

LIMITS OF THE AUTHORITIES' MEASURES TO PROTECT PUBLIC HEALTH DURING THE COVID-19 PANDEMIC

prof. JUDr. Soňa Košičiarová, PhD.

ОГРАНИЧЕНИЯ НА МЕРКИТЕ НА ВЛАСТИТЕ ЗА ЗАЩИТА НА ОБЩЕСТВЕННОТО ЗДРАВЕ ПО ВРЕМЕ НА ПАНДЕМИЯТА ОТ COVID-19

проф. д.ю.н. Соня Кошичярова, PhD.

Юридически факултет на Трнавския Университет в Трнава,
Република Словакия

Резюме: Авторката анализира правните ограничения, които трябва да се спазват повсеместно при прилагане на мерките на органите за опазване на общественото здраве като инструменти за предотвратяване на разпространението на болести по време на пандемията от COVID-19. Той обобщава универсалните правни принципи, които трябва да се следват в съответствие с Европейската конвенция за защита на правата на човека и основните свободи въз основа на опита от процедурите на властите в Словакията република.

Ключови думи: Конституция на Словакията република – извънредно положение – тест за пропорционалност – Закон за защита на общественото здраве – Конституционен съд на Словакията република – Европейски съд по правата на човека – основни критерии при оценката на законността на лишаването от лична свобода.

Abstract: Author analyzes the legal limits, that have to be universally observed when applying the measures of public health protection authorities as tools to prevent the spread of diseases during the COVID-19 pandemic. It generalizes the universal legal principles that have to be followed in accordance with the European Convention on the Protection of Human Rights and Fundamental Freedoms based on experience from the procedures of the authorities in the Slovak Republic.

Key words: Constitution of the Slovak Republic – state of emergency – the proportionality test – the Public Health Protection Act – the Constitutional Court of the Slovak Republic – European Court of Human Rights – basic criteria in assessing the legality of the deprivation of personal liberty.

Introduction

The Covid-19 pandemic caught the Slovak Republic legally, institutionally, and organizationally unprepared. It turned out, that the tools for dealing with extraordinary situations known to the legal system to this time were not fully usable in specific conditions.

The Government of the Slovak Republic, which was aware of its political responsibility and the legal responsibility of state bodies for implementing measures to protect the lives

and health of citizens, proceeded to order special measures based on the recommendations of a council of experts who had many years of professional experience in fighting epidemics abroad. Thanks to this, the government actions had a high degree of trust among the population. Early and thorough information led to the fact, that Slovakia had excellent results in the European statistics of diseases and deaths from the beginning of the pandemic and for a relatively long period during it. People voluntarily submitted to the imposed restrictions and showed a high degree of solidarity.

The Slovak Government was also aware of its responsibility for the eventual inaction of the state authorities. This could be qualified from a legal point of view as a violation of Article 2 of the European Convention on the Protection of Human Rights and Fundamental Freedoms, which protects the right to life and ultimately led to the overly ambitious introduction of measures to protect the population.

Valid legislation against the Covid-19 pandemic

The Constitution of the Slovak Republic assumes, that if one of the extreme situations occurs, such as *war, state of war, exceptional state or state of emergency*, it is possible to limit basic rights and freedoms and introduce certain obligations.

Conditions and extent of limitation of fundamental rights and freedoms and extent of obligations in time of war, state of war, exceptional state and state of emergency according to Article 51 Par. 2 of the Constitution of the Slovak Republic can only be established by the Parliament through a *constitutional act*. Thus, the Parliament cannot adopt an act for the approval of which a lower quorum of deputies' votes is sufficient.

According to the Article 5 of the Constitutional Act No. 227/2002 Coll. the Government could declare a state of emergency during the COVID-19 pandemic. This happened for three times:

1. from 16 March 2020 (Decree of the Government of the Slovak Republic No. 114 of 15 March 2020 published in the Collection of Laws No. 45/2020), terminated by the expiration of 13 June 2020 (Decree of the Government 366 of 10 June 2020 published in the Collection of Laws No. 147/2020).
2. from 1 October 2020 (Decree of the Government of the Slovak Republic No. 587 of 30 September 2020 published in the Collection of Laws No. 268/2020), terminated by the expiration of 14 May 2021 (Government Decree 260 of 14 May 2021 published in the Collection of Laws No. 175/2021)
3. from 25 November 2021 (Decree of the Government of the Slovak Republic No. 695 of 24 November 2021 published in the Collection of Laws No. 428/2021), terminated by the expiration of 22 February 2022.

Until December 28, 2020, the Constitutional Act No. 227/2002 Coll. provided for the power of the Government. The Government could legally act only:

- if there has been or there is an immediate threat to the life and health of persons and in causal connection with the emergence of a pandemic,
- in an affected or immediately threatened area,
- to the necessary extent and
- for the necessary time, the longest for 90 days.

As the pandemic did not abate, it was necessary to amend the Constitutional Act No. 227/2002 Coll. because at that time, the Act did not regulate the *possibility of extending the state of emergency* by decision of the Government.

From December 29, 2020, the state of emergency declared due to the threat to the life and health of persons in causal connection with the emergence of the pandemic can be extended in the Slovak Republic to the *necessary extent* and for the *necessary time* by a maximum of another 40 days, even repeatedly. However, it is the Parliament, which has to approve the extension of the state of emergency. If the Parliament does not give its consent, the state of emergency will end *ex lege*.

Content of the measures taken by public authorities to combat the Covid-19 pandemic

During the Covid-19 pandemic, the Government of the Slovak Republic announced the following legal restrictions:

- declared a state of emergency on March 15, 2020, only in the affected area (in twelve districts). The state of emergency concerned health services. Since the declaration of the state of emergency, the Government of the Slovak Republic has imposed a work obligation on employees to ensure the provision of health care.
- on March 18, 2020, the government extended the declaration of a state of emergency to the entire territory of the Slovak Republic,
- on March 27, 2020, it extended the state of emergency to the entire service sector.

The most significant extension of the state of emergency measures was, when the Government restricted freedom of movement and residence by imposing a curfew with specific exceptions. At the same time, the Government prohibited the exercise of the right to peaceful assembly.

A much more extensive restriction of basic rights and freedoms due to the declared state of emergency was brought about by the *measures of state administration bodies* in the area of the public health according to *Public Health Protection Act* (Act No. 355/2007 Coll.).

Until the Covid-19 pandemic, few people in the Slovak Republic were aware of the wide range of measures available to the Public Health Authority of the Slovak Republic or regional public health offices as state administration bodies. Measures taken by the Public Health Authority of the Slovak Republic during the state of emergency specifying behaviour of entities in the form of a ban or order due to the COVID-19 pandemic were largely involved in the restriction of fundamental rights and freedoms.

They acted on the basis of and within the limits of valid legislation. However, the problem was not the compliance with the applicable legislation, but the content of the valid legislation. Lawyers began to ask, whether the regulation is in accordance with the Constitution of the Slovak Republic.

Legal experts pointed out, that the content of the legislation needs to be analyzed through the *proportionality test*, which is also used by the European Court of Human Rights in its decision-making activities and which is also used by the Constitutional Court of the Slovak Republic.

The first step in the proportionality test is the aspect of suitability, or sufficiently important goal and rational connection between the legal norm and the goal (purpose) of the legal regulation.

The test of a sufficiently important aim (test of legitimate aim/effect) means an assessment of whether the intervention is aimed at a goal that is important enough to justify an intervention in the fundamental right and freedom. It also includes a test of the rational link between the intervention and the goal of the intervention - whether the given means can achieve an acceptable goal. This bond is dynamic and its development during the

duration of the state of emergency can be assumed, both in the direction of strengthening of this bond and in the direction of weakening of this bond.

The second step of the proportionality test is determining the criterion of inevitability, necessity or the use of the least drastic – gentler means – test of necessity (test of necessity, test of subsidiarity) – so it is possible to use a milder restriction.

The third step is the test of proportionality in the strict sense, which includes the test of maintaining the maximum of both fundamental rights.

The problem up for debate became the manner in which the measures were being adopted, directly restricting the fundamental rights and freedoms, or secondary rights and freedoms. This provided the ground for a broad expert discussion, which culminated, when the state generally ordered, that *every person entering the territory of the Slovak Republic has to undergo temporary quarantine isolation in specially designated accommodation facilities for this purpose*. What appeared to be useful from an epidemiological point of view, did not meet the legal criteria.

Proceedings concerning compliance of certain provisions of the Public Health Protection Act before the Constitutional Court of the Slovak Republic

At the beginning of 2021, the Public Defender of Rights, professor JUDr. Mária Patakyová, PhD., filed a motion for constitutional review of several provisions of the Public Health Protection Act with the Constitutional Court of the Slovak Republic. She primarily focused on three issues.

Firstly, her complaint covered the possibility of isolation and quarantine in medical facilities and other facilities determined by the Government (the so called state quarantine). She arrived at a conclusion, that the provisions of the Public Health Protection Act concerning the state quarantine were in conflict with the fundamental right to personal liberty in terms of its substantive and procedural aspect. In particular, the relevant provisions of the Act fell short of establishing the reasons under which personal liberty of persons could be restricted by placing them in state quarantine, and there was no maximum permissible duration of such restriction of personal freedom specified either. Therefore, it was not clear which legal act allows restricting personal liberty by means of the “state quarantine”. Moreover, persons placed in „state quarantine” did not have an effective remedy available for examining the lawfulness of restriction of their personal liberty through a fast-track judicial review, with the court being able to order their immediate release, as also required by constitutional and international standards for the protection of the right to personal liberty.

Another provision, the unconstitutionality of which she contested before the Constitutional Court of the Slovak Republic, was a provision of the Public Health Protection Act, according to which the costs incurred when carrying out measures imposed under the Public Health Protection Act are to be borne by those persons who are required to carry them out. When placed in the „state quarantine” for a long time, these costs were reaching significant amounts.

Finally, the last group of provisions which she contested before the Constitutional Court of the Slovak Republic because of non-compliance with the Slovak Constitution were those, which allowed the public health authorities (Health Ministry of the Slovak Republic, Public Health Authority of the Slovak Republic, regional public health offices) to adopt, during the pandemic, additional measures not specified in more detail in the Act. These provisions have unacceptably interfered with the separation of powers in a democratic society through an extensive possibility of delegated lawmaking – the lawmaking body allowed the executive bodies to set the limits for the restriction of fundamental rights and

liberties. According to the Constitution, however, the limits of fundamental rights and freedoms may only be set by act.

Constitutional Court's decision No. PL. ÚS 4/2021

The Constitutional Court in its decision No. PL. ÚS 4/2021 of 8 December 2021 agreed with the arguments of the public defender both in the part about „state quarantine” and in the part related to the disproportionately extensive powers of public health authorities.

As regards the „state quarantine”, the Constitutional Court ruled that it involved deprivation of personal liberty which, however, does not meet the standards of personal liberty protection under Article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The Constitutional Court arrived at a conclusion, that the provisions of the Public Health Protection Act concerning the state quarantine were in conflict with the fundamental right to personal liberty in terms of its substantive and procedural aspect. In particular, the relevant provisions of the act fell short of establishing the reasons under which personal liberty of persons could be restricted by placing them in state quarantine, and there was no maximum permissible duration of such restriction of personal freedom specified either. Therefore, it was not clear, which legal act allows restricting personal liberty by means of the „state quarantine”. Moreover, persons placed in „state quarantine” did not have an effective remedy available for examining the lawfulness of restriction of their personal liberty through a fast-track judicial review, with the court being able to order their immediate release, as also required by constitutional and international standards for the protection of the right to personal liberty.

The decision of the Constitutional Court of the Slovak Republic had no impact on isolation at home which, due to its intensity, does not constitute interfering with the fundamental right to personal liberty, but is „only” seen as a restriction of the freedom of movement that is subject to less stringent standards.

As regards the contested provisions establishing the public health authorities' powers to “adopt further measures through which other activities may be prohibited or imposed”, the Constitutional Court ruled, that these provisions were not in line with several provisions of the Constitution. According to the Constitutional Court, the Parliament as a lawmaker may not leave such authorisations to the bodies of executive power, which allow them to determine, through secondary legislation, a restriction of certain rights and freedoms, how they will be restricted and to what extent (limits for restricting the basic rights and freedoms). Pursuant to Article 13 Par. 2 of the Constitution, the limits to basic rights and freedoms may only be determined by the lawmaking body, while any restriction of basic rights and freedoms by means of secondary legislation (such as decrees issued by the bodies of executive power) must be explicitly supported by act and may not constitute “a blank cheque” handed to the executive bodies so that they could prohibit or impose other activities at their own discretion. The Act did not determine the maximum duration of personal liberty restriction and did not establish sufficient procedural guarantees for persons with restricted personal liberty.

General conclusions, that can be drawn from the decision of the Constitutional Court of the Slovak Republic PL. ÚS 4/2021 in the context of the European Convention on the Protection of Human Rights and Fundamental Freedoms

In the opinion of the Constitutional Court of the Slovak Republic, even the COVID-19 pandemic cannot justify serious deficiencies in the legislation.

A) The act cannot authorize the executive authority to issue a regulation of lower legal force, that would determine the limits of fundamental rights and freedoms. The Constitution entrusts the right to determine the limits of fundamental rights and freedoms (due to the preservation of the constitutional nature of these rights and freedoms) only to the Parliament.

The authorization in the act for the issuance of a generally binding legal regulation of lower legal force, which would regulate other conditions affecting the rights guaranteed by the Constitution, is not allowed by the Constitution. In this context, the Constitutional Court pointed to the decisions of the European Court of Human Rights, which provides legal protection against arbitrary interventions by public authorities in rights protected by the European Convention. It would be contrary to the principle of the rule of law, if the legal discretion given to the executive was expressed as unlimited power. The act has to express (with sufficient clarity) the scope of the discretion granted by the competent authority and also the manner of its exercise (ECtHR Decision of 2/8/1984 in *Malone v. United Kingdom*, complaint no. 8691/79, § 68, ECtHR decision of 16/2 2000 in the case of *Amann v. Switzerland*, complaint No. 27798/95, § 56). *The more serious restrictions and interference with fundamental rights the use of an authorizing provision can lead to, the more precisely the boundaries for the actions of a public body must be defined in it.* In such cases, one cannot rely only on vague legal concepts ("necessary scope").

B) The right to personal freedom according to Article 5 Par. 1 Letter e) of the European Convention is one of the most important fundamental rights. Its purpose is to prevent arbitrary and unjustifiable deprivation of an individual's liberty. *All exceptions have to be interpreted extremely restrictively*, both in terms of the procedural and material lawfulness of the deprivation of liberty, while at the same time it is equally important for the preservation of this right that they are subject to expedited judicial review.

C) The European Convention in Article 5 allows an individual to be deprived of his liberty only in *exhaustively determined cases*. When assessing whether it is a "deprivation of liberty", it is necessary to start from the situation, in which the person is, to take into account the type, length, effects and method of implementation of the measure that interferes with personal freedom.

Permissible grounds for deprivation of liberty also include the lawful detention of persons in order to prevent the spread of a contagious disease [Art. 5 Par. 1 Letter e) of the European Convention]. It assumes that the spread of the disease is dangerous to public health. Holding a person for this reason *may only last for the necessary time*.

D) The basic criteria in assessing the legality of the deprivation of personal liberty with the aim of preventing the spread of an infectious disease are whether this spread is dangerous for public health or public safety and whether the deprivation of liberty of an infected person is the last option to prevent the spread of the disease, if *less serious measures are proved insufficient to protect the public interest*. If these criteria are not met, the basis for deprivation of liberty does not exist (decision of the European Court of Human Rights of 25/01/2005 in the case of *Enhorn v. Sweden* on complaint No. 56529/00, § 44).

A constitutionally acceptable definition of the conditions of deprivation of personal liberty in these cases requires a *clear, comprehensible, predictable and unequivocal regulation by law*, namely:

- the scope and prerequisites for ordering measures and imposing obligations on natural persons, which may (in principle) be based on the decision of the executive authority, but the ordering of measures must be conditional on the careful

- consideration of less strict measures to achieve the intended purpose (e.g. isolation at home),
- the obligation to immediately notify a person of the specific reason for the deprivation of personal liberty,
 - determining the maximum period of deprivation (restriction) of personal freedom,
 - by creating sufficient procedural guarantees of a proper, expedited, effective and timely judicial (fully independent) inquiry of the deprivation of personal liberty in proceedings initiated at the request of the person, who was deprived of personal liberty (in principle, after his hearing), in which the court has the power to decide on the immediate release of a person, if he finds that the deprivation of liberty was illegal,
 - the mechanism of subsequent periodic control of the further duration of the restriction of personal freedom carried out by a judicial authority from an official duty within reasonable periods.

In response to the Constitutional Court's finding, the Parliament adopted an amendment to the Public Health Protection Act removing those shortcomings, that were in conflict with the Constitution.

The possibility of isolation and quarantine in health care facilities and other designated facilities has been renounced. Isolation and quarantine may thus be occurring only at home.

The legal definitions of quarantine and of other measures, such as increased health surveillance and medical supervision, were detailed as well. The provisions establishing unreasonably wide powers of public health authorities have been abolished without any replacement.

Библиография

1. Krunková, A. – Dobrovičová, G.: Political Rights during the COVID-19 Pandemic in the Slovak Republic. Bialystok Legal Studies Białostockie Studia Prawnicze 2022 vol. 27 nr 2, p. 111-123, ISSN 1689–7404, e-ISSN 2719–9452.
2. Patakyová, M.: Activities of the Public Defender of Rights During Her 2017-2022 Tenure. Public Defender of Rights. 47 p.
https://vop.gov.sk/wp-content/uploads/2022/03/FINAL_Odpocet_VOP_2017_2022_ENG_.pdf
3. Svák, J.: Ústavnosť mimoriadnych zákonov pre boj s Covid-19.
<https://www.pravniprostor.cz/clanky/ustavni-pravo/ustavnost-mimoriadnych-zakonov-covid19> (published 12.03.2021)

The text of the conference paper was reviewed by Associate professor Slavka Dimitrova, PhD.