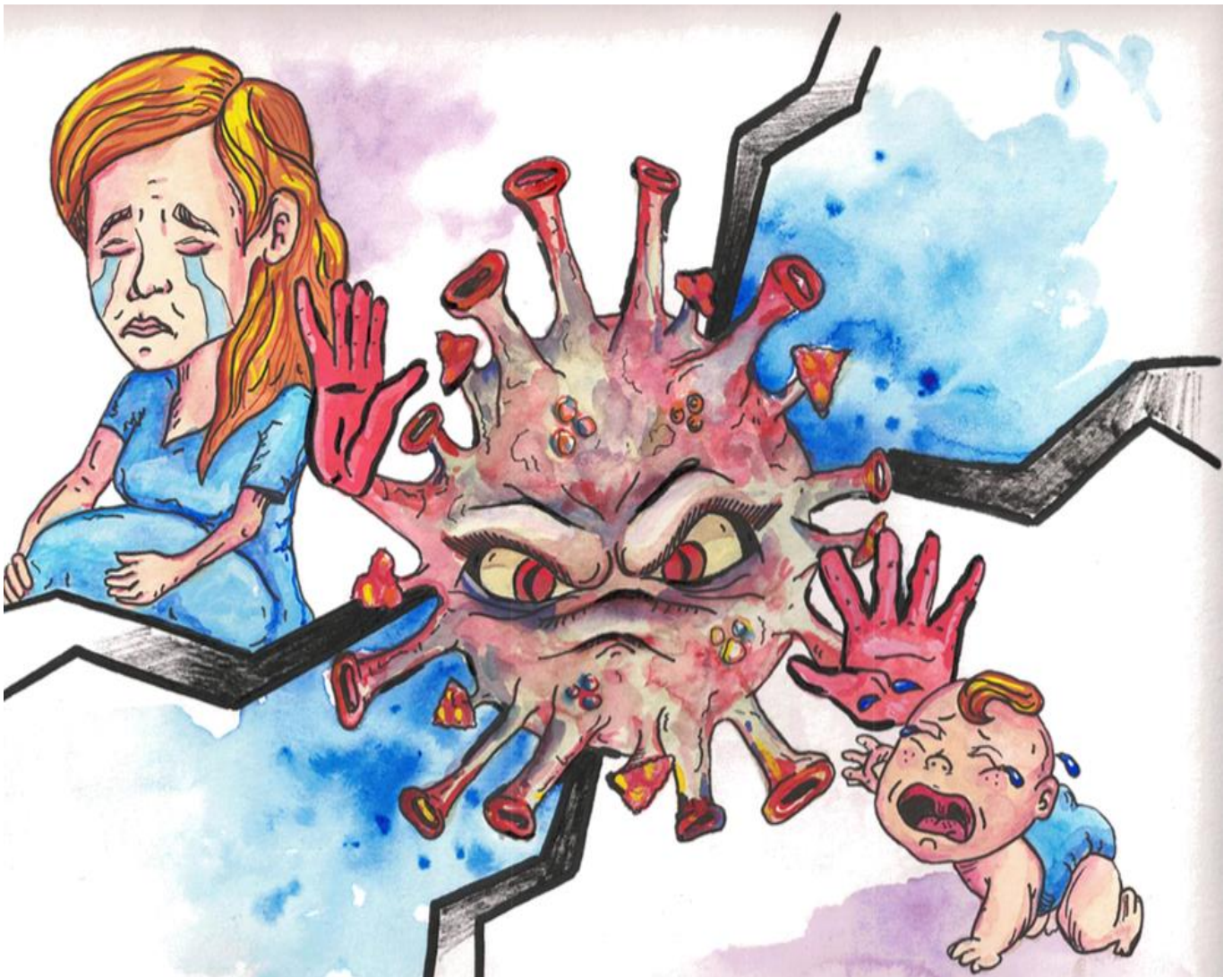


Mothers, newborns and Coronavirus barriers

An analysis of restrictive measures implemented in the EU in light of the European Convention on Human Rights



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Semi-Final B: EU and European Family Law

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Abstract

In December 2019, a new severe illness caused by coronavirus 2 (SARS-CoV-2) emerged in Wuhan, China, creating a global pandemic of unprecedented magnitude.

The situation has evolved rapidly throughout the world and particularly in the European Union. The unexpected risks and threats that the Member States faced and the need to ensure the continued exercise of the most basic and elementary functions of the state are essentially the reasons why some Member States made provision in their constitutions for a state of emergency.

Regarding the restrictive measures implemented, we focused our analysis on the measures which impacted mothers and newborns, also focusing on the peri-partum period, the period between the last month of pregnancy and the first 5 months of the baby's life. The consequences of these measures on the future psychosocial development of families and how they may be modified and alleviated during the course of the pandemic are still unknown.

Faced with the centrality of the rights affected, it is up to the scientific community to reflect on the preservation of the essential core of freedoms. In particular, those applying the Convention are called upon to work together to preserve the rights set out in it.

Keywords: COVID-19; right to respect for family life; freedom of movement; inseparability between mothers and children; restrictive measures; proportionality.

1. Part I

A. Problem statement

In December 2019, a new severe illness caused by coronavirus 2 (severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2)) emerged in Wuhan, China, creating a global pandemic of unprecedented magnitude.

On 11 March 2020, the World Health Organization (WHO) qualified the public health emergency caused by Covid-19 disease as an international pandemic constituting a public calamity.

The situation has evolved rapidly throughout the world and particularly in the European Union.

Focusing the issue on the European reality, and in view of the above, measures were, and continue to be, adopted that severely restrict rights and freedoms with regard to rights of movement and economic freedoms, in an attempt by the different Member States to prevent the transmission of the virus.

In March 2020, there were increasing numbers of new infections in all Member States. The knowledge and experience of some recommended, at that time, the adoption of identical measures by others as a way to contain the spread of the disease in the EU.

The different ways in which the virus could be transmitted were still being investigated by the scientific community, as they were unknown. Person-to-person transmission through respiratory droplets that are produced when an infected person coughs, sneezes, speaks, sings or exercises were already confirmed, although more details were not yet known.

It was also known that the disease was usually transmitted from close contact (about 1.5m away for 15 minutes or more) with a contagious person and that the virus could spread over longer distances or stay in the air for longer under certain circumstances.

It was also known that it was possible for a person to contract the virus by touching surfaces that had been in contact with the virus and then touching their own mouth, nose or eyes.

It was also known that the virus is transmitted by a person with symptoms of the infection, but also before they even manifest clinical symptoms (pre-symptomatic) and even by infected people who do not manifest symptoms (asymptomatic).

COVID-19 seemed to have the greatest impact on elderly and people with significant comorbidities. The SARS-CoV-2 infection in children appeared to be less common and less severe compared with adults. Few cases of newborns with COVID-19 were reported in the reporting period, and little was known regarding route of infection, clinical presentation, management and outcome.

Vertical transmission of SARS-CoV-2 appeared to be rare, consistent with other coronavirus infections. There were few children reported with possible vertical transmission.

Answers were lacking to an endless number of pressing questions, including the significance of vertical and horizontal transmissions to newborns, route and timing of horizontal transmission, the role of breastfeeding, prediction of the severity of childhood illness, and the effectiveness of preventive measures

to protect infants and health workers, as well as the potential side effects of such measures, particularly on maternal-fetal attachment initiated during pregnancy and requiring intensification during the first days of the newborn's life.

The WHO put forward hygiene, respiratory etiquette and food safety practices as preventive and protective measures to reduce exposure and transmission of the disease.

It was in this context - that of the emergence of a new coronavirus causing a new disease that spread rapidly, was very deadly and was completely unknown to the scientific community - that the various Member States implemented measures restricting fundamental rights, such as restrictions on freedom of movement, as a means of containing the spread of the disease.

The unexpected risks and threats that the Member States faced and the need to ensure the continued exercise of the most basic and elementary functions of the state are essentially the reasons why some Member States made provision in their constitutions for a state of emergency¹.

Only a minority of Member States do not have constitutional provision for a state of emergency, although they do provide for alternative mechanisms to this exceptional state as a means of reacting in the event of their parliaments being unable to function, by allowing the exceptional transfer of legislative powers to the monarch, for example, to the executive (Belgium and Denmark) or even to the Federal President (Austria).

Of the 24 member states that provide for the state of exception in their constitutions, only 17 anticipate its possible application in a pandemic situation².

Of the 17 Member States equipped with this emergency 'constitutional armoury' that could be used in a pandemic, such as that caused by the SARS-Cov-2 virus, only 10 chose to use it during the first peak of the pandemic in Europe: Bulgaria, Czech Republic, Estonia, Finland, Hungary, Luxembourg, Portugal, Romania, Slovakia and Spain. The remaining 7 Member States - Croatia, Germany, Lithuania, Malta, the Netherlands, Poland and Slovenia - which could in principle have used the state of emergency on pandemic grounds, chose not to do so³. However, it can be noted that in almost half of the Member States that declared a constitutional state of emergency, this was not the only measure, and a legal emergency regime was

¹ European Parliamentary Research Service, *States of Emergency in response to the coronavirus crisis - Normative response and parliamentary oversight in EU Member States during the first wave of the pandemic*, December 2020, available at [https://www.europarl.europa.eu/RegData/etudes/STUD/2020/659385/EPRS_STU\(2020\)659385_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2020/659385/EPRS_STU(2020)659385_EN.pdf).

² Please see table 2 of the document cited in the previous footnote – *Member States with emergency state clauses in their constitutions*, pages 19 and 20, available at [https://www.europarl.europa.eu/RegData/etudes/STUD/2020/659385/EPRS_STU\(2020\)659385_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2020/659385/EPRS_STU(2020)659385_EN.pdf).

³ This is the case, for example, in Spain, where Organic Law 4/1981 regulates the state of alarm, emergency and siege, with an indication of the type of measures that the executive can adopt and the rights that can be restricted during these arrangements. In Hungary, the main rules on the state of extreme danger are set out in the Constitution, while implementing rules of such states are contained in two cardinal acts (Disaster Management Act and the Coronavirus Containment Act), i.e. legislative acts with an improved method of adoption, because they were adopted by a two-thirds majority in the National Assembly. In Poland, the state of natural disaster provided for in Article 232 of the Polish Constitution is detailed in its legal aspects in the Act of 18 April 2002, which defines the requirements, powers and measures. In Romania, the state of emergency is governed by Organic Law 453/2004 of 1 November 2004 (which requires a majority vote of the members of both houses of parliament to approve), which approved Emergency Ordinance (EGO) 1/1999 of 21 January 1999. During the first wave of the pandemic, the Romanian Government modified EGO 1/1999 through EGO 34/2020 of 26 March. The Constitutional Court found this emergency ordinance unconstitutional, considering that the government had exceeded its powers by assuming additional legislative powers.

activated. This was the case in Bulgaria, Hungary, Portugal, Romania and Slovakia. The combination of these two regimes did not occur simultaneously, but in most cases, one preceded or followed the other in a staggered way.

Finally, states of emergency of a constitutional nature are most often not autonomous, but are complemented by detailed legislation, either constitutional or ordinary, to regulate the transfer of powers, the duration, safeguarding and limiting the state of emergency in detail.

B. Measures to be considered in the investigation

Regarding the restrictive measures implemented, we focused our analysis on the measures which impacted mothers and newborns, also focusing on the peri-partum period, the period between the last month of pregnancy and the first 5 months of the baby's life. The measures analysed are of a different nature: contact of the baby with the mother with suspected or confirmed COVID-19 and breastfeeding⁴.

The WHO recommended skin-to-skin contact, provided the mother complied with hygiene rules^{5,6}.

Despite the benefits of contact, its absence minimized the risk of horizontal mother-child contagion and allowed a more correct analysis of the possibility of vertical transmission if mother and child turned out to be positive; it was not known whether vertical transmission existed or if the type of transmission influenced the clinical evolution of the newborn. Contagion after birth does exist and cases of infection of the newborn have been reported, generally with a favourable evolution. The same applies to accommodation after birth, where temporary mother-child separation may minimise the potential risk of postnatal mother-child horizontal infection, despite the possible consequences on mother-child bonding and breastfeeding success⁷.

⁴ It should be noted that, in addition to the measures listed above, measures were also implemented restricting visits and family members' stay in the hospital during and after childbirth.

⁵ The benefit of skin-to-skin contact has been demonstrated, namely the establishment of a strong mother-child bond, increased likelihood of successful breastfeeding, stabilization of glucose levels and maintenance of the baby's body temperature.

⁶ Public health and medical organizations released guidance regarding breastfeeding for mothers with confirmed SARS-CoV-2 infection that weighed infection risk with the known and documented benefits of breastfeeding and early bonding. The WHO and UNICEF recommended continued breastfeeding, rooming in, skin to skin contact, and kangaroo care utilizing infection control practices. Specifically, the '*WHO recommends that mothers with suspected or confirmed COVID-19 should be encouraged to initiate or continue to breastfeed. Mothers should be counselled that the benefits of breastfeeding substantially outweigh the potential risks for transmission.*' In contrast, the Centers for Disease Control and Prevention, while encouraging the continuation of breastfeeding in general, stated, '*temporary separation of the newborn from a mother with confirmed or suspected COVID-19 should be strongly considered to reduce the risk of transmission to the neonate*' [Bastug A, Hanifehnezhad A, Tayman C, Ozkul A, Ozbay O, Kazancioglu S, Bodur H. Virolactia in *An asymptomatic Mother with COVID-19, Breastfeeding Med.*, 2020, 15(8):488–491, available at <https://doi.org/10.1089/bfm.2020.0161>].

⁷ About breastfeeding and infant contact, Bethany Kotlar, Emily Gerson, Sophia Petrillo, Ana Langer and Henning Tiemeier, *The impact of the Covid-19 pandemic on maternal and perinatal health: a scoping review*, 2021, available at <https://reproductive-health-journal.biomedcentral.com/articles/10.1186/s12978-021-01070-6>.

The possibility of transmission of novel coronavirus through breast milk is unclear. The published evidence on the presence of SARS-CoV-2 in breastmilk consisted of case reports and case series of postpartum women who tested positive for the coronavirus during pregnancy. Of milk samples collected from 37 women, the majority tested negative for SARS-CoV-2 [Huntley BJ, Huntley ES, Di Mascio D, Chen T, Berghella V, Chauhan SP. Rates of maternal and perinatal mortality and vertical transmission in pregnancies complicated by severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2) infection: a systematic review. *Obstet Gynecol.* 2020; 136(2):303–312; Dong L, Tian J, He S, Zhu C, Wang J, Liu C, Yang J. Possible vertical transmission of SARS-CoV-2 from an infected mother to her newborn, *JAMA*, 2020; 323(18): 1846–1848. <https://doi.org/10.1001/jama.2020.4621>, Oxford-Horrey C, Savage M, Prabhu M, Abramovitz S, Griffin K, LaFond E, Riley L, Easter SR. Putting it all together: clinical considerations in the care of critically ill obstetric patients with COVID-19. *Am J Perinatol.* 2020;37(10):1044–1051. <https://doi.org/10.1055/s-0040-1713121>; Lei D, Wang C, Li C, Fang C, Yang W, Chen B, Wei M, Xu X, Yang H, Wang S, Fan C. Clinical characteristics of COVID-19 in pregnancy: analysis of nine cases. *Chin J Perinatal Med.* 2020 Mar 16;23(3):225–31.,

Neonatal Intensive Care Units (henceforth NICUs) have implemented visiting policies restricting the presence of parents and extended family with the aim of protecting hospitalized newborn's and health professionals.

The consequences of these measures on the future psychosocial development of families and how they may be modified and alleviated during the course of the pandemic are still unknown.

The scientific evolution imposes a constant updating of the models of clinical approach, continuously adapted to the epidemiological evolution and the Public Health measures implemented and, therefore, we circumscribe our analysis to the measures implemented in March 2020, taking for granted that, today, the reality differs from the one we present.

We list below some of the measures implemented in different Member States⁸, in March 2020, starting with Portugal.

In Portugal, if in the presence of a pregnant woman with suspected or confirmed COVID-19, the whole health team linked to the delivery block should be informed. After delivery, the puerperal woman was to remain in an individualized space until a decision was made according to the test result. Contact isolation measures were implemented until the mother's result was known, taking into account the recommendations on skin-to-skin contact.

Breastfeeding or breastfeeding through the offer of extracted milk could be considered, according to the mother's wishes and after clarification and information by the clinical team.

Joint accommodation of the newborn and the mother in an individual room could be considered, with a assurance that the mother would comply with infection control measures (mask and hand and breast hygiene). In this situation, the cot should be placed at least 2 metres away from the mother's bed. The hospitalization of the newborn in a dedicated room or nursery could also be considered, preferably in an incubator, and respecting measures to control infection by contact and droplets.

In Belgium and Germany, under the same circumstances, the newborn was allowed to stay with the mother, as was breastfeeding. Strict hygiene precautions were taken and a distance of at least 1.5 metres was maintained between the cradle and the mother. If the mother was moderately ill, the child was hospitalized in the NICU.

Wang S, Guo L, Chen L, Liu W, Cao Y, Zhang J, Feng L. A case report of neonatal 2019 coronavirus disease in China. *Clin Infect Dis*. 2020;71(15):853–857. <https://doi.org/10.1093/cid/ciaa225>, with the exceptions of Zhu et al. and Wu et al. who found one positive sample among 5 samples from 5 women [Zhu C, Liu W, Su H, Li S, Shereen MA, Lv Z, Niu Z, Li D, Liu F, Luo Z, Xia Y. nBreastfeeding risk from detectable severe acute respiratory syndrome coronavirus 2 in Breastmilk. *J Infect*. 2020. <https://doi.org/10.1016/j.jinf.2020.06.001>], and among 3 samples from 3 women, respectively [Wu Y, Liu C, Dong L, Zhang C, Chen Y, Liu J, Zhang C, et al. Coronavirus Disease 2019 among pregnant Chinese women: case series data on the safety of vaginal birth and breastfeeding. *BJOG*. 2020;127(9):1109–1115. <https://doi.org/10.1111/1471-0528.16276>]. These preliminary findings suggested that transmission of SARS-CoV-2 through breast milk was unlikely.

⁸ Anna Lavizzari, Claus Klingenberg, Jochen Profit, John A. F. Zupancic, Alex S. Davis, Fabio Mosca, Eleanor J. Molloy, Charles C. Roehr and The International Neonatal Covid-19 Consortium, *International comparison of guidelines for managing neonates at the early phase of the SARS-CoV-2 pandemic*, 2020, clinical research article available at <https://www.nature.com/articles/s41390-020-0976-5>.

Following first contact after delivery between a mother with suspected or confirmed COVID-19 and her newborn, the infant was kept in isolation until the test result was known. The infant would remain in isolation for 14 days if negative. Both, mother and infant, were tested.

In both Member States, breastfeeding was promoted even in the case of mother-infant separation.

In Spain and Italy, under the same circumstances, the baby was allowed to stay with the mother, and breastfeeding was permitted. Strict hygiene precautions were also followed. Following contact between mother and baby immediately after birth, the use of a mask was required until the baby tested negative. The baby was kept in a closed incubator and isolation room (negative pressure room, if available). Everyone, as in Belgium and Germany, was tested, both mother and baby.

In both Member States breastfeeding was promoted even in the event of separation, although in Italy, before the decision on breastfeeding was taken, medication given to the mother was considered.

In the Netherlands, the measures in place at the time were broadly similar. Without prejudice, following the first contact of a mother with suspected or confirmed COVID-19 with her infant after delivery, the infant was considered positive for SARS-Cov-2 until tested negative. In all other cases, only babies showing symptoms were tested.

Breastfeeding was also promoted in the case of separation.

In Norway and Sweden, the measures implemented were similar to those listed.

In Poland, in circumstances similar to those described, the newborn was isolated from the mother during hospitalization and breast milk was provided from a distance. Following contact between mother and baby shortly after delivery, masking was required until the baby tested negative. The baby was kept in a closed incubator and isolation room (negative pressure room if available). Everyone, as in Belgium and Germany, was tested, both mother and baby.

Regarding breastfeeding, and in case the mother tested positive for SARS-Cov-2, breastfeeding was promoted but the administration of infant formula was also considered possible for organizational reasons.

In France⁹, SARS-CoV-2 positive newborns were isolated and clinically monitored for 14 days, but this did not necessarily require admission to the NICU.

C. Central research questions

Are the distancing measures imposed in the course of the states of emergency declared in the different member states, in March 2020, compatible with the right to freedom of movement provided for in Article 2 of Protocol 4 to the ECHR and the conditions for its limitation provided for in para. 2 of the same article?

⁹ Janice Hopkins Tanne, *Covid-19: Doctors in France report case of baby infected in utero*, July 2020, available at <https://www.bmj.com/content/370/bmj.m2851>.

What impact did the restriction on this right to freedom of movement have on the established relationship (or lack thereof) between the mother and the newborn child in the first days following the birth?

Did those removal measures involve, or did they not involve, albeit reflexively, a violation of the right to respect for private and family life provided for in Article 8 of the ECHR?

Were, at that time, the restrictive measures we are proposing to examine proportionate to the gravity of the threat they were intended to combat?

Given the current relevance of the subject, the aim of this work is to contribute to the scarce existing literature and the lack of consensus found therein.

It is also intended to think to the future, and taking into account the cyclical occurrence of pandemic phenomena, propose possible measures to be taken in the event of another threat of the same or greater magnitude.

2. Part II

D. Freedom of movement

Provided for in Article 2 of Protocol No. 4, freedom of movement consists of three different rights: freedom to move, freedom to choose the country of residence and freedom to abandon any State¹⁰. It does not appear in isolation, but it is also provided for in many other documents, such as the Universal Declaration of Human Rights (Article 13), the International Covenant on Civil and Political Rights (Article 12), the Charter of Fundamental Rights of the European Union (Article 45), and others¹¹.

Of particular interest to our analysis, Paragraph 1 of Article 2 states, «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». Reading the paragraph, it is possible to identify the freedom of movement and freedom to choose one's country of residence.

Addressed to *everyone*, the rights stated on Article 2 apply to children as well, as clarified by the Court in the Case of *Diamante and Pelliccioni v. San Marino*, where it states that «it notes that the rights guaranteed by this provision apply to any person, and not solely to adults» (para. 204)¹².

To benefit from freedom of movement, one must be «lawfully within the territory of a State». Controlled by domestic law criteria, this requirement does not exclude aliens or stateless people who are only in transit or for a limited period¹³.

¹⁰ ECtHR, *Guide on Article 2 of Protocol No. 4 to the European Convention on Human Rights – Freedom of movement*, First edition - 31 December 2021, at p. 6 para. 1.

¹¹ The Protocol No.4 and, of course, its Article 2, can only be invoked before the States which ratified the Protocol. Therefore, it can not be invoked in relation to Greece, Switzerland, Turkey or the United Kingdom.

¹² *Diamante and Pelliccioni v. San Marino*, 2011. All ECtHR decisions are available at <http://hudoc.echr.coe.int/>.

¹³ For further developments, see the Explanatory Report to Protocol No.4, para. 8 and ECtHR, *Guide on Article 2 of Protocol No. 4 to the European Convention on Human Rights – Freedom of movement*, First edition - 31 December 2021, p. 10 para. 32.

Guaranteed by Article 5(1), the right to liberty differs from freedom of movement on the intensity of the level of the offense¹⁴. More oriented towards situations such as detentions or convictions, Article 5(1) aims to focus on more serious offenses. If the case falls within the scope of the right to liberty, the Court will not consider freedom of movement¹⁵.

To distinguish between the two rights, the Court will take into account criteria such as the duration of the deprivation, its effects, and the lack of consent to isolation, the last consisting of a subjective element¹⁶. The Court will also consider an objective factor¹⁷, such as the restricted area where the person is confined, the freedom to leave, the level of supervision or control.

In view of the specific situation of the COVID-19 pandemic, the Court sided with the decision that the order of confinement by the States, specifically by the Romanian Government in the *Terhes v. Romania* decision, should not be seen as a deprivation of liberty. The applicant claimed house arrest, and the Court held that «The level of restrictions on the applicant’s freedom of movement had not been such that the general lockdown ordered by the authorities could be deemed to constitute a deprivation of liberty»¹⁸.

The Court considered that: *i*) since the applicant could leave his home for reasons determined in domestic legislation; *ii*) since he could decide when to do so; *iii*) since the measures implemented to compel citizens to remain at home had been general; *iv*) and considering he was not subjected to special and individual surveillance; *v*) nor was he obliged to remain in a determined and cramped space; or *vi*) deprived of social contact, this was not a deprivation of liberty. Considering the various criteria, and with the understanding that it was not a case that falls under the Article 5 of the Convention, the Court pointed out that the situation should be read as a limitation to the freedom of movement.

In the same vein, in case of *De Tommaso v. Italy*, the Court clarified that it is important to pay attention to the circumstances contributing to the adoption of restrictions. That said, the Court added that «Indeed, the context in which the measure is taken is an important factor, since situations commonly occur in modern society where the public may be called on to endure restrictions on freedom of movement or liberty in the interests of the common good»¹⁹.

Accordingly, adding to the case-law, the Court stated that «The Court does not consider that such commonly occurring restrictions on movement, so long as they are rendered unavoidable as a result of circumstances beyond the control of the authorities and are necessary to avert a real risk of serious injury or damage, and are kept to the minimum required for that purpose, can properly be described as “deprivations of liberty” within the meaning of Article 5 para. 1»²⁰.

¹⁴ ECtHR, *Guide on Article 2 of Protocol No. 4*, p. 14 para. 55.

¹⁵ ECtHR, *Guide on Article 2 of Protocol No. 4*, p. 14 para. 57-58.

¹⁶ ECtHR, *Guide on Article 2 of Protocol No. 4*, p. 14 para. 59.

¹⁷ ECtHR, *Guide on Article 2 of Protocol No. 4*, p. 14 para. 60.

¹⁸ *Decision Terhes v. Romania*, 2021.

¹⁹ *De Tommaso v. Italy*, paragraph 81, 2017. In conformity, check *Nada v. Switzerland*, 2012.

²⁰ *Austin and Others v. The United Kingdom*, paragraph 59, 2012.

Therefore, considering the abovementioned case-law, taking into account criteria such as the duration, effects, possibility of access to social contact, area where the person is confined, the possibility of leaving the area, level of personalized supervision, and also the circumstances which determined the adoption of such measures, the most probable decision would be to analyse these cases under the appreciation of the freedom of movement, as resulting from Article 2(1).

E. Right to family life

Article 8 embodies four interests, identified as private life, family life, home and correspondence²¹. In what concerns us, it is particularly relevant to consider the right to family life, reflected in paragraph 1 of Article 8.

The Court recognizes the primary purpose of Article 8 as a mechanism to protect individuals from arbitrary intrusions by the State²², in its traditional negative understanding.

When it comes to the definition of family life and what we should consider to be a family, the Court has been building this notion. Nuclear to the definition of family life is the right to live together. By living together, the members of the family are able to socialize or provide company and cooperate or look after each other, as primary and traditional aspects of family life²³. Whenever we consider that there is a family, considering that the right to family life requires the prior existence of a family – and the *Court* has already clarified that a family can consist of a single mother and her child,²⁴ - we then must apply the protection proclaimed by paragraph 1 of Article 8. Therefore, the States may only interfere with the indicated right when the intrusion reflects the concerns stated in paragraph 2.

It follows from the case of *Marckx v. Belgium*, that the States assume not only negative obligations, as stated, but also positive obligations. Accordingly, since the need for protecting the right to family life results from Article 8(1), there remains an obligation to adopt, within domestic legal systems, a law that secures family ties, ensuring the child's integration into the family from the moment of birth. With this, it becomes possible to respect family life²⁵.

Secondly, the right to family life is also composed of a right to mutual enjoyment. Resulting from the case of *Olsson v. Sweden* (no. 1), the company enjoyed by both parents and child is a «fundamental

²¹ ECtHR, *Guide on Article 8 of the European Convention on Human Rights – Right to respect for private and family life, home and correspondence*, Updated on 31 August 2021, p. 7 para. 1.

²² *Kroon and Others v. the Netherlands* – «31. The Court reiterates that the essential object of Article 8 (art. 8) is to protect the individual against arbitrary action by the public authorities. There may in addition be positive obligations inherent in effective "respect" for family life. However, the boundaries between the State's positive and negative obligations under this provision do not lend themselves to precise definition. The applicable principles are nonetheless similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation (see, as the most recent authority, the above-mentioned Keegan judgment, p. 19, para. 49)», 1994.

²³ OLIVEIRA, Guilherme – “*Fique em casa*” – *Notas para uma taxonomia dos “familiares”*. JULGAR Online [Em linha]. Julho de 2020, available at <http://julgar.pt/fique-em-casa/>.

²⁴ ECtHR, *Guide on Article 8*, p. 78 para. 329.

²⁵ *Marckx v. Belgium*, paragraph 31, 1979.

element of family life»²⁶. Although there are cases that justify their restriction, notably the right to enjoy each other's company (cf. paragraph 2), the right to family life does imply this notion²⁷.

None of these changes if, for some justifiable reason, the family is separated. Even then, we must consider the right to family unity or reunification.

But if the rights to family integration and mutual enjoyment are recognizable, it is also true that the analyses of their exercise must consider a balance.

F. The intersection

Being qualified as a situation of restriction of movement, and considering the inability to visit others – notably newborns –, the restrictions to the freedoms guaranteed by Article 2 will necessarily impact the right to family life²⁸.

When it comes to the intersections between the identified rights: the freedom of movement and the right to family life, the Court is of the understanding that where the situation is analysed from the perspective of Article 2 of Protocol No.4, then it is not necessary to examine whether or not there is a violation of Article 8²⁹. The opposite also being true. Thus, when a violation of Article 8 is found to exist, it is also not necessary to analyze whether there has been a violation of Article 2 of Protocol 4³⁰. Nevertheless, because it is essential to the analysis, we will consider the intersection of both rights.

It is important to consider that there are situations where the mother and the newborn child are restricted in what concerns their freedom of movement, within a hospital facility, due to the associated danger of the COVID-19 pandemic. Considering the duration of the measures, ranging up to a few days, it cannot be excluded that it might be considered a deprivation of liberty, contemplating previous cases decided by the Court. Notably, the case of *Khlaifia and Others v. Italy*, where a deprivation on liberty was deemed to exist in a case where the applicants were held in a secure facility for nine and twelve days³¹. However, the number of days involved in cases of limitations associated with COVID-19 infections are decided according to the need for preventing the transmission of a contagious disease not entirely known to the general public or the scientific community. That is why, in addition to the aforementioned, we defend it to be seen as a restriction of movement.

The possibility to engage in social contact was not excluded, although it was limited. It is true that hospital visits were subject to limitations, but the mother and the newborn could still access the outside

²⁶ *Olsson v. Sweden* (no. 1), paragraph 59, adding that «(...) furthermore, the natural family relationship is not terminated by reason of the fact that the child is taken into public care», 1988.

²⁷ ECtHR, *Guide on Article 8*, p. 71 para. 292.

²⁸ ECtHR, *Guide on Article 2 of Protocol No. 4*, p. 18 para. 73. Considering the recalled impact in situations where there is a travel ban preventing the applicants from travelling to meet their family, namely: *Parmak and Bakir v. Turkey*, 2019, and *İletmiş v. Turkey*, 2005.

²⁹ ECtHR, *Guide on Article 2 of Protocol No. 4*, p. 18 para. 77. Considered para. 79 in *Kotiy v. Ukraine*, 2015 or para. 77 at *Penchevi v. Bulgaria*, 2015.

³⁰ Paragraph 62 of *Pfeifer v. Bulgaria*, 2009 and paragraph 56, of *Prescher v. Bulgaria*, 2011, paragraph 54 of *A.E. v. Poland*, 2009, and others.

³¹ *Khlaifia and Others v. Italy*, 2016.

world through alternative means of communication.

Considering the area of the confinement, it had to be necessarily variable, considering it can change not only from hospital to hospital, but also according to the influx felt at the time.

But mainly, with reference to the supervision or the prohibition to leave the assigned area, it should be noted that there was a specific nature associated with the prohibition of movement. The particular circumstances surrounding these restrictions should not be compared to a detention or arrest. Even though there was a formal restriction on liberty, there was no punitive nature to justify it. Other reasons motivated it, such as the need to prevent the transmission of a threat, a medical condition. It is also important to note that these restrictions were always implemented when there was a confirmed case of COVID-19 or at least a suspected infection. Thus, there was not a limitation on movement when the mother and the newborn tested negative and had no symptoms of the disease.

In this regard, when it comes to defining what is tolerable in restrictive measures, the Court pays attention to situations in which the restriction on the freedom of movement infringes on particularly sensitive moments of private life and the right to exercise family life³².

In a situation diametrically opposed to the issue at hand, in a case where an applicant was prevented from travelling to his home and consequently from helping his ailing mother or attending her funeral, the Court stated that the national courts should have taken into account «the exceptional circumstances and the strong humanitarian considerations involved», examining «his request with particular care and scrutiny»³³.

With regard to sensitivity, it is possible to foresee that a situation such as the irreplaceable and unrepeatable moment of birth deserves the same understanding. Therefore, given the particularity of the situation and the significance both for family life and integration and for the child's development, specific consideration should be given, leading national and European judges to a comprehensive approach.

G. Restrictions

1. Preliminary considerations

For the purposes of the current discussion, there are two significant conceivable ways of restricting the freedom of movement and the right to respect for family life through the ECHR; one of the paths entails Article 15, a derogation clause that allows Contracting States to drift, in exceptional circumstances, from their obligations to secure certain rights and freedoms set out in the ECHR³⁴; another route follows the provisions of the ECHR that allow for the limitation of the specific aforementioned freedom and right,

³² ECtHR, *Guide on Article 2 of Protocol No. 4*, p. 45 para. 247.

³³ *Berkovich and Others v. Russia*, paragraph 96, 2018. The Court then concludes that «Such a rigid and automatic approach cannot be reconciled with the obligation imposed by Article 2 of Protocol No. 4 to ensure that any interference with an individual's right to leave his or her country is, from the outset and throughout its duration, justified and proportionate in the light of the evolving circumstances (see *Vlasov and Benyash*, cited above, para. 36, with further references)». Similar observations were built in *Manannikov v. Russia*, 2018.

³⁴ ECtHR, *Guide on Article 15 of the European Convention on Human Rights - Derogation in time of emergency*, Updated on 31 December 2021, p. 5, para. 1.

Article 8(2) of the ECHR and Article 2(3) of Protocol No. 4 of the ECHR.

According to Article 15(1) of the ECHR, in times of war or other public emergencies threatening the life of the nation, States may take measures derogating from their obligations under the Convention.

It is important to start off by mentioning that the freedom of movement and the right to respect for family life aren't absolute under Article 15(2) of the ECHR.

Secondly, the circumstance to which “other public emergency threatening the life of the nation” refers is understood as being «an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organized life of the community of which the State is composed»³⁵, such as the one resulting from the spread of SARS-CoV-2.

It is evident that by March 2020, the COVID-19 pandemic was, if not an actual emergency, at least an imminent one throughout the whole of Europe, and that the normal measures or restrictions permitted by the Convention for the maintenance of public safety, health and order were plainly inadequate³⁶.

Nevertheless, due to their proximity with the situation and the urgent exigencies felt, it fell on the national authorities to determine if the life of its nation was threatened by a public emergency as well as the nature and extent of the measures necessary to fend it off³⁷. Yet, this does not grant the States an unlimited margin for action, it being within the national authorities' margin of appreciation to decide on the presence of an emergency and to dictate the necessary measures subject to European supervision³⁸.

It is worth noting that «Since the purpose of Article 15 is to permit States to take derogating measures to protect their populations from future risks, the existence of the threat to the life of the nation must be assessed primarily with reference to those facts which were known at the time of the derogation. The Court is not precluded, however, from having regard to information which comes to light subsequently»³⁹.

Additionally, besides requiring that the measures taken do not violate other obligations under international law, Article 15(1) clearly stipulates that the derogations adopted by the States can only be to the extent strictly required by the requirements of the situation, for which such factors like the nature of the rights affected by the derogation, the circumstances leading to the emergency situation, as well as its duration, should be taken into account⁴⁰.

³⁵ *Lawless v. Ireland (No. 3)*, 1961, para. 28.

³⁶ *Denmark, Norway, Sweden and the Netherlands v. Greece* (the “Greek case”), Commission report, 1969, para. 153; and ECtHR, *Guide on Article 15*, p. 6, para. 10.

³⁷ *Ireland v. the United Kingdom*, 1978, para. 207; *Brannigan and McBride v. the United Kingdom*, 1993, para. 43; *A. and Others v. the United Kingdom*, 2009, para. 173; *Mehmet Hasan Altan v. Turkey*, 2018, para. 91; *Şahin Alpay v. Turkey*, 2018, para. 75; and ECtHR, *Guide on Article 15*, p. 7 para. 12.

³⁸ *Ireland v. the United Kingdom*, 1978, para. 207; *Brannigan and McBride v. the United Kingdom*, 1993, para.43; *A. and Others v. the United Kingdom*, 2009, para. 173; *Mehmet Hasan Altan v. Turkey*, 2018, para. 91; *Şahin Alpay v. Turkey*, 2018, para.75; and ECtHR, *Guide on Article 15*, p. 7 para. 12.

³⁹ *A. and Others v. the United Kingdom*, 2009, para. 177.

⁴⁰ *Brannigan and McBride v. the United Kingdom*, 1993, para. 43; *Aksoy v. Turkey*, 1996, para. 68; *A. and Others v. the United Kingdom*, 2009, para. 173; and ECtHR, *Guide on Article 15*, p. 9 para. 23.

Although the information which comes to light subsequently can be taken into account⁴¹, similarly to the requirement of a public emergency threatening the life of the nation, the aforementioned factors must be assessed in accordance with the conditions and circumstances that were in force and subsisted when the derogating measures were implemented, and not examined retrospectively⁴².

Notwithstanding, under Article 15(3) of the ECHR, the Secretary General of the Council of Europe must be informed of the derogation measures taken and the reasons for adopting them, otherwise Article 15 isn't applicable to the decreed measures⁴³. This procedure is set in place in order for the derogation to become public and known by other Contracting States⁴⁴.

It is true that the notification of the derogation does not have to take place prior to the measures being taken⁴⁵. No matter how, it appears that during March 2020, most States had chosen to take different approaches to address the pandemic situation, the freedom of movement and the right to respect for family life being restricted on the grounds of Article 2(3) of Protocol No. 4 to the ECHR and Article 8(2) of the ECHR.

Even if not so, it is the position of the ECtHR that the analysis of the validity of a derogation will only take place after the conclusion that the measures taken cannot be justified under the substantive articles of the ECHR⁴⁶.

Both Article 8(2) of the ECHR and Article 2(3) of Protocol No. 4 of the ECHR mention public safety, protection of health and protection of the rights and freedoms of others as legitimate aims for restricting the freedom of movement and the right to respect for family life. In spite of the fact that the COVID-19 pandemic easily fits into the acknowledged justifications⁴⁷, the Government still had to show that the interference caused by the measures taken to combat the SARS-CoV-2 crises pursued a legitimate aim⁴⁸ and that the actions taken in accordance with such measures aimed to seek that end⁴⁹.

⁴¹ *A. and Others v. the United Kingdom*, 2009, para. 177; and ECtHR, *Guide on Article 15*, p. 10 para. 25.

⁴² *Ireland v. the United Kingdom*, 1978, para. 214; *A. and Others v. the United Kingdom*, 2009, para. 177; and ECtHR, *Guide on Article 15*, p. 10 para. 25.

⁴³ *Cyprus v. Turkey*, Commission report of 4 October 1983, para. 67-68; and ECtHR, *Guide on Article 15*, p. 14 para. 42.

⁴⁴ *Greece v. the United Kingdom*, 1958, para. 158; and ECtHR, *Guide on Article 15*, p. 14 para. 41.

⁴⁵ *Greece v. the United Kingdom*, 1958, para. 158; and ECtHR, *Guide on Article 15*, p. 14 para. 44.

⁴⁶ *A. and Others v. the United Kingdom*, 2009, para. 161; *Ireland v. the United Kingdom*, 1978, para. 191; *Lawless v. Ireland (no. 3)*, 1961, para. 15; and ECtHR, *Guide on Article 15*, p. 5 para. 4.

⁴⁷ EAPIL, COVID-19 and the Right to Respect for Family Life under Article 8 ECHR, 1 June 2020, available at <https://eapil.org/2020/06/01/the-interplay-between-covid-19-and-the-right-to-respect-for-family-life-under-article-8-echr/>.

⁴⁸ *Mozer v. the Republic of Moldova and Russia*, 2016, para. 194; *P.T. v. the Republic of Moldova*, 2020, para. 29; and ECtHR, *Guide on Article 8*, p. 12, para. 22.

⁴⁹ *Kilin v. Russia*, 2021, para. 61; and ECtHR, *Guide on Article 8*, p. 12 para. 22.

It is also a condition, under Article 8(2) of the ECHR and Article 2(3) of Protocol No. 4 of the ECHR, that the interference be carried out in accordance with the law. As such, the restrictions at stake must have had a basis in domestic law⁵⁰, this is in contrary to the absence of a specific legal basis⁵¹.

But this requisite also refers to the quality of the law⁵². Therefore, the domestic law must be characterized by foreseeability and accessibility⁵³. Regarding accessibility, «the citizen must be able to have an indication that is adequate, in the circumstances, of the legal rules applicable to a given case»⁵⁴. So, as long as the guidelines in question are in the public domain (for example, online), they satisfy this condition⁵⁵.

The domestic law should, also, be foreseeable in its terms, in a way that it is formulated with sufficient precision⁵⁶ to let individuals be aware of the circumstances and the conditions that allow the authorities to resort to measures affecting their rights under the Convention⁵⁷, as well as the consequences that may arise⁵⁸.

Furthermore, «domestic law must indicate with reasonable clarity the scope and manner of exercise of the relevant discretion conferred on the public authorities so as to ensure to individuals the minimum degree of protection to which they are entitled under the rule of law in a democratic society»⁵⁹.

⁵⁰ Concerning Article 8 of the ECHR: *Rotaru v. Romania*, 2000, para. 52; *Amann v. Switzerland*, 2000, para. 50; *Kopp v. Switzerland*, 1998, para. 55; *S. and Marper v. the United Kingdom*, 1995, para. 95; *Klaus Müller v. Germany*, 2020, para. 48; *Big Brother Watch and Others v. the United Kingdom*, 2021, para. 332; *Kennedy v. the United Kingdom*, 2010, para. 151; and ECtHR, *Guide on Article 8*, p. 10, para. 15. Respecting Article 2 of Protocol No. 4 of the ECHR: *De Tommaso v. Italy*, 2017, para. 106; *Sissanis v. Romania*, 2007, para. 66; *Khlyustov v. Russia*, 2013, para. 68; *Mursaliyev and Others v. Azerbaijan*, 2018, para. 31; *Olivieira v. the Netherlands*, 2002, para. 47; *Landvreugd v. the Netherlands*, 2002, para. 54; and ECtHR, *Guide on Article 2 of Protocol No. 4*, p. 31, para. 136.

⁵¹ *Heglas v. the Czech Republic*, 2007, para. 74; and *Big Brother Watch and Others v. the United Kingdom*, 2021, para. 332.

⁵² Pertaining Article 8 of the ECHR: *Rotaru v. Romania*, 2000, para. 52; *Amann v. Switzerland*, 2000, para. 50; *Kopp v. Switzerland*, 1998, para. 55; *Klaus Müller v. Germany*, 2020, para. 49; *Big Brother Watch and Others v. the United Kingdom*, 2021, para. 332; and ECtHR, *Guide on Article 8*, p. 10, para. 15. When it comes to Article 2 of Protocol No. 4 of the ECHR: *De Tommaso v. Italy*, 2017, para. 106; *Khlyustov v. Russia*, 2013, para. 68; *Mursaliyev and Others v. Azerbaijan*, 2018, para. 31; *Olivieira v. the Netherlands*, 2002, para. 47; *Landvreugd v. the Netherlands*, 2002, para. 54; and ECtHR, *Guide on Article 2 of Protocol No. 4*, p. 31, para. 136.

⁵³ In the matter of Article 8 of the ECHR: *Rotaru v. Romania*, 2000, para. 52; *Amann v. Switzerland*, 2000, para. 50; *Kopp v. Switzerland*, 1998, para. 55; *Klaus Müller v. Germany*, 2020, para. 49; and *Big Brother Watch and Others v. the United Kingdom*, 2021, para. 332. In reference to Article 2 of Protocol No. 4 of the ECHR: *De Tommaso v. Italy*, 2017, para. 106; *Sissanis v. Romania*, 2007, para. 66; *Khlyustov v. Russia*, 2013, para. 68; *Mursaliyev and Others v. Azerbaijan*, 2018, para. 31; *Olivieira v. the Netherlands*, 2002, para. 47; *Landvreugd v. the Netherlands*, 2002, para. 54; and ECtHR, *Guide on Article 2 of Protocol No. 4*, p. 31, para. 136.

⁵⁴ *The Sunday Times v. The United Kingdom*, 1979, para. 49.

⁵⁵ *Khlyustov v. Russia*, 2013, para. 73; and ECtHR, *Guide on Article 2 of Protocol No. 4*, p. 32, para. 137.

⁵⁶ As to Article 8 of the ECHR: *Klaus Müller v. Germany*, 2020, para. 50; *Amann v. Switzerland*, 2000, para. 56; *Rotaru v. Romania*, 2000, para. 55; *S. and Marper v. the United Kingdom*, 1995, para. 95. For Article 2 of Protocol No. 4 of the ECHR: *De Tommaso v. Italy*, 2017, para. 107; *Khlyustov v. Russia*, 2013, para. 68; and ECtHR, *Guide on Article 2 of Protocol No. 4* cit., p. 32, para. 138.

⁵⁷ In relation to Article 8 of the ECHR: *C.G. and Others v. Bulgaria*, 2008, para. 39; *Fernández Martínez v. Spain*, 2014, para. 117; and ECtHR, *Guide on Article 8* cit., p. 11, para. 18. About Article 2 of Protocol No. 4 of the ECHR:

⁵⁸ With reference to Article 8 of the ECHR: *Fernández Martínez v. Spain*, 2014, para. 117; *Big Brother Watch and Others v. the United Kingdom*, 2021, para. 332; *Kopp v. Switzerland*, 1998, para. 55; *Rotaru v. Romania*, 2000, para. 52; *Amann v. Switzerland*, 2000, para. 50; and *Klaus Müller v. Germany*, 2020, para. 49. In regard to Article 2 of Protocol No. 4 of the ECHR: *De Tommaso v. Italy*, 2017, para. 107; *Sissanis v. Romania*, 2007, para. 66; *Khlyustov v. Russia*, 2013, para. 68; *Mursaliyev and Others v. Azerbaijan*, 2018, para. 31; *Olivieira v. the Netherlands*, 2002, para. 47; *Landvreugd v. the Netherlands*, 2002, para. 54; and ECtHR, *Guide on Article 2 of Protocol No. 4*, p. 31, para. 136.

⁵⁹ *Piechowicz v. Poland*, 2012, para. 212. As to Article 8 of the ECHR: see, also, *Domenichini v. Italy*, 1996, para. 33; *Nurzyński v. Poland*, 2010, para. 36; *Domenichini v. Italy*, 1996, para. 33, and ECtHR, *Guide on Article 8*, p. 10-11, para. 17. In relation with Article 2 of Protocol No. 4 of the ECHR: *De Tommaso v. Italy*, 2017, para. 109; *Sissanis v. Romania*, 2007, para. 66; *Khlyustov v. Russia*, 2013, para. 70; *Rotaru v. the Republic of Moldova*, 2020, para. 124; and ECtHR, *Guide on Article 2 of Protocol No. 4*, p. 32, para. 140.

One question that can come to light is whether Health Authorities, despite their connection to the executive, have the legitimacy to issue guidelines on the management of newborn infants born to SARS-CoV-2-suspected or SARS-CoV-2-positive mothers, mainly those that imply a physical separation between baby and mother, as they pose restrictions on fundamental rights and freedoms.

The answer shall depend on the legal regimes established in different countries⁶⁰. As long as the interference in the freedom and right at stake is authorized by a recognized rule in the national order and such rule is accessible and foreseeable, then, in this aspect, no legality complication should emerge⁶¹. It is the ECtHR's understanding that the term "law" should be accepted in its substantive sense and not, necessarily, in its formal one, and, thus, is the provision in force⁶².

Additionally, adequate safeguards must be adopted to warrant the respect for one's freedom of movement and the right to respect for family life against various possible abuses or, in other words, against arbitrary interference⁶³.

2. *The requirement of necessity in a democratic society*

Lastly, Article 8(2) of the ECHR and Article 2(3) of Protocol No. 4 of the ECHR demand that the interference on the freedom of movement and right to respect for family life be necessary in a democratic society. The term "necessary" implies the existence of a "pressing social need" for the interference at hand⁶⁴.

It is relevant to highlight that a margin of appreciation is granted to States to make the initial assessment of the pressing social need, on a case-to-case basis⁶⁵. In light terms, the margin of appreciation refers to the space or room that the Strasbourg institutions are willing to give national authorities in fulfilling their obligations under the ECHR⁶⁶.

In relation hereto, the machinery for protection contained within the ECHR is subsidiary to the national systems safeguarding human rights and, thus, it is, primarily up to the States to secure the rights

⁶⁰ Regina Valutytė, Danutė Jočienė and Rima Ažubalytė. Legality of Human Rights Restrictions During the COVID-19 Pandemic Under the European Convention on Human Rights. *Tilburg Law Review*. 2020; 26(1): 1–15, p. 5, available at <https://doi.org/10.5334/tilr.245>.

⁶¹ Regina Valutytė, Danutė Jočienė and Rima Ažubalytė. Legality of Human Rights Restrictions, p. 4.

⁶² *Leyla Şahin v. Turkey*, 2005, para. 88; *Kafkaris v Cyprus*, 2008, para. 139; and *Vyerentsov v Ukraine*, 2013, para. 63.

⁶³ About what was said in relation to freedom of movement: *Rotaru v. the Republic of Moldova*, 2020, para. 24; and ECtHR, *Guide on Article 2 of Protocol No. 4*, p. 32, para. 143. As to what was said in reference to the right to respect for family life: *Bykov v. Russia*, 2009, para. 81; and ECtHR, *Guide on Article 8*, p. 11, para. 19.

⁶⁴ Pertaining Article 8 of the ECHR: *Dudgeon v. the United Kingdom*, 1981, para. 51; and ECtHR, *Guide on Article 8*, p. 13, para. 28. In reference to Article 2 of Protocol No. 4 of the ECHR: *Khlyustov v. Russia*, 2013, para. 84; and ECtHR, *Guide on Article 2 of Protocol No. 4*, p. 34, para. 162.

⁶⁵ As to Article 8: *Dudgeon v. the United Kingdom*, 1981, para. 52; and ECtHR, *Guide on Article 8* cit., p. 13, para. 28. In regard to Article 2 of Protocol No. 4 of the ECHR: *Khlyustov v. Russia*, 2013, para. 84; and ECtHR, *Guide on Article 2 of Protocol No. 4* cit., p. 34, para. 16.

⁶⁶ Steven Greer, *The Margin of Appreciation: Interpretation and Discretion Under the European Convention on Human Rights*, Council of Europe Publishing, 2000, p. 5.

and liberties consecrated in the Convention⁶⁷. When all domestic remedies have been exhausted that the institutions created by the ECHR shall become involved and intervene⁶⁸.

As follows from the principle of subsidiarity, each State should decide democratically what is more appropriate for itself and «The principle of review states that the role of the Court is not one of final court of appeal or “fourth instance”. Therefore, the main responsibility of ensuring the rights provided in the Convention rests with the Member States, and the role of the Strasbourg organs is limited to ensure whether the relevant authorities have remained within their limits»⁶⁹.

In any event, even though the guidelines under observation pursued legitimate aims - public safety, protection of health and protection of the rights and freedoms of others - and, in reference to the narrow time period - March 2020 -, there was a pressing social need - combating the coronavirus -, no restriction can be considered necessary in a democratic society, unless it's proportionated to the legitimate aim pursued⁷⁰. So, despite the existing domestic margin of appreciation, it is still subject to European supervision, which covers the aim of the restrictive measures and their “necessity”⁷¹.

The principle of proportionality⁷² requires that all decisions and actions taken by the States are appropriate to the legitimate aim pursued, the aim or purpose resulting from the constitution or from the law. In addition, States must provide a rationale for the measure taken, and also on the specific objective or purpose pursued. The last requirement, consistent with the principle of proportionality, is the need for an evaluation on the proportionality in the narrow sense. To refine this variant of proportionality, States and the ECtHR would look at the proportionality between the restriction resulting from the measure taken, and the gain it brought about. There is also a consideration of the balance of the restriction and the benefits that flow therefrom. A balance will be considered to exist if the restriction on the right does not impact its essential content. All the criteria will then take into account the specific margin of appreciation recognized to the States.

It is apparent that the guidelines that imply the separation between newborn infants and their mothers are appropriate to achieve public safety, the protection of health and the protection of the rights and freedoms of others, and that the motives underlying the abovementioned guidelines are sufficient since they are designed to combat the spread of SARS-CoV-2. However, the actual proportionality in the narrow sense of the different extents and dimensions that the aforementioned separation can take may be dubious.

⁶⁷ *Handyside v. The United Kingdom*, 1976, para. 48.

⁶⁸ *Handyside v. The United Kingdom*, 1976, para. 48.

⁶⁹ https://www.coe.int/t/dghl/cooperation/lisbonnetwork/themis/echr/paper2_en.asp#P106_8173.

⁷⁰ As to Article 8 of the ECHR: *Dudgeon v. the United Kingdom*, 1981, para. 52; and ECtHR, *Guide on Article 8*, p. 13, para. 28. In regard to Article 2 of Protocol No. 4 of the ECHR: *Khlyustov v. Russia*, 2013, para. 84; and ECtHR, *Guide on Article 2 of Protocol No. 4*, p. 34, para. 162.

⁷¹ *Handyside v. The United Kingdom*, 1976, para. 49.

⁷² Kristina Trykhlil, *The Principle of Proportionality in the Jurisprudence of the European Court of Human Rights*. EU and Comparative Law Issues and Challenges Series, 2020; 4: 128-154, available at <https://doi.org/10.25234/eclic/11899>.

In March 2020, the knowledge that the scientific community had about the new coronavirus was, as we have said, insufficient. Let us remember: it was known that the transmission of the virus was quick and easy, that the virus could, and did, cause death, and that it was, or at least appeared to be, of greater concern in adults with pre-existing health problems.

The level of knowledge in the various member states was similar. However, it should not be forgotten that the consequences of the virus, namely the number of infections, were different and that in some member states the experience was more overwhelming, as in Italy.

Without prejudice to the fact that knowledge of the virus was very similar in all member states, because the scientific community shared the knowledge it acquired during the course of the pandemic situation, the truth is that the measures taken by member states were different, some more restrictive than others.

Countries such as Portugal, for example, decided to require a minimum distance of 2 metres between the mother's bed and the baby's cot when more restrictive measures were not necessary. In the same circumstances, other countries such as Belgium and Germany have considered that the appropriate minimum distance was 1.5 metres. Furthermore, in Germany and Belgium, after first contact between a mother with suspected or confirmed COVID-19 and her newborn child, the child was kept in isolation until the test result was known, and the child remained in isolation for 14 days even if the result was negative. The same requirement, isolation for a period of 14 days, did not apply in other member states.

It should also be noted that in Poland, in circumstances similar to those described, the newborn was isolated from its mother during hospitalization and breast milk was provided remotely.

Breastfeeding, however, was encouraged in almost all member states, even in the case of separation, and here there is greater consistency in the measures taken by the different states. Nevertheless, it should be noted that in Poland, if the mother tested positive for SARS-Cov-2, although breastfeeding was promoted, the administration of infant formula was considered, even for organizational reasons.

Some member states made it compulsory to test both mother and infant, while others considered testing only in the event of symptoms, and still others considered the infant to be positive for SARS-CoV-2 after contact with a positive mother without testing the newborn, as in the Netherlands, for example.

Notwithstanding, the margin of appreciation which the States hold plays a key role in ascertaining if the principle of proportionality was (not) upheld⁷³. Amongst other elements, the extent of the margin of appreciation shall vary according to the presence or absence of the European consensus on a certain matter⁷⁴, being narrow if such consensus exists and wider if not⁷⁵.

⁷³ Kristina Tryklib, *The Principle of Proportionality*, p. 139.

⁷⁴ Kristina Tryklib, *The Principle of Proportionality*, p. 141.

⁷⁵ Kristina Tryklib, *The Principle of Proportionality*, p. 146.

There appears to not be a consensus on the best measures to combat the proliferation of the coronavirus, as some countries ended up embracing harsher separations between newborns and their mothers than others.

Consequently, in an anti-COVID context, States enjoy a wide margin of appreciation in regard to the right to respect for family life and the disparate guidelines dictating the separation between newborn infants and their mothers should be perceived as being proportionate to the aims pursued.

3. Part III

H. Final considerations

In a globalized world, threats of the magnitude of the one we are dealing with are undeniable, bringing to debate the impacts on the most varied fundamental rights. For this reason, it is essential to think about the future with the lessons of the present.

Faced with the centrality of the rights affected, it is up to the scientific community to reflect on the preservation of the essential core of freedoms. In particular, those applying the Convention are called upon to work together to preserve the rights set out in it.

In the uncertainty of the future, knowing only that children will be part of it, measures adopted in a crisis situation must not compromise their full and healthy development and the adult they will become.

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ECtHR Case Law

<i>A. and Others v. the United Kingdom</i> , 2012	<i>Dudgeon v. the United Kingdom</i> , 1981	<i>Kotiy v. Ukraine</i> , 2015	<i>P.T. v. the Republic of Moldova</i> , 2020
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<i>De Tommaso v. Italy</i> , 2017	<i>Khlyustov v. Russia</i> , 2013	<i>Nada v. Switzerland</i> , 2012	<i>Sissanis v. Romania</i> , 2007
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<i>Domenichini v. Italy</i> , 1996	<i>Kopp v. Switzerland</i> , 1998	<i>Olsson v. Sweden</i> (No. 1), 1988	<i>Vyerentsov v Ukraine</i> , 2013

Webgraphy

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