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Universality and inviolability of human rights in the age of pandemics

Abstract: The time of the pandemic involves many organisational and legal difficulties, which require greater watchfulness and responsibility of public authorities and citizens. People and institutions can take advantage of this difficult situation for their own benefits, which is harmful for others. A sense of danger accompanies all of us, and the introduced restrictions may contribute to gradual limitation of the rights and freedoms regulated by national and international law. As a rule, the particular risk concerns groups excluded from a social and public life. Their position is always a kind of test of human sensitivity and the effectiveness of the law. The analysis and description of the situation, in the light of selected documents of international law, aims at an initial assessment of the current and future social and legal effects of the restrictions. The result of this attempt may be worrying and it suggests the need for greater monitoring of the rapidly changing situation.

Keywords: pandemic, human rights, derogation of rights, social effects, legal effects

1. Introduction

The issue of dangerous infectious diseases can be called a recurring problem. Examples are Ebola virus diseases (Binek, 2014, p. 263-284). The risk of infection resulting from the occurrence of a new virus "reminded" of the universality and indivisibility of human rights. While we multiply our efforts to protect the right to health care, we should not overlook or limit the right to study or work, or the obligation to help people who cannot function without it.

On 11 March, 2020, The World Health Organization (WHO) has reported that the new coronavirus has reached the level of a global pandemic. In response, many countries have introduced preventive measures, mostly in the form of quarantines, closed schools and workplaces and imposed travel restrictions – all of it in order to limit the spread of the virus. "We must protect ourselves," "we must resist," "we need cooperation," "we need support and prevention measures," are phrases that we have heard from world leaders. In this period of uncertainty and growing sense of danger, these words were supposed to build (and they successfully did it) solidarity among citizens.

However, the task of dealing with a public health crisis – considering its impact on the economy and the people in the worst situation – is not easy. This situation and the need to take (sometimes quite drastic) remedial actions by the state, can increase social inequalities and violate human rights.

The situation is alarming in places particularly exposed to the risk of infection, i.e. schools, isolation centers or nursing homes. It is not about an indication of threatened rights and freedoms, but an analysis assessing the real impact of the introduced regimes on the fundamental rights of individuals, mainly the freedom of movement, the right to privacy, non-discrimination and personal freedom.

The subjects of considerations are the actions initiated by the governments of the countries, which are intended to protect their citizens as effectively as possible from the debilitating disease. The aim is to try to assess the social and legal effects of the restrictions imposed on individual and public life. Therefore, it would be good to become acquainted with methods which are used by public authorities to keep balance between the need to respect fundamental rights and their obligation to protect public health, guaranteed by international law and internal laws (including the basic law), also in situations where provisions have legal gaps or are contradictory. This balance must take into account among others the principle of temporality of being in force and proportionality of the solutions adopted, which must above all be rational. It is therefore worth asking whether the used solutions are based on those principles which, despite the extraordinary situation, allow the state to be still called the state of law.

A broader comparisons of the condition in other countries give a better view of this difficult situation across the country and places of local importance. These are mostly schools, prisons or refugee camps or for people awaiting repatriation. The outbreak of the pandemic is accompanied also by the cases of discriminatory treatment of minorities, invasion of privacy, and the urgent need to inform and respond adequately to *fake news* destabilising or discrediting people and institutions.

There is still too little discussion on these issues, and that is (probably) due to the fact, that at the time of threat – and partly there is some point in it – caused by force majeure and the danger that threatens the whole community, the narrowing of rights by the governments entrusted with the responsibility of looking after the public safety is considered not only justified, but also necessary

– simply justified. In such situations – i.e. in the face of real risk or higher necessity – we believe that in order to ensure maximum security and effective functioning, the public authorities can afford to make greater use of the mandate entrusted to them. The challenges of our times (which, in the face of the threat, are far from declassifying analysed rights in favour of the more urgent ones at present) show the need for such governance, which reconciles the plurality of institutions with the diversity of needs and the plurality of requirements without forgetting about the individual. However, in such a unique situation, there is a sense of confusion in actions and discussions that show the risk of over-narrowing rights and freedoms. Somewhere deep down, there is always the awareness that it is a bit dangerous; that imposing excessive (though provided by law) restrictions can shape a belief, that the establishment of special rigour is indeed permissible and even desirable, even though it would apply only within a certain time regime.

The discussion about this issue and monitoring of the situation is particularly important in order to protect at least a certain minimum of living of the marginalised and excluded people, often in conditions that differ from those in the immediate vicinity. It concerns particularly homeless people, illegal immigrants, victims of domestic violence, people serving a sentence (Ficocelli).

2. Coronavirus: implementing the right to health is the responsibility of the states

States are obliged to prevent, treat and control epidemic diseases (including Covid-19). They also aim at guaranteeing everyone the right to live in the best possible living conditions and enjoy mental

and physical health¹. After the announcement of the pandemic, the WHO published temporary recommendations to prevent further transmission of the new virus and to soothe the impact of the epidemic in the affected countries.

Anti-pandemic measures introduced by states are supposed to fulfil several criteria, namely:

- a) must be based on scientific evidence;
- b) must be the least invasive and reasonably available option;
- c) must respect human rights and fundamental freedoms as much as possible.

In other words, the point is that a lawful and ethically acceptable response to the developing Covid-19 pandemic requires to strike a delicate balance between taken (usually restrictive) measures to respect, protection and satisfying the right to health, as well as minimising interference with other human rights.

3. Human rights and coronavirus: limitations and derogations

The current pandemic – like any other – requires sometimes drastic measures to save lives, which change the lives of individuals and entire communities, but nevertheless it is important to take into consideration the legal criteria for restrictions or derogations from human rights in order to avoid arbitrary, excessive or too far-reaching actions.

For certain purposes, including the protection of Public Health, international law provides for the possibility of restricting

¹ Article 12 of the International Covenant on Economic, Social and Cultural Rights.

certain human rights. These so-called “ordinary restrictions” must be defined by law, strictly necessary and proportional to set reasonable objective (Jasudowicz, 1987, p. 31). Derogations which temporarily suspend the exercising of certain rights may be justified only in exceptional situations where they endanger the life of the nation. Derogations must be absolutely necessary in relation to the needs determined by the situation and states must comply with the notification procedures indicated by the Treaty.

In response to coronavirus, various parts of the world have experienced the effects of drastic restrictions, and in some countries – i.a. in Armenia, Estonia, Georgia, Latvia, Moldavia and Romania – some human rights were not respected at all – such as personal freedom², freedom of movement³, the right to assembly⁴, the right to education⁵ and the right to work⁶. Seeking answers to questions about the proportionality of these restrictions and the validity of the introduced derogations would require a separate legal analysis on a case-by-case basis. However, generally it has become clear that we must be better prepared for crisis situations, providing alternative solutions that nevertheless would guarantee exercising all human rights as much as possible. Moreover, it is important to remember that human rights are interdependent.

² Extremely voluminous category is regulated in the Article 5 of the European Convention on Human Rights ; Articles 9-10 of the International Covenant on Civil and Political Rights

³ Article 12 of the International Covenant on Civil and Political Rights; Article 2 Protocol No. 4 of the ECHR.

⁴ Article 22 of the International Covenant on Civil and Political Rights; Article 11 ECHR.

⁵ Normalised in the Article 12 of the International Covenant on Economic, Social and Cultural Rights, in the Articles 28-29 of the Convention on the Rights of the Child, in the Article 2 of the Protocol No. 1 to the European Convention.

⁶ Articles 6-7 of the International Covenant on Economic, Social and Cultural Rights; the Articles 1-4 of the European Social Charter.

It is very beneficial, from the point of view of the interests of the individual and of public health, to continue education (to the highest possible degree), to maintain continuity of work without abandoning pre-established social conditions and to help those in need of special treatment.

4. The right to learn and “digital discrimination”

Education is fundamental and it is a key to the implementation of other human rights. School closures in various countries around the world seriously impairs the children's right to education, as well as the right to food, health and safety due to the many functions of school facilities. Schools often provide free meals for children, promote and implement automatisms of personal hygiene, health care and comprehensive physical and intellectual development. If the habit of going to school is broken, young people's mental health can suffer from anxiety about the future combined with a lack of incentives and socialisation. According to similar experiences of school closures as a reaction to the occurrence of the Ebola virus, UNICEF stated that the longer children do not attend school, the less likely they are to return there later. Ensuring continuity of schools' functioning or reopening them after they were closed, requires a great deal of effort and considerable resources, but if it is done properly, it can help to promote public health. Children staying at home longer than normally are more vulnerable to abuse and violence; they are constantly in cramped spaces with their families. Furthermore, in such terms their parents may also be subjected to extreme stress due to inactivity, greater uncertainty than usual, potential bereavement and depression due to the loss of a close person or unemployment.

Several IT companies faced these problems, offering some solutions to parents and teachers, for example the possibility of alternative learning at home. These measures are significant. In addition to the role they play in the implementation of educational processes, the very existence of them must be appreciated. However, the truth cannot be overlooked, that they create scenarios in which children from low-income families can be excluded. There is a division resulting from factual access to digital technologies between those who have the ability to use online technology and those who do not have such possibilities. It is a source of indirect discrimination and it is a problem that needs to be urgently solved (at least at places where it is potentially possible considering infrastructure and state resources).

5. Between human rights and pandemics: the right to work safely

Job insecurity and the deprivation or reduction of social protection escalate the devastating impact of coronavirus – they diminish the importance of human rights. Some companies have been able to adapt to remote work, but others have been forced to cut hours of work, suspend activities or even dismissals of employees. According to the International Labour Organization, many millions of people may become unemployed, but only one in five can count on unemployment benefits.

This emphasizes the fragility of the market economy and the problems which concern self-employed persons, those who have so-called junk contracts and those who cannot use sickness benefits. Apart from the unfavourable effect on health and well-being, the lack of economic security also makes it difficult to be quarantined and to remain in social isolation.

Governments have a duty to minimise the risk of accidents and diseases at the place of work, but in the current pandemic some of them do not provide employees (e.g. health care workers) adequate protection, equipment and means to control infection. Nevertheless, in accordance with international health provisions, effective response capacities at national and global level must be built and supported to prevent, identify and respond to epidemics.

States also need to make special arrangements to guarantee a fair access to health services for the most vulnerable social groups, as socioeconomic inequalities are most noticeable in crisis situations such as the current one. In the face of a pandemic, people in jails, prisons and educational care facilities are particularly vulnerable because as a rule they live in high density, which greatly facilitates the rapid spread of the virus. A similar problem applies to refugee camps, where whole families are concentrated on small areas, live in overcrowded tents, in unsanitary conditions and with limited access to health facilities.

The United Nations has launched a global humanitarian response plan for Covid-19, calling on governments to support – both financially and politically – global interventions in order to limit the spread of the new disease. As UN Secretary-General António Guterres concludes, “global solidarity is not only a moral imperative, but it is in everyone’s interest”⁷. Lack of actions to protect the most vulnerable groups from Covid-19 will allow the virus to survive, mutate and continue to circulate around the world.

⁷ The Secretary-General of the United Nations on pandemic: time for rapid transition to sustainable development <https://www.pch24.pl/szef-onz-w-czasie-pandemii-pora-na-szybkie-przejscie-na-zrownowazony-rozwoj,74783,i.html> (4.08.2020).

6. Coronavirus: an alert incentive to universality and integrity of human rights

The Covid-19 pandemic is a warning signal for the globalised society and economy in which we live. The danger is that nation states generally take short-term measures limited to their own territory to protect their interests, concentrating on the economic crisis and public health.

Meanwhile, a holistic approach to needs, human rights is more required to protect the most vulnerable people and build global, multi-faceted resilience in our interdependent world. While trying to protect the right to health, we cannot overlook education, the right to work and the protection of the most vulnerable people.

The coronavirus pandemic has significantly worsened the situation of people fleeing from the dangers of war, internal conflicts and persecution. In this new situation for everybody, when countries around the world make efforts to protect their citizens and their own economy from the negative effects of disease, the basic norms relating to the many refugee issues are still not well established.

The main principles for the protection of refugees⁸ in the current situation have been put to a serious test. Despite the risks, people forced to flee from the ongoing conflicts and persecution in their country, should not be denied the opportunity to seek refuge under the pretext of fighting coronavirus⁹. The

⁸ Convention Relating to the Status of Refugees, Geneva, 28 July 1951 (Journal of Laws of 20 December 1991).

⁹ Coronavirus: a rischio i diritti umani e la protezione dei rifugiati nel lungo periodo, avverte UNHCR, <https://www.unhcr.it/news/coronavirus-a-rischio-i-diritti-umani-e-la-protezione-dei-rifugiati-nel-lungo-periodo-avverte-unhcr.html> (8.08.2020).

responsibilities of caring for public health and helping refugees are not mutually exclusive. This should not be a dilemma, even if certain preferences need to be taken into consideration. The international agreements also require support for such persons in situations where national governments impose restrictions to protect public health on their territory.

Today, the vast majority of countries have closed their boundaries completely or partially expecting the spread of the virus to be limited. Some of them make no exceptions even for refugees. Although wars and conflicts persist in many regions of the world, the imposed restrictions have actually frozen the right to asylum. People seeking refuge are blocked at borders and/or escorted to places as dangerous as those from which they came. It usually happens with reference to people coming from countries with a politically unreliable situation with limited sanitation capacities and tight security at their borders. Obtaining permission to use quarantine and provide basic medical care even to those who actually need help is usually impossible organisationally and logistically, and sometimes politically unhelpful.

At national level, implemented measures to counteract the spread of the disease also result in significant/debatable effects. There are more frequent incidents of illegal immigrants detentions, an increased risk of violence and sexual abuse, difficulties and disparities in the use of medical and social assistance, and a drastic decline in wealth, loss of resources and sources of income that marginalise many people in social life.

With reference to refugees and migrants, the imposition of quarantine and medical testing at the border cannot be a measure contrary to international human rights. These concerns are reasonable because, for example, the need to be quarantined can become a legitimate way of restricting

freedom of movement, as long as other human rights are respected and not affected. Conversely, motives arising from concerns of public health do not justify the systematic and arbitrary use of detention as a tool for controlling migrants. Otherwise, we risk that awareness and practice of respecting the principles, established laws and policies that have been developed to protect human rights – very important for people who desperately look for safety – will suffer so much that it will take many years to restore their importance¹⁰.

7. Pandemic: a political opportunity

Prohibition of assemblies, restrictions on movement, social distance, quarantine obligation. These are certainly extraordinary measures – a temporary suspension of certain freedoms and fundamental rights aims at limiting the spread of a dangerous virus and at the same time ensuring respect for an equally fundamental right, which is the right to health care. Therefore, not incidentally, the majority of citizens from the most at-risk countries have complied with the imposed restrictions without undue discussion. But what can happen (or what happened) in countries where the rules of democracy are still quite unstable and the ways of governance are oppressive or authoritarian? Even in our European democracies, the restrictions imposed can be seen as unclear and undermining human rights. International monitoring of cases of derogation from respecting fundamental human rights therefore appears to be justified. It is mainly about situations, despite their uniqueness, which must be regulated by

¹⁰ <https://www.unhcr.it/news/coronavirus-a-rischio-i-diritti-umani-e-la-protezione-dei-rifugiati-nel-lungo-periodo-avverte-unhcr.html> (3.08.2020).

international law which provides for a series of obligations in the sphere of state activities due to the declaration of a pandemic. Among others there is an obligation to inform the United Nations about introducing restrictions on fundamental rights, usually those relating to freedom of movement, family life or assembly. The detailed information on the types and the scope of the derogation of those rights must be provided with appropriate justification, indicating the date of departure. However, there should be the risk noticed, that the Covid-19 crisis could be used by states to strengthen their power, limit controlling abilities by social factors, or to consolidate their authoritarianism (Toro).

The governments of some states have used the pandemic situation to suspend some rights and consolidate their own position. The coronavirus crisis forces states – including the democratic ones – to introduce the stricter sanitation regimes, which allows to use emergency measures to slow the spread of pathogen. As a result, regulations restricting the movement of people were quickly introduced. It allows the authorities to act in order to limit the scope of personal freedom of citizens and it is justified with the care of individual and public health. In most cases, these provisions were introduced under time pressure, without consultation with the public, in the shadow of universal consent “forced” by the pandemic threat. Some Western countries did not make use of such possibility in the name of respect for freedom and democracy. Discussions about the validity of such a move, combined with the social and economic costs, are likely to fail. Serious abuses have been committed in many other countries. In India, for example, the right to privacy infringement on a large scale has been criticised because of such actions as marking the hands of people quarantined with colour and sealing the doors of homes to make them easier to control.

Restrictions on the freedoms of individuals and the ones “slowing down” previously initiated social changes were introduced in Tunisia, Algeria and Morocco. The concerns go to perpetuating that what was supposed to be only temporary and extraordinary.

8. Summary

The rapidly changing pandemic situation suggests to look at other rights and freedoms that may be violated. This applies not only to the protection of privacy and personal data, the use of which, the rules for sharing, the methods of collecting and processing, especially those affected by the disease, with the obligation to remain quarantined or to be treated, may face difficulties.

Therefore, the situation is extremely complicated, as it actually relates to all the levels of governance, from international and community to local government. These concerns are primarily applied for public health issues, but are closely connected with the prevention of the economic crisis and the social consequences. Economic difficulties will surely intensify already existing inequalities, marginalise those “on the fringe” of society, and increase mutual distrust and distance.

Therefore, is it reasonable to look for patterns of action to mitigate the effects of a pandemic? It certainly is worth seeking, even if it is not a simple task. We do not even know if it is manageable. Surely we are dealing with a global problem and a huge variety of systemic solutions – as we should believe – adapted in the best way for a particular national context. Certainly none of the methods that individual states implement is the one and the best. Their choice, to varying degrees, is motivated by political, social and economic reasons, and certainly it should be

expected to be modified in the near future. Consequently, it is unnecessary to compete which country have responded better to the threat. After all, not all countries have closed schools, parks, workplaces, restricted the operation of offices, imposed restrictions on citizens. Not all states have introduced priorities in the provision of medical care with regard to the small number of hospital beds, etc. It resulted certainly not only due to the statistics about the number of people infected, sick or dead. These were decisions that took into account the domestic situation, without ignoring the European and global condition. However, surely a reasonable openness to other solutions allows us to consider and apply methods which occur effective elsewhere.

References:

- Convention Relating to the Status of Refugees (Dz. U. z dnia 20 grudnia 1991).
- Convention on the Rights of the Child (Dz. U. z 1991, Nr 120, poz. 526).
- International Covenant on Economic, Social and Cultural Rights (Dz.U. z 1977, Nr 38, poz. 169).
- International Covenant on Civil and Political Rights (Dz. U. z 1977, Nr 38, poz. 167).
- Protocol No. 4 to the European Convention on Human Rights (Dz.U. z 1995.36.175/2).
- Protocol No. 1 to the European Convention on Human Rights (Dz.U. z 1995.36.175/2).
- BINEK T., *Ebola virus – the terrorist's ideal weapon*, Journal of Modern Science, Vol. 4/23, 2014, p. 263-284.
- JASUDOWICZ T., Administration towards Human Rights, Toruń: TNOiK, 1997. ISBN ISBN 85-86850-47-7.
- TORO A., *Coronavirus e diritti: chi controlla l'eccezione*, <http://www.vita.it/it/article/2020/04/11/coronavirus-e-diritti-chi-controlla-eccezione/154990>. (access 10.08.2020).

Coronavirus: a rischio i diritti umani e la protezione dei rifugiati nel lungo periodo, avverte UNHCR, <https://www.unhcr.it/news/coronavirus-a-rischio-i-diritti-umani-e-la-protezione-dei-rifugiati-nel-lungo-periodo-avverte-unhcr.html>. (access 10.08.2020).

FICOCELLI S., *Coronavirus e diritti fondamentali: una mappa europea*, https://www.repubblica.it/dossier/esteri/fondi-strutturali-europei-progetti-italia/2020/05/28/news/fundamental_rights_agency_rapporto_su_diritti_umani_e_covid-257835409/. (access 10.08.2020).

The Secretary-General of the United Nations on pandemic: time for rapid transition to sustainable development <https://www.pch24.pl/szef-onz-w-czasie-pandemii--pora-na-szybkie-przejscie-na-zrownowazony-rozwoj,74783,i.html>.

<https://www.unhcr.it/news/coronavirus-a-rischio-i-diritti-umani-e-la-protezione-dei-rifugiati-nel-lungo-periodo-avverte-unhcr.html>. (access 10.08.2020).