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RESTRICTION OF MOVEMENT AND THE TRIALS DURING THE STATE OF EMERGENCY

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RESTRICTION OF MOVEMENT AND THE TRIALS DURING THE STATE OF EMERGENCY

Analysis of constitutionality of the measure imposed during the state of emergency
caused by the epidemic of COVID-19 with an overview of the analyses
of the trials held in criminal proceedings in Serbia

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Restriction of Movement and the Trials during the State of Emergency



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I Initial considerations and methodology

The pandemic of virus COVID-19 is one of the biggest global pandemics in the modern times, and based on the data of the World Health Organization, until **July 1, 2020**, there were **10,321,689** infected individuals, and **507,435** persons were deceased. There are almost no countries that were ready to meet such a threat for the public health of their citizens. There are numerous and different measures undertaken by the countries in order to protect their population from the spread of this highly infectious disease.

Human rights, despite being categorized as fundamental rights of the citizens with the exception of the absolute rights, are not unlimited. One of the reasons for the limitation of human rights recognized by all contemporary constitutions is precisely the protection of public health. Due to the significance of human rights in the lives of both the individuals and the community, it is necessary to put a special focus on the limitation of human rights caused by the need to protect public health during the special measures against the pandemic. On one hand, there are human rights and freedoms, and on the other hand, there is a need for sustainable community, to prevent collapse of the healthcare system and to bring the damages to the lowest possible level. It is not easy to balance this interest. Since the countries have a tendency to limit human rights to greater extent than needed and use more restrictive measures towards the citizens, believing that they justifiably defend more important interests, the role of national and constitutional courts is very significant in these situations. They are protectors of citizens from the state and its unfounded and excessive intervention in the basic human rights.

This report presents the findings of the series of the activities recognized as necessary by the Lawyers' Committee for Human Rights in the response to the crisis caused by the epidemic of virus COVID – 19.

- ▶ **Provision of free legal support** to the citizens was our most significant activity throughout the state of emergency in Serbia (from **March 15 to May 6, 2020**), as well as after its termination. Frequent changes of the regulations, lack of information, overburdening of the competent state bodies, sudden economic crisis, restriction of the right to movement that caused social and family crisis, created the need for the citizens to receive correct information about their legal positions. During the state of emergency, we were addressed by **226 citizens**, with the questions that referred directly to **application of the measure of protection from epidemic in different legal fields**. Along with provision of information, this was also an opportunity to identify systemic violations of human rights and practical problems, and to respond adequately in accordance with our goals and competences.
- ▶ We followed daily all the **changes of the regulations**, as well as **reporting of the media on the epidemiological situation**. We thought that it was

necessary to open criminal procedure to the public in the proceedings for violation of safety measures, and we initially addressed the Supreme Court of Cassation, and then individual courts with the request for **approval to observe the trials via video link**;

- ▶ **We addressed state bodies and the Government of Serbia**, that is Crisis Team, as well as the Protector of Citizens of Serbia in order to observe whether some problems within their competence reoccurred and **provided solutions and proposals**.
- ▶ We followed **comparative practice** and the events in other countries in the region, as well as the entire Europe. Since even the European Court of Human Rights, which has a comprehensive practice of decisions on restrictions of the right to freedom of movement, did not have the practice that referred directly to the situations of the epidemic, we had to apply broader observation of the problem.

The fact is that there are no cases in comparative law of such massive interventions of the state in fundamental human rights due to public health. We are witnessing a completely new creation and writing of the law that should be a foundation for such situations in the future. For that reason, we paid close attention to the **restriction of the right to freedom of movement**. By restricting the right to freedom of movement, the state interfered in everyday life of the citizens in extremely rigorous way, which was affected many other rights of the citizens, such as the right to work, right to personal and family life, the rights of the child, including the right to a fair trial, since in many cases violation of imposed measures resulted in initiation of criminal proceedings.

Due to all above stated, this analysis has two focuses. The first one is on the attempt to respond to the question **whether restriction of the right to the freedom of movement during the state of emergency was in accordance with the Constitution of Serbia** and international treaties ratified by Serbia because of its impact on other rights of the citizens of Serbia.

In the second part of the analysis, we have presented **our observations from the hearings we observed during the state of emergency for the criminal offence Failure to Act Pursuant to Health Regulations during Epidemic**. The right to a fair trial, as one of the absolute rights, which cannot be restricted even during the state of emergency must be guaranteed even during the crisis such as this one. Enabling public access to the hearings, as the integral element of the right to a fair trial must be consistently implemented even when the measures and the new method of questioning of the defendants through use of technical means are introduced. When a new legal concept is introduced during the state of emergency or the existing one is changed, the role of the civil society is to monitor these changes and report its finding to the professional community and public.

II Chronology of events

- ▶ **On March 6, 2020**, the first confirmed case of contagion by virus COVID-19 was confirmed in Serbia.
- ▶ **On March 10, 2020**, the Government of the Republic of Serbia rendered the [Decision on proclamation of the disease COVID-19 caused by virus SARS-CoV-2 as contagious disease](#). This decision has been amended 22 times at the time this report is written, and since the Decision is still in force, it is expected that it will undergo more changes.
- ▶ **On March 12, 2020**, the Minister of Health rendered the [Ordinance on prohibition of gathering in the Republic of Serbia in public locations in closed space](#) prohibiting gathering of the citizens of Serbia in public locations in closed space, when more than 100 people gather.
- ▶ **On March 15, 2020**, the state of emergency was proclaimed in Serbia with the [Decision](#) rendered by the President of the National Assembly, the Prime Minister and President of the Republic in accordance with Article 200 of the Constitution of Serbia.
- ▶ **On March 16, 2020**, the *Regulation on the measures during the state of emergency* was rendered. This act stipulated the measures of derogation from human and minority rights, and based on the Decision on introduction of the state of emergency.
- ▶ **On March 18, 2020**, the Minister of Internal Affairs rendered the [Ordinance on restriction and prohibition of the movement of individuals on the territory of the Republic of Serbia](#), which has been changed four times after its rendering – **March 21, March 22, March 28 and April 3, 2020**. Initially, in accordance with the ordinance, the persons who were 65 or older in the inhabited places with more than 5000 inhabitants, as well as individuals who were 70 years old or older in the inhabited places with up to 5000 inhabitants, were entirely prohibited from being in public places, that is, outside of their apartments, premises and housing facilities in residential buildings and outside of their households, while the movement was prohibited for all other individuals in the period from 8 p.m. to 5 a.m. **In the period from March 18, 2020 to April 9, 2020**, the restriction of the right to movement during the state of emergency was regulated by the Ordinance on restriction and prohibition of movement of the individuals on the territory of the Republic of Serbia, while as of **April 9, 2020**, until the termination of the state of emergency on **May 6, 2020**, this issue was regulated by the amendments to the Regulation on the measures during the state of emergency. This regulation was placed out of force in accordance with the provision of Article 2 of the [Law on Validity of Regulations](#) adopted by the Government with co-signature of the President the Republic during the state of emergency and which was confirmed by the National Assembly.

The table below provides an overview of the changes of the restrictions of the right to movement in accordance with the Ordinance, based on the dates of their rendering.

Amendments to the Ordinance on restriction and prohibition of the movement of individuals on the territory of the Republic of Serbia ¹	
18.03.2020.	Total prohibition of movement of the individuals who were 65 or older. Prohibition of movement for other individuals in the period from 8 p.m. to 5 a.m.
21.03.2020.	Individuals who were 65 years old or older were permitted movement in the period from 3 a.m. to 8 a.m. on Saturdays. Prohibition of movement in all the parks and public surfaces designated for recreations and sports.
22.03.2020.	Prohibition of movement for all individual starts at 5 p.m. instead at 8 p.m. Permitted walking of the pets in the period from 8 p.m. to 9 p.m., in duration of 20 minutes, not more than 200 m from the place of temporary or permanent residence.
28.03.2020.	Prohibition of movement for all the individuals starts at 3 p.m. on the weekends. Walking of the pets is prohibited.
03.04.2020.	On the weekends, the prohibition of movement lasts from Saturday at 1 p.m. until Monday at 5 a.m. Walking of the pets is permitted in the period from 11 p.m. to 1 a.m. Persons who were 65 years old or older were allowed to go outside on Saturdays from 3 a.m. to 7 a.m. Maximum of two people could walk together or stay at public location in open air. Maximum of 10 people could attend the funerals.

- ▶ In accordance with the amendments to the ordinance of **March 21, 2020**, the individuals who were 65 years old or older were allowed to go outside on Saturday mornings, from 3 a.m. to 8 a.m.
- ▶ In accordance with the amendment of **March 21**, other individuals were prohibited from going to all the parks and public surfaces designated for recreation and sports, and then, based on the amendments of **March 22, 2020**, the prohibition of movement (so called curfew) was expanded so it started at 5 p.m. instead at 8 p.m., with the exception of the permitted 20 minutes for walking of the pets.
- ▶ With the amendments of **March 28, 2020**, the prohibition of movement for all the citizens started at 3 p.m., as well as prohibition to walk the pets.
- ▶ As of **April 4, 2020**, the prohibition of movement started from Saturday at 1 p.m. until Monday 5 a.m., with the exception for the walking of the pets. In accordance with this ordinance, maximum of two individuals could walk together or stay together in a public location in open air.

¹ More at <http://www.yucom.org.rs/wp-content/uploads/2020/04/LJUD-SKA-PRAVA-I-COVID-19-Analiza-izmena-pravnog-okvira-tokom-vanrednog-stanja-i-uticaj-na-u%C5%BEivanje-ljudskih-prava-final.pdf>

- ▶ General exemption from the prohibition of movement applied to the individuals who needed immediate medical assistance, as well as for two persons accompanying that individual. The exceptions also applied to licensed healthcare professionals, members of the Ministry of Internal Affairs, Ministry of Defense, security services and the Military of Serbia, while on duty, as well as the individuals with the permit for movement issued by the Ministry of Internal Affairs.

Having in mind that further restrictions were regulated by the amendments to the Regulation on the measures during the state of emergency, the table below provides the overview of all the amendments to this regulation:

Amendments to the Regulation on the measures during the state of emergency that apply to the restriction of the freedom of movement	
09.04.2020.	<p>Complete prohibition of movement for the individuals who were 65 years old or older except on Fridays from 4 a.m. until 7 a.m.</p> <p>Prohibition of movement for other individuals from 5 p.m. until 5 a.m. on workdays and on weekends from Friday at 5 p.m. until Monday 5 a.m.</p> <p>As an exception, the movement was allowed during the ban for the individuals walking their pets and who were younger than 65 in the period from 11 p.m. to 1 a.m. on the following day, as well as on Saturdays and Sundays from 8 a.m. to 10 a.m., for 20 minutes, not more than 200 m away from the place of temporary or permanent residence.</p> <p>Prohibition of movement in the parks and in public surfaces designated for recreation and sports.</p>
15.04.2020.	<p>During the prohibition, the movement is permitted for disabled children and children with autism, exclusively in the company of one adult person (one parent or guardian) not more than 200 m away from the place of temporary or permanent residence.</p>
16.04.2020.	<p>During the Easter holidays, the individuals who did not turn 65 years of age were prohibited movement from Friday, April 17 at 5 p.m. until Tuesday, April 21 at 5 a.m., but it was permitted to walk the pets, except in previously defined timeframe, and on Monday, April 20 from 8 a.m. to 10 a.m.</p>
21.04.2020.	<p>Individuals older than 65, that is older than 70 are permitted to move on Tuesdays, Fridays and Sundays in the period from 6 p.m. until 1 a.m. on the following day, in the duration of 30 minutes, in the radius of 600 m from the place of temporary or permanent residence.</p> <p>Blind, visually impaired, deaf and hearing-impaired individuals, as well as the individuals who due to similar issues cannot move independently, could be escorted by one person, at the time individuals are permitted to go out in accordance with the provisions of this Article.</p>
25.04.2020.	<p>Persons older than 65, that is 70 are permitted to go out every day in the period from 6 p.m. until 1 a.m. on the following day, in the duration of 60 minutes, in the radius of 600 m from the place of temporary or permanent residence.</p> <p>Movement of other individuals is prohibited during the First of May holidays, from Thursday, April 30 at 6 p.m. until Monday, May 4, at 5 a.m.</p> <p>In that period, it is allowed to take the pets out in the period from 8 a.m. to 10 a.m.</p>

III Analysis of the restriction of the right to movement

1. Legal basis for the restriction of the right to freedom of movement

Constitution of the Republic of Serbia stipulates that when the survival of the state or its citizens is threatened by a public danger, the National Assembly shall proclaim the state of emergency.² With proclamation of the state of emergency, the National Assembly may impose the measures that derogate from the human and minority rights guaranteed by the Constitution. Exceptionally, if the National Assembly is unable to meet, the state of emergency shall be proclaimed by the President of the Republic, President of the National Assembly and the Prime Minister. In this case, when the Assembly cannot meet, the measures that derogate from human and minority rights may be imposed by the Government by the regulation with co-signature of the President of the Republic. This situation occurred on **March 15** in the Republic of Serbia. Neither the state of emergency nor the measures of derogation from human and minority rights were proclaimed, that is, adopted by the National Assembly, but by alternatively designed state bodies. There were many debates in public and professional life in Serbia about constitutionality of such actions of state bodies, but the Constitutional Court rendered the [Decision](#) rejecting numerous initiatives for evaluation of constitutionality of proclamation of the state of emergency and thus provided the answer to this question.

Restriction of the right to freedom of movement is stipulated by the *Regulation on the measures during the state of emergency*. During its term, the relevant *Regulation* was changed for up to 10 times. Article 2 of the first version of the *Regulation* contained the following provision:

“Ministry of Internal Affairs, with the consent of the Ministry of Health, may temporarily restrict or prohibit movement of the individuals in public places, by ordering certain individuals or groups of individuals who are infected or it is suspected that they are infected by contagious disease COVID-19 to stay at the address of their place of temporary or permanent residence, with the obligation to report to the competent healthcare institution.”

This Article of the Regulation was the legal basis for rendering of the *Ordinance of the Minister of Internal Affairs on restriction and prohibition of the movement of individuals on the territory of the Republic of Serbia*.

In respect of the freedom of movement, the Constitutions of Serbia stipulates the following:

“Everyone shall have the right to free movement and residence in the Republic of Serbia, as well as the right to leave and return.

2 Constitution of the Republic of Serbia, “Official Gazette of RS”, no. 98/2006.

*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.*³

In respect of the general restriction of human and minority rights, the *Constitution* stipulates:

“Human and minority rights guaranteed by the Constitution may be restricted by the law if the Constitution permits such restriction and for the purpose allowed by the Constitution, to the extent necessary to meet the constitutional purpose of restriction in a democratic society and without encroaching upon the substance of the relevant guaranteed right.

Attained level of human and minority rights may not be lowered.

*When restricting human and minority rights, all state bodies, particularly the courts, shall be obliged to consider the substance of the restricted right, pertinence of restriction, nature and extent of restriction, relation of restriction and its purpose and possibility to achieve the purpose of the restriction with less restrictive means.”*⁴

The possibility of restriction of the right to movement is also envisioned by the *Law on Protection of Citizens from Contagious Diseases*, where Article 53, paragraph 1, item 2 stipulates that, at the proposal of Professional Commission for the Protection of Citizens from Contagious Diseases of the State and the Institute of Public Health established for the territory of the Republic of Serbia, the Minister may order the prohibition of the movement of the citizens, or restriction of the movement of the citizens in the area affected by the contagious disease, that is the epidemic of that contagious disease.⁵

As we can see from the attached Article of the *Constitution of the Republic of Serbia*, in order for the restriction of the right to freedom of movement to be justified, it is necessary for it to:

- ▶ be envisioned by the Constitution including the purpose of its restriction
- ▶ be restricted by the law
- ▶ the restriction should be required and in the scope that does not interfere with the essence of the guaranteed right.

The *Constitution* envisioned the possibility to restrict the right to movement for prevention of the spread of contagious diseases. The introduction of the state of emergency and rendering of the *Regulation on the measures during the state of emergency* provided the legal constitutional basis for the restriction of the right to freedom of movement.

European Convention for Protection of Human Rights and Fundamental Freedoms regulates the freedom of movement by *Protocol no. 4* with the Convention,⁶ Article 2:

3 Constitution of the Republic of Serbia, Article 39.

4 Constitution of the Republic of Serbia, Article 20.

5 Law on Protection of Citizens against Contagious Diseases, “Official Gazette of RS”, no. 15/2016 and 68/2020.

6 Council of Europe, [Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms](#), 16 September 1963, Strasbourg.

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
2. Everyone shall be free to leave any country, including his own.
3. No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of order public, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.
4. The rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society.”

In that sense, the European Court of Human Rights interpreted expression “in accordance with the law” by setting several conditions that refer to the fact based on which the right is restricted “in accordance with the law”. Not only does it require that the impugned measure should have some basis in domestic law, but also refers to the quality of the law in question. Firstly, **the law must be adequately accessible**: a citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a “law” unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances.”⁷ Observing it through the prism of the practice of the European Court of Human Rights, it could be said that the **precondition to the legality of the restriction of the right to movement was fulfilled**.

2. Necessity, scope of the restriction of the right and the issue of interference with the essence of the guaranteed right

The restriction of the right to freedom of movement during the state of emergency was imposed on all the citizens of Serbia, although **they were not all equally affected by this restriction**. There was a differentiation between the individuals younger than 65 that is 70 in the places with less than 5000 inhabitants and the other citizens of Serbia. Although there was an information in public discourse that the older persons were more susceptible to the more serious consequences of the virus due to weaker immune system, there was a lack of explanation what initially led the Minister of Internal Affairs, and later the Government of Serbia to set this age limit at 65, that is 70 years of age. Although labor related legislation of Serbia envisions 65 years of age as the time when age based retirement could be achieved, many citizens of Serbia who are older than 65 are still working and this restriction, along with their

.....
 7 [Khlyustov v. Russia, 28975/05](#), July 11, 2013, European Court of Human Rights.

right to movement, had significant impact on their labor rights. For that reason, it is justified **to raise the question of age discrimination and its justification.**

While in case of other citizens, younger than 65 years of age, the measures were progressively intensified, thus the prohibition of movement initially set from 8 p.m. to 5 a.m. was extended to 12 hours (from 5 p.m. to 5 a.m.), **the Government if Serbia did not even try to apply more lenient measures in respect of the elderly persons** (for example, restriction of movement in certain time period or at certain locations). *Order on restriction and prohibition of movement of March 8, 2020* fully prohibited elderly persons from going out from their homes, except in the case of urgent medical assistance. Lack of attempt to apply any more lenient measures before restriction of the movement of elderly persons in this scope has left an open question of the necessity of introduction of such severe measures were elderly persons were allowed to go outside only in case of medical emergency, and subsequently, they were allowed to go out only one day in a week for four hours in unfavorable time period (from 3 a.m. to 7 a.m.). It is necessary to take into consideration that many persons older than 65 years have recommendation to walk regularly due to cardiac and other chronic diseases. Additional problem experienced by these individuals was the fact that all of a sudden they were dependent to their friends, family members and volunteers who visited them and brought them groceries.

In respect of the application of Article 15 of the Convention⁸, the European Court of Human Rights provides the member states with a very vast scope of evaluation of the treat for the survival of the nation. However, in respect of the restriction of the basic rights guaranteed by the Convention, in its practice, the Court sets certain criteria for the evaluation whether there was a breach of the essence of the guaranteed right and whether such a breach was justified. This primarily refers to the **nature of the right that was restricted, circumstances that lead to emergency situation and its duration.**

While the circumstances that led to the emergency situation are clear and undisputable and are reflected in a sudden need to protect public health from the spread of a very contagious disease, as well as the very duration of the situation limited by the constitutional provision on the restricted duration of the state of emergency to up to 90 days, at the same time the nature of the restricted rights remained in the gray zone of the constitutionality. The right to the freedom of movement is one of the essential rights required in order to meet series of life needs and other rights of the citizens of Serbia.

In its [Decision](#) based on the constitutional appeals that referred to a very similar prohibition of movement, the Constitutional Court of Bosnia and Herzegovina faced this problem with a three-part test responding to three questions:

- ▶ Is interference with the right of movement in accordance with the law?
- ▶ Does the interference have a legitimate goal?
- ▶ Has the just balance between general interest of the community and the right of the individuals to the freedom of movement been established?

8 In time of war or other public emergency threatening the life of the nation, any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

While there was no dilemma that in respect of the first two criteria, this interference with the basic human right was legal due to the legitimate goal, but in respect of the third criteria, the Constitutional Court of Bosnia and Herzegovina states:

“(...) The fact was neglected that the category of individuals older than 65 included people who were actively working or professionally engaged in the entities where the work was not prohibited in the new occurred situation, such as judicial authorities, that is, judges and prosecutors whose tenure in accordance with the law lasts until they turn 70. Another neglected fact was that the same category included the individuals who have constitutional right and the obligation to perform certain duties entrusted to them in legislative and/or executive branch (representatives in legislative bodies of Bosnia and Herzegovina, members of the Presidency of Bosnia and Herzegovina, Council of Ministers of Bosnia and Herzegovina, governments of the entities). Namely, it was completely disregarded that there was no age restriction for performance of the functions in legislative and/or executive branch in accordance with the Constitution or the law, but those persons were prevented from performing those functions in accordance with such a general measure. This significantly disabled work of the legislative, executive and judicial branch, which must have the possibility to continue working even in such extraordinary circumstances, in ways that would be adjusted to those circumstances.”

The Constitutional Court of Bosnia and Herzegovina also reflected to the fact that it was a new, never before seen situation in modern democratic countries, stating: *“The Constitutional Court also considers the fact that there is no uniform professional opinion in respect of the application of suitable measures even on the global level. However, in such a situation, the Constitutional Court must take care of the balance between the need and protection of the society as a whole and the rights of the individuals. Thus, the Constitutional Court repeated the possibility of restriction of the rights guaranteed by the Constitution of Bosnia Herzegovina and the European Convention, caused both by general social benefits, and directly by the series of factors used to evaluate existence of fair balance between the undertaken measures and the intended goal, and in this specific case particularly the duration of the application and regular reexamining of their necessity. Otherwise, there could be a vast space for arbitrary actions of the competent authorities, which is contrary not only to the freedom of movement, but to the principle of the rule of law as well.”*

Finally, the Constitutional Court of Bosnia and Herzegovina establishes:

“Considering all above stated, the Constitutional Court finds that the contested measures do not meet the requirement of “proportionality” referred to in Article 2 of Protocol 4 to the European Convention, because based on the contested ordinances, it is unclear what the basis is for the Federal Team to conclude that the disputable groups to which the measures applies bore a higher risk to be infected or spread the contagion with COVID 19, there were no considerations of the possibility to introduce more lenient measures if such a risk justifiably existed, they were not strictly time limited, there was no set obligation for their regular reexamining in order to secure that they lasted only as long as it was “necessary” in the context of Article 2 of the Protocol number 4 to the European Convention, or to decrease or terminate them as soon as permitted by the situation.”

With insignificant differences between the situations in Bosnia and Herzegovina compared to Serbia, we think that these arguments could also be applied *mutatis mutandis* to the situation in Serbia.

Considering different reactions of the member states of the EU to the epidemic of the virus COVID-19, the EU Agency for Fundamental Rights published the report “Coronavirus Pandemic in the EU – Fundamental Rights Implications: With A Focus On Contact-Tracing Apps.”⁹ The following segment contains quotations of entire parts of this report in respect of the measure of restriction of the freedom of movement and the freedom of gathering.

2.1 State of emergency and extraordinary measures under supervision

In the period covered by the report, the courts, national bodies for human rights and civil society undertook increased supervision of the restrictions of human rights during the state of emergency and implementation of these restrictions. The following selected examples show how various actors examined the emergency measures within their competences in the filed under their jurisdictions.

- ▶ The courts in several countries valued legality of the measures with the focus on those that restricted the freedom of movement and the freedom of gathering. **Slovenian Constitutional Court** received the request for examining constitutionality of the decision of the Government restricting the freedom of movement and gathering of people in public spaces and prohibiting movement of the citizens outside of their municipalities. The Court established¹⁰ that the intrusions in the human rights and fundamental freedoms were permanent because they were not restricted by time. According to the opinion of the court, such a regulation is not required to achieve the intended purpose of this regulation. The same goals could be archived by setting periodical revisions of proportionality of the measures. The extension of the measures should be approved only if considering the circumstances and professional opinion, it is still considered necessary to achieve set goals. This would decrease the possibility of disproportionate violation of human rights and fundamental freedom. The court ordered the Government to perform evaluations at least once every seven days as to whether the introduced measures are still required to achieve certain goals. Based on the professional opinion, the decision will be made whether the measures will be extended, modified or terminated and the public will be informed accordingly.
- ▶ **In Germany**, the request for temporary placement out of force of the prohibition of gathering submitted to the Federal Constitutional Court was partially successful. The Court established¹¹ that the local authorities of Giessen beached the freedom of gathering when they prohibited gathering based on the interpretation of the regulation in Hesse prohibiting meeting of more than two persons. According to the opinion of the Court, the local authorities did not consider their discretionary authorization, which, in accordance with the Regulation, includes approval of gathering with compliance with the precautionary measures. The Court requested from the local authorities to render a new decision whether they would allow gathering in such

9 EU Agency for Fundamental Rights FRA, „[Coronavirus Pandemic in the EU – Fundamental Rights Implications: With A Focus On Contact-Tracing Apps](#)”, April 2020.

10 Constitutional Court of Slovenia, [Decision U-I-83/20-10](#) of April 16, 2020

11 Federal Constitutional Court of FR Germany, [decision 1 BvR 742/20](#) of April 1, 2020

circumstances. In another case, the Constitutional Court temporarily annulled¹² the provisions of the regulation on COVID-19 in u Lower Saxony since it did not allow exemptions from the general prohibition of religious services and other religious gatherings, even when there was no significant increase of the risk of infection. The Court previously ruled that the prohibitions of religious services were serious restrictions of religious freedoms that required strict supervision of proportionality in the light of new events in respect of the pandemic.

- ▶ **The judgment of the Municipal Court in Prague, Czech Republic**, annulled four safety measures adopted by the Ministry of Health, and which established the restriction of retail and free movement of people. The Court decided that the Ministry of Health had overstepped its competences by the adoption of these measures. The Court considered that the Government had not adopted the measures based on the Constitutional Law or the Crisis Law of the Czech Republic, but it was done by the Ministry of Health based on the Law on the Protection of Public Health, thus violating constitutional guarantees of the separation of powers. The measures adopted in accordance with the Law on Crises shall be supervised by the Parliament and may be adopted only for the state of emergency restricted to 30 days, unless the Parliament approves the extension. Contrary to that, the period of the safety measures adopted by the Ministry of Health is not directly set and depends on the need of the measures.
- ▶ The academics in the **Netherlands** expressed the same concerns. They claimed that the regional regulations on the extraordinary situations adopted of the chairpersons of 25 “safety regions” in the country were illegal since such restrictions could be imposed only by the law of the Parliament, and not by regional legislation. They claim that the urgent measures restricted numerous fundamental rights contained in the Constitution, including the rights to association and gathering, and to privacy, religion and respect of home.
- ▶ The institutions of the Ombudsman and the organizations of the civil society in **Romania and Spain** focused on the measure of coercion. Spanish Ministry of Internal Affairs published the data showing that 7,183 individuals were detained and that 805,875 proposals for imposing of the sanctions were submitted due to breach of the law that refers to COVID-19, between the initiation of the state of alarm¹³ on **March 14 and April 28**. Upon publishing, the institution of the Ombudsman requested additional information in order to analyze whether such action is correct and proportionate. Romanian Ombudsman posed the question of the constitutionality of monetary fines due to failure to comply with the measures applied during the state of emergency and requested from the Minster of Internal Affairs to be more precise in defining criminal offences in order to avoid abuse of sanctions. Several non-governmental organizations warned that the amount of monetary fines – between 2,000 and 20,000 RON (415-4,150 €) for individuals – was disproportionate to average income.

12 Federal Constitutional Court of FR Germany, [decision 1 BvQ 44/20](#) of April 29, 2020

13 Estado de alarma or the state of alarm is the official name of the state of emergency in Spain.

IV Sanctioning of the violations of the measures against the spread of the contagious disease COVID-19 in Serbia

Sanctioning of the violation of the measures against the spread of contagious disease during the state of emergency was reflected in numerous misdemeanor and criminal proceedings led against the citizens violated or allegedly violated some of the imposed measures.

Criminal Code of the Republic of Serbia stipulates the criminal offences against the health of people: Failure to Act Pursuant to Health Regulations during Epidemic (Article 248 of the *Criminal Code*) and Spread of the Contagious Diseases (Article 249 of the *Criminal Code*).¹⁴

On the other hand, the misdemeanor provisions were numerous and contained in bylaws that were frequently changed, and some of them more than several dozen times. The individuals that violated the imposed prohibition of movement were punished in the misdemeanor proceedings with the monetary fine.

[Regulation on the misdemeanor for violation of the Ordinance of the Ministry of Internal Affairs on the restriction and prohibition of movement of the individuals on the territory of the Republic of Serbia](#) was rendered on **March 21, 2020**. Article 2 of the said Regulation stipulates that the proceedings may be initiated for the misdemeanor in case a criminal proceeding is initiated or is ongoing for the criminal offence that includes the features of such misdemeanor offence, “regardless of the prohibition referred to in Article 8, paragraph 3 of the Law on Misdemeanors, which created the threat of double punishment of citizens - both in criminal and misdemeanor proceedings, explicitly prohibited by the principle *ne bis in idem*, and guaranteed by Article 34 of the Constitution of the Republic of Serbia that regulates the principle of legal certainty in criminal law”.¹⁵

The most frequent reason for criminal processing was violation of the measure of self-isolation, that is, mandatory isolation at home, in accordance with the [Decision on proclamation of the disease COVID-19 caused by the virus SARS-CoV-2 as contagious](#)

14 Criminal Code of RS, “Official Gazette of RS”, no. 85/2005, 88/2005 – corr., 107/2005 - corr., 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016 and 35/2019.

15 [The initiative was submitted to the Constitutional Court for the evaluation of constitutionality and compliance with the European Convention on Human Rights of Article 2 of the Regulation on the misdemeanor for violation of the Ordinance of the Ministry of Internal Affairs on the restriction and prohibition of movement of the individuals on the territory of the Republic of Serbia](#), Belgrade Centre for Human Rights, March 25, 2020.

disease, Decision on closing of the border crossings that was rendered on **March 12, 2020**, *Ordinance on restriction and prohibition of the movement of individuals on the territory of the Republic of Serbia*, rendered by the Minister of Internal Affairs with the consent of the Minister of Health on **March 18, 2020**, and *Decision on closing of all border crossings for entrance to the Republic of Serbia* of **March 19, 2020**.

Numerous citizens addresses the Lawyers' Committee for Human Rights – YUCOM stating that a persons close to them was detained and imposed detention due to violation of the measure on mandatory isolation at home, but without receiving any decision or signing of the minutes, and without receiving a notification of their rights and obligations. Only during the first week, we were addresses 12 citizens with this problem. One of the reasons why this was a systemic problem is the fact that the *Decision on proclamation of the disease COVID-19 caused by the virus SARS-CoV-2 as contagious disease*, which defined the measures of mandatory isolation at home, was changed several times by changing the duration of the measure (from 14 to 28 days of mandatory isolation), and there were frequent changes of the countries this measure referred to, that is, for the citizens who arrived from those countries. **Only in March 2020, this decision was changed as many as 12 times**, which led to total confusion. The citizens were given verbal decisions at the time they crossed the border, but they were not handed any notification on the rights, particularly during the first few days of the application of the measures, and that is why many citizens were unaware that these measures applied to them. Public notifications on the mandatory measures of isolation and the list of countries these measures referred to were very scarce, and were contained in a bylaw, and even the lawyers experienced difficulties in continuous monitoring of its amendments. Furthermore, the language of the decision is very professional and difficult to understand.

Lawyers' Committee for Human Rights – YUCOM reacted, realizing that this was a systemic problem and addressed the Crisis Team of the Government of the Republic of Serbia, stating that the purpose of the criminal punishment of the citizens could not be met if the citizens were punished for the obligations they were unaware of. Understanding that due to the scope of rendered decisions and the need for urgent reaction, these decisions had to be issued verbally, we addressed the Crisis Team with the appeal to, along with the decision on mandatory isolation at home, the individuals should also be delivered the notification on the following:

- ▶ To which individuals the measures apply
- ▶ Reasons for implementation of the measure
- ▶ Rights and obligations of the individuals the measures apply to
- ▶ Duration of the measure
- ▶ Right to a legal remedy.

Soon after our appeal to the Crisis Team of the Government of the Republic of Serbia, the citizens who were imposed the measures at the crossing of the border were also delivered the notification on the rights of the citizens. However, the issue of the legality of imposing of the detention for the individuals who were not informed of their rights and obligations and the measures imposed on them still remained. **In that sense, such practice would hardly pass the above-mentioned test imposed by the European Court for Human Rights when interpreting Article 15 of the Convention, and which is reflected in accessibility and predictability of the regulations for the citizens.**

V Monitoring of Skype trials

Several days after proclamation of the state of emergency, on **March 26, 2020**, the Ministry of Justice sent the *Recommendations* to all the courts with the jurisdiction to decide in the proceedings against the persons who violated the measure of self-isolation, recommending them to organize the trials via video-link, in order to protect both the employees and the individuals the proceedings are led against.¹⁶ The strictest penalties to up to even three years of imprisonment were issued in the first judgements.¹⁷ Non-governmental organizations, as well as the Bar Association of Serbia colloquially called the trials via video-link the Skype trials, and characterized them as unlawful. It took until **April 1, 2020**, for the Government of the Republic of Serbia to adopt the [*Regulation on the manner of participation of the defendant at the main hearing in criminal proceedings held during the state of emergency proclaimed on March 15, 2020*](#).¹⁸ In accordance with this Regulation, it was allowed for the defendants in the first instance criminal proceedings to take part in at the main hearing via technical means for the transfer of sound and picture, in case the court considered that the direct presence of the defendant in detention would increase the threat of the spread of the contagious disease. We should remind that the right to a public hearing, as part of the right to a fair trial includes presence of the defendant at the main hearing, as well as efficient participation in it. Criminal Procedure Code of the Republic of Serbia does not envision this derogation from the principle of directness and the principle of publicity, and the professional public¹⁹ considered it to be significantly contrary to the Constitution of the Republic of Serbia and the European Convention for Protection of Human Rights and Fundamental Freedoms.

As of coming of the regulation in force, the Lawyers' Committee for Human Rights – YUCOM addressed numerous courts with the request to enable the representatives of YUCOM as professional public to attend these trials via video link, since there was a threat that such hearings of the defendants would jeopardize the principle of publicity. On April 9, 2020, the High Judicial Council rendered the Conclusion, stating that the trials via Skype could be held only for the individuals detained for the criminal offences referred to in Articles 245, 248 and 249 of the Criminal Code.

On **April 7, 2020**, YUCOM sent the letter to the addresses of 15 courts requesting monitoring of the cases for the criminal offence referred to in Article 248 of the Criminal Code - Failure to Act Pursuant to Health Regulations during Epidemic. The courts were selected based on the information on scheduled hearings on their Internet presentations, and the criteria was the vicinity of the border of the Republic

16 Open doors of the judiciary, blog, Savo Đurđić – [“Is it legal and possible to organize trial and questioning of the defendant via video link?”](#)

17 RTS, [“First judgements for violation of self-isolation, three individuals sentenced to prison sentences”](#), March 27, 2020.

18 Regulation on the manner of participation of the defendant at the main hearing in the criminal proceeding held during the state of emergency proclaimed on March 15, 2020, “Official Gazette of RS” no. 49/20.

19 N1, [“First Skype trials held, experts warn – the rights of the defendants are violated”](#), March 31, 2020.

of Serbia.²⁰ At that moment, the trials were held in six contacted courts where the defendants were connecting via video-link,²¹ but since the Basic Court in Novi Sad and the Basic Court in Leskovac only allowed direct presence of the public, the trials were monitored in the total of four courts.²²

Direct observing of the hearings in the courts was not technically feasible, since the intercity transportation was ceased. In addition, YUCOM did not consider it wise to expose its activists to the danger of direct attendance of the trials, considering all the adopted measures and recommendations of social distancing. It was evaluated that this could not be in accordance with the general principles of preservation of health in the fight against the epidemic.²³

1. Observing of the trials during the state of emergency

In the courts where we were allowed to observe the trials via conference connection on Skype, we were met with understanding of the need to consistently comply with the principle of publicity of the trials and cooperation of both the presidents of the courts, and the relevant judges. The main hearings were held in presence of the relevant judge, typist, public prosecutor, defendant's attorney, and in some courtrooms, person in charge of technical support in the courtroom. During the trial, the defendant would be in detention and would appear via video-link. During the hearing, a member of the security staff would be present in the room with the defendant, except in the cases when the court allowed confidential conversation between the defendant and the defense attorney, when the court would warn the security officer to monitor the defendant only visually.

All the participants in the proceeding, including the defendant, had suitable protective gear. In certain proceedings, depending on the position of camera in the courtroom, the defendant could only see the judge, while in others, the defendant could also see the defense attorney and the public prosecutor. With the exception of direct presence of the defendant in the courtroom, the course of the proceeding was regular. In all the proceedings we monitored, including the citizens who addressed us for legal support, the defendants had a selected or assigned defense attorney. When requested, a confidential conversation with the defense attorney was enabled via Skype. The hearing would also be postponed because there was not enough time for defense. Depending on the method of organization and technical possibilities, the right to contradictory procedure was accepted in certain cases. In its publication [Human rights and COVID-19 – Right to a](#)

20 Letter requesting the permit to monitor the trials via video link sent to the Basic Court in Krusevac, Basic Court in Lebane, Basic Court in Leskovac, Basic Court in Nis, Basic Court in Novi Sad, Basic Court in Sid, Basic Court in Sremska Mitrovica, Basic Court in Vranje, Basic Court in Vrsac, Basic Court in Bujanovac, Basic Court in Subotica, Basic Court in Paracin, Basic Court in Valjevo and Basic Court in Prokuplje.

21 Basic Courts in Lebane, Sid, Prokuplje and Vranje did not have this type of cases at the given moment.

22 Eight main hearings in four courts were monitored - Basic Court in Sremska Mitrovica, Basic Court in Sombor, Basic Court in Vrsac, Basic Court in Subotica.

23 After obtaining the approval exclusively for direct observation, YUCOM sent the letter to one of the courts requesting for the decision to deny the observing via conference call to be reconsidered, but there have been no reactions.

[fair trial.](#) the Lawyers' Committee for Human Rights – YUCOM, with the support of the United Nations in Serbia, provided a detailed analysis of the measures introduced by the Government of the Republic of Serbia during the state of emergency, and which affected the right to a fair trial in the criminal proceedings.

The most frequent proposals of the defense referred to abolishing of the measure of detention, and especially in the period when the expiration of 28 days as of imposing of the measures for the defendants would be approaching. It was also common for these proposals to be issued by the public prosecutor's office itself. According to the findings of YUCOM based on monitoring of the trials, as of **April 15**, the courts would abolish the measure of detention. In other cases where the hearings were held during the state of emergency, the hearings were continued in the courtroom, with compliance with the epidemiological precautions.

According to the response we received from the *Administration for Enforcement of Criminal Sanctions*,²⁴ at the moment of termination of the state of emergency, **on May 6, 2020**, there were 17 individuals in detention suspected of committing a criminal offence Failure to Act Pursuant to Health Regulations during Epidemic. Along with the criminal offence referred to in Article 248 of the Criminal Code, all the persons were also charged by some other criminal offence, mostly: Domestic Violence, Theft, Aggravated Theft and Grievous Bodily Injury.

2. Data on the trials held during the state of emergency

The total number of criminal cases where the main hearings were held during the state of emergency was at least 945.²⁵ The highest number of cases was led for the criminal offences referred to in Article 248 *of the Criminal Code* - Failure to Act Pursuant to Health Regulations (at least 132 cases), Article 194 - Domestic Violence (at least 105 cases) and Article 204 – Aggravated Theft, 36 cases. Among other criminal cases, the most frequent ones were for Theft,²⁶ Illegal Possession of Narcotics,²⁷ as well as Failure to Pay Alimony.²⁸

As previously stated, the trials were held in two ways –with presence of the defendant or with participation of the defendant via video link, that is, via Skype. The latter method of the trials, when the defendant attended via video-link, was used by 50% of the courts, in at least 84 cases. In the highest number of cases, the trials were organized in such a way because the defendants were accused of the criminal offence Failure to Act Pursuant to Health Regulations, which implied that the attendance of the defendant to the court would cause the spread of the disease.

Numerous citizens charged during the state of emergency did not have previous convictions, which led to many agreements on admission of criminal offence

24 Available in the archives of YUCOM.

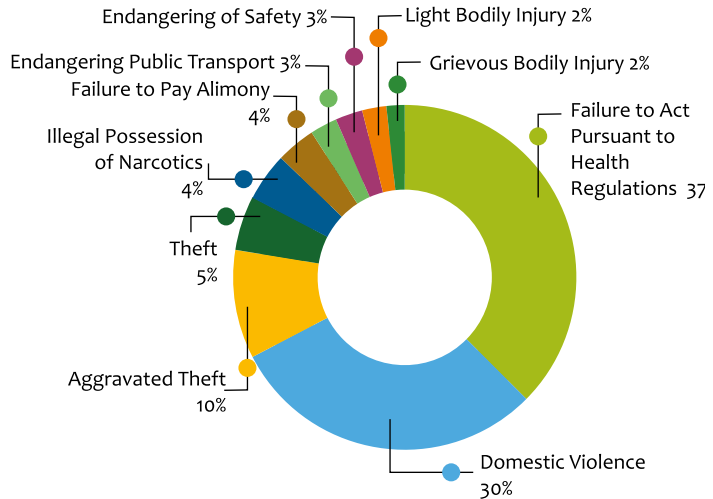
25 Data received from 65 basic courts on the territory of the Republic of Serbia. There is a possibility of small derogation from this number since certain courts responded to the question about the number of the cases with the information on the number of the main hearings – in such a case the number of the cases may be different from the submitted data. For detailed information on the number of cases see Annex 1.

26 Criminal Code, Article 203, at least 16 cases.

27 Ibid, Article 246a, at least 14 cases.

28 Ibid, Article 195, at least 12 cases.

MOST FREQUENT CRIMINAL OFFENCES



between the defendant and the public prosecutor, based on Article 315 of the *Law on Criminal Procedure*.²⁹ The number of judgements rendered in the period from **March 15 to May 6, 2020**, based on the agreements on admission of the criminal offence is 196. This number also includes the judgements for all the criminal offences referred to in the Criminal Code of the Republic of Serbia.

As stated by the courts, attendance of the public at the trials was mostly allowed, but there were no requests for direct attendance. In respect of the requests for the attendance of the public via video-link, 15 courts specifies the request of the Lawyers' Committee for Human Rights – YUCOM. However, referencing to the healthcare measures, the total of ten courts refused the presence of the public while only one court rejected presence of the public.³⁰ The professional public was allowed to monitor the total of six cases, in four courts, via video-link.³¹ Public was excluded from the cases where the agreement on admission of the criminal offence was signed, as well as from one case for the criminal offence Espionage, referred to in Article 315 of the Criminal Code.

²⁹ Law on Criminal Procedure, "Official Gazette of RS", no. 72/2011, 101/2011, 121/2012, 32/2013, 45/2013, 55/2014 and 35/2019.

³⁰ Basic Court in Sabac, Basic Court in Valjevo, Basic Court in Negotin, Basic Court in Gornji Milanovac, Basic Court in Knjazevac, Basic Court in Raska, Basic Court in Priboj, Basic Court in Lebane, Basic Court in Backa Palanka and Basic Court in Ruma. Basic Court in Krusevac states that the request for monitoring send by the Lawyers' Committee was denied since it had been submitted after working hours, and they were unable to reach the office by telephone in order to provide the response.

³¹ Basic Court in Subotica (K-206/20), Basic Court in Sombor (K-197/20), Basic Court in Sremska Mitrovica (K-139/20, K-152/20, K-144/20) and Basic Court in Vrsac (K-88/20).

VI Conclusion

Article 15 of the [European Convention on Human Rights](#) regulates derogation from the Convention in extraordinary circumstances, clearly stating that in public emergency threatening the “life of the nation”, the state may take measures derogating from its obligations, to the extent strictly required by the exigencies of the situation. Even in this situation, it is completely prohibited to derogate from the right to life, prohibition of torture, as well as derogation from punishment solely based on the law. The Republic of Serbia restricted the right to movement of the citizens without notifying [Secretary General of the Council of Europe on derogation from certain obligations](#). It was done only on **April 7, 2020**, retroactively and without accompanying list of rights to be restricted or the timeframe of the duration of the restrictions.³² It remains to be seen whether the citizens who appeal for violation of the right to movement, as well as other fundamental rights, will seek the justice before the European Court of Justice, since their rights guaranteed by the Convention were breached violated.

As shown by the analysis, although it could be said that the condition of the legality of the restriction of the right to movement was fulfilled, the restriction of this right was suffered by all the citizens of Serbia, but not equally. There is a justified question of age discrimination of the citizens older than 64 or older than 70 and its justification, where the Government of Serbia did not even try to apply more lenient measures that had impact on the restriction of the freedom of movement. Unlike constitutional courts in the region and throughout Europe that evaluated constitutionality of similar measures, the Constitutional Court of Serbia remained passive throughout the entire state of emergency, allowing for the continued legal uncertainty and violation of the rights of the citizens.

Precisely that legal uncertainty, caused by frequent changes of the regulations, led to extremely high number of cases where the citizens were charged with the criminal offence of Failure to Act Pursuant to Health Regulations during Epidemic. It remains to be seen how the second-instance courts will proceed in these cases.

Since the [National Assembly of the Republic of Serbia](#) confirmed all the measures rendered during the state of emergency and adopted the [Law on validity of regulations adopted by the Government with the co-signature of the President of the Republic during the state of emergency](#), the final evaluation of the constitutionality of the disputable measures should be rendered by the Constitutional Court of Serbia. Along with the responses to the numerous initiatives for the valuation of constitutionality, the Constitutional Court will have the assignment to respond to the individual violations of human rights, which will certainly be brought before it, and these rights will include the right to movement and the right to a fair trial. The assignment is not an easy one, but it does not have to be too difficult if we apply the basic principle of proportionality in restriction of human rights.

Considering the announcements that such critical situations will occur in the future and that it is the most difficult when you need “to break the ice” in a certain field, we hope for this report to serve as the guidance for some future measures. This primarily refers to the issue of legal certainty of the citizens and their trust in the current regulations, and the ways they could be informed of their rights and obligations.

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32 Ministry of Foreign Affairs of the Republic of Serbia, [Note verbal](#), 6 April 2020.

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