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# ЮРИСТ АХБОРОТНОМАСИ

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# ЮРИСТ АХБОРОТНОМАСИ ВЕСТНИК ЮРИСТА LAWYER HERALD

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## DIMENSIONS OF HUMAN RIGHTS AND DEROGATION CLAUSES DURING COVID 19 PANDEMIC UNDER ARTICLE 15 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS (ECHR)

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### ANNOTATION

In many legal systems, the state of emergency is a well-known and recognized legal instrument and allows a certain degree of derogation from human rights standards. However, in some cases emergencies provide governments with convenient reasons for strengthening their powers, weakening democratic institutions, and repressing political opponents. The magnitude and severity of the COVID-19 pandemic has clearly risen to the level of danger to public health and has given rise to a wide range of legal responses across the Council of Europe States, which can justify restrictions on certain rights. However, when derogation clauses are used, there is a risk of going beyond the principle of proportionality, which may bring to the abusive exercise of power. Nevertheless, while dealing with COVID-19 Pandemic formal declaration of a State of emergency and the notification of derogations under the Human Rights Treaty may have a positive impact on the constraining of emergency powers within prescribed limits.

**Keywords:** derogation clauses, emergency powers, human rights, COVID-19, Article 15 ECHR, state of exception, Council of Europe.

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## COVID 19 ПАНДЕМИЯСИ ДАВОМИДА ИНСОН ҲУҚУҚЛАРИ ВА АСОСИЙ ЭРКИНЛИКЛАРИНИ ҲИМОЯ ҚИЛИШ ТЎҒРИСИДАГИ ЕВРОПА КОНВЕНЦИЯСИНИНГ 15-МОДДАСИ ДОИРАСИДА МАЖБУРИЯТЛАРГА РИОЯ ЭТИШДАН ЧЕТГА ЧИҚИШ ВА ИНСОН ҲУҚУҚЛАРИ ЎЛЧАМЛАРИ

### АННОТАЦИЯ

Кўпгина ҳуқуқий тизимларда фавқуллодда ҳолат-таниқли ва тан олинган ҳуқуқий восита бўлиб, инсон ҳуқуқлари меъёрларидан маълум даражада четга чиқиш имконини беради. Бироқ айрим ҳолларда фавқуллодда вазиятлар ҳукуматларни ўз ҳокимиятини мустаҳкамлаш, демократик институтларни заифлаштириш ва сиёсий рақибларни бостириш учун қулай баҳона билан таъминлайди. COVID-19 пандемиясининг кўлами ва зўравонлиги аниқ соғлиқни сақлаш



хавфи даражасига кўтарилди ва барча ЕвропаКенгаши давлатлари ўртасида муайян ҳуқуқларга чекловларни оқлаши мумкин бўлган кенг кўламли ҳуқуқий жавобларни келтириб чиқарди. Аммо, дерогация қоидаларини қўллашда мутаносиблик тамойилидан ташқарига чиқиш хавфи мавжуд бўлиб, бу ҳоқимиятни суиистеъмол қилишга олиб келиши мумкин. Бирок, COVID-19 пандемияси доирасида, фавқулодда ҳолатнинг расмий еълон қилиниши ва инсон ҳуқуқлари тўғрисидаги шартномаларнинг айрим бандларидан воз кечиш тўғрисидаги хабарнома белгиланган муддат доирасида юборилиши фавқулодда ваколатларни чеклашда ижобий таъсир кўрсатиши мумкин.

**Калит сўзлар:** мажбуриятларга риоя этишдан четга чиқиш (дерогация ҳолатлари), фавқулодда кучлар, инсон ҳуқуқлари, COVID-19, 15-модда, истисно ҳолати, Европа Кенгаши.

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## АСПЕКТЫ ПРАВ ЧЕЛОВЕКА И ПОЛОЖЕНИЯ ОБ ОТСТУПЛЕНИЯХ ВО ВРЕМЯ ПАНДЕМИИ COVID 19 СОГЛАСНО ЕВРОПЕЙСКОЙ КОНВЕНЦИИ О ПРАВАХ ЧЕЛОВЕКА

### АННОТАЦИЯ

Во многих правовых системах чрезвычайное положение является известным и признанным правовым инструментом и допускает определенную степень отступления от стандартов в области прав человека. Однако в некоторых случаях чрезвычайные ситуации дают правительствам удобный повод для усиления своей власти, ослабления демократических институтов и подавления политических оппонентов. Масштабы и тяжесть пандемии COVID-19 явно возросли до уровня опасности для здоровья населения и вызвали широкий спектр правовых ответных мер во всех государствах Совета Европы, которые могут оправдать ограничения определенных прав. Однако при использовании положений об отступлении от соблюдения обязательств существует риск выйти за рамки принципа соразмерности, что может привести к злоупотреблению властью. Тем не менее, имея дело с пандемией COVID-19, официальное объявление чрезвычайного положения и уведомление об отступлениях от договора по правам человека могут оказать положительное влияние на ограничение чрезвычайных полномочий в установленных пределах.

**Ключевые слова:** положения об отступлениях, чрезвычайные полномочия, права человека, COVID-19, статья 15 ЕКПЧ, состояние исключения, Совет Европы.

Global community recognizes that individuals are born free and equal, and hold throughout their lives a collection of rights and freedoms that are inalienable in their nature. Human rights represent a set of universal claims that can not be taken away by the governments, other people, or institutions. Thus, the concept of human rights holds much broader sense, rather than just “negative” rights depiction such as the right to be free from discrimination, oppression and/or intimidation. The concept in all its glory, systematized and interpreted properly, encompasses “positive” rights as well such as the right to education and/or medical care. If we take an expansive view in this regard the concept appears to have inclusive, equitable and universal nature[4,p.8].

To begin with, it is important to underline that international community do not regard to all human rights as absolute, and international treaties propose the possibility of the derogations and tolerate them in limited extent. International human rights law recognizes that reasonable limits may be placed on most rights and freedoms in specific situations.

Certain rights, however, are non-derogable in their nature, that is, they cannot be suspended even in critical circumstances. Non-derogable rights may be either absolute or non-absolute. As W.A.Schabas suggests non-derogable status of certain rights is also associated with their claim to be jus cogens or

peremptory[10,p.593]. A jus cogens rule is defined in the Vienna Convention on the Law of Treaties in Art. 53 as ‘a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted’.

The pressure to take exceptional urgent measures, including suspensions of civil and political rights that the State has already undertaken to protect, is always daunting when a State faces a challenge to its national safety. These risks were well known to the drafters of the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights. They understood that exigencies provide governments with convenient reasons for strengthening their powers, weakening democratic institutions, and repressing political opponents. Yet the drafters have agreed that in such critical times, sovereign nations have a duty to protect their citizens and domestic institutions. Consequently, the so called “derogation clause” was introduced in those treaties to reconcile these conflicting interests, which permitted limitations on some rights during urgent situations but subjected those restrictions to the constrictions of international law[8,p.676].

In fact, many legal systems concede the official declaration of a state of emergency as legal instrument that may permit a certain degree of derogation from human rights standards. Just as important, Fundamental Laws – constitutions of countries contain similar provisions for the declaration of a state of emergency. Thus, provisions on temporary derogation are legislative instruments that allow states to suspend certain human rights in exceptional urgent situations enforcing strict compliance with the established procedures relating to exigency cases[1, p.9].

Nevertheless, the exception to the duty to protect human rights must be based solely on the factual presence of an exigency. On this rationale, the limitations on human rights in times of war or periods of exigencies are viewed as a consequence of the severity of the situation and are justified only if they reflect a proportionate response to the situation in question[5,p.306].

Therefore, according to principle of proportionality some “fundamental” freedoms are non-derogable, including the right to life and the prohibition of torture, since they are “indispensable for the protection of human beings.”[4,p.6]. If we try to be more specific, we can foresee why derogation clause is excluded from the 1948 Convention Against Genocide and the 1984 Convention Against Torture. On the same equal importance assumptions and considerations, it is not difficult to anticipate why derogations are invalid in regard of gender and race conventions[8,p.677].

With all above-mentioned in mind, this particular research is focusing on The European Convention on Human Rights (ECHR) – an international treaty designed to protect rights and freedoms of individuals and to uphold democratic principles and ideals. As W.A.Shabas suggests the European Convention on Human Rights was the first comprehensive treaty for the protection of human rights to be developed from the post-Second-World-War law-making process [10,p.1].

The methodological basis of the research is built using techniques, methods and cognitive attitudes that are currently known to scientific research and that have been adapted to the specifics of the object under study – derogations as a legal concept. As the main method of cognition, the universal dialectical method is going to be used, to explain certain aspects of derogation procedures and their limits in regard to our hypothesis (thesis – antithesis – synthesis). We also think, that the usage of modeling method, as well as formal interpretation method are particularly prevail.

The research is primarily focused on examining prior research studies, so systematic and theoretical reviewing methods of literature will be predominantly used. In regard to the research question we studied in depth, critically investigated and summarized the research theories that already exist and tried to develop a new insight to the issue of concern. Particularly our work followed the theories of A.Greene, who writes that COVID-19 pandemic is an ‘ideal state of emergency’ and claims that Article 15 ECHR does not create Schmitt’s ‘state of exception’.

A section on derogation is included in Article 15 of the ECHR. The key proviso is that the State Party exercising its right under Article 15 have to meet two criteria. First, the given State must establish that a state of war or other exigency actually prevail in unforeseen and/or uncontrollable form. Second, just as important, the given State must establish that the measures taken in response to such an exigency

are “strictly determined by the severity of the situation”. It is worth mentioning that Stephen Tierney has usefully referred to these two stages as the ‘designation issue’ and the ‘interference issue’ [5, p.291].

Subsequently, with the aim of preventing arbitrary derogation by states from the duty to uphold human rights in times of war and/or public exigencies, this stipulation is explicitly conditioned. Accordingly, the requirements include as such the followings: the exceptional exigency, the duration and period of the derogation, compliance with other commitments under international law and reporting to other countries on the state of public exigency, as well as the steps taken to resolve the immediate danger [4, p.6].

The first significant interpretation of article 15 of the ECHR was made in *Lawless v. Ireland* (No 332/57) 14 November 1960, which concerned the applicant’s extrajudicial detention from July to December 1957. Confirming the European Commission’s determination that Art. 15 should be interpreted in the light of its “natural and customary” meaning, the European Court of Human Rights (hereinafter, ECtHR) defined “a time of emergency” as “an exceptional crisis or emergency that affects the entire population and threatens the organized life of the community of which it is composed” [10, p.595].

There is no doubt that pandemic caused by Sars-Cov-2 (COVID-19 pandemic) outgrew to the size of a real exigency, when the populations of not only picked countries are under the threat, but the whole global community is. Nevertheless, it should be borne in mind that while States may exercise their right of derogation in exigency situations, international law advises to precisely determine the appropriateness of the steps taken, the nuances of their application, subordination to the principle of proportionality. Thus, States should, in particular, pay careful attention to disadvantaged groups so that they are not affected disproportionately [5, p. 295].

The magnitude and severity of the COVID-19 pandemic has clearly risen to the level of danger to public health and has given rise to a wide range of legal responses across the Council of Europe States, which can explain restrictions on certain rights, such as those arising from quarantine or exclusion, which limit freedom of movement. Some of the earliest steps taken by EU Member States (which are at the same time the Council of Europe States Parties) against the spread of COVID-19 were the unilateral limits on mobility across borders [3, p.18]

Meanwhile, many other steps taken to slow the spread of the virus and implement social distancing are common across States Parties. At the same time, careful attention should be paid to human rights, such as non-discrimination, and to the values of human rights, such as openness and respect for human dignity, which can contribute to an effective response to the instability and damage that eventually leads to crisis situations, and to the restriction of the harm caused by the implementation of overly wide-ranging policies that do not follow the requirements set out above [6].

When faced with a state of exigency that poses a danger to the nation’s existence, Article 15 allows States Parties to derogate from the defense of some constitutional rights in the best interests of their people. Despite the inevitability of circumstances to take extraordinary actions in order to resolve the exigency, the motives of decisive measures taken by countries are often subject to dispute, meaning these regulations can be seen as a tool to gain more power under the pretext of the best interests of people.

With this in mind, we want to focus on Carl Schmitt’s ‘state of exception’ concept. A ‘State of Exception’ was described by the German legal theorist and Nazi ideologue Carl Schmitt as the mechanism by which in the name of the public good, a sovereign leader may circumvent the rule of law. Thus, for C.Schmitt ‘a state of exception’ (in our case ‘a state of emergency’) is a ‘zone beyond the law’ or rather a ‘zone of lawlessness’. Furthermore, many researchers confirm that when derogation clauses are used, there is a risk of going beyond the principle of proportionality, which may bring to the abusive exercise of power [1, p.64].

Consequently, our dependent variable states that derogation clauses under Article 15 do not lead to Schmitt’s ‘state of exception’ = ‘a zone of lawlessness’. While independent variable says: “States have a constructive responsibility to uphold the right to life, which may justify derogations from some other fundamental human rights”.

According to Gerald L. Neuman, derogation clauses do not contradict the notion of human rights (hence they are not in a ‘zone beyond the law’) but can on the contrary, lead to their effective defense

[9, p. 15-31]. Indeed, States have a constructive responsibility to uphold the right to life, which may justify derogations from some other human rights.

Emilie Hafner Burton et al. defined derogations as ‘a rational response to [the] uncertainty, enabling governments to buy time and legal breathing space from voters, courts, and interest groups to combat crises by temporarily restricting civil and political liberties’ [8, p.680]. However, they also warn us against negative consequences generated by derogation. According to Emilie Hafner-Burton et al. the negative effect of escape clauses (derogations) is that “they officially condone a deviation from preexisting treaty commitments precisely when those commitments are most at risk of being undermined” [8, p.678].

Having paid due attention to the political and social aspects of restrictions on human rights during the height of the COVID-19 pandemic, we can assume that some countries may come to the Schmitt “state of exclusion” thus go beyond the law, cover themselves with the complexity of circumstances and dispose of power for mainly selfish purposes (as some media reports suggest like in cases of Hungary, Czech Republic, Poland). However, we should not forget that dealing with COVID-19 pandemic, there is a real risk that threatens the life of the nations, which justifies derogations under article 15 of the ECHR.

Exceptional powers encompass a significant risk of being manipulated, according to Martin Scheinin. As he suggests, mostly for political reasons such as holding down opposition, dissolving Parliament, postponing elections, etc. He brings as an example the case of Hungary, which shows how this danger even relates to the COVID-19 pandemic – a matter of great urgency [7].

Nevertheless, while dealing with COVID-19, we have a strong counter-argument in hand by Alan Greene, who during the COVID-19 pandemic devoted the entire book to emergency powers. Thus, on the contrary, he suggests that formal declaration of exigency state and the notification to international organizations of measures derogating from some of their obligations under the Human Rights Treaty may have a positive impact on the taming of exceptional powers by restricting the State to express its exigency measures on the basis of necessity, proportionality, situation requirements, temporality and commitment to human rights [2, p.20].

Finally, the decision to derogate may be affected by the state’s concern about the message that escaping from a treaty sends to international audiences that could punish them for restricting rights rather than domestic ones, who may not have such rights, which also contradicts Schmitt’s theory. The loss of international funding or trade rights is one such penalty. This concept is referred to by Emilie M. Hafner-Burton et al. as ‘derogations as international signals’. [8, p.686]

They predict that countries receiving significant sums of foreign assistance or other types of privileges or exemptions would be particularly vulnerable to other nations’ human rights concerns. While dealing with derogations under Art. 15 ECHR, the European Union (EU) Member States are most likely to provide assistance or use trade and other economic instruments to prosecute human rights violators.

According to this theory, if derogations are a mark of respect for the international system, a country that enjoys trade concessions or receives foreign aid might derogate to provide a legal justification for suspending rights in a crisis. Thus their concern is not pushback from domestic voters or courts but, on the contrary, from the EU, who could withdraw these benefits. [8, p.687]

If derogations are an attempt to deflect international censure during crises, we would expect countries that receive substantial aid from, or that trade heavily with, the EU to be more likely than other states to derogate, provide information about the nature and duration of the derogation, and avoid serial derogations. So, if we look to the list of official Notifications for derogations under Art.15 we can see that all the countries are dependent on mutual favorable relations with EU Member States as such being mostly from Eastern Europe and the western Balkans. {for the full list of Notifications under Art. 15 ECHR in the context of the COVID-19 visit <https://www.coe.int/en/web/conventions/full-list/-/conventions/webContent/62111354>}

On this final note, we can conclude with a few proposed ideas relying on the theories we examined. States have a constructive responsibility to uphold the right to life, which may justify derogations from some other fundamental human rights. However, when derogation clauses are used, there is a risk of going beyond the principle of proportionality, which may bring to the abusive exercise of power and eventually



there is a risk of Shmittian ‘state of lawlessness’. Nevertheless, while dealing with COVID-19 Pandemic formal declaration of a state of emergency and the notification of derogations under the Human Rights Treaty may have a positive impact on the constraining of exceptional powers within prescribed limits on the basis of necessity, proportionality, situation requirements, temporality and commitment to human rights.

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