THE RIGHT TO FREEDOM OF MOVEMENT DURING THE COVID-19 PANDEMIC

Ana Čović, PhD[1]
Institute of Comparative Law, Belgrade, Serbia
Oliver Nikolić, PhD[2]
Institute of Comparative Law, Belgrade, Serbia

Abstract: We have entered the second year of a global pandemic in the world, which has resulted in the adoption of various measures that limited certain human rights, especially freedom of movement. This limitation was felt by everyone - employees, children, and especially people older than 65. It therefore seems necessary to try to answer the question of where the limits of restrictions on human rights and freedom of movement are during a pandemic, what are the differences in restrictions imposed by some states, and what is the content of court decisions in situations where this issue is a subject to court proceedings. Also, the paper will analyze the latest judgment of the European Court of Human Rights regarding the protection of freedom of movement during the pandemic in the case of Terheş v. Romania.

Keywords: COVID - 19, freedom of movement, human rights, state of emergency, case law, Constitutional Court, European Court of Human Rights.

INTRODUCTION

Although we know that rights guaranteed by the Constitution may be restricted only when this is permitted by law, to the extent stipulated by the Constitution, without encroaching upon their substance and without lowering their attained level (Article 20 of the Serbian Constitution), while it is possible to prescribe by law the manners of their exercising when this is expressly stipulated by the Constitution and necessary due to the nature of the right itself, a year and a half spent in a pandemic has given rise to many questions with regard to compliance with these generally accepted right-related provisions. Is there always a proportionate relation between a possible right restriction and its purpose, that is

1 a.covic@iup.rs
2 o.nikolic@iup.rs

to say, do we resort to lesser restrictions if the purpose can be attained by means of them, or does it happen that state authorities abuse the powers vested in them by the will of citizens in situations when we are faced with particularly challenging circumstances that could not be accurately anticipated and regulated during legal standardization in different areas? Derogations from guaranteed rights are permitted during the state of emergency or war to the extent deemed necessary and they cease to be effective upon ending of the state of emergency or war (Article 202 of the Serbian Constitution), and on 15 March 2020, the President of the Republic, the President of the National Assembly, and the Prime Minister passed a Decision on the proclamation of the state of emergency in the territory of the Republic of Serbia, which was effective until 6 May 2020, when it was abolished by the Decision of the National Assembly. On 10 March 2020, the Serbian Government passed a decision proclaiming COVID-19 a contagious disease.

Decree on measures in the state of emergency (Official Gazette of the Republic of Serbia no. 31/2020-3, dated 16 March 2020) restricted and prohibited the movement of people with this virus, as well as persons under suspicion of being infected; it prohibited the organization of indoor assemblies and restricted the organization of outdoor assemblies. Decree on the restriction and prohibition of movement for persons in the territory of the Republic of Serbia (Official Gazette of the Republic of Serbia, nos. 34/2020, 39/2020, 40/2020, 46/2020, and 50/2020) prohibited movement within a period longer than 24 hours for all persons in the country's territory.

Similar situations happened in many countries, whose population was - over a period of several months - for the first time disabled to freely move in a particular period of time during daytime, but also in a period of several successive days, due to which first court rulings appeared and dealt with the justifiability of the extent of movement restrictions during the pandemic. Given the current events, several new waves of the pandemic, and new virus variants that are emerging despite the ongoing vaccination, or the fact that the people have been inoculated with vaccines made by different manufacturers in a surprisingly short span of time, a long-term solution to this, first of all, health but also financial crisis, whose full consequences are yet to be revealed in the upcoming period, does not seem to be on the horizon. The initial euphoria over "a return to normal life" after vaccination and the hope and trust of a large number of citizens in the efficacy of the measures taken are now replaced by suspicion, uncertainty, and fear of the things that the future might bring. We cannot tell whether the coming autumn will bring new movement restrictions due to the new variant that spreads more quickly than the previous ones, but we can suppose so. Until then, there is little else for us to do but see what kind of a stance was assumed by the European Court for Human Rights in its most recent ruling concerning the legitimacy of movement restrictions during the pandemic in Romania, but also by the Constitutional Courts of certain states, whose decisions basically differ from one another, primarily decisions rendered by the Constitutional Court of the Republic of Serbia and the Constitutional Court of Bosnia and Herzegovina. Given that the exceptional measures taken by the state during the emergency situation have to be legal, necessary, consistent, necessary for the accomplishment of a legitimate goal as based on scientific evidence, and in accordance with international guidelines (Valerio, 2020), a question arises whether the prescribed measures were arbitrary, discriminatory in their application, that is to say, whether human dignity was respected during the challenging months behind us.

THE RIGHT TO FREEDOM OF MOVEMENT – THE CONCEPT AND LEGISLATION

The right to freedom of movement includes the right to freedom of movement in a country for those who are lawfully staying in that country, the right to exit any country and the right to enter a country of which you are a citizen (Pécoud, 2013).

In its Article 5, the European Convention on Human Rights guarantees liberty and security, prescribing that everyone has the right to liberty and security of person, and that no one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by the law. These cases are given in the following order: the lawful detention of a person after conviction by a competent court; the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law; the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so; the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority; the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants; the lawful arrest or detention of a person to prevent his effecting on authorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful, and everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation (The European Convention on Human Rights, 1950).

Protocol 4 to the 1963 European Convention on Human Rights secures certain rights and liberties that are not included in the Convention and its first Protocol. Article 2 of this Protocol guarantees freedom of movement and stipulates that everyone lawfully within the territory of a state shall, within that territory, have the right to liberty of movement and to choose his residence, and it also stipulates that everyone shall be free to leave any country, including his own. No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and necessary in a democratic society in the interests of national security or public safety, for the maintenance of ordre public, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. In similarity with Article 15 of the Convention as prescribing the possibility of derogation from guaranteed rights under emergent circumstances, Article 2 of the Protocol stipulates that the rights in particular areas may be subject to restrictions imposed in accordance with law and justified by the public interest in a democratic society. Derogations refer to the time of war or other public emergency threatening the life of the nation, but to the extent required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law. In that case, any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor; it shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.

Article 13 of the Universal Declaration of Human Rights (UDHR) deals with internal and international mobility and stipulates as follows: (1) “Everyone has the right to freedom of movement and resi-

dence within the borders of each state" and (2) "Everyone has the right to leave any country, including his own, and to return to his country" (Universal Declaration of Human Rights, 1948).

Article 12 of the International Covenant on Civil and Political Rights prescribes that everyone lawfully within the territory of a state shall, within that territory, have the right to liberty of movement and freedom to choose his residence, that everyone shall be free to leave any country, including his own, and that no one shall be arbitrarily deprived of the right to enter his own country. Here, too, it is precisely emphasized that the above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order, public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant (The International Covenant on Civil and Political Rights, 1966).

Within the European Union, the legal framework for the free movement of people also consists in Article 3 (2) of the Treaty on European Union (1992), Article 21 of the Treaty on the Functioning of the European Union (2009), and Article 45 of the Charter of Fundamental Rights of the European Union (2000). The establishment of an internal market with a free movement of people begins after the conclusion of the Schengen Agreement on 14 June 1985 and the Convention implementing the Schengen Agreement, which was signed on 19 June 1990 and came into effect on 26 March 1995. The Schengen area, which is one of the fundamental achievements of the European Union, has recently faced a threat to its survival due to the COVID-19 pandemic, given that the member-states were closing their borders in an attempt to prevent the spreading of the virus, but also due to the inflow of refugees and migrants into the EU and the increasing frequency of terrorist attacks. Directive 2004 /38 / EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the European Union was adopted on 29 April 2004 for the purpose of consolidating different laws and taking into consideration a large number of court practices related to the people's freedom of movement (Directive 2004/38/EC of the European Parliament and of the Council).

In our internal law, of importance is Article 39 of the Constitution of the Republic of Serbia which guarantees that everyone shall have the right to free movement and residence in the Republic of Serbia, as well as the right to leave and return. Freedom of movement and residence, as well as the right to leave the Republic of Serbia may be restricted by the law if necessary for the purpose of conducting criminal proceedings, protection of public order, prevention of spreading contagious diseases or defense of the Republic of Serbia (Constitution of the Republic of Serbia, 2006).

In addition, Article 133 of the Criminal Code incriminates the violation of freedom of movement and residence, prescribing a fine or imprisonment up to one year for a person that unlawfully denies or restricts freedom of movement or residence in the territory of Serbia to a citizen of Serbia, and its paragraph 2 envisages a qualified offence for an official person in discharge of duty and imprisonment up to three years (Criminal Code, *Official Gazette of RS*, no. 85/2005, 88/2005 - corrected, 107/2005, 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016 and 35/2019).

Imprecise and broad formulations in international and internal law, such as "public danger", "public security", "national security", "public health", always allow for the possibility of abuse in critical situations, as has been the case with the latest ongoing pandemic, not only when it comes to freedom of movement but also when it comes to other rights and liberties guaranteed by the Constitution and law. This is also perceived as even more topical when we take into consideration certain hints at the possibility of introducing compulsory vaccination for particular categories of the population in an ever-increasing number of countries worldwide, as well as the possibility of introducing COVID passports and health passes as prerequisites for the free crossing of borders, travelling, visiting different cultural events, but also restaurants. Because of all these events and, as it seems, ever-more repressive

measures taken by the authorities, a question arises as to where the borderline is, one that must not and may not be crossed in relation to the respect, inalienability and inviolability of natural human rights, which have not been given to men by the state and which men, as a result, do not owe to the state, and as to when and where a man's right but also his duty to future generations to uncompromisingly protect these rights begins.

THE EXTENT OF RESTRICTIONS OF FREEDOM OF MOVEMENT IN PARTICULAR COUNTRIES DURING THE COVID-19 PANDEMIC AND PROTECTION BY CONSTITUTIONAL COURTS

Between March 2020 and June 2020, most EU member-states, 19 of them, adopted the constitutional emergency state, the emergency regime prescribed by the law, or both, while a smaller number of countries, 8 of them, made it possible for their governments to adopt measures of restriction by means of special or common legislation (Diaz Creo & Kotanidis, 2020). Out of the 17 member-states with a constitutional clause that is convenient for responding to the pandemic, 10 decided to use it in the first wave of the pandemic (Bulgaria, Czechia, Estonia, Finland, Hungary, Luxembourg, Portugal, Romania, Slovakia, Spain), 7 member-states (Croatia, Germany, Lithuania, Malta, Holland, Poland, and Slovenia) decided not to proclaim the state of emergency, while legal regimes were applied in 14 member-states (Bulgaria, Croatia, France, Germany, Hungary, Italy, Latvia, Lithuania, Malta, Poland, Portugal, Romania, Slovenia, and Slovakia) (Diaz Creo & Kotanidis, 2020). Special legislative authorities that were exercised by the executive branch were used only in a few countries: Belgium, Greece, Italy, Romania, and Spain (Diaz Creo & Kotanidis, 2020).

Belgrade Centre for Human Rights analyzed the way and the extent to which European countries restricted the right to freedom of movement for the purpose of preventing the spreading of the disease, and the results show that the measures of restriction and prohibition of freedom of movement for the citizens of Serbia were certainly among the most drastic ones in Europe. At the Belgrade Centre for Human Rights, it was stated that frequent changes in the scope and temporal restrictions of freedom of movement, as well as illogicalities in the sequence of introducing and removing the measures, created confusion among the citizens, who often had difficulties adapting their behavior to currently valid restriction measures, which is testified to by a large number of cases where citizens were penalized because of their violations of movement restriction measures (Belgrade Centre for Human Rights, 2020). So, in a study which included 39 European states, it is stated that 69% of the states introduced measures restricting freedom of movement, only 18% of the states introduced a curfew, and 15% of the states introduced measures additionally restricting freedom of movement for elderly persons (Belgrade Centre for Human Rights, 2020).

By means of Order on the restriction and prohibition of freedom of movement in the territory of the Republic of Serbia, a curfew was introduced in Serbia during the state of emergency, and the citizens of Serbia were prohibited to move during business days from 5 PM (for several days also from 3 PM) to 5 AM, and during the weekend, from 5 PM on Friday to 5 AM on Monday. Full prohibition of movement for persons older than 65 lasted for as many as 34 days, with the possibility of going to a grocery shop once a week, on a particular day, from 4 AM to 7AM. Professor Marinković emphasizes that this order violates the right to freedom of movement as guaranteed by the Constitution, but also the right to private assembly of all citizens, and that it regulates a matter which may only be the subject of a decree that the Government passes with the President as a co-signatory (Article 200, paragraph 6 of the Constitution), and by no means the subject of the order issued by a minister, so this very fact is

enough to dispute the order before the Constitutional Court. Also, he argues that the Minister of the Interior introduces new violations into the legal system although the Constitution clearly prescribes that "criminal actions and criminal sanctions are determined by the law, from which it is impossible to derogate even in the state of emergency" (Marinković, 2020). A similar opinion was shared by those who unsuccessfully tried, before the Constitutional Court of the Republic of Serbia, to dispute the constitutionality and legality of the Order, but also of the Decision on the proclamation of the state of emergency.

So, in a decision of the Constitutional Court of the Republic of Serbia, dated 22 May 2020 (IУo-42/2020), with regard to the initiatives for evaluating the constitutionality and legality of the Decision on the proclamation of the state of emergency, the Council of judges rejected the initiatives for launching a procedure for the evaluation of the constitutionality and legality of the Decision on the proclamation of the state of emergency (Official Gazette of RS, no. 29/20), as well as the demands for cancelling the execution of individual acts and actions undertaken on the basis of the disputed Decision. Submitters of the initiatives believed that the disputed decision was made although the conditions for the proclamation of the state of emergency had not been met, and that, contrary to the Constitution, the state of emergency was proclaimed with the President of the National Assembly, the Prime Minister, and the President of the Republic as co-signatories, instead of it being proclaimed by the National Assembly. Also, with respect to the existence of an epidemic as a reason for the National Assembly not to convene, the submitters of the initiatives pointed out that it was a legally unacceptable argument, since the Order on the proclamation of the COVID-19 contagious disease epidemic (Official Gazette of RS, number 31/20) was passed on 19 March 2020, after the disputed decision, and the general prohibition of retroactivity (Article 197 of the Constitution) does not allow for justifying the National Assembly's alleged inability to convene by a retroactively proclaimed epidemic. In the explanation of the Constitutional Court's decision it is stated that "the Constitutional Court must remind that, in its procedure of evaluating constitutionality and legality, it judges neither based on the facts nor about the facts, but, bearing in mind the things mentioned earlier about the constitutional condition for the proclamation of the state of emergency, the Constitutional Court decides that the COVID-19 contagious disease could be considered a public danger threatening the existence of the state or citizens, in terms of Article 200 of the Constitution… and in relation to this decides that the peculiarity of the state of emergency resides exactly in the fact that it permits derogation from the regular regime of human rights in order to overcome the emergency circumstances as effectively as possible and re-establish the disrupted public order… The Constitutional Court concludes that the allegations made by the submitters of the initiatives are not based on constitutional law" (Decision on Rejecting the Initiative of the Constitutional Court of the Republic of Serbia, No. IУo-42/2020). In a separate opinion expressing agreement with the aforesaid decision, judge Jovan Ćirić states that "the general institute of extreme necessity does not have to be solely connected with criminal law … that it was possible for extreme necessity to be valid during the coronavirus pandemic… Under the circumstances of a relatively high COVID-related mortality rate, absence of medications, and insufficient knowledge of the entire coronavirus phenomenon, the deprivation of freedom of movement presented itself as a measure of extreme necessity and purposefulness."

According to data of the World Health Organization, as of 19 July 2021, close to 190,000,000 confirmed cases of COVID-19 infection have been registered, as well as around 4,000,000 deaths, which makes a mortality rate of about 2.15% (World Health Organization, 2021). According to the same data, as of 19 July 2021, a total of 718,465 cases of COVID-19 infection have been registered in Serbia, of which 7,080 deaths, which makes a mortality rate lower than 1%, so it is not quite clear what the statements about a "relatively high mortality rate", which are used as justification for the extremely restrictive measures taken by the authorities, were based on. The argument of "insufficient knowledge of

the entire coronavirus phenomenon" pointed out by judge Ćirić seems like more reasonable and more truthful, given that even today, a year and a half after the beginning of the pandemic, we are witnessing a general confusion and the absence of consensus, even among the members of the medical profession, all over the world. High expectations and hopes that vaccination (which 50% of the population have undergone) and a collective immunity acquired after a certain number of people have recovered from the virus would restore "normal life" in the world are slowly losing their credibility as new variants multiply with every coming "wave". At the same time, questions arise as to which vaccine (made by which manufacturer) protects from which variant and in what period of time, so that states are faced with a complex task of determining more precisely the conditions for travelling and border-crossing. Moreover, it is necessary to know that, in all the EU member-states that proclaimed the constitutional state of emergency, with the exception of Estonia and Slovakia, the national parliament participated in deciding to proclaim or prolong the state of emergency, because the parliament had to proclaim the state of emergency (Bulgaria), approve the proclamation of the state of emergency (Finland, Portugal, Romania, and Czechia), or approve the prolongation thereof (Diaz Creo & Kotanidis, 2020).

In the second decision of the Constitutional Court of the Republic of Serbia no. IУо-45/2020, dated 17 September 2020, the procedure for establishing the unconstitutionality of the Order on the restriction and prohibition of movement in the territory of the Republic of Serbia was cancelled. In terms of the allegations stated in particular initiatives, according to which the measures of movement prohibition deprived the elderly (persons aged 65 or more) of their freedom and so encroached upon their constitutional right to freedom and personal liberty (Article 27 of the Constitution), that is, upon their additional rights in case of deprivation of freedom without a court decision from Article 29 of the Constitution, the Court finds that the measures which included derogation from the constitutional right of freedom of movement, and which were necessary for the suppression and prevention of the spreading of the COVID-19 contagious disease and the protection of the population from that disease during the state of emergency, do not constitute the deprivation of freedom of said persons, and thereby these measures cannot be brought into legal connection with the violation of guaranteed rights from Articles 27 and 29 of the Constitution. In the Court's explanation it is stated that "the prescribed measures of prohibition of movement for particular categories of persons do not constitute deprivation of freedom neither according to their purpose nor according to their contents… Similarly to this, patients who effectively suffer from certain diseases that, according to the rules of the medical profession, require staying in hospital – which, in particular situations, includes a longer stay in a hospital room or even attachment to particular devices used for conducting therapy, maintaining vital functions or making a diagnosis, and for the purpose of carrying out relevant medical interventions which also sometimes include a longer stay in hospital for the purpose of recovery and the like – are definitely not deemed as persons who have been deprived of freedom." Moreover, it is stated that "not even from the contents of prescribed measures does it follow that they are aimed at deprivation of freedom… The contents of those measures essentially boil down to creating necessary conditions for effective protection from a dangerous contagious disease under specific circumstances, targeting elderly citizens, which in the largest number of cases is directly related to particular chronic diseases that are typical of elderly people" (Decision of the Constitutional Court, No. IУо-45/2020). In a separate opinion, judge Tamaš Korhec points out that even "if, after the cessation of validity of the measures and regulations by means of which they were regulated, we confirm legal flaws, even formal-law flaws of these regulations, with this we will legitimize the violation of law, relativize the significance of respect for the procedure, the competence of various bodies, and the constitutionally established relationship between the branches of government, and even the relationships within the same branch of government… the court must not confirm the constitutionality of a state body's order, not even when the latter constitutes a justifiable exercising of power under emergency circumstances; the courts exercise legal authority, and they

have to stick with the constitution and the law, or otherwise they become instruments of a certain political ideology."

Judges of the Constitutional Court of Bosnia and Herzegovina had a somewhat different opinion. By orders of the Federal Department of Civil Protection of 20 and 27 March 2020, which ordered a prohibition of movement for persons under 18 and above 65 years old in the territory of the Federation of Bosnia and Herzegovina, the right to freedom of movement from Article II/3.m of the Constitution of Bosnia and Herzegovina and from Article 2 of Protocol 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, in relation to appellants and all other persons in the relevantly same factual and legal situation, was violated, as decided by the Constitutional Court of Bosnia and Herzegovina on 22 April 2020 with Decision no. AP 1217/20 (Official Gazette of BiH, no. 26/20). Also, the Government of the Federation of Bosnia and Herzegovina and the Federal Department of Civil Protection were ordered to harmonize, within 5 days of receipt of decision, the Order of the Federal Department of Civil Protection with standards from the Constitution of Bosnia and Herzegovina and Protocol 4 to the European Convention, and also to notify, within three days, the Constitutional Court about the execution of the order from this decision. According to the opinion of the Constitutional Court, the disputed measures do not meet the requirement of consistency from Article 2 of Protocol 4 to the European Convention on Human Rights, because it is not possible to see from the disputed orders what the estimations of the Federal Department of Civil Protection were based on, estimations that the disputed groups the measures refer to are at a higher risk of contracting or spreading the COVID-19 infection, and at the same time the possibility of introducing more relaxed measures was not considered if such a risk justifiably exists, they were not strictly restricted in terms of time, and the obligation of their regular reevaluation was not established for the purpose of ensuring that they last only as long as it is "necessary" in the sense of Article 2 of Protocol 4 to the European Convention on Human Rights, that is to say, that they are eased or abolished as soon as the situation allows for such a thing to take place.

Eight months later, the constitutional Court of Bosnia and Herzegovina once again stands on the first line of defense of human rights and fundamental freedoms of its citizens. By Order of the Constitutional Court of Bosnia and Herzegovina AP-3683/20, dated 22 December 2020, on the violation of the human rights to private life and freedom of movement, and in relation to the wearing of protective masks and the so-called curfew, violations of the right to "private life" from Article II/3.f of the Constitution of Bosnia and Herzegovina and from Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms are established, due to Orders on mandatory wearing of masks and the right to freedom of movement from Article II/3.m of the Constitution of Bosnia and Herzegovina and from Article 2 of Protocol 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms. In this manner, a legal basis was provided for all the citizens and legal entities in the Federation of Bosnia and Herzegovina who were penalized for a misdemeanour to file lawsuits in a civil action against the Federation of Bosnia of Herzegovina and the Canton of Sarajevo on the grounds of unjust enrichment. Also, in case of the issuance of misdemeanour citations in a court proceeding, citizens may invoke the Decision of the Constitutional court of Bosnia and Herzegovina number AP-3683/20 and submit a request for the cancellation of a misdemeanour proceeding, based on which the court is obliged to render a decision on rejection of the misdemeanour citation. However, the Constitutional Court of Bosnia and Herzegovina did not annul the unconstitutional and illegal Orders of the Crisis Staff of the Ministry of Health of the Sarajevo Canton no. 01-33-6301/20, dated 9 November 2020, and the Orders of the Crisis Staff of the Ministry of Health of the Sarajevo Canton no. 62-20/2020, dated 12 October 2020, because it found that by means of such annulment, "given the undoubted public interest in introducing the necessary measures of protection of the population against the pandemic", negative consequences might arise before the legislative and

the highest executive authorities take measures within their powers and obligations". In its Decision based on Article 72, paragraph 4, of the Rules of the Constitutional Court of Bosnia and Herzegovina, the Constitutional Court of Bosnia and Herzegovina ordered the Parliament and Government of the Federation of Bosnia and Herzegovina to take action, immediately and no later than 30 days from the date of receipt of Decision, in order to harmonize their activities with standards from Article II/3.f of the Constitution of Bosnia and Herzegovina and from Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, as well as with standards from Article II/3.m of the Constitution of Bosnia and Herzegovina and from Article 2 of Protocol 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (Official Gazette of BiH, no. 85/2020).

On 25 June 2020, at the request of the Romanian Ombudsman, the Constitutional Court of Romania evaluated as unconstitutional the legal provisions in the area of healthcare and the provisions of the government's urgent order, which gave the minister of health the power to take certain measures that would restrict fundamental freedoms, such as the measures of involuntary hospitalization and quarantine. In the explanation behind the Court's decision, it is stated that "the extraordinary and unpredictable nature of the state of affairs does not justify disrespect for the conditions under which it is possible to restrict the exercise of fundamental rights and freedoms, so the referred to measures should have been based on an act that has the force of law, with clear and effective protective measures against abuse or discretionary or illegal actions" (Court of Justice of the European Union - Research and Documentation Directorate, 2021).

A similar standpoint can be found in the Constitutional Court of Spain, which in July 2021 rendered a decision on the unconstitutionality of a lockdown (with six votes for and five votes against), which in 2020 was declared in response to the pandemic; owing to this decision the people who were penalized for violating the rules were given the possibility of suing the state for the purpose of regaining the money that had been taken from them in the form of fines. On the other hand, charges filed by the persons and companies that wanted to sue the government because of the money they had lost due to the lockdown would not be accepted. The decision was a response to the charges pressed by the right-wing political party Vox. On 14 March 2020, the Spanish Government declared the state of emergency and, according to emergency rules, nearly all people in the country were ordered to stay home, and leaving home was possible only for basic reasons until June 2020. In its explanation the Court said that the state of emergency was not enough to provide constitutional support for such restrictions. In order to legally restrict freedoms of the people to the extent in which this was done, as the Court emphasized, the Government would have to proclaim the state of exception instead of the state of emergency. In Spain, the government may proclaim the state of emergency – in Spanish known as "the state of alarm" – and apply it before it gets to be debated in the parliament, which enables the government to establish new rules relatively quickly, but when talking about the state of exception, the proposal should be first submitted to the parliament, given the fact that Spain has three levels of the state of emergency: the state of emergency, the state of exception, and the highest level or the level of siege (BBC News, 2021).

On 23 July 2020, the Bulgarian Constitutional Court assumed the stance that the right to free movement, economic liberty, and the right to work are not absolute rights and that their restriction was just temporary, for the purpose of a consistent legitimate goal of guaranteeing life and the protection of citizens' health, for which reason the intervention of the state is in accordance with the Constitution, justified by a legitimate cause and in the public interest (Court of Justice of the European Union - Research and Documentation Directorate, 2021).

THE STANCE OF THE EUROPEAN COURT FOR HUMAN RIGHTS IN THE CASE TERHEŞ VERSUS ROMANIA

The European Court of Human Rights rejected the application submitted by Cristian Terheş, with a unanimous decision against this European MP, who believed that a seven-week restriction of movement during the pandemic in Romania can be compared to house arrest. The Court stated that "the level of restrictions of freedom of movement, as presented by the applicant, was not such as to make it possible to deem the general lockdown ordered by the authorities as deprivation of freedom".

Mr. Terheş was elected to the position of a member of the European Parliament in 2019, representing Romania's Social Democratic Party. On 16 March 2020, the Romanian President issued Decree no. 195/2020, which introduced a thirty-day state of emergency in Romania and a restriction of certain fundamental rights, including freedom of movement. On 14 April 2020, the Romanian President issued Decree no. 240/2020 on the prolongation of the state of emergency by thirty days, and the state of emergency ended on 14 May 2020, at midnight.

On 7 May 2020, Terheş pressed charges with the Bucharest County Court based on Article 5, paragraph 4 of the European Convention on Human Rights (the right to a quick decision on the legality of detention), emphasizing that he was subjected to "administrative detention" and demanding from the court to establish his right to leave his home for any possible reason without the necessity of having a document which would confirm a valid reason for doing so and without the possibility of being punished. The Court established that the initiation of his procedure was without purpose because the lockdown had been abolished in the meantime. On 8 and 25 May 2020, the applicant filed requests for reconsideration of decrees and the parliamentary decisions by means of which they were justified, as well as of other decrees issued by the Minister of the Interior, but the applications were rejected with the explanation that said acts were not subject to administrative review.

On 17 March 2020, Permanent Representation of Romania to the Council of Europe notified the Secretary General of the Council of Europe about their intention to apply derogation as envisaged by Article 15 of the Convention, and, following this, the Romanian authorities notified the Secretary General in regular intervals about the various measures adopted until the end of the state of emergency at midnight on 14 May 2020.

At the beginning, the European Court of Human Rights noticed that the applicant had not invoked Article 2 of Protocol 4 (freedom of movement) to the Convention, but rather wanted to prove that the generally imposed lockdown constituted deprivation of freedom, rather than merely a restriction of the right to freedom of movement. The Court noted that Romania had announced its intention to derogate, based on Article 15 of the Convention, from the obligations arising from Article 2 of Protocol 4 to the Convention on guaranteeing freedom of movement. As Article 5, paragraph 1 of the Convention was not applied in this case, the Court deemed it unnecessary to evaluate validity of the derogations that Romania had reported to the Council of Europe.

The Court found the complaint to be incompatible with the provisions of the Convention and decided that, for this reason, the application should be rejected. Over the course of the lockdown in Romania, the authorities advised the people not to leave their homes between 6 AM and 10 PM, and residents could legally leave their homes during the curfew provided they had an official form stating in detail their reasons, their address of residence, and the period of time for their activities. These measures were in force until 14 May 2020 and the applicant claimed that his right to freedom according to Article 5 of the European Convention was violated.

The court found that the measures were applicable to all, and not only to the applicant, and that there were no special measures directed against the applicant, such as intensified surveillance, or any special aggravating circumstances in the applicant's life which amplified the negative conditions of his detention. Moreover, the Court noted that the applicant could leave his home for different reasons and that he could go to different places. In accordance with that, the measures cannot be equated with house arrest, for which reason the ECtHR not only established that the violation of Article 5 did not take place but also that in this case it is not possible to refer to Article 5 because there was no deprivation of freedom.

Before this, Terheş, a former Roman Catholic priest, had spoken against the possibility of introducing COVID-19 passports. He committed himself to "carry on this struggle for defending the rights and freedoms of all Romanians and Europeans" and said that "with this decision, the ECtHR has created a precedent after which Europe will no longer be a space of freedom, but of massive lockdowns and surveillance, as is the case with Russia and China, and based on this precedent governments can violate the freedom of Europeans".

Greene believes that the explanation of the judgment is "for concern, given that the Court emphasized that Romania's lockdown regime cannot be compared with house arrest, which entails that house arrest – whatever that means – is a threshold that the regime must reach before Article 5 is even activated" (Greene, 2021). The Court implies, since the measures were applied to all in Romania, and not specially to the applicant, that the lockdown measures are actually in the direction of "restrictions", rather than "deprivation" of freedoms, for which reason the Court's emphasis that there was no evidence regarding how the measures specially affected him is the Court's error (Greene, 2021). He goes on to conclude that, in this way, "space is created for the introduction of similar measures for other crises that the state presents as necessary and which may be less objective than the present pandemic – for instance, terrorism – and as such a fertile ground for the violation of human rights" (Greene, 2021). Instead of raising the standards of human rights, the approach of the ECtHR to this case shows how the standards on human rights were expanded so that they could be adapted to exceptional authorities. Court practice as flexible as this then "lies almost like a loaded gun, ready for the hands of any organ that might make a trustworthy claim about an urgent necessity" (Greene, 2021).

CONCLUDING REMARKS

"*The only way to deal with an unfree world is to become so absolutely free that your very existence is an act of rebellion.*"

Albert Camus

The scenario that EU member-states are faced with because of the coronavirus pandemic is "a real stress test for most legal systems in the EU" (Diaz Creo & Kotanidis, 2020). What is left is the open question of whether such rigorous measures of restriction and prohibition of movement were necessary in order to attain the goal – the suppression of the spreading of the coronavirus, that is, whether the same result could have been achieved with measures that encroach upon the rights of the citizens to a lesser extent, and also whether the state in this case acted in contrast to the Constitution and the provisions of international law. The author Simões notes that the efficiency of travel restrictions is not supported by scientific evidence, and that it is very difficult to justify certain measures that were adopted in the name of public health (Simões, 2021). Prohibitions on entry into a country and prohibitions on exit from a country indirectly prevent family members from exercising one more right – the

right to family unity (Simões, 2021). Individual authors remind that the economic and social interests of the region are better achieved under the circumstances of free movement and conclude that we are witnessing "an instrumentalization of the pandemic due to short-term economic perfectionism" (Hamadou, 2020).

Is "the elite manipulating our fear as we witness the defense of mankind against an elitist coup for the purpose of taking away fundamental rights and freedoms, conquered after several centuries of fighting" (Burrowes, 2020), while tyranny and the end of freedoms as we know them are taking place before our very eyes (Pimenta, 2020)? Without any doubt, this is not a time to neglect human rights, but a time when they are needed more than ever, for the sake of steady sustainable growth and peace-keeping (United Nations, 2020), because the global health crisis cannot be resolved with nationalist measures, but only with international solidarity and cooperation (Mezzadra, Stierl, 2020).

Today it is more than clear that the policy of fear is spreading across the planet with ever-more restrictive measures, many of which will survive threatening many fundamental rights and freedoms even after the pandemic ends, for which reason it is possible to talk about widespread authoritarian tendencies (Mezzadra, Stierl, 2020). In the 21st century, in the era of pandemics, global financial and other turbulences that are in most cases hardly understood by a common man, words of some of our great predecessors on this earthly stage of life sound livelier and clearer than ever before. Aristotle knew that "only he who has overcome his fears will truly be free" and Martin Luther King warned that "freedom is never given voluntarily by the oppressor". Abraham Lincoln said that "those who deny freedom to others, deserve it not for themselves" and Voltaire wittily remarked that "it is difficult to free fools from the chains they revere".

The present situation caused by the pandemic is a test for states and legal systems, but it also is and is yet to become a test for people around the world. That is why we need to timely ask ourselves whether we are at risk of "becoming a society of perfectly healthy robots or slaves" where our health condition will be confirmed with QR codes and mobile applications (Čović, 2020), what is the worth of an enslaved person's health and to whom is it useful? When we talk about the means by which someone can legitimately protect himself well, they depend on the worth of the good itself, and the fact is that there is no greater and more important good than freedom. When it is absent and taken away, all other goods and rights lose their meaning and become useless.

REFERENCES

1. Burrowes, R. (2020, April 13). The Elite's COVID 19 Coup Against a Terrified Humanity: Resisting Powerfully, Global Research. Available at https://www.globalresearch.ca/elite-covid-19-coup-against-terrified-humanity-resisting-powerfully/5709479
2. Court of Justice of the European Union. Research and Documentation Directorate. (2021). Covid 19 - Overview of Decisions in the period April - September. Available at http://www.aca-europe.eu/flash/COVID/en/Flash-Covid-2021-01_EN.pdf
3. Čović, A. The Right to Privacy and Protection of Personal Data in the Age of the Covid – 19 Pandemic. *Sociological Review*. Vol. LIV, no. 3/2020, 670 - 697. DOI: 10.5937/socpreg54-27284
4. Dias Simões, F. (2021). COVID-19 and International Freedom of Movement: a Stranded Human Right? The Chinese University of Hong Kong Faculty of Law Research Paper No. 2021-07, Available at SSRN: https://ssrn.com/abstract=3781792 or http://dx.doi.org/10.2139/ssrn.3781792

5. Diaz Creo, M. & Kotanidis, S. (2020). States of Emergency in Response to the Coronavirus Crisis. EPRS - European Parliamentary Research Service. Available at https://www.europarl.europa.eu/RegData/etudes/STUD/2020/659385/EPRS_STU(2020)659385_EN.pdf

6. Greene, A. (2021, Jun 18). Falling at the First Hurdle? Terheş v Romania: Lockdowns and Normalising the Exception. Available at https://strasbourgobservers.com/2021/06/18/falling-at-the-first-hurdle-terhes-v-romania-lockdowns-and-normalising-the-exception/#more-5403

7. Hamadou, A. (2020). Free Movement of Persons in West Africa Under the Strain of COVID-19. AJIL Unbound. Volume 114, 337 - 341. DOI: https://doi.org/10.1017/aju.2020.66

8. Mezzadra, S, Stierl, M. (2020). What Happens to Freedom of Movement During a Pandemic? Open Democracy. Available at https://www.opendemocracy.net/en/can-europe-make-it/what-happens-freedom-movement-during-pandemic/

9. Pécoud, A. (2013). Freedom of Movement. The Encyclopedia of Global Human Migration (ed. Ness I.). Blackwell Publishing Ltd. DOI: https://doi.org/10.1002/9781444351071.wbeghm241

10. Pimenta D M, E. (2020). Brief Reflections on Covid-19, Tyranny and the End of Freedom. Available athttps://www.academia.edu/44567633/Brief_Reflections_on_Covid_19_Tyranny_and_the_end_of_Freedom

11. United Nations. COVID – 19 and Human Rights – We are all in this together. (2020). Available at https://www.un.org/victimsofterrorism/sites/www.un.org.victimsofterrorism/files/un_-_human_rights_and_covid_april_2020.pdf

12. Valerio. C. (2020). Human Rights and Covid-19 Pandemic. JBRA Assisted Reproduction. 24(3): 379–381. DOI: 10.5935/1518-0557.20200041

LIST OF REGULATIONS AND ACTS

1. Charter of Fundamental Rights of the European Union. Available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012P%2FTXT

2. Constitution of the Republic of Serbia, (*Official Gazette of RS*, no 98/2006).

3. Criminal Code, *Official Gazette of RS*, no. 85/2005, 88/2005 - corrected, 107/2005, 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016 and 35/2019.

4. Decree on Emergency Measures (*Official Gazette of RS*, No. 31 / 2020-3 of March 16, 2020).

5. Directive 2004/38/EC of the European Parliament and of the Council, (2004, 29 April). Available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32004L0038

6. The European Convention on Human Rights, 1950, Council of Europe. Available at https://www.echr.coe.int/Documents/Convention_ENG.pdf

7. The International Covenant on Civil and Political Rights, 1966, the United Nations General Assembly. Available at https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx

8. Order on Restriction and Prohibition of Movement of Persons on the Territory of the Republic of Serbia (*Official Gazette of RS,* No. 34/2020, 39/2020, 40/2020, 46/2020 and 50/2020).

9. Treaty on European Union. Available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012M%2FTXT

10. Treaty on the Functioning of the European Union. Available at https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12012E/TXT:en:PDF

11. Universal Declaration of Human Rights (1948). United Nations General Assembly.

COURT DECISIONS

1. Terheş v. Romania Application (No. 49933/20). Available at https://www.juridice.ro/wp-content/uploads/2021/05/Decision-Terhes-v.-Romania-lockdown-ordered-by-the-authorities-to-tackle-the-COVID-19-pandemic-could-not-be-equated-with-house-arrest.pdf

2. Decision on Rejecting the Initiative of the Constitutional Court of the Republic of Serbia, (2020, May 22) No. IУо-42/2020. (*Official Gazette of RS,* No.77/2020). Available at http://www.ustavni.sud.rs/page/predmet/sr-Latn-CS/16219/?NOLAYOUT=1

3. Decision of the Constitutional Court of the Republic of Serbia (2020, September 17). No. IУо-45/2020, (*Official Gazette of RS,* No. 126/2020). https://www.propisi.net/odluka-ustavnog-suda-rs-broj-iuo-45-2020/

4. Decision of the Constitutional Court of Bosnia and Herzegovina of 22 April 2020, no. AP-1217/20 (*Official Gazette of BiH*, No. 26/20). http://sluzbenilist.ba/page/akt/7XvnB8uDg48=

5. Decision of the Constitutional Court of Bosnia and Herzegovina, No. AP-3683/20 of 22 December 2020, (*Official Gazette of BIH,* No. 85/2020). Available at http://sluzbenilist.ba/page/akt/4EeZhRWYGo0=

INTERNET SOURCES

BBC News. (2021, July 14) Covid: Spain's Top Court Rules Lockdown Unconstitutional. Available at https://www.bbc.com/news/world-europe-57838615

Belgrade Centre for Human Rights. (2020, May 7). Restriction of Freedom of Movement of Serbian Citizens during the COVID-19 Virus Pandemic one of the Most Drastic in Europe. Available at http://www.bgcentar.org.rs/ogranicenje-slobode-kretanja-gradana-srbije-za-vreme-pandemije-virusa-covid-19-jedno-od-najdrasticnijih-u-evropi/

Marinković, T. (2020, April 4). Unconstitutional Order on the Prohibition of Movement. Available at https://www.danas.rs/drustvo/vladavina-prava/neustavna-naredba-o-zabrani-kretanja/

World Health Organization (2021). WHO Coronavirus (COVID-19) Dashboard. Available at https://covid19.who.int