

The background is a composite image. At the top, a portion of the Earth is visible from space, showing continents and clouds. In the foreground, a green surgical mask is positioned, partially covering the Earth. In the upper right corner, a stylized coronavirus particle is depicted. The text is overlaid on this background.

FREEDOM OF EXPRESSION IN TIMES OF PANDEMIC

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STATUTE

„Freedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man” – EtCHR, Handyside

„Democracy thrives on freedom of expression” – EtCHR, Manole v. Moldova

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„A free and pluralist public debate is a precondition for democracy, and strong action is required to reverse the recent deterioration of freedom of expression in Europe” – Declaration by the Committee of Ministers on the occasion of the 70th anniversary of the Council of Europe, 2019



IS THE SANITARY CRISIS A FREEDOM OF EXPRESSION CRISIS?

[ARTICLE19.ORG/CORONAVIRUS-IMPACTS-
ON-FREEDOM-OF-EXPRESSION/](https://article19.org/coronavirus-impacts-on-freedom-of-expression/)

REPORT OF JULY 7, 2020 – THE SECRETARY GENERAL OF THE COE

COE COMMISSIONER FOR HUMAN RIGHTS, DUNJA MIJATOVIĆ

„The success of any efforts to contain the spread of the virus depends to a large extent on access to accurate, reliable, diverse and timely information [...]

By contrast, restrictions on free access to information, instead of allaying public concerns, are more likely to erode trust and undermine the efficiency of crisis-response measures”.

Hungary

Russian Federation

Azerbaijan

Bosnia and Herzegovina

Romania

Armenia

Czech Republic

Serbia

Italy

INSTRUMENTS WITHIN THE COE

Guidelines of the Committee of Ministers of the Council of Europe on protecting freedom of expression and information in times of crisis

https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805ae60e



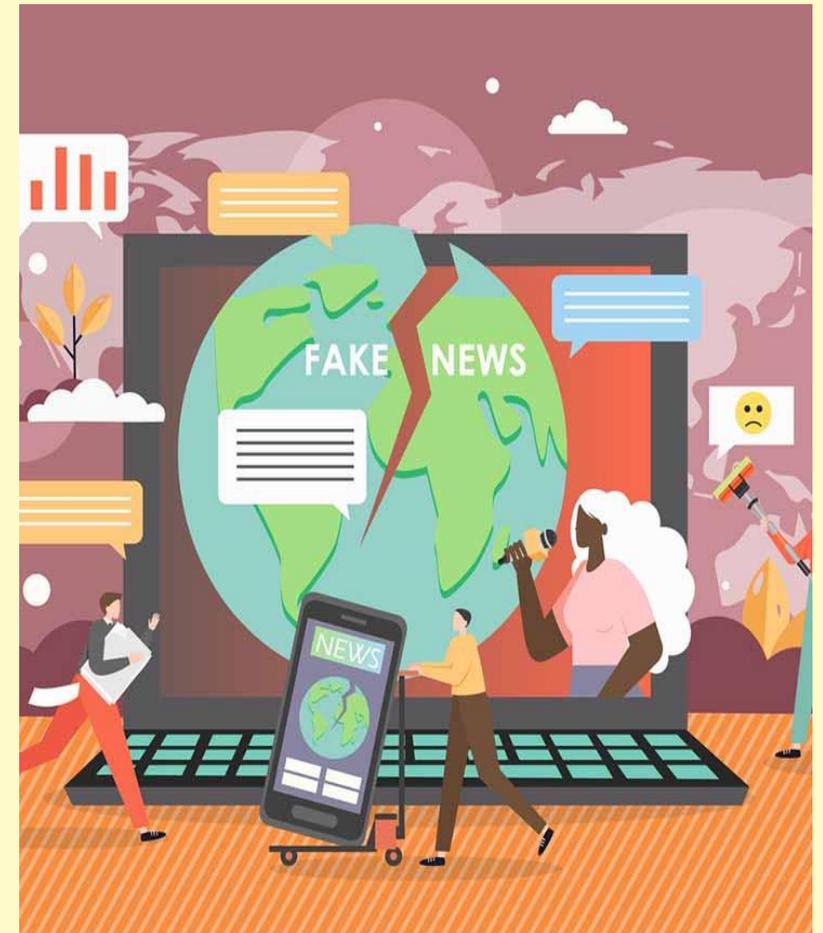
BASIC PRINCIPLES

- Special attention should be paid to the **communication and dissemination of information relating to the virus and its circulation**, risks of contamination, number of illnesses/deaths
- Media play a key role, also coupled with increased responsibility, in providing **accurate, reliable information to the public**, but also in preventing panic and fostering people's understanding for and cooperation with necessary restriction.



BASIC PRINCIPLES

- **Rumours, misinformation and disinformation are more likely to cause harm to the public order and health safety.**
- Media organisations and journalists - **highest professional and ethical standards**, give **priority to authoritative messages regarding the crisis**, **refrain from publishing, and thus amplifying, unverified stories.**
- **States should avoid measures** derogating from the guarantees of Article 15 ECHR that are broadly and vaguely worded, lack foreseeability and/or are **likely to lead to over-criminalisation.**



PART A – GENERAL RULES UNDER EXTRAORDINARY CIRCUMSTANCES



GENERAL RULES

TOOLKIT FOR LEGAL PRACTITIONERS ON RESPONSE TO HUMAN RIGHTS VIOLATIONS DURING THE EXTRAORDINARY CIRCUMSTANCES

Funded
by the European Union
and the Council of Europe



EUROPEAN UNION

COUNCIL OF EUROPE



CONSEIL DE L'EUROPE

Implemented
by the Council of Europe

LEVEL OF PROTECTION

Broad level of protection

Special level of protection granted by ECtHR within in Art. 10 ECHR itself

Debate
on matters
of public importance

CONTENTS OF ART. 10 ECHR

- Freedom to hold opinion
- Freedom to impart information and ideas
- Freedom to receive information and ideas

- ✓
- Journalists' access to information
- Demand for quick, complete, uncensored and reliable information vs. being misinformed, disinformed, being subject to hate speech.
- Need for effective remedies to secure the enforcement of court orders granting access to information

STATES' OBLIGATIONS. POSITIVE

- 1. Keeping the public educated about the pandemic?
- 2. Ensuring that health-care professionals have access to global information about the disease?
- 3. Providing the public with access to information held by public authorities concerning the pandemic?

STATES' OBLIGATIONS. POSITIVE. NEGATIVE

States should regularly and promptly inform the public about the dimensions and implications of the crisis and the governments' measures, engaging in an open communication that promotes trust and cooperation of every individual.

However, the flow of information about the pandemics should not be reduced to official communications. This would lead to censorship and suppression of legitimate concerns

RESTRICTIONS

As exceptional measures required by exceptional circumstances (i.e. to avoid spreading conspiracy theories, false alerts, etc.), some restrictions may be needed and justified.



RESTRICTIONS 1) WITHIN THE GENERAL SYSTEM OF THE ECHR

ART. 17 ECHR: [*Dieudonné M'Bala M'Bala v. France* (2015), *Garaudy v. France*, *Hizb Ut-Tahir et al. v. Germany* (2012), *W., W.P. et al. v. Poland* (2009), *Norwood c. Great Britain* (2004)]

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ART. 15 ECHR: allows States to derogate from their obligations under the ECHR “[i]n time of war or other public emergency threatening the life of the nation”.

Need or no need for derogation?

! Restrictions under art. 15 must themselves be narrowly construed, have a clear legal basis, be strictly necessary to bringing public emergency to a close ([A. and Others v. the United Kingdom](#))

Governments shall exercise particular prudence and caution to only introduce measures that constitute
“an appropriate response to the state of emergency”.

RESTRICTIONS 2) SPECIFIC TO ALL CONVENTIONAL RIGHTS THAT ALLOW INTERFERENCE (ART. 8-11 ECHR)

INTERFERENCE

„formalities, conditions, restrictions or penalties”

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**Restrictions on the media concerning the reporting of the pandemic
obligation to publish only official information**

RESTRICTIONS 2) SPECIFIC TO ALL CONVENTIONAL RIGHTS THAT ALLOW INTERFERENCE (ART. 8-11 ECHR)

- The interference is prescribed by law: the newly enacted legislation
- The interference pursues a legitimate aim: public health – global sanitary crisis
- **The interference must be necessary in a democratic society:** surveillance

PROPORTIONALITY

CHECKS AND BALANCES V. CHILLING EFFECT

Checks and balances

Journalists and media, medical professionals, along with civil society activists and members of the general public, should have the right to criticise the authorities and scrutinise their response to the crisis

Chilling effect

Measures that could „deter journalists from contributing to public discussion of issues affecting the life of the community. By the same token, a sanction [may be] liable to hamper the press in performing its task as purveyor of information and public watchdog” (Lingens v. Austria)

RESTRICTION 3) SPECIFIC TO ART. 10

“The exercise of these freedoms, since it carries with it duties and responsibilities ...”

Engel and Others v. the Netherlands

Rommelfanger v. the Federal Republic of Germany

∞

Are sanitary officials concerned by the specific restriction imposed on those carrying duties and responsibilities?



Li Wenliang

RESTRICTION 3) SPECIFIC TO ART. 10

WISTLEBLOWER

person, usually an employee, who exposes information or activity within a private, public, or government organization that is deemed illegal, illicit, unsafe, fraud, or abuse of taxpayer funds

HYPOTHETICAL

The applicant, a doctor at the Liechtenstein National Hospital, discovered patient files that seemingly indicated that his superior had practised active euthanasia. He lodged a criminal complaint on these suspicions. Reports by the hospital board and external experts concluded that the applicant's suspicions were unfounded, and he had failed to verify his suspicions with further documentation available. Thereafter, the applicant was dismissed without notice from the hospital. He launched proceedings against this decision, but his case was ultimately quashed by the Constitutional Court.

Should the doctor complain before the ECtHR, do you think that the Court would find a violation of the applicant's freedom of expression under Article 10 of ECHR? What elements must be taken into account?

(ECtHR, Gawlik v. Liechtenstein, 16.02.2021)

B.
**FREEDOM OF
EXPRESSION
ONLINE**



FREEDOM OF EXPRESSION ONLINE IN TIMES OF PANDEMIC

ACT I: THE STATES

- **Azerbaijan:** the owners of internet news outlets must prevent the dissemination of “harmful information” online
- **Romania:** the authorities can remove content and block websites where this content provides “false information” regarding the evolution of COVID-19
- **Bosnia and Herzegovina:** punishing the circulation of information that can cause panic on social media platforms
- **Armenia:** a number of newspapers and websites had to delete some information which is not fully consistent with official sources

FREEDOM OF EXPRESSION ONLINE IN TIMES OF PANDEMIC

ACT II: THE COMPANIES

„Private search engine and social media companies are justifiably under significant pressure to ensure that they do not enable potentially harmful public health disinformation to circulate on their platforms. Several have already taken aggressive steps to address misinformation about the COVID-19 virus. Many have developed approaches to ensure that, whenever a person searches for information related to the disease, an early search result includes verified information from a public health authority. Others are reinforcing their existing policies, for instance by removing content that may discourage people from seeking medical treatment or claim that harmful substances have health benefits”.

(A/HRC/44/49, §51)

FREEDOM OF EXPRESSION ONLINE IN TIMES OF PANDEMIC

ACT II: THE COMPANIES

„As has been evident during the COVID-19 pandemic, social media and search engine companies have an enormous impact on public discourse and the rights of individuals on and off their platforms. There is potential for mistakes, particularly in the context of the emphasis on tools of automation that could cause significant public health harms. Such harm could be caused by, among other things, the take-down of verified and beneficial public health information, which thereafter attracts a negative reputation because of the initial takedown, or a failure to remove content or users sharing unverified information that could lead to health risks”

(A/HRC/44/49, §52)

FREEDOM OF EXPRESSION ONLINE

THE COURT

- The internet: an unprecedented platform for the exercise of FoE
- No obligation for the state to provide access to internet;
- Obligation of the state to justify the access restriction

CONTENT RESTRICTIONS

Ahmet Yildirim v. Turkey, 2012

The applicant owns and runs a website on which he publishes material including his academic work. It was set up using the Google Sites website creation and hosting service. On 23 June 2009 the Criminal Court of First Instance ordered the blocking of another Internet site under the Law on regulating publications on the Internet and combating Internet offences. The order was issued as a preventive measure in the context of criminal proceedings. Later that day, under the same Law, a copy of the blocking order was sent to the Telecommunications Directorate for execution. On 24 June 2009, further to a request by the Telecommunications Directorate, the Criminal Court of First Instance varied its decision and ordered the blocking of all access to Google Sites. As a result, the applicant was unable to access his own site. On 1 July 2009 he applied to have the blocking order set aside in respect of his own site, which had no connection with the site that had been blocked because of its illegal content. On 13 July 2009 the Criminal Court dismissed the applicant's application. In April 2012 he was still unable to access his own website even though, as far as he understood, the criminal proceedings against the owner of the offending site had been discontinued in March 2011.

CONTENT RESTRICTIONS

Ahmet Yildirim v. Turkey, 2012

- Strict scrutiny
- Clear legal framework
- Control over the purpose of blocking / filtering
- Effective judicial review for abuse of power
- Balance between the interests at stake

Conclusion: Such wholesale blocking had rendered large amounts of information inaccessible, thus substantially restricting the rights of Internet users and having a significant collateral effect. The interference had therefore not been foreseeable and had not afforded the applicant the degree of protection to which he was entitled by the rule of law in a democratic society. The measure in issue had had arbitrary effects and could not be said to have been designed solely to block access to the offending site. Furthermore, the judicial-review procedures concerning the blocking of Internet sites were insufficient to meet the criteria for avoiding abuses; domestic law did not provide for any safeguards to ensure that a blocking order concerning a specified site was not used as a means of blocking access in general.

HYPOTHETICAL

In May 2020, the applicant posted an online comment on Instagram, alleging inter alia that there had been no real cases of Covid-19 in the Krasnodar Region of Russia. She was subsequently convicted for disseminating untrue information on the Internet, and sentenced to a fine of 390 EUR.

Imagine that the applicant contests the fine in your court. What elements would you take into account when assessing her claim?

(ECtHR, pending, Avagyan v. Russia)

HYPOTHETICAL

The case concerns a petition lodged for the annulment of a Decision by the Greek National Council for Radio and Television that imposed the administrative sanction of 'Recommendation' to the petitioner – a limited company that owns the tv station concerned. The Recommendation was that the company should not broadcast ads which may encourage behaviours that are obviously detrimental to public health and safety.

What do you think the Court's Decision should be?

*(Limited company v. Greek National Council for Radio and Television –
Decision of the Supreme Court of Greece)*

ONLINE RESOURCES

FREEDOM OF EXPRESSION

HELP

Human Rights Education for Legal Professionals



Funded
by the European Union
and the Council of Europe



EUROPEAN UNION

COUNCIL OF EUROPE



CONSEIL DE L'EUROPE

Implemented
by the Council of Europe

RESOURCES

General resources:

- <https://www.coe.int/en/web/freedom-expression/-/the-impact-of-the-health-crisis-on-freedom-of-expression-and-media-freedom-report-by-the-secretary-general-of-the-council-of-europe-marija-pejcinovic>
- <https://www.coe.int/en/web/freedom-expression/freedom-of-expression-and-information-in-times-of-crisis>
- <https://freedex.org/2020/04/24/new-report-covid-19-and-freedom-of-expression/>
- HELP course on Freedom of Expression – new version, end of June 2020: <https://www.coe.int/en/web/freedom-expression/-/updated-course-on-freedom-of-expression-available-on-the-help-platform>
- <http://help.elearning.ext.coe.int/course/view.php?id=1743>
- <https://www.coe.int/en/web/commissioner/-/press-freedom-must-not-be-undermined-by-measures-to-counter-disinformation-about-covid-19>
- <https://rm.coe.int/toolkit-for-legal-practitioners/1680a318bd>
- <https://www.coe.int/en/web/human-rights-channel/-/freedom-of-expression-easily-explained>