Murray C. (2017)

[Shifting Emergencies from the Political to the Legal Sphere: Placing the United Kingdom's Derogations from the ECHR in Historical Context.](#)

In: Saul, M., Follesdal, A., Ulfstein, G. (eds.)

The International Human Rights Judiciary and National Parliaments: Europe and Beyond.

Cambridge: Cambridge University Press, pp.198-222.

Copyright:

This version is free to view and download for personal use only. Not for re-distribution, re-sale or use in derivative works. © Cambridge University Press, 2017

<http://www.cambridge.org/catalogue/catalogue.asp?isbn=9781107183742>

Date deposited:

10/07/2017

Embargo release date:

30 April 2018

Shifting Emergencies from the Political to the Legal Sphere: Placing the United Kingdom's Derogations from the ECHR in Historical Context

C.R.G. Murray*

1. Introduction

The need to protect 'political expediency' long undermined the development of international human rights.¹ Governments had so long used other states' human-rights records as bargaining chips in international relations, emphasising some perceived abuses whilst downplaying others, that even in the aftermath of the Second World War the new European Convention on Human Rights (ECHR) attracted considerable scepticism.² The ECHR institutions' handling of applications arising in the context of war or other emergency circumstances would be vital to the success of these fledgling arrangements because, although constitutional rights and civil liberties had long been features of Europe's domestic legal orders, responses to emergencies had historically been dominated by *raison d'État*.³ Whereas this approach marginalised the role of domestic courts in emergency situations, under the ECHR states could continue to 'take measures derogating from its obligations' in response to 'war or other public emergency threatening the life of the nation', but only 'to the extent strictly required by the exigencies of the situation'.⁴

This provision was designed 'to ensure that even exceptional state action remains governed by independent norms, which in turn allows for supervision by independent tribunals'.⁵ One of the ECHR institutions' first tasks was therefore to develop the legal requirements for derogations, in the face of two countervailing concerns. If Strasbourg was too rigorous in its interpretation of Article 15's requirements, states might begin to abandon the ECHR system before it had the opportunity to establish itself. By contrast, if states were

* Senior Lecturer, Newcastle Law School. My thanks to Aoife O'Donoghue (Durham), Alan Greene (Durham) and Matt Saul (Oslo) for their encouragement and comments upon earlier drafts of this article, which was developed in the course of two ERC-funded seminars at the University of Oslo (18 March 2015) and Middlesex University (13 November 2015). Any errors remain my own.

¹ H. Lauterpacht, *International Law and Human Rights* (New York: F.A. Praeger, 1950) p.456.

² European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 UNTS 222 (1953).

³ D. McGoldrick, 'The Interface between Public Emergency Powers and International Law' (2004) *International Journal of Constitutional Law* 380, 388.

⁴ ECHR, Art.15(1).

⁵ T. Hickman, 'Between Human Rights and the Rule of Law: Indefinite Detention and the Derogation Model of Constitutionalism' (2005) 68 *Modern Law Review* 654,657. See also O. Gross and F. Ní Aoláin, 'Law in Times of Crisis: Emergency Powers in Theory and Practice' (Cambridge: Cambridge University Press, 2006) p.263.

given too much leeway in early ECHR jurisprudence, derogations could become a means of legalising egregious human rights abuses. The uncertainty surrounding how Article 15 would operate persisted until the early derogation jurisprudence unfolded in the 1950s and 1960s.

Despite not having a constitutional concept of *état de siège*⁶ as maintained in France, or the ability to invoke emergency powers which are protected from challenge on constitutional grounds which operates under the Irish Constitution,⁷ the UK insisted on the inclusion of Article 15 during the drafting of the ECHR⁸ and has relied upon derogations more frequently than any other contracting state. Indeed, in the face of ministerial assertions that '[d]erogation is not something that any government ... enter into lightly',⁹ the UK has maintained one or more operative derogations for most of the ECHR's history. This article evaluates the UK's persistent use of derogations and how, even in the face of a continuing terrorist threat, it broke this reliance in recent years. I place the UK's approach to derogations in historical context by evaluating them by reference to the UK's pre-ECHR approach to emergency situations. The ECHR arrangements in theory provided an extra European layer of oversight in emergency situations and invoking a derogation amounted to an international admission that a state needed far-reaching powers to bring such a situation under control. In operation, however, Strasbourg's oversight was so light-touch as to make derogations an attractive option for UK policy makers. The UK Government also manipulated the apparently legalised nature of the Article 15 test to curtail parliamentary oversight. This light touch jurisprudence has given way to efforts by the Court to foster more effective oversight by domestic courts and parliamentary processes. Since Strasbourg has developed these expectations over the role of domestic oversight, derogations have lost much of their former allure.

2. Martial Law, Emergency Powers and Parliament

By the turn of the twentieth century the common law powers possessed by the UK Government in an emergency context had long been shrouded in uncertainty.¹⁰ Through the

⁶ Constitution of the Fifth Republic (1958) Art.36. French Law also provides for crisis responses to an *état d'urgence* under Law No. 55-385 of 3 April 1955.

⁷ Constitution of Ireland (1937) Art.28.3.3.

⁸ See A-L. Svensson-Mccarthy, *The International Law of Human Rights and States of Exception: With Special Reference to the Travaux Préparatoires and Case-Law of the International Monitoring Organs* (The Hague: Martinus Nijhoff, 1998) pp.200-202.

⁹ Baroness Scotland, HL Debs, vol.667, col.1589 (20 Dec 2004). See also Lord Rooker, HL Debs, vol.628, col.877 (19 Nov 2001).

¹⁰ See C. Rossiter, *Constitutional Dictatorship: Crisis Government in the Modern Democracies* (New Jersey: Princeton University Press, 1948) 135-150.

nineteenth century authoritative voices insisted that a soldier tasked with restoring order in the face of a riot or insurrection is ‘only a citizen armed in a particular manner’.¹¹ In other words, the authorities enjoyed no inherent special powers with regard to emergencies under the UK’s “ancient constitution”, short of a declaration of martial law. Where the Crown’s forces resorted to force to address an emergency, the common law ordinarily required that it be proportionate to the threat at issue.¹² Martial law, by contrast, enabled the military to take all steps within their power to address an emergency, including trial of civilians by means of military tribunal, provided it is ‘used in case of necessity, and imminent danger ... as in cases of rebellion [or] sudden invasion’.¹³ But doubt persisted over whether martial law could be invoked if circumstances were not so grave as to prevent the ordinary courts from functioning.¹⁴ Imperial expansion, increasing prosperity and peace in Great Britain (if not in Ireland and many of the colonies), however, had long combined to push uncertainties over the ‘disengagement between martial law as theory and as praxis’ from policy makers’ agendas.¹⁵

The spectre of imperial collapse and the exigencies of the First and Second World War brought the issue of these ‘meagre’ powers back to prominence in the twentieth century.¹⁶ In the face of these threats the courts restricted their oversight of the operation of emergency powers. An early indication that the bounds upon martial law were loosening came during the Boer War in the *D.F. Marais* case,¹⁷ a challenge before the Privy Council to the refusal by the Courts in the Cape Colony to consider the legality of an arrest made under martial law powers. Lord Halsbury concluded that provided the threshold of war or insurrection necessitating the invocation of martial law had been met, judges would not assess the proportionality of actions taken *durante bello*; ‘let the fact of actual war be established, and there is an universal consensus of opinion that the civil Courts have no jurisdiction to call in question the propriety of the action of military authorities’.¹⁸ Parliament might have been able to pass legislation curtailing the use of martial law, but Conservative MPs ‘promoted British

¹¹ C. Bowen, *Report of the committee appointed to inquire into the circumstances connected with the disturbances at Featherstone on the 7th of September 1893* (HMSO, 1893) Cmnd.7234, 10.

¹² See W. Holdsworth, ‘Martial Law Historically Considered’ (1902) 18 *Law Quarterly Review* 117, 127. See also *R v Nelson and Brand* (1867) F Cockburn Sp Rep 69, 85 (Cockburn CJ’s Grand Jury Charge).

¹³ *R v Hampden* (1637) 3 Howell’s St.Tr. 825, 1162 (Croke J). See H. Richards, ‘Martial Law’ (1902) 18 *Law Quarterly Review* 133, 135-136.

¹⁴ See *R v Wolfe Tone* (1798) 27 St.Tr. 759.

¹⁵ R. Kostal, *A Jurisprudence of Power: Victorian Empire and the Rule of Law* (Oxford: Oxford University Press, 2005) p.458.

¹⁶ I. Jennings, *The Law and the Constitution* (5th Ed., London: University of London Press, 1959) p.56.

¹⁷ *D.F. Marais v The General Officer Commanding the Lines of Communication* [1902] AC 109.

¹⁸ *ibid.*, 115.

imperial policy’¹⁹ and the Government’s parliamentary majority allowed it to fend off opposition. Even when the Colonial Secretary Joseph Chamberlain admitted that the institution of martial law was ‘illegal and unconstitutional’,²⁰ he quietened dissent by declaring that ‘[t]he Ministers of this country ... have, even in times of perfect peace, done illegal and unconstitutional acts from time to time, and we have had to come to the House of Commons for an indemnity.’²¹ Nonetheless, the *Marais* case itself became something of a *cause célèbre*, with several parliamentarians taking a close interest into his treatment. In a largely forgotten postscript to the Privy Council decision, he would be quietly released a few months later.²²

Two decades later, against the backdrop of the Irish War of Independence, Malony CJ refused to accept challenges to uses of military power during the conflict even though the civilian courts were still in session on the basis that ‘[w]hen peace is restored, acts in excess of what necessity requires ... may require the protection of indemnifying legislation.’²³ This reassertion of the *Marais* position did not, however, prevent the courts from hearing such claims once order had been restored. That an Indemnity Act might ultimately be needed had cooled the UK military’s enthusiasm for the seemingly unrestricted powers available under martial law even before the First World War.²⁴ Officers craved ‘the supposed certainty of statute law, rather than the somewhat open-ended flexibility of the common law’, with its attendant risk that Parliament might refuse to pass a potentially unpopular Indemnity Act once an emergency was over.²⁵

Instead of relying upon martial law, a pattern emerged of the UK Parliament enacting specific legislation, for the duration of an emergency situation, which granted special powers to the authorities to tackle the danger in question. At the outbreak of the First World War fears over the UK’s large expatriate German population led to the introduction of detention without trial of anyone suspected of having German family connections or sympathies for the

¹⁹ T. Freyer, ‘Comment on Chapter 1’ in A. Sarat (ed.), *Sovereignty, Emergency, Legality* (Cambridge: Cambridge University Press, 2010) 58, p.67.

²⁰ *Marais* did not render the steps taken under martial law legal, the Privy Council simply declined to exercise any judicial oversight for the duration of the conflict. For a detailed analysis of the case, see D. Dyzenhaus, ‘The Puzzle of Martial Law’ (2008) 59 *University of Toronto Law Journal* 1.

²¹ HC Deb, vol.101, col.158 (16 Jan 1902). See also H. Richards, ‘Martial Law’ (1902) 18 *Law Quarterly Review* 133, 134.

²² W. Brodrick, MP, HC Deb, vol.104, col.869 (10 Mar 1902).

²³ *R v Allen* [1921] 2 IR 241, 272.

²⁴ C. Townshend, *Making the Peace: Public Order and Public Security in Modern Britain* (Oxford: Oxford University Press, 1993) p.77.

²⁵ See G. Rubin, ‘The Royal Prerogative or a Statutory Code? The War Office and Contingency Planning, 1885-1914,’ in R. Eales and D. Sullivan (eds.), *The Political Context of the Law* (London: Hambledon, 1987) 145, p.146.

duration of hostilities. This power was the centrepiece of what Brian Simpson described as ‘a comprehensive code of emergency powers’ under the Defence of the Realm Acts 1914-1915.²⁶ The powers proved so useful that even after the First World War ended the UK authorities were determined to be able to continue to access many of them in the context of the Irish War of Independence and they were repackaged in the Restoration of Order in Ireland Act 1920. This legislation provided a partial legal basis for the Government’s emergency response in Ireland alongside martial law.²⁷ Even after most of Ireland gained its independence the authorities in the six counties of Northern Ireland, which remained part of the UK, enacted a system of special powers legislation on the basis of their experience of the political violence surrounding partition to enable them to tackle a mixture of real and assumed on-going threats.²⁸ From these beginnings, tailored emergency codes ‘became the model both in colonial territories and in the United Kingdom itself’.²⁹ They would be introduced at the outbreak of the Second World War³⁰ and at the onset of the Provisional Irish Republican Army (IRA) bombing campaign in England in 1974.³¹ Although quasi-permanent special powers edifices were constructed in the form of the Emergency Powers Act 1920 and its successor the Civil Contingencies Act 2004, the use of this legislation has been focused upon instances of industrial unrest.³²

As with martial law, in the pre-ECHR era the broad framing of the powers contained in the UK’s statutory emergency codes restricted judicial oversight. During the First World War it was posited that the discretion conferred on the executive under the Defence of the Realm Acts was so broad that it could be used to authorise extra-judicial killing.³³ In the leading case on the Acts, *ex parte Zadig*,³⁴ Lord Dunedin did not demur that Parliament had conferred particularly extensive powers with little by way of oversight; ‘[T]he fault, if fault there be, lies in the fact that the British Constitution has entrusted to the two Houses of Parliament ... an absolute power untrammelled by any written instrument obedience to which

²⁶ A. Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (Oxford: Oxford University Press, 2001) p.80.

²⁷ K. Ewing and C. Gearty, *The Struggle for Civil Liberties: Political Freedom and the Rule of Law in Britain, 1914-1945* (Oxford: Oxford University Press, 2000) pp.357-362.

²⁸ Civil Authorities (Special Powers) Acts (Northern Ireland) 1922-43.

²⁹ Simpson, *Human Rights and the End of Empire*, p.80.

³⁰ Emergency Powers (Defence) Act 1939.

³¹ Prevention of Terrorism (Temporary Provisions) Acts 1974-1989.

³² See Townshend, *Making the Peace*, pp.86-90. See also C. Allen, *Law and Orders* (London: Stevens & Sons, 1965) p.378.

³³ See D. Foxton, ‘*R v Halliday, ex parte Zadig* in Retrospect’ (2003) 119 *Law Quarterly Review* 455, 483.

³⁴ *R v Halliday, ex parte Zadig* (1917) AC 260.

may be compelled by some judicial body'.³⁵ The courts treated Parliament as the focal point of scrutiny of the executive in times of crisis, a position which was remarkable given that the Defence of the Realm legislation contained 'no provision that regulations made under the Act require parliamentary approval'.³⁶ Once Parliament had granted a discretionary power the Courts' oversight of such measures was limited to assessing whether there had been an act of bad faith on the part of the Executive.³⁷

This concentration upon parliamentary oversight of emergency codes from the First World War onwards proved problematic, as parliamentarians were required to fly in the face of public concern over security threats and a push by the executive for enhanced security powers.³⁸ Lord Finlay did at least recognise in *ex parte Zadig* that even parliamentary oversight was constrained in these circumstances; 'it may be necessary in time of great public danger to entrust great powers to His Majesty in Council, and ... Parliament may do so feeling certain such powers will be reasonably exercised'.³⁹ Uncertainty naturally coloured parliamentary debate given the Government's refusal to make security assessments public and given the 'the size of the stakes'.⁴⁰ Whilst some civil-liberties-enhancing concessions were won by parliamentary opposition during the enactment of the Defence of the Realm Acts, these interventions 'ought not to be exaggerated' when considered against the legislature's 'failure adequately to ensure that regulations were given proper consideration'.⁴¹ A pattern was set which extended through the Second World War and beyond.

3. The UK adapts to the ECHR

Derogations involve an ECHR state's notification to the Council of Europe of the suspension of specific substantive human rights to enable it to address an on-going crisis. The prohibition of torture and slavery and the right not to be subjected to retrospective criminalisation are excluded from the ambit of derogations, as is the right to life 'except in respect of deaths

³⁵ *ibid.*, 270-271.

³⁶ C. Campbell, *Emergency Law in Ireland 1918-1925* (Oxford: Oxford University Press, 1994) p.112. See also A. Simpson, *In the Highest Degree Odious: Detention Without Trial in Wartime Britain* (Oxford: Oxford University Press, 1994) p.25.

³⁷ See D. Lowry, 'Terrorism and Human Rights: Counter-Insurgency and Necessity at Common Law' (1977-78) 53 *Notre Dame Lawyer* 49, 55.

³⁸ See D. Foxton, '*R v Halliday, ex parte Zadig* in Retrospect' (2003) 119 *Law Quarterly Review* 455, 478.

³⁹ *R v Halliday, ex parte Zadig* (1917) AC 260, 268-269.

⁴⁰ B. Porter, *The Origins of the Vigilant State: The London Metropolitan Police Special Branch before the First World War* (London: Weidenfeld & Nicolson, 1987) p.173.

⁴¹ Ewing and Gearty, *The Struggle for Civil Liberties*, p.50.

resulting from lawful acts of war'.⁴² The developing UK practice of enacting an emergency code to deal with emergency situations could be made to conform to these requirements. Just as an emergency code, for the duration it is in effect, would abrogate certain human rights, so an accompanying derogation would act as its external face, preventing the UK from falling foul of its international commitments. The ECHR did not stipulate that the notification needed to give extensive detail as to the basis for asserting an emergency to the Council of Europe, nor did it impose a duty to regularly report on the use of the emergency powers once a derogation was in place. Parliamentary probing, media or civil society investigation or subsequent litigation would often be needed to bring further details of the actual operation of emergency powers to light.

Caroline Elkins, assessing the suppression of the Mau Mau insurgency in 1950s Kenya, has noted the incongruence between the UK's acceptance that the right to liberty under the ECHR extended to Kenya and its reliance upon 'a policy of mass detention' in this colony.⁴³ From the outset of the ECHR, parts of the UK Government, and in particular the Colonial Office, reacted to the new human rights mechanisms with hostility, strenuously resisting the ability of individuals to petition the Strasbourg institutions.⁴⁴ This official mind set was the product of concerns over the need to preserve freedom of action in response to emergency situations.⁴⁵ Given the Colonial Office's disdain for the ECHR, derogations were often issued late and the reasons provided to the Council of Europe tended to be 'laconic in the extreme'.⁴⁶ On the ground, colonial administrators responding to emergencies tended to assume that tried-and-tested 'UK precedents',⁴⁷ such as maintaining internment for the duration of an emergency, were in line with the new human rights requirements.⁴⁸ At the outset of the Kenya Emergency, for example, many of the communications which flowed back and forth between London and Nairobi concerned how internment had functioned in the UK during the Second World War⁴⁹ and how to map Kenyan measures onto that experience.⁵⁰ Even if such measures did impinge upon ECHR rights, there was seemingly

⁴² Art.15(2). See *A v United Kingdom* (2009) 49 EHRR 29, para.126.

⁴³ C. Elkins, *Imperial Reckoning: The Untold Story of Britain's Gulag in Kenya* (New York: Owl, 2006) p.371.

⁴⁴ See A. Lester, 'Fundamental Rights: the United Kingdom isolated?' [1984] *Public Law* 46, 51–2.

⁴⁵ See Simpson, *Human Rights and the End of Empire*, p.875.

⁴⁶ *ibid.*, 878.

⁴⁷ T. Bingham, 'Personal Freedom and the Dilemma of Democracies' (2003) 52 ICLQ 841, 846.

⁴⁸ They could point to the support of Viscount Kilmuir, who had played a lead role in the drafting process, who maintained that 'no one seriously says that English Common Law does not protect the rights of freedoms, at least to the extent which the Convention says'; HL Deb, vol.212, col.624 (18 Nov 1958).

⁴⁹ Defence (General) Regulations (Miscellaneous Amendments) Order 1939, S.I. 1939/978, Reg.18B.

⁵⁰ See UK National Archives, FCO 141/5666, O. Lyttelton (Secretary of State for the Colonies) to E. Baring (Governor) (12 Mar 1953).

little to fear from potential inter-state actions when many other ECHR states were embroiled in similar late-colonial entanglements.⁵¹ In the Kenyan context it took some time before the ECHR compatibility of these measures came to be considered, in large part because the treaty entered force nearly a year into the Emergency and at the height of military operations.⁵² In early 1954, in light of proposals to increase the use of internment, a note on the application of the ECHR to the Kenya Emergency finally reached the Prime Minister's desk. With a perfunctory tick Sir Winston Churchill signalled his approval for a derogation.⁵³

The ECHR's profile for colonial authorities increased significantly when the Cyprus Emergency became the first colonial-era emergency to be subject to the scrutiny of the ECHR institutions. Greece launched two inter-state challenges to human rights compatibility of the UK's efforts to counter the separatist EOKA movement.⁵⁴ At the start of 1958 the Human Rights Commission sent a fact-finding team to Cyprus as part of its investigations into whether the circumstances on the island justified the application of emergency powers including detention without trial.⁵⁵ The Acting Governor informed London that their presence was 'widely resented by Security Forces and Administration here'⁵⁶ and complained that several members of the Commission team were 'biased against us'.⁵⁷ Throughout the summer of 1958 the UK Government weighed breaking off engagement with the Commission investigations altogether as an affront to UK sovereignty against concerns that the ECHR already enjoyed considerable respect and that refusing to engage with the Commission would be embarrassing.⁵⁸ Ultimately this crisis point in UK relations with the Council of Europe was not reached. The Commission Report on the derogation recognised that 'the Government concerned retains, within certain limits, its discretion in appreciating the threat to the life of the nation',⁵⁹ and also enjoys 'a certain measure of discretion' in assessing the proportionality

⁵¹ See W. Osiatynski, 'Are Human Rights Universal in an Age of Terrorism', in R. Wilson (ed.), *Human Rights in the "War on Terror"* (Cambridge: Cambridge University Press, 2005) 295, pp.297-298.

⁵² See UK National Archives, PREM 11/696, O. Lyttelton (Secretary of State for the Colonies), Cabinet Briefing, 'Kenya: Detention of Supporters of Mau Mau' (8 Feb 1954) para.2.

⁵³ See UK National Archives, PREM 11/696, N. Brook (Cabinet Secretary) to W. Churchill (Prime Minister) (16 Feb 1954).

⁵⁴ Application 176/56 concerned the validity of the UK's derogation whilst Application 299/57 concerned allegations of torture against UK forces.

⁵⁵ 'Inquiry of Rights in Cyprus' *The Times* (13 Jan 1958) p.6.

⁵⁶ UK National Archives, FO 371/136395, H. Foot (Acting Governor Cyprus) to A. Lennox-Boyd (Secretary of State for the Colonies) (15 Jan 1958).

⁵⁷ UK National Archives, FO 371/136395, H. Foot (Acting Governor Cyprus) to A. Lennox-Boyd (Secretary of State for the Colonies) (18 Jan 1958).

⁵⁸ See UK National Archives, FO 371/136406, Joint Memorandum by Foreign Office and Colonial Office Officials, 'Cyprus: Human Rights' (Jun 1958) para.9-10.

⁵⁹ *Greece v United Kingdom* (App. 176/56) (26 Sep 1958) para.136. A summary of the Commission findings was published in (1958-1959) 2 ECHR Yearbook 174, but the Commission Report was not made public until Committee of Ministers Resolution DH (97) 376 (17 Sep 1997).

of specific responses.⁶⁰ The Commission limited itself to mild criticism of the delay and lack of detail in the UK's derogation.⁶¹ The second application was dropped in the context of the peace agreement which was the precursor to Cyprus' independence.⁶² In the aftermath of the Commission Report, however, there was some concern that Belgium wanted to see the issue of derogations referred to the European Court for an authoritative ruling. The UK Foreign Office ordered the UK representative in Strasbourg to head off this development, on the basis that 'many Human Rights questions do not lend themselves to examination and decision by a body whose deliberations are guided by purely legal considerations to the exclusion of political factors. Cyprus is just such a question'.⁶³

Parliament would subsequently be told that the UK Government considered derogations to be 'political decisions' which 'cannot in our view be decided on purely legal grounds'.⁶⁴ Even though the UK had taken a prominent role in drafting Article 15, and despite the Government being satisfied with the leeway its wording permitted to states,⁶⁵ concerns remained, even after the *Cyprus* cases, about allowing an unproven independent judicial body to rule upon emergencies. During the ECHR's first decade, when Parliament had been generally supine with regard to the swathe of colonial emergencies, the UK Government was not keen to see its practices subjected to more active oversight by Strasbourg. The Conservative Lord Chancellor, Lord Kilmuir, maintained that it was for Parliament 'to see that no Statute contains something which would conflict with ... any treaty obligations which we took on',⁶⁶ given that, with regard to Article 15, '[t]here are bound to be considerable arguments ... as to whether a state of emergency exists'.⁶⁷ The UK Government maintained at least the pretence that parliamentary oversight of emergency powers was both meaningful and sufficient.

Once the Strasbourg Court issued its decision in *Lawless v Ireland*⁶⁸ many of the UK Government's concerns over its treatment of emergency situations abated. The Court asserted that a derogation would have to respond to 'an exceptional situation or emergency which affects the whole population and constitutes a threat to the organised life of the community of

⁶⁰ *ibid.*, para.143.

⁶¹ *ibid.*, para.158.

⁶² See Simpson, *Human Rights and the End of Empire*, pp.924-1052.

⁶³ UK National Archives, FO 371/136408, Foreign Office to G. Meade (UK Council of Europe Representative) (17 Dec 1958) para.1.

⁶⁴ R. Allan, MP, HC Deb, vol.607, col.1555 (25 Jun 1959).

⁶⁵ See J. Hartmann, 'Derogation from Human Rights Treaties in Public Emergencies' (1981) 22 *Harvard International Law Journal* 1, 4-7.

⁶⁶ HL Deb, vol.212, col.624 (18 Nov 1958).

⁶⁷ HL Deb, vol.212, col.626 (18 Nov 1958).

⁶⁸ *Lawless v Ireland* (1961) 1 EHRR 15.

which the State is composed'.⁶⁹ It accepted, however, that Ireland could derogate from the Convention notwithstanding that few lives had been lost as a result of IRA activity in the 1950s and no threat to the state's territorial integrity existed. As the Court's first decision, *Lawless* marked a pivotal moment for the ECHR project with the risk, depending upon the outcome, that either contracting states would bridle at the constraints the system imposed or that individuals could have lost faith in its ability to hold states to account.⁷⁰ In its decision the Court seemed, at the time, to have broadly pleased both the advocates of international human rights adjudication and states like the UK by restating the letter of Article 15, but in practice giving leeway to the state in how these terms applied. One commentator enthused that 'the Court seemed to divorce itself from the diplomatic ... conservatism which has predominated in other international tribunals, and in doing so established itself as a potent force for the protection of human rights and freedoms'.⁷¹ Whatever the subsequent criticisms of the latitude granted to states by the *Lawless* decision⁷² at the time it undoubtedly helped to embed the ECHR. The UK's delay in recognising the Court's compulsory jurisdiction and denial of individual petition on ratification had been explained in Parliament on the basis that states, and not individuals 'are the proper subject of international law' and a concern that 'British codes of common and statute law would be subject to review by an international Court'.⁷³ Nothing in the acceptance of individual petition in 1966 explains the sudden *volte face* on this point, unless the UK had really been cautiously assessing the nature of Strasbourg's oversight in the early years of the ECHR. Article 15's terms seemed to permit the UK's standard practice of detention without trial in emergency situations, but before the Wilson Government would open the UK to challenges by individual claimants it first required the ECHR institutions to establish their "trustworthiness" in respect of a derogation provision which came to be called, in parliamentary debate, the ECHR's 'escape clause'.⁷⁴ The UK's acceptance of individual petition resulted, at least in part, from the European Court addressing the concerns raised at the time of the Cyprus challenges.⁷⁵

⁶⁹ *ibid.*, para.28.

⁷⁰ See B. Dickson, *The European Convention on Human Rights and the Conflict in Northern Ireland* (Oxford: Oxford University Press, 2010) 37.

⁷¹ G. Smith, 'The European Convention on Human Rights and the Right of Derogation: A Solution to the Problem of Domestic Jurisdiction' (1965) 11 *Howard Law Journal* 594, 604.

⁷² See A. Greene, 'Separating Normalcy from Emergency: The Jurisprudence of Article 15 of the European Convention on Human Rights' (2011) 12 *German Law Journal* 1764, 1778.

⁷³ S. Lloyd, MP, HC Deb, vol.574, col.867-868 (29 Jul 1957).

⁷⁴ Lord Layton, HL Deb, vol.201, col.103 (24 Jan 1957).

⁷⁵ The UK's acceptance of the right of individual petition also, importantly, aligns with the Wilson Government's eagerness to distance itself from its Conservative predecessors and the independence of many of

4. Deepening the Legalisation of Emergencies

A range of factors have influenced the general lack of reliance upon derogations by most ECHR states. Perhaps the most important reason why derogations have played a much less prominent role than the treaty's drafters expected is that no state, during its ECHR membership, has suffered the ravages of total war. Where ECHR states have gone to war with each other, including Turkey's invasion of Cyprus in 1974⁷⁶ and the war between Russia and Georgia in 2008,⁷⁷ these conflicts have not been marked by derogations.⁷⁸ Where states have had to tackle non-international armed conflicts whilst subject to the ECHR, these conflicts have seen limited reliance upon derogations,⁷⁹ with the exception of Turkey's derogations to facilitate its military action against the PKK between the 1970s and 1990s.⁸⁰ In the counter-terrorism context, most of the ECHR states which have sought to tackle violent Marxist groups and ethno-nationalist irredentists from the 1950s onwards did not rely on derogations.⁸¹

This general reluctance to issue derogations in response to terrorist violence has often been explained in terms of their effect of raising an emergency situation's visibility on the international stage. Colin Warbrick also emphasises the effect of the 'flexible' nature of qualified ECHR rights in often negating the need for derogations,⁸² whereas Brice Dickson identifies the impact of negative memories of states of emergency within many European states in turning policy makers away from derogations even when they have been confronting

the UK's former colonies; see Simpson, *Human Rights and the End of Empire*, p.1057. Art.56 ECHR continues to be employed to exclude the application of the ECHR to many of the UK's remaining colonies.

⁷⁶ See *Cyprus v Turkey* (1993) 15 EHRR 509, para.67.

⁷⁷ See *Georgia v Russia (No 2)* (2012) 54 EHRR SE10, para.1.

⁷⁸ Strasbourg has accepted that ECHR states have not as a matter of practice relied on derogations in the context of international armed conflicts; see *Hassan v United Kingdom*, App. 29750/09 (16 Sep 2014), para.101.

⁷⁹ See S. von Schorlemer, 'Human Rights: Substantive and Institutional Implications of the War against Terrorism' (2003) 14 *European Journal of International Law* 265, 275. As a result, Strasbourg was able to adjudicate upon cases arising out of Russia's Chechnya and Ingushetia conflicts 'against a normal legal background'; see *Isayeva v Russia* (2005) 41 EHRR 38, para.191.

⁸⁰ *France and Others v Turkey* (1984) 6 EHRR 241. See R. MacDonald, 'Derogations Under Article 15 of the European Convention on Human Rights' (1998) 36 *Columbia Journal of Transnational Law* 225, 253-254. On states' efforts to rely on limitations to the right to life in conducting military operations in the context of non-international armed conflicts in lieu of a derogation, see W. Abresch, 'A human rights law of internal armed conflict: the European Court of Human Rights in Chechnya' (2005) 16 *European Journal of International Law* 741, 764-767.

⁸¹ The exception, other than UK practice, was Ireland's derogation to allow for the implementation of internment (1957-1959) to tackle the IRA's border campaign (1956-1962). See B. Flynn, *Soldiers of Folly: The IRA Border Campaign 1956-1962* (Dublin: Collins Press, 2009).

⁸² C. Warbrick, 'The European Response to Terrorism in the Age of Human Rights' (2004) 15 *European Journal of International Law* 989, 999.

terrorist threats.⁸³ That the UK was comparatively unburdened by such experiences made derogations more attractive to its policy makers as legal tool facilitating the application of standard emergency powers such as internment in a counter-terrorism context. But this factor does not, of itself, explain why derogations became such a prominent feature within the UK's engagement with the ECHR. Only when derogations came to be associated with loose parliamentary and judicial oversight in the minds of UK policy makers did they become a stock element of the UK's response to terrorism.

Soon after the first rash of colonial derogations the UK authorities began to appreciate a potential problem with ECHR compliance closer to home. In Northern Ireland the Special Powers Acts 1922-43 maintained the emergency responses which the Unionist Government had implemented at the time of partition. It was not until these powers started to be employed with the internment of over 400 suspects in response to renewed IRA activity in 1957 (the same circumstances which prompted Ireland's derogation and the *Lawless* case), that a derogation was issued regarding these provisions.⁸⁴ Whereas Ireland's derogation lasted just two years, successive UK Governments were forced to maintain the derogation covering Northern Ireland as the devolved administration refused to weaken the Special Powers Acts. The Wilson Government frequently relied upon this derogation to deflect awkward parliamentary questions regarding human rights in Northern Ireland.⁸⁵ Derogations might on some level be embarrassing, but there was no denying their usefulness as a means of deflecting unwanted attention. Even Wilson eventually tired of this charade, going so far as to inform Parliament in 1969 that he considered that 'this source of embarrassment should be removed as soon as possible'.⁸⁶ These efforts towards reform came too late, as Northern Ireland had already begun to lurch into the genuine crisis of the "Troubles". The 1957 derogation was replaced with a new derogation in August 1971 to allow for an extension of emergency powers and the renewed application of internment.⁸⁷ This derogation covered only the use of emergency powers in Northern Ireland and was not extended to cover the UK-wide counter-terrorism measures enacted in response to the Provisional IRA's first attacks in Great Britain in 1974.⁸⁸ Archival records reveal the two concerns which militated against a further

⁸³ See Dickson, *The ECHR and Northern Ireland*, p.67.

⁸⁴ Standing Advisory Commission on Human Rights, *The Protection of Human Rights by Law in Northern Ireland* (1977) Cmnd.7009, 103.

⁸⁵ H.Wilson, MP, HC Debs, vol.766, col.435 (13 Jun 1968).

⁸⁶ HC Debs, vol.784, col.661 (22 May 1969).

⁸⁷ (1971) 14 ECHR Yearbook 32. For subsequent notifications regarding this derogation see also (1973) 16 ECHR Yearbook 26-28, (1975) 18 ECHR 18 and (1978) 21 ECHR Yearbook 22.

⁸⁸ Prevention of Terrorism (Temporary Provisions) Act 1974.

notice of a derogation were whether ‘the prevailing level of terrorist activity’ reached the ECHR threshold for an emergency and ‘the undesirability of conceding to the world that terrorist activities constituted such a major threat’.⁸⁹ Political and legal concerns had melded seamlessly in official thinking on derogations.

The widespread use of internment powers in Northern Ireland between 1971 and 1975, accompanied by reports of torture and coercive interrogation techniques in detention centres, saw Ireland launch an inter-state challenge in relation to the UK’s human rights record in Northern Ireland.⁹⁰ Whilst the European Court ultimately found that the UK had inflicted inhuman and degrading treatment upon some internees, it was once again at pains not to invalidate the UK derogation, emphasising that ‘it is certainly not the Court’s function to substitute for the British Government’s assessment any other assessment of what might be the most prudent or expedient policy to combat terrorism’.⁹¹ Through its acceptance of this risk assessment the Court effectively granted the UK Government a wide margin of appreciation in terms of both the existence of an emergency and the proportionality of the internment measures taken to address it.⁹² The Court was admitting that ‘[d]erogatory measures are assumed to belong to the hot-blooded sphere of governmental policy rather than the cool, technical sphere of legal reasoning’.⁹³

In extending a margin of appreciation over both a state’s findings of fact and the Court’s interpretation of how the ECHR applied in an emergency, *Ireland v United Kingdom* might have been an embarrassing decision for the UK Government, but it was not one which foreclosed emergency responses. The Court’s decision, in effect, fortified the non-derogable Article 3 at the expense of derogable rights. The UK was able to maintain its derogation, with Northern Ireland Office officials considering that ‘although HMG takes measures which are in derogation of our obligations under ... the Convention we are still operating under the terms of the ... Convention because they allow such derogations if certain circumstances are met’.⁹⁴ From the outset of the ECHR system derogations had attracted little political attention, but *Ireland v United Kingdom* affirmed that Strasbourg’s oversight was at best “light touch”. Derogations therefore marked the ‘path of least resistance’ in terms of both

⁸⁹ UK National Archives, CJ 4/4136, R. Harrington, ‘Brief: Human Rights and the Prevention of Terrorism’ (13 Jun 1979) para.5.

⁹⁰ *Ireland v United Kingdom* (1978) 2 EHRR 25.

⁹¹ *ibid.*, para.214.

⁹² *ibid.*, para.207.

⁹³ S. Marks, ‘Civil liberties at the Margin: The UK Derogation and the European Court of Human Rights’ (1995) 15 *Oxford Journal of Legal Studies* 69, 93.

⁹⁴ UK National Archives, CJ 4/4136, D. Hill (NIO) to D. Snoxell (Republic of Ireland Dept., FCO) (20 Apr 1982) (emphasis in the original).

legal and political oversight when it came to dealing with terrorism.⁹⁵ Strasbourg remained an important concern, as seen in anxious inter-departmental correspondence⁹⁶ regarding the interstate challenge which France, Denmark, the Netherlands, Norway and Sweden mounted against Turkey's 1980 derogation,⁹⁷ but UK Governments placed increasing reliance upon the European Court's jurisprudence.

Internment had, however, been thoroughly tarnished as a response to terrorism in Northern Ireland, and the UK's derogation was focused upon the power to detain individuals without trial.⁹⁸ In August 1984, seeking to trumpet the UK's shift to a counter-terrorism strategy based around criminal law which was intended to delegitimise paramilitary groups, the UK withdrew its derogation from Article 5. The Government did so in the course of the summer parliamentary recess, thereby avoiding awkward questions, and presented the shift as a sign of its concern for human rights.⁹⁹ But at a stage when the "Troubles" seemed particularly intractable and when internment had not been in operation for almost a decade, the Thatcher Government did not seem to be losing any security dividend in giving up the derogation and relying instead upon the qualifications and limitations within many of the ECHR rights to sustain its security measures.¹⁰⁰ From the outset, however, Government legal advisers noted that this criminalisation approach relied upon a heavily modified version of criminal due process, including police powers of pre-charge detention for up to seven days without judicial oversight,¹⁰¹ and that without the cover of a derogation ECHR compliance was dependent upon the European Court operating 'not too strict an approach to these provisions'.¹⁰²

⁹⁵ See C. Murray, 'Of Fortresses and Caltraps: National Security and Competing Models of Rights Protection', in R. Dickinson, E. Katselli-Proukaki, C. Murray, and O. Pedersen (eds.), *Examining Critical Perspectives on Human Rights* (Cambridge: Cambridge University Press, 2012) 107, pp.118-121.

⁹⁶ UK National Archives, CJ 4/4136, D. Snoxell (Republic of Ireland Dept., FCO) to S. Street (Home Office) (21 Jul 1982).

⁹⁷ *France and Others v Turkey* (1984) 6 EHRR 241.

⁹⁸ See *A v Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2 AC 68, para.203 (Lord Walker).

⁹⁹ UK National Archives, HO 274/41, News Release: Derogations from Human Rights Instruments (22 Aug 1984).

¹⁰⁰ The Committee on the Administration for Justice, a Belfast-based civil liberties group, immediately recognised that the withdrawal had 'not been accompanied by any significant relaxation of the powers which made the notices necessary', UK National Archives, HO 274/41, J. Lyon (NIO) to L. Brittan (Home Secretary) (15 Oct 1984), para.1.

¹⁰¹ Prevention of Terrorism (Temporary Provisions) Act 1984, s.12. This provision was subsequently replaced by the same substantive power in Prevention of Terrorism Act 1989, s.14. Although the previous derogation from Art.5 ECHR had not directly covered pre-charge detention, ECHR rights are read in light of any notified derogation; see *Brogan and Others v United Kingdom* (1989) 11 EHRR 117, para.48.

¹⁰² UK National Archives, HO 274/41, S. Evans (Legal Adviser, Home Office) to D. Mainwood (UN Dept., FCO) (29 Nov 1984).

In *Brogan*¹⁰³ Strasbourg refused to oblige, maintaining that even in the circumstances of a terrorist campaign the right to liberty required judicial oversight of police powers of detention prior to charges being brought.¹⁰⁴ Following this decision the Home Secretary Douglas Hurd asked the Commons for time to consider the possible responses.¹⁰⁵ Two weeks later, on the final day of the parliamentary session before the Christmas recess, in a standing committee considering the reform of counter-terrorism measures, the Home Secretary announced that the UK would derogate from the ECHR.¹⁰⁶ The day after Parliament went into recess the Council of Europe was notified that the UK was issuing a new derogation. Once again, the legalised nature of the derogation system allowed the UK to side-step parliamentary safeguards. Through the efforts of successive UK Governments' to minimise the oversight of their counter-terrorism activities, emergencies went from being an issue so intrinsically political that the European Court could not be trusted to adjudicate upon them in the 1950s, to being considered so legalised by the 1980s that Parliament could be marginalised in derogation decisions.

Once the derogation was in place it was maintained without much parliamentary difficulty. The House of Commons was simply informed in writing that the derogation would remain in place for as long as the Government considered it to be necessary.¹⁰⁷ Thereafter the maintenance of the derogation was rolled into the annual renewal debates on the counter-terrorism legislation. Difficulties began to mount, however, as a result of the lag between the derogation entering force and the Strasbourg Court pronouncing upon its ECHR compatibility. In this window, both the Opposition and groups involved in the struggle in Northern Ireland made hay out of the *Brogan* decision. Tony Blair, then Shadow Home Secretary, attacked the Government's handling of the affair just before the European Court addressed the first cases arising out of the derogation; 'We have had to derogate from the convention, and our reputation abroad is attacked as a transgressor of human rights'.¹⁰⁸

These criticisms were, however, deflected by the European Court's decision in *Brannigan and McBride*,¹⁰⁹ which upheld the validity of the UK's renewed derogation because 'the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of

¹⁰³ *Brogan v United Kingdom* (1989) 11 EHRR 117.

¹⁰⁴ *ibid.*, para.62.

¹⁰⁵ HC Debs, vol.143, col.211 (6 Dec 1988).

¹⁰⁶ *Brannigan and McBride v United Kingdom* (1994) 17 EHRR 539, para.30.

¹⁰⁷ D. Waddington, MP, HC Debs, vol.160, col.209-10 (14 Nov 1989).

¹⁰⁸ HC Debs, vol.220, col.975 (10 Mar 1993).

¹⁰⁹ *Brannigan and McBride v United Kingdom* (1994) 17 EHRR 539.

derogations necessary to avert it'.¹¹⁰ The Court's dilemma is evident within the decision.¹¹¹ Northern Ireland represented a particular difficulty in being an 'entrenched'¹¹² emergency covered by near-continuous derogations for over 40 years. In this context any meaningful distinction between normality and emergency had all but disappeared and the compromises in terms of human rights protection imposed by derogations became particularly difficult to justify.¹¹³ In *Brannigan and McBride* the Court acknowledged but did not address these concerns, stating only that it would 'give appropriate weight to such relevant factors as the nature of the rights affected by the derogation, the circumstances leading to, and the duration of, the emergency situation'.¹¹⁴ Some seven years later, in *Marshall*,¹¹⁵ a challenge by a person affected by the use of extended detention powers after the main paramilitary groups in Northern Ireland had issued ceasefires, the Court continued to accept 'that there had been no return to normality ... such as to lead the Court to controvert the authorities' assessment of the situation ... in terms of the threats which organised violence posed for the life of the community and the search for a peaceful settlement'.¹¹⁶

Outward manifestations of parliamentary oversight were an important factor in Strasbourg granting the UK this sustained margin of appreciation. In *Brannigan and McBride* the Court noted how independent reviews of counter-terrorism powers, including extraordinary pre-charge detention, were presented to Parliament¹¹⁷ and how legislators had been informed of the derogation's introduction.¹¹⁸ This consideration of Parliament's review of the emergency and the proportionality of the response was nonetheless cursory. Neither the shortcomings in how the derogation was first presented to Parliament, nor the lack of substantive consideration of the independent reviews, were addressed by the Court. In *Marshall*, however, the consideration of parliamentary scrutiny was more assertive, with the Court noting that the independent reviewer had repeatedly called for judicial oversight of pre-

¹¹⁰ *ibid.*, para.43.

¹¹¹ The dissenting opinion of Judge Walsh, para.3, that there is 'no evidence that the operation of the courts in either Northern Ireland or Great Britain has been restricted or affected by "the war or public emergency" in Northern Ireland' maps to the definition of an emergency under traditional conceptions of martial law which required circumstances to be so serious as to prevent the operation of the ordinary courts.

¹¹² O. Gross, 'Once More unto the Breach: The Systemic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies' (1998) 23 *Yale Journal of International Law* 437, 455-456.

¹¹³ See O. Gross and F. Ní Aoláin, 'From Discretion to Scrutiny: Revisiting the Application of the Margin of Appreciation Doctrine in the context of Article 15 of the European Convention on Human Rights' (2001) 23 *Human Rights Quarterly* 625, 645.

¹¹⁴ *Brannigan and McBride*, para.43.

¹¹⁵ *Marshall v United Kingdom* (App. 41571/98) (2001).

¹¹⁶ *ibid.*, 11-12.

¹¹⁷ *Brannigan and McBride*, para.15.

¹¹⁸ *ibid.*, para.31.

charge detention.¹¹⁹ This subtle change in emphasis was nonetheless easy to miss, perhaps because the assessment of Parliament's oversight of the derogation's necessity was less important for the Court than the fact that the UK had withdrawn its derogation by the time it issued its decision.¹²⁰

The European Court's scrutiny of emergency powers was therefore linked to the circumstances of a derogation. A country like the UK, with ostensibly active parliamentary oversight and a generally good human rights record, could leverage this record for a 'generous'¹²¹ margin of appreciation in emergency situations, and certainly a wider one than the Court would extend to a country with a more dubious record.¹²² Turkey, by contrast, fell foul of the Court's assessment of whether measures were strictly required by the circumstances of the emergency affecting its South-Eastern provinces in *Aksoy*.¹²³ As this decision aligned with the hardening of ECHR control mechanisms,¹²⁴ with compulsory individual petition preventing states from threatening to restrict judicial oversight to inter-state claims,¹²⁵ Strasbourg could have been signalling a new approach to derogations. But after *Marshall* UK policy makers could remain confident that this decision did not compromise their use of derogations. Parliament could continue to be bought off with assurances that the European Court monitored derogations, whilst Strasbourg checked for the form, but not the substance, of parliamentary oversight in the course of granting a wide margin of appreciation. Even after the UK's counter-terrorism powers were "normalised" after the Troubles, this perceived oversight gap meant that the UK's response to the 11 September 2001 terrorist attacks would invariably involve a derogation.

5. The Swansong for UK Derogations?

By 2001 derogations had become the default option for the UK Government in the face of crises great and small, attracting limited scrutiny from either the legislature (which could be cowed by talk of special security circumstances and intelligence briefings known only to

¹¹⁹ *Marshall*, 5-6.

¹²⁰ *ibid.*, 13.

¹²¹ S. Greer, 'What's Wrong with the European Convention on Human Rights?' (2008) 30 *Human Rights Quarterly* 680, 699.

¹²² See, for example, *The Greek Case*, App. 3321/67, 3322/67, 3323/67, 3344/67 (1969) 12 ECHR Yearbook 1, para.159.

¹²³ *Aksoy v Turkey* (1997) 23 EHRR 553, para.78.

¹²⁴ ECHR, Protocol 11.

¹²⁵ C. Warbrick, "'Federal" Aspects of the European Convention on Human Rights' (1989) 10 *Michigan Journal of International Law* 698, 709-710.

ministers¹²⁶) or by judges in Strasbourg, who had explicitly recognised the primacy of executive threat assessments. The only unknown quantity in terms of oversight, since the enactment of the Human Rights Act 1998, was how the domestic judiciary would approach derogations, but the auguries suggested continued executive freedom of action. Within days of the Al-Qaeda attacks Lord Hoffmann issued an opinion in which he emphasised ‘the need for the judicial arm of government to respect the decisions of ministers’ in the context of national security, because of the expert advice the executive can draw upon and their legitimacy as elected actors.¹²⁷ Once again, the judiciary seemed to be conceding to Parliament the task of overseeing actions taken in response to emergency situations, at the same time that Article 15’s operation ensured that Parliament expected that the judiciary would apply the test for a derogation. Even as legal commentators pointed out the laxity of that test,¹²⁸ its imposingly legalistic terms combined with respect for official security assessments to impose a ‘veil of ignorance’ upon Parliament.¹²⁹

Into this scrutiny gap the Blair Government pushed Part IV of the Anti-Terrorism Crime and Security Act 2001, which authorised the detention without trial of any foreign national present in the UK whom the Home Secretary suspected of having links to international terrorism but who could not be deported due to the ‘real risk’¹³⁰ of torture or inhuman and degrading treatment they faced in their home country. As deportation of such individuals was not possible this measure could not be accommodated within the exceptions to the right to liberty,¹³¹ necessitating a derogation from Article 5 ECHR. The Human Rights Act had enhanced Parliament’s involvement in the issuing of a derogation,¹³² with MPs having to accept a statutory instrument authorising the derogation.¹³³ The other newly-minted element of Parliament’s human rights procedure, the Joint Committee on Human Rights, provided parliamentarians with detailed guidance into the legislative proposals and Article 15 in advance of the Commons’ statutory instrument debate.¹³⁴ Although this debate was

¹²⁶ See D. Blunkett, MP, HC Debates, vol.375, col.21 (19 Nov 2001).

¹²⁷ *Rehman v Secretary of State for the Home Department* [2001] UKHL 47, para.63.

¹²⁸ See B. Dickson, ‘Law versus Terrorism: Can Law Win?’ [2005] *European Human Rights Law Review* 11, 20-21.

¹²⁹ D. Feldman, ‘Human Rights, Terrorism and Risk: The roles of Politicians and Judges’ [2006] *Public Law* 364, 381.

¹³⁰ See *Chahal v United Kingdom* (1997) 23 EHRR 413, para.80.

¹³¹ ECHR, Art.5.1(f).

¹³² See H. Fenwick, ‘The Anti-Terrorism, Crime and Security Act 2001: A Proportionate Response to 11 September’ (2002) 65 *Modern Law Review* 724, 762.

¹³³ Human Rights Act 1998, s.14.

¹³⁴ See N. Baker, MP, HC Deb, vol.375, col.139 (19 Nov 2001). The Committee did follow up by questioning whether adequate consideration had been given to the existence the grounds for an emergency and the

confined to a 90-minute session late one November night, the Government was challenged over a how a derogation could be squared with its claims that its legislation was human-rights compatible.¹³⁵ The Government's blithe response was that because the ECHR provides a derogation mechanism,¹³⁶ using it 'preserves unequivocally – this is an important point – our international obligations'.¹³⁷ This assertion conforms to the logic of *Brannigan and McBride* in which 'the Court endorsed the notion that derogation is a viable alternative to compliance'.¹³⁸

In *Belmarsh Detainees*¹³⁹ a nine-judge House of Lords panel supplied the missing piece of the derogation oversight puzzle; domestic judicial oversight. The seven-judge majority position accepted that grounds for a derogation existed, in line with Strasbourg's generous jurisprudence in this regard,¹⁴⁰ but refused to accept that the steps taken under the UK's derogation were strictly required by the exigencies of the Al-Qaeda threat. The most important basis for this decision was that there was no objective rationale for a separate security regime applicable to foreign nationals whilst 'leavening British suspects at large' and that the manner in which the regime operated enabled suspected nationals 'to leave the country with impunity' if a third country would permit entry.¹⁴¹ As Lord Bingham explained, the majority position rested on the proposition that 'the more purely political (in a broad or narrow sense) a question is, the more appropriate it will be for political resolution and the less likely it is to be an appropriate matter for judicial decision ... Conversely, the greater the legal content of any issue, the greater the potential role of the court'.¹⁴²

Judicial oversight of a derogation's proportionality does not, therefore, wholly substitute for shortcomings in parliamentary oversight of whether an emergency exists (the more "political" aspect of the derogation equation). Parliament was nonetheless well placed to follow up on *Belmarsh Detainees* as part of a 'legislative-judicial dialogue'.¹⁴³ The House of Lords decision to issue a declaration of incompatibility¹⁴⁴ and its quashing of the statutory

proportionality of the response; Joint Committee on Human Rights, *Second Report: Anti-Terrorism, Crime and Security Act* (2001) HL 37/HC 372, para.30.

¹³⁵ D. Hogg, MP, HC Debs, vol.375, col.124 (19 Nov 2001).

¹³⁶ B. Hughes, MP, HC Debs, vol.375, col.124 (19 Nov 2001).

¹³⁷ B. Hughes, MP, HC Debs, vol.375, col.147 (19 Nov 2001). See Warbrick, 'The European Response to Terrorism', 1014.

¹³⁸ Marks, 'Civil liberties at the Margin', 75.

¹³⁹ *A v Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2 AC 68.

¹⁴⁰ *ibid.*, para.17-18 (Lord Bingham).

¹⁴¹ *ibid.*, para.43 (Lord Bingham).

¹⁴² *ibid.*, para.36.

¹⁴³ F. de Londras and F. Davis, 'Controlling the Executive in Times of Terrorism: Competing Perspectives on Effective Oversight Mechanisms' (2010) 30 *Oxford Journal of Legal Studies* 19, 46.

¹⁴⁴ Human Rights Act 1998, s.4.

instrument by which Parliament authorised the derogation, did not of themselves trigger the release of any detainees. But as parliamentarians took up this challenge the Blair Government abandoned its stock response that derogations were a form of compatibility with human rights and pledged that the detention regime would be replaced in a manner that would not rely upon a derogation and would be ‘consistent with the ECHR’.¹⁴⁵ As Helen Fenwick and Gavin Phillipson assert, ‘[t]he withdrawal of the derogation from the right to liberty amounted to a public affirmation by the British government of its intention to protect British citizens from terrorism while remaining within ... normal human rights standards’.¹⁴⁶

Over four years later, in *A v United Kingdom*,¹⁴⁷ Strasbourg finally became involved in the case, addressing issues left over from *Belmarsh Detainees*. This meant that, because a ruling that the derogation did not comply with Article 15’s requirements no longer affected operative UK law, the Court’s Grand Chamber was able to reassess its existing case law in a relatively uncontroversial context.¹⁴⁸ Even with this leeway the unanimous judgment recapitulated the House of Lords’ summary of case law on whether an emergency existed,¹⁴⁹ and accepted that it is ‘for each Government, as the guardian of their own people’s safety, to make its own assessment on the basis of the facts known to it’.¹⁵⁰ Nothing in this approach seems to displace claims that ‘the *de facto* existence of a state of emergency is left to the political sphere’, and more specifically to executive actors.¹⁵¹ As for the assessment of whether detention without trial was proportionate, the Grand Chamber stuck closely to the domestic court’s line of reasoning.¹⁵² This decision has therefore drawn adverse comment for ‘expressly endorsing a wide margin of appreciation on both legal questions – public emergency and proportionality of measures’.¹⁵³

The Court did, however, confine this wide margin of appreciation to ‘relations between the domestic authorities and the Court’, thereby encouraging domestic courts not to

¹⁴⁵ Baroness Scotland, HL Debs, vol.668, col.277 (26 Jan 2005).

¹⁴⁶ H. Fenwick and G. Phillipson, ‘Covert Derogations and Judicial Deference: Redefining Liberty and Due Process Rights in Counterterrorism Law and Beyond’ (2010) 56 *McGill Law Journal* 863, 867.

¹⁴⁷ *A v United Kingdom* (2009) 49 EHRR 29.

¹⁴⁸ See S. Dothan, ‘Reputation and Judicial Tactics: A Theory of National and International Courts’ (Cambridge: Cambridge University Press, 2015) p.111.

¹⁴⁹ *A v United Kingdom*, para.176.

¹⁵⁰ *ibid.*, para.180.

¹⁵¹ Greene, ‘Separating Normalcy from Emergency’, 1778.

¹⁵² The Court accepted that ‘it should in principle follow the judgment of the House of Lords on the question of the proportionality of the applicants’ detention, unless it can be shown that the national court misinterpreted the Convention or the Court’s case-law or reached a conclusion which was manifestly unreasonable’; *A v United Kingdom*, para.182.

¹⁵³ S. Sheeran, ‘Reconceptualizing States of Emergency under International Human Rights Law: Theory, Legal Doctrine, and Politics’ (2013) 34 *Michigan Journal of International Law* 491, 537.

adhere to its light-touch approach.¹⁵⁴ By endorsing the House of Lords' proportionality assessment, Strasbourg effectively delegated the primary responsibility for evaluating a derogation's validity to domestic courts, emphasising that such review should not be clouded by the margin of appreciation.¹⁵⁵ This approach might appear to push oversight of derogations even further into the legal sphere, at the risk of marginalising the involvement of domestic assemblies in scrutinising their inception and operation. Strasbourg, however, also linked its extensive the margin of appreciation to parliamentary engagement with relevant expert reports into a derogation.¹⁵⁶ Building upon its earlier approach in *Marshall*, the Court picked up on the cursory Government responses to the Newton Committee report¹⁵⁷ and Joint Committee on Human Rights reports¹⁵⁸ on Part IV of the Anti-Terrorism Crime and Security Act and the European Commissioner for Human Rights' complaints regarding 'the lack of sufficient scrutiny by Parliament of the derogation provisions'.¹⁵⁹ These considerations wrong-footed UK Government attempts to claim that executive detention 'was not only the product of the judgment of the Government but was also the subject of debate in Parliament'.¹⁶⁰ The Court might be delegating the primary responsibility for assessing invocations of Article 15 to domestic organs, but such a delegation cannot be dismissed as neglecting its own oversight duties.

6. The Future of Derogations

Although the limited role played by derogations has been one of the most surprising features of the ECHR's history,¹⁶¹ equally remarkable has been how the UK has bucked this general trend. Derogations are by their nature 'politically significant', flagging up the use of practices which can cause an administration embarrassment.¹⁶² Nonetheless, as successive UK governments found to their advantage, the legalised format of derogations also provides a means of closing off parliamentary opposition. In emergency situations a veneer of legality,

¹⁵⁴ *ibid.*, para.184.

¹⁵⁵ As Lord Steyn put it the margin of appreciation is applicable only 'to the relationship between the European Court of Human Rights and national authorities'; J. Steyn, 'Deference: A Tangled Story' [2005] *Public Law* 346, 346.

¹⁵⁶ *A v United Kingdom*, para.180.

¹⁵⁷ *ibid.*, para.98-99.

¹⁵⁸ *ibid.*, para.100.

¹⁵⁹ *ibid.*, para.103.

¹⁶⁰ *ibid.*, para.150.

¹⁶¹ Warbrick, 'The European Response to Terrorism', 1007.

¹⁶² Simpson, *Human Rights and the End of Empire*, p.878.

which David Dyzenhaus describes as ‘a legal grey hole’,¹⁶³ can prove particularly corrosive to efforts to hold official actions to account. Only when the ECHR system was integrated into the UK’s domestic legal orders did the room for manoeuvre so readily exploited by successive UK governments become more restricted.

But even as derogations have seemingly become less attractive to the UK, 2015 saw both Ukraine and France issue derogations, which in their form and timing point to the influence of UK practice. The Ukrainian derogation, in June 2015, was issued in the context of fighting between government forces and Russian-backed separatists in Donetsk and Lugansk which had broken out in April 2014. The delay in this derogation, approved by Ukraine’s Parliament more than a year after ‘anti-terrorist operations’ had commenced,¹⁶⁴ and almost 8 months after the Ukrainian President had announced that it would be sought,¹⁶⁵ takes advantage the absence of time limits on derogation applications under the ECHR. It aligns with UK practice in the 1950s and 1960s when there were long delays between the onset of an emergency and a derogation notification. France derogated to enable it to institute a nationwide *état d’urgence* in response to the terrorist attacks of 13 November 2015. Although France notified the Council of Europe within two weeks of the attacks, its derogation notice contained little detail, noting that an emergency existed because ‘[t]he terrorist threat in France is of a lasting nature, having regard to information from the intelligence services and to the international context’ and that the measures adopted in response ‘appeared necessary to prevent the commission of further terrorist attacks’.¹⁶⁶ Nothing in the unanimous Grand Chamber decision in *A v United Kingdom* suggests that, in any legal challenge arising from these derogations, Strasbourg will be quick to revisit its own standards in applying the key tests for a derogation. This case does, nonetheless, indicate that a derogating state will have to demonstrate robust domestic oversight of its emergency powers if it is to take advantage of the broad margin of appreciation available under Article 15. A challenge to the French or Ukrainian derogations will test whether the Court is willing to sustain this approach, and extend it to cover the timing and content of a derogation notice. If it is not, derogations could begin to play an increasingly significant role in the life of the ECHR.

¹⁶³ Dyzenhaus characterises such circumstances as involving legal constraints which ‘are so insubstantial that they pretty well permit government to do as it pleases’; D. Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge: Cambridge University Press, 2006) p.42.

¹⁶⁴ See Permanent Representative of Ukraine to Secretary General Council of Europe (5 Jun 2015).

¹⁶⁵ Edict of the President of Ukraine, No. 875/2014 (14 Nov 2014).

¹⁶⁶ See Permanent Representative of France to Secretary General Council of Europe (24 Nov 2015).