



Human rights-based framework for analyzing restrictions during the Covid-19 health crisis

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Abstract—

Human rights are sometimes subjected to restrictions by the State in order to ensure public interest. This stands in stark contrast with the inalienable, indivisible, and interdependent nature of human rights. In the wake of the pandemic, this debate has been sparked again due to restrictions imposed on certain human rights. This article discusses the necessity of complying with four principles when dealing with restrictions of human rights: legitimacy, legality, necessity, and proportionality. More comprehensively, the article puts in place a framework consisting of fourteen criteria to analyze measures restricting human rights.

Keywords— Covid-19, human rights, restriction, human rights-based approach, health crisis

I. INTRODUCTION

In the human rights field, the restriction of certain rights by the State is possible under certain conditions. Still, certain rights – called absolute– are not liable to be subject to any dispensation such as the right to life, security of the person, not to be subjected to acts of torture. Furthermore, the Convention on the Rights of the Child or the International Covenant on Economic, Social, and Cultural Rights does not stipulate the possibility of dispensation. Any exceptions are subject to conditions: the exigencies must strictly require the existence of a public emergency endangering the life of the nation; the measures must not discriminate on the



ground of race, color, sex, religion, language, social origin, and other member states of the instrument concerned must be notified of the derogation or dispensation.

Thus, four principles are essential to respect while taking such restrictive measures:

- Legitimacy: the restriction's objective must be recognized as legitimate (the existence of a national emergency threatening the life of the nation).
- Legality: the regime under which the restriction was imposed must be legal and transparent.
- Necessity: each measure taken must be strictly necessary for the stated objective.
- Proportionality: the measures taken must remain proportional to the achievement of the stated objective; in particular, the limitations should be time-bound.

These four principles are essential and interdependent. In other words, the restriction of human rights is only acceptable if it is for the public interest, implemented and managed legally in a transparent manner, and as least restrictive as possible of the rights of individuals.

I. HUMAN RIGHTS, INDIVISIBLE, INTERDEPENDENT, BUT OFTEN DIFFICULT TO RECONCILE

Experts in international human rights law agree on the indivisibility and interdependence of human rights. In reality, there are situations in which rights are difficult to reconcile. This “irreconcilability” of rights leads, in given circumstances, to apply the principle of “balance” or “equilibrium” between rights for allowing such restrictions. In this regard, case law provides information on several cases of “opposition” to human rights.

In the case of *S.A.S vs. France*, against the background of a complaint regarding Law No. 2010-1192 (October 2010) prohibiting full-face coverage in public places, the European Court of Human Rights issued a judgment based on Article 4 of the International Covenant on Civil and Political Rights along with Article 15 of the European Convention on Human Rights which specify a list of rights that cannot be subject to derogation or restriction.¹

The Court found that the restriction on the applicant's rights was proportionate and therefore permissible.



The request was to invalidate this law on the grounds of invoking the rights to respect private life and freedom of religion. To justify the restriction of the right to privacy (a right susceptible to being restricted), the Court invoked the interests of national security, public safety, the economic well-being of the country, the prevention of disorder or crime, the protection of health or morals, and the protection of the rights and freedoms of others. The Court based itself on the fact that respect for the minimum requirements of life in society (living together) could be linked to the legitimate objective of “protecting the rights and freedoms of others” referred to in the European Convention on Human Rights Article 8, paragraph 2.

The Human Rights Committee General Comment No. 29² (paragraph 5) stipulates: “the possibility of restricting certain Covenant rights under the terms of, for instance, freedom of movement (article 12) or freedom of assembly (article 21) is generally sufficient during such situations and no derogation from the provisions in question would be justified by the exigencies of the situation”.

The European Court of Human Rights had ruled, in the judgment³ relating to the case

of Ireland vs. The United Kingdom (January 1978): “It falls in the first place to each Contracting State, with its responsibility for “the life of [its] nation”, to determine whether that life is threatened by a “public emergency” and, if so, how far it is necessary to go in attempting to overcome the emergency. By reason of their direct and continuous contact with the pressing needs of the moment, 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 derogations necessary to avert it”.

To illustrate the notion of “balance” or “equilibrium,” we quote General Comment No. 34 of the Human Rights Committee⁴ (paragraph 24): “Restrictions must be provided by law. Law may include laws of parliamentary privilege and laws of contempt of Court. Since any restriction on freedom of expression constitutes a serious curtailment of human rights, it is not compatible with the Covenant for a restriction to be enshrined in traditional, religious or other such customary law”.

The following example shows that the limitation of a right, the freedom of expression in this case here, for the sake of



preserving other rights, is subject to strict legal conditions and cannot be an absolute restriction. In the *Brannigan and McBride case vs. the United Kingdom* (May 1993), the European Court of Human Rights' judgment validated the exemption in extending the detention duration of 2 individuals without being presented before a judge, against the backdrop of the fight against terrorism. The judgment⁵ states: "It falls to each Contracting State, with its responsibility for "the life of [its] nation," to determine whether that life is threatened by a "public emergency" and, if so, how far it is necessary to go in attempting to overcome the emergency . . . In this matter, a wide margin of appreciation should be left to the national authorities . . . Nevertheless . . . the domestic margin . . . is accompanied by European supervision . . . The Court must give appropriate weight to such factors as the nature of the rights affected by the derogation, the circumstances leading to, and the duration of, the emergency situation". For illustrative purposes, Jovičić⁶ reports on the case of *Kavala vs. Turkey* (2019) and its judgment. The European Court of Human Rights examined the detention of a human rights defender (suspected of attempting to overthrow the government and the constitutional order)

suspected as the instigator and leader of the events in Gezi Park and as a participant in the coup attempt in 2016. "On July 18th 2018, Turkey lifted the State of emergency while the applicant was still in detention. When assessing the reasonableness of the suspicion that the applicant had committed the acts alleged by the prosecution, the Court found no evidence showing that these acts involved violence or the use of force but represented non-violent acts performed in the exercise of Convention rights".

"The Turkish government tried to justify the applicant's prolonged detention with the difficulties in investigating terrorist offenses which covered a wide area in the country. No particular argument was adduced as to why the domestic courts had been unable to review the lawfulness of suspected terrorists' detention. For the Court, the period of detention of fourteen days was "exceptionally long," and the Government had not provided detailed reasons justifying the complete absence of judicial supervision," revealed Jovičić.

II. LITERATURE REVIEW ON THE RESTRICTION OF HUMAN RIGHTS IN THE CONTEXT OF COVID-19



In April 2020, the United Nations Secretary-General published a message attached to a policy brief, “COVID-19 and Human Rights: We are all in this together”, emphasizing the importance and centrality of the issue of human rights⁷ in response to the pandemic. The text⁸ insisted on the right to life and the duty to protect life, the right to health and access to health care, and the central challenge of freedom of movement. It was based on six key messages:

- “Protecting people’s lives is the priority; protecting livelihoods helps us do it;
- The virus does not discriminate, but its impacts do;
- Involve everyone in your response;
- The threat is the virus, not the people;
- No country can beat this alone;
- When we recover, we must be better than we were before”.

An array of recommendations and good practices accompanied the text. In the same vein, the Office of the United Nations High Commissioner for Human Rights published “COVID-19 Guidance”, which deals with different rights in the pandemic’s context: “Access to health care; Emergency measures; Leaving no one behind; Housing; Persons with disabilities; Older persons; People in detention and institutions;

Information and Participation; Stigmatization, xenophobia, racism; Migrants, Displaced People, and Refugees; Social and Economic Impacts; Food; Privacy; Children; Youth; Gender; Water, sanitation and hygiene; Indigenous peoples; Minorities; Business and Human Rights; International and Unilateral Sanctions; Trafficking; International Cooperation and Solidarity.”

The Council of Europe Secretary-General’s document “Respecting democracy, the rule of law and human rights in the framework of the COVID-19 sanitary crisis – A toolkit for member states”⁹ recalled the general principles which should govern “respect for the rule of law and democratic principles in times of emergency”:

- The principle of legality;
- Limited duration of the regime of the State of emergency and the emergency measures;
- Limited scope of the emergency legislation;
- The principle of necessity;
- Distribution of powers and checks on the executive action during the State of emergency regime.



According to Jovičić,¹⁰ “in the present sanitary situation, the Court will have no difficulties in finding that there is an actual and imminent public emergency threatening the life of the nation. What will be difficult for Governments will be to prove whether the extraordinary measures taken during the COVID-19 period have been an adequate and proportionate response to the situation. Putting whole cities under lockdown in the first months of the pandemic may have been justified in the view of the unknown characteristics of the new virus and the lack of adequate preparedness and response. However, with the passage of time, when more evidence was surfacing as to how the virus spread and which protection measures were most effective, severe restrictions may no longer have been strictly required by the exigencies of the situation. Certainly, freedom of expression is one of those human rights which will be difficult to limit unless it is used to spread misinformation. The pandemic does not allow the Council of Europe Member States to take a relaxed attitude and assume that any kind of restrictions on human rights will automatically be justified without a constant evaluation both of the situation and of the measures necessary to prevent further

spread of disease. It will be for the domestic courts to assess the situation on the ground and to ensure the protection of human rights in Council of Europe Member States in line with the Court’s case-law”.

Concurrently, Spadaro¹¹ argues: “In order to prevent the curtailment of human rights from becoming the new normal, States should strive to adopt a long-term strategy for the management of the pandemic that does not rely on the continued restriction or suspension of fundamental freedoms. They should also be wary of the long-lasting and sweeping effects of certain measures”.

1. THE ROLE OF NATIONAL HUMAN RIGHTS INSTITUTIONS IN THE CONTEXT OF THE PANDEMIC

In the context of the pandemic, the National Human Rights Council (CNDH) has undertaken a series of measures as part of its missions. It shared with its peers within the Global Alliance of National Human Rights Institutions (GANHRI) at the beginning of April 2020 a general note¹² on its actions relating to preventive measures internally, receipt of complaints, monitoring, and awareness-raising, as well as advocacy in favor of vulnerable groups. In a message¹³ to GANHRI members



regarding Covid19, the CNDH Chairperson highlighted the values of solidarity, compassion, mutual aid, and altruism that have emerged in the effort to combat the spread of this virus. In May 2020, the Council issued a “Call for commitment to human rights in the world of labor after lockdown: diligent companies for a resilient society.”¹⁴ The Council also presented its contribution to the joint questionnaire by Special Procedures mandate holders on “Protecting human rights during and after COVID-19.”¹⁵

The European Network of NHRIs (ENNHRI) issued a statement¹⁶ at the end of April 2020 “calling for solidarity at all levels to ensure that these standards are respected, helping us see this pandemic through while staying true to our democratic values” and recalling the following principles:

- “Human rights remain in force in a time of crisis;
- Measures must be legally-based, proportionate, and time-limited;
- Measures cannot have any discriminatory impacts;
- Situations of vulnerability must be addressed;

- Broad public debate is as important as ever;
- Parliaments must hold governments to account;
- Judicial independence must be protected;
- Restrictions on democratic rights must be kept in check;
- States should engage with their NHRIs”.

The Australian Human Rights Commission has issued an opinion¹⁷ on the limitation of human rights during Covid-19, recalling the same principles stated by other organizations, adding interesting elements:

- “The need for the restrictions must be regularly assessed, and the moment they are no longer necessary, they must cease”;
- “It is important to ensure independent monitoring of the measures is in place to keep human rights front of mind”;
- “We must make sure that any restrictions are temporary and do not erode our freedoms longer-term”.

The Australian Human Rights Commission raised the critical point that some decisions, related to the response to Covid-19, “were introduced in other ways – which means they cannot be easily reviewed, and they



don't automatically require independent human rights scrutiny at the time of the decision.” “The Commission is concerned at the lack of transparency in explaining the continued justification for some emergency measures, and even for identifying which level of government is responsible for some measures,” the opinion adds. Another relevant remark of the Commission relates to the fact that certain measures have been taken by the local authorities, which would have impacted the principle of transparency.

In its opinion (end of April 2020), “State of health emergency and the rule of law”¹⁸, the National Consultative Commission on Human Rights (CNC DH) in France was concerned “about the extent of these powers and their sharing amongst several authorities, including the prefects who may be empowered to take them. This concern is all the more justified by the fact that the law of March 23rd, 2020 empowers the Government to take by ordinance measures likely to infringe rights and freedoms in extensive areas”.

The CNC DH noted that “The reduction in jurisdictional review, which is a constituent element of the rule of law, is also particularly alarming. The law of March

23rd, 2020 is certainly one of the most serious infringements on it. Through a single seemingly technical provision relating to procedural deadlines, the law suspends the control of the constitutionality of laws by way of the priority question of constitutionality”.

III. CONCLUSION

Given the above, we propose that the analysis of measures restricting human rights be carried out within the framework of the following fourteen criteria:

- No restriction of “absolute” rights.
- Non-discrimination: the restrictions must not contain any discriminatory measures.
- Legitimacy: the reason for the restriction must be recognized as legitimate (existence of a public emergency endangering the life of the nation).
- Legality: the restrictions should be enacted by law.
- Transparency: the implemented measures and the situation invoked must be explained to the public. These measures should, as far as possible, be subject to public and parliamentary debate.



- Necessity: the State must ensure that each measure implemented is strictly necessary for the stated objective. As such, limitations should be assessed continually and ceased when no longer needed.
- Proportionality: the restrictions must not be disproportionate to the situation and must particularly be limited in time to the strict minimum.
- Formalism: the Member States must be notified of the derogation and the instrument concerned with it.
- Balance: the State must minimize the impact of restrictions on the enjoyment of other human rights.
- Solidarity: solidarity provisions at all levels (local, national, regional, and international) must accompany measures limiting rights. In the Covid-19 response, this also includes measures in favor of people in vulnerable situations.
- Balance of powers: restrictions of certain human rights, although permitted in a democratic state, must not affect the balance and distribution of powers, notably the independence of the judiciary, which must be protected.
- Monitoring: N.G.O.s and NHRIs
 - must establish independent monitoring of derogatory measures. The government is required to interact with the NHRI.
 - Coherence: The measures implemented by the authorities at the national, regional, or local level must be coherent and transparent. The authority capable of taking such measures must be easily identifiable.
 - Preparation: The measures taken by the State must take into account the post-crisis preparation for greater enjoyment of human rights.

Ultimately, these principles constitute a human rights-based framework for analyzing restrictions during the Covid-19 health crisis.



NOTES

¹ 'Case of S.A.S. V. France (Application No. 43835/11) - Judgment', (Strasbourg: European Court of Human Rights, 2014).

² 'General Comment No. 29 - States of Emergency (Article 4)', (UN Human Rights Committee, 2001).

³ 'Affaire Mckay C. Royaume-Uni (Requête No 543/03) - Arrêt', (Strasbourg: European Court of Human Rights, 2006).

⁴ 'General Comment No. 34 - Article 19: Freedoms of Opinion and Expression', (Geneva: UN Human Rights Committee, 2011).

⁵ 'Brannigan and McBride V. The United Kingdom - 14553/89 and 14554/89 - Judgment 26.5.1993', (European Court of Human Rights, 1993).

⁶ Sanja Jovičić, 'Covid-19 Restrictions on Human Rights in the Light of the Case-Law of the European Court of Human Rights', In ERA Forum 21, no. 4 (2021): 545-60

⁷ Antonio Guterres, *We Are All in This Together: Human Rights and Covid-19 Response and Recovery*, (2020).

⁸ Antonio Guterres, *Covid-19 and Human Rights We Are All in This Together*, (New York, 2020).

⁹ 'Respecter La Démocratie, L'état De Droit Et Les Droits De L'homme', (Council of Europe, 2020).

¹⁰ Sanja Jovičić, 'Covid-19 Restrictions on Human Rights in the Light of the Case-Law of the European Court of Human Rights', In ERA Forum 21, no. 4 (2021): 545-60

¹¹ Alessandra Spadaro, 'Covid-19: Testing the Limits of Human Rights', European Journal of Risk Regulation 11, no. 2 (2020): 317-25.

¹² 'Actions Menées par le Conseil National des Droits de l'Homme du Maroc en Matière de Lutte contre le Covid19', (Rabat: CNDH, 2020).

¹³ Amina Bouayach, 'Message from the President of the National Human Rights Council of Morocco Concerning Covid-19', (Rabat, 2021).

¹⁴ 'CNDH Call for Commitment to Human Rights in the World of Labour after Lockdown: Diligent Companies for a Resilient Society', (Rabat: CNDH, 2020).

¹⁵ 'Protéger les Droits Humains durant et après Covid-19 - Contribution du CNDH au Questionnaire Conjoint par des Titulaires de Mandats des Procédures Spéciales', (Rabat : CNDH, 2020).

¹⁶ 'Now is the Time for Solidarity on Human Rights - the Need for Human Rights in Covid-19 Responses in Europe', (European Network of NHRIs, 2020).

¹⁷ 'What Is the Commission's View on Limiting Human Rights During Covid-19?', (Australian Human Rights Committee, 2021).

¹⁸ 'État D'urgence Sanitaire Et État De Droit', (Paris : Commission Nationale Consultative des Droits de l'Homme, 2020).