Velimir Delovski[*]

CONVENTION RIGHTS AND FREEDOMS UNDER QUARANTINE: CHALLENGES FOR THE JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS IN THE ERA OF PANDEMIC

Abstract

The unprecedented COVID-19 pandemic resulted into limitations of the movement and rights under Article 5 and Article 2 of Protocol No. 4 and interferences with other rights guaranteed by the Convention, which will inevitably lead to new applications brought before the ECtHR. This paper will focus on the implications of the crisis and its potential transformative impact on the Court's jurisprudence related to emergency situations by exploring whether the well-established principles and doctrines of the Court's adjudication need to be revisited to tackle the challenges posed by the pandemic. This will involve examination of the extent of judicial scrutiny to be applied - whether the Court should demonstrate judicial activism regarding the measures taken at national level, or it should be deferential to the national policy choices.

In this respect, special attention will be paid to the degree of margin of appreciation which has to be granted to the States, as a reflection of the principle of subsidiarity, formally introduced with Protocol 15 to the Convention. Such discretion should leave room for a proper substantive and procedural review by the Court, but it should not be regarded as *carte blanche* for the national authorities in the exercise of their powers.

Moreover, the paper will deal with legality, necessity and proportionality of the restrictions that have been adopted and with the relevance of the balancing exercise which should properly weigh collective (public) interests with the individual rights, as well as reconcile conflicts between certain Convention rights.

Finally, this paper seeks to provide a clear methodological framework which will accommodate the particularities of the situation, in order to keep the States accountable and ensure that the effectiveness of the human rights protection is not jeopardized, regardless whether the State concerned has derogated of its Convention obligations under Article 15 of the Convention.

Keywords: COVID-19, judicial scrutiny, European Court of Human Rights

I.INTRODUCTION

The COVID-19 pandemic is the first time in the 70 years' history of the Convention system that all Member States have been concurrently struck by the same exceptional crisis, which

[*] Velimir Delovski, LL.M., Independent Researcher and Consultant on Human Rights Law and Judiciary
E-mail: delovskiv@gmail.com

has affected so many Convention rights and caused derogations under Article 15 by ten States parties.[1]

In addition to the extensive limitations on the freedom of movement under Article 2 of Protocol No. 4 ECHR and the right to liberty and security under Article 5, the outbreak of the coronavirus has entailed interferences with other rights, including the right to life (Article 2) and the prohibition of torture (Article 3), especially as regards the access to adequate health care and medical treatment not only of those persons infected with COVID-19, but also of illnesses and conditions other than COVID-19.

Moreover, the increase of domestic violence during the confinement has raised issues under Articles 2, 3 and 8. The right to respect for private and family life under Article 8 was also affected with respect to the access to information concerning health, the right to visit and maintain physical contact between non-custodial parents and their children, the collection and storage of personal data, as well as surveillance of a person's movement, for example tracking their location using GPS data.

Throughout the pandemic, States have introduced a range of measures restricting access to courts, hearings were postponed for longer period of time, held remotely via video conferencing technology and without public, or the cases were decided on the papers without a hearing taking place. Furthermore, the accused or litigants were not able to participate effectively in a hearing or trial held online or effectively to communicate with their lawyers. All these examples might amount to violations of the right to a fair trial (Article 6 ECHR).

The lack of access to timely and accurate information about risks to public health and the measures taken by governments might question the freedom of expression under Article 10,[2] while restrictions on the freedom of religion (Article 9), freedom of assembly and association (Article 11), the protection of property (Article 1 of Protocol No. 1), the right to education (Article 2 of Protocol No. 1) and the right to free elections (Article 3 of Protocol No. 1) might also be raised in future applications before the Court. Additionally, the possible unequal treatment could be tackled under Article 14 or Article 1 of Protocol No. 12.

At this point only a few applications which concern the pandemic have been communicated to the respective governments and there is not yet any relevant judgment delivered in response to allegations of possible rights infringements during the pandemic. Consequently, it could only be speculated what would be the Court's approach in such cases and whether it would lead to development of any new standards in its adjudication.

Even though it remains to be seen how will the Court proceed future COVID-19-related cases, this paper seeks to deal with the legitimate dilemma whether the current methodological framework could be sufficient in addressing and/or resolving the challenges the ECtHR might face. It will look at the applicability of the well-established principles and doctrines, focusing on the margin of appreciation, proportionality, the balancing exercise and the concept of positive obligations. Furthermore, it will analyse the potential impact of derogations on the outcome of cases brought against States who have derogated from the Convention.

[1] Only in 2006 Georgia entered a derogation to address a public health emergency in order to prevent further spread of the H5N1 virus (bird flu). For the full list of derogations and other notifications under Article 15 in the context of the COVID-19 pandemic, see: https://www.coe.int/en/web/conventions/full-list/-/conventions/webContent/62111354

[2] Similar questions concerning the responsibility of private individuals for dissemination of untrue information on the Internet which had allegedly created a risk to the life or health of individuals were raised in *Avagyan v. Russia*, no. 36911/20, communicated on 4 November 2020.

II. MARGIN OF APPRECIATION

The doctrine of margin of appreciation is defined as a room for manoeuvre the Strasbourg Court is prepared to accord the national authorities in fulfilling their obligations under the Convention when they weight competing public and individual interests in cases raising sensitive moral, ethical or policy issues. It reflects the *principle of subsidiarity* implying that there is a chronological, normative or procedural priority of domestic over international control whereby the domestic authorities are primarily responsible for respecting and ensuring Convention rights and freedoms.[3]

The margin of appreciation is always accompanied by a *European supervision*.[4] It allows for a proper substantive and procedural review by the Court and enables it to vary the intensity of its scrutiny of national measures and policy decisions, thus being deferential in some cases, while strict in others. Its scope will also depend on the existence of a so-called European consensus, either as to the relative importance of the interest at stake or as to the best means of protecting it.[5] The consensus itself will narrow the margin of appreciation left to the respondent State in the assessment of the permissible limits of the interference with the right at stake.[6]

Considering the state of emergency declared in most States, it is very likely that the Court will grant States a wide margin of appreciation as to the manner in which they have dealt with the health crisis, also given the absence of a uniform approach and European consensus in this respect. In addition, even in normal circumstances the Court tends to permit a broad margin of appreciation with respect to the "protection of health" as a ground for interference with qualified rights under Articles 8-11 ECHR.

It could be argued that it is not desirable the ECtHR to decide about the suitability or necessity of national decisions during the pandemic, as they have been taken in highly complex policy areas. However, the wide margin of appreciation should not prevent it from carrying out a more rigorous review in order to evaluate whether the impugned measures were justified and whether the limitation of rights was based on careful and objective assessment of facts.

In principle, the margin of appreciation can rather easily be transformed into a '*doctrine of deference*', as an excellent instrument to leave the decisions to the national authorities and to correct them only if it appears that the outcome of the domestic decision-making process was manifestly unreasonable, arbitrary or inappropriate. Accordingly, when the Strasbourg Court has to decide upon the appropriateness, necessity, reasonableness or justifiability of a certain measure or decision it will not substitute the competent domestic authority, which is 'better placed' to decide, unlike the ECtHR that, as a supranational court, lacks adequate knowledge or understanding of the national circumstances or debates underlying the introduction of a certain measure or policy.[7]

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[3] *'Belgian Linguistics' Case* A 6 (1968) p 34; 1 EHRR 241 at 284 PC and *Handyside v. the United Kingdom*, 7 December 1976, §48, Series A no. 24

[4] *Handyside v. the United Kingdom*, 7 December 1976, §49, Series A no. 24

[5] *Evans v. the United Kingdom* [GC], no. 6339/05, §77, ECHR 2007-I

[6] For instance, there is such consensus concerning privacy and new technologies. See Ilia Siatitsa and Ioannis Kouvakas, 'Indiscriminate Covid-19 Location Tracking (Part II): Can Pandemic-Related Derogations be an Opportunity to Circumvent Strasbourg's Scrutiny?' *(Strasbourg Observers*, 5 May 2020) <https://strasbourgobservers.com/2020/05/05/indiscriminate-covid-19-location-tracking-part-ii-can-pandemic-related-derogations-be-an-opportunity-to-circumvent-strasbourgs-scrutiny> accessed 11 February 2021

[7] Janneke Gerards, 'Towards a European Doctrine of Deferrence' (Expert Seminar 'The Margin of Appreciation Doctrine of the ECtHR', Ghent, 21 May 2010) 6-7

On the other hand, a marginal review will be insufficient to ensure a thorough observation of States' compliance with their Convention obligations, especially as the common deferential approach is based on the premise that national decisions have been taken by democratically elected legislatures or by executive bodies in the exercise of their discretionary powers in transparent procedures which involved effective participation of all stakeholders and are, thus, capable of generating reasonable outcomes. On the contrary, in the Covid-19 context, the ECtHR must operate as a 'gate-keeper' which shall carefully check whether the demands of legitimacy, participation and accountability have been met; if not, the quite marginal, deferential test would be transformed into an immediate or very strict or rigorous scrutiny. [8]
Furthermore, the choice of higher intensity of judicial review might be justified with the democratic deficit in many States where the decision-making process on the measures to be applied to tackle the pandemic lacked legitimacy since it was carried out without the necessary checks and balances between the legislative and the executive branch, or the measures were introduced exclusively by government decrees. For example, when the operation of democratically elected institutions and the judiciary was interrupted for a certain period of time or when governments displayed anti-democratic and autocratic tendencies, concerns were raised as regards the rule of law and democracy as prerequisites for the human rights protection.
As the Court ruled in *Shtukaturov v. Russia*, the extent of the margin of appreciation will depend on the quality of the decision-making process and on the absence of serious procedural deficiencies.[9] Therefore, procedural scrutiny to be carried out in COVID-19-related cases should function as a check on state discretion in settings where the domestic margin of appreciation is wide. The "procedural turn" in the case law of the ECtHR requires that its assessment of the compatibility of a particular measure with the Convention shall include an evaluation of the quality of the domestic process that led to that measure, which might concern both administrative and legislative processes, as well as procedures before domestic courts.[10] Consequently, whereby a positive quality assessment will result in widening of the margin of appreciation, a negative quality assessment will lead to narrowing it.[11] Thus, finding of deficient procedural safeguards should automatically lead to a narrow margin of appreciation thereby increasing the intensity of the Court's scrutiny and leaving less room for domestic authorities to restrict human rights.[12]

III. DEROGATIONS UNDER ARTICLE 15 ECHR

When dealing with applications against States who have derogated from the Convention, the Court will have the opportunity to pronounce on the legality of derogations. In particular, it should assess whether derogating States have met the requirements contained in Article 15, in order for a derogation to be considered valid and Convention-compliant.[13]

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[8] *ibid*, 7.
[9] *Shtukaturov v. Russia*, no. 44009/05, §89, ECHR 2008
[10] Eva Brems, 'The 'Logics' of Procedural-Type Review by the European Court of Human Rights' in Janneke Gerards and Eva Brems (eds), *Procedural Review in European Fundamental Rights Cases* (Cambridge University Press 2017) 17, 17
[11] *ibid*, 7.
[12] Eva Brems and Laurens Lavrysen, 'Procedural Justice in Human Rights Adjudication: the European Court of Human Rights'[2013] Human Rights Quarterly 176, 200
[13]On limitations of the Court's role with respect to derogations, see Velimir Delovski, 'Derogations under Article 15 of the European Convention on Human Rights in the Context of Covid-19', in *Conference Proceedings, Volume II* (International Scientific Conference "Towards a Better Future: Human Rights,

Undoubtedly, all derogating States have fulfilled the formal requirement laid down in Article 15(3) to "keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor" by notification of the state of emergency declared domestically and the measures taken in response to the pandemic. Additionally, all of them, with the exception of Georgia which extended the state of emergency, have informed the Secretary General of their withdrawal of the derogations following the termination of their state of emergency, thus fulfilling the other requirement of that provision.[14]

Derogating States also acted in accordance with Article 15(2) since none of the derogations concerned non-derogable rights, including the right to life (Article 2), the prohibition of torture (Article 3), the prohibition of slavery (Article 4(1)), the prohibition of punishment without law (Article 7) and the abolition of the death penalty (Article 3 of Protocol No. 6 and Article 2 of Protocol No. 13), all of which are recognized as peremptory norms of international law (*jus cogens*), as well as the prohibition of double jeopardy (Article 4 of Protocol No. 7).

Article 15(3) sets out three substantive criteria that have to be met for a derogation to be permitted: 1) that there is a *war or other public emergency threatening the life of the nation*; 2) that the measures taken are *proportional*, which requires that they *do not exceed the extent strictly required by the exigencies of the situation*, and 3) that such measures are *not inconsistent with other States' obligations under international law*.

The ECtHR jurisprudence has shown that in cases of derogations Article 15 ECHR is subject to a more generous margin of appreciation, as "*the national authorities are in principle better placed than the international judge to decide both on the presence of such an emergency and on the nature and scope of the derogations necessary to avert it*."[15]

Looking at the previous Court's case law applicable to emergencies, it appears that the Court will not deal with the question whether exists a public emergency that would justify a derogation, as it is clear that the Covid-19 pandemic will fall within the definition of public emergency threatening the life of the nation which affects the whole population and constitutes a threat to the organised life of the nation, as it is defined in *Lawless v. Ireland (no. 3)*.[16]

Even when derogating States are afforded a wide margin of appreciation, the Court will be empowered to rule whether they have gone beyond the "extent strictly required by the exigencies" of the crisis.[17] Therefore, the Court will have to decide whether the derogations were justified in relation to the specific measures taken under a particular derogation.

The Court listed the following relevant factors which must be given appropriate weight in the process of supervision of any derogation: the nature of the rights affected by it, the circumstances leading to, and the duration of, the emergency situation.[18] It is crucial that the interferences should be linked to the pandemic and limited in time. However, in practice it might be challenging for the Court to interpret properly the requirement of temporariness, as

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Organized Crime and Digital Society", Faculty of Law, University "St. Kliment Ohridski", Bitola, October 2020) 188-198

[14] For further details, see *supra note* 1.

[15] *Ireland v. the United Kingdom*, 18 January 1978, §207, Series A no. 25. See also *Brannigan and McBride v. the United Kingdom*, 26 May 1993, §43, Series A no. 258-B.

[16] *Lawless v. Ireland (no. 3)*, 1 July 1961, Series A no. 3

[17] *Lawless v. Ireland (no. 3)*, 1 July 1961, §22 and §§36-38, Series A no. 3; *Ireland v. the United Kingdom*, 18 January 1978, §207, Series A no. 25, and *Brannigan and McBride v. the United Kingdom*, 26 May 1993, §43, Series A no. 258-B

[18] *Brannigan and McBride v. the United Kingdom*, 26 May 1993, §43, Series A no. 258-B

some States have extended the state of emergency and the duration of derogations for a considerable period of time which has resulted into prolonged interferences with certain rights and freedoms.
Given the previous case-law concerning emergencies which was rather deferential, there is a real risk that the Court would be reluctant to establish that the disputed measures were disproportionate to achieve the purpose for which they were granted and to find a violation due to the discretion granted to the States as to the nature and scope of the measures. However, this risk should be avoided by greater judicial activism, which is needed considering that the gravest violations of human rights occur when States are inclined, under the pretext of a state of emergency, to use their power of derogation for other purposes or to a larger extent than it is justified by the exigency of the situation.[19]
Even during a state of emergency, the ECtHR has examined in detail the scope of the measures when assessing the compatibility of the derogations with the Convention in order to check whether the Government have exceeded their margin of appreciation in considering that the derogation was strictly required by the exigencies of the situation.[20] Moreover, the UN Human Rights Committee held that the legal obligation to narrow down all derogations under Article 4(2) of the International Covenant on Civil and Political Rights (ICCPR) to those strictly required by the exigencies of the situation establishes a duty to conduct a careful analysis under each article of the Covenant based on an objective assessment of the actual situation.[21]
Unlike Article 4 ICCPR, Article 15 ECHR does not expressly state that derogation measures should be introduced and applied in a non-discriminatory manner. Nonetheless, the fulfilment of the third substantive criterion under Article 15(1) that measures should be consistent with other international law obligations, such as, for example, the prohibition of discrimination should also be examined by the Court. In fact, it should carry out a thorough assessment to establish whether the emergency measures have affected more severely members of particular vulnerable or disadvantageous groups and whether the respective States have taken into account and sufficiently accommodated for the needs of and differences between different groups.[22]

IV. PRINCIPLES OF LEGALITY, NECESSITY AND PROPORTIONALITY

The ECtHR will be called upon to scrutinise the national responses to the pandemic and their human rights impact in light of the facts and circumstances of each particular case.
The framework of the Convention was designed to ensure its provisions are also applicable in extraordinary situations which require taking measures to protect health, also as its drafters who have lived through the "Spanish flu" epidemic of 1918-20 were aware of the need to built tools and mechanisms for containing outbreaks of infectious diseases into the text of the Convention.[23]

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[19] European Commission for Democracy through Law (Venice Commission), Opinion no. 359/2005 on the Protection of Human Rights in Emergency Situations (Adopted by the Venice Commission at its 66th Plenary Session held in Venice on 17-18 March 2006), Strasbourg, 4 April 2006, CDL-AD(2006)015, p.5, at para.12
[20] For example, see *Brannigan and McBride v. the United Kingdom*, 26 May 1993, §66, Series A no. 258-B.
[21] UN Human Rights Committee (HRC), CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency, 31 August 2001, CCPR/C/21/Rev.1/Add.11 UN, at para. 6
[22] The AIRE Centre and Civil Rights Defenders, *Covid-10 and the Impact on Human Rights: An Overview of Relevant Jurisprudence of the European Court of Human Rights* (2020) 135 <https://rolplatform.org/wp-content/uploads/2020/10/covid-guide-eng.pdf> accessed 8 January 2021
[23] *ibid*, 16-17.

Therefore, regardless whether restrictions to qualified or derogable ECHR rights were made on basis of derogation or on basis of the limitation clauses provided in the Convention provisions, in both cases restrictions must ultimately satisfy the requirements of legality, necessity and proportionality.[24] The fulfilment of these requirements should be verified within the Court's assessment.

The Court should pay special attention to the legality of measures, in particular in a situation where the measures were imposed by government decrees and it is questionable whether the relevant legal provisions limiting Convention rights were accessible to citizens and sufficiently precise to enable them reasonably to foresee the consequences which a given action may entail. Moreover, the laws governing these powers needed to be drafted and implemented quickly and updated regularly to respond to changing levels of risk, which led in some cases to confusion regarding their scope and effects.[25] Consequently, although derogations might help to meet the legality requirement, they should not automatically lead the Court to hold that certain measures are legal.

Proportionality presents an important analytical method in the jurisprudence of the Strasbourg Court, which is employed to reconcile the ECHR rights with the public or other competing rights or interests and to verify whether the restriction of a fundamental right is justified in the light of those rights or interests.

In order to determine whether the requirement of proportionality has been met in a particular case, the Court will apply an analysis which includes the following questions:

1. Have "relevant and sufficient reasons" been advanced for any interference with a Convention right? Is it "necessary in a democratic society"? Does it correspond to a "pressing social need"?
2. Is there an alternative action which would have interfered less? Has it been considered? Have relevant and sufficient reasons been given for rejecting it?
3. Were procedural safeguards both in place and observed so as to avoid the possibility of abuse?[26]
4. Does the interference operate so as to "impair the very essence of the right"?[27]

Actually, the Court has adopted the same structure of proportionality analysis as developed in German constitutional law, which consists of three distinct sub-tests: suitability, necessity and proportionality test (in the strict sense)/ balancing.

Suitability takes into account the reasonable relationship of proportionality between means and goals and deals with the question if the right-restricting measure is capable of attaining its objective.

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[24] The importance of these principles has been emphasized by the 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. See also European Commission for Democracy through Law (Venice Commission), Report- Respect for Democracy, Human Rights and the Rule of Law during States of Emergency: Reflections, Strasbourg, 19 June 2020, CDL-AD(2020)014.

[25] *supra note* 22, 79-80.

[26] This question has already been asked by the Court in order to assess whether the applicants, who were owners of businesses, were afforded a reasonable opportunity to effectively challenge the measures interfering with their right to peaceful enjoyment of possessions, as their businesses were closed by virtue of the measures introduced in the context of prevention of the spreading of the COVID-19 (see *Toromag, S.R.O. v. Slovakia*, no. 41217/20 and 4 other applications, communicated on 5 December 2020).

[27] The AIRE Centre, *Towards a More Effective National Implementation of the European Convention on Human Rights: Guide to Key Convention Principles and Concepts and Their Use in Domestic Courts* (2018) 31 <https://rolplatform.org/wp-content/uploads/2018/04/echr_guide-eng.pdf> accessed 14 January 2021

Once the suitability test has been successfully concluded, the *necessity test* can be applied, with the aim of ascertaining whether the action taken is the mildest among those available to achieve the same practical goal, or there were less restrictive means to accomplish the same end, so as to minimise the sacrifice of individual rights without affecting the public interest.[28] Under the 'less restrictive means' (LRM) analysis if two means are equally suitable to promote a competing principle but differ as to the extent they restrict a right, in that case, optimisation requires the adoption of the less restrictive of both means.[29]

The intensification of the Court's review in COVID-19-related cases will inevitably have consequences for the substantive standards to be applied when examining a certain measure of policy in terms of imposing a greater burden of proof or persuasion to the responsible government, who should demonstrate that it has chosen the least restrictive alternative. For instance, in order to rule whether there is a violation of Article 11, in one communicated case the Court asked the respondent Government whether the general ban on all demonstrations under threat of criminal prosecution was proportionate to the legitimate aim and whether any less stringent measure would have achieved an identical or comparable result.[30] In another communicated case which concerned Article 9, the Government was asked whether the refusal to allow a prisoner to attend church service outside the prison during the pandemic was necessary and proportionate to the intended purpose and if he had any reasonable alternatives to exercise his right to freedom of religion inside the prison.[31]

The Court should be particularly cautious with regard to any blanket or indiscriminate measures, despite the present attempt to justify them *a priori* with a catch-all approach of the derogations that might effectively compromise governments' arguments should any future case reach Strasbourg. Therefore, when assessing whether a restriction on movement is necessary in a democratic society, the Court will have to engage with the question why that particular measure was strictly necessary compared to less intrusive measures, by taking into account the duration of the restriction, whether it was applied in an automatic and indiscriminate fashion or takes into consideration individual circumstances, and whether the restriction actually serves the aim for which it was introduced.

In its third, final phase, the ECtHR will apply a *proportionality test*, which is similar to balancing of interests and consists of an assessment whether the measure, relative to its objective, places an excessive burden on the individual.[32]

In respect of COVID-19 cases, this test is likely to be carried out as regards qualified rights (Articles 8-11), where it is presented under paragraph 2 as a limitation clause, as it is a common practice of the ECtHR. This test is composed of three steps, through which is should be established that: 1) there is *legal provision* of the measure restricting the right, ii) there is a *legitimate aim* for the restriction, and iii) the interference is a "*necessary measure in a democratic society*" for a certain legitimate aim when it answers a "*pressing social need*" and, in particular, it is proportionate to the legitimate aim pursued and if the reasons adduced

[28] Gino Scaccia, 'Proportionality and the Balancing of Rights in the Case-law of European Courts' (20 February 2019) <https://www.sipotra.it/wp-content/uploads/2019/03/Proportionality-and-the-Balancing-of-Rights-in-the-Case-law-of-European-Courts.pdf> accessed 5 February 2021, at p.6

[29] Robert Alexy, *A Theory of Constitutional Rights* (first published 2002, Oxford University Press), 67-69. See also Eva Brems and Laurens Lavrysen '"Don't Use a Sledgehammer to Crack a Nut": Less Restrictive Means in the Case Law of the European Court of Human Rights' [2015] Human Rights Law Review 15(1) 1-30 <https://ssrn.com/abstract=2891307> accessed 20 December 2020

[30] For more details, see *Communaute Genevoise d'Action Syndicale (CGAS) v. Switzerland*, no. 21881/20, communicated on 11 September 2020

[31] *Spinu v. Romania*, no. 29443/20, communicated on 1 October 2020

[32] Jeremy Gunn, 'Deconstructing Proportionality in Limitations Analysis' [2005] Emory International Law Review 465, 467-468

by the authorities to justify it are "relevant and sufficient".[33] The impact upon the right in question, the effects upon the applicant and the context are also likely to be considered.
The Court will apply a similar test when examining whether there was an objective and reasonable justification for the difference in treatment or if not, there was a breach of Article 14,[34] as well as with respect to complaints under Article 1 Protocol No. 1.
When processing COVID-19-related cases, the ECtHR should engage in a *balancing exercise* in order to ensure that a fair balance between the public health and other competing interests is maintained. In addition, a fair balance must be struck between the various aspects of Article 6, for example the requirement to hold a hearing within a reasonable time against the appropriateness of holding a remote hearing which can take place sooner, but which can impact the fairness of proceedings differently, depending on the nature of the case and the parties involved.[35]
It is ultimately for the Court to rule whether the measures were "strictly required" or "necessary in a democratic society" also when it accepts that the derogation is permissible, but a derogating measure encroaches upon a fundamental Convention right, such as the right to liberty. In such cases, the Court must be satisfied that the measure was a genuine response to the emergency situation, that it was fully justified by the special circumstances of the emergency and that adequate safeguards were provided against abuse.[36]
Dzehtsiarou rightly argues that Article 15 might help to overcome the legality requirement and loosen the scrutiny in proportionality analysis but the practical impact of Article 15 will be very limited, bearing in mind that the ECHR rights are sufficiently flexible to adjust to the current COVID-19 crisis. Indeed, rights guaranteed under Articles 8-11 already have an embedded mechanism allowing limitations for protection of health and public order even without any emergency and Article 5(1)(e) permits the lawful detention of persons for the prevention of the spreading of infectious diseases.[37] Similar mechanism has been incorporated in the text of Article 2(3) of Protocol No. 4 which permits restrictions to be placed on the exercise of free movement rights for the protection of health.
It is also true that the nature, extent and seriousness of pandemic is such that similar and fairly restrictive measures will nevertheless fall within the scope of allowed limitations on Article 5 and Article 2 of Protocol No. 4. Thus, formal derogation will not have any significant effect on the proportionality assessment carried out in relation to these provisions. The derogation from certain Convention provision should not itself lower the intensity of review, which should be equal regardless whether the respondent State has derogated from the Convention or not.
Of certain relevance as regards the right to liberty and security might also be the judgment in *Enhorn v. Sweden*, where the applicant was kept in a compulsory isolation for prolonged period of time. In this case the Court set criteria for determining the lawfulness of detention under Article 5(1)(e), which include assessing "whether the detention of the person infected is the last resort in order to prevent the spreading of the disease because less severe measures

[33] *Nada v. Switzerland* [GC], no. 10593/08, §181, ECHR 2012; *S. and Marper v. the United Kingdom* [GC], nos.30562/04 and 30566/04, §101, ECHR 2008. For insight on the ECHR's application of the proportionality test, see Yutaka Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Case-law of the ECHR* (Intersentia, 2002).
[34] See *Kiyutin v. Russia*, no. 2700/10, ECHR 2011. In this case the Court concluded that the applicant had been a victim of discrimination on account of his health status, in violation of Article 14 in conjunction with Article 8.
[35] *supra note* 22, 87.
[36] *supra note* 8.
[37] Kanstantsin Dzehtsiarou, 'COVID-19 and the European Convention on Human Rights' (*Strasbourg Observers*, 27 March 2020) <https://strasbourgobservers.com/2020/03/27/covid-19-and-the-european-convention-on-human-rights > accessed 21 January 2021

have been considered and found to be insufficient to safeguard the public interest."[38] Since this was not the case, the Court found that the authorities had failed to strike a fair balance between the need to ensure that the HIV virus did not spread and the applicant's right to liberty.[39]

Furthermore, the ECHR is a "*living instrument*", which has to be interpreted and applied in the light of present-day conditions.[40] The Venice Commission held that the criteria for the balancing exercise, and the weight to be attributed to the various elements, may vary at different times and in different contexts and that the assessment of the fairness, proportionality and balancing of public and private interests has to be determined by the concrete situation and circumstances. It may also have as a result that a specific situation or specific developments justify more far going restrictions.[41]

This will also be the case in the COVID-19 context due to the fact that this is a new virus and initially there was no sufficient information on the ways in which it is spread, despite some scientific findings about how long it can survive without a host.[42] Thus, when assessing the proportionality between the protection of health and the measures introduced to pursue this aim, the Court will have to consider whether the authorities acted diligently and promptly to ensure that measures which are particularly restrictive and onerous are kept in place only for the time strictly required in order to achieve the desired aim and that they are lifted as soon as the grounds for imposing them cease to apply.[43]

While States shall be given leeway to shape their respective responses to COVID-19, the ECtHR will be called to decide a case *ex post facto*. Therefore, it should also be aware that the policies and measures have been introduced quickly without the domestic bodies having the time and sufficient scientific knowledge that will be available to its judges when they exercise their functions.[44]

V. POSITIVE OBLIGATIONS

Another important aspect which needs to be addressed is the concept of positive obligations. It has been invoked to justify extensive (coercive) measures such as lockdowns, quarantines and enforced social distancing that were implemented by governments in an effort to contain the spread of the pandemic and to offer appropriate medical treatment to those infected.[45]

Mavronicola underlined that the State bears positive obligations *to protect*, rather than to coerce, and even when they are coercive and considered reasonable and deemed necessary to protect life and bodily and mental integrity, they are not sufficient to provide effective protection.[46]

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[38] *Enhorn v. Sweden*, no. 56529/00, §44, ECHR 2005-I.
[39] *Enhorn v. Sweden*, no. 56529/00, §55-56, ECHR 2005-I
[40] *Tyrer v. the United Kingdom*, 25 April 1978, §31, Series A no. 26
[41] *supra note* 19, p.3, at para.8.
[42] Biljana Kotevska, *On Shaky Ground: Human Rights and COVID-19 in North Macedonia after the Derogation from the European Convention on Human Rights* (European Policy Institute Skopje 2020), 10 <https://epi.org.mk/wp-content/uploads/2020/05/ENG-ECHR-MK-COVID19.pdf> accessed 21 January 2021
[43] *supra note* 22, 384-388.
[44] Vassilis P. Tzevelekos, 'Herd Immunity and Lockdown: The Legitimacy of National Policies against the Pandemic and Judicial Self-Restraint by the ECtHR' (*Strasbourg Observers*, 11 May 2020) <https://strasbourgobservers.com/2020/05/11/herd-immunity-and-lockdown-the-legitimacy-of-national-policies-against-the-pandemic-and-judicial-self-restraint-by-the-ecthr> accessed 19 December 2020
[45] Particularly relevant in this respect might be the case of *Lopes Fernandes v. Portugal*, no. 29378/06, 8 June 2010.
[46] Natasa Mavronicola, 'Positive Obligations in Crisis' (*Strasbourg Observers*, 7 April 2020) <https://strasbourgobservers.com/2020/04/07/positive-obligations-in-crisis> accessed 27 January 2021

Measures taken to discharge States' positive obligations are also fundamentally bounded by legality within the ECHR,[47] meaning that even if the imperative to protect individuals from grave harms is very strong so that it may justify or require a range of 'exceptional' measures, it does not give licence to States to act in ways that are unlawful under the Convention. Accordingly, positive obligations may only extend to measures that amount to necessary and proportionate infringements of rights that are strictly required by the exigencies of the emergency situation.

With respect to COVID-19, there are positive obligations to take adequate measures to protect individuals from the spread of the virus and from being avoidably infected and suffering its consequences. As it was often claimed that States failed to fulfil their obligations to protect the life, health and well-being of individuals, expectedly Articles 2 and 3 will be invoked in future applications, along with Article 8.[48] Article 2 ECHR imposes not only a negative obligation on States to refrain from arbitrary takings of life but also a positive obligation to safeguard the lives of those within their jurisdiction, whereas Article 3 ECHR requires them to refrain from ill-treatment and to take certain steps to protect persons within their jurisdiction from grave harm or suffering.[49]

As elaborated in *Volodina v. Russia*, positive obligations are interlinked and they encompass:

(a) the establishment of an *adequate legal framework* for protecting life and bodily or mental integrity by private individuals;
(b) *operational duties* requiring States to take reasonable measures to protect persons at real and immediate risk to life or bodily or mental integrity, and
(c) *investigative duties* requiring States to conduct an effective investigation when an arguable claim of ill-treatment has been raised.[50]

When assessing the scope of positive operational duties to protect lives from COVID-19,[51] and the State's compliance with them, the Court will have to consider the particular circumstances of each individual case and adjust the well-known *Osman test* to the new context. The latter requires that it must be established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual, but they failed to take preventive measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.[52] For

[47] See, for instance, *Opuz v. Turkey*, no. 33401/02, §129, ECHR 2009.

[48] For instance, in *D.C. v. Italy*, no. 17289/20, communicated on 19 May 2020, the applicant complained that the authorities had not complied with their positive obligations under Article 8 to take all measures that could reasonably be required of them in order to ensure the maintaining of a family link between the applicant and his daughter, including guaranteeing him an effective access to his child.

[49] In the first ECtHR decision which concerned COVID-19 handed down in *Le Mailloux v. France*, no. 18108/20, 5 November 2020, relying on Articles 2, 3, 8 and 10, the applicant complained of the failure by the State to fulfil its positive obligations to protect the lives and physical integrity of persons under its jurisdiction and in particular of restrictions on access to diagnostic tests, preventive measures and specific types of treatment, and interference with the private lives of individuals who were dying of the virus on their own. Reiterating that it did not recognise an *actio popularis*, the Court declared the application incompatible *ratione personae* under Article 34 of the Convention, since the applicant was complaining *in abstracto* about the measures taken by the French Government to curb the propagation of COVID-19 among the whole population of France, but had not shown how he was personally affected.

[50] *Volodina v. Russia*, no. 41261/17, §77, 9 July 2019

[51] For example, a duty to provide protective equipment for people exposed to the virus, especially medical professionals.

[52] *Osman v. the United Kingdom*, 28 October 1998, §116, Reports of Judgments and Decisions 1998-VIII

example, a violation of Article 2 will be found if there is a causal link between the State's failure to take preventive measures and a person's death. As a result, the Court will have to decide whether the lack of action by the authorities where they have a positive duty to act in order to protect a particular right resulted into a breach of the Convention right. However, in practice, it might be difficult to establish such causal link between the omission and the death.

It is undeniable that States across Europe have been aware of the threat to life posed by COVID-19 and the risk of its spread within their jurisdictions since the beginning of 2020. Thus, the Court could rely on the knowledge on the part of the authorities about the existence of the risk for all citizens of being infected with COVID-19 and analyse States' compliance with their obligation to protect them against it.

States typically have a wide margin of appreciation regarding the methods adopted to fulfil their operational duties. Thus, in the interpretation of such positive obligation in each particular case the Court should not impose disproportionate burden on the authorities and consideration must be given to the constraints of competing priorities and limited resources.[53]

Furthermore, the Court will have to consider in its assessment the challenges posed by COVID-19 to the ordinary ways in which the distinct procedural obligation to carry out an effective investigation into deaths or acts of inhuman treatment, also related to the provision of medical care, are being discharged.

VI. CONCLUSION

This paper has presented only a few important elements that the ECtHR would have to focus on when reviewing cases that will be submitted in connection to measures that States undertook or failed to undertake during the pandemic. Notwithstanding that the Court might demonstrate self-restraint by recognising a wide margin of appreciation, it should not refrain from scrutinising national policies and decisions with a view to identifying a possible breach of the Convention in situations where governments exploited the pandemic to escape judicial and/or parliamentary control. The Court's activism becomes even more pertinent when interferences with individual rights were not subject to review by the highest courts.

The crisis posed a new challenge for the domestic courts as well, which had to assess the legality, necessity and proportionality of the introduced measures, thus facilitating the work of the Strasbourg Court which will only have to verify whether their assessment was made in compliance with the standards established in its jurisprudence and if so, will most probably rely on their findings, and conclude that there was no violation.

Nonetheless, the Court will play a critical role in ensuring that the aforementioned principles are duly respected during the COVID-19 crisis. The manner in which these principles are interpreted and applied is an extremely important mechanism in assessing the compatibility with the Convention of the government measures tackling the pandemic.

Since its inception the Convention system has certainly proved capable of developing and adapting and it has been on a constant process of reform. There will also be many new challenges when applying the common methodological tools and the existing case law by analogy, where appropriate, to the novel set of facts related to the pandemic.

However, it seems that those challenges could be successfully met within the existing framework. Even though it is difficult to make predictions, there is no plausible reason to think that the Court will follow a different, more robust approach, especially not when it is deciding about a qualified right that already accommodates the measures required to respond

[53] *supra note* 22, 23. See also *Budayeva and Others v. Russia*, nos.15339/02 and 4 others, ECHR 2008 (extracts)

to COVID-19. It is, therefore, unlikely that the prolonged sanitary crisis will significantly change the Court's methodology of analysis and reasoning, while it might certainly be of profound importance for its jurisprudence related to emergency situations.

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