

**Media Regulation during the Covid-19 Pandemic**

**A Study from Central and Eastern Europe**

**Edited by Gergely Gosztonyi and Elena Lazar**

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DURING THE  
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Ethics International Press

2023

# **Gergely Gosztonyi: Being honest with people? The state of freedom of expression and censorship in Central and Eastern Europe during the Covid-19 pandemic<sup>1</sup>**

## **Introduction**

At the time of the Covid-19 pandemic outbreak, Spain, Italy, and the United Kingdom reported hundreds of infected citizens and even deaths every day. The countries of Central and Eastern Europe coped with the first wave of the epidemic with much lower recorded infection and death rates.<sup>2</sup> However, the situation changed dramatically in late summer and early autumn 2020, when the rate of virus spread in the region's countries also increased significantly. Governments in central and eastern Europe introduced strict measures to protect the population's health, including a lockdown, but significant other restrictions were also observed. State of emergency-type restrictions can include a wide range of measures, but notable among these are lockdowns, physical distancing, travel restrictions, right to assembly, Freedom of Expression, and other restrictions. Unfortunately, as was observed, some governments 'got the taste for it' and settled issues under the guise of emergency decree governance that certainly had little or nothing to do with the pandemic.<sup>3</sup> Selam Gebrekidan (2020) called this a "parallel epidemic", where some governments use the Covid-19 pandemic as a pretext to consolidate political power undemocratically or impose undue restrictions on the exercise of civil and political rights.

The most significant cases that affected the normal functioning of legal systems were:

- governance systems have been at least temporarily altered,
- campaigns and elections have been postponed,
- parliamentary sessions were taking place with a reduced number of participants or via videoconference,

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<sup>1</sup> This chapter was supported by the János Bolyai Research Scholarship of the Hungarian Academy of Sciences and the ÚNKP-22-5 New National Excellence Program of the Ministry for Culture and Innovation from the source of the National Research, Development and Innovation Fund.

<sup>2</sup> A number of hypotheses have been suggested to explain the surprising containment success in the spring, including „the widespread prevalence of the bacille Calmette-Guérin tuberculosis vaccine, lower population density and exposure to tourism, lack of trust in the healthcare system and government in general, low testing numbers (which may have led to underreporting of cases), and an autocratic advantage leader of imperfect democracies” (King and Loblova, 2021).

<sup>3</sup> A textbook example of this in Hungary is the subordination of nature conservation considerations in the context of mining development.

- deactivation of checks-and-balances systems,
- functioning of justice bodies was suspended or slowed, and
- provision of essential public services was seriously affected.

All these instruments have contributed to a significant breakdown of the institutional guarantees and operational mechanisms that underpin the fundamental values of the rule of law (Pech, 2022) in some countries and, to a lesser extent, in others. However, even less significant changes can affect the functioning of the legal system in the short or long term, so the analysis of this area should be more exhaustive than those States that have resorted to more robust instruments. The vulnerability of human rights in a pandemic situation is apparent, and their protection is essential for future generations. It could also be seen as a ‘stress-test’ for democracies (Guasti, 2020, p. 56.)

### **The legal grounds for derogations and restrictions**

Article 4 of the International Covenant on Civil and Political Rights (ICCPR) states that:

*In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.*

Derogations are not possible from Articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18 of ICCPR. State Parties that would like to use this public emergency derogation must inform other State Parties immediately through the United Nations (UN) Secretary-General about the derogation and its reasoning. They also have an obligation to do the same through the UN Secretary-General when the derogation terminates. In connection to this, it should be noted that such provision can also be found in Article 27 of the Inter-American Convention on Human Rights (IACHR) and Article 15 of the European Convention on Human Rights (ECHR).<sup>4</sup>

Centre for Human Rights (2021) published those countries that used the public emergency derogation provision and acted as it was enacted in Article 4:

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<sup>4</sup> The African Charter on Human and People’s Rights does not contain any such provision.

- Derogations from Article 21 of the ICCPR: Guatemala, Latvia, Armenia, Estonia, Ecuador, Romania, Peru, Georgia, Palestine, Chile, Kyrgyzstan, Colombia, El Salvador, San Marino, Moldova, Ethiopia, Dominican Republic, Senegal, Namibia.
- Derogations from Article 19 of the ICCPR: Columbia.
- Derogations from Article 11 of the ECHR: Romania, Armenia, Moldova, Estonia, Georgia, Albania, North Macedonia, Serbia, San Marino, Latvia, Paraguay.

Although these countries are definitely only a small number of the total number of countries, these are the ones that acted adequately. UN Office of the High Commissioner for Human Rights (UN OHCHR) issued a guidance on emergency measures that stated the declared emergencies should be time-limited, ‘the least intrusive to achieve the stated public health goals,’ and include safeguards ‘to ensure a return to ordinary laws as soon as the emergency situation is over’ (UN OHCHR, 2020, p. 1.). They also refer to the General Comment (GC) No. 29, as they also point out that any derogation should be strictly used in duration, geographical coverage and material scope of the state of emergency (UN, 2001). That means that measures used by State Parties should be transparent, non-discriminatory, and subject to independent review. In GC No. 27. the UN also call the State Parties for self-limitation as they ‘must not rely on derogation from the right of peaceful assembly if they can attain their objectives by imposing restrictions in terms of Article 21’ (UN, 2020, 96).

This could also be underlined with the Siracusa Principles, which emphasise that any derogation in public emergency circumstances could be justified only if the danger is ‘exceptional and actual or imminent’ (Siracusa Principles, 1985, 39). That could be possible if

- “the whole of the population and either the whole or part of the territory of the state is affected, and
- the physical integrity of the population is threatened” (Siracusa Principles, 1985, 39)

Based on the well-established case law of the European Court of Human Rights (ECtHR), the so-called three-part test should also be used (UN OHCHR, 2020, p. 1.), so any restriction on human rights during these difficult times must be

- “suitable to achieve the legitimate aim pursued (suitability);
- the least intrusive instrument amongst those which might achieve the legitimate aim (necessity); and

- strictly proportional to the legitimate aim pursued (proportionality *sensu stricto*).” (Oster, 2015, pp. 123-124.)

### **The importance of freedom of expression during Covid-19 and the main challenges**

As freedom of expression is the cornerstone of any democratic society, it alone makes possible the continuing intellectual controversy, the contest of opinions that forms the lifeblood of free and democratic constitutional order (Claude-Reyes et al. v. Chile, 2006, 85; Ríos et al. v. Venezuela, 2009, 105). This includes the right to seek, receive and impart information and ideas of all kinds regardless of frontiers (Autronic AG v. Switzerland, 1990, 45). It should also be noted that the European Court of Human Rights (ECtHR) stated that ‘the Internet plays an important role in enhancing the public’s access to news and facilitating the dissemination of information in general’ (Cengiz and Others v. Turkey, 2015, 52.). Freedom of expression is essential to a healthy and vibrant society and is considered fundamental to an individual’s moral and intellectual development (Ingabire Victoire Umuhoza v. Rwanda, 2018, 132).

This is particularly important in complex social situations where a nation needs to work together to solve the problems that arise. Such was the case with the Covid-19 pandemic, during which present generations were confronted for the first time with a global disease that claimed large numbers of lives.

In such a situation, freedom of expression contributes to:

- facilitate and preserve keeping the public educated about the pandemic,
- ensuring that healthcare professionals have access to global information about the disease and the steps to address it,
- guaranteeing that the public has access to information held by public authorities concerning the pandemic,
- media and journalists can adequately report on the pandemic’s different aspects and implications.

Without this, it is more difficult for a country to defend itself and for members of society to access the information they need, which can create unnecessary tensions. Moreover, the ‘success of any efforts to contain the spread of the virus depends to a large extent on access to accurate, reliable, diverse and timely information’ (Council of Europe, 2020, p. 2).

The main challenges in such a situation may be:

- making access to information held by public authorities more difficult and slowing down or stopping the release of data of public interest,
- restricting internet access by various means (Gosztonyi, 2020),
- disinfodemic (restrictions on ‘fake news’, ‘misinformation’ or ‘causing panic’) (Lin, 2022; Costescu and Lazar, 2023),
- Data protection and privacy,
- Strategic Lawsuits Against Public Participation (SLAPP) (Noorlander, 2020, p. 9.),
- Contact-tracing apps’ privacy concerns (e.g. in Bulgaria, Latvia, Lithuania, or Hungary),
- Safety of media and journalists,
- Protection of whistleblowers (Bucur and Toma v. Romania, 2013),
- Keeping intact the public watchdog role of the media (Szurovecz v. Hungary, 2019, p. 54; Bajomi-Lázár, 2006, p. 51),
- Installing massive video surveillance systems (Cendic et al., 2021),
- Excessive criminal prosecutions and sanctions (Szentgáli-Tóth et al., 2023).

### **General principles for the legislation in a world pandemic: Being honest with people**

Amid a global pandemic, it is natural that governments do everything they can to protect the health and safety of their citizens. However, this is only possible if legal restrictions are sufficiently limited and legal safeguards are in place. In all this, human rights must be given special attention. Therefore, emergency curtailments of the exercise of civil and political rights in the context of Covid-19 responses should meet the following criteria (UNHRC, 2020b):

- some of the provisions cannot be subject to derogation in any case;
- be grounded in law and subject to independent oversight;
- serve a legitimate and necessary public health purpose;
- be strictly proportionate to the public health threat and limited in duration; and
- be non-discriminatory.

But these are only primary conditions, without which the restrictions will certainly not be legally appropriate. An examination of the jurisprudence of individual Central and Eastern European states may lead us closer to deciding whether the legislation met these conditions and was compatible with the derogation from the ICCPR.

As the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression stated in the Disease Pandemics and the Freedom of Opinion and Expression report in 2020, “In legal terms, ensuring the dignity and respect owed to all individuals entails: being honest with people and giving them access to information in ways they can consume, in a way that promotes non-discrimination” (UNHRC, 2020a, 63.a)

### **The state of freedom of expression and censorship in Central and Eastern Europe during the Covid-19 pandemic**

Freedom House’s Freedom in the World report is the most widely read and cited report of its kind, tracking global trends in political rights and civil liberties. If we look at the latest 50th-anniversary report, 2023, the very sentence is striking: ‘Global freedom declined for the 17th consecutive year’ (Freedom House, 2023, p. 1.) The picture is even darker when looking at the situation in Central and Eastern European states. In the region, Poland, the Czech Republic, Slovakia, Austria, Italy, Slovenia, Croatia, Romania, Bulgaria and Greece are among the free countries, while Hungary, Bosnia and Herzegovina, Serbia, Montenegro, Kosovo, Albania and Northern Macedonia are in the semi-free category (Freedom House, 2023, p. 23.) If we compare this with the democracy index for Central and Eastern Europe and Asia, we see that only the Czech Republic, Slovakia and Slovenia are considered consolidated democracies in the region, while Poland, Romania, Bulgaria and Croatia are only semi-consolidated democracies, and the rest of the countries are in the category of transitional or hybrid regimes.<sup>5</sup> A very similar picture can be observed in the 20th-anniversary Reporters Without Borders World Press Freedom Index (RSF, 2022): the Czech Republic, Slovakia, Austria, and Croatia have been placed in the so-called yellow colour, while all other states have earned the orange colour.<sup>6</sup>

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<sup>5</sup> Hungary is a textbook example; see (Bellucci, 2021, pp. 152-153.)

<sup>6</sup> The World Press Freedom Index uses colours ranging from light yellow to blood red to indicate a country’s position in the survey: the darker the colour, the lower the country is in the ranking for the given year.

Although, as Zsolt Kokoly stated (2021, p. 66.), “The most challenging issues to examine are the efficiency of the national law-making and national regulating authorities in offering an adequate response to a new and unprecedented situation where swiftness and flexibility are considered key elements”, it seems that almost all the regulatory solutions of the Central and Eastern European states under Covid-19 would fail the rule of law test, as they have introduced legal instruments that raise more questions than they solve. Among these, the following should be highlighted:

- regulating by decrees,
- severe limits on requests for information,
- too broad discretion by public authorities for granting information about the outbreak,
- blanket suspensions,
- loss of continuity in the recording of government decisions and actions,
- limits were lifted later than possible.

## **Conclusion**

Freedom of expression is increasingly under threat in many parts of the world, not only in its own right but also concerning its role in democratic discourse (Papp, 2022). Although the ECtHR stated that “the Internet has now become one of the principal means by which individuals exercise their right to freedom to receive and impart information and ideas” (Cengiz and Others v. Turkey, 2015, 29.), this form of communication has also been increasingly under threat in recent years. The ideals of *cyberlibertarianism* seem to be failing (Zanathy, 2021, p. 44.), and cybersovereignty is the new keyword (Griffiths, 2019, p. 17.; (Gosztonyi, 2021). There are growing voices that, in the case of the Internet, individual countries could regulate both the infrastructure and the content displayed (Gosztonyi, 2022, p. 255.) The formula is further complicated by the various platforms’ own legislation and specific judicial mechanisms (Lendvai, 2022, p. 22.) Rising digital repression in many countries mirrored broader crackdowns on human rights over the past year (Freedom House, 2022, p. 2.), and we could see in Eastern Europe “a level of censorship not seen since the Soviet period, massive disinformation” (RSF, 2022).

This downward spiral of communication, which has been going on for years, was triggered by the Covid-19 pandemic, under cover of which governments could take the above steps, which are incompatible with the rule of law. Empowerment was the fear of the unknown, which



provided an excellent breeding ground for the “parallel epidemic”. As was stated in a report about Hungary: “During the Covid era, freedom of information was further restricted. The centralised online public reporting itself made it significantly more difficult, if not impossible, for non-government news outlets to ask real questions about the outbreak.” (Kovács and Polyák and Urbán, 2021, p. 64.)

All this is compounded by the ongoing hybrid conflicts (Farkas and Kelemen, 2022), so we can only hope that the pressure of the international community can keep the leaders of the Central and Eastern European states under some control so that the “democratic paradox” (Badouard, 2020, p. 11) and the digital gap do not grow further. Although it is well documented now that governments “used the cover of Covid-19 to strengthen their grip on power” (Bohle et al., 2022), the most fundamental lesson from a legal perspective of the Covid-19 pandemic is that access to public information and transparency in the region must be increased, as “no State is free to use this public health crisis for unlawful purposes beyond the scope of the health threat” (UNHRC, 2020a, 63.f).

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