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Freedom of Expression and Misinformation Laws During the COVID-19 Pandemic and the European Court of Human Rights

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Abstract This article assesses the European Court of Human Rights' possible responses to post-COVID-19 misinformation laws. These laws are intended to protect society but may become dangerous weapons if used by governments wishing to silence opponents. We identify four categories of speech restrictions that appeared during the COVID-19 pandemic. We then present the recent misinformation laws from Council of Europe member states as well as various potential arguments when cases appear before the Court, and assess their potential weight. We also analyze the expected post-pandemic development of the European Convention on Human Rights' Article 10 jurisprudence.

Keywords: • freedom of expression • emergency • constitutional law • pandemic • European Court of Human Rights

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1 Introduction

This article assesses the ECtHR's possible responses to post-COVID misinformation laws. These laws are intended to protect society but may become dangerous weapons if used by governments wishing to silence opponents. The development of post-Covid Article 10. jurisprudence may produce meaningful impact on local regulations and policies, since municipalities played a crucial role during the public health emergency in maintaining public order and public security (Kostrubiec 2021: 118). Several extraordinary restrictions on free speech have been implemented by local authorities, therefore, the new tendencies of ECtHR case law should also heavily affect the space of manoeuvre left for self-governments during a public health emergency vis a vis the central government, as well as vis a vis the local residents. Moreover, as Karpiuk and Kostrubiec has demonstrated even before the global pandemic, state interference against public health-related misinformation may also narrow severely the field for raising moderate criticism regarding the decisions of municipalities as well as the performance of its public tasks (Karpiuk and Kostrubiec, 2018: 70).

Our overall research finding provides that, taking into account the inherently case-dependent character of such assessments, (Perinçek, 2015: 220) only the most virulent anti-disinformation measures taken during the first waves of the pandemic will amount to violations of Article 10 before the ECtHR. However, in the long run, the same restrictions should not stay in place. Stricter measures, especially excessive criminal sanctions, will not be justifiable when the threat to public health recedes. The balancing under the necessity element of fundamental right restrictions changes rapidly, especially with the latest development of the public health situation. However, the additional grounds on sanctioning expressions will not disappear, since enacted anti-disinformation laws will not be annulled.

2 Literature overview

Freedom of expression is seen as the cornerstone of democracy (Chafee, 1920; Barendt, 2005; Stone and Schauer, 2021). The COVID-19 pandemic[5] brought about curtailments of freedom of expression and other human rights (Joseph, 2020; Lebret, 2020: 9; Kjaerum et al, 2021). Three months after the declaration of the pandemic, the United Nations published a call for governments to "take action to protect and promote freedom of expression during the COVID-19 pandemic, which many States have exploited to crack down on journalism and silence criticism" (OHCHR, 2020).

International organizations are increasingly addressing the spread of dis- and misinformation (Cavaliere, 2022). Legal scholars have examined differences in European and U.S. approach to tackle them (Pollicino, 2020; Pollicino and Somaini,

2020: 171-193). In literature, the terms "misinformation" and "disinformation" and "propaganda" are sometimes used interchangeably, with shifting and overlapping definitions.[6] (Guess and Lyons 2020). Following Tucker et al. (2018), we understand misinformation to be a broader term than disinformation. Disinformation is deliberately propagated false information, while misinformation is the dissemination of false information, with or without intent to deceive.

Since the CoE member states had committed themselves to implementing their restricting measures in compliance with Articles 10[7] and 15[8] of the European Convention on Human Rights (ECHR), Jovičić distinguishes two possible circumstances under which states could have adopted extraordinary measures during the pandemic (Jovičić, 2021: 545). Firstly: under Article 15, CoE member states may derogate from the ECHR or from some of its articles. Albania, Armenia, Estonia, Georgia, Latvia, North Macedonia, Romania, San Marino, and Serbia derogated soon after the outbreak of the pandemic (Istrefi, 2020: 2; Molloy 2020). Secondly: CoE member states may impose legitimate limitations on freedom of expression in line with the requirements provided under Article 10 (2).

Post-COVID freedom of expression cases are still subject to the general test applicable to all interferences in areas of conventionally protected fundamental rights. The European Court of Human Rights (ECtHR) first examines whether the impugned measure interferes with the freedom of expression, and if such intervention exists, whether it is prescribed by law, whether it has a legitimate aim, and whether it is necessary in a democratic society (Noorlander, 2020: 5; Zakharova, 2021). Datuashvili concluded that the changes caused by the public health emergency affected mostly the last of those elements, as far as the necessity of the interference is concerned (Datuashvili, 2020: 114). Consequently, this contribution will focus also on the necessity element of assessing each post-Covid interference under Article 10 of ECHR.

3 Methodology

We first identify four categories of restrictions of free speech that appeared during the pandemic.1 One category is of new, restrictive laws or regulations introduced in the name of combating the emerging "infodemic".2 The second category is those measures that curbed the work of journalists by harassing or prosecuting them for allegedly violating COVID-19 rules. The third category is the banning of the press from reporting on certain pandemic-related matters, and the fourth is of state authorities that used hostile rhetoric towards the media or those who spoke up (e.g., whistleblowers). (Noorlander, 2020) The great majority of these practices appeared online; hence, most state actions addressed "digital" forms of free speech.

This contribution is limited to anti-disinformation legislative pieces imposing additional restrictions on free speech during the COVID-19 pandemic in Council of Europe (COE) member states. A series of such measures have been implemented in various Central- and East-European member states, therefore, the reflections of these countries will be highlighted. Simultaneously, however, many Western democracies enacted measures against terrorist-related speech and hate speech,3 which will not be discussed by this article in detail. Nevertheless, we dully acknowledge the tendency stressed by Bechtold and Phillipson that measures against terrorist-related propaganda are "increasingly draconian" and "undermine long-standing free speech principles." (Phillipson and Bechtold 2021: 518–541)

We identify the restrictive policies applied by the national authorities for combatting against misinformation; then with the formal dogmatic analysis of relevant ECtHR case law, we present the various potential arguments employed when anti-disinformation law cases would appear before the ECtHR and assesses their estimated weight. We also analyze the expected post-pandemic development of Article 10 jurisprudence. Then, it will be analyzed, which factors may determine the outcome of legal controversies, when these laws would be contested before the ECtHR. In spite of the Court's discretion and potential use of judicial restraint (Tzevelekos and Dzehtsiarou, 2022; Tulkens, 2022), we rely on the willingness of the ECtHR to elaborate sets of criteria with which to approach interferences with similar context.4 (Filippachi, 2015: 93) When assessing whether an interference was "necessary in a democratic society" we conceptualize the five main aspects which we found to be the most influential: the potential role of content-based restrictions; the role of freedom of expression to discuss social traumas such as the pandemic; the personal circumstances of the disseminator; the specialties of the online marketplace of ideas; and the severity of the sanction imposed. From the still revealed post-Covid case law of the ECtHR, only those few judgements will be assessed, which either have been decided under Articles 10 and 11 of ECHR, where freedom of expression has been strongly concerned, or where ECtHR identified key principles of fundamental right restrictions in the post-Covid period.

4 Research

As a concrete example of a contested measure, in Hungary, a subsection has been added to the rules on fear-mongering in the Criminal Code (Cox, 2020: 2-3): paragraph 337. § (2) of the Hungarian Criminal Code sets out that a person who during an emergency period and before a broad audience states or disseminates any untrue statement or any misrepresented fact and hinders the effectiveness of the protective measures shall be imprisoned for 1–5 years. Criminal proceedings were established after Facebook posts appeared, questioning government measures, which involved heavy investigation with questioning, seizure, and perquisition. (Eötvös Károly Institute, 2020: 6; Hoffman and Kostrubiec, 2022: 46-47) Several

individuals also faced prosecution for their online comments. (Official communication of Pest County Police, 2020)

The Romanian Penal Code has also been supplemented: according to paragraph 326. § (2) of the Romanian Criminal Code spreading false statements in order to conceal the existence of a risk of infection with an infectious disease is punishable by imprisonment of 1–5 years or a fine. Apart from that, following a mandate received in a Presidential Decree, (Decree no. 195 of March 16, 2020, Art.54) the Romanian media authority removed and limited access to fake news content on COVID-19. It did this by obliging electronic communication service providers to immediately discontinue the transmission or storage of such content. If the fake news did not originate in Romania, the authority was able to require foreign providers to block Romanian users' access to the respective content. (Official communication of state regulator ANCOM, 2020) The authority blocked several websites for publishing false information. Gotev and Rotaru (2020)

Similar amendments to the Russian Criminal Code have been enacted. Russian courts have shown differing approaches to their interpretation: the author of an article considered to be fake news received a fine of €769 alleging that 1,000 graves were dug in a city for possible victims of COVID-19, (Article1, 2020) while prison charges were dropped eventually in the case of a journalist who wrote about poor conditions in a Russian hospital. (Article2, 2021) In addition to financial penalties, media outlets have been asked by the Russian media regulator to remove content from their websites. (Blake, 2020)

In Greece, anyone disseminating false news that may cause citizens concern or fear, or harm public confidence, may be imprisoned for at least three months and fined. The provider of the online platform through which the message was conveyed may face similar sanctions.

In Serbia a governmental order decreed that the Crisis Headquarters was the only authorized source of information about the pandemic; no other sources were to be considered accurate or verified. After general outrage over the detention of a journalist, (Article3, 2020) within one week the Prime Minister announced that this decree would be revoked. (Article4, 2020) Apart from this, in Bosnia and Herzegovina, in the Republika Sprska,[9] individuals proven to have caused panic and to have spread false news may face pecuniary fines. (Kovacevic, 2020)

Another set of measures targeted online content providers or platforms serving as a place for the publication of information, news, or opinions about – among other things – the pandemic. In this case, the legal consequences did not extend to fines or imprisonment, but to the filtering, blocking, or removal of online content. For instance, in Armenia, one emergency provision was a ban on publishing or sharing

any information on the outbreak that did not emanate from the Armenian government or other official state sources.[10] The Azerbaijani government has amended the Law on Information, such that the owner of the internet information resource must remove or restrict access to false information threatening to cause damage to human life and health.[11]

Currently, one case has been communicated by the ECtHR as a post-COVID state intervention directly linked to anti-disinformation laws. In Avagyan v. Russia the applicant made an Instagram post in which she stated that there were no infected people in the Krasnodar region; therefore, such strict protective measures were not reasonable. At the time of her posting, infections had not been confirmed in that region. (Avagyan, 2020) Nevertheless, in the first instance the court imposed a fine of around €390 since she was unable to prove the truth of the disseminated information. The Russian Federation ceased to be a CoE member in March 2022, (Resolution CM/Res(2022)2) but the ECtHR maintains (at least in principle) its jurisdiction in pending Russian cases, such as Avagyan. Furthermore, the lodging of this application illustrates that legal controversies around Covid-related anti-disinformation laws are gradually reaching the ECtHR.

Another proceeding currently in its initial stages may be indirectly linked to anti-disinformation laws. In the case of Jeremejevs v. Latvia, the applicant posted videos of conversations with healthcare professionals about COVID-19 and the Latvian government's control and prevention measures. (Jeremejevs, 2022) For these posts, the applicant was held in detention and subjected to a criminal investigation for hooliganism. His requests to terminate the proceedings were dismissed.

Now we turn to the discussion of conflicting rights and interests expected to be taken into account, if any of the aforementioned national laws, or any measure based on them would be contested before the ECtHR in Avagyan-like controversies.

5 Discussion

5.1 Content-based restrictions on pandemic-related disinformation

As one possible way to tackle contested communications about the COVID-19 pandemic, the ECtHR may rely on Article 17[12] of the ECHR and read it together with Article 10 to eliminate certain speech from public discourse due to their content (Klein, 2002). The ECtHR has highlighted several times that even sharp and dubious messages should be protected by Article 10 unless they are incompatible with the fundamental values of the ECHR, such as peace, justice, and democracy. (Glimmerveen and Hagenbeek v. Netherlands, 1979: 18 ; Marais v. France, 1996: 184; Orban and Others v. France, 2009) Moreover, a certain level of openness is expected of all stakeholders in a democratic society, to tolerate competing views on

matters of public interest. (Handyside v. UK, 1976: 49; Lindon, Otchakovsky-Laurens and July v. France, 2007: 45) However, this protection must be subject to restrictions on content when a communication is intended merely to undermine or narrow the conventionally protected fundamental rights of others. (Lawless v. Ireland, 1960) The ECtHR used this argument when the Nazi holocaust was denied or relativized, (Garaudy v. France, 2003) or when terrorism was glorified (Leroy v. France, 2009: 41; Soffiaux v. France, 2009: 427); the spread of misinformation from a dangerous epidemic may also qualify. This distinction is grounded on the content of speech, or mainly its harmful effects on the fundamental rights of others. Instead of participating in constructive discussion on a matter of public concern, the disseminator simply offends or insults others, (Morice v. France, 2015: 162; Kirs, 2015: 285) or causes tangible harm to certain individuals (Archard, 2014: 136) or identifiable groups. (Bayev and Others v. Russia, 2017: 70)

When one disseminates false or misleading information in the serious matter of public health, it may amount to depriving others of their conventionally protected rights, (Perinçek v. Switzerland, 2015: 253) especially within the uncertain circumstances of a worldwide pandemic. An overgeneralized demonstration of the risks and the probability of becoming infected would cause unexpected and irrational reflections. A relativization of public health concerns may undermine pandemic-related restrictions, leading to jeopardy of human life and constituting a threat to public health.

In the light of the above, the protection of human life and public health would present strong arguments to national authorities to uphold the application of Article 17 of ECHR to several post-COVID cases. However, as the ECtHR confirmed in its previous case law, such restrictions should be acceptable only in a limited area, (Wingrove v. UK, 1996: 58; Sürek v. Turkey, 1999: 61; Feldek v. Slovakia, 2001: 74; Plon v. France, 2004: 44) and strongly convincing arguments would be necessary to uphold state interventions employing this justification. (Krasulya v. Russia, 2007: 38) Moreover, when one's respect for democratic values leads to the violation of another's fundamental rights, a proper balance should be found between protection of the democratic order and the rights of individuals. (Refah Partisi and Others v. Turkey, 2003: 96)

Banning disinformation about COVID-19 should be distinguished from other restrictions on freedom of expression involving Article 17, since most of the former contain a strong element of hate speech (Gordon, 2015: 423–4) and neglect the reasonable sensitivities of others. By contrast, in cases of COVID-19 disinformation most of the disseminators have no harmful intentions in mind; they are expressing a view on the most important public concern of the day. However, if these opinions expressed during a troubling period are not formulated sufficiently carefully, they might provide a point of reference for the upholding of anti-disinformation laws,

since they may easily provoke ill-considered behaviors from certain readers or viewers.

Despite the potential undermining of public health during a global pandemic, we do not consider it likely that the ECtHR will apply Article 17 to the spread of disinformation during this period, except perhaps in the most virulent cases. In spite of its inherently epidemiological character, during the main waves of the pandemic this was the most important matter of public discourse, and the exclusion of any public communication during an emergency from the protection of Article 10 would greatly narrow the scope of debates on the justification of the emergency and the implemented measures. (Witzsch v. Germany, 1999; Fuchs v. Germany, 2015) A further point highlights the danger of vesting in any court the power to decide whether a communication has a minimum value amongst competing opinions and has at least the potential to contribute to the discussion of a matter of public interest. (Haldimann and Others v. UK, 2015: 57) Content-based selection may be able to eliminate the most harmful speech from public debates, but may also have chilling effects for those with legitimate concerns about the epidemiological situation and the protective measures (Cendic, K. & Gosztonyi, G., 2020: 14–15).

5.2 Freedom of expression in the discussion of contested historical events

The ECtHR acknowledged the role of freedom of expression in settling historical disputes, (Lehideux and Isorni v. France, 1998: 47; Chauvy and Others v. France, 2004: 69; Monnat v. Switzerland, 2006: 57) and considered that if a matter is of paramount importance to an entire society, (Sunday Times v. UK, 1979: 66) especially the life and the well-being of the community, (Barthold v. Germany, 1985: 58) and if considerable controversy exists,(Tønsbergs Blad A.S. and Haukom v. Norway, 2007: 87) freedom of expression should be subject to very exceptional limitations only. Furthermore, public debate on the global pandemic may also be classified as a continuing historical debate, (Lehideux and Isorni v. France, 1998: 55; Monnat v. Switzerland, 2006: 60) where uncertainties are likely to exist. The treatment of the pandemic might also be seen as a sensitive moral and ethical issue without broad consent, (Bayev and Others v. Russia, 2017: 66) which would further narrow the margin of appreciation of contracting states.

The ECtHR has provided a detailed standard for limitations on views expressed in a historical debate in progress. Its main elements might also be a proper basis for various arguments in post-COVID-19 cases. Therefore, we illustrate the ECtHR's approach to historical debates through these standards.

Firstly, it should be taken into account how the impugned expressions have been phrased and construed, (Karatas v. Turkey, 1999: 51-2; Perinçek v. Switzerland, 2015: 206,216) especially in a post-COVID-19 context. In exceptional

circumstances, when, due to a lack of verified information and huge uncertainties, otherwise insignificant disinformation may cause significant harm, extraordinary prudence is required from disseminators when selecting the methods, manners, and content of the messages being conveyed. (Zana v. Turkey, 1997: 57-60; Sürek v. Turkey, 1999: 52,62) To give a concrete example, within these very demanding circumstances, people should not make shocking allegations or statements which might easily be taken as facts. Such opinions, which might at other times be understood to be merely offensive or shocking ideas, may have additional threatening implications during a public health emergency, which may justify limitations on otherwise clearly acceptable expressions. However, such additional interferences should not unreasonably discourage individuals; and should especially not discourage the press from fulfilling its task as a public watchdog. (Bladet Tromsø and Stensaas v. Norway, 1999: 64; Jersild v. Denmark, 1994: 35)

Secondly, the rights and interests affected by the statements (Radko and Paunkovski v. Macedonia, 2009: 69,74) should be taken into account. (Orban and Others v. France, 2009: 46, 49-51; Perinçek v. Switzerland, 2015: 217) This is the point where the most pressing arguments might be invoked by national authorities. Spreading disinformation about an infectious disease would significantly undermine protective measures established by the authorities, which would lead to the threatening of human life and health, which undoubtedly constitute the most important fundamental rights. Only a very narrow selection of fundamental rights and interests should prevail over freedom of expression, but the right to life and health should be amongst them. If one could demonstrate that an expression would be at least capable of causing significant tangible harm during a public health emergency, this would provide a core justification for each restricting measure. The balancing between the fundamental rights concerned and the considerations justifying their restrictions are heavily affected by the pandemic, when the pressing social need has greater importance, compared to similar assessments during an ordinary period. The ECTHR has already underlined the exceptional significance of positive obligation on states to implement effective measures for the protection of human lives and public health within the very special context of the pandemic, however, this duty should not justify all forms of restrictions (Vavricka v. Czech Republic, 2021: 282; CGAS v. Switzerland, 2022: 84).

Thirdly, the effect of the statement should be assessed carefully, to verify or reject the reasonability of the interference in a democratic society. (Pirin and Others v. Bulgaria, 2005: 61; Perinçek v. Switzerland, 2015: 218) If one can illustrate the exact influence of the expression with evidence, this should enhance the probability of upholding state interventions. However, proper differentiation should be made between instances of speech, based on their ability to create an effect and their definite achievements. The effect of a speech may depend on: the platform where it is conveyed; the size of the community at which it was aimed, and which accessed

it; its subject matter; and the exact public health circumstances under which it was made. Regulations which make no proper distinction between differing communications will often fail to comply with the conventional standards.

Lastly, the lapse of time should be considered between the historical event and the reflections on it. (Lehideux and Isorni v. France, 1998: 55; Monnat v. Switzerland, 2006: 64; Filipacchi v. France, 2007: 47; Orban and Others v. France, 2009: 52; Smolorz v. Poland, 2012: 38; Perinçek v. Switzerland, 2015: 219, 249).) Again, this aspect must be interpreted in a special post-COVID-19 context, where reflections on the epidemiological situation and its treatment are almost immediate. If a certain period of time has elapsed since an event being discussed took place, this may reduce the relevance of sensitivities about the event, or may reduce the level of exceptional prudence required from participants in public discourse on such matters. In the case of the global pandemic, this argument is not yet relevant due to its recent occurrence. At least during the initial stages of the post-COVID-19 period, the extraordinary public health circumstances should determine the assessment of these controversies.

5.3 Personal circumstances of the disseminator

The assessment of each restriction may depend heavily on the person who stated his or her view during the public health emergency. Different standards may be reasonable for representatives of the press and for professionals (health care or legal experts). The level of expected carefulness may also vary among these groups (Bayer 2020, 284).

The vital role of the press as watchdog (Sunday Times v. UK, 1991: 50b) circumscribes the national margin of appreciation (Plon v. France, 2004: 43) by the interests of a democratic society, especially in times of crisis, such as the COVID-19 pandemic. Free access to information can help to resolve the crisis and expose abuses that may take place. (Guidelines of the Committee of Ministers, 2007: 18) At the same time, the criminal or administrative liability of public officials who try to manipulate public opinion by exploiting its special vulnerability in times of crisis shall also be of concern. (Guidelines of the Committee of Ministers, 2007: 22) Article 10 applies to journalists, but they must act in good faith in order to provide accurate and reliable information. (Pentikäinen v. Finland, 2015: 90) Strong reasons must be established for substituting national decisions when private reputation and freedom of expression are concerned. (MGN Limited v. UK, 2011: 150) Reflecting the laws introduced and detailed in section 1, official communications cannot be the only information channel about the pandemic. (SG/Inf(2020)1) Enforcing criminal sanctions implies adverse effects on the vital role of the press, and itself constitutes interference in freedom of expression. (Smith and Grady, 1999: 127)

Article 10 affords a safeguard to journalists reporting on issues of general interest. But it is subject to the provision that they are acting in good faith, and providing reliable and precise information in accordance with the ethics of journalism. Where the "duties and responsibilities" of journalists are concerned, the potential effect of the medium of expression is an important factor in assessing the proportionality of the interference. (Monnat v. Switzerland, 2006: 67,68,70) One may conclude from these standards that due to its special responsibility, the press should face stricter standards in a post-COVID-19 context than ordinary people when it discloses information about public health concerns. However, its vital role as a public watchdog amounts to an additional importance, and should be fully protected when emergency measures are tailored.

Communication by healthcare experts and epidemiologists should be also reflected in the shadow of a pandemic. During such periods their responsibility is paramount, and their opinions are widely spread and believed by the public. Unfortunately, some of these professionals are openly anti-vaccination or anti-mask, and some even deny the existence of the virus itself. (Hanula, 2020) The protection of human health is a legitimate aim under ECHR and could justify national measures against statements undermining efforts to combat the virus. Contrary to the status of the press, where Article 10 offers additional protection of freedom of expression under a public health emergency, for public health experts the protection should be narrower because their profession places upon them an additional obligation to communicate these issues with exceptional prudence, with special regard for the particular professional environment itself. (Kharlamov v. Russia, 2016: 27)

The ECtHR also acknowledges the professional status of politicians, and concludes that these public figures have an important position in debates concerning an entire community. (Perinçek v. Switzerland, 2015: 254) As for lawyers commenting on the legal responses to the pandemic, the right balance should be struck between the various interests involved, including the right to receive information about matters of public concern, the dignity of the legal profession, and the credibility conferred upon lawyers. (Nikula v. Finland, 2002: 46) As a consequence, when the legal framework of a public health emergency is discussed, legal professionals must rely on a higher level of prudence as well. (Lindon, Otchakovsky-Laurens and July v. France, 2007: 41)

5.4 The specifics of the online marketplace of ideas

The term "marketplace of ideas" describes freedom of expression through an economic analogy. It originated in the USA and it was first explicitly set out in a Supreme Court judgement's concurring opinion by Justice Douglas: *"Like the publishers of newspapers, magazines, or books, this publisher bids for the minds of men in the market place of ideas."*(United States v. Rumely, 1953) In this regard,

the market in the modern age is rather different than the market before the internet became available to billions of people. Formerly, the free exchange of ideas had to happen in person, or through traditional media such as television, print, and radio. Justice Douglas' almost 70-year-old concurring opinion mainly considered print media, but as we know, times are ever-changing. A study by Dawn C. Nunziato mentions that a few years before the pandemic, two-thirds of surveyed Americans identified the internet as one of the top sources of information on the 2016 presidential election (Nunziato, 2019: 1519, 1528.). It is an easily accessible platform on which to receive information. One can post a status update or publish an article in a few seconds, and in this way everyone can remain up to date on matters of public interest. The rapid nature of the medium makes it easy to disseminate information to millions, which is why misleading information poses such an unprecedented problem.

The ECtHR is well aware of the importance of the internet in relation to freedom of expression. It declared: *"The Court notes at the outset that user-generated expressive activity on the Internet provides an unprecedented platform for the exercise of freedom of expression."*(Delfi AS v. Estonia, 2015: 110) Another recurring stance laid out in most of the relevant case law concerns the increased general access to news, and the platform as a source of dissemination. The ECtHR held that *"the Internet plays an important role in enhancing the public's access to news and facilitating the dissemination of information in general."* (Delfi AS v. Estonia, 2015: 133) It gave several valid reasons why the online marketplace of ideas ought to be examined and regulated differently than other tools of communication. Considering the possible effects, the ECtHR found that audiovisual media have a more immediate and powerful effect than print media.(Monnat v. Switzerland, 2006: 68) In its Jersild judgement it explained that *"The audiovisual media have means of conveying through images meanings which the print media are not able to impart."*(Jersild v. Denmark, 1994: 31) By itself, this is definitely not a negative phenomenon. It simply means that we can send and receive information quicker than ever before; for example, the most recent developments of the pandemic. On the other hand, the ECtHR is also right that there is immense risk in all of this, because even if a post is factually incorrect, or intentionally or inadvertently misleading, it will remain online long enough to be seen by a wide audience. Hence, *"The risk of harm posed by contents and communications on the Internet to the exercise and enjoyment of human rights and freedoms, particularly the right to respect for private life, is certainly higher than that posed by the press."* (Editorial Board of Pravoye Delo and Shtekel v. Ukraine, 2011: 63) It can be argued that from the standpoint of a state, this principle can especially serve as a legitimate aim to intervene in people's freedom of expression by passing stricter regulations during a public health emergency, because false and misleading communications about COVID-19 can not only seriously undermine a state's authority to respond to the pandemic, but could also endanger millions of lives.

The unique characteristics of the internet mean that it likely must be regulated differently than the traditional press, as policies governing the online sphere must undeniably be adjusted according to the technology's specific features. (Editorial Board of Pravoye Delo and Shtekel v. Ukraine, 2011: 63) The decentralized structure also means that it is not only the state which has the task of regulating within reasonable bounds; the platform provider has to intervene as well. This latter point we will discuss in detail later.

Regarding freedom of expression in the context of audio-visual media, the ECtHR states that "*in a democratic society (…) where, through the press, it serves to impart information and ideas of general interest, which the public is moreover entitled to receive (…).*"(Informationsverein Lentia and Others v. Austria, 1993: 38) The ECtHR then also established that this can be accomplished only in respect of pluralism, and the state itself has an obligation to safeguard and preserve pluralism as an "*ultimate guarantor* (…) *This observation is especially valid in relation to audio-visual media, whose programmes are often broadcast very widely*." This argument highlights the importance of (a) pluralism, and (b) the willingness of the state to intervene if necessary. As for pluralism, through freedom of expression it has an immensely important role in serving societal cohesion. (Orban and Others v. France, 2009: 52) Speech falling under the protection of the ECHR often makes valuable contributions to public discourse. It must also be highlighted that as far as the ECtHR is concerned: *"Even though a particular view is neglected, it is always easier to bear, when it is at least expressed regularly."* (Smolorz v. Poland, 2012: 38) As for the importance of the state, local authorities are best placed to assess the difficulties of safeguarding democratic order. (Zdanoka v. Latvia, 2006: 134) This means that while on the one hand the state has to let pluralism prevail, on the other hand it has to create sufficient, internet-specific regulation which balances all interests and rights of the parties concerned. This interference of some sort arises from the aforementioned severe risk of harm posed by online content. The ECtHR therefore expects a greater degree of diligence from journalists on the basis that "*the potential impact of the medium concerned is an important factor and it is commonly acknowledged that the audio-visual media often have a much more immediate and powerful effect than the print media."* (Delfi AS v. Estonia, 2015: 134)

There is seemingly a contradiction in the case law of the ECtHR about television reports. In the Monnat judgement it said that *"the domestic authorities in principle have a broader margin of appreciation where a television report is concerned"*. (Monnat v. Switzerland, 2006: 68) However, it appears that this wide margin of appreciation is applicable only until a TV report raises a matter of major public concern (and there is no doubt that any report about COVID-19 is a report about a major public concern), because the authorities then have *"only a limited margin of appreciation in determining whether there was a "pressing social need" to take the*

measure in question"; and to justify any interference authorities must give *"convincing, well-substantiated reasons to justify their decisions."* (Schweizerische Radio- und Fernsehgesellschaft SRG v. Switzerland, 2012: 56) This contradiction can be explained by the use of the phrase "*in principle" in* the Monnat case. This does not exclude the possibility of stricter margins, the use of which can still be proportionate to the legitimate aim pursued under Article 10 (2).

With strict quarantine and social distancing rules in place, public discussion during the pandemic was conducted mostly in the online world. Vigorous discussions took place in the comments section under certain press articles. The general rule was: the more controversial the article, the more intense the comments battle became. The role of the internet in enhancing dissemination is therefore accentuated during a pandemic. But there is another matter we must touch upon, which is the duty and the responsibilities of media portals. Portals which provide a forum for the exercise of the right of expression, enabling the public to impart information and ideas, *"must be assessed in the light of the principles applicable to the press."* (Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary, 2016: 61)

The question is whether such portals can be classified as the publishers of third-party content. The ECtHR established in two notable cases that these sites are *"not publishers of the comments in the traditional sense"*. But this does not mean that they have no responsibility at all: *"Internet news portals must, in principle, assume duties and responsibilities."*Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary, 2016: 61) Therefore, internet platform providers' duties differ greatly from those of traditional publishers, and include *"(a) large news portal's obligation to take effective measures to limit the dissemination of hate speech and speech inciting violence"*. But there is a limitation: this *"can by no means be equated to private censorship*". (Delfi AS v. Estonia, 2015: 157) Of course we note that the responsibility for third-party content was found in cases with elements of hate speech. But disseminations regarding COVID-19 also concern free expression, and the moderation of some of these potentially dangerous comments might also be required, to protect the rights of others. We therefore deem these criteria to be applicable in our context. In summary: the platform holder bears responsibility not because it is the publisher, but upon consideration of three conditions: if (a) the publication of the comments is in its financial interest, and (b) it increases the page's popularity, and (c) no "notice and take down" system or anything similar is in place that would result in the immediate removal of the offensive comments. (Delfi AS v. Estonia, 2015: 162) It is therefore in the interest of these portals to create a moderated online environment, if they wish to avoid being punished for their unwillingness to take down harmful comments.

The platforms provided to user-generated content also have an important role because, as the ECtHR determined, they foster the emergence of citizen journalism,

and therefore content ignored by traditional media can prevail. (Cengiz and Others v. Turkey, 2015: 52) This is especially relevant in states that opted to restrict reporting on factual events of the COVID-19 pandemic, but these platforms also could have served as primary vehicles to discuss overall government response.

5.5 The severity of the sanction imposed

Laws restricting free expression can have severe consequences on democracy and political process (Schultz and Toplak, 2022), and autocracies in Central and Eastern Europe (Ágh, 2022: 72-87) may use the opportunity for political motives. In 2022, Turkey has adopted a law that carries prison terms of up to three years for spreading disinformation online. (Article 5, 2022)

As the ECtHR highlighted, the chilling effect of the criminal sanction is particularly dangerous in cases of (a) political speech and (b) public interest debate. (Lewandowska-Malec v. Poland, 2012: 70) Disseminations about COVID-19 could fall under both categories simultaneously. The pandemic itself is highly important in public interest debates (e.g., the determination of quarantine rules), but they could also be classified as political speech if their goal is to hold the national government to account or to seek redress of grievances. One should first state that all criminal sanctions are general measures. The ECtHR makes a compelling argument about the use of general measures instead of case-by-case distinctions because the latter could cause risks of significant uncertainty, litigation, expense, delays, discrimination, and arbitrariness. (Animal Defenders International v. UK, 2013: 108; Hoffman and Balázs, 2021: 106-108) The ECtHR prepared a checklist to determine the proportionality of a general measure, which includes: (a) assessing the legislative choices underlying the provision; (b) analyzing whether it had received parliamentary and judiciary review, and; (c) assessing risk of abuse if a general measure were to be relaxed. (Bayev and Others v. Russia, 2017: 63) It says that *"As a matter of principle, the more convincing the general justifications for the general measure are the less importance the Court will attach to its impact in the particular case."* (Bayev and Others v. Russia, 2017: 63) It is unlikely that states would struggle to prove that they have *some* justification for the adopted measure; for example, passing stricter rules in the name of protecting public health, especially the vulnerable elderly. But the use of a general measure will not outweigh the specificities of each individual case. It is only the margin that is unified.

Most of the fear-mongering laws imposed criminal sanctions on certain behaviors committed by the public dissemination of certain communications. However, criminal sanctions should be used as *ultima ratio* in restricting freedom of expression in exceptional circumstances, when the legitimate aim pursued cannot be achieved with less interference to the protected scope of the fundamental right. ." (Radio France and Others v. France, 2004: 40; Lindon, Otchakovsky-Laurens and

July v. France, 2007: 47; Długołęcki v. Poland, 2009: 47) The ECtHR noted that *"a criminal conviction was a serious sanction, having regard to the existence of other means of intervention and rebuttal, particularly through civil remedies. (...) what matters is not so much the severity of the applicant's sentence but the very fact that he was criminally convicted, which is one of the most serious forms of interference with the right to freedom of expression.* (Perinçek v. Switzerland, 2015: 273) The ECtHR does not explicitly argue that a criminal sanction is sufficiently severe not to be used in the field of freedom of expression. However, the case law highlights that it should be used only as a last resort. As for the severity of the imposed sanction, the ECtHR found that the *"nature and severity of the penalty imposed are also factors to be taken into account when assessing the proportionality of the interference."* (Ceylan v. Turkey, 1999: 37)

Even during emergencies, a strong pressing social need should be proven by authorities wishing to prescribe and especially to apply criminal sanctions against disseminators, this was also confirmed in relation to freedom of assembly regarding the post-Covid context (CGAS v. Switzerland, 2021: 89). In several cases, enforceable imprisonment has been foreseen, of durations of up to five years. Enforceable imprisonment is the most severe criminal sanction, and rarely appears in the field of freedom of expression. Consequently, once imprisonment of excessive length is imposed on the ground of laws on fear-mongering, authorities should always provide stronger justification of the interference even if it was ordered during a public health emergency.

We highlighted the importance of the press and media platforms in providing information to the public. As a platform of public discourse, sanctions against journalists must now be examined. They are expected to have a chilling effect: "*what matters is the very fact of judgment being given against the person concerned, including where such a ruling is solely civil in nature. Any undue restriction on freedom of expression effectively entails a risk of obstructing or paralysing future media coverage of similar questions."* (Filippachi v. France, 2015: 151) Criminal sanctions against journalists have the potential to seriously undermine the media's public watchdog function.

On the matter of criminology and behavioral ethics, whenever we wish to examine whether the introduction of certain policies intended to reduce disseminations that could have hindered the effectiveness of a government's response to COVID-19 were successful, we should examine how many times those sanctions were used, and in this context discuss the method of enforcement and the severity of the sanction itself. A study entitled "Frequency of enforcement is more important than the severity of punishment in reducing violation behaviors" finds that a high probability of inspection with low fines was more effective than an economically equivalent policy that combined a low probability of inspection with severe fines

(Teodorescu et al., 2021: 1) Based on this, the effect of looming sanctions is definitely relevant on its own, because it is possible that law-abiding citizens would self-censor rather than pay a large fine or go to prison. This effect becomes stronger when enforcement is well-monitored and efficient.

6 Conclusions

We consider that the ECtHR will not reject the applications by anti-COVID disseminators as manifestly ill-founded due to its incompatibility with ECHR's fundamental values. So, if other formal requirements are met, such cases will be examined on their merits. Regarding the substantial assessment, we agree with Tsomidis that the pressing social need undoubtedly experienced during the pandemic should not mean an automatic presumption by the authorities of the lawfulness of their emergency actions; it should strengthen the justification of even far-reaching restrictions on the scope of free expression (Tsomidis, 2020: 381–4.). The growing intensity of state interventions should not eliminate the free exchange of differing views of the global pandemic or of a public health emergency. The vital role of the press would be accentuated during such a period, when there are difficulties in accessing reliable information.

In our view, in general terms, contestants of anti-disinformation measures before the ECtHR would have a better chance of proving the violation of Article 10 if they concentrate on the severity of the fine or term of imprisonment imposed on them. As a general principle, all laws restricting freedom of expression should be interpreted narrowly. This is particularly true when the law envisages criminal investigations against authors of public communications. It may be dubious, even in the circumstance of a public health emergency, whether it is proportionate to imprison authors of public messages potentially able to undermine the efficiency of the protective measures. Authorities have weighty arguments based on the necessity of combating a virus threatening human lives and public health. However, the priority of these considerations *vis-à-vis* counterarguments at least does not stand beyond doubt. Applicants should take due regard of the perspectives of this argument in a particular case.

As a general evaluation, one may argue that criminal proceedings based on public communications will be strictly reviewed by the ECtHR, but the protection of public health and public order as well as the standard of exceptional carefulness expected from certain disseminators will lead to several judgements also in favor of national authorities.[13]

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Notes:

1. The weight and the jeopardies have also been underlined by the Council of Europe. Press freedom must not be under-mined by measures to counter disinformation about COVID-19.
2. According to the WHO, an infodemic is an excess of information, including false or misleading information, in digital and physical form during a disease outbreak.
3. The literature on hate speech is vast. See Kaye, 2022; Kučiš, V., and Gušić, D.K., 2021; Teršek, A. , 2020.
4. See for instance: Couderc and Hachette Filipacchi Associés v. France, November 10, 2015 [GC]: 40454/07, 93.
5. The World Health Organization (WHO) made its assessment that COVID-19 could be characterized as a pandemic on March 11, 2020.
6. Guess and Lyons (2020) "All three concern false or misleading messages spread under the guise of informative content, whether in the form of elite communication, online messages, advertising, or published articles."
7. Article 10 of the ECHR: Freedom of expression: 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.
8. Article 15 of the ECHR: Derogation in time of emergency:
In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law. 2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision. 3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons there for. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.8. The Serbian Republic in Bosnia and Herzegovina.
9. The Serbian Republic in Bosnia and Herzegovina.
10. Part VII of Decision of the Government of the Republic of Armenia on Declaring a State of Emergency in Armenia.

11. On amendments to the Law of the Republic of Azerbaijan: "On information, informatization and protection of information"
12. Article 17 of the ECHR: "Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention."
13. In the CGAS v. Switzerland judgement, the ECtHR has already acknowledged the impact of the special post-Covid context on the public communication, and held, that a general ban on public assemblies means an unreasonable interference under Article 11 ECTHR, even taking into account the serious public health concerns caused by the Covid-19 pandemic.

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