

Human rights and the pandemic crisis

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In 1948, sovereign representatives hailing from a variety of worldviews, including a variety of religious and cultural traditions, adopted the Universal Declaration of Human Rights "as a common standard of achievements for all peoples and all nations" (Preamble). **Human rights as a fundamental value** have engendered – to and continue to do so – a variety of legal norms (and not the other way around, which is a mistake often made by the "uninitiated"). "Human rights" as a value find their legal expression in a still-evolving tool kit of international and regional treaties, some of more general nature while others more narrowly thematic, in national constitutions and laws, as well as in the jurisprudence created by international, regional and national authorities, including courts.

If something is valuable, it can sometimes be a luxury (e.g. a diamond ring) and other times it can be an essential precondition for a dignified life. The second type of values is often taken for granted to such an extent as to become invisible to one who cannot do without them. As Schopenhauer says, only loss teaches us the value of things. We notice our rights no earlier than when they are jeopardised or we lose them – just like health, freedom, etc. And – metaphorically – like breathing. See how much effort the countless schools of yoga, meditation, mindfulness, etc. make to rivet our attention on breathing, even for a little while, and how hard it is. But every breath makes a difference for the one that chokes.

During the corona virus-related state of emergency, when several rights and freedoms were restricted, and the very liberal order with which they were intertwined was potentially threatened, many more people began to take notice of their rights and freedoms. It is unlikely that there has been a time in the last twenty years when rights have been more vigorously discussed – and by such a variety of people – in the public arena.

There is also an apparent historical phenomenon, which, however, much as it has long been a cultural framework of our organised social relations, remains invisible to us: we have taken our right to health for granted and expect the state to respect, guarantee and exercise this right by taking the measures it needs to take. This is precisely what is required by the human rights paradigm, in which the state is the main guarantor of these three types of obligations. There was no such expectation during the plague epidemic in Europe in the mid-14th century, for example.

Human rights are important for us Bulgarians also as the 'civilisation choice' we made back in 1989-1990 and enshrined in our – in outline – liberal-democratic constitution. The

liberal nature of this choice mostly hinges on the constitution's emphasis on human rights, as opposed to the so-called "people's democracy" seen across communist Eastern Europe until 1990, or today's Democratic People's Republic of Korea.

In connection with the feeling of something unprecedented underway triggered by the pandemic and the fact that "from now on the world will never be the same again", the question arises **whether the Universal Declaration of Human Rights should not be revisited**. Has the Declaration provided for ways to protect and enforce human rights in disaster situations, such as pandemics? I think that whether we "should" amend the Universal Declaration or not, is not asking the right question as the established tradition of change (apologies for the oxymoron) in international human rights law has already taken a different path. The amending and updating of rights is an ongoing process not based on rewriting the fundamental principles and norms, but by putting in place a sequence of follow-up, more or less innovative, specific instruments (conventions, charters, etc.), all of which derive their legitimacy from the Universal Declaration.

Moreover, the latter is long past being considered only a political document and has instead acquired the status of customary law, the domain of the so-called peremptory norms of the common law. This is an important caveat as it also gives grounds, based on the Universal Declaration, to hold to account countries, which are not parties to the international pacts adopted in 1976.

So there is no prospect of changing the general regulatory framework. Yet the interpretation of each of the human rights is constantly evolving, with new rights being laid out as derivatives of the previous generation of more general rights. The doctrine of the "living tree", which originated in Canada (*Edwards v Canada (AG)*, 1928) and is often cited by the European Court of Human Rights (ECHR), is almost universally accepted today. The doctrine upholds the fundamental legal instrument as organic and insists on interpreting it broadly and progressively, in line with changing times. Everywhere we look today in the field of human rights, we see long roads already paved. Domestic violence, as one example, would not have been recognised as a violation of Art. 3 of the European Convention on Human Rights (prohibiting "torture or inhuman or degrading treatment or punishment") in the ECHR jurisprudence in the 1960s whereas now it is.

The pandemic crisis has created **several threats to democracy and human rights**. I am personally reasonably concerned by the excessive efforts of governments to exercise

electronic surveillance of people, which upsets the tricky balance between, on the one hand, the use of modern technologies for the large scale collection and processing of personal data in the public interest and, on the other, the need to protect private life.

Another worrying trend is the centralisation of power and compromising the system of checks and balances. We have already witnessed this process in a more extreme version in Cambodia, Hungary, and the Philippines. In our country, this trend materialised as restricting the functioning of the National Assembly and the judiciary, which has jeopardised control over the executive.

Something else I also find worrying is the hazard that the authorities will take advantage of the restrictions on the right of assembly and curb more massive street protests in their attempts to drive forward policy decisions on issues, which are subject to serious public pushback. For example, the minister of health hastened to sign a contract for the construction of a new children's hospital in Sofia, a project that triggered strenuous public protests some time ago.

The state of emergency signed into law by the National Assembly gave political legitimacy to the **temporary restrictions on some of the fundamental human rights**, such as the right to personal liberty, privacy, and freedom of movement. (Legally justifying the restrictions was, indeed, unnecessary as long as only qualified rights were curtailed, i.e. the ones with limitations contained within themselves, as opposed to absolute rights.) All restrictions on rights had an explicit legitimate purpose: they were designed to protect public health. Yet many of them were not acceptable because they violated other criteria. International law, including the binding interpretations of UN treaty bodies that monitor compliance with member states' obligations under international treaties, have well-honed criteria, also called tests, for the eligibility of rights' restrictions. There are also classic documents of good practice, such as the 1984 [Siracusa Principles](#), which handle derogations and restrictions concerning the International Covenant on Civil and Political Rights.

The criteria for the legitimacy of limitations can be summarised in different ways, but the list has to include at least the following:

1. *Legality* – the rights limiting measure should be adopted by law or be based on a valid law.
2. *Is the limitation necessary to achieve a legitimate aim* – the restriction should be relevant to (and proportional to) the pursuit of the identified aim by the

measure. In our case, it is the protection of public health against coronavirus infection. For example, the complete ban on alcohol sale and consumption in South Africa as an emergency measure was seriously debatable in terms of whether it corresponded directly to the stated objective of combating COVID-19. In a local example, the imposition of a curfew on the entire territory of the Stara Zagora region during the first days of the state of emergency raises the question of how this relates to the goal of curtailing the coronavirus spread, as it is unclear how going out at night for justified reasons (which was disallowed) differs from doing it during daytime (which was allowed).

3. *The illegality of discrimination* – a measure cannot discriminate on the grounds of the so-called 'protected characteristic' (race/ethnicity, sex, religion, sexual orientation, age, etc. - according to the relevant national anti-discrimination law). In our country, the closing down of entire Roma neighbourhoods with police posts can constitute direct discrimination on ethnic grounds, which is explicitly prohibited even in a state of emergency, as explained, for example, by CCPR General Comment 29 of the UN Human Rights Committee (item 8). The blockades of the Roma neighbourhoods in the first days of the emergency state in Kazanluk and Nova Zagora were particularly suspicious for the lack of infection outbreaks there at that moment.

4. *Strict necessity* – the specific objective of the measure cannot be achieved by less restrictive means, i.e. the measure is "indispensable". In the Bulgarian example, the government banned visits to parks and gardens altogether. The ban failed to accommodate any factors like the type of park or its location both within the settlement and within the national territory. Was this the least restrictive measure to ensure social distance even in settlements without a single case of infection? Restricting rights through blanket bans hardly ever pass the test of strict necessity.

5. *Proportionality* – the weighing of the benefits achieved by the measure and the harm it does on human rights and other parts of the public weal must the former outweighs the latter. In our case, an example of flouted proportionality was the blanket cancellation of health consultations for pregnant women and young children and planned operations. It grossly violated the health rights of people whose health problems were not COVID-related. The benefit of this measure can hardly be justified as outweighing the expected and possible harm to patients.

6. *Time constraint* – the measure must be attached with a fixed deadline and never last an indefinite period; if the measure's necessity has not been outlived when the deadline is reached, its extension must be justified in a clear and specific manner.

Every time a restriction of a right does not meet the above conditions, it amounts to a violation of this right. What we often see is the failure to respect several of these criteria. A clear example was the clampdown on freedom of expression in many parts of the world, e.g. Egypt, Jordan, China, Thailand, among others, under the pretext of counteracting disinformation. The prosecution's indictment filed in April against the Bulgarian Pharmaceutical Union president, Prof. Stoimenova, for having publicly warned of possible drug shortages was the Bulgarian example of this. The charges against her possibly amounted to infringements of the requirements for purposefulness, strict necessity and proportionality of a measure.

As the **proportionality criterion** is the most difficult one to understand and apply, a bit of explanation might be useful. We should distinguish proportionality as a broad principle in human rights-related trial cases from proportionality in the medium and narrow sense as a criterion, or test, in assessing restrictions on rights. In the broader sense, we are talking about balancing conflicting rights, as well as about balancing rights and other public benefits. Balancing is ubiquitous in human rights-related law enforcement. In the medium sense, proportionality is sometimes referred to as covering almost the whole set of criteria, i.e. it encompasses both purposefulness (hence the phrase "proportionality as the conformity of means with ends"), and strict necessity, as well as other criteria like prudence, appropriateness, etc. Finally, in a narrow sense, proportionality is a different criterion (test) other than 'appropriateness' and 'strict necessity'.

Why is this important? Because each one of the criteria enjoys its validity: if a single one is not met, it is enough for the restrictive measure to be a violation of the relevant law. Once it passes the strict necessity test, a measure may fail its proportionality test. For instance, banning all non-COVID-19 medical procedures might, in some circumstances, pass the "strict necessity" test. Still, if more lives are lost than will be saved by this particular measure, it won't pass the "proportionality" test. This example might seem easy for comparing the numbers of victims. I must therefore highlight the fact that when comparing more disproportionate benefits, the assessment of proportionality becomes the most subjective

aspect while assessing a measure, as it may ultimately rest on the opposing values of those who assess.

In some cases the courts have treated legality, strict necessity and proportionality as three successive steps: if, for example, a measure fails its strict necessity test, there is no need to go to the next step and assess its proportionality. Strict necessity is a prerequisite for proportionality. Such is, for example, the most common practice in anti-discrimination law, in the law on privacy and personal data protection, etc. (see, e.g., joined cases C-293/12 and C-594/12, *Digital Rights*, ECLI: EU: C: 2014: 238).

Finally, let me get back to the more philosophical question of the **importance of human rights and their future after the end of the current crisis**. I believe the pandemic can give a further push to a process that has been in place for a while, leading us to a significant revisiting of human rights' role in liberal politics. This process has been evolving in response to the pervasive onslaught of authoritarian and conservative populist movements over the past decade, as well as the rise of anti-liberal civilisations such as China. The threats to democracy created by the current pandemic crisis add fuel to it and almost guarantee the onset of another kind of liberalism, different from the current one – I do not know what it will be called in time.

Firstly, it will transcend identity politics and will rather be neo-universalist. Secondly, the problem of freedom from universal surveillance and universal manipulation hanging upon us will come into focus. We have entered the era of surveillance capitalism (in the words of Shoshana Zuboff - see her *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power*, Public Affairs, 2020). It is an era where for the first time capital is less tied to the protection of privacy required in the past by the protection of private property. Technology today makes it possible to gain more from surveillance than from building walls around private interest. Following the principle of profit, capital has no scruples. The future belongs to business models based on universal surveillance and the concomitant manipulation of personal consumer behaviour, and subsequently of any other personal behaviour. This is demonstrated by the business models of Google and Facebook, for example. And when not only private companies but also countries like China, embark on the path of total surveillance, our freedom no longer could be protected by traditional civil rights. The way we still interpret the individual right to expression, assembly, voting, etc., will not work. Instead of fighting coarse prohibitions, the liberal movement will pivot towards fighting the behaviour control and manipulation in an environment of complex propaganda campaigns.

An environment where drawing a clear demarcation between free choice and the externally designed quasi-free choice will be harder to draw. The very evolution of surveillance capitalism and the surveillance state is intensified by the effort to put the COVID-19 pandemic under control; accordingly, it frames a new agenda for the liberal community.