

THE BOUNDS OF “MARGIN OF APPRECIATION” OF THE STATE IN RESTRAINING FREEDOM OF EXPRESSION DURING THE PANDEMIC

ABSTRACT

2020 will certainly become a part of history of the mankind not just due as a healthcare crisis related to COVID-19 (novel Coronavirus), but also as vivid example of a more “coordinated action” of the “civilised nations”,¹ the situation, the management and improvement of which became the reason for unity of the “international society”. However, despite such unity, even in the era of technological development like this one, the only relevant measure of combating the virus is the one from the century before.²

Thus, the foregoing paper discusses the public-law aspects of the emergency caused by the pandemic on the basis of legal analysis of state policies. The goal of the paper is to vividly distinguish the power of information in the process of managing the pandemic and to demonstrate that censorship is used by the states for silencing the political opponents. Apart from demonstrating the problems, the paper aims at showing the ways, which the international society can use to face disinformation and unjustifiable involvement in media activity shackled by authoritarianism.

The main postulate of the paper is that in the era of technological development, gossip and conspiracy have no place and that the states shaping the current political agenda should treat the power of information and its impact on the wellbeing of the society with higher preservation.

INTRODUCTION

Notwithstanding the negative effects of COVID-19 on public health, it should be acknowledged that the pandemic, in itself, does not violate our rights. It does have an impact on our

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¹ WHO, Coronavirus Disease (COVID-19) Dashboard, 2020, available at: <https://covid19.who.int/> [last accessed: 30 September, 2020].

² WHO, Coronavirus disease (COVID-19) advice for the public, 2020, available at: <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/advice-for-public> [last accessed: 30 September, 2020].

exercise of rights, however, regardless of our desire, we can neither judge the virus based on legal credos, nor impose any liability.

States are not responsible for COVID-19. However, they are responsible for methods which they invoke to respond to the current challenge the world is facing. If they are responding to the challenge by implementing policies and enacting regulations that unjustifiably restrict human rights, then this will be deemed as a human rights violation. If they do not ensure relevant measures aiming to prevent the spread of the virus, then this too, shall be regarded as a violation of human rights.

The author is of the opinion, that a post-crisis reality can develop in two directions: the first **approach to the future** is that, when the crisis has once again demonstrated the role of coordinated international action for the purposes of progress in this regard,³ the pandemic has once again shown every government, politician, relevant actors of the digital era, that any kind of censorship targeting accessibility of information, effective governance of issues related to health, life and autonomy, shall satisfy the criteria of lawfulness, necessity and proportionality. This is the desired way of recovering from the pandemic, which should be followed by states all over the world in order to strengthen the framework for respecting human rights.

Under the **second approach**, we might have a different reality, whereby the policy of disproportionate restriction of human rights will result in the reign of autocratic regimes, inequality and disrespect for human rights. In this reality, the COVID-19 is not only an invisible enemy, but also a pathogen of repression. It is likely that many states will follow the second way, taking into account that the virus has started to spread in a censored environment, which caused the politisation and degeneration of science and expertise.⁴

The following areas protected by freedom of expression regarding state policy administration will be reviewed during the discussion:

1. Freedom to have one's own opinion;⁵
2. Freedom to spread information;⁶
3. Freedom to receive information.⁷

All three dimensions are closely interconnected, given that formation and possession of an opinion becomes practically impossible, if one has no access to information.⁸

³ UN General Assembly, Global solidarity to fight the coronavirus disease 2019 (COVID-19), 2020, available at: <https://undocs.org/en/A/RES/74/270> [accessed 30 September 2020].

⁴ International Press Institute (IPI) Tracker on Press Freedom Violations Linked to COVID-19 Coverage – “COVID-19: Number of Media Freedom Violations by Region,” available at: <https://ipi.media/covid19-media-freedom-monitoring/> [accessed 30 September 2020].

⁵ The Constitutional Court of Georgia case No.1/5/675,681 “Ltd TV Rustavi 2 and Ltd TV Sakartvelo v. the Parliament of Georgia”, 30 September 2016, § 71.

⁶ The Constitutional Court of Georgia case No.1/1/468, “Public Defender (Ombudsman) of Georgia v. the Parliament of Georgia“, 11 April 2012, § 27.

⁷ The Constitutional Court of Georgia case No.2/3/364, “Georgian Young Lawyers' Association (GYLA) and Rusudan Tabatadze v. the Parliament of Georgia”, 14 July 2006, page 7.

⁸ European Court of Human Rights, *Handyside v. the United Kingdom*, December 7, 1976, § 49, Series A no.

The European Court of Human Rights considers that the freedom of expression protects not only “information” and “ideas” that the society likes, or that are inoffensive and harmless, but also those that are unacceptable, offensive and shocking.⁹

The press plays an essential role in a democratic society, its duty is to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest [...]. Not only does it have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of “public watchdog”.¹⁰

The aim of the article is to analyse legal and political processes caused by COVID-19 and to demonstrate problems that might arise after an emergency with respect to the freedom of expression and governing information related to the pandemic. In addition, the research is intending to address “a state of emergency – a hallway to authoritarianism”.

1. FREEDOM OF EXPRESSION, GOVERNING INFORMATION RELATED TO THE PANDEMIC AND THE STATE

*“Give me the liberty to know, to utter, and to argue freely according to conscience, above all liberties,”*¹¹

*John Milton, 1644
English civil servant and intellectual*

Throughout the centuries, freedom of expression has been an inspiration for a number of legal and political processes. History keeps the records of civic activism, which would have been deprived of its substantial essence without the freedom of expression, as well as revolutions, which would have not been accomplished without the freedom of thought and expression.¹² The humanity also remembers, from the point of view of improving the protection of human rights, a famous speech by Martin Luther King, Jr., which would not have been kept in the history without the freedom of expression.¹³ History has provided answers with respect to social importance of the freedom of expression on many occasions, emphasising the role that this freedom has on the development of the worldview of the society.

24 and nos 21279/02 and 36448/02, *Lindon, Otchakovsky-Laurens and July v. France* [GC], 2007, § 45, also no. 32772/02, *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (no. 2)* [GC], 2009, § 96, also, no. 39954/08, *Axel Springer AG v. Germany* [GC], February 7, 2012, § 78.

⁹ European Court of Human Rights *Mouvement raëlien suisse v. Switzerland* [GC], no. 16354/06, 2012, § 48.

¹⁰ European Court of Human Rights *Thoma v. Luxembourg*, no. 38432/97, 2001, § 45.

¹¹ Malik K. “From Milton to Pullman, the quest for truth is riddled with ambiguity”. *The Guardian*, 29 December 2019, pp. 1-2, available at: <https://www.theguardian.com/commentisfree/2019/dec/29/from-milton-to-pullman-the-quest-for-truth-is-riddled-with-ambiguity> [accessed 30 September 2020].

¹² Shearlaw Maeve, “Egypt five years on: was it ever a 'social media revolution'?” *The Guardian*, 25 January 2016, <https://www.theguardian.com/world/2016/jan/25/egypt-5-years-on-was-it-ever-a-social-media-revolution> [accessed 30 September 2020].

¹³ Younge Gary, “Martin Luther King: the story behind his 'I have a dream' speech,” *The Guardian*, 9 August 2013, pages 2-4, <https://www.theguardian.com/world/2013/aug/09/martin-luther-king-dream-speech-history> [accessed 30 September 2020].

This is also demonstrated by the fact that the freedom of expression was enshrined in a number of international conventions, including the Universal Declaration of Human Rights, European Convention on Human Rights and the International Covenant on Civil and Political Rights (ICCPR).¹⁴

The Constitution of Georgia gives a special attention to the freedom of information in the context of formation of the democratic society.¹⁵

Under the definition provided by the Constitutional Court of Georgia:

“For the formation of a thought, it is important to access information, while the freedom to disseminate information ensures that the thought be delivered from the author to the addressee. Besides the social importance, freedom of information also bears a significant importance for the purposes of intellectual development of individuals”.¹⁶

The European Court of Human Rights reiterates that enacting certain measures against information based on prejudices or ungrounded allegations falls within the “margin of appreciation” of a state.¹⁷ Moreover, when disseminating information, an individual shall demonstrate great caution in analysing exactness and reliability of information, as well as the interest of making it publicly available.¹⁸ For instance: An act imbued with personal hatred, personal antagonism, or for the sake of personal exclusion cannot justify high-level protection. It is significant to establish that the applicant acts in good faith, aiming only to make the public aware of a specific injustice.

When the requested information is of high public interest, the state’s denial to provide access to such information shall be subjected from strict supervision on behalf of the public and shall be adequately reasoned.¹⁹

¹⁴ Article 19, UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III); Articles 9, 10 and 11, 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 ; Articles 18 and 19, UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171;

Article 32, 1921 Constitution of Georgia, Adopted by The Constituent Assembly, 21 February 1921.

Article 17, Constitution of Georgia (ed. 2018), Parliament of Georgia, 24 August 1995, available at: <https://matsne.gov.ge/en/document/view/30346?publication=36> [accessed 30 September 2020].

The Constitutional Court of Georgia case No.1/7/1275, “Aleksandre Mdzinarashvili v. Georgian National Communications Commission”, 2 August 2019, Motivational part of the judgement, § 7.

¹⁵ The Constitutional Court of Georgia Ruling No.2/6/1311 “LTD Stereo +, Luka Severini, Lasha Zilpimiani, Robert Khakhalevi and Davit Zilpimiani v. the Parliament of Georgia and the Ministry of Justice of Georgia”, 17 December 2019, § 54; The Constitutional Court of Georgia case No. 1/6/561,568, “Iuri Vazagashvili v. the Parliament of Georgia”, 30 September 2016, § 39.

¹⁶ The Constitutional Court of Georgia case No.2/3/406,408 “Public Defender’s Office of Georgia and Georgian Young Lawyers’ Association (GYLA) v. the Parliament of Georgia”, 30 October 2008, § 10.

¹⁷ *ibid.* See also, European Court of Human Rights case no. 39293/98, *Fuentes Bobo v. Spain*, February 29, 2000, § 38; nos 28955/06, 28957/06, 28959/06 and 28964/06, *Palomo Sánchez and Others v. Spain* [GC], 2011, § 59 and also, no. 44306/98 *Appleby and Others v. the United Kingdom*, 2003, §§ 39–40.

¹⁸ European Commission case no. 252, *Hadjianastassiou v. Greece*, Series A, 16 December 1992, § 45.

¹⁹ European Court of Human Rights Judgement on Admissibility *Sdruzeni Jiboceske v Czech Republic*, 10 July 2006.

In addition, the Constitutional Court of Georgia noted in another decision that:

“[a] free society consists of free individuals, which live in a free informative space, think freely, have independent opinions and participate in a democratic process, which implies exchange of ideas and competition among these ideas”.²⁰

It is worth pointing out the approach of the World Health Organisation towards the socio-legal importance of freedom of expression before the world was strangled by the pandemic. Governing the epidemic requires “active communication regarding the risks”,²¹ a bilateral dynamic and progressive information strategy since the moment of the eruption of the virus, which consists of the following aspects:

1. Provision of information by a state with respect to the nature of risks and preventive measures;
2. Analysis of collective and individual fears;
3. Gossip-management, which, in the first place, implies “listening” to disinformation, analysing it and correcting immediately.²²

Taking this into account, it is preferable to disseminate information in a way that is targeted on the needs of different audiences and is aiming to improve rather than punish. In addition, it should be pointed out that states shall implement the healthcare policy in accordance with fundamental human rights.²³

Resolution 21/12 of the Human Rights Council and Resolution 68/163 of the UN General Assembly vividly enshrine the role of free media in building democracy and good governance. Both bodies clearly recognise the crucial role of journalism and set the standard that, both in physical and in the virtual dimension (the Internet), freedom of expression must be guaranteed. The Council has established that freedom of thought and expression is an integral part of both personal and social development. This concept remains firm even in the times of global pandemic.²⁴

Accordingly, the principles of legality, necessity and proportionality apply to any circumstances, including the attempts to combat threats posed by the COVID-19 to public health. The International Covenant on Civil and Political Rights recognises freedom of expression a special importance, which is also one of the most important instruments for developing public healthcare policies.²⁵ We might also discuss that the restriction of freedom of expression

²⁰ The Constitutional Court of Georgia case No.2/2-389, “Maia Natadze and others v. Parliament of Georgia and the President of Georgia”, Chapter II, 26 October 2007, § 13.

²¹ WHO, *Managing Epidemics: Key Facts about Major Deadly Diseases* (Geneva), 2018, p. 34.

²² *ibid.*

²³ *International Health Regulations*, WHO, 2005, Article 3 (1).

²⁴ Human Rights Committee, General Comment No. 34, 2011, § 2.

²⁵ The Inter-American Legal Framework regarding the Right to Freedom of Expression, Inter-American Commission on Human Rights, 2009, p. 11, available at:

http://www.oas.org/en/iachr/expression/docs/publications/inter-american_legal_framework_of_the_right_to_freedom_of_expression_final_portada.pdf [accessed 30 September 2020].

can never be necessary, even during the pandemic. Accordingly, states shall do all in their powers to protect the freedom of expression.²⁶

A healthcare crisis such as the pandemic shall not be understood as a factor limiting accessibility of information, or as if the government is no longer required to act in the best interests of the nation. On the contrary, - a public health threat strengthens an argument in favour of free access to information related to the epidemic, given that the public can only take measures for the protection of their health as a result of being informed on threats caused by the disease. A method enabling states to restrict certain rights when facing an epidemic or another large-scale challenge should also be pointed out.

2. PANDEMIC AS A CHALLENGE FOR FREEDOM OF EXPRESSION: STATE PRACTICE

The discussion above has on several occasions demonstrated that media is a main instrument at the hands of the society for getting acquainted with topical issues and finding ways to approach problems. Restricting access to information bars an important element of sharing information.²⁷ Prior restrictions regarding certain topics, closing media outlets and blocking an access to internet communication platforms call for careful examination and can only be justified under exceptional circumstances.²⁸

As noted above, journalism plays an important role from the point of view of providing information to the public, thereby allowing it to find and have access to such information, that would enable them to protect themselves. This is what constitutes a fundamental accomplishment of media for the contemporary public.²⁹

Several Member States of the EU have adopted measures (criminalisation) in order to avoid the spread of disinformation, however, in most cases, these measures have been assessed as incompatible with democratic principles.³⁰

According to a joint statement of the United Nations, Organisation for Security and Cooperation in Europe and the Inter-American Commission on Human Rights,

“Any attempts to criminalise information relating to the pandemic may create distrust in institutional information, delay access to reliable information and have a chilling effect on freedom of expression”.³¹

²⁶ Human Rights Committee, General Comment No. 29, on derogations from provisions of the Covenant during a state of emergency, 2001, paras. 5 and 8.

²⁷ WHO, *Managing Epidemics*, 2018, pp. 34 and 47, available at: <https://www.who.int/emergencies/diseases-/managing-epidemics-interactive.pdf?ua=1> [accessed 30 September 2020].

²⁸ European Court of Human Rights, *Cumpănă and Mazăre v. Romania* [GC], no. 33348/96, 2004, § 118.

²⁹ Human Rights Committee, General Comment No. 34, 2011, para. 13, available at: <https://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf> [accessed 30 September 2020].

³⁰ Council of Europe, Public Statement, “Press freedom must not be undermined by measures to counter disinformation about COVID-19”, 3 April 2020, available at: <https://www.coe.int/en/web/commissioner/-/press-freedom-must-not-be-undermined-by-measures-to-counter-disinformation-about-covid-19> [accessed 2 November 2020].

To put it in other words, criminalisation of disinformation is disproportionate, it cannot justify the aims of restricting information, deprives persons of the right to share information, which can be crucial for life. Nevertheless, during the crisis, Hungary, for example, began fighting against disinformation through criminal law provisions. These provisions are too broad as compared to the standard for the freedom of expression and impose disproportionate sanctions.³²

Alongside ensuring the freedom and impartiality of the media, it is also important that the public has a guaranteed access to reliable information. Moreover, the UN and regional experts on freedom of expression stated in a joint declaration, that public agencies, even without the request for such an information, shall proactively publish information of public interest, as well as the date they were obtained and the source.³³

According to the Human Rights Watch, access to information shall be guaranteed. This, for specific groups, means that information shall be provided while taking into account their needs and accommodating the format and relevant procedures.³⁴

To deep dive into practical reflection of the aforesaid threats, it would be interesting to analyse the examples of Russia and China with respect to governing information in the context of the pandemic. We should also bear in mind that worldwide, more than 250 journalists are in detention because of performing their duties and that persons whose liberty is restricted are among the most vulnerable groups during the pandemic.³⁵

³¹ International experts - “COVID-19: Governments must promote and protect access to and free flow of information during pandemic – international experts”, 19 March 2020, available at: <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=25729&LangID=E> [accessed 30 September 2020].

³² Amendment to Section 337 of the Hungarian Criminal Code, See Walker Shaun, “Hungarian journalists fear coronavirus law may be used to jail them”, The Guardian, 3 April 2020, available at: <https://www.theguardian.com/world/2020/apr/03/hungarian-journalists-fear-coronavirus-law-may-be-used-to-jail-them> [accessed 30 September 2020].

The European Commission, “Democracy cannot work without free and independent media and that respect for freedom of expression and legal certainty are essential during such times”, 31 March 2020, available at: https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_20_567 [accessed 30 September 2020].

³³ UN Commission on Human Rights, Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, submitted in accordance with Commission resolution 1999/36, 18 January 2000, E/CN.4/2000/63, para. 44, available at: <https://www.refworld.org/docid/3b00f3e10.html> [accessed 30 September 2020].

UN General Assembly, Promotion and protection of the right to freedom of opinion and expression, 2013, A/68/362 para. 76, available at: <https://undocs.org/A/68/362> [accessed 30 September 2020].

³⁴ Human Rights Watch, “Human Rights Dimensions of COVID-19 Response”, 19 March 2020, available at: <https://www.hrw.org/news/2020/03/19/human-rights-dimensions-covid-19-response> [accessed 2 November 2020].

³⁵ Committee to Protect Journalists, “Release all jailed journalists now”, 30 March 2020, available at: <https://cpj.org/2020/03/release-all-jailed-journalists-now/> [accessed 30 September 2020].

WHO, “Preventing COVID-19 outbreak in prisons: a challenging but essential task for authorities”, 23 March 2020, available at: <https://www.euro.who.int/en/health-topics/health-emergencies/coronavirus-covid-19/technical-guidance/2020/preparedness,-prevention-and-control-of-covid-19-in-prisons-and-other-places-of-detention,-15-march-2020> [accessed 30 September 2020].

2.1. THE GOVERNMENT KNOWS BEST – ANALYSIS OF THE COMMUNIST POLITICS

In order to understand a general background with respect to the relationship between China and the freedom of expression, it should be noted that according to the report by Reporters Without Borders (RSF), China was recognised as the largest prison for reporters. This report emphasises deadly conditions in the prison.³⁶ According to the 2020 Report of the same organisation, China ranks 177th out of 180 countries in the index of media freedom.³⁷

Although the origins of the virus are disputed, the history of a medic Li Wenliang from the Central Hospital of Wuhan grabs the attention. By the end of December 2019, he warned his colleagues about the patient with a Severe Acute Respiratory Syndrome (SARS). The local government immediately “silenced” him and punished for “spreading rumours”. Events unfolded in such a way, that the medic himself was a victim of COVID-19.³⁸

Foreign media such as New York Times (NYT), Wall Street Journal (WSJ) and Washington Post were involved in political processes. They were banned from operating on the territory of China. The state tasked these three media outlets, - alongside the Voice of America and the Times, - with providing information with respect to their operations in China.³⁹ In addition, there are conspiracy theories of the members of the Chinese Government with respect to the virus and the US army,⁴⁰ and that the virus had already been spread within Italy before the medical personnel in China noticed it.⁴¹

³⁶ Radio Free Asia, “China is ‘world’s biggest prison’ for journalists, bloggers: Report, 20 December 2017, available at: <https://www.refworld.org/docid/5a942812a.html> [accessed 30 September 2020].

³⁷ Reporters Without Borders - 2020 World Press Freedom Index, 15 May 2020, available at: <https://rsf.org/en/ranking> [accessed 30 September 2020]. Internet platform WeChat is constantly used by the Government for the surveillance purposes. Wang, Yaqui, “How China’s censorship machine crosses borders — and into Western politics,” Human Rights Watch, p. 2-4, 20 February 2019, available at: <https://www.hrw.org/news/2019/02/20/how-chinas-censorship-machine-crosses-borders-and-western-politics> [accessed 30 September 2020].

³⁸ Amnesty International, “China: Doctor’s death highlights human rights failings in coronavirus outbreak”, 7 February 2020, available at: <https://www.amnesty.org/en/latest/news/2020/02/china-doctor-death-highlights-human-rights-failings-in-coronavirus-outbreak/> [accessed 30 September 2020]; Wang, Ivian, “They Documented the Coronavirus Crisis in Wuhan. Then They Vanished.” The New York Times, 21 February 2020, available at: <https://www.nytimes.com/2020/02/14/business/wuhan-coronavirus-journalists.html>, See also “Lawyer Chen Qiushi documenting coronavirus epicentre disappears”, 10 February 2020, available at: <https://www.youtube.com/watch?v=Iwpr55PZEJ8> [accessed 30 September 2020]; Reporters Without Borders (RSF) (28 February 2020) – “RSF urges China to stop censoring information about coronavirus epidemic”, 25 February 2020, available at: <https://rsf.org/en/news/rsf-urges-china-stop-censoring-information-about-coronavirus-epidemic> [accessed 30 September 2020].

³⁹ Reporters Without Borders (RSF), “Coronavirus : mass expulsion of foreign correspondents further cripples freedom of information in China“, 27 March 2020, available at: <https://rsf.org/en/news/coronavirus-mass-expulsion-foreign-correspondents-further-cripples-freedom-information-china> [accessed 29 March 2020]; See also, Bill Birtles, “In the midst of the coronavirus pandemic, China forces out foreign reporters”, ABC Australia, 9 May 2020, available here: <https://www.abc.net.au/news/2020-05-09/china-kicks-out-foreign-journalists-during-coronavirus-crisis/12227782> [accessed 30 September 2020].

⁴⁰ Myers, Steven Lee, “China Spins Tale That the U.S. Army Started the Coronavirus Epidemic,” The New York Times, 13 March 2020, available at: <https://www.nytimes.com/2020/03/13/world/asia/coronavirus-china-conspiracy-theory.html> [accessed 30 September 2020].

⁴¹ Reporters Without Borders (RSF), “Beware of China’s coronavirus disinformation, RSF says”, 18 April 2020, available at: <https://rsf.org/en/news/beware-chinas-coronavirus-disinformation-rsf-says> [accessed 28 November 2020]; Tang Didi, “Beijing twisted my words on coronavirus’s Italian origin, says scientist Giuseppe Remuzzi”, The Times, 26 March 2020, available at: <https://www.thetimes.co.uk/article/beijing-twisted-my->

Accordingly, China is well-known for restricting the freedom of expression, and yet it maintains and strengthens the communist regime, regardless of appeals from international organisations.⁴²

The essence of this article is to provide an overview of standards that shall be met by a state in terms of informative management of the pandemic, rather than discussing issues of international state responsibility. Thus, the author does not address this issue, however, political sanctions invoked by the US against China throughout the years are to be appreciated.⁴³

When tools of criminal law are used to restrict the freedom of expression at the national level, together with the "threat of silence," the suppression of critical opinion beyond criminal proceedings, the manipulation via immigration policy, the "expulsion threat" of foreign media outlets, and the incitement of conspiracy theories, the authoritative regime and usurpation of power in China is more vivid.

When speaking about communist and authoritarian regimes, we should not forget about our occupant neighbouring state. In order to provide background information with respect to interrelation between Russia and disinformation campaign, we can refer to the EU policy with respect to hybrid warfare, that was initiated upon occupation of the territory of Eastern Ukraine by Russia. In 2015, a special programme - East StratCom Task Force - „EUvsDisinfo“ was created under the European External Action Service.⁴⁴ As of 18 May 2020, within the scope of this programme, 500 facts of spreading disinformation by outlets favouring Russia were recorded.⁴⁵

Concerning numbers of COVID-19 cases were recorded in Russia from the end of February 2020, from the emergence of first case, till the end of April, which was distinct from that of Brazil and the US, with roughly the same amounts of population.⁴⁶ Given that media has fo-

words-on-coronaviruss-italian-origin-says-scientist-giuseppe-remuzzi-6twwhkrvn [accessed 28 November 2020].

⁴² Rankin Jennifer, "EU says China behind 'huge wave' of Covid-19 disinformation" The Guardian, 10 June 2020, available at: <https://www.theguardian.com/world/2020/jun/10/eu-says-china-behind-huge-wave-covid-19-disinformation-campaign>; Amnesty International, "Global: Crackdown on journalists weakens efforts to tackle COVID-19", 1 May 2020, available at: <https://www.amnesty.org/en/latest/news/2020/05/global-crackdown-on-journalists-weakens-efforts-to-tackle-covid19/>; Reporters without Borders, "CORONAVIRUS: We need reliable news more than ever – act now!" (public statement), 7 May 2020, available at: <https://rsf.org/en/campaigns/coronavirus-we-need-reliable-news-more-ever-act-now>; IFJ Launches Global Platform for Quality Journalism, 29 April 2020, available at: <https://www.ifj.org/media-centre/news/detail/category/world-press-freedom-day-2020/article/ifj-launches-global-platform-for-quality-journalism.html> [links accessed 30 September 2020].

⁴³ Swanson Ana and Mozur Paul, "U.S. Blacklists 28 Chinese Entities Over Abuses in Xinjiang", 7 October 2019, New York Times, available at: <https://www.nytimes.com/2019/10/07/us/politics/us-to-blacklist-28-chinese-entities-over-abuses-in-xinjiang.html> [accessed 25 November 2020]; Guardian staff and agencies, "US House approves Uighur Act calling for sanctions on China's senior officials", The Guardian, 4 December 2019, <https://www.theguardian.com/world/2019/dec/04/us-house-approves-uighur-act-calling-for-sanctions-on-chinas-politburo-xinjiang-muslim> [accessed 30 September 2020].

⁴⁴ For details, see EUvsDisinfo website, available at: <https://euvsdisinfo.eu/about/> [accessed 30 October 2020].

⁴⁵ EEAS Special Report Update: Short Assessment of Narratives and Disinformation around The Covid-19 Pandemic (Update 23 April – 18 May), 18 May 2020, p. 2, available at: <https://euvsdisinfo.eu/uploads/2020/05/EEAS-Special-Report-May-1.pdf> [accessed 30 September 2020].

⁴⁶ Chief freelance infectious diseases specialist of the Ministry of Health Elena Malinnikova explained the low mortality from coronavirus in Russia, 4 May 2020, available at: <https://iz.ru/1007510/2020-05-04/spetcialist->

cused attention on these issues and much has been written on Russia's handling of the pandemic, a person might be sentenced to 5 years of imprisonment because of dissemination of harmful information regarding the pandemic, according to restrictions of the Kremlin.⁴⁷ In addition, administrative fines have increased up to 127 thousand dollars.⁴⁸ Besides the censorship, it should be noted that Russia does not welcome foreign media which speak about the governmental disinformation campaign. One example of this is the article by Voice of America, which discussed real number of Coronavirus fatal cases and the inconsistency thereof with the governmental statistics.⁴⁹ According to Russian media regulators, such articles incite riots and extremism.⁵⁰ If we elaborate on the content of the Article, it was dealing with the analysis of statistical data, referring to research conducted by other media outlets, and did not contain any incitements regarding the *coup d'état*. Moreover, a journalist and an advisor, with opposition political views, from "Novaya Gazeta" was arrested.⁵¹ This is not the first, nor the last act of implementing censorship policies against this outlet.⁵²

In addition to the foregoing, we are dealing with an intentional discreditation when speaking about the Russian propaganda against the Lugar laboratory. Criticism and conspiracy theories against this laboratory are not unique in this kind.⁵³ Similarly, disinformation was spread with respect to activities of laboratories in Moldova, Armenia and Ukraine.⁵⁴

obiasnila-nizkuiu-smertnost-ot-koronavirusa-v-rossii [accessed 30 September 2020]; Sepkowitz, Kent, "Why is Russia's Covid-19 mortality rate so low?", CNN, 13 May 2020, available at: <https://edition.cnn.com/2020/05/13/opinions/russia-low-covid-19-mortality-rate-sepkowitz/index.html> [accessed 30 September 2020].

⁴⁷ Rainsford, Sarah, "Coronavirus: Russia includes jail terms to enforce crackdown", BBC, 31 March 2020, available at: <https://www.bbc.com/news/world-europe-52109892> [accessed 30 September 2020].

⁴⁸ Committee to Protect Journalists, "Russian media regulator orders 2 outlets to take down COVID-19 reports", 24 March 2020, available at: <https://cpj.org/2020/03/russian-media-regulator-orders-2-outlets-to-take-d.php> [accessed 30 September 2020].

⁴⁹ Roskomnadzor, Russian Media Regulator, "Roskomnadzor demanded that the media and social networks remove false information about the coronavirus", 24 March 2020, available at: <https://www.rkn.gov.ru/news/rsoc/news72366.htm>; Associated Press, "Fake News or the Truth? Russia Cracks Down on Virus Postings", 1 April 2020, available at: <https://www.voanews.com/europe/fake-news-or-truth-russia-cracks-down-virus-postings> [links accessed 30 September 2020].

⁵⁰ "Russia's Media Regulator Asks Google To Block Article Questioning Coronavirus Death Toll", 15 May 2020, available at: <https://www.rferl.org/a/russia-s-media-regulator-requests-google-block-article-questioning-coronavirus-death-toll/30613809.html?fbclid=IwAR3-TgkQGU8PSqUyelksZLH85IxavQbIKPmO9c-ZZ9uuRWwPCc038l2GESo> [accessed 30 September 2020].

⁵¹ EUvsDesinfo, DISINFO: COVID-19 without Independent Journalism, 6 May 2020, available at: <https://euvsdesinfo.eu/covid-19-without-independent-journalism/> [accessed 30 September 2020].

⁵² See, e.g., European Court of Human Rights, *Novaya Gazeta and Milashina v. Russia*, no. 45083/06, 3 October 2017.

⁵³ Factcheck, "Lugar laboratory in Georgia – Russia's traditional rigmarole", 16 January 2019, available at: <https://factcheck.ge/en/story/37919-lugar-laboratory-in-georgia-russia-s-traditional-rigmarole>; Statement of the Minister of External Affairs of Russia regarding operation of the Lugar Centre in Georgia, 26 May 2020, available at: https://www.mid.ru/ru/foreign_policy/news/-/asset_publisher/cKNonkJE02Bw/content/id/4138777 [links accessed 30 September 2020].

⁵⁴ Comment of the Press and Information Department of the Ministry of Foreign Affairs with respect to the statement of the Russian Federation, 16 May 2020, available at: [https://mfa.gov.ge/News/sagareo-saqmeta-saministros-presisa-da-informa-\(6\).aspx?CatID=5](https://mfa.gov.ge/News/sagareo-saqmeta-saministros-presisa-da-informa-(6).aspx?CatID=5) [accessed 30 September 2020].

EUvsDesinfo, DISINFO: Suspicious American Military Activity in Lugar Lab, 1 July 2020, available at: <https://euvsdesinfo.eu/report/suspicious-american-military-activity-in-lugar-lab/> [accessed 30 September 2020]. Statement by Amiran Gamkrelidze, 28 May 2020, available at:

Given that Russia is a State Party to the European Convention on Human Rights since 1998, it is likely that within the next 3-4 years, we will witness cases against Russia regarding its disinformation policy and oppression of free media,⁵⁵ while also taking into account that judgments on several cases regarding freedom of expression were delivered against the Russia throughout the Case Law of the European Human Rights Court.⁵⁶

By imposing legal penalties on critical thought, banning foreign media and implementing measures that are disproportionate to the fight against disinformation, the state expresses not only its desire to oppress the dissent, but is actually implementing measures to accomplish this desire. Under the principle of plurality, the means of restricting media sources shall not be used for the purposes of governing opposition forces and establishing authoritarianism. However, the reality suggests otherwise based not only on the case of Russia, but other examples as well.⁵⁷

2.2. INTERRELATION BETWEEN A STATE OF EMERGENCY AND AUTHORITARIANISM

Based on the practice of aforesaid countries and considering historical examples, it can be concluded that during the crisis, states are oftentimes tempted to preserve stability and public safety at the expense of individual rights. As stated by the Council of Europe Commissioner for Human Rights Dunja Mijatović,

“In this extraordinary time of the COVID-19 pandemic, politicians and decision-makers must resist the temptation to push through measures that are incompatible with human rights”.⁵⁸

https://www.radiotavisupleba.ge/a/30640007.html?fbclid=IwAR14BiwPpyOjW5CEvnBP7J3gYHdWszcfD_iRPqceAr7K38fznNcJuQpOzts [accessed 30 September 2020]; EUvsDesinfo, DISINFO: American Biolaboratory In Armenia Is The Epicentre Of The Spread Of New Coronavirus In The Region, 9 April 2020, available at: <https://euvsdisinfo.eu/report/american-biolaboratory-in-armenia-is-the-epicenter-of-the-spread-of-new-coronavirus-in-the-region/> [accessed 30 September 2020].

EUvsDesinfo, DISINFO: Coronavirus Could Have Been Created In A Ukrainian Laboratory, 25 April 2020, available at: <https://euvsdisinfo.eu/report/coronavirus-could-be-created-in-a-ukrainian-laboratory/> [accessed 30 September 2020].

⁵⁵ Moreover, the document adopted by the European Union recognises the immense role of the media in combating false information. The document also calls on China and Russia to refrain from a global disinformation campaign. European Commission, Joint Communication, “Tackling COVID-19 disinformation - Getting the facts right”, JOIN(2020) 8, Brussels, 10 June 2020, p. 9, available at:

https://ec.europa.eu/info/sites/info/files/communication-tackling-covid-19-disinformation-getting-facts-right_en.pdf; Radio Free Europe/Radio Liberty, “EU: Russia, China Undermine Democracy with Coronavirus Disinformation, public statement”, 10 June 2020, available here: <https://www.rferl.org/a/eu-russia-china-undermine-democracy-with-coronavirus-disinformation-campaigns/30663872.html> [links accessed 30 September 2020].

⁵⁶ European Court of Human Rights, Report on Russian Federation, page 1, last updated September 2020, available here: https://www.echr.coe.int/Documents/CP_Russia_ENG.pdf [accessed 30 September 2020].

European Court of Human Rights, *Margulev v. Russia*, case no. 15449/09, 08.10.2019. European Court of Human Rights, *Stomakhin v. Russia*, case no. 52273/07, 09.05.2018.

⁵⁷ BBC, “Coronavirus: Is pandemic being used for power grab in Europe?”, 18 April 2020, available at: <https://www.bbc.com/news/world-europe-52308002> [accessed 30 September 2020].

⁵⁸ Commissioner for Human Rights, public statement, “Commissioner urges Poland’s Parliament to reject bills that restrict women’s sexual and reproductive health and rights and children’s right to sexuality education” 14 April 2020, available at: <https://www.coe.int/en/web/commissioner/-/commissioner-urges-poland-s-parliament->

As a response to the challenge, many states have adopted measures that objectively serve the aim of preventing the spread of COVID-19. Among these measures, restrictions on “freedom of movement, freedom of expression and manifestation” are frequent.⁵⁹

In *Lawless v. Ireland*, the European Court of Human Rights defined a state of emergency as a condition threatening the life of the nation. According to this definition, this implies such situations of crisis, which impacts organised life of the society from which a state is composed.⁶⁰

As discussed above, restrictions to rights shall be derived from the principle of lawfulness. Accordingly, if certain rights are restricted in a state of emergency, it is based on an ordinance of the government, which is consistent with the decree referring to the constitutional provision. Hence, the restriction is adopted based on the law and, thus, is valid.⁶¹

Considering current examples as well as those from history, it might be relevant to take a look at the relationship of a state of emergency with authoritarianism and usurpation of power. As a result of a state of emergency declared in Hungary due to COVID-19, the executive branch was granted an exclusive authority to enact special measures, - including suspension of certain norms without the consent of the parliament. Accordingly, it is the Prime-Minister rather than the Parliament who decides when a state of emergency and special measures cease to exist.⁶² A similar situation can be observed in Georgia, where it is up to the Constitutional Court to decide upon the validity of certain measures and their compliance with democratic standards.⁶³

Such an increase of powers of the government and deviation from the principle of separation of powers can potentially create the risk of usurpation of power. The principal risk has to do with effective management of the crisis through imposing less human rights restrictions, so that we avoid the creation of authoritarian restrictions like the ones enacted in China.⁶⁴ A classic example can be Great Britain’s broad definitions with respect to anti-terrorism legislation and their application to any suspect and accused in Northern Ireland.⁶⁵

to-reject-bills-that-restrict-women-s-sexual-and-reproductive-health-and-rights-and-children-s-right-to-sexual?fbclid=IwAR173ivMkNi-eEXxCTueu9cSacgp39Mon2fG2JSUpCLBZxGLTjG-saOpAHQ [accessed 27 November 2020].

⁵⁹ Human Rights Watch, “COVID-19 Offers Chance to Address Human Rights Concerns”, 14 April 2020, available at: <https://www.hrw.org/news/2020/04/14/covid-19-offers-chance-address-human-rights-concerns> [accessed 30 September 2020].

⁶⁰ European Court of Human Rights, *Lawless v. Ireland* (no. 3), 1 July 1961, p. 27, § 28, Series A no. 3.

⁶¹ Greene Alan, “Permanent States of Emergency and the Rule of Law: Constitutions in an Age of Crisis”, Hart Publishing, 2018, p. 69, Chapter 3, <https://media.bloomsburyprofessional.com/rep/files/9781509906154sample.pdf> [accessed 30 September 2020].

⁶² Thorpe Nick, “Coronavirus: Hungary government gets sweeping powers,” BBC, 30 March 2020, <https://www.bbc.com/news/world-europe-52095500> [accessed 30 September 2020].

⁶³ GYLA Appeals Amendments to Health Care Law to Constitutional Court, Radio Free Europe / Radio Liberty 23 May 2020. Public Statement available from: <https://www.radiotavisupleba.ge/>.

⁶⁴ Gerson Michael, “Coronavirus might make authoritarianism look like the answer. It’s not”, The Washington Post, 19 March 2020, available at: https://www.washingtonpost.com/opinions/coronavirus-might-make-authoritarianism-look-like-the-answer-its-not/2020/03/19/ebfc72c0-6a06-11ea-abef-020f086a3fab_story.html [accessed 30 September 2020].

⁶⁵ Jabauri Ana, “Preserving Criminal Justice during a State of Emergency: Derogations from Fair Trial and Due

The next risk would be the post-emergency period: a reality where the government is still operating within the scope of the authority enhanced during a state of emergency. A practical example of such a reality is a socio-legal state in Turkey, given the impact of a state of emergency on the democratic process.⁶⁶ Events begun to occur in 2016, after the government declared a state of emergency aiming to stabilise the situation caused by an attempted *coup d'état*. Attempts of the government to silence the dissent can also be observed during this time,⁶⁷ which keeps on occurring even today, through controlling various media outlets during the pandemic.⁶⁸ In addition, in a post-emergency period, legal system of Turkey kept the norms enacted during a state of emergency.⁶⁹ Moreover, exercise of the municipalities' authorities is monitored and democratic processes such as local elections are being controlled.⁷⁰

If we agree that human rights shall be protected during a military state of emergency, we shall *a priori* argue that, during the healthcare crisis, governments are to observe basic principles, such as: separation of powers, democratic governance and pluralistic society.⁷¹ Otherwise, history reveals the risks of establishing such a socio-legal environment, where it is entirely up to an authoritarian government to protect human rights. Concentration of power within one branch of the government, without proper checks and balances, is against the aspiration of a democratic society, according to which decisions regarding state policies are to be taken based on consensus and through civic engagement. Accordingly, the discretion of introducing a different regime after the state of emergency is inconsistent with the "genuine constitution".⁷²

Process Rights under the ICCPR, ECHR and the ACHR," Thesis Submitted to the Department of Legal Studies of the Central European University, 2018, p. 19.

⁶⁶ Human Rights Watch, "Turkey: Normalizing the State of Emergency: Draft Law Permits Purging Judges; Prolonged Detention; Curbing Movement, Assembly", 20 July 2018, available at: <https://www.hrw.org/news/2018/07/20/turkey-normalizing-state-emergency>, [accessed 30 September 2020].

⁶⁷ Human Rights Watch, Joint NGO Letter, "Turkey: State of emergency provisions violate human rights and should be revoked", 20 October 2016, available at: <https://www.hrw.org/news/2016/10/20/turkey-state-emergency-provisions-violate-human-rights-and-should-be-revoked> [accessed 30 September 2020].

⁶⁸ Sinclair-Webb Emma, "Turkey Seeks Power to Control Social Media," Human Rights Watch, 13 April 2020, available at: <https://www.hrw.org/news/2020/04/13/turkey-seeks-power-control-social-media> [accessed 30 September 2020].

⁶⁹ Amnesty International, "Turkey's State of Emergency Ended But The Crackdown on Human Rights Continues", 1 February 2019, p. 1, available at: <https://www.amnesty.org/en/documents/eur44/9747/2019/en/> [accessed 30 September 2020].

⁷⁰ European Commission for Democracy through Law, Opinion No. 888/ 2017 "On the Provisions of the Emergency Decree Law N°674 Of 1 September 2016", 9 October 2017, para. 97, available at: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2017\)021-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2017)021-e) [accessed 30 September 2020].

Ülgen Sinan, "How Istanbul's mayoral elections are shaping the future of Erdoğan's Turkey", The Guardian, 15 May 2019, available at: <https://www.theguardian.com/commentisfree/2019/may/15/istanbul-elections-erdogan-mayor> [accessed 30 September 2020].

⁷¹ Cole David, "The Poverty of Posner's Pragmatism: Balancing Away Liberty After 9/11", Stanford Law Review, Vol. 59:1735 April 2007, pp. 1735-1751.

⁷² Jabauri Ana, "State of Emergency: A Shortcut to Authoritarianism", Journal of Constitutional Law, Vol 1 (2020), Special Issue, pp. 121-143, at 143, 15 June 2020, available at: https://www.constcourt.ge/en/journal/journal_editions/journal-2020-1-special [accessed 30 September 2020].

Greene Alan, *supra* note 61, p. 70. Chapter 3, available at:

<https://media.bloomsburyprofessional.com/rep/files/9781509906154sample.pdf> [accessed 30 September 2020].

CONCLUSION

The events of 2020 have indeed shown the international community its weaknesses in terms of its immediate response to the fight against the epidemic, and a century-old lesson that it has overlooked. State leaders and leading virologists argue that the world will never be the same again and that COVID-19 has given rise to scientific challenges that are directly related to human health and life.

The pandemic processes were no less interesting in terms of human rights challenges. We were given the opportunity to conduct a legal analysis of the policies that various countries implemented. For its part, COVID-19 has reaffirmed the great role of the freedom of expression in dealing with pandemic processes.

The author undoubtedly shares the view that the post-pandemic period and our existence will never be the same as before, by both social and legal contexts. The crisis has once again shown the World the role of unified, internationally coordinated action. In this step of progress, the pandemic has made it clear to all governments, politicians and all relevant players in the digital age that any kind of censorship aimed at restricting access to information, health, life, autonomy and good governance, even legitimate ones, must be within the standards of legality, necessity and proportionality. This is the preferred path of rehabilitation from the pandemic that states should follow to establish a stronger framework for respect for human rights.

The treatment of freedom of expression in times of crisis is definitely in line with the country's democracy index. Disinformation and hybrid attacks, which weaken the state's ability to deal effectively with a crisis, should not be overlooked. This requires strategic communication between the internal structures of the country, detection of disinformation and its deterrence from the Internet, as well as international support from both technology giants and international organisations.

State policy, which considers arbitrary and unjustified restriction of freedom of expression, yearns towards establishing an authoritarian regime, and on the part of society, towards seizing the primacy of inequality. The international community should apprehend that COVID-19 poses not only a virologic war but also an information challenge. It is transparency and freedom of speech that build the bridges of international relations and ensure effective coordination.