

Restricting Human Rights in a Democratic Society



Law

Keywords: human rights, State, power, government, restriction.

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Abstract

Human rights condition the relations between the individual and the State, delimiting the power of the latter, and simultaneously obliging the State to take the appropriate measures that will make it possible for any person to enjoy and exercise his or her human rights freely. In the last two hundred and fifty years or so, history has witnessed the struggle and continued efforts to translate that into a tangible deed. Since the French and American Revolutions, which took place in the late eighteenth century, the human rights cause has led to several democratic revolutionary movements seeking to achieve individual liberation and establish control over the institutions of power, especially governments. Thus, governments and other power structures are duly obliged to respect, protect, guarantee and implement human rights as a sum of personal and collective rights defined in State Constitutions and other domestic and international laws comprising the reliable foundations for legal entitlements and remedies in case of non-fulfilment. Accordingly, our article focuses mainly on a detailed analysis of the relations between governments and human rights in democratic societies, stressing that guaranteeing them clears the necessary ground for the existence and functioning of the rule of law. More specifically, it aims to provide adequate answers to the following questions: (1) May governments restrict human rights, and what are the relevant clauses? (2) What does the term “derogation” mean in a state of emergency? (3) What are the reservations concerning the international or regional human rights treaties? (4) What do measures against terrorism represent within the framework of human rights?

Introduction

The term “democracy” derives from the Greek δημοκρατία (*dēmokratía*) “rule of the people”, which was coined from δῆμος (*dêmos*) “people” and κράτος (*kratos*) “power” or “rule”. Meanwhile, as defined by Abraham Lincoln, “democracy” means “the rule of the people, by the people, for the people”. Hence, respecting of human rights is an indispensable condition for its realization.

Human rights cover all aspects of life²²¹. Exercising them enables men and women to shape and determine their lives in freedom, in equality, and abiding by the principle of human dignity. Human rights consist of the civil and political rights, the social, economic and cultural rights, as well as of the collective rights of peoples to self-determination, equality, development, peace and healthy environment.

Specific human rights, such as the prohibition of torture and slavery, are absolute and can never become subject to derogation. As stipulated by Article 1 of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT), practising interrogation techniques that might include the use of torture, for instance, electric shocks or other methods bringing about unbearable physical pains or mental sufferings, is unjustifiable for any cause or reason. The same holds true even for counter-terrorism related conditions that raise the need to obtain from detainees crucial information relating to possible terrorist attacks.

²²¹ *Le droit d'être un homme*, anthologie de textes établie sous la direction de Jeanne Hersch, UNESCO et Robert Laffont, 1968.

State is entitled to a “margin of appreciation” about its official obligations to respect, protect, implement and guarantee the vast majority of human rights²²². Most these obligations remain subject to “progressive implementation” and thus specific social political, economic, religious and cultural conditions must be taken into consideration while judging whether State has failed or has not failed to fulfil its own human rights obligations. Hence, the principle of the human rights universality fits in with the essential content of human rights, whereas Government, on the basis of lawful reservations, derogation and limitation provisions, as well as by applying the principle of “progressive implementation”, has enough powers to handle human rights issues to the benefit of its national interests.

Restrictive provisions

Several obligations to implement human rights fall under the so-called restrictive provisions. This is explicitly stipulated in the Constitution of the Republic of Albania, as follows:

Article 15

1. The fundamental human rights and freedoms are indivisible, inalienable, and inviolable and stand at the basis of the entire juridical order.
2. The bodies of public power, in fulfilment of their duties, shall respect the fundamental rights and freedoms, as well as contribute to their realization.

Article 17

1. The limitation of the rights and freedoms provided for in this Constitution may be established only by law for a public interest or for the protection of the rights of others. A limitation shall be in proportion with the situation that has dictated it.
2. These limitations may not infringe the essence of the rights and freedoms and in no case may exceed the limitations provided for in the European Convention on Human Rights.

Hence, the full exercise of political freedoms, for instance, freedom of expression, assembly and association, depends on the fulfilment of individual duties and responsibilities and may, therefore, go through specific formalities, conditions, restrictions and penalties, which serve the interest of national security, of territorial integrity, of public safety, of social health and morals, of reputation or rights of others. Hence, if people abuse the freedom of speech in a demonstration to promote racial or religious hatred, wage propaganda to incite war or instigate others to commit criminal act, Government is responsible for interfering with the exercise of such freedoms for the purpose of protecting the human rights of other individuals. Yet no interference or restriction or penalty may be carried out otherwise than stipulated in the domestic law. Besides, it is quite necessary that the undertaken measures should ensure the achievement of the respective objectives, and the protection of national interests in a free democratic society. In any case, State

²²² *Respect for International Humanitarian Law: A Handbook for Parliamentarians*, IPU, Geneva, 1999.

must prove the need for imposing the restrictions, and take only those measures that never run contrary to legitimate interests and purposes²²³.

The rights, freedoms and prohibitions that cannot become subject to derogation in times of war

According to Article 4 of the *International Covenant on Civil and Political Rights* (ICCPR), excluded from derogation are the following: (1) the right to life; (2) the prohibition of torture, or cruel, inhuman or degrading treatment or punishment; (3) the prohibition of slavery and serfdom; (4) the prohibition of detention for debt; (5) the freedom from retroactive criminal laws; (6) the right to recognition as a person before the law; and (7) the freedom of thought, conscience and religion.

According to Article 15 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (ECHR), excluded from derogation are the following: (1) the right to life, except in cases related to deaths resulting from lawful acts of war; (2) prohibition of torture, cruel, inhuman and degrading treatment or punishment; (3) prohibition of slavery and servitude; and (4) protection from retroactive criminal laws.

According to Article 27 of the *American Convention on Human Rights* (ACHR), excluded from derogation are the following: (1) the right to legal personality; (2) the right to life; (3) the right to humane treatment; (4) prohibition of slavery; (5) protection from retroactive criminal laws; (6) freedom of conscience and religion; (7) the right to nationality; (8) the right to participate in government; (9) the right to judicial remedy; (10) the right to a name; (11) the rights of the family; and (12) the rights of the child.

In the meantime, lawful restrictions include the following: (1) reservations; (2) derogation measures in emergency cases; and (3) prohibition of misuse of human rights. Restrictive provisions, however, must be in full accordance with the domestic law, serve legitimate interests and purposes; respond proportionately to the situation dictating them, and never affect the essence of human rights.

Lawful restrictions: Jurisprudence examples

The international bodies, which deal with human rights, assess on a case by case basis whether particular forms of interference serve or fail to serve reasonable or lawful purposes, comply or fail to comply with the domestic law in force, and correspond or fail to correspond to the state dictating them. Within this context, the *European Court of Human Rights* has interpreted the restriction provisions stipulated in the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (ECHR), providing the Governments with the required “margin of appreciation” and, at the same time, demanding them to demonstrate urgent social needs for justifying the limitations, and avoid exceeding them. For example, the *European Court of Human Rights* dismissed the argument presented by the Government of Ireland that the prohibition of homosexuality according to the Irish Criminal Law was an indispensable legal mean

²²³ Commission Resolution 1994/32.

to protect public morals in a democratic society, since, for the lack of comparable legislation in the rest of European societies, there was no urgent social need to impose such an extreme limitation on the privacy right.

Derogation during a state of emergency

During times of armed conflicts, of riots, of crises, of natural disasters or of other public emergencies such as terrorist assaults, which constitute a grave threat to the life of a nation, Governments may impose measures derogating from their obligations to respect the fundamental human rights and liberties on condition that the following internationally recognized requirements are met:

- The situation must amount to a public emergency that threatens the life of the nation.
- A State must officially proclaim a state of emergency, acting in accordance with its constitutional and other legal provisions that govern such proclamation and the exercise of emergency powers.
- A State must officially notify the relevant International Organizations and other State Parties about the specific measures derogating from its obligations to respect the fundamental human rights and liberties.
- A State may derogate from its obligations to respect the fundamental human rights and liberties only to the extent strictly required by the exigencies of the situation.
- A State must lift the derogation from its obligations to respect the fundamental human rights and liberties as soon as the situation.
- The fundamental human rights and liberties subject to derogation measures must not be among those that permit no derogation whatsoever, as already mentioned above.

Hence, if any act conducted under the authority of a State constitutes a basis for individual criminal responsibility for a crime against humanity by the persons involved in that action, Article 4 of the International Covenant on Civil and Political Rights (ICCPR) cannot be used as justification that a state of emergency exempted the State in question from its responsibility in relation to the same conduct²²⁴. Therefore, the recent codification of crimes against humanity, for jurisdictional purposes, in the Rome Statute of the International Criminal Court, is of relevance in the interpretation of Article 4 of International Covenant on Civil and Political Rights (ICCPR)²²⁵.

International or regional human rights treaties reservations

In certain cases, upon signing, ratifying, accepting, approving of, or acceding to a treaty, a State makes a specific statement that may be called “reservation”, “declaration”, “understanding”, “interpretative declaration” or “interpretive statement”. Yet, regardless of the name, any such statement, which purports to exclude or modify the legal effect of a treaty provision in relation to

²²⁴ Bertrand G. Ramcharan, *The Fundamentals of International Human Rights Treaty Law*, page 92.

²²⁵ ICCPR/C/21/Rev.1/Add.11, General Comment No. 29.

the declarant, is, in the long run, a reservation²²⁶. Thus, a reservation may permit a State to join a multilateral treaty that it would otherwise be unwilling or unable to take part in.

In the meantime, Article 19 of the 1969 Vienna Convention on the Law of Treaties provides that a State, when signing, ratifying, accepting, approving of, or acceding to a treaty, is allowed to make reservations, unless:

- (1) The treaty prohibits the reservation;
- (2) The treaty stipulates that only specified reservations not containing the one in question may be imposed; or
- (3) In cases excluded from the above two categories, the reservation fails to be compatible with the object and purpose of the treaty.

If a treaty says nothing about reservations, and a certain reservation is formulated and subsequently circulated, the concerned State may object to the reservation within a period of twelve months, starting on the date of the depositary notification, or on the date on which the concerned State expressed its consent to become a party to the treaty, choosing the later one²²⁷.

At any time, unless the treaty provides otherwise, a State may withdraw its reservation or objection to a reservation either completely or partially.

Measures against terrorism and human rights

The *Digest of Jurisprudence of the United Nations and Regional Organizations on the Protection of Human Rights while Countering Terrorism*, which the Office of the United Nations High Commissioner for Human Rights (OHCHR) published in September 2003, contains a selected collection of excerpts from the jurisprudence of United Nations relevant bodies and other organizations committed to the protection of human rights, particularly in Africa, America and Europe.

Reading it in depth, you learn about several typical issues relating specifically to the question of the protection of human rights and fundamental freedoms, which did arise during the fight against terrorism. For example, the definition of terrorism is one of them. Although the term is not yet reliably authoritative, the States have agreed on some essential constituents of its definition. Thus, on December 9, 1994, the General Assembly of the United Nations approved the “Declaration on Measures to Eliminate International Terrorism” (A/RES/49/60) that points out that terrorism comprises “criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes” and further advocates that these acts “are in any circumstances unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them.”

The issue of terrorism and human rights has long been a concern of great interest in the

²²⁶ Article 2(1)(d) of the 1969 Vienna Convention.

²²⁷ Article 20 (5) of the 1969 Vienna Convention

United Nations program on human rights. Dealing with it, however, became more pressing after the September 11 attacks of 2001 and the outbreak of terrorist acts around the world. Hence, during a special meeting of the Security Council Counter-Terrorism Committee with regional and sub-regional organizations on March 6, 2003, former Secretary General Kofi Annan underlined:

“Terrorism is a global threat with global effects; its methods are murder and mayhem, but its consequences affect every aspect of the United Nations agenda — from development to peace to human rights and the rule of law. No part of the United Nations mission is safe from the effects of terrorism; and no part of the world is immune from this scourge.

The United Nations has a clear obligation to deal with this global threat. The United Nations has an indispensable role to play in providing the legal and organizational framework within which the international campaign against terrorism can unfold.”

Our responses to terrorism, as well as our efforts to thwart it and prevent it, should uphold the human rights that terrorists aim to destroy. Respect for human rights, fundamental freedoms and the rule of law are essential tools in the effort to combat terrorism - not privileges to be sacrificed at a time of tension.”

Some United Nations bodies involved in human rights have already expressed their concern that counter-terrorism measures may lead to violations of human rights. For example, at the tenth annual meeting, which was held in Geneva in June 2003, the United Nations special rapporteurs and independent experts, made the following joint statement²²⁸:

They express alarm at the growing threats against human rights, threats that necessitate a renewed resolve to defend and promote these rights. They also note the impact of this environment on the effectiveness and independence of special procedures.

Although they share in the unequivocal condemnation of terrorism, they voice profound concern at the multiplication of policies, legislation and practices increasingly being adopted by many countries in the name of the fight against terrorism which affect negatively the enjoyment of virtually all human rights - civil, cultural, economic, political and social.

They draw attention to the dangers inherent in the indiscriminate use of the term “terrorism”, and the resulting new categories of discrimination. They recall that, in accordance with the International Covenant on Civil and Political Rights and pursuant to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, certain rights are non-derogable and that any measures of derogation from the other rights guaranteed by the Covenant must be made in strict conformity with the provisions of its Article 4.

They deplore the fact that, under the pretext of combating terrorism, human rights defenders are threatened and vulnerable groups are targeted and discriminated against on the basis of origin and socio-economic status, in particular migrants, refugees and asylum-seekers, indigenous peoples and people fighting for their land rights or against the negative effects of

²²⁸ E/CN.4/2004/4, Annex 1.

economic globalization policies.

They strongly affirm that any measures taken by States to combat terrorism must be in accordance with States' obligations under the international human rights instruments.

They are determined, in the framework of their respective mandates, to monitor and investigate developments in this area and call upon all those committed to respect for human rights, including the United Nations, to be vigilant to prevent any abuse of counter-terrorism measures.

Under very specific circumstances, terrorism may serve as a justification for establishing a state of emergency, in which certain human rights may become subject to "derogation" in compliance with the International Covenant on Civil and Political Rights (ICCPR) and regional instruments on human rights. According to the same provisions, however, some human rights may not become subject to suspension under any conditions.

The International Covenant on Civil and Political Rights (CCPR) and regional instruments on human rights stipulates that "derogation" from human rights, other than the above-mentioned, shall be permitted only under specific conditions. Besides, (1) they must be exceptional; (2) they must be strictly limited in time, and to the extent required by the urgency of the situation; (3) they must be subject to regular review, and comply with other obligations stemming from international law; and (4) they must avoid entailing discrimination. Moreover, the States are required to inform the United Nations Secretary General or the relevant regional organizations about the provisions from which they have "derogated", and the reasons for the "derogation".

Taking full account of other obligations of the States, which stem from international law, and referring to the human rights stipulated in Article 4 of the International Covenant on Civil and Political Rights (ICCPR), the United Nations Human Rights Committee has compiled an additional list of elements that may not become subject to "derogation"²²⁹. These include: (1) all persons deprived of liberty must be treated with respect for their dignity; hostage taking, abduction and unacknowledged detention are prohibited; (2) persons belonging to minorities are to be protected; (3) unlawful deportations or forcible transfers of population are prohibited; and (3) "no declaration of a state of emergency ... may be invoked as a justification for a State party to engage itself ... in propaganda for war, or in advocacy of national, racial or religious hatred that would constitute incitement to discrimination, hostility or violence".

Furthermore, since International Humanitarian Law explicitly guarantees the right to a fair trial during armed conflicts, the United Nations Human Rights Committee has come to the conclusion that the principles of legality and the rule of law require that fair trial obligations be respected during a state of emergency, stressing that to protect those rights, which are explicitly recognized as excluded from the practice of "derogation", it is indispensable that they be secured through procedural guarantees, often including judicial ones.

²²⁹ ICCPR/C/21/Rev.1/Add.11, General Comment No. 29.

According to the International Covenant on Civil and Political Rights (ICCPR) and regional instruments on human rights, the principles of necessity and proportionality apply only in cases where it is exceptionally permitted to restrict certain human rights for specific, legitimate and clearly defined purposes other than pressing needs. The undertaken measures must be appropriate, and should bear the least intrusive possibility to achieve their objectives. The discretion conferred upon the authorities to act in this direction must not be unlimited. In all cases, the principle of non-discrimination should be respected, and special efforts should be made to protect the human rights of vulnerable groups. Taking counter-terrorism measures, which target certain ethnic or religious groups, runs contrary to human rights, and thus may lead to the outbreak of discrimination and racism.

Conclusions

During the last twenty years or so, the interdependent relationship between democracy and human rights has been studied both extensively and intensively. Democracy is not seen simply as a sum of established procedural rules and restrictions enabling the construction and exercise of political power, but also, together with human rights, as a means to preserve and protect the dignity of the individual. Thus, in 1995, the Inter-Parliamentary Union began to draft a Universal Declaration on Democracy for the purpose of advancing the international standards and of contributing to the ongoing democratization around the world. The Declaration, which was adopted in 1997, show that democracy and human rights are so closely linked together, that you can consider them inseparable.

Democracy embodies the idea that all citizens must enjoy the equal right to express their views about decisions, which affect their personal lives. Thus, Article 21 of the Universal Declaration of Human Rights (UDHR) and Article 25 of the International Covenant on Civil and Political Rights (ICCPR) provide for the right to take part in public affairs management. To exercise this right freely, however, citizens must first be entitled to freedom of expression, of assembly and of association, as well as to fundamental economic and social rights. Besides, democratic institutions are prerequisites required for enabling people's participation and control. Hence, Parliament, the highest representative body in a genuine democracy, established through regular, free and fair elections, is responsible for providing "government of the people, for the people and by the people". As a key institution competent to make laws and conduct constant supervision over the policies and actions of the executive branch, Parliament also plays a crucial role in advancing and protecting human rights. Moreover, Parliament creates the necessary legal framework for guaranteeing the independence of the judiciary system and, consequently, the rule of law, which serves as the cornerstone for the preservation of democratic health and human rights protection. It is all these reasons that make Parliament indispensable for democracy and human rights.

Above all, democracy is a lofty ideal that aims to preserve, promote and protect individual dignity and basic human rights by establishing social justice, by fostering economic and social development, by strengthening social cohesion, by enhancing national tranquillity, as well as by creating a favourable climate for international peace. Furthermore, democracy is a form of

government that represents the best way to accomplish these objectives. Obviously, democracy is also the only political system capable of self-correction²³⁰.

References

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²³⁰ *Inter-Parliamentary Union, Universal Declaration on Democracy*, Cairo, September 1997, paragraph 3.