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Restricciones a los derechos humanos durante la pandemia COVID-19

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ABSTRACT:

In 2020, the world is faced with COVID-19 pandemic as one of the worst global catastrophes of the 21st century. The governments of countries around the world have introduced various emergency rules on the territory of their states as a measure to contain the pandemic. Are such restrictions permissible and how justified were they? Did the restrictions imposed comply with the norms enshrined in international human rights standards? Have states managed to strike a balance between "legality" and "necessity"? We will try to answer all these questions in this paper.

KEYWORDS: Coronavirus, COVID-19, human rights, International law, legality..

RESUMEN:

En 2020, el mundo se enfrenta a la pandemia COVID-19 como una de las peores catástrofes mundiales del siglo XXI. Los gobiernos de países de todo el mundo han introducido varias reglas de emergencia en el territorio de sus estados como medida para contener la pandemia. ¿Son permisibles tales restricciones y cuán justificadas están? ¿Las restricciones impuestas cumplieron con las normas consagradas en los estándares internacionales de derechos humanos? ¿Han sido exitosos los estados en lograr un equilibrio entre "legalidad" y "necesidad"? Intentaremos responder a todas estas preguntas en este documento.

PALABRAS CLAVE: Coronavirus, COVID-19, derecho internacional, derechos humanos, legalidad..

INTRODUCTION

COVID-19 has been the main topic of the entire world's news for several months now and the cause of many economic, social and cultural problems. As a measure to contain the COVID-19 pandemic, governments around the world have imposed restrictions on human rights and freedoms declaring emergency rules (Amon: 2020, Freckelton: 2020). The consequence of these actions was the restriction of civil, political, economic, social and cultural human rights and freedoms. The restrictions imposed have caused an increase in poverty (Altman: 2020, pp.23-33), a drop in employment (Monitor: 2020), and a tightening of authoritarian regimes (Liljeblad: 2020). In this regard, the issue of reasonable and necessary limitation of human rights and freedoms comes to the fore (Yamin& Habibi: 2020); their features are indicated by international law and are directly implemented in the legislation of states (Lebret: 2020).

The purpose of this work is to determine how legitimate the restrictions imposed by states on human rights and freedoms are from the point of view of international law. The object of research is the emergency rules introduced by the governments of European states on their territory. The subject of the research is restrictions on human rights and freedoms (Spadaro: 2020, pp.1-9).

METHODOLOGY

Both general scientific (method of deduction, analysis, and synthesis) and specific scientific methods (comparative legal, formal legal) were used in the present study.

RESULTS

In the context of the global COVID-19 pandemic, and from an international legal point of view, such human rights treaties as the International Covenant on Civil and Political Rights of 1966, the International Covenant on Economic, Social and Cultural Rights of 1966, and the European Convention on Human rights law from 1950 are the most interesting. The reason is that each of them contains a clause according to which states can take measures to derogate from their human rights obligations, which, in fact, allows the possibility of their lawful limitation. In this regard, the question arises: can all rights be limited? In accordance with the texts of the clauses of Article 4 (2) of the ICCPR and Article 15 (2) of the ECHR the following rights shall not be subject to limitation:

- Right to life (Article 6 of the ICCPR, Article 2 of the ECHR); prohibition of torture, inhuman or degrading treatment or punishment (article 7 of the ICCPR, article 3 of the ECHR); the prohibition of slavery and servitude (Article 8 of the ICCPR, Article 4 of the ECHR); freedom from retroactive effect of the law in criminal offenses (Article 18 of the ICCPR, Article 7 of the ECHR);
- The ICCPR also recognizes the unrestricted right to recognition of legal personality (Article 16); the right to freedom of thought, conscience and religion (article 18); prohibition of imprisonment for failure to fulfill a contractual obligation (article 11);
- The additional protocols of the ECHR also contain a number of rights, the restriction of which is inadmissible: Protocol No. 6 (Article 1, Abolition of the death penalty, and Article 2, Application of the death penalty in time of war), Protocol No. 7 (the non bis in idem principle contained in Article 4), Protocol No. 13 (complete abolition of the death penalty, Article 1)

Thus, all other rights enshrined in these documents may be subject to restrictions. What, then, does the concept of “restriction of human rights and freedoms” mean? Grecova E.V. believes that this concept should be understood as:

Interference with human rights and freedoms permissible by international law and / or domestic law, which meets the requirements of legality, necessity, expediency and proportionality to the aim pursued. The purpose of restricting human rights and freedoms is to protect the basic generally recognized values in society, which include life, freedom, dignity, health and morality of the population, as well as maintaining state security, ensuring public order and other values (Grecova: 2009, pp.7-8).

We believe we should agree with the author that restrictions on human rights must comply with the requirements of legality, necessity, expediency and proportionality. These requirements may well act as fundamental principles when assessing certain restrictive measures.

To get a more complete picture of permissible restrictions on human rights, let us turn to the comments on Article 4 of the ICCPR and Article 15 of the ECHR.

In accordance with General Comment No. 29 (ICCPR: 1966) of the Human Rights Committee, States have the right to derogate from their human rights obligations if measures derogating from the provisions of the Covenant are of an exceptional and temporary nature. However, before any State makes a reference to Article 4, two fundamental conditions must be met:

1. The current situation should be tantamount to a state of emergency in which the life of the nation is in danger;
2. The state party must officially declare the state of emergency.

Only if these two conditions are met, derogations from human rights obligations can be considered legitimate, not to mention that the measures introduced must be necessary and proportionate. How does the committee determine proportionality? Proportionality is determined by the committee proceeding from the "severity of the situation", according to which certain restrictive measures should be taken during an emergency. The more "acute" the situation, the more serious restrictive measures can be introduced. In addition, in accordance with paragraph 3 of article 4, States parties using the right of derogation under article 4 are obliged to immediately inform the UN Secretary General of the provisions from which it derogated and the reasons for such a decision.

In accordance with the Guidelines on Article 15 of the European Court of Human Rights (El Zeidy: 2003), a state must meet three conditions for establishing legitimate restrictions on human rights:

1. Measures to restrict human rights are taken during a war or other emergency situation that threatens the life of the nation;
2. Measures taken in response to a war or other emergency should not go beyond the strict necessity required by the urgency of the situation;
3. Measures should not contradict other obligations of the state under international law.

The necessity of the measures introduced by states is reviewed by courts when considering the case on the merits (Hudson: 2020). In determining whether a State has gone beyond strict necessity, the Court will assess factors such as the nature of the rights affected, the circumstances of the emergency, and its duration.

The third condition is also evaluated individually. For example, in the case *Brannigan and McBride v. the United Kingdom* (Cryslar: 1996, pp.91-121), the court found that in order to derogate from its obligations under Article 4 of the ICCPR, the United Kingdom was required to formally declare it. The absence of such a declaration meant that the United Kingdom's derogation was not in accordance with its obligations under international law (Dodds et al.: 2020).

As we can see, the conditions for establishing lawful restrictions on human rights and freedoms contained in the ECHR and in the ICCPR are generally similar. However, the European Convention on Human Rights does not contain such an important criterion in establishing restrictions as an indication of their temporary nature. In addition, paragraph 1 of Article 4 of the ICCPR provides an important indication that restrictive measures should not discriminate solely on the basis of race, colour, sex, language, religion, or social origin. Unfortunately, it should be noted that in connection with the spread of COVID-19, discrimination and stigmatization of patients was especially widespread in the countries of Central Asia and East Asia, in particular, in China. Finally, both documents do not contain specifics as to when exactly the state should notify the relevant authorities about the imposed restrictions. We believe that this may give rise to various manipulations of their obligations by states in the form of attempts to refer to the lack of a clear indication of this period in the relevant treaties (Amon & Wurth: 2020).

Now, having considered the general provisions on restrictions on human rights and freedoms, we will analyse the restrictive measures introduced on the territory of the Russian Federation (Åslund: 2020, pp.1-14).

In the period from March 5 to March 29, a "high alert" mode was introduced to prevent the spread of COVID-19 in all regions of the Russian Federation (which number is 85 in accordance with the Constitution as of today) in accordance with Federal Law dated December 21, 1994 N 68-FZ "On the protection of the population and territories from natural and man-made emergencies". De jure, the rule is

designed to prevent the emergence and development of emergencies, and to ensure the observance of "social distancing". De facto, this rule in many regions has gone far beyond the goals outlined by law.

On March 29, thanks to the efforts of Moscow Mayor Sergei Sobyenin, the "high alert regime" was transformed into a "self-isolation regime." In accordance with his decree (Nikolaeva&Rusanov: 2020): "Since March 30, residents of Moscow, regardless of age, should not leave their place of residence. They can leave the apartment to travel to work, seek emergency medical help, and go to the nearest store or pharmacy." In addition, the decree emphasizes that people over 65 must stay at their place of residence. That is, in fact, they were forbidden to go outside. On April 1, 2020, the self-isolation regime in the city of Moscow was further tightened in connection with the introduction of administrative fines for its violation (Orlova&Morris: 2020). Failure by citizens to comply with the requirements established by the acts of the city of Moscow aimed at introducing and ensuring a high alert regime, entailed the imposition of a fine of 4,000 roubles, and for repeated violations, citizens were threatened with a fine of 5,000 roubles. In the period from April 1 to June 8, Russian courts received 400 thousand cases under Part 1 of Article 20.6.1 from the Code of Administrative Offenses of the Russian Federation "Failure to comply with the rules of conduct in an emergency or the threat of its occurrence") and slightly more than 16 thousand cases under part 2 of Article 6.3 from the Administrative Code of the Russian Federation ("Violation of legislation in the field of ensuring sanitary and epidemiological welfare of the population"). The amount of fines issued for violating the "self-isolation regime" during the COVID-19 pandemic has almost reached 1 billion roubles. Was it necessary to issue so many fines for violation of the regime? Let us leave this question open and return to human rights (Wenham et al.: 2020, pp.846-848).

Speaking about the restrictions imposed and their consequences, the following human rights were subjected to the greatest restrictions:

- The right to freedom and security of person (Article 9 of the ICCPR, Article 5 of the ECHR, Article 23 of the Constitution of the Russian Federation);
- The right to free movement (Article 12 of the ICCPR, Article 27 of the Constitution of the Russian Federation);
- The right to liberty and security of person (Article 9 of the ICCPR, Article 5 of the ECHR);
- Prohibition of discrimination (Article 26 of the ICCPR, Article 14 of the ECHR)

As we can see, the list of limited rights is very substantial. Some categories of citizens were subjected to the restriction of several of the listed rights at once. Let us dwell on the analysis of some limited human rights.

DISCUSSION

First, we would like to note the direct discrimination against elderly people, that is, people over 65. Due to the restrictions described above, many older people have faced difficulties in meeting their basic social and economic needs, as well as internationally recognized rights and freedoms. Although today the restrictive measures have begun to be gradually lifted, the prohibition not to leave their place of residence for the elderly over 65 remains in force and these restrictions are in no way compensated by additional support for this category of persons. In this regard, according to the authors, such measures are excessive and discriminatory. The authors believe that the state should provide elderly people with additional rights and opportunities to access the health care system in the form of positive discrimination, due to their special vulnerable position. Perhaps they should have additional material support given them or provided them with free medicines, and also volunteer help to make sure they are safe and healthy. This would be fully consistent with the restriction of the rights of elderly people in accordance with Article 4 of the ICCPR. Unfortunately, despite targeted support to families with children, entrepreneurs and some other categories of citizens, the overwhelming

majority of elderly people in the Russian Federation did not receive any sufficient compensation due to the restrictions imposed.

Further, we would like to dwell on the right to freedom and personal security. In accordance with general comment No. 35 of the Human Rights Committee (ICCPR: 1966), Article 9 of the ICCPR “recognizes and protects both personal liberty and security of the person”. Further, the committee continues: “Personal freedom is understood as the freedom of a person from being subjected to physical isolation, and not general freedom of action.... Article 9 guarantees these rights to every person.” What are we actually seeing? From a legal and practical point of view, self-isolation which in its content should be voluntary, but in fact it is compulsory and everyone who does not comply with the specified regime will face an administrative fine or even criminal liability. According to the authors, the current state of affairs does not speak at all in favour of the legal rights and freedoms of citizens and is a serious shortcoming of the introduced regime.

States can restrict human rights and freedoms if an emergency situation has developed in the country that threatens the life and health of the population. To do this, the state must officially declare the introduction of a state of emergency, as well as take responsibility for protecting the population and territory from coronavirus infection. The restrictions imposed on human rights and freedoms should comply with the principles of legality, necessity, expediency and proportionality, be temporary and not contradict other international legal obligations of the state. During a state of emergency, the state should contribute to the minimization, elimination and compensation of damage to persons affected by the disease and should contribute to the full, as far as possible, the realization of their human rights and freedoms. In addition, the state is obliged to notify the UN Secretary General of the measures and derogations taken on human rights in accordance with paragraph 3 of article 4 of the International Covenant on Civil and Political Rights or the Secretary General of the Council of Europe in accordance with paragraph 3, article 15 of the European Convention on Human Rights, provided that these treaties have been ratified by the state.

CONCLUSION

As we can see from the example of the Russian Federation, the issue of proportionality and lawfulness in practice may not be so easily resolved. However, the world first encountered such a global problem and each state is trying to solve it, taking into account its personal historical experience, which is not always adequate to the situation.

To prevent further disproportionate restriction of human rights, States should coordinate within the World Health Organisation and begin to share best practices on imposing restrictions. In addition, the crisis that has arisen has clearly shown that today there is a need to adapt existing standards to new realities. Developing new universal and regional international human rights and health standards could address the fragmented approach to limiting them in the event of a pandemic and could prepare the world for new threats.

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