

PROPORTIONALITY OF HUMAN RIGHTS LIMITATIONS IMPOSED BY OPPORTUNITY PASSPORT IN LITHUANIA

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Abstract: *The article analyses the Green Passport established in Lithuania (named Opportunity Passport) and the proportionality of the imposed limitations on human rights. For the analysis, the German proportionality test is employed and its application to this particular instrument of pandemic management. The article explores the suitability of the aim of the Opportunity Passport, trying to clarify what were the aims sought by the Opportunity passport. Further, in analysing the first step of the proportionality test - suitability- the authors explore the theoretic possibility to attain the pandemic management goals by limiting the access to certain services and events only for vaccinated persons or those having proof of their immunity status. Furthermore, the second step – necessity – is analysed, that is whether the measures were necessary in the absence of other, more lenient but equally effective means of achieving the intended objectives. Lastly, the third step of the three-tier test includes the assessment of the proportionality in the strict sense (stricto sensu) of the restricting measure: is the chosen sanction disproportionate to the constraints imposed on it, does the scale of the measure meet its objectives or will the likely (outset) benefits outweigh the potential losses. The Opportunity Passport legal regulation and the limitations imposed by it are weighed against the gravity of human rights limitations. The last chapter discusses the regulation of Opportunity Passport and its aspects in the context of the prohibition of discrimination. Conclusions of the publication are made on the basis of careful examination of theory and facts.*

Keywords: *Covid pandemic, Opportunity Passport, Covid – 19 health status certificate, human rights limitations, principle of proportionality, discrimination according to health status*

INTRODUCTION

In Lithuania during the COVID-19 pandemic the Government introduced an Opportunity Passport (Lithuanian version of the Green Passport) which allowed access to certain services and shops during pandemic only if a person is vaccinated or complies with other procedures proving the status of his/her immunity. This regulation raises important questions regarding the proportionality of such legal regulation as limiting certain human rights. It also raises questions regarding the prohibition of discrimination of persons, in this case based on their health status.

The extraordinary situation of the pandemic of unseen proportions of course is an important factor in evaluating the justification for the limitations imposed on persons. Nevertheless, it is even more important to carefully weigh the actions restricting human rights as the necessary measures affect such a great number of persons. The regulation has gone from strict measures of quarantine to all citizens, including even the lockdowns of municipalities, to distinction of persons who are vaccinated or have had COVID, from those who do not have immunity. Are these measures justified in the face of scientific information and pure statistical data? At the same moment some of the European states

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were imposing mandatory vaccinations and some were declaring the end of the pandemic. Such variations indicate that the situation is not clear-cut and that reference had to be carefully made both to the scientific data available as well as other relevant aspects of human rights.

The aim of the article is to provide the analysis of the rules establishing the Opportunity passport in Lithuania in the context of the requirements of as proportionality of such measures according to the classical German three tier test of proportionality in the human rights context. The article will provide insights into the requirement of non-discrimination in the discussed context.

1. OPPORTUNITY PASSPORT – IMPOSED LIMITATIONS

The Government of Lithuania has established the so-called Opportunity Passport (hereinafter – OP) in a decree from 2020 establishing the extraordinary situation in the Republic of Lithuania.¹ The OP was introduced in May 2021 and was presented as a temporary decision of the transitional period to open up some of the activities then closed due to quarantine.² Publicly the officials stated that the aim of OP would be to learn to live with the COVID-19 pandemic and that all persons could use the opportunities without any passports whatsoever. Then the OP concerned a limited number of activities (such as eating inside the premises of cafes and restaurants, use other services of leisure, such as billiards or bowling; for events inside up to 500 people, outside up to 2000 people, which was not allowed at the time according to the applicable regime of quarantine;³ personal events with no limitations, housing services, various services).

The stricter provisions regarding OP use came into force from 13 September 2021.⁴ The provisions list the services that may be provided for persons who do not present certain documents stating either his/her vaccination status, proved case of COVID-19 (valid for 210 days), antigen test (valid for 60 days), or test indicating that a person does not have COVID-19 (valid for 48/72 hours). In practice it excluded those persons from visiting any cultural, educational event (only allowing visiting events taking place outside with less than 500 visitors), going to shops which sell non-essential goods, and for the purchase of essential goods, the persons without OP could visit only smaller supermarkets which have an area less than 1500 sq.m. Later an additional limitation was imposed on smaller shops – the shops had to ensure that the area for one customer should be at least 30 sq. m., therefore the customers' flow had to be limited by shop personnel. The persons who did not have an OP could get services only when the provision of service was not longer than 15

¹ Decree of the Government of the Republic of Lithuania. *Regarding the Declaration of the State Level Extraordinary Situation*. Register of Legal Acts, 2020-02-26, No. 4023, with subsequent changes.

² The regime of quarantine imposing various limitations to all persons was in force in Lithuania from 16 March 2020 to 17 June 2020 and from 7 November 2020 until 30 June 2021.

³ NAPRYS, E. Viskas, ką reikia žinoti apie Galimybių pasą: kur gauti, kaip naudoti, kur galima eiti? [Everything you need to know about Opportunity Passport: where to get, how to use, where can you go?] In: *Delfi.lt* [online]. 20. 5. 2021 [2022-10-20]. Available at: <<https://www.delfi.lt/verslas/verslas/viskas-ka-reikia-zinoti-apie-galimybiu-pasa-kur-gauti-kaip-naudoti-kur-galima-eiti.d?id=87241139>>.

⁴ Decree of the Government of the Republic of Lithuania, *Regarding the changing of the Decree of the Government of the Republic of Lithuania of 26 February 2020 No. 152*, Register of Legal Acts, 2021-08-13, Nr. 17455.

minutes, therefore it excluded any services that took longer (any beauty services, consultation services, sport clubs etc.). It also prohibited students of higher education institutions who do not have a document mentioned above from attending studies and classes.

It should also be noted that from September 2021 to December 2021 according to the provisions of the legal acts regulating the questions of security during the pandemic, the masks and other provisions on personal safety during the pandemic were only recommendatory to the holders of OP, and even the obligation for quarantine after having contact with a person who had COVID-19 was lifted.

The costs of testing in order to obtain an OP for 24/72 hours for those persons who were not vaccinated or did not have antidotes/proof of illness were borne by the people, not by the government. The Government did not provide free testing for persons willing to obtain an OP, differently than, for example, in Denmark, where the testing was available for free.⁵ It is a very important difference as in Lithuania if a person did not have antidotes or had not contained COVID and was not vaccinated he/she could get the Opportunity Passport only if he/she took a RT-PCR test which costed around 70 Eur and was valid for 72 hours from the moment of taking of a sample in the testing centre. Taking into account that the answer of the test comes in after 24 hours, the test was valid only for about 48 hours.

The provisions governing the OP were abolished from 5 February 2022.⁶ Despite the provisions and prohibitions imposed by the OP, the numbers of persons ill with COVID-19 were much bigger than at the moment of establishment of the OP.⁷ The provisions on the Opportunity passport were submitted to Lithuanian Constitutional Court, but the Court used its discretion to terminate the proceedings due to the abolishment of the above-mentioned provisions.⁸

2. RIGHTS AFFECTED BY THE OPPORTUNITY PASSPORT

The provisions of OP imposed limitations on the right to respect for private and family life ensured by Article 8 of the European Convention on Human Rights and Fundamental Freedoms (hereinafter – ECHR) and Article 22 of the Constitution of Lithuania, as it limited

⁵ JURČENKAITĖ, I. Lietuva galimybių pasą nukopijavo nuo danų: kodėl jie gyvena laisviau? [Lithuania has copied the opportunity passport from the Danes: why do they live more freely?] In: *15min.lt* [online]. 27. 8. 2021 [2022-10-20]. Available at: <<https://www.15min.lt/naujiena/aktualu/lietuva/lietuva-galimybiu-pasa-nukopijavo-nuodanu-kodel-jie-gyvena-laisviau-56-1554604>>.

⁶ Decree of the Government of the Republic of Lithuania *Regarding the changing of the Decree of the Government of the Republic of Lithuania of 26 February 2020 No. 152*, Register of Legal Acts, 2022-02-03, Nr. 1864.

⁷ On 02 September 2021 816 COVID-19 cases were established in Lithuania, and on 05 February 2022 – 12700 COVID-19 cases.

⁸ Constitutional Court of the Republic of Lithuania. “Nutraukta teisena byloje pagal Seimo narių grupės prašymą įvertinti kai kurių Vyriausybės nutarimo nuostatų, susijusių su COVID-19 pandemijos sukeltos situacijos pasekmių šalinimo priemonių įvedimu, konstitucingumą” [The case initiated by a group of Seimas members in order to evaluate the constitutionality of certain provisions of the Government Resolution related to the introduction of measures to eliminate the consequences of the situation caused by the COVID-19 pandemic was terminated”] In: *The Constitutional Court of the Republic of Lithuania* [online]. 9. 2. 2022 [2022-10-20]. Available at: <<https://lrkt.lt/lt/apie-teisma/naujienos/1331/nutraukta-teisena-byloje-pagal-seimo-nariu-grupes-prasyma-ivertinti-kai-kuriu-vyriausybes-nutarimo-nuostatu-susijusiu-su-covid-19-pandemijos-sukeltos-situacijos-pasekmiu-salinimo-priemoniu-ivedimu-konstitucinguma:405>>.

the choice of a person to choose the activities according to their own preference, limited the possibility to take care of their everyday needs, and also for the holders of the OP, it limited their right to privacy and to keep the information about their health status private.

Furthermore, it limited the right to higher education ensured by the Protocol to ECHR, Article 2, which states that “No person shall be denied the right to education.”⁹ Lithuanian Constitution guarantees the right to higher education “to everyone according to his individual abilities.”¹⁰ The students who did not possess the OP could not access the premises of the universities and colleges in Lithuania and could not attend classes which were conducted in person. Initially, for a month (September 2021 to October 2021), the students were able to take tests which entitled to get the OP, for free, but later, if they were not vaccinated or had not had COVID-19, they had to pay for the tests themselves, and one test allowed them to use the OP for 48/72 hours. Thus, if no remote/online option for joining classes was provided by the teaching institution (and the approach varied in different institutions of higher education), the students were in practice barred from studies due to their vaccination/health status.

And the most evident aspect is the establishment of discriminatory treatment based on person’s status of health: the persons were distinguished on the basis whether they have carried out a medical procedure – vaccination, or the fact of illness or the amount of antibodies in their blood. The prohibition of discrimination is established in two articles of ECHR: Article 14 prohibits discrimination in connection with the rights established in the Convention and states that “The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”¹¹ Article 1 of Protocol No. 12 of ECHR establishes a general prohibition of discrimination. Furthermore, the prohibition to discriminate against persons. It states that “The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”¹² The Constitution of the Republic of Lithuania also states that “All persons shall be equal before the law, the court, and other State institutions and officials. The rights of the human being may not be restricted, nor may he be granted any privileges on the ground of gender, race, nationality, language, origin, social status, belief, convictions, or views.”¹³

⁹ Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, as amended by Protocols Nos. 11 and 14, 4 November 1950 (ETS 5).

¹⁰ *Constitution of the Republic of Lithuania*. Parliamentary record, 1992-11-01, No. 11, Article 41.

¹¹ Council of Europe, *supra* note 9.

¹² Council of Europe, *Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, ETS No. 177.

¹³ *Constitution of the Republic of Lithuania*. Parliamentary record, 1992-11-01, Nr. 11, Article 19.

3. THE REQUIREMENT OF PROPORTIONALITY IN THE CONTEXT OF THE LIMITATIONS OF HUMAN RIGHTS AND LITHUANIAN OP

The Constitutional Court has stated regarding the principle of proportionality in the context of limitations of human rights that “in deciding whether a law restricting the exercise of individual rights and freedoms violates the constitutional principle of proportionality as one of the elements of the constitutional principle of the rule of law, it is necessary to assess whether the measures foreseen in the law correspond to the legal aims that are important to society and whether those measures do not manifestly restrict the rights and freedoms of the individual beyond what is necessary to achieve those objectives.”¹⁴

3.1. PROPORTIONALITY TEST IN THE CONTEXT OF LIMITATIONS OF HUMAN RIGHTS – ECTHR JURISPRUDENCE AND GERMAN THREE-TIER TEST

The principle of proportionality means that when defining the limits of the exercise of rights by law, it is necessary to take into account the purpose and meaning of the respective right (or freedom) and the possibilities and conditions for its restriction established in the Constitution of a state. In order to answer the question whether a particular restriction is indispensable in a democratic society, it is necessary first to ascertain the objectives and purpose of the restriction and then to determine whether the restrictive measures are proportionate to the legitimate aim pursued.¹⁵

The ECtHR applies in essence two different tests regarding the necessity of the restrictions of human rights, depending on the rights affected. The standard of absolute necessity is applied in the case of limitation of non-derogable rights, for example, the right to life. In these cases, a stricter and more compelling test of necessity was applied, where the force used must be strictly proportionate to the achievement of permitted aims.¹⁶ Regarding the rights guaranteed by Articles 8–11 of the ECHR the necessity test was persuasive. “Following the practice of the ECtHR, the convincing necessity test requires establishing the existence of a ‘pressing social need’ and ‘relevant and sufficient’ reasons for interference with human rights and freedoms enshrined in Articles 8–11. Such interference also must be ‘proportionate to the legitimate aim’ pursued by public authorities.”¹⁷ However, the test applied by the Court is “pressing social need”, which it still applies quite ambiguously. “It would be advisable for the test for fair balance to be systematically preceded by a means-ends test. The test of means and ends would allow the ECtHR to examine the justification of the reasonableness of the choice of means, which is a substantial element of the reasonableness of an interference with human rights.”¹⁸

¹⁴ *Dėl organizuoto nusikalstamumo užkardymo* [On the prevention of organized crime]. The Constitutional Court of the Republic of Lithuania, 2004, no. 8/02-16/02-25/02-9/03-10/03-11/03-36/03-37/03-06/04-09/04-20/04-26/04-30/04-31/04-32/04-34/04-41/04.

¹⁵ BAUBLY, L. et. al. *Teisės teorijos įvadas*. [Introduction to legal theory]. 2nd ed. Vilnius: Leidykla MES, 2012, p. 24.

¹⁶ TRYKHLIB, K. *The Principle of Proportionality in the Jurisprudence of the European Court of Human Rights. EU and Comparative Law Issues and Challenges*, Vol. 4. Osijek: Faculty of Law, Josip Juraj Strossmayer University of Osijek, 2020, p. 134.

¹⁷ *Ibid.*, p. 136.

¹⁸ *Ibid.*, p. 137.

The concept of proportionality was most widely developed especially in German law, in the jurisprudence of the German Constitutional Court, established in 1951.¹⁹ It is used both to establish the constitutionality of legal acts as well as in cases describing the discretion of administrative institutions when adopting legal acts influencing the human rights of citizens.²⁰ It involves a clear three step test aimed at determining the legality and proportionality of human rights limitations, and thus is considered coherent and exhaustive method of analysis into the question.

3.2. LEGALITY OF THE AIM OF THE OP

Preliminary step of the investigation of restrictions of human rights according to German doctrine is the establishment of legality of the aim of the restriction and its conformity with the Constitution. After this step, the three-step proportionality test is carried out, establishing the suitability, necessity and proportionality *stricto sensu* of the measure in question.²¹

Therefore, the first question is whether the government is attaining the aims indicated as legitimate aims in the provisions of ECHR and of the Constitution. In the context of Articles 8 to 11 of the ECHR, the compatibility of a restriction with a legitimate aim (i.e. whether the restriction pursued a legitimate aim) is usually assessed with sufficient flexibility, so that it is sufficient to establish that the contested restriction had one of the aims indicated in the Convention.²²

The legal acts establishing the requirements for the so-called Opportunity Passport were adopted in the general scheme of the requirements and procedures applicable during the pandemic and did not contain detailed description of the specific aims pursued. Of course, the general aim seems more than evident – the protection of public health. But speaking more specifically, what in this context does this aim mean? There are quite a few possibilities. One could aim:

- 1) to reduce the spread of the virus, to reduce the number of cases of COVID-19;
- 2) to reduce the number of deaths from the virus;
- 3) to reduce the pressure for the healthcare system so that all persons in need of help could be served;
- 4) to reduce the number of excessive deaths (those resulting from the situation in hospitals due to misdiagnosis and maltreatment or delayed treatment due to pandemic situation);
- 5) to reduce the number of persons hospitalized and requiring intensive care;
- 6) to increase vaccination rate aiming at “herd immunity” in the society;
- 7) to reach herd immunity in the society.

¹⁹ LEONAITĖ, E. *Proporciumo principas Europos žmogaus teisių teismo jurisprudencijoje* [Principle of Proportionality in the Jurisprudence of the European Court of Human Rights]. Ph.D. thesis. Vilnius: Vilnius University, 2013, p. 33.

²⁰ *Ibid.*, 33; VAN GERVEN, W. The Effect of Proportionality on the Actions of Member States of the European Community: National Viewpoints from Continental Europe. In: Evelyn Ellis (ed.). *The Principle of Proportionality in the Laws of Europe*. London: Hart Publishing, 1999, pp. 37–64, 45–46.

²¹ LEONAITĖ, E. *Proporciumo principas Europos žmogaus teisių teismo jurisprudencijoje*, p. 33.

²² *Ibid.*, p. 161.

There was not much public discussion or arguments regarding the aims sought by the OP. It was stated in May 2021 that “this passport is needed so that as many businesses as possible can start working and earning, and people can use business services without fear of infecting themselves with coronavirus or infecting others.”²³ The Ministry of Economics and Innovation in response to a news portal 15min.lt stated that the main aim of the Opportunity Passport introduced in Lithuania is to avoid complete closure even if the epidemiological situation deteriorates. The Opportunity passport also promotes the vaccination process, which is necessary to control the pandemic in the country, and allows those who have it to be subject to more lenient restrictions, the ministry said.²⁴ Thus the initial aim stated above was not the preservation of health, but economic reasons. Surely, the second side of this aim is the preservation of health of persons who participate in social/economic life, but the statements on the original aim raise doubts about the legality of the aim and the foreseen measures.

Furthermore, the Minister of Health has stated that “this opportunity passport is only one piece. (...) It [the OP] was as in my mind as restoration of social justice or social awareness: if a person agrees with state actions, with state-imposed obligations, he is automatically worthy to get more opportunities than others”.²⁵ Very often the argument on increasing vaccination and “punishing” those who are not vaccinated appeared in public discussions. This of course is not stated in the official documents, but such a statement from a public official and the related rhetoric in the press related to those persons who are not vaccinated raise serious concerns about the real intentions of the government about imposing the OP. The aim of seeking conformity of citizens with the policy of the government, leaving the critics of the policy without certain rights surely may not be a legitimate aim to restrict the rights of certain persons, it denies the right to disagree with the policy of the government and is more like a dictatorship regime. The persons and professionals opposing the regulations of OP and of other measures to contain the pandemic taken by the Government were named as dark people, working for the Kremlin, being against the needs of society. Such tendencies raise danger to the very essence of the right to express one’s opinion and to other human rights.

Furthermore, it is often referred to as a measure of containment of the pandemic, without specification what exactly is this containment of the pandemic. As mentioned, the provisions governing OP were [temporarily] abolished by the Government on the proposition of the Health Ministry of Lithuania. The explanation report on the abolishment of the above-mentioned provisions indicates arguments on the introduction of the OP. It states dual aims for the OP:

²³ JANAUSKAITĖ, D. Galimybių pasas – ne visiems jo norintiems? [Opportunity Passport – not to all willing to get it?] In: *diena.lt* [online]. 11. 5. 2021 [2022-10-20]. Available at: <<https://m.diena.lt/naujienos/klaipeda/miestopulsas/galimybiu-pasas-ne-visiems-jo-norintiems-1024809>>.

²⁴ JURČENKAITĖ, I. *Lietuva galimybių pasą nukopijavo nuo danų: kodėl jie gyvena laisviau?*

²⁵ PANKŪNĖ, D. Po prezidentūros kritikos dėl galimybių paso – Šimonytės atsakas: yra paskelbti tyrimai [After the critics regarding the opportunity passport from the president’s office: the answer of Šimonytė: there is research published]. In: *delfi.lt* [online]. 18. 2. 2022 [2022-10-20]. Available at: <<https://www.delfi.lt/news/daily/lithuania/po-prezidenturos-kritikos-del-galimybiu-paso-simonytes-atsakas-yra-paskelbti-tyrimai.d?id=89223475>>.

“The OP was introduced in the spring of 2021 and was used as a pandemic mass protection management tool to protect people from infection until the possibility of vaccination. Also, the purpose of using an OP was to ensure more secure conditions during the provision of services, thus enabling businesses to operate.

At the end of summer 2021, due to an increasing number of cases, OP was returned to protect people, especially those at risk, who do not develop immunity. Thanks to OP, the flow separation implemented reduced the number of unvaccinated infections by managing the number of contacts.”²⁶

Even in this latter description there is an illogical assumption. If the activities allowed to persons who have OP than the outcome is the fact that mostly vaccinated persons and persons who had had COVID-19 will be participating in activities, so there is no direct link between the protection of the unvaccinated and the proposed measures.

There is another possibility how to formulate the task of the pandemic containment measures – the main task could be the enhancement of capabilities of health system – both of places for persons to be hospitalized as well as the strengthening of the corpus of medical workers and procedures so that more persons could receive help in hospitals, if needed. Such task would have necessitated a whole different approach to the management of the pandemic and, as discussed below, could have better served to reach the aim of the protection of public health in general.

3.3. SUITABILITY OF THE MEASURES IMPOSED BY OP – FIRST STEP OF THE PROPORTIONALITY TEST

The first step of the German proportionality test is assessing suitability of the restricting measure, that is, whether the sanction is appropriate to achieve (or facilitate the achievement of) the objectives set for it. “The first stage of the three-step proportionality test is to determine whether there is a causal link between the measure taken and the objective pursued. At this stage, the future effectiveness of the measures is not assessed, it is sufficient to establish that the chosen measure is theoretically appropriate for the specific objective.”²⁷

As we will see below, there are a lot of doubts whether the measures foreseen by the OP may even theoretically reach the aim of protection of public health.

The Government of Lithuania had stated in one of its documents that “At the end of summer 2021, due to an increasing number of cases, OP was returned to protect people, especially those at risk, who do not develop immunity. Thanks to OP, the flow separation implemented reduced the number of unvaccinated infections by managing the number of contacts.”²⁸

²⁶ Ministry of Health of the Republic of Lithuania. *Dėl Lietuvos Respublikos Vyriausybės nutarimų projektų* [Regarding the projects of the decrees of the Government of the Republic of Lithuania No. G-1074]. In: *Ministry of Health of the Republic of Lithuania* [online]. 2. 2. 2022 [2022-10-20]. Available at: <https://lrv.lt/uploads/main/meetings/docs/2476732_imp_27063a4305767479519e6ba2ee281715.pdf>.

²⁷ NOLTE, G. General Principles of German and European Administrative Law – a Comparison in Historical Perspective. *Modern Law Review*. 1994, Vol. 57, No. 2, [2022-10-20]. Available at: <https://www.jstor.org/stable/1096807?read-now=1&seq=3#page_scan_tab_contents>.

²⁸ Ministry of Health of the Republic of Lithuania, *Dėl Lietuvos Respublikos Vyriausybės nutarimų projektų*.

The statement itself is not logical. If the activities allowed to persons who have OP than the outcome is the fact that mostly vaccinated persons and persons who had had COVID-19 will be participating in activities, so there is no direct link between the protection of the unvaccinated and the proposed measures. The unvaccinated persons could participate in those activities after taking a test, but since it was quite costly, the percentage of those participating must have been quite low. Thus, most of the activities carried out by unvaccinated persons were not the services and activities allowed by OP and therefore had no direct influence on their health status.

Furthermore, the introduction of the Opportunity Passport was based on the premise that people who are vaccinated will not transfer virus. The provisions of Opportunity Passport allowed those who are vaccinated or have had COVID-19 to enter all the shops, use services, go to cafes, attend events and concerts and for the first three months of its use the use of masks and social distancing was only recommended.

But it can be stated that even at the moment of the imposition of the stricter provisions of the OP in September 2021 the scientific knowledge available indicated that it is possible to transmit virus between vaccinated individuals.

The investigation carried out in 2020 and published in 2021 indicates that “systemic respiratory vaccines generally provide limited protection against viral replication and shedding within the airway, as this requires a local mucosal secretory IgA response. Indeed, preclinical studies of adenovirus and mRNA candidate vaccines demonstrated persistent virus in nasal swabs despite preventing COVID-19. This suggests that systemically vaccinated patients, while asymptomatic, may still become infected and transmit live virus from the upper airway.”²⁹

Even though the transmission of the virus is lower in vaccinated individuals, the protection is not absolute. The research published in July 2021 that evaluated the infectivity of COVID-19 in vaccinated individuals (Pfizer vaccine, BNT162b2) states that “By testing those who had been exposed, we estimated that full vaccination reduced susceptibility to infection by 65% (45-79%) [...]. A combined approach showed that among exposed individuals, the risk of infection with a Ct value <30 (our definition of infectious) was reduced by 70% (43-84%). This provides clear evidence of at least a 70% reduction in likely transmission.”³⁰

At the moment of introduction of stricter OP measures, the Delta variation of coronavirus was spreading in Lithuania. The spread of Delta started in summer in 2021 in Lithuania.³¹ The research of the Delta variant, published in August 2021, shows that “that the prevalence of B.1.617.2 was not different between the vaccinated and unvaccinated

²⁹ BLEIER, B. S., MURUGAPPAN, R. Jr., LANE, A. P. COVID-19 Vaccines May Not Prevent Nasal SARS-CoV-2 Infection and Asymptomatic Transmission. *Otolaryngology–Head and Neck Surgery*. 2021, Vol. 164, No. 2, pp. 305–307.

³⁰ REGEV-YOCHAY, G. et. al. Decreased infectivity following BNT162b2 vaccination: A prospective cohort study in Israel. *The Lancet Regional Health – Europe*. 2021, Vol. 7, pp. 1–9 [2023-03-13]. Available at: <<https://doi.org/10.1016/j.lanep.2021.100150>>.

³¹ National Public Health Center under the Ministry of Health. Daugiau nei pusė delta atmainos atveju – vietinio plitimo [More than half of delta cases – of local spread]. In: *National Public Health Center under the Ministry of Health* [online]. 22. 7. 2021 [2022-10-20]. Available at: <<https://nvsc.lrv.lt/lt/naujienos/daugiau-nei-puse-delta-atmainos-atveju-vietinio-plitimo>>.

groups. Delta variant was the dominant circulating strain and one of the primary drivers for the second wave of SARS-CoV-2 in India.”³²

Furthermore, it can be reminded that the use of masks for a certain period of time was only recommendatory for the OP holders in gatherings and places of shopping and service.

Therefore, it can be stated that already at the moment of the adoption of the more stringent measures by the Opportunity passport the scientific data available indicated that even in theory it was not possible to avoid all instances of COVID-19 in the meetings and places where only OP holders were present.

On the other hand, the limitation for persons to enter shops exceeding the area of 1500 sq. m. had a reverse effect than expected – more persons did not use the OP and rather went shopping to the smaller shops thus crowding in smaller shops and thus the aims of halting/stopping the spread of virus were not possible to reach.

If, as suggested, we would formulate the aim differently – to ensure that there are enough places in hospitals for those ill with COVID-19 and that enough medical staff was available to service those in need and in most risk of complications, the measures by the OP were not at all, not even theoretically related to the achievement of this aim. The limitations on entering the events and shops do not have any influence on how many places/beds are there in the hospitals for the sick with COVID-19 and how much staff is available to help persons. One could state that measures established by OP possibility helped reduce the number of persons who are admitted to the hospital, but this is not directly related to the aim stated in this paragraph and is doubtful in the face of the facts that we have on COVID-19 illness.

3.4. NECESSITY OF THE RESTRICTIONS BY OP – SECOND STEP

Second step of the German “three-tier” test is the assessment of the necessity of the restricting measure. The restricting measure may be considered necessary in the absence of other, more lenient but equally effective means of achieving the intended objectives. “The necessity of the measure is not subject to a high standard of proof and the position is taken that the legislator has a certain political discretion to choose the specific measures necessary to achieve the goal.”³³

It is not at all easy to discern whether the measure is necessary because the necessity test requires to “compare the effectiveness of the contested measure with that of a less restrictive measure, especially where the assessment of future effects is based on long – term forecasts.”³⁴ The German Constitutional Court “uses various tests to assess effectiveness in this area, such as checking that the legislature’s predictions are not manifestly erroneous, the test of reasonableness and the stricter assessment of content. The choice of a specific test in a particular case depends on the scope of the measure, the possibility to

³² THANGARAJ, J., Wesley V. et. al. Predominance of delta variant among the COVID-19 vaccinated and unvaccinated individuals. *The Journal of infection*. 2021, Vol. 84, No. 1, pp. 94–118 [2023-03-13]. Available at: <<https://doi.org/10.1016/j.jinf.2021.08.006>>.

³³ LEONAITĖ, E. *Proporcingumo principas Europos žmogaus teisių teismo jurisprudencijoje*, p. 35.

³⁴ *Ibid.*, p. 25.

base the decision on reliable facts and the importance of the values or interests protected by the Constitution.”³⁵

Of course, at the beginning of the pandemic it was not clear how dangerous this disease was, and the measures imposed were strict, aiming at the containment of the spread of the COVID-19. Thus, in this earlier stage maybe the shortage of data and absence of any reliable analysis of the phenomenon might have justified stricter measures. But later when more and more information was available to the officials managing the pandemic, the measures needed to be evaluated very timely on the basis of the data available so as to avoid unnecessary restrictions on persons’ rights and possibly saving much more lives than by the application of measures that were not based on the facts and were aimed at restricting the rights of persons who were not vaccinated. The comparison of measures taken and of measures that could have been taken is not an easy task and cannot rest only on lawyers’ shoulders. A very transparent public discussion providing for public review the different venues and their possible outcomes was necessary, taking into account the opinions and knowledge of persons having necessary experience in the field. This could have led to more efficient decisions on the management of pandemic. The analysis of the different aspects of management of pandemic illustrates that state efforts possibly could have been directed towards many other fields besides restricting human rights and segregating persons according to their vaccination/immunity status and thus could have been viable alternative routes to achieve public health. It lied on the state officials to provide this detailed and comprehensive analysis which should have been made public.

In this context in the opinion of the authors the choice of particular tasks/modes of action for protection of public health is important. As mentioned above, there are quite a number of possibilities of defining a task of the containment measures in this particular situation. In general, everyone agrees that the overall aim is public health, but what is the best way to protect public health in the situation of this pandemic? As mentioned, the dominant aim of the Lithuanian government, at least from the available public information, was to reduce the spread of the virus and cases of COVID-19 and as well the reduction of difficult cases of COVID-19 in order for the system of health protection to be able to function. The question whether this could have been achieved, at least partially, even in theory, remains under question.

But the more important question is whether the overall direction of the whole pandemic management goes into the right direction. During the course of the pandemic, it became evident that restricted access to health care resulted in additional deaths due to maltreatment or delayed treatment of persons. The Statistics Department of Lithuania has announced that COVID-19 influenced additional 11000 deaths during the period of the pandemic.³⁶

Furthermore, even though not statistically proven, it becomes known from persons who were sick with COVID-19, that it was very difficult for patients with medium-difficulty

³⁵ Ibid.

³⁶ Statistikos departamentas: COVID-19 lėmė 11.000 papildomų mirčių [Statistics department: COVID-19 caused 11,000 additional deaths]. In: *Verslo žinios* [online] 18. 2. 2022 [2022-10-20]. Available at: <<https://www.vz.lt/verslo-aplinka/2022/02/18/statistikos-departamentas-covid-19-leme-11000-papildomu-mirciu>>.

symptoms of COVID-19 to get proper care as it was difficult to get into the clinics for consultations as there were large queues to get there and only the designated “fever” clinics accepted patients with temperature and COVID-19. This resulted in complications which could have been avoided if the proper care was administered.

Moreover, the patients who were ill with COVID-19 as well as with other diseases were hospitalized, could not be visited by relatives, and this might have contributed to poorer care of patients and possible early deaths or consequences for health. All these factors might have contributed to the number of excessive deaths and possibly to the higher mortality rate from COVID-19.

Another factor which was not solved in aiming to contain the spread of COVID-19 was the limitations to the testing for COVID-19 and the problems with the detection of contacts for those who had COVID-19. The testing was available with the delay of one-two days and the answer for the test came one more day later, so for three days a person who possibly had COVID-19 could freely visit any public places, meet with other persons and “successfully” spread COVID-19, especially when there was no requirement to wear masks in the places where OP was necessary and as scientific data shows that vaccinated persons may get COVID-19 as well as spread it. The OP could have created a “false sense of security” due to the fact that the virus could spread among vaccinated individuals.³⁷

Furthermore, from the very beginning of pandemic there were problems with the institution tasked with the tracing of the contacts, the National Society Health Centre- the head of this Centre was accused of mismanagement of the institution, there were too few workers, they had to work for long hours, and still sometimes the persons who had COVID-19 were contacted quite late into their disease and possible contacts did not get any notification until late into the disease. Therefore, this field could have merited from much more state attention and could possibly have contributed to better management of pandemic.

The system of installing the OP, its IT decisions and systems, the manpower needed to check those documents had huge costs for the state. The question arises: if we were to invest those resources into strengthening our health system, that might have had a much larger impact on the health system and on the wellbeing of all persons in Lithuania.

Other costs for persons who did not want to get vaccinated, or who vaccinated only because of the requirements of OP or requirements of their job position, cannot be measured in money. Furthermore, those persons who did not have other means to continue working or participating in public life except for vaccination were forced to vaccinate against their will. This raises a lot of questions whether such indirect coercion goes against the integrity of a person. It should be noted that all the vaccines against COVID-19 were approved for use provisionally. The vaccines were tested for efficacy, but the regular testing procedures were not finished for long term effects. All the vaccines now available and allowed to use in the EU (Comirnaty, Nuvaxovid, Spikevax, Vaxzevria, Janssen) still had the conditional

³⁷ Nauja ekspertų grupė su pandemija siūlo tvarkytis kitaip: pasisako prieš privalomą vakcinaciją ir galimybių pasus [New expert group suggests to manage pandemics in a different way: argues against mandatory vaccination and opportunity passports]. In: *Lietuvos Rytas* [online]. 30. 8. 2021 [2022-10-20]. Available at: <<https://www.lyttas.lt/sveikata/medicinos-zinios/2021/08/30/news/nauja-ekspertu-grupe-su-pandemija-siuo-tvarkytis-kitaip-pasisako-pries-privaloma-vakcinacija-ir-galimybiu-pasus-20583223>>.

marketing authorisation,³⁸ which meant that “the approval of a medicine that addresses unmet medical needs of patients on the basis of less comprehensive data than normally required. The available data must indicate that the medicine’s benefits outweigh its risks and the applicant should be in a position to provide the comprehensive clinical data in the future.”³⁹ Later, there was information in the news about possible breaches of testing during the first stages of testing of Comirnaty vaccine.⁴⁰ All this indicates that people must be able to choose whether, knowing all the risks associated with the vaccines, they freely choose whether to vaccinate or not. Any coercion, direct or indirect, is not justified taking into account all the factors mentioned above.

It becomes more and more likely that if the aim was to ensure that all persons received proper medical care by augmenting the capabilities in the healthcare system, whether for COVID-19 or for other patients, it is possible that in the end more persons were saved and we would have better results for public health overall.

All these factors illustrate that the OP, which clearly limited important rights of persons, was not the most effective measure to achieve the aim of public health of the Lithuanian society, or to protect most lives in Lithuania, and thus did not comply with the necessity requirement of the proportionality test.

3.5. PROPORTIONALITY *STRICTO SENSU* OF THE RESTRICTIONS BY OP – THIRD STEP

The third step of the three-tier test includes the assessment of the proportionality in the strict sense (*stricto sensu*) of the restricting measure: is the chosen sanction disproportionate to the constraints imposed on it, does the scale of the measure meet its objectives or will the likely (outset) benefits outweigh the potential losses.⁴¹ Therefore “in the third stage, the objects of comparison change and the field of analysis expands, because it compares the importance of the law-protected value in favour of which the restriction was implemented with the restrictions on a fundamental right, or in other words, the right balance between the public and private interest is established.⁴² When making a decision, an assessment shall be made of the extent to which the fundamental right is restricted, the extent of the threat to the value protected by law and the reality of the threat shall be assessed. This stage of the assessment does not involve an analysis of the specific circum-

³⁸ COVID-19 vaccines In: *European Medicines Agency* [online]. [2022-10-20]. Available at: <<https://www.ema.europa.eu/en/human-regulatory/overview/public-health-threats/coronavirus-disease-covid-19/treatments-vaccines/covid-19-vaccines>>.

³⁹ Conditional marketing authorisation In: *European Medicines Agency* [online]. [2022-10-20]. Available at: <<https://www.ema.europa.eu/en/human-regulatory/marketing-authorisation/conditional-marketing-authorisation>>.

⁴⁰ “A regional director who was employed at the research organisation Ventavia Research Group has told The BMJ that the company falsified data, unblinded patients, employed inadequately trained vaccinators, and was slow to follow up on adverse events reported in Pfizer’s pivotal phase III trial. Staff who conducted quality control checks were overwhelmed by the volume of problems they were finding.” THACKER, P. D. Covid-19: Researcher blows the whistle on data integrity issues in Pfizer’s vaccine trial. In: *bmj.com* [online]. 2. 11. 2021 [2023-03-13]. Available at: <<https://doi.org/10.1136/bmj.n2635>>.

⁴¹ SCHWARZE, J. *European Administrative Law*. Revised 1st edition. London: Sweet & Maxwell, 2006, p. 679.

⁴² KARGAUDIENĖ A. Proporcingumo principas administracinėje teisėje [Principle of proportionality in administrative law]. *Jurisprudencija*. 2005, Vol. 78, No. 70, pp. 35, 48.

stances of the case, comparing the possible damage to the limited fundamental right if the contested law is maintained with the damage to the value protected by the law if the fundamental right is given priority.⁴³

In the present case it is not totally clear what particular rights of persons or which value is being protected by the OP regulation. As the aim is the protection of public health, what rights of particular persons are being protected? Does the threat rise to the life of a person? Is a non-vaccinated individual in a shop a direct threat to the life of those around him? Or is it the right to health? The right not to be infected? These values and rights are not very clearly defined when establishing the questioned legal regulation, so it is not very clear.

It is quite clear what is on the other side of the balance – the rights mentioned above – the right to private life, right to the integrity of the person, the right of movement, in some cases the right to work, which are limited quite extensively. Thus, the question arises whether the risk to the society, to public health posed by unvaccinated/unttested individuals is so high that the limitations of this extent are justifiable. As the question was raised when discussing the restrictions and their legality – where are the saved lives? Even though publicly officials were speaking about the lives saved, but the numbers of 2021 show that the mortality rate in Lithuania has not decreased from 2020.⁴⁴

4. DISCRIMINATION OF PERSONS AND OP

According to the regulation of the OP, there was a distinction of persons according to their health status and perceived danger that they cause to others. The basis of discriminate treatment in this case was the fact whether the person had had a medical intervention – vaccination; or whether he has performed a test indicating his present health status (whether he is infected with COVID-19 or not), or on the basis of the fact if he had contracted COVID-19 or whether there are enough antidotes against COVID-19 in his blood. Therefore, this health status, proven by certain documents, became the distinguishing factor on the limitations of his right to privacy, to work, to movement. This raises a lot of questions on the validity/soundness of such discriminatory treatment.

The principle of non-discrimination of persons is essential to human rights system. Article 29 of the Lithuanian Constitution states that “All persons shall be equal before the law, courts, and other state institutions and officials. Human rights may not be restricted; no one may be granted any privileges on the grounds of gender, race, nationality, language, origin, social status, belief, convictions, or views.”⁴⁵

Consequently, at the constitutional level, formal equality of all persons is established, and at the same time the prohibition of discrimination and the provision of privileges is established. The constitutional principle of equality of all persons determines the legislative process by directing it in such a direction that the requirements established in legal

⁴³ GRIMM, D. Proportionality in Canadian and German Constitutional Jurisprudence. *University of Toronto Law Journal*. 2007, Vol. 57, No. 2, [2023-03-13]. Available at: <<https://www.jstor.org/stable/4491725>>.

⁴⁴ GUDAITIS, A. Ką pasako statistika apie pandemijos (ne)valdymą? [What does statistics say about the (non)-management of the pandemic?] In: *Health Law Institute* [online]. 30. 1. 2022 [2022-10-20]. Available at: <<https://sti.lt/ka-pasako-statistika-apie-pandemijos-ne-valdyma/>>.

⁴⁵ *Constitution of the Republic of Lithuania*. Parliamentary record, 1992-11-01, No. 11, Article 29.

acts are based on general provisions that can be applied to all envisaged subjects of the respective legal relations without unreasonably distinguishing individual participants of such legal relations.⁴⁶

The Constitutional Court of Lithuania has ruled in numerous cases that “the constitutional principle of equality of all persons, which must be observed both in the enactment and application of laws and in the administration of justice, obliges equal treatment of equal facts in law and prohibits arbitrary treatment of essentially the same facts differently. [...] The principle of equality of persons enshrined in Article 29 of the Constitution presupposes the duty of the legislator to establish uniform (undifferentiated) legal regulation in respect of certain categories of persons in equal position, when there are no such differences and such extent that such unequal treatment is objectively justified.”⁴⁷ The Court has also stressed that the inherent right of man to be treated equally with others protects the realm of human freedom because, in principle, man is free to the extent that he is equal with others.⁴⁸

4.1. GROUNDS FOR DISCRIMINATION NOT FORESEEN IN THE CONSTITUTION OF LITHUANIA

In the present case the basis of discrimination is not indicated as a separate ground of discrimination in the Constitution of Lithuania.⁴⁹ This limit is recognized by the Equal Opportunities Ombudsman who states that “It is important to emphasize that less favourable treatment does not in any circumstances constitute discrimination under these laws. The Equal Opportunities Act provides an exhaustive list of grounds for possible discrimination, so that when a person is discriminated against, for example because of their place of residence, appearance, etc., the Equal Opportunities Ombudsman would not be able to open an investigation into possible discrimination.”⁵⁰ On the other hand, the Constitutional Court has indicated the importance of the prohibition of discrimination and therefore has stated that “the content of the constitutional principle of equality of persons may be revealed only by interpreting Paragraphs 1 and 2 of Article 29 of the Constitution together; Paragraph 2 of Article 29 of the Constitution, which *inter alia* provides that human rights may not be restricted on the grounds of sex, race, nationality, language, origin, social status, religion, belief or opinion, shall not be construed as establishing an exhaustive list of grounds for non-discrimination; otherwise, preconditions would be created for denying the equality of all persons guaranteed by Paragraph 1 of Article 29 of the Constitution to the law, the court and other state institutions, i. e. the very essence of the constitutional principle of equality of persons.”⁵¹ In that particular case the Constitutional Court indi-

⁴⁶ PRANEVIČIENĖ, B. Konstitucinis lygiateisiškumo principas: samprata ir institucinė lygiateisiškumo apsaugos sistema Lietuvoje [Constitutional principle of equality: concept and the institutional system of ensuring equality in Lithuania]. *Public Security and Public Order*. 2014, Vol. 12, pp. 161–176.

⁴⁷ *Dėl jaunesnių kaip 40 metų asmenų įtraukimo į pensijų kaupimą* [Regarding the inclusion of persons younger than 40 into the pension savings program]. Constitutional Court of the Republic of Lithuania, 2020, No. 16/2018.

⁴⁸ *Dėl butų privatizavimo* [Regarding the privatisation of apartments]. Constitutional Court of the Republic of Lithuania, 1996, No. 2/96.

⁴⁹ “Gender, race, nationality, language, origin, social status, belief, convictions, or views.”

⁵⁰ Kas yra diskriminacija? [What is discrimination?] In: *Office of the Equal Opportunities Ombudsperson* [online]. 23. 7. 2020 [2022-10-20]. Available at: <<https://lygybe.lt/lt/kas-yra-diskriminacija>>.

cated that “one of the grounds for discrimination prohibited under Article 29 of the Constitution is the restriction of human rights on grounds of age.”⁵² Therefore in this case discrimination on the basis of status of health also falls under the Constitutional provision against discrimination of persons.

Similarly, even though the European Court of Human Rights had stated that the ECHR “prohibits ‘discriminatory treatment having as its basis or reason a personal characteristic (“status”) by which persons or groups of persons are distinguishable from each other’, [this position] has therefore traditionally not led to the exclusion of non-personal discrimination grounds from the scope of protection. Accordingly, the textbook position is that while they may not all be subject to the same strictness of review, any discrimination ground can in principle be included in the scope of protection *ratione materiae* of Article 14.”⁵³ The status of health would fall under both of those views: the narrower view that only personal characteristics allow to declare certain behaviour as discriminatory (as status of health is a personal characteristic of a particular person), and of course into the wider view allowing for broader interpretation of possible discrimination grounds.

4.2. DIFFERENTIATION AND DISCRIMINATION IN THE CASE OF OP

On the other hand, the Constitutional Court acknowledges that the principle of equality does not in itself deny that the law may establish different legal regulation with regard to certain categories of persons in different situations. “The constitutional principle of equality of persons would not be violated, inter alia, if by different (differentiated) legal regulation, which establishes special requirements or certain conditions related to the peculiarities of regulated relations, positive, socially significant goals would be pursued. The problem of equality of persons in laws cannot be adequately solved in each case without assessing whether the peculiarities of legal regulation are applied to the persons with good reason.”⁵⁴

Therefore, objective differences of the subjects of the societal relations may lead to differentiated legal regulation, and here the important factor to consider is whether a certain group of persons, addressees of a particular legal norm, in comparison with the other group indicated in the norm, is treated differently because there are differences between those groups of such a nature and size as to objectively justify such different treatment.⁵⁵

Looking into the distinct treatment in this case the main difference between those two groups is the perceived danger to other members of society. The logic behind the restric-

⁵¹ Dėl vyresnių kaip 65 metų mokslininkų ir dėstytojų teisės dirbti Vilniaus universitete [Regarding the right of scientists and lecturers older than 65 to work in Vilnius university]. Constitutional Court of the Republic of Lithuania, 2021, No. 11/2019.

⁵² Ibid.

⁵³ ARNARDOTTIR, O. M. The Differences That Make a Difference: Recent Developments on the Discrimination Grounds and the Margin of Appreciation under Article 14 of the European Convention on Human Rights. *Human Rights Law Review*. 2014, Vol. 14, No. 4, [2023-03-13]. Available at: <<https://doi.org/10.1093/hrlr/ngu025>>.

⁵⁴ PRANEVIČIENĖ, B. *Konstitucinis lygiateisiškumo principas: samprata ir institucinė lygiateisiškumo apsaugos sistema Lietuvoje*.

⁵⁵ Ibid., p. 161.

tions by the OP is that a person who is not vaccinated and has not made a test proving that he is not ill with COVID-19 *potentially* poses greater danger to the society as a whole or to other individuals, or to the health system of Lithuania than a person who had been vaccinated or has a test proving that he was not ill during the last 48-72 hours. But is this danger real? Does this argument stand to the simple logic? Persons were not allowed into bigger shops, but could shop in smaller shops. How is this situation so much different? As we have mentioned above, in this situation there could be more danger when persons crowded in smaller shops than in the shops which have bigger premises. Furthermore, as we saw, later variants of COVID-19 were more contagious and infected vaccinated and unvaccinated individuals alike. Taking this into account, we can see that the potential to transmit COVID-19 was in both cases, in both groups of people. Furthermore, the same people in theory could meet in private circumstances, in working places, in personal events, in the street etc. Of course, the number of persons meeting in the mentioned situations is much smaller than in concerts or events, but the perceived danger posed to a particular person does not change on the fact whether we are in concert or in a private personal event. Besides, persons who had the OP and thus were allowed to gather in these bigger shops and cultural events, according to the affirmations of the Government, should have been immune and thus the unvaccinated persons should not pose danger to them.

Therefore, it is very hard to see “differences between those groups of such a nature and size as to objectively justify such different treatment”. The Government had not provided any scientific proof, extensive research that would indicate the effectiveness of such measures and has not illustrated without doubt that this difference between a person having the document allowing him to obtain the OP and between a person who does not possess such a document is so big as to justify the different treatment and the limitations of his rights.

Furthermore, there are cases where the state foresees preferential treatment for certain groups of persons greater protection of their rights, where they would not be able to ensure those rights themselves (people with disabilities, with special needs). Here, the content of the terms “discrimination” and “differentiation” needs to be discussed. “Discrimination” is understood as an arbitrary deprivation, restriction or extension of individual rights, and “differentiation” as an increase in the protection of rights by state measures for fundamental rights (for example, people with disabilities) or who have special responsibilities related to their person and the fulfilment of such responsibilities is a basis for enhancing their rights (for example, the right of police officers to a reduced retirement age).⁵⁶ In this case, persons who have been vaccinated or have been ill with COVID-19 would not be considered persons with special needs. Persons with chronic illnesses, of old age, etc. could be considered as special needs, but there were no special rules / privileges accorded to them by the regulation of OP, therefore these provisions are not applicable in this particular case.

⁵⁶ PRANEVIČIENĖ, B. *Konstitucinis lygiateisiškumo principas: samprata ir institucinė lygiateisiškumo apsaugos sistema Lietuvoje*, p. 165.

CONCLUSIONS

Regarding the legality of the aim of the OP it can be noted that various public references by different officials mentioned among aims the re-opening of economic life, the “incentives to behave according to the Government’s requirements”, promotion of vaccination process. Therefore, the aim of the limitations was not clearly expressed and was not limited to the aims indicated in the provisions establishing the human rights that were limited. The implied aim of protecting public health was not clearly expressed and was not clearly defined, as there are various objectives within such aim.

The aim of seeking conformity of citizens with the policy of the government, leaving the critics of the policy without certain rights surely may not be a legitimate aim to restrict the rights of certain persons, it denies the right to disagree with the policy of the government and is more like a dictatorship regime. The persons and professionals opposing the regulations of OP and of other measures to contain the pandemic taken by the Government were named as dark people, working for the Kremlin, being against the needs of society. Such tendencies raise danger to the very essence of the right to express one’s opinion and to other human rights.

Speaking about the suitability of the restricting measure, that is, whether the sanction is appropriate to achieve (or facilitate the achievement of) the objectives set for it, it can be noted that even in theory it was not possible to attain the objective of the OP – to stop the spread of the virus, as the scientific data provided in the article illustrated that even persons who were vaccinated or have had COVID-19 may contract COVID-19 (again) and transfer it to other individuals, even though the rate is lower. The masks were only recommendatory in places where persons were allowed with the OP during the first three months, and thus the spread of the virus was not halted. Other measures were even more illogical – why limit the entry to the big shops with the OP, and not require it in smaller shops? It is not at all clear how those measures had to prevent the spread of COVID-19.

When discussing the necessity of the restricting measure. i.e. whether there are other, more lenient but equally effective means of achieving the intended objectives, it became evident that the choice of the right objectives for the management of pandemic was of utmost importance. To save most lives from this illness, the accent had to be paid to the enhancement of the opportunities of health care institutions to take care of the ill persons, to increase the testing abilities of the appropriate institutions, and to properly care for other, non-COVID patients, to avoid excessive deaths from other diseases that were maltreated. Accent on vaccination, and on the restrictions on non-vaccinated did not help to achieve the abovementioned aims.

Speaking about the different treatment of persons who had and did not have the OP or equivalent documents, it is very hard to see differences between those groups of such a nature and size as to objectively justify such different treatment, that is, that the situation of those not holding the OP or equivalent document was so much different from the persons having the OP. The Government had not provided any scientific proof, extensive research that would indicate the effectiveness of such measures and has not illustrated without doubt that this difference between a person having the document allowing him to obtain the OP and between a person who does not possess such a document is so big as to justify the different treatment and the limitations of his rights. Thus, this discrimination was not legal and was a clear infringement of people’s rights.