

Pandemic-related Restrictions on Freedom of Expression. *Nihil novi sub sole?*

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This paper presents some normative and/or factual restrictions impacting the freedom of expression resulting from the COVID-19 pandemic against the background of the norms of international human rights law, more specifically limitation and derogation clauses. These restrictions are categorised according to different criteria. Analysis of the recent practice of the European Court of Human Rights referring to the circumstances related to the COVID-19 pandemic is presented. The paper concludes that so far there are no reasons to assume that the interpretative standards on limitation clauses, developed prior to the pandemic, shall be reformulated to adapt them to the pandemic circumstances.

Keywords: Freedom of Expression, Derogating Measures, Limitation Clauses, COVID-19, European Convention on Human Rights, European Court of Human Rights

1. Context

The Covid-19 pandemic impacted the freedom of expression in many ways. Let us mention a couple of examples here:

- Adoption of new regulations banning fake news/misinformation/causing panic about the pandemic (e.g. in Russia, South Africa or Uzbekistan) or using old laws to prosecute fake news about the pandemic (e.g. India, Nicaragua, Moldova)¹;
- Violence against journalists covering anti-lockdown or anti-vaccination news²;
- Adoption of laws empowering the executive to limit fundamental freedoms, including free-

¹ See e.g. <https://www.loc.gov/law/help/covid-19-freedom-of-expression/freedom-of-expression-during-covid-19.pdf> (9 April 2021). Also: <https://www.courthousenews.com/more-countries-pass-fake-news-laws-in-pandemic-era/> (9 April 2021).

² See e.g. <https://www.article19.org/resources/italy-violence-against-journalists/> (9 April 2021).

dom of expression³ (also *e.g.* in Hungary⁴)

- Limiting access to information⁵;
- Using SLAPP⁶ lawsuits against journalists covering news about the abuses of power or corruption related to the pandemic⁷;
- Using the pandemic as a pretext to prosecute expressions' imparters⁸;
- Imposing arguably unreasonable and disproportionate Covid-motivated restrictions on the functioning of theatres, cinemas and art galleries⁹;
- Punishing whistle-blowers for raising public awareness about governments' failure to cope with the pandemic¹⁰;
- Limiting commercial spending on advertising resulting in budget cuts of media companies;
- Shifting the communication of artists with the public to e-channels resulting in greater exposure of performers to the discretion of the digital platforms' providers;
- Politically motivated decisions on the distribution of Covid-related public aid to artists;
- Impairment of the right to receive information by the flood of "infodemic."

And these are just randomly selected examples. But already mentioning these phenomena allows us to suspect that we are facing a major challenge to freedom of expression (hereafter also: FoE) caused by the pandemic. To be more precise: the challenge results predominantly from governmental decisions concerning the legal or public policy responses to the pandemic.

2. Health-related considerations as a justification for restrictions regarding freedom of expression and the limitation clause in the ECHR

The protection of health is one of the grounds justifying restrictions imposed on FoE pursuant to

³ See *e.g.* <https://www.article19.org/resources/kenya-measures-covid-19-must-not-violate-human-rights/> (9 April 2021).

⁴ See *e.g.* <https://www.dw.com/en/hungary-passes-law-allowing-viktor-orban-to-rule-by-decree/a-52956243> (9 April 2021).

⁵ See *e.g.* <https://rm.coe.int/covid-and-free-speech-en/1680a03f3a>, pp. 6 and 7 (9 April 2021).

⁶ The acronym refers to *strategic lawsuits against public participation*.

⁷ See *e.g.* <https://rm.coe.int/covid-and-free-speech-en/1680a03f3a>, p. 9 (9 April 2021).

⁸ See *e.g.* <https://rm.coe.int/covid-and-free-speech-en/1680a03f3a>, p. 10 (9 April 2021). Also: <https://www.theartnewspaper.com/news/polish-government-issues-artists-with-fines-then-withdraws-them> (9 April 2021) - on 6 May, 2020, 11 artists walked a 14-metre long letter from Warsaw's main post office to the parliament building, two kilometres away. It was "delivered" to members of parliament ahead of a debate on whether to hold the country's presidential elections 10 May at the height of the country's lockdown (the elections were ultimately postponed until at least 28 June). Artists have been fined with significant amounts.

⁹ See *e.g.* <https://notesfrompoland.com/2020/09/09/drama-unfolds-for-polands-theatre-scene-amid-the-pandemic/> (9 April 2021).

¹⁰ See *e.g.* <https://rm.coe.int/covid-and-free-speech-en/1680a03f3a>, p. 11 (9 April 2021).

Article 10 of the European Convention on Human Rights (ECHR).¹¹ Also under Article 19 of the International Covenant on Civil and Political Rights, or under Article 13 of the American Convention on Human Rights, the protection of public health belongs to the grounds of justifiable restrictions.

Nevertheless, health-related concerns rarely serve as grounds of restrictions on FoE. When it so happens, restrictions normally relate in the practice of the European Court of Human Rights¹² to expressions promoting use of certain “illicit” substances such as nicotine (e.g. *Hachette Filipacchi Presse Automobile*¹³), alcohol or drugs (*Palusiński*¹⁴). In the latter case the ECtHR held that national authorities enjoy a “wide margin of appreciation in the area of protection of public health” as a normative ground of restricting FoE. Also, the ECtHR had the opportunity to address restrictions on health-related speech of health professionals. In respect of advertisements commissioned by medical professionals the Court ruled that, unlike in case of lawyers, “there are no particular circumstances [...] which would justify granting the national authorities a comparable wide margin of appreciation”¹⁵. Also, in *Frankowicz*, a case concerning punishing a doctor for criticising the professional conduct of his colleagues, the Court did not seem to opt for finding a wide margin of appreciation.¹⁶

Without engaging in in-depth analysis, one can note a level of incoherence in the case-law of the ECtHR concerning the identification of the margin of appreciation in respect of the limitations regarding FoE justified by health considerations.

By comparison, the US practice is particularly interesting as it seems to create a sort of interpretative tension between the approaches to commercial speech on health issues (where laws appear to be subject to strict scrutiny) and professional speech of health care providers on health issues (where some courts tend to accept restrictive laws with lesser stringency).¹⁷

3. “Public emergency threatening the life of the nation” and freedom of expression: derogating measures under Article 15 ECHR

Pursuant to Article 15 § 1 ECHR, “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”. According to Article 15 § 3 ECHR, “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 therefor. 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”. By February 2021, 10 Member States resorted to Article 15.¹⁸ None of the restrictions

¹¹ “The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such [...] restrictions [...] as are prescribed by law and are necessary in a democratic society [...] for the protection of health”

¹² Hereafter also as “ECtHR” or – where suitable contextually – “the Court”.

¹³ *Hachette Filipacchi Presse Automobile v. France* (App. no. 13353/05) ECtHR (2009).

¹⁴ *Palusiński v. Poland*, decision (App. no. 62414/00) ECtHR (2006).

¹⁵ *Stambuk v. Germany* (App. no. 37928/97) ECtHR (2002) para 40.

¹⁶ *Frankowicz v. Poland* (App. no. 53025/99) ECtHR (2008).

¹⁷ See: Wendy E. Parmet & Jason A. Smith, *Free Speech and Public Health: Unravelling the Commercial-Professional Speech Paradox*, Ohio State Law Journal, Vol. 78, No. 4, 2017, pp. 887-915.

¹⁸ See: <https://www.coe.int/en/web/conventions/full-list/-/conventions/webContent/62111354> (9 April 2021). States having notified under Article 15 the derogating measures motivated by the COVID-19 pandemic included Albania,

imposed in pursuance of Article 15 ECHR and related to the COVID-19 pandemic concerned FoE directly.¹⁹

One must note at the outset that the derogating measures must not extend beyond the strict necessity resulting from the exigencies of the situation. Although it appears imaginable in certain situations that limitations concerning the method of disseminating expression may be required in view of the pandemic (such as *e.g.* banning participation in or organising public exhibitions of art), such limitations may well fit the framework of the limitation clause of *e.g.* Article 10 § 2 ECHR. Nevertheless, the notion of “public emergency threatening the life of the nation”, being construed as “an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed” seems to apply to the pandemic situation.²⁰

The difference between the derogating measures and limitation clauses is that the latter do not allow for the “switching off” of the essence of the freedom in question, whereas the former – although temporarily and only to the extent strictly required by the exigencies of the situation – allows for such a far-reaching reduction of protected freedoms. The similarity of both institutions is that states must apply the proportionality principle and they remain subject to European supervision exercised by the Court.²¹

4. Examples of some national Covid-19-related laws and practices of restricting freedom of expression

Three examples have been invoked below to illustrate the pandemic-related laws and practices likely to affect adversely the freedom of expression: South Africa, Moldova and Poland. All three are democratic states with – at least declaratively – functioning democracies. The first state does not encounter any noticeable problems with the independence of the judiciary. The second state is a European state but not a member of the EU. The last state is an EU Member State where the democratic rules have been challenged recently by the political powers. Also, the last state did not *de jure* declare any sort of state of emergency.

In *South Africa*, the national state of disaster was declared on March 15, 2020, under the 2002 Disaster Management Act.²² According to the declaration, the Minister of Cooperative Governance and Traditional Affairs was empowered to make regulations, “only to the extent that it is necessary for the purpose of [...] preventing or combatting disruption”. Minister Zuma thus issued a regulation requiring that “any person who intentionally misrepresents that he, she or any other person is infected with COVID-19 is guilty of an offence and on conviction liable to a fine or to imprisonment for a period not exceeding six months or to both such fine and imprisonment” (§ 11.4.) and that “any person who publishes any statement, through any medium, including social media, with the intention to deceive any other person about— (a) COVID-19; (b) COVID-19 infection status of any person; or (c) any measure taken by the Government to address COVID-19, commits an offence and is liable on conviction to a fine or imprisonment for a period not exceeding six months,

Armenia, Estonia, Georgia, Latvia, North Macedonia, Republic of Moldova, Romania, San Marino, and Serbia.

¹⁹ See: Anja Radjenovic & Gianna Eckert, *Upholding Human Rights in Europe During the Pandemic*, PE 652.085, Strasbourg 2020.

²⁰ *Lawless v. Ireland (No. 3)* (App. no. 332/57) ECtHR (1961) para. 28.

²¹ *Brannigan and McBride v. the United Kingdom* (App. no. 14553/89) ECtHR (1993).

²² Government Notice 313 in Government Gazette 43096 dated 15.03.2020, source: 57 Of 2002 Disaster Management Act. Regs. GN 313_2020.03.15 (9 April 2021).

or both such fine and imprisonment” (§ 11.5.).²³ Only a number instances of application of the abovementioned provisions were reported to the public, including information on “the arrest of a 55 year old man in Cape Town for publishing a social media message encouraging the public to refuse COVID-19 tests, claiming, without any evidence, that the cotton swabs being used by the government for testing were infected with CODID-19.”²⁴ By judgment of the High Court of South Africa, the regulations were ultimately struck down as unconstitutional, although not due to the passages relating to the restrictions on freedom of expression.²⁵

In *Moldova* the state of national emergency was declared by the parliament on March 17, 2020.²⁶ Although none of the provisions of parliamentary decision explicitly empowered the Audiovisual Council of the Republic of Moldova to enact specific provisions concerning limitations of freedom of expression, the Council nevertheless adopted a decision on March 24, 2020, providing that “presenters/moderators/editors, during the emergency period, shall unilaterally give up both uninformed enunciation and favouring of their own opinion” regarding the COVID-19 pandemic and shall only present views of the competent public authorities from the country and abroad (Commission for Exceptional Situations of the Republic Moldova, the Government of the Republic of Moldova, the Ministry of Health, Labour and Social Protection, World Health Organization).²⁷

In *Poland*, where no state of emergency was declared²⁸, the Council of Ministers adopted a regulation on March 30, 2020, introducing “certain restrictions, obligations and prohibitions related to the state of epidemy.”²⁹ Pursuant to § 1.1.c and § 1.2. in conjunction with § 9.1.1. of the regulation, the absolute prohibition of pursuing activities including creative activities relating to all collective forms of culture and entertainment (which covers *e.g.* theatres, operas, orchestras, but also writers, sculptors, painters etc.) and activities of libraries, archives, museums etc. was introduced. At the same time, churches remained open provided that the limit of 50 participants was not trespassed in a given religious event (which illustrates the inconsistency of the pandemic-related legislation allowing for some forms of gatherings *e.g.* those religiously-motivated, whereas some other forms *e.g.* those related to artistic performances, have been banned). Also, the same regulation imposed

²³ Disaster Management Act, 2002: Regulations issued in terms of Section 27(2) of the Act, 17.03.2020, Government Gazette 2020, vol. 657, no. 43107; source: Perma | cdn.24.co.za (9 April 2021).

²⁴ See *e.g.* <https://www.loc.gov/law/help/covid-19-freedom-of-expression/freedom-of-expression-during-covid-19.pdf> p. 55 (9 April 2021).

²⁵ Judgment of the High Court of South Africa, Gauteng Division, Pretoria, 02.06. 2020, case no. 21542/2020, source: <http://www.saflii.org/za/cases/ZAGPPHC/2020/184.html> (9 April 2021).

²⁶ Parliamentary decision declaring the state of emergency (Parlamentul a declarat stare de urgență pe perioada 17 martie – 15 mai 2020) of 17.03.2020. Source: <https://perma.cc/CSA7-XQJ4> (9 April 2021).

²⁷ Provision no. 2 of the Audiovisual Council of the Republic of Moldova of 24.03.2020. Source: Perma | Audiovisual Council of the Republic of Moldova (Consiliul Audiovizualului,) The Provision No. 2, March 24.,2020, signed by Dragoș Viclo, the president of the Audiovisual Council (09.04.2021); in Romanian: *Pe durata perioadei stării de urgență prezentatorii/moderatorii/redactorii vor renunța unilateral la enunțarea și favorizarea neavizată atât a propriei opinii, cât și a liberei formări de opinii arbitrare în reflectarea subiectelor ce vizează pandemia COVID-19, atât în context național, cât și extern, unicele surse sigure, veridice, imparțiale și echilibrate fiind autoritățile publice competente din țară și de peste hotare (Comisia pentru Situații Excepționale a Republicii Moldova, Guvernul Republicii Moldova, Ministerul Sănătății, Muncii și Protecției Sociale, Organizația Mondială a Sănătății).*

²⁸ The decision not to declare the state of emergency was unconstitutional and aimed at impeding possible claims for compensation. Since however the so-called “Constitutional Tribunal” does no longer play its constitutional role (due to colonisation of that institution by political nominees of the ruling party) there has been no organ in the state capable of reviewing the constitutionality of regulations adopted by government in violation of the constitution (save for incidental constitutionality review by administrative courts reviewing legality of decisions imposing fines for violation of these regulations *a casu ad casum*).

²⁹ Regulation of the Council of Ministers of 30.03.2020, on the introduction of certain restrictions, obligations and prohibitions related to the state of epidemy, OJ 2020 item 566.

restrictions on moving in public spaces (which was also beyond the statutory delegation provided for in the Law on infectious diseases) on the basis of which *e.g.* a group of artists was fined (approx. 2,500 EUR fine for each person) for organising an artistic happening against the government's intention to organise presidential elections. The happening was inspired by the famous work of performative artist Tadeusz Kantor "The Letter" (1967) and it took the form of a march of 7 artists carrying a banner with the sentence "Live, Do Not Die" (Pol. *Żyć, nie umierać*) through the streets of the Polish capital to the parliamentary building. Artists maintained a required distance of 2 metres between each of them, nonetheless they were fined on the basis of the Police note claiming to the contrary. Only because of the public opinion's heavy criticism and intervention of the Ombudsman were the decisions imposing fines annulled.³⁰

5. Categories of restrictions on freedom of expression motivated by or resulting from the pandemic

While attempting to categorise the COVID-motivated restrictions of freedom of expression, one can apply different criterions. Therefore one can propose categorisations based on the criterions of the directness of the restrictions' impact on freedom of expression, of the source of restrictions and of the justifiability of restrictions. Consequently, the COVID-motivated restrictions can be divided as follows:

The criterion of *directness* of the restrictions' impact on freedom of expression:

- a) Restrictions *directly* affecting freedom of expression (*e.g.* adoption of new regulations banning fake news, misinformation or causing panic about the pandemic); and
- b) Restrictions *indirectly* affecting freedom of expression (*e.g.* shifting the communication of artists with the public to e-channels resulting in greater exposure of performers to the discretion of the digital platforms' providers);

The criterion of the *source* of restrictions:

- a) *State-sponsored* restrictions (*e.g.* adoption of new regulations banning fake news, misinformation, causing panic about the pandemic); and
- b) Restrictions by *private individuals* (*e.g.* violence against journalists covering the anti-lock-down or anti-vaccination news, caused by right-wing extremist groups expressing discontent about state restrictions relating to the pandemic);

The criterion of the *justifiability* of restrictions:

³⁰ See: European Union Agency for Fundamental Rights, Coronavirus pandemic in the EU – Fundamental Rights Implications. Country: Poland, 2020, p. 3 *in principio*; source: https://fra.europa.eu/sites/default/files/fra_uploads/pl_report_on_coronavirus_pandemic_july_2020.pdf (9 April 2021).

- a) *A limine justified* restrictions (e.g. limiting commercial spendings on advertising resulting in the cuts of the budgets of the media companies); and
- b) *A limine unjustified* restrictions (e.g. using SLAPP lawsuits against journalists covering news about the abuses of power or corruption related to the pandemic- like the lawsuit in Poland instituted by a clothing company against journalists criticising the exportation of masks to a third country while there was a severe shortage of these masks in the country); and
- c) Restrictions *possibly justifiable* (e.g. adoption of new regulations banning fake news/misinformation/causing panic about the pandemic; also: imposing some Covid-motivated restrictions on the functioning of theatres, cinemas and art galleries).

Generally speaking, it seems that at least some national laws/practices adversely affecting FoE and motivated by COVID arguably constitute abuses of power construed as utilising some essentially justifying considerations to introduce disproportionate restrictions hindering FoE³¹. For example, taking politically motivated decisions on the distribution of the COVID-related public aid to artists, ostensibly serving the aim of protecting the latter from dramatic economic consequences of the pandemic in fact serves the goal of impacting the composition of the content of expressions imparted to the public.

Some other restrictions are seemingly disproportionate if analysed in the overall context of different restrictions imposed by the public authorities. The example of imposing unreasonable and disproportionate COVID-motivated restrictions on the functioning of theatres, cinemas and art galleries can be invoked in this respect.

6. International response: the example of the ECtHR

At the time of writing, there are already 41 references in the HUDOC database for the record “COVID”³², yet only some of them refer to decisions or notifications actually considering the pandemic circumstances in any way. In *Feilazoo* the Court found the prolonged placing of the applicant “for several weeks, with other persons who could have posed a risk to his health in the absence of any relevant consideration to this effect, cannot be considered as a measure complying with basic sanitary requirements”, which could not be excused due to the pandemic circumstances – and therefore the Court ruled that there has been a violation of Article 3 ECHR.³³ In *Fenech*, only ostensibly more leniently, the Court accepted the Maltese government’s justifications regarding a prolonged detention of the applicant (resulting even from the suspension of the committal proceedings against the applicant *sine die*, based on the pandemic-related emergency measures which were not covered by the Maltese notification under Article 15 ECHR), nevertheless it noted – which seems crucial – the very specific circumstances of the case. These included the nature of charges against the applicant, including complicity in wilful homicide resulting in the death of the famous Maltese journalist Daphne Caruana Galizia, but also the fact that the applicant’s four requests for release on bail were thoroughly analysed by national courts which was in turn invoked and analysed extensively the ECtHR’s case law, or the fact that the overall suspension of national courts’ proceedings

³¹ See e.g. the inspirations for construing the notion of „abuse of powers” drawn from *McKay v. The United Kingdom* (App. no. 543/03) ECtHR (2006) para. 48, or *Medvedyev and others v. France* (App. no. 3394/03) ECtHR (2010) para. 120.

³² For 07.04.2021. Source: <https://hudoc.echr.coe.int/eng#%7B%22fulltext%22:%5B%22COVID%22%5D%7D>; (9 April 2021).

³³ *Feilazoo v. Malta* (App. no. 6865/19) ECtHR (2021) para. 92.

did not exceed 3 months.³⁴ In *Le Mailloux* the Court dismissed as inadmissible the application challenging the alleged failures on the part of the French government to provide the general framework to combat the pandemic, finding the application incompatible *ratione personae* with the Convention (“*la requête relève de l’actio popularis et [...] le requérant ne saurait être considéré comme une victime, au sens de l’article 34 de la Convention*”)³⁵. In *Toromag* however, the Court decided to communicate the Slovak government of the application (on the limb of Article 1 of Protocol No. 1) of some 5 companies and natural persons whose businesses were adversely affected by the Slovak COVID-pandemic restrictions – the Court invited the parties to address, in the first place, the issue of exhaustion of domestic remedies in view of the national court’s case law, exemplified by the ruling of the Slovak constitutional court on the so called “*všeobecné povolenie*”³⁶ (an administrative act of a mixed nature having both elements of an individual administrative act and an act of generally binding effect), and secondly – to explain whether in their view there has been an interference with the applicants’ right to the peaceful enjoyment of possessions, within the meaning of Article 1 of Protocol No. 1.³⁷ A seemingly similar problem was raised in another communicated case (this time on the limb of Article 11 ECHR) – *Communauté Genevoise d’Action Syndicale* (organisation claiming to be a victim of the prohibition of public gatherings, introduced by the ordinance of the Federal Council).³⁸ In *Maratsis* the Court communicated the applications of detainees of Greek penitentiary institutions accusing the state of failing to provide adequate measures to protect the health of the applicants, as persons living with HIV, in the context of the COVID-19 health crisis³⁹ and in *Khokhlov* the communication concerned alleged failure to proceed extradition case (resulting in alleged unlawful detention) resulting from the pandemic⁴⁰ and in the structurally similar case – *D.C.* – the applicant accused the Italian state of failing to take urgent interim measures, in view of partial suspension of operations the Italian judiciary – to ensure the maintenance of the family link with his daughter (Article 8 ECHR)⁴¹. Also in *Babiński* the Court communicated the application accusing Poland of undue delay of criminal proceedings and extension of detention on remand resulting partly from the COVID pandemic⁴². In *Association of orthodox ecclesiastical obedience* the Court communicated the case concerning the temporary prohibition of collective worship (Article 9 ECHR) and the refusal of the Greek courts to review its legality on the ground that the temporary measures expired and thus the applicant had no longer any legitimate interest in applying for legality review.⁴³ A similar communicated case – *Spinu* – concerned the refusal to allow a detainee to participate in a religious celebration outside the detention facility, substantiated by COVID-related concerns and the assumption that “only absolutely necessary activities could be carried out outside the prison” – the Court requested the parties to address the question on the proportionality of restriction⁴⁴. In *Hafeez* the Court asked the parties to present arguments on whether “having particular regard to the ongoing Covid-19 pandemic, if the applicant were to be extradited [to the USA] would there be a real risk of a breach of Article 3 of the Convention on account of the conditions

³⁴ *Fenech v. Malta*, decision (App. no. 19090/20) ECtHR (2021) paras. 82-97.

³⁵ *Le Mailloux v. France*, decision, (App. no. 18108/20) ECtHR (2020), in particular para. 15.

³⁶ See: judgment of the Constitutional Court of Slovakia of 22.01.2009, case I. ÚS 354/08, §§ 25 and 27 (concluding that “a general permit can be reviewed by a court in an administrative court”).

³⁷ *Toromag, s.r.o. and 4 other applicants v. Slovakia*, communication (App. no. 141217/20 and other) ECtHR (2020).

³⁸ *Communauté Genevoise d’Action Syndicale v. Switzerland*, communication (App. no. 21881/20) ECtHR (2020).

³⁹ *Maratsis and Vasilakis and others v. Greece*, communication (App. no. 30335/20 and other) ECtHR (2021).

⁴⁰ *Khokhlov v. Cyprus*, communication (App. no. 53114/20) ECtHR, 01.03.2021.

⁴¹ *D.C. v. Italy*, communication (App. no. 17289/20) ECtHR (2020).

⁴² *Babiński v. Poland*, communication (App. no. 10635/20) ECtHR (2021).

⁴³ *Association of orthodox ecclesiastical obedience v. Greece*, communication (App. no. 52104/20) ECtHR (2021).

⁴⁴ *Spinu v. Romania*, communication (App. no. 29443/20) ECtHR (2020).

of detention he would face on arrival.”⁴⁵

Only one case communicated to date actually refers directly to the COVID-related restriction of FoE, namely *Avagyan*, where the applicant accused the state of – among others – violating her right to freely impart opinions by sentencing her for a fine of approx. 390 EUR on the charge that she disseminated untrue information on the Internet (the applicant stated on her Instagram profile that “There has NOT been a single case of corona[virus] infection in the Krasnodar Region. No patient who tested positive has received a document showing a confirmed virus infection. Think why the authorities would need it ... No one will talk about it, for fear of being fired or killed. Money is being offered for agreeing to list the corona[virus] as a cause of death in the death certificate, everyone knows it”). The Krasnodar court held that “before the court, [the applicant] did not produce evidence disproving the existence of coronavirus infection (COVID-2019) in Krasnodar and the Krasnodar Region which could have been capable of showing the truth of the information she had shared online. It follows that [the applicant’s] guilt in the commission of an administrative offence under Article 13.15(9) of the Code of Administrative Offence has been established.” The applicant alleged that “the law failed to distinguish between dissemination of untrue information and sharing value judgments, that her opinion was based on other Internet publications and posed no risk to public health or security, and that the amount of fine was excessive”. The Court asked the parties, among others, to address the crucial question as to whether it has been shown “that individuals, such as the applicant, should be held to the same standard of accuracy in their private exchanges on the Internet, as the media which have a duty and responsibility to provide accurate, reliable and precise information in line with the ethics of journalism.”⁴⁶ This question does not suggest any departure from the well-established standards of interpretation of Article 10 ECHR⁴⁷.

7. Conclusions

It obviously seems too premature to predict the possible reaction of international human rights courts (e.g. the ECtHR) to the restrictions on freedom of expression resulting from or relying on the pandemic circumstances. The already existing practice is not yet extensive. It seems implausible, though, to assume that there will be no “specificity” regarding pandemic-related cases.

However, as matters stand, the ECtHR does not seem to apply or be manifesting a willingness to apply in the future – at least this is what appears from the cases decided or communicated to date – any specific interpretational approaches nuancing the existing case law to adapt it to the pandemic circumstances. The approach taken in *Fenech* was inspired by the peculiar circumstances of that case and cannot be considered particularly lenient simply and only because of the COVID-19 circumstances. In *Feilazoo* the Court found the violation of – among others – Article 3 ECHR, actually making no particular reference to the COVID-related circumstances raised by the government. A comparison of *Le Mailloux* and *Toromag* also appears to suggest that the Court is prepared to apply the already well-developed standards. The same seems to hold true about other communicated cases mentioned above. The formulation of one of the questions addressed to the parties in *Avagyan* appears to allow for even a stronger standing: the Court seems to be applying the usual and well-known “necessity in a democratic society” test thus manifesting its immunity to allegations repeated so frequently nowadays that we should ‘suspend’ FoE’s guarantees because of the pandemic.

⁴⁵ *Hafeez v. The United Kingdom*, communication (App. no. 14198/20) ECtHR (2020).

⁴⁶ *Avagyan v. Russia*, communication (App. no. 36911/10) ECtHR (2020).

⁴⁷ See e.g. *Times Newspapers Limited (Nos. 1 and 2) v. the United Kingdom* (App. no. 3002/03 and 23676/03) ECtHR (2009) para. 45 (stressing the “the duty of the press to act in accordance with the principles of responsible journalism by ensuring the accuracy” of information).

One can thus cautiously assume that the well-established standards of interpretation still apply – so, *nihil novi sub sole*? After all, only 10 out of 47 State Parties to the ECHR resorted to Article 15 ECHR so far and neither of the derogating measures concerned Article 10 ECHR, at least according to states notifying them.