PUBLIC HEALTH PROTECTIONS AND LIMITATIONS ON FREEDOM OF RELIGION

Abstract. From the point of view of human rights, the global covid-19 pandemic has drawn our attention to the state's duty to take appropriate measures to address threats to life that aim to stop the spread of the virus by severely restricting certain rights and freedoms that we are used to enjoying, namely freedom of movement, freedom of assembly, the right to personal freedom, etc. Accordingly, when the manifestation of a person's or organization's religious beliefs affects the rights of others, the state has the right to try to balance the protection of these competing rights. This situation has made us realize the conflict-confrontational dilemma between different constitutional rights.

A substantive analysis of norms of international law shows that religious freedom is one of those rights that may be subject to restrictions under Article 18 of the International Covenant on civil and political rights 1966, if such restrictions are "provided for by law and are necessary for health protection". The measures introduced by the state give rise to general principles of harmonization between religious freedom and the protection of public health, while respecting the principle of proportionality.

At the same time, Article 18 should also be considered in the light of Article 21 of the Covenant (right to freedom of peaceful assembly), which, in turn, loses its legal status as "absolute" in the event of a state of emergency. The measures introduced have created long-term difficulties for religious persons and communities to practice their religion and significantly restricted the access of these entities to places of religious worship. The responses of the world's states to the general ban on public gatherings give rise to significant discussions about the legitimate restriction of religious freedom.

Keywords: emergency situation, restrictions, health care, pandemic, religious freedom, freedom of assembly and of association.
ЗАХИСТ ГРОМАДСЬКОГО ЗДОРОВ'Я ТА ОБМЕЖЕННЯ СВОБОДИ ВІРОСПОВІДАННЯ

Анотація. З погляду прав людини, світова пандемія Covid-19 звернула нашу увагу на обов’язок держави вживати відповідних заходів для усунення загроз життю, які мають на меті зупинити поширення вірусу, обмежуючи певні права і свободи, якими ми звикли користуватися, а саме свободу пересування, свободу зібрань, право на особисту свободу тощо. Відповідно, коли прояв релігійних переконань особи чи організації зачіпає права інших осіб, держава має право намагатися збалансувати захист цих конкуруючих прав. Ця ситуація зуміла усвідомити конфліктно-конфронтаційну ділему між різними конституційними правами.

Предметний аналіз міжнародного законодавства свідчить, що релігійна свобода — одне з тих прав, яке може зазнати обмежень згідно зі ст. 18 Міжнародного пакту про громадянські і політичні права, якщо такі обмеження «передбачені законом, є необхідними для охорони здоров'я». Запроваджені державою заходи породжують загальні принципи гармонізації між релігійною свободою та захистом громадського здоров'я з дотриманням принципу пропорційності.

При цьому статтю 18 Пакту також необхідно розглядати у світлі статті 21 Пакту (право на свободу мирних зборів), яка, у свою чергу, втрачає правовий статус «абсолютних» у разі настання в державі надзвичайній ситуації. Запроваджені заходи створили довготривалі труднощі для релігійних осіб та громад сповідувати свою релігію і значно обмежили доступ цих суб’єктів до місць відправлення релігійного культу. Вказано, що відповіді держав світу на загальну заборону публічних зібрань породжують суттєві дискусії стосовно правомірного обмеження обсягу релігійної свободи.

Ключові слова: надзвичайна ситуація, обмеження, охорона здоров'я, пандемія, релігійна свобода, право на свободу мирних зборів.

Formulation of the problem. In international human rights documents, the institution of restriction of rights and the concept of goals of restriction of human rights have acquired a fairly broad justification and development [1, p.52]. Thus, the Universal Declaration of human rights (1948) allows restricting rights and freedoms solely for the purpose of ensuring proper recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and general welfare in a democratic society (Part 2 of Article 29).

The International Covenant on civil and political rights (1966) allows for restrictions on freedom of thought, conscience, religion, if they are necessary for the protection of public safety, order, health and morals, and the fundamental rights and freedoms of others (Article 18). In view of the above, it becomes obvious that the
list containing grounds for restriction is closed and restrictions are not allowed on grounds not specified in Article 18 of the Covenant, and it should not be supplemented by additional grounds in national legislation.

The UN Human Rights Committee makes it clear that this article of the covenant should be strictly interpreted and that restrictions based on other grounds, such as national security, are not allowed [2].

On March 11, 2020, the WHO director-general announced that in response to the Covid-19 pandemic, "all countries must strike a clear balance between health care, minimizing economic and social crises, and respecting human rights" [3]. And given the fact that at the beginning of the pandemic outbreak, the scale and severity of the consequences of Covid-19 clearly rose to the level of threat to "health" and "the rights and freedoms of others," it becomes clear that states were able to justify restrictions on religious practices during the Covid-19 pandemic. The only thing that should be understood is the extent to which state security measures to prevent an epidemic can legally encroach on religious freedom [4].

This unprecedented time has prompted meticulous jurists and religious scholars to think about how to strategically approach the free implementation of religious practices in times of "physical distancing", changing forms of worship, such as videoconferencing, and rapidly adapting religious beliefs to new living conditions.

Achieving a balance between conflicting rights has never been an easy task. It is even more complicated during a state of emergency, when a quick state readiness for decisive action is required. In addition, it should be recognized that balancing between different social values in the context of Covid-19 was extremely burdensome for a number of reasons, one of which, as Croatian law professor Iris Goldner Lang appropriately notes, "is caused by the high degree and rate of coronavirus infection and partly due to the difficulty of quantifying its effects when comparing different precautions" [5].

Thus, this article aims to find a fair balance between values that conflict under the international legal framework for human rights in the context of restrictive quarantine norms.

Presenting the main material. In the light of modern standards of international law, religious freedom is undoubtedly one of the fundamental human rights, the protection of which is a prerequisite for a democratic state governed by the rule of law. The importance of protecting religious freedom can be traced in many international human rights treaties, both general and regional.

Paragraphs 1 and 2 of Article 18 of the International Covenant on civil and political rights (1966) cover a fairly wide range of religious and non-religious beliefs, and therefore protect theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief. Analyzing this article, it is impossible to ignore such an important feature as the collective nature of performing ritual rites, which, as a rule, applies to all religious beliefs.
It is important to say that places of worship and places of religious assembly perform special functions in such communities. They are usually a meeting place for believers and important ceremonies based on the beliefs or beliefs of community members. They can also serve as a place for individual and collective prayer and worship, reflection and meditation, as well as a platform for conducting various educational, social, cultural, charitable and humanitarian events [6, p.66-67]. Therefore, there is a clear incentive for public authorities to ban various forms of religious rites and close places of worship in order to stop the spread of the virus. Among other things, Article 27 of the Covenant protects the rights of religious minorities, which cannot be denied the right to enjoy, to practice their own religion together with other members of their community, which also further increases interest in the topic of scientific research.

Without a doubt, religious communities can potentially become hot spots for the transmission and spread of viral pathogens. International media reports indicate that violations of government restrictions for the purpose of religious worship are quite common. However, it is worth noting that the information document «Respecting democracy, rule of law and human rights in the framework of the Covid-19 sanitary crisis» from April 7, 2020 [7] states that "although strengthening restrictions on human rights can be fully justified during a crisis, strict criminal sanctions are of concern and their application should be strictly controlled; a fair balance between coercion and prevention is the most appropriate, if not the only way to observe proportionality".

From the point of view of literal interpretation, health is a public good and a basic requirement necessary for the exercise of a number of other rights, including the right to freedom of religion. Healthcare is widely recognized in many international treaties. In particular, the International Covenant on economic, social and cultural rights, to which the majority of states are parties, recognizes everyone's right to "the highest attainable standard of physical and mental health" (Article 12) and obliges governments to take effective measures to "prevent and treat epidemic, endemic, occupational and other diseases".

At the international level, it is also recognized that health can be the basis for restrictions on rights and freedoms in order for a state to take measures "in connection with a serious threat to the health of the population or individuals". These measures must be aimed directly at preventing disease or injury or providing care for the sick and injured (Article 25 of the Syracuse principles...).

The basis of restrictive norms is also defined in the Document of the Copenhagen meeting of the conference on the human dimension of the CSCE in 1990 [8]. Thus, "any restriction on rights and freedoms in a democratic society must relate to one of the objectives of the applicable law and be strictly" (Article 24).

At the same time, it is worth noting that during a state of emergency in a state, these ordinary restrictions may not be sufficient to achieve a legitimate goal, and as
a result, the state may be able to derogate from certain rights, while legality, necessity and proportionality remain key principles. It should be noted that among such circumstances, there may well be a health crisis similar to the Covid-19 pandemic.

It is generally accepted that emergency powers should be used within the parameters provided for in international human rights law, which contain provisions on derogation, namely Article 4 of the Covenant and Article 15 of the convention for the protection of human rights and fundamental freedoms. They provide for the possibility of derogation from international obligations in the field of human rights during a state of emergency in which the life of the nation is at risk.

The UN Human Rights Committee also does not provide a clear explanation of this concept, but notes that "not every catastrophe qualifies as an emergency that threatens the life of the nation" [9], emphasizing the need for careful consideration of the grounds and reasons for retreats in situations not related to armed conflict. In particular, there is a serious test of the "urgency" of the situation for states seeking retreat. This requirement concerns the duration, territorial scope and material scope of the state of emergency. The test suggests that derogation measures should be avoided when the situation can be adequately resolved by establishing necessary and proportionate restrictions or such restrictions as are normally permitted by international treaties on the maintenance of public safety, health and order [10].

Since the state of emergency is designed for emergencies, it should only be applied in the event of threats that are truly emergency (and short-term). Conversely, it should not be used in the case of threats that, although very sad and dramatic, are endemic to modern societies and can never be completely eliminated (ordinary crime, sporadic terrorist attacks, etc.). However, it is not possible to draw a line between the two scenarios in abstracto [11]. And in addition, the indentation model, as opposed to the restrictions provided for in Art. 18, is more stringent in terms of the severity of the danger and the scope of the restriction of the right.

It is noteworthy that under Article 4 (2) of the Covenant, certain human rights enjoy absolute legal protection, the exercise of which cannot be suspended or restricted under any circumstances, even in an emergency. These are the right to life (Art. 6), the prohibition of torture or ill-treatment (Art. 7), the prohibition of slavery (Art. 8), the prohibition of deprivation of liberty (Art. 11), the prohibition of illegal finding guilty of committing any criminal offence (Art. 15), the right to legal personality (Art. 16) and the right to freedom of thought, conscience and religion (Art. 18).

A similar approach is applied in Part 2 of Article 15 of the European Convention, on Human Rights although the list of articles has been reduced to 4 rights (right to life, prohibition of torture and other forms of ill-treatment; prohibition of slavery and forced labor; no punishment without law), but religious freedom is not included in this list.
An exhaustive explanation on this issue is provided in a special document — "The Syracuse principles on the limitation and derogation provisions in the International Covenant on civil and political rights" of 1984 [12], which states that the right to freedom of thought, conscience and religion is not subject to derogation under any circumstances, even with the confirmed goal of preserving the life of the nation. And these rights, which are not derogable, must be exercised and respected by states parties in all circumstances and situations.

This situation gave rise to a new perception on religious autonomy, impacted and defined by societal and public health imperatives. However, self-regulation is dependent on the existing system of relations between the State and Religions [13].

Responding to the pandemic, more than a third of the participating states have officially declared a "state of emergency" as stipulated by international law; other states have introduced emergency regimes of varying degrees of intensity or have taken other legislative or political restrictive measures without officially declaring a state of emergency [14].

In this context, it is important that freedom of assembly (Article 21 of the Covenant), which directly concerns religious assembly at the expense of a large mass of people, is definitely included in the category of rights from which derogation is allowed. States that have notified the UN and the Council of Europe of a derogation from their obligations since the outbreak of the pandemic have directly or indirectly resorted to derogations from the right to freedom of peaceful assembly, similarly restricting religious gatherings.

Ultimately, this potentially poses a real problem when states impose various emergencies, arguing that the degree of interference with religious freedom is actually necessary and justified, since the interrelated Articles 21, 22 and 27 of the Covenant contain rights from which derogation is permitted. In such circumstances, it is important to note that religious freedom enjoys a high degree of protection in international law, and its protection cannot be reduced to freedom of assembly.

Note that the internal dimension of religious freedom is always absolute and inviolable, which can never be stopped or restricted, under any circumstances. Legal restrictions apply only to aspects of expressing religious behavior in crowded environments. Such restrictions must meet the three criteria already mentioned. External freedom of religion may be proportionally restricted by law and only if necessary, under clearly defined and specific circumstances, such as "protection of public safety", "order", "health" and "morals", "fundamental rights and freedoms of others" (Article 18 of the Covenant). It is precisely these interests that are the legitimate goals for which restrictions on the right to religious freedom can be imposed.

More clearly and convincingly concretizes the provision on the clash of interests of Article 36 of the Syracuse principles, which notes that in the event of a conflict between a right enshrined in the Covenant and another right, special
attention should be paid to the fact that the Covenant is aimed at protecting the most important, fundamental rights and freedoms. In this regard, special importance should be attached to rights that are not subject to restriction under the Covenant.

Proportionality and balance are the semantic core of global constitutionalism, which are characterized as the most important criteria in assessing the application and implementation of human rights. Its essence is that the state can restrict human rights only when it is really necessary, and only to the extent that measures are appropriate to achieve a legitimate goal. In view of the position of the European Court of human rights, the principle of proportionality presupposes a reasonable correlation between the means used and the legitimate aim.

In order to identify key planning aspects that should be taken into account by organizers of mass events in the context of the Coronavirus outbreak, WHO issued "Key planning recommendations for mass gatherings in the context of Covid-19: interim guidance" dated March 19, 2020 [15] and "Practical considerations and recommendations for religious leaders and faith-based communities in the context of Covid-19" dated April 7, 2020 [16], which explain the rules for organizing a mass event during the safe conduct of religious events in compliance with quarantine requirements during the Covid-19 pandemic, however, it is necessary to point out an important point, which is noted in this document, that "if it is impossible to implement these measures that guarantee the safety of people in a religious building, the measure should be canceled".

In order to avoid large gatherings of believers and public health, religious organizations can remain open if the size and characteristics of the religious organization's premises are taken into account in order to calculate a separate place for each, and if visitors comply with all necessary requirements regarding interpersonal distance of at least one meter, hand washing and wearing a mask. Videoconferencing and other remote technologies should not always be a solution for believers, because not all religious beliefs can use technological resources during religious holidays, as this would be contrary to their nature and mission (Judaism, Islam).

**Conclusions.** The period of the pandemic have shown how difficult it is to draw a clear line between what is necessary and proportionate. In particular, considerable uncertainty about how serious a threat the virus actually poses has made deciding on the timing and scope of the response a daunting task. It is determined that in an emergency situation, the Convention protects certain rights of derogation of the state from its obligations to ensure them, except for religious freedom.

It is therefore necessary to ensure that any restrictions on religious freedom are clearly prescribed by law as necessary to achieve a legitimate aim, namely the proper protection of public health, proportionate and non-discriminatory with a view to minimizing possible abuse or the possibility of incomplete implementation of measures and without a conscious intention to "undermine" democratic and pluralistic constitutional boundaries.
It should be noted that the state should ensure that the introduced measures of physical distancing do not encroach on the religious beliefs of believers either directly (a clear restriction of the right to have, accept or change religion), or indirectly (through the restriction of forum externum — the right to conduct and conduct religious practice). Restrictions on physical distancing, in most cases, are not (and should not be) aimed at creating conflict with religious organizations, but are aimed at achieving the overall goal of protecting the health of the population.

References:


Література:


