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STATES' RESPONSE TO THE COVID-19 HEALTH CRISIS – EMERGENCY POWERS VS HUMAN RIGHTS

The sudden outbreak of the global pandemic caused by the spread of the new coronavirus confronted the international community with many challenges. The current pandemic has triggered health, economic and social crisis, that pushed a great number of states into the grey zone when it comes to human rights protection. Dozens of state parties to the three main human rights treaties, namely the ICCPR, the ECHR, and ACHR, have exercised their emergency powers by calling for the derogation of one or more human rights protected by the abovementioned treaties. Declaration of the state of emergency, followed up by the notification to the relevant bodies of the UN, or regional organizations, even though completely legal, opened the door for possible abuses of the situation for political purposes. States closed their borders, banned religion, movement, and other freedoms, and proclaimed new legislation, all to combat the global threat coming from the invisible enemy.

This paper aims to analyze the states' response to the COVID-19 health crisis, in the context of the derogation from their obligation to secure rights and freedoms outlined in the human rights treaties. With the outbreak of the global pandemic, the international community changed its face overnight. By questioning the behavior of states in times of the pandemic, the author suggests that there has been a change of the paradigm so that individual human rights protection does not stand equal with the need of a wider community or a state as such. Therefore, the author concludes that the postmodernist ideas of the unquestionable subjectivity of individuals faced the wall of state-centrism.

Key words: Human rights; Emergency powers; Derogation; ICCPR; ECHR; ACHR.

1. INTRODUCTION

It has been widely accepted that in the era of the United Nations, after the adoption of the human rights treaties on the universal and regional level, the individual gained an active role in the international community. Based on the fact that the individual possesses direct rights and duties under the basic human rights treaties, many theorists concluded that the individual could and might stand shoulder to shoulder with states on the international level. The idea that an individual is a subject of international law is not new, as it is not a new or current tendency to humanize the international legal order. The present international community has largely abandoned the idea of absolutism. As it is no longer acceptable to perceive the sovereignty of the state as the absolute value, but as the sovereignty within the existing legal system, it is also not acceptable to understand subjectivity as an exclusive capacity of the state. It is irrefutable that states continue to be dominant factors on the international stage and it is not likely that this condition will change in the near future. No extreme is desirable. The unlimited power of the state throughout history has thrown humanity on its knees several times. On the other hand, the dominance of the individual interests over the interests of the wider community threatens to seriously endanger the basic community postulates. Everything in moderation, including moderation, as Oscar Wilde once said.

However, circumstances caused by the global pandemic proved once more that the individual and the state are not and could not be equal, since the situations like this one showed that the state is the one who can limit or derogate individual rights in order to safeguard his life. Vice-versa is not possible. According to the human rights treaties, it is permitted to derogate from some of the treaty obligations in the situation of grave crisis (for IC-CPR it is stipulated in art. 4, ECHR art. 15, and ACHR art. 27). So far, a great number of states called upon the state of emergency and derogated some of their treaty obligations, followed by the notification to the United Nations, Council of Europe, or the Organization of American States. Other states called upon their internal emergency powers in order to derogate some of their constitutional obligations regarding human rights protection.

One part of the academia believes that the emergency powers of the state, when already secured by the treaties themselves, may have the positive effect of taming emergency¹, while others fear that the emergency powers carry a grave risk of being abused for political purposes. Whether pro or contra, it is unquestionable that the current global pandemic caused a massive constitutional challenge for the world democracies. All those meas-

¹ A. Greene, „Derogating from the European Convention on Human Rights in Response to the Coronavirus Pandemic: If not Now, When?“, (2020) (3) *European Human Rights Law Review* 262–276.

ures taken called for global academia scrutiny of its legality and necessity. Consequently, a new field in constitutional public law emerged, called the „Comparative Covid Law”, with the main purpose of examining the state’s response to this new reality.²

In this paper, the author questions the meaning and the limits of the derogation clauses in three major human rights treaties, namely the ICCPR, the ECHR, and ACHR, and confronts them with the behavior of the states in practice. Declaration of the state of emergency, followed up by the notification to the relevant bodies of the UN, or regional organizations, even though completely legal, opened the door for possible abuses of the situation for political purposes. States closed their borders, banned religion, movement, and other freedoms, and proclaimed new legislation, all to combat the global threat coming from the invisible enemy.

The intent of this paper is not to provide an in-depth analysis of the behavior of particular states during a global pandemic, but rather to question and analyze the forms of possible, legal derogation of human rights in times of health crisis such as the current one. The focus is on the antagonism between the proportionality of the measures taken by states and the public interest that was supposed to be protected by them.

2. THE EMERGENCE OF THE GLOBAL PANDEMIC CAUSED BY THE CORONAVIRUS

It has been over two years since the world entered into a health crisis of an unprecedented scale. The official declaration of the outbreak of the global pandemic caused by acute respiratory syndrome coronavirus (SARS-CoV-2) was made on the 30th of January 2020.³ Being highly contagious, the virus has spread unexpectedly rapidly from Wuhan in China to almost every state in the world. The disease named Covid-19 affected millions of people worldwide.

The sudden outbreak of the global pandemic caused by the spread of the new coronavirus confronted the international community with challenges on several levels. It is by no means the first global health emergency, but most definitely it is the one that will leave lasting consequences not only to the global health and economy but to the international legal system as such. An

² A scholarly portal called „Comparative Covid Law” consists of the greatest number of legal materials concerning the current Covid-19 pandemic. As cited in: A. Jr Golia, L. Hering, C. Moser, T. Sparks, „European Constitutional Systems and the Covid-19 Pandemic”, *MPIL Research Paper Series* No. 2020-42, p. 2 fn. 4.

³ On 30 January 2020 following the recommendations of the Emergency Committee, the WHO Director-General

declared that the outbreak constitutes a Public Health Emergency of International Concern (PHEIC). [https://www.who.int/publications/m/item/covid-19-public-health-emergency-of-international-concern-\(pheic\)-global-research-and-innovation-forum](https://www.who.int/publications/m/item/covid-19-public-health-emergency-of-international-concern-(pheic)-global-research-and-innovation-forum), 29 October 2021.

excellent point was made by Anne Peters, in her work on „The Pandemic and Public International Law“, stating that the current crisis is a direct product of the evolution of the international community. „The current pandemic is a product of globalization. While centuries ago the plague and cholera took decades to spread and often did not affect the entire world, it took only a few months for the world to be completely scoured with Covid-19. The main reason for this was the very high and rapid mobility of people worldwide.“⁴

In order to safeguard their public interest, states introduced massive restrictions by invoking their emergency powers. It is unquestionable that the states, according to human rights treaties, might derogate from some of their treaty obligations. However, one can not avoid concern regarding the proportionality of the restrictions imposed on the individual and their effect on human rights protection worldwide. As said by the Secretary General of the Council of Europe: „The virus is destroying many lives and much else of what is very dear to us. We should not let it destroy our core values and free societies.“⁵

The global pandemic caused by coronavirus showed the weakness of the national systems to protect its citizens and once again brought to the fore the difference between the developed north and the poor south. It is no surprise that there is already a large number of cases filed against the measures taken by states, on all levels. Therefore, this article focuses on two points, what could legally be done and what was done in the past two years.

3. WHAT COULD STATES LEGALLY DO? THE SCOPE OF THE DEROGATION CLAUSES IN TIMES OF EMERGENCY

Most of the international treaties protecting human rights allow states to derogate from some of the human rights, under strict requirements. The derogation mechanisms do not mean a free hand for a state to do what they want. Quite contrary. In order to protect the public interest and its citizens, states are permitted to take temporary measures and suspend human rights in a strictly regulated manner. Therefore, in order to do so and do it legally, states must comply with requirements agreed on in the human rights treaties. It should not be forgotten that the *ratio* behind the human rights treaties was to protect the individual from his state. Derogation clauses, thus, should be read throughout and understood strictly, to prevent any form of abuse by the state party.

According to the European Convention on Human Rights (hereinafter: European Convention, ECHR), states parties to the Convention, are allowed to

⁴ A. Peters, „Die Pandemie und das Völkerrecht“, MPIL Research paper series No. 2021-03, In: *Jahrbuch des öffentlichen Rechts der Gegenwart: Neue Folge*, vol. 69 (2021), 2. Translation provided by – SK.

⁵ <https://www.coe.int/en/web/chisinau/-/coronavirus-guidance-to-governments-on-respecting-human-rights-democracy-and-the-rule-of-law>, 12 December 2021.

“take measures derogating from its obligations under [the] Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.”⁶ Further, it stipulates the absolute protection of fundamental human rights, such as, but not limited to the right to life⁷, prohibition of torture and inhuman or degrading treatment or punishment⁸ and prohibition of slavery and servitude.⁹

Likewise, the American Convention on Human Rights' derogation clause stipulates that “in time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the ground of race, color, sex, language, religion, or social origin.”¹⁰ It is worth mentioning that the latter document has a long list of non-derogable, fundamental, human rights, that include *inter alia* right to legal personality¹¹, rights of the family¹² and freedom of thought and religion¹³.

A similar clause consists in the International Covenant on Civil and Political Rights (hereinafter: ICCPR) art. 4 which reads as follows: „In a time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, color, sex, language, religion or social origin.”¹⁴ The list of non-derogable rights provided in the ICCPR consists of the rights and freedoms mostly already mentioned in the previous regional documents.¹⁵

Hence, according to the provisions of the major human rights instruments, in order to validly derogate from their human rights obligations, several conditions should be met. *Primo*, states must find themselves in a situation of war

⁶ Art. 15 (1) of the European Convention on Human Rights.

⁷ Art. 2 of the European Convention on Human Rights. In the case of the right to life, the except is made in respect of deaths resulting from lawful acts of war. See, Factsheet – Derogation in time of emergency, European Court of Human Rights, of April 2021, fn. 2.

⁸ Art. 3 of the European Convention on Human Rights.

⁹ Art. 4 (1) of the European Convention on Human Rights.

¹⁰ Art. 27 (1) of the American Convention on Human Rights.

¹¹ Art. 3 of the American Convention on Human Rights.

¹² Art. 17 of the American Convention on Human Rights.

¹³ Art. 12 of the American Convention on Human Rights.

¹⁴ Art. 4 of the International Covenant on Civil and Political Rights.

¹⁵ See art. 4 (2) of the International Covenant on Civil and Political Rights.

or other public emergency or danger. In the case law of the European Court of Human Rights, the public emergency is understood as „an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organized life of the community of which the State is composed”.¹⁶ In terms of the current pandemic, it is non-disputable that it poses a serious threat to the life of nations, or in Greene's words, it is „the closest we have ever seen of a phenomenon that can objectively be categorized as necessitating exceptional measures. It is an 'ideal state of emergency'”¹⁷.

Secundo, all of the three human rights instruments stipulate that the extent of the derogation must be „strictly required by the exigencies of the situation“, which means that the derogation and the reasons supporting it must be proportionate to the crisis itself, necessary for protecting the nation and should not be discriminatory on any ground. Even though the proportionality test lies in the hands of the state, it does not mean that it was not subject to an assessment of the international body. According to the European Court of Human Rights case-law, „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”.¹⁸ However, the states are obliged to continuously evaluate the necessity of derogatory measures and reduce them when possible.¹⁹ In that regard, the Human Rights Committee issued a statement already in 2020, urging „where possible, and with a view of the need to protect the life and health of others, States parties should replace COVID-19-related measures that prohibit activities relevant to the enjoyment of rights under the Covenant with less restrictive measures that allow such activities to take place, while subjecting them to necessary public health requirements such as physical distancing”.²⁰

Tertio, it is stipulated that the measures taken may not be inconsistent with other international obligations of the state, encompassing both conventional and customary law. It has been noted that this condition has received little attention from the judges of the European Court of Human Rights so far.²¹

As seen above, the American convention is the only one that contains a *temporal* provision demanding the state to provide the period of time during which a derogation is set in advance. The other two documents contain a

¹⁶ *Lawless v. Ireland* (no. 3), 1961, § 28.

¹⁷ A. Greene, 11.

¹⁸ *Ireland v. the United Kingdom*, 1978, § 207.

¹⁹ A. Le Bret, „COVID-19 pandemic and derogation to human rights“, *Journal of Law and Biosciences*, 2020, 7.

²⁰ As cited in: *Ibid.* fn. 55.

²¹ T. Marinello, „Prolonged emergency and derogation of human rights: Why the European Court should raise its immunity system“, *German Law Journal*, 20-1/2019, 50.

procedural obligation to inform the relevant body of the measures taken and the time when the measures ceased to operate. Emmons notices well that none of the treaties set the timeframe in which the organization should be informed when the derogation measures are being invoked.²²

Even though we agree with Greene who argues that „Article 15 ECHR does not create a Schmittian state of exception“ (zone of lawlessness – op. a.), but „instead constitutes a different regime of legality“²³, there is still a question of possible abuses of the human rights protection system. The same could be said for the derogation clauses in the other two human rights instruments. Therefore, the issue at hand does not tackle the structure nor the necessity of the derogation clauses as such, but rather the measures taken by the states twisted into the form of the previously mentioned „different regime of legality“.

4. WHAT HAVE STATES ACTUALLY DONE? THE EXERCISE OF EMERGENCY POWERS IN THE PRACTICE OF STATES

Many authors argue that besides the coronavirus pandemic, the world is also facing a „constitutional pandemic“, which means a „regression of governance to authoritarianism, triggered by the invocation of public health emergency powers“.²⁴ Several states worldwide, trying to reconcile the conflicting interests between safeguarding public health and protection of human rights, have stepped into the grey zone of intervention and exaggerated limitations to rights and freedoms. The scope of this paper has been limited to a number of states, whose measures, taken at the time of the pandemic, have triggered a multitude of judicial and social challenges. In the words of the abovementioned authors, „these range from semi-authoritarian jurisdictions such as Cambodia and Hong Kong, Special Administrative Region of the People's Republic of China, to established liberal democracies such as the United Kingdom and France, and illustrate that the multivariate inclination to authoritarian governmental and administrative overreach is not only found in more authoritarian regimes but also liberal democracies.”²⁵ In simple terms, no government or political regime in the world is immune to exercising power over its citizens when the circumstances allow it.

In this chapter, we will provide a short overview of the activities taken and measures imposed by states that could serve as *exemplum* and cannot

²² C. V. Emmons, „International Human Rights Law and COVID-19 States of Emergency”, *VerfBlog*, 2020/4/25, <https://verfassungsblog.de/international-human-rights-law-and-covid-19-states-of-emergency/>, 25 December 2021.

²³ A. Greene, 4.

²⁴ See S. Thomson, E. C. Ip, „COVID-19 emergency measures and the impeding authoritarian pandemic”, *Journal of Law and Biosciences*, 7:1/2020, 5.

²⁵ *Ibid.*

be overlooked. Arresting people for violating lockdown measures, violence used by the police or security forces, and restrictions on individual movement are only some of the examples that could be seen as troubling trends. Unfortunately, the world has also witnessed drastic measures that could hardly be brought under the permissible limitations of human rights for the purpose of safeguarding public health. One of those happened in Nigeria where, according to the author, eighteen people were killed by security forces during the lockdown before May 2020, „demonstrating the disproportionate use of force to implement COVID-19 response measures“.²⁶

4.1. Derogations imposed by European states

Some state parties to the European Convention have already in the first months of the pandemic informed the Secretary General of the Council of Europe about their intent to derogate from their conventional obligations.²⁷ As being said, the derogations as such are not an issue, but the appropriateness of measures taken as a result of the right of the state to derogate from its conventional obligations.

It is worth noting that not all of the European states called for the extraordinary measures in the same manner. There were countries such as Hungary for example, that did not derogate from the ICCPR or the ECHR, and still were reported as being abusive towards emergency powers. The enactment of the Act on the Containment of Coronavirus was being described as one of the most draconian examples of the exercising of emergency powers in Europe.²⁸ „In the public discourse, it was called the ‘Enabling Act’ because the parliament was in session, but the Act enabled the government to issue decrees independently of the parliament.“²⁹ Proclamation of an indefinite and uncontrolled state of emergency, followed by uncontrolled governmental actions, has caused high concerns on the international stage and at this moment serves as one of the examples of the abuse of the public emergency caused by the pandemic for political purposes. The fact that every form of direct participation of citizens in the exercise of state power and making political decisions was also suspended by the Act³⁰ proves the point.

²⁶ T-D. Nguyen, T-T. Thi Tran, „The Age of Extreme: The COVID-19 and Human Rights Crises“, *Journal of Southeast Asia Human Rights*, 6-1/2022, 77.

²⁷ Latvia, Armenia, the Republic of Moldova, Estonia, Georgia, and Albania have done so already in March 2020. See S. Molloy, „Covid-19 and Derogations Before the European Court of Human Rights“, *VerfBlog* 2020/4/10, <https://verfassungsblog.de/covid-19-and-derogations-before-the-european-court-of-human-rights/>, 25 December 2021.

²⁸ S. Thomson, E.C. Ip, 22.

²⁹ Kovács, Kriszta: „Hungary and the Pandemic: A Pretext for Expanding Power“, *Verf-Blog*, 2021/3/11, <https://verfassungsblog.de/hungary-and-the-pandemic-a-pretext-for-expanding-power/>, 30 December 2021.

³⁰ Section 6 (2) and (3) of the Act.

Germany was an example of a state where „neither the Federal Government nor the Länder has made use of the constitutional rules of the emergency constitution to contain the pandemic, and no declaration of a state of emergency was made.“³¹ This was, of course, the consequence of the constitutional provisions regarding emergencies consisted in the Basic Law. Since there was no legal possibility of establishing emergency provisions in the current situation, the taken measures were based on the Infection Protection Act (*Infektionsschutzgesetz*), „the purpose of which is to prevent communicable diseases in humans, detect infections at an early stage, and prevent their further spread“.³² However, from the very beginning of the pandemic, there were significant concerns related to the limitation of freedom of faith, freedom of movement, and assembly, all the way to occupational freedoms. The Court confirmed, in several cases, „the need to avoid the blanket suspension of fundamental rights while granting a wide latitude to executive action to prevent the spread of the coronavirus“.³³

Among states that have made valid notification of the derogation from some of the human rights treaty obligations, but still faced criticism was Romania, which imposed high penalties for the breach of the measures relating to the ban of movement or the assembly. While being a low-income country, Romania imposed fees ten times higher than the average salary in the country, which has been assessed as disproportionate to the goal that was supposed to be achieved with the measures.³⁴ Serbia, among others, could serve as an example of a state which imposed drastic restrictions on freedom of movement, consisting of the total ban of movement for some part of the population, except for a few hours a week. This measure was questioned as being unproportionate and unnecessary. The fact that it affected only one part of the population, based on their age, made the measure even more problematic. Interestingly, it is noted that „the Constitutional Court remained in a coma throughout the state of exception. Although it received initiatives for review of the constitutionality of the state of exception, its declaration, and ensuing measures, it did not even meet once for the whole period.“³⁵

³¹ A. Jr Golia, L. Hering, C. Moser, T. Sparks, 15.

³² § 1 para. 1 IfSG, as cited in: *Ibid*, 16.

³³ H. Hestermeyer, „Coronavirus Lockdown-Measures before the German Constitutional Court“, <https://constitutionnet.org/news/coronavirus-lockdown-measures-german-constitutional-court>, 30 October 2021.

³⁴ T-D. Nguyen, T-T. Thi Tran, 77.

³⁵ T. Marinković, „Fight Against Covid-19 in Serbia: Saving the Nation or Securing the Re-Election?“, *VerfBlog*, 2020/5/18, <https://verfassungsblog.de/fight-against-covid-19-in-serbia-saving-the-nation-or-securing-the-re-election/>, 2 January 2022.

4.2. One aspect of the health emergency in Latin America

While Europe was struggling with the limitations of freedoms of movement, assembly, and others, in other parts of the world some other difficulties were reported, with special emphasis on the right to health. For instance, many concerns were raised before the American court of human rights, related to the protection of the indigenous communities, as an especially vulnerable group within the American community. Issues raised in the frame of the global pandemic were different: Mexico was confronted with the lack of information on the indigenous language, while Peru faced the lack of regulatory mechanisms created specifically for the indigenous groups.³⁶ It has been noted that the Inter-American Court of Human Rights adopted a „sensitive approach“ and provided a guideline for the health system in order to be inclusive and open to everyone in need.³⁷

5. CONCLUSION

The emergence of the global pandemic caused by the spread of the coronavirus has brought us into a new reality. In the globalized world, in which freedom of movement achieved the highest stage, the individual faced complete lockdown overnight. Many other rights and freedoms that were deeply rooted in the European heritage were drastically limited. All of that opened a door not only for political, but also academic disputes and debates. One part of academia has been exclusively *pro* derogation of human rights in the current situation, understanding it as a new necessity, while others are opposed to it demanding the continuance of the „normal“ regimes, at least when it comes to international human rights law. The author concludes that the public interest and public health might and should be preserved together with the core values of the international community of the 21st century.

With regard to the behavior of states in times of the pandemic, the author suggests that there has been a change of the paradigm so that individual human rights protection does not stand equal with the need of a wider community or a state as such. Before 2020 it was safe to conclude that there was a change of paradigm from state-centric to individually-oriented international public order. From 2020 however, we are witnessing the international community of states caring more about their political interests than the individual human rights of their citizens and people generally. Therefore, it is safe to conclude that the postmodernist ideas of the unquestionable subjectivity of individuals faced the wall of state-centrism.

³⁶ A. Kohte, „Vulnerability in times of Corona – Guidelines from the Inter-American Court of Human Rights on the Right to Health“, *Völkerrechtsblog*, 29 October 2021.

³⁷ *Ibid.*

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Сажетак

Изненадно избијање глобалне пандемије изазване ширењем новог корона вируса суочило је међународну заједницу са многим изазовима. Актуелна пандемија је покренула здравствену, економску и социјалну кризу, која је велики број држава гурнула у сиву зону када је у питању заштита људских права. Десетине држава потписница три главна уговора о људским правима, Међународног пакта о грађанским и политичким правима, Европске конвенције о људским правима и Америчке конвенције о људским правима, активирале су своја ванредна овлашћења и суспендовале једно или више људских права заштићених наведеним уговорима. Проглашење ванредног стања, праћено обавештавањем надлежних органа УН, односно регионалних организација, иако потпуно легално, отворило је врата за могуће злоупотребе тренутне ситуације у политичке сврхе. Државе су затвориле своје границе, забраниле религију, кретање и друге слободе и прогласиле нове законе, све у циљу борбе против глобалне пријетње која долази од невидљивог непријатеља.

Овај рад има за циљ да анализира одговор држава на здравствену кризу узроковану КОВИДОМ-19, у контексту одступања од њихове обавезе да обезбиједи права и слободе наведене у споразумима о људским правима. Избијањем глобалне пандемије, међународна заједница је преко ноћи промијенила своје лице. Анализирајући понашање држава у вријеме пандемије, аутор сугерише да је дошло до промијене парадигме те да индивидуална заштита људских права није једнака потребама шире заједнице или државе као такве. Стога аутор закључује да су се постмодернистичке идеје о неупитном субјективитету појединаца суочиле са зидом државоцентризма.

Кључне ријечи: *Људска права; Ванредна овлашћења; Дерогација; МПГПП; ЕКЉП; АКЉП.*