

Discussion on COVID-19 Prevention apart of Public Health: Several Judgments of national and international Courts Helps to prepare us for the next Wave of Pandemics (Letter to the Editor)

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Abstract:

This letter to the editor highlights other than just medical aspects of ongoing pandemics, just before the third/fourth wave of COVID-19, arriving back to the EU, having destroyed several economic and trade structures in China and Korea in recent months. However, we have some advantages in comparison to December 2019. First, (i) testing is widely available, accessible, cheap and more accurate. Second, vaccines are on the market (ii) and 4.5 billion of the whole population are vaccinated, (iii) Third two molecules of antivirals are registered for clinical use and finally (iv) several judications on both sides of the At-

lantic may help to protect the global and local Public Health. In this first letter, we have selected some - according to space - important judgments supporting the protection of health care on one side, and minimizing the side effect of pandemics to human rights, economic bills and legal structure of pandemic response.

To the editor:

Prof. Michael Costello and Prof. Dan West, experts in International Health and Public Health Law at the University of Scranton, the same where President Joe Biden graduated, published last 2 years in *Clinical Social Work and Health Intervention* several papers in economic, social and legal issues on COVID-19 pandemics in the US from other than Public Health views. Here we have selected some experiences from an EU legal perspective.

Restrictions on human rights during the time of COVID-19

The unexpected and unprecedented spread of the pandemic, as well as the novel nature of the disease, in an attempt to stem the tide of infections prompted many States to take urgent and drastic measures. From a human rights perspective, States have had to strike a balance between their positive obligation to protect their citizens' health, safety and well-being and their negative obligation not to disproportionately restrict citizens' freedoms.

At the regional and international level, States have derogated from, or "suspended" guarantees or rights contained in other human rights treaties including the *International Covenant on Civil and Political Rights*³ and the *American Convention on Human Rights*. The UN Human Rights Committee has issued a Statement on derogations from the International Covenant on Civil and Political Rights in connection with the COVID-19 pandemic. It noted that several States had failed to formally submit any notification, despite adopting emergency measures that seriously affect the implementation of their obligations under the Covenant; and provided guidance to States on so doing.

Lockdown

The decision of *Terheş v. Romania*, no. 49933/20, 13 April 2020 concerned a 52-day general lockdown imposed by the authorities to

tackle the COVID-19 pandemic. The Court found the application to be inadmissible. Under a state of emergency as applied in Romania, no movement outside the home was permitted, except in a certain number of listed circumstances and on production of a document attesting to valid reasons for leaving home. The applicant complained that this confinement measure, with which he had to comply, constituted a deprivation of liberty contrary to Article 5 § 1 (e) of the Convention. The decision is noteworthy as the Court found that the measure complained of had been imposed under a state of emergency, with the aim of isolating and confining the entire population on account of a public-health situation which the competent national authorities had deemed to be serious and urgent.

Freedom of assembly

Magdić v. Croatia, no. 17578/20, concerns the measures adopted by the Croatian authorities in the context of preventing the spread of the COVID-19 virus, including prohibitions on public gatherings comprising more than five people and the suspension of religious gatherings. The applicant alleges that the measures breached, *inter alia*, his right to freedom of religion and freedom of peaceful assembly.

The pending case of *Association of Orthodox Ecclesiastical Obedience v. Greece*, no. 52104/20 concerns the inability to judicially review a temporary prohibition on collective worship in the light of the pandemic on the grounds that the restriction was no longer in force when the application was examined by the domestic court. The Court has given notice of the application to the Greek Government and put questions to the parties under Article 6 § 1 (access to court) and Article 9 of the Convention.

Vaccination

Although not directly related to a COVID-19 vaccination scheme, the Court has dealt with compulsory vaccination of children against cer-

tain diseases in *Vavříčka and Others v. Czech Republic* [GC], no.s 47621/13 and 5 others, 8 April 2021. The case concerned parents' general legal duty to vaccinate children against 9 well-known diseases. Parents who failed to fulfill this duty without good reason could be fined and non-vaccinated children were not accepted in nursery schools (an exception was made for those who cannot be vaccinated for health reasons). The Court found no violation of Article 8 (right to respect for private life) of the Convention.

In the decision of *Zambrano v. France*, no. 41994/21, 7 October 2021, the Court rendered inadmissible the applicant's complaints concerning legislation on the management of the public-health crisis caused by the COVID-19 pandemic. The Law introduced a transitional regime for lifting the public-health state of emergency and authorized the Prime Minister, among other measures, to limit travel and the use of public transport and to impose protective measures in shops. It also broadened the use of the health pass to other areas of daily life, such as bars and restaurants, department stores and shopping centers. The applicant relied on Articles 3, 8 and 14 of the Convention, and on Article 1 of Protocol No. 12. In his view, by creating and imposing a health pass system, the laws in place on the management of the public-health crisis caused by the COVID-19 pandemic amounted to a discriminatory interference with his right to respect for private life and were intended primarily to coerce individuals into consenting to vaccination. Although it was not necessary to decide the issue of the applicant's victim status, the Court noted that that the applicant had complained *in abstracto* about the unsuitability and inadequacy of the health pass system and other measures for managing the COVID-19 crisis without specifying their effect on his personal situation.

Without being more specific, he had not shown that any coercion had existed on him as a person who did not wish to be vaccinated: there was no general duty to be vaccinated.

On 31 March 2021, the Secretary General issued an Information document on Protection of human rights and the "vaccine pass". The document addresses the human rights considerations related to "vaccine passes". It reaffirms that vaccines are an essential part of the strategy to combat the pandemic which States are obliged to im-

plement under international human rights law, but warns that the use of vaccination certificates for purposes other than strictly medical should be considered with the utmost caution. Such use could prevent the enjoyment of certain fundamental rights by individuals not holding the certificates; raise concerns about the protection of privacy and personal data; lead to an increase of criminal activities such as counterfeiting of vaccines or the issuing of false certificates, which would seriously compromise public health efforts.

The Chair of the Committee of Convention 108 and the Data Protection Commissioner of the Council of Europe have issued a Joint Statement on the right to data protection in the context of the COVID-19 pandemic (30 March 2020). It recalls that, while data protection can in no manner be an obstacle to saving lives, even in particularly difficult situations, data protection principles must be respected. The statement covers (i) general data protection principles and rules, (ii) processing of health-related data, (iii) large-scale data processing, (iv) data processing by employers, (v) mobile, computer data, and (vi) data processing in educational systems.

Freedom of expression

The Council of Europe's Committee of experts on media environment and reform (MSI-REF) has issued a statement on freedom of expression and information in times of crisis which underscores the importance of reliable journalism, based on the standards of professional ethics, to inform the public and to scrutinize the measures taken in response to the pandemic.

Financial damage to businesses

The pending case of *Toromag, S.R.O. v. Slovakia*, no. 41217/20 and 4 other applications concerns the issue of financial damage to businesses caused by the COVID-19 pandemic. The applicants were forced to close their business (fitness centers) by virtue of measures adopted by the Slovak Public Health Authority to prevent the spread of the virus. The applicants allege under Article 1 of Protocol No. 1 (peaceful enjoyment of possessions) that they have thereby incurred pecuniary damage and lost future income as well as clientele.

Positive obligations during COVID-19

Near the beginning of the COVID-19 pandemic, the European Committee of Social Rights issued a statement of interpretation on the right to protection of health in times of pandemic (21 April 2020). The statement urged State Parties to ensure that the right to protection of health under Article 11 of the European Social Charter was given the highest priority in policies, laws and other actions taken in response to a pandemic. The right to protection of health dictated that States Parties must: (i) take all necessary emergency measures in a pandemic; (ii) take all necessary measures to treat those who fall ill in a pandemic; (iii) take all necessary measures to educate people about the risks posed by the disease in question; (iv) implement precautionary measures; (v) be particularly mindful of the impact that their choices will have for groups with heightened vulnerabilities; (vi) protect the right of access to healthcare without discrimination; (vii) aim to achieve health equity; (viii) operate widely accessible immunisation programs; (ix) protect the right to protection of health not merely theoretically, but also in fact.

On 24 March 2021, the European Committee of Social Rights adopted a Statement on COVID-19 and social rights. With that statement, it aimed to highlight those Charter rights that are particularly engaged by the COVID-19 crisis. These are (i) employment and labor rights, including full employment and employment services; the right to a safe and healthy working environment; just working conditions, including fair remuneration; the right to organise and collective bargaining, gender equality and the world of work, and the rights

of migrant workers; (ii) social security, social and medical assistance and the fight against poverty and social exclusion; (iii) right to education; (iv) rights of different categories of people, namely children and families, women, older persons, and persons with disabilities; and (v) right to housing.

Conclusion

Surprisingly, most judgements came quickly enough to help the healthcare sectors both in the EU and the UK to protect public health, and the vast majority or all decisions (some are pending, but those were not selected in this contribution)

are in favor of health protection upgrading the right not being infected by deadly disease upon other also important human rights. We will be interested in the opinions from the authors from other side of Atlantic (US, Canada and Brazil (three countries most heavily affected by pandemics, having their own judicature). (1-14)

However first discussions on equity or superiority the right for health care measurements, protecting individuals from death and postcovid syndrome, most similar to COVID-19, came from the US (court decisions of the superiority of public health against the right to education, and religious assembly) when in Bronx, Brooklyn and Philadelphia deadly outbreaks of measles killing dozens of children and parents being infected from unvaccinated children in 2018 from either orthodox Jewish, Amish, or Parent antivax groups. The decisions of Diocese of Brooklyn against NY Supreme Court or Amish Fraternity or Askenazi Family versus Pennsylvania or New York, historically very near to 2022 situation, are very consistent with European decisions, In addition they are historically chained with the first cases (California versus unvaccinated Chinese community in SFO refusing smallpox prevention and quarantine, 100 years ago) underlined the superiority of public health protection before individual or collective rights.

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