

# Judicial Practice of Bodies of Constitutional Jurisdiction of Foreign States on Restrictions of Human and Civil Rights Imposed in Connection with the Spread of Covid-19 and Quarantine Measures

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## ABSTRACT

The article analyzes the restrictions on human rights and civil rights and freedoms imposed by states to overcome the spread of COVID-19. The article considers some decisions of the Constitutional Courts of foreign countries on the restriction of the constitutionality of human and civil rights and freedoms in the fight against a pandemic. Restrictions on civil, political, social, economic, cultural and other human rights associated with volatile epidemics require an assessment of their compliance with international and national standards, the appropriateness and reasonableness in the field of human rights and civil rights and freedoms. The article focuses on some issues of the implementation of anti-epidemic measures, including restrictions on the rights of freedom of movement, privacy, restrictions on suffrage and restrictions on the right to trial.

**Keywords:** *Covid-19, human and civil rights, restriction of rights, freedom of movement, right to privacy, suffrage, right to a trial*

## 1. INTRODUCTION

Bodies of constitutional jurisdiction of foreign states have adopted a significant number of decisions on the constitutionality (in some cases also legality) of provisions of legal acts that in order to prevent the spread of COVID-19 [1-3] restricted human and civil rights and freedoms, including the right to privacy (Bulgaria, Montenegro), the right to vote and to be elected (Republic of Croatia, French Republic), the right to a fair trial within a reasonable time (Italian Republic), the right to peaceful assembly (Federal Republic of Germany).

At the same time, the study did not reveal any solutions that would address the constitutionality of regulations restricting the right to health care and medical care, in particular, prohibiting health care facilities to conduct planned hospitalization activities.

In some cases, the bodies of constitutional jurisdiction decided on the admissibility of further consideration of the case in the conditions if the disputed provisions lost force during the consideration. In

particular, in deciding to continue the proceedings in such circumstances, the Constitutional Courts of the Republic of Austria and the Republic of Latvia considered that the invalidity of the impugned provisions during the proceedings was a basis for exercising the right of the constitutional court but not its obligation to discontinue in the case, and given the specific circumstances of the case, continued the consideration.

## 2. REGARDING RESTRICTIONS ON FREEDOM OF MOVEMENT AND RESTRICTIONS ON THE RIGHT TO PRIVACY IN ORDER TO PREVENT THE SPREAD OF COVID-19 IN DECISIONS OF CONSTITUTIONAL COURTS

International human rights law guarantees everyone the right to the highest attainable standard of health and obliges states to take measures to prevent threats to public health and to provide health care to those who need it. International human rights standards also provide that in situations of serious threats to public health and

emergencies that threaten the life of the nation, restrictions on certain rights and freedoms are permissible, if such restrictions are introduced in legal pleasure, are absolutely necessary and scientifically justified, and also if their application is not arbitrary or discriminatory and is limited in time, if at the same time human dignity is respected, in addition, such restrictions are subject to control and proportionate to the aim pursued [4-5].

The scale and severity of the COVID-19 pandemic certainly reaches a level of threat to public health, which may justify restricting certain rights and freedoms, as in the case of restrictions on freedom of movement due to quarantine or isolation [6].

In practice, there are court decisions of constitutional courts that determine restrictions on freedom of movement that are not constitutional.

The Constitutional Court of the Republic of Austria declared illegal the provisions of the Order of the Federal Minister of Social Affairs, Health and Consumer Protection, according to which entry into public places, with some exceptions, is prohibited. However, it found no evidence of the unconstitutionality of Article 2 § 1 of the Federal Law on Interim Measures to Prevent the Proliferation of COVID-19, which gave rise to the impugned Order authorizing the Minister of Public Health to identify specific public places prohibited.

Reasons for this decision, the Constitutional Court noted, in particular, that “in accordance with Article 2 of the Federal Law on Interim Measures to Prevent the Spread of COVID-19, the authorized Minister of Public Health may designate specific public places to which entry is prohibited. However, this article does not authorize the introduction of a general ban on entry to any public places, with only a few exceptions, as such a ban actually means the introduction of a general curfew.

However, the Constitutional Court noted that “in the light of the first part of Article 4 of the Basic Law and Article 2 of Protocol No. 4 to the ECHR, this does not mean that special circumstances cannot justify the imposition of curfew with appropriate restrictions, provided that the severity of the intervention of such a measure, its proportionality can be proven. In any case, such a significant restriction on freedom of movement, which in fact abolishes this freedom, requires a specific and more clearly defined legal basis” [7].

In its judgment, the Constitutional Court of Bosnia and Herzegovina concluded that orders from the Federal Civil Protection Headquarters restricting movement within the Federation of Bosnia and Herzegovina violated the right to freedom of movement under Article II (C) (m) of the Constitution of Bosnia and Herzegovina [8].

The Constitutional Court stressed that «the need to continue the state of emergency must be under the control of the legislature in order to prevent abuse and unacceptable continuation of such a state by the executive body».

The possibility of restricting the rights guaranteed by the Constitution of Bosnia and Herzegovina and the Convention for the Protection of Human Rights and Fundamental Freedoms, in addition to the general social benefit, is directly determined by a number of factors on the basis of which the fair balance between measures taken and the purpose to achieve is estimated, and in this case, this is especially due to the duration of their use and regular review of their need. Otherwise, there will be ample scope for arbitrary action by the competent authorities, contrary not only to the principle of the right to freedom of movement but also to the rule of law enshrined in Article I (2) of the Constitution of Bosnia and Herzegovina, regardless of state of emergency in connection with which measures were taken [9].

The Constitutional Court of the Republic of Slovenia has ruled to suspend the implementation of a government decree restricting the freedom of movement and assembly of people in public places. It established that the violations of human rights and fundamental freedoms enshrined in the resolution are of a long-term nature, as they are not limited in time.

Such regulation is not necessary to achieve the purpose pursued by the resolution. The same objectives can be achieved by providing for a periodic review by the government of the proportionality of the measures and their continuation only if, in the light of the circumstances, in the opinion of experts, they are still considered necessary to achieve the objective.

Thus, the court ruled that the government should immediately, after receiving this decision, and then at least every seven days, assess whether the implemented measures remain necessary to achieve the set goals. Based on the expert opinion, the government should decide on the continuation of measures, their change or cancellation and inform the public about it [10].

In its judgment of 6 April 2020 № 54/20 4 the Constitutional Court of the Republic of Kosovo stated that fundamental rights and freedoms may not be restricted by government decrees, except where the restriction of the relevant right is provided for by a law adopted by the Assembly. The Government may ensure compliance with a law restricting fundamental rights and freedoms only to the extent permitted by the relevant law of the Assembly. Restrictions on fundamental rights and freedoms, set out in detail in Article 56 of the Constitution, provide for a more serious degree of interference than the restrictions set out in Article 55 of the Constitution and require a declaration of a state of emergency.

The Constitutional Court set another date for the entry into force of its decision, namely 13 April 2020 "as an exception and taking into account the circumstances created by the declaration of COVID-19 pandemics at the global level; relevant recommendations of state and global medical institutions; potentially harmful consequences for public health as a result of the immediate lifting of the restrictions provided for in the Government Resolution, and the protection of public health and the interests of the relevant institutions of the Republic of Kosovo in the implementation of this decision [11].

Regarding restrictions on the right to privacy during the COVID-19 pandemic.

States should ensure that the collection, storage and accumulation of personal data, including health data, are used only to respond to the COVID-19 pandemic. Data received, stored and aggregated for pandemic response should be limited in scope, work with it should be limited in time by the pandemic period, and they should not be used for commercial or any other purpose.

The state cannot allow the COVID-19 pandemic to justify the violation of human rights to privacy [12].

In its decision, the Constitutional Court of Montenegro declared unconstitutional (as violating the right to respect for private life) the decision of the National Coordinating Body for Infectious Diseases, which provided for the disclosure of information about persons in compulsory self-isolation without their consent; relevant information was published on the website of the Government of Montenegro.

Assessing the need to take the above measure in a democratic society, the Constitutional Court noted that the impugned Decision did not comply with the principle of proportionality, as it did not strike a fair balance between the need to protect the lives and health of all citizens and privacy and protection of personal data, guaranteed by Articles 40 and 43 of the Constitution and the right to respect for private and family life, guaranteed by Article 8 of the ECHR, persons who are in self-isolation, on the other hand

Also, the Constitutional Court of the Republic of Bulgaria in its Decision declared unconstitutional certain provisions of the Law on Electronic Communications in conjunction with certain provisions of the Law on Emergency Measures and Actions, which provided for access and storage by law enforcement agencies of data from publicly available electronic communications networks in order to ensure that their designated persons comply with the coercive measures of isolation and hospitalization in connection with COVID-19. In this Decision, the Constitutional Court, in particular, found that the measures provided for in the impugned provisions are disproportionate to their purpose of

interfering with the right to privacy and, therefore, violate this right [13].

### **3. DECISIONS OF BODIES OF CONSTITUTIONAL JURISDICTION OF FOREIGN COUNTRIES ON RESTRICTION OF SUFFRAGE AND RESTRICTION OF THE RIGHT TO TRIAL IN ORDER TO PREVENT THE SPREAD OF COVID-19**

In 2020, societies around the world have largely fought the COVID-19 pandemic, which, in addition to serious public health problems, has challenged the organization and conduct of elections. According to this study, one of the main challenges was to hold elections and ensure the constitutional right to vote in a pandemic, while ensuring the safety of voters and minimizing risks to public health.

It is perhaps these two aspects that governments and electoral authorities have had to think about the most during the electoral process, seeking a balance between democratic rights and public health risks [14].

The Constitutional Court of the Republic of Croatia has ruled in its judgment that citizens who have been diagnosed with COVID-19 or any other infectious disease and are in isolation, as well as citizens who are in isolation due to on suspicion that they have an infectious disease is not constitutionally unacceptable from the point of view of Article 16 of the Constitution.

The Constitutional Court noted that «such persons (citizens who have been diagnosed with COVID-19 or any other infectious disease and are in isolation, as well as citizens who are in isolation on suspicion of having an infectious disease) have the right to demand equal opportunities for them to vote outside polling stations, but such voting must also be carried out in compliance with the health measures of other participants in the electoral process in view of the COVID-19 epidemic» [15].

The Constitutional Council of the French Republic in the Decision recognized the constitutional provisions of the first part of Article 19 of the Law № 2020-290 of March 23, 2020 on emergency measures to combat the COVID-19 epidemic.

The impugned provisions provided that if after the first round of elections of members of municipal and local councils held on March 15, 2020, there is a need to hold a second round of elections, such a second round, originally scheduled for March 22, 2020, is postponed to June 2020 year, provided that the state of health of the population will allow to organize the election process. If this condition is not met, voters in municipalities where the municipal council was not fully elected in the first round will be invited to re-vote in two rounds on terms to be determined by the new law.

Thus, the provisions challenged in this case suspended the election process after the end of the first round of elections and postponed the organization of the second round of elections.

In resolving the issue of the constitutionality of the impugned provisions, the Constitutional Council noted that without violating the requirements of Article C of the Constitution (which enshrines the right to vote and be elected), the legislator may authorize such a change in the electoral process only if it is in the overriding general interest and does not violate the right to vote and to stand for election, as well as the principle of fairness of elections or the principle of equal suffrage. The Constitutional Council found that the adoption of the impugned provisions was justified by the overriding general interest, which was the restrained spread of the COVID-19 epidemic, and that the postponement of the second round of municipal elections in connection with the COVID-19 epidemic no later than June 2020 the right to vote and to be elected, violates neither the principle of fairness of elections, nor the principle of equal suffrage» [16].

The independence of the judiciary is central to both human rights and the rule of law. Restrictions imposed by or on the application of the judiciary are generally more in line with the principle of judicial independence than measures imposed on the judiciary by other branches of government.

In the context of the COVID-19 pandemic, not only the human rights of litigants and other stakeholders should be taken into account: judicial staff are also rights holders, and the right to life and health of individual judges, lawyers, prosecutors and court staff, including others are also subject to compliance, protection and enforcement [17].

In its judgment, the Constitutional Court of the Italian Republic ruled that the suspension of statutes of limitations provided for by the Decrees-Laws adopted to overcome the state of emergency caused by COVID-19 is constitutional, as it concerns the suspension of proceedings as a whole from 9 March to 11 May 2020. year to overcome this emergency.

The Constitutional Court noted, in particular, that the so-called "COVID suspension" is one of the general

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grounds for suspending the statute of limitations set out in Article 159 of the Criminal Code, which provides for the suspension of statutes of limitations in cases where the law requires the suspension of criminal proceedings.

Thus, the suspension of the statute of limitations, in particular, the statute of limitations for criminal prosecution does not violate the constitutional principle of prohibition of retroactive effect of less favorable criminal law provisions, as well as the principle of no punishment without law. The short duration of the suspension of legal proceedings and the consequent suspension of the limitation period fully corresponds to the right to a trial within a reasonable time. In addition, according to the Court, the impugned provisions are justified in terms of reasonableness and proportionality in order to protect public health to reduce the risk of infection with COVID-19 during this emergency [18].

## 4. CONCLUSIONS

Based on this study, we can assume that the existing practice of appealing the constitutionality of quarantine restrictions has not yet been finalized. The possibility of violating personal freedom to overcome global pandemics has now become an urgent and acute problem. If restrictive measures are taken in the prescribed manner, for health reasons and meet the requirements of emergency measures, these measures can be considered legal. In this case, it is extremely important that the constitutional jurisdiction performs the function of constitutional control, which can prevent abuse of power by public authorities and force the public to comply with the legal requirements of the quarantine ban.

In addition, in some countries/regions, courts give priority to combating the spread of COVID-19, which creates a precondition for granting emergency powers to the executive authorities and may violate constitutional legitimacy. Therefore, each established restrictive measure requires constant monitoring and analysis of compliance with the epidemic and its impact on the entire population and its individuals (especially vulnerable groups). It is obvious that in the conditions of a pandemic the question of proportionality of restrictive measures and legality of their application will exist for a long time and will not be unambiguously resolved.

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