



For the life, for the death the hospital
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**WITH REGARD TO INTERNATIONAL CONVENTIONS,
IS GENERAL FORCED CONFINEMENT (CFG) LEGAL?**
France's disregard of the principle of proportionality.

Presentation of the IDHBP and IDHAE Report

HEALTH EMERGENCY AND THE PRINCIPLE OF PROPORTIONALITY.

THE IMPORTANCE OF PUBLICISING FUNDAMENTAL RIGHTS AND THEIR GUARANTEES.

« Knowing what must be done does away with fear. » Rosa Parks (1913 - 2005)

The decree of 16 March 2020, instituting generalised forced confinement (hereafter “CFG”) in France, **has undermined most fundamental rights**. This violation was aggravated and confirmed by the Emergency Health Act No. 2020-290 of 23 March 2020 and its accompanying measures. **It has never been on such a scale since the Second World War.**

Intended to combat the coronavirus pandemic, this attack is, of course, supposed to be temporary. It is in fact accepted in national and international law that even fundamental rights may be restricted **in the event of "public danger threatening the life of the nation"**. However, **individual freedoms are the foundation of a democracy**. It therefore runs a serious risk when they are massively called into question. The harmful effects then induced on all areas of society can be lasting, and **make a regime of exception become the rule**. This is why it seemed essential to the Human Rights Institutes, the Paris Bar Association and European Lawyers (IDHBP and IDHAE) to inform citizens about the **importance of their most supreme rights through a Report. Also to question the compatibility of the infringement of these rights with France's obligations under its Constitution and the principle of proportionality in international law, which limit and control the power of States**. This principle, contained in Article 4 of the International Covenant on Civil and Political Rights (ICCPR) of 16 December 1966, Article 15 of the European Convention for the Protection of Fundamental Freedoms (ECHR) of 4 November 1950 and Article 52 of the Charter of Fundamental Rights of the European Union (CFEU) of 7 December 2000, is binding on France, which is a signatory to the Conventions that set it out. It implies, when a State envisages a derogation from fundamental rights, that **it must be strictly proportionate to the danger. Otherwise, this derogation and the measures resulting from it are unlawful.**

It also applies to the provisions of the above-mentioned international conventions when the State Party has not declared it to the Secretaries General of the Council of Europe and the United Nations, as is the case for France.

THE SUPREMACY OF ALL FUNDAMENTAL RIGHTS IS THE BASIS OF THE RIGHT TO LIFE.

The lifting of the GFC is finally announced, for 11 May 2020. However, **the question remains as to whether priority should not have been given to measures which, while aiming to protect people at risk of death as effectively as possible, allow the country's vital functions to be maintained.**

Other European countries, such as Germany, Switzerland and Sweden, have explored, with benefit, alternatives to the CFG, which are less detrimental to liberties and have a lower number of deaths than in France, in relation to their population.

It has certainly been argued that the CFG could not be ruled out in European countries with a Latin culture, where the population is "undisciplined" and "tactile". But the United Kingdom, which succeeded Italy, Spain and then France, which, in order of entry into the CFG, have the highest excess mortality due to the pandemic in the world, behind the United States (for those countries where it can be known with some accuracy...), has since been ranked just behind France in this sinister score.

Moreover, the supposed indiscipline of the Mediterranean populations does not justify, in a democratic society, the considerable extent of the violations of fundamental rights by the CFG. Indeed, it follows from the principle of indivisibility of these rights that **the right to life only makes sense if it fully allows the exercise of other rights, attached to human dignity.** This is why René Cassin, one of the main drafters of the Universal Declaration of December 10, 1948, stated: *"The right to life, yes, but not to just any life!"* ».

URGENCY DOES NOT DISPENSE WITH AN EFFECTIVE PROPORTIONALITY CHECK.

Insofar as the derogation from fundamental rights must be strictly proportionate to the threat, it must be clearly defined. The restriction must be limited in time, space and specify the rights and persons concerned.

Given the terms of Articles 4 PICDP, 15 ECHR and 52 CFEU - **urgency does not dispense with an effective proportionality check, prior to the exercise of a derogation from its treaty obligations, by a State Party.** Therefore, when faced with a health emergency, a State cannot rely exclusively on scientists to assess the health risk. **It must also call on legal experts to assess the legal risk of infringements of fundamental rights.** The lack of this dual assessment makes a genuine proportionality check impossible. **In Germany, many lawyers, whose role is central, are very attentive to ensuring that freedoms are respected. In particular, it is important to ensure that the measures taken to combat the pandemic do not upset the institutional balance. That was why the Federal Government had never raised the possibility of resorting to a state of emergency.**

THE VIRTUALLY NON-EXISTENT ASSESSMENT OF LEGAL RISKS.

Assessing the risks of a regime of exception on freedoms and the rule of law requires at least a good knowledge of:

- **The conventions protecting fundamental rights**, both in the domestic and international order, for the definition of rights that are likely to be restricted and the recall of their guarantees.
- **The principle of indivisibility of rights**, which derives from the Universal Declaration of Fundamental Rights of 10 December 1948, means that all the rights it contains are interdependent and of equal importance and that none of them can prosper at the expense of the others. Mastery of the principle of indivisibility is indispensable for monitoring compliance with the principle of proportionality.

It is therefore for lawyers with expertise in fundamental rights to carry out this assessment. **However, no authority competent to protect fundamental rights has been consulted.**

Only the National Consultative Ethics Committee (CCNE) was consulted. However, its purpose is not to safeguard fundamental rights. On the other hand, neither the opinion of the National Consultative Commission on Human Rights (CNCDH), which advises the Government and Parliament on fundamental rights, nor that of the Human Rights Ombudsman, who is responsible for defending the rights of citizens in their dealings with the authorities, has been sought. Nor that of experts specialized in fundamental rights (professors or lawyers).

HEALTH RISK ASSESSMENT.

The Covid-19 Scientific Council was created on 11 March 2020 at the request of the President of the *Republic "to inform public decision-making in the management of the health situation related to the coronavirus"*. Here is what emerges from its opinions of March 2020.

On the definition of risk.

In its first opinion of 12 March 2020, after defining the categories of people at risk of developing a serious form of COVID-19 (age, comorbidity, ALD, other factors...), it estimates their number at 17 million and the risk of excess mortality of 0.5 to 1% of the population *"due to saturation of the intensive care units"* if the virus is allowed to spread. The Scientific Council therefore states: *"If we want to avoid the saturation of the intensive care units and mortality, contacts must be further reduced with more restrictive measures in order to extinguish the epidemic"*. This imperative will be underlined in its subsequent opinions, the one of 23 March 2020 specifying, with regard to the CFG: *"the Scientific Council recalls that this intervention aims first and foremost to relieve the French resuscitation services, by reducing the number of serious forms requiring a stay in the resuscitation service."*

The proposed measures, outside the GFC.

In its opinions of 12 and 14 March 2020, the Scientific Council **only retains containment for persons at risk**, in particular *"over 70 years of age, and medically fragile persons"*. This containment must be "adapted and reinforced". It also proposes **the application of "barrier measures", the limitation of groupings to certain thresholds and the closure of places open to the public.**

Its opinion of 16 March 2020 states: *"For the most vulnerable people, the High Council of Public Health issued recommendations on Saturday 14 March 2020 to ensure maximum protection for these people. The Scientific Council recalls the importance of these recommendations which must be strictly applied"*.

However, on 16 March, forced confinement was applied to the entire population, with the approval of the Scientific Council.

The Scientific Council's position on the GFC

According to his opinion of 12 March 2020, he states: *"The very restrictive measures implemented in China have made it possible to contain the epidemic. It is possible that less restrictive measures will be sufficient (...) Everything will depend on the population's adherence to the control measures (...). A political trade-off must therefore be made between the intensity of the control measures on the one hand, and their impact on the population on the other hand (...)"*. In its opinion of 14 March 2020, the Scientific Council recalls that it formulated several measures *"in order to further restrict social life while preserving the economic life and essential activities of the country"*. It does not include the CFG among them. However, in its opinion of 16 March 2020, the Scientific Council proposes to political decision-makers: *"For the metropolitan population as a whole, the implementation of strict generalised containment on the model of Italy, implemented at national level for the entire French population"*. Then, in its opinions of 23 March 2020, it states: (...) *"Analyses (...) based on data from 16 and 17 March show a priori profiles that are unequally receptive to containment measures (...) They justify communication more specifically oriented towards compliance with containment"*.

The position of the Scientific Council on the municipal elections. In its opinions of 12 and 14 March, the Scientific Council decided in favor of holding them. Then, in its opinion of 16 March 2020, after the first round of elections, it decides against holding the second round.

GOVERNMENT ACTION.

INITIAL MEASURES.

By decree of 14 March 2020 on various measures relating to the fight against the spread of the covid-19 virus, the Minister of Health has in particular: Closed places open to the public that are not essential to the life of the nation such as cinemas, bars or discotheques; (...) shops except those of an essential nature such as food shops, pharmacies, banks, service stations or press distribution; Prohibited gatherings of more than 100 people; Suspended reception in primary, secondary and higher education establishments;

Decree No. 2020-260 of 16 March 2020 regulating travel as part of the fight against the spread of the covid-19 virus provides that *"(...) until 31 March 2020, it is forbidden to move any person outside his or her home except for the following reasons, (...) by avoiding any gathering [without definition in the text or in the Decree of 23.03. 20, which replaced it] of persons : (1) journeys between the home and the place or places where the professional activity is carried on and professional journeys that cannot be postponed; (2) journeys to make purchases of supplies necessary for the professional activity and purchases of basic necessities in establishments whose activities remain authorized by order of the Minister responsible for health (...); (3) travel for health reasons; (4) travel for compelling family reasons, for the assistance of vulnerable persons or for child care; (5) short trips, near the home, related to the individual physical activity of persons, excluding any collective sports practice, and to the needs of pets. Persons wishing to benefit from one of these exceptions must, when travelling away from home, provide themselves with a document enabling them to justify that the journey in question falls within the scope of one of these exceptions. "*

THE HEALTH EMERGENCY LAW OF 23 MARCH 2020

It implements a "state of health emergency", which is more severe than the state of emergency resulting from the law of 1955, which preceded it.

The law applicable until 1 April 2021, provides that a state of emergency shall be declared by decree in the Council of Ministers over all or part of metropolitan territory and the territory of the communities governed by articles 73 and 74 of the Constitution and New Caledonia, in the event of a health disaster endangering, by its nature and seriousness, the health of the population (and no longer "the life of the nation" as stipulated in international conventions).

While the extension of the 1955 state of security emergency was subject to the authorization of Parliament beyond 12 days, the extension of the emergency health law is subject to it only beyond one month. However, the state of health emergency was declared **for two months, i.e. until 24 May 2020, without parliamentary intervention after one month. And already the proposed legislation extending the state of health emergency by two months, until 24 July, will be presented to the Council of Ministers on Saturday and discussed next week in Parliament.**

The constitutionality review has been neutralised.

A prior review of the emergency health law could only be carried out on referral by the Presidents of the National Assembly, the Senate and sixty members of parliament. They abstained. Moreover, to prevent an ex post constitutional review, an organic law of 30 March 2020,

to deal with the covid-19 epidemic, was adopted, providing for the suspension of constitutional recourse (“QPC”) to the Constitutional Council from 30 March 2020 to 30 June 2020. The latter could be deemed unconstitutional, for not having respected the deadline for its adoption (Article 61-1 of the Constitution) and disregarded the requirement for the Constitutional Council, seized of a QPC, to give its opinion within a specified period (Article 61-1 of the Constitution).

- However, on 26 March 2020, the Constitutional Council declared this law constitutional, specifying that the suspension of deadlines *“does not call into question the exercise of this appeal or prohibit the ruling on a priority question of constitutionality during this period”*. Nevertheless, the European Court, seized on the conformity of the provisions of the Emergency Health Act with the ECHR, could rule that there is no longer any possibility of effective remedy under domestic law against its provisions and therefore directly retain its jurisdiction. In this perspective, all applicants are advised to refer, in their submissions to domestic and international courts, to Article 4 of the ICCPR, Article 15 of the ECHR and Article 52 of the CFEU, from which France implicitly derogates.

THE EFFECTS OF GOVERNMENT MEASURES ON FUNDAMENTAL RIGHTS

Violations of fundamental rights resulting from the decree of 14 March 2020, containing measures that are strictly limited in time and which, in comparison with those adopted in other European countries that have not applied the GFC, may meet the requirements of the principle of proportionality, are not the subject of this Communiqué.

This is not the case, however, for infringements of these rights arising from the application of the GFC.

A LEGITIMATE PURPOSE REQUIRES LEGITIMATE MEANS.

The adoption of the GFC shows that **this method, which originated in China, cannot be transposed into a democratic society without successively undermining the legal guarantees that ensure its durability**. Indeed, because of the extent of the violations of fundamental rights that it causes, resorting to the GFC without nuances implies ignoring the first and most important of these guarantees; the principle of proportionality.

This is precisely what the French State has done.

Without seeking to strike a balance between scientific and legal expertise, any solution has been examined solely through the prism of the health risk.

Thus, **the appropriateness of a CFG was only apprehended**, as the Scientific Council indicates, **on the basis of the reactions of the population to this measure**. From the moment it seemed to be tolerated, its relative relevance to fundamental rights was not questioned. Moreover, the government has not taken into account the repeated opinions of the Scientific Council, for an adapted and reinforced containment of persons at risk. These people have therefore been subject to the GFC common to the whole population, which has exposed some of them to more critical situations than before the GFC, due to the loss of support from caregivers and relatives and restricted access to care.

In this context, **the possibility of limiting isolation to only those at risk has not been explored, during the period when the probability of contamination was highest, as an alternative to the CFG** (this is the choice made by Sweden, where on 27 March 2020, for a population of 10,313,447 people, there were 2194 deaths, compared with 22,856 in France).

However, this measure, coupled with others (including quarantine of contaminated persons), **and applied with respect for the dignity of the persons concerned** (priority to consent, medically certified risk with no age criterion, secure contact with a few relatives) **appeared to be the most proportionate response to ensure their protection**. It would also have made it possible to free up the human and material resources, paralysed by the CFG, around their health and well-being.

DEMOCRATIC AND NON-DEMOCRATIC SOCIETIES: PREVENTING THE RISKS OF CONTAMINATION.

The pandemic reveals the fragilities and flaws, both individual and collective, which is also true for democracies...

The choice of the CFG resulted in a violation of freedom of movement and the right to private and family life, punishable by prison sentences, which are themselves contrary to the freedoms guaranteed by the Constitution.

This violation, in addition to the other derogations to fundamental rights made necessary to combat the pandemic, has in turn led, in addition to the cancellation of the municipal elections, the legality of which is still being debated, to other violations of these rights, an impressive list of which is examined in the Human Rights Institutes Report.

It has also pushed France into a regime of exception, even if it is declared provisional, allowing many measures to be taken that further aggravate the violations of fundamental rights.

All this could have been avoided if the government had placed itself in the perspective offered by the principle of proportionality. The quest for the least harmful measures would have maybe made it possible to anticipate the risks of the pandemic as well as possible, to move earlier towards the supply of gels, masks and tests and to better protect people at risk of occupational overexposure to the virus, like the entire population, through systematic screening.

It is now urgent, despite and because of the immense damage, **to do everything possible to restore democracy.**

Indeed, allowing the executive to govern without any control of citizens through the independent authorities responsible for monitoring respect for fundamental rights can only make the situation worse and add other dangers, as history has shown us). **The Universal Declaration of Human Rights was adopted in response to the attacks on human dignity and democracy perpetrated during the Second World War, let us remember.** The establishment of an uncontrolled derogation regime is a response neither to the social emergency, nor to the ecological emergency, nor to the economic emergency, which could follow the health emergency. On the contrary, **these challenges require a free, conscious and voluntary mobilisation of the entire population and its institutions. This requires the reappropriation of fundamental rights by individuals.**

It is therefore necessary to ensure that;

1°/ The CFG be completely abandoned as soon as possible and banned as a method in the future.

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

3°/ The state of exception is not renewed on 24 May next, it is unnecessary (if necessary, the ECHR allows restrictions to fundamental rights, to achieve legitimate and proportionate goals, without resorting to them).

4°/ The measures taken in application of the state of emergency are all abolished in the absence of effective control of proportionality, if necessary to the benefit of other measures, taken through ordinary legal channels.

FOR REMINDER

■ [Article 15 ECHR - Derogation in time of emergency](#)

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

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

■ [Article 52 CFREU - Scope of guaranteed rights](#)

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

■ [Article 4 ICCPR](#)

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

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

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