Title: A Right to Derogate? A Critical Approach to the European Court of Human Rights' Interpretation of Art 15(3)

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I

Responding to Covid-19 has required some of the most extensive peacetime curbs on civil liberties in the modern era. While very few of these regulations have been found to breach any human rights instrument, however desirable or otherwise that may be, anecdotal evidence shows that concern with potential judicial reviews limited governments' responses.[1] It is surprising, therefore, that only 9 states chose to derogate under the ECHR. Art 15(3) reads as follows:

> 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.[2]

In response to Dr Martin's blog[3] discussing a judgment[4] containing some odd dicta on this point, Professor Akande raised the question of whether a state could rely on Art 15 without notification? While the ECtHR has stated that a lack of notification will not necessarily result in nullity, in this article I answer Professor Akande's question in the negative, further concluding that a lack of notification *must* result in nullity.

My thesis is that Art 15 is a power conferring (PC) law and that the notification requirement in Art 15(3) is internally related to the power to derogate conferred by Art 15. A key consequence of this is that failing to comply with the requirements of Art 15(3) must result in nullity to ensure that Art 15(3) is reason giving and thus capable of being a legal norm. This is because nullity is not the same as a sanction. Unlike a sanction imposed for a breach of a duty imposing law, which when detached from its associated legal standard leaves the standard intelligible, nullity is a logically necessary element of PC laws. This

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[1] Health and Social Care Committee and Science and Technology Committee, Oral evidence: Coronavirus: Lessons learnt, HC 95 <https://committees.parliament.uk/oralevidence/2249/pdf/> accessed 30 September 2021

[2] European Convention on Human Rights (1950)

[3] Stevie Martin, 'A Domestic Court's Attempt to Derogate from the ECHR on behalf of the United Kingdom' (*EJIL:Talk!*, April 9 2020) <https://www.ejiltalk.org/a-domestic-courts-attempt-to-derogate-from-the-echr-on-behalf-of-the-united-kingdom-the-implications-of-covid-19-on-judicial-decision-making-in-the-united-kingdom/?utm_source=mailpoet&utm_medium=email&utm_campaign=ejil-tal> accessed 30 September 2021

[4] *BP v Surrey County Council & Anor* [2020] EWCOP 17

may seem a very analytic argument, however, there are also good normative reasons for adopting this interpretation also. Art 15(3) is in essence a requirement of form and the valuable functions of these provisions are well known. Their value in the human rights context is, in my view, accentuated given the higher standards that international human rights instruments impose.

At a more practical level, some leading cases on Art 15 may well have been wrongly decided if my thesis is correct. In *Ireland v UK* one of the complaints made by the applicant state concerned the internment of suspected IRA members.[5] The UK did not issue a derogation notice until after the internment had taken place. If my thesis is correct the court erred in its decision. Given that Art 15(3) was not complied with until *after* the measure had been implemented, the UK had not validly exercised its power to derogate under Art 15 until after the measures had been implemented and thus should not receive the protection it affords convention incompatible conduct. Yet, even if we were to return to the leading case on Art 15 we see a similar state of affairs. In *Lawless v Ireland*, the Court and Commission (C+C) held that an eleven-day delay, on the part of the Irish government, in informing the SG met the requirements of Art 15(3) was lawful.[6] If my thesis is correct, the Irish government should only have been able to rely on its derogation from the point at which it was valid, which is to say once it had complied with Art 15(3). Notwithstanding any debate over the sufficiency of the content of the derogation notice in *Lawless*, the “right of derogation” would only have been effective 11 days after the measures taken were first implemented. On this basis, the Court should have held Ireland liable for the breaches of its duties under the Convention that took place in those 11 days, including those initial breaches of Mr Lawless’ Convention rights.

II

In *Lawless*, a leading case on this issue, Ireland claimed that Art 15(1) confers a right on states to derogate — “the right of derogation” — and that Art 15(3) imposes an independent "duty to inform” the Secretary General (SG). The applicant, however, contended that compliance with Art 15(3) was a necessary condition for reliance on derogation. The C+C sided with Ireland on this point finding no violation of the Convention and went on to state:

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[5] *Ireland v. The United Kingdom*, 5310/71, European Court of Human Rights

[6] *Lawless v Ireland* Report of the Commission App 332/57

> the Commission is not to be understood as having expressed the view that in no circumstances whatever may a failure to comply with the provisions of paragraph 3 of Article 15 attract the sanction of nullity of the derogation or some other sanction.[7]

As Higgins notes "The Commission…in oral argument before the Court, seemed inclined to accept [that non-compliance should not result in nullity] as a general principle."[8] This is the approach that the C+C went on to adopt going forward.

The C+C's dicta on this issue raise several difficulties, the first of which results from conceiving of Art 15(3) as an independent "duty to inform". Following Hohfeld, rights and duties are biconditionally entailed.[9] This is to say that A is only under a duty to phi iff B holds a right that A phis and B only holds a right that A phi iff B is under a duty to A to phi. As such, if one is to take this interpretation at face value, talk of a "duty to inform" necessarily entails a "right to be informed". This theoretical point presents certain practical difficulties as one is forced to query: who holds this "right to be informed"? It appears that the potential right holders are the SG, individuals in the State in question, or the other Member States. One might begin by arguing that, as the SG is mentioned explicitly in the provision, they are the obvious right holder, however, here lie the biggest practical worries. It is unclear how the SG might go about enforcing this right. There is no explicit direct access provision for the SG to make an application to the Court based on this provision and it is unclear whether, in all cases, the SG would have standing to enforce this right in domestic courts. Yet the concerns about enforceability extend to the remaining two potential right holders also. Before any legal challenge, what distinguishes a simple breach of Convention obligations from a derogation is a notification. As such, where a State does not notify, it appears to all others as though the State is simply breaching its Convention obligations. That the State is also breaching its "duty to inform" under Art 15(3) is epistemically inaccessible to all onlookers, such that no party could ever bring an action to enforce the "right to be informed". The C+C's interpretation of Art 15(3) thus renders it a dead letter.

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[7] ibid.

[8] Higgins, Derogations Under Human Rights Treaties, 48 BRIT. Y.B. INT'L LAW 281

[9] Wesley Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (Routledge, 2016)

III

Two other key dicta are present throughout the C+C's limited jurisprudence on this issue, namely "the right of derogation" and "the sanction of nullity". These raise two principal questions: 1) recalling Hohfeld, is the legal entitlement in question a right? And 2) is nullity a sanction? In my view, the answer to both questions is no. In my opinion, the legal entitlement to derogate from Convention obligations is best viewed as a power, that is, the ability to change the legal entitlements of a legal person. We might further look to Hart who described PC laws thusly:

> Such laws do not impose duties or obligations. Instead, they provide individuals with *facilities* for realising their wishes, by conferring legal powers upon them to create, by certain specified procedures and subject to certain conditions, structures of rights and duties within the coercive framework of the law.[10]

This passage helps meet any objection that the text of the Convention explicitly refers to "the right of derogation" because it shows that, while there is a right of derogation, this right may be created by the prior valid exercise of a power. From this recognition that Art 15 is best conceived of as a PC law, we can see why the conflation of sanction and nullity is false. In general, nullity and sanction are distinct because, in some cases, nullity can be beneficial, for example where a beneficiary fails to exercise their *Saunders v Vautier* rights as they were underage and, in the meantime, the trust property's value appreciates. Regarding derogation, it can be the case that nullity makes no difference if it were held that the measures taken did not breach the Convention at all. More fundamentally, however, for PC laws, nullity is a necessary element of the law — a point I will return to later.

Before that, however, I will address the use of the word "shall" in Art 15(3) — surely the imperative in the provision means it is duty imposing? This is a stronger objection than some, including Hart, might think. Hart argued that manner and form provisions such as Art 15(3) are merely different varieties of PC law.[11] While he was right to believe that this kind of objection did not defeat his objections regarding PC laws it was his student, Joseph

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[10] HLA Hart, *The Concept of Law* (3rd edn, OUP 2012) 27

[11] HLA Hart, *The Concept of Law* (3rd edn, OUP 2012) 28

Raz, who provided the better response. Raz's analysis of this issue is particularly sophisticated and, as such, in what follows I will be brief.[12] Raz contends that Art 15 and other PC laws create interlocking systems of norms. He argues that the varieties of PC law identified by Hart are, at least in this case, duty imposing laws that are internally related to the original PC law. This creates a transitive relation between the various internally related standards as they cannot be explained fully without reference to each other, for example, the power to make a will, given a requirement that a will must have two witnesses to be valid, cannot be explained fully without reference to the witness requirement. So, while Art 15(3) imposes a duty, it remains part of the system related to the original law conferring the power to derogate.

I would now return to my contention that nullity is a logically necessary element of PC laws. Considering duty imposing laws, sanctions are in some sense separable from the standard of conduct the law sets out.[13] For example, in the UK when most Covid restrictions were ended in mid-2021 and instead became merely guidance, with no criminal sanction attached to them, it was still possible to discern the standard of conduct required — the lack of sanction was merely relevant to questions of efficacy. With PC laws, however, nullity is a vital element of the intelligibility of the standard in question. If nullity is detached from the standard in Art 15(3) then notification becomes neither a necessary nor sufficient condition for a valid derogation because derogations can be valid without compliance and invalid with compliance. This means that the reason for action in Art 15(3), given that it is internally related to the power to derogate conferred by Art 15 writ large, is eliminated and thus it cannot function as a legal norm leaving it with no function whatsoever.

IV

Thus far I have made what might be seen as quite limited, analytic arguments to support my strong claim regarding the necessity of nullity as the result of a failure to notify a derogation. Despite scant critical engagement by courts and scholars with Art 15(3), there has been more engagement with the analogous provision in Art 4(3) ICCPR.[14] What is explicit in this literature and implicit in the limited discussion of Art 15(3) is that those

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[12] Joseph Raz, *Practical Reason and Norms* (2nd edn, OUP 1999) 111

[13] HLA Hart, *The Concept of Law* (3rd edn, OUP 2012) 34

[14] International Convention on Civil and Political Rights (1966)

adopting the prevailing interpretation of Art 15(3) tend to do so because they believe there are good normative reasons for doing so. In what follows I will argue that these reasons are unsatisfactory and that there are stronger normative reasons to adopt the kind of interpretation I propose above.

At the outset, I would return to the dictum of the C+C that "the Commission is not to be understood as having expressed the view that in no circumstances whatever may a failure to comply with the provisions of paragraph 3 of Article 15 attract the sanction of nullity…"[15] In essence, this states that nullity will not always follow a failure to notify but that it might follow a failure to notify in some cases. As such, to rescue the position from arbitrariness, its supporters must develop some principle to guide the application of nullity. I am aware of three attempts to do this: 1) a proportionality principle, 2) an "as a rule" principle, and 3) a bad faith principle.

Proportionality

There are several variants of this argument. One holds that the sanction applied for failing to comply with Art 15(3) should only be so onerous as to incentivise compliance with its terms and that nullity is too blunt an instrument.[16] Another takes the form that, where the other terms of Art 15 are complied with, breach of an "essentially procedural" standard should not result in nullity.[17] What ties these forms of the argument together is the view that, during the emergencies that would engage Art 15, there ought to be some concession to human frailty. In these situations, time pressure may mean that informing the SG of the measures being taken may be the last thing on the mind of a head of government. Yet, this is precisely why this principle cannot be adopted. This move would adopt the kind of approach seen in domestic criminal law where individuals in high-pressure situations may be given more leeway, however, it is States that are bound by international human rights instruments, not individuals.[18] With all its resources and all its responsibilities, a higher standard is expected from the State and dilution of this would undermine the very purpose

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[15] *Lawless* n6

[16] Joan Hartman, 'Working Paper for the Committee of Experts on the Article 4 Derogation Provision' 7 Hum Rts Q 89 103.

[17] ibid.

[18] cf Natasa Mavronicola, 'Taking Life and Liberty Seriously: Reconsidering Criminal Liability Under Article 2 of the ECHR' 80 MLR

of international human rights law.

"As a Rule"

Another argument made is that the sanction for violation of Art 15(3) is nullity but that it acts indirectly because "as a rule" deficiencies in notification are accompanied by deficiencies in other regards.[19] This claim, however, is falsifiable. In *Lawless*, the Commission held that Ireland's derogation notice "does not indicate with sufficient clearness the reasons which have led the Respondent Government to derogate from its obligations under the Convention."[20] Notably, the Irish government's notice did not specify which Articles of the Convention were being derogated from. Yet, while the Commission did not strike the derogation with nullity on Art 15(3) grounds it also did not strike the derogation with nullity on any other grounds.

Bad Faith

This argument runs that failure to comply with the terms of Art 15(3) provides evidence of bad faith regarding the evidence provided concerning Art 15(1), for example, the national authorities' determination of the existence of a public emergency.[21] As such, the breach of Art 15(3) would indirectly invalidate the purported derogation under Art 15(1). Further, it has been argued that the political ideology of the government seeking to derogate is a relevant factor in determining its validity. It remains an open question whether it is desirable that judges engage in such complex political philosophy to decide cases? There are good reasons to think that judges are not competent to address such questions. Beyond this, the argument in this form appears self-defeating. We are looking for a principle that will prevent the application of nullity from being arbitrary. If the solution is to ask judges to theorise about vague concepts in political philosophy then the arbitrariness is not eliminated it is now simply the principle itself that is arbitrary.

So, the search for principle seems to have been in vain. With reference to the functions of formality requirements identified by Lon Fuller, I will argue that it is, in fact, desirable that

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[19] Report by the UN Special Rapporteur <http://hrlibrary.umn.edu/demo/HumanRightsandStatesofEmergency_Despouy.pdf>

[20] *Lawless* n6

[21] Higgins n8

non-compliance with Art 15(3) should lead to nullity.[22] As noted above, some argue that the breach of an "essentially procedural" norm should not lead to nullity because this would be disproportionate. I contend that it is often not possible to draw such a bright-line distinction between the "procedural" and the "substantive".

(i) The evidentiary function

The evidentiary function provides evidence of a purported act. It tends to have greater relevance for the content of a notification, for example, the territorial scope of the derogation, the rights derogated from, evidence of the measures taken, etc. Yet, it should be noted that it is exceedingly likely that a given benefit of a formality requirement will be justified with regard to more than one function. As such, recalling the initial criticism of epistemic inaccessibility, the evidentiary function of Art 15(3) ensures that there is evidence that can be used by all parties in their decision making.

(ii) The channelling function

Ihering termed the channelling function "the facilitation of judicial diagnosis".[23] Fuller, however, took pains to note the significance of the channelling function for those conducting business outside of court. Here we ought return to the criticism of epistemic inaccessibility. Another aspect of the criticism is that, for both courts and observers, a notification under Art 15(3) is what distinguishes a purported derogation from a simple breach of Convention obligations. The channelling function is, therefore, an essential element of the collective enforcement mechanism of the Convention. This function is one of the essential underpinnings of the system of derogation. The channelling function serves to put human rights at the centre of the emergency. It requires the state to assess the gravity of the emergency through the lens of Art 15(1) and to determine whether any exceptional response is strictly necessary. In privileging a rights-based response to emergencies the formality requirement fulfils another function discussed below.

(iii) The cautionary function

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[22] Lon Fuller, 'Consideration and Form' 41 CLR 799.

[23] Rudolf von Ihering, Geist Des Romischen Rechts

The cautionary function is a “check on inconsiderate action”.[24] It provides the opportunity to pause for thought so that through attaching a seal or committing something to writing the weighty, legal nature of the steps being taken is truly felt. Professor Tomuschat’s has argued, regarding Art 4(3), that this can extend even to a change in plans. In the context of derogation, this means that a state may, being faced with the notification requirement, decide against a derogation.[25] The cautionary function also operates by speaking to the fundamental nature of human rights. This is the essence of Lord Hofmann’s stirring, yet misguided, dissent in the *Belmarsh* case.[26] In proposing a much higher threshold for the existence of a “public emergency threatening the life of the nation”, Lord Hofmann was seeking to limit the scope of the situations where human rights might be abridged. As he stated in his closing paragraph “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.”[27] When measures of such gravity are being taken by a state it is important that the derogation procedure provides the opportunity for reflection on the measures being taken and the recapitulation of the arguments for taking them so that what is at stake remains front and centre.

V

In this article I have demonstrated both that failure to comply with Art 15(3) must result in nullity and that this result can be readily justified. We can see that this supposedly “essentially procedural” norm has great substantive effects. In my view, these substantive effects are positive ones, promoting the integrity of the human rights framework. If we truly believe in the human rights framework, we should not shy away from mainstreaming human rights considerations in times of emergency.

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[24] Fuller n22.

[25] UN Doc. CCPR/C/SR.469 (1983), para. 19.

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

[27] ibid.

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