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Citation: Fenwick, Helen and Fenwick, Daniel (2018) The case for a more ready resort to derogations from the ECHR in the current "war on terror". *European Human Rights Law Review* (4). pp. 303-310. ISSN 1361-1526

Published by: Sweet & Maxwell

URL:

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The case for a more ready resort to derogations from the ECHR in the current ‘war on terror’

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Abstract

Over the last 4/5 years the terrorist threat faced by the contracting states of the ECHR has intensified and become more widespread. The threat has come to a significant extent from their own citizens, and since suspect nationals usually cannot be deported, it might have been expected that detention or control measures, requiring derogations under art.15 ECHR, would have been put in place. It is therefore of interest to note that very few derogations have been sought, despite the recent very significant rise in terrorist activity. This piece asks why derogations have not played a pivotal role in the current ‘war on terror’, and connects the answer to some of the advantages of relying on derogations as opposed to exploring alternative ways of evading the ECHR guarantees. It argues that derogations are not currently playing the role envisaged for them by the founders of the ECHR, and that there is a case for resorting to reliance on them more readily in the current situation.

1. Introduction

Over the last 4/5 years the terrorist threat faced by the contracting states of the ECHR has intensified and become more widespread. The threat has come to a significant extent from their own citizens, whether from the far right or from jihadist Islamist groups. Since suspect nationals usually cannot be deported, it might have been expected that detention or control measures, requiring derogations under art.15 ECHR, would have been put in place in a number of the states. It is therefore of interest to note that very few derogations have been sought, despite the recent very significant rise in terrorist activity. At the present moment only one derogation is in place in the contracting states, in Turkey.

This piece asks why derogations have not played a pivotal role in the current ‘war on terror’, and connects the answer to some of the advantages of relying on derogations as opposed to exploring alternative ways of evading the ECHR guarantees. It argues that derogations are not currently playing the role envisaged for them by the founders of the ECHR, and that there is a case for resorting to reliance on them more readily in the current situation.

2. Methods of evading or minimising ECHR guarantees absent a derogation

The threat from ISIS-supporting nationals and from the far-right in ECHR contracting states has led them to consider and introduce an increasing array of counter-terror measures, including non-trial-based measures, creating tensions with human rights norms. If the terrorism threat comes from a states' own citizens, they have to be retained within its borders (with some exceptions), prompting the search for counter-terror measures that can be used to control their activities. But such measures may come into conflict with the ECHR guarantees, in particular that of the right to liberty under art.5. If no derogation from art.5 or other derogable Articles is sought, other methods of evading their strictures may be explored.

One such method takes the form of liberty-invading non-trial-based executive measures. Clearly, such measures tend to be in tension with domestic and international human rights law, but they have often been presented as reconcilable with them, via down-grading recalibrations of human rights, as was necessitated by control orders, and similar measures, which have recently spread from the UK to other contracting states. The UK was the first European state to introduce such measures, but recently, as pointed out by Amnesty International¹ in a report concerning counter-terror measures in 14 European countries, a number of other Member States have followed suit, or are about to do so. The Report found that the adoption of various legislative measures has resulted in a downgrading of safeguards for rights to privacy, expression and liberty across Europe, disproportionate to the terrorist threat.² The Report noted that “In a number of states, emergency measures that are supposed to be temporary have become embedded in ordinary criminal law” contrary to the temporarily and operationally limited understanding of derogations in the context of the ECHR and other international human rights instruments. The Report highlighted the specific issue of control orders and related measures,³ the use of citizen-stripping measures, and measures that temporarily exclude suspected foreign fighters from the country, mentioned below.⁴

¹ Amnesty International, *Europe: Dangerously disproportionate: The ever-expanding national security state in Europe* (17 January 2017).

² Amnesty International, *Europe: Dangerously disproportionate*, p.19.

³ Amnesty International, *Europe: Dangerously disproportionate*, pp 48-56.

⁴ Amnesty International, *Europe: Dangerously disproportionate*, pp 62-63.

As is well known, in the UK after the decision in *A and others*⁵, a further non-trial-based measure emerged unaccompanied by a derogation in the form of control orders applicable to suspect nationals and non-nationals alike under the Prevention of Terrorism Act 2005 (PTA). Control orders, and the measure that replaced them in the UK in 2011 - Terrorism Prevention and Investigation Orders (TPIMs) - are non-trial-based executive measures which have provided the model for the introduction of such measures in a number of the ECHR contracting states in Europe. The 2017 Amnesty report criticised “the regional trend [in Europe] of using such measures instead of charging and prosecuting people in the criminal justice system”.⁶ In the UK they are imposed by the Home Secretary, with court review, on a low standard of proof and enable individuals to be subjected to significant restrictions on liberty, including house detention, but not to imprisonment. Measures on the control orders model rely on targeting terrorist suspects to curtail their liberty without the need for a criminal trial, by imposing specific restrictions on them, related to the particular types of activity it is thought that they might engage in (due to previous behaviour), with the aim of preventing future terrorist activity before it occurs.

Control orders as non-trial-based counter-terror measures were designed to approach or possibly over-step the limits of human rights’ law, in particular of the substantive rights to liberty under art.5 ECHR, to private life under art.8 and to a fair trial under art.6. The courts were impliedly required to reinterpret art.5 in a minimising fashion in relation to the content of control orders and to do the same in respect of art.6 in respect of the process of reviewing them. Minimising human rights via reinterpretation, rather than openly departing from them via a derogation, implies that a re-balancing between societal needs and individual rights *should* occur, in effect emptying the right of part of its content.

But in response the courts relied on art.5 and 6 ECHR to bring the control orders scheme into closer compliance with their demands, meaning that the scheme itself became in various respects, less repressive. However, the courts also partially acquiesced in the notion of finding that the ECHR could accommodate the scheme by accepting somewhat recalibrated versions of art.5 and 6. Thus reconciliation with human rights law was achieved by relying on a degree of recalibration of the rights, although not of the extensive nature demanded by the initial

⁵ *A and others v SSHD* (2004) UKHL 56.

⁶ Amnesty International, *Europe: Dangerously disproportionate*, p.48.

iteration of the scheme. In other states schemes on the control orders model are being introduced, without being covered by a derogation. So it is worth considering whether such schemes do necessitate a derogation, due to the damage done to certain Strasbourg concepts if they are introduced and operated without one.

A further means of evading the ECHR guarantees arises via a citizenship-deprivation order. Reliance on citizenship deprivation to protect security is currently being introduced and explored in a range of democracies, including the ECHR-contracting states. If a terrorist suspect is stripped of citizenship and deported to a non-ECHR state (or is already in that state when the citizenship-deprivation occurs) he/she cannot – or is less likely to be able to – rely on the ECHR against the depriving state. Use of citizenship-stripping has become much more prevalent in Europe (and globally) recently as an aspect of the escalating war on terror and offers another means of evading ECHR safeguards without seeking a derogation.

But states have not sought to issue citizen deprivation orders against mono-nationals who are suspected terrorists even when facing an influx of foreign terrorist fighter returnees, and even in the face of the terrorist attacks and plots in Europe in 2015-18. In the UK, citizenship can be stripped from a national if their actions are “seriously prejudicial to the vital interests of the UK”, and they are a dual national, *or* “the Secretary of State has reasonable grounds for believing that the person is able, under the law of a country or territory outside the UK, to become a national of such a country or territory” under the British Nationality Act 1981⁷. Therefore persons covered by those provisions can be stripped of citizenship and have their passports withdrawn while inside or outside the UK.

In France, the Constitutional Reform Bill 2016 considered measures for removing citizenship from French mono-nationals who were convicted as terrorists in the wake of the 2015 Paris attacks; while a clear majority of MPs in the lower House of Parliament approved the measures, they were ultimately abandoned. Dual nationals convicted on terror charges in Belgium face losing their Belgian citizenship, while Bulgaria, Denmark, Macedonia, the Netherlands, Romania and Spain have similar laws.

⁷ s.40(4A), (s4A(c)) after amendment by the Immigration Act 2014 s.66).

The UK has also introduced temporary exclusion orders under the Counter-terrorism and Security Act 2015, which reportedly have already been used, sparingly. They operate on the basis that while the TEO subject is outside the UK he/she is outside the UK's ECHR jurisdictional competence. Therefore, if that position is correct, the state which has control over the suspect at the time when the TEO is imposed, not the UK, is responsible for any violations of the ECHR that occur.

It is arguable that a reluctance to seek to rely on a derogation may have prompted an exploration of these other methods of evading the ECHR - which in some instances would also allow evasion of non-derogable rights. If so, that would support the case for resort to derogations more readily, the point pursued further below.

3. The contrasting role of derogations in the UK, France and Turkey in the 'war on terror'

For the purposes of the argument being put forward in this piece, it is argued that some lessons can be learnt from the use of derogations in the UK, France and Turkey in the current 'war on terror'.

As is well known, in the UK, immediately post-9/11, reconciliation between reliance on a non-trial-based measure and human rights law was sought by use of a derogation from art.5 ECHR in 2001. That reconciliation failed since detention without trial under Part 4 Anti-Terrorism Crime and Security Act 2001 (ACTSA) for non-national terrorist suspects was abandoned, after the House of Lords invalidated the derogation in *A and others* on grounds of proportionality, and the Strasbourg Court later confirmed that finding.

In *A v UK*⁸, the first test under art.15 was found to be satisfied – it was accepted, conceding a wide margin of appreciation to the state, that an emergency had been in being. But the Strasbourg Court then went on to consider whether the Part 4 measures had been strictly required by the exigencies of the situation. The Court reiterated that when it comes to consider a derogation under art.15, it allows the national authorities a wide margin of appreciation to decide on the nature and scope of the derogating measures necessary to avert the emergency,

⁸ *A v UK* (2009) 49 E.H.R.R. 29.

but stated that it was ultimately for the Court to rule whether the measures were “strictly required”. The Court found that it had not been provided with any evidence which could persuade it to depart from the conclusion of the House of Lords that the difference in treatment between suspect nationals and non-nationals was unjustified, so the measures were not found to be strictly required by the exigencies of the situation.

The derogation relied on by France in 2015 may be contrasted with the one in the UK on a number of grounds; it did not create discrimination on grounds of nationality; it was introduced in the wake of terrorist attacks on French soil, and it was abandoned by the government after 2 years. France instituted a number of emergency measures (etat d'urgence) in 2015 after the Paris attacks accompanied by a derogation under art.15 ECHR. The Constitutional Reform Bill (to create changes to art.16 and 36) came before the Senate in France on 10 February 2016 and a clear majority of MPs in the lower House of Parliament approved the measures. They were intended to enshrine the state of emergency powers into the constitution, allowing a government to call on the powers in a time of crisis. The expanded emergency powers allowed the government to: impose immediate house arrest without authorization from a judge, if persons were considered a risk; impose traffic restrictions, and prohibitions on public assembly; to order closure of public spaces; power to requisition property; prohibition of entry into or residence of certain persons; conduct searches without a judicial warrant and seize any computer files found, and to block websites deemed to glorify terrorism, without prior judicial authorization. These powers created interferences with the rights to liberty, security, freedom of movement, privacy, and freedoms of association and expression and so required the derogation under art.15. The length of the state of emergency was criticised by Amnesty International, but France eventually abandoned the derogation on 1 November 2017.

Turkey’s recent reliance on a derogation contrasts strongly with that of France in a range of respects. A group of members of the Turkish armed forces attempting to seize power in Istanbul on 15 to 16 July 2016. The attempted coup involved soldiers in an attack on several key State buildings, including Parliament and the Presidential compound; the Chief of General Staff was captured and taken as a hostage.⁹ It was reported that more than 300 people were killed during the coup and 2,500 people were injured. The Turkish government alleged that the coup attempt was linked to Fetullah Gülen and allegedly master-minded by the Gulenist terrorist group; on

⁹ *Mehmet Hasan Altan v Turkey* (App. No.13237/17), judgment of 20 March 2018 at [15].

21 July 2016 the government declared a national state of emergency pursuant to art.120 of the Turkish Constitution of 1982 to last for three months, which has subsequently been extended. Subsequently Turkey formally notified the Council of Europe that it intended to derogate from the ECHR under art.15 but, unusually, no specific measure was identified in the notice, such as detention without trial, and no Article of the Convention was identified as having been derogated from.¹⁰

In two cases in 2018, *Mehmet and Sahin v Turkey*¹¹ the Strasbourg Court found that “the attempted military coup and its aftermath have posed severe dangers to the democratic constitutional order and human rights, amounting to a threat to the life of the nation” and, noting the broad margin of appreciation accorded to the state in relation to the judgement that such a threat existed, accepted that the derogation was relevant to its assessment of the merits of the applicant’s complaint.¹² The Court in *Mehmet* and in *Sahin* reaffirmed the approach to the margin of appreciation and the stance taken as to the question of whether the measures taken were ‘strictly required’ in *A and others v UK*. Mehmet and Sahin were both journalists critical of the government. Both applicants were subject to criminal proceedings on the basis of contravention of art.309 of the Criminal Code – attempting to overthrow the constitutional order – due to their alleged connections and sympathies with the Gulenist movement, despite there being no evidence linking them to the coup attempt, or to active participation in the movement. Mehmet had been held in pre-trial detention for over a year prior to being sentenced to life imprisonment (subject to ongoing appeals) and Sahin had been held for a similar period, although his trial had yet to be heard at the time of the Court judgment. Both *Mehmet* and *Sahin* involved claims of compensation for a lengthy period of pre-trial detention. The Turkish Constitutional Court, taking a stance similar to that of the House of Lords in the UK in *A and others*, had also accepted that there was a ‘public emergency’ within the terms of art.15, but had also gone on to find that that the measures were not strictly required by the exigencies of the situation. Since the derogation was found to be invalid domestically, a violation of the applicants’ art.5(1) rights was found in both cases.

The Court of Human Rights had regard to these findings. Unlike *A and others*, however, in which the UK’s derogation referred to specific measures of pre-trial detention, in *Mehmet* and

¹⁰ *Mehmet* (App. No.13237/17) at [81].

¹¹ *Sahin Alpay v Turkey* (App. No.16538/17), judgment of 20 March 2018.

¹² *Mehmet* (App. No.13237/17) at [92]; *Sahin* (App. No.16538/17) at [76].

Sahin the derogation did not refer to such measures. Another crucial distinction is that in *Mehmet* and *Sahin* there was limited evidence that the two applicants had had any involvement in terrorist activity, and therefore the Court found that the pre-trial detention was not “lawful”, nor effected “in accordance with a procedure prescribed by law” due to the lack of reasonable suspicion, and thus could not ‘be said to have been strictly required by the exigencies of the situation’.¹³ So the derogation was *not* found to justify the treatment of the applicants in *Sahin* or *Mehmet*, as the measures taken were not “strictly required by the exigencies of the situation”. The Court thus found violations of art.5. In this regard the European Court agreed with the Constitutional Court’s finding in relation to art.5(1) that “if it were accepted that people could be placed in pre-trial detention without any strong evidence that they had committed an offence, the guarantees of the right to liberty and security would be meaningless”.¹⁴

In *Mehmet* and in *Sahin* the Court of Human Rights also considered the question whether the interference with the applicants’ art.10 (freedom of expression) rights was justified as a measure ‘strictly necessary’ due to the exigencies of the situation. This issue was raised because the imposition of pre-trial detention had been linked explicitly to both applicants’ critical statements about the government in relation to the events leading up to and in response to the coup. The Court considered that:

...even in a state of emergency – which is, as the Constitutional Court noted, a legal regime whose aim is to restore the normal regime by guaranteeing fundamental rights... the Contracting States must bear in mind that any measures taken should seek to protect the democratic order from the threats to it, and every effort must be made to safeguard the values of a democratic society, such as pluralism, tolerance and broadmindedness.¹⁵

The Court observed that detention of journalists in part for publication of articles and providing commentary created a ‘chilling effect’ on the press. The Court therefore found a violation of art.10 in both cases. The Court awarded non-pecuniary compensation to the victims due to the lack of evidence that either applicant was associated with terrorism or otherwise with violent opposition to the state. The applicants in *Mehmet* and *Sahin* were granted €21,500 in non-pecuniary damages.

¹³ *Mehmet* (App. No.13237/17) at [140]; *Sahin* (App. No.16538/17) at [119].

¹⁴ *Mehmet* (App. No.13237/17) at [36]; *Sahin* (App. No.16538/17) at [32].

¹⁵ *Mehmet* (App. No.13237/17) at [210]; *Sahin* (App. No.16538/17) at [180].

It is clear that the actions taken in Turkey, including arresting and imprisoning thousands of academics, civil servants and journalists, could not be covered by a derogation from arts 5 or 10, as the Strasbourg Court found in the 2018 cases considered, because they are clearly disproportionate to the threat in question. So it appears that Turkey is no longer adhering to the ECHR in a range of respects, and although it has openly declared that that is the case via the derogation, its engagement with the demands of art.15, and of the ECHR in general, may be viewed as a tokenistic one. The situation is precisely the one that art.15 was designed to avoid. So while the vast majority of the ECHR-contracting states have not sought a derogation in the face of the ‘war on terror’, the only derogation currently in existence in a contracting state relates instead to an attempted internal coup and shows little allegiance to ECHR values.

4. Why have states largely avoided reliance on derogations?

If further states had sought derogations in the last five years from art.5 to cover detention without trial, or to introduce lengthy periods of house arrest likely to create a ‘deprivation of liberty’, the Strasbourg Court would have been likely to uphold them, provided the measures were compatible with the state’s other international legal obligations, depending on the precise measures introduced, given the relative ease with which it is possible to satisfy the jurisprudence governing the tests under art.15. The Court has tended to defer to the state’s judgment as to the existence of a state of emergency (the first question under art.15). Initially it appeared, as evidenced in certain decisions, such as *Brannigan and McBride v UK*,¹⁶ that the Court would take the view that the margin of appreciation conceded would not differ in respect of the second question regarding proportionality. So the margin of appreciation conceded at Strasbourg on the ‘emergency’ point meant that it was hard to challenge the state’s view as to the measures needed to combat the threat, and in most cases, until recently, once the emergency point was conceded, so was the point as to the measures needed to combat the emergency. But in more recent cases – *Aksoy v Turkey*¹⁷, *A and others v UK* - a change in that stance became apparent and the margin appears to have narrowed at the second step, enabling the Court to come to a judgment differing from that of the member state. That stance was then confirmed in *Sahin Alpay v Turkey* and *Mehmet Hasan Altan v Turkey* in 2018. The Court is showing a

¹⁶ *Brannigan and McBride v UK* (1994) 17 E.H.R.R. 539.

¹⁷ *Aksoy v Turkey* (1997) 23 E.H.R.R. 553.

greater determination to scrutinise the measures taken; it is subjecting them to a more intensive review, having reduced the margin conceded on this issue. A divide between the width of the margin conceded as to making a determination as to an ‘emergency’ and the margin conceded regarding the proportionality analysis is apparent.

It is possible that the reluctance of the contracting states to seek derogations from the ECHR post 9/11, even in the face of the increase in terrorist activity in Europe in 2015-18, may have been influenced by the diminished deference shown in the case of *A v UK* (and perhaps to a lesser extent by that of *Aksoy v Turkey*, in which the measures also failed the proportionality test). That stance of the Strasbourg Court, evident in *A and others* in 2004, and its counterpart decision at Strasbourg in 2010, may have sent a signal to the other states that use of derogations can be risky and – since they may be invalidated - de-stabilising to counter-terror efforts. If, combined with reluctance to rely on a derogation, other methods of evading or minimising the ECHR guarantees are available, the basis for seeking a derogation could appear to be undermined. Clearly, that suggestion must be treated with caution since if no derogation is in place, counter-terror measures can be tested directly against the standards maintained under the relevant ECHR guarantees, which can also be de-stabilising to counter terror efforts. But the perception that derogations are of value to the member states in aiding in combatting terrorism appears to have undergone some revision, and it would be strange if that was not connected to the recent adoption of stricter scrutiny of proportionality under art.15 at Strasbourg.

A further reason for a reluctance to seek a derogation in the member states may be due to fear of reputational damage and of handing a propaganda victory to ISIS and similar groups. If the ‘war on terror’ relies on maintenance of a moral difference between a state and terrorist groups that threaten it, then an announcement that human rights are to be partially abandoned may appear to fail to aid that enterprise. The risk that a derogation might be invalidated would add a further concern: unsuccessful reliance on a derogation, as found in *A v UK*, would create even greater reputational damage.

5. The case for resorting to derogations more readily

Although the risk of terror attacks may be over-stated by governments and the media, and the human rights of suspects can be portrayed as needlessly interfering with a state’s ability to

combat terrorism, that has not led in the last five years to a rush in most of the contracting states to deploy derogations to introduce the most draconian measures. The existence of a state of emergency is a necessary precondition for derogation – it does not mandate it, and a state which seeks to adhere to the Convention, despite the fact that it could probably defend a derogation at Strasbourg, may be said to deserve credit for doing so. However, if in the absence of a derogation other methods of evading the ECHR are resorted to, the option of openly declaring that certain ECHR standards are not being maintained, on a temporary basis, may create less damage to human rights in the long run. In other words, if art.15 is relied on in a manner that takes its demands seriously, and with a view to returning to normal human rights standards as quickly as possible, as was arguably the case in France (and reiterated in *Mehmet* and in *Sahin*), resort to a derogation may have advantages over more stealthy departures from rights' standards.

So it is argued that current counter-terrorism debate needs to consider more openly the impact of non-trial-based liberty-invading measures as one aspect of the solution to the current terrorist threat in order to question whether there is a case for openly seeking a derogation to protect such measures. It should be asked whether, given the principles underlying the current conception of international human rights law, the cost of relying on such measures without a derogation from art.5 is out of proportion to their value, since in particular they tend to lead to recalibration of the concept of 'deprivation of liberty'. There is a case for contending that such measures should be covered by a derogation, which also requires that they should be non-discriminatory and proportionate to the specific threat emanating from members and supporters of ISIS and similar groups, as well as from far-right secular groups. In general, reliance on a derogation is more transparent than relying on the other methods considered here of reconciling such measures with human rights law, and less likely to lead to normalisation of such measures. A derogation must be openly declared and therefore is less insidious in eroding rights-adherence than the stealthy avoidance of human rights laws via recalibrations of rights or by seeking to place suspects outside the area of a state's jurisdictional responsibility.

Use of a derogation would also show respect for the mechanisms international human rights law has provided for crisis situations, for use even against a state's own citizens. Availability of derogations under the ECHR (and other international human rights' instruments) means that states are encouraged, even when facing crisis situations, to remain within the ECHR system

rather than considering withdrawal. But the derogation is still policed by the Court, and, as seen in *Aksoy, A v UK, Mehmet and Sahin*, is not always accepted.

Reliance on derogations when a state is or perceives itself to be in a state of emergency arguably means that the actions of the state still retain legitimacy (including satisfying the needs of transparency) since it can only derogate to the extent, and for the period of time, that will satisfy the demands of proportionality under art.15, and that judgment is likely ultimately to be made by the Strasbourg Court. If a derogation was continued after the point when the state of emergency had diminished those demands would not continue to be satisfied. But reliance on derogations means adhering to transparency and proportionality as demanded by art.15 – the converse of the current position Turkey appears to be in in relation to art.15 and the ECHR in general. Turkey has purported to remain within the Convention system by relying on a derogation, but the connection between the emergency caused by the attempted military coup and the widespread arrest and detention of journalists, academics and others apparently linked to Gulenism is not apparent. Even if it was apparent, such arrests would not be viewed as a proportionate response to the emergency, while the purported derogation appeared to be intended to obscure rather than reveal adherence to the ECHR.

6. Conclusions

Despite these advantages of use of derogations this piece has explored the question why, in the face of the current and increasing terrorist threat in Europe, derogations have not on the whole been sought, so derogations have not played a pivotal role in the ‘war on terror’ in Europe. As discussed, reliance on such evasion may lead to protracted court action, continued tension with human rights law and an insidious undermining of respect for such law in the UK and elsewhere. Thus, art.15 is not fulfilling the role it was originally intended to have since it is either largely being side-lined in the ‘war on terror’, or misused as in Turkey at the present time.

So this piece has put the case for the open use of derogations as opposed to the use of more covert methods of evading the impact of the ECHR (and ICCPR). It acknowledges that so doing could encourage the use of more repressive measures (so long as the demands of proportionality were met) and would not necessarily inhibit states from embracing the use of

measures such as citizenship-stripping, but at the least it asks that debate as to the role of art.15 in the current situation, and in future, should be initiated.