COVID-19 and Human Rights Law: A Legal and Philosophical Approach

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ABSTRACT

At the time of writing, an infectious disease, named COVID-19, has spread globally, resulting in the ongoing pandemic. For this reason, more than ever it is fundamentally important to address the issue of how to allow governments sufficient discretion, flexibility, and powers to deal with emergencies, such as COVID-19, while respecting the rule of law. Notably, there are some exceptional situations where States can restrict or derogate from certain human rights. Yet, what are the moral principles that should guide democracies when dealing with the limitation or suspension of rights in times of public emergencies? Through the lenses of utilitarianism and liberalism, this paper aimed at providing both a legal and a philosophical overview of the limitation, or suspension, of human rights in emergency situations – such as the COVID-19 pandemic. The legal-philosophical approach of this paper is, therefore, fundamental in order to understand the current situation. In other words, the legal-philosophical approach of this paper will help to understand the current challenges for human rights during times of crisis. To understand why we are where we are.

1. Introduction

Philosophers, lawyers, and political scientists have for a long time attempted to solve issues related to human rights and the so-called "state of emergency", or "state of exception" as the Italian philosopher Giorgio Agamben frames it. Accordingly, Agamben defines the "state of exception" as a "point of imbalance between public law and political fact that is situated – like civil war, insurrection and resistance – in an "ambiguous, uncertain, borderline fringe, at the intersection of the legal and the political."[1] Hence, traditional paradigmatic

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[1] Giorgio Agamben. *State of Exception.* (Chicago: The University of Chicago Press, 2005), 1.

examples of public emergencies were situations of war, insurrection and resistance. Yet, today's exceptional situations that "threaten the life of the nation" can be of different nature, such as insurgency, terrorist attacks, environmental calamities, serious industrial accidents, pandemics or similar situations that threaten a great number of lives.[2] In order to tackle these emergencies, most constitutions provide the executive branch with extraordinary powers, which included the suspension of civil liberties and rights even for the State's own citizenry. The same idea applies to modern democracies and signatories of international human rights treaties. In emergencies, States may consider it necessary to limit the enjoyment of individual rights and freedoms, and possibly even to suspend their enjoyment altogether.[3] Consequently, the international legal system faces a great challenge, i.e. how to allow governments sufficient discretion, flexibility, and powers to meet crisis while maintaining limitations and control over governmental actions?[4] This issue is particularly important at the time of writing, where an infectious disease, named COVID-19, has spread globally, resulting in the ongoing pandemic.

This paper aimed at providing both a legal and a philosophical overview of the limitation, or suspension, of human rights in emergency situations – such as the COVID-19 pandemic. The legal-philosophical approach of this paper is, therefore, fundamental in order to understand the current situation. Consequently, in the first part of this paper, I intend to discuss to what extent and under what conditions derogation from human rights can be justified in a "state of emergency", such as the COVID-19 pandemic, if at all. According to Art. 4 of the ICCPR, States Parties may derogate from human rights, when the life of the nation is threatened (i.e. in time of "public emergency"). These measures, however, must not "involve discrimination solely on the ground of race, colour, sex, language, religion or social origin."[5] Therefore, a State has the responsibility to ensure public safety when an emergency situation arises. Yet, the new emergency powers must not be used in abusive, discriminatory, and

[2] Anna Khakee. *Securing democracy? A comparative analysis of emergency powers in Europe*. (Geneva: Geneva Centre for the Democratic Control of Armed Forces, 2009), 6.
[3] Office of the High Commissioner for Human Rights. "The Administration of Justice During States of Emergency" in: *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers*. (New York and Geneva: United Nations, 2003), 813.
[4] Oren Gross & Fionnula Ní Aoláin. *Law in times of crisis*. (Cambridge: Cambridge University Press, 2006), 1.
[5] Art. 4, ICCPR.

unjustified ways.[6] In the second part of this work, I intend to investigate to what extent limitation or derogation from human rights to deal with public emergencies is morally justified, and if so under which circumstances.

To put it differently, the first part of this paper will focus on the response of International Human Rights Law. In other words, the interaction between human rights law and the experience of emergency at the domestic level will be investigated. We shall show that human rights can either be limited or suspended by a State facing an emergency situation. Importantly, the right to derogate could be invoked only under certain circumstances, which include terrorist threats, military coups, pandemics, etc. For instance, both Art. 15, ECHR and Art. 4, ICCPR affords to the governments of the States Parties the possibility of *derogating*; in a temporary, limited and supervised manner, from their human rights obligation when "the life of the nation is threatened." Similarly, both the ECHR and the ICCPR allow States Parties to *limit* a series of rights, such as the right to respect for private and family life (Art. 8 ECHR), freedom to manifest one's religion or belief (Art. 9 ECHR and Art. 18 ICCPR), freedom of expression (Art. 10 ECHR and Art. 19, ICCPR), freedom of assembly and association (Art.11, ECHR and Art. 21-22 ICCPR), and freedom of movement (Art. 2 ECHR and Art. 12 ICCPR).

In the second part of this work, we shall take a philosophical approach. As legal philosophers, we need to address and understand the legality of the matter, i.e. whether it is legally justified to suspend human rights under a state of emergency (Part I). Yet, the legal understanding of the issue should be used as a starting point to evaluate the moral justification of human rights derogation under a state of emergency. In other words, we should ask: what can be the philosophical justification behind the derogation clause? A possible answer will be presented taking into account two philosophical positions. Firstly, States might try to provide a justification of human rights' derogation using a utilitarian approach. In a nutshell, modern versions of utilitarianism claim that people should maximize human welfare after having weighed up the consequences of various alternative actions, and choose that action which would, on balance, have the best consequences, in the sense of producing the largest net balance of welfare. Consequently, a utilitarian approach might claim that suspending individuals' rights maximize the welfare of the majority (e.g. in

[6] Human Rights Watch Report . "France: Abuses under State of Emergency". (3rd Febr 2016). Available at: <https://www.hrw.org/news/2016/02/03/france-abuses-under-state-emergency> (Accessed: 1st Dec 2018).

terms of health and safety). Therefore, if we accept the utilitarian reasoning, limiting, or even suspending human rights, could be morally justified. In light of this view, a possible alternative philosophical justification is presented. I will briefly discuss liberalism as a possible alternative to the utilitarian approach when dealing with the limitation, or derogation, of human rights in public emergencies. Liberalism, which puts emphasis on human freedom and individual rights, would advance the idea that democracies are not just a majority rule disciplined by checks and balances, which merely serve majority interests. Contrariwise, democracies should accord individuals intrinsic respect.

This paper aims at dealing with a very interesting and timely topic: Human Rights restrictions during pandemics (and perhaps other states of emergency). And it will eventually take a plausible, and nuanced position, i.e. while neutral and generally applicable restrictions on freedom of association or collective religious activities may be justified, targeting minorities or discriminating against certain groups is impermissible. Hence, international law and philosophy are called to answer the following urgent question: Which is the legal and moral underpinnings of the concept of human rights limitation, or derogation, in a public emergency? More specifically, which might be the legal and philosophical explanations behind governments' decisions to cope with COVID-19?

2. Human Rights Law in Public Emergencies: A Legal Approach

The first part of this work shall focus on the legal justification for the derogation/limitation of human rights. In order to give a broader understanding of this topic, firstly, we shall start the discussion with a short historical overview of human rights and human rights law. Secondly, we shall briefly introduce the debate between universalism and particularism of human rights, in relation to the concept of public emergency. Thirdly, we shall extensively discuss the established practices in derogating human rights in public emergencies and we shall evaluate how and when these practices are legally justified.

When we legally refer to human rights, we usually refer to the legal catalogue of human rights developed through the international texts. A key text for us today is the Universal Declaration of Human Rights (UDHR) – adopted by the UN General Assembly in 1948.[7] It is worth noting that the human rights story

[7] Andrea Clapham. *Human rights: A very short introduction.* (Oxford: OUP, 2015). 27.

in the 20th century has different levels. First of all, "human rights were invoked as a rationale for fighting the world wars".[8] Just to give an illustration, in 1915, Sir Francis Younghusband found an organization whose aim was to fight the battle of Humanity and preserve Human Rights.[9] Similarly, in 1917, Alejandro Alvarez, the Secretary-General of the American Institute of International Law, was advocating for "international recognition of rights for individuals and associations".[10] Furthermore, President Wilson's Fourteen Points programme, which formed the background to start the negotiations to end WWI, can be interpreted as the desire to "create a world dedicated to justice and fair dealing".[11] In a way, the same principles guided the creation of the UDHR.

The first embryonic states of the development of international human rights law can be seen with the work of the League of Nations in: (a) the minorities treaties and declarations for the protection of certain minority rights among the Allied Powers and various Easter European countries; (b) the development of workers' rights (which became central to the work of the International Labour Organization); and (c) the work on the abolition of slavery.[12] As far as points (a) and (b) are concerned, it must be acknowledged that these arrangements reflect States' self-interests, i.e. a move to reduce political tensions and to avoid war.[13] For instance: "workers' rights were to be recognized and protected, because this was seen by some States as the best way to prevent their populations from turning to Communism thereby reducing the risk of revolution.[14] Nonetheless, the League of Nations did not yet protect human beings *qua* human beings. As showed, it only had strategic concerns for specific groups of people such as certain national minorities, workers, and women engaged in prostitution.[15] Representatives of twenty-six Allied nations signed a Declaration by United Nations on 1 January 1942, and further twenty-one States signed the Declaration by August 1945.[16] The 1945 UN Charter encouraged the fifty-one original member States to respect human rights and obligates them to cooperate

[8] Ibidem, 28.
[9] Ibidem.
[10] Ibidem, 29.
[11] Ibidem.
[12] Ibidem, 29-30.
[13] Ibidem, 30.
[14] Ibidem.
[15] Ibidem, 32.
[16] Ibidem, 37-38.

with the UN for the promotion of universal respect for, and observance of, human rights.[17]

Even though the principle of universality goes back to an earlier time, the UDHR marked a major stage in the universalist debate. In the context of the preparatory work of the UDHR, the French jurist René Cassin insisted on mentioning the concept of universality in the title.[18] Furthermore, the universal principle is stated at the beginning of the UDHR, e.g. according to Art.1: "all human beings are born free and equal in dignity and rights". Despite the apparent claim at the international stage, a "facade of consensus"[19] has been erected regarding the universality of human rights. But on the factual level, fundamental rights remain largely misunderstood in certain Third World circles, as contrasting some of their visions of the world. Consequently, we have been able to witness a regionalization of protection systems in which State sovereignty takes precedence. Indeed, the Charter of the United Nations (Chapter VIII) provides, if necessary, for the conclusion of regional agreements; a prerogative which is in line with the maintenance of international peace and security. In this critical perspective, various Third World Approaches to International Law appear to have arisen.[20]

Nonetheless, we can find the universalist vocation of the Declaration in its very substance. This is expressed by a refusal to prioritize fundamental rights. According to René Cassin himself, during the session of December 9, 1948, before the United Nations General Assembly, "there are no first-class fundamental freedoms and second-class fundamental rights."[21] This idea is fundamental when we discuss the derogation of human rights in a state of emergency. How can we justify that only certain rights can be suspended? Does this imply a hierarchy among human rights? Is the right to be free from torture more important than the right, for instance, of freedom of assembly?

[17] Ibidem, 48.

[18] René Cassin, "La Déclaration universelle et la mise en œuvre des Droits de l'homme" in *Recueil des cours de l'Académie de droit international* (1951).

[19] Boutros Boutros-Ghali. "Discours du Secrétaire général de l'Organisation des Nations Unis à l'ouverture de la Conférence mondiale sur les droits de l'homme" (1993: GE. 93-14240), 5.

[20] Andrea Bianchi. *International law theories: an inquiry into different ways of thinking*. (Oxford: OUP, 2016), 206-210.

[21] Jean-Manuel, Larralde. ″Lorsque René Cassin commentait la Déclaration universelle des Droits de l'homme; à propos du cours publié dans le Recueil des cours de l'Académie de droit international de 1951″ in *Cahiers de la recherche sur les droits fondamentaux* 7, 2009, 23-32.

Importantly, States cannot derogate from all human rights, so each Convention lists a number of non-derogable rights.[22] The list of rights depends on the Convention, yet, there are four non-derogable rights recognized by all of them, i.e. (i) right not to be deprived arbitrarily of one's life; (ii) right to be free from torture; (iii) right to be free from slavery; (iv) right not to be subjected to the retroactivity of criminal law.[23] Despite the fact that this list might differ from one Convention to the other, there are four non-derogable rights, which are universally recognized. Hence, if certain rights can be suspended, while others cannot, it means that some rights matter more than others, "and that the whole is not an indivisible and interconnected package of entitlements."[24] In other words, this "selection" of underogable rights might undermine the principle of universality, according to which there should not be a first and a second class of human rights.

This brief overview shows us that human rights law is almost universally accepted and omnipresent, i.e. it applies at all times. Nonetheless, there are some exceptional situations where States can restrict or, in time of "public emergency" suspend certain rights.[25] Already in 1940, the World Declaration of the Rights of Man was distributed to over 300 editors in forty-eight countries, generating a spreading interest. H. G. Wells, the British author and defender of the human rights' discourse, "expressed the concern that laws were being passed that were disproportionate to the threats posed by traitors and foreigners.[26] Therefore, the worry of derogating from human rights in a state of emergency was already present at that time. Yet, despite the worrisome danger of introducing the derogation clause, the drafters of the Human Rights Declaration introduced it anyway. According to many human rights treaties (e.g. Art. 15 ECHR), States have the possibility of derogating from some of the rights and liberties enshrined in them, but only in certain circumstances, i.e. in times of war and other public emergencies threatening the life of the nation.

[22] Ibidem.

[23] Andrea Bianchi. "Counterterrorism and International Law" in Chenoweth, E.; Gofas, A.; English, R.; Kalyvas, S. (eds.) *Oxford Handbook of Terrorism*. (Oxford: OUP, 2019), 672.

[24] Michael Ignatieff. *The lesser evil: political ethics in an age of terror*. (Edinburgh: Edinburgh University Press, 2005), 46.

[25] Helen Duffy. *The War on Terror and the Framework of International Law*. (Cambridge: Cambridge University Press, 2005), 280.

[26] Andrea Clapham, *Human rights: A very short introduction*, 30.

With this in mind, Michael Ignatieff clarifies that "emergency legislation may take three forms: national, territorial, or selective"[27] First of all, in national emergencies, when civilian law enforcement agencies are unable to maintain public order and safety, martial law is invoked by the government. Just to give an illustration, when a State is facing a terrorist emergency, it can "suspend the normal rule of law in order to give military full authority to arrest, detain, search, and harass insurgents within a civilian population."[28] Importantly, in national emergencies, martial law substitutes civilian law for an indeterminate period of time. [29] Secondly, in territorial emergencies, martial law applies only in a designed area, where – for instance – there are ongoing terrorist activities and where the military needs to have the power to detention, search, and arrest without civilian constraint or review.[30] In Sri Lanka, for example, where the government has declared a state of emergency for combating an insurgency, military law prevails on the civilian one.[31] Thirdly, in selective emergencies, "portions of the law are suspended for terrorist suspects." [32] This type of emergency has been particularly used after the 9/11 attacks, when police powers of search and wiretap authorizations were increased; the right of access to counsel and lawyer-client privilege changed; etc.[33]

In light of this view, it is worth mentioning the difference between the derogation from human rights obligations in emergency situations and the limitations on the exercise of human rights. [34] Firstly, States may impose "ordinary" limitations on the enjoyment of many human rights such as the right to freedom of expression, association and assembly for certain legitimate purposes.[35] On the one hand, limitations are allowed when they are prescribed by law, pursuant to a legitimate aim and when such limitation is necessary for a democratic society and proportionate to the identified legitimate aim.[36] On the

[27] Ignatieff, Michael. *The lesser evil: political ethics in an age of terror*, 25.
[28] Ibidem.
[29] Ibidem.
[30] Ibidem, p. 26.
[31] Ibidem.
[32] Ibidem.
[33] Ibidem.
[34] Office of the High Commissioner for Human Rights. "The Administration of Justice During States of Emergency", 814.
[35] Ibidem.
[36] Alessandra Spadaro. "Do the containment measures taken by Italy in relation to COVID-19 comply with human rights law?" *EJIL:Talk*, 2020.

other hand, derogations from human rights obligations can be imposed only under emergency situations. For this reason, they are usually called "extraordinary limitations" on the exercise of human rights.[37]

Yet, what does an *emergency situation* mean? Carl Schmitt in his book *Politische Theologie* (1922) established the essential proximity between the state of emergency and sovereignty. Despite his famous definition of the sovereign as "the one who can proclaim a state of emergency" there is still no theory of the state of exception in public law.[38] The difficulties arise from not having a universally accepted definition of "emergency". According to Oren Gross and Fionnuala Ní Aoláin, it is neither desirable nor possible to stipulate *in abstracto* what particular type or types of events will automatically constitute a public emergency within the meaning of the term. Each case is different and it has to be judged on its own merits taking into account the overriding concern for the continuance of a democratic society. [39] The difficulty of defining ''emergency'' in advance was cogently captured by Alexander Hamilton when he wrote that ''it is impossible to foresee or to define the extent and variety of national exigencies, and the correspondent extent and variety of the means which may be necessary to satisfy them. The circumstances that endanger the safety of nations are infinite.''[40]

As far as Giorgio Agamben is concerned, the very definition of the term is complex, since it is situated at the limit of law and of politics. According to a widespread conception, the state of emergency would be situated at an "ambiguous and uncertain fringe at the intersection of the legal and the political," and would constitute a "point of disequilibrium between public law and political fact." [41] Yet, we can still find a sort of common dominator in emergencies. According to Ian Zuckerman, an emergency situation is composed of three elements: (i) an *epistemic* component, i.e. emergency situations come "unexpected"; (ii) a *temporal* component, i.e. emergency situations demand immediate actions; and (iii) an *existential* component, i.e. emergencies situations pose a fundamental threat to something's existence, security, or

[37] Office of the High Commissioner for Human Rights. "The Administration of Justice During States of Emergency", 814.

[38] Giorgio Agamben. State of Exception, 1.

[39] Gross, Oren, Ní Aoláin, Fionnula. *Law in times of crisis.*, 5-6.

[40] Ibidem, p. 6.

[41] Giorgio Agamben. "State of Emergency" in lecture given at the Centre Roland-Barthes (Universite Paris VII, Denis-Diderot, 2002).

integrity.[42] Similarly, in *Lawless vs. Ireland*, a nine-member majority in the ECHR defined a "public emergency" for the purpose of article 15 of the European Convention as a "situation of exceptional and imminent danger or crisis affecting the general public, as distinct from particular groups, and constituting a threat to the organised life of the community which composes the state in question".[43] Hence, it is an undeniable fact that many States face several emergency situations, including pandemics, terrorist attacks, transnational organised crime, sudden and large scale population flows, as well as natural catastrophes resulting from global warming.[44]

Consequently, from these complex threats and challenges, a complex question arises: what shall States do when there is an *emergency situation*? The central promise of the State is to protect its citizens, i.e. security is a priority for most governments. When the available or "normal" measures cannot solve the situation, States can count on emergency measures. Firstly – as far as national law is concerned –modern constitutions have special provisions for dealing with emergency situations, permitting the delegation of powers to a president, or to some other constitutional authority, to issue decrees, to censor information, and to suspend legal processes and rights.[45] Secondly – as far as international law is concerned – different human rights conventions allow States parties to resort to derogatory measures on certain strict conditions, e.g. the International Covenant on Civil and Political Rights, Art. 4; the American Convention on Human Rights, Art. 27; and the European Convention on Human Rights, Art. 15. [46] Furthermore, it has to be noted that national governments decide autonomously whether there is a state of emergency. Hence, according to the doctrine of the margin of appreciation, States are in a better position to make an initial assessment of whether there is a state of emergency, [47] whereas the European Court of Human Rights would only have the final assessment to check the compatibility between States' individual determination and the Convention's standards.[48] The rationale behind this concept can be found on

[42] Saskia Hufnagel & Roach, Kent. *Emergency law*. (Farnham: Ashgate, 2012), 40.

[43] Oren Gross & Fionnula Ní Aoláin. *Law in times of crisis*, 249.

[44] Anna Khakee. *Securing democracy? a comparative analysis of emergency powers in Europe*, 5.

[45] Saskia Hufnagel & Roach, Kent. *Emergency law*, 63.

[46] Office of the High Commissioner for Human Rights. "The Administration of Justice During States of Emergency", 815.

[47] Andrea Bianchi. "Counterterrorism and International Law", 672.

[48] Ibidem.

the belief that every State has its own particular sensitivity in determining when a particular situation is threatening the life of the nation. For this reason, in general, human rights supervisory organs have been quite flexible in accepting States' individual determinations.[49]

Let us now turn into a particular scenario that, at the time of writing, is affecting everyone's life and in which the "state of emergency" has been declared: the spread of COVID-19 pandemic. Initially, on the 30th of January 2020, the World Health Organization (WHO) Director-General, Dr Tedros Adhanom Ghebreyesus, declared the novel coronavirus (2019-nCoV) outbreak a public health emergency of international concern (PHEIC). Furthermore, as reported by the WHO on the 11th of March 2020, more than 118,000 cases in 114 countries were confirmed, and 4,291 people have lost their lives. Therefore, the WHO assessed that COVID-19 can be characterized as a pandemic, calling for countries to take urgent and aggressive action. [50] If we come back to Zuckerman's definition of "emergency situation", we can easily acknowledge that COVID-19 has all the elements to be considered as such. In other words, COVID-19 has: (i) an *epistemic* component, i.e. the spread of the virus came "unexpected"; (ii) a *temporal* component, i.e. the rapid spread of the virus demand immediate actions in order to prevent infections, save lives and minimize impact; and (iii) an *existential* component, i.e. the coronavirus posed a fundamental threat to some people's life. Hence, the fast spread of the virus, together with the high – but still uncertain – mortality rate poses a threat to the life of the population. Interestingly, despite COVID-19 could be considered as an *emergency situation* threatening the life of the nation, only a handful of States have notified their intention to derogate from some of their obligations under the ICCPR and the ECHR due to the COVID- 19 emergency, probably believing that the situation can be dealt with by simply limiting human rights on public health grounds.[51]

Human rights law recognizes that national emergencies may require limits to be placed on the exercise of certain human rights. Yet, as legal philosophers, we can go further. Even though the law might justify the limitation/derogation from

[49] Ibidem.

[50] World Health Organization (2020): "WHO Director-General's opening remarks at the media briefing on COVID-19", March 11, 2020. https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020.

[51] Alessandra Spadaro. "Do the containment measures taken by Italy in relation to COVID-19 comply with human rights law?"

human rights, is this morally permissible? And if so, under which circumstances? Recalling to a quite established debate in philosophy, i.e. utilitarianism vs. liberalism, we should consider States possible pitfalls in the response to the crisis and it would be crucial to suggest ways in which attention to human rights can shape better responses.[52] In light of this view, the next section of this paper aims at critically exploring the theoretical foundations of the limitation, or derogation, of human rights through the lens of two of the major contemporary theories of justice, i.e. utilitarianism and liberalism.

3. Human Rights Law in Public Emergencies: A Philosophical Approach

Following a legal-philosophical approach, this work adheres to the moral philosophy of international law, i.e. a normative kind of philosophical or theoretical enquiring pertaining to international law. As Samantha Besson points out, this approach consists "in the reasoned moral evaluation of existing international law that should guide the design and the reform of international law."[53] Supporting Allen Buchanan's argument, we shall reject the position of certain international lawyers who "tend to be uncomfortable with moral thinking about international law."[54] Their fear of confusing the scientific study of the law and morality is unfounded. The aim of the moral philosophy of international law is "to contribute to the formulation of *moral standards* for the evaluation of public international law."[55] Therefore, the contribution of moral philosophy is to help international lawyers in making and/or reforming international law. It is a further development inside the international legal theory, showing that it is possible to think normatively about international law.[56] It is true that the majority of legal philosophers do not "dare to venture into the murky waters of the law."[57] However, this work intends to contribute to the study of international law, exploring the possible moral wrongs and - at the same time

[52] United Nations (2020): "Covid-19 and Human Rights: We are all in this together", 3.

[53] Samantha Besson. "Moral Philosophy and International Law" in Orford, A. and Hoffman, F. (eds.) *The Oxford Handbook on the Theory of International Law*. (Oxford: OUP 2016), 386.

[54] Allen Buchanan. *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law*. (Oxford: OUP, 2004), 4.

[55] Samantha Besson. "Moral Philosophy and International Law", 391.

[56] Ibidem, 398.

[57] Andrea Bianchi, "On Asking Questions" in Bianchi, A. (ed.) (2017). *Philosophy and Theory of International Law*, 2.

- underlying the existing legal framework on the derogation from human rights in times of emergency. Since the decision of derogating from human rights could affect all people's lives, it is fundamental to tackle questions regarding the moral standards of these acts.[58] We shall do so by reiterating a quite established debate regarding major contemporary theories of justice, i.e. utilitarianism and liberalism.

3.1 Utilitarianism

In this section, we shall see how the limitation, or derogation, from human rights in times of public emergency might be analysed through the lenses of utilitarianism. Hence, as a bricklayer intends of building a house's wall, we shall put the first brick and try to explain what is utilitarianism.

Utilitarianism is one of the main schools of thought in moral philosophy, according to which the best moral action is the one that maximizes utility. According to Richard Posner:

> Utilitarianism, as ordinarily understood, holds that the moral worth of an action (or of a practice, institution, law, etc.) is to be judged by its effect in promoting happiness – "the surplus of pleasure over pain" – aggregated across all of the inhabitants (in some versions of utilitarianism, all of the sentient beings) of "society" (which might be a single nation, or the whole world).[59]

Before getting straight to the crux of the matter, let me illustrate the typical utilitarian reasoning with an example. Imagine you decide to take a nice walk along the trolley tracks that crisscross your town. It is a sunny day and you would never expect to face a moral dilemma. However, this is exactly what is about to happen. You notice that there is a trolley getting closer and closer. The trolley's brakes have gone out, and it is gathering speed. With horror, you also notice that the trolley is heading toward a group of five workers on the tracks. No worries: you can change the situation. All you have to do is pull a hand lever to switch the tracks, and you will save the five people. Easy, is not it? Not really: here it comes the moral dilemma. If you flip the switch, one person – who finds herself on the other track – will die. If you do nothing, five people will die. Should you flip the

[58] Ibidem, 10.

[59] Richard A. Posner. "Utilitarianism, economics, and legal theory." *The Journal of Legal Studies* 8.1 (1979): 104.

switch? According to utilitarianism, the answer is yes. As I have briefly said, utilitarianism aims at maximizing utility and, at the same time, minimizing harm.

It is worth pointing out that utility can be defined in different ways, yet, the classical utilitarian theories associate the term "utility" with "happiness". Principles that reflect this view are called "welfarist" and they treat values such as freedom and individual autonomy as "instrumental", i.e. valuable only because of their contribution to well-being. [60] To put it differently, "utilitarianism, in its simple formulation, claims that the morally right act or policy is that which produces the greatest happiness for the members of society."[61] According to Will Kymlicka, utilitarianism has two main attractions. First, utilitarianism as a modern theory of socio-political justice seeks to promote the good (happiness, or welfare, or well being) that we all pursue in our lives. [62] It is something concrete and achievable, which does not depend on asserting any metaphysical claim, nor on the intrinsic goodness or badness of a given act. To put it differently, "it does not depend on the existence of God, or a soul, or any other dubious metaphysical entity."[63]

The second attraction is represented by utilitarianism's consequentialism, which says that something is morally good only if it makes someone's life better off.[64] In other words, consequentialism is not a deontological approach, i.e. it requires assessing whether (or not) the act or policy at issue actually produces some identifiable good/wrong. Hence, thanks to this consequentialist credo, understanding the complex conception of moral rules does not seem so difficult anymore. We need moral rules because they are necessary to alleviate the moral condition. Or, in consequentialist terms, because moral rules are the expressions of a concern for welfare.[65] As a result, consequentialism helps us resolve moral dilemmas – such as the trolley problem – in a straightforward way. In Kymlicka's words: "Finding the morally right answer becomes a matter of measuring changes in human welfare, not of consulting spiritual leaders, or

[60] Charles Blackorby, Walter Bossert, and David Donaldson. "Utilitarianism and the theory of justice." In *Handbook of social choice and welfare* 1 (2002), 543.
[61] Will Kymlicka. *Contemporary political philosophy: an introduction.* (Oxford: OUP, 2002), 10.
[62] Ibidem, p. 11.
[63] Ibidem.
[64] Will Kymlicka. *Contemporary political philosophy: an introduction*, 11.
[65] Nigel Simmonds. *Central issues in jurisprudence: justice, law and rights.* (London: Sweet & Maxwell, 2008), 20.

relying on obscure traditions".[66] Due to this "practical" consequentialist dimension, utilitarianism is often thought to be a suitable principle to guide the decisions of those who exercise public power, such as judges and legislators.[67] Since utilitarianism does not depend on asserting any metaphysical claim, it can be said that utilitarianism seems to make each issue turn upon a question of fact: in each case, we will be asking what will actually serve to maximise welfare.[68] In other words, utilitarian's decisions are based upon hard evidence, and it seems clear that we expect public officials to act upon the basis of evidence and objective criteria.[69]

To sum up, we can see that in any utilitarian theory, maximization of "social utility" (or of the total amount of "good" in our social environment) plays a fundamental role. However, this "social good" or "social utility" can be defined in different ways. The classics of utilitarianism used a *hedonistic* definition, i.e. social utility should be considered as the total amount of pleasure – less the total amount of pain – if each instance of pleasure and of pain is properly weighted according to its duration, intensity, and similar characteristics. In contrast, other utilitarian philosophers proposed an ideal-utilitarian definition, which would measure social utility by the total amount of "mental states of intrinsic worth."[70] In our debate regarding "state of emergency", we can think of the maximization of "social utility" as the maximization of "security". For this reason, the utilitarian reasoning could align to what Ignatieff calls "the purely pragmatic position." According to Ignatieff, pure pragmatists believe that if the government suspends rights, it does so in the interest of the majority of citizens,[71] e.g. their security against terrorist attacks or against the threat of a global pandemic. In other words, the purely pragmatic position maintains: "Democracies do have bills of rights but these exist to serve vital majority interests."[72] Significantly, a pure pragmatist would not deny that it is very important to defend individual rights. Yet, when the security of the majority is at stake, States have the right to take certain measures that are usually not allowed in times of safety. For instance, according to the purely pragmatic position:

[66] Will Kymlicka. *Contemporary political philosophy: an introduction*, 12.
[67] Nigel Simmonds. *Central issues in jurisprudence: justice, law and rights*, 20.
[68] Ibidem.
[69] Ibidem, p. 21.
[70] John C. Harsanyi. "Rule utilitarianism and decision theory." *Erkenntnis* 11.1 (1977), 27.
[71] Ignatieff, M. (2005). The Lesser Evil: Political Ethics in the Age of Terror, 3.
[72] Ibidem.

Defending a right to an individual to freedom of association in times of safety protects the liberty of all. But protecting that same individual in a time of emergency may do harm to all. A state of emergency is precisely a case where allowing individual liberty – to plan, to plot, to evade detection – may threaten a vital majority interest.[73]

To put it differently, according to the above-mentioned position, the majority's interest is prior to individual rights. The purpose of rights is, therefore, the protection of a democracy's members and they exist as long as they serve this purpose. We can see that the utilitarian position, intended as "security-fist" approach, wants to show that the safety of the majority is what matters. To put it differently, in the context of a state of emergency, utilitarians believe that the general good (i.e. the safety of the majority) has more importance than the individual one. Rights, therefore, should not be considered as "a pesky impediment to robust and decisive action."[74]

In light of what just said, the mainstream moral justification for the limitation, or derogation, from human rights in times of public emergency (as explained in the previous section) appeals to the utilitarian reasoning. We should recall once again that utilitarianism is a welfarist principle, which can be used to rank social alternatives according to their goodness. In other words, utility is an index of individual lifetime well-being and, for a fixed population, utilitarianism declares alternative x to be better than alternative y if and only if total utility is greater in x than in y.[75] Translating this equation into the language of a state of emergency, utilitarianism declares alternative x (suspending/derogating from human rights) to be better than alternative y (enjoyment of human rights and civil liberties) if and only if total utility (in terms of security) is greater in x than in y. Let's come back to the COVID-19, a pandemic that has brought many States to their knees.

As stated in the previous section, COVID-19 can be considered as an *emergency situatio*n in Zuckerman's terms, i.e. it is a situation that came unexpected, which demands immediate actions, and which poses a fundamental threat to something's existence, security, or integrity. As claimed before, under these exceptional situations, States can restrict or suspend certain rights. Hence, every decision-maker would face the same moral dilemma: should we suspend

[73] Ibidem, p. 4.
[74] Ibidem, p. 7.
[75] Charles Blackorby, Walter Bossert, and David Donaldson. "Utilitarianism and the theory of justice", 543.

individual rights in the name of collective security? Limiting or suspending human rights for security reasons might enclose the same reasoning of the purely pragmatic position, spelled out above. In the utilitarian calculation, the welfare, or "social utility" – in the COVID-19 case we can substitute these terms with health security – of the majority is what matters the most. In other words, the general good has more importance than the individual one. Hence, according to the utilitarian calculus, if the government limits or suspends rights, it does so in the interest of the majority of citizens. As previously seen, utilitarian scholars would not deny that it is very important to defend individual rights. Yet, when the health of the majority is at stake, States have the right to take certain measures that are usually not allowed in times of safety. To put it differently, the majority's interest is prior to individual rights. The purpose of rights is, therefore, the protection of a democracy's members and they exist as long as they serve this purpose.[76] Hence, in the case of COVID-19, acting on behalf of the majority's interest does not simply mean avoiding infecting more people and increasing the chance of contagion, but also avoid putting so much stress on health systems.

Furthermore, we have seen that utilitarianism is a version of consequentialism. It is clear that for utilitarianism consequences matter. Pure consequentialist scholars would argue that "measures which aim to save lives and preserve the security of the citizens cannot be wrong if they actually succeed in doing so".[77] In other words, according to consequentialism – i.e. the view that normative properties depend only on consequences – good consequences (e.g. saving thousands of people) will morally justify an action (e.g. limiting or suspending human rights). This argument seems to suggest that the majority's security is more important than individuals' rights, i.e. the general good has more importance than the individual one. Yet, we should be careful in claiming that consequentialism is the moral justification behind the pure pragmatist position, which maintains to suspend individual rights in the interest of the majority. In fact, consequentialism seems to eventually require some kind of balancing of the claims of a majority and minority; and depending on what those consequences are, once aggregated, there will be different outcomes. For instance, let's imagine that a State X decides to suspend the rights and liberties of its citizens after a terrorist attack committed by "Red Hair", a foreign terrorist

[76] Michael Ignatieff. *The lesser evil: political ethics in an age of terror*, 4.

[77] Ibidem, 154.

group. However, X is mainly concerned with red hair's people (which in country X, is only 10% of the population). If the consequences for the majority are that they will all suffer a minor headache, but for the minority (people with red hair) they will all suffer torture; then what does a theory that values consequences say about the morality of that act? How many headaches balance out the torture of even one person? In other words, Whose happiness is to count in designing policies to maximize the greatest happiness? [78] This is a problem that utilitarianism fails at solving.

In light of this view, we should ask: How can the effectiveness of human rights as a guarantee of dignity be sustained, if rights are suspended in a state of emergency? We can imagine defenders of the utilitarian position answering: "If you have to choose between leaving laws unchanged and changing them to stop an emergency situation, such as a pandemic, and your concern is the rule of law, far better to abridge a right than to let a concern for pure consistency stay your hand."[79] Or, as James Ames claimed: "The law is utilitarian. It exists for the realization of the reasonable needs of the community. If the interest of an individual runs counter to the chief object of the law, it must be sacrificed."[80]In simpler terms, let's imagine taking a bitter syrup (i.e. suspending human rights) when we are sick (i.e. "when the life of the nation is threatened" – in a state of emergency). We are willing to take a bitter syrup since we believe that it will make us feel better (e.g. we will overcome the pandemic). However, once recovered (i.e. when we are not facing the threat of the pandemic anymore), there won't have any benefit from taking the same syrup. In this sense, we can claim that the law is utilitarian. Hence, the utilitarian principles, in emergency situations, offers a conceptually clear practical criterion for resolving our real-life moral perplexities: it tells us what to do when two or more, prima facie equally compelling, moral rules seem to impose mutually conflicting moral obligations upon us. [81] Yet, the utilitarian approach presents substantive problems when we look at it more closely. For instance, if utilitarianism counts lives as numbers, it means that life does not have an intrinsic value *per se*. In other words, it seems that utilitarianism has many practical implications inconsistent with some of our most firmly held moral convictions, such as the

[78] Richard A. Posner. "Utilitarianism, economics, and legal theory", 112.
[79] Michael Ignatieff. *The lesser evil: political ethics in an age of terror*, 4.
[80] James Barr Ames, Law and Morals, 22 Harv. L. Rev. 97, 110 (1908).
[81] John C. Harsanyi. "Rule utilitarianism and decision theory", 30.

belief that considerations of social expediency cannot justify infringements upon fundamental rights of other people.[82]

3.2. Liberalism

So far, we have seen how the limitation/derogation from human rights can be morally justified, if we embrace a utilitarian perspective, i.e. "social utility" such as security acts as a trump to individual rights when facing a public emergency. In this second part, we shall analyse an opposing view, which accords individuals with intrinsic respect in the form of rights that guarantee certain freedoms and which holds that individual rights act as trumps when – for instance – States deal . In other words, we shall consider "pure liberalism" as that philosophical view which counters the limitation/derogation from human rights.

According to Will Kymlicka: "We need some or other theories of fair shares prior to the calculation of utility, for there are limits to the way individuals can be legitimately sacrificed for the benefit of others. If we are to treat people as equals, we must protect them in their possession of certain rights and liberties".[83] Hence, liberalism is the theory that presents itself as a reaction to utilitarianism, which accords liberty and equality primacy as political values. Importantly, one of the most well known liberal philosophers who fiercely reject utilitarianism is John Rawls. He rejects utilitarianism on two main grounds. Utilitarianism, he argues, ignores the distinctness of persons, and it defines the right in terms of the good.[84] These two main criticisms will turn into the cornerstone of Rawls' *Theory of Justice*. Nonetheless, it is to be noted that not all liberal philosophers reject utilitarianism. John Stuart Mill, who is considered the father of liberalism, is also a utilitarian. Mill's liberal philosophy is articulated in one of his greatest work, i.e. *On Liberty*.[85] The key element of *On Liberty* is the so-called Harm Principle, which can be described through two dimensions or characteristics: (a) is negative, duty-imposing, i.e. we have a duty not to harm others and the State has a duty to prevent us from harming others; (b) is positive, power conferring, i.e. we are free to make any choices as long as our actions do not harm others and the State has a duty to make it possible for us

[82] Ibidem.
[83] Will Kymlicka. *Contemporary political philosophy: an introduction*, 12.
[84] Nigel Simmonds. *Central issues in jurisprudence: justice, law and rights*, 62.
[85] Please refer to: Mill, J.S., Himmelfarb, G., 1985. On liberty, Repr. ed, Penguin classics. Penguin Books, London.

to make these choices. Hence, for a liberal thinker such as Mill, the only legitimate governmental use of coercive power is to prevent harm done by an individual to others. To sum up, Mill defends the idea of freedom as a function of self-realization and of society which first of all imposes the protection of individual choices from any unjustified interference, which is not aimed, at protecting others and even oneself from possible damage.[86] More generally, Raymond Geuss claims that there are four main components of classical liberalism. Firstly, liberalism assigns a high positive value to toleration – considered as one of the main virtues of human society.[87] Secondly, liberalism emphasises human freedom. Society should consist as much as possible of voluntary relations between people.[88] Thirdly, liberals believe that the only source of political authority should be the free assent of the members. Hence, the goal of liberalism consists of limiting concentrated or arbitrary power.[89] Fourthly, liberals are committed to individualism: a society is good only to the extent to which the individuals in it are well off.[90]

In the debate on how a democratic State should deal with the state of emergency, we shall take the point of view of "pure liberalism", which would claim that democracies are not just a majority rule disciplined by checks and balances, which merely serve majority interests. On the contrary, a democratic State is an "order of rights that puts limits to the power of the community over individuals".[91] Rights could be seen as boundaries that States cannot overcome, and whose purpose is to protect individuals from possibly abusive treatments. To put it differently, rights represent a restraint on what a State can do, protecting each individual from potential harm and restrictions of liberties. In light of this view, "pure liberalism" would stress out that democracies accord individuals intrinsic respect. Thus, rights express the idea that individuals matter intrinsically and they guarantee certain freedoms and human dignity. As Michael Ignatieff states, liberalism endorses the idea that "government for the people [...] is something more than government for the happiness and the

[86] Roberta Sala e Virginia Sanchini "Libertà e sorveglianza. Il caso della pandemia da Covid-19" in Nicola Riva. *L'antipaternalismo liberale e la sfida della vulnerabilità*. Roma: Carocci Editore, 2020), 114.

[87] Raymond Geuss. "Liberalism and Its Discontents", *Polit. Theory 30* (2002), 322.

[88] Ibidem.

[89] Ibidem.

[90] Ibidem.

[91] Michael Ignatieff. *The lesser evil: political ethics in an age of terror*, 73-74.

security of the greatest number".[92] The idea that rights serve as a guarantee of certain freedom has a strong ethical implication. As Ignatieff points out: "Freedom matters because it is a precondition for living in dignity".[93] Therefore, it seems clear that liberalism aspires to banish emergency or exception from the legal order because the former does not focus on the intrinsic value of every individual's life. Liberalism, in other words, wants an order where all political authority is subject to the law.[94] To put it shortly, the "pure liberal" position would claim that "if rights are abridged, even for a few individuals, then democracy betrays its own identity",[95] i.e. the democracy's commitment to dignity and freedom.

The current COVID-19 situation has exacerbated this quite old "liberal" debate. Hence, we should wonder which interference is lawful and which is not, with what legitimacy the authority can set limits to individual choices, on which basis some of these choices also affect others in addition to the one who makes them, and so forth. In other words, we shall take into account the main question of this paper, i.e. is it morally justified to limit/suspend our individual rights, such as human rights, in name of a greater good, such as the "life of the nation"? In the circumstances of COVID-19, the reason for suspending certain individual rights was pretty straightforward. At stake there was a higher value than freedom of movement, i.e. health if not life, for oneself and for others, in the present and in the future.[96] For instance, a group of Italian researchers estimated that without the restrictive countermeasures, 70-80% of Italians would have been affected by COVID-19 and the 10% of the population, equal to 6 million people, would have needed intensive care. Nonetheless, with very strict measures applied from the outset, only 0.08% of the population has been affected.[97]

We should notice that emergency powers across jurisdictions have had pervasive and insidious effects on law and legal institutions, the patterns of

[92] Ibidem, 77.
[93] Ibidem, 78.
[94] David Dyzenhaus. "Schmitt v. Dicey: Are states of emergency inside or outside the legal order", *Cardozo L. Rev., 27*(2005), 2005.
[95] Michael Ignatieff. *The lesser evil: political ethics in an age of terror*, 78.
[96] Roberta Sala e Virginia Sanchini "Libertà e sorveglianza. Il caso della pandemia da Covid-19", 115.
[97] La Repubblica. "Coronavirus, senza restrizioni sarebbe stato colpito il 70-80% degli italiani", (March 24th, 2020).

which bear remarkable similarity across jurisdictions and time. [98] Hence, we shall ask: What remains of the status of human rights if they can be abridged in times of public emergency? Put differently: How can the rule of law be maintained if the law can be suspended as necessity dictates? How can the effectiveness of human rights as a guarantee of dignity be sustained, if rights are suspended in a state of emergency?[99] In my view, this concern brings to mind Aesop's tale, i.e. "the boy who cried wolf". According to the latter, a shepherd boy used to repeatedly trick nearby villagers into thinking that wolves were attacking his flock. However, when a wolf actually did appear and the boy again called for help, the villagers believed that it was another false alarm and they did not help the boy, letting the wolf eat the sheep. Similarly, if governments can suspend human rights every time they declare a state of emergency, how can we still believe in the legitimacy of human rights? A liberal view would fear that such a rationale would risk permanent damage both to rights and to the system of checks and balances. [100] In other words, "pure liberalism" would argue that human rights are independent of conduct, circumstances, or citizenships.[101]Humans have human rights simply because they are humans and it is always wrong to suspend human rights. In fact, rights express the idea that individuals matter intrinsically and they guarantee certain freedoms and human dignity.[102] Therefore, suspending human rights means defying the commitment to freedoms and dignity

There is a further concern held by the liberal position, when criticizing the suspension/derogation of rights in a state of emergency. This criticism is part of a more general debate against contemporary democracies, which seem to have embarked on an authoritarian drift, precipitating politics into a "state of exception" – here meant as any State in which the political authority acts outside the law.[103] Those who have seen evidence of an impending state of exception in the anti-Covid directives accuse the democratic government of abuse of power, by imposing, through decrees, restrictions on freedoms. In other words, even if emergency measures are eventually revoked, the very fact that the law is made

[98] Oren Gross & Fionnula Ní Aoláin. *Law in times of crisis*, 3.
[99] Michael Ignatieff. *The lesser evil: political ethics in an age of terror*, 26.
[100] Ibidem, 27.
[101] Ibidem, 34.
[102] Ibidem, 5.
[103] Roberta Sala e Virginia Sanchini "Libertà e sorveglianza. Il caso della pandemia da Covid-19", 116.

more severe in a time of emergency does damage to respect for the law as an abiding set of standards,[104] i.e. the temporary suspensions of civil liberties will become permanent, once the emergency is over. What we have just presented is, however, the biggest matryoshka. If we open it, we can find a smaller one, whose matter of concern is as important as the first one. The smaller matryoshka reveals a fundamental issue. Who has the authority to decide when emergencies exist? Are presidents and prime ministers entitled to declare a state of emergency? Should we trust their judgments? "Pure liberals" worry that if the determination of a state of emergency is in the hands of a single president or a prime minister, (s)he might manipulate the emergency crisis as (s)he pleases. This matter seems quite appropriate if, for instance, we look at what is happening in Hungary. To deal with the coronavirus emergency, Hungary's parliament has passed a new set of coronavirus measures that includes jail terms for spreading misinformation and gives no clear time limit to a state of emergency that allows the nationalist prime minister, Viktor Orbán, to rule by decree.[105] In this case, the liberal nightmare might be about to come true.

Nonetheless, I agree with Roberta Sala e Virginia Sanchini: the "suffering" of Western democracies, Italy for instance, that followed the restrictions imposed the COVID-19 pandemic did not translate into a state of exception, if by this we mean a denial of democratic principles in favour of the establishment of absolute power.[106] What we have seen, however, is that COVID-19 especially impacted people on the margins. Put differently, the COVID-19 pandemic has had a significant impact on human rights worldwide, yet it has particularly aggravated the situation for vulnerable people. As reported by the Human Rights Council, the pandemic has set back progress on women's rights in a number of significant ways, especially related to livelihood. Lockdowns and other restrictions on movement have exposed many women and girls to gender-based violence in the home. Poverty, structural discrimination, and exclusion faced by minorities resulted in diminished life opportunities and restricted access to resources, such as education, health, work, food, etc.[107]

[104] Michael Ignatieff. *The lesser evil: political ethics in an age of terror*, 30.

[105] The Guardian. "Hungary passes law that will let Orbán rule by decree", (March 30, 2020).

[106] Roberta Sala e Virginia Sanchini "Libertà e sorveglianza. Il caso della pandemia da Covid-19", 116.

[107] General Assembly, Annual report of the United Nations High Commissioner for Human Rights, A/HRC/47/54

In pursuance of investigating whether States are morally justified in derogating from human Rights in a state of emergency, we shall recall Andrea Sangiovanni, according to whom: "Human rights are not those moral rights possessed in virtue of our humanity, but those moral rights whose systematic violation ought to be of universal moral, legal, and political concern."[108] In other words, human rights cannot be listed, but rather they vary depending on the context. The type of universal moral, political, and legal concern which is a *real* concern and which *really do* merit such a concern, depends on a specific context.[109] For the purpose of our discussion, let me take into account a subgroup of moral concerns, which gather universal moral, legal, and political concerns, i.e. the system of the international legal human rights (ILHR).[110] In Sangiovanni's view, human rights are meant to protect the moral equality of all human beings.[111] Yet, what is moral equality? In a nutshell, we must explore what is moral inequality, if we want to appreciate the idea of moral equality. This approach is called "Negative Conception". According to Sangiovanni, there are five interrelated types of actions that are instances of treating others as inferior[112]: (1) dehumanization (i.e. treating others *like animals* – as if they lack typically human characteristics); (2) infantilization (i.e. treating others *like children* in need of help and supervision); (3) stigmatization (i.e. excluding or disdaining others for their physical aspect, background, or character); (4) treating people as objects (i.e. treating others as they lack subjectivity); (5) treating people as instruments (i.e. "as we would a tool.")[113] As I see it, States have a *negative duty*[114] to respect the moral equality of citizens/non-citizens. In other words, States should act to protect individuals against *morally unequal* treatments, refraining from being responsible for these kinds of actions. As Sangiovanni points out: "All States and citizens have duties to protect the equal moral status of both their own citizens and those in other States."[115]

[108] Sangiovanni, A. (2017). *Humanity without Dignity*. Cambridge, Massachuttes: Harvard University Press, 191.
[109] Ibidem.
[110] Ibidem, 207.
[111] Ibidem, 209.
[112] Ibidem, 74.
[113] Ibidem.
[114] For *negative duty* I mean refraining from acting, i.e. an obligation that prohibits us to do something morally bad.
[115] Sangiovanni, A. (2017). *Humanity without Dignity*. Cambridge, Massachuttes: Harvard University Press, 212.

In light of this view, let us think for a moment how the suspension of human rights to deal with the Coronavirus pandemic has impacted the moral equality of the marginalized and vulnerable groups, on the basis of racial, religious, and gender grounds. Fear and uncertainty about the pandemic have equally fuelled the so-called "Coronavirus stigma", and laid bare, in particular, the vulnerability of those living in precarious situations and marginalised groups, including persons with disabilities, women and children, refugees and migrants.[116] Hence, even though the virus does not discriminate, its impacts do.[117] In some countries, for instance, leaders have used labels like "foreigner's disease" to describe COVID-19. In some countries, health workers – especially women – have been ostracised or even attacked.[118] Just to give an illustration, in France, videos and testimonies of apparently abusive controls and violence by the police began to emerge on social networks. In some cases, comments made by the police were xenophobic or homophobic. Furthermore, some images show police officers using dangerous and potentially lethal immobilization techniques.[119] It goes without saying that the state of health emergency must not be undermined, and that States must protect the health of their citizens. Yet, it is also important to bear in mind that these operations must take place within a strictly legal framework, without discriminatory controls or the use of unjustified or disproportionate force. For this reason, several French organizations called on the Minister of the Interior and the director-general of the National Police to ensure that the maintenance of order and control operations in the context of the fight against the COVID-19 epidemic do not open to abuse.[120] To put it differently: ensuring public safety cannot be a way to justify abuse and discriminative raids.

Nonetheless, this is not the first time that, during a public emergency, France is accused of discriminatory and abusive police checks against people because of their physical appearance, their real or supposed origin, or their place or mode of housing. Let us come back in time, just of few years, to the terrorist attacks of November 13, 2015. That night, shootings and bomb blasts left 130

[116] Universal Human Rights Group. "Right-On: Inequality and discrimination during Covid-19", (April 15, 2020).
[117] United Nations. "Covid-19 and Human Rights: We are all in this together" (2020), 10.
[118] Ibidem.
[119] Ligue des droits de l'homme. "Mesures de confinement: les contrôles de police ne poivent être ni abusifs ni violents ni discriminatoires" (March 27th, 2020).
[120] Ibidem.

people dead and hundreds wounded, with more than 100 in critical condition.[121] In the aftermath of these attacks, France declared the "state of emergency", applying Law 55-385 of 3 April 1955.[122] Importantly, France has also notified the Secretary-General of the Council of Europe of several extensions of the emergency situation.[123] Yet, what were the implications of suspending civil and human rights? The declaration of "state of emergency" allowed French executive to impose house arrest without judicial control and conduct property searches without a judicial warrant, *if* there are serious reasons to believe that someone's behaviour constitutes a threat to public security and public order.[124] Hence, a dangerous arbitress on the application of the emergency law was clearly emerging, i.e. especially Muslims and North Africans were considered to be "a threat to public security and public order" and, therefore, they are placed under house arrest. Just to give an illustration, Halim, a young French citizen, was placed under house arrest on November 15, 2015 with the accusation of "radical Islamist movement." To support the accusation, Halim was reported of having taken photos with his phone outside the home of an editor of Charlie Hebdo. Two months later, Halim was exonerated from the accusation and his house arrest was suspended. Halim was simply calling his mother that day and he never took a single photo with his phone. The judge ordered the government to pay Halim €1,500 compensation, yet this amount of money could never pay back Halim's losses. "My credibility, I lost it. My lifestyle, I lost it," he said. "Since that day I have only God, my family, and my lawyer".[125]

However, even when a public emergency is declared, the majority of the people – not from the suspected ethnic background – do not experience any discriminatory or potentially dangerous treatments. These are for the others, for the minorities. In January 2016, Human Rights Watch interviewed 18 people who said they had been subjected to abusive searches or placed under house arrest. Those targeted said the police burst into homes, restaurants, or mosques; broke people's belongings; terrified children; and placed restrictions on

[121] BBC (2015): "Paris attacks: What happened on the night", December 9, 2015. https://www.bbc.com/news/world-europe-34818994.

[122] Triestino Mariniello. ″Prolonged emergency and derogation of human rights: Why the European Court should raise its immunity system″, *Ger. Law J. 20* (2019, 52.

[123] Ibidem.

[124] Ibidem.

[125] Human Rights Watch. ″France: Abuses Under State of Emergency″, (February 3rd, 2016).

people's movements so severe that they lost income or suffered physically.[126] One of these people is Halim. France and its prolonged state of emergency might be seen as a way to strengthen the above-mentioned conventional liberal model of citizenship, which recreate a narrative of a single national culture – condemning newcomers to a second-class citizenship and reinforcing the disadvantage of historically marginalised minorities.[127] Hence, it is not surprising that Holland declared that the alleged "war on terror" is between the identity, the values, the cultures, and the people of France and the terrorists, who are nothing more than cowards who fired on an unarmed crowd.[128] What is the implication of this claim? To defend French security and identity, the police used the new emergency in a discriminatory way, which has strengthened even more the narrative of *us vs. them*. For instance, as reported by Izza Leghtas, these new emergency powers have traumatized families and tarnished reputations, leaving targets feeling like second-class citizens.[129] Hence, with the derogation of human rights in public emergencies, it arises a dangerous arbitress on the application of the emergency law. The latter refers to "all persons with regards to whom there exist serious reasons to think that their behaviour constitutes a threat of public order" (Art. 3, L. 1510). Yet, I doubt that a white man living in a fancy neighbour in Paris would raise "serious reasons to think" that he might be a suspect. As Conor Gearty rightly asks: what happens when the "wrong person" (ex: white suspected arms-dealer) finds him/herself falling foul of the law? The majoritarian stampede for fair play then is almost wondrous to behold: "that law is not for us".[130] This arbitrary judgment turns out to be a discriminatory judgment against a particular kind of minority group in France, i.e. the Muslim community. As the Human Rights Watch fiercely report, the emergency measures: "have created economic hardship, stigmatized those targeted, and have traumatized children. [...] In a context of growing Islamophobia, the French government should urgently reach out to Muslims and

[126] Ibidem.

[127] Neus Torbisco-Casals, "Multiculturalism, Identity Claims, and Human Rights: From Politics to Courts." *Law Ethics Human Rights 10* (2016), 372-373.

[128] Fraçois Hollande. "Speech by the President of the Republic before a Joint Session of Parliament", (November 16th, 2015).

[129] Human Rights Watch (2016): "France: Abuses Under State of Emergency" (February 3rd, 2016).

[130] Conor Gearty. *Liberty and security*. (Cambridge: Polity, 2013), 22.

give them assurances that they are not under suspicion because of their religion or ethnicity".[131]

Sadly enough, *ipsa historia repetit*. History repeats itself.

Even in a global emergency – which affects everyone's lives, rights and liberties – racism and discrimination increasingly spread. Just to give an illustration, Matteo Salvini, former Italian Deputy Prime Minister, wrongly linked COVID-19 to African asylum seekers. Similarly, former US President Donald Trump has referred to COVID-19 as the Chinese virus. Hence, rather than being an equaliser, given its ability to affect anyone, COVID-19 policy responses have disproportionately affected people of colour and migrants– people who are over-represented in lower socioeconomic groups, have limited health-care access, or work in precarious jobs.[132]

As reported by the United Nations:

> Equality and non-discrimination are core human rights that apply at all times, but this pandemic shows clearly why inequality and discriminatory practices are unacceptable and ultimately hurt everyone. We cannot afford to leave anyone behind in fighting the pandemic.[133]

In light of this view, we should pay particular attention to cultural minorities to fight against the discriminatory effect of the emergency law. The main point would be to ensure that members of minority cultures are not coerced to assimilate or to give up their commitments and efforts to preserve their institutions.[134] The goal shall be having a State, I would argue, that do not treat other cultural identities as a "threat to the life of the nation."

4. Conclusion

This paper aimed at providing both a legal and a philosophical overview of the limitation, or suspension, of human rights in emergency situations – such as the COVID-19 pandemic. The legal-philosophical approach of this paper is, therefore, fundamental in order to understand the current situation.

[131] Human Rights Watch (2016): "France: Abuses Under State of Emergency" (February 3rd, 2016).

[132] Delan Devakumar, et al. "Racism and discrimination in COVID-19 responses", *The Lancelet 395* (2020), 1194.

[133] United Nations. "Covid-19 and Human Rights: We are all in this together" (2020), 10.

[134] Neus Torbisco-Casals, "Multiculturalism, Identity Claims, and Human Rights: From Politics to Courts." *Law Ethics Human Rights 10* (2016), 374.

We can summarize the main cornerstones in emergency law with three main points: (i) the major international human rights treaties, as well as modern constitutions, allow States to derogate from some of their obligations under emergency situations; (ii) the right to derogate is designed to help Governments deal with situations in which the *life of the nation is threatened* and when an immediate response is needed; (iii) the right to derogate does not allow a sort of "anything goes" approach; on the contrary, the right to derogate is a right that is circumscribed by several conditions such as the principle of non-derogability of certain rights. This approach, we have seen, might be in contrast with a fundamental idea of human rights' universalism, i.e. there should be not a first and second class of human rights. Furthermore, new emergency powers must not be used in abusive, discriminatory, and unjustified ways. This is the problem this work tries to explain.

In light of this view, an important theoretical question arises: what are the moral principles, i.e. the ethics of emergency that should guide the liberal democracies when dealing with the derogation of rights? Should not we worry about the fact that international law, including human rights law, allows the suspension of fundamental human rights as a legally legitimate measure? Different philosophical approaches might provide different answers. In this paper, we have approached a quite established debate in philosophy, i.e. utilitarianism vs. liberalism. Firstly, utilitarianism has been analysed as a possible moral justification for the derogation from human rights in public emergencies. I have argued that according to utilitarianism the "social utility", i.e. the safety of the majority, is what matter the most. A similar account is endorsed by a consequentialist morality, which would say that those measures aiming at saving the lives of the majority could not be wrong if they actually succeed in doing so. To put it differently, in the context of a state of emergency, utilitarians might believe that the general good (i.e. the safety of the majority) has more importance than the individual one. Rights, therefore, should not be considered as a pesky impediment to robust and decisive action. Secondly, liberalism has been presented as an alternative philosophical approach, which is usually understood as a reaction to utilitarianism. Liberalism, in fact, accords individuals with intrinsic respect in the form of rights that guarantee certain freedoms. Hence, "pure liberals" would claim that no violations of rights could ever be justified– even if the heavens fall.

We have tried to approach the issue taking a nuanced standpoint. We have seen that the Covid-19 pandemic has had a significant impact on human rights

worldwide, yet it has particularly aggravated the situation for vulnerable people. For this reason, this paper aimed at presenting a plausible, and nuanced position, i.e. while neutral and generally applicable restrictions on freedom of association or collective religious activities may be justified, targeting minorities or discriminating against certain groups is impermissible as it undermines a fundamental principle in human rights, such as moral equality.

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