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Fundamental (Human) Rights versus Emergency Measures: Excerpts from the Case-law of the CJEU and ECtHR[1]

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Abstract

The response of States to the outbreak of a COVID-19 pandemic in the European Region from spring 2020, such as curfews, limited opening hours, restrictions on activities, the use of masks and possible vaccination requirements to prevent further spread and mitigate consequences, may raise a number of human rights issues. The role of the Court of Justice of the European Union (CJEU) is to ensure that the EU law is observed in the interpretation and application of the Treaties and to work together with the national courts to ensure the uniform interpretation and application of EU law. The European Court of Human Rights (ECtHR) is the principal guardian of the European system of human rights protection, based on the European Convention on Human Rights. It is therefore not difficult to see that, in this unique period since the outbreak of the pandemic, the role of the courts has been even more decisive in a number of cases dealing with the fundamental and human rights aspects of the (restrictive) state measures taken in the wake of the COVID-19 epidemic. The paper selects cases from the CJEU and the ECtHR relating to the COVID-19 epidemic. The purpose of this paper is to analyse the approaches and judgments of the two courts, with a focus on providing the reader with a comprehensive overview of the role of the courts in interpreting the law in times of public health emergencies. In addition, the presentation of the cases provides an insight into the measures or procedures used by each Member State to deal with the pandemic.

Key Words:

fundamental (human) rights, COVID-19, emergency measures, CJEU, ECtHR

1 Introduction

Early 2020, the global COVID-19 pandemic unexpectedly exploded around the world, affecting the lives of citizens and the functioning of public institutions. Consequently, countries took a variety of measures to manage the epidemic and prevent further spread.

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The effectiveness of the instruments and procedures used has been analysed extensively. What they all have in common is that they can impact fundamental human rights in various areas such as mobility, privacy, personal data, employment, social security, transport and travel. Following the epidemic, the EU Member States implemented individual, uncoordinated, and sometimes conflicting national responses based on their respective risk assessment frameworks (Alemanno, 2020). A key aspect of the responses was to encourage individuals to limit their contacts and mobility.

The Court of Justice of the European Union (CJEU) has the role of ensuring that the law is respected in the interpretation and application of the Treaties and also works together with the courts of the Member States to ensure the uniform interpretation and application of EU law (Art. 19 TFEU)[4]. The European Court of Human Rights (ECtHR) is the main guardian of the European system of human rights protection, and is based on the European Convention on Human Rights (ECtHR)[5]. Both courts have dealt with the human rights aspects of the (restrictive) measures taken by the State in the wake of the COVID-19 epidemic in a number of cases since 2020. The role of these courts has become even more crucial in this unique period: Judges acted as guardians of rights and freedoms, striking new balances in light of the rule of law and of general principles such as proportionality, effectiveness, precaution, and solidarity (Iamiceli & Cafaggi, 2024).

The paper selects cases from the CJEU and the ECtHR relating to the COVID-19 epidemic. The purpose of this paper is to analyse the approaches and judgements of the two courts with the focus on providing the reader with a comprehensive overview of the role of the courts in interpreting the law in times of public health emergencies. Moreover, the presentation of the cases provides insight into the measures used by Member States to deal with the epidemic.

Because of their different nature, the ECtHR cases are based on the suspension of the application of the European Convention on Human Rights, as well as issues of inadmissibility and fundamental rights. Conversely, the ECJ cases related to free movement and mobility will be presented through the request for a preliminary ruling, the procedure for failure to fulfil obligations, and the application for annulment.

2 Excerpts from Relevant CJEU Case Law

The global spread of the coronavirus (COVID-19) has created a novel situation for all. The virus has spread rapidly from a limited area, developing into a pandemic in a relatively short period of time. In response, unprecedented protection measures have been introduced worldwide, with negative impacts on many rights. Although the role of health emergency preparedness, monitoring and coordination in the European Union has increased over the last two decades, the Member States' responses to the first wave of the epidemic were surprisingly uncoordinated. This resulted in national measures limiting the EU's effectiveness in combating the disease and jeopardising the proper functioning of the single market and the Schengen area (Beaussier & Cabane, 2020).

[4] Consolidated Version of the Treaty on European Union, OJ C 202, 7/6/2016, pp. 13-45.
[5] Act XXXI of 1993 on the Promulgation of the Convention on the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and the related eight Additional Protocols.

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Art. 3 para. 2 TEU, Art. 20 and 21 TFEU and Art. 45 of the Charter of Fundamental Rights of the European Union (CFR)[6] constitute the fundamental elements of the right of every citizen of the Union to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and the provisions adopted for their implementation. But according to Art. 168 TFEU, public health is a shared competence between the European Union and the Member States. EU action is intended to complement national policies, with the primary objective being to provide support to Member States in the form of monitoring, early warning and combating serious cross-border threats to health. Member States coordinate their policies and programmes in areas covered by EU action, such as public health. The CJEU is responsible for reviewing the legality of acts of the EU institutions, ensuring that Member States fulfil their obligations under the Treaties and interpreting EU law at the request of national courts. In the following, these two basic aspects determining the measures of Member States will be analysed through a selection of cases.

2.1 Request for Preliminary Ruling

The requests for preliminary ruling encompassed a range of topics, including the processing of personal data (CJEU, Judgement of 5/10/2023, RK v Ministerstvo zdravotnictví, C-659/22; Advocate General, Opinion of 6/6/2024, National Authority for Data Protection and Freedom of Information, Hungary, v UC, C-169/23), labour (CJEU, Judgement of 16/11/2023, NC and Others v BA and Others, C-583/21-586/21), international protection (CJEU, Judgement of 22/9/2022, Bundesrepublik Deutschland v MA and Others, C-245/21 and C-248/21; Judgement of 22/9/2022, GM v National Directorate-General for Aliens Policing, Constitution Protection Office, Counter Terrorism Centre, C-159/21) and even freedom of movement. The latter will be discussed in greater detail below.

2.1.1 Free Movement between Member States: Border Control

Guaranteeing border security as a response to external threats has guided the response of numerous Member States to the global pandemic, and border policy has also been used previously in the context of crisis, such as during migration flows or terrorist attacks (Kenwick & Simmons, 2020). The Schengen Borders Code (SBC)[7] contains the rules on the control of persons at the external borders, the conditions of entry and the conditions for the temporary reintroduction of border controls at the internal borders of the Schengen area. Therefore, Art. 25, 28 and 29 SBC permit Member States to reintroduce temporary border controls at internal borders in the event of a serious threat to public policy or internal security. Moreover, under Article 25 para. 4 of the Code, checks may be reintroduced at internal borders between Member States.

During the period of the COVID-19 pandemic, numerous Member States repeatedly extended border controls. However, questions were raised as to whether these national measures were compatible with EU law. The cases of *NW v Landespolizeidirektion Steiermark* and *NW v Bezirkshauptmannschaft Leibnitz* (CJEU, Judgement of 26/4/2022, C-368/20 and C-369/20) concerned internal border controls within the Schengen area

[6] OJ C 364, 18.12.2000, pp. 1-22.
[7] Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) (codification), OJ L 77, 23/3/2016, pp. 1–52.

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where the applicants were subject to reintroduced border controls on arrival in Austria from Slovenia. Applicants claimed that these controls were contrary to EU law. The Regional Administrative Court of Styria referred questions to the CJEU, asking, inter alia, about the compatibility of the national legislation with EU law as the former allowed the reintroduction of border controls beyond the period laid down in Art. 25 and 29 SBC without a corresponding Council implementing decision. The Court emphasised that, when interpreting a provision of EU law, it is necessary to consider not only the wording of the provision itself but also the context in which it is set and the objectives of the legislation in question.

As stated in Recital 27 of the Code, exceptions and derogations to free movement must be interpreted strictly. Furthermore, on the basis of Recitals 21 and 23 and Art. 3 TEU, the reintroduction of internal border controls remains exceptional and should only be used as a last resort. It is crucial to emphasise that the CJEU has highlighted that the Code forms part of the general framework of the area of freedom, security and justice. This framework aims to achieve a fair balance between the free movement of persons and the necessity to safeguard public policy and internal security within the territory of the country. Consequently, the objective pursued by the maximum period of six months set out in Art. 25 para. 4 can be seen as a continuation of this general objective. Austria also failed to demonstrate the existence of any new threat that would justify the imposition of new time limits and the possibility of control measures; thus Art. 25 para. 4 had to be interpreted as precluding the temporary reintroduction of border control at internal borders where the duration of the measure exceeded the maximum overall duration of six months and there was no new threat justifying the reintroduction of the time limits. Furthermore, the Court stated that national legislation that requires individuals to present a passport or identity card upon entering the territory of a Member State at the internal border under penalty of a fine is incompatible with the provisions of the SBC.

2.1.2 Free Movement between Member States: Entry Ban

There is no explicit ban on entry in the SBC, only on persons crossing the external borders of the Union and the way in which checkpoints are operated. According to the SBC, external borders are the land borders of the Member States, including those crossing inland or river waters, maritime borders and airports, river, sea and lake ports, provided that they are not internal borders. Border controls may be reintroduced on grounds of public policy or internal security, which clearly does not include public health, but in the context of the current pandemic, public policy must be interpreted broadly to include public health. The SBC stipulates that entry may be denied in the event that an individual fails to meet the criteria set forth in Art. 6. This includes instances where the individual poses a threat to public policy, internal security, public health, or the international relations of Member States. Additionally, the individual must not be the subject of an alert in the national databases of Member States for the same reasons. According to the SBC, a threat to public health is any disease with epidemic potential as defined in the International Health Regulations of the World Health Organisation (WHO), as well as other communicable diseases or contagious parasitic diseases if they are covered by the protection provisions applicable to nationals of Member States (Art. 2 SBC).

In the case of *Nordic Info BV v Belgian Staat* (CJEU, Judgement of 5/12/2023, C-128/22), after the WHO (2020) declared the COVID-19 epidemic a “pandemic”, Belgium banned non-essential travel to or from countries classified as red zones because of the health

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situation there. In addition, travellers from these countries had to undergo screening and remain in quarantine. In July 2020, the Belgian authorities also briefly designated Sweden as a "red zone". Following the classification, the Scandinavian travel agency Nordic Info cancelled all planned trips between Belgium and Sweden and claimed compensation for the loss caused. The Belgian court referred the case to the Court, asking whether the Belgian rules were contrary to EU law. The CJEU ruled that a Member State may ban non-essential travel to or from other Member States classified as red zones in order to combat a pandemic such as COVID-19. It can also impose screening and quarantine on people entering its territory. Measures restricting freedom of movement within the EU may be laid down in legislation of general application, but they must be justified, contain clear and precise rules and be foreseeable for citizens. They should also be non-discriminatory and open to challenge in judicial or administrative review procedures. Restrictions on free movement must be appropriate to achieve the public health objective pursued. Also, they must be limited to what is strictly necessary and must not be disproportionate to that objective, which means, in particular, weighing up the importance of the objective and the seriousness of the interference with the rights and freedoms of the persons concerned. The Court has therefore upheld certain entry bans, testing and quarantine obligations in the event of the health crisis.

2.1.3 Free Movement within a Member State

The issue of freedom of movement concerned not only the movement between Member States but also within Member States as Member States used, among other measures, quarantine, to control the spread of the disease. In the context of labour law, social security, and the freedom of movement of workers, case *TF v Sparkasse Südpfalz* (CJEU, Judgement of 14/12/2023, C-206/22) concerned a worker who agreed with his employer, *Sparkasse Südpfalz* (Germany), to take paid annual leave from 3-11 December 2020. Because of his contact with a person who tested positive for COVID-19, the competent German authority quarantined the worker during the same period. The employee asked *Sparkasse* to allow him to carry over these days as paid leave to next year. Following *Sparkasse*'s refusal to do so, the applicant brought an action before the competent labour court, claiming that this refusal was contrary to EU law, namely the Working Time Directive. According to the courts, national law only allows to carry over paid leave if the employee can certify that the incapacity occurred during the paid leave. However, German courts had determined that the mere quarantine does not constitute incapacity for work. The labour court requested a preliminary decision whether EU law requires that paid leave coinciding with a quarantine period should be carried over.

According to the CJEU's interpretation of EU law, the days of paid annual leave when the employee is not ill but falls within the period of quarantine should not be carried over. The purpose of paid annual leave is to permit employees to cease their obligatory work duties and engage in a period of rest and recuperation. Unlike illness, the duration of quarantine does not in itself prevent the achievement of these objectives. Thus, employers are not obliged to compensate for the disadvantages resulting from unforeseen events, such as a quarantine, which can prevent employees from exercising their right to paid annual leave entirely and in a manner they wish.

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2.2 Infringement Procedure

Border policy influenced the functioning of the asylum and the reception systems. This could be observed at the beginning of the pandemic with the closure of the EU's external borders in 2020. The public health situation has also been used in public debates on migration when countries had introduced states of emergency. Hungary was a good example of this, but the European Commission, acting in its role as guardian of the Treaties, launched infringement proceedings against the country.

The European Commission v Hungary case (CJEU, Judgement of 22/6/2023, C-823/21) concerns the suspension of the entry of asylum seekers into border transit zones due to the risks associated with the spread of COVID-19 (Magyarország Kormánya, 2020). In response to the outbreak of the COVID-19 epidemic, *Act LVIII of 2020 on the Transitional Rules and Epidemological Preapredness related to the Cessation of the State of Danger* (2020), promulgated in the National Gazette on 17 June 2020 and entered into force on 18 June 2020, was enacted, stipulating that in the event of an epidemic risk, third-country nationals must declare their intentions in person at the Hungarian Embassy in Belgrade or Kyiv before they can commence the asylum procedure in the country. The declaration of intention is then assessed by the National Directorate-General for Aliens Policing. It follows from the applicable provisions of the Act that if third-country nationals residing in Hungary, including at the borders, express their intention to seek international protection, the Hungarian authorities do not consider this declaration as an application for international protection within the meaning of Directive 2013/32. The application is not registered and the person does not enjoy the rights of an applicant. Instead, in order to file an application, the person must leave Hungary, return to a third country and first go through a procedure at the Hungarian embassy of Kyiv or Belgrade.

The European Commission launched infringement proceedings against Hungary, arguing, among other things, that while it recognises the need to take measures to limit the spread of the virus in the wake of the COVID-19 pandemic, Member States can only take necessary and proportionate measures to protect public health. Therefore, such measures should not prevent access to the international protection procedure

According to the Commission, the new Hungarian asylum procedure was incompatible with Art. 6 of Directive 2013/32 on common procedures in Member States for granting and withdrawing international protection (Procedure Directive), interpreted in the light of Art. 18 CFR. The right of access to the procedure guaranteed by Art. 6 of the Directive means, first and foremost, that third-country nationals residing in the territory of a Member State, including at its borders, may lodge an application for international protection. The CJEU determined that the recently enacted legislation effectively denies third-country nationals or stateless persons the ability to exercise their right to apply for asylum and is not justified by Hungary's objective of protecting public health. The measure constitutes a disproportionate interference with the rights of applicants for international protection. Furthermore, the obligation to move third-country nationals or stateless persons potentially exposes them to the risk of contracting a disease that they could later spread in Hungary. The requirements for submitting a so-called declaration of intent[8] and obtaining travel documents are not set out in Art. 6 of the EU Directive, and contravene

[8] See for the declaration http://www.bmbah.hu/images/sz%C3%A1nd%C3%A9knyilatkozat_angol_4.pdf

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the Directive's objective of ensuring effective, easy and rapid access to the procedure for granting international protection.

Moreover, the authorities did not demonstrate that no other proportionate measure could have been adopted. Hungary invoked a general threat to public policy and internal security in order to justify the compatibility of its legislation with EU law, without demonstrating the need for a specific derogation from the requirements of Art. 6 of the Directive.

2.3 Action for Annulment

The EU Digital COVID Regulation (EU) 2021/953[9] (the original validity period was scheduled to conclude on 30 June 2022. However, in consideration of the prevailing epidemiological circumstances, the period was subsequently extended to 30 June 2023) permitted the issuance, cross-border verification, and acceptance of three types of digital ID cards: the vaccination card, the test certificate, and the medical certificate. In addition to facilitating the movement of individuals across borders, the EU digital COVID certificate could also be used for other purposes, such as participation in cultural, sporting and social events, or access to public institutions. This has been regulated in the Member States on the basis of national law, taking into account EU law on free movement, in line with the principles of non-discrimination and proportionality.

In *Roos and Others v European Parliament* (CJEU, Judgement of 27/4/2022, T-710/21, T-722/21 and T-723/21), the joint cases focused on the legality of certain restrictions imposed by the EU institutions in the context of the COVID-19 pandemic, in particular to protect the health of their staff. This follows the introduction of the exceptional health and safety rules by the Bureau of the European Parliament on 27 October 2021, regarding the access to three buildings where the Parliament works. This decision essentially made entry to these buildings subject to the presentation of a digital COVID-19 vaccination card, a test certificate and a medical or equivalent certificate until 31 January 2022.

The CJEU dismissed the action brought by the MEPs and held that the Parliament may require the presentation of a valid COVID certificate for access to its buildings. Furthermore, it ruled that the Parliament may require anyone wishing to enter its buildings to present a valid EU digital COVID-19 certificate. The Parliament was not required to obtain the express authorisation of the EU legislator in order to adopt the contested decision. Since the decision was intended to restrict access to Parliament's premises to holders of a valid COVID card, it falls within the Parliament's competence to adopt rules governing its own internal organisation and that apply only to the Parliament's premises.

Furthermore, it was observed that the aforementioned action did not constitute a disproportionate or unreasonable interference with the free and independent exercise of a Member's mandate. The decision served a legitimate purpose in that it sought to achieve a balance between two competing interests at the time of a pandemic, namely the continuity of the Parliament's activities and the health of the occupants of its buildings. The contested decision did not infringe or disproportionately infringe the right to physical

[9] Regulation (EU) 2022/1034 of the European Parliament and of the Council of 29 June 2022 amending Regulation (EU) 2021/953 on a framework for the issuance, verification and acceptance of interoperable COVID-19 vaccination, test and recovery certificates (EU Digital COVID Certificate) to facilitate free movement during the COVID-19 pandemic (Text with EEA relevance) PE/27/2022/REV/1, OJ L 173, 30.6.2022, p. 37-45.

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integrity, the principles of equal treatment and non-discrimination, the right to free and informed consent to medical treatment, the right to liberty and, finally, the right to privacy and the protection of personal data.

Furthermore, it was considered that, in light of the epidemic situation and current scientific knowledge, the measures in question were necessary and appropriate at the time they were adopted. The contested decision also took into account the general Europe-wide epidemic situation and the specific situation of the Parliament, in particular the frequency of international travels by individuals entering the Parliament's buildings. Moreover, the measures in question were time-limited and regularly reviewed.

3 Excerpts from Relevant ECtHR Case Law

The human rights protection mechanism under the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: Convention) under the auspices of the Council of Europe has also been invoked on several occasions by applicants in relation to the COVID-19 pandemic (Kirchner, 2021). Given that several Council of Europe Member States introduced a number of restrictions in their domestic laws that fundamentally affect human interaction after the declaration of a health emergency or similar special legal orders after the outburst of the COVID-19 pandemic, it is not surprising that a large number of cases were eventually brought before the ECtHR (For a very extensive analysis of this topic, see McQuigg, 2024). The restrictions imposed by a series of state actions following the declaration of an epidemic ultimately led to applicants claiming violations of rights under the Convention and some of its additional Protocols.

While a number of judicial procedures are still pending and ongoing (ECtHR, 2024), certain conclusions can already be drawn from the case law of the Strasbourg-based ECtHR. Given that the procedural rules of the ECtHR require that all domestic remedies shall be exhausted first, it is probable that a considerable number of cases will arise in the future as a result of legislative measures taken by Member States in the wake of the COVID-19 pandemic. Indeed, many cases are certainly still pending before domestic fora with domestic remedy just a few years after the end of the pandemic. At the conclusion of these procedures, applicants may consider bringing the matter to the ECtHR. It is also important to note that, thus far, it is not clear whether challenges to the human rights aspects of state restrictions imposed as a result of the pandemic have been successful before certain judicial bodies, such as the ECtHR.

3.1 A Derogation of Application of the Convention and Certain Issues of Inadmissibility

The legal response to the global pandemic in the European region, which, since the outbreak of the COVID-19 pandemic in Fall 2020, has included the imposition of curfews, restrictions on opening hours, operation limitations, requirements to wear face masks, and potential vaccination requirements, among other measures, may raise a number of human rights concerns. It is of paramount importance to ascertain whether the measures implemented by State Parties to the Convention in the wake of the COVID-19 pandemic (e.g. the health emergency in Hungary) may result in the derogation of the Convention or only of certain sections thereof. In this context, Art. 15 of the Convention (derogation in time of emergency) is relevant, but only applicable "in time of war or other public emergency threatening the life of the nation".

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Although the COVID-19 pandemic cannot be considered a war by definition, some States have indicated that the epidemic situation may justify invoking another state of emergency threatening the life or existence of the nation. This would be in accordance with the derogation of the Convention under Art. 15, which has been invoked by several States during the epidemic situation. In the early spring of 2020, Albania (Permanent Representation of the Republic of Albania to the Council of Europe, 2020), North Macedonia (Permanent Representation of the Republic of North Macedonia to the Council of Europe, 2020), Estonia (Permanent Representation of Estonia to the Council of Europe, 2020), Georgia (Permanent Representation of Georgia to the Council of Europe, 2020), Latvia (Permanent Representation of Latvia to the Council of Europe, 2020), Moldova (Permanent Representation of the Republic of Moldova to the Council of Europe, 2020), Armenia (Permanent Representation of the Republic of Armenia to the Council of Europe, 2020), Romania (Permanent Representation of Romania to the Council of Europe, 2020), San Marino (Permanent Representation of San Marino to the Council of Europe, 2020) and Serbia (Permanent Representation of Serbia to the Council of Europe, 2020) informed the Secretary General of the Council of Europe of their intention to apply Art. 15 of the Convention, which allows for the proportional and legitimate derogation of certain obligations in relation to human rights, in the context of the COVID-19 pandemic. Subsequently, other States, including the United Kingdom, France, Greece, Ireland and Turkey, have subsequently made notifications in a similar manner (ECtHR, 2022; see also Molloy, 2020).

However, for the other States, the rights set out in the Convention and its Protocols remained in force throughout the pandemic. The States sending the note verbale indicated their intention to derogate from these rights in accordance with Art. 15, to the extent and for the duration required by necessity. However, there are exceptions to Art. 15, and in such cases, these rights shall continue to apply. First and foremost, these rights include the right to life and the prohibition of torture. The most significant derogations of rights pertained to the right to liberty and security (Art. 5), the right to a fair trial (Art. 6), the right to respect for private and family life (Art. 8), the freedom of thought, conscience and religion (Art. 9), the freedom of expression (Art. 10) and the freedom of assembly and association (Art. 11). Furthermore, the First Protocol to the Convention also protects right to property (Art. 1) and the right to education (Art. 2).

In the context of the Convention, it is also important to consider the admissibility criteria set out in Art. 34 and 35. These criteria inevitably arise in most cases involving state action in relation to the COVID-19 pandemic. It is noteworthy that the Strasbourg court has pointed out their absence in a number of cases. With regard to individual applications, Art. 35, in addition to Art. 34, sets out the detailed rules, which are of particular relevance to the subject under examination. This is because in many of the cases examined below, the ECtHR will refer to the lack of jurisdiction based upon the problem of inadmissibility. The problem of inadmissibility typically arises from the failure to exhaust domestic remedies, incompatibility with the Convention and the Protocol (i.e. the applicant invokes a right of the person concerned which is not covered by the Convention or its Protocol), and the absence of significant disadvantage or substantial prejudice.

3.2 The Most Relevant COVID-19 related Cases before the ECtHR to Date

The right to life (Art. 2 of the Convention) has remained applicable despite the derogation, and it was invoked in one of the first cases (November 2020) in which the ECtHR ruled

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inadmissibility, in the *Le Mailloux v. France* case (ECtHR, Decision of 5/11/2020, No. 18108/20). The ECtHR contended the applicant's claim that the State had failed to fulfil its obligations to protect the life and physical integrity of persons within its jurisdiction by restricting access to diagnostic tests, preventive measures and certain treatments during the epidemic did not constitute a violation of the right to life. The ECtHR thus declared the application inadmissible under Art. 34 and 35 of the Convention. The Court ruled that the applicant could not prove that he was the victim of the violation in question as he was not directly concerned (the harm required by Art. 34 was not suffered by the applicant himself) and that the applicant had not even exhausted local remedies.

Similarly, the ECtHR found the claim inadmissible in the case of *Riela v Italy* (ECtHR, Judgement of 9/11/2023, No. 17378/20). In this instance, the Court found the arguments of the applicant who was allegedly exposed to serious health risks (such as type 2 diabetes, severe obesity and sleep deprivation as well as sleep disturbance), unconvincing under Art. 2. The applicant asserted that he had not received adequate medical care for his condition during his detention in an epidemic situation that had placed his life in jeopardy. Nevertheless, the ECtHR determined that the applicant had not substantiated his claims with sufficient evidence, thereby negating any potential violation of the right to life under Art. 2.

In relation to the prohibition of torture (Art. 3), the ECtHR has issued a number of divergent decisions. In the *Feilazoo v Malta* (ECtHR, Judgement of 11/3/2021, No. 6865/19) case, the Nigerian national's invocation of Art. 3 of the Convention was upheld on the grounds that the conditions of the applicant's immigration detention and quarantine met the requirements of the prohibition of inhuman and degrading treatment.

In contrast to the previously mentioned case, in the cases of *Hafeez v United Kingdom* (ECtHR, Decision of 20/4/2023, No. 14198/20) and *Rus v Romania* (ECtHR, Judgement of 1/6/2023, No. 2621/21), the ECtHR ruled that the detainees' requests were inadmissible, as in the case of Hafeez the extradition of the detainee to the United States during a public health emergency did not in itself violate the requirement of the prohibition of torture, while in the case of Rus the applicant failed to exhaust domestic remedies in relation to his claim that he had contracted the coronavirus, which was particularly dangerous to his health, because of the poor conditions of detention.

Among the cases falling within the scope of the right to liberty and security under Art. 5 of the Convention, the case of *Fenech v Malta* (ECtHR, Judgement of 1/6/2022, No. 19090/20) has attracted significant attention. In that specific case in question, the applicant was allegedly subjected to significant harm due to delayed procedural actions suspended as a result of the epidemic situation during his pre-trial detention. For instance, the applicant was unable to post bail for a long time and the trial was delayed during the detention due to the emergency instructions enacted by the state. The ECtHR ruled the application inadmissible because the State had enacted the margin of appreciation relating to the public health risk situation, despite the due care and attention that had been exercised by the State.

A comparable argument for inadmissibility can be found in *Bah v The Netherlands* (ECtHR, Decision of 22/6/2021, No. 22842/04) where the applicant argued that the pandemic constituted an impediment to the conduct of immigration detention proceedings.

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In the case of *Terheș v Romania* (ECtHR, Decision of 20/6/2021, No. 49933/20) a member of the European Parliament complained that the measure imposed in an epidemic situation, namely the restriction on his freedom to leave his place of residence, constituted a deprivation of liberty. Nevertheless, the ECtHR accepted Romania's argument that the measure could not in any event be considered as house arrest and that the restriction on the applicant's freedom of movement was not such (or at least the applicant could not justify it before the Court) as to constitute a substantial restriction of the rights. However, in the case of *Khokhlov v. Cyprus* (ECtHR, Judgement of 13/9/2023, No. 53114/20) the ECtHR ruled a judgment in favour of the applicant when it pointed out that the applicant, who was serving his prison sentence in Cyprus and awaiting extradition to Russia, had been detained for a disproportionate and unlawful period of time during the epidemic situation. This was because the Court found that the applicant's appeals in Cyprus had been pursued for a disproportionate period of time.

In the context of the right to a fair trial (Art. 6), the ECtHR did not accept the argument of the applicant in the case of *Makovetskyy v Ukraine* (ECtHR, Decision of 15/9/2022, No. 50824/21) that the fine imposed on him for breaching the mask-wearing rules in a supermarket would be arbitrary and unlawful, and thus would have been contrary to Art. 6 of the Convention. The ECtHR ruled that the application was inadmissible, stating that the fine had been imposed in accordance with the law and that the complainant had been afforded the opportunity to challenge the procedure in a lawful manner within Ukraine. However, a violation of the right to a fair trial was found by the Court in the case of *Q and R v. Slovenia* (ECtHR, Judgement of 20/6/2022, No. 19938/20). In this case, the applicants submitted that the procedure for appointing them as guardians of their grandchildren (since, they argued, the children's mother, i.e. the applicants' daughter, had been killed by her own husband, namely by the children's father) had taken an unreasonably long time, not least because of the restrictions imposed by the epidemic. The ECtHR accepted the argument and observed that, as the children were minors in need of care, the State should have taken particular care (including through procedural measures such as an accelerated procedure) to ensure that the reasonable time requirement was met, which it failed to do.

In the context of the right to respect for private and family life under Art. 8 of the Convention, the case of *Narbutas v Lithuania* (Judgement of 19/12/2023, No. 14139/21) saw the applicant raise the issue that he was a subject of news reports which made him easily identifiable and discredited his activities. This was due to his involvement in the procurement of large quantities of COVID-19 tests through state bodies in the course of his work. The applicant asserted that his reputation and thus his right to respect for his private life under Art. 8 had been violated, as he contended that a number of his personal data had been disclosed in a negative context. The ECtHR accepted the argument and found that the information about the applicant had been published to an unnecessary extent and that this was liable to infringe his reputation, thereby violating his right to respect for private life. The applicant was not a public figure and therefore had no public interest in the disclosure of this information.

In the context of the right to freedom of thought, conscience and religion (Art. 9), the case of *Constantin-Lucian Spînu v Romania* (ECtHR, Judgement of 11/10/2022, No. 29443/20) concerned the restriction of the applicants' (at the time of detention: prisoners') right to take part in religious services in the context of the situation created by

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the epidemic. The ECtHR, however, held that the applicant's right under Art. 9 of the Convention had not been violated because the State had ensured the exercise of his religion. However, this was done on the condition that the place of worship was within the prison grounds. Furthermore, the State was exercising its discretion and margin of appreciation within reasonable limits.

With regard to the freedom of expression (Art. 10) and the right of assembly and association (Art. 11), a number of cases are currently before the ECtHR. In these cases, several applicants have invoked these articles in relation to curfews and certain services linked to vaccination (Vinceti, 2021; ECtHR, Communicated Case, Petrova v. Bulgaria, No. 938/21; ECtHR, Communicated Case, Jámbor v. Hungary, No. 50723/21). One of the most notable cases was that of *CGAS v. Switzerland* (ECtHR, Judgement of 15/3/2022, No. 21881/20), in which the applicant's legal entity challenged the general ban on demonstrations due to the restrictive legislation introduced as a result of the epidemic situation. The ECtHR ultimately upheld the complaint and determined that the applicant's right had been violated by the State.

However, it is inaccurate to suggest that, in the absence of knowledge of the domestic legal systems of the States, all restrictions of the same kind are equally taken into consideration before the ECtHR. It is not possible to make a general finding without knowing all the relevant circumstances of the violation of rights in the applications. For example, the application of the right to demonstrate and assemble is contingent upon the constitutional arrangements, traditions, and attitudes of the population of the state in question. Consequently, the same restriction may be more detrimental to a Swiss citizen than to a natural person residing in another state. Nevertheless, the majority of cases remain unresolved, as domestic remedy procedures may take several years to conclude under domestic law. This therefore represents the exhaustion of domestic remedies, following which the ECtHR can proceed to handle the case. It seems inevitable that the Strasbourg court will issue a number of high-profile judgments in the near future concerning the freedom of expression (Art. 10) and the right of assembly and association (Art. 11).

The right to property (Art. 1) of the First Protocol has also been invoked in several cases before the Strasbourg court. Additionally, there are a number of significant cases that are currently pending on the basis of the right to education (Art. 2 of the First Protocol), which relate to the school closures and educational restrictions that were implemented during the epidemic (e.g. ECtHR, Communicated Case, M. C. K. and M. H. K.-B. v. Germany, No. 26657/22).

It is evident from the aforementioned that a significant number of cases remain pending. However, it is also apparent that the restrictive measures implemented by the State in response to an epidemic situation do not invariably result in human rights violations. In general, States have exercised their margin of appreciation to impose restrictions that are, for the most part, lawful and proportionate, with the aim of preventing public health risks. It is important to note that in *Vavřička and others v. the Czech Republic* (ECtHR, Judgement of 8/4/2021, No. 47621/13) the ECtHR reinforced this idea when it held that the right to decide on public health matters falls within the (wide) margin of appreciation of the States.

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4 Conclusion

Art. 15 of the Convention provides that restrictions on the exercise of rights may be imposed in the event of war or other public emergency threatening the life of the nation. Art. 52 CFR provides that restrictions on the exercise of rights and freedoms may be imposed in order to protect objectives of general interest recognised by the EU or the rights and freedoms of others.

To date, the practice of the ECtHR in assessing cases related to the rights of individuals during the COVID-19 pandemic has been characterised by a lack of legal coherence. Furthermore, a significant number of cases remain ongoing. On the one hand, a number of States have requested derogation under Art. 15 of the Convention during the epidemic situation. On the other hand, epidemic-induced measures, such as public health restrictions, tend to fall within the margin of appreciation of States. This is evidenced by the decision in the case of *Vavřička and others v Czech Republic*: Even in the absence of the COVID-19 pandemic, a very serious violation, disproportionality and a close causal link would be required for the ECtHR to deliver a decision on a human rights violation. In a number of instances, however, the reason for rejecting the application was also the applicant's failure to exhaust the domestic remedies system or a lack of demonstration of personal concern and significant disadvantage.

Public health is an area of shared competence between the European Union and the Member States, with EU action complementing national policies and the EU's primary intention being to support Member States' actions, such as surveillance, early warning and response to serious cross-border health threats. Member States were unprepared for the transformation of an outbreak into a pandemic and, with no precedent for this type of crisis management, mistakes were bound to be made. The initial, almost hasty, restrictive measures taken by Member States have also been referred to the CJEU for review of compliance with the principles of legality, necessity and proportionality, as well as for review of Member States' discretionary powers. We shall emphasise that a significant number of requests for preliminary rulings have been made, seeking guidance on measures taken in such an unpresented public health situation. However, it is clear that more cases are likely to be decided in the near future, as the pandemic wanes and the underlying public restrictive measures fade into the past.

It is challenging to make a meaningful comparison between the effectiveness of the two analysed courts (CJEU and ECtHR) regarding the so-called COVID-cases, given the significant differences in their legal basis, the ratione personae as well as the domain of margin of appreciation by the States. The law of the European Union and the human rights enlisted in the Convention give noticeably different margin of discretion for the states, based on the distinct contours of EU law and human rights law. It is noteworthy that the unprecedented and unusual nature of the global pandemic presented a challenge to the jurisdiction of both courts. This was evident from the outset, given that the foundation of the courts and the adoption of their legal basis coincided with the emergence of the COVID-19 pandemic, which was the first such global challenge to test the applicability of the rules. The common element is that both courts are willing to apply their rules for pandemic-related cases. However, the applicability of such rules is determined by the narrower margin of appreciation of States (in the case of the ECtHR) in comparison with the wider margin of discretion of Member States (CJEU) with regard to legality, necessity, and proportionality.

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