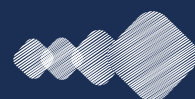


On shaky ground:  
Human Rights and **COVID-19**  
in North Macedonia after the derogation  
from the European Convention on Human Rights

Skopje, April 2020



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## INTRODUCTION

After the concern about the impact of new pandemic viral infection on the availability and accessibility of healthcare services<sup>1</sup> (including abortion<sup>2</sup> and mental health<sup>3</sup>), labour rights<sup>4</sup> (including those of journalists<sup>5</sup>), corruption,<sup>6</sup> the rights of persons deprived of liberty<sup>7</sup> and of the victims of human trafficking and exploitation,<sup>8</sup> as well as the impact on gender equality,<sup>9</sup> including through the expected increase in domestic violence,<sup>10</sup> several days ago the (perhaps) anticipated, yet worth re-visiting, step came. Namely, North Macedonia derogated<sup>11</sup> from the European Convention of Human Rights (ECHR)<sup>12</sup> in relation to the state of emergency introduced as a result of the spreading of COVID-19.<sup>13</sup> Up until the moment of finalisation of this text, the Secretary General of the Council of Europe had received notifications about derogations from Albania, Armenia, Estonia, Georgia, Latvia, Moldavia, Romania and Serbia as well.<sup>14</sup>

- 1 Investigative Reporting Lab, „КОВИД-19 тестови: Право или привилегија во време на пандемија“ [COVID-19 tests: Right or a privilege in times of pandemic] (02.04.2020), <https://irl.mk/video-kovid-19-testovi-pravo-ili-privilegia-vo-vreme-na-pandemia/>
- 2 HERA, „Што треба да знаеме за абортусната грижа за време на КОВИД-19“ [What do we need to know about abortion care during COVID-19] (06.04.2020), <https://hera.org.mk/abortusnata-grizha-za-vreme-na-kovid-19/?fbclid=IwAR3XklPTVQRWWqaqbprZrZ1ykdFyMANXzO37z6OXD9h8wJmIHazoXl6qLA>
- 3 Ivo Kunovski, „Грижа за менталното здравје: Справување со социјална дистанца, карантин и изолација“ [Minding mental health: Dealing with social distancing, quarantine and isolation], *Meduza* [Медуза] (18.03.2020), <https://meduza.mk/fem-101/grizha-za-mentalnoto-zdravje-spravuvanje-so-sotsijalna-distantsa-karantin-i-izolatsija/>
- 4 Helsinki Committee on Human Rights of the Republic of Macedonia, „Инфографик: Работничките права во време на корона вирусот (10 март – 31 март)“ [Infographic: Workers' rights in times of coronavirus (10 March – 31 March)], <https://mhc.org.mk/wp-content/uploads/2020/03/1-infographic-mkd.pdf?fbclid=IwAR0mqmqcXBUuGjCjOqkfbW3Ut1HvRwkGLEykVbYECduuTJqCaNAp21nvFc>
- 5 Association of Journalists of Macedonia, „СНМ и ЗНМ: Отпуштање новинари не смее да биде прва мерка за справување со кризата“ [SSNM and ZNM: Firing journalists must not be first measure for dealing with the crisis] (01.04.2020), <https://znm.org.mk/csnm-i-znm-otpushtanje-novinari-ne-smee-d/?fbclid=IwAR0b3TTMAo2EwS7o-PeXuCMZtP7F7t6plf86vYp0bXdxOkyvWpD3foI00v0>
- 6 Platform of Civil Society Organisations for Fight Against Corruption, „Заедничко соопштение на ДКСК и Платформата на граѓански организации за борба против корупција“ [Joint Announcement of the DKSK and the Platform of Civil Society Organisations for Fight Against Corruption] (08.04.2020), <http://antikorupcija.mk/mk/record.php?id=1191&mv=3&fbclid=IwAR3JkkuNA6WlgytCCYSAOHM9F96e6zxnXVlO8aDKyvwHDSR01qRo7UOEgE>
- 7 Macedonian Young Lawyers Association and Helsinki Committee on Human Rights of the Republic of Macedonia, „Известување до јавноста за поднесени препораки до надлежните институции за заштита на лицата лишени од слобода во услови на пандемија на вирусот КОВИД 19“ [Public information regarding submitted recommendations to the competent institutions for protection of the persons deprived of liberty in conditions of COVID 19 pandemic], *Macedonian Young Lawyers Association* [Македонско здружение на млади правници] (01.04.2020), <https://myla.org.mk/2020/04/известување-до-јавноста-за-поднесени/>
- 8 La Strada, „Влијанието на COVID-19 врз заштитата на правата на жртвите на трговија со луѓе и експлоатација“ [The impact of COVID-19 on the protection of the rights of the victims of trafficking and exploitation] (nd), <http://lastrada.org.mk/vli-anieto-na-covid-19-vrz-zashtitata-na-pravata-na-zhrtvite-na-trgovia-so-lu-e-i-eksloataci-a/?fbclid=IwAR1FxcVSTdsYoG1NjrtCPP8pn7hVgE6pztzgfniZZjMceA9SOnKGMTqu4>
- 9 Center for Research and Policy Making, „Covid 19 и родот“ [COVID-19 and Gender] (23.03.2020) <http://www.crpm.org.mk/wp-content/uploads/2020/03/Covid-19-i-rodot.pdf?fbclid=IwAR0jmvVFX03hzmucEnQdwrRbSgLjrtlFxaFhQD4DHmxuByrecnREIDpwgzc>
- 10 National Network against Violence against Women and Domestic Violence, „Соопштение за медиуми: Зголемен ризик од семејно и интимно партнерско насилство во период на вонредна состојба“ [Press release: Increased risk of family and intimate partner violence in the emergency state period] (19.03.2020), <http://www.glasprotivnasilstvo.org.mk/19-03-2020-soopshtenie-za-mediumi-zgolemen-rik-od-semejno-i-intimno-partnersko-nasilstvo-vo-period-na-vonredna-sostojba/?fbclid=IwAR0EsPm27iu9WWFEFLVfowuPRjn0iSxN8w5qKWdWWKHJ1FQfk368LVPWqQ>; Kalia Dimitrova, „„Дома“ не е безбедно за сите“ [“Home” is not safe for everyone], *Медуза* [Meduza] (20.03.2020), <https://meduza.mk/fem-101/doma-ne-e-bezbedno-za-site/>
- 11 Council of Europe - Directorate of Legal Advice and Public International Law, Note Verbale, JJ9021C Tr./005-232, (02.04.2020), <https://rm.coe.int/16809e1288>
- 12 European Convention on Human rights (1950 in accordance with Protocols no. 11 and 14 with protocols no. 1, 4, 6, 7, 12, 13 and 16; Macedonian version), [https://www.echr.coe.int/Documents/Convention\\_MKD.pdf](https://www.echr.coe.int/Documents/Convention_MKD.pdf)
- 13 European Convention on Human rights (1950 in accordance with Protocols no. 11 and 14 with protocols no. 1, 4, 6, 7, 12, 13 and 16; Macedonian version), [https://www.echr.coe.int/Documents/Convention\\_MKD.pdf](https://www.echr.coe.int/Documents/Convention_MKD.pdf)
- 14 Council of Europe, Reservations and Declarations for Treaty No.005 - Convention for the Protection of Human Rights and Fundamental Freedoms - Declarations in force as of today (Status as of 08/04/2020), [https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/declarations?p\\_auth=qx42QIL0](https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/declarations?p_auth=qx42QIL0)

This seems like a completely expected next step after the country declared a state of emergency. However, we do believe that it is important to bear in mind that the derogation significance, assessment and consequences will not only depend on how well-conceived and carried out the initial step – the submission of the notification about the derogation was,<sup>15</sup> but also on all the other upcoming steps that the country would take from now on, until the day the derogation ceases. These would be the elements that the European Court of Human Rights (ECtHR) would focus on when reviewing the cases that will be submitted in connection to the measures that the states undertook or failed to undertake during the COVID-19 crisis. However, in addition and equally important is the fact that this crisis will pose a new challenge for the domestic courts as well, as already indicated by the Fundamental Rights European Union Agency for Fundamental Rights (FRA); the domestic courts will need to assess the necessity and proportionality of the introduced measures in the cases related to these measures.<sup>16</sup>

Consequently, here we will tackle several points in relation to this derogation: the grounds for the derogation, the scope of the derogation, its duration and its termination. We close this text by proposing several steps that we believe should be undertaken, and which are founded in the obligations that the state has in accordance with this convention that may not be derogated from and which refer to what the state has an obligation to do for us rather than to us.<sup>17</sup> In a period when public support for restrictive measures and for limitation of some of the human rights is, expectedly, wide due to the severity of the situation and the danger possessed to the health and life of people<sup>18</sup> the Government's responsibility not to exceed the limits of what's lawful, proportionate and necessary with the measures it introduces is even greater.

*So far, with regards to the COVID-19 crisis,*

- *Albania,*
- *Armenia,*
- *Estonia,*
- *Georgia,*
- *Latvia,*
- *Moldavia,*
- *Romania,*
- *North Macedonia and*
- *Serbia*

*notified about their derogation from the Convention.*

<sup>15</sup> Council of Europe - Directorate of Legal Advice and Public International Law, Note Verbale, JJ9021C Tr./005-232, *Council of Europe* (02.04.2020), <https://rm.coe.int/16809e1288>

<sup>16</sup> European Union Agency for Fundamental Rights, 'Coronavirus Pandemic in the EU — Fundamental Rights Implications (01 February – 20 March 2020)' (April 2020), [https://fra.europa.eu/sites/default/files/fra\\_uploads/fra-2020-coronavirus-pandemic-eu-bulletin-1\\_en.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-coronavirus-pandemic-eu-bulletin-1_en.pdf)

<sup>17</sup> I draw this parallel from Natasha Mavronicola („to do to us rather than for us"). Source: Natasha Mavronicola, 'Positive Obligations in Crisis', *Strasbourg Observers* (07.04.2020), <https://strasbourgobservers.com/2020/04/07/positive-obligations-in-crisis/>

<sup>18</sup> European Union Agency for Fundamental Rights, 'Coronavirus pandemic in the EU - Fundamental Rights Implications - Bulletin 1' (April 2020), [https://fra.europa.eu/sites/default/files/fra\\_uploads/fra-2020-coronavirus-pandemic-eu-bulletin-1\\_en.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-coronavirus-pandemic-eu-bulletin-1_en.pdf), 14.

## GROUND S FOR THE DEROGATION

# Grounds for the derogation

Based on the ECHR, all parties to the convention unquestionably have the option to derogate from certain obligations arising from this convention for a limited period of time and under certain conditions. According to Article 15 "Derogation in time of emergency", this possibility is available "in time of war or other public emergency threatening the life of the nation",<sup>19</sup> but it must be exercised in a "limited and supervised manner"<sup>20</sup> and may not include Article 2 (right to life),<sup>21</sup> Article 3 (prohibition of torture), Article 4 (1) (prohibition of slavery and forced labour), Article 7 (no punishment without law), Article 4 of Protocol 7 (not to be tried or punished twice for the same offense), as well as Protocol 13 (in particular Article 2) and Protocol 6 (in particular Article 3).

Article 15 foresees substantive and procedural requirements in order for the derogation to be allowed.<sup>22</sup> There are three main substantive requirements:

<sup>19</sup> Article 15 "Derogation in time of emergency" states:

- „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 [the] 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 (§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 therefore. 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.

<sup>20</sup> European Court of Human Rights, Guide on Article 15 of the European Convention on Human Rights Derogation in time of emergency (Updated December 2019), [https://www.echr.coe.int/Documents/Guide\\_Art\\_15\\_ENG.pdf](https://www.echr.coe.int/Documents/Guide_Art_15_ENG.pdf)

<sup>21</sup> Except in respect of deaths resulting from lawful acts of war.

<sup>22</sup> Robin C A White and Clare Ovey, *Jacobs, White & Ovey: The European Convention on Human Rights* (OUP, 5th edition, 2010).

# Grounds for the derogation

- (1) **Emergency:** It is necessary to establish the existence of an emergency threatening the life of the nation. This was defined in the first case that was ruled by ECtHR – the case *Lawless v. Ireland*, as “an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed”.<sup>23</sup> With regards to this element, the Court most often accepts the assessment of the state, which, according to certain judges from this court, may be too open.<sup>24</sup> Until now, there has only been one case where the state’s argument about the existence of an emergency was not accepted and it was deemed that the state had, in fact, acted in bad faith.<sup>25</sup>
- (2) **Strictly required:** The measures introduced must be strictly required, assessed based on the exigency of the situation. In *Aksoy v. Turkey* the Court found that this element of “European supervision” shall be implemented based on the circumstances of the situation, whereby the nature of the rights affected by the derogation shall be taken into consideration, along with the circumstances which led to it, along with its duration.<sup>26</sup> When assessing whether the measures are strictly necessary, the Court shall assess whether they are (i) necessary to deal with the threat to the life of the nation, (ii) proportionate, i.e. not exceeding the demands of the specific situation, and (iii) of adequate duration i.e. once the need for introduction of the measures expires, the measures should be revoked. In addition, it is necessary for the measures introduced to be undertaken in response to the state of emergency and therefore justified, as well as to have measures against possible abuse of the newly introduced measures.<sup>27</sup>
- (3) **Lawfulness:** The measures must be in accordance with the other obligations of the state according to international law, i.e. there must be no conflict between other existing obligations of the state in accordance to this law, or the customary norms of this law.

23 *Lawless v Ireland* (1979-80) 1 EHRR 1.

24 Jacobs, White & Ovey point to the dissenting opinion of Judge Walsh in *Brannigan and McBride v United Kingdom* as an example. Source: Robin C A White and Clare Ovey, *Jacobs, White & Ovey: The European Convention on Human Rights* (OUP, 5th edition, 2010), 118.

25 David John Harris et al, *Harris, O’Boyle & Warbrick: Law of the European Convention on Human Rights* (OUP, 4th edition, 2018), ctp.814.

26 *Aksoy v Turkey* (1997) 23 EHRR 553.

27 Robin C A White and Clare Ovey, *Jacobs, White & Ovey: The European Convention on Human Rights* (OUP, 5th edition, 2010).119-220.

# Grounds for the derogation

The procedural requirement is a formal or public act of derogation and notification of the Secretary General of the Council of Europe about the derogation under Article 15, along with the reasons for it, the measures taken as a result of the derogation, as well as notification about the end of the derogation. The timeframe for submission of the notification is not specified in Article 15. In *Lawless*, the Court found that this should be done “without delay”.<sup>28</sup> In that specific case, the notification of 12 days after the adoption of the domestic decision was found to be in accordance with the requirements for such notification. It is important to note that the assessment of the measures is given by monitoring the development of the context, i.e. it shall include: an overview of the situation before and after the adoption of the measures, very little tolerance for retroactivity, and request for their mandatory abolition as soon as the circumstances for their introduction have ceased.<sup>29</sup>

Whether, in conditions of COVID-19, the derogation from the ECHR is necessary or desirable, or both, is a question which has been hotly debated recently.<sup>30</sup> According to Alan Greene, this is “the closest we shall get to an ‘ideal state of emergency’—the very thing it [Article 15] was designed for... failure to use Article 15 ECHR risks normalising exceptional powers and permanently recalibrating human rights protections downwards”.<sup>31</sup> Kanstantsin Dzehtsiarou, on the other hand, believes that the rights in the ECHR, as they are formulated, are sufficiently flexible to adjust to the current COVID-19 crisis. In addition, he believes that now, more than ever, it is necessary to “to keep the authorities accountable and within certain limits ... [as to] giving new extensive powers to the executive branch”.<sup>32</sup> It seems that there is consensus only with regards to the fact that the scope of the consequences from the present (non)derogation would be familiar after several years at the earliest, when the initial cases related to the COVID-19 crisis start to reach the Court.

28 *Lawless v Ireland* (1979-80) 1 EHRR 1, 62.

29 Jacobs, White and Ovey, 122.

30 Strasbourg Observers opened a poll on the topic and the results so far indicate that the for the time being the opinions are divided between the options “derogation is neither necessary nor desirable” and derogation is necessary and desirable”. Source: <https://strasbourgobservers.com/2020/04/02/to-derogate-or-not-to-derogate-poll-on-emergency-covid-19-measures/>

31 Alan Greene, ‘States should declare a State of Emergency using Article 15 ECHR to confront the Coronavirus Pandemic’, Strasbourg Observers (01.04.2020), <https://strasbourgobservers.com/2020/04/01/states-should-declare-a-state-of-emergency-using-article-15-echr-to-confront-the-coronavirus-pandemic/>

32 Kanstantsin Dzehtsiarou, ‘COVID-19 and the European Convention on Human Rights’, Strasbourg Observers (27.03.2020), <https://strasbourgobservers.com/2020/03/27/covid-19-and-the-european-convention-on-human-rights/>



# Grounds for the derogation

North Macedonia used the possibility for derogation under Article 15. At its thirtieth session, the Government adopted the “Information on the need to notify the Secretary General of the Council of Europe on the Republic of North Macedonia’s derogation from certain articles of the European Convention on Human Rights as a consequence of the COVID-19 pandemic”.<sup>33</sup> Apart from restating the grounds for introduction of a state of emergency, i.e. the COVID-19 pandemic, the Government also specifically cites the “protection of health... [as] legitimate grounds to restrict the those rights in order to enable the undertaking of measures to address the serious risks to the health of the population or to certain sections of the population, provided that they are: based on the law, necessary in a democratic society and specifically targeted to the prevention of illness or care for sick people”.<sup>34</sup>

*North Macedonia derogated from Article 8 (right to respect for the private and family life), Article 11 (freedom of assembly and association), Article 2 from Protocol 1 (right to education) and Article 2 from Protocol 4 (freedom of movement).*

In its notification to the Secretary General of the Council of Europe, the Government stated that it was necessary to derogate from some of the obligations under Article 8 (right to respect for private and family life), Article 11 (freedom of assembly and association), Article 2 of Protocol 1 (right to education) and Article 2 of Protocol 4 (freedom of movement).<sup>35</sup>

33 Government of the Republic of North Macedonia, „Од 30-тата седница на Владата: Земјите од регионот и ЕУ договориле зелени коридори за олеснување на транспортот и трговијата на примарни производи“ [From the 30th session of the government: The countries in the region and the EU have agreed on green corridors for facilitating transport and trade with primary products] (27.03.2020) <https://Mada.mk/node/20774>

34 Government of the Republic of North Macedonia, „Од 30-тата седница на Владата: Земјите од регионот и ЕУ договориле зелени коридори за олеснување на транспортот и трговијата на примарни производи“ [From the 30th session of the government: The countries in the region and the EU have agreed on green corridors for facilitating transport and trade with primary products] (27.03.2020) <https://Mada.mk/node/20774>

35 Council of Europe - Directorate of Legal Advice and Public International Law, Note Verbale, JJ9021C Tr./005-232, Council of Europe (02.04.2020), <https://rm.coe.int/16809e1288>

## SCOPE OF THE DEROGATION

# Scope of the derogation

The possibility for derogation is not without limitation.<sup>36</sup> Resolution 2209 (2018) of the Parliamentary Assembly of the Council of Europe serves as a good guide on the limits within which such derogation should take place.

What seems to be most difficult to determine in the case of North Macedonia's derogation from ECHR is the proportionality of the measures. Namely, the measures were taken in relation to COVID-19 and in order to protect the public health. However, very rarely is an explanation provided for the individual measures as to why they were taken and what the assessment of the decision makers is with regards to the impact they should have. What makes the assessment of proportionality even more difficult is the fact that this is a new virus, and therefore there is no sufficient information on the ways in which it is spread, although there are some initial scientific findings about how long it can survive without a host.<sup>37</sup> This makes it easy to rely on a general justification of any measure that would keep people away from each other. Yet such a general measure may disproportionately affect specific groups, such as care recipients on a variety of grounds. Moreover, it may also curb the community's potential for assistance and support, which could continue to be taken advantage of if the other measures to prevent the spread of the infection are complied with. For example, the assistance in the provision of food and medicine for the elderly through community support.

But this distancing does not affect everyone in the same way. The measures are general and rarely tailored to the needs of specific groups. In the publicly available documents published thus far, it is not possible to identify whether and how the assessment of the impact of the measures was made, both in general, and on specific groups (there is also no information on how the groups for which a special assessment would be made were selected). This makes it difficult to monitor whether the introduced measures were strictly necessary.

<sup>36</sup> Parliamentary Assembly of the Council of Europe, 'Resolution 2209 (2018) State of emergency: proportionality issues concerning derogations under Article 15 of the European Convention on Human Rights', <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=24680&lang=en>

<sup>37</sup> Centers for Disease Control and Prevention, 'How COVID-19 Spreads' <https://www.cdc.gov/coronavirus/2019-ncov/faq.html#how-covid19-spreads>

## Scope of the derogation

In addition, acting in accordance with the ECHR means that apart from the measures that include prohibitions (for example, general or specific restrictions on the right to free movement), the state needs to introduce measures that would provide adequate protection. This includes targeted protection (for example, protective equipment for people exposed to the virus), as well as general protection, through an effective and non-discriminatory approach to crisis planning and increased health care.<sup>38</sup>

A non-discriminatory approach to crisis planning not only implies the absence of direct discrimination, but also the obligation to introduce different perspectives when making the assessment of the impact and effectiveness of measures. Typically, in normal (non-crisis) conditions, decision makers belong to groups that are not part of the most marginalised groups, and in conditions of crisis this type of exclusion further escalates,<sup>39</sup> with many groups and their needs being left out. For example, the measures to restrict movement may not take into account the health status of certain groups of people for whom daily walks may be part of a prescribed therapy for a particular health condition. In addition, the commitments already made to introduce an ethnic,<sup>40</sup> and gender<sup>41</sup> perspective as well as a perspective on disability<sup>42</sup> are even more important in this situation. To this we must add the social and the personal and societal status because of the major consequences this crisis has and is expected to have on the economy. Due to this, it is necessary to bring them together and to introduce an intersectional approach to the planning, implementation, monitoring and evaluation, as well as termination of measures, in order to minimise the possibility of disproportionate negative effect on those who are most marginalised in the society. This approach can and should include other perspectives, regardless of how low the number of people estimated to be affected may be (for example, migrants). By introducing an intersectional perspective on the crisis planning in relation to COVID-19, the situation where measures are taken by persons in a position of power to the benefit of other persons in a position of power would be avoided. For example, working on measures that include financial assistance, and that would only focus on businesses. This also implies a step towards respecting the obligation of the state to be familiar with the scope of the problem (in this case - the reason for the derogation) to the best of its ability, in order to be able to claim that it has reacted appropriately and in a non-discriminatory way in the given situation.

38 Natasha Mavronicola, 'Positive Obligations in Crisis', *Strasbourg Observers* (07.04.2020), <https://strasbourgothers.com/2020/04/07/positive-obligations-in-crisis/>

39 Julie Lafrenière, Caroline Sweetman and Theresia Thylin, 'Introduction: gender, humanitarian action and crisis response', 27 *Gender and Development* 2 (2019), 187-201, 187-188.

40 Above all, with the Ohrid Framework Agreement.

41 Above all, the domestic legal and strategic framework.

42 Above all, by becoming party to the Convention on the Rights of Persons with Disabilities.

## DURATION AND END OF THE DEROGATION

### Duration and end of the derogation

The derogation should have a set duration, i.e. the state should inform the Secretary General on when it starts and when it ends. This duration should correspond to the purpose for its introduction, i.e. as soon as the need for it has ceased, it should be terminated. In cases such as those covered by Article 15, there will no doubt be a question of introducing several measures. This criterion applies to all of them, i.e. the duration of each individual measure should be justified.

The derogation must end as soon as the circumstances which led to it cease to exist. Any extension of the introduced measures after the need for them expires is unnecessary and shall be considered unjustified according to the ECHR. The justification for the duration and the need for termination does not only include the general derogation, but also each measure separately.

## MONITORING THE DEROGATION

The need for detailed monitoring and increased transparency regarding the derogation in this situation also arises from the lack of a mechanism to monitor the consistency of the derogation. Namely, other authors have already pointed out the reduced institutional capacity of the Council of Europe to monitor derogations. The ECtHR is already operating with a decreased activity<sup>43</sup> and based on a policy of priorities,<sup>44</sup> while the possibility for such monitoring by the Venice Commission on the Rule of Law and the Secretary General of the Council of Europe are questionable.<sup>45</sup>

Calling on transparency also implies transparency regarding the derogation from ECHR. This instrument is perhaps the most important instrument available to the citizens of this country to protect their human rights, both due to the fact that it is an instrument that globally enjoys the reputation of being one of the most effective mechanisms for the protection of human rights, but also due to the decrease in the capacity of the domestic judiciary to deliver justice on human rights violations. Any limitation or deprivation of the right to protection under this Convention needs to be clearly stated and explained. That was not the case with this derogation. The information was included in the press release from the government session, but no further action was taken to inform the public that the state was notifying the Court in Strasbourg that, within the duration of this period, it could not guarantee our private and family life, the right to education, the freedom of assembly and association and the freedom of movement.<sup>46</sup>

43 European Court for Human Rights, 'Press Release: Current activities at the ECHR during the global health crisis' (27.03.2020), <http://hudoc.echr.coe.int/eng-press?i=003-6670996-8872788>

44 European Court for Human Rights, 'The Court's Priority Policy', [https://www.echr.coe.int/Documents/Priority\\_policy\\_ENG.pdf](https://www.echr.coe.int/Documents/Priority_policy_ENG.pdf)

45 Kushtrin Istrefi, 'Supervision of Derogations in the Wake of COVID-19: a litmus test for the Secretary General of the Council of Europe', *EJIL* (06.04.2020), [https://www.ejiltalk.org/supervision-of-derogations-in-the-wake-of-covid-19-a-litmus-test-for-the-secretary-general-of-the-council-of-europe/?utm\\_source=mailpoet&utm\\_medium=email&utm\\_campaign=ejil-talk-newsletter-post-title\\_2](https://www.ejiltalk.org/supervision-of-derogations-in-the-wake-of-covid-19-a-litmus-test-for-the-secretary-general-of-the-council-of-europe/?utm_source=mailpoet&utm_medium=email&utm_campaign=ejil-talk-newsletter-post-title_2)

46 Council of Europe - Directorate of Legal Advice and Public International Law, Note Verbale, JJ9021C Tr./005-232, *Council of Europe* (02.04.2020), <https://rm.coe.int/16809e1288>

## Monitoring the derogation

Full transparency is necessary in relation to the need, the grounds, the goal, the scope and the duration of the introduced restrictions. In this regard, the report that the Government needs to draft and submit to the President at the end of the 30 days from the day when the state of emergency was declared will be particularly important. This report should contribute, in particular, to the clarification of the objectives of each of the measures separately, but also as clusters in a whole, which is one of the elements that has not been clearly communicated to the public. In doing so, it should be taken into consideration that the proportionality and necessity are elements that should be observed for the entire duration of the derogation. The introduction of an intersectional perspective on crisis management would also entail the need to introduce this perspective within the mechanisms for monitoring of the derogation. This would imply an increase in the system's ability to recognize and take into account the different risks to which different persons are exposed, as well as its response to those risks.

## RECOMMENDED STEPS

### Ensuring the principle of non-discrimination by introducing an intersectional approach:

In order to minimise the possibility of a disproportionately negative effect on those who are most disadvantaged in society, it is necessary to introduce an intersectional approach to the planning, implementation, monitoring, evaluation and termination of measures. This is of particular importance, not only for those who would be more affected by the measures introduced compared to others, but also because the proportionality of the measures would be one of the criteria based on which the derogation would be assessed in the event of possible future cases that would reach the ECtHR. Civil society organizations, which are active in this period as well,<sup>47</sup> may help identify the possible obstacles or peculiarities regarding the measures for the specific groups they work with and make specific proposals for their adjustment. In addition, the already existing principles need to be complied with, in this situation too, and the aspect of crisis may not serve as an excuse to neglect or put aside some of the ongoing obligations, such as gender mainstreaming, taking into account the gender perspective, or accessibility and inclusion of persons with disabilities. By introducing an intersectional approach of this kind, the obligation for non-discriminatory action in taking measures within the justified derogation will be complied with.

### Strictly evolutive, proportional and responsive measures:

Monitoring and re-evaluation of the measures and, if necessary, their adjustment or termination. Continuous monitoring makes it possible not only to draw conclusions as to whether the introduced measures have given the expected result, but also whether there is a need for their adjustment or termination. It would not be considered justified under the ECHR to keep in place measures the need for which has ceased.

<sup>47</sup> The Civica Mobilitas programme initiated a database where it is possible to follow the civil society organisations' activities in relation to COVID-19: <https://civicamobilitas.mk/covid-19/>

### Transparency, both in the introduction of the measures, their aim, as well as in their monitoring:

It is necessary to report about the circumstances related to the derogation in a clear, unambiguous and transparent manner. This includes reporting on the aim or objectives set to be achieved by each separate measure, as well as the state's assessment of their proportionality, strict necessity, and legal ground. Transparency regarding the monitoring of the implementation of the measures is necessary in order to have an insight into the continuous need for their subsistence.

### Familiarity with the problem:

The state has an obligation to be familiar with the problem and all its circumstances to its best abilities in order to properly design and implement measures that would achieve their aim, which was the reason why it initially derogated from the ECHR. Indeed, this implies familiarity by taking action which would be within the scope of what is allowed under the Convention. For example, this could include conducting testing of a scope and in a manner that would lead to collection of the necessary data in order to provide protection, as per its obligations.



