

---

**Could the United Kingdom's Derogation Order 2001 Breach the European Convention on Human Rights?**

---

Prof. Isa H. Chiroma (SAN)<sup>[1]</sup> & Ibrahim Sule<sup>[2]</sup><sup>[1]</sup>Professor of Law, Senior Advocate of Nigeria

Director General, Nigerian Law School, Abuja, Nigeria

<sup>[2]</sup>Department of Civil Litigation, Nigerian Law School, Kano Campus, Nigeria

**Abstract.** After the September 11 attacks on the US many countries all over the world took a number of drastic measures to crackdown on whom they suspected to be terrorists. These measures were criticized by many academicians and human rights activists as incompatible with human rights conventions, charters and legislations, internationally and domestically. Then, the United Kingdom passed Human Rights Act 1998 (Designated Derogation) Order 2001 which was seriously criticized as being against the country's several treaties on human rights and most especially the Human Rights Act. This article critically analyses that derogation order in view of the so many decisions of the European Court of Human Rights and the provisions of the European Convention on Human Rights and the United Kingdom's Human Rights Act.

**Keywords:** derogation order, human rights, terrorism

**Introduction**

As a result of terrorist attacks of 11th September 2001 in the United States of America, the Government of the United Kingdom (UK) in the interests of national security, passed Human Rights Act 1998 (Designated Derogation) Order 2001. Under this order, the UK was proposing to derogate from the provisions of Article 5(1) of the European Convention for Protection of Human Rights and Fundamental Freedoms (ECHR) pertaining to right to personal liberty and security of persons, which is incorporated into the Human Rights Act 1998 (HRA). This would enable the government to pass without legal hindrance the Anti-Terrorism, Crime and Security Act 2001 (ATCSA) compatible with the requirements under Article 15 of the Convention as well as Section 14 of the HRA. The proposed Act would contain "an extended power to arrest and detain a foreign national" (Tomkins, 2001), who, by the certificate issued by the Secretary of State is believed to be a risk to national security and is suspected to be an international terrorist; but who may not be removed or deported from the UK to his country (or any other) because he may be subjected to torture or degrading treatment or even death. The UK government considered the measure necessary because the presence of such persons posed threat to its national security. This derogation order attracted many comments and criticisms from human rights organisations, institutions and legal writers. For instance the British Institute of Human Rights in a submission stated that the derogation order: "...sets a dangerous precedent, procedurally and substantively... [it] is at variance with certain accepted principles of international human rights law...." (*The British Institute of Human Rights*, 2007).

The derogation order attracted attention of human rights defenders and organisations more or less because it sought to interfere with one of the most important fundamental rights i.e. the right to personal liberty. And it came not quite long after the Government of the UK "was so warmly applauded for having introduced the Human Rights Act 1998" (Tomkins, 2001, p. 205). Another prominent writer stated that the ATCSA which was introduced by the derogation "goes further than was needed to protect democracy" (Fenwick, 2002, p. 762). This article is going to analyse the UK's derogation order in line with the requirements of derogations under Article 15 (1), (2) and (3) of the Convention as construed by the ECtHR and the Commission as a matter of international law; as well as the Court of Appeal's decision in

*A and Others v Secretary of State for the Home Department* (2003). The decision in this case is to the effect that the measures taken by the Secretary of State was in the circumstance justified because there was public emergency and it was not discriminatory. This article will argue that this decision may be distinguished from the general obligation and jurisdiction of ECtHR to assess, in terms of the Convention and international law, the genuineness of the justifications of the measures given by State Parties as opposed to the finding of domestic courts on national security which finding is in most cases being maintained by ECtHR.

The main legal dilemma that made the UK's government to choose to derogate from Article 5 of the Convention was the effect of the application of the extended power under ATCSA. Firstly, under the Immigration Act 1971 the government has powers to deport persons whose presence in the UK is not conducive to public good, which includes national security reasons. The persons may, for the purposes of their removal only, be arrested and detained. However, it would be unlawful for the government to continue detaining them if their removal is not possible within reasonable time (*R v Governor of Durham Prison, Ex p. Singh* 1984) Secondly, at the Convention level the lawful arrest and detention of person against whom action is being taken with a view to deportation or extradition will not be deprivation of his right to liberty. However, the detention may not be permitted where it was carried out not for the purposes of removing such person or where it was unnecessarily prolonged or carried out without due diligence. Thirdly, in (*Soering v United Kingdom*, 1989) the ECtHR found that where there are substantial grounds to believe that if an alien is extradited he could be subjected to inhuman or degrading treatment, then his extradition becomes a matter of Article 3 of the Convention and should not be permitted. Fourthly, from the circumstances involved it would seem that due to the sensitivity of the evidence and the high standard of proof in international terrorism the suspects might not ordinarily and quickly be brought to normal hearing, hence their continued detention in the circumstance seemed inevitable (H. Fenwick). Considering these points of law and bearing in mind the provisions of the Immigration Act 1971 as construed in *R v Governor of Durham Prison, ex p. Singh* the UK government felt that the continued detention of suspected terrorists would not be lawful by invoking the powers under the Immigration Act 1971 because in the circumstance it might not be possible to deport the suspects within reasonable time; hence it would be a breach of Article 5 of the Convention. The government had in mind its obligation under the Convention, International Covenant on Civil and Political Rights and customary international law on prohibition of torture or inhuman treatment and it might breach one of these obligations if it decided to deport suspected terrorists to their countries or any other countries where they might be subjected to these prohibited treatments. Moreover, Article 3 is non-derogable under the Convention. Upon these legal and factual considerations, the UK's government had to engage in a cautious exercise of weighting and balancing the public duty of maintaining national security, preventing the citizens against threat of terrorists' attacks and its obligations under the Convention and international law of respecting, protecting and promoting human rights. The option apparently opened to the UK government was to give notice of its derogation from Article 5 of the Convention. Did these measures satisfy the requirements of Article 15 of the Convention?

#### **A. Was the United Kingdom's derogation order (SI 2001 NO. 3644) compatible with Article 15 of the Convention?**

Article 15 of the Convention provides:

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

2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Article 3, 4 (paragraph 1) and 7 shall be made under this provision.
3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons 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.

Two general requirements and one proviso are clearly spelt out in Article 15 (1) and (3) above, i.e. *pre-derogation substantive conditions* and *post-derogation procedural requirements* both of which must be met before derogation is said to be compatible with the Convention. Out of the former the state exercising the right of derogation must establish that there is ‘public emergency threatening the life of the nation’ as at the material time when the measures were taken; that the measures were ‘strictly required by the exigencies of the situation’; and that the measures taken were not inconsistent with the state’s ‘other obligations under international law’. Accordingly, the state must also establish as procedural requirements that it ‘fully informed’ the Secretary General of the Council of Europe of the measures ‘taken and the reasons thereof’; that it (shall) inform him when it lifted the measures and the ‘provisions of the Convention are again being fully executed’. Article 15(2) places limitation upon state’s right of derogation by making certain rights non-derogable. However, it may be pointed out “the fact that a right is not listed as non-derogable does not mean that it could automatically be derogated from” (Oraa, 1992, p. 97).

It is undisputable that the UK has right to derogate from derogable provisions of the Convention as it proposed to do under the order because the Convention has acknowledged the principle of necessity common to all legal systems. The question has always been whether the requirements under Article 15 of the Convention and international law have been satisfied. The ECtHR has general duty under Article 19 of the Convention to ensure the observance of the obligations undertaken by State Parties and therefore is competent to determine and declare whether the justifications given by derogating state are acceptable by the terms of the convention. In relation to the UK derogation order the requirements under Article 15 above have raised the following questions (Tomkins, 2001):

- a) Was there public emergency in UK when the order was made?
- b) Was the public emergency threatening the life of UK as a nation?
- c) Were the measures taken strictly required by the exigencies of the situation?
- d) Were the measures inconsistent with the UK’s other obligations under international law?

The first question seems to be the most problematic and controversial because the term ‘public emergency’ does not have precise definition in the jurisprudence and case law of the ECtHR. In *Lawless v Ireland* ((No. 3) A. 3 (1960) 1 EHRR 15 the ECtHR) elaborately considered the question of what constitutes ‘public emergency’. As a result of political violence, terrorists attacks and bombings in Northern Ireland the Irish Government passed the Offences Against the State (Amendment) Act 1940 (No. 2 of 1940). And on the 8<sup>th</sup> of July 1957 as there was massive outbreak of violence by members of IRA, the government declared public emergency that brought into force special powers of arrest and detention without trial under the 1940 Act. Some days ‘later’ the Irish Government informed the Secretary General of the Council of Europe about the measures it had taken. With coming into force of the Act, Lawless who was previously arrested and released upon his admission of being a former member of IRA was arrested again and suspected of being involved in terrorist activities. He was detained without trial from 13<sup>th</sup> July to 11<sup>th</sup> December 1957. On his release he challenged the legality of the public emergency declared by the Irish government complaining breach of

Articles 5 and 6 of the Convention. The Irish government argued among other things that within the meaning of Article 15 of the Convention the declaration was justified because there was public emergency threatening the life of the nation. On the question of what constitutes public emergency, the ECtHR concurred with majority members of the Commission that in the circumstances there was public emergency threatening the life of the nation. The Court defined public emergency threatening the life of the nation in their natural and customary context to mean exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organized life of the community of which a state is composed.

Another controversy is on the question of who is to determine the existence of public emergency. On this issue the Court found that it could be reasonably deduced by the Irish Government. In determining this however, the Court considered some factors e.g. that there was in the territory of Ireland secret army engaging in unlawful terrorist activities; that the armies were operating outside Ireland thereby jeopardizing the relationship with its neighbors; that there was increase of terrorist activities in Ireland and the continuing nature of terrorism. On this point the Court concluded that there was public emergency threatening life of the nation in Ireland. The applicant's argument before the Commission was that even if there was public emergency in Ireland justifying the derogation the measures taken under 1940 Act by Irish Government were not 'strictly required by the exigencies of the situation' and were disproportionate to combating terrorism. And there were other options available before the Irish Government could necessarily go to the extreme of detaining suspected persons without trial. It could, it was argued apply ordinary criminal law; invoke the provisions of Offences Against the State Act 1939 by establishing special or military courts or it could seal its border. The Court rejected this argument and found that the application of the ordinary law had proved unable to check the growing danger which threatened the Republic of Ireland, the ordinary criminal courts, or even the special criminal courts or military courts, could not suffice to restore peace and order.

The fact that the 1940 Act had with it certain safeguards against abuse like parliamentary supervision which could accordingly annul the proclamation if it was abused by the Irish Government and the establishment of "Detention Commission" to hear appeals from detained suspects with power quash any detention made unlawfully were among other factors that the Court considered and concluded that the measures taken by the Irish Government were in the circumstance 'strictly required by the situation by the exigencies of the situation' and were proportionate to the legitimate aim pursued.

The same question of what constitutes 'public emergency' was raised before the Commission in *Greek case* (1969) 12 YB 170 EComHR). On taking power from the legitimate government the military suspended some of provisions of the constitution, declared martial law and entered derogation on some fundamental rights; because there were threats of taking over government posed by the communist party, political instability and constitutional crisis. Governments of the Netherlands, Norway, Denmark and Sweden filed their application objecting the derogation. The Commission accepted that it is for the national authorities to decide what amounts to threat to their national security and to take measures they find relevant to convert the threat; but then there is a burden on the derogating state to prove in fact the existence of such an emergency. This seems to have introduced a more stringent objective test than it was in *Lawless case* where the state was required to reasonably deduce the existence of public emergency. The Commission also found that even where there is social unrest if there is no actual danger or imminent threat the measures taken to derogate would not be justifiable. From these decisions the following can be extracted as elements of public emergency:

- a) That there must be the presence of imminent threat or actual danger.
- b) That the danger must affect the whole nation.
- c) That it must constitute a threat to the organized life of the community.

d) That the threat must not be ordinarily controllable by derogating state's institutions.

The UK government took measures to derogate from Article 5 of the Convention because there were terrorists attacks in the United States of America, which resulted to the death of many people. The attacks were recognized as threat to international peace and security by the United Nations via resolutions 1368 (2001) and 1373 (2001) which required all States to take measures to prevent the commission of terrorist attacks, including by denying safe haven to those who finance, plan, support or commit terrorist attacks. A question may be asked: could the UK government's claim be justifiable in terms of the case law of the ECtHR? It may be argued that in *Lawless* case the court found that there was public emergency in Republic of Ireland because of among other things the existence of a secret army *engaged* in unconstitutional activities and using violence to attain its purposes. In *Greek* case it was found out that military junta failed to satisfy the Commission that as at the day in which the martial law was declared there was public emergency threatening the life of the nation. So also in *Brannigan and McBride v United Kingdom* (A. 258-B (1993); 17 EHRR 539) because of the death of over three thousand people and other terrorist attacks in some part of UK the Court found that there can be no doubt that such a public emergency existed at the relevant time.

Considering these findings and bearing in mind the natural and customary meaning of "public emergency" as construed by ECtHR in *Lawless* case as "exceptional situation of crisis" (*Lawless v Ireland* (No. 3)) it is difficult to submit that there was public emergency threatening the life of the UK as a nation when the order was made. Of course one may not deny the existence of some "legitimate fears" (*The British Institute of Human Rights*) or social unrest because of the terrorist attacks on United States. However, the Commission's finding in *Greek* case is to the effect that for a threat to justify public emergency it must be imminent or actual – not only that it must be a "threat to the organised life of the community of which a state is composed" (*Lawless v Ireland* (No. 3)). A different conclusion may be reached by domestic courts because, considering the secret nature and complications of terrorism the government must have gathered information from high security intelligence before it concluded that there was public emergency - as there can be an emergency notwithstanding that matters have not reached the stage at which there is a threat of imminent attack. However, the cases considered above demonstrated that the ECtHR is usually in favour of the conclusion that there is public emergency when it is established that the suspected terrorists do not only exist in the territory of derogating state, but also engage in unlawful activities and use violence to achieve their purposes. An argument may be maintained that "[t]he Court is not bound, under the Convention...by strict rules of evidence" (*Ireland v United Kingdom App. No. 25* (1978); 2 EHRR 25) and in satisfying itself that there were public emergencies "is entitled to rely on evidence of every kind, insofar as it deems them relevant, documents or statements from governments, be they respondent or applicant, or from the institutions or officials..." (*Ireland v United Kingdom*). It is also true that the ECtHR's function when reviewing whether or not there is public emergency is not "to substitute for the British Government's assessment any other assessment of what might be the most prudent and the most expedient policy to combat terrorism" (*A and Others v Secretary of State for the Home Department*). All these are unquestionably accepted. Of course it is for the state to have "responsibility for the life of its nation... to determine both whether the relevant emergency exists and how far it is necessary to go on attempting to overcome it" (*A and Others v Secretary of State for the Home Department*). This is also undisputable. It is also accepted that by their "direct and continuous contact with the executive in their countries and given their vast background knowledge" (Canor, 2002). National courts are in the better position than any other court to determine on the legality of national security measures. Nevertheless, on issues of derogation as a matter of international law, although the derogating state has wide margin of appreciation on what it considered a public emergency, its decision is not final and conclusive as the "last words will

lie with the Strasbourg authorities” (Harris, O’Boyle, & Warbrick, 1996), who review the lawfulness or other wise of the measures taken by derogating state in the light not of a purely retrospective examination of the efficacy of those measures, but of the conditions and circumstances reigning when they were originally taken and subsequently applied. In essence these authorities have pointed out to the fact that the wide margin of appreciation given to derogating state is not unlimited the ECtHR makes its “own assessment, in light of all the material before it as to the extent and impact of terrorist violence” (*Brannigan and McBride v United Kingdom*). The conclusion to be drawn from these findings is that it is difficult that the ECtHR’s interpretation of what constitutes ‘public Emergency’ would accommodate the UK’s definition of public emergency.

The next task is to determine whether the measures taken by UK ‘were strictly required by the exigencies of the situation’. This is a burden to be proved by the UK and to be determined by the ECtHR using objective test on principles of proportionality. It involves the question of whether the situation could not be ordinarily controlled other than by declaring public emergency. If the answer to this question is in affirmative this could mean that the situation has been extra-ordinary that (all) attempts made by state’s agencies using means available to them to control the situation proved inadequate. The point of consideration here for the UK would be, as stated by the ECtHR in *Ireland v United Kingdom* whether the normal legislation offered insufficient resources for the campaign against terrorism and that recourse to measures outside the scope of the ordinary law, in the shape of extra-judicial deprivation of liberty, was called for. The same test was applied in *Lawless* case where the ECtHR considered whether the ordinary criminal courts, or even the special criminal courts or military courts, could not suffice to restore peace and order. It is doubtful that ECtHR could reach the same conclusion in respect of the UK. This is because firstly, it appeared that no any State Party, beside the UK has found it necessary to derogate from Convention in relation to those events. Of course it may be arguable that the UK’s closeness with US in the fight against international terrorism as well as its position among international community makes it more visible target of terrorist attacks than all other State Parties. This may be acceptable. However, the fact that the terrorists could choose to lunch their attack on British and American citizens and properties in other countries instead of directly attacking the British soil should not be ignored.

Secondly, it is pointed out that the UK could if it wished, apply other means at its disposal to deal with the threat without necessarily taking the measure of indefinitely detaining the suspects. Thus the terrorism Act 2000; the Police and Criminal Evidence 1984; the Regulation of Investigatory Powers Act 2000 as well as the Criminal Justice and Police Act 2001 are sufficient resources to be used to combat terrorism because they “already provide the state with extremely extensive range of coercive and investigatory powers” (Fenwick, 2002). The UK could if it wished, apply less stringent measures used by some countries like Sweden and Canada of binding over; reporting to police; authorized interception with communications; electronic tapping etc. Based on these, it may be argued that it is difficult to conclude that the measures taken by United Kingdom were proportionate to legitimate aim pursued because in this case proportionality could be measured “against the practice of other member states” (Fordham, 2001).

Other elements of proportionality like judicial or parliamentary safeguard against abuse and the temporary nature of public emergency are to be discussed in the next limb of this article – as they also relate to features of a democratic society. However it may be noted that bearing in mind its other obligations under international law, the UK while derogating from Article 15 of the Convention derogates also from its obligation under ICCPR. Although it is generally acknowledged that this requirement is of “little significance in the case law of the Court” of Human Rights yet a country may not be permitted to derogate if to do this “would breach other international law obligations” (Harris, O’Boyle, & Warbrick, 1996).

On the requirement of Article 15(3) of the Convention, there is no dispute that the UK has fully informed the Secretary General of the Council of Europe through its Permanent Representative, there may also no dispute the notice contains full information about the derogation measures. However, an argument could be advanced objecting the notification because it was made prior to the formal declaration of emergency by passing legislation to that effect. Although the Convention has not provided on this issue and the ECtHR's case law seems to be unclear, yet it would appear that in the cases pertaining to derogation considered by the ECtHR as well as the Commission, notification is not required *prior* to the derogation measures, or simultaneous with them. The fact that the UK has not made formal declaration of emergency before its notification to Secretary General of the Council of Europe could make its claim that there was an emergency difficult to prove.

**B. Were the measures taken under the United Kingdom's derogation order (SI 2001 NO. 3644) necessary in a democratic society?**

Writing on the tension between the destructive nature of terrorism and the stringent measures times being taken by states in order to combat terrorism, a writer (Soulie, 1992, p. 15) eloquently observed thus:

Terrorism is a threat to democracy" is a frequently repeated assertion...it states a truth in authoritative terms: Terrorism tends to destroy democracy. At the same time it implies value-judgement: Terrorism is "the evil" set against democracy which is "good". Finally it suggests that "the good" must be defended – at all costs – against the evil.

The concept of democracy is so important that the ECtHR and the Commission have not differentiated between cases of permissible restrictions under Article 2-11 and cases of derogations under Article 15 of the Convention on the question of what is necessary in democratic society. Although it has been observed that determination of what is 'necessary in a democratic society' has been "the most complex and controversial area of the ECtHR's jurisprudence", (Loveland, 2003) the ECtHR has consistently been holding that the question has to do with among other things, "whether the interference complained of was based on 'sufficient reason'" (*Sunday Times v United Kingdom* A. 30, 1979); "whether there existed a pressing social need for the measures in question"; (*Open Door and Dublin Well Woman v Ireland* A. 246, 1992), or whether the interference is proportionate to the legitimate aim pursued (*Silver v United Kingdom* A. 61, 1983). The notion of democratic society is no doubt the foundation of the Convention and is also a principal feature characterising the European states. In a case the Commission observed that "[d]emocracy is without doubt a fundamental feature of the European public order" (*United Communist Party of Turkey v Turkey*, 1998-1). However, the notion of democracy is not without "substantive content" (Singh, 2001) within the Convention which among other things includes pluralism, tolerance and above all the principles of the rule of law. The idea of pluralism is a fundamental flavour of democratic set up as there can be no democracy without pluralism. As observed by R. Singh, pluralism connotes cultural and religious diversity, political and opinion differences as well as different social back ground and orientation.

Without going into the philosophical discourse of the notion of democracy which is not the objective of this article, one thing which is undisputable is that UK has right to take the most expedient ways to deal with threat of international terrorism to its national security. However, against this entitlement to margin of appreciation there is corresponding duty to engage in "human rights reasoning" so that when carrying out measures in derogation there should always be a "balance between the taking of effective measures to combat terrorism on the one hand, and respecting individual rights on the other" (Singh, 2001). This is because

whenever there is exercise of the right under Article 15 usually human rights are vulnerable to abuse and in most cases “the consequences may be so far reaching and a number of people affected may be so large” (van Dijk & Hoof, 1998). It may be right to say that generally speaking beside the restrictions placed upon exercise of some rights under the provisions of Articles 2-11 and derogation in situation of emergency under Article 15, the Convention has made no allowance of any interference whatsoever with the rights under it. Rights under the Convention are sacred and inalienable to the extent that any interference has to be not only justified but must be such that is necessary in a democratic society. This is a question of proportionality which, although not clearly mentioned in the Convention the ECtHR has been consistently applying it when weighting and balancing the lawfulness or other wise of measures taken by derogating state. The ECtHR stated in *United Communist Party of Turkey v Turkey* that the only necessity that may justify interference with the rights under the Convention is “one which may claim to spring from democratic society. It may be right therefore to say that proportionality under the Convention is measured and assessed by the yardstick of what is necessary in a democratic society. This presupposes a tension between “democratic necessity” (Delmas-Marty, 1992b). on one hand and democratic legality on the other hand. Both of these are important although it may be right to say that the latter is more important than the former because even where restrictions or derogations from Convention rights are permitted, and even if there is the existence of imminent danger justifying the derogation and the measures are strictly required by the exigencies of the situation, this does not entirely exclude the Court from exercising jurisdiction to see whether the measures taken are acceptable by the terms of the Convention taking them all together. The rule has always been that “[n]ecessity does not completely prevail over the law (Delmas-Marty, 1992a). This argument can be supported by the Court’s emphasis that “the adjective ‘necessity’ is not synonymous with ‘indispensable’, neither has it the flexibility of such expressions as ‘admissible’, ‘ordinary’, ‘useful’, ‘reasonable’, or ‘desirable’. It may be argued that although “the speed with which those authorities need to assess the situation and their response thereto” (O’Boyle, 1998) has to be considered, in a democratic society and in terms of the Convention measures taken in public emergency are to be tested against principles of proportionality which makes for more objective analysis than the question of the existence of an emergency. As observed by J. Oraa (1992), “[u]nder international law, so called states of emergency of a ‘preventive nature’ is not lawful”.

Bearing in mind that the concept of rule of law is made inseparable by the Convention from the notion of democratic society, it may be asked whether the UK’s declaration of public emergency is necessary in democratic society; or whether the declaration, been made, could prevent the suspected terrorist from invoking the rights under the Convention. This may depend to some extent, on the broad or narrow interpretation of Article 17 of the Convention. The UK sought to derogate from the provision of Article 5 (1) of the Convention pertaining to right to liberty so that it could pass without legal obstacle the Anti-Terrorism, Crime and Security Act. Article 5 (1) of the Convention guarantees right to liberty and security of person with certain exceptions provided under 5 (1) (a)-(f). Accordingly, there is no deprivation of liberty where a person is lawfully detained “after conviction by a competent court”; or if he is lawfully arrested or detained for his failure to comply with lawful order of court or to secure the fulfillment of any obligation prescribed by law”; or if he is lawfully arrested or detained in order to bring him before a competent legal authority upon reasonable suspicion of an offence or where it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so. However, whether deprivation of right to personal liberty in excess of those recognised by the Convention could be lawful depends on the construction given to the extended power under the derogation order. In order to determine this, the ECtHR has given guidance that where there is allegation of deprivation of liberty (*Guzzardi v Italy* A. 39, 1980):

...the starting point must be [the applicant's] concrete situation and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question...

It would appear that the derogation order based the extended power of arrest and detention (indefinitely) on the Secretary of State's *unqualified belief* that the suspect is an international terrorist. In a democratic society the power seems to be lacking one of the essential elements of safeguard against arbitrariness i.e. reasonableness. On this respect the ECtHR stated in *Fox, Campbell and Hartley v UK* (A. 182 (1990) 13) that:

The 'reasonableness' of the suspicion on which an arrest must be based forms an essential part of the safeguard against arbitrary arrest and detention. ....

Of course it may be argued that due to the secret and complicated nature of international terrorist activities different test of reasonableness should be applied in this case. However, although this assertion may be subjectively true, the ECtHR has pointed out that the exigencies of dealing with terrorist crime cannot justify stretching the notion of 'reasonableness' to the point where the essence of the safeguard ...is impaired. It may also be argued that although derogation order contemplates certain safeguards such as parliamentary supervision and judicial intervention, yet some of the phrases like having links with members used in the order might introduce some uncertainty into the proposed Act, because their broad construction could lead to the arrest and detention of persons who might not necessarily be international terrorist. Thus, one of the fundamental features of democratic society and rule of law is not only that an interference with or invasion upon rights has to be prescribed by law, but also the law must be "formulated with sufficient precision" (*Sunday Times v United Kingdom*). In *James v UK* A. 98 (1986) 8 EHRR the ECtHR stated that:

The Court has consistently held that the terms 'law' or 'lawful' in the Convention '[do] not merely refer back to domestic law but also [relate] to the quality of law, requiring it to be compatible with the rule of law'...

### Conclusion

In conclusion, an attempt has been made in this article to analyse the UK's derogation order (2001) in line with the requirements under Article 15 of the Convention. It is submitted that it is undisputable that the UK Government is in the best position to decide what measures to take to tackle any threat to its national security. It is also not contested that the UK has right under the Convention to derogate from derogable provisions of the Convention. It is also unobjectionable that terrorism is evil and destructive, and therefore should not be permitted to pose threats to peaceful co-existence of democratic societies. However, against this there is universally acknowledged fact that human rights are inalienable, God-given and should be respected and protected in whatever circumstances- in peace or war and in emergency situations. It may be right to say that derogation is absolutely permitted by the Convention but the ECtHR has been stressing that this does not grant absolute and unlimited power to State Parties to take whatever measures at their disposal (*Klass and Others v Germany*, 1978) 2 EHRR). Measures taken are subject to the scrutiny of the Court. An interference with or invasion upon rights may be lawful because presumably, the measures satisfy the requirements of Article 15; yet the law introduced by the measures might not objectively withstand the ECtHR's scrutiny in terms of the Convention. For instance, if it lacks the certainty and quality which a law is expected to have in order to meet the requirements of the rule of law and democracy (*Malone v United Kingdom* (1984) 7 EHRR 14). It is submitted that the UK's derogation order has not completely satisfied the requirements of Article 15 of the Convention and some of the measures were not compatible with the Convention's general emphasis upon

preservation of democracy in European states. However, the determination on whether or not Article 15 has been complied with has always been tasking and difficult, may be because of the reasons eloquently pointed out by J. Fitzpatrick (1994, p. 19) that:

...the treaty drafters left their job unfinished by simply deciding to make the relevant rights derogable without precisely specifying the circumstances under which administrative detention would be tolerated. They identified neither the nature of an emergency justifying the practice (and, indeed, whether it would be tolerable only under a genuine emergency), nor mandatory safeguards to prevent abusive application of detention measures. [T]his lack of clarity in treaty standards has contributed to a wide-spread laxness of practice...

### References

- Canor, I. (2002). Harmonising the European Community's Standard of Judicial Review. *EPL*, 8(135), 161.
- Delmas-Marty, M. (1992a). Restraining or Legitimizing the Reason of State? In M. Delmas-Marty (Ed.), *The European Convention for the Protection of Human Rights International Protection versus National Restrictions* (pp. 7–14). Kluwer Academics.
- Delmas-Marty, M. (1992b). The Richness of Under laying Legal Reasoning. In *The European Convention for the Protection of Human Rights International Protection versus National Restrictions* (pp. 319–322). Kluwer Academics, Netherlands.
- Fenwick, H. (2002). The Anti-Terrorism, Crime and Security Act 2001: A Proportionate Response to 11 September? *MLR*, 65, 762.
- Fitzpatrick, J. (1994). Human Rights in Crisis: the International System for Protecting Rights during States of Emergency. In *Procedural Aspects of International Law Series* (Vol. 19, p. 19). University of Philadelphia Press.
- Fordham, M. (2001). Identifying the Principles of Proportionality. In T. de la Mare, J. Jowell, & J. Cooper (Eds.), *Understanding Human Rights Principles* (p. 54). Oxford: Hart Publishing.
- Harris, D. J., O'Boyle, M., & Warbrick, C. (1996). *Law of the European Convention on Human Rights*. Butterworth.
- Lobel, J. (1989). Emergency Power and the Decline of Liberalism. *YLJ*, 98, 1385–1433.
- Loveland, I. (2003). *Constitutional Law, Administrative Law and Human Rights A Critical Introduction* (3rd ed.). Reed Elsevier.
- Mowbery. (1999). The Role of European Court of Human Rights in the Promotion of Democracy. *PL*, 725–732.
- O'Boyle, M. (1998). The Margin of Appreciation and Derogation Under Article 15: Ritual Incantation or Principle? *HRLJ*, 01, 23–35.
- Oraa, J. (1992). *Human Rights in States of Emergency in International Law*. Clarendon Press.
- Singh, R. (2001). The Place of the Human Rights Act in a Democratic Society. In J. Jowell & J. Cooper (Eds.), *Understanding Human Rights Principles* (pp. 178–201). Oxford: Hart Publishing.
- Soulier, G. (1992). Terrorism. In M. Soulier (Ed.), *The European Convention for the Protection of Human Rights International Protection versus National Restrictions* (pp. 15–16). Kluwer Academics.
- The British Institute of Human Rights: 'Submission to the Joint Committee on Human Rights Inquiry into Derogation from Convention Rights.' (2007, December 21). <http://www.bihhr.org>. Retrieved May 12, 2012, from <http://www.bihhr.org/pdfs/derogations%20submission.pdf>

- Tomkins, A. (2001). Legislating Against Terror: The anti-Terrorism, Crime and Security Act 2001. *PL*, 205.
- van Dijk, P., & Hoof, V. (1998). *Theory and Practice of European Convention of Human Rights*. The Netherlands: Kluwer.

### Case Law

- A and Others v Secretary of State for the Home Department* (2003, All ER 816)
- Brannigan and McBride v United Kingdom* (A. 258-B (1993); 17 EHRR 539)
- Chahal v United Kingdom* App. (22414/ 93), Judgement of 15 November, 1996; (1997) 23 EHRR 413
- Fox, Campbell and Hartley v UK* (A. 182 (1990) 13
- Guzzardi v Italy* A. 39 (1980); 3 EHRR 333
- Ireland v United Kingdom* App. No. 25 (1978); 2 EHRR 25
- James v UK* A. 98 (1986) 8 EHRR) 123
- Klass and Others v Germany* (1978) 2 EHRR 214
- Lawless v Ireland* (No. 3) A. 3 (1960) 1 EHRR 15
- Malone v United Kingdom* (1984) 7 EHRR 14
- R v Governor of Durham Prison, Ex p. Singh* [1984] All ER 983