

LIBERTY

PROTECTING CIVIL LIBERTIES
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Liberty Briefing on Derogations and the Human Rights Act

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What is a derogation?

1. The European Convention on Human Rights ('ECHR') recognises that, in certain circumstances, states may need to take measures which may breach human rights. For example, in times of war, a state may wish to have the power to preventatively detain, without recourse to judicial procedures – provided any measures taken are not contrary to international humanitarian law. States are therefore permitted to derogate from some, but not all, of the rights under the ECHR, rendering them inapplicable for a discrete period of time.

2. The text of Article 15 reads as follows:

ARTICLE 15 – Derogation in time of emergency

1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.

3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.

3. There are certain formal requirements to be fulfilled prior to the making of a derogation. As the European Court of Human Rights ('ECtHR') stated in *Cyprus v. Turkey*:

“Art. 15 requires some formal and public act of derogation, such as a declaration of martial law or state of emergency, and that, where no such act

has been proclaimed by the High Contracting Party concerned, although it was not in the circumstances prevented from doing so, Art. 15 cannot apply.”¹

4. As the Commissioner on Human Rights has stated, Article 15 requires both that the judicial and legislative branches exercise effective scrutiny over any derogation, providing for “essential guarantees against the possibility of an arbitrary assessment by the executive and the subsequent implementation of disproportionate measures.”²
5. Moreover, by Article 15(3), states must keep the Secretary General of the Council of Europe “fully informed” of the measures taken pursuant to the derogation, and the reasons for taking them. States must also inform the Secretary General when the period of the derogation has ceased. The Court has held that Article 15(3) imposes “a process of continued reflection” on the necessity of the measures taken.³
6. Most importantly, derogations may only be made where the circumstances truly necessitate them. Derogations are permissible only “to the extent strictly required by the exigencies of the situation”. They must be narrowly tailored to the situation at hand, with governments clearly demonstrating the need to avoid their obligations in pursuit of security goals of real urgency.
7. Moreover, any derogation must be consistent with the state’s “other obligations under international law”. In other words, derogations do not allow the state to do things which international law prohibits. For example, unlimited, unreviewable detention of combatants remains unlawful under international humanitarian law – as the US found in respect of its illegal detention regime in Guantanamo Bay.⁴ And, as explored below, by the terms of Article 15, states can only derogate from their obligations under Article 2 – the right to life – where consistent with international humanitarian law.

¹ App. Nos. 6780/74 & 6950/75, paragraphs 527-528.

² Opinion of the Commissioner for Human Rights, Mr Alvaro Gil-Robles, on certain aspects of the United Kingdom 2001 derogation from Article 5, paragraph 1 of the European Convention on Human Rights, CommDH (2002)7, paragraphs 5, 8, and 12.

³ See *Brannigan and McBride v United Kingdom* (App. Nos. 14554/89 and 14553/89).

⁴ See the US Supreme Court’s decision in *Hamdan v Rumsfeld* 548 U. S. 557 (2006) in which it found that the unreviewable limitless detention at Guantanamo Bay was a violation of international humanitarian law. See also ICRC codification of CIL rules applicable to IHL, ‘Rule 99: Deprivation of Liberty’, accessible here: https://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter32_rule99 and ICRC, Pejic, P., ‘Procedural principles and safeguards for internment/administrative detention in armed conflict and other situations of violence’, June 2005, accessible here: https://www.icrc.org/eng/assets/files/other/icrc_002_0892.pdf. See also ICRC codification of CIL rules applicable to IHL, ‘Rule 99: Deprivation of Liberty’, accessible here: https://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter32_rule99.

8. The UK's compliance with the requirements of derogations is itself reviewable by both our domestic courts and the European Court of Human Rights. A state's compliance with the requirements of Article 15 will determine whether any derogation is lawful – and if it seeks to go beyond what is strictly required by the urgencies of the situation, or violate the most fundamental rights, it will not be.

The UK's experience with derogations

9. The UK has faced these issues a small number of times during its history. Derogations were made in respect of Article 5 during the conflict in Northern Ireland, for example. This was despite a Government review which recommended that derogations not be made: Sir George Baker – a senior judge appointed by Government to review law enforcement powers in the region – counselled against army arrest powers in Northern Ireland which could only be made lawful by way of a derogation from Article 5.⁵ Nonetheless, in 1979, the European Court of Human Rights found that the circumstances of Northern Ireland, and the use of preventative detention of terrorist suspects without trial, met the criteria for derogation as to Article 5.⁶
10. The Government has faced challenge for both its use of, and its failure to use, derogations, and its attempt to evade their legal requirements. In one case, the Government sought to detain those suspected of terrorism in Northern Ireland without charge for seven days – but without seeking any derogation from Article 5 beforehand. As a result, the European Court of Human Rights found that it had breached Article 5.⁷
11. A further derogation notice was then sought, and challenged before the Court in 1993. In this case, however, it was held that the Government had not breached Article 5, since the derogation – specifically permitting pre-trial detention for up to seven days – was held to be valid.⁸ The violence in Northern Ireland was held to amount to a public emergency threatening the life of the nation, and that the UK had not overstepped its margin of appreciation in taking what it viewed as the measures strictly required by the exigencies of the situation.

⁵ Baker, Sir George, 'Review of the Operation of the Northern Ireland (Emergency Provisions) Act 1978', London: Her Majesty's Stationary Office, 1984, for example paragraphs 264 and 340.

⁶ *Ireland v the United Kingdom* (1979-80) 2 EHRR 25.

⁷ *Brogan v. the United Kingdom* (1989) 11 EHRR 117.

⁸ *Brannigan and McBride v. the United Kingdom* (1993) 17 EHRR 539.

12. But it must be remembered that no derogation could have permitted the use in Northern Ireland of what became known as the 'five techniques' – that is, stress positions, hooding, subjection to noise, sleep deprivation, and deprivation of food and drink. These were found to violate Article 3 of the Convention,⁹ from which no derogation is permissible. After promising to ban them, these were exactly the same techniques which the Ministry of Defence resurrected during the war in Iraq – and which led to the death of Baha Mousa.
13. The last time the UK sought a derogation was when it sought to indefinitely detain individuals suspected of being terrorists in Belmarsh prison. Precisely two months after the events of 11 September 2001, the then Government issued a notice of derogation under Article 15, stating that the threat of terrorism in the UK amounted to a "public emergency threatening the life of the nation". The Government believed that this permitted the indefinite detention of foreign nationals suspected of being terrorists but who could not be removed from the UK.
14. The House of Lords declared these measures incompatible with the Human Rights Act. Targeting, as the measures did, only those who were not British citizens, it found that the scheme was unjustifiably discriminatory under Article 14, the right against discrimination.¹⁰ Even on the assumption that there was a public emergency threatening the life of the nation, the measures taken had to be strictly necessary to combat the emergency. As Lord Bingham held:

"Article 15 requires any derogating measures to go no further than is strictly required by the exigencies of the situation and the prohibition of discrimination on grounds of nationality or immigration status has not been the subject of derogation. Article 14 remains in full force. Any discriminatory measure inevitably affects a smaller rather than a larger group, but cannot be justified on the ground that more people would be adversely affected if the measure were applied generally. What has to be justified is not the measure in issue but the difference in treatment between one person or group and another. What cannot be justified here is the decision to detain one group of suspected international terrorists, defined by nationality or immigration status, and not another. To do so was a violation of art 14. It was also a violation of art 26 of the ICCPR and so inconsistent with the United Kingdom's other obligations

⁹ See *Ireland v the United Kingdom* (App. No. 6310/71).

¹⁰ *A and others v Secretary of State for the Home Department* [2004] UKHL 56.

under international law within the meaning of art 15 of the European Convention.”¹¹

15. As a result, the Derogation Order was quashed, and the indefinite detention regime declared incompatible with Article 14.

16. But the Lords themselves also had important things to say about derogation. Lord Hoffman, for example, made clear his scepticism as to the use of derogations:

“What is meant by "threatening the life of the nation"? The "nation" is a social organism, living in its territory (in this case, the United Kingdom) under its own form of government and subject to a system of laws which expresses its own political and moral values. When one speaks of a threat to the "life" of the nation, the word life is being used in a metaphorical sense. The life of the nation is not coterminous with the lives of its people. The nation, its institutions and values, endure through generations. In many important respects, England is the same nation as it was at the time of the first Elizabeth or the Glorious Revolution. The Armada threatened to destroy the life of the nation, not by loss of life in battle, but by subjecting English institutions to the rule of Spain and the Inquisition. The same was true of the threat posed to the United Kingdom by Nazi Germany in the Second World War. This country, more than any other in the world, has an unbroken history of living for centuries under institutions and in accordance with values which show a recognisable continuity.

...

“This is a nation which has been tested in adversity, which has survived physical destruction and catastrophic loss of life. I do not underestimate the ability of fanatical groups of terrorists to kill and destroy, but they do not threaten the life of the nation. Whether we would survive Hitler hung in the balance, but there is no doubt that we shall survive Al-Qaeda. The Spanish people have not said that what happened in Madrid, hideous crime as it was, threatened the life of their nation. Their legendary pride would not allow it. Terrorist violence, serious as it is, does not threaten our institutions of government or our existence as a civil community.

...

¹¹ Paragraph 67.

“The real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these.”¹²

Derogations and fundamental rights

17. Article 15(2) places important restrictions on States’ powers to avoid compliance with human rights: only certain rights can be limited by derogation. For example, derogations are permitted in respect of Article 5, the right against arbitrary detention. However, the Convention does not allow derogations in respect of Article 2, the right to life, or Article 3, the right against torture and inhuman or degrading treatment.
18. Nonetheless, specific derogations from Article 2 are permissible insofar as they amount to deaths resulting from “lawful acts of war”. The designers of the Convention specifically drafted the document to take into account the exigencies of war. After the horrors of the Second World War, they recognised that arbitrary killings of civilians could never be permissible, and human rights law must apply during wartime to hold wrongdoing states to account. But the ECHR also makes clear that attacks on combatants in accordance with international humanitarian law are permitted – since it accepts that war, when conducted in accordance with international law, must sometimes take place. And so, where any war-time killing is in accordance with international humanitarian law, it will not breach Article 2.
19. It is important to note that states cannot derogate from other obligations under Article 2. For instance, no derogation is permitted in respect of a state’s obligations to make sure that it does not recklessly endanger the lives of its own troops through faulty procurement and equipment decisions away from the battlefield.¹³
20. Indeed, no derogation would have permitted the mistreatment and death of a 15-year-old boy, Ahmad Jabbar Kareem, in May 2003, for which the Ministry of Defence recently apologised.¹⁴ He was unlawfully detained by British troops in Basra during a period of looting and – as a report by a former High Court judge found – “aggressively manhandled and assaulted” during his arrest and detention. He – along with several other detainees – was then forced at gunpoint into a canal, and he drowned. The report found that the soldiers simply walked off as he struggled for life,

¹² Paragraphs 90, 95, and 96.

¹³ *Smith and others v Ministry of Defence* [2013] UKSC 41.

¹⁴ *The Guardian*, ‘Apology from MoD over Iraqi boy’s drowning at hands of UK soldiers’, 16 September 2016, available here: <https://www.theguardian.com/uk-news/2016/sep/16/apology-from-mod-over-iraqi-boys-drowning-at-hands-of-uk-soldiers>.

it being “plain and certain” that their forcing him into the canal and failing to assist him caused his death.

21. Moreover, several of other rights, such as Article 3, the right against torture and inhuman or degrading treatment, and Article 4, the right against slavery, cannot be derogated from under any circumstances. Indeed, what happened to Baha Mousa, and the other Iraqi men with whom he was detained, amounted to severe breaches of Articles 2 and 3 of the Human Rights Act. Derogations will never permit any government to commit such abuses, nor would the British military wish for any such latitude. And yet the vast majority of the claims brought through the IHAT process involve just these kinds of claims.

The availability of derogations in foreign ‘wars of choice’

22. Article 15 specifically applies to “times of war or public emergency threatening the life of the nation”. Derogations are therefore not permitted in respect of all forms of armed conflict. Rather, it is only those wars which “threaten the life of the nation”. The recent armed conflicts conducted in Iraq and Afghanistan, for example, could not plausibly be said to have threatened the life of the UK. Indeed, these wars were described by governments then and now as fought in the service of human rights and democracy – nothing like the wars envisaged by the drafters of the Convention, who had just lived through the all-time most serious threat to each of their nations.

23. As Lord Bingham stated in our own House of Lords:

“It is hard to think that these [derogation] conditions could ever be met when a state had chosen to conduct an overseas peacekeeping operation, however dangerous the conditions, from which it could withdraw. The Secretary of State does not contend that the UK could exercise its power to derogate in Iraq (although he does not accept that it could not). It has not been the practice of states to derogate in such situations, and since subsequent practice in the application of a treaty may (under article 31(3)(b) of the Vienna Convention) be taken into account in interpreting the treaty it seems proper to regard article 15 as inapplicable.”¹⁵

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¹⁵ *R (Al-Jedda) v. Secretary of State for Defence* [2007] UKHL 58.