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Araştırma Makalesi / Research Article

Freedoms in the COVID-19 Pandemic in the Light of the ECtHR Case Law*

AIHM İçtihadı Işığında COVID-19 Pandemisinde Özgürlükler

Mustafa Eren GÜÇARSLAN**

ABSTRACT

The European Convention on Human Rights (ECHR) has gone beyond being a catalog of rights that only lists fundamental rights and freedoms, and it has created an effective judicial mechanism. In this article, the legal analysis of the limitation of fundamental rights and freedoms within the effect of the COVID-19 pandemic has been made in light of the European Court of Human Rights (ECtHR) case law. Although many rights have been affected during the process, our study addresses freedom of movement, assembly, and religion due to the limited number of cases. The conditions for restricting fundamental rights and freedoms will be mentioned in our research. Then, the compliance of the interventions to fundamental rights with these conditions is analyzed within the framework of the decisions. How the proportionality review in terms of the measures taken is examined within the framework of the ECtHR's recent judgments.

Keywords: European Convention on Human Rights, Fundamental Rights and Freedoms, Freedom of Movement, Freedom of Assembly, Freedom of Religion.

Öz

Avrupa İnsan Hakları Sözleşmesi (AIHS) sadece temel hak ve özgürlükleri listeyen bir haklar kataloğu olmanın ötesine geçerek etkin bir yargı mekanizması oluşturmuştur. Bu makalede, COVID-19 pandemisi etkisiyle temel hak ve özgürlüklerin sınırlandırılmasının hukuki analizi Avrupa İnsan Hakları Mahkemesi (AIHM) içtihadı ışığında yapılmıştır. Süreç içerisinde birçok hak etkilenmiş olmakla birlikte, mahkeme önüne gelen dava sayısının henüz sınırlı olması nedeniyle; bu çalışmamızda seyahat, toplanma ve din özgürlükleri ele alınmıştır. Çalışmamızda, öncelikle temel hak ve özgürlüklerin sınırlandırılmasının koşullarına kısaca değinilmiştir. Ardından temel haklara yapılan müdahalelerin bu koşullara

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uygunluğu kararlar çerçevesinde incelenmiştir. Alınan tedbirler bakımından orantılılık incelemesinin AİHM içtihadına ne şekilde yansıdığı, mahkemenin güncel kararlarıyla değerlendirilmiştir.

Anahtar Kelimeler: Avrupa İnsan Hakları Sözleşmesi, Temel Haklar ve Hürriyetler, Seyahat Özgürlüğü, Toplanma Özgürlüğü, Din Özgürlüğü.

Introduction

Various restrictions have been implemented within the scope of combating the COVID-19 pandemic. Many precautions taken to combat the COVID-19 pandemic are of the nature of limiting a fundamental right and freedom guaranteed in constitutions.¹ Over time, there have been many interferences with fundamental rights and freedoms in the pandemic. For example, curfews and mandatory quarantine measures interfered with the right to personal freedom and security. Also, the obligation to wear a mask affects the person's immunity. Travel bans have limited the freedom of movement. Limitations on open-air meetings, prohibition of demonstrations, and postponing association meetings interfere with the freedom of assembly and association. Therefore, the closing of places of worship such as churches, mosques, and synagogues and the prohibition of worship limited the freedom of worship. Measures such as the suspension of workplaces and the closure of schools also affected the right to property, the freedom to work and contract, and the right to education.

International attempts at protecting human rights at the international level developed by establishing the League of Nations, including certain human rights guarantees in the peace treaties negotiated by the war's end. However, the established international structures did not give a suitable environment for shaping international law.

International community; whereas human rights are a fundamental and basic component of world peace and participation, it was after the Second World War that the universal community got to be persuaded of the basic significance of shielding and advancing human rights. A response to the destruction caused by the Second World War on the European continent was realized by establishing the Council of Europe.²

1 Anja Radjenovic, *Upholding human rights in Europe during the pandemic*, European Union, 2020, p. 1, [https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/652085/EPRS_BRI\(2020\)652085_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/652085/EPRS_BRI(2020)652085_EN.pdf). (19.07.2022).

2 Peter Van Dijk, Fried Van Hoof, Arjen Van Rijn, Leo Zwaak, *Theory and Practice of the European Convention on Human Rights*, 5th ed., Interstania, United Kingdom, 2018, p. 4.

Some of the rights included in the United Nations Universal Declaration of Human Rights (UDHR) are also participated in the European Convention on Human Rights (ECHR). In addition, the European Court of Human Rights (ECtHR), which is the judicial review mechanism of the ECHR, appears as a specific issue. The ECtHR is designed to guarantee the protection of fundamental rights for the states which are under the jurisdiction of the Council of Europe. The fact that the ECHR has created an effective judicial mechanism by going beyond just being a catalog of rights that determines fundamental rights and freedoms brings the ECtHR to an essential point with its structure that performs the judicial function, despite being a regional court, the ECtHR has a global impact. The Convention deals with the non-intervention area of the state based on negative rights areas. Therefore, the ECtHR focuses on; pluralism, tolerance, recognition, equality, and freedoms that constitute the rights regulated in the Convention.

Regarding ECHR, it is accepted as an essential step that the ECtHR has provided the binding and a sanction mechanism.³ The ECHR is a document that has been put into practice with the case law of the ECtHR and, therefore, cannot be considered independent from the case law of the ECtHR. Therefore, it is vital to consider the Convention and the Court's case law in deciding disputes. Otherwise, there will be a violation of rights due to non-compliance with the Convention.

In this regard, the Turkish Constitutional Court stated that *"international agreements on fundamental rights and freedoms shall be applied first compared to the provisions of the law, and within this scope, the Convention and the case law of the ECtHR should be taken into account in the decision of the dispute."*⁴ In this respect, the ECtHR imposes a responsibility on the parties to protect individuals and their rights and freedoms.

The central part of this study provides a legal analysis of the limitation of fundamental rights and freedoms during the pandemic in light of the case law. Although many rights have been affected during this period, a limited number of rights mentioned on the topic have been discussed in the study to limit the issue. For this aim, the case law of the ECtHR has been examined. First, the conditions for restricting fundamental rights and freedoms will be mentioned. Second, the compatibility of the interventions with fundamental rights to these conditions will be examined.

3 Van Dijk, Van Hoof, Van Rijn, Zwaak, p. 4.

4 Turkish Constitutional Court, Sevim AKAT EŞKİ Individual Application, 2013/2187, para. 46.

To prevent the spread of the coronavirus, measures were taken to prohibit people from traveling from one place to another. During this period, European Union (EU) Member States adopted entry and travel restrictions, including mandatory medical checks, quarantine, and travel bans.⁵ This situation interfered with freedom of movement.

The freedoms that allow people to progress in their interests and meet with others are named freedom of assembly and association is regulated in article 11 of the ECHR. Due to the nature of the right, it is not only a protection against state intervention but also protects the social life of the relevant community. In order to ensure the emergence and expression of the different perspectives that individuals have, it provides the mutual relationship and interaction between different social groups, as well as in organizational matters.⁶ Freedom of association and assembly go beyond the freedom of expression, that is, the freedom of individuals to express their opinions and collectively reveals the use of the right.⁷ From this point of view, it can be said that freedom of expression, in particular, constitutes the foundations of a democratic society.

In terms of freedom of religion, many forms of religious worship require collective participation and physical proximity between participants, thus reducing social distance. Therefore, the prohibition of religious gatherings was among the measures taken to reduce the speed of the spread of the virus. The ECHR contains provisions stipulating that freedom of religion may be restricted in certain circumstances. As one of these, it is stipulated that the right may be subject to certain limitations in cases necessary for public health. However, in practice, when we look at the measures taken by European states during the COVID-19 pandemic, the restrictions imposed on religious places of worship and practices differed significantly.

Articles 9, 10, and 11 of the ECHR expand the meaning of freedom of expression. Significantly, its scope expands through organizations that include individuals with the same beliefs, ideas, or interests.⁸

5 Costica Dumbrava, *Lifting coronavirus restrictions: The role of therapeutics, testing, and contact-tracing apps*, European Parliamentary Research Service, 2020, p. 3, [https://www.europarl.europa.eu/RegData/etudes/IDAN/2020/652016/EPRS_IDA\(2020\)652016_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/IDAN/2020/652016/EPRS_IDA(2020)652016_EN.pdf), (19.07.2022).

6 Nihal Jayawickrama, *The Judicial Application of Human Rights Law: National, Regional and International Jurisprudence*, Cambridge University Press, Cambridge, 2002, p. 738.

7 İlyas Doğan, *İnsan Hakları Hukuku*, 2nd ed., Astana Yayınları, Ankara, 2015, p. 660.

8 Jayawickrama, p. 942.

The freedom of movement is regulated in the fourth protocol of the ECHR⁹ as follows: “*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.*” Furthermore, the restrictions stated in the following paragraph as “*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 the protection of the rights and freedoms of others.*” As seen from the convention “*protection of health or morals*” included in the restriction regime of the freedom of movement.

I. The Proportionality of the Measures During the Times of Pandemic

The examination method of the ECtHR cases starts with examining whether the applicant’s rights given by the first paragraph of the article have been interfered with and, if there is, whether this intervention is justified under the first paragraph of the article.¹⁰ The ECHR seeks to answer whether there ECHR article applies the case in the first of the tests applied by the ECtHR to determine the violation of freedom.

In the second, after determining an interference, answers are sought to the following questions: whether it is a legally prescribed interference, the existence of a legitimate aim, and whether it is necessary for a democratic society. In the case of detection of these, it is examined whether there is a situation that makes the action taken in line with the limitations in the second paragraph under the law. If we consider the systematic order of the examination made by the Court, In the file it deals with, the Court first examines whether the issue dealt with, i.e., the scope of one of its leading articles, and investigates whether there is an interference with freedoms. If it is concluded that there is no intervention, it is decided that there is no violation. If there is an intervention, the next step is passed. It is examined whether the intervention is under the legislation and whether the practitioners are authorized or determined. In the next stage, the legitimacy of the intervention is investigated. Finally, considering the “*margin of appreciation*” doctrine introduced by the Convention, it is examined whether the interference with freedoms is “*necessary in a democratic society*” and proportionate to the legitimate aim.

9 Katharina Koch, *Lockdown measures as detention? – The case Terheş & La Roumanie, Jean-Monnet-Saar* Europarecht Online, https://jean-monnet-saar.eu/?page_id=101545 (20.08.2022).

10 Alastair R. Mowbray, *Cases and Materials on the European Convention on Human Rights*, 3rd ed., Oxford University Press, Oxford, 2014, p. 739.

Similar to the previous systematic review, determining the violation and then investigating whether the violation is under the law is sought. In the fundamental systematic, the first paragraph of an article regulates freedom, and the second paragraph regulates the restriction of freedom. Regarding the tests to be applied, it will be checked whether the legal order foresaw the interference, and then it will be examined whether such an intervention is necessary for a democratic society.¹¹ On the other hand, the examination of necessity in a democratic society investigates whether there is a social need for the intervention and whether there is a proportionality between the legitimacy of the intervention and the aim pursued.¹²

Protecting the person against political power is considered a legal and political assurance of public freedoms. Therefore, the first precaution to protect fundamental rights and freedoms is to include legal rules in a hierarchy. The hierarchy of norms is a tool developed to ensure the supremacy of the Constitution and is one of the most rooted guarantees of public freedoms.¹³

Three essential elements exist for a text to be accepted as a law. Otherwise, it will not be enough to call a text a law. These criteria are; a law should be “*accessible*”, “*clear*,” and “*foreseeable*” to people.¹⁴ The fact that the law is accessible means that people have sufficient information about the rule of law and that it is understandable means that it is arranged with sufficient clarity to allow people to regulate their behavior.¹⁵

As stated in the *Golder v. UK* case, one of the reasons why the contracting states come together is the principle of “*the rule of law*.”¹⁶ Defining the Convention as the first step towards securing certain rights in the ECHR, which brings the states’ parties together at the point of regulation, is related to the rule of law principle.

11 Levent Korkut, “Avrupa İnsan Hakları Sözleşmesi’nin 9., 10. ve 11. Maddeleri (Düşünce, Vicdan ve Din Özgürlüğü; İfade Özgürlüğü; Toplantı ve Dernek Kurma Özgürlüğü)”, Ed. Serdar Güleler, Recep Kaplan, Musa Sağlam, *Bireysel Başvuru Yuvarlak Masa Toplantıları, Volume 2*, Anayasa Mahkemesi Yayınları, Ankara, 2014, p. 905.

12 Korkut, p. 905.

13 Tarık Zafer Tunaya, *Siyasal Kurumlar ve Anayasa Hukuku*, 4th ed., Fakülteler Matbaası, İstanbul, 1980, p. 230.

14 Tijen Dünder-Sezer, *Avrupa İnsan Hakları Sözleşmesinde Dernek Kurma Özgürlüğü*, Yayımlanmamış Doktora Tezi, Dokuz Eylül Üniversitesi Sosyal Bilimler Enstitüsü Kamu Hukuku Anabilim Dalı, 2004, p. 264.; *Sunday Times v. UK*, 6538/74, para. 49.; *Silver v. UK*, 5947/72, 6205/73, 7052/75, 7061/75, 7107/75, 7113/75, para. 87.

15 *Sunday Times v. UK*, 6538/74, 06.11.2020, para. 49.

16 *Golder v. UK*, 4451/70, 21.02.1975, para. 34.

Accordingly, ECtHR interprets that the principles of the rule of law and legal certainty are inherent in the whole Convention.¹⁷ This also can be expressed as “*the rule of law test*”¹⁸ which has the following steps that include these reasons can be defined as follow: “i) *Is there a legal foundation for the proposed measure in domestic law?* ii) *Is the legal provision available to the general public?* *Is the legal provision sufficiently precise to allow persons to anticipate the consequences of a particular action rationally?* *Is the legislation successfully protecting the various substantive rights against arbitrary interference?*”¹⁹

The ECtHR interprets the concept of law expressed in the Convention in a substantive sense, and transactions that set an abstract norm, regardless of their type, can be accepted by the Court as the existence of an element of legal predictability.²⁰ However, the Court broadly interprets the unwritten law, including the Court’s jurisprudence and even the rules set by professional organizations that make regulations based on the authority given by the legislature.²¹ Accessibility is a sub-element of the legality criterion. However, the criterion of accessibility does not necessarily mean that every norm should be published.²² In the *Chappell v. United Kingdom* decision, it is stated that there will be no problem with accessibility in case of publication.²³

With the predictability factor, the Court examines whether it enables individuals to regulate their behavior under the legal norm by obtaining counseling if necessary. To a certain extent, it is ensured that they can foresee the consequences of a certain act.²⁴ Therefore, seeking a consultancy to understand the provisions and consequences of the law will not constitute a violation in terms of predictability.

17 *Marckx v. Belgium*, 6833/74, 13.06.1979, para. 58.

18 Gentjan Skara, Bojana Hajdini, *The Right to Freedom of Peaceful Assembly during the COVID-19 pandemic in the light of the Albanian Constitutional Court’s Decision 11/2021 and the ECHR*, Jean-Monnet-Saar Europarecht online, 27 Sep 2021), https://jean-monnet-saar.eu/?page_id=102519 (25.08.2022).

19 Gentjan Skara, Bojana Hajdini, *The Right to Freedom of Peaceful Assembly during the COVID-19 pandemic in the light of the Albanian Constitutional Court’s Decision 11/2021 and the ECHR*.

20 Mustafa Erdoğan, *İnsan Hakları Teorisi ve Hukuku*, 7th ed., Hukuk Yayınları, Ankara, 2019, p. 156; Steven, Greer, *The European Convention on Human Rights Achievements Problems and Prospects*, Cambridge University Press, Cambridge, 2006, p. 376.

21 *Sunday Times v. UK*, 6538/74, 26.04.1979, para. 47; *Barthold v. Germany*, 8734/79, 25.03.1985, para. 46.

22 Tolga Şirin, *Karşılaştırmalı Anayasa Hukukunda Kanun Kavramı*, On İki Levha Yayınları, İstanbul, 2019, p. 378.

23 *Chappell v. UK*, 10461/83, 30.03.1982, para. 56.

24 Şirin, p. 410-411.

In the *Kokkinakis v. Greece* decision, despite the ambiguity in its writing, regarding the prohibition of religious indoctrination, considering that there was a judicial decision that would make predictable what behaviors fall within the scope of this law, it decided that the law met the criterion of predictability.²⁵ The Court considers that the administration cannot have unlimited discretion in matters that impact fundamental rights. According to this, “*In matters affecting fundamental rights, it would be contrary to the rule of law, one of the fundamental principles of a democratic society enshrined in the Covenant, to express the judicial discretion vested in the executive as unlimited power. Consequently, the law should specify the scope and manner of exercising such discretion vested in the competent authorities.*”²⁶ However, in cases where the Court decides that the interference has a legal basis that is accessible, predictable, and contains sufficient guarantees against arbitrariness, it displays a hesitant appearance in checking whether the national authorities have correctly interpreted this legal basis. The applicants are told that the norm subject to interference is not predictable. Do not make a comprehensive assessment unless a claim is made.²⁷ Accordingly, in the decision of *Young, James, and Webster v. the United Kingdom*, the Court stated that it would not examine the case within this scope, as the legality condition was not put forward by the applicants regarding the dismissal of the applicants who did not comply with the terms of the “*closed-shop agreement*” and stated that it would not examine the case on other issues examined.²⁸ The subject of the *Tebieti Mühafize Cemiyeti and Israfilov v. Azerbaijan* decision is the claim for its closure as the Ministry of Justice sent a letter to the applicant association requesting it to correct certain violations of laws and by-laws, as it did not correct the stated violations. The Court found problems with the predictability of a law written in general terms, which seemed to give the Ministry of Justice broad powers.²⁹

Concepts such as “*public order*,” “*public interest*,” and “*general morality*” in the ECHR and constitutional regulations, although expressed in these higher normative regulations, need to be clarified and expressed clearly in the laws.³⁰ Otherwise, it will be challenging to prevent arbitrariness in the limitation of

25 *Kokkinakis v. Greece*, 14307/88, 25.05.1993, para. 19.

26 *Hasan and Chaush v. Bulgaria*, 30985/96, 26.10.2000, para. 84.

27 Şirin, p. 408-409.

28 Ferdinand Von Prondzynski, “Freedom of Association and the Closed Shop: The European Perspective”, *The Cambridge Law Journal*, Volume 41, No: 02/1982, p. 272.; *Young, James and Webster v. UK*, 7601/76, 7806/77, 13.08.1981, para. 60.

29 *Tebieti Mühafize Cemiyeti and Israfilov v. Azerbaijan*, 37083/03, 10.05.2010, para. 61-62.

30 Mustafa Erdoğan, *Türk Anayasa Hukuku*, Hukuk Yayınları, Ankara, 2018, p. 84.

rights, and the legal ground will be opened for the de facto implementation of the rights written in the books.³¹ At the beginning of the aims aimed at the legality of the restriction, it is to present the provisions regarding the restriction in the Constitution, which is essentially the upper norm of the law in question, clearly and distinctly.

In the systematic of the Convention, instead of a general reason for the restriction of rights and freedoms, specific reasons for restriction are regulated in the relevant articles, considering the nature and nature of each right.³² After determining that the interference was legally prescribed, the ECtHR focuses on whether the interference in question pursued the legitimate aims set out in the Convention.³³

The Court evaluates these limits according to the conditions specific to each concrete case. It should be noted that the right cannot be subject to any restrictions other than those listed here. In other words, the Convention adopted the principle of “*numerus clausus*” while determining the limit of limitation.³⁴ The intervention must comply with the democratic social order. The interference with fundamental rights and freedoms should not have been in line with hidden political interests. With the cases, *Handyside*³⁵ and *Silver*³⁶ have developed an interpretation framework consisting of three essential elements in their decisions with the examination method, which can be expressed as the necessity test: When we examine the stages of the necessity test, due to the nature of the democratic necessity; elements of proportionality and margin of appreciation are achieved.

Interference with freedom must comply with the criteria of a democratic society. In its decisions on the subject, the ECtHR expresses the importance of democratic society in general in the ECHR and is accepted as a fundamental characteristic of the European public order.³⁷ Since democracy is the only political model accepted by Convention, any restriction on freedom must be

31 Münici Kapani, *Kamu Hürriyetleri*, 7th ed., Yetkin Yayınları, Ankara, 2013, p. 234.

32 Şeref Gözübüyük, Feyyaz Gölcüklü, *Avrupa İnsan Hakları Sözleşmesi ve Uygulaması*, 11th ed., Turhan Kitabevi, Ankara, 2016, p. 393; Evra Çetin, *İnsan Hakları Avrupa Sözleşmesinin 8-11. Maddeleri Bağlamında Çalışanların Hakları*, On İki Levha Yayınları, İstanbul, 2015, p. 111-112.

33 *Handyside v. UK*, 5493/72, 07.12.1976, para. 45-46.

34 Şeref Gözübüyük, Feyyaz Gölcüklü, p. 396.

35 *Handyside v. UK*, 5493/72, 07.12.1976, para. 48-50.

36 *Silver v. UK*, 5947/72; 6205/73; 7052/75; 7061/75; 7107/75, 25.03.1983, para. 97-98.

37 Philip Leach, Tim Eicke, *Taking a Case to the European Court of Human Rights*, 4th ed., Oxford University Press, New York, 2017, p. 187.

necessary for a democratic society.³⁸ The Court evaluates the principle of “*proportionality*”, in other words, “*proportionality criteria*”, within the criteria of being necessary in a democratic society. There must be a balance between the aim and the tool used. The principle of proportionality determines to what extent the state can be limited about what it wants to limit for a legitimate purpose. In other words, the limit of limitation is determined by the principle of proportionality. In particular, the issue of whether an interference with a right is proportionate should be considered from two aspects. The first one is the effect of the interference on the right in question, and the second one is the reasons for the interference and its effects on the applicant.³⁹

Within the framework of the Convention “*margin of appreciation*” given to the member states emerges as important in determining a necessary intervention. There are social, economic, and cultural differences between the member states. Therefore, as the ECtHR has developed with its case law, it is accepted that the member states have the power to decide because each society has different characteristics. In other words, it is possible to interpret the Convention within the legal limits. While the margin of appreciation plays an essential role in interpreting the ECHR, it also provides room for maneuvering for the member states.⁴⁰ The Court refers to the practice in the judicial systems of member states where there is no consensus, particularly on sensitive issues of morality, ethics, and social policy.⁴¹

The margin of appreciation doctrine, which was first expressed in the case law of the ECtHR in the *Handyside v. the United Kingdom* case, emerged as a result of the national authorities having more information about the characteristics of each society, the duty to the parties protection of rights and freedoms, and the principle of subsidiarity of the Convention.⁴²

In the doctrine, it is stated that it is not easy to define a “*margin of appreciation*” that can be valid in all cases, it is relatively vague, and therefore its application is difficult to predict.⁴³ Situations where there is no common denominator between the practice parties, may lead to different applications

38 The United Communist Party v. Turkey, 133/ 1996/ 752/ 951, 30.01.1998, para. 45.

39 Steven Greer, *The Margin of Appreciation: Interpretation and Discretion Under The European Convention On Human Rights*, Council of Europe Publishing, Strasbourg, 2000, p. 20.

40 Derya Doğru, *Avrupa İnsan Hakları Mahkemesi Yargılamasında Takdir Marjı Doktrini*, Turhan Kitabevi, Ankara, 2019, p. 9.

41 William A. Schabas, *The European Convention on Human Rights: A Commentary*, Oxford University Press, Oxford, 2015, p. 500.

42 *Handyside v. UK*; 5493/72, 07.12.1976, para. 48.

43 Bernadette Rainey, Elizabeth Wicks, Clare Ovey, *Jacobs, White and Ovey: the European Convention on Human Rights*, 7th ed., Oxford University Press, Oxford, 2017, p. 360.

according to the conditions of the party country. It has been characterized as a concept that could significantly weaken the protection granted by the Convention and has been criticized for these reasons.⁴⁴

II. Recent Case Law of the ECtHR

The case law of the ECtHR develops over time regarding the prudence of the measures taken. Currently, on *Terheş v. Romania* and *Communauté genevoise d'action syndicale (CGAS) v. Switzerland* cases the ECtHR has decisions. Especially in terms of the criteria applied by the Court in terms of margin of appreciation, both decisions are remarkable. Firstly, in the case of *Terheş v. Romania*, the decision of inadmissibility was rendered. In the second *CGAS v. Switzerland* case, the Court gave a violation verdict with a close vote. Here, the case law will be put forward in terms of three rights, which are our subject of examination, and legal analysis will be made on the two decisions that have been decided. Other pending cases will be summarized in terms of subject integrity.

A. *Terheş v. Romania*⁴⁵

During the Covid 19 pandemic, a state of emergency was declared by a decree issued by the President of Romania. The decree provided restrictions on exercising certain fundamental rights, including freedom of movement.⁴⁶

Based on the decree, the Ministry of the Interior issued a circular prohibiting people from leaving their homes during certain hours.⁴⁷ A circular issued later expanded the scope of the curfew. Accordingly, anyone leaving their home had to carry a document justifying the reason for doing so.⁴⁸ Violation of the rule was punishable by fines. The applicant alleged that he was personally affected by the measures imposed by the government.

According to the ECtHR, the measures were applied to everyone through legislation adopted in Romania. The applicant was forced to stay at home due to the application of the measure and was only allowed to leave on grounds expressly set out in the legislation and with the appropriate form of exemption.⁴⁹ In this judgment, the Court assessed Article 5 and found that the interference

44 Hilaire Barnett, *Constitutional and Administrative Law*, 10th ed., Routledge, London and New York, 2013, p. 403.

45 *Terheş v. Romania*, 49933/20, 13.04.2021.

46 *Terheş v. Romania*, para. 5.

47 *Terheş v. Romania*, para. 6.

48 *Terheş v. Romania*, para. 7.

49 *Terheş v. Romania*, para. 38-47.

had a legal basis and involved a proportionate measure in pursuit of a legitimate aim. However, based on the uncertainty at the onset of the COVID-19 pandemic, and given the urgent need for measures at the time, given the increasing number of cases and the increasing rate of hospitalization, it may be justifiable for a state to take stricter measures to protect its citizens.⁵⁰ Therefore, when a state takes stringent measures, they need to be limited to a short period, closely monitored, and adapted as necessary. In the current situation, with the course of the COVID-19 pandemic and the data obtained, the proportionality threshold of the measures to be taken can be expected to be higher.

B. Communauté généroise d'action syndicale (CGAS)

v. Switzerland⁵¹

In this case, where the Court decided a violation, the prohibition of public meetings for a while at the beginning of the COVID-19 pandemic, the criminal sanctions associated with it, and the fact that proportionality was not subject to judicial review constituted the rationale for the decision.⁵² In the instant case, between 17 March and 30 May 2020, all public events in which the applicant association could carry out its activities under its legal purpose were prohibited entirely. The Court notes that in the same period, hundreds of people could use workplaces such as factories and offices. From 17 March 2020, any person who willfully violates the ban can be imprisoned or fined for up to three years under the said regulation.⁵³

The Court notes the delay in the domestic court's decision to hold meetings.⁵⁴ The Court further declares that, in order to fulfill the requirements of the nature of law, domestic law must provide specific protection against arbitrary violations by public authorities of the rights guaranteed by the Convention and that when it comes to questions of fundamental rights, the law will be contrary to the rule of law.

In summary, these principles are first having determined that it pursued a "*legitimate aim*", second it evaluates the interference in the light of the whole case to determine whether it met a "*pressing social need*." In particular, it had to be proportionate to the aim pursued, and the reasons the national authorities relied on to justify it had to be "*relevant and sufficient*". Other key aspects to examine when considering the proportionality of the interference with the

50 Katharina Koch, *Lockdown measures as detention? – The case Terheş & La Roumanie*.

51 Communauté généroise d'action syndicale (CGAS) v. Switzerland, 21881/20, 15.03.2022.

52 CGAS v. Switzerland, para. 9.

53 CGAS v. Switzerland, para. 9.

54 CGAS v. Switzerland, para. 58.

goal pursued are the kind and severity of the punishments applied.⁵⁵

In examining the proportionality of the measures, the Court considers that it should consider the chilling effect they can have, particularly the fact that a prior ban on a meeting may deter potential participants from attending the meeting.⁵⁶

In this context, for a measure to be proportionate and necessary in a democratic society, the Court decides on a violation where a measure violates that fundamental right less seriously and achieves the same aim.⁵⁷

The Court held that Sweden had exceeded its margin of appreciation and violated Article 11 as interference was not necessary in a democratic society.⁵⁸

C. EB and one Other Application v. Serbia⁵⁹

According to the Court, the limits on the applicant's freedom of movement were not so severe that the authorities' nationwide curfew could be a deprivation of liberty. This case concerns the restrictions imposed by the Serbian executive authorities through successive by-laws and administrative decisions on persons placed in asylum and reception centers. Opinions were requested from the parties that the Court wanted to achieve their link between article 5 and the freedom of movement in this case. For now, the Court asks about the necessity of the measures taken about Krnjača Asylum Centre.⁶⁰

D. Central Unitaria De Traballadores/As v. Spain⁶¹

The application concerns the right to organize and participate in peaceful assemblies and demonstrations during the COVID-19 pandemic. The applicant, a trade unionist, alleged that the ban on the 1 May Labor Day demonstration amounted to a breach of the Convention. The applicant, a trade unionist, notified the administrative authorities of his intention to hold a demonstration on 1 May 2020. can be recommended. The competing rights were evaluated, and the local authorities decided that the latter is dominant between freedom of assembly and the right to health in the current situation.⁶² The case is being communicated.

55 CGAS v. Switzerland, para. 81.

56 CGAS v. Switzerland, para. 83.

57 CGAS v. Switzerland, para. 87

58 CGAS v. Switzerland, para. 91.

59 E.B. v. Serbia, 50086/20 and 50898/20, 05.11.2021.

60 E.B. v. Serbia.

61 Central Unitaria De Traballadores/As v. Spain, 49363/20.

62 Central Unitaria De Traballadores/As v. Spain.

E. Nemytov and Two Other Applications v. Russia⁶³

The case concerned the restrictions on public events in Moscow in response to the spread of the COVID-19 pandemic. During the process, the applicants faced administrative detention and administrative fines. During this period, ECtHR has asked questions from the parties as follows: “Does domestic provisions meet the “quality of law” requirements? did the interference pursue a legitimate aim? Was the interference “necessary in a democratic society” and “proportionate to the legitimate aim pursued?”⁶⁴ Were the reasons adduced by the national authorities to justify the interference “relevant and sufficient?”⁶⁵

F. Magdić v. Croatia⁶⁶

This case is about both three rights; freedom of movement, assembly, and religion. In Croatia, in the fight against coronavirus, measures were taken to prohibit leaving the residence and residence, except in exceptional cases and with their permission, banning public gatherings of more than five people and suspending religious gatherings. The applicant alleges that these measures violated his rights.

The Court asks the applicants about Article 9,11 and Article 2 § 1 of Protocol No. 4 of the ECHR that there has been a violation of the applicant’s right according to these articles of the Convention.⁶⁷

G. Association of Orthodox Ecclesiastical Obedience v. Greece⁶⁸

Within the scope of this study, it has emerged as an application related to the freedom of religion. The facts of the case can be briefly said as, during the COVID-19 pandemic, authorities have decided to ban public worship for one month, including Easter. On 30 March 2020, the applicant association applied for judicial review of the said measures.⁶⁹

It is noteworthy that the domestic Court rejected it because it had no legitimate interest. In this case, an examination will also be carried out within the scope of the right of application of legal persons.⁷⁰ The case is a pending, and an another communicated case.

63 Nemytov v. Russia and 2 other applications, 1257/21 3244/21 24699/21.

64 Nemytov v. Russia and 2 other applications.

65 Nemytov v. Russia and 2 other applications.

66 Magdić v. Croatia, 17578/20.

67 Magdić v. Croatia,.

68 Association of Orthodox Ecclesiastical Obedience v. Greece, 52104/20.

69 Association of Orthodox Ecclesiastical Obedience v. Greece.

70 Association of Orthodox Ecclesiastical Obedience v. Greece.

Conclusion

Following the start of the COVID-19 pandemic in the spring of 2020, various European countries have taken steps to stop the spread of the virus. The measures taken were to stop the spread of the virus and prevent hospital capacities from being exceeded. In short, the legal value to be protected by these measures is the protection of the right to health.

“Human rights in the times of pandemic,” which was the starting point of our work, constitutes the main subject area of this article. Within the framework of the requirements explained above, the issue has been handled within the framework of the ECtHR decisions. The boundaries of the subject were determined according to the ECHR case law based on freedom of movement, assembly, and religion.

This framework gave brief information about the three rights at the first stage. In the second stage, if the violation has a legal basis, whether it is necessary for a restrained, democratic society has been examined within ECtHR criteria. In addition, this section analyses recent decisions to understand the subject better.

The findings obtained within the framework of this legal analysis will be evaluated, and an idea will be given for further studies; the main ideas can be summarized as follows, according to Kukathas, *“a free society is an open society.”*⁷¹ Therefore, the principles that define its nature must accept the variability of human arrangements rather than fixate or establish or maintain a particular set of institutions in a closed order.⁷²

The basic principle that defines a free society broadly connects with free speech expanding rights. The first consequence of this is the principle of freedom of movement.⁷³ A second consequence is the principle of mutual indulgence in relationships. Indeed, society is accessible to the extent that it is prepared to tolerate intermediate associations that differ or differ from its standards or practices.⁷⁴

During the pandemic, there have been interventions to fundamental rights and freedoms around the thin line between freedoms and security. Ensuring that freedom is the exception to the main limitation will strengthen the ideal of a democratic society.

71 Kukathas, *Chandran*, The Liberal Archipelago: A Theory of Diversity and Freedom, Oxford University Press, Oxford, 2003, p. 74.

72 Kukathas, The Liberal Archipelago: A Theory of Diversity and Freedom, p. 74.

73 Kukathas, The Liberal Archipelago: A Theory of Diversity and Freedom, p. 75.

74 Kukathas, The Liberal Archipelago: A Theory of Diversity and Freedom, p. 75.

The UDHR states, “*All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.*” It aims to protect and develop human dignity. In this respect, human rights are a part of personality and, at the same time, a subject of society. Therefore, all institutions and structures in societies can have legitimacy only to the extent that they prioritize human rights.

People need services provided by the government. Achieving these services requires a stable management mechanism. The state performs services that other institutions cannot fulfill. Nevertheless, there is no freedom where the state has a despotic structure. Where there is no state and law, there is no freedom. The state must be involved in a dynamic and active social structure for freedom. Society must be an element of democratic pressure on practitioners.

Therefore, it reveals the state’s and society’s necessity to be strong in connection. Another consequence of this situation is that the state and society interact. However, it is known that it will not be practical for individuals to participate in decision-making mechanisms one by one in today’s societies. Therefore, it is possible to say that democracy will become an essential building block of society and play a significant role in its future.

The legality of the measures may be questioned in terms of necessity, which is also the subject of scrutiny in the case law of the ECtHR. Limitations of fundamental rights are only permissible if prescribed by law and the measures taken are proportionate to the legitimate aim pursued, such as, here, the protection of health. Significant restrictions on many ordinary social activities, such as access to public places of worship and attendance at public gatherings, need to be enforced under the law. The state has to bring about a restriction by law under the relevant constitutional guarantees and in proportion to the purpose pursued.

Increasing restrictions on the rights mentioned above can be fully justified in a crisis. A fair balance must be struck between coercion and prevention. This will ensure that the measures taken comply with the principles of necessity and proportionality in a democratic society. In this case, the proportionality condition specified in the Convention is also complied with.

The state’s positive obligation is the obligation to provide appropriate conditions for individuals to exercise their rights without hindrance by other people and groups in society. However, keeping this in mind, this positive obligation brings responsibilities.

Today, the situation is changing in times of pandemic. The virus is constantly evolving, with new variations appearing regularly. Other measures are being

taken to reduce the spread of the virus. Therefore, the situation is not the same as at the beginning of the pandemic, such as vaccines and increased testing capacities. For this reason, each concrete event should be evaluated according to the current conditions. In this way, it will be possible to determine whether there is a necessary and measured intervention in a democratic society.

As the ECHR's case law develops, this issue will remain on the agenda and be enriched with new discussions. One of the reasons for mentioning the ongoing decisions in the study is to emphasize that the subject is open to development.

Namely, the Swedish case was decided by the ECtHR in recent days. An important place is reserved in this study because it sets a precedent in case law. This situation is a living example that emphasizes that the law is changing and developing structure. The coronavirus pandemic has been a necessary test for states to act according to the law and evaluate their success in taking health-related measures. Finally, the *"living instrument doctrine"*, which expresses the necessity of interpreting the ECHR according to the evolving circumstances, reappears here.

Finally, to emphasize again, the following can be said to give an idea for future studies on the subject. During the study, it was also seen that new applications were added to pending cases. In addition, the proceedings and cases are still ongoing. Some applications were decided while the article was being prepared. Future studies can be evaluated separately, considering the case law and the decisions to be made. In addition, as can be seen, the rights affected during the pandemic period are not limited to those within the scope of this study. For this reason, a scientific study can be carried out regarding other rights.

BIBLIOGRAPHY

- Adet, Jo, *Coronavirus: how new restrictions on religious liberty vary across Europe*, The Conversation, 2020, <https://theconversation.com/coronavirus-how-new-restrictions-on-religious-liberty-vary-across-europe-135879>. (19.07.2022).
- Barnett, Hilaire, *Constitutional and Administrative Law*, 10th ed., Routledge, London and New York, 2013.
- Çetin, Evra, *İnsan Hakları Avrupa Sözleşmesinin 8-11. Maddeleri Bağlamında Çalışanların Hakları*, On İki Levha Yayıncılık, İstanbul, 2015.
- Doğan, İlyas, *İnsan Hakları Hukuku*, 2nd ed., Astana Yayınları, Ankara, 2015
- Doğru, Derya, *Avrupa İnsan Hakları Mahkemesi Yargılamasında Takdir Marjı Doktrini*, Turhan Kitabevi, Ankara, 2019.
- Dumbrava, Costica, *Lifting coronavirus restrictions: The role of therapeutics, testing, and contact-tracing apps*, European Parliamentary Research Service, Brussels, 2020.
- Dündar-Sezer, Tijen, , *Avrupa İnsan Hakları Sözleşmesinde Dernek Kurma Özgürlüğü*, Yayımlanmamış Doktora Tezi, İzmir, 2004.
- Erdoğan, Mustafa, *İnsan Hakları Teorisi ve Hukuku*, 7th ed., Hukuk Yayınları, Ankara, 2019.
- Erdoğan, Mustafa, *Türk Anayasa Hukuku*, Hukuk Yayınları, Ankara, 2018.
- Gözübüyük Şeref; Gölcüklü, Feyyaz, *Avrupa İnsan Hakları Sözleşmesi ve Uygulaması*, 11th ed., Turhan Kitabevi, Ankara, 2016.
- Greer, Steven, *The European Convention on Human Rights Achievements Problems and Prospects*, Cambridge University Press, Cambridge, 2006.
- Greer, Steven, *The Margin of Appreciation: Interpretation and Discretion Under The European Convention On Human Rights*, Council of Europe Publishing, Strasbourg, 2000.
- Jayawickrama, Nihal, *The Judicial Application of Human Rights Law: National, Regional and International Jurisprudence*, Cambridge University Press, Cambridge, 2002.
- Kapani, Münci, *Kamu Hürriyetleri*, 7th ed., Yetkin Yayınları, Ankara, 2013.
- Koch, Katharina, Lockdown measures as detention? – The case Terheş & La Roumanie, Jean-Monnet-Saar Europarecht Online), https://jean-monnet-saar.eu/?page_id=101545 (20.08.2022).
- Korkut, Levent, “Avrupa İnsan Hakları Sözleşmesi’nin 9., 10. ve 11. Maddeleri (Düşünce, Vicdan ve Din Özgürlüğü; İfade Özgürlüğü; Toplantı ve Dernek Kurma Özgürlüğü)”, Ed. Serdar Gülenler, Recep Kaplan, Musa Sağlam, *Bireysel Başvuru Yurvarlak Masa Toplantıları, Volume 2*, Anayasa Mahkemesi Yayınları, Ankara, 2014.
- Kukathas, Chandran, *The Liberal Archipelago: A Theory of Diversity and Freedom*, Oxford University Press, Oxford, 2003.
- Leach, Philip; Eicke, Tim, *Taking a Case to the European Court of Human Rights*, 4th ed., Oxford University Press, New York, 2017.
- Mowbray, Alastair R, *Cases and Materials on the European Convention on Human Rights*, 3rd ed., Oxford University Press, Oxford, 2014.
- Radjenovic, Anja, *Upholding human rights in Europe during the pandem-*

ic, European Union, 2020, [https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/652085/EPRS_BRI\(2020\)652085_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/652085/EPRS_BRI(2020)652085_EN.pdf). (19.07.2022)

- Rainey, Bernadette; Wicks, Elizabeth; Ovey, Clare, Jacobs, White and Ovey: *the European Convention on Human Rights*, 7th ed., Oxford University Press, Oxford, 2017.
- Schabas, William A, *The European Convention on Human Rights: A Commentary*, Oxford University Press, Oxford, 2015.
- Skara, Gentjan; Hajdini, Bojana, The Right to Freedom of Peaceful Assembly during the COVID-19 pandemic in the light of the Albanian Constitutional Court's Decision 11/2021 and the ECHR, Jean-Monnet-Saar Europarecht Online, 27 September 2021), https://jean-monnet-saar.eu/?page_id=102519 (25.08.2022)
- Şirin, Tolga, *Karşılaştırmalı Anayasa Hukukunda Kanun Kavramı*, On İki Levha Yayınları, İstanbul, 2019.
- Tunaya, Tarık Zafer, *Siyasal Kurumlar ve Anayasa Hukuku*, 4th ed., Fakülteler Matbaası, İstanbul, 1980.
- Van Dijk, Peter; Van Hoof, Fried; Van Rijn, Arjen; Zwaak Leo, *Theory and Practice of the European Convention on Human Rights*, 5th ed., Interstania, United Kingdom, 2018.
- Von Prondzynski, Ferdinand, "Freedom of Association and the Closed Shop: The European Perspective", *The Cambridge Law Journal*, 41, 02/1982, p. 256-272.

Amerika Birleşik Devletleri'nde Ceza Yargılamasından Çıkarma ve Onarıcı Adalet Uygulamaları*

Diversion and Restorative Justice Practices in the United States

Selin ULUDOĞAN**

ÖZ

Amerika Birleşik Devletleri'nde onarıcı adalet kurumu eyalet yasası ve eyalet yargı teşkilatı çerçevesinde değerlendirilmektedir. Onarıcı adalet uygulamaları ceza yargılamasının her aşamasında olabilmektedir. “*Diversion*”, yani, dosyayı klasik ceza yargılamasından çıkarma kapsamında erken aşamalarda uygulanan onarıcı adalet uygulamaları ceza adaleti açısından daha anlamlı olmaktadır.

Anahtar kelimeler: Amerika Birleşik Devletleri, ceza yargılaması, ceza yargılamasından çıkarma, eyalet yargı teşkilatı, eyalet yasası, onarıcı adalet.

ABSTRACT

The state law and the state trial court systems are the legal framework of the restorative justice practices in the U.S. The restorative justice can take place at any stage during the criminal proceedings. Diverting the case from the traditional criminal justice system to restorative justice programs at the early stages of the criminal proceedings seems to be more meaningful for the criminal justice system.

Keywords: The United States, criminal proceedings, diversion, state trial courts, state law, restorative justice.

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