Supervision of Derogations in the Wake of COVID-19: a litmus test for the Secretary General of the Council of Europe

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The pandemic COVID-19 has triggered a record number of derogations from the European Convention on Human Rights (the 'ECHR' or the 'Convention'). By now, Albania, Armenia, Estonia, Georgia, Latvia, Moldova, North Macedonia and Romania have notified the Secretary General of the Council of Europe (the 'Secretary General') of their derogations from the ECHR. More States may follow suit, or have already derogated from the ECHR, but have not yet notified the Secretary General thereof pursuant to Article 15.3 ECHR.

Derogations are somewhat like pandemics. They receive an extensive attention only once they occur. They are both undesired. When they occur, nothing but a short life is wished for them. This blog argues that derogations and pandemics have another thing in common: they test the ability of the relevant supervisory mechanisms to respond to their effects. The present blog discusses this aspect with regard to supervision of derogations from the ECHR in particular.

Supervision of derogations from the ECHR

The European Court of Human Rights (the 'ECtHR' or the 'Court') acts as a supervisory mechanism for derogations from the ECHR. The Court has discharged this task rather successfully by examining in each case whether derogation measures were strictly required and proportionate. However, no judicial supervision *alone*, including that of the ECtHR, can effectively supervise derogations for at least two reasons (for additional arguments see here).

First, the ECtHR cannot guarantee a timely review of derogation measures so as to provide an adequate response to derogation measures in place. Under its current priority policy on examination of incoming cases, applications relating to derogatory measures do not appear as a separate category that enjoys priority. They are not classified as 'urgent cases'. Hence, it may take years before the Court decides on such cases (save for interim measures). As Kanstantsin Dzehtsiarou recently noted, the effects "of COVID-19 will be seen in 5-6 years when measures taken by the Governments now will be analysed in judgments of the [ECHR]". In fact, this could take even longer. For

illustration, a case is still pending before the ECtHR against Armenia concerning a derogation used by the government to crush the peaceful anti-government protests in Yerevan in 2008, which resulted in the death of many protesters.

Second, the ECtHR rulings focus on the facts of an individual complaint and, therefore, cannot address the magnitude of human rights concerns related to derogation regimes. In this vein, the ECtHR, or, for that matter any court, alone is ill-equipped to address in a systemic manner the effects of emergency measures on human rights, the rule of law and democracy. By way of example, the Turkish derogation (2016 – 2018), which involved the arrest of an international judge, a director of Amnesty International and thousands of teachers and journalists will no doubt have a lasting effect not only on human rights, but also on the independence of institutions and democracy as a whole.

The loopholes in the supervision of derogations cannot be fully mitigated by occasional engagements of the Venice Commission or the Council of Europe Commissioner for Human Rights, however proactive and activist. These and other challenges in the supervision of derogations are to some degree tackled by Resolution 2209 (2018) of the Parliamentary Assembly of the Council of Europe (the 'PACE'). It recommends the Secretary General to take a proactive role and provide timely supervision of derogations. In particular, the PACE Resolution 2209 recommended that the Secretary General:

> 20.1. as depository of the Convention, provide advice to any State Party considering the possibility of derogating on whether derogation is necessary and, if so, how to limit strictly its scope;
>
> 20.2. open an inquiry under Article 52 of the Convention in relation to any State that derogates from the Convention;
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> 20.3. on the basis of information provided in response to such an inquiry, engage in dialogue with the State concerned with a view to ensuring the compatibility of the state of emergency with Convention standards, whilst respecting the legal competence of the European Court of Human Rights.

The COVID-19 derogations are the first derogations since the adoption of Resolution 2209. The reaction by the Secretary General to these derogations will clarify whether Resolution 2209 has empowered it to act as an additional layer of supervision of derogations and how it aims to discharge this function.

COVID-19 derogations and the 'response' by the Secretary General

Resolution 2209 does not set out a clear guidance as to how the Secretary General should discharge its supervisory duties with respect to derogations (for more on the mandate and merits of this initiative, see here). However, the gist thereof is clear: the Secretary General should *advise* and *supervise* States before and during a derogation.

The issue of advice can prove challenging from a legal standpoint. Contrary to paragraph 20.1 of Resolution 2209, no treaty provision creates an obligation on the Council of Europe member States to consult the Secretary General as to whether to derogate from the Convention or not or what emergency measures to adopt. The wording of Article 15 of the Convention suggests that a State only informs, rather than consults, the Secretary General about a planned derogation. In view of Article 15, the advisory role of the Secretary General in derogation cases depends a lot on the willingness of the Council of Europe member States to cooperate.

Against this background, this contribution argues that COVID-19 derogations present an excellent opportunity for the Secretary General to exercise its advisory role on derogations.

These derogations are in response to a common threat, namely pandemic COVID-19. Hence, all derogating States may have a genuine interest to learn whether derogations are suitable in such a situation or not, and, if yes, what specific measures could be considered necessary and proportionate. This is a topic of common interest and the Secretary General could advise on best practices.

In reply to my enquiry, the office of the Secretary General could not confirm that they have instituted a formal dialogue with the derogating or other Council of Europe member States. Be that as it may, any failure to engage in a dialogue with the derogating States and advise them on derogations would be incompatible with the spirit of the PACE Resolution 2209.

The PACE recommendation to supervise derogations through Article 52 ECHR is legally sound. Article 52 ECHR, in a firm language, obliges States to "furnish an explanation of the manner in which its internal law ensures the effective implementation of any of the provisions of the Convention". As I have argued previously, the PACE has turned a 'retired' Article 52 ECHR (hardly ever used in the past) into an essential tool, through which the Secretary General can supervise each derogation practice.

Paragraph 20.2 is not clear as to whether the Secretary General should open an inquiry under Article 52 ECHR in relation to every single derogation. In reply to my enquiry, the office of the Secretary General confirmed that they have not used Article 52 in relation to current derogations. It is possible that activating Article 52 ECHR at this stage may appear antagonistic to many States that are coping with the devastating effects of COVID-19. At the same time, it may not be excluded that no government will use the emergency powers related to COVID-19 for other gains. For several days, credible human rights organisations have warned that Hungary may misuse COVID-19 emergency measures in a way that can "threaten our democracies well beyond the current situations". The Secretary General has extended to Hungary her readiness to assist with expertise on how to ensure compatibility of emergency measures with human rights. This response is in line with the spirit of paragraph 20.1 of Resolution 2209. However, on 31 March 2020, Hungary adopted a law on emergency powers, without having consulted with the Secretary General, as well as ignoring the criticism made by the human rights

NGOs. This signals that it may be appropriate for the Secretary General to consider the use of Article 52 ECHR pursuant to Resolution 2209, in order to effectively supervise the implementation of emergency measures in Hungary.

Conclusion

The effects of COVID-19 have been devastating for all institutions where the pandemic is present. One cannot exclude that also the work of the office of the Secretary General has been affected. Hence, this may not be the best time for the Secretary General to ensure all necessary resources to effectively supervise the derogations from the ECHR. At the same time, Resolution 2209 invites the Secretary General to provide a timely and proactive supervision of derogations. It is thus essential that the Secretary General makes the necessary efforts to at least formalise its supervisory role. This could be done by establishing formal communications with the States that have derogated from the Convention. The Secretary General could keep all States informed of best practices on how to secure human rights while tackling COVID-19 and activate enquiry procedures with regard to States whose emergency powers have far reaching effects on democracy and rule of law.

The response of the Secretary General to current derogation cases remains a litmus test as to whether or not it will become an additional layer of supervision of derogations, complementing the ECtHR's judicial role.