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RESTRICTION OF HUMAN RIGHTS AND STATE OF EMERGENCY[a]

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Abstract

Human rights and freedoms are the most sensitive area and the ultimate measure of democracy in a state and society. Absolute human rights and freedoms cannot be restricted, even in conditions of war or emergency. This paper focuses on human rights which were derogated by declaring a state of emergency due to the imminent danger of the infectious disease COVID-19 caused by the SARS-CoV-2 virus. The author addresses the issues related to the definition of state of emergency and the derogation of the guaranteed human rights and freedoms, as well as the proportionality between the taken measures and intended goals of such restrictions. In particular, the author examines the international sources of law pertaining to the restriction of human rights, with specific reference to the situations and conditions when such restrictions are admissible. The content of the proportionality clause which is to be fulfilled by the state when restricting human rights and freedoms is one of the supreme precepts for admissibility and justifiability of such restrictions.

Key words: human rights, state of emergency, COVID-19, restriction of human rights, Constitution, international law, European Convention.

ОГРАНИЧАВАЊЕ ЉУДСКИХ ПРАВА И ВАНРЕДНО СТАЊЕ

Апстракт

Људска права и слободе су најосетљивије поље и мера демократије у једној држави и друштву. Апсолутна људска права и слободе ничим се не могу ограничавати, па и у стањима као што је ратно или ванредно. У овом раду је сва пажња усмерена на она људска права која су била дерогирана проглашавањем ванредног стања услед

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опасности од заразне болести COVID-19. У раду тражимо одговоре на питања дефинисања ванредног стања и одступања од зајемчених људских права и слобода, као и сразмерности између предузетих мера и циља који се жели постићи оваквим ограничењима. Посебно се испитују међународни извори који се тичу ограничавања људских права, те у којим ситуацијама и под којим условима је то допуштено. Садржина клаузуле пропорционалности коју треба да испуни држава ограничавајући људска права и слободе једна је од врховних заповести да би таква ограничења била дозвољена и оправдана.

Кључне речи: људска права, ванредно стање, COVID-19, ограничавање људских права, Устав, међународно право, Европска конвенција.

INTRODUCTION

Personal freedoms and rights ensure the protection of physical and personal integrity of every human being. They have been acquired step by step, along with the development of human society and the process of individualization of human personality. Once treated as a slave and a thing (property item), man gradually managed to conquer spaces for the expansion of personal rights and freedoms. The awakened rebellious spirit of man progressively imposed limits to autocracy, unlimited dictatorship and unrestrained tyranny of state power.

The historical development of the human civilization clearly reflects the changing legal theories and views on human rights and freedoms. The contemporary private law introduces the concept of the legal subject (Kovačević, Kuštrimović, 2011: 47), where man is regarded as the subject of law. Legal subjectivity exists only when a person becomes aware of his/her individual self, legal capacity, individual rights and duties. For this reason, the concept of the legal subject is considered to be the most significant attainment of legal civilization, derived from the philosophy of law (Radbruh, 1980: 5). The abstract right of an individual, embodied in Hegel's axiom, "Be a person and respect others as persons," revolutionized law because it made provisions for equality and the belief that man is the ultimate and the only purpose of the legal order. Hegel pointed out that all ideas are based on the freedom and self-consciousness of an individual (Jevtić, 2020: 591).

Further development of legal thought extended the concept of a legal subject to all human rights, envisaged in both private and public, and national and international law. Thus, by the adoption of important international law documents on the protection of human rights, "natural rights have been transposed into inalienable rights embodied in national constitutions, civil and criminal legislation, etc. The principle of equality is no longer exercised through the notion of a legal subject but through the notion of a man who is a part of the human species, a cosmopolitan" (Kovačević, Kuštrimović, 2011: 49-51).

Personal rights and freedoms are the result of a long struggle for respect for physical and personal integrity which has been underway to

the present day. In contemporary constitutions, human rights and freedoms are commonly envisaged in special chapters. There are opinions that the roots of such systematization are to be found in the fact that human rights and freedoms were initially envisaged in declarations (as subject-specific acts) (Đorđević, 1986: 365).

In contrast to the tendency to constantly expand the scope of basic human rights, there is also a tendency to derogate (limit) them. The fundamental human rights and freedoms are part of the basic law of the state, and they are defined in terms of content (Stojanović, 1989: 164). The content determines the rights and duties of an individual (as a legal subject); in effect, duties and obligations entail some restrictions. In democracies, individual rights and freedoms may be restricted to an extent necessary to ensure the observance and prevent the violation of human rights and freedoms of others.

Given that the fundamental human rights and freedoms are part of constitutional law, the primary source of law is the constitution. In addition to domestic sources, human rights and freedoms are also envisaged in international sources of law. In the Republic of Serbia, the hierarchy of these legal sources is determined by the Constitution as the supreme legal act. Ratified international treaties and generally accepted rules of international law must be in compliance with the Constitution of the Republic of Serbia. Individual legislative acts must comply with the Constitution, ratified international treaties and generally accepted international rules (Article 194 of the Serbian Constitution).

On 15 March 2020, facing the outbreak of the COVID-19 contagious disease, the Republic of Serbia made a decision to declare a state of emergency due to the imminent risk of mass infection, widespread transmission and death. Both during the state of emergency and after its abolition, there was a widespread controversy in the public about the violation of human rights during the state of emergency. The corona-virus pandemic has brought to the fore the topic of human rights and freedoms during the state of emergency, not only among legal theorists but also in the general public (including lay public on social networks, for example). The focal point of debate have been the issues pertaining to non-discrimination, freedom of movement, freedom of expression, freedom of the media, and the right to information.

STATE OF EMERGENCY AND THE CONSTITUTION AS A GUARANTEE OF PROTECTION OF HUMAN RIGHTS AND FREEDOMS

The Constitution of the Republic of Serbia[1] defines a state of emergency in Article 200 (para. 1) of as follows: "When the survival of

[1] Ustav Republike Srbije [Constitution of the Republic of Serbia], Sl. glasnik RS, br. 98/2006

the state or its citizens is threatened by a public danger, the National Assembly shall declare the state of emergency." In such a case, "the National Assembly may prescribe the measures which shall provide for derogation of human and minority rights guaranteed by the Constitution" (Art. 200, para. 3). The Constitution further states: "When the National Assembly is not in a position to convene, the decision on proclaiming the state of emergency shall be made jointly by the President of the Republic, the President of the National Assembly, and the Prime Minister, under the same terms as by the National Assembly" (Article 200, para. 4). Based on this paragraph, the President of the Republic, the President of the National Assembly and the Prime Minister of Serbia made a decision to declare a state of emergency due to the danger of infectious disease COVID-19 caused by the SARS-CoV-2 virus.[2]

These provisions raise two issues. The first one refers to the interpretation of the term "public danger" threatening the survival of the state or its citizens, and the possible inclusion of a pandemic under this term. To clarify this dilemma, we will refer to the position of the Venice Commission[3], the provisions of the Serbian Defense Act[4] and the Disaster Risk Reduction and Emergency Management Act.[5] Namely, when considering the text of the Constitution of the Republic of Serbia, the Venice Commission was of the opinion that the phrase used was quite general, leaving room for abuse. Therefore, the Venice Commission considered that it was necessary to amend the existing legal solution by adding the following qualification at the end of Article 200 (para.1): "if regular constitutional measures are insufficient." The Venice Commission also specified that a state of emergency can be imposed in four cases: 1)in case of external threats to the State, acts of armed aggression against the territory; 2) in case of an obligation of common defense against aggression arising by virtue of an international agreement;3)in case of threats to the constitutional order of the State, the security of citizens, or public order; and 4) in case of the need to prevent or eliminate the consequences of a natural disaster or technological accident exhibiting the characteristics of a natural disaster (Venice Commission, 2007: 20). Therefore, the position of the

[2] Odluka o proglašenju vanrednog stanja [Decision on declaring a state of emergency], Sl. glasnik RS, br. 23/2020

[3] European Commission for Democracy through Law (Venice Commission), Opinion on the Constitution of Serbia, adopted by the Commission at its 70th plenary session (Venice, 17-18 March 2007 (p. 20).

[4] Zakon o odbrani [Defense Act], Sl. glasnik RS, br. 116/2007, 88/2009, 88/2009 - dr. zakon, 104/2009 - dr. zakon, 10/2015 i 36/2018

[5] Zakona o smanjenju rizika od katastrofa i upravljanju vanrednim situacijama [Disaster Risk Reduction and Emergency Management Act], Sl. glasnik RS, br. 87/2018

Venice Commission indicates that the pandemic cannot be declared a state of emergency.

As the position of the Venice Commission does not have a binding legal force (but can serve as a guideline), we may take into account the national sources of law. In order to eliminate the specific dilemma, we may first refer to the provisions of the Defense Act. Article 4 (para. 6) of this Act prescribes that a state of emergency is a state of public danger where the survival of the State or its citizens is endangered, and which is the consequence of military or non-military challenges, risks and security threats. Although this provision allows for the inclusion of a pandemic under the state of emergency, the wording is still rather broad and imprecise. In the author's opinion, in resolving the dilemma on the rationale for introducing a state of emergency, the legislator should have referred to the normative solutions contained in the Disaster Risk Reduction and Emergency Management Act. Namely, Article 2 (para. 2) of this Act stipulates that a natural disaster is a phenomenon of biological origin, caused (*inter alia*) by a pandemic and an epidemic of infectious diseases, which is one of the grounds for declaring an emergency situation. Pursuant to Article 39, an emergency situation for the territory of the Republic of Serbia is declared by the Government upon the proposal of the Republic Headquarters for Emergency Situations. Under Article 2 (para. 7), it can be a situation in which the risks and threats or consequences for the population are of such scope and intensity that their occurrence or consequences cannot be prevented or eliminated by regular action of competent bodies and services; thus, in order to eliminate the risks and consequences, there is a need for special measures, operative forces and means. It is important to note that the level of protection of human rights is not reduced by introducing an emergency situation. Thus, the competent authorities and other entities which implement appropriate measures are obliged to consistently take into account the protection of human rights, gender equality and, particularly, ensure the protection of the poor, the elderly, children, persons with disabilities, refugees and displaced persons, and other vulnerable groups.

The second issue arising from the constitutional provisions is whether the deputies (MPs) could gather in the Serbian National Assembly at the outbreak of the epidemic to proclaim a state of emergency. As noted by the former Commissioner for Information of Public Importance (Rodoljub Šabić), Article 200 (para. 5) of the Constitution should be construed as referring to *de facto* impossibility of convening a parliamentary assembly; it does not refer to the decision of the Government of the Republic of Serbia to ban gatherings including over one hundred people. In the author's opinion, this Article is not applicable in the situation of a

pandemic caused by an epidemic.[6] Another disputable issue is the time frame for introducing a state of emergency. Namely, the state of emergency was introduced before the epidemic was officially declared on the territory of the Republic of Serbia; the state of emergency was introduced on 15 March 2020, while the epidemic was declared four days later (Simović, 2020: 12).

Article 202 (para. 1) of the Constitution prescribes that "upon proclamation of the state of emergency or war, derogations from human and minority rights guaranteed by the Constitution shall be permitted only to the extent deemed necessary." By stating that derogations are allowed only to the extent that is deemed necessary, the framers of the Constitution emphasized the adherence to the principle of proportionality between the restriction of human rights and the goals to be achieved by imposing the restrictions.

The Constitution of the Republic of Serbia prescribes the inalienable rights that cannot be limited during a state of emergency or war. These are absolutely protected rights: the right to dignity and free development of one's personality (Art. 23); the right to life (Art. 24); the right to inviolability of physical and mental integrity (Art. 25); prohibition of slavery, servitude and forced labor (Art. 26); the right to freedom and security (Art. 27) ; the rights of persons deprived of liberty (Art. 28); the right to a fair trial (Art. 32); the right to legal certainty in criminal law (Art. 34); the right to legal personality (Art. 37); the right to citizenship (Art.38); freedom of thought, conscience and religion(Art. 3); the right to conscientious objection (Art. 45); freedom of expression (Art. 6); prohibition of inciting racial, national and religious hatred (Art. 49); the right to marry and equality of spouses (Art. 62); freedom to decide on procreation (Art. 63); rights of the child (Art. 64), and the prohibition of forced assimilation (Art. 78). At the same time, Article 200 (para. 4) of the Constitution stipulates that "when declaring a state of emergency, the National Assembly may prescribe the measures that shall provide for derogation of the constitutionally guaranteed human and minority rights."

The Constitution also stipulates that "human and minority rights guaranteed by the Constitution may be restricted by law if such restrictions are permitted by the Constitution, and for the purpose allowed by the Constitution, to the extent necessary to meet the constitutional purpose of restrictions in a democratic society" (Article 20, para. 1). In deciding on the restriction of human rights and freedoms, the state authorities must respect constitutional rules and must take into account the essence of the right being restricted, the purpose of imposing restrictions,

[6] Danas (15 March 2020): Šabić: Nema pravnih osnova za uvođenje vanrednog stanja (No legal grounds for declaring a state of emergency), Retrieved 14 May 2021 from: https://www.danas.rs/drustvo/sabic-nema-pravnih-osnova-za-uvodjenje-vanrednog-stanja/

the nature and the extent of restriction, the proportionality between the restriction and the intended goals of restriction, as well as the possibility of achieving the purpose of restriction by less restrictive means (Pajvančić, 2009: 31). For certain rights, the Constitution explicitly prescribes the specific conditions under which they can be limited. In legal theory, such cases are designated as special limitations of human rights (Stojanović, 1989: 392). The Constitution also guarantees the direct implementation of human and minority rights "guaranteed by generally accepted rules of international law, ratified by international treaties and laws" (Art. 18).

STATE OF EMERGENCY AND INTERNATIONAL SOURCES OF LAW AS A GUARANTEE OF PROTECTION OF HUMAN RIGHTS AND FREEDOMS

Both under the International Covenant on Civil and Political Rights (hereinafter: the International Covenant, ICCPR)[7]and under the European Convention for the Protection of Human Rights and Freedoms (hereinafter: the European Convention, ECHR),[8] States are subject to international supervision with regard to restrictions on guaranteed human rights and freedoms.

The International Covenant allows for the restriction of human rights and freedoms "in the event of an exceptional general danger threatening the survival of the nation" (Article 4ICCPR). As a precondition for restricting human rights and freedoms, two requirements must be met concurrently: the presents of an exceptional general danger and the threat

[7] Ukaz o proglašenju Zakona o ratifikaciji Međunarodnog pakta o građanskim i političkim pravima[Decree on the Promulgation of the Act on Ratification of the International Covenant on Civil and Political Rights], Sl. list SFRJ, br. 7/1971

[8] Zakon o ratifikaciji Evropske konvencije za zaštitu ljudskih prava i osnovnih sloboda, izmenjene u skladu sa Protokolom br. 11 uz Konvenciju za zaštitu ljudskih prava i osnovnih sloboda, Protokola broj 4 uz Konvenciju za zaštitu ljudskih prava i osnovnih sloboda kojim se obezbeđuju izvesna prava i slobode koji nisu uključeni u konvenciju i prvi protokol uz nju, Protokola broj 6 uz Konvenciju za zaštitu ljudskih prava i osnovnih sloboda o ukidanju smrtne kazne, protokola broj 7 uz Konvenciju za zaštitu ljudskih prava i osnovnih sloboda, Protokola broj 12 uz Konvenciju za zaštitu ljudskih prava i osnovnih sloboda i protokola broj 13 uz Konvenciju za zaštitu ljudskih prava i osnovnih sloboda o ukidanju smrtne kazne u svim okolnostima [Act on Ratification of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), amended in accordance with Protocol No. 11 to the ECHR, Protocol No. 4 to the ECHR ensuring freedoms not included in the Convention and the First Protocol thereto, Protocol No. 6 to the ECHR on the Abolition of the Death Penalty, Protocol No. 7 to the ECHR, Protocol No. 12 to the ECHR, and Protocol No. 13 to the ECHR on the Abolition of the Death Penalty in all Circumstances], Sl. list SCG - Međunarodni ugovori, br. 9/2003, 5/2005 i 7/2005-ispr. i Sl. glasnik RS -Međunarodni ugovori, br. 12/2010 i 10/2015

to the survival of the nation. Any State Party which resorts to the restriction of human rights and freedoms during a state of emergency must officially declare the state of emergency and notify the Secretary-General of the United Nations, stating which rights are being derogated and for what reasons. The subsequently adopted optional protocols to the International Covenant[9] enable an individual to initiate a proceeding for monitoring the observance of the rights to which the State Party to the International Covenant has committed itself. A written statement (communication) is submitted to the Human Rights Committee if the person submitting the statement has exhausted all domestic legal remedies available in the state of origin (Art. 2 Optional Protocol to the ICCPR). The Committee's assessment does not have the character of a judgment; thus, the adopted mechanism has a limited scope.

The European Convention prescribes three conditions which have to be met in order to allow derogations from human rights and freedoms in times of emergency: 1) the existence of war or other public danger threatening the survival of the nation; 2) derogations must be minimal, and only to the extent required by the specific danger, and 3) the taken measures must be compliance with other obligations assumed by the state under international law (Article 15, para.1 ECHR). Moreover, "any High Contracting Party exercising the right to derogation shall keep the Secretary General of the Council of Europe fully informed of the measures taken and the reasons thereof. It shall also notify the Secretary General of the Council of Europe when such measures have ceased to have effect and when the provisions of the Convention are fully applied again" (Article 15, para. 3 ECHR). Derogation of the guaranteed human rights and freedoms calls for a decision of the competent state body (parliament). The adoption of such a decision is a paramount precondition which makes it possible to prescribe relevant measures. The state which adopts measures on the derogation of certain rights must prove the existence of a public danger and that the adopted measures are necessary (Mitrović, Grbić Pavlović, Pavlović, 2016: 201-211). Therefore, the state must adhere to the principle of proportionality between the public danger and the introduced measures, i.e. the goal that the measures aim to achieve.

Thus, in order to fulfill the proportionality clause, a State Party must meet three cumulative conditions: legality, legitimacy, and the necessity of restrictions. Legality entails a "constitutional approval" for the restriction of certain human rights and freedoms. Legitimacy is the justification for taking restrictive measures. Necessity implies the obligation of the state to

[9] Fakultativni protokol uz Međunarodni pakt i Drugi fakultativni protokol uz Međunarodni pakt [Optional Protocol to the International Covenant and Second Optional Protocol to the International Covenant], Sl. list SRJ –Međunarodni ugovori, br. 4/2001

prove the existing real and immediate risks which justify the need to limit certain human rights and freedoms (Petrović, 2011: 37-50).

The European Court of Human Rights (hereinafter: the Court, ECtHR)[10] and the European Commission have established internationally acceptable criteria which are to be met before imposing a state of emergency. In order for a state of emergency to be acceptable from the point of view of the European Convention, the danger must be exceptional, imminent, threatening to the entire state (i.e. all citizens), and endangering the organized life in that state. According to the Court's case-law, a declaration of a state of emergency is acceptable if the measures and restrictions that could normally be taken would be insufficient to remedy the public danger. The state of emergency and derogation of guaranteed human rights and freedoms must be limited in time. The European Commission exhaustively states the absolute human rights and freedoms which cannot be subject to restriction even during a state of emergency.

The European Convention also envisages the prohibition of abuse of rights by referring to interpretation of prescribed norms: "Nothing in this Convention shall be construed to imply the right of any State, group or person to engage in any activity or to perform an act aimed at the destruction of any of rights and freedoms set forth herein, or at their limitation to a greater extent than is provided for in the Convention" (Article 17 ECHR). The European Convention also defines the limitations on the use of restrictions on the guaranteed human rights and freedoms, by stating that "the restrictions permitted under this Convention shall not be applied for any purposes other than those for which they have been prescribed" (Article 18 ECHR).

The analysis of Article 15 of the European Convention leads to the conclusion that the states are free to assess whether the measures taken under this Article, i.e. whether the derogation of human rights, is within the limits allowed by the European Convention. The issue of free assessment is not precisely defined, which complicates the European control mechanism (Šepurin, 2015: 188).

Another limitation is the possibility for a state to express a reservation in relation to certain provisions of the European Convention which are contrary to the constitutional provisions. The reservations made must be specifically stated in terms of which parts are unconstitutional, because reservations of a general nature are not allowed. A possible middle ground between free assessment of the state when it is time to declare a state of emergency and the effective protection of human rights and freedoms at the international level is seen in determining more precise criteria

[10] In 1994, Protocol No. 11 of the Council of Europe established a permanent European Court of Human Rights (ECtHR) in Strasbourg. In the previous period, complaints were sent to the European Commission.

or "harmonious reconciliation" of state needs and the measures to prevent danger (Šepurin, 2015: 189-190).

A state of emergency also entails the possibility of multiple abuses "in the name of higher interests" of the power-holders. After lifting the state of emergency, the European Convention is fully implemented again. Yet, there is a clear distinction between the need of the government to act effectively in order to eliminate danger for the state and its citizens and the violation of human rights, excessive use of approved measures, or totalitarian tendencies, such as the arbitrariness of state supervision and the like.

During the state of emergency imposed to prevent COVID-19 transmission and infection, many countries introduced bans on public assembly or restricted the number of people in public gatherings, restricted the citizens' freedom of movement, used drones to monitor movement, collected geo-location data, imposed continuous bans on the movement of elderly person, curfew hours, and the like. The state authorities of some countries tried to impose more stringent prison sentences (for example, for "spreading fake news") or to allow the police to enter private premises without a court decision, and the like.

THE STATE OF EMERGENCY IN THE REPUBLIC OF SERBIA

Generally, declaring a state of emergency changes the operation of state bodies and society as a whole. The state of emergency leads to the concentration and personalization of governing powers (of the government, president, prime minister). During the state of emergency, the executive power rises above the legislative power (parliament)which returns to the scene by the decision to lift the state of emergency and (non) confirmation of the decisions of the executive power. The concentration and personalization of power is justified by the need to act quickly and efficiently during a state of emergency, whereas the meeting of parliament and the adoption of decisions with legal force by parliament would be slow and inadequate to the real and immediate danger: *Salus patriae supremus lex esto.*[11]

Domestic courts also have a significant place in the protection of human rights and freedoms. Their task is similar to international oversight. They should examine whether the existence of danger is real, whether the declaration of a state of emergency is necessary, and determine the proportionality of the derogative measures taken by the state government. Internal control does not exclude international control because there is always a danger of biased perception of the entire situation by domestic courts.

[11] Let the salvation of the homeland be the greatest law

The state of emergency in the Republic of Serbia was introduced on 15 March 2020, and lifted on 6 May 2020. One of the consequences of introducing the state of emergency is the issuance of the Order on the restriction and prohibition of the movement of persons in the territory of the Republic of Serbia.[12] This Order was issued by the Minister of the Interior, with the consent of the Minister of Health, on the basis of Article 2 of the Decree on Measures during the State of Emergency[13] and Article 15 (para. 1) of the Public Administration Act.[14] The insight into the normative acts which served as the basis for introducing curfew hours shows that Article 2 of the Decree on Measures during a State of Emergency gives the competent ministries the opportunity to temporarily restrict or prohibit the movement of persons in public places. However, having in mind the already mentioned Article 200 (para. 6) of the Constitution of the Republic of Serbia, the question of legality of the mentioned regulation is rightly raised. Namely, Article 200 (para. 6) of the Constitution explicitly states that "when the National Assembly is not in a position to convene, the measures which provide for derogation of human and minority rights may be prescribed by the Government, by decree, with the President of the Republic as a co-signatory". This leads to the conclusion that the curfew was not only imposed by the incompetent body but also that it was declared by an inappropriate act, in violation of the Serbian Constitution (Milić, 2020: 747-748).

In addition to the aforesaid problems related to issuing the Order, it should be noted that it was disputable what kind of liability is involved in case of violation of the curfew hours: misdemeanor liability or criminal liability. Thus, Article 4 (para.1) of the Misdemeanors Act[15] stipulates that misdemeanors may be incriminated by a legislative act or a decree, or by a decision of the Assembly of the Autonomous Province, the Municipal Assembly, the City Assembly and the City Assembly of Belgrade. It follows that the Minister of the Interior is not competent to issue an order on misdemeanors. However, by looking at the text of the Order, we can see that it refers to criminal responsibility for committing an offence envisaged in Article 248 of the Criminal Code, designated as non-compliance with health care regulations during an epidemic. The Order

[12] Naredba o ograničenju i zabrani kretanja lica na teritoriji Republike Srbije [Order on restriction and prohibition of movement of persons in the territory of the Republic of Serbia], Sl. glasnik RS, br. 34/20, 39/20, 40/20, 46/20, 50/20.

[13] Uredba o merama za vreme vanrednog stanja [Decree on measures during a state of emergency], Sl. glasnik RS, br. 31/20

[14] Zakon o državnoj upravi [Public Administration Act], Sl. glasnik RS, br. 79/05, 101/07 i 95/10, 99/14, 30/18–dr. zakon, 47/18

[15] Zakon o prekršajima [Misdemeanors Act], Sl. glasnik RS, br. 65/2013, 13/2016, 98/2016 -odlukaUstavnog suda, 91/2019-dr. zakon, 91/2019

on Amendments to the Order on Restriction and Prohibition of Movement of Persons in the territory of the Republic of Serbia[16] was passed, which included the possibility of establishing both criminal and misdemeanor liability. Thus, as prescribed by the legislator, criminal liability for non-compliance with the prohibition envisaged in items 1 and 2 of this Order arises in case of commission of a criminal offense under Article 248 of the Criminal Code. Misdemeanor liability arises on the basis of the Decree on Misdemeanor for violation of the Order of the Minister of Internal Affairs on restriction and prohibition of movement of persons in the Republic of Serbia,[17]which prescribes a fine of 50,000 to 150,000 RSD. In particular, the Decree on Misdemeanors introduced a highly disputable norm stating that a misdemeanor procedure may be initiated and completed not only in case of a misdemeanor, but also in case a criminal proceeding has been initiated against the perpetrator for a criminal offense including the characteristics of that misdemeanor, which is starkly inconsistent with Article 8 (para. 3) of the Misdemeanors Act. Namely, Article 8 (para. 3) of the Misdemeanors Act envisages a rule prohibiting a retrial (*ne bis in idem*) in the event that a person has already been convicted in criminal proceedings; thus, if the criminal offence has the characteristics of a misdemeanor, a misdemeanor proceeding cannot be initiated against that person; in case such a proceeding has been initiated or is underway, it cannot be continued and completed. In addition, another problem is that the Curfew Order prescribes a ban on unlawful conduct, while the Decree on Misdemeanors envisages a sanction for illegal behavior (Milić, 2020: 749-750).Yet, it should be noted that the Constitutional Court issued a Decision (IUo-45/2020)[18] stating that, "regardless of the prohibition envisaged in Article 8 (para.3) of the Misdemeanors Act, "the provisions of Article 4c (para. 6), Article 4d (para. 6) and Article 4d (para. 2) of the Decree on Emergency Measures and Article 2 of the Decree on Misdemeanors for Violation of the Order of the Minister of the Interior on Restriction and Prohibition of Movement of Persons in the Republic of Serbia were not in accordance with Article 34 (para. 4) of the Constitution of the Republic of Serbia.

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[16] Naredba o izmeni i dopunama Naredbe o ograničenju i zabrani kretanja lica na teritoriji Republike Srbije [Order on Amendments to the Order on Restriction and Prohibition of Movement of Persons in the Territory of the Republic of Serbia], Sl. glasnik RS, br. 46/2020

[17] Uredba o prekršaju za kršenje Naredbe ministra unutrašnjih poslova o ograničenju i zabrani kretanja lica na teritoriji Republike Srbije [Decree on Misdemeanor for Violation of the Order of the Minister of Internal Affairs on Restriction and Prohibition of Movement of Persons in the territory of the R. Serbia], Sl. glasnik RS, br. 39/2020

[18] Odluka Ustavnog suda Republike Srbije [Decision of the Constitutional Court], br. IUo-45/2020

The Decree on Misdemeanors and the Curfew Order ceased to be valid upon the adoption of the Decree on Amendments to the Decree on Measures during the State of Emergency[19] by a competent body as determined by law. However, it does not mean that all problems were solved when this new Decree entered into force. Namely, Article 6 (para. 2) of the Decree on Amendments to the Decree on Measures during the State of Emergency stipulates that misdemeanor proceedings will be initiated under the Decree on Misdemeanors shall be completed under the same Decree. This decision is not in compliance with Article 6 (para. 2) of the Misdemeanors Act which stipulates that, if the regulatory act is changed one or more times after the commission of the specific misdemeanor, the applicable regulatory act shall be the one that is most favorable (lenient) for the perpetrator. Considering the inconsistencies in the two legal texts, the author thinks that this contradiction should be resolved according to the principle of hierarchy of formal legal sources in our legal system; thus, given that regulatory acts are classified as bylaws, it undoubtedly removes all dilemmas regarding which act should be applied in case of initiating and conducting misdemeanor proceedings. In addition, it is important to emphasize that the Decree on Amendments to the Decree on Measures during the State of Emergency ceased to be valid and that it was not amended. The given situation was also in contradiction with Article 34 (para. 2) of the Constitution of the Republic of Serbia.

Furthermore, the abolition of the state of emergency by the National Assembly on 6 May 2020 did not resolve the problem of initiating and conducting misdemeanor proceedings for a violation of curfew hours. As previously noted, the problem may be resolved by using the relevant provisions of the existing legislative acts: Article 34 (para. 2) of the Constitution of the Republic of Serbia and Article 6 (para. 2) the Misdemeanors Act. A similar question arises regarding the possible criminal liability for the commission of the criminal offence of non-compliance with health care regulations during an epidemic, envisaged in Article 248 of the Criminal Code, particularly given the fact that the curfew Order and the Decree on Misdemeanors were invalidated (Milić, 2000: 752-753).

[19] Uredba o dopunama Uredbe o merama za vreme vanrednog stanja [Decree on Amendments to the Decree on Measures during the State of Emergency], Sl. Glasnik RS, br. 53/2020

QUESTIONABLE PROPORTIONALITY OF HUMAN RIGHTS RESTRICTIONS IN RELATION TO THE JUSTIFIABILITY OF IMPOSING RESTRICTIVE MEASURES IN THE REPUBLIC OF SERBIA

From the aspect of (dis)proportionality of the imposed measures, the public raised the issue of prohibition on the movement of persons over the age of 65 due to the risk of infection. The ban was justified by health professionals on the grounds of the fact that elderly people are a "risk group" and that such a measure was taken to protect their lives. The opponents of "locking down" the elderly claimed that it was a discriminatory measure, based on personal characteristics, and that the duration of such a measure was unjustified. Although the ban on the movement of elderly persons over the age of 65 was taken to protect their lives, it is debatable whether such a measure was proportionate. The author is convinced that there is no proportionality in this particular case. Although the rights of the elderly were restricted, the Ministry of Labor, Employment, Veterans and Social Affairs did not take the necessary measures within its competence to provide the needed support or organize assistance in a different manner. Thus, the elderly remained locked in their apartments without adequate care and assistance. Social welfare centers and social protection institutions were not given instructions on how to act in such situations. Under the pressure of the general public, these restrictions were later relaxed.

The disproportion in terms of restrictions on movement is also reflected in the ban on movement of people with autism. As it is extremely important for this category of people to adhere to their daily routines, the Commissioner for the Protection of Equality (Brankica Janković) responded to the parents' plea by sending an initiative to the competent ministry to allow the freedom of movement to children and adults with autism, as well as parents and guardians of autistic persons, for a limited time, near the place of residence, during the general ban on movement.[20]Like in cases involving the elderly, the restrictions for people with autism were relaxed one month after the state of emergency was imposed.

The freedom of expression, envisaged in Article 46 of the Constitution, is subject to restrictions during a state of emergency. The content of this right entails the freedom to seek, receive and impart information and ideas through speech, writing, art, or otherwise (Art. 46, para.1). The same Article prescribes that freedom of expression may be restricted by the law for the following reasons: protection of rights and reputation of others, protection of the authority and impartiality of the court, protection

[20] Danas (2020): Retrieved 24, May 2021 from: https://www.danas.rs/drustvo/poverenica-dozvoliti-starateljima-i-osobama-sa-autizmom-kretanje-u-ogranicenom-vremenu/

of public health, protection of the morals of a democratic society, and protection of national security of the state (Art. 46, para. 2) The General Mandatory Instructions, issued by the State Public Prosecutor,[21] prescribe urgent action in case of the criminal offense of causing panic and disorder (Article 343 of the Criminal Code).[22]Under this provision, citizens were prosecuted for the commission of this crime on suspicion of spreading false news through social networks. Trials for this crime were initially held via Skype. A journalist (Ana Lalić) was arrested and detained for disclosing the alarming situation in healthcare, but charges against her were subsequently dropped.On9April 2020, the High Judicial Council issued a Conclusion,[23]taking the position that the Decree on the manner of participation of defendants in the main trial in criminal proceedings[24] held during the state of emergency applies only to the criminal offense of illicit trafficking, failure to comply with health regulations during an epidemic, and the criminal offense of transmission of infectious diseases, while the offence of causing panic and disorder is to be excluded from Skype trials.

Article 50 of the Constitution guarantees *the freedom of the media* and envisages that "censorship shall not be applied in the Republic of Serbia" (Article 5, para.3). This general provision contains no further specification or explicit provision on the prohibition of censorship, nor punishment for the existence of censorship (Pajvaničić, 2009: 67). Yet, Article 5 (para. 3) provides that the competent court may prevent the dissemination of information through public media for precisely stated reasons:

> […] when it is necessary in a democratic society to prevent inciting to violent overthrow of the system established by the Constitution or to prevent violation of territorial integrity of the Republic of Serbia, to prevent propagation of war or instigation to direct violence, or to prevent advocacy of racial, ethnic or religious hatred enticing discrimination, hostility or violence."(Article 50, para 3 of the Constitution)

In the Conclusion issued on 28 March 2020[25], the Government of Serbia centralized the communication of public information about the suppression of the infectious disease COVID-19 caused by the SARS-

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[21] Opšte obavezno uputstvo [General mandatory instructions], Sl. glasnik RS, broj 2/20

[22] Krivični zakonik Republike Srbije [Criminal Code of the Republic of Serbia], Sl. glasnik RS, br. 85/2005, 88/2005 - ispr., 107/2005-ispr., 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016 i 35/2019

[23] Zaključak Visokog saveta sudstva [Conclusion of the High Judicial Council], br. 52/20

[24] Uredba o načinu učešća optuženih na glavnom pretresu u krivičnom postupku [Decree on the Manner of Participation of the Accused in the Main Trial in Criminal Proceedings], Sl. glasnik RS, br. 49/20

[25]Zaključak Vlade Republike Srbije (05 broj 53-2928/2020) [Conclusion of the Government of the RS], Sl. glasnik RS, br. 48/2020 od 31.3.2020.;https://www.propisi.net/zakljucak-vlade-05-broj-53-2928-2020/

CoV-2 virus. The authority to impart information on this matter was vested in the Crisis Team. Under the pressure of the international and domestic public, the controversial conclusion was subsequently withdrawn. As noted by the Council of Europe, in the Recommendation of the Committee of Ministers of the Member States on the protection of journalism and the safety of journalists and other media actors,[26]

> "a chilling effect on freedom of expression arises when interference with this right causes fear, leading to self-censorship and ultimately the absence of public debate, which is to the detriment of society as a whole. Accordingly, state authorities should avoid taking measures or imposing sanctions that have the effect of discouraging participation in public debate." (CM/Rec (2016)4[1], item 33)

Article 51 of the Constitution envisages the *right to information*, specifying that everyone has the right to be truthfully, fully and timely informed about issues of public importance, and that the media are obliged to respect that right (Art. 51, para.1). Yet, the legislator failed to envisage a penalty for non-compliance with this right which is closely related to the freedom of the media. Article 51 further specifies that everyone has the right to access information/data kept by state bodies, institutions and organizations with delegated public authorities, in accordance with the law (Article 51, para.2). Article 16 of the Act on Free Access to Information of Public Importance[27] stipulates that competent authorities have to respond to requests for information on the public health within 48 hours from receiving the request. This time limit was frequently disregarded, as indicated by the NGO sector which urged the governments to promote and protect free access to information and provide for its free flow during the pandemic.[28]

In addition to the problems at the normative level regarding the observance of the right to information, we will be briefly referring to the previously mentioned case of the detained journalist Ana Lalić. While reporting on the current situation in healthcare, she was charged with and

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[26] CoE: Recommendation CM/Rec (2016)4[1] of the Committee of Ministers to Member States on the protection of journalism and safety of journalists and other media actors, CoECommittee of Ministers, 13 April 2016; https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016806415d9#_ftn1

[27] Zakon o slobodnom pristupu informacijama od javnog značaja [Act on Free Access to Information of Public Importance], Sl. glasnik RS, br. 120/2004.54/2007,104/2009 i 36/2010

[28] UNHR Office of the High Commissioner (OHCHR, 19 March 2020): COVID-19: Governments must promote and protect access to and free flow of information during pandemic – International expert; Retrieved 13 May 2021 from: https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25729&LangID=E

detained for allegedly causing panic and riots. Although the charges were subsequently dropped, this case illustrates the inadequate conduct of the state which clearly violated the citizens' right to free access and flow of information, creating fear among journalists and citizens in general, indirectly limiting the right to expression, and making fertile soil for the emergence and development of self-censorship.

In terms of criminal proceedings in our country, we may briefly examine the phenomenon of online trials via Skype. Namely, the so-called Skype trials are not envisaged in the Criminal Procedure Code (CPC).[29] Yet, Article 447 provides that the judicial panel in second-instance proceedings may decide to institute a session via an audio or video link (provided there are adequate technical tools available) in case the panel finds that securing the presence of the defendant in proceedings is aggravated by security or other reasons (Art. 447, para. 4 CPC). Thus, instituting Skype trials in the first instance criminal procedure violated several principles that ensure the fairness of criminal procedure (fair trial and due process). One of these principles is the principle of immediacy. In this regard, we may refer to Article 13of the CPC which provides for a trial in the presence of the defendant in court. Although Article 381 of the CPC prescribes certain exceptions when a person may be tried *in absentia* (for justified reasons, for being at large, or for being inaccessible to the authorities), the epidemic or pandemic situation is not among them. Concurrently, Skype trials violated the principle of publicity envisaged in Article 362 of the CPC, which provides that "the main hearing shall be public."

Another issue is related to the respect for the freedom of religion (Art. 43 of the Constitution), which may be restricted by law only if that is necessary in a democratic society to protect lives and health of people, morals of democratic society, freedoms and rights guaranteed by the Constitution, public safety and order, or to prevent inciting of religious, national, and racial hatred. On 26 March 2020, the Government of the Republic of Serbia passed a Conclusion recommending safe performance of religious services in churches and religious communities during the state of emergency and the epidemic.[30] It stipulates that religious services should be performed in religious buildings and in the open without the presence of believers, whereas burial services should be performed in the presence of a small number of people, respecting all preventive measures prescribed for the effective suppression of infectious diseases and the pro-

[29] Zakonik o krivičnom postupku [Criminal Procedure Code], Sl. glasnik RS, br. 72/2011, 101/2011, 121/2012, 32/2013, 45/2013, 55/2014, 35/2019 i 27/2021 - odluka US

[30] Zaključak kojim se crkvama i verskim zajednicama preporučuje bezbedno vršenje verskih obreda za vreme trajanja vanrednog stanja i epidemije [Conclusion recommending safe performance of religious services in churches and religious communities during a state of emergency and epidemic], Sl. glasnik RS, broj 43/2020.

tection of human life and health (Conclusion 05 no. 53-2868/2020, item 1). It is important to note that the Conclusion is not a legally binding document. However, certain restrictions on the freedom of religion had already been imposed by the Order prohibiting public assembly of more than five people at the same time (both indoors and outdoors). This ban was violated on several occasions, especially during Easter holidays, regardless of the fact that the curfew was in force.[31]

In this context, we may refer to an interesting position of Prof. Zoran Čvorović from the Faculty of Law in Kragujevac. In his argumentation, Prof. Čvorović refers to Article 31 (para. 3) of the Churches and Religious Communities Act,[32] which prescribes that the place of worship is inviolable, as well as to Article 8 of the Higher Education Act,[33]which stipulates that the premises of a higher education institution are inviolable, whereby members of internal affairs bodies cannot enter the premises without the permission of the competent body of that institution, except in cases involving danger to general safety, life, physical integrity, health or property. Thus, Prof. Čvorović emphasizes that freedom of religion is an absolute right, that it is not subject to any restrictions, and that the police had no authority to enter religious premises, to make unauthorized recordings, to take identification data, and to violate the worshipers' right to privacy and freedom of religion even during the state of emergency and curfew.[34] Yet, the analogy with the provision in the Higher Education Act is unacceptable in this case. In order to refute Prof. Čvorović's thesis that freedom of religion is an absolute right, we may refer to Article 9 of the European Convention, and relevant ECtHR practice. One of the envisaged grounds for restricting the freedom of religion is the protection of health. Thus, it will be almost impossible to prove that the imposed restrictions were not necessary in a democratic society.

CONCLUSION

Many countries worldwide were quite unprepared to encounter the pandemic caused by the corona-virus COVID-19, particularly in terms of

[31] N1 Info (April 2020): Retrieved 22, May 2021 from: https://rs.n1info.com/vesti/a589718-liturgija-u-doba-korone/

[32] Zakon o crkvama i verskim zajednicama [Churches and Religious Communities Act], Sl. glasnik RS, br. 36/2006

[33] Zakon o visokomo brazovanju [Higher Education Act], Sl. glasnik RS, br. 88/2017, 73/2018, 27/2018 - dr. zakon, 67/2019 i 6/2020 - dr. zakon

[34] Srpsko-rusko udruzenje Pravoslavna porodica (3. April 2020): Čvorović: Policija nezakonito upadala u crkve (Illegal Police Raid on Churches); Retrieved 22 May 2021 from: http://православнапородица.орг.срб/index.php/apokalipsa/2243-zoran-cvorovic-policija-nezakonito-upada-u-crkve

its magnitude, duration and danger to the general public health. The Republic of Serbia was no exception. Considering the manner of handling and managing the pandemic, we may conclude that there was no clear plan as to when and what measures should be taken. It is clearly illustrated by the fact that the state passed a general ban on movement without taking into account the special needs of certain categories of the population. The manner of adopting certain measures was also disputable, which made the imposed measure obviously disproportionate. The same is true for other controversial situations, such as the introduction of the so-called Skype trials, the centralization of the right to information, and the restriction of religious freedoms. While it remains debatable whether the freedom of religion can be limited by a conclusion issued by the Government, the international standards introduced by the European Convention on Human Rights and the case law of the Court show that the Republic of Serbia had legal grounds to restrict the freedom of religion on the basis of protection of human health. On the other hand, the issue of (dis)proportionality, duration and discriminatory nature of the imposed measures is still disputable.

In March 2020, the Constitutional Court of the Republic of Serbia received an initiative to initiate proceedings for assessing the constitutionality and legality of the Decision on declaring a state of emergency. On May 22, 2020, the Constitutional Court issued a Decision rejecting the initiative.[35]Article 36 of the Constitutional Court Act[36]explicitly prescribes the elements that each initiative must contain in order to be admissible: the name of the general act and the designation of the provision it is based on, the title and number of the Official Gazette in which the act was published, the legal grounds on which the proposal is based, the specific proposal or request, and other data relevant to the assessment of constitutionality or legality. Otherwise, the initiative is rejected. Based on the above, it is not clear how the Constitutional Court made the decision to reject the mentioned initiative, without stating the reason for such a decision, while examining the merits. Another objection to the Decision is that the Constitutional Court did not examine the issue of human rights restrictions (Nastić, 2020: 86).

[35] Ustavni sud R. Srbije (2020): Rešenje o odbacivanju inicijative za pokretanje postupka za ocenu ustavnosti i zakonitosti Odluke o proglašenju vanrednogstanja [CC Decision on rejecting the initiative for instituting proceedings for assessment of constitutionality and legality of the Decision to declare a state of emergency] br. IVo-42/2020, Ustavni sud Srbije, Beograd, Sl. glasnik RS, br. 29/20

[36] Zakon o Ustavnom sudu [the Constitutional Court Act], Sl. glasnik RS, br. 109/2007, 99/2011, 18/2013 - odluka US, 103/2015 i 40/2015 - dr. zakon

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Uredba o dopunama Uredbe o merama za vreme vanrednog stanja [Decree on Amendments to the Decree on Measures during the State of Emergency], Sl. glasnik RS, br. 53/2020

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ОГРАНИЧАВАЊЕ ЉУДСКИХ ПРАВА И ВАНРЕДНО СТАЊЕ

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Резиме

Пандемија изазвана вирусом COVID-19 донела је много проблема државама широм света. Обим распрострањености и опасност вируса довели су до тога да државе морају да предузимају све могуће мере како би покушале да контролишу ширење вируса. Једна од тих мера јесте увођење ванредног стања. Тако је Република Србија донела 15. марта 2020. године одлуку о увођењу ванредног стања због претње масовног обољевања и умирања људи. С друге стране, јавила су се питања да ли је било неопходно уводити ванредно стање или је било могуће увести ванредну ситуацију у којој је обим ограничавања људских права незнатан. У раду су представљени међународни стандарди у погледу основа за увођење ванредног стања како бисмо на адекватан начин сагледали потребу његовог увођења. У стручној, али и у лаичкој јавности, повела се дискусија да ли је процедура увођења ванредног стања испоштована.

Увидом у уставна, али и законска решења долазимо до закључка да Република Србија није поштовала сопствена нормативна решења у погледу увођења ванредногстања, јер се поставило питање да ли је могуће да Влада Републике Србије ограничи седницу Народне скупштине Србије на којој би се расправљало о његовом увођењу. Уједно, поставило се питање сразмерности уведених ограничења. Неадекватност уведених мера огледа се у ограничавању кретања свим категоријама становништва, не узимајући у обзир њихове посебне потребе. Поред тога, спорна су била ограничења у вези слободе изражавања и слободе медија. Право на правично суђење угрожено је могућношћу да се за поједина кривична дела суди путем Скајп апликације. Иако је доста дискусије изазавало ограничење уживања слободе вероисповести, треба нагласити да је Република Србија само код овог прав аиспоштовала међународне и домаће стандарде. Представљени проблеми у раду нас доводе до закључка да је Република Србија могла знатно боље да реагује на ситуацију изазвану вирусом COVID-19, при чему би обим ограничења људских права био знатно мањи.