

Constantijn Bakker

Amsterdam School of International Business
cbakker@dds.nl

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Protection of human rights within the European Union during the pandemic of Covid-19

During the pandemic, freedom of expression was restricted in many ways: for example by closing theatres, museums, and bookshops. Freedom of assembly was limited in a rigorous manner: meetings with more than a very few persons were simply prohibited. Also the freedom of religion was limited, sometimes by a total prohibition of religious ceremonies or meetings. Last, rigid limitations on the free movement of persons were seen as an efficient method in “the war” against the virus.

Were all these restrictions justified by the need to protect public health and, if so, were severe sanctions justified?

This paper focuses on the situation in the EU. First, the importance of the EU Charter of Fundamental Rights with regard to Covid-19 related restrictions will be discussed. Next, the conditions under which these restrictions may be justified on the basis of protection of public health will be analyzed. This involves a discussion regarding the condition of necessity in a democratic society. Last, the impact of protection of public health, as a fundamental right in itself, will be reviewed.

The importance of the EU Charter of Fundamental Rights in the times of Covid-19

The final version of the “Charter of Fundamental Rights of the European Union” [EU Charter] was established in 2007. It was however not included in the Treaty of Lisbon of the same year. The Member States did this on purpose: they wanted to avoid the TEU and TFEU having any similarity to a Constitution. After all, it is typical of a Constitution that it contains provisions concerning human rights.

However, in a roundabout way the Charter became a constituent part of the Treaties. By virtue of art. 6 (1) first sentence, TEU, the Charter has the same legal value as the Treaties:

The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.

Article 6 (1) second sentence, TEU, stipulates that the provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties. This is a somewhat superfluous announcement, which repeats what has been stipulated already in art. 51 (2) of the Charter itself.

However, in several other places, the Member States repeated this basic principle¹ and Poland repeated it even in a unilateral declaration. These common and unilateral declarations do not have any legal meaning, since they just repeat what the TEU and Charter have already established. According to Ingolf Pernice, these declarations are the expression of a deep concern, almost a phobia, of at least some Member States anxious to ensure a restrictive approach regarding EU competences.²

Opt-out Protocol 30

Moreover, the UK and Poland wished an opt-out from the Charter and tried to achieve this by Protocol 30, which states in art. 1 (1)³:

The Charter does not extend the ability of the Court of Justice of the European Union, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent *with the fundamental rights, freedoms and principles that it [the Charter] reaffirms*.

The question is whether this article can seriously be considered to be an opt-out. It just seems to reaffirm what is applicable in all Member States: the Charter does not create new rights and does not allow any new legal procedures. A reaffirmation of existing rights means that these rights must have the character of binding law.⁴ If it is true that the Charter just reaffirms existing rights, then there is simply nothing left to opt-out from. For this and other reasons a majority of authors consider the opt-out Protocol to be entirely obsolete.⁵

Protection of the EU Charter

There are examples demonstrating that the protection offered by the EU Charter is more far-reaching than the European Convention for Human Rights [ECHR]. An important example is art. 1 of the EU Charter:

Human dignity is inviolable. It must be respected and protected.

¹ See for example Declaration 24 concerning the legal personality of the European Union: "The Conference confirms that the fact that the European Union has a legal personality will not in any way authorize the Union to legislate or to act beyond the competences conferred upon it by the Member States in the Treaties".

² Cf. Ingolf Pernice, "The Treaty of Lisbon and Fundamental Rights" [in:] S. Griller and J. Ziller, "The Lisbon Treaty: Constitutionalism without a Constitutional Treaty?", Wien, Springer 2008, p. 243.

³ Italics added by the author.

⁴ See also the preamble of Protocol 30; compare no. 6.

⁵ Cf. more details in Ingolf Pernice, already quoted, pp. 244–249.

This provision – which does not exist in the ECHR – is formulated as a proactive obligation to respect and protect human dignity. As a result the Luxembourg Court [CJEU] concluded that “respect for human dignity within the meaning of that article requires the person concerned not finding himself or herself in a situation of extreme material poverty that does not allow that person to meet his or her most basic needs such as a place to live, food, clothing and personal hygiene, and that undermines his or her physical or mental health or puts that person in a state of degradation incompatible with human dignity”.⁶

All over the EU, the restrictive measures to stop the spreading of the Covid-19 virus had the result that many vulnerable people, dependent for their means of existence on day-to-day freelance activities, could no longer afford to buy (healthy) food for themselves and their family. A right to food, which is – according to the CJEU – included in the EU Charter, does not exist in the ECHR.

Restricted jurisdiction of the Luxembourg Court

According to art. 51 (1) first sentence, the Charter is addressed to the Member States “only when they are *implementing Union law*”.⁷ For this reason the Luxembourg Court ruled that it has no jurisdiction – with regard to a Slovakian mandate concerning the vaccination of young children – to the preliminary question whether this obligation is in conformity with the EU Charter.⁸

Indeed, art. 51 EU Charter limits the jurisdiction of the Luxembourg Court: supervision on safeguarding human rights by Member States is limited to situations where these States apply EU law. Hence, a vaccination requirement, which has been established by a Member State and not by the EU, cannot be challenged before the CJEU.

What is the exact meaning of “implementing EU law”? Does a Member State apply EU law where it imposes restrictions on fundamental freedoms (laid down in the TFEU) with a view to protecting public health during a pandemic? With reference to earlier case law, the Luxembourg Court gave a positive answer to this question in the case Hungary/Commission:⁹

As follows from the Court’s case-law, where a Member State argues that a measure of which it is the author and which restricts a fundamental freedom guaranteed by the TFEU is justified by an overriding reason in the public interest recognised by EU law, such a measure must be regarded as implementing EU law within the meaning of Article 51(1) of the Charter, such that it must comply with the fundamental rights enshrined in the Charter (...).

The consequence of this consideration is that restrictions on the principles of free movement – laid down in the TFEU – which Member States have justified by reasons

⁶ Case Zubair Haqbin, C-233/18, § 46 – ECLI:EU:C:2019:956.

⁷ Italics added by the author.

⁸ Case Milica Široká, C-459/13, §§ 25–27 – ECLI:EU:C:2014:2120.

⁹ Case Commission/Hungary, C-78/18, § 101 – ECLI:EU:C:2020:476, referring to C-201/15, EU:C:2016:972, §§ 63–64 and C-235/17, EU:C:2019:432, §§ 64–65. Cf also C-66/18, § 214.

of public health during the pandemic, imply the applicability of art. 45 of the Charter: “Every citizen of the Union has the right to move and reside freely within the territory of the Member States.” It also implies that a journalist, whose right of free movement is restricted due to the pandemic, can invoke the freedom of expression guaranteed by art. 11 of the Charter.

How does the Luxembourg Court interpret such fundamental rights guaranteed by the Charter? In this respect, it ruled that a right that corresponds to a right granted by the ECHR “must (...) be regarded as having the same meaning and scope as the latter”. This point of view is in accordance with art. 52(3) of the Charter.¹⁰ It is, however, worth mentioning that the last sentence of this provision emphasizes that this “shall not prevent Union law providing more extensive protection”.

Public health as a justification for restrictions on human rights

With regard to some human rights guaranteed by the Convention (ECHR), in particular the rights mentioned in art. 8–11, States may impose restrictions. Exactly these rights, like the right to family life (art. 8), freedom of religion (art. 9), freedom of expression (art. 10), and freedom of assembly (art. 11) were often restricted during the pandemic.

An objective for restricting these rights can be for example the “*protection of health and morals*”. Hence protection of health, meaning not only the health of a specific person, but also *public health*, can be invoked as an exception with regard to certain human rights. However, it must be noted that the Convention makes these exceptions conditional: the interference needs to be prescribed by law, the aim of the limitation must fit a legitimate aim, and the limitation must in all circumstances be necessary in a democratic society.

The Charter chose a similar approach in art. 52 (1):

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

Interference prescribed by law

Any interference with a fundamental right must have a basis in national law. This means that the restriction needs to be accessible and foreseeable. In other words, a citizen shall be informed – by proper publication of the law – that there can be certain restrictions, which he/she may reasonably foresee.

¹⁰ Cf. § 111 of case Hungary/Commission, C-78/18, already quoted.

During the pandemic many EU Member States established restrictions, which – in the first instance – often had no or an unstable legal basis, such as emergency law.¹¹ However, quite soon formal law was issued as a basis for several restrictions. Hence, after the initial panic, the foreseeability test seemed to be fulfilled in all Member States.

Limitation fits a legitimate aim

Protection of public health is by definition a legitimate aim, which may allow restrictions on some human rights. This condition was certainly fulfilled whenever the EU Member States issued restrictions with a view to make the pandemic manageable.

Limitation is necessary in a democratic society

The limitation must be necessary in a democratic society. This means – according to the Strasbourg Court – that the limitation needs to be justified by a *pressing social need*,¹² which is certainly true during a pandemic that could have led to a complete collapse of the public health system.

Necessary restriction in a democratic society

The Strasbourg Court [ECtHR] emphasised that the notion of necessity implies an extra requirement: the interference must be *proportionate to the legitimate aim pursued*. This test was applied, for example, in the case *Kuimov/Russia* regarding quarantine imposed on a young girl. As a consequence of this measure, the parents were not allowed to visit their daughter for more than a year. The parents claimed that this refusal was a breach of art. 8 ECHR (right to family life). The Court considered that these restrictions on the parents' access to their child were imposed with the legitimate aim of protecting its health. However, since there were no specific reasons for refusing the parents opportunities to visit their daughter, the restrictions on access of a long duration were judged to be disproportionate.¹³

The proportionality test during the Covid-19 pandemic

Since there is not yet any case law available from the Strasbourg Court, it may be interesting to analyze a recent decision of the US Supreme Court. During a short period in

¹¹ Only the following EU Member States used the possibility for derogations in emergency situations under art. 15 ECHR: Latvia, Romania, and Estonia.

¹² Case *Handyside/UK*, 7 December 1976, 5493/72 - ECLI:CE:ECHR:1976:1207JUD000549372.

¹³ Case *Kuimov/Russia*, no. 32147/04, 8 January 2009, § 96, ECLI:CE:ECHR:2009:0108JUD003214704. See also the comments of Jeremy McBride in "An analysis of covid-19 responses and ECHR requirements", pp. 1–11, <https://www.echrblog.com/2020/03/an-analysis-of-covid-19-responses-and.html> [accessed: 2021.07.25].

2020, the Governor of New York had imposed very severe restrictions on attendance at religious services in areas classified as “red” or “orange” zones. In red zones, no more than 10 persons could attend each religious service, and in orange zones, attendance was capped at 25.

According to the majority of the justices of the US Supreme Court,¹⁴ these measures “cannot be viewed as neutral because they single out houses of worship for especially harsh treatment”. Hence, the US Supreme Court concluded that the restrictions on religious ceremonies are not proportionate “(...) there are many other less restrictive rules that could be adopted to minimize the risk to those attending religious services. Among other things, the maximum attendance at a religious service could be tied to the size of the church or synagogue”. The US Court refused however to take into consideration that the contested measures applied only during a short period of time and were shortly afterwards replaced by a limitation of up to 50% of the capacity of the building.

Although Chief Justice Roberts – in his dissenting opinion – agrees that the initial capacity limits “do seem unduly restrictive”, he was in favour of allowing the public authorities a broad margin of appreciation: “it is a significant matter to override determinations made by public health officials concerning what is necessary for public safety in the midst of a deadly pandemic”.

It seems to be probable that the Strasbourg Court will come to comparable conclusions to those of Chief Justice Roberts. On the one hand, it will certainly allow a broad margin of appreciation “in the midst of a deadly pandemic”. On the other hand, it may not allow restrictions that are “unduly restrictive”. Examples of the latter are the complete closing of theatres, churches, bookshops etc. over a lengthy period of time. Another example is the complete isolation of elderly persons in care-institutions over several months. With regard to this type of arbitrary restrictions, provided they have taken place, the Strasbourg Court will certainly consider them disproportionate.

Even if restrictions, as such, will be considered proportionate, this does not mean that the Strasbourg Court will be of the opinion that severe sanctions automatically fulfil the proportionality test. In this respect, a pending case is interesting; it regards Mrs Sozina, living in Krasnodar, who posted on Instagram: “There has NOT been a single case of corona [virus] infection in the Krasnodar Region. (...)”. This resulted in a Russian court, on 8 June 2020, finding her liable for disseminating untrue information, that is, alleging the non-existence of Corona virus infection in the Krasnodar Region, and sentenced her to a fine of 30,000 Russian roubles.¹⁵ It will be interesting to know whether the ECtHR will agree with this severe punishment (the fine appears to correspond to an average month salary in Russia).

False or unreliable information is certainly a nuisance in times of a pandemic and the authorities are totally justified in taking action against it. However, it seems un-

¹⁴ Decision 20A87, 25 November 2020 (*Roman Catholic Diocese of Brooklyn/Cuomo*), www.supremecourt.gov/opinions/20pdf/20a87_4g15.pdf [accessed: 2021.07.25].

¹⁵ Avagyan/Russia, no. 36911/20, lodged on 6 August 2020.

likely that the imposition of a severe fine for postings on social media by a private person would be regarded as consistent with art. 10 ECHR. At least this seems to be the message of the Strasbourg Court in a case in which the applicant may have disseminated “fake news” in local political debates, for which he was severely fined. The Court considered the total of heavy fines and other punishments to be a disproportionate interference in his right of expression; they are not necessary in a democratic society.¹⁶

Margin of appreciation during the Covid-19 pandemic

The Strasbourg Court emphasizes regularly that in determining whether interference is necessary in a democratic society, States are afforded a margin of appreciation, with a view to balancing a fundamental right with other legitimate aims. The scope of this margin of appreciation depends on several factors, such as the objective invoked. With regard to protection of morality, the scope of the margin will be rather wide, since there is no uniform conception of morals among the Contracting States.¹⁷ For similar reasons, it seems probable that its scope will also be broad with regard to restrictions aiming at protection of public health during the pandemic. After all, one can hardly argue that the EU countries have agreed upon a uniform concept of protection of public health in the times of Covid-19.

In some States, restrictions have been stricter during the pandemic than in other States, for example with regard to curfews. Does this mean that States like France that imposed a curfew starting at 18.00 that lasted several months, will not be granted a margin of appreciation since other Member States hardly imposed a curfew? Not necessarily: the case *Handyside/UK* shows that the margin of appreciation may vary from country to country. The UK considered “*The Little Red Schoolbook*” to be immoral and therefore prohibited it. Although in many other countries such a prohibition did not apply, the Strasbourg Court allowed the UK a wide margin of appreciation and accepted the prohibition of this booklet.

Public health as a fundamental right in itself

Public health protection is considered to be a fundamental right in itself. This follows from art. 168 TFEU and is explicitly confirmed by art. 35 EU Charter:

Everyone has the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices. A high level of human health protection shall be ensured in the definition and implementation of all the Union’s policies and activities.

¹⁶ *Brzezinski/Poland*, 25 July 2019, no. 47542/07, § 63 – ECLI:CE:ECHR:2019:0725JUD004754207 (not available in English).

¹⁷ This seems to be the message in *Handyside/UK*, already quoted. Cf. B. Rainey, P. McCormick, C. Ovey, “*The European Convention on Human Rights*”, Oxford 2010, p 328.

It is distinctive that this provision asks in the last sentence for proactive measures to protect public health. Does such a positive obligation to protect public health also exist with regard to the European Convention? This seems indeed to be the case: the Strasbourg Court already in 1998¹⁸ ruled that art. 8 of the Convention (the right to respect for private life) does not merely compel the State to abstain from arbitrary interference: “In addition to this primarily negative undertaking, there may be positive obligations inherent in effective respect for private or family life”, such as the obligation to guarantee health protection.

Vaccination duty

The question now is whether the Strasbourg Court may justify a vaccination duty under the Convention. Such an obligation could easily be considered as an arbitrary interference in conflict with *the right to respect for private life*. In the YF case – concerning a forced gynaecological examination of a detainee in Turkey – the Court ruled that such a compulsory medical intervention, even if it is of minor importance, constitutes an interference with the right of respect for private life. The Court held that such a compulsory intervention violates art. 8, since the Turkish Government failed to demonstrate the existence of a medical necessity.¹⁹

What does this mean with regard to a vaccination duty? Recently, on 8 April 2021, in the Vavříčka case, the Strasbourg Court has had an opportunity to judge the legality of a Czech vaccination obligation for young children. It is important to note that the Czech vaccination duty is not comparable to the forced medical treatment in the YF case: in the Czech Republic no vaccinations were administered against the will of the persons concerned. The only legal consequence of a refusal to vaccinate was an exclusion of those non-vaccinated children from preschool.

With regard to this Czech vaccination duty, the Court held that it does not constitute a violation of art. 8 ECHR. On the contrary: “(...) it [art. 8] should also be seen as encompassing the value of social solidarity, the purpose of the duty being to protect the health of all members of society, particularly those who are especially vulnerable with respect to certain diseases and on whose behalf the remainder of the population is asked to assume a minimum risk in the form of vaccination.”²⁰

However, the Court emphasizes that States should have a wide margin of appreciation regarding the fight against infectious diseases. It held that although the Contracting States agree that vaccination is one of the most successful and cost-effective health interventions, there is no consensus over making vaccination compulsory. For this reason Hendriks argues that under art. 8 ECHR the authorities have an obligation

¹⁸ Case Guerra/Italy, 16 February 1998, no. 14967/89, § 58 – ECLI:CE:ECHR:1998:0219JUD001496789. Cf. also case LCB/United Kingdom, 9 June 1998, no. 23413/94, § 36 – ECLI:CE:ECHR:1998:0609JUD002341394.

¹⁹ Cf. case YF/Turkey, 22 July 2003, no. 24209/94, §§ 36 and 41–44 – ECLI:CE:ECHR:2003:0722JUD002420994.

²⁰ Case of Vavříčka/the Czech Republic, § 279, no. 47621/13 – ECLI:CE:ECHR:2021:0408JUD004762113.

to make a special effort to convince the persons who are suspicious with regard to vaccination: these men and women are quite often poorly educated or have a migrant background.²¹

The wide margin of appreciation, which is afforded to the Contracting Parties in the Vavříčka case, implies that States may protect public health by compulsory vaccination in times of a pandemic, but that they are certainly not obliged to do so. Does this mean that the Contracting Parties can at random refrain from imposing a vaccination duty?

Hendriks is of the opinion that members of a football team should not have the right to refuse vaccinations,²² since their activity is not essential. Hence, he implies that the State has an obligation to make vaccination compulsory in situations in which persons are working close to each other, in particular with regard to non-essential activities.

For other reasons, the French government wishes to impose a vaccination duty on the personnel of hospitals and care institutions. However, the activities of these professionals are essential in times of a pandemic and can, therefore, not be compared to those of members of a football team. Moreover, to be in harmony with the above-discussed Vavříčka case, the (financial) sanctions resulting from a vaccination refusal need to be moderated. Beyond any doubt, dismissing hospital and care institution personnel must be considered disproportionate, in particular, because this group of people worked exceptionally hard, putting their own health at risk, during the initial waves of the pandemic.

Other duties resulting from the health protection guarantee

Do the authorities have a duty to impose certain restrictions in order to fulfil their duties under the health protection guarantee of art. 8 ECHR? Here too, a broad margin of appreciation will certainly apply. However, it seems that the authorities fail to guarantee a sufficient level of protection if they do not impose restrictions on non-essential activities with high health risks.

A breach of the health protection guarantee likely took place in London, where the British authorities allowed ± 60,000 supporters to watch a European Championship football match, despite the rapid spread of the delta variant at the time, and the warnings of healthcare experts. It seems contrary to art. 8 ECHR to allow this type of mass gathering under the circumstances just described.

²¹ A.C. Hendriks: "Vaccination: Freedom or obligation under ECHR?" [in:] "Nederlands Juristenblad", *Netherlands Lawyers Magazine*, no. 23, pp. 1887–1888.

²² *Ibidem*, p. 1888.

Conclusion

The EU does not have exclusive powers with regard to public health, meaning that it cannot coordinate national restrictive measures during a pandemic. Hence, the national restrictions issued in March 2020 usually do not implement EU law. For that reason, they do not fall under the scope of the European Charter.

The Strasbourg Court will most certainly allow a broad margin of appreciation with regard to restrictive measures for protection of public health during a pandemic. However, it will certainly not accept what Chief Justice Roberts labels “undue restrictions”, meaning restrictions that last too long and that are needlessly severe and, therefore, disproportionate. Moreover, the Strasbourg Court will in many cases consider severe punishments to individuals to be not proportionate.

The health protection guarantee laid down in art. 8 ECHR and art. 35 EU Charter implies an obligation on States to take certain (restrictive) measures with a view to protecting people during a pandemic. This obligation includes (compulsory) vaccination programs. However, severe (financial) punishments will certainly be considered disproportionate.

Let us hope that this paper – whenever a next pandemic arrives – may help to avoid some of the excessive restrictions that we have experienced since March 2020. On the other hand, it hopefully also shows that necessary restrictions shall not be withdrawn too easily. This is especially true for certain non-essential activities, which may pose important risks of spreading the virus.

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Summary

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Protection of human rights within the EU during the pandemic of Covid-19

The paper deals with protection of human rights within the European Union during the Covid-19 pandemic. The purpose of the article is to show the importance of the EU Charter of Fundamental Rights with regard to Covid-19 related restrictions. Simultaneously, the scope of the application of the public health clause in the context of Covid-19 restrictions is examined.

Moreover, the impact of protection of public health, as a fundamental right in itself, is reviewed. The analysis shows that the health protection guarantee laid down in art. 8 ECHR and art. 35 EU Charter implies an obligation on States to take certain (restrictive) measures with a view to protecting people during a pandemic. This obligation includes (compulsory) vaccination programs. However, severe (financial) punishments will certainly be considered disproportionate.

Keywords: protection of human rights; public health clause; Covid-19 pandemic; art. 8 ECHR; art. 35 EU Charter of Fundamental Rights.

Streszczenie

Constantijn Bakker

Ochrona praw człowieka w UE podczas pandemii Covid-19

Artykuł został poświęcony ochronie praw człowieka w Unii Europejskiej w czasie pandemii Covid-19. Celem artykułu było podkreślenie znaczenia Karty Praw Podstawowych UE w odniesieniu do ograniczeń wprowadzanych w związku z pandemią Covid-19. Równolegle zbadano zakres zastosowania klauzuli zdrowia publicznego w kontekście ograniczeń Covid-19. Ponadto, dokonano przeglądu ochrony zdrowia publicznego jako prawa podstawowego samego w sobie. Dogłębna analiza wykazała, że prawo do ochrony zdrowia, ustanowione w art. 8 EKPC i art. 35 KPP UE pociąga za sobą zobowiązanie państw do podjęcia określonych (ograniczających) środków w celu ochrony ludności podczas pandemii. Obowiązek ten obejmuje (obowiązkowe) programy szczepień. Jednak surowe kary (finansowe) z pewnością zostaną uznane za nieproporcjonalne.

Słowa kluczowe: ochrona praw człowieka; klauzula zdrowia publicznego; pandemia Covid-19, art. 8 EKPC, art. 35 Karty Praw Podstawowych UE.