law attempted to bring a degree of semblance of foreseeability and stability on important functions of the judiciary. The amendments were necessitated in order to clarify certain provisions of the original Law of the State of Emergency of March 2020, especially for the continuation of the applicability of various procedural and temporal requirements in criminal, civil and administrative trials and processes. The Law of Amendment of April 2020 contains a list of various primarily criminal law procedures which are not affected by the state of the emergency, such as pretrial detention orders, judicial review of the detention orders, prohibition on leaving the territory of the Republic of Bulgaria, removal of defendant from office, placement for examination in a mental institution, measures for fine and forfeiture and expropriation of devices in favor of the State, measures for securing the civil claim as well as the procedures of interrogation of a witness before a judge, the acts associated with the execution of the European Arrest Warrant, as well as search and seizure measures, and proposal for releases ahead of terms, among others.¹⁵

The Law of the Amendment of the Law of the State of Emergency also contains administrative procedures which are not affected by the state of emergency: the anticipatory enforcements, the judicial review of remedies against unwarranted actions by the State, individual motions against all administrative acts promulgated during or related to the state of emergency, appeals of decisions and orders under the Administrative Procedural Act as well as Election Codex judicial proceedings, judicial proceedings in the Public Concession Law and Public Procurement Law, to mention a few.¹⁶

As seen above, the Law of State of Emergency primarily focused on the penalties of violations of the administrative orders during the state of emergency, restriction of speculative pricing, temporary suspension of various forfeiture or seizure of property procedures, late payment of liabilities, temporary amendments to the Law on Public Procurement, among others. What is noticeable is that the relevant clauses for the functioning of the judiciary were introduced subsequently in the amendment to the Law of the State of Emergency in early April 2020. In this manner, one ponders whether the original Law of the State of Emergency was well deliberated and whether all affected or interested parties along with the public have taken adequate participation in the decision-making process. The most reasonable explanation is the necessity to pass the legal framework regulating the state of emergency quickly through parliament. Inherently, the fast drafting and deliberation in the relevant committees and plenary sessions may affect the quality of the legal provisions.

1.2 Assessment of the Law of the State of Emergency

The ordinary legal framework in the form of a Law on the State of Emergency resembles an attempt, at least to a certain degree, to guarantee the principles of legal predictability and foreseeability. The promulgation of a law on state of emergency aims at laying specific rules applicable during the emergency situation, although the restrictions of civil liberties are noticeable. In this manner, the balance is tilted towards widespread discretion on part of the executive or administration to decide and implement acts that would otherwise be regu-

¹⁴ For a brief summary, see Deloitte, 'The New State of Emergency Act' (24 March 2020) <<https://www2.deloitte.com/bg/en/pages/legal/articles/Act-on-the-Measures-during-State-of-Emergency.html>> accessed 11 May 2020.

¹⁵ The Law amending the Law of the State of Emergency of 7 April 2020, Paragraph 12. See also, Criminal Procedural Code of the Republic of Bulgaria <https://www.legislationline.org/download/id/4152/file/PENAL_PROCEDURE_CODE_am2011_en.pdf> accessed 11 May 2020.

¹⁶ The Law amending the Law on Measures and Actions during the State Emergency of 7 April 2020, Section 12.

lated by general rules of law while restricting or suspending certain civil liberties.¹⁷ While the framework offers a degree of predictability, it implicitly validates a minimal range of application of the rule of law. Nonetheless, certain core principles of the rule of law continue to be applicable in times of emergency. The principle of legality plays a paramount function in an emergency situation as it is to be applicable to any acts of the legislative, executive and judiciary branches on a clearly provided and established constitutional basis.¹⁸ The principle of necessity demands that “emergency measures must be capable of achieving their purpose with minimal alteration of normal rules and procedures of democratic decision-making”, thus limiting the possibility for abuse of executive powers.¹⁹

Moreover, one of the flaws of the legislative model of dealing with a public emergency is the potential for the introduced legal structure and norms during the state of emergency to become embedded in the normal legal system, “essentially enacting permanent changes in that system under color of the emergency.”²⁰ One safety mechanism against such backdoor permanency is the temporal scope and inherent proportionality checks to emergency powers of the Law of the State of Emergency, discussed below. However, as seen above, the Law of the State of Emergency also introduces certain amendments to the criminal law framework. Moreover, as of the current moment, it is not possible to rationally predict on how many occasions the exigencies of the situation around the public health emergency due to COVID would reoccur. A potential pitfall of the state of emergency approach would be the continuous and repetitive prolongation of the relevant restrictive legislative framework.

The duration of the state of the emergency in Bulgaria is until 13 May 2020 per decision of the Council of Minister of 4 May 2020 for termination of the state of emergency as of 13 May 2020 and requisite amendments in the normative framework of the Law of Public Health and other laws, submitted to the National Assembly.²¹ On 12 May 2020, the National Assembly passed the Law on the Amendment of Law of Public Health in light of the termination of the *de jure* state of emergency. The Amendment Law on the Law of Public Health created a new category of an extraordinary epidemic situation for a restricted period of time under Article 63 (1) of the Law of Public Health. According to the amendments, the Council of Ministers could declare such an extraordinary epidemic situation per proposal of the Minister of Health and a preliminary assessment by the Chief Health Inspector of the existing epidemiological risk.²² This raises the query whether the newly created category of ‘extraordinary epidemic situation’ is not a *de facto* prolongation or ‘normalization’ of the state of emergency from 13 March until 13 May 2020. The practice will show to what degree and how the newly provided ‘extraordinary epidemic situation’ powers will be utilized.

¹⁷ Jeremy Waldron, “The Rule of Law” in, Edward N. Zalta (ed), The Stanford Encyclopedia of Philosophy (Spring 2020 Edition) <<https://plato.stanford.edu/entries/rule-of-law/>> accessed 11 May 2020.

¹⁸ Secretary General of the Council of Europe, ‘Respecting democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis: A toolkit for member states’ SG/Inf(2020)11 (7 April 2020), 3.

¹⁹ Secretary General of the Council of Europe, ‘Respecting democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis: A toolkit for member states’ SG/Inf(2020)11 (7 April 2020), 4.

²⁰ Ferejohn and Pasquino, Law of the Exception, 219. See also, Kim Lane Scheppele, ‘Legal and Extralegal Emergencies’ in G. Caldeira (eds) The Oxford Handbook on Law and Politics (OUP 2008). For a contemporary analysis, see Gabor Halmai, and Kim Lane Scheppele, ‘Don’t Be Fooled by Autocrats!: Why Hungary’s Emergency Violates Rule of Law’ (VerfBlog, 22 April 2020) <<https://verfassungsblog.de/dont-be-fooled-by-autocrats/>> accessed 11 May 2020.

²¹ The National Assembly has been working on amending the Public Health Act as of early May in order not to extend the state of emergency beyond 13 May 2020. The discussed amendments to the Public Health Act concern the introduction of an “extraordinary epidemiological situation” in order to avail the Minister of Health to respond to such a situation by imposing epidemiological restrictive measures over the territory or some parts of Bulgaria and by extending some of the existing measures until 13 July 2020 without resorting to the invocation of a state of emergency. See Dnevnik, “Парламентът ще гласува окончателно закона за извънредната епидемична обстановка” (12 May 2020) <https://www.dnevnik.bg/politika/2020/05/12/4065675_parlamentut_shte_glasuva_okonchatelno_zakona_zh/?ref=home_NaiNovoto> accessed 12 May 2020. See, Council of Ministers of the Republic of Bulgaria, “Министерският съвет одобри проект на Закон за изменение на Закона за здравето” <<https://www.government.bg/special/bg/prestsentar/zasedaniya-na-ms/dneven-red-na-zasedanieto-na-ministerskiya-savet-na-04-05-2020-g>> accessed on 12 May 2020.

²² Law on the Amendment of the Law of Public Health of 12 May 2020 with entry into force of 14 May 2020, National Assembly of the Republic of Bulgaria, Section 2 (amending article 63 of the Law of Public Health).

What may be pertinent for the analysis on the limited temporal applicability of the emergency powers is the compliance of Bulgaria with its international obligations, especially under the European Convention on Human Rights (ECHR). However, the duration of the state of emergency in light of the international obligations of Bulgaria is construed differently in comparison to the theoretical approaches that the scope should be limited as much as possible in lieu with relevant principles such as necessity, distress and proportionality. The main rationale of introducing a state of emergency regime is to limit or contain an ongoing crisis and ultimately return to the normal legal framework as soon as possible.²³ There is no strictly speaking maximum duration of a 'public emergency threatening the life of the nation'. If called to examine a claim in light of derogations made by the High Contracting Parties, the European Court of Human Rights (ECtHR) has indicated in its jurisprudence that it would assess the circumstances of each case separately.²⁴ In these cases, the derogation was specific to a particular set of rights related to the deprivation of liberty in light of the exigency of the situation related to anti-terrorist campaigns or political upheavals.

Strictly speaking, the public health emergency has not been used as a public emergency in the jurisprudence of the Court in Strasbourg yet. What could be drawn from the examples under Article 15 ECHR so far is that it may be reasonable to expect that if the catalogue of derogable rights that are affected in their applicability is lengthy then it would be reasonable to expect that the derogation measures would need to be even more specific in terms of being clearly established in law and properly implemented by the executive. Additionally, if the restricted or infringed derogable rights such as the right to private and family life, the freedom of assembly and association, the right to property, the right to education or the freedom of movement are affected, the derogation measures must also include a clear temporal limit or a sunset clause. It goes beyond saying that the non-derogable fundamental rights, such as the right to life, the prohibition of torture, inhuman or degrading treatment or punishment, or the prohibition of retroactivity under Article 15(2) ECHR along with the abolition of the death penalty in Protocols 6 and 13 and the right not to be tried or punished twice in Article 4 of Protocol 7, should not be affected whatsoever in their scope, applicability and enforcement.

In such testing circumstances in times of emergency, judicial supervision over the application of measures taken becomes even more pertinent. Although it is understandable that the judiciary cannot function as under normal circumstances in order to offer pragmatic solution to avoid gatherings of the public in the courtrooms, it is also relevant to remember that a system of gradual "increasing judicial scrutiny" should be implemented after the initial one- or two- month period of the state of emergency.²⁵ Moreover, it should not be forgotten that Bulgaria has been under a special monitoring of the European Union since its accession in 2007, the Cooperation and Verification Mechanism, as the State has had continuous problems with the rule of law and namely the independence, transparency, accountability and efficiency of the judiciary.²⁶ Bulgaria has been ranked 53 out of 128 in the global ranking of the World Justice Project Rule of Law Index, as well as 23rd out of 24 in the regional EU&EFTA ranking with particular low scores in the constraints on government power, absence of corruption, civil justice and criminal justice.²⁷

What Bulgaria may want to avoid is to follow on a model of eroding the applicable checks and balances even

²³ Secretary General of the Council of Europe, 'Respecting democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis: A toolkit for member states' SG/Inf(2020)11 (7 April 2020), 3. See also, The Venice Commission, 'Turkey - Opinion on Emergency Decree Laws N°s667-676 adopted following the failed coup of 15 July 2016' CDL-AD(2016)037, para. 41.

²⁴ ECtHR, *Ireland v the United Kingdom*, Series A no. 25 (ECHR 18 January 1978), and *A. and Others v the United Kingdom*, [GC], no. 3455/05 (ECHR 2009).

²⁵ B. Ackerman, *The Emergency Constitution*, 1070.

²⁶ EU Commission, "Cooperation and Verification Mechanism for Bulgaria and Romania" <https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/assistance-bulgaria-and-romania-under-cvm/cooperation-and-verification-mechanism-bulgaria-and-romania_en> accessed 11 May 2020. See also, S. Panov, "Judicial Anti-Corruption Reforms in Bulgaria and the Role of the EU in Bulgaria's Judiciary Regulation" 61(2) *Südosteuropa* (2013), 195.

²⁷ WJP, "Rule of Law Index 2020: Bulgaria" <<https://worldjusticeproject.org/rule-of-law-index/country/Bulgaria>> accessed 11 May 2020.

in times of emergency. As a counter example, one may examine closely the approach taken by Hungary in terms of enabling the government to rule by decree without a predetermined time limit,²⁸ which drew an immediate reaction by the EU Commission in reminding all EU Member States that “[i]t is of utmost importance that emergency measures are not at the expense of our fundamental principles and values as set out in the Treaties...[and]... [a]ny emergency measures must be limited to what is necessary and strictly proportionate. They must not last indefinitely. Moreover, governments must make sure that such measures are subject to regular scrutiny.”²⁹

Additionally, it is relevant to examine on a regular basis how other state or judicial organs function. Although a derogation may enlarge the scope of permissible restrictive measures that may affect the right to liberty and security and the right to a fair trial by affording state authorities some leeway as regards the applicable deadlines or timelines and other procedural requirements, as examined below, there are core applicable principles that continue to apply such as the prohibition of detention with legal basis or lack of timely judicial review and the positive obligation by the State to guarantee fundamental requirements of fairness during trials such as equality of arms or presumption of innocence.³⁰

Moreover, the government can take no steps to interfere with the independence of the judiciary in emergency situations. For example, the Prosecutor’s Office, as part of the judiciary under the constitutional framework of Bulgaria, has a particularly important role in safeguarding the life, dignity and rights of individuals, especially in terms of enforcement functions by charging criminal suspects in criminal trials, overseeing enforcement of penalties and even rescinding illegitimate acts in the newly established legal framework.³¹ One example illustrates how the freedom of expression may be affected. Article 326(1) of the Bulgarian Criminal Code, which stipulates that “a person who transmits over the radio, by telephone or in some other way false calls or misleading signals for help, accident or alarm, shall be punished by imprisonment for up to two years” has been used as the basis for indictments for “unsubstantiated claims for expected deficit of medicines” during the state of emergency in the COVID-19 crisis. The information or opinion about the potential deficit was in some occasions provided by the head of the Bulgarian Pharmaceutical Union in her official capacity, which led to her indictment under the respective criminal code provision for a series of statements that were qualified as to raise unreasonable alarm among society in the state of emergency.³² Such acts on part of the state organs may be classified as disproportionate and stifling or having a chilling effect on the public debate about particularly relevant topics such availability of medicines in times of health emergency. Medical professionals, journalists and the public should retain their capacity to scrutinize the authorities through critique which is not based on malicious spreading of disinformation.³³

1.3 Assessment of the Orders by the Executive

²⁸ See Politico, “Hungary’s Viktor Orban Wins Vote to Rule by Decree” (30 March 2020) <<https://www.politico.eu/article/hungary-viktor-orban-rule-by-decree/>> accessed 11 May 2020. See also, Halmai, Gábor; Scheppele, Kim Lane “Orbán is Still the Sole Judge of his Own Law”, VerfBlog (30 April 2020) <<https://verfassungsblog.de/orban-is-still-the-sole-judge-of-his-own-law/>> accessed 11 May 2020.

²⁹ Statement by President von der Leyen on emergency measures in Member States (31 March 2020) <https://ec.europa.eu/commission/presscorner/detail/en/statement_20_567> accessed 11 May 2020.

³⁰ Secretary General of the Council of Europe, “Respecting democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis: A toolkit for member states” SG/Inf(2020)11 (7 April 2020), 6.

³¹ See Prosecutor’s Office of Republic of Bulgaria, “Prosecutors’ Statute and Functions” <<https://prb.bg/en/acts/prosecutors-statute-and-functions>> accessed 11 May 2020.

³² Svobodna Evropa, “Прокуратурата обвини шефката на фармацевтичния съюз, защото е предупредила за недостиг на лекарства” (10 April 2020) <<https://www.svobodnaevropa.bg/a/30546414.html>> accessed 11 May 2020.

³³ Secretary General of the Council of Europe, “Respecting democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis: A toolkit for member states” SG/Inf(2020)11 (7 April 2020), 7.

As early as 13 March 2020, the Minister of the Health issued a series of orders to respond to the COVID-19 pandemic. Regular classroom activities in kindergartens, primary and secondary schools and universities were suspended. All public gatherings of more than two persons were prohibited, including access to museums, theatres, cinemas, shopping centers, restaurants, as well as all sports competitions, conferences and art performances. As of 16 March 2020, various travel restrictions were imposed initially on third-country nationals from particularly affected states from COVID-19 which was later expanded to include some EU nationals from particularly affected states such as France, Germany, Italy, Spain, among others, with a few exceptions for Bulgarian nationals or official status exceptions. As early as 17 March 2020, all persons arriving in Bulgaria were subject to a 14-day mandatory quarantine, with a limited list of exceptions such as for transit truck drivers, with an applicable sanction of 5000 Levs (2500 Euro) for violating the mandatory quarantine. Various lockdown and quarantine orders on specific towns and settlements were imposed in order to limit the potential spread of the infection.³⁴

Such orders based on the Law of the State of Emergency could be classified as primarily technocratic in nature and scope. Law and orders dealing with state of emergency due to epidemics or pandemics or natural disasters “grant extraordinary powers to...impose quarantine, which may seem intolerable under normal circumstances.”³⁵ The rationale is that the faster the state responds, the smaller the likelihood of the damage caused to society. Nonetheless, the delegated prerogatives to the executive, namely the Minister of Health in the particular examples, cannot contravene and must comply with the Constitution and other normative acts of higher order.³⁶ The executive must comply with the positive obligations on part of the State through proper implementation and protection of human rights. Moreover, the orders or any normative act should be reasoned in order to provide legal certainty.

As seen above and although outside of the scope of the current paper, the new category of extraordinary epidemic situation introduced in the Law on the Amendment of the Law of Public Health of 12 May 2020 contains the most relevant measures within the powers of the Minister of Health found in the Law of the State of Emergency. For example, the restrictive measures for freedom of movement including the imposition of lockdowns, access to public places restrictions, restriction on entry in the territory of Bulgaria by foreign nationals are incorporated in the Law on Amendment of the Law of Public Health of 12 May 2020.³⁷ The most relevant sanctions under the Law of the State of Emergency pertaining to violations of the epidemiological measures and mandatory quarantine also remain, based on the sanction regime during the state of emergency.³⁸ Moreover, the rights and privileges enjoyed by legal subjects to various administrative deadlines, tax regulations and other favorable treatment, introduced under the state of emergency framework, continue to apply for at least additional two months as of 13 May 2020.

What is noticeable in the recently applied measures in Bulgaria is that they offer a degree of flexibility and adaptability to the relevant circumstances by enabling more executive powers to the Minister of Health and Ministry of the Interior with a significant role in implementing and enforcing the promulgated orders. The flexibility to apply various restrictive measures on part of the State is significantly enhanced, although certain checks on the decision-making powers of the executive remain. For example, the National Assembly can be requested to convene in sittings when more than half of its Members are present as quorum per Article 81(1)

³⁴ Ministry of Health Orders Portal <<https://www.mh.government.bg/bg/normativni-aktove/zapovedi-pravilnitsi-instruktsii/>> accessed 11 May 2020.

³⁵ Bruce Ackerman, *The Emergency Constitution*, ‘The Emergency Constitution’ (2004) 113 *Yale Law Journal* 1057.

³⁶ See Article 15 of the Law of Normative Acts, <<https://www.lex.bg/laws/ldoc/2127837184>> accessed 11 May 2020.

³⁷ Law on the Amendment of the Law of Public Health of 12 May 2020 with entry into force of 14 May 2020, National Assembly of the Republic of Bulgaria, Section 2 (amending article 63 of the Law of Public Health).

³⁸ Law on the Amendment of the Law of Public Health of 12 May 2020 with entry into force of 14 May 2020, National Assembly of the Republic of Bulgaria, Sections 6 and 7 (amendment of article 209a(1) and introduction of article 215b of the Law of Public Health). The violation of a mandatory imposed quarantine is 5000 Levs (approx. 2500 Euro).

of the Constitution and some functionality of the judiciary is preserved during the pandemic emergency as observed above, such as urgent criminal law measures related to pre-trial detention hearings or execution of arrest warrants.³⁹ The balance is tilted in the ability of the State to respond to the extraordinary circumstances of the public health danger. However, an indefinite extension and application of executive powers is impermissible.⁴⁰

1.4 Role of the Legislative Branch to Check and Balance Executive Powers in Times of Emergency

The role of parliaments in emergency situations is fundamental as they must check and have the power to control the executive branch “by verifying, at reasonable intervals, whether the emergency powers of the executive are still justified, or by intervening on an *ad hoc* basis to modify or annul the decisions of the executive”.⁴¹ The proper functioning of the parliament is predicated on the ability of its members to participate in its sessions. A related issue is the ability of the National Assembly to extend the state of emergency by amending the Emergency Law by repeated majority votes. If we examine the Bulgarian example, the point of departure is Article 81(2) of the Constitution which stipulates that the laws and other acts can be passed by majority of more than one-half of the present Members.⁴² There are applicable exceptions, requiring a qualified majority such as laws ratifying international treaties with two-thirds majority (Article 85(9)(2) of the Constitution of Bulgaria) or constitutional amendments requiring a majority of three-quarters in three ballots with the possibility for re-introduction of a failed amendment which gained more than two-thirds but less than three-quarters during the initial voting to be passed by two-thirds majority up to five months after the initial ballot vote (Article 155 of the Constitution of Bulgaria). But such exceptions do not directly concern the introduction of the state of emergency.

If one contemplates a hypothetical in which 10 or 20 Members of the National Assembly out of total of 240 may usurp the legislative order and extend or amend the emergency powers, there are two constitutional brakes or checks that are available to constraint such a development. First, any session or sitting of the National Assembly requires a quorum check of more than half of its Members (namely 121 Members).⁴³ Once the quorum is passed, the passing of the law is based on majority of present Members. However, in the event of a forthcoming voting, the Chairperson of the National Assembly has the discretion to check the quorum, and only once per one sitting the Chairperson per request of a Parliamentary Group may perform the quorum check.⁴⁴ The sitting of the National Assembly is possible to continue without the requisite quorum, but “no voting can be held and no acts adopted” until the necessary quorum is achieved.⁴⁵

Second, the President has the discretion to veto within two-week period the law, and overcoming the presidential veto requires a majority of more than half of all Members of the National Assembly per Article 101(2) of the Constitution of Bulgaria. However, to rely on a procedural check as the quorum and the discretionary competence of the President to veto may be too thin when possible abuses of the emergency crisis may

³⁹ See Jeremy Waldron, “The Rule of Law” in The Stanford Encyclopedia of Philosophy.

⁴⁰ The Venice Commission, ‘Parameters On The Relationship Between The Parliamentary Majority And The Opposition In A Democracy: A Checklist’ CDL-AD(2019)019, para. 119.

⁴¹ Secretary General of the Council of Europe, ‘Respecting democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis: A toolkit for member states’ SG/Inf(2020)11 (7 April 2020), 4.

⁴² See Article 70 of the Rules of Procedure of the National Assembly of the Republic of Bulgaria. See also, § 4 of the Rules of Procedure of the National Assembly of the Republic of Bulgaria: “By ‘present’ at open vote shall be understood the number of Members of the National Assembly, who have registered themselves prior to the start of the vote.”

⁴³ See Article 51(2) of the Rules of Procedure of the National Assembly of the Republic of Bulgaria, <<https://www.parliament.bg/en/rulesoftheorganisations>> accessed 11 May 2020.

⁴⁴ Article 52(3) of the Rules of Procedure of the National Assembly of the Republic of Bulgaria.

⁴⁵ Article 52(4) of the Rules of Procedure of the National Assembly of the Republic of Bulgaria.

tempt the executive. One such possible drawback is indeed the temptation to normalize emergency powers, thus eroding the urgency of the situation that necessitates the emergency powers.⁴⁶ Some scholars suggest that the extension of the emergency powers even via ordinary legislation should be done by super-majority escalating votes (initially simple majority then sixty percent, and so on) as is the case in South Africa.⁴⁷

What is noticeable in Bulgaria during the emergency situation is that the National Assembly only meets to deliberate acts related to the state of emergency with the regular parliamentary questions of the government being done in written form, while the National Assembly commissions *de jure* continue to function.⁴⁸ As established above, the Emergency Law was provided under the ordinary legislative procedure, which inherently necessitates the National Assembly “to remain in place to regulate the use of the granted powers...[and] is expected to monitor the use of the emergency powers, to investigate abuses, to extend these powers if necessary, and perhaps to suspend them if the emergency ends.”⁴⁹

The practice of the National Assembly in Sofia has been mixed so far in that aspect as, on at least one occasion, the National Assembly session did not begin due to insufficient quorum during the two-month period of the state of emergency.⁵⁰ Nonetheless, it is easy to contemplate that other pragmatic alternative means can be used in order to circumvent the high number of people gathering in the Assembly hall such as digital sessions, proportionate minimal representation of each political group with the requisite physical distancing in the Assembly hall, among others. What remains pertinent is that the executive powers need to be checked should abuse happen, a core principle of the legislative emergency model.⁵¹

This is particularly pertinent in circumstances when the rule of law is under pressure or if there is even the slightest possibility for abuse of power or arbitrary decision-making by public authorities in such extraordinary times. As shown above, the legal framework implemented in Bulgaria illustrates a regime of an officially declared state of emergency. As established, the legal framework and the relevant orders by the executive do deviate from the normal normative structure and function of the state as a result of the health emergency. As the duration of the pandemic is difficult, if not impossible, to predict at this exact moment, it is also extremely arduous and speculative to predict when the state of emergency would cease or be reintroduced. Nonetheless, individual rights under the Constitution and ECHR must continue to be protected.

2. Limitations to the Use of the State of Emergency

2.1 The State of Emergency as a Derogation from the Norms and Constitutional Limitations and International Standards

Could the Law of the State of Emergency and respective orders by the executive be considered to be derogations from the established public law norms? If we consider the constitution as a set of norms along with the ordinary legislation and if there is a deviation from the normal function and behavior of the State, then one

⁴⁶ See Bruce Ackerman, *The Emergency Constitution*, “The Emergency Constitution” (2004) 113 *Yale Law Journal* 1048.

⁴⁷ B. Ackerman, *The Emergency Constitution*, 1055.

⁴⁸ See National Assembly of the Republic of Bulgaria, ‘During the state of emergency the National Assembly will only meet on bills and acts related to the state of emergency’ (26 March 2020) <<https://www.parliament.bg/en/news/ID/5059>> accessed 11 May 2020.

⁴⁹ Ferejohn and Pasquino, *Law of the Exception*, 217.

⁵⁰ *Dnevnik*, ‘ГЕРБ, “патриотите” и “Воля” провалиха изслушването на Борисов за коронавируса в парламента’ (21 April 2020) <https://www.dnevnik.bg/politika/2020/04/21/4056937_izslushvaneto_na_borisov_v_parlamenta_shte_se_provali/> accessed 11 May 2020.

⁵¹ Ferejohn and Pasquino, *Law of the Exception*, 218. See also, Ackerman who suggests that “the Executive should be given the power to act unilaterally only for the briefest period- long enough for the legislature to convene and consider the matter, but no longer” (B. Ackerman, *The Emergency Constitution*, 1047).

can entertain the notion that a derogation has occurred which is “allowed under certain circumstances, justified, and in any event in need of justification.”⁵² In this manner, the norm as public law, constitution or the function of the regular government is qualified by the emergency powers (the derogation), based on certain specific proportionate and necessary justifications.

The crux of the problem is achieving the appropriate balance when certain rights are restricted in times of emergency. The guidance provided by various international and regional organizations can serve for illustrative purposes what the range of the limitation shall be in the current public health crisis. The Secretary General of the Council of Europe has issued a toolkit for governments to deal with “the present unprecedented and massive scale sanitary crisis in a way that respects the fundamental values of democracy, rule of law and human rights.”⁵³ The Council of Europe accepts that the restrictive measures to respond to the pandemic inevitably encroach on and interfere with integral rights and freedoms in a democratic society governed by the rule of law.

With the realization that the public health problem becomes an interwoven social, economic and human rights issue, the United Nations, with special attention on human rights protections in such difficult times, has focused on three particular rights: the right to life and duty to protect life, the right to health and access to health, and the central challenge to freedom of movement.⁵⁴ The UN also recalls the positive obligations on part of States to protect and promote economic and social rights, specifically relevant for the COVID-19. States should not engage in unjustifiable discriminatory practices, and particularly vulnerable groups most at risk or disproportionate impact should be protected. Severely ill patients, people with disabilities or the elderly may be particularly affected and States should continue to fully uphold and implement their positive obligations to protect life and prevent ill-treatment.⁵⁵ States must fulfill the obligation to inform the public about known risks related to the pandemic as well as to make publicly accessible the measures to respond to the spreading of the disease.⁵⁶ Moreover, the assessment of the derogation measures may include an examination whether such measures discriminate in an unjustifiable manner between different categories of persons.⁵⁷ Members of vulnerable groups should be able to benefit from various rights such as the right to education and the access to adequate health care.⁵⁸

The UN emphasizes that “authorities need to be open and transparent in their decision-making and willing to listen to and respond to criticism...[and] need to be accountable to the people they are seeking to protect.”⁵⁹ The coercive measures need to be proportionate and reasonable while “courts and administration of justice must continue to function despite the constraints imposed by the crisis.”⁶⁰ In particular, problematic practices include states of emergency that grant extensive executive powers with minimal or no oversight, no sunset clauses, derogations from human rights, criminal penalties for “spreading false information” with potential chilling effect on freedom of expression, excessive use of force in quarantine enforcement, among others. The permitted derogations in human rights law must be officially proclaimed, exclusively taken to the extent strictly required by the exigencies of the situation, not inconsistent with other obligations under inter-

⁵² Ferejohn and Pasquino, *Law of the Exception*, 222.

⁵³ Secretary General of the Council of Europe, ‘Respecting democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis: A toolkit for member states’ SG/Inf(2020)11 (7 April 2020), 2.

⁵⁴ UN, ‘COVID-19 and Human Rights: We are All in This Together’ Policy Brief (23 April 2020) p. 4, <https://www.un.org/sites/un2.un.org/files/un_policy_brief_on_human_rights_and_covid_23_april_2020.pdf> accessed 11 May 2020.

⁵⁵ Secretary General of the Council of Europe, ‘Respecting democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis: A toolkit for member states’ SG/Inf(2020)11 (7 April 2020), 5.

⁵⁶ See ECtHR, *Guerra and Others v Italy* ECHR 1998-I 227, para. 58.

⁵⁷ ECtHR, *A. and Others v the United Kingdom* (GC), App no 3455/05 (ECHR, 19 February 2009), paras. 182-190.

⁵⁸ Secretary General of the Council of Europe, ‘Respecting democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis: A toolkit for member states’ SG/Inf(2020)11 (7 April 2020), 8.

⁵⁹ *Ibid* 13.

⁶⁰ *Ibid* 15.

national law, time-limited, and not discriminatory.⁶¹

Due to these limitations, the relevant state organs do not enjoy an unlimited power in a state of emergency. Certain peremptory standards remain unrestricted or unaltered as essential for the rule of law and human rights protections even in times of public emergency. Core civil rights need to remain protected even in the most severe emergency.⁶² The national legal and constitutional emergency frameworks should also prohibit the possibility for derogation from certain obligations during the emergency in line with the international obligations of the State *inter alia* under Article 15 ECHR and Article 4 ICCPR.

The Bulgarian Constitution regulates the restriction of the scope of fundamental rights in Article 57(3). The clause allows, following the proclamation of a state of emergency, for temporary restriction on the exercise of individual rights, "except for the rights established by Article 28 (the right to life), Article 29 (the prohibition of torture or cruel, inhuman or degrading treatment), Article 31 paras 1 (due process clause), 2 (prohibition of enforced guilty plea) and 3 (the presumption of innocence), Article 32 para 1 (the right to privacy with the possibility for lawful interference), and Article 37 (The freedom of conscience, the freedom of thought and the choice of religion with possibility for lawful interference)." In this manner, the Bulgarian Constitution preserves the spirit of the supremacy of the law to a limited catalogue of fundamental rights and the protection of fundamental non-derogable *ius cogens* rights and principles even in extraordinary times of emergency.

What is essential for the national authorities in lieu with the obligations under the ECHR and the rule of law is to ascertain that the measures are a genuine, proportionate and necessary response to the emergency crisis as a response to the persistence of the derogation, the derogation is limited in scope and reasons are adequately provided ahead in time, the measures are subject to effective safeguards, important measures are provided against arbitrary behavior of the state authorities, judicial control was practicable, speedy and effective as well as public confidence in the independence of the judiciary is paramount, and the operation of the restrictive measures and respective legislative framework are "kept under regular independent review... subject to regular renewal."⁶³

2.2 Derogation under the European Convention on Human Rights in Times of Emergency

The standards of Article 15 of the ECHR for the derogation in times of emergency might serve as the appropriate lens through which the Law of the State of Emergency could be analyzed. As a High Contracting Party to the ECHR, Bulgaria has to ensure that the recently promulgated Law on the State of Emergency broadly follows the requirements of the ECHR under Article 15(1). The state of emergency and the introduced restrictive measures primarily attempted to respond to the public health emergency, created by COVID-19.

The qualifying features of such an emergency include:

- 1) It must be actual or imminent;
- 2) The derogation must be a genuine response to an emergency situation;
- 3) Its effects must involve the (whole) nation;
- 4) The continuance of the organized life of the community must be threatened;
- 5) The crisis or danger must be exceptional, as in that the normal restrictions, permitted by the ECHR for

⁶¹ Ibid 17.

⁶² See Ackerman, *The Emergency Constitution*, 1039.

⁶³ See ECtHR, *Brannigan and McBride v the United Kingdom* Series A no. 258-B (26 May 1993), paras. 51, 59, 61-65

the maintenance of public safety, health and order are plainly inadequate.⁶⁴

The Council of Europe's Venice Commission in its check-list on the rule of law also establishes the connection between the proportionality of the derogations, limited to the extent strictly required by the exigencies of the situation, duration, circumstance and scope, as laid down in Article 15 ECHR or Article 4 ICCPR.⁶⁵ As such, the premise of the Law could be considered to fall under the strict requirement of the exigencies of the situation as the emergency should be actual or imminent, and the crisis is of exceptional nature, so the normal restrictive measures under the Convention are plainly inadequate for maintenance of public health.⁶⁶

It should be recalled that the Court in Strasbourg considers that state executive, legislative or judicial authorities with their responsibility for the life of the nation are in optimal position

“to determine whether that life is threatened by a “public emergency” and, if so, how far it is necessary to go in attempting to overcome the emergency. By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it. Accordingly, in this matter a wide margin of appreciation should be left to the national authorities.”⁶⁷

However, one should not forget that it is for the ECtHR to rule on whether *inter alia* the High Contracting States of the ECHR have gone beyond the “extent strictly required by the exigencies” of the crisis. The domestic wide margin of appreciation is thus accompanied by a supervision at the Council of Europe level by taking into account “such relevant factors as the nature of the rights affected by the derogation, the circumstances leading to, and the duration of, the emergency situation.”⁶⁸ Most importantly, while derogations have been accepted by the ECtHR in public emergencies threatening the life of the nation, such derogation measures from the ECHR obligations “can never justify any action that goes against the paramount Convention requirements of lawfulness and proportionality”⁶⁹ and should safeguard the values of the democratic societies such as pluralism, tolerance and broadmindedness.⁷⁰ The check on part of the ECtHR whether the derogating measures from the obligations under the ECHR are only “to the extent strictly required by the exigencies of the situation” is rooted in the proportionality and necessity assessment of the said measures.⁷¹ Moreover, the ECHR also includes the obligations that Contracting States are prohibited to abuse rights per Article 17 ECHR as well as that any limitation on the use of restrictions on rights “shall not be applied for any purpose other than those for which they have been prescribed” per Article 18 ECHR.

What is noticeable is that the Republic of Bulgaria has resorted to declaring a state of emergency in its domestic legal framework which is a pattern in other states in Central and Eastern Europe. So far, at least ten High Contracting Parties have resorted to a derogation from the ECHR under Article 15 ECHR through notification to the Secretary General of the Council of Europe.⁷² Moreover, as established above, Bulgaria's restrictive measures could be classified as affecting the full implementation of certain ECHR rights such as Articles

⁶⁴ See ECtHR, Denmark, Norway, Sweden and the Netherlands v Greece (the “Greek case”) App no 3321/67 (Commission report of 5 November 1969), para. 153. See also, A. and Others v the United Kingdom [GC] App no 3455/05 (ECHR 2009), and ECtHR, Brannigan and McBride v the United Kingdom Series A no. 258-B (ECHR, 26 May 1993), para. 43.

⁶⁵ Venice Commission Rule of Law Checklist, 22-23.

⁶⁶ ECtHR, Denmark, Norway, Sweden and the Netherlands v Greece (the “Greek case”), Commission report, para. 153.

⁶⁷ ECtHR, Brannigan and McBride v the UK, para. 43. See also the Ireland v the United Kingdom Series A no. 25 (ECHR, 18 January 1978), paras. 78-79, 207.

⁶⁸ ECtHR, Brannigan and McBride v the UK, para. 43.

⁶⁹ Secretary General of the Council of Europe, ‘Respecting democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis: A toolkit for member states’ SG/Inf(2020)11 (7 April 2020), 3.

⁷⁰ See ECtHR, Şahin Alpay v Turkey App no 16538/17 (ECHR, 20 March 2018) paras. 78 and 180.

⁷¹ ECtHR, A. and Others v the United Kingdom [GC], no. 3455/05 (ECHR 2009), paras. 182-183.

⁷² See Council of Europe Notifications <<https://www.coe.int/en/web/conventions/notifications>> accessed 11 May 2020.

8 (Right to respect for private and family life) with a particular relevance for restrictive measures about mobility restriction of reunifications of families, partners and parents as well as interruption of various planned medical activities which may affect self-determination and private life decisions; Article 10 (freedom of expression) and 11 (Freedom of assembly and association) of the ECHR with particular relevance for assemblies and gatherings of more than two people at public places; Article 2 of Protocol 1 to the ECHR (Right to education) with relevance for suspension of primary, secondary and higher education regular activities; Article 2 of the Protocol No. 4 (Freedom of movement) for restrictive measures on crossing the borders as well as various travel bans, quarantines of settlements or parts of the cities; as well as Articles 5 (Right to liberty and security) and 6 (Right to a fair trial) as to the restrictive measures affecting the regular functioning of the judiciary, for example.

The illustrative list shows that significant restrictions to social activities take place and may amount to interferences with the relevant provisions of the ECHR. The ECHR allows for restrictive measures to be justified on the ground related to protection of health under Article 5(e), Article 8(2), Article 10(2), Article 11(2), or Article 2(3) of Protocol 4 if such restrictions are laid down and in accordance with the law, necessary and proportionate for achieving the aim of the restriction. However, the derogation mechanism under Article 15 also avails the Contracting States to apply exceptional measures and derogate from the States' obligations under the ECHR under strict abidance to the absolute character of non-derogability under Article 15(2) ECHR.

Whether or not a derogation regime is applicable, any restrictive measure is to be clearly established in law, in compliance with the applicable constitutional guarantees and proportionate and necessary to achieve the aim it pursues.⁷³ As the list of potentially affected rights is rather expansive, one ponders whether the derogation is the most optimal option in order for the State to continue to comply and fulfil its obligations under various human rights treaties including the ECHR and the ICCPR. The decision to derogate or not to derogate from the States' obligations under these treaties has manifold effects on how the constitutional order and human rights obligations are upheld. A careful assessment on part of the State is necessary in order to determine whether the ultimate measure to derogate strictly required by the exigencies of the situation is taken.

One avenue of potential review of the acts of the State is the ECtHR. The Court in Strasbourg in its jurisprudence has clarified that if there is an application while the derogation is in force, it first would examine whether the measures taken can be justified under the substantive Articles of the Convention, and *only if* they cannot be so justified, the Court would determine whether the derogation under Article 15 ECHR was valid.⁷⁴ Ultimately, a case originating from Bulgaria after the state of emergency was promulgated would follow this construct of review. It would be interesting to see if the Court would determine that *de facto* and *de jure* there is a derogation regime in Bulgaria after 13 March 2020 including the recently introduced legal category of "extraordinary epidemic situation" of 14 May 2020 as the ECtHR can examine *proprio motu* whether the procedural requirements under Article 15 are complied with.⁷⁵

3. Absence of Notification under Article 15(3) ECHR

⁷³ Secretary General of the Council of Europe, 'Respecting democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis: A toolkit for member states' SG/Inf(2020)11 (7 April 2020), 6.

⁷⁴ ECtHR, *A. and Others v the United Kingdom* [GC], no. 3455/05 (ECHR 2009), para. 161.

⁷⁵ ECtHR, *Aksoy v Turkey* ECHR 1996-VI, para. 86. The ECtHR also reminds the High Contracting Parties that "it is ultimately for the Court [ECtHR] to rule whether the measures were 'strictly required'" as confirmed in the ECtHR, *A. and Others v the United Kingdom* [GC], no. 3455/05 (ECHR 2009), para. 184.

Another pertinent issue is whether Bulgaria should have lodged a notification under Article 15(3) ECHR with the Council of Europe. As seen above, the Law on the State of Emergency of 23 March 2020 introduced a legal framework which is legally and factually regulating the emergency situation, necessitated to respond in the most efficient and ideally proportionate manner to the spread of COVID-19. Moreover, the subsequent amendments to the Law of Public Health from 12 May 2020 seems to prolong the operative parts as regards the emergency powers of the executive to impose restrictive measures in the newly created category of an extraordinary epidemic situation. However, Bulgaria has not officially filed a notification of derogation under Article 15(3) ECHR with the Secretary General of the Council of Europe. Although the Bulgarian government contemplated submitting an official notification to the Council of Europe with some intriguing legal interpretation as to the function of the derogation in late March 2020, it has not done this so far.⁷⁶ This differs with the practice of various Eastern European states that have resorted to official proclamations of a state of emergency under Article 15 ECHR, as seen below.

The primary purpose of informing the Secretary General of the Council of Europe is the public aspect of the derogation as well as the reminder that the Convention is a system of collective enforcement as the other Contracting States need to be informed of the derogation.⁷⁷ The Committee of Ministers as early as 1956 provided the interpretation of the function of Article 15(3):

“any information transmitted to the Secretary-General by a Contracting Party in pursuance of Article 15, paragraph 3, of the Convention must be communicated by him as soon as possible to the other Contracting Parties and to the European Commission of Human Rights.”⁷⁸

Such notifications by the Contracting Parties also serve to uphold the principles of accessibility of legislation and foreseeability of the restrictive measures to the regular legal framework. The ECtHR has pronounced that “the notification does not have to be made before the measures in questions are introduced”⁷⁹, although Article 15(3) ECHR implies that any derogation notice must be done without unavoidable delay.⁸⁰ In the jurisprudence of the ECtHR, it has been established that “communication without delay is an element in the sufficiency of information.”⁸¹ For example, in *Lawless v Ireland*, the Court found that submitting a notice twelve days after the initial declaration is considered to being submitted without delay.⁸²

The question whether the absence of Article 15(3) ECHR notification is a condition to substantively rely on the derogation provision under Article 15(1) ECHR is pertinent as regards the international obligations of the Contracting States to the ECHR. The Council of Europe has reminded the Contracting Parties on 7 April 2020 that “the Secretary General of the Council of Europe, being the depository of the Convention, *must* [emphasis added by author] be fully informed of the measures taken, of the reasons therefore, and of the moment these measures have ceased to operate.”⁸³ The language indicates an obligatory nature, connoting a duty to fully inform the Secretary General of the Council of Europe and, respectively, the rest of the Contracting Parties.

Such an interpretation goes in line with one of the primary purposes of the formal notification requirement, namely to uphold the collective enforcement mechanism at the Council of Europe level. As the core purpose

⁷⁶ Dnevnik, ‘Данаил Кирилов: Възможно е да има нарушение на права на гражданите’ (20 March 2020) <https://www.dnevnik.bg/bulgaria/2020/03/20/4043958_sudut_v_strasburg_vremenno_niamalo_da_priema_jalbi_ot/> accessed 11 May 2020.

⁷⁷ See Council of Europe, ‘Guide on Article 15 of the European Convention on Human Rights’ (31 December 2019) para.33.

⁷⁸ Council of Europe Committee of Ministers, Resolution (56) 16 (26 September 1956) <<https://rm.coe.int/16805e35bf>> accessed 11 May 2020.

⁷⁹ ECtHR, *Greece v the United Kingdom* App no. 176/56 (Commission Report, 26 September 1958), para. 158.

⁸⁰ ECtHR, *Lawless v Ireland* (no. 3) Series A no 3 (1 July 1961) para. 47, and *Greece v the United Kingdom* App no 176/56 (Commission report of 26 September 1958) para. 158.

⁸¹ ‘The Greek Case’ (Report of the Sub-Commission) para. 43.

⁸² *Lawless v Ireland* (no. 3) Series A no 3 (1 July 1961), para. 47.

⁸³ Secretary General of the Council of Europe, ‘Respecting democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis: A toolkit for member states’ SG/Inf(2020)11 (7 April 2020).

of the ECHR in terms of enforcement of the guaranteed rights under Article 1 of the ECHR is for the Contracting Parties to “secure within their jurisdictions the rights and freedoms” defined in the ECHR, the collective enforcement mechanism is an essential safeguard for individual rights in the state of emergency and regime of derogation. The Secretary General of the Council of Europe also emphasizes that “the Council of Europe must carry out its core mandate by providing, through its statutory organs and all its competent bodies and mechanisms, the forum for collectively ensuring that these measures remain proportional to the threat posed by the spread of the virus and be limited in time.”⁸⁴

The collective enforcement mechanism is also predicated upon the ability of any Contracting State to refer to the ECtHR any alleged breach of the ECHR and Protocols by another Contracting Party under Article 33 ECHR.⁸⁵ In this sense, the notification serves as a quasi-monitoring and enforcement mechanism among the High Contracting Parties in itself. The practice of the Contracting Parties indicates that Article 15 ECHR has been raised and litigated in a few fundamental inter-state cases such as the *Greek case*⁸⁶, *Ireland v the UK*⁸⁷, *Greece v UK*⁸⁸, or *Cyprus v Turkey*⁸⁹. One ponders how one State would be able to bring an inter-state case against another State if the applicant State is not made aware of the derogation measures under Article 15 ECHR.

Moreover, the vast majority of cases are based on individual complaints under Article 34 ECHR. The principle of legal certainty along with the obligation on part of the Contracting States not to hinder the effective exercise of the right of an individual application further specify the necessity for an open public access to the whole legal framework upon which the derogation is based and implemented in times of emergency, and thus, for a notification under Article 15(3) ECHR. In that sense, the *de facto* derogation without the requisite notification to the Secretary General undermines the effective functioning of the overall human rights protective machinery at the Council of Europe level, and may lead one to conclude that the failure to notify may nullify the derogation whatsoever.⁹⁰ If this approach is taken, the nullification of the derogation would mean that the State would not be able to rely on the derogating measures as regards its obligations under the ECHR.

The practice of the ECtHR has not provided an unequivocal answer as to whether the failure to comply with Article 15(3) ECHR carries the sanction of nullity of the derogation. For example, in the *Cyprus v Turkey* case, the Commission recalls that “it reserved its view as to whether failure to comply with the requirements of Art. 15(3) may ‘attract the sanction of nullity or some other sanction.’”⁹¹ However, in the following paragraph the Commission establishes

“that, in any case, Article 15 requires some formal and public act of derogation, such as a declaration of martial law or state of emergency, and that, where no such act has been proclaimed by the High Contracting Party concerned, although it was not in the circumstances prevented from doing

⁸⁴ Secretary General of the Council of Europe, ‘Respecting democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis: A toolkit for member states’ SG/Inf(2020)11 (7 April 2020), 2.

⁸⁵ See also, Article 48 of the Articles on Responsibility of States for Internationally Wrongful Acts on invocation of responsibility by a State other than an injured States *erga omnes partes*.

⁸⁶ Denmark, Norway, Sweden and the Netherlands v Greece (the “Greek case”) App no 3321/67 and 3 others (Commission report of 5 November 1969).

⁸⁷ ECtHR, *Ireland v the United Kingdom* Series A no. 25 (ECHR, 18 January 1978).

⁸⁸ ECtHR, *Greece v the United Kingdom* App no. 176/56 (Commission Report, 26 September 1958).

⁸⁹ ECtHR, *Cyprus v Turkey* App no 8007/77 (Commission Report, 6 October 1983).

⁹⁰ For a discussion on the failure to notify and its consequences, see S. Martin, ‘A Domestic Court’s Attempt to Derogate from the ECHR on behalf of the United Kingdom: the implications of Covid-19 on judicial decision-making in the United Kingdom’ (EJIL:Talk!, 9 April 2020) <https://www.ejiltalk.org/a-domestic-courts-attempt-to-derogate-from-the-echr-on-behalf-of-the-united-kingdom-the-implications-of-covid-19-on-judicial-decision-making-in-the-united-kingdom/?utm_source=mailpoet&utm_medium=email&utm_campaign=ejil-tal> accessed 11 May 2020.

⁹¹ ECtHR, *Cyprus v Turkey* App nos 6780/74 and 6950/75 (Commission Report, 10 July 1976), para. 526.

so, Article 15 cannot apply.”⁹²

The effect of the failure to notify under Article 15(3) ECHR has remained unresolved so far in the jurisprudence of the ECtHR. As the ECtHR is vested “to ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto”⁹³ and as it has the jurisdiction extended to all matters concerning the interpretation and application of the Convention and the Protocols⁹⁴, perhaps the current crisis would allow the ECtHR to clarify its stand on the issue.⁹⁵ It should also be recalled that the Secretary General has the power to request “any High Contracting Party [to] furnish an explanation of the manner in which its internal law ensures the effective implementation of any of the provisions of the Convention.”⁹⁶

3.1 Procedural Requirements under Article 15(3) ECHR

The nature of the notice submitted to the Secretary General of the Council of Europe must fulfill the procedural requirements under Article 15(3) ECHR. Although there is no explicit prescribed form for the notification, the derogation notice must include information on the reasons for declaring the state of emergency and on the relevant measures taken. The notification also generally contains the reasons and circumstances of the state of emergency as well as it includes the legal texts of the relevant domestic emergency measures.⁹⁷ The degree of information should be such as to allow the High Contracting Parties “to appreciate the nature and extent of the derogation from the provisions of the Convention which the measures involved”.⁹⁸ The Estonian notification of 20 March 2020 followed this pattern by even enumerating the ECHR obligations of the relevant articles that may be derogated. In a note verbale of 20 March 2020, Estonia “pursuant to Article 15 of the Convention for the Protection of Human Rights and Fundamental Freedoms informs that Estonia exercises the right of derogation from its obligations under the Convention for the Protection of Human Rights and Fundamental Freedoms in the entire territory of Estonia.”⁹⁹ The derogation is based on the emergency situation necessary to respond and combat the spread of coronavirus in the most efficient manner.

What is noticeable in the derogation notification by Estonia is that it includes what range of rights and corresponding obligations under Articles 8 (Right to respect for private and family life), 11 (Freedom of assembly and association) of the ECHR, Article 1 of Protocol 1 (the right to property), Article 2 of Protocol 1 to the ECHR (Right to education), and Article 2 of the Protocol No. 4 (Freedom of movement) as well as Articles 5 (Right to liberty and security) and 6 (Right to a fair trial) might be affected. Additionally, Estonia attaches various orders of the government of Estonia which in essence resemble to a large degree the measures implemented by the Bulgarian government as seen above.¹⁰⁰

Other states in Central and Eastern Europe have also notified the Council of Europe under Article 15(3) ECHR such as Romania, Latvia, and Serbia. For example, the notification of Romania of 18 March 2020 for the pur-

⁹² ECtHR, *Cyprus v Turkey* App nos 6780/74 and 6950/75 (Commission Report, 10 July 1976), para. 527.

⁹³ Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14 (4 November 1950), ETS 5, art 19.

⁹⁴ Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14 (4 November 1950), ETS 5, art 32.

⁹⁵ See N. Holcroft-Emmess, ‘Derogating to Deal with Covid 19: State Practice and Thoughts on the Need for Notification’ (EJIL: Talk!, 10 April 2020) <<https://www.ejiltalk.org/derogating-to-deal-with-covid-19-state-practice-and-thoughts-on-the-need-for-notification/>> accessed 11 May 2020.

⁹⁶ See Article 52 ECHR on inquiries by the Secretary General.

⁹⁷ See ECtHR, *Lawless v Ireland* App no 332/57 (Commission Report, 19 December 1959), para. 80. See also ECtHR, *Lawless v Ireland* (no. 3) Series A no 3 (1 July 1961), para. 47.

⁹⁸ ECtHR, *Greece v the UK*, para. 168.

⁹⁹ Permanent Representation of Estonia to the Council of Europe, Notice of Derogation No.1-16/6, (20 March 2020) <<https://rm.coe.int/09000016809cfa87>> accessed 11 May 2020.

¹⁰⁰ *Ibid.*

pose of Article 15(3) ECHR is not as detailed as the Estonian notification but it contains the requisite information and decrees that introduce the measures in the state of emergency in the annex parts.¹⁰¹ Romania updated the notification on 2 April 2020 by adding a series of military ordinance decrees and governmental emergency ordinance.¹⁰²

In contrast, the Republic of Serbia submitted a blanket notification on 6 April 2020.¹⁰³ In a rather short form, Serbia simply states that the measures implemented in pursuance of the state of emergency declared on 15 March 2020 are derogation “from certain obligations provided for in the European Convention on Human Rights to the extent strictly required by the exigencies of the epidemiological situation and medical necessity.” Serbia ascertains that the relevant restrictive measures and institutions responsible for their implementation “adhere to [the] commitments arising from Article 15(1) and (2) of...the European Convention on Human Rights.”¹⁰⁴ The notification does not include annexes with the relevant restrictive domestic measures translated into English but simply includes links to websites of the Government of the Republic of Serbia and the Legal Information System. Nonetheless, under the procedural requirements of Article 15(3) ECHR, it is not expressly mentioned that the High Contracting Parties shall provide a list of the Articles that are derogated from in the Article 15 ECHR notification in contrast to Article 4(3) of the ICCPR that requires a State to list the “provisions from which it has derogated”. The ECHR demands that a High Contracting Party provides full information about “the measures which it has taken”. In this manner, blanket-style short notifications may be not an optimal solution in order to comply with the requirements of Article 15(3) ECHR.

3.2 Consistency with Other Obligations under International Law

Bulgaria has to consider its obligations under international law in light of its constitutional and ECHR obligations. One should not look further than Article 5(4) of the Constitution which stipulates that “international treaties...shall be part of the legislation of the State. They shall have primacy over any conflicting provision of the domestic legislation.” The Court in Strasbourg has also reminded the High Contracting Parties that under Article 15(1) ECHR, measures taken by the State derogating from Convention obligations must not be “inconsistent with its other obligations under international law”. Particularly relevant for the analysis of the derogation regime under ECHR is Article 4(1) of the ICCPR as the language of the ICCPR provision can be used to aid the interpretation along with the relevant context per Article 31(3)(c) of the Vienna Convention on the Law of Treaties, as all Contracting Parties to the ECHR are parties to the ICCPR.

Article 4(1) of ICCPR requires that the State Parties officially proclaim the existence of the public emergency that threatens the life of the nation. This requires a formal act of derogation at domestic level. Moreover, Article 4(3) of ICCPR obliges any State Party to “immediately inform the other State Parties... of the provisions from which it has derogated and of the reasons by which it was actuated.” Hence, the obligation to notify the other State Parties is qualified by the existence of an official proclamation in the form of a formal act at the domestic level.

Such a procedural construct may serve as a solution to the ambiguity in the jurisprudence of the ECtHR as regards the legal consequences of the failure to notify under Article 15(3) ECHR. The two-step process en-

¹⁰¹ Permanent Representation of Romania to the Council of Europe, Note Verbale Nr. 498/JJ9014C (18 March 2020), <<https://rm.coe.int/09000016809cee30>> accessed 11 May 2020.

¹⁰² Permanent Representation of Romania to the Council of Europe, Communication contained in a Note Verbale from the Permanent Representation of Romania (2 April 2020) <<https://rm.coe.int/09000016809e16bf>> accessed 11 May 2020.

¹⁰³ Ministry of Foreign Affairs of the Republic of Serbia, Note verbale JJ9025C (7 April 2020) <<https://rm.coe.t/09000016809e1d98>> accessed 11 May 2020.

¹⁰⁴ Ibid.

shrined in the ICCPR may avail the Contracting Parties with certainty and foreseeability in order to fully uphold the collective enforcement mechanism under the ECHR. In this vein, it is relevant to check the recent practice of the Contracting Parties to the ECHR with a cross-reference to their practice under the ICCPR regime during the COVID-19 emergency. As indicated above, so far ten Contracting Parties have submitted their notifications under Article 15(3) ECHR. But only six of these ten States have submitted the Article 4(3) ICCPR notifications as of early May 2020.¹⁰⁵

What is noticeable by comparing the notifications under Article 4(3) ICCPR and Article 15(3) ECHR is that in all six notifications under the ICCPR, the High Contracting Parties have explicitly invoked the relevant derogations from the obligations to the respective ICCPR rights. In all six derogation notifications from Council of Europe States under ICCPR, the right of liberty and movement under Article 12 ICCPR is derogated from; five States derogate from the freedom of assembly duties (Article 21 ICCPR); four States derogate from right to privacy, family, home or correspondence (Article 17 ICCPR); three States derogate from the right to liberty and security (Article 9 ICCPR); two States- from freedom of association (Article 22 ICCPR); and only Estonia derogates from the right to a fair trial.¹⁰⁶ The practice of the States is diverse and may be explained by the respective domestic measures that are implemented during the emergency situation in each respective jurisdiction.

For the purpose of this work, it is more relevant to examine the practice of the six Council of Europe States that filed official notifications under both ICCPR and ECHR notification regimes. Three High Contracting Parties did not include a specific reference to any ECHR articles in their Article 15(3) ECHR notifications. The remaining three of the Council of Europe States (Estonia, Georgia, Latvia) that derogated under both ICCPR and ECHR specifically mentioned ECHR articles in their Article 15(3) ECHR notifications.¹⁰⁷ Estonia broadly derogated from its obligations for similar rights under ECHR and ICCPR (with the exception that it included the right to education and protection of property under its ECHR derogation notice). Latvia followed a similar suit (by adding the right to education in its ECHR derogation notice). Georgia was more specific and invoked more rights in its derogation under the ECHR.¹⁰⁸

The preliminary conclusion that could be drawn is that High Contracting Parties that submit Article 15(3) ECHR derogation notices not always follow up to submit their derogation notifications under Article 4(3) ICCPR. Only half of the States that have submitted notifications under both regimes are specific in enlisting potential rights that may be affected under the ECHR regime. On some occasions, the ECHR notifications invoke more rights that may be affected by the derogation regime. It could be concluded that although the ICCPR demands an official notification, some High Contracting Parties are perhaps more concerned with their notifications to the Council of Europe in terms of the available enforcement mechanisms including the jurisdiction of the ECtHR. Ideally, the practice of the High Contracting Parties under ECHR would mirror the practice under ICCPR and vice versa as regards the notification obligations.

The ECtHR could also shed some light on the relationship between the derogation regimes under the ECHR and ICCPR. The ECtHR has so far interpreted the requirement of consistency on part of the Contracting Parties with other international obligations, including Article 4 of the ICCPR by reminding the High Contracting Parties in the *Brannigan and McBride v the UK* case that “that it is not its role to seek to define authoritatively the meaning of the terms “officially proclaimed” in Article 4 of the ICCPR”. Nonetheless, the Court continues to analyze in substance whether a statement of the Secretary of State for the Home Department before the House of Commons would amount to an explanation of reasons for the UK to derogate and to provide the steps being taken to provide the derogation notice under Article 15 ECHR and Article 4 ICCPR. The Court

¹⁰⁵ Armenia, Estonia, Georgia, Latvia, Romania, and San Marino. See Annex 1 of this Working Paper.

¹⁰⁶ See Annex 1.

¹⁰⁷ See Annex 1.

¹⁰⁸ See Annex 1.

concludes that “the statement, which was formal in character and made public the Government’s intentions as regards derogation, was well in keeping with the notion of an official proclamation.”¹⁰⁹ In this manner, the ECtHR uses the available interpretive method in international law to construct an absence of conflict between the obligations under the ECHR and ICCPR on part of the UK.

Conclusion

The Bulgarian authorities need to seriously consider the duty of the permanent and effective judicial review along with monitoring by the National Assembly and various state organs responsible for the implementation of the measures taken in pursuance of the state of emergency. Concerning the necessity for a constant reflection on the safeguards against abuse, validity of the derogation, and overall continuing exigencies of the situation requiring the state of emergency, the practice of the Court in Strasbourg can serve as a guiding illustration. The ECtHR found it necessary to emphasize that any derogation under Article 15 ECHR “requires permanent review of the need for emergency measures...also implicit in the very notion of proportionality”.¹¹⁰ The Venice Commission, in its checklist on the rule of law, also recalls that there must be a clearly established procedure for determining the emergency situation as well as ongoing parliamentary control and judicial review of the existence and length of the emergency situation along with the scope of the derogations.¹¹¹

The state of emergency presents many challenges to the democratic system. What is unambiguous is that the emergency is “a crucial tool enabling public reassurance in the short run without creating long-run damage to foundational commitments to freedom and the rule of law.”¹¹² The study above examined the challenges that any State would face in a state of emergency as regards its constitutional framework, the imposition of restrictive measures in society such lockdowns and restricted access to justice along with the difficult task to uphold and fulfil international or regional human rights obligations. The state authorities should be reminded to strike the appropriate proportionate balance in order to protect the public health of the population and continue to apply to the widest possible array the civil rights protections under the constitution and international law.

The decision whether to derogate or not from the obligations under ECHR varies among the High Contracting Parties. Under any circumstances, it should be recalled that the derogation regime does not equate a removal of the obligatory nature of human rights but offers the possibility of a State to recalibrate the range of the applicable obligations. Ultimately, the decision is political as well as legal as indicated in the ambiguous practice of the ECtHR. Finally, States should carefully strike the balance of upholding the rule of law and efficiently responding to the emergency crisis. The rule of law may be particularly affected in regimes of state of emergency and any nefarious attempts to use the exceptional circumstances to restrict willfully and in bad faith the applicability of fundamental legal principles should not be allowed.

¹⁰⁹ ECtHR, *Brannigan and McBride v the UK*, paras. 68-73.

¹¹⁰ ECtHR, *Brannigan and McBride v the UK*, para.54.

¹¹¹ Venice Commission, *Check-list on the Rule of Law*, 22.

¹¹² Ackerman, *The Emergency Constitution*, *Emergency Constitution*, 1044.

ANNEX 1

Comparative Table of Notification of Derogations under Article 4(3) ICCPR and Article 15 ECHR

	ICCPR articles explicitly invoked in Notification under Article 4(3) ICCPR	Specifically mentioned ECHR articles in Article 15(3) ECHR Notifications
Armenia	<ul style="list-style-type: none"> ➤ Article 9 ICCPR (Right to liberty and security) ➤ Article 12 ICCPR (the right to liberty of movement) ➤ Article 21 ICCPR (freedom of assembly)¹¹³ 	None ¹¹⁴
Estonia	<ul style="list-style-type: none"> ➤ Article 9 ICCPR (Right to liberty and security) ➤ Article 12 ICCPR (the right to liberty of movement) ➤ Article 14 ICCPR (the right to a fair trial) ➤ Article 17 ICCPR (right to privacy, family, home or correspondence) ➤ Article 21 ICCPR (freedom of assembly) ➤ Article 22 ICCPR (freedom of association)¹¹⁵ 	<ul style="list-style-type: none"> ➤ Article 5 ECHR (Right to liberty and security) ➤ Article 6 ECHR (Right to a fair trial) ➤ Article 8 ECHR (Right to respect for private and family life) ➤ Article 11 ECHR (Freedom of assembly and association) ➤ Article 1 Protocol 1 (Protection of property) ➤ Article 2 Protocol 1 (Right to education) ➤ Article 2 Protocol 4 (Freedom of Movement)¹¹⁶
Georgia	<ul style="list-style-type: none"> ➤ Article 9 ICCPR (Right to liberty and security) ➤ Article 12 ICCPR (the right to liberty of movement) ➤ Article 17 ICCPR (right to privacy, family, home or correspondence) ¹¹⁷ 	<ul style="list-style-type: none"> ➤ Article 5 ECHR (Right to liberty and security) ➤ Article 8 ECHR (Right to respect for private and family life) ➤ Article 11 ECHR (Freedom of assembly and association) ➤ Article 1 Protocol 1 (Protection of property) ➤ Article 2 Protocol 1 (Right to education) ➤ Article 2 Protocol 4 (Freedom of Movement)¹¹⁸

¹¹³ Armenia: Notification under Article 4(3) of the ICCPR (27 March 2020) <<https://treaties.un.org/doc/Publication/CN/2020/CN.114.2020-Eng.pdf>> accessed 11 May 2020.

¹¹⁴ See Armenia Notification to the Council of Europe JJ9015C Tr./005-227 (20 March 2020) <<https://rm.coe.int/09000016809cf885>> accessed 11 May 2020. See also, Armenia Notification JJ9030C Tr./005-238 (17 April 2020), <<https://rm.coe.int/09000016809cf885>> accessed 11 May 2020.

¹¹⁵ Estonia: Notification under Article 4(3) of the ICCPR (C.N.113.2020.TREATIES-IV.4) <<https://treaties.un.org/doc/Publication/CN/2020/CN.113.2020-Eng.pdf>> accessed 11 May 2020.

¹¹⁶ Estonia Notification - JJ9017C Tr./005-229 (20 March 2020) <<https://rm.coe.int/09000016809cfa87>> accessed 11 May 2020.

¹¹⁷ Georgia: Notification under Article 4(3) of the ICCPR (C.N.125.2020.TREATIES-IV.4) <<https://treaties.un.org/doc/Publication/CN/2020/CN.125.2020-Eng.pdf>> accessed 11 May 2020.

¹¹⁸ Georgia Notification - JJ9018C Tr./005-230 (23 March 2020), accessible at <<https://rm.coe.int/09000016809cff20>> accessed 11 May 2020.

Latvia	<ul style="list-style-type: none"> ➤ Article 12 ICCPR (the right to liberty of movement) ➤ Article 17 ICCPR (right to privacy, family, home or correspondence) ➤ Article 21 ICCPR (freedom of assembly)¹¹⁹ 	<ul style="list-style-type: none"> ➤ Article 8 ECHR (Right to respect for private and family life) ➤ Article 11 ECHR (Freedom of assembly and association) ➤ Article 2 Protocol 1 (Right to education) ➤ Article 2 Protocol 4 (Freedom of Movement)¹²⁰
Romania	<ul style="list-style-type: none"> ➤ Article 12 ICCPR (the right to liberty of movement) ➤ Article 17 ICCPR (right to privacy, family, home or correspondence) ➤ Article 21 ICCPR (freedom of assembly)¹²¹ 	None ¹²²
San Marino	<ul style="list-style-type: none"> ➤ Article 12 ICCPR (the right to liberty of movement) ➤ Article 21 ICCPR (freedom of assembly) ➤ Article 22 ICCPR (freedom of association)¹²³ 	None ¹²⁴

¹¹⁹ Latvia: Notification under Article 4(3) of the ICCPR (C.N.105.2020.TREATIES-IV.4) <<https://treaties.un.org/doc/Publication/CN/2020/CN.105.2020-Eng.pdf>> accessed 11 May 2020.

¹²⁰ Latvia Notification - JJ9012C Tr./005-225 (16 March 2020) <<https://rm.coe.int/09000016809ce9f2>> accessed 11 May 2020.

¹²¹ Romania: Notification under Article 4(3) of the ICCPR (C.N.121.2020.TREATIES-IV.4) <<https://treaties.un.org/doc/Publication/CN/2020/CN.121.2020-Eng.pdf>> accessed 11 May 2020.

¹²² Romania Notification - JJ9014C Tr./005-226 (18 March 2020) <<https://rm.coe.int/09000016809cee30>>. See also, <<https://rm.coe.int/09000016809e16bf>>, <<https://rm.coe.int/09000016809e2940>>, <<https://rm.coe.int/09000016809e3761>> accessed 11 May 2020.

¹²³ San Marino: Notification under Article 4(3) of the ICCPR (C.N.146.2020.TREATIES-IV.4) <<https://treaties.un.org/doc/Publication/CN/2020/CN.146.2020-Eng.pdf>> accessed 11 May 2020.

¹²⁴ San Marino Notification - JJ9026C Tr./005-235 (14 April 2020) <<https://rm.coe.int/09000016809e2770>> accessed 11 May 2020.

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