

CONSTITUTIONAL HUMAN RIGHT IN THE CONTEXT OF THE COVID-19 CHALLENGE

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Summary

The purpose of the article is research the interaction between human rights and measures to protect public health in the face of new legal challenges posed by COVID-19 through the disclosure of key legal standards to combat pandemic threats; study of the problem of restriction of the constitutional right to peaceful assembly and mass events; to analyze aspects of the implementation of the constitutional right to education in a pandemic crisis and the issue of restriction of freedom of movement. The article examines the interaction between human rights and measures to protect public health in the face of new legal challenges posed by COVID-19 through the disclosure of key legal standards to combat pandemic threats; study of the problem of restriction of the constitutional right to peaceful assembly and mass events; to analyze aspects of the implementation of the constitutional right to education in a pandemic crisis and the issue of restriction of freedom of movement.

The author's methodological analysis included a number of philosophical, general scientific and special scientific methods. In particular, the method of comparative jurisprudence was used to analyze the experience of a number of countries in allowing the restriction of human rights. The comparative method contributed to the generalization of knowledge in the field of medicine, law, public administration, psychology, etc. Synergetic aimed at the binary nature of legal reality and uncertainty in a pandemic crisis.

The positions of scientists and institutional international bodies on the legitimacy of restrictions on human rights are represented, the position is motivated by a casual dimension. The author reveals the key standards of counteracting pandemic threats, special attention is focused on the problem of restricting the constitutional right to peaceful assembly and mass events. The difficulties of realization of the constitutional right to education in the conditions of pandemic crisis are pointed out and also questions of legality and non-discrimination in the field of freedom of movement are raised.

An analysis of the experience of a number of countries has shown that in most countries, the rules of exclusive action allow for restrictions on human rights or certain deviations from the general mechanism of their implementation in times of health threats and/or national emergencies. However, in accordance with international law, as well as constitutional law in democracies, such measures must be necessary, proportionate and reasonably linked to legitimate public aims.

It is stated that state anti-epidemiological measures deprive citizens of the opportunity to properly exercise their constitutional rights, including the right to peaceful assembly, mass events, the right to education, and freedom of movement. Please note that the introduction of measures to prevent diseases that threaten public health should be exclusively for this purpose and should be motivated by critical necessity and not by political motives and interests. Restrictions must pursue a legitimate aim, demonstrate the exact nature of the threat and be proportionate according to that aim. This should demonstrate the direct and immediate link between the implication and the threat.

The conclusion states that the restrictions imposed by the application must comply with strict proportionality tests. Restrictions should not be too broad, they should be the least intrusive.

Key words: pandemic crisis, constitutional human rights, public health, right to peaceful assembly, mass events, right to education, freedom of movement.

1. Introduction

The 2019 coronavirus infection (COVID-19) caused by the SARS-CoV-2 virus poses a global threat to human life and health. As of November 7, 2021, the WHO has registered more than 249 million confirmed cases and more than 5 million deaths (WHO, 2021a). However, the pandemic also causes a transformation of social and legal reality. Law is changing as a social regulator of human relations, but its leveling and deviation cannot be explained solely by the purpose of protecting public health. And as Grietje Baars, the professor at The City Law School, City, University of London, points out, «even though the world suddenly looks very different from the beginning of the pandemic, the Law and the State remain relevant.» (Baars, 2020, p. 216)

There are constitutional restrictions of human rights in order to take preventive measures. Common restrictions to varying degrees were imposed on individuals, groups, communities, cities, or even entire regions. These restrictions contradict ab initio civil and human rights. These measures, which are now widely implemented in many regions and countries of the globe, have raised new ethical questions (Chia T., Oyeniran O.I., 2020). For the most part, scientists arguing that ambiguity as to the scope of the right to liberty in Article 5 of as narrow an interpretation of Article 5 as possible. (Greene, 2020). However, to resolve the issue by simply narrowing the rights is illegal. Therefore, the task of the constitutional legal doctrine of nowadays is to analyze the transformation of legal practice in the context of global challenges and determine the optimality of limited rights and legitimacy of state measures of a preventive nature.

Specialists in various fields of law, including G. Baars, T. Chia, O.I. Oyeniran, A. Greene, A. E. Yamin, R. Habibi, A. Kecojevic, C.H. Basch, M. Sullivan, N.K. Davi, S.K. Brooks, R.K. Webster, L.E. Smith, L. Woodland, S. Wessely, have dealt with legal issues of public health. However, the new threats posed by the pandemic necessitate additional scientific analysis.

The purpose of the article is to conduct a study of the interaction of human rights and measures to protect public health in the face of new legal challenges posed by COVID-19. The main tasks of the author are to disclose key legal standards for counteracting pandemic threats; study of the problem of restriction of the constitutional right to peaceful assembly and mass events; to analyze aspects of the implementation of the constitutional right to education in a pandemic crisis and the issue of restriction of freedom of movement.

2. Key standards for counteracting pandemic threats

The national measures that the state will take to overcome the problem in order to protect public health are important. Therefore, comprehensive international

and national guarantees for the latest global challenge are also important.

In this regard, on April 14, 2020, WHO adopted a COVID-19 Strategy update which stipulates that each country must implement a comprehensive set of measures appropriate to its capabilities and situation in order to slow down the transmission of the virus and reduce COVID-19 related mortality, with the ultimate goal of achieving and/or maintaining a stable level of low virus transmission or the absence of new cases of infection. Appropriate strategies at the national and regional levels should compare measures to reduce direct mortality associated with COVID-19, indirect mortality associated with health system overload and disruption of other priority medical and social services, and minimize hazardous and long-term negative consequences for health and well-being due to the socio-economic effect of certain retaliatory measures (WHO, 2020).

According to WHO regulations, «detection of cases of the disease, isolation, testing and providing care, contact tracking and moving to quarantine are important elements of a comprehensive strategy for localization of foci of infection and anti-epidemic measures» (WHO, 2021b).

Due to the COVID-19 pandemic, various countries have introduced a number of measures to protect the health of the population, as well as social measures, including keeping a safe distance, temporary closure of educational institutions and enterprises, quarantine in different geographical areas and restrictions on movement. In accordance with the changes in the epidemiological picture at the local level, the country is making adjustments to appropriate measures.

In Ukraine, in addition to constitutional norms and sectoral codified acts, there is the Law of Ukraine «On Protection of the Population from Infectious Diseases» (About the seizure of the population from infectious diseases, 2000), which defines a set of measures authorized by public authorities to minimize the spread of a pandemic.

Therefore, it is generally important to understand the following key aspects. International medical rules, obligatory for all 196 WHO member states, are clearly aimed at reducing the spread of the disease by minimizing barriers to travel and trade and respecting human dignity, human rights and fundamental freedoms in the event of a health care crisis. In practice, this means that key international standards and human rights values are necessary in all circumstances: non-discrimination on the basis of gender, socio-cultural, ethnic, religious and other characteristics; state provision of basic necessities; state support of public health, equality and fairness of limited resources, democracy and communication with civil society.

In most countries, the norms of exclusive action allow for restrictions on human rights or certain deviations from the general mechanism of their implemen-

tation in times of health threats and/or national emergencies. However, in accordance with international law, as well as constitutional law in democracies, such measures must be necessary, proportionate and reasonably linked to legitimate public aims (Yamin, Habibi, 2020).

It is not enough for any government to simply say that it is doing what is necessary or effective. The essence of human rights and democracy – is that the power is in the hands of the people. Governments must be able to provide adequate and transparent justification for the measures taken. Involving individuals and communities is important for effective management of the spread of the disease.

We believe it is necessary to focus on a number of human rights that have been restricted as a result of the necessary public health measures to combat COVID-19, but we note that much more rights are restricted than specified in this study.

3. Problems of restriction of constitutional law for peaceful assemblies and mass events

Such a right is not an absolute right and may be limited. However, this requires a good legitimate reason. This fundamental principle of the rule of law is reflected in the ECHR, namely: Articles 8, 9, 10 and 11 provide for interference with fundamental rights where it is necessary for a democratic society to protect health. In addition, Article 15 of the Convention also provides for the possibility of derogating from certain rights.

Article 39 of the Constitution states that «citizens have the right to assemble peacefully, without weapons and to hold gatherings, rallies, marches and demonstrations...» The free exercise of this right is one of the preconditions for the normal functioning of a modern democratic state, as it is a form of direct democracy and plays an important role in the formation of civil society in Ukraine. However, it has not only a political but also a social context, as communication between people provides different kinds of recreational and social human needs.

Outbreaks identified for today have mainly occurred in clusters of patients who became infected as a result of close contact, in the family or at individual events, characterized by crowds. Therefore, the restriction of this right is motivated and normatively justified.

Mass events include activities that involve gathering people in a specific place for a specific purpose over a period of time and that may place an undue burden on the planning and response system in the country or community that conducts them. In the context of COVID-19, mass activities are those that are accompanied by large crowds of people at the venue for a certain period of time and that can contribute to a more intensive spread of COVID-19, as well as create an additional burden on the health care system.

Mass events are not exclusively recreational; they can affect the psychological well-being of many people

(such as religious activities), encourage health-promoting behaviors (such as sports competitions), and are of great socioeconomic importance to communities.

Practical considerations and recommendations for religious leaders and confessional communities in the context of COVID-19 issued by WHO on April 7, 2020 call for ceremonies and rituals if needed and if possible, remotely/virtually instead of large-scale events; to hold cult, educational or public events with the personal presence of participants, on condition of a comprehensive risk assessment, as well as compliance with the requirements of central and local health authorities (WHO, 2020 b).

Considering the issue of the restoration of mass events should be based on the results of a thorough risk assessment, for example, in accordance with WHO recommendations for mass events in the context of COVID-19, which take into account both risk factors associated with the event and the ability of organizers to mitigate their influence (WHO, 2020 c).

4. Implementation of the constitutional right to education in a pandemic crisis

This right is key and universal for everyone, and is now enjoyed by 1.75 billion children and young people worldwide (Czerepaniak-Walczak, M., 2020, 58).

The right to education is a constitutional human right, in the Basic Law of our state it is defined in Art. 53 and according to the Decision of the Constitutional Court of Ukraine it should be understood as «the human right to acquire a certain amount of knowledge, cultural skills, professional orientation, which are necessary for normal life in modern society» (Decision of the Constitutional Court of Ukraine from the certificate, 2004).

This is the third school year in terms of limited access to education. The pandemic posed a real threat to the realization of this right to all persons of school and senior age, as all educational institutions at different levels received serious quarantine restrictions on the actual educational process. The most important measures for preparation, preparedness and response in connection with COVID-19 (interim recommendations) indicate that decisions to close, partially close or reopen educational institutions should be made on the basis of risk assessment and taking into account the need to continue the educational process and the health interests of students, teachers, staff and the local population and should help prevent a new outbreak of COVID-19 at the local level (WHO, 2020d).

Problems with the realization of the right to education are characteristic at any level. And while schoolchildren have problems mostly with access to information and the learning process, students have a wider range of problems. Currently available studies have shown that through COVID-19, college and university students have experienced mental health problems.

Psychological problems include feelings of anxiety, depression and stress, and they occur due to restricted movement, social distancing and quarantine. In the United States, studies have reported that higher levels of anxiety, depression, and stress have been reported to affect students' focus on their learning (Kecojevic etc., 2020). At the same time, it has been proven that universities and stakeholders should implement measures to mitigate the effects of COVID-19, but in general in most countries legal policy in education does not take measures to improve the mental health of pupils and students, which negatively affects academic performance and student success (Mudenda, 2021).

National policy is important here. Let's turn to the experience of China. On February 5, 2020, at the initiative, the «Guidelines for the organization and management of online teaching in higher education institutions in the period of prevention and control of the epidemic» was continued (Ministry of Education of P.R. China, 2020). Management requires national and local governments to encourage colleges and universities, along with the rest of society, to participate in the joint implementation of online education. In addition, the Ministry of Education requires that new online courses should be of the same quality as previous full-time courses. It requires that the workload of teachers in conducting online courses should be recognized as equivalent to the workload of a teacher in conducting face-to-face courses; it also encourages students to study independently online. The Ministry encourages universities to conduct multidimensional assessment of learning and to take proper account of student achievement on the Internet.

Higher education systems responded promptly to these activities, within a few months 22 large online curriculum platforms were opened, 24,000 online courses for higher education institutions to choose, including 1,291 national skill courses and 401 experimental national virtual simulation courses, covering 12 undergraduate programs and 18 higher professional programs (Wang, 2020).

Education is not a privilege. As one of the most important human activities, it should (even must) be guaranteed and provided by the state. It is the responsibility of the state to ensure respect for the right to education and to create the conditions for its exercise, including exceptional, unforeseen circumstances. Therefore, it is important that the right to education is not limited, it should be noted that it should receive the latest forms of implementation, usually through distance learning, but the basic standards of education should remain unchanged.

5. Restrictions on freedom of movement

The constitutional content of the right to freedom of movement is that a citizen can decide at his/her own discretion which places to visit and how long to stay there. The pandemic has stopped social communica-

tion in real life, practically implementing it in the field of online, as modernized technologies help people in times of social backwardness. The governments of most countries have taken unprecedented measures due to the normative rule of «staying at home», i.e., self-isolation (except for Belarus, Sweden and Japan). In some places, the WHO and some countries (China) use the term «blocking» (The 2019-2020 Novel Coronavirus, 2020).

The initial measures to restrict freedom of movement were very radical. According to the decision of the National Security and Defense Council «On the procedure for crossing the state border of Ukraine in the outbreak of acute respiratory disease COVID-19 caused by coronavirus SARS-CoV-2», which is put into effect by the President of Ukraine on March 17, checkpoints across the state border of Ukraine for air, rail and bus services will be closed for two weeks [14]. Subsequently, this period was extended.

However, this position differs from the WHO recommendations, which do not recommend imposing any restrictions on travel or trade in countries facing COVID-19 outbreaks.

The International Institution points out that «based on the available evidence, it can be generally concluded that the imposition of restrictions on the movement of people and goods during health emergencies is in most cases not an effective measure and may divert resources from other measures. Moreover, restrictions can lead to disruptions in the delivery of necessary assistance and technical support, disrupt the activities of economic entities and have negative socio-economic consequences for the countries affected by them. However, in some circumstances, measures to restrict the movement of people may have a temporary positive effect, in particular, if the area does not have active communication with foreign countries and is insufficiently prepared to respond to the outbreak» (WHO, 2020e).

Such a measure deprives the right to stay outside the place of stay (residence), except for personal needs, such as the purchase of food and medicine, urgent needs, work, in some countries – sports. Self-isolation causes inability to see loved ones, loss of rights, «loss of routine and reduced social and physical contact with others, often provoking fear, frustration and detachment from the rest of the world, which upsets participants. This disorder is exacerbated by the inability to participate in normal daily activities, such as the purchase of basic necessities, etc.» (Brooks atc, 2020).

The problem here is the reasonableness of the measures taken by the state and their compliance with real threats. Forced self-isolation should be distinguished from such a measure as quarantine. Quarantine, in essence, involves the isolation or restriction of mobility of people who came from other countries or suffered from this infectious disease. In this scenario, infected by COVID-19 are isolated from uninfected individuals, and this isolation usually occurs in a hospital. With the

help of quarantine, we can prevent the spread of the disease from person to person in order to break the chain of transmission. Researchers point to the benefits of quarantine: the isolation of individuals in the group of reported cases will avoid a significant number of uncontrollable diseases and deaths¹ (Wilder-Smith, 2020).

At the same time, the reference to complete isolation or self-isolation directly violates human rights. The problem is not only discrimination against the right to movement, but also the ability to communicate and engage in social activity. Even before the pandemic, reports showed that many older people were already more socially isolated and lonelier than the rest of the population. Numerous studies and reviews have shown that social isolation and loneliness have a serious impact on older people's mortality, their physical health and functioning (e.g., heart disease, diabetes, mobility, daily activities) and their mental health (depression, anxiety and decreased cognitive abilities) (Social isolation and loneliness in older adults: opportunities for the health care system, 2020; Courtin, Knapp, 2017).

The measures are often discriminatory and unequal. For example, in Bosnia and Herzegovina, older people were not allowed to leave their homes for several weeks (Cerimovic, Wurth, Brown, 2020). In the United Arab Emirates, people over the age of 60 were not allowed into shopping malls or restaurants after they reopened after a period of isolation. Similarly, in the Philippines, people over the age of 60 are prohibited from using the four Manila subway rail systems after they have resumed work for everyone else (Subingsubing, 2020).

6. Conclusions and prospects for further exploration

Paternalism involves the restriction of liberty in order to protect or promote the best interests of that person; giving priority to wider societal consequences than individual rights. The human right to health includes the protection and prevention of contact with diseases. This contributes to the fact that long-term interests take precedence over short-term ones. Public health policy, which focuses primarily on health outcomes at the population level, can thus subordinate people's interests and rights to the common good. Given this, there seems to be an informal consensus that human health takes precedence over human rights.

State anti-epidemiological measures deprive citizens of the opportunity to properly exercise their constitutional rights, including the right to peaceful assembly, mass events, the right to education, and freedom of movement. Please note that the introduction of measures to prevent diseases that threaten public health should be exclusively for this purpose and should be motivated by critical necessity and not by political mo-

tives and interests. Restrictions must pursue a legitimate aim, demonstrate the exact nature of the threat and be proportionate to that aim. This should demonstrate the direct and immediate link between the expression and the threat.

In addition, the restrictions imposed by the application must comply with strict proportionality tests. Restrictions should not be too broad; they should be the least intrusive.

One more thing. Implemented measures to restrict human rights should be carried out for a limited period and, if necessary, in a safe and humane manner. Although the need for human survival precedes the rights of the individual, the balance between individual rights and public health needs, cannot be neglected.

The transformation of social reality is taking place in all spheres. This article presents only a small list of changes in the institution of human and civil rights and freedoms. It requires further analysis of such rights as the right to work, the right to protection against discrimination on health grounds, the right to free elections and many others.

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КОНСТИТУЦІЙНІ ПРАВА ЛЮДИНИ В УМОВАХ ВИКЛИКУ COVID-19

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Анотація

Метою статті є дослідження взаємодії права людини та заходів захисту здоров'я населення в умовах нових правових викликів зумовлених COVID-19 через розкриття ключових юридичних стандартів протидії пандемічним загрозам; дослідження проблеми обмеження конституційного права на мирні збори та масові заходи; проаналізувати аспекти реалізації конституційного права на освіту в умовах пандемічної кризи та питання обмеження свободи пересування.

Авторський методологічний аналіз включав низку філософських, загальнонаукових та спеціально наукових методів. Зокрема метод порівняльного правознавства застосовувався для аналізу досвіду низки країн щодо допущення обмеження прав людини. Компаративний метод сприяв узагальненню знань у сфері медицини, права, громадського управління психології тощо. Синергетичний спрямував на бінарність правової реальності та невизначеність в умовах пандемічної кризи.

Репрезентовані позиції науковців та інституційних міжнародних органів щодо правомірності обмеження прав людини, мотивовано позицію казуальним виміром. Автором розкрито ключові стандарти протидії пандемічним загрозам, окрему увагу сконцентровано на проблемі обмеження конституційного права на мирні збори та масові заходи. Вказано на труднощі реалізації конституційного права на освіту в умовах пандемічної кризи а також піднято питання правомірності та недискримінації в сфері свободи пересування.

У статті відображено, що більшості країн нормами виключної дії допускаються обмеження прав людини чи певні відступи від загального механізму їх реалізації у період загрози охорони здоров'я та/або при національних надзвичайних ситуаціях. Однак відповідно до міжнародного права, а також конституційного права у демократичних державах, такі заходи мають бути необхідні, пропорційні та розумно пов'язані з законними суспільними цілями.

Констатовано, що державні проти епідеміологічні заходи позбавляють можливості громадян належним чином реалізувати свої конституційні права, зокрема право на мирні збори, масові заходи, право на освіту, можливість свобода пересування. Звертаємо увагу, що введення заходів запобігання хворіб, що загрожує громадському здоров'ю винятково має стосуватися зазначеної цілі та повинно бути мотивовано критичною необхідністю, а не політичними мотивами та інтересами. Обмеження повинні переслідувати законну мету, демонструвати точну характер загрози та бути пропорційними цій меті. Це має продемонструвати прямий і безпосередній зв'язок між виразом і загрозою.

У висновку зазначено, що обмеження, встановлені заявою, повинні відповідати суворим тестам на пропорційність. Обмеження не повинні бути занадто широкими, вони повинні бути найменш нав'язливі заходи.

Ключові слова: пандемічна криза, конституційні права людини, громадське здоров'я, право на мирні збори, масові заходи, право на освіту, свобода пересування.