

MEASURES TO COUNTER THE COVID-19 PANDEMIC AND THE PERMISSIBILITY OF HUMAN RIGHTS RESTRICTIONS

Mariya Mendzhul,

*Professor of the Department of Civil Law and Process
Uzhgorod National University*

*Doctor of Science of Law, Associate Professor,
<https://orcid.org/0000-0002-3893-4402>*

ResearcherID: F-6306-2019

*(<https://publons.com/researcher/1770355/marija-mendzhul/>)
marija.mendzhul@uzhnu.edu.ua*

Summary

Following the declaration of a pandemic caused by the SARS-CoV-2 virus, the EU and Ukraine have taken various measures to prevent infection and protect the health of citizens, including: mandatory observation (most countries); introduction of the rules of responsibility for violation of quarantine restrictions (usually administrative, but criminal liability is also possible); closure of educational and entertainment facilities, as well as public catering establishments (remote operation of educational facilities is allowed, as well as operation of public catering establishments with food delivery); obligation to wear masks; prohibition of movement of groups of persons; maximum transfer of employees to remote work; ban on operation of most companies (introduced by Italy and Spain); closing borders; curfew (introduced in Italy, Spain and Georgia); self-isolation of persons belonging to risk groups. Ukraine has implemented all these measures, except for curfew and closure of all enterprises.

Implemented measures in most countries have restricted: freedom of movement and peaceful assembly of citizens; the right to private and family life; protection of personal data; freedom of religion (most European countries and Ukraine have banned services and other religious ceremonies with gatherings); the right to medical care (in many countries, citizens have limited access to non-life-saving medical services, including dental, preventive medical services, non-urgent operations, etc.) and others.

In the context of the fight against the COVID-19 pandemic, states relied on various types of measures, which allowed us to distinguish three models: “hard” model (USA and most European countries and Ukraine); the “minimum intervention” model (introduced in South Korea); the “maximum public awareness” model (in Sweden). The question of the proportionality of measures taken by the state to counter the COVID-19 pandemic may be considered by the ECtHR regardless of whether the state has made a declaration of derogation, and the establishment of a violation of a particular right will depend on the specific situation in the country, scope and length of applied measures, as well as their feasibility and effectiveness.

Key words: COVID-19, pandemic, human rights, proportionality, ECtHR.

1. Introduction

WHO declared the COVID-19 pandemic on March 11, 2020, when the number of infected in 114 countries reached more than 118.000 cases, killing 4.291 people. A month later, on April 11, the number of infected cases in the world was 1.610.909, the death toll was 99.690 (Coronavirus disease 2019). Almost a month later, on May 8, the number of infected reached 3.759.967 cases, 259.474 died. As of March 16, 2021 new cases continued to rise globally, increasing by 10% in the past week to over 3 million new reported cases (Weekly epidemiological update, 2021). In the face of threats to human health, states have taken various measures to stop the spread of the SARS-CoV-2 virus, including those that have led to intrusion into private life and restrictions on other individual rights.

Following the declaration of a pandemic caused by the SARS-CoV-2 virus, the EU and Ukraine have taken various measures to prevent infection and protect the health of citizens, including: mandatory observation (most countries); introduction of the rules of responsibility for violation of quarantine restrictions (usually administrative, but criminal liability is also possible); closure of educational and entertainment facilities, as well as public catering establishments (remote operation of educational facilities is allowed, as well as operation of public catering establishments with food delivery); obligation to wear masks; prohibition of movement of groups of persons (for example, in Ukraine the maximum movement of a group of two adults is allowed, without limiting the number of children they accompany); ban on visiting parks and recreation areas; maximum transfer of employees to remote work; ban on operation of most companies (introduced by Italy and Spain); closing borders; curfew (introduced in Italy, Spain and Georgia); self-isolation of persons belonging to risk groups. Ukraine has implemented all these measures, except for curfew and closure of all enterprises. It is necessary to study the extent to which the implementation of measures to combat the COVID-19 pandemic restricts human rights and whether such interventions are permissible.

Identify if the measures taken by States to combat the COVID-19 pandemic and the permissible limits for such measures correspond those

limits allowed by the human rights standards within the meaning of the Convention for the Protection of Human Rights and Fundamental Freedoms.

The study is based on an interdisciplinary approach to the analysis of the problem of applying measures to combat the COVID-19 pandemic by various states and the admissibility of such measures to interfere with fundamental human rights using dialectical, comparative law, systemic and statistical methods. The study used scientific developments in the field of legal protection of human rights in the European Court of Human Rights (hereinafter - ECtHR), the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter - ECHR), official information on measures taken by states to combat the virus SARS-CoV-2, Ukrainian legislation, case law of the European Court of Human Rights, official WHO statistics.

2. Measures to counter the pandemic and restrict human rights

Implemented measures in most countries have restricted: freedom of movement and peaceful assembly of citizens (mass gatherings, mass events, stopped traffic between states and restricted movements within the states have been banned in the EU and Ukraine); the right to private and family life (restriction of movement, closure of borders led to the fact that a number of families found themselves in different cities and even states, and could communicate only by phone or via the Internet); protection of personal data (for example, in Ukraine for the period of national quarantine it is allowed to process personal data without the consent of the person, in particular - information on health status, place of hospitalization, surname, name, patronymic of the patient, date of birth, place of residence, work or training); freedom of religion (most European countries and Ukraine have banned services and other religious ceremonies with gatherings); the right to medical care (in many countries, citizens have limited access to non-life-saving medical services, including dental, preventive medical services, non-urgent operations, etc.) and others.

At the same time, there are states that have introduced rather liberal measures, such as clos-

ing only schools, isolating patients and restricting the movement of people at risk (South Korea (Dennis Normile, 2020)), or recommending social distancing, isolation of patients and not closing educational institutions (Belarus (Minsk zdavnya pered koronavirusom i zaprovadyvshyroki obmezhenya) and Sweden (Salnikov, 2020)).

Undoubtedly, the measures implemented in most European countries and Ukraine in the fight against the COVID-19 pandemic have affected the right to education, as well as the labor rights of citizens. On the one hand, learning takes place remotely, on the other hand, the quality of such learning, especially for children of primary school age, raises many questions. As a result, a recommendation has already been adopted at the level of ministries in a number of countries to repeat the distance learning program in September 2020. The COVID-19 pandemic, combined with the economic crisis, has also led to rising unemployment in all European countries.

These measures to combat the COVID-19 pandemic have led to interference and restrictions on fundamental human rights, which may result in appeals against the actions of states to the European Court of Human Rights.

Convention for the Protection of Human Rights and Fundamental Freedoms (Article 15 states that in cases of public danger threatening the life of the nation, the state may waive its obligations other than guaranteeing the right to life (Article 2), prohibition of torture or inhuman or degrading treatment), degrading treatment, punishment or punishment (Article 3), prohibition of slavery (Article 4, paragraph 1) and prosecution without lawful grounds (Article 7). With regard to other rights, including the right to family and private life (Article 8), freedom of thought conscience and religion (art. 9), freedom of expression (art. 10), freedom of assembly and association (art. 11), freedom of movement (art. 2 of Protocol 4) and others, such interferences are possible, if they are based on the law, have a legitimate purpose and are proportionate and necessary in a democratic society.

As of May 8, 2020, ten States have made a declaration of withdrawal from their obligations under the Convention under Article 15: Latvia (March 16), Romania (March 18), Arme-

nia (March 20), Estonia (March 20), Moldova (March 20), Georgia (March 23), Albania (April 1), Macedonia (April 2), Serbia (April 7) and San Marino (April 14). Ukraine has not yet made such a statement. States which have derogated from Article 15 of the ECHR shall inform the Secretary General of the Council of Europe of the measures taken. At the same time, it is necessary that the restrictions on rights introduced be proportionate, despite even claims of derogation. In the case of "Mehmet Hasan Altan v. Turkey" The ECtHR argued that a declaration of derogation did not imply the possibility of imposing measures without legal grounds and without respecting the constitutional guarantees established in the State (paragraph 140, Case of Mehmet Hasan Altan v. Turkey, 2018).

Thus, the ECtHR will take the above criteria into account when considering cases, and States that have made a declaration of derogation must still comply with the constitutional and other legislative guarantees of the rights of their citizens.

3. Legality and proportionality of measures restricting human rights

As for legality, both European states and Ukraine take restrictive measures in accordance with international acts and national legislation. For example, the state of emergency situation was introduced in Ukraine on March 25 by a government order (Pro perevedennya yedynoyi derzhavnoyi systemy tsyvilnoho zakhystu u rezhym nadzvychaynoyi sytuatsiyi, 2020). In addition, according to the Law of Ukraine "On Protection of the Population from Infectious Diseases" (Pro zakhyst naselennya vid infektsyynykh khvorob, 2000) and the Civil Protection Code of Ukraine in case of emergency, citizens must adhere to the anti-epidemic regime, which also allows quarantine and traffic restrictions (Kodeks tsyvilnoho zakhystu Ukrayiny, 2012). Therefore, in an emergency situation, the imposed regime may in fact restrict the exercise of a number of human rights, and in the case if sufficient legal grounds are available (in this case - the fight against the COVID-19 pandemic), the established measures meet the criterion of legality as required by the Convention for the Protection of Human Rights and Fundamental Freedoms and the case law of the ECtHR.

The legitimate aim according to the Convention for the Protection of Human Rights and Fundamental Freedoms will be to protect health, and given the rapid spread of the SARS-CoV-2 virus, this cannot be doubted.

It is necessary to analyze whether the implemented measures are proportional and necessary in a democratic society.

The principle of proportionality has already been the subject of scholar researches. Most scholars believe that the principle of proportionality is a general guiding idea of compliance, the relevance of applied legal instruments to achievement of a legitimate goal (Fufal'ko, 2011, p. 71), which is especially important for human rights (Jean-François Renucci, 2005, p. 128). To establish proportionality, scholars, taking into account the practice of the ECtHR, propose a test of proportionality: 1) the instrument designed to achieve the goal must be suitable for achieving this goal (appropriateness); 2) from all suitable means, the one that least restricts the right of an individual (necessity) should be chosen; 3) the damage to an individual from the restriction of his right must be proportional to the benefit that the state will receive to achieve the goal (proportionality in the narrow sense) (Pogrebnyak, 2012, p. 51). Thus, proportionality is aimed at ensuring the effectiveness of legal regulation and ensuring the balance of private and public interests.

In its case law, the ECtHR has concluded that the notion of necessity means that the intervention meets an urgent social need and that it is proportionate to the legitimate aim pursued (p. 50 «Gnahoré v. France»; p. 60, p. 61 «W. v. the United Kingdom»). If the principle of proportionality is not respected, the intervention cannot be considered necessary in a democratic society.

In order to establish if COVID restrictive measures were necessary and proportional than relevant statistical data must be analyzed.

Table I shows data on the rate of spread of SARS-CoV-2 virus, as well as the state of infection in the countries that introduced quarantine (Spain, Italy, Germany, France, Great Britain, Czech Republic, Poland, Romania, Ukraine, Hungary and Slovakia) and those countries that have not introduced quarantine measures (Belarus, Sweden and South Korea). We have added

to the table for comparison non-European countries, namely the United States, where tough measures have been introduced, and South Korea, where the containment of COVID-19 infection has been achieved through fairly liberal steps and the so-called partnership policy and public awareness work with the population. A similar model of measures was used in Europe by Belarus and Sweden, which have not even closed schools. When comparing the data for six months (Table I), in South Korea the figure rose to only 0.04%. Therefore, it can be concluded that the situation with the COVID-19 pandemic in South Korea is under control, which has been achieved through liberal measures and minimal human rights interference.

In European countries that have imposed strict restrictions the number of infected cases as compared to the total population has increased during the month (for six months) by: in Italy – 0.16% (0.23%), in Spain the figure increased by 0.17% (0.7%), in the UK – by 0.22% (0.43%), in France – by 0.08% (0.34%), in Germany – by 0.08% (0.17%), in Romania – by 0.05% (0.46%), in Poland – by 0.03% (0.15%), in the Czech Republic – by 0.02% (0.21%), in Hungary – by 0.02% (0.075%), in Ukraine – by 0.027% (0.31%), in Slovakia – by 0,01%(0.07%). At the same time, in Sweden, which has not introduce quarantine, the percentage of infected people increased by 0.15% over the month (for six months by 0.74%), in Belarus by 0.2% (for six months by 0.75%) of the total population.

At the same time, regarding Ukraine, experts have pointed attention on the inaccuracy of official COVID-19 statistics in the country for various reasons: low quality of purchased tests (Ispaniya povernula v Kytay neyakisni testy na koronavirus. Tochno taki kupuvav Kyyiv), cases of erroneous testing results (Testuvannya na koronavirus: chomu PLR-analiz mozhe davaty khybnyy rezul'tat), insufficient number of tests performed and the use of tests only in the case of sufficient symptoms or contact with the infected or arrival from the "epicenters of infection" («Try symptomy»: Lyashko nazvav pidstavy dlya testuvannya na koronavirus).

As for the percentage of mortality to the total number of infected as of May 8, 2020, in Ukraine the figure is 2.54%, in Poland - 5.01%, the United States - 5.52%, Spain - 11.77%, Swe-

den - 12.34 %, Italy - 13.87%, in the UK - 14.8%, and in France - 19.08%. As of September 9, the number of deaths to the total number of infected is declining in a number of countries: in

Ukraine - 2.09%, in Poland - 3.01%, the United States - 3.03%, Spain - 5.89%, Sweden - 6.86 %, Italy - 12.85%, in the UK - 12.07%, and in France - 10.16% (data for all countries is in Table I).

Table I. State of infection in some countries

Country	Total population	The total number of infected (8 April 2020) / Percentage of the infected to the total population (8 April 2020)	The total number of infected (8 May 2020) / Percentage of the infected to the total population (8 May 2020)	The total number of infected (8 June 2020) / Percentage of the infected to the total population (8 June 2020)	The total number of infected (8 Juli 2020) / Percentage of the infected to the total population (8 Juli 2020)	The total number of infected (8 August 2020) / Percentage of the infected to the total population (8 August 2020)	The total number of infected (9 September 2020) / Percentage of the infected to the total population (9 September 2020)	Total deaths (9 September 2020) / The percentage of deaths from the total number of infected (9 September 2020)
USA	330 627 484	766128 / 0,23 %	1215571 / 0,37 %	1 915 712 / 0,58 %	2 923 432 / 0,88 %	4 836 930 / 1,46 %	6 144 138 / 1,86 %	186 663 / 3,03 %
Spain	46 754 778	140510 / 0,30 %	221447 / 0,47 %	241550 / 0,52 %	252 130 / 0,54 %	314 362 / 0,67 %	498 989 / 1,06 %	29 418 / 5,89 %
Italy	60 461 826	135586 / 0,22 %	215858 / 0,38 %	234998 / 0,39 %	241 956 / 0,40 %	249 756 / 0,41 %	276 338 / 0,45 %	35 534 / 12,85 %
Germany	83 783 942	103228 / 0,12 %	167300 / 0,19 %	184193 / 0,20 %	197 341 / 0,23 %	215 336 / 0,25 %	249 985 / 0,29 %	9 325 / 3,73 %
France	65 273 511	77 226 / 0,12 %	135980 / 0,20 %	150315 / 0,23 %	159 909 / 0,24 %	185 353 / 0,28 %	300 515 / 0,46 %	30 546 / 10,16 %
The United Kingdom	67 886 011	55246 / 0,08 %	206719 / 0,30 %	286198 / 0,42 %	286 353 / 0,42 %	309 009 / 0,45 %	344 168 / 0,51 %	41 549 / 12,07 %
Republic of Korea	51 260 707	10 384 / 0,02 %	10822 / 0,02 %	11 814 / 0,023 %	13 244 / 0,028 %	14 562 / 0,028 %	21 177 / 0,04 %	334 / 1,57 %
Sweden	10 099 265	7693 / 0,08 %	24623 / 0,23 %	44 730 / 0,44 %	73 344 / 0,72 %	82 323 / 0,81 %	84 985 / 0,82 %	5 835 / 6,86 %
Czechia	10 708 981	5 017 / 0,05 %	8031 / 0,07 %	9 628 / 0,08 %	12 685 / 0,11 %	18 060 / 0,16 %	27 752 / 0,26 %	431 / 1,55 %
Poland	37 846 611	4 848 / 0,01 %	15047 / 0,04 %	26 561 / 0,07 %	36 412 / 0,09 %	50 324 / 0,13 %	70 387 / 0,16 %	2 113 / 3,01 %
Romania	19 237 691	4417 / 0,02 %	14499 / 0,07 %	20 479 / 0,1 %	29 620 / 0,15 %	59 273 / 0,30 %	93 864 / 0,48 %	3 850 / 4,1 %
Ukraine	43 733 762	1668 / 0,003 %	14195 / 0,03 %	27 462 / 0,06 %	50 414 / 0,11 %	79 750 / 0,18 %	135 894 / 0,31 %	2 846 / 2,09 %

Hungary	9 660 351	895 / 0,01 %	3178 / 0,03 %	3 970 / 0,04 %	4 210 / 0,044 %	4 621 / 0,047 %	7 892 / 0,08 %	624 / 7,9 %
Belarus	9 465 300	861 / 0,01 %	20168 / 0,21 %	48630 / 0,51 %	64 003 / 0,67 %	68 614 / 0,72 %	72 663 / 0,76 %	705 / 0,97 %
Slovakia	5 459 642	598 / 0,01 %	1445 / 0,02 %	1 528 / 0,02 %	1 767 / 0,03 %	2 523 / 0,04 %	4 526 / 0,08 %	37 / 0,81 %

As of March 16, 2021, the statistics on the total number of infected are as follows: USA - 29 063 401; Spain - 3 183 704; Italy - 3 201 838; Germany - 2 569 245; France - 3 975 989; The United Kingdom - 4 253 824; Republic of Korea - 95 635; Sweden - 712 527; Czechia - 1 399 078; Poland - 1 906 632; Romania - 855 326; Ukraine - 1 460 756; Hungary - 516 490; Belarus - 301 328; Slovakia - 337 503 [18]. Mortality rates do not increase in the number of infected, thanks to developed approaches to treatment and vaccination.

This statistics is important because it can show the effectiveness of various measures in the fight against the COVID-19 pandemic. Statistics can be analyzed in the European Court of Human Rights in the event of an appeal against the legitimacy of measures to restrict human rights by the state through quarantine measures.

Kanstantsin Dzehtsiarou came to the correct conclusion that the European Court of Human Rights has a limited set of tools to influence the current emergency situation, so other political bodies of the Council of Europe can better respond to it (Kanstantsin Dzehtsiarou, 2020). At the same time, the Convention for the Protection of Human Rights and Fundamental Freedoms should not be underestimated, as the very possibility of carefully examining the actions of Council of Europe member states in the event of potential appeals to the ECtHR is already a precautionary factor.

From the standpoint of the analysis of the case law of the ECtHR, it can be concluded that the long duration of restrictive measures may be grounds for recognizing such measures disproportionate. Therefore, the position of a number of European states on the gradual lifting of restrictive measures is quite correct.

4. Conclusions.

In the context of the fight against the COVID-19 pandemic, states relied on various types

of measures, which allowed us to distinguish three models: “hard” model (USA and most European countries and Ukraine), which provides for strict restrictive measures, quarantine, administrative and criminal liability for violations of anti-epidemic rules, closure of most facilities and maximum transfer to a remote system of work, education and obtaining of the number of services; the “minimum intervention” model (introduced in South Korea) and combines restrictive measures in case of emergency and maximum testing of the population for the presence of SARS-CoV-2 virus; the “maximum public awareness” model (in Sweden) does not provide for quarantine, but for a mass information and awareness campaign on the COVID-19 pandemic, ways of transmitting the virus and preventing infection.

The question of the proportionality of measures taken by the state to counter the COVID-19 pandemic may be considered by the ECtHR regardless of whether the state has made a declaration of derogation, and the establishment of a violation of a particular right will depend on the specific situation in the country, scope and length of applied measures, as well as their feasibility and effectiveness. In addition, measures implemented in the state that restrict human rights cannot be discriminatory (for example, against the Roma community, due to social or economic status, political beliefs or any other feature).

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ЗАХОДИ ПРОТИДІЇ ПАНДЕМІЇ COVID-19 ТА ДОПУСТИМІСТЬ ОБМЕЖЕНЬ ПРАВ ЛЮДИНИ

Менджул Марія,

*професор кафедри цивільного права та процесу Ужгородського національного
університету,*

доктор юридичних наук, доцент

<https://orcid.org/0000-0002-3893-4402>

ResearcherID: F-6306-2019

(<https://publons.com/researcher/1770355/marija-mendzhul/>)

marija.mendzhul@uzhnu.edu.ua

Анотація

Після оголошення пандемії спричиненої вірусом SARS-CoV-2 держави ЄС та Україна вдалися до різних заходів з метою попередження інфікування та захисту здоров'я громадян, зокрема: обов'язкова обсервація (більшість держав); застосування відповідальності за порушення правил карантину (як правило адміністративної,

