



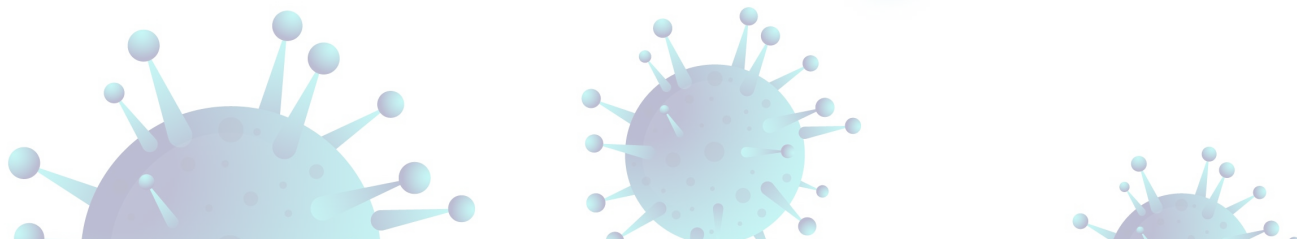
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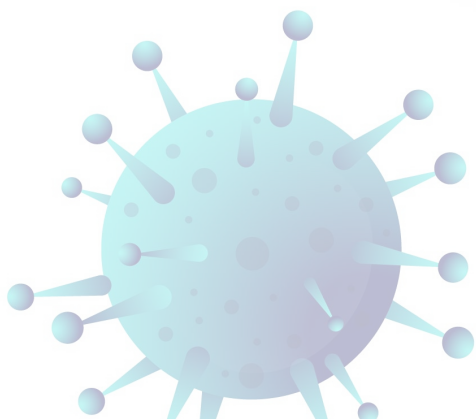


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ANALYSIS OF MEASURES DEROGATING FROM HUMAN AND MINORITY RIGHTS

during the state of emergency
in the Republic of Serbia caused by the epidemic
of infectious disease COVID-19



Implemented by:



**KVINNA
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A11*
initiative for
economic and
social rights



Impresum

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March 2020.

This publication was translated with the financial support of the European Union and co-funded by Swedish International Development Agency (Sida). Its contents are the sole responsibility of the A 11 - Initiative for Economic and Social Rights and do not necessarily reflect the views of the European Union or Sida.

Introduction

The goal of this analysis is to show to what extent restrictions, that is, measures derogating from human rights enacted under the auspices of the state of emergency, have affected the daily life of citizens of the Republic of Serbia and whether they have been implemented in the manner prescribed by the Constitution.

The questions that this analysis should answer are whether the introduction of a state of emergency was necessary, which human rights were derogated from and in what way, whether these derogations are in accordance with the Constitution, international treaties and generally accepted rules of international law, and whether these measures are justified, necessary and proportionate.

The analysis is divided into two sections. The first section provides an overview of the introduced "emergency" legal framework, as well as a mapping of human rights, which were derogated from according to the author of this analysis. The second section provides an overview of the international commitments freely assumed by the Serbian authorities during derogations, which stem from the standards of the United Nations and the Council of Europe.

At the end of the second section, there are an assessment and conclusion on the extent to which the introduction of the state of emergency and accompanying derogative measures was necessary and justified, and the way in which it reflected the rule of law and legal security of citizens in our country.

1. A new legal framework at the time of a state of emergency and derogation from human and minority rights

Decision to declare a state of emergency

On 15 March 2020, President of the Republic of Serbia Aleksandar Vucic announced that he as the President of the Republic of Serbia, the President of the National Assembly and the Prime Minister had rendered a Decision to Declare a State of Emergency^[1], on the basis of the Article 200, Paragraph 4 of the Constitution, as it was not possible to convene the National Assembly, which is primarily authorised to make a decision to declare a state of emergency.^[2] Specifically, [Decision to declare a state of the emergency](#) reads as follows:

- "1. State of emergency is declared in the territory of the Republic of Serbia.
2. This decision shall come into force on the day of its publication in the Official Gazette of the Republic of Serbia."

The Article 200, Paragraph 6, stipulates that when the National Assembly is not in a position to convene, the decision proclaiming a state of emergency shall be adopted by the President of the Republic together with the President of the National Assembly and the Prime Minister, under the same terms as by the National Assembly. Measures providing for derogation shall be effective 90 days at the most, and upon expiry of that period may be extended under the same terms.^[3]

[1] The Official Gazette of RS, no.29/2020

[2] The Official Gazette of RS, no.98/2006.

[3]Article 200, Paragraph 7 of the Constitution.

Decree on Emergency Measures

Pursuant to the Article 200, Paragraph 6, the Government, with the President's signature, issued a **Decree on Emergency Measures**^[4], which prescribes measures derogating from the constitutionally guaranteed human and minority rights during a state of emergency.^[5]

The Article 2 of the Decree provides that the Ministry of the Interior ^[6], in agreement with the Ministry of Health ^[7], may temporarily restrict or prohibit the movement of persons in public places, and order individual persons or groups of persons infected or suspected to be infected with an infectious disease COVID-19 to stay at the address of their place of permanent or temporary residence, with the obligation to report to the competent health institution.

The Article 3 of the Decree stipulates that the Ministry of the Interior may order the closure of all accesses to an open space or facility and prevent the abandonment of that space or facility without special authorization, and order the compulsory stay to certain persons or groups of persons in a specific space and in certain facilities **(reception centres for migrants, etc.)**.

The Article 4 of the Degree provides for a ban on convening and holding meetings and all other gatherings of citizens in an open space. Further, the same article also provides for the prohibition of gatherings (sports, cultural and other manifestations) indoors except gatherings of special interest for the operation and functioning of state bodies and services, the organization of which, in accordance with this decision, is specifically authorized by the Minister of the Interior.

^[4] The Official Gazette of RS, no.31/2020, 36/2020, 38/2020 and 39/2020, hereinafter: Decree.

^[5] Article 1 of the Decree.

^[6] Hereinafter: MoI.

^[7] Hereinafter: MoH.

The Article 4a of the Decree provides for the prohibition of landing at and departing from airports in Serbia of all aircrafts engaged in the carriage of passengers in international air traffic, in order to protect against the introduction and spreading of infectious diseases in the territory of the Republic of Serbia.

This prohibition does not apply to:

- 1) cargo and mail transport flights;
- 2) search and rescue flights;
- 3) flights for humanitarian purposes;
- 4) emergency medical transport flights;
- 5) technical landing and positioning of aircraft registered in the Aircraft Registry of the Republic of Serbia;
- 6) emergency landing of aircraft;
- 7) state aircraft and special purpose flights.

The Article 4b of the Decree further provides that, in order to protect against the spread of infectious diseases, the following shall be prohibited in the territory of the Republic of Serbia:

- 1) public transport of passengers in road traffic by bus, except for special regular transport, which will be performed by economic entities solely for the purpose of fulfilling the task assignments of employees;
- 2) international and domestic railway passenger transport;
- 3) international and domestic water traffic for transport of passengers.

Further, the Decree prescribes a whole set of punitive measures to be taken against natural and legal persons who do not comply with the restrictions introduced by the Decree

Order on restriction and prohibition of movement of individuals in the territory of the Republic of Serbia

On the basis of the Article 2 of the Decree, and the Article 15, Paragraph 1 of the Law on State Administration[8], Ministry of the Interior, with the consent of the Minister of Health, issued an **Order on restriction and prohibition of movement of individuals in the territory of the Republic of Serbia**. [9]

Item 1, Paragraph 1 of the Order stipulates that, in order to suppress and prevent the spread of infectious disease COVID-19 and protect the population from the disease, it is prohibited to move in public places, that is, outside apartments, premises and dwellings in residential buildings and outside the households (courtyards), to:

- 1) individuals aged 65 and over - in populated places with more than 5,000 inhabitants;
- 2) individuals aged 70 and over - in populated places with up to 5,000 inhabitants.

This prohibition does not apply to Sundays from 3 a.m. to 8 a.m.

In addition, this Order prohibits all individuals to leave their flats, premises or dwellings in residential buildings and outside households (courtyards) between 5 p.m. to 5 a.m., except on Saturdays when the ban runs from 3 p.m. to 5 a.m. [10]

The Order was subsequently changed in a way that previously allowed walking pets in the period from 8 p.m. to 9 p.m. lasting for 20 minutes within 200 m distance from the place of permanent or temporary residence [11] at most was abolished. [12]

[8] The Official Gazette of RS, no.79/05, 101/07 and 95/10, 99/14, 30/18 – other law, 47/18.

[9] The Official Gazette of RS, no.34/2020, 39/2020, 40/2020, 46/2020, hereinafter: Order.

[10] Item 2 of the Order.

[11] Item 2, Paragraph 2 of the Order.

[12] The Official Gazette of RS, no.46/2020.

In addition, movement in all parks and public places intended for recreation and sports has been also prohibited since 21 March 2020 at 8 p.m.[13]

The following prohibitions do not apply to:

- 1) health professionals – licensed ones;
- 2) members of Ministry of the Interior, Ministry of Defense, security services and Serbian armed forces who are on duty;
- 3) individuals with movement permit issued by the Ministry of Interior;
- 4) natural persons in urgent need of medical assistance and up to two persons accompanying them;
- 5) national and foreign citizens who are members of the crew of freight motor vehicles, cargo ships, railway rolling stock personnel, crews and cabin crew of aircraft engaged in international transport in road, rail, water and air traffic.[14]

The responsible persons shall be punished for non-compliance with the imposed prohibitions in accordance with the Criminal Code[15], and for the offense in accordance with the Decree on misdemeanor for violation of the Order of the Minister of the Interior on restriction and prohibition of movement of individuals in the territory of the Republic of Serbia.[16]

[13] Item 2a of the Order..

[14] Item 2a, Paragraph 2 of the Order.

[15] The Official Gazette of RS, no.85/2005, 88/2005 – correct, 107/2005 – correct., 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016 and 35/2019, hereinafter: CC.

[16] Item 5 of the Order.

Possible incriminations of violation of the Order

When it comes to criminal liability for violation of the Order, there are three criminal offences - **failure to comply with health regulations during an epidemic** (Article 248 of the Criminal Code), **transmission of an infectious disease** (Article 249 CC) and **serious offenses against human health**, which actually contains qualified forms of the first two offenses (Article 259 of CC).

The criminal offense of **not complying with health regulations during an epidemic** is as follows:

"Whoever, during an epidemic of a dangerous contagious disease, does not act in accordance with regulations, decisions or orders which determine measures for its suppression or prevention, shall be punished by a fine or imprisonment for a term not exceeding three years."

The actus reus of this criminal offense involves failure to comply with regulations, decisions or orders that specify measures to combat or prevent an epidemic. Therefore, it is a criminal offense of **blank character**, and in order to define the act of execution, it is necessary to consult the Decision to declare a state of emergency, Decree and Order. Therefore, acting contrary to the Decree and the Order in the first place constitutes the act of committing a criminal offence (**a true criminal offence of failure to act**).[17]

The criminal offense must be committed at the time of the epidemic, which in this case is an epidemic of the SARS-CoV2 virus, which undoubtedly causes a dangerous infectious disease COVID-19[18], and the act of execution produces a consequence of an abstract danger to life and human health. The epidemic was declared on 19 March 2019. [19]

[1] Stojanović, Z., 2012, Comment on Criminal Code, fourth, amended edition, The Official Gazette, p. 722.

[18] Ibid.; Decision to declare disease COVID-19 infectious disease caused by the virus SARS-COV-2, The Official Gazette of RS, no.23/2020, 24/2020, 27/2020, 28/2020, 30/2020, 32/2020, 35/2020, 37/2020, 38/2020 and 39/2020, hereinafter: Decision on COVID-19.

[19] Order to declare the epidemic of infectious disease COVID-19 no. 512-02-00016/2020-10.

Taking into account the existing state of emergency, as well as the content of the Decree or Order, this criminal offense will be committed by anyone who, for example, goes out into the street after 5 p.m. for any reason, or any person of 65 years of age who lives in a place with more of 5,000 inhabitants, and decides to go outside his/her home to go to a store or a pharmacy.

The criminal offense of infectious disease transmission

reads as follows:

"Whoever does not act in accordance with regulations, decisions or orders for the control or prevention of infectious diseases and, consequently, infectious diseases are transmitted shall be punished by imprisonment up to three years."

In this criminal offense, there is also **an enforcement action**, which in this particular case implies non-compliance with the Decree and the Order, but also with other regulations such as the Law on Protection of the Population from Infectious Diseases[20], the Law on Health Care[21] or the Law on Public Health[22]. However, to speak of the presence of this offence, there has to be a **consequence of transmitting the infectious disease** to at least one person[23]. The offense requires **intent**

If the commission of a criminal offense causes the transmission of an infectious disease with a serious consequence in the form of serious bodily injury, serious impairment of health, or the death of one or more persons, then it will be a **serious offense against human health**, which prescribes qualified forms of the criminal offense of transmitting infectious disease. [24] There is **negligence** in relation to the above stated serious consequences

[20] The Official Gazette of RS, no.15/2016.

[21] The Official Gazette of RS, no.25/2019.

[22] The Official Gazette of RS, no.15/2016, hereinafter: LHC.

[23] Stojanović, Z., p. 723.

[24] Article 259, Paras. 1 and. 2 of CC.

Decree on misdemeanor for violation of the Order of the Ministry of the Interior on restriction and prohibition of movement of individuals in the territory of the Republic of Serbia

In addition to criminal liability, misdemeanor liability for failure to comply with the Order is also possible, and it is defined by the Decree on misdemeanor for violation of the Order of the Minister of the Interior on restriction and prohibition of movement of individuals in the Territory of the Republic of Serbia [25].

The Article 1 provides that a person who violates the prohibition referred to in items 1 and 2 of the Order shall be fined between 50,000 and 150,000 RSD.

A misdemeanor procedure may be initiated and completed for the said offense even if criminal proceedings have been instituted or pending for an offense involving the characteristics of that offense, notwithstanding the prohibition in the Article 8, Paragraph 3 of the Law on misdemeanors *prekršajima*[26], and also the Article 34, Paragraph 4, which contains the *ne bis in idem* principle.

[25] The Official Gazette of RS, no.39/2020, hereinafter: Decree on misdemeanor.

[26] The Official Gazette of RS, no.65/2013, 13/2016 and 98/2016 – Decision of CC.

2. Human rights that are derogated from during the state of emergency

So, the Decree and the Order are legal acts derogating certain human and minority rights. However, in terms of their content, there is a whole set of shortcomings and imprecise formulations that leave room for arbitrary action and introduce legal uncertainty for the citizens of Serbia, as well as for foreigners located in its territory or under the effective control of the competent state authorities. The shortcomings in terms of derogation measures are numerous, and the Decree and the Order:

- do not provide an adequate answer as to whether the objective to be achieved by the introduction of a state of emergency and derogation could be achieved by applying regular laws and regulations, and thus there is no answer to the question whether the introduction of a state of emergency and derogation was justified, necessary and legitimate;[27]
- do not explicitly envisage which human and minority rights guaranteed by the Constitution are derogated;[28]
- do not define in a sufficiently precise manner all the derogation measures introduced, their nature and content;[29]
- do not provide a detailed explanation of why any of the measures have been introduced in relation to certain categories of population, vulnerable groups, particular geographical area or certain legal institutes, which raises the question of the use of discriminatory criteria;[30]

[27] ECtHR, Mehmet Hasan Altan v. Turkey, Application no. 13237/17, par. 94..

[28] Human Rights Committee, General comment no. 29: Emergency state (Article 4), 31 August 2001, CCPR/C/21/Rev.1/Add.11, par. 10.

[29] Ibid.

[30] A. and Others v. the United Kingdom, Application no. 3455/05, par. 190.

- do not envisage the possibility for individuals to bring an effective and efficient legal remedy to the competent judicial authority against the derogation measures that personally affect them ;[31]
- do not explicitly stipulate that the right to an effective and efficient legal remedy has been abolished in relation to the derogation measures affecting each person individually [32]

Therefore, the way how the implementation of derogation has affected the lives of Serbian citizens and foreigners in its territory or under the effective control of the competent state bodies can provide a conclusion on which human rights have been derogated from since the introduction of the state of emergency. In the opinion of the author of this analysis, the, Decree, Order and Decree on misdemeanor have **derogated the right to freedom of movement** (Article 39 of the Constitution), **the right to liberty and security of person** (Article 27, Article 28, Paragraph 1, and Article 29 of the Constitution), **the right of an individual not to be sentenced twice in the same case** (Article 34, paragraph 4 of the Constitution - *ne bis in idem*) and **the right to an appeal or other legal remedy** (Article 36, paragraph 2).

[31] Aksoy v. Turkey, Application no. 21987/93, par. 76 and par. 78; Brannigan and McBride v. the United Kingdom, par. 59.

[32] Ibid.

2.1 The right to freedom of movement

Article 39 of the Constitution envisages:

"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.

Entry and stay of foreign nationals in the Republic of Serbia shall be regulated by the law. A foreign national may be expelled only under decision of the competent body, in a procedure stipulated by the law and if time to appeal has been provided for him and only when there is no threat of persecution based on his race, sex, religion, national origin, citizenship, association with a social group, political opinions, or when there is no threat of serious violation of rights guaranteed by this Constitution."

The right to freedom of movement is one of the most important conditions for the free development of every person, as guaranteed by the Article 12 of the International Covenant on Civil and Political Rights (hereinafter: the ICCPR).[33]. Everyone who is lawfully in the territory of a state enjoys the right to move freely through it and to choose a place of permanent residence, and citizens shall always lawfully reside in the territory of their state.[34] The right to freedom of movement applies to the entire territory of the country: individuals have the right to move from one place to another and to settle wherever they want without being obliged to state any purpose or reason.[35] The right to freedom of movement allows an individual to leave and return to his or her country, by complying, of course, with the legal requirement.[36]

Article 12, Paragraph 3 of the ICCPR sets out the circumstances under which the right to freedom of movement may be restricted, such as the protection of national security, public order, health or morals, as well as the rights and freedoms of others. Restrictions must be in accordance with domestic laws, must be necessary to safeguard these values in a democratic society, and must be consistent with other rights guaranteed by the ICCPR.[37] Restrictions must not undermine the essence of the right itself, must not be disproportionate, and regulations imposing measures of restrictions must have precise criteria and must not give unlimited discretion to those charged with enforcing those restrictions [38] The restriction must not be based on discrimination on the basis of race, skin color, sex, language, religion, political or any other opinion, national or social origin, property, birth or on any other grounds, which would constitute an evident violation of the Covenant.[39]

[33] Human Rights Committee, General comment no. 27: Freedom of movement (Article 12), 1 November 1999, CCPR/C/21/Rev.1/Add.9 **, par. 1.

[34] Ibid, par. 4.

[35] Ibid, par. 5.

[36] Ibid, par. 7–10.

[37] Ibid. par. 11.

[38] Ibid, par. 13.

[39] Ibid, par. 18.

It is also important to emphasize that a person's right to return to his/her country is based on the special type of relationship which that person has towards his/her country and is manifested through that person's right to remain in and return to his/her home country. [40] In no case shall any person be arbitrarily deprived of the right to return to his/her country. In its practice, the Human Rights Committee considers that there are few or even no circumstances under which it is reasonable to deny the right to enter one's own country.[41]

Freedom of movement restrictions for persons up to 65 years of age

When it comes to citizens up to 65 years of age, it is clear that their right to freedom of movement has been derogated. Specifically, citizens under the age of 65 are not allowed to leave their homes between 5 a.m. and 5 p.m. [42] The only exception was between 8 p.m. and 9 p.m. when dog owners could take their pets out for 20 minutes. This exception was abolished by the recent amendments to the Order [43] In case of disobeying the order, that person may be punished both with criminal and misdemeanor penalties. [44] Supervision and control to which all citizens are subjected are exercised by police patrols, and in some parts of the city also by the army, which are present in all parts of Serbia and whose members are authorized to deprive of freedom the offenders of orders and submit them to the competent criminal and misdemeanor judicial authorities.[45]

During that time, citizens have an unhindered ability to communicate with the outside world via telephone, social networks and the like. Thus, the level of restriction to which the said category is exposed indicates that people up to 65 years of age are restricted in their right to freedom of movement **(Article 39 of the Constitution)**. [46]

[40] Ibid, par. 19.

[41] Ibid, par. 21.

[42] Item, 1, Paragraph 1 of the Order.

[43] Item 1, Paragraph 2 of the Order, see The Official Gazette of RS no.46/2020

[44] Articles 248 and 249 of the CC and Item 1 of the Decree on misdemeanour

[45] Kurir Daily, Pljušte kazne za kršenje policijskog časa: U Beogradu privedeno 6 osoba, odmah osuđene, jedna završila u kućnom zatvoru, 21. March 2020, available at: <https://bit.ly/2wvHABy>.

[46] De Tommaso v. Italy, Application no. 43395/09, par. 88–89

In relation to this category of population, no competent state body has made an individual decision with respect to each citizen, nor is it possible for individuals belonging to this category to file an effective and efficient legal remedy. Accordingly, the right of appeal or other legal remedy has been also derogated to this age category **(Article 36, Paragraph 2 of the Constitution)**.

Freedom of movement restrictions for citizens of the Republic of Serbia who are abroad

The right to freedom of movement is also restricted to persons who, at the time of declaring a state of emergency, resided abroad on different grounds and who are prevented from returning to Serbia via plane, passenger, railway or road traffic. This has happened to a large number of students, travelers located in the transit zones of various airports around the world, as well as people on the border with Serbia, who want to return to their country, but are prevented by the Article 4a of the Decree. Since no individual decision was made against them either, stating the reasons for the restriction of the right to freedom of movement, nor were they entitled to an appeal or other legal remedy, we conclude that their right to an effective and efficient legal remedy was also derogated **(Article 36, Paragraph 2 of the Constitution)**.

2.2 Right to liberty and security

Article 27 of the Constitution envisages:

"Everyone has the right to liberty and security. Deprivation of liberty shall be allowed only on the grounds and in a procedure stipulated by the law.

Any person deprived of liberty by a state body shall be informed promptly in a language they understand about the grounds for arrest or detention, charges brought against them, and their rights to inform any person of their choice about their arrest or detention without delay.

Any person deprived of liberty shall have the right to initiate proceedings where the court shall review the lawfulness of arrest or detention and order the release if the arrest or detention was against the law.

Any sentence which includes deprivation of liberty may be proclaimed solely by the court."

Article 29, Paragraph 2 envisages:

"Any person deprived of liberty without a decision of the court must be brought before the competent court without delay and not later than 48 hours, otherwise they shall be released."

Article 5 of the European Convention guarantees the right to liberty and security of person. The right to freedom is the **right to physical freedom**, that is, to the freedom of an individual to move freely, without any restriction, in space, that is, to be free to decide when, where and how he/she will move. The same right is guaranteed by the Article 9 of the International Covenant on Civil and Political Rights.[47]

The right to liberty and security of person **protects an individual from unlawful and arbitrary deprivation of liberty**. Unlawful deprivation of liberty is one that has not been carried out in accordance with a procedure established by law, by a legally authorized body. Thus, failure to comply with the internal regulations of a member state leads to a violation of the Article 5..

Unlawful deprivation of liberty is always arbitrary, but there are also situations in which deprivation of liberty is lawful, but also arbitrary because the legal provisions give too much space for discretion to the competent authority, which puts an individual in the state of legal uncertainty. Therefore, the law in this situation was not tailored "in the spirit" of the Article 5 of the European Convention.[48]

The right to liberty and security is not the same as the right to freedom of movement, which is broadly set out as a right that guarantees an individual who lawfully resides in the territory of a particular country to move freely and to choose his/her place of residence freely.[49] The right to freedom of movement also includes the right of an individual to move freely between the territories of different states, under the conditions laid down by those states, which are in accordance with the international law.

[47] The Official Gazette of SFRY, no.7/71; hereinafter: ICCPR.

[48] ECtHR, Creangă v. Romania, Application no. 29226/03, par. 84.

[49] Human Rights Committee, General comment no. 27: Article 12 (right to freedom of movement), 2 November 1999, CCPR/C/21/Rev.1/Add.9, par. 4 and 5

Therefore, for the Article 5 to be applicable, it is necessary to determine whether a particular situation constitutes deprivation of liberty or not. In order to determine whether someone is deprived of his or her liberty within the meaning of the Article 5, the Court considers a number of criteria such as:

- 1) type;
- 2) duration;
- 3) effects;
- 4) the method of application of the measure in question.[50]

The obligation to take into account the 'type' and 'method of application' enables the European Court to consider specific context and circumstances of the case beyond those involving deprivation of liberty in a police or prison cell [51] – other forms of deprivation of liberty that would appear unconventional at first glance. In other words, the context in which measures have been taken is an important factor because certain situations in modern society imply calling on public to subject itself to restrictions of the right to freedom of movement or the right to liberty and security of person for the general interest. [52]

In its case law, the European Court has taken the view that deprivation of liberty is present when subjective and objective criteria are met. The subjective criterion is not difficult to determine, and it boils down to whether the individual in question wants or does not want to be in a situation where he or she is restricted from the physical freedom to move freely in space. On the other hand, objective criteria relate to the ability to leave a restricted area, the level of supervision and control over a person's movement, the duration of isolation, and the possibility and availability of social contacts.[53]

[50] ECtHR, *De Tommaso v. Italy*, Application no. 43395/09, par. 80; *Guzzardi v. Italy*, Application no. 7367/76, par. 92.

[51] ECtHR, *Austin and Others v. the United Kingdom*, Application nos. 39692/09, 40713/09 and 41008/09, par. 59.

[52] *De Tommaso v. Italy*, par. 81.

[53] ECtHR, *Guzzardi v. Italy*, Application no. 7367/76, par. 95.

Even security measures or measures taken in the interest of the person concerned can be considered as deprivation of liberty.[54]

In the case law of the European Court, the following situations are regarded as deprivation of liberty:

1. stopping by the police for identification and further checks, as well as for body inspection;[55]
2. police restraint;[56]
3. detention;[57]
4. house arrest with or without electronic monitoring;[58]
5. imprisonment;[59]
6. imprisonment in detention units for foreigners;[60]
7. deprivation of liberty in airport transit zones;[61]
8. deprivation of liberty in social care or psychiatric institutions;[62]
9. mandatory isolation to prevent the spread of infectious disease. [63]

[54] ECtHR, *Khlaifia and Others v. Italy*, Application no. 16483/12, par. 71.

[55] ECtHR, *Foka v. Turkey*, Application no. 28940/95, par. 74–79.

[56] ECtHR, *I. I. v. Bulgaria*, Application no. 44082/98.

[57] Article 5-1-c European Convention.

[58] ECtHR, *Dacosta Silva v. Spain*, Application no. 69966/01.

[59] Article 5-1-a of the European Convention

[60] ECtHR, *Khlaifia and Others v. Italy*, Application number 16483/12, par. 71–72.

[61] ECtHR, *Ammur v. France*, Application no. 19776/92.

[62] ECtHR, *Shtukaturv v. Russia*, Application no. 44009/05; *Stanev v. Bulgaria*, Application no. 36760/06

[63] ECtHR, *Enhorn v. Sweden*, Application no. 56529/00, par. 33

Any deprivation of liberty must be accompanied by an adequate notice of the reasons why the person concerned is being deprived of liberty, and that person must also be given the opportunity to initiate proceedings in which the court will examine the legality and justification of the detention [64]

PThe right to liberty and security of person cannot be derogated to the extent that it is impossible for a person deprived of liberty to submit a request for review of the legality and justification of deprivation of liberty before the court.[65]

In any event, it is undisputed that the mandatory isolation order is tantamount to deprivation of liberty [66], which the European Court of Human Rights has already established in the case of [Enhorn v. Sweden](#). In the concrete case, one of the measures imposed on the applicant was compulsory home isolation that did not require strict supervision, that is, isolation from which Mr Enhorn could have come out at any time with a risk of imposing a more severe measure, which was then issued (compulsory hospitalization in a healthcare institution).[67]

When it comes to deprivation of liberty in order to prevent the spread of infectious diseases, there are two basic criteria for assessing the legality of detention:

- 1) whether the spread of the infectious disease is dangerous to public health and safety;
- 2) whether the deprivation of liberty of an infected person is the ultimate measure that alone can prevent the spread of the infection, that is, whether other, more lenient measures were not sufficient to protect the public interest.

[64] Član 5-2 i 5-4 Evropske konvencije.

[65] Komitet za ljudska prava, Opšti komentar br. 35: član 9 (sloboda i bezbednost osoba), 16. decembar 2014, CCPR/C/GC/35, par. 67.

[66] ECtHR, Enhorn protiv Švedske, predstavka br. 56529/00, par. 33

[67] Ibid.

Persons of 65 years of age, that is of 70 and older

Persons of 65 years of age or older who live in populated places with a population of more than 5,000, or persons who are 70 years of age or older who live in populated places with less than 5,000 inhabitants, are prohibited from leaving house 24 hours, except on Sundays between 3a.m. and 8 a.m.[68]

The level of restriction to which this category of population is subject implies that these citizens must be in their homes permanently, without being able to go out into the street, and in a period not clearly defined but which, under the Article 200, Paragraph 7, should not be longer than 90 days, with the possibility to be expanded.

Contact with the outside world is only reflected in the ability to use the telephone, the Internet, social networks, and going out on the street entails misdemeanor and criminal liability [69] preceded by deprivation of liberty by police officers and surrender to the judicial authorities.[70] As already mentioned, police patrols are deployed in all populated areas in Serbia to ensure that the Decree, the Order and the Decree on Misdemeanor are applied and complied with.

Groceries, medicines and other necessities are generally brought to this category of citizens mainly by their householders, family members, employees of administrative bodies, or other citizens who have organized themselves to assist them during the state of emergency.

This measure alone does not affect all members of this age category in the same way. It is not the same when someone lives in a home with a yard, surrounded by family or neighbors, or when living in a 25 square meter apartment or other property that is far from the centre of life and business.

[68] Item 1, Paragraph 1 and Paragraph 2 The Order.

[69] N1, Rebić: A total of 112 processed for violation of prohibition of movement, 218 were not found at home, 24 March 2020, available at <https://bit.ly/3drrcCH>.

[70] Article 248 and 249 of CC and Item 1 of the Decree on misdemeanour.

Likewise, contact with the outside world is significantly restricted to persons who do not have relatives or close friends with whom they could interact within the apartment or home where they live.

The measure of ban on leaving the apartment during the state of emergency does not differ from the measure of ban on leaving the apartment without electric monitoring^[71] which is provided for by the Criminal Procedure Code^[72] as deprivation of liberty. This measure is also more severe than the criminal sanction of imprisonment served in the premises where the defendant resides, which is also considered a deprivation of liberty in the case law of the European Court of Justice.^[73] Serving a prison sentence in the premises where the convicted person resides implies the possibility of staying outdoors for a maximum of two hours a day between 7 a.m. and 5 p.m.^[74] The convicted person may also leave the premises to go to work, to an educational institution for the purpose of schooling or taking an examination, marrying or going to the wedding of his/her blood relative to the second degree of kinship or for the death of a close relative, and so.^[75]

The rationale for introducing the measure in question, which appeared in public but not formally in any of the aforementioned decisions, boils down to the fact that the elderly are a particularly endangered category, in which the death rate due to COVID-19 is extremely high. However, a high mortality rate is also present in the lower age categories of people who suffer from chronic diseases (heart disease patients (diabetics, asthmatics, kidney disease patients), have impaired immunity (patients undergoing chemotherapy or immunosuppressive therapy, e.g. people who have rheumatoid arthritis, systemic lupus, multiple sclerosis, etc.) and so on. Therefore, people who are younger than 65 or 70, if they live in places with less than 5,000 inhabitants, and who also belong to the vulnerable categories, are not forced to stay at their homes all day.

[71] Article 208 and 209 Criminal Procedure Code, The Official Gazette of RS, no.72/2011, 101/2011, 121/2012, 32/2013, 45/2013, 55/2014 and 35/2019, hereinafter: CPC.

[72] Article 2, Paragraph 1, Item 23 of CPC.

[73] ECtHR, *Dacosta Silva v. Spain*, Application no. 69966/01.

[74] Article 23, Paragraph 2 of the Law on Execution of Extrajudicial Sanctions and Measures, The Official Gazette of RS, no.55/2014 and 87/2018, hereinafter: LEESM

[75] Article 24 of LEESM.

In view of all above stated, it can be concluded that all persons forbidden to leave their home for 24 hours are deprived of their liberty within the meaning of the Article 27 of the Constitution, Article 5 of the European Convention on Human Rights and Article 9 of the International Covenant on Civil and Political Rights. Therefore, the term "restriction or prohibition of movement" is incorrect because it refers to the right to freedom of movement, while the effects of derogating measures in relation to the concerned category are equivalent to deprivation of liberty.

No individual decision on deprivation of liberty has been made in respect of persons belonging to the concerned category, nor is it provided for in the Decree or Order. Consequently, none of the persons belonging to the said age category was individually informed of the reasons for their deprivation of liberty (although they were publicly known), nor were they allowed to bring the legality and justification of their deprivation of liberty to a competent court (*habeas corpus*). In fact, as this measure was introduced by the Order on 18 March 2020, it is clear that the competent court did not decide on deprivation of liberty, nor were the persons affected by this measure brought before the competent court within 48 hours, since neither the Decree nor the Order provides for it.

The only conclusion that can be drawn from all of the above stated is that the Decree, Order and Decree on misdemeanor derogate the right to liberty and security of persons over 65 years of age who live or reside in settlements with more than 5,000 inhabitants or persons over 70 years of age living or residing in populated places with less than 5,000 inhabitants. Therefore, Articles 27 and 29, Paragraph 2 of the Constitution have been derogated, i.e. Article 5 of the European Convention on Human Rights and Article 9 of the International Covenant on Civil and Political Rights, to the extent that individuals who belong to the category in question are denied the right to:

- be served an **individual decision** on deprivation of liberty in the premises where they live or reside and which contains clearly stated reasons for deprivation of liberty;
- to try to challenge the legality and justification of their deprivation of liberty before a judicial body (**habeas corpus**).

2.3. Ne bis in idem

Article 34, Paragraph 4 of the Constitution envisages:

"No person may be prosecuted or sentenced for a criminal offence for which he has been acquitted or convicted by a final judgement, for which the charges have been rejected or criminal proceedings dismissed by final judgement, nor may court ruling be altered to the detriment of a person charged with criminal offence by extraordinary legal remedy."

The Article 1 of the Decree on misdemeanor provides that a person who breaks the ban referred to in items 1 and 2 of the Order (relating to the prohibition of movement and leaving the apartment) shall be fined between 50,000 and 150,000 RSD. The Article 2 further provides that a misdemeanor proceeding may be initiated and completed even if criminal proceedings are instituted or pending for a criminal offense involving the characteristics of the misdemeanor, notwithstanding the prohibition from the Article 8, Paragraph 3 of the Law on Misdemeanors [76], but also Article 34, Paragraph 4, which contains the *ne bis in idem* principle.

Therefore, it is possible to punish one and the same person twice for the same behavior, which causes the same consequences, in two different court proceedings - misdemeanor and court. By its nature, this provision is also the most controversial because it encroaches on the right that is inherently non-derogating under the Article 202, Paragraph 4 of the Constitution, and also under Article 15[77] of the European Convention on Human Rights.

Therefore, Decree on misdemeanor derogated the right that was non-derogating, that is to say, it departed from the Article 34, Paragraph 4, and from the Article 4 of Protocol no. 4 to the European Convention on Human Rights. [78]

[76] The Official Gazette of RS, no.65/2013, 13/2016 and 98/2016 – Decision of CC.

[77] ECtHR, Mihalache v. Romania, Application number 54012/10, par. 47.

[78] With regard to this provision, the Belgrade Center for Human Rights has submitted an initiative to the Constitutional Court to review the constitutionality and legality, available at <https://bit.ly/33OAch1>.

2. „The “old“ international law obligations of the Republic of Serbia on human rights derogations during the state of emergency

1. International Convent on Civil and Political Rights

Article 4, Paragraph 1, of the International Covenant on Civil and Political Rights [79] provides that at the time when the survival of a nation is threatened by an exceptional public danger, which has been declared officially, the contracting parties of the ICCPR may take, to the extent of the strictly serious gravity of the situation, measures to abolish the obligations provided for in this Covenant. [80] provided that such measures are not incompatible with other obligations imposed by international law and do not entail discrimination based solely on race, skin colour, sex, language, religion or social origin.

Derogation measures must be exceptional and temporary in nature and enacted in accordance with the Constitution and national laws, and only in a situation when:

- 1) a state of emergency is of such a nature as to threaten the survival of the nation;
- 2) a state of emergency has been officially declared [81]

[79] The Official Gazette of SFRY, no. 7/71; hereinafter: ICCPR

[80] Hereinafter: derogation measures.

[81] Human Rights Committee, General comment no. 29: State of emergency (Article 4), 31 August 2001, CCPR/C/21/Rev.1/Add.11, par. 2

Derogation measures must be carefully considered in terms of justification, necessity and legitimacy.[82] They must be proportionate, which means that the derogation of certain rights can only extend to the extent that it is conditioned by a state of emergency.[83] Proportionality is determined by the duration, the geographical distribution of the measures and substantive ranges of the state of emergency.[84] Only in this way can it be ensured that no provision of the ICCPR will be wholly inapplicable, that is, the core of any right guaranteed by it will be preserved.[85]

The fact that it is allowed to apply measures of derogation to a large number of rights protected through the ICCPR does not relieve a contracting party of the obligation to carry out an objective assessment of the need for a derogation in respect of each of those rights, appropriate to the urgency of the state of emergency.[86]

Derogation measures must not rely on discrimination on the basis of race, skin color, sex, language, religion, or social origin. [87].

Measures of derogation cannot be applied to the right to life (Article 6), the prohibition of torture and other cruel, inhuman or degrading treatment or punishment (Article 7), the prohibition of slavery and slavery-like position (Article 8, paragraphs 1 and 2), prohibition of deprivation of liberty for failure to fulfil a contractual obligation (Article 11), guarantee of punishment only on the basis of law (Article 15), right to legal personality (Article 16) and freedom of thought, conscience and religion (Article 18). These rights fall into the category of inviolable. Thus, contracting parties cannot under any circumstances invoke the Article 4 of the ICCPR to justify violations of humanitarian law and peremptory norms of customary international law. [88]

[82] Ibid, par. 3.

[83] Ibid, par. 4.

[84] Ibid.

[85] Ibid.

[86] Ibid, par. 6.

[87] Ibid, par. 8

[88] Ibid, par. 11.

Even during a state of emergency, the contracting party is under an obligation to provide the alleged victims of human rights abuses with the opportunity to file an effective and efficient legal remedy against certain decisions or acts of the authorities.[89] General comment no. 29 envisages:

“The fact that certain provisions of the Covenant are set out in Art. 4, para. 2, as those which cannot be subject to restriction does not mean that other members of the Covenant may be subject to restriction, even in the event of a threat to the survival of the nation [...] Article 2, para. 3 requires a contracting party to the Covenant to provide legal remedies for breach of any provision of the Covenant. This provision was not mentioned in the list of rights that cannot be subject to restrictions in Art. 4, para. 2, but represents an obligation pertaining to the Covenant as a whole. Although a contracting party may, during a state of emergency and to the extent appropriate to the circumstances of the case, make improvements in the exercise of judicial or other remedies, the contracting party must comply with the basic obligation under Art. 2, para. 3 of the Covenant and to provide for an effective remedy [90]

Contracting parties which resort to derogation measures shall notify the Secretary General of the United Nations without delay and state the reasons for doing it. They must also give the same notification when derogation measures cease to apply. [91]

When notifying the Secretary General of the United Nations under Art. 4, paragraph 1, the contracting party is obliged to describe in detail the domestic legal framework providing for the introduction of a state of emergency, but also to state what other international obligations it has freely assumed through other international instruments (e.g. all international treaties it has ratified). [92]

[89] Article 2, Paragraph 3 of the ICCPR.

[90] Human Rights Committee, General comment no. 29: a state of emergency (Article 4), 31 August 2001, CCPR/C/21/Rev.1/Add.11, par. 6, 14.

[91] Article 4, Paragraph 3 PGP.

[92] Ibid, par. 10.

The international notification to the Secretary General of the United Nations must contain detailed information on:

- 1) the derogation measures taken and a clear explanation for each of them, as well as with respect to which individual rights they are applied;
- 2) the internal legal framework applicable during the state of emergency;
- 3) the duration, extension and termination of a state of emergency.[93]

2. European Convention for the Protection of Human Rights and Fundamental Freedoms

The Article 15 of the European Convention for the Protection of Human Rights and Fundamental Freedoms [94] provides that, in times of war or other public danger threatening the survival of the nation, any high contracting party may take measures which depart from its obligations under the Convention, to the extent necessary by the urgency of the situation, provided that such measures are not inconsistent with its other obligations under international law.

Accordingly, the Article 15 sets out three conditions that must be cumulatively fulfilled in order to justify derogations:

- 1) the existence of a state of war or other emergency threatening the survival of the nation;
- 2) the measures taken must be proportionate to the gravity of the situation;
- 3) the measures must not be in conflict with other obligations under international law.[95]

[93] Ibid, par. 17.

[94] The Official Gazette of Montenegro – International Treaties, nos. 9/2003, 5/2005 and 7/2005 – corr. and The Official Gazette of RS – International Treaties, nos. 12/2010 and 10/2015; hereinafter: European Convention.

[95] Council of Europe, Guide to the Implementation of Article 15 of the European Convention on Human Rights - Derogations in a state of emergency, revised version of 31 December 2019, para. 6.

The European Court stated in its case law as follows:

"It is on a contracting party primarily, within the framework of its obligation to ensure the survival of the nation, whether the survival of the nation is endangered through a state of emergency and, if so, how far to go [in terms of derogations] to overcome this situation. Due to the fact that they are in direct and constant contact with current needs, national authorities are generally in a better position than international judges to decide on a state of emergency and the nature and extent of derogations necessary to prevent it. In this regard, Art. 15, paragraph 1 [...] leaves the authorities a large space for free assessment." [96]

A contracting party does not enjoy unlimited power with regard to derogations, and the European Court is empowered to decide whether the states have exceeded the measure that was strictly necessary in view of the seriousness of the crisis. In order to assess whether the measure was really necessary in view of the gravity of the situation and consistent with other obligations arising under international law, the European Court will examine the petition on the merits. [97]

With regard to the assessment of the introduction of a state of emergency, accompanied by measures of derogation, the European Court has the right to take into account:

- whether regular laws would be capable of responding to the dangers posed by the public danger in question;[98]
- whether the new measures are the correct response to the state of emergency[99]
- whether the measures were used in the capacity in which they were adopted;[100]

[96] ECtHR, Ireland v. the United Kingdom, Application no. 5310/71, par. 207.

[97] ECtHR, Mehmet Hasan Altan v. Turkey, Application no. 13237/17, par. 94.

[98] ECtHR, Lawless v. Ireland (no. 3), Application no. 332/57, par. 36; Ireland v. the United Kingdom, par. 212.

[99] ECtHR, Alparslan Altan v. Turkey, 12778/17, par. 118; Brannigan and McBride v. the United Kingdom, Applications nos. 14553/89 and 14554/89, par. 51.

[100] ECtHR, Lawless v. Ireland (no. 3), par. 38.

- whether the need for derogation was under constant examination;[101]
- any mitigation of the measures imposed;[102]
- whether the measures taken were secured in any way;[103]
- the importance of the concerned law and the wider importance of judicial review for interference with a given right;[104]
- whether judicial review of the measures was possible;[105]
- the proportionality of the measures, as well as whether they include elements of unjustified discrimination;[106]
- whether the measure is "lawful" and whether it was "carried out in accordance with the procedure prescribed by law".[107]

The European Convention prohibits derogation from absolute rights, such as the right to life (Article 2), prohibition of torture, inhuman or degrading treatment or punishment (Article 3), prohibition of slavery and slavery-like position (Article 4, paragraph 1), guarantees of punishment only on the basis of law (Article 7) [108] and the *ne bis in idem* principle.[109]

[101] Ibid, par. 54.

[102] ECtHR, Ireland v. the United Kingdom, par. 220.

[103] Ibid, par. 216–219; Lawless v. Ireland (br. 3), par. 37; Brannigan and McBride v. the United Kingdom, par. 61–65; Aksoy v. Turkey, Application no. 21987/93, par. 79–84.

[104] Ibid, par. 76

[105] Ibid, par. 78; Brannigan and McBride v. the United Kingdom, par. 59.

[106] A. and Others v. the United Kingdom, Application no. 3455/05, par. 190

[107] ECtHR, Alparslan Altan v. Turkey par.117=119.

[108] Article 15, Paragraph 2 of the European Convention

[109] Article 4 of the Protocol no. 4 to the European Convention.

Similar to the derogations of the rights guaranteed by the International Covenant on Civil and Political Rights, 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. [110]

In the lack of official and public notice on derogations, the Article 15 is not applied to measures undertaken by the concerned state. [111]

The obligation to notify the Secretary General of the measures taken and the reasons for their introduction is usually fulfilled by a letter and accompanying copies of the regulations on the basis of which emergency measures have been taken, explaining their purpose and reason. If copies of the regulations containing the measures have not been submitted, the obligation shall be considered as not fulfilled. [112] The European Court has tolerated situations in which notification was not sent immediately after the imposition of measures, taking for a reasonable period of three months after the imposition of the measures. [113]

[110] Article 15, Paragraph 3 of the European Convention

[111] Council of Europe, Guide to the Implementation of Article 15 of the European Convention on Human Rights - Derogations in a state of emergency, revised version of 31 December 2019, para. 34.

[112] Ibid, par. 35.

[113] ECtHR, Greece v. the United Kingdom, Report of the European Committee on Human Rights, Paragraph 81–3.

3. Consistency of human rights derogation measures in a state of emergency with the Constitution, the International Covenant on Civil and Political Rights and the European Convention on Human Rights

In the light of all the above stated, in order to determine whether the imposition of a state of emergency, and therefore measures of derogation, was necessary, justified and proportionate, the questions that follow must be answered.

3.1. Does the COVID-19 infectious disease epidemic threaten the survival of the nation and has a state of emergency been formally declared?

The first question is whether the danger that has arisen is of such severity that it threatens the "survival of the nation". Given the magnitude of the COVID-19 epidemic and the dire consequences it has left on the citizens and health systems of many countries in the world (China, Iran, Italy, Spain, and others), it can be concluded that the coronavirus is a real danger to the Republic Serbia. Above all, it poses a threat to the lives and health of tens of thousands of citizens who, due to their age or their general health, are largely unable to cope with this disease alone, and their survival and recovery would depend solely on the health system. On the other hand, Serbia's health system would not have the capacity to cope with tens of thousands of vulnerable patients and, in the event of an intense spread of the infection, could collapse and the epidemic could be "out of control". The second question is whether a state of emergency has been officially declared and the answer is clear. The state of emergency was formally declared on 15 March 2020.

3.2. Was the regularly applicable legal framework sufficient to meet the challenges of infectious disease COVID-19?

The most difficult question to answer is whether it was necessary to introduce a state of emergency, that is, whether some of the regularly applicable laws were eligible to treat the coronavirus epidemic by measures similar in nature and content to those of the Decree and the Order, but which do not require a state of emergency.

Article 6 of the Law on the Protection of the Population from Infectious Diseases (hereinafter: LPPCD) provides that, in the event of a danger of a new infectious disease that may significantly threaten the population of the Republic of Serbia, the Government, at the proposal of the Minister of Health, may declare such a disease an infectious disease whose prevention and control is of interest to the Republic of Serbia, as well as to determine appropriate measures, conditions, method of implementation, executors and means of implementation.

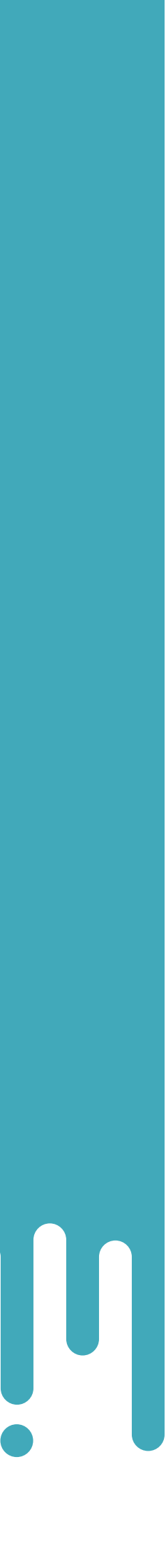
In addition, the Minister of Health is empowered to declare the outbreak of an infectious disease epidemic of major epidemiological importance and to order the measures to be implemented in that case, upon the proposal of the Republican Expert Commission for the Protection of the Infectious Diseases [114] and the Public Health Institute „Dr Milan Jovanović Batut“ [115] within two days of submission of the proposal. [116] So, in this way, the so-called emergency situation [117] regarding epidemic prevention is introduced.

[114] Hereinafter: Commissions.

[115] Hereinafter: Institute.

[116] Article 50 of LPPCD

[117] Article 2, Paragraph 1, Item 30 of LPPCD.



In the event of emergencies that may endanger the health and lives of persons and in which there is an imminent threat of the mass transmission of communicable diseases, the following measures may be implemented:

- 1) organizing, planning and ensuring the implementation of measures for the prevention and suppression of infectious diseases;
- 2) rapid epidemiological assessment in order to take immediate measures to protect the population;
- 3) epidemiological surveillance in an emergency situation, with the introduction of an early warning system;
- 4) transportation, isolation and quarantine, in case of any indication;
- 5) activation of the emergency communication system;
- 6) mandatory participation of health institutions, private practices, entrepreneurs and citizens in the control of risks to public health and the use of certain facilities, equipment and means of transport to prevent and control the transmission of infectious diseases, on the basis of the Minister's order.[118]

The Minister may order upon the proposal of the Commission and the Institute, as long as the danger persists:

- ban on gathering in public places;
- restriction of movement of population in the area affected by the emergency situation;
- prohibition or restriction of travel;
- prohibition or restriction on the circulation of certain types of goods and products;
- emergency vaccination. [119]

[118] Article 51 of LPPCD

[119] Article 52 of LPPCD

The Minister is also authorized to order measures for the protection of the population against infectious diseases through the prohibition of travel to one of the countries, the prohibition or restriction of movement of the population in the area affected by the infectious disease, and so on. [120]

On March 20, 2020, the Government, on the basis of Article 6 of the LPPCD, issued a Decision declaring the COVID-19 disease caused by the SARS-CoV-2 infectious disease[121], as well as numerous other decisions and measures resulting in the restriction of the right to freedom of movement, but also deprivation of liberty.[122] The only conclusion that could be drawn is that the **regular legal system based on the Law on the Protection of the Population from Infectious Diseases enabled the competent state authorities to take all measures introduced by the Decree, the Order and the Decree on misdemeanour.** Therefore, there was no need to introduce a state of emergency and to deviate from the constitutionally guaranteed human and minority rights, because the way it was done so far was the way that it could be achieved through a regularly valid legal framework.

3. 3. Are the constitutional provisions on human and minority rights that have been derogated clearly stated?

As already noted, neither the Decree nor the Order clearly indicated which constitutionally guaranteed human rights were derogated from or whether there was a possibility of judicial protection in respect of the said derogations and potential violations. The author of this analysis asserts that **the right to freedom of movement and the right to liberty and security has been derogated, but in a way that creates a state of legal uncertainty and unpredictability.**

[120] Article 53 of LPPCD

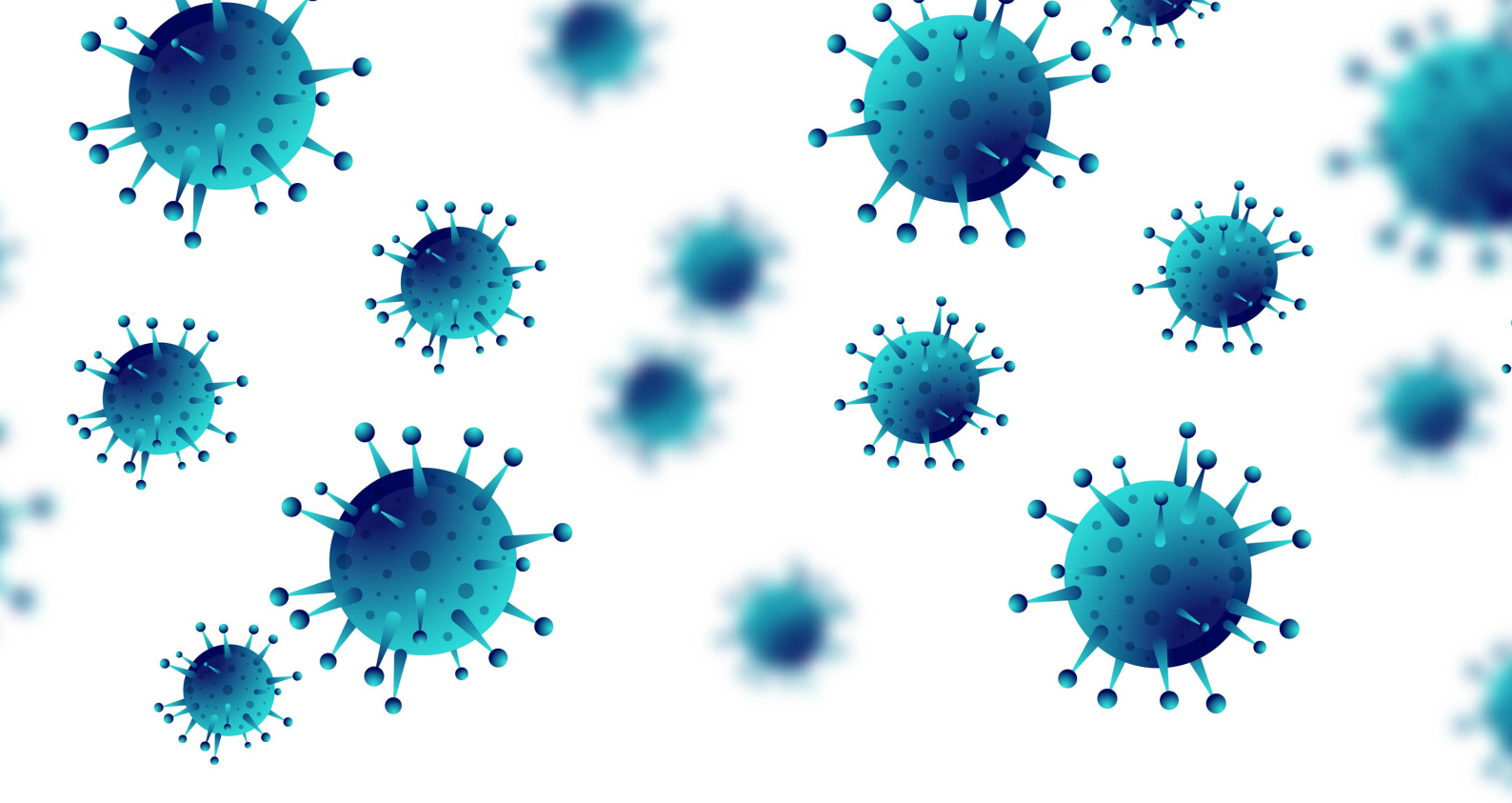
[121] The Official Gazette of RS, no.55/05, 71/05 – correction, 101/07, 65/08, 16/11, 68/12 – US, 72/12, 7/14 – US, 44/14 and 30/18 – other law

[122] See, for example, the Decision on Temporary Restriction of the Movement to Asylum Seekers and Irregular Migrants in Asylum Centers and Reception Centers in the Republic of Serbia, The Official Gazette of RS, no. 32/2020 or Decree on the Prohibition of Visits and Restrictions of Movement in the Facilities of Institutions for the Elderly, The Official Gazette of RS, no.28 / 2020.

The limitation of neither right provides for the possibility of judicial protection, which clearly indicates the denial of [habeas corpus](#). On the other hand, it was also **departed from the ne bis in idem principle, which is directly contrary to the Constitution.**

3. 4. Have the Secretaries General of the United Nations and the Council of Europe been notified?

And finally, as the rights that have been undoubtedly derogated from are integral parts of the International Covenant on Civil and Political Rights and the European Convention on Human Rights, it is unclear for now whether Serbia has fulfilled its obligation to notify the Secretaries General of the United Nations and the Council of Europe. By the time the work on this analysis was concluded, the authors had found no evidence or clue that this was the case. Publicly available deposits of international treaties in which notifications of derogations of rights during a state of emergency are published do not contain information that the Republic of Serbia has filed notifications in accordance with its obligations under those international treaties.



Conclusion

Based on all above stated, the conclusion that could be drawn is that there was no need to introduce a state of emergency in Serbia, nor derogation measures that followed in relation to the right to liberty and security of person and the right to freedom of movement. The risks posed by the COVID-19 epidemic could have been treated in almost identical way by the Law on the Protection of the Population from Infectious Diseases and the accompanying by-laws that could be enacted during an emergency. In addition, there should have not been any deviation from the *ne bis in idem* principle. Therefore, the introduction of a state of emergency and the manner in which certain human rights were derogated is not in accordance with the Constitution, ratified international treaties and generally accepted rules of international law.

With the introduction of the state of emergency in this way, the state of legal uncertainty emerged, the judicial protection was denied to most of the persons currently residing in the territory of the Republic of Serbia, and an atmosphere of uncertainty and unpredictability was created.