

PANDEMIC AS A CHALLENGE TO INTERNATIONAL AND NATIONAL LAW

The article is devoted to the analysis of the impact of the pandemic caused by COVID-19 on human rights. The analysis is carried out through the prism of studying two practices: (a) the use by states in the new conditions of a specific instrument “derogations from the Covenant”; (b) interpretation by the courts of government anti-epidemic restrictions and prohibitions.

The purpose of the article is a legal analysis of the impact of the pandemic on interstate and national mechanisms for ensuring human rights.

Methods. In the article, a comparative method was used (it made it possible to systematize information about the redistribution of the vaccine between states as an important means of global counteraction to the pandemic), the method of analysis and synthesis (the algorithm for derogation of states from the implementation of previously assumed international legal obligations in the field of guaranteeing human rights was determined), as well as the method of generalization (makes it possible to form conclusions on the analysis).

Results. The human rights paradigm is under threat. More and more acute than these new conditions, problems of a civilizational nature arise: commensurability, humanity, justice. The human right to health on different continents and in countries with different per capita incomes is provided differently. International organizations are making efforts to somehow balance the situation with the distribution of the COVID-19 vaccine. One should agree with the prediction that the relatively low rules and standards in international human rights law will obviously have to be strengthened. Now there is a practice of derogation from human rights conventions. Four human rights treaties contain a derogation clause from the obligation to comply with the provisions of the treaties in full – ECHR, ICCPR, ACHR, EU. These international human rights treaties require official notification of derogations. However, not a single contract specifies the time period for such information. Justice is the foundation for building civilized relations between the state and its citizens. Especially during crises, states of emergency and other special regimes, when there is a real threat of violation of basic rights and freedoms. The published Priority Actions for Customs Administrations to Take Emergency Measures to Preserve International Supply Chains and Implement the Objectives of Counteracting the COVID-19 Crisis are focused mainly on revenue mobilization deals, trade facilitation, and ensuring the security of state borders.

Conclusions. One of the expected results of cooperation in the context of the WHO, UNDP, UNAIDS pandemic should be the assertion of the principle of respect for human rights and fundamental freedoms, and specifically the right to health. As never before, harmonization of the practice of interpreting and applying international human rights treaties is relevant. Prohibitions and restrictions imposed by governments and other subjects of power, if they apply to specific subjects, can cause denial and unwillingness to comply. The experience of the response of the courts of other states to human rights violations deserves a separate study and generalization. As well as the practice of the activities of state authorities, in particular, customs, in the new conditions of the threat of further spread of coronavirus.

Key words: COVID-19, Human Rights, Right to Health, Derogation from an International Treaty, Constitution, Justice, Customs Administration.

JEL Classification: F53, F69, I18, K33.

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1. Introduction

With the entry of mankind into a new era, and until now the globalizing world did not know the spread of the virus on such a scale, there was an urgent need to know the new reality, to adapt the international and national legal systems to it. Social, economic, political, legal, biological, moral and other dimensions of such reality are subject to research. Scientists around the world are focusing their attention on the relevant issues. There is a clear understanding that the further existence of a person, no matter what continent he lives

on, depends on a quick and effective search for answers to the questions of recent times. The pandemic has also intensified the discussion about the global legal order built after the Second World War. Seemingly indisputable postulates about the inviolability of human rights, laid down in the formulas of conventions under the auspices of the UN, are violated by countries with authoritarian regimes and large reserves of hydrocarbons (such as the Russian Federation, Kazakhstan), or without such (such as Syria, Belarus, etc.). The pandemic is an unprecedented challenge to the international legal order and at the same time actualizes the discussion about unity and mutual support in the development of democracies, in which a person is not only recognized by the Constitution, but also in practice is a high social value. And then the resources are spent not on military aggression, but on developing a vaccine against the still deadly virus and financing state support programs for their own citizens.

We look at the future from the standpoint of a modern understanding of international legal and national algorithms for ensuring human rights, in particular, the right to health. The subject of the study is the pandemic as a challenge to the human rights paradigm, including the issues of derogation from human rights conventions as a temporary forced government remedy, the possibility of judicial protection of rights and freedoms during a pandemic.

2. Analysis of recent research and publications

In the last two years, there have been many scientific publications on the topic under study. Some of them directly relate to the mutual influence of the global pandemic and the norms of international law (Hathaway, OA et al., 2021; Fidler, DP, 2020; Danchin, P. et al., 2020; Nyinevi, C., 2020; Buchan, R. Et al., 2020). Domestic researchers are also working on this topic, for example, Butkevych, O. (2020), Yatsyshyn, M. (2020). Works began to appear in print (Menezes, W., & Marcos, H., 2020; Kessedjian, C., 2021), in which researchers are trying to predict the “post-COVID” period in the development of international law.

This list should supplement the proposed work, in which the author tried to synthesize the results of a study of the functioning of international legal (in terms of temporary refusal to comply with an international treaty in an emergency) and national (in terms of the administration of justice in cases of appealing against epidemiological restrictions on the exercise of human rights) legal mechanisms.

3.1. The New Reality: The Pandemic Tests the Human Rights Paradigm

It should be recognized that the fundamental / basic principles of international law should be understood, first of all, the principles enshrined in the UN Charter, the Declaration of Principles of International Law concerning friendly relations and cooperation between states in accordance with the UN Charter (adopted by resolution 2625 (XXV) of the General UN of October 24, 1970, OSCE Helsinki Final Act (1975) Interstate/international cooperation has one of its main goals to ensure the observance of human rights. Currently, the human rights paradigm is under threat (Cohen, J., 2020). regarding risks in the field of fundamental human values, in particular the right to health, would find its supporters, taking into account acute, but well-known broad masses, problems: poverty, poor ecology, food shortages, unequal living conditions, discrimination, imperfect healthcare legislation and many others. Now to the undeniable factor m, capable of shaking the health care system or protection of human rights in both rich countries and developing countries, was added the pandemic caused by the coronavirus. The coronavirus pandemic that has swept the world has radically changed the lives of many and the information space we are in (Shul'ha, M.G., Mazur, A.V., Heorhievskyy, Y.V., 2021:2992).

More and more acute than these new conditions, problems arise, so to speak, civilizational: commensurability, humanity, justice. Is, for example, the effect of redistributing a vaccine through COVAX fair and satisfying to all concerned? When answering this question, one should proceed from the interests of everyone, not only the inhabitants of the European continent. We are talking about statistical data for February-May last year. During this time period, African countries received only 18.2 million of the 66 million doses they expected through COVAX. Of nearly 1.3 billion people in Africa, only 2% received a single dose of the COVID-19 vaccine. According to the WHO Africa Office, just over 1% – 26 million people – are fully vaccinated (Padma, T.V., 2021). The unfair distribution of vaccines allowed the virus to continue to spread. Unvaccinated populations are already at risk of infection, especially with new strains of coronavirus. Therefore, as Forman, L., & Kohler, JC (2020) predict, we may need to reinforce hitherto relatively low rules and standards in international human rights law. If their norms truly promote global solidarity in the context of crises like COVID-19, especially when it comes to global access to a future vaccine. The pandemic has revealed other problems with the

realization of the right to health, as well as broad public health problems. These tools need to be updated and revised if we hope to effectively address now and prevent future threats to the lives and health of hundreds of millions of people around the world. In this context, the COVID-19 Law Lab initiative to share experience in health care legislation in partnership with WHO, the United Nations Development Program (UNDP), The Joint United Nations Program on HIV/AIDS (UNAIDS), etc., is extremely relevant and useful. After all, one of the expected results of such cooperation is the affirmation of the principle of respect for human rights and fundamental freedoms, and specifically the right to health.

3.2. Derogation from human rights conventions during the pandemic

Since the start of the COVID-19 pandemic, several human rights scholars have argued that human rights can be better protected if governments move away from international human rights protection mechanisms during the pandemic. Thus, these government authorities of a given country clearly separate the emergency regime from the usual regime, and therefore limit the measures they take to combat the pandemic in time. Article 15 “Derogation in an emergency” allows such derogations from the European Convention on Human Rights (ECHR). Dzehtsiarou K. (2020) questioned the thesis expressed by human rights researchers. Firstly, deviation from the requirements of an international treaty, sometimes, is justified by the emergence of an emergency in the military sphere. But, the author points out, it is unacceptable to draw parallels between the state of emergency caused by the virus and the threat of a military nature. Secondly, it is argued that the human rights enshrined in the ECHR have a “natural quarantine effect”, and derogations from Article 15 cannot significantly change the Court’s approach to human rights during a pandemic.

One way or another, but there is a practice of derogation from human rights conventions. Four human rights treaties contain a derogation clause from the obligation to comply with the provisions of the treaties in full. We are talking about Article 15 of the European Convention on Human Rights (ECHR), Article 4 of the International Covenant on Civil and Political Rights (ICCPR), Article 27 of the American Convention on Human Rights (ACHR), Part V of Article F of the European Social Charter (ESS). All derogation clauses under these treaties require States Parties to (a) formally report the relevant treaty regime, (b) state the reasons for the derogation, and (c) report the termination of the derogation. The purpose of the message differs on the one hand within the ECHR and ESS on the one hand, and the ICCPR and ACHR on the other hand. In the first case, the purpose is to notify the Secretary General, who is entrusted with the monitoring function. In the second case, the goal is primarily to inform the other states parties to these two treaties. The relevant official must forward the received notice of withdrawal to the representatives of the other states parties to the treaties.

Consequently, the human rights treaties require precisely the official notification of derogations. However, not a single contract specifies the time period for such information. The European Court of Human Rights has ruled that two weeks (hudoc, 1961) of a delay in reporting a derogation is susceptible, but four months, as the corresponding decision of the European Commission of Human Rights shows, is excessive (European Commission of Human Rights, 1956). This leads to the fact that in order to counteract the spread of coronavirus infection, states implement a state of emergency or other special legal regime and after an indefinite period of time officially announce the derogation from human rights treaties (Istrefi K., Humburg I., 2020), or not at all inform about this fact.

Many governments have responded to the COVID-19 pandemic by declaring a state of emergency and restricting individual rights and freedoms protected by international law. However, a much larger number of states have decided to introduce emergency measures before officially derogating from international human rights treaties (Helfer, L. R., 2020). Most often, the suspension concerned the right to move freely, freedom of assembly and association – they are directly related to the measures to combat the pandemic, because they are designed to ensure the social distance necessary to prevent airborne viral infections.

The problem, according to Lebret A. (2020), is the failure of certain states to comply with the obligation to notify the relevant officials of their intention to deviate from the prescriptions of the convention norms. European states and ACHR signatories have regularly notified regional organizations rather than depositaries of signed conventions. It was as a reaction to such a situation that on April 24, 2020, the appeal of the UN Human Rights Committee (UN, 2020) was published, in which it called on the participating states (note that we are talking about the G7 countries!), Which have taken emergency measures, to immediately implement duty and notify the Secretary-General of the United Nations. After all, for example, neither the UK nor Germany notified the Council of Europe in time of their intention to derogate from the convention to counter COVID-19.

While the enjoyment of some human rights may be subject to special restrictions in an emergency, such restrictions should never go so far as to destroy the essence of human rights (UN Human Rights, 2020:827). The rule of law is inviolable even when a threatening epidemic situation develops.

As of July 2021, 11 states have declared derogations from the ECHR in response to COVID-19. This list does not include Ukraine and the Republic of Poland. Ukraine reported a “derogation” in connection with the military aggression of the Russian Federation, the Republic of Poland – a statement due to “some violations of the rights to freedom of speech and assembly ... in 1993.” 8 out of 25 States reported suspension of safeguards under ACHR. 14 out of 173 states (8%) reported derogations from the ICCPR (Poland and Ukraine have signed and ratified the Convention and have not declared a derogation from it).

Unlike the ECHR and the ICCPR, the ACHR speaks of the suspension, not the derogation, of human rights and fundamental freedoms (Coghlan, N., 2020). The American convention uses at least four different terminologies for suspension: a) termination of warranties; b) termination of performance of contractual obligations; c) suspension of rights; and d) right to stop). This terminological difference, stresses N. Coghlan (2020), has already been emphasized by the Inter-American Court of Human Rights (ICHR) in its advisory opinion OC-8/87 on the Habeas Corpus in Emergency Situations (American Convention on Human Rights, 1987:7) : states can never suspend the rights inherent in man, they can only limit their full and effective exercise. This postulate clearly formulates the idea of anthropocentrism.

There is another specific feature of the so-called Inter-American Human Rights System: the limited judicial tools for enforcing ACHR orders compared to ECHR. It, according to M.M. Antoniazzi and S. Steininger can be compensated by the work of inter-American human rights bodies demonstrating the importance of a proactive and dialogic approach, as well as continuous monitoring and information support of participating States and civil society in order to ensure the widest possible protection of human rights during Covid-19 (Antoniazzi, M., Steininger, S., 2020).

As noted above, the COVID-19 pandemic threatens to undermine the commitments made by States to protect human rights. Consideration of the “derogation clauses” included in most international human rights treaties that allow for the suspension of certain rights in emergency situations leads to the conclusion of a “worrisome trend in the approach of states towards them” (Zdravkovic, A., 2021). On the other hand, in the absence of this “necessary evil”, states are more likely to fail to fulfill their obligations during emergencies, but with a greater risk of violations due to lack of oversight (Lebret, A., 2020). “Derogation provisions” allow the international community not only to detect and monitor human rights violations in exceptional circumstances, but also to preserve and protect the fundamental (non-derogable) rights of individuals” (Zdravkovic, A., 2021).

Gorodovenko et al. (2020) noted during the acute phase of the pandemic that “derogation from the provisions of the European Convention on Human Rights in the context of the implementation of measures to combat the COVID-19 pandemic is a common problem for European countries, requiring the introduction of emergency measures by the governments of these countries...”. Under no circumstances should emergency measures justify the violation of human rights and the restriction of fundamental freedoms.

Now that there is much more information about the virus, protocols for its treatment have been improved, drugs against COVID-19 are announced, new strains of it are emerging, however, the effectiveness of existing vaccines that can minimize the harmfulness of SARS-CoV-2 variations is declared, one way or another, there is a need to rethink the attitude to many once-established constants. These include the assertion that the state of emergency is a short-term phenomenon, that parliaments cannot be responsive compared to governments and are unable to quickly respond to changes in the epidemiological situation when adopting “emergency” legislation (Istrefi, K., Radoš, M., Merison, W., 2021). There is a risk that COVID is being used to justify violations of human rights and restrictions on fundamental freedoms (SIIAEC Conference, 2021:1). In particular, when the right to vaccination is transformed into a general obligation.

3.3. The right to judicial protection of rights and freedoms during a pandemic

Questions remain about how long the government can take emergency measures to combat COVID-19 when this pandemic has become the new normal, and how such government measures affect checks and balances in a democratic society. This issue, of course, will be the subject of consideration by the national courts when considering and resolving disputes regarding the restrictive measures taken by the public administration authorities against the backdrop of COVID-19.

The Convention for the Protection of Human Rights and Fundamental Freedoms for the sake of protection or public health involves the limitation by law of certain rights: Article 8 “Right to respect for private and family life”, Article 9 “Freedom of thought, conscience and religion”, Article 10 “Freedom of expression”, article 11 “Freedom of assembly and association”. Therefore, the problematic issues of the application of these norms by the European Court of Human Rights deserve a separate study. As well as the application of the ACHR prescriptions by the Inter-American Court of Human Rights.

Let us only pay attention to the fact that justice is the foundation for building civilized relations between the state and its citizens. Especially during crises, states of emergency and other special regimes, when there is a real threat of violation of basic rights and freedoms. Prohibitions and restrictions imposed by governments and other subjects of power, if they apply to specific subjects, can cause denial and unwillingness to comply. Lawyers may have differing views on whether the actions of the authorities in such situations are lawful. When the principle of universality yields to the principle of expediency. For example, judges of the US Supreme Court were divided in their views in interpreting the instructions of the California state authorities to limit attendance at religious services to 25% of the capacity of the church premises or 100 visitors, whichever is less in a particular case (SUPREME COURT OF THE UNITED STATES, 2020). An application for an injunction filed by the church was denied. Significantly, the plaintiff expressed a willingness to comply with the rules applicable to secular businesses, including social distancing and hygiene rules, but objected to the 25% limit imposed on religious institutions and did not apply to offices, supermarkets, restaurants, retail stores, pharmacies, shopping centers, bookstores, beauty salons – crowded places where the requirement of social distancing is not always observed. Some judges pointed out that the California decision discriminated against religious institutions compared to secular ones, which do not have such restrictions, and that the issue of interpretation of the Constitutional rule is on the agenda. Chief Justice Roberts C. J. opined that “the Constitution pre-eminently entrusts the safety and health of the people to politically responsible officials,” but the Constitution also places the protection of the rights of the people in the judiciary. Judge Alito J. did not uphold the majority and voiced his legal position that the state must prove that nothing less than the above restrictive measures will reduce the spread of COVID-19 in public places at closed religious meetings to the same extent as restrictions. that the state applies to other activities.

The experience of the response of the courts of other states to human rights violations deserves a separate study and generalization. As well as the practice of the activities of public authorities in the new conditions of the threat of an unprecedented spread of COVID-19. For example, the Fiscal Affairs Department of the International Monetary Fund has developed Special Recommendations (Special Series on Fiscal Policies to Respond to COVID-19) to public authorities authorized to implement fiscal policy, designed to help IMF member countries overcome the negative economic impact caused by COVID-19. On April 20, 2020, the Priority Actions for Customs Administrations to Take Emergency Action to Preserve International Supply Chains and Achieve Objectives to Address the COVID-19 Crisis were released. These activities are focused mainly on operations to mobilize revenues, facilitate trade, and ensure the security of state borders. The document clarifies the issues of customs activity, set out in the IMF methodological document “Appropriate measures of the tax and customs service. It is recognized that proactive customs activities are extremely important. After all, the effectiveness of epidemiological, socio-economic measures to counteract COVID-19 depends on specific government steps and their timeliness. It is recorded that “the customs service is an important authority helping to save people’s lives by ensuring the reliability of international supply chains, especially in terms of importing essential goods, including those related to the treatment of COVID-19, and also ensures the security of tax revenues, the economy, serves other purposes.” Of practical interest is the answer to the question of success in the implementation of measures in three areas: (a) continuity of operation, (b) taking measures to combat COVID-19, (c) taking control measures. In general, the COVID-19 pandemic has shown the importance of both the Revised WTO Kyoto Convention (RKC) and the WTO Trade Facilitation Agreement (TFA), including the core concepts of a fully digital customs clearance process and efficient customs risk management.

4. Conclusions

One of the expected results of cooperation in the context of the WHO, UNDP, UNAIDS pandemic should be the assertion of the principle of respect for human rights and fundamental freedoms, and specifically the right to health. More than ever, the manifestation of international cooperation in the practice of interpreting and applying international human rights treaties is relevant. Perhaps the idea of solidarity

in the face of the threat of a pandemic in an era of pragmatism, bordering on state egoism, will sound naive. However, in order to preserve man as a biological being, to search for the much-needed balance and harmony on planet Earth, the role of legal scholars is to clearly articulate and defend the possibility of international treaties and institutions in maintaining civilized cohabitation. Prohibitions and restrictions imposed by governments and other subjects of power, if they apply to specific subjects, can cause denial and unwillingness to comply. Lawyers may have differing views on whether the actions of authorities are lawful in situations where the principle of universality is inferior to the principle of expediency. The experience of the response of the courts of other states to human rights violations deserves a separate study and generalization. As well as the practice of the activities of public authorities, in particular customs (on the implementation of the IMF recommendations of 04/20/2020 – Priority measures for customs administrations to take emergency measures to preserve international supply chains and implement the tasks of countering the COVID-19 crisis), in the new conditions of the threat of further the spread of the coronavirus.

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ПАНДЕМІЯ ЯК ВИКЛИК МІЖНАРОДНОМУ ТА НАЦІОНАЛЬНОМУ ПРАВУ

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Статтю присвячено аналізу впливу пандемії, викликаною COVID-19, на права людини. Аналіз проведено крізь призму дослідження двох практик: (а) використання державами в нових умовах специфічного інструменту «відступ від конвенції» («derogations from the Covenant»), (б) тлумачення судами урядових протиепідемічних обмежень і заборон. Метою статті є правовий аналіз впливу пандемії на міждержавні та національні механізми забезпечення прав людини.

Методи. Для написання статті використано компаративний метод (дав можливість систематизувати відомості щодо перерозподілу вакцини поміж державами як важливого засобу глобальної протидії

пандемії), метод аналізу та синтезу (окреслено алгоритм відступу держав від виконання раніше взятих на себе міжнародно-правових зобов'язань у сфері гарантування прав людини), а також метод узагальнення (дає можливість сформулювати висновки з проведеного аналізу).

Результати. Парадигма прав людини перебуває під загрозою. Дедалі гострішою за цих нових умов постають проблеми цивілізаційного характеру: співмірності, гуманності, справедливості. Право людини на здоров'я на різних континентах і в країнах із різним доходом на душу населення забезпечується неоднаково. Міжнародні організації докладають зусиль, аби урівноважити бодай якомось ситуацію із розподілом вакцини проти COVID-19. Слід погодитися із прогнозом про те, що вочевидь доведеться зміцнити досі відносно занижені правила та стандарти у міжнародному законодавстві з прав людини. Тепер існує практика відступу від конвенцій з прав людини. Чотири договори з прав людини містять пункт про відступ від зобов'язання виконувати приписи договорів у повному об'ємі – ECHR, ICCPR, ACHR, ESC. Вказані міжнародні договори про права людини вимагають саме офіційного інформування про відступи. Утім, жоден договір не вказує на строк такого інформування. Правосуддя є фундаментом побудови цивілізованих відносин між державою та її громадянами. Особливо під час криз, надзвичайних станів та інших особливих режимів, коли виникає реальна загроза порушення базових прав і свобод. Оприлюднені Пріоритетні заходи для митних адміністрацій щодо вжиття екстрених заходів задля збереження міжнародних ланцюгів постачань і реалізації завдань протидії кризі COVID-19 зорієнтовано, головним чином, на операціях із мобілізації доходів, полегшення торгівлі, забезпечення безпеки державних кордонів.

Висновки. Одним із очікуваних результатів співпраці в умовах пандемії WHO, UNDP, UNAIDS має стати утвердження принципу поваги прав людини й основних свобод, і конкретно права на здоров'я. Як ніколи на часі узгодження практики тлумачення й застосування міжнародних договорів з прав людини. Запроваджені урядами та іншими суб'єктами владних повноважень заборони та обмеження, якщо вони розповсюджуються на конкретних суб'єктів, здатні викликати заперечення й небажання виконувати. Досвід реагування судових інстанцій інших держав на порушення прав людини заслуговує окремого дослідження й узагальнення. Як і практика діяльності органів державної влади, зокрема митних, в нових умовах загрози подальшого поширення коронавірусу.

Ключові слова: COVID-19, права людини, право на здоров'я, відступ від міжнародного договору, Конституція, правосуддя, митна адміністрація.