

Constitutional principles of functioning of democratic institutions in the conditions of COVID-19 pandemic: Domestic practice and foreign experience

Principios constitucionales de funcionamiento de las instituciones democráticas en las condiciones de la pandemia COVID -19: práctica nacional y experiencia extranjera

Princípios constitucionais de funcionamento das instituições democráticas nas condições da pandemia COVID -19: Prática doméstica e experiência estrangeira

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Abstract

Due to the spread of the coronavirus infection around the world, there is a threat of destabilization of the democratic development of most countries. Therefore, the objective reality of today is the need for global consolidation of states and the advance of a promising strategy for the development of democracy in the context of the covid-19 pandemic. As a result of the study, the authors suggest that to overcome the crisis in the post-war period, democracies should also take several measures, including: to adopt a "Global Declaration of Human Rights in a Pandemic", as well as the conditions and possibilities of their limitation; to carry out the reception of the norms proclaimed in the proposed declaration by national Constitutions; to promote the dissemination of information of a legal and educational nature, aimed at the formation of global legal awareness to develop a person's ability to self-limit guaranteed constitutional rights in the event of a pandemic; to improve the constitutionalization of digital human rights to overcome digital discrimination and create an effective system to guarantee and protect digital rights.

Key words: covid-19 pandemic, constitutional human rights, constitutionalism, constitutionalization of digital human rights, democracy, restrictions on constitutional human rights.

Resumen

Debido a la propagación de la infección por coronavirus en todo el mundo, existe una amenaza de desestabilización del desarrollo democrático de la mayoría de los países. Por lo tanto, la realidad objetiva de hoy en día es la necesidad de una consolidación global de los Estados y el avance de una estrategia prometedora para el desarrollo de la democracia en el contexto de la pandemia de covid-19. Como resultado del estudio, los autores sugieren que, para superar la crisis en la posguerra, las democracias también deberían tomar varias medidas, incluyendo: adoptar una "Declaración Global de Derechos Humanos en una Pandemia", así como las condiciones y posibilidades de su limitación; llevar a cabo la recepción de las normas proclamadas en la declaración propuesta por parte de las Constituciones nacionales; promover la difusión de información de carácter jurídico y educativo, dirigida a la formación de una conciencia jurídica global para desarrollar la capacidad de la persona de autolimitar los derechos constitucionales garantizados en caso de pandemia; mejorar la constitucionalización de los derechos humanos digitales para superar la discriminación digital y crear un sistema eficaz para garantizar y proteger los derechos digitales.

Palabras clave: pandemia de covid-19, derechos humanos constitucionales, constitucionalismo, constitucionalización de los derechos humanos digitales, democracia, restricciones a los derechos humanos constitucionales.

Resumo

Devido à propagação da infecção pelo coronavírus em todo o mundo, existe uma ameaça de desestabilização do desenvolvimento democrático da maioria dos países. Portanto, a realidade objetiva de hoje é a necessidade de consolidação global dos Estados e o avanço de uma estratégia promissora para o desenvolvimento da democracia no contexto da pandemia da covid-19. Como resultado do estudo, os autores sugerem que para superar a crise no período pós-guerra, as democracias também deveriam tomar várias medidas, inclusive: adotar uma "Declaração Global de Direitos Humanos em uma Pandemia", bem como as condições e possibilidades de sua limitação; realizar o recebimento das normas proclamadas na declaração proposta pelas constituições nacionais; promover a disseminação de informações de natureza jurídica e educacional, visando a formação de uma consciência jurídica global para desenvolver a capacidade de uma pessoa de auto-limitar direitos constitucionais garantidos em caso de pandemia; melhorar a constitucionalização dos direitos humanos digitais para superar a discriminação digital e criar um sistema eficaz para garantir e proteger os direitos digitais.

Palavras-chave: Pandemia covid-19, direitos humanos constitucionais, constitucionalismo, constitucionalização dos direitos humanos digitais, democracia, restrições aos direitos humanos constitucionais.

INTRODUCTION

It's known that law, as a system of mandatory rules of conduct introduced or sanctioned by the state, is the most effective regulator of public relations. No other social norms, such as traditions, customs, norms of morality, etc., are able to regulate and ensure the protection of various social relations as the rules of law do.

Law, as a unique social phenomenon, arises with the emergence of the state, because an indispensable attribute of any legal norm is the possibility of using state coercion in case of non-compliance with its instructions. On the other hand, it is with the help of legal norms that states are able to perform their functions properly.

Moreover, law arises together with the first ancient states and then passes side by side with the state and society through all the historical stages of their development. In particular, the law arises in the period of formation of the first states (Ancient Rome, India, China, Egypt, etc.), develops together with the specified and other state formations during all period of state building, and continues to carry out the functions today.

There are many theories of the origin of law: theological, organic, positivist, natural law, violent, psychological, Marxist, and so on. Probably, each of the above concepts to a greater or lesser extent have found their manifestations in the process of formation of law as a unique social phenomenon.

The modern civilizational stage of human development is determined by the processes of transformation of legal reality, and it takes place in the context of the need for coordinated interstate legal cooperation in the face of global threats (demographic, environmental, climatic, terrorist, etc.). Recently, the world community has faced another problem – the COVID-19 pandemic, which significantly affects and radically changes the functioning of the constitutional mechanism of public power and the organization of all spheres of society (social, economic, political, cultural, environmental, legal, etc.) in the global scale.

These processes involve the need for consolidated interstate cooperation and require the universalization and development of supranational legal institutions. The creation of a system of supranational legal systems, which are gradually moving into national legal systems, requires proper constitutional regulation and the development of universal mechanisms to counter such a global threat as the COVID-19 pandemic.

Humanity's global challenges raise the issue of changing the era of legal thinking and require modernization of the doctrine of constitutionalism, because the Constitution is a system-forming matrix, which lays down the program goals of state-building and the main vectors of modern democracy.

The proposed study is carried out to determine the real state of democracy in Ukraine and abroad during the COVID-19 pandemic, based on comparative legal analysis, as well as to identify prognostic trends and promising areas of democracy. Researchers emphasize the need to develop modern technological innovations and the possibility of adapting democratic legal institutions to the conditions of digital reality, namely the introduction of electronic voting, electronic voter identification, electronic discussion, electronic petitions, etc.

I. METHODOLOGY

The methodological basis of the study is a set of philosophical, general and scientific principles and approaches, and special scientific methods of cognition of constitutional and legal phenomena, the use of which allowed to obtain scientifically sound results, including systemic and structural-functional methods. Thus structural-functional method was used to identify useful preconditions for the need for constitutional regulation of forms of democracy in the period of the COVID-19 pandemic. The application of the axiological method aims to reveal the content of the basic political and legal values of democracy and the peculiarities of their implementation during the pandemic.

The method of constitutional-comparative studies and the method of dialectical logic revealed constant patterns and general trends in the development of democratic institutions in the COVID-19 pandemic, and in particular, the method of comparative analysis identifies destructive manifestations in the actions of governments. Sociological and statistical methods allow us to analyze the system-structural relationship between the spread of coronavirus infection and the actions of governments, and the restriction of human rights and democratic governance.

II. THE PRESENTATION OF KEY RESEARCH FINDINGS

Recently, the study of democracy in a pandemic has received considerable attention from the United Nations. The last is a universal international organization established to promote peace and international security, and the development of cooperation between states, intergovernmental organizations involved in supporting democratic processes in the world such as the International Institute for Democracy and Electoral Assistance (International IDEA), as well as various non-governmental international

organizations such as the International Foundation for Electoral Systems (IFES), Freedom House, the European Endowment for Democracy (EED), etc.

Researchers around the world are also concerned about the development of democracy, and therefore more and more analytical materials on this issue are emerging, including: Lührmann, Edgell, Grahn, Lachapelle and Maerz;¹ Atkinson, Applegate and Aaberg;² Kurmanaev;³ Mugabi;⁴ Youngs and Panchulidze;⁵ Verlos;⁶ and Russell and Zamfir.⁷

However, insufficient attention has been paid to the development of democratic institutions in the context of the COVID-19 pandemic. The purpose of this study is to carry out a comparative legal analysis of the constitutional foundations of the functioning and development mechanisms of democratic institutions during the COVID-19 pandemic in Ukraine and foreign countries, and to identify promising areas for their implementation.

III. RESULTS AND DISCUSSION

1. The impact of the covid-19 pandemic on the development of constitutionalism and the effectiveness of public authority

For a long time, the international community tried to develop universal standards of human rights development, which are enshrined in international regulations such

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- 1 Anna Lührmann, Amanda B. Edgell, Sandra Grahn, Jean Lachapelle & Seraphine F. Maerz. *Does the coronavirus endanger democracy in Europe?* CARNEGIE EUROPE. June 23, 2020. Available at: <https://cutt.ly/WTD6iLU>
 - 2 Virginia Atkinson, Meredith Applegate & Rebecca Aaberg. *INCLUSION AND MEANINGFUL POLITICAL PARTICIPATION IFES COVID-19. BRIEFING SERIES: INTERNATIONAL FOUNDATION FOR ELECTORAL SYSTEMS.* International Foundation for Electoral Systems. (2020). Available at: <https://cutt.ly/pTFrJkm>
 - 3 Anatolyi Kurmanaev. *América Latina se enfrenta a un retroceso de la democracia durante la pandemia.* NEW YORK TIMES. July 29, 2020. Available at: <https://cutt.ly/1TD6tT6>
 - 4 Isaac Mugabi. *Africa: COVID-19 – Security Forces in Africa Brutalizing Civilians Under Lockdown.* ALLAFRICA. April 20, 2020. Available at: <https://cutt.ly/qTFwKTw>
 - 5 Richard Youngs & Elene Panchulidze. *GLOBAL DEMOCRACY & COVID-19: UPGRADING INTERNATIONAL SUPPORT.* European Endowment for Democracy, The Carter Center, European Partnership for Democracy, European Network of Political Foundations, IFES, IRI, NDI, NED, Parliamentary Centre, WFD. (2020). Available at: <https://cutt.ly/yTFrYmi>
 - 6 Nataliia Verlos. *Innovative potential of reception as a constitutional and legal phenomenon.* BULLETIN OF ZAPORIZHIA NATIONAL UNIVERSITY: LEGAL SCIENCES 3-4. 2019. P. 24.
 - 7 Martin Russell & Ionel Zamfir. *Digital technology in elections: Efficiency versus credibility?* EUROPEAN PARLIAMENTARY RESEARCH SERVICE. September 10, 2020. Available at: <https://cutt.ly/DTFwGAA>

as the Universal Declaration of Human Rights,⁸ the Convention for the Protection of Human Rights and Fundamental Freedoms,⁹ the International Covenant on Civil and Political Rights,¹⁰ etc. Those were ratified by national constitutional legislation. That is, in the process of interaction of international and national legal systems, there was a transformation of domestic constitutional and legal regulation, which is a characteristic feature of modern globalization processes.

The COVID-19 pandemic challenges the functioning and development of democratic institutions and threatens the many years of experience of anthropocentric state-building trends in the modern world. According to the World Health Organization (WHO), as of November 15, 2020, 53,766,728 confirmed cases of COVID-19 were registered, including 1,308,975 deaths,¹¹ and this figure is growing. This confirms the fact that the spread of the coronavirus requires concerted action and appropriate response from the international community, but does not mean that restrictions on the exercise of fundamental human rights and the stagnation of democracy are imposed.

Several international instruments provide for the possibility of derogating from the guarantee of certain human rights in the event of an emergency. Thus, following Article 4 of the International Covenant on Civil and Political Rights¹² during emergencies, states may take measures to derogate from their obligations, except those which provide for discrimination "solely on grounds of race, color, sex, language, religion or social origin". Article 15 of the Convention for the Protection of Human Rights and Fundamental Freedoms¹³ provides that in time of war, or other public danger threatening the life of a nation, measures may be taken that derogate from the obligations of the Convention to the extent required by the exigencies of the situation.

At the same time, any derogation should be explicitly regulated in national legislation to protect against abuse, arbitrariness, and ambiguous interpretation, and should be justified by the need to combat the danger to society. States must bear in mind that any measures taken must be aimed at protecting the democratic order

8 Resolution 217A of 1948. Universal Declaration of Human Rights. December 16, 1948. Available at: <https://cutt.ly/OTFeomL>

9 Convention for the Protection of Human Rights and Fundamental Freedoms. December 10, 1950. Available at: <https://cutt.ly/jTD6Cxb>

10 Resolution 2200A (XXI) of 1966. International Covenant on Civil and Political Rights. December 16, 1966. Available at: <https://cutt.ly/9TFcecg>

11 KazInform. *WHO records over 590,000 new cases of COVID-19*. November 16, 2020. Available at: <https://cutt.ly/bTFwWH8>

12 Resolution 2200A (XXI) of 1966. International Covenant on Civil and Political Rights. December 16, 1966. Available at: <https://cutt.ly/9TFcecg>

13 Convention for the Protection of Human Rights and Fundamental Freedoms. December 10, 1950. Available at: <https://cutt.ly/jTD6Cxb>

from threats to it, and efforts should be made to preserve the values of a democratic society, such as pluralism, tolerance and a common worldview.¹⁴

The international community is concerned about the state of democracy. In particular, an open letter initiated by the Stockholm International IDEA and the Washington National Endowment for Democracy, which was supported by 73 pro-democracy institutions, as well as by political and community leaders around the world, including 13 Nobel laureates and 62 former heads of state, affirms that:

The current pandemic is a serious global threat to democracy. Authoritarian rulers around the world view the COVID-19 crisis as a new political battlefield in their attempts to denigrate democracy as a weak political system and nullify its vast achievements over the past few decades. Democracy is under threat, and people who care about it must show the will, discipline, and solidarity to protect it. Freedom, health, and dignity of people all over the world are at stake.¹⁵

The need to respect and respect human rights to prevent all forms of discrimination, racism, and xenophobia is emphasized in the United Nations Recommendations¹⁶ of April 2, 2020. The European Union (EU) has recently renewed its commitment to democracy around the world. The new EU Action Plan on Human Rights and Democracy for 2020-2024 sets out Europe's ambitious plans and outlines foreign policy action plans for the years to come. Besides, in 2019, cooperation projects in support of democracy covered 37 countries with a total budget of 147 million euros.¹⁷

However, violations of the constitutional principles of democracy, especially during a pandemic, occur in most countries, including the EU. According to the Institute for Democracy (V-Dem), an index of democratic violations during a pandemic has been created, which uses a scale from 0 to 1: Lower scores indicate fewer violations of democratic standards in emergency measures. In particular, Hungary has the highest score of 0.375 points, Poland 0.125, Bulgaria 0.083, Romania 0.083, and Greece 0.042.¹⁸

14 Information Documents sg/Inf(2020)11 of 2020. Respecting democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis. April 7, 2020. Available at: <https://cutt.ly/ITFqnsY>

15 Defend Democracy. *A Call to Defend Democracy*. June 26, 2020. Available at: <https://cutt.ly/oTFqo9e>

16 Resolution A/RES/74/270 of 2020. Global solidarity to fight the coronavirus disease 2019 (COVID-19). April 2, 2020. Available at: <https://cutt.ly/1TFeGaG>

17 EU Neighbours. *COVID-19: Both a challenge and an opportunity for democracy*. September 15, 2020. Available at: <https://cutt.ly/LTFqjxX>

18 Anna Lührmann et al., *supra*, note 6.

Violations of the democratic regime are observed in many countries. For example, in Hungary, the Parliament has given the Prime Minister broad powers to pass decrees that have the force of law without specifying the date of their expiration. Besides, emergency measures include prison sentences for publishing fake pandemic news. A similar situation occurs in Poland, where regulations on the state of emergency are established without an end date, and some restrictions on media freedom are imposed. In Romania, there are restrictions on media freedom and abuse by the police during curfews. In Cyprus and Greece, the fight against coronavirus involves severe restrictions on the movement of refugees and asylum seekers.¹⁹

In Ukraine, the government begins to take active steps to prevent the spread of COVID-19 in March 2020. The first stage, from March 12 to April 3, 2020, is characterized by the introduction of a quarantine regime throughout the country with restrictions on attendance by educational institutions; holding all mass events in which more than 200 people take part, except for the measures necessary to ensure the work of state authorities and local governments. Sports events are allowed without the participation of spectators (fans). Subsequently, it was extended from April 24²⁰ to May 11, 2020,²¹ and from May 22 to June 22, 2020,²² with the gradual introduction of additional restrictions on the mask regime, ban on staying on the streets without identity documents, special regime transportation of passengers, the obligation to observe a social distance of 1.5 meters, etc.

The next stage of quarantine in Ukraine from August 1 to December 31, 2020, extends to the entire territory of the country and is established depending on the epidemic situation in the region or district or city of regional importance. "Green", "yellow", "orange" or "red" levels the epidemic risk of spreading COVID-19 with appropriate restrictions.²³

19 *Ibidem*.

20 Resolution 211 of 2020. On amendments to the resolution of the Cabinet of Ministers of Ukraine. March 11, 2020 (Ukraine). Available at: <https://cutt.ly/ITFeyOW>

21 Resolution 291 of 2020. On amendments to some acts of the Cabinet of Ministers of Ukraine. April 22, 2020 (Ukraine). Available at: <https://cutt.ly/PTFebVR>

22 Resolution 392 of 2020. On establishing quarantine in order to prevent the spread of acute respiratory disease COVID-19 caused by the coronavirus SARS-CoV-2 in Ukraine and the stages of mitigation of anti-epidemic measures. May 20, 2020 (Ukraine).

23 Resolution 641 of 2020. On the establishment of quarantine and the introduction of enhanced anti-epidemic measures in the territory with a significant spread of acute respiratory disease COVID-19 caused by the spread of acute respiratory disease COVID-19 caused by coronavirus SARS-CoV-2. October 22, 2020 (Ukraine). Available at: <https://cutt.ly/WTFeSY9>

2. *Functioning of separate institutions of democracy in the period of COVID-19*

The functioning of an effective system of democratic institutions during a pandemic is an urgent problem in most countries. After all, under the auspices of the fight against the coronavirus, governments can resort to appropriate manipulations to over-centralized public power and hamper democratic development.

Freedom House, an international human rights NGO, calls on governments to protect civil and political rights during and after a pandemic, adhering to the following principles:

1. Any emergency restrictions must be necessary, clearly defined, and accepted transparently;
2. extraordinary restrictions on fundamental human rights, including freedom of assembly, association or freedom of movement, should be limited in duration, subject to independent oversight, and established and continued only based on transparent criteria. Individuals should be able to seek redress and compensation for unnecessary or disproportionate violations of rights committed during the crisis;
3. programs for monitoring or collecting personal information using new technologies must be administered openly and transparently;
4. free press is especially important in emergencies. There should be no state censorship or other unjustified restrictions on the free flow of information. Every effort should be made to provide and maintain access to the Internet and other communication platforms;
5. all possible steps should be taken to hold fair elections, and their postponement can take place only as a last resort.²⁴

It is worth noting that pandemic elections are a specific challenge for decision-makers. They require careful planning to reduce the risk of spreading the disease, and significant operational adjustments. In a crisis, such as COVID-19, it is even more important that electoral and political decision-makers are called upon to safeguard the integrity of the democratic process by taking the necessary measures to increase inclusiveness and protect the democratic rights of marginalized communities.²⁵

²⁴ Freedom House. *Principles for Protecting Civil and Political Rights in the Fight against COVID-19*. March 24, 2020. Available at: <https://cutt.ly/jTFqxA3>

²⁵ Virginia Atkinson et al., *supra*, note 7.

According to the International Foundation for Electoral Systems (IFES), as of October 7, 2020, elections were postponed in 66 countries and eight territories, and 113 election events were postponed in total.²⁶ Among them are Australia, Austria, Brazil, Armenia, Canada, France, Germany, India, Iran, Italy, Latvia, Moldova, Serbia, and Slovakia.

In some countries, elections have been canceled altogether until the spread of coronavirus infection. Thus, in Hungary, according to §6 of the Law on Coronavirus Protection, by-elections may be called only the day after the end of the state of emergency, as well as referendums. However, this law does not set a final date for the state of emergency, with the reference to the fact that this date will be determined by Parliament.²⁷

Ukraine is one of the few countries where local elections scheduled for October 25, 2020, took place on time, although they were held following the Government's Procedure for the implementation of anti-epidemic measures during the organization and conduct of elections.²⁸

It is quite difficult to implement elections in conditions of quarantine, emergency, or lockdown regime, which is introduced in most states and other constitutional forms of direct democracy such as the right to peaceful assembly, freedom of expression, strikes, etc. Such a situation may provide an opportunity for manipulation to significantly restrict human rights, usurp power, or other manifestations of authoritarianism. For example, in Hong Kong, excessive force is used to contain protests during a coronavirus outbreak. Similarly, mass rallies were suspended in India.²⁹ In Zimbabwe, the imposition of a state of emergency requires mandatory testing, detention and treatment, and even demolition or destruction of any premises that may "contribute" to the spread of the coronavirus.³⁰

In Latin America, political leaders have used the crisis as an excuse to extend the legislature, weaken oversight of government actions and restrict the right to free

26 International Foundation for Electoral Systems (IFES). *Elections postponed due to COVID-19*. October 7, 2020. Available at: <https://cutt.ly/wTFwgvU>

27 Draft Law T/9790 of 2020. A koronavírus elleni védekezésről (On protection against coronavirus). March 20, 2020. Available at: <https://cutt.ly/LTFqd8w>

28 Resolution 641 of 2020. On the establishment of quarantine and the introduction of enhanced anti-epidemic measures in the territory with a significant spread of acute respiratory disease COVID-19 caused by the spread of acute respiratory disease COVID-19 caused by coronavirus SARS-CoV-2. October 22, 2020 (Ukraine). Available at: <https://cutt.ly/WTFeSY9>

29 Katherine Ellena & Erica Shein. *Emergency powers and the COVID-19 pandemic: protecting democratic guardrails*. INTERNATIONAL FOUNDATION FOR ELECTORAL SYSTEMS. March 30, 2020. Available at: <https://cutt.ly/pTFwbeH>

30 *Ibidem*.

expression of political views, i.e., actions that would be described as authoritarian and anti-democratic, but which are now characterized as rescue measures to curb the spread of the disease.³¹

The number of cases of ill-treatment by law enforcement agencies in African countries is growing. In particular, the most stringent measures were observed in Nigeria, South Africa, Uganda, and Kenya. According to the Nigeria Human Rights Commission, law enforcement officials killed at least eighteen civilians in an attempt to secure a state-imposed lockdown regime to curb the spread of COVID-19.³² In Iran, lethal weapons and tear gas have been used in several prisons to suppress protests in response to prisoners' concerns about COVID-19 infection.³³

Recently, most countries have introduced significant restrictions on the exercise of the right to information. Along with the pandemic, there is such a phenomenon as "infodemia", i.e., the spread of false information. The WHO emphasizes: Like pathogens in epidemics, misinformation is spreading faster and faster and makes it more difficult to respond to health emergencies.³⁴ Therefore, in order to respond effectively to infodemia, WHO calls for the adaptation, development, testing and evaluation of new evidence-based measures and practices to prevent, detect and respond to erroneous and misinformation data.

In Hungary, criminal liability has been introduced for disseminating false information about the coronavirus,³⁵ and the Romanian government has shut down several websites, accusing them of spreading false information about the coronavirus.³⁶

Ukraine guarantees at the constitutional level the right to freedom of thought and speech, the right to freely express one's views and beliefs, and the right to freely collect, store, use, and disseminate information (Article 34³⁷), as well as the right to free access to information on the state of the environment may be classified, restrictions may be established only by law.³⁸ At the same time, the current sectoral legislation states that access to information on accidents, catastrophes, dangerous natural phe-

31 *Ibidem*.

32 Isaac Mugabi, *supra*, note 9.

33 Amnesty International. *Iran: Prisoners killed by security forces during COVID-19 pandemic protests*. April 9, 2020. Available at: <https://cutt.ly/OTD55ZJ>

34 World Health Organization (WHO). 1st WHO Infodemiology Conference. July 16, 2020. Available at: <https://cutt.ly/zTFrLU2>

35 Draft Law T/9790 of 2020. A koronavírus elleni védekezésről (On protection against coronavirus). March 20, 2020. Available at: <https://cutt.ly/LTFqd8w>

36 Anna Lührmann et al., *supra*, note 6.

37 Constitution of Ukraine. June 28 of 1996 (Ukraine). Available at: <https://cutt.ly/gTD-6QT7>

38 *Ibidem*.

nomena, and other emergencies that threaten human safety, as well as information on the health of the population, may not be restricted (paragraphs 2, 3 Part 4 of Article 21 of the Law of Ukraine "On Information"³⁹). This may result in disciplinary, civil, administrative, or criminal liability (Article 27 of the Law of Ukraine "On Information"⁴⁰).

However, administrative liability is established for spreading false rumors that may cause panic among the population or disturb public order. In particular, as of April 21, 2020, the Security Service of Ukraine exposed 207 Internet agitators who distributed fakes about the coronavirus. It also blocked more than 2,000 online communities with a total audience of 800,000 users).⁴¹

Thus, as the international report proposed by the European Endowment for Democracy (EED) researchers rightly points out: "[...] in an effort to contain the virus, governments around the world are imposing a variety of emergency powers. Although in many cases, these restrictive measures were proportionate and justified to protect the lives and health of the population, some governments have used them to restrict democracy and avoid public criticism".⁴²

Summarizing the above, it should be noted that currently there are certain violations around the world in the field of ensuring and implementing human rights and the effective functioning of democratic institutions. The main reason for these violations is the unpreparedness of states for such a global threat to humanity as a pandemic and, therefore, there is an urgent need for open dialogue and consensus to create a universal system of standards for the effective functioning of democratic institutions and human rights.

3. Digital transformation (digitalization) as a factor in the development of democracy in the context of the COVID-19 pandemic

The development of democratic human rights institutions in the current pandemic exacerbates the already tense situation in this area, from inadequate health care systems, gaps in social protection, digital barriers and unequal access to education

39 Law 48 of 1992. On information. October 10, 2020 (Ukraine). Available at: <https://cutt.ly/5TFwPI2>

40 *Ibidem*.

41 Security Service of Ukraine (ssu). *ssu has already exposed 207 agitators who distributed fakes about a coronavirus: The message of the press center*. April 21, 2020. Available at: <https://cutt.ly/JTFrOnZ>

42 Richard Youngs and Elene Panchulidze, *supra*, note 10.

to environmental degradation, discrimination due to racial differences and violence against women.

These problems do indeed threaten democracy in general, but in European politics the idea is gradually being formed that the current crisis may become a new opportunity to breakthrough.⁴³ On the one hand, it is difficult to agree with this opinion because, as noted earlier, there are many facts of violation of constitutional principles and the effectiveness of democratic institutions, but, on the other hand, rapid development has always been accompanied by exacerbation of systemic political crisis. Therefore, the only way out of this situation is the need to develop modern technological innovations, and therefore there is an urgent need to adapt democratic legal institutions to the conditions of digital reality.

The evolution of e-government has led to the gradual formation of the e-Government 3.0 (e-Gov 3.0) model, which is based on innovations related to big data analytics in the field of administrative and business process management. The development of this model is directly dependent on information and communication technologies used in public administration to improve service delivery, policymaking, and resource management. This model involves the use of innovative technologies of blockchain, artificial intelligence, semantic analysis of the Internet and text, machine learning, Internet of Things, etc., included in the field of public administration.

The impact of the digital environment on legal reality is gradually becoming an interdisciplinary, fundamental problem of our time, which requires doctrinal rethinking, the development of conceptual foundations, and general development strategy. Constitutional law as a leading branch of the national legal system creates a system of norms designed to form the basis of legal regulation of public relations. Therefore, for the effective functioning of constitutional and legal institutions, it is necessary to modernize them, taking into account the development of digital technologies.

Recently, legal discourse is gradually enriched with such terms as digital personal rights, right to the Internet, digital services, virtual reality, cyberspace, digital sovereignty, artificial intelligence, cloud services, the Internet of Things, blockchain, etc.

In the context of the socio-economic upheavals caused by the coronavirus, some national and local authorities in the EU have initiated attempts to overcome this acute digital exclusion. In Milan, free internet access was provided for poor families. Barcelona's overnment has distributed thousands of laptops and tablets with Internet connections to students in difficult life situations.⁴⁴

43 EU Neighbours, *supra*, note 22.

44 Carme Colomina. *Digital divides and the coronavirus, in how the coronavirus tests European democracy*. CARNEGIE EUROPE. 2020. Available at: <https://cutt.ly/kTD6lvK>

Europe is the world's region with the highest percentage of people using the Internet – 82.5%; but in some EU countries, such as Bulgaria, Greece, Italy, and Romania, almost a quarter of the population never uses the Internet. A similar situation is observed in the United States, where four out of ten households do not have broadband.⁴⁵

Since the development of digital technologies, especially in a pandemic, is global, the legal norms governing the process related to this are mostly transnational in nature, and therefore, the reception of the relevant legal models is a necessary condition for the development and constitutional construction of a modern democratic state.

The Council of Europe has long emphasized the need to introduce and develop e-government, in particular, the recommendations adopted in 2009 by the Committee of Ministers of the Council of Europe CM/Rec (2009)1 to the member states of the Council of Europe on e-Democracy, which invited the possibility of using the means of electronic democracy to strengthen democracy, democratic institutions, and processes, and to consider and implement e-democracy through information and communication technologies (ICT).

According to paragraph 35 of the Recommendation of the Committee of Ministers of the Council of Europe CM/Rec (2009)1, the following sectors of e-democracy development are defined: e-parliament, e-legislation, e-justice, e-mediation, e-initiative, e-elections, e-referendum, e-voting, e-consultations, electronic petitions, electronic agitation, electronic counting of votes, and electronic polls. That is, e-democracy takes advantage of e-participation, e-discussion, and e-forums.

Individually, we would like to emphasize the need for the active introduction of such an institution of democracy as e-elections, which would solve the problem faced by most European countries in the context of the COVID-19 pandemic. The main factor hindering the process of e-elections is the low level of public confidence, digital inequality, high probability of manipulation and others.

However, for example, electronic voter identification has already been effectively implemented in 45 countries (mostly in Africa) where fingerprint scanning is used. Paradoxically, some of the world's least developed countries have become leaders in the use of biometric technology in the electoral process, precisely because of the lack of reliable identity documents and population registers. Somaliland even used an iris scan.⁴⁶

45 *Ibidem.*

46 Martin Russell and Ionel Zamfir, *supra*, note 12.

International standards relating to the specific characteristics of electronic voting and other voting technologies do not yet exist. However, the Council of Europe's recommendation on e-voting standards (adopted in 2004 and updated in 2017) may be useful in this process. In particular, the following is recommended:

- Voters should be reliably identified;
- interfaces should be easy to understand and use for all voters; voters must be able to confirm their vote before it is cast;
- after the vote has been cast, voters should be able to verify that it has been cast correctly;
- voting must be anonymous; all aspects of voting must be completely transparent;
- electronic voting systems must be tested and certified by an independent body (Recommendation CM/Rec(2017)5, 2017).

In Ukraine, most of the areas identified in the Recommendations of CM/Rec (2009)¹ are gradually being implemented, namely:

- E-services such as e-legislation, e-justice, e-petitions have been actively implemented at the state level and in most local governments;⁴⁷
- the functioning of the state web portal of the budget for citizens was launched; the "public budget" technology begins to function and be used by citizens at the level of local self-government;
- platforms for online discussions of draft regulations are being launched, both at the level of state power and the level of local self-government;
- information and telecommunication networks are used in the election process, this includes maintaining a state register of voters with an online service "voter's office" where you can check your inclusion in the State Register of Voters, and electronic counting of votes by the Central Election Commission, etc.⁴⁸.

With the adoption of the Electoral Code in 2019 (Law 396-IX, 2019), Ukraine laid the normative principles of the possibility of experimental use of innovative technologies in the electoral process, in particular under Art. 18. The Central Election Commission may decide on the introduction of innovative technologies, hardware,

⁴⁷ Available at: <https://openbudget.gov.ua/analytics/incomes>

⁴⁸ Available at: https://www.drv.gov.ua/ords/portal!/cm_core.cm_index?start

and software during the organization and conduct of elections in the form of an experiment or pilot project, regarding the following:

1. voting at the polling station using hardware and software (machine voting);
2. counting of votes with the help of technical means for electronic counting of votes;
3. drawing up protocols on the counting of votes, results, and results of voting using the information-analytical system. Unfortunately, during the local elections in Ukraine in 2020, no pilot project was implemented, but the regulatory framework already exists, and therefore there is hope for its implementation in the future.

Foreign countries that have implemented pilot projects for e-elections and e-voting include the Republic of Estonia, the French Republic, the Kingdom of Norway, the Swiss Confederation, and the Australian Union.

Thus, the need for digital transformation (digitalization) and constitutionalization of digital human rights was especially acute during the COVID-19 pandemic, when there was a need to actively use cyberspace to ensure elections and referendums using e-voting technology, as well as the functioning of public authorities, the provision of online services to citizens in both private and public spheres, the implementation of constitutional law and education (distance education), social protection, employment, judicial protection, etc.

IV. CONCLUSIONS

The current political situation related to the implementation of the constitutional principles of democracy is a kind of challenge for the vast majority of countries. The global crisis associated with the COVID-19 outbreak calls for exceptional measures to be taken to prevent the spread of coronavirus infection, but restrictions on rights and freedoms in democracies must be exercised with caution when necessary and limited in duration.

In support of the principles proclaimed by Freedom House (an international human rights NGO), we believe that the threat of a pandemic poses a global challenge to the international community with the need to rethink and qualitatively update most existing democratic practices. To overcome the crisis in the post-war period, democracies should also take the following measures:

1. to adopt a "Global Declaration of Human Rights in a Pandemic", which clearly defines the general principles of human rights in a pandemic limitation;
2. to carry out the reception of the norms proclaimed in the proposed declaration in the national constitutions;
3. to promote the dissemination of information of legal and educational nature aimed at the formation of global legal awareness to develop a person's ability to self-limit guaranteed constitutional rights in the event of a pandemic;
4. to promote the development of digital transformation and effective implementation of the concept of e-government, including electronic voting;
5. promote the constitutionalization of digital human rights to overcome digital discrimination and create an effective system for guaranteeing and protecting digital rights.

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