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COVID-19: Regulation of Migration Processes in The European Legal Area

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Abstract

The rapid spread of the virus around the globe, the widespread introduction of restrictions on freedom of movement and declarations by governments about the great threat to public health on a global scale, have had a serious impact on migration processes in the world. The European legal space has some regulation of migration processes, developed within the framework of the EU, the Council of Europe and the OSCE. However, COVID-19 presented him with some additional challenges. The purpose of the article is to analyze the legal regulation of migration processes within the European legal area in the conditions of the COVID-19 pandemic. The main method to study this problem is the comparative analysis, which allows to compare the legal regulation of migration processes during COVID-19 in three organizations: the European Union, the Council of Europe and the OSCE. In conclusion, the pandemic once again demonstrated the tendencies of national isolation, which exist in the European continent. The EU closes internal borders, the members of the Council of Europe make an exception to the rights contained in the European Convention on Human Rights, but they do not notify the Secretary General of the Council of Europe.

Keywords: COVID-19; migration in Europe; internal and external borders of the EU; freedom of movement; European legal space.

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COVID-19: Regulación de los procesos migratorios en el espacio jurídico europeo

Resumen

La rápida propagación del virus en todo el planeta, la introducción generalizada de restricciones a la libertad de movimiento y las declaraciones de los gobiernos sobre la gran amenaza para la salud pública a escala mundial, han tenido un grave impacto en los procesos de migración en el mundo. El espacio jurídico europeo tiene cierta regulación de los procesos de migración, desarrollados en el marco de la UE, el Consejo de Europa y la OSCE. Sin embargo, COVID-19 le planteó ciertos desafíos adicionales. El propósito del artículo es analizar la regulación legal de los procesos de migración dentro del área legal europea en las condiciones de la pandemia de COVID-19. El método principal para estudiar este problema es el análisis comparativo, que permite comparar la regulación legal de los procesos de migración durante COVID-19 en tres organizaciones: la Unión Europea, el Consejo de Europa y la OSCE. Como conclusión la pandemia demostró nuevamente las tendencias de aislamiento nacional, que existen en el continente europeo. La UE cierra las fronteras internas, los miembros del Consejo de Europa hacen una excepción a los derechos contenidos en el Convenio Europeo de Derechos Humanos, pero no notifican al Secretario General del Consejo de Europa.

Palabras clave: COVID-19; migración en Europa; fronteras internas y externas de la UE; libertad de movimiento; espacio jurídico europeo.

Introduction

The modern world is characterized as closely interconnected. Over the past 100 years, there have been five pandemics, inter alia, Spanish Flu (1918), Asian Flu (1957), Hong Kong Flu (1968), Swine Flu (2009). On 11 March 2020, the World Health Organization characterized COVID-19 as a pandemic. The rapid spread of the COVID-19 has led to such global consequences in the history of mankind as the mass closure of borders for the entry of foreigners, stateless persons, and sometimes even their own citizens; as well as it has led the governments to impose certain restrictions on the movement rights.

On 16 March 2020, the European Union closed the external borders of the Schengen area (European Border and Coast Guard Agency, 2020). The EU Member States have closed an internal border that is the

largest closure from the time of the EU foundation. As a result, the EU has faced an unprecedented fall in the number of border crossings. The worldwide migrant population includes students, asylum seekers, refugees, permanent residents, temporary workers, undocumented migrants, etc. These categories of migrants have a set of rights, such as the freedom of movement, reunification with families, the right to seek asylum, the right to free entry in the country, etc. At the same time, such rights affect the realization of other rights: the right to family life, the right to education, the choice of a profession, property rights, etc.

However, COVID-19 put under the question the abovementioned rights. For the due regulation of migration processes, these rights are not absolute but restricted, for example, for the purposes of public health, which becomes of high importance in the context of COVID-19. At the same time, the right to enter one own country is absolute and could not be restricted. Also, under international law, measures taken in the area of asylum, resettlement, and return should comply with the non-refoulement principle. It means that even during the time of COVID-19 pandemic, individuals have the legal right to apply for asylum. However, border closures, suspension of international passenger traffic also restrict the non-refoulement principle. It should be noted that regulation of migration processes is within the competence of states, which define the criteria for a person for entry and leave the country, as well as regulation of the border control. However, a number of universal, as well as regional legal instruments set standards for the regulation of migration processes and conditions for restriction of migration.

Among the scientists, the issue of regulation of migration processes in the European migration space was given attention by: E. Guild (Guild and Grant, 2017), T. Konstadinides (2016), M. Schane (2009), C. Peers (2012), A. Palm (2016). Also, this issue was studied by Ukrainian scientists, in particular: V. Denysov (Denysov and Falaleeva, 2018), O. Malinovskaya (2018) and others. O. Polivanova (2012) explored the issues of freedom of movement of individuals in the EU. At the same time, the issue of regulation of migration processes in the European legal space during the COVID-19 pandemic has not been investigated by scientists.

1. Materials and methods

The leading method for studying this problem is the method of comparative analysis, that allows to compare the legal regulation of the migration processes during COVID-19 in three organizations, inter alia, the EU, the Council of Europe and the OSCE. The EU has seriously tightened its migration policy amid the spread of COVID-19. The crisis associated with the Covid-19 pandemic reinforces national isolation trends already present

in the policies of many EU countries. Migration flows within Europe are a poorly controlled mass of people, and often completely uncontrolled. Within the EU, the mobility of such flows is extremely high, as this is facilitated by the principle of transparent borders. And all this is completely incompatible with the main mechanism of the fight against coronavirus – social distance and localization of the source of infection.

That is why, the COVID-19 again closes the EU internal borders, which is one of the main EU values. In Greece, the migration camps were quarantined, and the resettlement programs suspended. Germany, Austria, Hungary, Belgium, and the Netherlands also stopped accepting refugees (COVID-19 Emergency Measures in Asylum and Reception Systems, 2020). It means that the non-refoulement principle in the conditions of COVID-19 became not effective and the EU cannot protect people suffering from discrimination. Another problem is that refugees often live in unsanitary conditions, which is a favorable environment for the spread of COVID-19.

Relations between migrants and EU citizens will deteriorate. The increase in unemployment in the EU will be an additional factor for this. Therefore, thousands of migrants and refugees are far more vulnerable to COVID-19 than the others. After Europe defeats the coronavirus, it will also face a problem that can take no less time to resolve. Regarding the regulation of migration processes, before finding a vaccine, and possibly even after, the Schengen Borders Code 2016 should be amended with the provision for a mandatory body temperature check on the external borders for EU citizens, as well as for the third-country nationals, stateless persons, asylum seekers, refugees and other categories of migrants. At the same time, COVID-19 demonstrated, that although some of the countries made a derogation from the European Convention on Human Rights (1950), they did not make a notification to the Secretary General of the Council of Europe, that violates the procedure of the derogation of the rights.

2. Results and discussion

Among universal legal instruments, which include provisions for the regulation of migration possesses are the Universal Declaration of Human Rights (1948), the International Covenant on Civil and Political Rights (1966), the International Covenant on Economic, Social and Cultural Rights (1966). Also, there are several specialized international treaties which determines human rights of migrants, such as the Convention relating to the Status of Refugees (1951), the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990), Global Compact for Safe Regular and Orderly Migration (2019). At the same time, Siracusa Principles on the Limitation and Derogation of Provisions in

the International Covenant on Civil and Political Rights (1984) defines, that public health may be invoked as a ground for limiting certain rights in order to allow a state to take measures dealing with a serious threat to the health of the population or individual members of the population.

These measures must be specifically aimed at preventing disease or injury or providing care for the sick and injured. Due regard shall be had to the international health regulations of the World Health Organization (Feinberg *et al.*, 2018). It means, that international standards allow the limitation of the right to leave the country; freedom of movement and freedom to choose the residence within a country. However, the right to enter the own country should not be arbitrarily deprived, as is mentioned in article 12 of the International Covenant on Civil and Political Rights (1966). It means that the right to enter the own country is an absolute right and even in the case of COVID-19, a person should not be deprived of this right.

The European legal framework for the regulation of migration processes and restrictions of migration is based on international standards and is very broad. A number of regional organizations are functioning in Europe, such as the European Union, the Council of Europe and the Organization for Security and Cooperation in Europe. All these organizations develop the standards for the response of COVID-19, inter alia, in the sphere of regulation of migration processes. The EU founding treaties stipulate the restrictions on the rights to freedom of movement. Such as, Article 45 of the Treaty on Functioning of the European Union (2009), which define that freedom of movement for workers is subject to limitations justified on grounds of public policy, public security, or public health.

The definition of the “threat to public health” is possible to find in the Article 2(21) of the Regulation (EU) 2016/399 of the European Parliament and of the Council (2016) on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) (2016). It means any disease with epidemic potential as defined by the International Health Regulations of the World Health Organization and other infectious diseases or contagious parasitic diseases if they are the subject of protection provisions applying to nationals of the Member States. Article 6 of the Schengen Borders Code stipulates, that in the case when a third country national considers being a threat to public health it is possible to refuse in the entry on such grounds. The Directive 2004/38/EC (2004) on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States in article 29 clarifies that diseases occurring after a three-month period from the date of arrival shall not constitute grounds for expulsion from the territory.

At the same time, COVID-19 again threatened one of the main European values, namely freedom of movement within the Schengen area. In article 25, the Schengen Borders Code, 2016 allows the temporary reintroduction

of border control at internal borders in the cases of serious threat to public policy or internal security in a Member State. At the same time, the reintroduction of border control at internal borders is the competence of a Member State.

The EU Commission cannot prohibit such reintroduction; however, it could make an opinion concerning the necessity and proportionality of such reintroduction. As for 10 April, 2020, the following countries have notified the EU Commission and the interior ministers of all EU countries on the reintroduction of borders because of the threat of COVID-19, as it defined in the article 28 of the Schengen Border Code, inter alia: Denmark, Austria, Finland, Switzerland, Czech Republic, France, Belgium, Portugal, Norway, Spain, Germany, Poland, Lithuania, Switzerland, Estonia, Hungary, Finland, Norway. In general, from the beginning of coronavirus COVID-19, EU Member States applied 37 times for the reintroduction of border control at internal borders. The first EU country, which applied for such a measure was Austria on 11 March 2020 (Communication from the Commission COVID-19, 2020).

On 30 March 2020, the EU issued the Communication from the Commission Guidelines concerning the exercise of the free movement of workers during COVID-19 outbreak (Communication from the Commission, 2020). It defines, that Member States should allow workers to enter the territory of the host Member State and have unhindered access to their place of work if the workers exercise in particular one of the following occupations:

Health professionals including paramedical professionals; Personal care workers in health services, including care workers for children, persons with disabilities and the elderly; Scientists in health-related industries; Workers in pharmaceutical and medical devices industry; Workers involved in the supply of goods, in particular for the supply chain of medicines, medical supplies, medical devices and personal protective equipment, including in their installation and maintenance; Information and Communications Technology Professionals; Information and Communications Technicians and other technicians for essential maintenance of the equipment; Engineering professionals such as energy technicians, engineers and electrical engineering technicians; Persons working on critical or otherwise essential infrastructures; Science and engineering associate professionals (includes water plant technicians); Protective services workers; Firefighters/Police Officers/Prison Guards/Security Guards/Civil Protection Personnel; Food manufacturing and processing and related trades and maintenance workers; Food and related products machine operators (includes food production operator); Transport workers; Fishermen; Staff of public institutions, including international organisations, in critical function (Communication from the Commission, 2020).

In accordance with the data of the European Border and Coast Guard Agency (2020), the total number of illegal border crossings for the first quarter of 2020 reached 24 500, up 26% from the same period of 2019. However, comparing the number of detections of illegal border crossings on Europe's main migratory routes in March with the situation in February 2020, it should be noted, that it has fallen by nearly half to around 4650. It means that coronavirus COVID-19 has not influenced very much on the illegal migration to the European Union. Illegal crossings of the EU external borders are still happening. On March 17, EU Heads of State and Government endorsed proposals from the European Commission to temporarily limit "non-essential" travel to the EU from third countries for a period of 30 days, which was subsequently extended until May 15 (Official website of the European Union).

Exemptions from such restrictions apply to persons in need of international protection or seeking asylum for other humanitarian reasons. On 16 April, the European Commission presented COVID-19: Guidance on the implementation of relevant EU provisions in the area of asylum and return procedures and on resettlement (COVID-19: Temporary Restriction on Non-Essential Travel to the EU, 2020). Such instructions have been developed with the assistance of the European Asylum Support Office, the European Border and Coast Guard Agency (2020) and the relevant services of the EU Member States.

The new rules restrict the personal contact of officials with asylum seekers, giving them flexibility in the timing of registering and processing such requests. Personal interviews required in such cases may be conducted remotely, or generally bypassed in cases where such remote contact cannot be arranged. Quarantine and isolation measures associated with the coronavirus spike should be moderate, proportionate, and non-discriminatory. In doing so, such searchers in temporary accommodation centers should have access to the open air and should be provided with clear explanations for the reasons for limiting external contacts and visits. For health reasons, a new rule has been set – where asylum seekers cannot remove their fingerprints, such prints must be taken within 48 hours as soon as emergency health care is abolished. In accordance with Article 2 of Protocol 4 of the European Convention on Human Rights (1950) everyone who is legally located on the territory of the state has the right to free movement, and everyone has the right to leave any country. However, according to the Convention, it is restricted right. It means that a state may interfere with this right in certain circumstances:

No restrictions shall be placed on the exercise of these rights other than such as are in accordance with the law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of order public, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others (European Convention on Human Rights, 1950: 09).

The European Court on Human Rights considers this provision with a number of questions. The Court is examining the applicability of the provision to a given situation. Secondly, whether there is an interference with this right. Thirdly, if there is interference, the Court will examine the justification of this interference. In order for the interference to be justified, it must be fully consistent with the law. This not only requires a national law that permits such interference, but this law must have certain qualities. It must be accurate and understandable so that the individual can be guided by it in his/her behavior. Fourth, the interference should be aimed at a legitimate aim, for example, the protection of health. Fifth, the intervention must be necessary in a democratic society.

This means that it must correspond to important public needs, and, more importantly, to be proportionate to the legitimate aim pursued. The proportionality of the intervention depends on all the circumstances of the case. It is necessary to find out whether appropriate and sufficient reasons preceded the intervention, whether procedural safeguards were involved, and whether the interference infringed the essence of the law.

The Court emphasized in the only case in which the application of quarantine has been considered – *Kuimov v. Russia*, No. 32147/04, 8 January 2009 – that the restriction should be: “A temporary measure, to be discontinued as soon as circumstances permit” and that “severe and lasting restrictions... a long duration are particularly likely to be disproportionate to the legitimate aims pursued”. This suggests that the approach to the assessment of the admissibility of restrictions will be broadly the same, whatever the right or freedom involved (Council of Europe, 2020).

Some Members of the Council of Europe exercised the right to derogation from its obligations under the European Convention on Human Rights (1950) in accordance with Article 15. These countries declared a state of emergency on their entire territory. It should be noted, that measures implemented by Members of the Council of Europe have derogated from certain obligations provided for in the European Convention on Human Rights (1950) to the extent required by the epidemiological situation and medical necessity, in response to the COVID-19 coronavirus pandemic.

As for 10 April, 2020 such notifications to the Secretary General of the Council of Europe concerning Article 15 of the European Convention on Human Rights (1950) have been made by following countries: Serbia (7.04.2020), Romania (3.04.2020), North Macedonia (2.04.2020), Albania (1.04.2020), Georgia (23.03.2020), Estonia (20.03.2020), Republic of Moldova (20.03.2020), Armenia (20.03.2020), Latvia (16.03.2020) (Council of Europe, 2020). Thus, in the history of the European Convention on Human Rights (1950), the number of appeals from countries that simultaneously relied on Article 15 of the Convention and made the derogation from their obligations is unprecedented. Although it is also

worth noting that there are a number of countries that have also derogated from their obligations under the Convention but have not informed the Secretary General of the Council of Europe of the measures taken.

The Helsinki Final Act (1975) of the Conference on Security and Cooperation in Europe was adopted on August 1, 1975. The document stipulates the obligation of states to guarantee freedom of movement, in particular, to ensure family reunification, travel for personal or professional reasons, contacts and regular meetings based on family ties, marriages between citizens of different states, travel for personal or professional reasons. The obligation of states to gradually simplify and flexibly apply the procedure for exit and entry is envisaged; to facilitate the movement of citizens from other participating States, taking into account security requirements, etc. (OSCE). At the same time, Population Registration Guidelines (2009) stipulates, that the participating States will ensure that the exercise of rights cannot be the subject of any restrictions other than those provided by law and compatible with their obligations under international law. These restrictions are in the nature of exceptions. The participating States will ensure that these restrictions are not abused and that they are not applied arbitrarily, but so that the effective exercise of these rights is ensured.

Conclusion

The COVID-19 coronavirus has become a new challenge for the regulation of migration processes in the world, and in particular on the European continent. It came to Europe at the time when EU member states were actively working on the development of common standards for regulating migration processes. COVID-19 demonstrated that nowadays it is difficult for the EU to be single in decision-making, as well as in 2015 when it demonstrated the lack of solidarity during the European migration crisis. In addition, the coronavirus also happened against the backdrop of the UK's exit from the EU. All these factors complicate the EU's position in the global geopolitics, as well as the further expansion and deepening of integration.

It was also analyzed the reaction of the EU, the Council of Europe and the OSCE to the migration during COVID-19. The regulation of migration processes is very vulnerable. EU closing internal borders, that become a kind of tradition during last time. Members of the Council of Europe make derogation from the rights, contained in the European Convention on Human Rights, but not notify the Secretary General of the Council of Europe. That is why, COVID-19 again demonstrated national isolation trends, that exist on the European continent during last time.

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