

FREEDOM OF MOVEMENT: CHALLENGES OF COVID-19

СВОБОДА ПЕРЕСУВАННЯ: ВИКЛИКИ COVID-19

Zavhorodnia V., PhD in Law, Assistant Professor,
Head of the Department of International, European and Comparative Law
Sumy State University

Slavko A., PhD in Law,
Teaching Assistant at the Department of International,
European and Comparative Law
Sumy State University

Cherniavskiy A., PhD in Law,
Assistant Professor at the Department of International,
European and Comparative Law
Sumy State University

The paper deals with an analysis of the concept of «freedom of movement» and the development of criteria for assessing the proportionality of restrictions on the freedom of movement during the pandemic. In the COVID-19 pandemic, the most challenged are the right to life, the right to health and access to health care, and freedom of movement. It is established that the proper realization of fundamental and inalienable human and civil rights and freedoms, such as the right to freedom of movement, is one of the most important guarantees of individual freedom, a necessary condition for person's cultural, spiritual and physical development. It requires appropriate and effective mechanisms of ensuring, lying in the plane of justice and good governance. Of course, under martial law, freedom of movement is already subject to new restrictions (for example, curfew, ban on conscripts leaving Ukraine, etc.), and quarantine restrictions have somewhat lost their relevance for Ukraine. At the same time, in some states, quarantine restrictions remain. The paper presents a brief study of approaches to restricting the right to freedom of movement under the legislation of the United States of America and the European Union. Based on the European Court of Human Rights case law analysis, the criteria for determining the proportionality of restrictions on the right to freedom of movement have been formulated. In particular, the extent of restrictions on the right to freedom of movement during a pandemic should be based on: 1) the severity of the disease; 2) the risks of infection by contact; 3) the effectiveness of therapy for the disease; 4) existence of alternative measures to curb the development of the disease (for example, the vaccination); 5) duration of restrictions. The severity of the disease, its high «contagiousness», the lack of effective therapy and alternative ways of containment are the arguments in favour of establishing restrictions on freedom of movement, and the considerable duration of their effect – in favour of easing such restrictions.

Key words: freedom (liberty) of movement, pandemic, restriction of rights, international legal guarantees, European Court of Human Rights, proportionality.

У статті проаналізовано поняття «свобода пересування» та розроблено критерії оцінки пропорційності обмежень свободи пересування під час пандемії. Під час пандемії COVID-19 найбільш загроженими є право на життя, право на здоров'я та доступ до медичної допомоги та свободу пересування. Встановлено, що належна реалізація основних і невід'ємних прав і свобод людини і громадянина, таких як право на свободу пересування, є однією з найважливіших гарантій свободи особистості, необхідною умовою культурного, духовного та фізичного розвитку людини. Для цього потрібні відповідні та ефективні механізми забезпечення, що лежать у площині справедливості та належного управління. Звичайно, в умовах воєнного стану на свободу пересування вже накладено нові обмеження (наприклад, комендантська година, заборона на виїзд чоловіків призовного віку з України тощо), а карантинні обмеження дещо втратили свою актуальність для України. При цьому в деяких державах все ще зберігаються карантинні обмеження. Також варто враховувати, що у майбутньому можуть виникнути нові пандемії чи інші явища схожого характеру, тому важливо заздалегідь розробити інструменти для оцінки пропорційності можливих обмежень свободи пересування. У цій роботі представлено коротке дослідження підходів до обмеження права на свободу пересування за законодавством Сполучених Штатів Америки та Європейського Союзу. На основі аналізу практики Європейського суду з прав людини сформульовано критерії визначення пропорційності обмежень права на свободу пересування. Зокрема, міра обмежень права на свободу пересування під час пандемії має ґрунтуватися на: 1) тяжкості захворювання; 2) ризиках зараження шляхом безпосереднього контакту; 3) ефективності терапії захворювання; 4) наявності альтернативних заходів для стримування розвитку захворювання (наприклад, вакцинація); 5) тривалості дії таких обмежень. Тяжкість захворювання, його висока «заразність», відсутність ефективної терапії та альтернативних шляхів стримування свідчать на користь встановлення обмежень свободи пересування, а значна тривалість їх дії – на користь пом'якшення таких обмежень.

Ключові слова: свобода пересування, пандемія, обмеження прав, міжнародно-правові гарантії, Європейський суд з прав людини, пропорційність.

Introduction. Freedom (liberty) of movement is one of the basic human rights, which serves as a basis for the realization of a number of other rights and freedoms. The right to freedom of movement is guaranteed, for example, by Article 12 of the ICCPR, according to which 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 [1]. In General Comment 27, the Human Rights Committee emphasized that liberty of movement is an indispensable condition for the free development of a person. It interacts with several other rights enshrined in the Covenant, as is often shown by the Committee's practice in considering reports from States parties and communications from individuals [2]. The

right to freedom of movement is also guaranteed by the law of the Council of Europe, in particular Article 2 of Protocol 4 to the European Convention on Human Rights. It provides that everyone lawfully within the territory of any State shall, within that territory, have the right to liberty of movement and freedom to choose his residence. Also, everyone is free to leave any country, including their own [3]. Similarly, the right to freedom of movement is one of the basic rights guaranteed by the primary law of the European Union.

Revealing the meaning of the right to freedom of movement, researchers emphasize that it is often understood as the right to enter a particular state [4]. However, in order to exercise your right to enter, you must first have the right to leave (emigrate). «The right to enter the country is only half the story; in fact,

it does not even come into force if the previous right to leave one's country is not respected» [5].

It is well known that over the last two years, freedom of movement has faced a number of challenges related to pandemics and quarantine restrictions. For example, according to the UN, in the current COVID-19 pandemic, the most challenged were three rights:

- 1) the right to life and the duty to protect life;
- 2) the right to health and access to medical care;
- 3) freedom of movement [6].

Given that the exercise of freedom of peaceful assembly, the right to employment, the right to education, the freedom of entrepreneurial activity usually depends in one way or another on cyclical movements in space, restrictions on freedom of movement directly lead to interference with relevant rights. Therefore, given the «domino effect», which affects the exercise of human rights and freedoms restriction of the right to freedom of movement, we believe that any interference with such a right, even under quarantine restrictions, should be appropriate and proportionate, and to be conditioned by national needs. This paper deals with determining the proportionality and adequacy of restrictions on the right to freedom of movement.

Theoretical Background. The right to freedom of movement cannot be called a little-studied topic. Thus, there is a fairly rich judicial and administrative practice and a number of scientific studies aimed at studying the national characteristics of the content of this right [7], as well as the analysis of international legal guarantees for the exercise of such a right [4; 5]. However, it is seen that, firstly, the challenges to freedom of movement are a complex issue that raises not only legal but also social, political and security aspects, which are usually given little attention in the relevant literature. Secondly, given the relatively rare cases of large-scale restrictions on the right to freedom of movement for public health reasons, the experience of quarantine restrictions over the past two years requires detailed reflection and discussion to identify the most successful models for balancing rights.

Argument of the paper. According to researchers, the importance of the fundamental right to free movement becomes clear only when a person is actually faced with a potential restriction of the right ... Interference with rights, including the right to freedom of movement, cannot be arbitrary. For example, in the United States, when the government restricts the law, the courts must exercise serious scrutiny when reviewing the law, which is potentially contrary to fundamental rights. To pass control, the law must meet two requirements: first, it must be justified by a convincing and legitimate state interest, and secondly, it must be narrowly aimed at achieving this interest [7].

A slightly different approach to determining the conditions for interfering with the right to freedom of movement has been developed in the European Union. Thus, in accordance with EU Council Recommendation 2020/1475 of 13 October 2020 on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic, as the COVID-19 pandemic has caused an unprecedented health emergency, the protection of public health has become an overriding priority for both the Union and its Member States. On the basis of the protection of public health, Member States may take measures that restrict the free movement of persons within the Union) [8]. In general, this document was intended to help strike a fair balance between the right to medical care (and, indirectly, to life) and the right to freedom of movement. The EU Council sets out two basic rules for interfering with freedom of movement in a pandemic: when adopting and applying restrictions to free movement, Member States should respect principles of EU law, in particular proportionality and non-discrimination. Therefore, it seems that proportionality and non-discrimination are

the cornerstones on which the system of restriction of rights and freedoms in the EU is built.

The UN also demonstrates its own approach to restricting the right to freedom of movement. As noted in the above-mentioned General Comment 27 of the UN Human Rights Committee, the permissible restrictions that may be imposed on the rights protected by Article 12 of the ICCPR should not nullify the principle of freedom of movement and are determined by the requirement of Article 12, paragraph 3, and also the need to harmonize with other rights recognized by the Covenant [2].

However, the most interesting in this context is the Council of Europe's approach to defining the main criteria for interfering with the right to freedom of movement. It is worth noting that to fight against the pandemic, ten member states of the Council of Europe submitted applications for derogations, in which they notified a temporary waiver of their obligations under certain articles of the Convention and protocols. Restrictions on the right to freedom of movement were declared, in particular, by Romania (Note Verbale Nr. 498) [9], Moldova (Letter JJ9016C) [10], Northern Macedonia (Note verbale JJ9021C) [11], Latvia (Note verbale JJ9012C) [12], Georgia (Note verbale JJ9018C) [13], Estonia (Note verbale JJ9017C) [14], Armenia (Letter JJ9015C) [15] and Albania (Note verbale JJ9020C) [16]. But keep in mind that «beyond the requirement of notification, the implementation of derogatory measures needs to meet certain substantive criteria:

- first, states cannot derogate to non-derogable rights;
- second, and concerning other rights, Article 15 of the ECHR states that derogating measures must be 'strictly required by the exigencies of the situation' and 'not inconsistent with its other obligations under international law' [17].

Therefore, for the ten mentioned states, the degree of interference with freedom of movement should be determined by the seriousness of the situation and the conflict with other international legal obligations. However, the other 37 member states of the Council of Europe did not declare a derogation, so in these countries restrictions on freedom of movement took place according to the general rules established by the established case-law of the European Court of Human Rights.

At the Council of Europe level, the ECtHR has formulated basic approaches to restricting the right to freedom of movement. For example, in the case of *Khlyustov v. Russia*, the Court has stated that Article 2 of Protocol No. 4 to the Convention guarantees any person the right to freedom of movement, including the right to leave any country for such a country at the choice of the person to whom he may be admitted. Any measure restricting this right must be «in accordance with the law», pursue one or more of the legitimate aims set out in the third paragraph of the same article, and «be necessary in a democratic society» (§ 64) [18].

Therefore, restrictions on freedom of movement are possible in case when they:

- 1) provided by law; and
- 2) are necessary in a democratic society; and
- 3) carried out in the interests of:
 - national or public security;
 - to ensure public order;
 - to prevent crimes;
 - for protection of health or morals;
 - in order to protect the rights and freedoms of others.

The Court reiterates its settled case-law, according to which the expression "in accordance with law" not only requires that the impugned measure should have some basis in domestic law, but also refers to the quality of the law in question, requiring that it should be accessible to the persons concerned and foreseeable as to its effects (for example, *de Tommaso v. Italy*, § 106) [19]. Herewith, the legislature's margin in principle extends both to decision to intervene in

the subject area and, once having intervened, to the detailed rules it lays down in order to achieve a balance between the competing public and private interests. However, this does not mean that the solutions reached by the legislature are beyond the scrutiny of the Court. It falls to the Court to examine carefully the arguments taken into consideration during the legislative process and leading to the choices that have been made by the legislature and to determine whether a fair balance has been struck between the competing interests of the State and those directly affected by those legislative choices (§ 38) [20].

The ECtHR's practice of restricting the right to freedom of movement in connection with the protection of public health does not appear to be very extensive. However, in the case of *Enhorn v. Sweden*, concerning the right to liberty and security of person, the Court found that the essential criteria when assessing the "lawfulness" of the detention of a person "for the prevention of the spreading of infectious diseases" are whether the spreading of the infectious disease is dangerous to public health or safety, and whether detention of the person infected is the last resort in order to prevent the spreading of the disease, because less severe measures have been considered and found to be insufficient to safeguard the public interest (§ 44) [21]. In view of the above mentioned, it seems clear that the control of SARS-CoV-2, especially in the first period after its detection, can be considered «protection of health or moral».

Thus, in our view, the most problematic aspect of assessing the extent to which a restriction on the right to freedom of movement is lawful and does not constitute a violation of the law is to determine the proportionality of the restriction («necessity in a democratic society»). The proportionality of the restriction is assessed in view of the individual circumstances of the person whose right is restricted, the availability of alternative ways to achieve a legitimate goal, the possibility or impossibility of periodic review of the restriction applied to the person, its rigidity, duration and so on.

Given the recent case law of the European Court of Human Rights on the restriction of the right to freedom of movement in a pandemic, we propose our own list of criteria on the basis of which the proportionality of the restriction of the right to freedom of movement in a pandemic should be assessed. In this case, in our opinion, should be taken into account:

- The severity of the disease. By this criterion, we propose to understand the health consequences of such a disease (for example, the onset of disability or other serious damage to human health) and its mortality (i.e. the percentage of infected persons who died as a result of the disease);

- The ability of the disease to cause infection by contact. In this case, it is necessary to take into account the mode of transmission of the disease (for example, airborne or in contact with human blood, or physical contact, etc.), the length of the incubation period during which a person can already spread the virus but not experience its symptoms, and therefore to continue the social activity and the number of virus particles that are needed to cause infection;

- Availability of effective therapy for the disease. It is worth noting that diseases for which there is already

a proven special therapy that does not require significant time / money, seem less dangerous than the rest. Instead, if specialized therapy has not yet been developed, or is very expensive and time-consuming, or does not guarantee a positive outcome, then the disease carries significant risks in spreading;

- Existence of alternative measures to curb the development of the disease. Among such means, in particular, it is worth mentioning the presence of developed vaccines. If there are vaccines against the disease, the effectiveness of which has been proven, and vaccinations cover a relatively large proportion of the population – then such measures seem more acceptable than the permanent restriction of freedom of movement. It is also important to set up operational mechanisms for testing and tracking the contacts of patients;

- Duration of restrictions. In this respect, it is important to note that over time, other criteria lose their relevance and need to be revised. Restrictions on the right to freedom of movement should not last as long as desired without reviewing and reassessing the conditions that led to it. The longer the restriction of the right, the more serious the grounds must be.

Conclusions. Thus, given the proposed list of criteria, we can assess the justification for restricting the right to freedom of movement in the current pandemic. First, it should be noted that the disease caused by SARS-CoV-2 is quite serious – its average mortality in 2020 was about 2 %, and the health consequences of the disease are quite severe: patients still experience shortness of breath for a long time, get tired quickly, there is a decrease in cognitive function. The disease is highly contagious, transmitted by airborne droplets, sometimes causing infection even after a short conversation or a few minutes with the patient in the same room, and is characterized by a long incubation period during which the person is a spreader of the virus but does not experience symptoms. However, there is still no effective specialized therapy for the disease, and treatment in severe cases is long and requires specialized medical equipment.

Until the end of 2020, there were no vaccines with proven efficacy, but at the end of 2020, the completion of tests for several such vaccines was announced. As of mid-2021, large-scale vaccination campaigns have been launched in many countries around the world, creating alternatives to lockdowns and strict quarantine restrictions. In addition, restrictions on freedom of movement are already quite long in time, indicating that they need to be reviewed and relaxed.

In summary, most of the criteria we have developed indicate that the restrictions on freedom of movement imposed in connection with the pandemic were proportionate at the time they were implemented. However, as of mid-2021, they need to be reviewed and should be weakened. The dynamic development of the pandemic situation, the creation of new and testing of old vaccines, the identification of new strains of the virus indicate that quarantine restrictions, in particular those relating to freedom of movement, must be tested for compliance with the law, legitimacy and proportionality. We believe that this opens broad prospects for further research and studies.

REFERENCES

1. International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966. United Nations Human Rights. URL: <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>
2. CCPR General Comment No. 27: Article 12 (Freedom of Movement), adopted at the Sixty-seventh session of the Human Rights Committee, on 2 November 1999. Refworld. URL: <https://www.refworld.org/pdfid/45139c394.pdf>
3. European Convention on Human Rights. European Court of Human Rights. URL: https://www.echr.coe.int/documents/convention_eng.pdf
4. Hosein A. (2013) Immigration and freedom of movement. *Ethics & Global Politics*. Vol. 6, No. 1, 25–37.
5. Mcadam J. (2011). An Intellectual History of Freedom of Movement in International Law: The Right to Leave as a Personal Liberty. *Melbourne Journal of International Law*, Vol. 1, 1–30.
6. United Nations (2020) COVID-19 and Human Rights. We are all in this together. United Nations. URL: https://www.un.org/victimsofterrorism/sites/www.un.org.victimsofterrorism/files/un_-_human_rights_and_covid_april_2020.pdf

7. Wilhelm K. E. (2010) Freedom of Movement at a Standstill? Toward the Establishment of a Fundamental Right to Intrastate Travel. *Boston University Law Review*, Vol. 90, 2461–2497.
8. Council Recommendation (EU) 2020/1475 of 13 October 2020 on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic. EUR-Lex. Access to European Union law. URL: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32020H1475>
9. Note Verbale No. 498 dated 18 March 2020 of Romania. Council of Europe. URL: <https://rm.coe.int/16809cee30>
10. Letter JJ9016C dated 20 March 2020 of Moldova. Council of Europe. URL: <https://rm.coe.int/16809cf9a2>
11. Note verbale JJ9021C dated 2 April 2020 of North Macedonia. Council of Europe. URL: <https://rm.coe.int/16809e1288>
12. Note verbale JJ9012C dated 16 March 2020 of Latvia. Council of Europe. URL: <https://rm.coe.int/16809ce9f2>
13. Note verbale JJ9018C dated 23 March 2020 of Georgia. Council of Europe. URL: <https://rm.coe.int/16809cff20>
14. Note verbale JJ9017C dated 20 March 2020 of Estonia. Council of Europe. URL: <https://rm.coe.int/16809cfa87>
15. Letter JJ9015C dated 20 March 2020 of Armenia. Council of Europe. URL: <https://rm.coe.int/16809cf885>
16. Note verbale JJ9020C dated 1 April 2020 of Albania. Council of Europe. URL: <https://rm.coe.int/16809e0fe5>
17. Lebret A. (2020) COVID-19 pandemic and derogation to human rights. *Journal of Law and the Biosciences*, Vol. 7, Is. 1, 1–15.
18. Case of Khlyustov v. Russia, 11 July 2013. European Court Human Rights HUDOC. URL: <http://hudoc.echr.coe.int/eng?i=001-122186>
19. Case of de Tommaso v. Italy, 23 February 2017. European Court of Human Rights. URL: <http://hudoc.echr.coe.int/eng?i=001-171804>
20. Case of Garib v. The Netherlands, 6 November 2017. European Court of Human Rights. URL: <http://hudoc.echr.coe.int/eng?i=001-177406>
21. Case of Enhorn v. Sweden, 25 January 2005. European Court of Human Rights. URL: <http://hudoc.echr.coe.int/eng?i=001-68077>