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States of emergency and the legal questions over human rights restrictions

Abstract

This article starts from the premise that human rights are the singular most important achievement won in political struggle. However, there remains a gap between the ideal and the practical reality which gives room for debate as to how, and in what circumstances, such rights can be restricted when a state of emergency arises. Within this framework, special attention is paid to the provisions of certain international documents related to the field of human rights as well as within a state's own national law. The article discusses in particular the possible abuses of human rights in the situation of a state of emergency and the legal safeguards that have been put in place. The article presents the specifics of the constitutional system of the Republic of North Macedonia, with a special analysis of the role of constitutional courts in the protection of human rights during a state of emergency, and concludes with a look at the declaration of a state of emergency in Macedonia during the Covid-19 pandemic and at the legality of the actions of the various institutions involved.

Keywords: *human rights, state of emergency, restrictions, international documents, Covid-19*

Introduction

Human rights are the most important achievement that has been won by modern struggle. Human rights, among other things, ensure the protection of the physical and moral integrity of each person individually or of all people in a community. In this way, individuals gained the status of a person and a subject of law. This leads us to the conclusion that there is a difference between the two concepts of 'human being' and 'person'.

There are numerous definitions of 'person' within society in political thought. In the full sense, a person is a product of the socio-historical development of ourselves as generic beings. The peculiarities of a generic being are characterised by consciousness, creative abilities, sociability and work as a creative ability, all of which make us 'practical beings'. There are many definitions into which we will not enter, for reasons of limited space in this article, but the one produced by John Locke should give us pause for thought, albeit briefly. According to Locke, a person is defined as a:

> Thinking, intelligent being who has reason and reflection and can understand the 'I' as self (see also Miljković and Đorđević 1975: 514-515).

Accordingly, the outstanding characteristic of a person – in terms of law – is the legal regulation and guarantee of their human rights. Human rights determine the legal position of an individual towards the authorities. However, the political struggle to win human rights was long, difficult and complex. In a slave-owning society, as is well-known, certain human beings, as members of a particular group or class, were the object of property and not the subject of law. Legal status was determined by birth within one or other social class. In this political struggle, it was necessary to affirm the understanding that differences between people do not arise by birth or inheritance. On the contrary, people are born equal. Differences between people are of social origin.

The conceptual definition of human rights is important and represents a preliminary issue. As a concept, human rights originates from the spiritual heritage of the school of natural law. The teachings of the school of natural law, among other things, strongly criticise the privileges of the feudal class, discrimination and the omnipotence of absolutist rule. There is indeed a rich legal, political, sociological and philosophical literature on the scientific understanding of what is meant by human rights (Petrović 1998).

In a conceptual definition of human rights, the content may be used, especially today, for various purposes. Namely, what amounts to human rights may also be used for ideological and propaganda-based purposes. From this point of view, human rights emerge:

> More as an ideology and less a real programme of emancipation than discrimination. (Tadić 1996: 122)

When it comes to human rights and freedoms, almost no-one today publicly disputes their existence and the need for their realisation. However, even now there is, sometimes more and sometimes less, a gap between established and proclaimed human rights, on the one hand, and their efficient and effective realisation in reality on the other. Therefore, the political struggle is continuing in almost all parts of the world which points to the conclusion that the specific measures which have been taken both by individual countries and by the international community as a whole are, as yet, insufficient.

Numerous measures and activities have indeed been taken to achieve human rights. In terms of precautionary measures, the first and most important place is occupied by legal norms. In other words, it is necessary to establish human rights by legal regulation and to envisage particular mechanisms for their efficient and quality implementation.

In this regard, chronological legal acts have been adopted within each state within the international community. However, as can be seen from the title of this article, a key issue that is now being addressed and explored concerns the restriction of human rights in specific communities and under specific conditions or situations such as under the Covid-19 pandemic. When posed in this way, the question can cause some contradictions. This is due to the well-known principle that human rights are universal and that there should be no barriers to them or to their realisation. This

general rule is important in both domestic and international law. However, the law also accepts that there may be exceptions to each rule, in specific cases and under the conditions which are provided for. What is important about the issue of restricting human rights is that:

1. this can only be foreseen in legal situations, under precisely determined conditions and in a strictly formal procedure
2. it operates only for a specific period provided by the constitution of a country or legally in accordance with the constitution
3. the constitution prohibits the restriction of specific irrevocable rights even where a state of emergency has been proclaimed in one country.

The problem posed in this way requires us first to review human rights legislation and then to turn to important innovations in terms of the restriction of human rights and, of most relevance to us in this current context, in terms of the specific case of the declaration of a state of emergency.

The positive regulation of human rights and the problems posed by their restriction

Analysis of positive human rights regulations requires that important acts of a constitutional nature be taken into account. This speaks to the importance of human rights as a legal and political value within a society. That human rights are established and proclaimed by a constitution – as the most important legal act of a country *(materia constitutionis)* – perhaps testifies best to the importance of the concept. In different periods of human development there have been certain differences; the specifics that lay behind this are dealt with further on in this article.

Legal regulation of human rights in the past

In the theory of constitutional law, the first written document of a constitutional character on human rights is the Great Charter of Freedoms (*Magna Carta Libertatum*), adopted in England in 1215. According to this view, *Magna Carta* is the first legal act that guaranteed human freedoms of course albeit, as Professor Slobodan Petrović puts it, that this was 'in accordance with the circumstances of the time' (Petrović 1996: 99). Indeed, the prevailing view is that human rights within *Magna Carta* essentially represented rights that were reserved to the highest nobility in England (Marković 1995: 559).

The institutionalisation of human rights refers to a much longer period in which those rights become part and parcel of a civil society or political formation (Vračar 1991: 32-33). Alternatively, according to the terminology of Marxism, this would be a bourgeois society, as a special economic, social and political formation within capitalism. In such a view, the establishment of human rights is thus connected with civil society and ultimately with capitalism itself: in the development of capitalist relations of production, the recognition of human rights has come to be a precondition. Such a development rested on notions of the market and of the free movement of capital, labour and goods (Marković 1995: 559).

In the process of developing social relations in civil society, the bourgeoisie, step-by-step, both by agreements and by force of arms, won specific areas of human rights for themselves. In this way, the first steps were taken towards the elimination of any formal discrimination in the area of human rights.

These aspirations in the exercise of human rights are also the subject of legal regulation, first through the adoption of declarations and then through the adoption of constitutions in certain countries. Of the important declarations, it is necessary to mention the Declaration of Independence of the United States from 1776. In the same year, the Virginia Charter of Rights was adopted with special emphasis on the rights to life, freedom, property and to strive for happiness (Petrović 1996: 100). Among other important declarations, there is no doubt that the French Declaration of the Rights of Man and of the Citizen of 1789 is of special importance, although we should note that this, despite being of a constitutional nature, has not been incorporated into a constitutional text and thus remains a solemn declaration of supra-constitutional value. In this way, the human rights proclaimed in this Declaration grew into the state *acquis* of the French Revolution (Vračar 1991: 33).

With the consolidation of political power in modern civil society, human rights has become an integral part of the formal constitutional order; but then another problem arises regarding human rights and that is their realisation in practice (Marković 1995: 561-562).

Legal questions of the restriction of human rights in modern law formations

Modern law continuously pays 'due attention' to human rights. It does this on two levels: first, at the level of legal regulation; and second, which is very important if not the most important, at the level of their practical realisation. This second is especially significant for the reason that, as underlined in the Introduction, there remains a gap between the human rights proclaimed in the relevant documents and their actual realisation.

In this respect, and from this point of view, the rule applies that human rights proclaimed in documents but which are unfulfilled in practice essentially represent a 'wish list'.

In the context of the legal regulation of human rights and their protection in law, the question of the possibility of their restriction also arises. In cases of human rights restrictions, there is always the potential for the government to abuse its position.

In other words, there is the possibility that restrictions placed on human rights in the event of a state of emergency will be abused by the authorities. Abuses can move in two directions. The first of these is the establishment of restrictions, or derogations, from certain rights and freedoms despite the lack of an emergency justifying it. This will certainly be the case if there is a restriction of those human rights for which specific prohibitions have been placed on their restriction, i.e. the freedoms and rights that are excluded from the group of human rights that may lawfully be limited in the event of a state of emergency. The second case is where the restrictions, even where there is an emergency in place, are extended beyond the period required, or when the emergency has ceased to exist.

These issues may be addressed in national legal regulations or in international legal documents, in the latter case either as international acts at the level of the entire international community or as acts and documents which have a regional domain. Thus there are several levels at which these rights retain importance.

The remainder of this article seeks to present the most important points on the issue of the restriction of human rights in the case of the declaration of a state of emergency.

National law and the issue of human rights and the possibility of their restriction

The national law of each country, especially in those countries that opt for democratic forms of organisation, regulates and proclaims the human rights and freedoms of citizens separately. This is often the most appropriate level for such regulation. As a subject or matter of regulation, human rights have a constitutional character, determined and proclaimed by constitutional norms which are the best herald as to the importance and status of such rights.

Modern constitutions contain a whole set of norms on human rights and the freedoms of citizens. For example, in the 1991 Constitution of the Republic of Northern Macedonia more than one-third of the total number of articles concern the issue of human rights.[1]

One of the characteristics of the human rights and freedoms guaranteed by a constitution is their direct realisation on the basis of constitutional principles – thus, they are both established and guaranteed by it. The direct exercise of human rights in this way makes it possible to prevent the occurrence of the recognition of human rights by one constitutional act and then to deprive citizens of the same rights by another act (i.e. a law). Consequently the legislator does not have the authority to influence the scope of human rights as determined by the drafting of the constitution with regard to the guarantee of human rights and their realisation (Marković 1995: 609-610; Škarić 2015).

In this context, however, one explanation is needed. In principle, human rights are exercised directly only on the basis of a country's constitution and its specific provisions. For certain specific human rights, however, as a rule due to their complexity, the constitution contains reference norms and requires the enactment of a special law. The legislator who has the obligation to pass such a law provides the manner and the procedure under which this specific right or freedom might be exercised. Therefore, if the intervention of the law in the field of constitutionally guaranteed rights is allowed, it must be confined to prescribing the manner of their realisation; the law cannot touch upon their content or scope (Marković 1995: 609).

1 The Constitution of the Republic of North Macedonia was published in the *Official Gazette* of the Republic of Macedonia No. 52/1991. It has a total of 131 articles. The provisions of Articles 9-60 of the Constitution concern the basic freedoms and rights of individuals and citizens. Constitutional law on the implementation of the Constitution of the Republic of Macedonia is also published officially.

Comparative constitutional law does not indicate that the number of cases of the enactment of special laws prescribing the manner of exercising constitutionally proclaimed human rights and freedoms is likely to be small.[2]

Due to human rights being proclaimed only by the constitution of one country, the same rule applies *mutatis mutandis* to the specific restrictions set in place. In other words, this means that human rights and freedoms can be limited only to those cases which are determined by the constitution. Constitutional norms refer to a limited number of cases and apply the *numerus clausus* principle of the cases in which specific human rights may be restricted. Often, this boils down to declarations of a state of war or a state of emergency. Regarding the former, the situation is clear; in our work here, however, we dwell on the declaration of a state of emergency.

International law and human rights with special reference to limitations

The importance of human rights is confirmed by the body of basic human rights and freedoms guaranteed by international norms. There are numerous international acts (conventions, resolutions, recommendations, pacts and other documents) which establish and regulate human rights and fundamental freedoms.[3]

We refer here briefly and only to the most important international acts with specific emphasis on the provisions of such documents in relation to the restrictions which may be placed on human rights in emergency situations.

One important international document is the 1945 United Nations Charter which emphasises, among other things, that the peoples creating the United Nations were determined to reaffirm 'faith in fundamental human rights'. This is stated in the introductory part of the Charter. The provisions of the Charter's Article 13 are significant; these insist on the improvement of international cooperation in several areas of social relations including the exercise of human rights and fundamental freedoms for all regardless of race, sex, language or religion.[4]

The Universal Declaration of Human Rights of 1948 is not just a summary recommendation of the United Nations General Assembly but it represents a practical codification of human rights. According to Vojin Dimitrijević, it signifies 'the source of international law' not as an international treaty but either as customary rules or as general rules recognised by civilised nations (quoted in Marković 1995: 561).

International pacts detailing human rights play a significant role in the realisation of human rights. The International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights were adopted by the

2 Taking the Republic of North Macedonia as an example, since independence in 1991, i.e. over almost thirty years, the Assembly has passed more than thirty laws that prescribe the manner and procedure of the exercise of the specific human rights and freedoms guaranteed by the Constitution.

3 According to our analyses and research in the field of human rights, there are over 100 international acts regulating human rights.

4 The Charter of the United Nations was adopted at the United Nations Conference held in San Francisco on 26 June 1945 by representatives of 51 states. It entered into force on 24 October 1945.

General Assembly of the United Nations in 1966 and both entered into force in 1976.[5]

The International Covenant on Civil and Political Rights explicitly and clearly addresses – among other things – the issue of states of emergency and the possibility of restricting human rights in such situations.

Article 4 of the Covenant provides the scope of the restrictions which may be placed on human rights at the time of a public emergency. However, the Covenant sets and demands the fulfilment of specific conditions in such a case. Firstly, member states are enabled to take specific measures relating to the suspension of obligations only in cases when the public emergency 'threatens the life of the nation'. The second condition is equally important. The scope for the abolition of the obligations of the state is framed by what is 'strictly required by the exigencies of the situation' that has arisen while the public emergency must itself have been 'officially proclaimed'. Thirdly, the measures taken to restrict rights and freedoms in the public emergency must not be 'inconsistent with… other obligations under international law'. Finally, the measures must expressly not contravene the principle of discrimination on the grounds of 'race, colour, sex, language, religion or social origin' – a concept which is familiar in all modern constitutions as well as in important international documents (see also Vasiljevića 1993).

Anticipating the possibility of restriction and even the abolition of specific freedoms and rights in emergency situations, the Covenant also sets down other provisions. Namely, it explicitly prohibits certain rights and freedoms from being restricted or abolished, these being the most important human values. Article 4(2) lists the rights and freedoms from which a state body does not have the authority 'to derogate' in a state of emergency.[6]

In addition to international acts, regional acts elaborated within international law are also of importance in the system of the protection of human rights and freedoms. Among them are, for example: the Convention for the Protection of Human Rights and Fundamental Freedoms from 1950; the 1961 European Social Charter; the 1969 American Convention on Human Rights; and the African Charter on Human and People's Rights, adopted in 1981 and which came into force in 1986.

The Convention for the Protection of Human Rights and Fundamental Freedoms, adopted by the Council of Europe in Rome in 1950 and entering into force in 1953, is of particular importance. There is one important specificity regarding the Convention and that is that any violation of the human rights guaranteed by the Convention must be resolved and decided by the European Court of Human Rights. This is an important mechanism that can be used by citizens of all contracting states within the Council of Europe. The decisions of the European Court of Human Rights, whose seat is in Strasbourg, France, are binding on all those states that have signed the Convention.

5 The two covenants were adopted by the UN General Assembly on 16 December 1966. After they had been ratified by the required number of states (35), they entered into force in 1976, some ten years after their adoption. Yugoslavia ratified both in 1971.

6 Article 4(2) refers specifically to Articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 17.

The European Convention contains significant provisions regarding restrictions on human rights during a state of emergency. The provisions of Article 15 of the Convention are devoted to this issue. In a time of 'war or other public emergency threatening the life of the nation', any contracting state may take measures derogating from its obligations under the Convention to an extent which is 'strictly required by the exigencies of the situation'. It also stipulates that the measures taken must not be inconsistent with other obligations under international law. We can see that these provisions are, to a large extent, fully harmonised with those of Article 4 of the International Covenant on Civil and Political Rights.

Article 15(2) of the European Convention also prohibits the restriction of some specific rights during a state of emergency. The following rights cannot be restricted: the right to life (Article 2); the prohibition of torture (Article 3); the right not to be held in slavery or servitude (Article 4(1)); and the right not to be punished without the due process of law (Article 7).

States of emergency and the possibility of human rights violations

We conclude this article with the issue of the scope of human rights violations during a state of emergency, dwelling in particular on three questions:

1. commitments in principle and important rules on the possibility of human rights violations
2. the role of the constitutional judiciary in states of emergency
3. a few remarks on the constitutional provisions on states of emergency in the Republic of North Macedonia.

Important rules on the possibility of violations of human rights

So far, we have attempted to investigate and analyse the issue of human rights with specific reference to their violation or the impossibility of their realisation due to the existence of a state of emergency. We have approached the issue from the perspective of legal and political thought as well as the especially important one of legal regulation, the latter rooted within the context of the national law of a country in addition to that of international law.

The problem of human rights violations can appear in two cases. The first is when the constitution of a country regulates the issue of a state of emergency but, with regard to the restriction or eventual abolition of specific freedoms and specific rights, the measures taken were neither adequate nor appropriate. The second case, as a problem, is even more difficult – when a country is prevented, according to its own constitution, from restricting or abolishing particular freedoms or rights.

In the first case, regarding the taking of measures which limit certain rights and freedoms, the reasons for violations are numerous. First, the assessment of the need to declare and establish a state of emergency may be erroneous. This is because the state of emergency itself, as a concept and as a political and legal institution, is very complex. In constitutional law theory and in national constitutions, the circumstances and reasons for establishing a state of emergency may be inaccurately stated. Due to such inaccuracies, it follows that the decision to declare a state of emergency can be

wrong. The circumstances and reasons considered potentially suitable in terms of when a state of emergency may be established include: 'endangerment of the survival of a nation or state due to some public danger', 'epidemics' and 'natural disasters (disasters)'.[7] In connection with incorrect assessments of a situation as an emergency, the basis for the restriction of specific rights and freedoms will also, therefore, be wrong. The second criterion is also important: namely, that the scope of the measures should be strictly determined by the requirements of the situation. The provisions of Article 4 of the International Covenant on Civil and Political Rights also point to that.

Violations of freedoms and rights in a state of emergency can also occur through the abuse of power or when the executive exceeds its authority. Namely, in the case of an emergency, if parliament is not in operation, the constitution gives the government special and important powers. More precisely, the government receives a portion of the competence of the legislative power, entitling it to issue decrees which have the force of law. Regulations with the force of law have the status of laws specifying the measures to overcome the state of emergency. These measures, for the reasons stated in this article, may violate a certain right or freedom proclaimed by the constitution.

The second case is a situation in which a certain right or freedom is violated over which there is a constitutional prohibition. Here the situation is clear. Depending on the assessments of the drafters of a country's constitution, there is a determined 'list' of the freedoms and rights of which any restriction is absolutely prohibited during a state of emergency.

In the Republic of North Macedonia, the prohibition of restrictions applies to seven freedoms and rights (similar to those set out in the provisions of Article 4(2) of the Covenant on Civil and Political Rights). In this regard, certain countries are at the forefront of prescribing bans on the restriction on human rights in a state of emergency. For example, in Albania the number of such rights is 19, in Serbia it is 17 and in other countries the situation is similar.[8]

The role and jurisdiction of the constitutional judiciary in a state of emergency

The role of the constitutional judiciary in each country is of particular importance. In each case, jurisdiction is determined by the constitution of the country in question and the competencies of each constitutional judiciary are numerous. In the first place it is a question of normative control of constitutionality and legality. Fur-

7 The Albanian Constitution also mentions situations arising from 'natural disasters'. This is set out in Articles 170-176 of the Constitution of Albania, adopted in a referendum held on 22 November 1998.

8 In the provisions of Article 54 of the Constitution of North Macedonia, the restriction of human rights cannot be applied to the right to life; the prohibition of torture or inhuman and degrading treatment and punishment; legal certainty in the case of crimes and punishments; and freedom of conviction, conscience, thought and confession. Discrimination on a range of grounds is also explicitly prohibited in a state of emergency. The Constitution of Albania has provisions on these issues in emergency situations in its Article 175.

thermore modern constitutions also contain important provisions on the constitutional protection of human rights.

In situations of the declaration of a state of emergency in one country, the constitutional court of the country benefits from 'extraordinary circumstances' as a result of its key role. In the event of a state of emergency, there are four institutions which have an irreplaceable function and thus responsibility: the parliament of the country; the president of the state; the government; and, without a doubt, the constitutional court. The constitutional court has the job of evaluating the constitutionality and legality of the legal acts passed by parliament, the head of state and the government where a state of emergency has come to exist.

In these situations, with the government taking over part of the authority of the legislature to issue decrees which have the status of laws, prevailing opinion in the theory of constitutional law indicates that only an ounce of constitutionality is required for such decrees to be endowed with legal status: in practice, this is a given. Given that decrees with the force of law can violate human rights, however, the constitutional court remains the only 'legal controller' of acts passed by the government and the head of state.

The constitutional system of North Macedonia in connection with the state of emergency

The Republic of North Macedonia has still not managed to pass a law on states of emergency. Issues related to states of war and of emergency and the question of democratic accountability for the actions taken at such times are, on the other hand, regulated by the constitutional provisions contained in Chapter VII of the constitution – The defence of the Republic and states of war and emergency – i.e. Articles 122-128.

It is therefore only the provisions of the Constitution that regulate the issue of the declaration of a state of emergency, but these are very precise and suitable for implementation and application in specific situations. Regarding a state of emergency, Article 125(1) and (2) of the Constitution stipulate that such a state comes to exist when determined by the Assembly on the basis of the proposal of the president, the government or at least thirty members of parliament. A decision establishing the existence of a state of emergency must be made by a two-thirds majority; given that the Assembly has 120 members of parliament, this means that such a majority must constitute at least eighty members of parliament. A decision on a state of emergency is valid for a maximum of thirty days. Under Article 125(3), in cases where the Assembly cannot meet, a decision declaring a state of emergency may be made by the president and submitted to the Assembly for confirmation as soon as it is able to meet. In such a state of emergency, authorisation to the government to issue decrees with the force of laws remains in place as set out in Article 126 until there is an Assembly declaration on the end of the state of emergency.

In place of a conclusion: the Covid-19 pandemic

During the declaration of the state of emergency in March 2020, the procedure was somewhat different to the 'normal' but was still in accordance with the constitu-

tion. The outbreak of the Covid-19 pandemic in March 2020 imposed an imperative demand for the declaration of a state of emergency. The existence of the pandemic had been declared by the World Health Organization which has authority in education, culture and other spheres of social life representing in the true sense a higher (major) power whose statements have consequences of global proportions.[9]

At the time of the proclamation of the Covid-19 pandemic, the Assembly had been dissolved by its own decision, with the aim of organising and conducting early parliamentary elections scheduled for 12 April 2020. This had been made on 16 February 2020 and was published in *Official Gazette* No. 43/2020.

In this situation, the president, acting strictly according to the constitution, fulfilled the constitutional obligation and, upon the proposal of the government, passed a decision declaring a state of emergency on 18 March 2020, published in *Official Gazette* No. 68/2020. Since the causes behind the declaration of the state of emergency have not ceased to expire, the president has – at the time this article was written – made four further declarations extending the state of emergency. These are special and independent decisions taken with regard to each newly-established state of emergency.

During the entire period of the state of emergency, the government has passed more than 150 decrees with the force of laws. There have been several initiatives put before the Constitutional Court to assess their constitutionality. Out of the total number of initiatives submitted by specific entities against regulations possessed of legal force, more than 97 per cent have been rejected. Consequently, the overwhelming majority of government decrees during this period have been confirmed by decisions of the Constitutional Court. It should also be noted that there was an initiative before the Constitutional Court to assess the constitutionality and legality of the decisions declaring a state of emergency. This initiative was not accepted: all decisions were confirmed as being made in accordance with the Constitution.

While the Covid-19 pandemic continues to rage, this is not the end – so no conclusion to this article is really possible. But it is gratifying to note at this point that the constitutional protections are, in the vast majority of cases so far in these unusual times, at least operating as they should.

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9 The decision of the World Health Organization of 11 March 2020 declared that Covid-19 was a 'pandemic', a term originating from the Greek language and which in medical terminology means a disease that affects an entire nation, country, region, continent or the world.

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