

The Institute for Human Rights of European Lawyers

Press release of IDHBP and IDHAE.

**WITH REGARDS TO INTERNATIONAL CONVENTIONS, IS GENERAL FORCED CONFINEMENT
LEGAL?**

France's disregard of the principle of proportionality.

« Knowing what must be done makes the fear disappear. » Rosa Parks (1913 - 2005)

Date : 3th May 2020

Publication of the report written by experts on fundamental rights, which calls for an end to general forced confinement (GFC) and other violations of civil liberties, while taking health measures proportional to the pandemic.

The decree of 16 March 2020 and the law of 23 March 2020, which organized the health emergency in France, were analysed in detail by the Institutes of Human Rights, the Paris Bar and European lawyers (IDHBP and IDHAE). Their report, published on 3 May 2020, on their sites;

- idhbp.org

- idhae.fr

concludes that the scheme leads to serious infringements of fundamental rights applicable in France. Designed to combat the coronavirus pandemic. These restrictions on civil liberties are supposed to be provisional, but the report warns citizens about the threats they pose to democracy by transforming an exception regime into a rule, without it being adapted to the protection of the most fragile people.

The lack of proportionality of violations of fundamental rights makes them illegal.

The legal experts who have analysed the texts on the state of health emergency question their compatibility with the principle of proportionality. In international law, it limits and controls the power of States and appears both in the European Convention for the Protection of Fundamental Freedoms (ECHR) of 1950 and in the Charter of Fundamental Rights of the European Union (CDFUE) of 7 December 2000, as in the International Covenant on Civil and Political Rights (ICCPR).

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The derogation and the resulting measures may also be regarded as unlawful where the State has not declared it to the Secretaries-General of the Council of Europe and of the UN, as is the case for France.

To question the proportionality of the system, the report compares decisions taken in other European countries such as Germany, Switzerland or Sweden, whose measures have done much less damage to freedoms, while the number of deaths due to the epidemic remains lower than in France, reported to their population. The justification for the radical measure taken by France is that of a Latin culture of the population deemed « unruly » and « tactile ». This cannot justify, in a democratic society, the considerable extent of violations of fundamental rights. Indeed, it follows from the principle of indivisibility of these rights that the right to life only makes sense if it fully permits the exercise of the other rights attached to human dignity. This is why René Cassin, one of the main drafters of the Universal Declaration of 10 December 1948, said: « *The right to life, yes, but not to any life !* ».

The health emergency does not dispense with an effective proportionality check, nor with the use of ad hoc legal expertise. The State decided to use only scientists to assess the health risk and define its system. It should also have asked legal experts to assess the risk of violations of fundamental rights. The absence of this double assessment prevented the proportionality review of the GFC.

In Germany, lawyers, whose place is central, are many who pay close attention to respect for freedom, especially to ensure that measures taken to fight the pandemic do not upset institutional balances. That is why the federal government never mentioned the possibility of resorting to a state of emergency.

In France, the government did not wish to assess the legal risks associated with the implementation of the GFC. Nor did it consult the competent bodies on the protection of fundamental rights such as the National Consultative Commission on Human Rights (CNCDH), the Human Rights Defender or experts in fundamental rights (professor or lawyer).

The emergency health law and the widespread containment measures undermine fundamental rights.

Even the scientists didn't ask for the GFC! Initially, in its opinions of March 12-14, 2020, the Scientific Council recommended containment only for people at risk, this in a « suitable » manner, particularly for « over 70 years of age, and medically fragile people ». Its objective was to relieve French ICU services, by reducing the number of serious forms requiring a stay in ICU. But on 16 March, the GFC was applied to the entire population, with the approval of the Scientific Council. This mechanism, reinforced by the law of 23 March 2020, implements a « state of health emergency », more severe than the preceding.

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Applicable until 1 April 2021, this law provides, that the state of emergency is declared by decree in Council of Ministers in all or part of the territory, « in the event of a health disaster putting at risk, by its nature and its severity, the health of the population» (and not « the life of the nation » as stipulated in international conventions).

But the isolation of the most fragile, coupled with other measures and applied **with respect for the dignity of the people concerned** (*priority to consent, risk certified medically without age criteria, secure contacts with a few relatives, free travel outside groups, dedicated and pleasant places for people who cannot stay at home, guarantee of employment, material aids if necessary...*) **appeared however as the most proportionate response.**

The choice of the GFC led to a violation of freedom of movement and the right to private and family life, sanctioned by prison sentences, which were themselves contrary to the freedom guaranteed by the Constitution. The report lists the violations of fundamental rights, which is impressive. The GFC, even if it is declared as provisional, has thus turned France into an exceptional regime, allowing for many measures to be taken that further aggravate the violation of fundamental rights.

Restoring civil liberties to fight the pandemic and preserve democracy.

The urgency is now, in spite of and because of the immensity of the damage, to do everything to restore democracy. How can we forget that the 1948 Universal Declaration of Rights was adopted in response to the attacks on human dignity and democracy during the Second World War?

In fact, allowing the executive to govern without citizen(s) control can only worsen the situation and add other dangers. As France experienced after the attacks of 2015, the derogations caused by the state of emergency tend to be permanently part of the legislative arsenal, as in the context of the state of security emergency.

The introduction of a derogation regime without controls is neither a response to the social, ecological or economic emergency, which could follow the health emergency. On the contrary, these challenges require a conscious and voluntary mobilization of the whole population and its institutions. This requires the re-appropriation of fundamental rights by individuals.

To this end, the report recommends that:

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1°/ The CFG dictated by panic, be completely abandoned, in the shortest possible time.

2°/ Effective protection be ensured for people at risk in strict respect of their rights (priority to consent, medically certified risk without age criteria).

3°/ The emergency health act be abrogated as unnecessary (if necessary, national law and the ECHR allows restrictions to fundamental rights, to achieve legitimate and proportionate goals, without resorting to such a law).

4°/ The measures taken in application of the state of emergency are all abolished, if necessary to the benefit of other measures, taken through ordinary legal channels, taking into account the public health requirements and the fundamental rights and freedoms.

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LÉGAL BASIS

■ **Article 15 ECHR - Derogation in time of emergency**

1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.

■ **Article 52 CFREU - Scope of guaranteed rights**

1. Any limitation on the exercise of the rights and freedoms recognised by this Charter **must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest** recognised by the Union or the need to protect the rights and freedoms of others.

■ **Article 4 ICCPR**

1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

2. No derogation from articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18 may be made under this provision.

3. Any State Party to the present Covenant availing itself of the right of derogation **shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated.** A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.



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