UK Human Rights Blog

Rights in a time of quarantine – an extended look by Niall Coghlan

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Quarantines and lockdowns are sweeping Europe: Italy, France, Spain. Through them, states seek to contain Covid-19 and so save lives. It is difficult to imagine higher stakes from a human rights perspective: mass interferences with whole populations' liberties on one side; the very weighty public interest in protecting lives on the other; and all this under the shadow of uncertainty and disorder. What, if anything, do human rights have to say?

To begin sketching an answer to this complex question, this post analyses the situation in the European state furthest down this path: Italy. After outlining the Italian measures (**I**), it argues that Italy's mass restrictions on internal movement are unlikely to violate the right to free movement but pose problems in respect of the right to liberty (**II**). I conclude by summarising the tangle of other rights issues those measures raise and making a tentative reflection on the currently limited role of human rights law (**III**).

Before beginning, I should note that analysing measures' human rights compliance *in abstracto* is difficult and slightly artificial: a great deal turns on how measures are implemented in practice and particular individuals' circumstances. Moreover, my analysis is limited to the European Convention on Human Rights ('ECHR'), and I do not profess expertise in Italian law (which is proving complex to interpret). The aim of this post is therefore to start, not end, debate about human rights' role as these measures begin to spread across Europe.

I. The Italian measures

As the number of Italian Covid-19 cases and deaths continued to grow by roughly 25% daily, the Italian government imposed a series of mass restrictive measures through Decrees and Decree-Laws dated 23 February, 8, 9 and 11 March 2020 (**'the measures'**). In summary, these impose the following restrictions until 3 April 2020:

- **'Movement limitations':** No individual may move save in cases of proven work obligations, situations of necessity, health reasons or to return home (8 March Decree, art.1(1)(a)). The reason for such movement must be self-certified through a form on the government's website. This originally applied to 16 million people in affected northern regions, but on 9 March was extended to the entire Italian territory (some 60 million persons).
- **'Quarantine & isolation':** Isolated persons (confirmed Covid-19 cases) and quarantined persons (those who have been in close contact with a confirmed case or been who have been individually quarantined following return from an at-risk area in the past 14 days) must remain at home and under remote surveillance by health authorities (21 February Ordinance, art.1; 23 February Decree-Law, art.1(2)(h); 8 March Decree, arts 1(1)(c) and 3).
- **'Lockdown':** All public gatherings, meetings, sports events, educational activities, gyms and so on are closed. Limited exceptions apply for restaurants, bars, stores and places of worship (amongst others), which must nevertheless ensure people remain at least one metre from each other. From 12-25 March, this is further tightened: only a narrow set of shops (e.g. supermarkets, IT and electronics stores and pharmacies) may remain open; restaurants and bars are closed, subject to narrow exceptions; and transport may be regulated and reduced to the essential minimum. Most other workplaces remain open (8 March Decree, art.1(1)(d-o, r and s); 11 March Decree, art.1).

Violation of the Decree obligations and false declaration on the self-certification form are criminal offences punishable by three months' imprisonment or a €206 fine.

Whilst critics have questioned these measures' compatibility with Italian law (and see here in respect of Spain's measures, which are similar to Italy's), Italy has not been subject to the human rights-based scrutiny that was directed at China in respect of similar measures in January 2020: here, here.

II. Analysis

This section focuses on the two rights most immediately affected by the measures: liberty (art.5 ECHR) and free movement (art.2 of Protocol 4 to the ECHR). It argues that the movement limitations merely restrict free movement, whereas the quarantine & isolation amount to deprivations of liberty (*A*); that the movement limitations are likely compatible with art.2P4 (*B*); but that the quarantine & isolation provisions raise difficult, and potentially fatal, art.5 issues (*C*). I finally note the relevance of derogation under art.15 ECHR (*D*).

A. Deprivation or restriction?

ECHR law distinguishes between deprivations of liberty (art.5(1)) and restrictions on freedom of movement within a state (art.2(1)P4). The distinction is crucial: deprivations are subject to far stricter substantive and procedural conditions than restrictions. Yet the dividing line between the

two is *'merely one of degree or intensity, and not one of nature or intensity'*, such that *'some borderline cases are a matter of pure opinion'*. The starting point is the *'concrete situation, and account must be taken of…the type, duration, effects and manner of implementation of the measure in question'* (*Khlaifia v. Italy* [GC] 2016, §64). A long series of cases addresses restrictions confining people to their homes: whilst 24-hour house arrest is undoubtedly deprivation (*Buzadji v. Moldova* [GC] 2016 §104), a 12-hour daily weekday curfew combined with whole weekend curfew for 16 months is not (*Trijonis v. Lithuania* (dec.) 2005).

Against that background, Italy's movement limitations are difficult to judge. On balance, however, they are likely to constitute restrictions rather than deprivation. Two factors are crucial here. First, the exceptions are wide enough to permit some semblance of life and social contact, including continued attendance at work (compare *De Tommaso v. Italy* [GC] (2017) §88). Critically, the 'situations of necessity' exception is potentially open-ended and is at present being interpreted broadly to include exercise, dog-walking and assisting elderly relatives. These exceptions are broader than those dismissed in *Dacosta Silva v. Spain* (2006) §13. Second, in context the greatest restriction arises from the lockdown rather than the movement limitations; this falls properly to be analysed under other rights (compare *Nada v. Switzerland* [GC] 2012, §230). A third, less important factor is the (in context) limited duration and lack of overt coercion involved.

By contrast, the quarantine & isolation obligations are indistinguishable from 24-hour house arrest. They are thus highly likely to constitute deprivations of liberty. The UK Government's apparent arguments to the contrary in respect of similar powers in 2007 are unpersuasive: they mis-read *Cyprus v. Turkey* (the night-time only curfew at issue there fell outside of art.5, but the house and hotel arrests did not) and it is no longer arguable that the authorities' intention determines whether someone is deprived of liberty (*Austin*, §58).

B. The movement limitations: art.2P4 analysis

Turning first to the movement limitations, art.2(1)P4 provides that those lawfully present in a state

> *shall, within that territory, have the right to liberty of movement and freedom to choose his residence.*

Cases to date have tended to concern individual restrictions on movement in connection with criminal, civil or bankruptcy cases; restrictions on migrants' movement; and, occasionally, zoning laws (e.g. *Miazdzyk v. Poland* 2012; *Omwenyeke v. Germany* (dec.) 2007; and *Garib v Netherlands* [GC] 2017).

This case-law is an uncomfortable fit for the measures at issue here, which concerns a

population-wide restriction on movement based on health grounds. Nevertheless, the cases make clear that states enjoy a relatively wide discretion under art.2P4 so long as (i) they can establish some rational connection between the aim and the measure and (ii) the restrictions do not last an unduly long time, typically on the scale of years (compare *Miazdzyk* and *Labita v. Italy* [GC] 2000 §196). With this in mind, we need to fall back on the ordinary interference/legitimate aim/in accordance with the law/proportionality test (art.2(3-4)P4).

In that respect, the limitations amount to a highly intrusive, blanket interference with art.2(1)P4, consisting of strict restrictions applying to some 60 million people. That interference plainly pursues the legitimate art.2(3)P4 aim of protecting public health. On its face (and subject to this critique, noted above), it is prescribed by law. Proportionality is thus the key question. Despite the blanket nature of the movement limitations, they are likely to be proportionate given the extremely weighty pressing social need pursued; uncertainty as to how best to contain the virus, together with evidence that these measures may be effective; their limited duration; the exceptions to the restrictions, including the open-ended 'situation of necessity' exception, which permits some level of case-by-case review; the difficulty in conceiving of a less restrictive but equally effective measure; and the wide margin states enjoy in health-care policy (*Hristozov v. Bulgaria* 2012, §119).

C. Quarantine & isolation: art.5 analysis

Art.5 ranks with arts 2, 3 and 4 as a 'paramount' and 'first rank' right protecting physical security; consequently, it is tightly-structured and strictly interpreted (*S, V & A v. Denmark* [GC] 2018, §73). These highly unusual measures are difficult to fit within this structure. They amount to mass detention without case-by-case authorisation (save, perhaps, those returning from an affected area); yet they are largely self-enforcing, as in practice the state is unlikely to have the information or resources to identify all but the most flagrant breaches. Three issues arise.

First, the only possible ground of justification is '*for the prevention of the spreading of infectious disease*' (part of art.5(1)(e)). According to the only case to date concerning this ground, the test is whether (i) the spreading of the disease is dangerous for public health or safety and (ii) *'detention of the person infected is the last resort in order to prevent the spreading of the disease, because less severe measures have been considered and found to be insufficient to safeguard the public interest'* (*Enhorn v. Sweden* 2005 §44).

This is likely to be satisfied for those in isolation. But on its face, it excludes those in quarantine: they are not 'infected'. Nevertheless, in practice this test is highly likely to extend to those *reasonably suspected* of being infected: this is consistent with the wording and purpose of art.5(1)(e), as well as the International Health Regulations 2005 (art.1; see also art.57(1)), and the question did not arise in *Enhorn* (a case concerning a known HIV carrier). By contrast, art.5(1)(e) is unlikely to extend further: in particular, if the movement limitations analysed above were

tightened to the extent that they fell within art.5 – for instance, if the entire Italian population were confined to their houses – this would be unlikely to be justifiable.

Even for those in quarantine, questions remain. The quarantine extends beyond those who have been in close contact with a confirmed case (as per WHO guidelines) to anyone who has been to an affected region in the previous 14 days. Whilst the latter quarantines are subject to assessment by public health officials, the law is unclear as to who (if anyone) will escape isolation: 8 March Decree, art 3 (2-7). The WHO guidelines thus appear both less liberty-restrictive and more tailored to the harm. The burden would be on the Italian authorities to demonstrate that the quarantine criteria are nevertheless justified; why 14 days was a justified period; and why less severe measures were discounted. Given the short detention period and the context, Italy is likely to enjoy a wide margin in this respect. These difficulties, then, are likely to be resolvable.

More problematic is the second issue: due process. Protection against arbitrariness is a core aspect of art.5; case-by-case assessment of all the circumstances is required (*V.K. v. Russia* 2017 §33; compare esp. *Ilnseher v. Germany* [GC] 2018, §§127-141). That is particularly so for detention of those suffering from mental issues, a ground that is closely-related to this one (*Enhorn* §42): such detention requires individual medical expert evidence save in urgent cases (*Varbanov v. Bulgaria* (2000) §47). How can adequate safeguards against arbitrariness exist when, in most cases, no procedure whatsoever precedes the detention?

This links to the third issue: procedural safeguards. How can one be sure that individuals are all informed, in language they understand, of the reasons for their detention (art.5(2))? Moreover, an important reason for the art.5(2) obligation is to ensure that people can judicially challenge their detention under art.5(4) (*Khlaifia v. Italy* [GC] 2016 §115). Can this be fulfilled where many are likely unaware that this even amounts to a deprivation of liberty?

These are fundamental problems. They are not, however, insuperable. The Court has shown remarkable – if controversial – flexibility in respect of mass detention in certain circumstances. Mass detention of irregular migrants and asylum seekers may, at least initially, be lawful: *Thimothawes c. Belgique* 2017 §73; *Z.A. and ors v. Russia* [GC] 2017 §§162-3. The state must, however, be in a position to identify those whose vulnerability may weigh against detention (e.g. minors). Similarly, *Austin* §59 states that *'commonly occurring'* temporary mass detention in the *'interests of the common good'*, such as airport checks or (in that case) kettling can fall outside of art.5(1) entirely.

Given the specific context, the limited period and the lack of overt coercion, it is possible that the Court would also relax art.5's strictures here. Indeed, a former Court President appeared to state that time-limited, systematic quarantine can be lawful (*Enhorn*, Concurring Opinion of Judge Costa, §11). Moreover, the self-enforcing nature of this detention means that in practice, legal challenges are likely to be against fines or imprisonment imposed for *breaching* the Decrees

rather than against the isolation & quarantine themselves.

Still, a significant extension of the case-law is required for Italy's mass detention to comply with art.5. Even under such an approach, Italy would almost certainly need to show how it identifies and protects those vulnerable persons placed at greatest risk by the home detention.

D. Derogation: art.15

For completeness, I note that Italy has not derogated from the Convention under art.15 in respect of these measures. It follows that if the measures do violate art.5 and/or art.2P4, Italy will not be able to rely on art.15 retroactively (here, §34).

Derogation from human rights obligations in response to pandemics is controversial (Negri, pp.285-9) and General Comment 29 suggests it should generally be unnecessary in the case of free movement rights (para 5). To date, only Latvia has derogated as a result of this crisis. But given art.15's wide margin and the scale of the crisis in Italy, the serious art.5 issues raised above and the apparent necessity of the quarantine & isolation measures, derogation in respect of art.5 may well have been justifiable. This, of course, would have involved publicly acknowledging that the measures amount to mass detention potentially in breach of art.5.

III. Broader reflections

This post has only explored the measures from the perspective of two rights. Yet these limitations, which are not the only ones Italy has imposed, raise a plethora of other issues. To highlight a few: they are severe interferences with art.8 ECHR (compare *Nada* §165), and information-gathering connected with them will also raise art.8 privacy issues; they will frequently interfere with arts 9-11 (hence, perhaps, the exception for places of worship); whilst the prohibitions are not overtly discriminatory, they likely impact certain groups more severely than others, raising art.14 issues; the mass closure of businesses raises art.8 and art.1P1 issues, which could require compensation in certain cases; the mass closure of schools raises art.2P1 issues; and ensuring that that state agents enforce the restrictions fairly and lawfully gives rise to a host of art. 2, 3, 5, 6, 8 and 14 issues. On the other hand, the state's positive obligations under arts 2, 3 and 8 will require that adequate access to food, water and healthcare is maintained, particularly for those placed in isolation or quarantine. And hanging over all of this is another spectre: how far might human rights law *compel* a state to introduce effective movement restrictions where this appears necessary to safeguard public health and lives?

This leads to a final, tentative point. Montesquieu famously wrote that in some states of emergency, *'a veil should be drawn for a while over liberty'*. It is tempting to see human rights law in this light. That law is flexible and, as shown above, gives great margin to states in this situation: indeed, even if the quarantine & isolation measures do breach art.5, derogation would likely cure this. This might be celebrated, then, as an example of law letting politics reign.

There is some truth to this. But two caveats apply. First, human rights still place crucial outer limits on emergency action, particularly in ensuring that draconian measures are abolished once the crisis fades. Second, the above analysis suggests that rights do *not* always simply give way to politics, and highly complex work is necessary to predict what limits might apply and what derogations are necessary. Quite apart from the strict law, human rights have the potential to be a valuable compass for states designing emergency measures: do movement restrictions require a religious exemption and, if so, how wide? What bare necessities should the state prioritise, and for whom? What potential discriminatory impact should be considered, particularly for disabled or elderly persons? Human rights law fails if detailed, uncertain analysis is needed by panicked, stretched states when orienting emergency measures and by vulnerable individuals when obeying them. More is needed, in this respect, than vague statements and the laconic references to *'respect for… human rights'* in the International Health Regulations. What is needed is detailed soft law, drafted by human rights bodies, clarifying the minimum standards human rights impose – and the wider guidance they provide – during health emergencies.

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Further reading

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