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RESTRICTIONS ON HUMAN RIGHTS UNDER THE EUROPEAN CONVENTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS – NEW TENDENCIES

Abstract: *The majority of human rights can be restricted in certain situations, despite their significance for every democratic society. That means that those rights are not absolute. Such situations represent, for example, war and states of emergency, according to the European Convention on Human Rights. Then, in order to protect the interest of the state and national security, human rights, that means the interests of individuals, come second. In that case, it is necessary to achieve a balance between the necessary restrictions and the preservation of the state's interests. One of the best examples of the restrictions of human rights during a state of emergency is the period of Covid-19. Many rights, such as the right to respect for private and family life, were restricted during Covid-19 in a number of countries in Europe, but each country established its own measures according to its own situation. The cases regarding these restrictions and violations will be submitted to the European Court of Human Rights in the years to come.*

Keywords: *restrictions, limitations, article 15 ECHR, relative human rights, Covid-19.*

1. INTRODUCTION

The protection of human rights at the national and international levels has been widely accepted in all democratic societies. This does not mean that they are all absolute, but most of them can be subject to certain restrictions and limitations. One of the best instruments at the international level to protect human rights is

the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: the Convention) with its Court of Human Rights. This paper first deals with the limitations on human rights and their implementation provided for in Article 15 of the Convention. These are the general limitations that can be applied to almost all the rights and freedoms of the Convention. Then, the restriction on Articles 8 to 11, which protect relative rights under the Convention, is highlighted. It also indicates the conditions under which these rights may be restricted. The second part of the paper deals with Covid – 19 and the case law of the European Court of Human Rights (hereinafter: the Court). Particular attention will be paid to recent cases concerning the limitations related to the Covid 19 situation in order to anticipate how the Court's practice might look in the future. They are playing a creative role in securing many rights that already exist, but now from a new perspective that adapts to the new conditions of life. It will certainly push the existing boundaries of human rights protection, as the Covid-19 is a new phenomenon for all of us.

2. DEROGATIONS AND LIMITATIONS OF HUMAN RIGHTS

Most important international documents, containing provisions for the protection of human rights, include the possibility of derogation from some human rights. Those international documents are the Universal Declaration of Human Rights,¹ the International Covenant on Civil and Political Rights,² the International Covenant on Economic, Social and Cultural Rights,³ the European Convention for the Protection of Human Rights and Fundamental Freedoms,⁴ etc.

Derogations from human rights can only be made in certain extremely difficult situations and applied until the end of these situations.⁵ These situations can be wars, natural disasters, or crises, which can endanger the security of the state and the safety of its population.⁶ In these special situations where countries declare a state of emergency or war, they derogate from or temporarily suspend the application

¹ The Universal Declaration of Human Rights, United Nation General Assembly, Paris, 10 December 1948.

² International Covenant on Civil and Political Rights, United Nation General Assembly Resolution 2200A, New York, 16 December 1966.

³ International Covenant on Economic, Social and Cultural Rights, United Nation General Assembly Resolution 2200A, New York, 16 December 1966.

⁴ Convention for the Protection of Human Rights and Fundamental Freedoms – European Convention on Human Rights, Council of Europe, Rome, 4 November 1950.

⁵ Ljubinko Mitrović, Nikolina Grbić Pavlović, Gojko Pavlović, „Derogiranje ljudskih prava u vanrednom stanju – slučaj Bosne i Hercegovine”, *Pravni vjesnik*, 3-4/2016, 202.

⁶ Jaime Oraa, *Human Rights in States of Emergency in International Law*, Oxford University Press 1992, 221.

of certain laws.⁷ A derogation in this context means the statutory authority of States to permit the suspension of particular individual rights in exceptional circumstances of a wartime emergency.⁸

The Convention protects a wide range of rights, some of which, however, may not be restricted under any circumstances (so-called absolute rights) and which are listed exhaustively in the Convention.⁹ Moreover, this list is not exhaustive, as the Protocols to the Convention add several absolute rights.¹⁰ On the other hand, there are certain rights that can be restricted, but under well-defined conditions and situations, known as relative rights.¹¹ Some of them are protected by additional protocols, such as the right to peaceful enjoyment of possessions, or right to property,¹² the limitations of which, however, are subject to the provisions of the Convention. Certain rights from the Convention defined the conditions under which they can be restricted. These rights include the right to respect for private and family life,¹³ freedom of thought, conscience and religion,¹⁴ freedom of expression,¹⁵ and freedom of assembly and association.¹⁶ The restrictions of these rights will be addressed later. However, this list is also not exhaustive, as the Additional Protocols to the Convention add several rights.¹⁷ Other rights that do not fall into these

⁷ Toni Pfanner, "Asymmetrical warfare from the perspective of humanitarian law and humanitarian action", *International Review of the Red Cross*, Vol. 87, 2005, 165.

⁸ Oren Gross, Fionnuala Ni Aolain, *Law in Times of Crisis: Emergency Powers in Theory and Practice*, Cambridge University Press 2006, 257.

⁹ European Convention on Human Rights, article 15 paragraph 2; List refers to right to life, prohibition of torture, prohibition of slavery and servitude, "no punishment without law".

¹⁰ Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty, Strasbourg, 28 April 1983, articles 1 and 2, abolition of the death penalty and death penalty in time of war; Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Strasbourg, 22 November 1984, article 4 right not to be tried or punished twice; Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty in all circumstances, Vilnius, 3 May 2002, article 2 prohibition of derogations of abolition of the death penalty.

¹¹ Uliana Koruts, Roman Maksymovych, Olha Shtykun, "Legal Grounds for Restrictions of Human Rights in the European Court of Human Rights Case-Law", *Access to Justice in Eastern Europe*, 4/2021, 137.

¹² See Bojan Tubić, "Ograničenje prava na neometano uživanje imovine u praksi Evropskog suda za ljudska prava", *Zbornik radova Pravnog fakulteta u Novom Sadu*, 4/2017.

¹³ European Convention on Human Rights, article 8.

¹⁴ *Ibid.*, article 9.

¹⁵ *Ibid.*, article 10.

¹⁶ *Ibid.*, article 11.

¹⁷ Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, Paris, 20 March 1952, article 1 protection of property; Protocol No 4. to the Convention for the Protection of Human Rights and Fundamental Freedoms securing certain rights and freedoms other than those already included in the Convention and in the First Protocol thereto, Strasbourg, 16 September 1963, article 2 freedom of movement; Protocol No. 7., articles 1 and 2, procedural safeguards relating to expulsion of aliens and right of appeal in criminal matters.

categories may be limited, but they are governed by Article 15 of the Convention, which will be discussed first.

2.1. Derogations under article 15 of the Convention

Before the interpretation of Article 15 of the Convention is given, the meaning of emergency in this context should first be explained. It has an elastic nature and it is difficult to give a precise definition.¹⁸ It is considered that there are an infinite number of circumstances that threaten the security of a country, and therefore it is impossible to define them and put them into a specific legal framework.¹⁹ However, wars, famines, earthquakes, floods, etc. can be cited as examples to which the word emergency most often applies.²⁰ The International Law Association holds that it is not even desirable to define the meaning of this term, but that each individual case must be determined on the basis of the particular circumstances.²¹

Article 15 of the Convention is known as the derogation clause²² and it allows states to derogate from their obligations to guarantee certain rights and freedoms, but only in exceptionally limited circumstances.²³ This Article is derived from Article 4 of the United Nations draft Covenant on Human Rights, which is now Article 4 of the International Covenant on Civil and Political Rights.²⁴

Article 15 contains three paragraphs, the first of which defines the conditions under which a state may legally derogate from its obligations. Paragraph 2 protects non-derogable rights in the Convention. Lastly, paragraph 3 establishes the process that any state making an exception must comply with.

2.1.1. Conditions for a valid derogation

Article 15 paragraph 1 specifies three conditions for a derogation to be valid, namely “*it must be in a time of war or other public emergency threatening the life of the nation; the measures taken in response to that war or public emergency must*

¹⁸ Mohamed M. El Zeidy, “The ECHR and States of Emergency: Article 15-A Domestic Power of Derogation from Human Rights Obligations”, *Michigan State University Detroit – College of Law’s Journal of International Law*, 11/2002, 265.

¹⁹ Alexander Hamilton, James Madison, John Jay, *The Federalist Papers*, Signet 2003, 153.

²⁰ Mohamed M. El Zeidy, 265.

²¹ Oren Gross, “Once more unto the Breach: The Systematic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies”, *The Yale Journal of International Law*, 23/1998, 439.

²² Christoph Schreuer, “Derogation of Human Rights in Situation of Public Emergency: The experience of the European Convention on Human Rights”, *Yale Journal of World Public Order*, 9/1982, 114.

²³ European Convention on Human Rights, article 15; David Harris, et al., *Law of the European Convention on Human Rights*, Oxford University Press 2009, 617.

²⁴ International Covenant on Civil and Political Rights, article 4.

not go beyond the extent strictly required by the exigencies of the situation; and the measures must not be inconsistent with the State's other obligations under international law."²⁵ Interpreting these conditions, it can be concluded, first of all, that there is no problem with the meaning of war, but with determining the meaning of "*other public emergency threatening the life of the nation*", since there is no clear and precise definition.²⁶ However, in the practice of the Court, we find numerous definitions. In *Lawless v. Ireland*, the Court held that a *public emergency threatening the life of the nation* means an exceptional crisis or emergency situation affecting the entire population and constituting a threat to the organized life of the community of which the State is a part.²⁷ The Court gave a similar definition in the "Greek case", stating that the public emergency must have actually occurred or be imminent and its impact must affect the entire nation. In addition, there must be a threat to the organized life of the population, and that threat must be exceptional in that the measures or restrictions allowed under the Convention to maintain public safety, health, and order are manifestly insufficient.²⁸ Later, it was also established that if a part of the territory is in a state of emergency²⁹ or affects only the population living there, it can be accepted as a valid state of emergency.³⁰ Even if it physically affects the population or is against the functioning of the state, the threat may exist.³¹

Another question is whether states have reached beyond what is "*strictly required by the exigencies of the crisis*" since they do not have "*an unlimited power in this respect*."³² In order to answer this question, the Court uses three elements – necessity and duration of the derogation³³ and the proportionality of

²⁵ European Court of Human Rights, Guide on Article 15 of the European Convention on Human Rights – Derogation in time of emergency, 31 August 2022, 6.

²⁶ Ronald St. J. MacDonald, "Derogations under Article 15 of the European Convention on Human Rights", *Columbia Journal of Transnational Law*, 36/1998, 233.

²⁷ *Lawless v. Ireland*, European Court of Human Rights, App. No. 332/57, Judgment of 1 July 1961, 28.

²⁸ *Denmark, Norway, Sweden and the Netherlands v. Greece*, European Court of Human Rights, App. No. 3321/67, Judgment of 5 November 1969, 72.

²⁹ Henkin Louis, *The International Bill of Rights: the Covenant of Civil and Political Rights*, Columbia University Press 1981, 80.

³⁰ Daphna Shraga, "Human Rights in Emergency Situations under the European Convention on Human Rights", *Israel Yearbook on Human Rights*, 16/1986, 220.

³¹ Nicole Questiaux, "Question of the Human Rights of Person Subjected to any Form of Detention or Imprisonment: Study of the Implications for Human Rights of Recent developments concerning situations known as states of siege or emergency", United Nations Special Report, 27 July 1982, 16.

³² *Ireland v. The United Kingdom*, European Court of Human Rights, App. No. 5310/71, Judgment of 18 January 1978, 207.

³³ Pieter van Dijk, Godefridus J.H. van Hoof, *Theory and Practice of the European Convention on Human Rights*, Martinus Nijhoff Publishers 1993, 739.

the measures.³⁴ In addition, the Court considers various factors, such as whether the measures are a justifiable response to a threat;³⁵ whether the necessity of the derogation has been constantly reviewed;³⁶ whether the purpose for which the measures were granted has been fulfilled;³⁷ whether the measures were proportionate and contain discrimination that is unjustified;³⁸ whether the State took “lawful” actions³⁹ and in “a procedure prescribed by law”,⁴⁰ etc.⁴¹

The last part of paragraph 1 refers to the inconsistency of the measures with other obligations under international law. It is intended to emphasize that universally recognized human rights must still be safeguarded during an emergency.⁴² It is related to Article 53, which stipulates that a state cannot invoke the Convention to justify a restriction or derogation of human rights which has been accepted “under any other agreement to which it is a party.”⁴³ However, the Court did not provide any explanation as to the meaning of “under any other agreement to which it is a party.” However, some international treaties and customary law can be mentioned as examples, such as the United Nations Charter (hereinafter: UN Charter), the Geneva Conventions, International Legal Organization documents, etc.⁴⁴ As another example, we can also cite a case, namely *Cyprus v. Turkey*, in which the action in Cyprus was considered a war of aggression⁴⁵ and constituted a violation of the obligations contained in the UN Charter. In this case, the obligations under the UN Charter can be seen as other international law obligations.⁴⁶

³⁴ Ronald St.J. Macdonald, Franz Matscher, Herbert Petzold, *The European System for the protection of human rights*, Martinus Nijhoff Publishers 1993, 125.

³⁵ *Alparslan Altan v. Turkey*, European Court of Human Rights, App. No. 12778/17, Judgment of 09 September 2019, 118.

³⁶ *Brannigan and McBride v. The United Kingdom*, European Court of Human Rights, App. No. 14554/89, Judgment of 25 May 1993, 53.

³⁷ *Lawless v. Ireland*, 38.

³⁸ *A. and Others v. The United Kingdom*, European Court of Human Rights, App. No. 3455/05, Judgment of 19 February 2009, 185.

³⁹ *Mehmet Hasan Altan v. Turkey*, European Court of Human Rights, App. No. 13237/17, Judgment of 20 March 2018, 140.

⁴⁰ *Sahin Alpay v. Turkey*, European Court of Human Rights, App. No. 16538/17, Judgment of 20 June 2018, 119.

⁴¹ See European Court of Human Rights, Guide on Article 15 of the European Convention on Human Rights – Derogation in time of emergency, 9-10.

⁴² Ronald St. J. MacDonald, 245.

⁴³ European Convention on Human Rights, article 53; Anna-Lena Svensson-McCarthy, *The International Law of Human Rights and States of Exception*, Martinus Nijhoff Publishers 1998, 624-625.

⁴⁴ Ronald St. J. MacDonald, 246.

⁴⁵ *Cyprus v. Turkey*, European Court of Human Rights, App. No. 6780/74, Report of the Commission of 10 July 1976, 512.

⁴⁶ *Ibid.*, 510.

2.1.2. Protection of non-derogable rights

Under the Convention, there are “*inalienable*” rights, referred to as non-derogable rights and as absolute rights, which cannot be derogated from even in times of emergency or war.⁴⁷ The importance of these rights is reflected in the fact that they enjoy the strongest protection, i.e. they apply in any time of war or public emergency, regardless of the derogations made by states.⁴⁸ They are precisely stated in paragraph 2 of article 15, namely the right to life (article 2 of the Convention), the prohibition of torture (article 3), the prohibition of slavery or servitude (article 4 paragraph 1), and no punishment without law (article 7).⁴⁹ In addition to the derogations set forth in paragraph 2, the limitations set forth in Articles 2 and 7 shall apply.⁵⁰ However, Article 2 itself states that, for example, a person who attempts to escape, is deprived of his or her life, and is lawfully detained does not violate this article.⁵¹ Additional protection is provided by Article 15 paragraph, which states that this article is not breached if the loss of life is the result of a lawful act of war. On other hand, The Court has not accepted the argument that the killing of suspects by state forces during a war or the threat of terrorism can be justified.⁵² Moreover, Article 7 does not refer to situations in which persons are convicted and punished for crimes that were considered crimes “*under general principles of law recognised by civilised nations*” at the time of the commission of the crime.⁵³

Moreover, as stated above, certain absolute rights are covered by the additional protocols. These are the abolition of the death penalty in time of peace and limiting the death penalty in time of war,⁵⁴ *ne bis in idem* principle⁵⁵ and the death penalty in all circumstances.⁵⁶

⁴⁷ Leslie C. Green, “Derogation of Human Rights in Emergency Situations”, *Canadian Yearbook of International Law*, 16/1978, 104.

⁴⁸ Oren Gross, 445-446.

⁴⁹ European Convention on Human Rights, article 15 paragraph 2.

⁵⁰ Guide on Article 15 of the European Convention on Human Rights – Derogation in time of emergency, 13.

⁵¹ European Convention on Human Right, article 2.

⁵² Andrea Bianchi, Yasmin Naqvi, *International Humanitarian law and Terrorism*, Hart Publishing 2011, 49.

⁵³ European Court of Human Rights, Guide on Article 7 of the European Convention on Human Rights – No punishment without law: the principle that only the law can define a crime and prescribe a penalty, 31 August 2022, 22-23.

⁵⁴ Protocol No. 6, article 3; Robin C.A. White, Clare Ovey, *European Convention on Human Rights*, Oxford University Press 2010, 114.

⁵⁵ Protocol No. 7, article 4.

⁵⁶ Protocol No. 13, article 2.

2.1.3. Obligation of notification

Article 15 paragraph serves to inform the Secretary General of the Council of Europe of the derogation measures taken by a State and the grounds on which they are based.⁵⁷ The Secretary General is then obliged to forward the information to the other Contracting States of the Council of Europe as soon as possible.⁵⁸ In the case of Greece, this country did not provide the Secretary General with information on the reason for the derogation measures in a timely manner, but four months later.⁵⁹ On the other hand, the Court found that twelve days after the measures became effective was considered sufficient for the notification to be accepted.⁶⁰ However, the wording of this provision does not specify the time limit within which the notice must be given, nor does it specify the scope of the information to be provided to the Secretary General.⁶¹ There is only the information that the announcement of the state must be “*official and public*” in order to be valid.⁶² As a rule, the Secretary General is notified by a letter containing copies of the legal documents on the basis of which the emergency measures are to be undertaken, with an explanation of their purpose.⁶³

2.2. Restrictions on Articles 8 to 11 of the ECHR

As mentioned above, there are some rights whose limitation is set forth in the article itself. These are Articles 8 to 11 of the Convention and the rights provided for in the Additional Protocols⁶⁴, although only the limitations of Articles 8 to 11 will be presented in the context of this work.

In assessing whether there has been a restriction of these human rights, the Court considers “*whether the interference was prescribed by law and whether it was pursued one of the legitimate aims*” listed in paragraph 2 of these articles,⁶⁵ and finally, “*whether the interference was necessary in a democratic society*”,⁶⁶

⁵⁷ Torkel Opsahl, “Emergency Derogation from Human Rights”, *Mennesker og Rettigheter*, 5/1987, 4; David Harris, 640.

⁵⁸ *Greece v. The United Kingdom*, European Court of Human Rights, App. No. 176/56, Report of the European Commission of Human Rights (Article 31 of the Convention) of 26 September 1958, 158.

⁵⁹ *Denmark, Norway, Sweden and the Netherlands v. Greece*, 46.

⁶⁰ *Lawless v. Ireland*, 47.

⁶¹ *Greece v. The United Kingdom*, 158.

⁶² *Cyprus v. Turkey*. European Court of Human Rights, App. No. 8007/77, Report of the Commission of 4 October 1983, 67.

⁶³ *Lawless v. Ireland*, 47.

⁶⁴ Protocols No. 4, 6, 7 and 13.

⁶⁵ European Convention on Human Rights, articles 8, 9, 10 and 11.

⁶⁶ European Court of Human Rights, Guide on Article 10 of the European Convention on Human Rights – Freedom of expression, 31 August 2022, 61.

which is one of the most significant clauses throughout the Convention.⁶⁷ For example, when the Court is presented with the question of a violation of Article 8, it first examines whether the claim is within the scope of that Article.⁶⁸ The question then becomes whether the State has failed to provide protection for this right since the state has a positive obligation to ensure “*its citizens the right to effective respect for their physical and psychological integrity.*”⁶⁹

2.2.1. Prescribed by law

“Prescribed by law”, the Court stated, means not only that the measure must be provided by law, but also that the citizen must be able to foresee the consequences of a particular act under reasonable circumstances.⁷⁰ However, since it is not possible to determine all the consequences that may result from a particular action, they are therefore unattainable.⁷¹ They are determined in each specific case before the Court. National courts have the task of interpreting domestic laws, which must ensure legal protection against arbitrary interference by the authorities with the rights protected by the Convention.⁷² The role of the Court is limited to determining whether the effects of that interpretation are consistent with the Convention, unless the interpretation is considered arbitrary or clearly unreasonable.⁷³ When a norm is applied for the first time in a case, the plaintiff cannot invoke the unpredictability of the law,⁷⁴ since it has been published in the national official gazette and is available to everyone,⁷⁵ although the Convention does not set out any specific requirements as to the degree of publicity to be given to a legal provision.⁷⁶

⁶⁷ Steven Greer, “The exceptions to Articles 8 to 11 of the European Convention on Human Rights”, *Council of Europe Publishing*, Human Rights Files No. 15, 1997, 14.

⁶⁸ Scope of Article 8 see European Court of Human Rights, Guide on Article 8 of the European Convention on Human Rights – Right to respect for private and family life, home and correspondence, 31 August 2022.

⁶⁹ *Nitecki v. Poland*, European Court of Human Rights, App. No. 65653/01, Decision as to the Admissibility of 21 March 2002, 4-5.

⁷⁰ *Djavit An v. Turkey*, European Court of Human Rights, App. No. 20652/92, Judgment of 09 July 2003, 65.

⁷¹ *Perincek v. Switzerland*, European Court of Human Rights, App. No. 27510/08, Judgment of 15 October 2015, 131.

⁷² *Cangy v. Turkey*, European Court of Human Rights, App. No. 24973/15, Judgment of 29 April 2019, 42.

⁷³ *Metropolitan Church Bessarabia and others v. Moldova*, European Court of Human Rights, App. No. 45701/99, Judgment of 27 March 2002, 109.

⁷⁴ *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland*, European Court of Human Rights, App. No. 931/13, Judgment of 27 June 2017, 131.

⁷⁵ European Court of Human Rights, Guide on Article 10 of the European Convention on Human Rights – Freedom of expression, 31 August 2022, 68.

⁷⁶ *NIT S.R.L. v. the Republic of Moldova*, European Court of Human Rights, App. No. 28470/12, Judgment of 5 April 2022, 163.

In view of the above, in the case *Kudrevičius and others v. Lithuania*, the Court pointed out that the applicants could foresee that their conduct, namely the long-term roadblocks, would disrupt traffic and the normal course of life, and that this conduct constituted a “*serious breach of public order*” under the Lithuanian Criminal Code.⁷⁷ However, if we are dealing with a new criminal offense, there will be some uncertainty about its meaning until the courts apply the new offense.⁷⁸

2.2.2. *Legitimate aim*

An analysis of Articles 8-11 shows that their legitimate aim is defined in the same way, with some of them containing additional objects of protection. For example, public order, morals and health, national security, the rights and freedoms of others are legitimate objectives on the basis of which the right provided for in the Convention may be restricted.⁷⁹ Article 11 also states that freedom of assembly and association may be restricted in order to prevent riots and crimes, but that this article does not prevent the restriction of this right, which is prescribed by law, and that it refers to the powers that members of the police and armed forces have by law.⁸⁰

Moreover, the defendant – the Government – must prove that the interference in the specific case pursued a legitimate aim,⁸¹ i.e. that the domestic authorities provided for the legitimate aim.⁸² This is supported by the fact that the Court considers that its practice should be succinct when reviewing the existence of a legitimate aim within the meaning of Articles 8-11.⁸³

In *Dareskizb Ltd. v. Armenia*, the Court ruled on the justification of the restriction on Article 10 when it indicated that prohibiting newspapers from publishing articles critical of the government during a state of emergency was not a justified restriction on Article 10 because it was not necessary in a democratic society and was contrary to the very purpose of Article 10, although it had a legitimate aim.⁸⁴

⁷⁷ *Kudrevičius and others v. Lithuania*, European Court of Human Rights, App. No. 37553/08, Judgment of 15 October 2015, 114.

⁷⁸ *Dmitriyevskiy v. Russia*, European Court of Human Rights, App. No. 42168/06, Judgment of 3 October 2017, 82.

⁷⁹ European Convention on Human Rights, articles 8, 9, 10 and 11, paragraph 2.

⁸⁰ European Convention on Human Rights, article 11, paragraph 2.

⁸¹ *P.T. v. The Republic of Moldova*, European Court of Human Rights, App. No. 1122/12, Judgment of 26 August 2020, 29.

⁸² *Kilin v. Russia*, European Court of Human Rights, App. No. 10271/12, Judgment of 11 August 2021, 61.

⁸³ *S.A.S. v. France*, European Court of Human Rights, App. No. 43835/11, Judgment of 1 July 2014, 114.

⁸⁴ *Dareskizb LTD v. Armenia*, European Court of Human Rights, App. No. 61737/08, Judgment of 08 October 2021, 78.

2.2.3. *Necessity in a democratic society*

In determining whether a particular limitation of these articles is “*necessary in a democratic society*“, the Court takes into account the interests of the Member State and the right of the applicant.⁸⁵ The Court considers that necessity may imply the existence of a “*pressing social need*“ for an intervention. States assess this need themselves, which means that state measures must be based on an “*acceptable assessment of the relevant facts*“,⁸⁶ but it is reviewed by the Court.⁸⁷ This means that there must be no other way to achieve a certain goal than to interfere with one of these rights. Therefore, the defendant states are obliged to prove that there were no other measures.⁸⁸

Thus, with respect to Article 8, the Court confirms that the interference must meet the aforementioned need and be proportionate to the legitimate aim pursued.⁸⁹ In analyzing the existence of “*necessity*“, the Court refers to the States’ margin of appreciation, although it is the State’s duty to prove, in each individual case, that there is an urgent social need justifying an interference.⁹⁰ Since there is no consensus at the European level on what constitutes a free assessment by States or how far States may go in this direction,⁹¹ they will differ depending on the nature of the issues at stake and the gravity of the interests at stake.⁹²

Moreover, in light of Article 10, in determining whether the national authorities took their decisions in accordance with that Article, the Court should consider whether the respondent State acted “*reasonably, carefully, and in good faith*“, and the Court should consider overall whether the State’s interference was “*proportionate to a legitimate aim*“ at which it was aimed and whether the reasons given by the States were “*relevant and sufficient*“. ⁹³ The Court thus examines

⁸⁵ *Vavrička v. The Czech Republic*, European Court of Human Rights, App. No. 47621/13, Judgment of 8 April 2021, 273.

⁸⁶ *Jersild v. Denmark*, European Court of Human Rights, App. No. 15890/89, Judgment of 23 September 1994, 31.

⁸⁷ *Dudgeon v. The United Kingdom*, European Court of Human Rights, App. No. 7525/76, Judgment of 22 October 1981, 52.

⁸⁸ *Biblical Centre of the Chuvash Republic v. Russia*, European Court of Human Rights, App. No. 33203/08, Judgment of 13 October 2014, 58.

⁸⁹ *Z. v. Finland*, European Court of Human Rights, App. No. 22009/93, Judgment of 25 February 1997, 94.

⁹⁰ *Piechowicz v. Poland*, European Court of Human Rights, App. No. 20071/07, Judgment of 17 July 2012, 212.

⁹¹ *Paradiso and Campanelli v. Italy*, European Court of Human Rights, App. No. 25358/12, Judgment of 24 January 2017, 184.

⁹² *Strand Lobben and others v. Norway*, European Court of Human Rights, App. No. 37283/13, Judgment of 10 September 2019, 211.

⁹³ European Court of Human Rights, Guide on Article 9 of the European Convention on Human Rights – Freedom of thought, conscience and religion, 31 August 2022, 46.

whether the respondent State applied the standards prescribed by Article 10 and whether it relied on its assessment of the relevant facts.⁹⁴

3. COVID – 19 AND DEROGATIONS ON HUMAN RIGHTS IN THE CASE LAW OF THE COURT

Numerous states in Europe have informed the Secretary General of the Council of Europe that they will be derogating from their obligations under the Convention in March and April 2020.⁹⁵ Serbia declared a state of emergency on March 15, 2020, due to Covid-19 and sent a “Note Verbale” to the Secretary General stating that Serbia has taken certain measures to stop the spread of Covid-19 disease. To this end, Serbia derogated from certain rights under Article 15 of the Convention.⁹⁶ Latvia also informed the Secretary General, but stated in its Note that it would derogate from its obligations under Articles 8 and 11. Its measures were to restrict third party access to hospitals, social services and detention facilities, to cancel all public events, meetings and gatherings, and to restrict the movement of persons.⁹⁷

For the purposes of this paper, only some aspects of these rights will be explained and only some conditions that occurred during the state of emergency – Covid-19 – will be addressed.

3.1. Right to respect for private and family life

3.1.1. Health care and treatment and mental health

Health care and treatment and mental health fall under the protection of Article 8, and therefore States have an obligation to protect the life and health of persons subject to their jurisdiction, in parallel with the obligation to protect the life of persons, contained in Article 2.⁹⁸ The obligations under Article 8 are limited to the establishment of hospitals and health professionals, protecting the integrity of patients.⁹⁹ Covid-19 has different impacts on people’s health, e.g., loss of the

⁹⁴ *Association de solidarité avec les témoins de Jéhovah and Others v. Turkey*, European Court of Human Rights, App. No. 8606/13, Judgment of 17 October 2016, 98.

⁹⁵ Sean Molloy, Covid-19 and Derogation Before the European Court of Human Rights, <https://verfassungsblog.de/covid-19-and-derogations-before-the-european-court-of-human-rights>, accessed date 16.11.2022.

⁹⁶ The Ministry of the Republic of Serbia, Note verbale, 6 April 2020, <https://rm.coe.int/09000016809e1d98>, accessed date 16.11.2022.

⁹⁷ The Ministry of the Republic of Latvia, Note verbale, 15 March 2020, <https://rm.coe.int/09000016809ce9f2>, accessed date 16.11.2022.

⁹⁸ *Vavrička v. The Czech Republic*, 282.

⁹⁹ *Vasileva v. Bulgaria*, European Court of Human Rights, App. No. 23796/10, Judgment of 17 March 2016, 63.

sense of taste or smell has consequences for physical integrity, thus affecting Article 8.¹⁰⁰ In addition, the manner in which Covid-19 was tested, such as swab collection, could constitute an interference with the right to respect for private life.¹⁰¹ However, in its previous judgments, the Court considers that the taking of the swab lasts only a very short time and does not usually have any effect on the body or physical or mental suffering, and that it is justified if it is undertaken for legitimate purposes in accordance with the law.¹⁰² One of the most important aspect of health care and treatment during Covid-19 was the question of justification of the vaccine's obligation, as it could violate the right to privacy in situations where a person cannot choose whether to be vaccinated. Many states in Europe, during Covid-19, implemented the measure that only vaccinated persons can enter public institutions, transport, etc. In the future, the Court could have cases regarding this problem in the context of Covid-19 and the question of whether there was a violation of Article 8 or not.¹⁰³

Covid-19 also has implications for people's mental health. For example, isolation and inadequate physical contact or emotional support, found in most European countries, can seriously disrupt a "*person's emotional and psychological balance*."¹⁰⁴ In this situation, the question may arise whether family life was threatened by isolation.

3.1.2. Time for family

The essential part of family life is the right to live together so that family relationships can be normal.¹⁰⁵ The family life concept includes "*the relationship between parent and child, siblings, aunts/uncles and nieces/nephews and children and grandparents*."¹⁰⁶ In addition, it should be noted that family life also includes relationships between parents and children who do not live together.¹⁰⁷ In *Kuimov*

¹⁰⁰ Biljana Braithwaite, Catharina Harby, Goran Miletić, *Covid-19 and the Impact on Human Rights – An overview of relevant jurisprudence of the European Court of Human Rights*, AIRE Centre 2020, 55.

¹⁰¹ *Schmidt v. Germany*, European Court of Human Rights, App. No. 32352/02, Decision as to the Admissibility of 5 January 2006, 4.

¹⁰² *Caruana v. Malta*, European Court of Human Rights, App. No. 41079/19, Decision as to the Admissibility of 15 May 2018, 7.

¹⁰³ The Court has ruled in similar situations, but there was no violation of Article 8. See *Vavrička v. The Czech Republic*; *Novotná v. the Czech Republic*, European Court of Human Rights, App. No. 3867/14, Judgment of 8 April 2021.

¹⁰⁴ *Sommerfeld v. Germany*, European Court of Human Rights, App. No. 31871/96, Judgment of 8 July 2003, 64-65.

¹⁰⁵ *Marckx v. Belgium*, European Court of Human Rights, App. No. 6833/74, Judgment of 13 June 1979, 31.

¹⁰⁶ Biljana Braithwaite, Catharina Harby, Goran Miletić, 61.

¹⁰⁷ *Boughanemi v. France*, European Court of Human Rights, App. No. 22070/93, Judgment of 24 April 1996, 35.

v. Russia,¹⁰⁸ the applicant was unable to see his adopted daughter in foster care because the home was in quarantine due to an influenza epidemic. The Court found that there was no violation of Article 8 because the quarantine lasted only two months and he was able to see her through a window and continued to see her normally after the quarantine period. When his daughter was in the hospital in intensive care for a year, he was not permitted to have any contact with her. The Court considered that the duration of the restrictions was not proportionate and that there was a violation of Article 8.¹⁰⁹

Another aspect of this right is the relationship between children and parents who are held in prison. Does it mean that they should lose contact in time of Covid-19 since many states in Europe have also banned visits to prison? Therefore, a state has a duty to introduce only necessary and proportionate restrictions on visits and not to violate Article 8. The Court finds that a blanket ban on prison visits violates Article 8 and that restrictions on visits rights are justified on a case-by-case basis.¹¹⁰ When visits are prohibited, states should make sure that alternative methods of communication are put in place, for video calls, for example. However, digital communication should not be used as an appropriate or long-term replacement for communication.¹¹¹

3.1.3. Pending cases

There are two interesting cases before the Court. One of them is *Guhn v. Poland and Michalski v. Poland*.¹¹² The applicants are prisoners who have complained about the imposition of restrictive measures regarding Covid-19 in prisons, and they claim that the prolonged ban on family visits in prison violates their right to respect for their private and family life. The question here is whether Poland has violated Article 8 of the Convention.

Another case is *Susnescu v. Romania*,¹¹³ in which the applicant stated that the prison did not provide enough protective masks against Covid-19 for about four months of detention. The question of violation of Article 8 arises here, and the Court awaits Romania's response.

¹⁰⁸ *Kuimov v. Russia*, European Court of Human Rights, App. No. 32147/04, Judgment of 8 January 2009.

¹⁰⁹ Biljana Braithwaite, Catharina Harby, Goran Miletić, 66.

¹¹⁰ *Khoroshenko v. Russia*, European Court of Human Rights, App. No. 41418/04, Judgment of 30 June 2015, 51.

¹¹¹ The effects of digital contact on children's well-being: evidence from public and private contexts, <https://www.nuffieldfjo.org.uk/resource/digital-contact-childrens-wellbeing>, accessed date 17.11.2022.

¹¹² *Guhn v. Poland*, European Court of Human Rights, App. No. 45519/20; *Michalski v. Poland*, European Court of Human Rights, App. No. 34180/20.

¹¹³ *Susnescu v. Romania*, European Court of Human Rights, App. No. 19034/21.

3.2. Freedom of thought, conscience and religion

In the case involving a violation of Article 9 of the Convention, namely *Constantin-Lucian Spinu v. Romania*,¹¹⁴ a prisoner, invoking his freedom of religion and the fact that he is a member of the Seventh Day Adventist Church, asked the national authorities to allow him to attend religious services outside prison during a pandemic, but they refused. The court considered that there was no violation of Article 9 and that the applicant's religious freedom had not been violated. Moreover, the Court concluded that the decision of the prison authorities to refuse such a request by the plaintiff was justified, as the decision was made in accordance with the plaintiff's personal circumstances and the circumstances of the health crisis.

3.2.1. Pending cases

In Greece, numerous decrees were issued in 2020 concerning emergency measures related to Covid-19, all of which were intended to protect public health. Some of them referred to a complete ban on public religious services for a total period of two months. The court has notified the Greek government of the petition and is awaiting its response to the application in the case *Association of orthodox ecclesiastical obedience v. Greece*.¹¹⁵

3.3. Freedom of expression, of assembly and association

The Court found a violation of Article 11 in the case *Communaute genevoise a'action syndicale (CGAS) v. Switzerland*,¹¹⁶ which is now before the Grand Chamber. This is the first case before the Court regarding Covid-19 in which the Court has found a violation of a right covered by the Convention.¹¹⁷ Namely, in 2020, public and private assemblies were banned in Switzerland on the basis of numerous regulations, which were later changed to the freedom of assemblies with up to 30 participants, etc. In this case, the Court found that the defendant state had exceeded its limits and that the intervention was not necessary in a democratic society and was not proportionate to the objective pursued. The plaintiff is an association that defends the interests of workers in the area of trade union and

¹¹⁴ *Constantin-Lucian Spinu v. Romania*, European Court of Human Rights, App. No. 29443/20, Judgment of 11 October 2022.

¹¹⁵ *Association of orthodox ecclesiastical obedience v. Greece*, European Court of Human Rights, App. No. 52104/20.

¹¹⁶ *Communaute genevoise a'action syndicale (CGAS) v. Switzerland*, European Court of Human Rights, App. No. 21881/20, Referral to the Grand Chamber 5 September 2022.

¹¹⁷ First violations in a Covid-19 case: *Communaute genevoise a'action syndicale (CGAS) v. Switzerland*, <https://strasbourgobservers.com/2022/05/09/first-violations-in-a-covid-19-case-communaute-genevoise-daction-syndicale-cgas-v-switzerland/>, accessed date 07.01.2022.

democratic freedoms, and in this particular case they considered that they were deprived of the right to organize and participate in public.

There are also several cases against Russia, Spain, and Poland in which plaintiffs stated that their freedom of assembly was violated because demonstrations were prohibited during Covid-19.¹¹⁸

4. CONCLUSION

All aspects of our lives have changed during last two years since the epidemic of Covid-19 has broken out. The pandemic of this virus, with its prolonged duration, has resulted in both short- and long-term restrictions on human rights. In almost all jurisdictions of the world, Covid-19 has become part of both private and public life. Taking into account these facts, we can say that there were certain short-term restrictions, such as restrictions on movement, quarantine, limited ability to travel to other countries, etc. On the other hand, the virus also affected the private sphere of our lives, namely the limited possibility to visit our family members, the restricted access to the educational system, the limited freedom of expression, etc.

Article 15 of the Convention proscribes that States could derogate from their obligation to provide human rights protection in time of war or other public emergency threatening the life of the nation, which actually happened during the pandemic. All States introduced some restrictions which represent a response to new, rapidly changed, circumstances. But in accordance with this article, every State has a duty to justify its measures and it is up to the Court to decide whether derogations were justifiable. One challenge for the Court will certainly be the fact that it has never faced this type of emergency before.

Restrictions on the rights provided for in the Convention, i.e. Articles 8-11, were limited in most European countries. A large number of cases before the Court already show us the widespread nature of restrictions on these rights, of which freedom of assembly and the right to privacy were the most common. In these cases, the Court must play the role of interpreter to determine whether the measures introduced by a particular state are in accordance with the conditions established by the Convention. If the state exceeds its powers and unjustifiably restricts a particular right, it is liable. In most of the cases involving Covid-19, the Court refused on procedural grounds that the domestic remedies before the national authorities had not been used. However, in the case *Communaute genevoise a'action syndicale (CGAS) v. Switzerland*, the Court found for the first time that there had been a

¹¹⁸ *Nemytov v. Russia*, European Court of Human Rights, App. No. 1257/21; *Central Unitaria de Traballadores v. Spain*, European Court of Human Rights, App. No. 49363/20; *Jarocki v. Poland*, European Court of Human Rights, App. No. 44644/21.

violation of the rights to freedom of expression, assembly, and association, but even that decision was not final and was referred to the Grand Chamber. If the decision of the Grand Chamber is adopted, we will have a precedent before this court. It is possible that another problem will arise after that, namely a large number of cases before the Court, with a similar factual situation and similar problems, because in most countries in Europe freedom of assembly has been restricted under similar arguments.

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Ограничења људских права према Европској конвенцији о људским правима и основним слободама – нове тенденције

Сажетак: Већина људских права може бити ограничена у одређеним ситуацијама, упркос њиховом значају за свако демократско друштво. То значи да ова права нису апсолутна. Такве ситуације представљају, на пример, рат и ванредно стање, према Европској конвенцији о људским правима. За тим, у циљу заштите интереса државе и националне безбедности, људска права, односно интереси појединаца, долазе на друго место. У том случају потребно је постићи баланс између неопходних ограничења и очувања интереса државе. Један од најбољих примера ограничења људских права током ванредног стања је период Ковид-19. Многа права, као што је право на поштовање приватног и породичног живота, била су ограничена током Ковид-19 у различитим земљама у Европи, али је свака земља успоставила своје мере у складу са својом ситуацијом. Случајеви у вези са овим ограничењима и кршењем биће представљени пред Европским судом за људска права у годинама које долазе.

Кључне речи: рестрикције, ограничења, члан 15 ЕКЉП, релативна људска права, Ковид-19.

Датум пријема рада: 18.11.2022.

Датум достављања коначне верзије рада: 23.11.2022.

Датум прихватања рада: 24.01.2023.