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### **CORONAVIRUS RESTRICTIONS: NECESSARY REACTION TO PANDEMIC AND THE OBSERVANCE OF PROPORTIONALITY PRINCIPLE (UKRAINIAN AND OTHER COUNTRIES' EXPERIENCE)**

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The SARS-CoV-2 pandemic has fundamentally changed the lives of all the countries in 2020 and forced them to adapt to new conditions in an extremely short space of time. Public authorities and local governments were suddenly faced with solving of multiple tasks: supporting medicine, small and medium-sized businesses, organization and administration of the educational process, and responding to global economic challenges. The need to respond quickly to all challenges has prompted most countries to restrict certain constitutional rights and freedoms. At the same time, the lack of an analytical component in the planning of such restrictive measures has led to many cases of excessive restrictions that infringed the principles of law-based and democratic state.

Analysing the several months experience of quarantine restrictions, the expert community and scientists came to the conclusion that some measures are excessive. For example, United Nations experts have noted that strict restrictions to prevent people from leaving their houses, even in an emergency, can be considered as imprisonment. Therefore, introduction of such restrictions requires strict adherence to guarantees against abuse, as well as complete information on any control measures from the government.

The experts also stressed that such measures should be proportionate to the existing threat and function only during a state of emergency [11].

The researchers also tried to assess some quarantine restrictions through the prism of a proportionality test. As a consequence, the idea that any approach that infringes upon civil rights such as free movement must be based on the principle of proportionality is stressed in many researches [4]. It should be mentioned that the proportionality considered to be a doctrinal tool for the resolution of conflicts between a right and a competing right or interest, at the core of which is the balancing stage which requires the right to be balanced against the competing right or interest [6, p. 710]. That is why the comparison of quarantine restrictions and the need to respect fundamental rights can be analyzed based on the principle of proportionality.

It should be mentioned, that proportionality test is applied as by researchers but also by judicial bodies. In Europe, the it is applied by the European Court of Human Rights and the Court of Justice of the European Union [4]. National courts may also apply the proportionality principle, moreover with their own variations, regarding different public relations. The German Federal Constitutional Court, for example, applied the proportionality principle, regarding financial system [See: 7].

One of the most common restrictions was a prohibition of holding any public events. The rationality of such a quarantine measure, taking into account the peculiarities of coronavirus person-to-person transmission and the impact of social contacts on the spread of disease, at first sight, should not be questioned. At the same time, the importance of the constitutional right to freedom of assembly affects the need to critically assess the expediency of banning any assembly. In particular, concerning a small gathering in the fresh air, which cannot contribute to the rapid spread of disease. Applying four stages of a proportionality test (legitimate aim; suitability; necessity and proportionality *stricto sensu*) scientists reached a conclusion that not all measures aimed at preventing the spread of COVID-19 can be assessed as proportionate. In particular, one of the problems is the absolute ban on holding any public events for an unlimited time [9, p. 45].

A similar position was expressed by the Federal Constitutional Court of Germany, when the court scrutinize the case of appealing the decisions of Land *Hessen* regarding the ban on holding several small public meetings. The Federal Constitutional Court noted that the appellee's formal refusal to hold public events clearly violated Article 8 of the Basic Law of the Federal Republic of Germany. Moreover, in the Court's view, the provisions of the land legislation on coronavirus do not in fact impose an absolute ban on

holding any public events, and each case must be assessed in the light of the freedom of assembly guaranteed by the constitution [2].

One more example was expressed in a decision of January 11, 2021 by a district court judge in Weimar, while considering the case of imposing a fine of 200 euros on a man from Weimar who celebrated his birthday in the courtyard of a house together with seven other people. This violates the contact requirements in force at the time, because it was only allowed members of two households to be together. It was stressed that a general ban on contact is a serious encroachment on civil rights. The freedom to determine with which people and under what circumstances people enter into contact is one of the fundamental freedoms. «...The state has to refrain from any purposeful regulating and restricting intervention. The question of how many people a citizen invites to his home ... is of no fundamental interest to the state» [3].

The Ukrainian authorities decided to respond to the global challenges of the coronavirus in advance, without waiting for the progress of a pessimistic scenario, such as Italian. Therefore, according to the Resolution of the Cabinet of Ministers of Ukraine «On Prevention of the Spread of Acute Respiratory Disease COVID-19 Caused by SARS-CoV-2 Coronavirus» from March 11, 2020, № 211 beginning from March 12, 2020 quarantine was established throughout Ukraine. After that several resolutions prolonged the term of quarantine restrictions were prolonged and changed in proportion to the epidemiological situation in the country.

On May 29, the plenum of the Supreme Court appealed to the Constitutional Court of Ukraine against certain provisions of Government Resolution № 392, as well as a number of provisions of the Laws of Ukraine referring to State Budget of Ukraine. Considering this constitutional appeal, the Constitutional Court of Ukraine expressed several important legal positions. Firstly, he stressed that the restriction of human and citizen's constitutional rights and freedoms is possible in cases determined by the Constitution of Ukraine. Such a restriction may be established only by law adopted by the Verkhovna Rada of Ukraine. Establishing such a restriction with by-law contradicts Articles 1, 3, 6, 8, 19, 64 of the Constitution of Ukraine [8]. In other words, the restriction of constitutional rights and freedoms is possible only in cases established by the Basic Law of the country, as well as only in the prescribed form. We believe that this entirely corresponds to the idea of the rule of law, demanding all public authorities strictly observe the principle of constitutional legality. Secondly, to the Constitutional Court of Ukraine determined the moratorium on the write-off of state budget funds for the execution of court decisions as the violation of the right to judicial protection. The Court stressed that the final execution of

judgement is a positive duty of the state, which it must comply even during the pandemic.

The Constitutional Court of the Republic of Moldova also considered restricting constitutional rights during a pandemic, however, in a different aspect. Thus, the Court declared unconstitutional the extreme scale of the fines for violating quarantine restrictions, which were about three times higher than the average monthly salary of Moldovan citizens. The situation was aggravated by insufficient information of the population by the government. Moreover, at the same time, Moldovan citizens were in fact deprived of the right to appeal because the window to register appeals was reduced from the usual 15 days to only 48 hours. All this has threatened access to justice [5].

The experience of the considered countries proves that quarantine restrictions, although intended to curb the spread of a dangerous disease, should be proportional and should not encroach on fundamental rights and freedoms of man and citizen, as well as the basic principles of the constitutional order of the country.

#### References:

1. Amtsgericht Weimar, Urteil vom 11.01.2021, Az. 6 OWi – 523 Js 202518/20. URL: <https://2020news.de/wp-content/uploads/2021/01/Amtsgericht-Weimar-Urteil-vom-11.01.21.-523-Js-202518-20.pdf>
2. Bundesverfassungsgericht. Beschluss vom 15. April 2020 – 1 BvR 828/20. URL: [https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2020/04/rk20200415\\_1bvr082820.html](https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2020/04/rk20200415_1bvr082820.html)
3. German District Court declares Corona Ordinance Unconstitutional. 25 January 2021. URL: <https://ukhumanrightsblog.com/2021/01/25/german-district-court-declares-corona-ordinance-unconstitutional/>
4. Gunnarsdóttir H. D., Sinha M. S., Gerke S., Minssen T. Applying the proportionality principle to COVID-19 antibody testing. *Journal of Law and the Biosciences*. Vol. 7, issue 1 Janbary-Junt 2020, Isaa058. doi: 10.1093/jlb/Isaa058
5. Mirza R. The rule of law in Moldova's age of COVID-19. № 1 January 2021. URL: [https://freedomhouse.org/sites/default/files/2021-01/Rule-of-Law-in-Moldova%27s-Age-of-COVID-19\\_Eng.pdf](https://freedomhouse.org/sites/default/files/2021-01/Rule-of-Law-in-Moldova%27s-Age-of-COVID-19_Eng.pdf)
6. Möller K. Proportionality: Challenging the critics. *International Journal of Constitutional Law*, Volume 10, Issue 3, July 2012. Pages 709–731, <https://doi.org/10.1093/icon/mos024>
7. The Federal Constitutional Court. Judgment of 5 May 2020. 2 BvR 859/15. URL: [https://www.bundesverfassungsgericht.de/e/rs20200505\\_2bvr085915en.html](https://www.bundesverfassungsgericht.de/e/rs20200505_2bvr085915en.html)

8. Рішення Конституційного Суду України № 10-р/2020 від 28 серпня 2020 року. URL: <https://zakon.rada.gov.ua/laws/show/v010p710-20#Text>

9. Харламова Т. Испытание пандемией: ограничение свободы собраний и слова в свете принципа пропорциональности. Сравнительное конституционное обозрение. 2020. № 4 (137). С. 36–54.

10. Эксперты ООН: пандемия не должна служить оправданием незаконного лишения свободы. Новости ООН. URL: <https://news.un.org/ru/story/2020/05/1377802>