

Freedom of the Press during COVID-19 Pandemic: a Comparative Overview

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Abstract: The emergence of the COVID-19 pandemic hindered the maintenance of stability in many fields, including the working environment of the media sector. Therefore, the UN Human Rights Committee and the Council of Europe issued several guidelines and informative documents to ensure press freedom and the significance of the media's work during the period of the coronavirus crisis. Accordingly, this article applies a comparative analyzing method to observe compliance with international standards in the chosen jurisdictions. Firstly, several cases between media workers and governmental agencies in Northern Europe countries are reviewed from the human rights perspective. Subsequently, the governmental bills and amendments to Hungarian and Russian laws are commented on through an interpretative lens. Finally, challenges brought by the new standards and regulatory norms are assessed on grounds of the protection of health and public safety.

The same approach is followed in Azerbaijan's legal framework, where specific amendments have been introduced to both the Code of Administrative Offenses and the Criminal Code. These amendments explicitly prohibit the dissemination of disinformation during emergencies, especially when it poses a real and imminent threat to the life and health of individuals. Furthermore, corresponding legal provisions have been analyzed, outlining sanctions such as administrative imprisonment or deprivation of freedom in the respective codes. In the end, guided by the global standards of international and regional human rights organizations, recommendations are indicated for developing a legal policy against disinformation.

Keywords: State of Emergency; Fake News; Dissemination; Transparency; Proportionality.

Table of contents: 1. Introduction. – 2. International Legal Standards during the COVID-19 Pandemic. – 2.1. Legal Policy of the UN and the Council of Europe. – 2.2. Scandinavian Model for Freedom of the Press during COVID-19. – 3. Legal Analysis of Domestic Emergency Laws adopted during COVID-19 Pandemic. – 3.1. Hungary. – 3.2. Russian Federation. – 3.3. Azerbaijan. – 4. Conclusion.

Introduction

Freedom of the press plays an important role in the protection of democracy as well as in the political and social development of society. Without that cornerstone, it would not be possible to obtain accurate and impartial information about the actions or policies of governments.

In 2021, the United Nations Educational, Scientific and Cultural Organization (UNESCO) published its Global Report on freedom of expression and media development¹. The overall global statistics indicated that 85 % of the world population contemplated a compression of press freedom in their countries over the previous five years². According to UNESCO data, many countries have adopted bills and regulations and established new law policies towards the media sector, which put the protection of freedom of the press at stake³. In 2022, Reporters Without Frontiers (RWF) ranked the Republic of Azerbaijan at 167th place out of over 180 countries on the Press Freedom Index, with a score of 58.48⁴.

On June 24th, 2022, the Thematic Report on freedom of opinion and expression was presented to the UN Human Rights Council. The

1. See UNESCO, *World Trends in Freedom of Expression and Media Development*, available at <https://www.unesco.org/en/world-media-trends> (last visited November 29, 2023)

2. See *id.*, at 2.

3. See *id.*, at 10.

4. See Reporters Without Borders, *Azerbaijan in Press Freedom in Europe overshadowed by the war in Ukraine*, available at <https://rsf.org/en/country/azerbaijan> (last visited November 29, 2023).

UN Special Rapporteur highlighted the importance of a diverse, independent, and unrestricted news media in upholding democracy, ensuring accountability, and fostering transparency. It is clarified that both states and the international community should actively support and foster a media environment as a public good to ensure the vitality of these democratic principles⁵. In short, the press serves as a vital link between the public and the government in fostering democracy. Hence, governments must create an environment where journalists can operate without financial constraints. Yet, in recent times, notably due to the impact of the COVID-19 pandemic, financial backing for media organizations has significantly dwindled. According to the Global Report by UNESCO, global newspaper circulation has decreased by 13% between 2019-2020 compared with almost 3% between 2018-2019, and over one-fifth of the journalists and other media workers have been exposed to salary cuts⁶.

Since 2016, 44 countries have been adopting constitutional, statutory acts or policy frameworks concerning the implementation of new standards in the media sector⁷. In general, many laws have limited access to health-related information and emergency plans, prohibiting the sharing of materials like epidemiological data and government protocols. Domestic laws often grapple with the intricate dynamics of a society, encompassing various interconnected issues such as privacy, health protection, moral concerns, and public safety. In the context of COVID-19, regulating health and morals should strike a balance that supports the free flow of information with minimal barriers. However, the increased use of sanctions and penalties based on political and social reasons in national laws creates ambiguity and jeopardizes press freedom.

Therefore, firstly the statements made by the UN Human Rights Committee will be discussed regarding the protection of freedom of

5. See United Nations Human Rights, Office of the High Commissioner, *Ensuring media freedom and safety of journalists requires urgent concrete action backed by political will: UN expert*, available at <https://www.ohchr.org/en/press-releases/2022/06/ensuring-media-freedom-and-safety-journalists-requires-urgent-concrete> (last visited November 29, 2023).

6. See *World Trends in Freedom of Expression and Media Development* (cited in note 1).

7. See *id.*, at 48.

the press during the COVID-19 pandemic. Later, I will refer to the Council of Europe's suggestions in connection with the shaping of Member States' legal policy and will assess the adherence level to the regional framework in European nations that excel in addressing conflicts among fundamental rights during the pandemic. Finally, the restrictive laws and adopted amendments in some chosen countries will be contemplated, the critical points will be outlined, and relevant recommendations will be made.

2 *International Legal Standards during the COVID-19 Pandemic*

2.1 *Legal Policy of the UN and the Council of Europe*

The COVID-19 virus emerged in China at the end of 2019 and spread all over the world within a short time, resulting in many changes and transformations in economic, political, and social fields on a global scale. In this process, the fact that people were forced to pay attention to social distance caused many challenges in working conditions in a wide range of professional fields, including the media sector. Due to the domestic measures applied during the pandemic, media outlets, journalists and bloggers have naturally been cautioned in catering information.

Brownson et al. observed that the deficiency in translating public health knowledge into practical settings and policy development happens, at least in part, because of ineffective dissemination⁸. In other words, the challenge lies not only in generating valuable knowledge but also in efficiently communicating and distributing that knowledge to those who can implement it in practice or policy. Nayyar et al. further elaborate that the unregulated environment of social media has led to a comparable degree of harm⁹. The freedom of speech on these platforms - often a source of misinformation and anti-scientific rhetoric - has hindered efforts to respond effectively to public health

8. See Anjali Nayyar, et al., *Social Media in the Time of a Pandemic: Global Perspectives of COVID-19 Pandemic on Health, Education, and Role of Media* at 293, available at <https://doi.org/10.1007/978-981-99-1106-6> (last visited November 29, 2023).

9. See *id.* at 296.

emergencies, including the ongoing COVID-19 pandemic¹⁰. It once again highlights the importance of effective communication strategies in the daily lives of individuals, as the latter acts according to the government's research findings and recommendations. It is true that during the pandemic, misinformation can spread rapidly and contribute to panic, fear, and non-compliance with public health guidelines¹¹. Limiting press freedom may be seen as a measure to prevent the dissemination of false or misleading information. But a question arises: are monitoring press activities and controlling media publications sufficient to eliminate risks that caused the health crisis?

Moreover, the extent of the imposed boundaries should also be investigated to find a reasonable answer to our question. In that regard, international and regional human rights organizations, such as the United Nations and the Council of Europe, published statements which will be discussed below. Generally, these statements lay down their standardized requirements concerning the potential restrictions of fundamental rights and freedoms due to the state of emergency. In the meantime, those sorts of requirements avail to understand the acceptable limits to restricting rights during emergencies, which foster the coordinated approach among nations.

From the angle of the European Convention on Human Rights (ECHR), Article 15 regulates the derogatory circumstances in times of emergency. Considering the emergency, it states that any High Contracting Party has the authority to implement measures that deviate from its commitments under the Convention¹². However, such measures must be strictly vital for addressing the urgent demands of the situation, and they should not conflict with the Party's other responsibilities under international law¹³.

As can be seen from the textual interpretation of the provision, the area of discretion for Member States is narrowly restricted. When derogations or restrictions are permitted, the State's interference in the enjoyment of a guaranteed right is subject to several conditions. First and foremost, derogation or restriction must be in accordance

10. See *ibid.*

11. See *Infodemic Definition* (World Health Organization) available at https://www.who.int/health-topics/infodemic#tab=tab_1 (last visited November 29, 2023).

12. Art. 15, European Convention on Human Rights.

13. See *ibid.*

with international law and must respect formal and procedural rules. Secondly, the limitation of rights must fulfill the principles of necessity and proportionality. The measure under consideration should align with a legitimate goal (in this case with the protection of health and life) and the inconveniences it causes should not be disproportionately high compared to the same aim. There should be no other appropriate measure that would be less costly in terms of freedom. Thirdly, the Siracusa Principles make the derogations to international human rights permissible only in cases of exceptional public emergency¹⁴. As stated in the Principles, the circumstances should challenge the very existence of the nation and the threat must be directed against the totality of the population or all the territory¹⁵. In the context of the COVID-19 pandemic, this exceptional danger may be linked to the protection of public health.

On April 24, 2020, the United Nations Human Rights Committee adopted the Statement on derogations from the Covenant in connection with the COVID-19 pandemic which attracted attention to the significance of freedom of the press during the pandemic situation¹⁶. The statement also emphasizes the importance of freedom of expression during COVID-19, so that to ensure the measures taken by State parties are consistent with the obligations under Covenant¹⁷. According to the text of the document, derogable rights might be conducted during emergencies, while still ensuring compliance with necessary public health measures, including physical distancing¹⁸. In other words, a derogation from freedom of movement and assembly is sufficient in combating the COVID-19 pandemic.

International cooperation has the potential to promote conducive measures that achieve public health objectives without

14. See UN Commission on Human Rights, *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, available at <https://www.icj.org/wp-content/uploads/1984/07/Siracusa-principles-ICCPR-legal-submission-1985-eng.pdf> (last visited November 29, 2023).

15. See *id.*, at 10, paragraph 39 (a).

16. See UN Human Rights Committee, *Statement on derogations from the Covenant in connection with the COVID-19 pandemic*, available at <https://www.ohchr.org/sites/default/files/Documents/HRBodies/CCPR/COVIDstatementEN.pdf> (last visited November 29, 2023).

17. See *id.*, at 2, paragraph 2 (f).

18. See *ibid.*, paragraph 2 (b).

unnecessarily infringing on freedoms. From that perspective, non-mandatory guidelines invite member states to collaborate with international bodies to collectively address challenges while respecting human rights. Due to its flexible character, legally enforceable policy frameworks, regulations, and other legal acts can initially be tested, changed, or exchanged via non-binding acts¹⁹. Simultaneously, it ensures transparency in communication and decision-making processes related to pandemic response²⁰. The Tromsø Convention on Access to Official Documents²¹ emphasizes the need for transparency, therefore it stipulates that the public authority must take the necessary measures to make official documents open to the public on its initiative to promote informed public participation in matters of general interest²². Meanwhile, compliance with those human rights standards can enhance public trust in government actions and uphold the rule of law by ensuring that any restrictions imposed are based on clear legal frameworks and are subject to legal oversight.

On April 7, 2020, The Council of Europe issued an Information Document²³ as a toolkit for Member States under the heading, "Respecting democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis". The regional organization promoted its suggestions for regulating democracy and the rule of law in various aspects of public affairs and for maintaining fundamental rights and freedoms, including freedom of expression, during the period of crisis. According to the recommendations on freedom of information, any restrictions on access to official information must be exceptional and proportionate to the objective of protecting public health²⁴.

19. See Barbara Boschetti and Maria Daniela Poli, *A Comparative Study on Soft Law: Lessons from the COVID-19 Pandemic* at 23 (Cambridge University Press on behalf of Centre for European Legal Studies 2021), available at <https://doi.org/10.1017/cel.2021.8> (last visited November 29, 2023).

20. See *id.* at 50.

21. See Council of Europe, *Council of Europe Convention on Access to Official Documents*, available at <https://rm.coe.int/1680084826> (last visited November 29, 2023).

22. See *id.* at 5, Article 10.

23. See Council of Europe, *Respecting democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis*, (April 7, 2020), available at <https://rm.coe.int/sg-inf-2020-11-respecting-democracy-rule-of-law-and-human-rights-in-th/16809elf40> (last visited November 29, 2023).

24. See *id.* at 7.

Authors often emphasize the importance of the temporal aspect in exceptional measures²⁵, as their duration is strictly confined to the necessities of the situation and is directly contingent on the objective existence of the extraordinary circumstance, including the pandemic²⁶. Although the European Court does not consider temporary tests in its cases, the proportionality of the emergency measures might be linked to the duration of the situation²⁷.

In general, International and European human rights law serves as a supplement to national systems for the protection of human rights. When there is a conflict between national laws and European human rights norms, the latter take precedence or have greater authority^{28,29}. However, it does not suggest an entire replacement of domestic laws but emphasizes the significance of prioritizing international human rights principles when there is a clash with national provisions. Meanwhile, the State's judiciary is obliged to set aside domestic provisions that are not in line with the international conventions of human rights, including in the event of a health crisis.

As for freedom of the press, the guidelines envisaged that the official means of communication cannot be the only source of information about the pandemic. This could lead to censorship and suppression of legitimate interests. Therefore, journalists, the media, health workers, civil society activists, and the public should have the opportunity to criticize government authorities and monitor their response

25. See Sanja Jović, *COVID-19 restrictions on human rights in the light of the case-law of the European Court of Human Rights* at 549 (ERA Forum 21 2021), available at <https://doi.org/10.1007/s12027-020-00630-w> (last visited November 29, 2023).

26. See Carlos Ayala Corao, *Challenges that the COVID-19 Pandemic Poses to the Rule of Law, Democracy, and Human Rights* at 3 (Max Planck Institute for Comparative Public Law & International Law (MPHIL) Research Paper No. 2020-23), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3638158# (last visited November 29, 2023).

27. See *A. and Others v. the United Kingdom*, ECHR 3455/05 (2009), available at <https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=002-1647&filename=002-1647.pdf&TID=ihgdqbxnfi> (last visited November 29, 2023).

28. See *Hirst v. The United Kingdom*, ECHR 74025/01 (2005), available at <https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-70442&filename=001-70442.pdf&TID> (last visited November 29, 2023).

29. See *Marckx v. Belgium*, ECHR 6833/74 (1979), available at <https://hudoc.echr.coe.int/fre#%22itemid%22:%22001-57534%22> (last visited November 29, 2023).

to the crisis. Stringent controls are necessary for any initial limitations on specific subjects, shutting down media channels, or entirely blocking access to online communication platforms, and they should only be warranted in highly exceptional circumstances. Subsequent prevention of misinformation dissemination and misuse can be achieved through sanctions and government-led awareness initiatives. Collaborative efforts between states, online platforms, and media outlets are essential to thwart public opinion manipulation and prioritize trusted sources of news, particularly information disseminated by public health authorities.

2.2 Scandinavian Model for Freedom of the Press during COVID-19

On April 15, 2020, the Swedish Ministry for Foreign Affairs published a joint statement on the safety of journalists and access to information during the COVID-19 pandemic³⁰. The statement stands out for touching on the most susceptible issues in connection with the freedom of the press. Thus, the significance of internet access is strongly emphasized to guarantee that the information reaches the people affected by the pandemic. Therefore, State authorities are suggested to restrict interference with internet information sources to provide accessibility to online information services. It was also highlighted in the statement that the emergency circumstances during COVID-19 must not be addressed to solve the limitations on freedom of the press as it complicates and challenges the working conditions of journalists and other media workers³¹. Additionally, smear campaigns aimed at discrediting journalistic work, the expulsion of foreign media officers based on their COVID-19 coverage, and the criminalization of alleged misinformation, both online and offline, may potentially infringe upon human rights³².

30. See Group of Friends on the Safety of Journalists and Media Freedom in Strasbourg, *Joint statement on safety of journalists and access to information during the COVID-19 crisis* (April 15, 2020) available at <https://www.government.se/statements/2020/04/joint-statement-on-safety-of-journalists-and-access-to-information-during-the-covid-19-crisis/> (last visited November 29, 2023).

31. See *ibid.*

32. See *ibid.*

The Nordic countries are appreciated and are highly ranked for maintaining stability during the COVID-19 pandemic about fundamental freedoms. However, from time to time several restrictions arose from the policy of governmental authorities which were publicly criticized for the lack of reasonable grounds.

Generally, the restrictions practiced against the media sector were not encountered in the Norwegian jurisdiction, and the pandemic was not an exception to the matter. There was solely one following case that has been exposed to criticism on social media regarding the freedom of the press. The Minister of Health participated in a public debate on October 27, 2020, and, amid the discussion, he complained that the host should not have been asking questions concerning the consistency of governmental measures on medical masks with scientific suggestions³³. Since journalists are considered as a "watchdog of the public"³⁴, making inquiries to the government ensures transparency and helps to scrutinize decision-making processes by communicating accurate information to the public. It should be highlighted that the cardinal goal of the governmental bodies must be dispelling all the doubts from the minds of the public, especially during emergencies. Without transparency, citizens might become skeptical of government actions, and this may prompt political and legal challenges due to the decreased confidence in public health measures.

As for the established laws linked to the emergency, the Norwegian Government presented general guidance to State authorities on access to public documents during COVID-19³⁵. The cardinal goal of the document covered the process of accessing information and guaranteeing this fundamental right during the pandemic, whereas it was stated in the guidance that access to specific information is up to the decision of the relevant Ministry. On the other hand, the press

33. See E Holmøyvik, B Moltumyr Høgberg and CC Eriksen, *Norway: Legal Response to COVID-19*, in Jeff King and Octávio LM Ferraz et al (eds), *The Oxford Compendium of National Legal Responses to COVID-19* (OUP 2021). At paragraph 55.

34. See *Lingens v. Austria*, ECHR 9815/82 (1986), at paragraph 44, available at [https://hudoc.echr.coe.int/fre/#%7B%22itemid%22:\[%22001-57523%22\]%7D](https://hudoc.echr.coe.int/fre/#%7B%22itemid%22:[%22001-57523%22]%7D) (last visited November 29, 2023).

35. See *Veileder Til Behandling Av Innsynskrav*, available at <https://www.regjeringen.no/contentassets/c40279014de04fa182485b02e86421f4/veileder-til-behandling-av-innsynskrav---utarbeidet-i-forbll178657.pdf> (last visited November 29, 2023).

expressed its concern due to the lack of public hearings for reviewing the emergency bills and regulatory standards. Considering the social and economic regulations, some of the draft documents were sent for public review 24-48 hours before their adoption³⁶. However, none of the draft regulations which were considered the most restrictive measures deriving from the Infection Control Act 1994 were sent for public discussion before passing³⁷.

In Finland, at the outset of the pandemic, financial limitations on the media sector captured the attention of the public. Some media organizations cut off the number of workers and other independent journalists faced difficulties in finding a job. However, the Government took respective measures to find solutions and devoted 7.5 million euros to media outlets and organizations for supporting purpose³⁸.

There were also issues regarding the access to information. Executive authorities, including the Prime Minister's Office, the Ministry of Social Affairs and Health, and the Institute for Health and Welfare refrained from the distribution of adequate information about their decisions considering their strategic policy³⁹. Such a situation sparked criticism among the public and challenged the stability of the newsgathering mission of journalists. According to the Finnish Act on the Openness of Government Activities⁴⁰, everyone is entitled to the right to access official documents in the public domain⁴¹. Therefore, governmental authorities were criticized for not abiding by the requirements of the law.

The policy taken by the Prime Minister's Office was the target of other criticism when it did not issue the minutes of the Coordination Group considered for COVID-19. The minutes, which set out the sharing of functions among ministries, were initially held secret, and

36. See *id.*, at 34, paragraph 55.

37. See *ibid.*

38. T Kotkas, A Kantola, H Wass, E Husu, Finland: Legal Response to COVID-19, in Jeff King and Octávio LM Ferraz et al (eds), *The Oxford Compendium of National Legal Responses to COVID-19* (OUP 2021), doi:10.1093/law-occl19/e32.013.32, paragraph 56.

39. See *id.*, at paragraph 57.

40. See Ministry of Justice Finland, *Act on the Openness of Government Activities* (1999), available at https://www.finlex.fi/en/laki/kaannokset/1999/en1999062l_20150907.pdf (last visited November 29, 2023).

41. See *id.*, at section 9, paragraph .

only after heated debates, they were presented to the consideration of the press⁴². Another critical point was made over the execution of competencies arising from the Emergency Powers Act because while the Government resolved the imposition of the restrictions on freedom of movement between the southern Uusimaa region and the rest of Finland, the reasonable grounds for the implementation were not indicated⁴³. Especially in situations like emergencies, which impact the lives of the people, the lack of specified grounds may raise questions about the constitutionality and the legality of the imposed restrictions. The concept of public interest typically pertains to issues that significantly impact the public or have substantial implications on the well-being of citizens or the community⁴⁴. In times of emergency, this extends to matters that the public has a legitimate interest in understanding.

At the same time, a lack of transparency decelerates effective public cooperation. When citizens are not informed or are hesitant about the reasons for restrictions, compliance may decrease, and it complicates the management of the pandemic. For instance, in 2021, the Finnish Government was condemned for not disclosing the pandemic exit policy and the information published after the decisions of executive authorities⁴⁵. Moreover, the Finnish News Agency's requests to access several documents were responded to differently by relevant ministries and public organizations. While some of the bodies presented the requested documents, others decided not to distribute the documents and held them secret. The Finnish Institute for Health and Welfare was also among the publicly criticized State organizations. The Institute was renowned for not divulging information about the ongoing pandemic and not revealing the scientific grounds for its strategic policy⁴⁶. From time to time, the Ministry of Social Affairs and Health also criticized the Institute for the lack of

42. See *id.*, at 39, paragraph 58.

43. See *id.*, paragraph 59.

44. See *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland*, ECHR 931/13 (2017), paragraph 171, available at <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-175121%22%5D%7D> (last visited November 29, 2023).

45. See *id.*, at 39, paragraph 59.

46. See *ibid.*

improvements in data reporting and communication⁴⁷. It is no coincidence that multiple scholars emphasized the importance of transparency as enabling individuals to gain a better understanding of the government and fostering closer connections among people⁴⁸. Therefore, it is worth bearing in mind that transparency of government communication enhances its local and international reputation. Once the public comprehends the necessity of restrictions, it signals a governmental commitment to democratic values and human rights.

3 *Legal Analysis of Domestic Emergency Laws adopted during COVID-19 Pandemic*

3.1 *Hungary*

In 2020, the Ninth Amendment to the Hungarian Constitution of 2011 concerning the state of emergency was adopted. For the adoption of "special legal orders" by the Government, six circumstances were outlined: "state of national crisis", "state of emergency", "state of preventive defense", "emergency response to terrorism", "unforeseen intrusion", and "state of danger"⁴⁹. According to Article 53, paragraph 1 of the Constitution, a "state of danger" is declared when there is an imminent threat to lives and property due to natural or industrial disasters, to mitigate the consequences of the event⁵⁰. This is the constitutional base used during COVID-19, entitling the Government to lay down emergency regulations established in a separate act to temporarily suspend the application of certain laws or derogate from the provisions of those laws, and give priority to the emergency rules and measures. It is worth mentioning that the situation qualified as an emergency must be of such magnitude and gravity that it seems impossible for the State to effectively address the crisis without altering

47. See *id.*, paragraph 61

48. See Stephan Grimmelikhuijsen, *Linking Transparency, Knowledge and Citizen Trust in Government: An Experiment*, 78(1) *International Review of Administrative Sciences*, at 51 (2012), available at <https://doi.org/10.1177/0020852311429667> (last visited November 29, 2023).

49. See Art. 48-53, Hungarian Constitution.

50. See *ibid.*, Article 53, paragraph 1.

its structure to enhance effectiveness (e.g., by extending executive powers) and/or efficiency (e.g., by reducing parliamentary control to expedite decision-making) on a temporary basis⁵¹. As can be seen from the Hungarian Constitution, after obtaining the approval of Parliament, the Government is the only determiner of the state of danger and is empowered with extraordinary capacity to terminate or limit the application of fundamental rights. However, the objective in mitigating the impact on fundamental rights should exclusively focus on reinstating conditions that eliminate any scope for the dominance of emergency rules⁵². Actions taken must be precisely suited and proportional to their intended purpose⁵³. While they may go beyond existing laws, they should never seek to endorse values that deviate from the usual legal framework. Therefore, the activities of extraordinary powers should be balanced with safeguards, to prevent potential abuses and protect fundamental rights.

The Authorization Act adopted by the Hungarian Government appointed the extraordinary power and determined its authority over COVID-19⁵⁴. The Act conferred the Government the legal competence to amend Section 337 of the Hungarian Criminal Code⁵⁵, and to extend the scope of the "Scaremongering" crime. Hereinafter, anyone who communicates any false information or distorts a factual occurrence related to the public danger, leading to potential disturbance or unrest among a larger group of people at the scene of public

51. See Andrej Zwitter, *The Rule of Law in Times of Crisis: A Legal Theory on the State of Emergency in the Liberal Democracy*, 98(1) ARSP: Archiv für Rechts- und Sozialphilosophie / Archives for Philosophy of Law and Social Philosophy, at 98 (2012), available at <https://www.jstor.org/stable/24769102> (last visited November 29, 2023).

52. See Guillaume Tusseau, *The Concept of Constitutional Emergency Power: A Theoretical and Comparative Approach*, 97(4) ARSP: Archiv für Rechts- und Sozialphilosophie / Archives for Philosophy of Law and Social Philosophy, at 528 (2011), available at <https://www.jstor.org/stable/23681137> (last visited November 29, 2023).

53. See *id.* at 529.

54. See Ministry of Justice Hungary, *Act XII of 2020 on the containment of coronavirus*, available at <https://berlin.mfa.gov.hu/assets/77/49/43/cc3672166e33b-2cf015ce4371aedf19417c2710.pdf> (last visited November 29, 2023).

55. See Ministry of Justice Hungary, *Act C of 2012 on the Criminal Code* (2023), available at <https://njt.hu/jogszabaly/en/2012-100-00-00> (last visited November 29, 2023).

peril, is deemed to have committed a felony⁵⁶. Most importantly, an individual who utters or spreads any untrue information or misrepresents a factual occurrence with the potential to impede or obstruct the effectiveness of a special legal order will be subject to criminal liability⁵⁷. It should also be stressed that the ruling party's majority in the Parliament guaranteed the immediate approval and application of those amendments. The Government also issued a statement explaining the reasons behind the new version of the definition⁵⁸. According to the latter, the legislative elements mentioned in paragraph 1 were not sufficient to take measures against scaremongering when it came to the pandemic⁵⁹. Since paragraph 1 only allows measures for communication made regarding public danger, it restricts the legality of sanctions in times of pandemic. However, penalizing disinformation during COVID-19 can now be justified by referral to paragraph 2, as it abolishes geographical standards.

The newly established provisions entailed such strong public criticism that the issue was raised to the Hungarian Constitutional Court⁶⁰. An applicant presented a complaint to the Constitutional Court, indicating that the latest provisions were contrary to the rule of law's requirements of the Constitution, with particular regard to the clarity of provisions. Moreover, the arbitrary implementation of those provisions was not in accordance with the legal necessity and

56. A person who, at a site of public danger and in front of a large audience, states or disseminates any untrue fact or any misrepresented true fact with regard to the public danger that is capable of causing disturbance or unrest in a larger group of persons at the site of public danger is guilty of a felony and shall be punished by imprisonment for up to three years.

57. A person who, during the period of a special legal order and in front of a large audience, states or disseminates any untrue fact or any misrepresented true fact that is capable of hindering or preventing the efficiency of protection is guilty of a felony and shall be punished by imprisonment for one to five years.

58. See András Koltay, *The Punishment of Scaremongering in the Hungarian Legal System, Freedom of Speech in the Times of the COVID-19 pandemic*, in *Law and Economics of the Coronavirus Crisis. Economic Analysis of Law in European Legal Scholarship*, ed. Klaus Mathis, Avishalom Tor (Springer 1st ed. 2022), at 41, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3910395 (last visited April 29, 2023)

59. See *ibid.*

60. See *ibid.*

proportionality elements, giving a broad competence to the Government for restrictions⁶¹.

On June 17, 2020, the Court ruled on the constitutionality of the trending definition of scaremongering⁶². The Court justified the criminal provisions on the grounds that they apply to a narrow range of communications, meaning the dissemination of untrue facts. The Court also noted that there is insufficient basis for inferring that the newly introduced legal elements, including terms such as fact, statement of fact, statement of untrue fact, distortion of fact, distinction between statement and rumor, special legal order, wide publicity, etc., are inherently uninterpretable and thus inapplicable⁶³. Judicial precedents concerning these elements can serve as a benchmark for determining what constitutes scaremongering under the Criminal Code⁶⁴. A general court might ascertain that criticism of specific government measures during a special legal order, forecasting future events, or speculating on undisclosed data in the context of the special legal order may not fall within the scope of this criminal offense⁶⁵. In several statutory elements, the Criminal Code requires that the act be capable of producing a consequence. This suitability indicates the objective effectiveness and direction of the act⁶⁶.

That is the reason why the Court decided that the newly established provisions are in line with the requirements of the Constitution and affirmed that it positively responds to the standards of freedom of expression. It further stated that scaremongering is a type of crime that should be committed deliberately⁶⁷. The offender must be aware that he is conducting this specific act during a special legal order. If the fact an individual asserted is wrong or materially distorts the real facts

61. See Hungary Two pandemics: Covid-19 and attacks on media freedom (The European Center for Press and Media Freedom, June 17th, 2020), available at <https://www.ecpmf.eu/hungarys-two-pandemics-covid-19-and-attacks-on-media-freedom/> (last visited November 29, 2023).

62. See Constitutional Court of Hungary, 2020, no. 15, available at <https://hunconcourt.hu/decisions/decision-15-2020-on-scare-mongering/> (last visited November 29, 2023).

63. See *id.*, paragraph 43.

64. See *ibid.*

65. See *ibid.*

66. See *ibid.*

67. See *id.*, at 11.

(irrespective of being a state or local/municipality act), it can put the effective defense at stake under the special legal order⁶⁸.

As can be seen from the decision of the Constitutional Court, it was aware somehow of the disproportionality of the provision with respect to the restrictions born by the freedom of the press. The boundaries are frequently defined by international legal instruments. As it was discussed in previous chapters, the boundaries are frequently defined by international legal instruments, even if those sources are not directly mandatory. Once human rights are in danger, the media should leverage its influence to maintain a balance to fulfill its democratic responsibility, which is preserving the diversity of thoughts⁶⁹. States, in turn, must under no circumstances, exploit a crisis to assert disproportionate powers or curtail freedom of expression. Actions such as exerting control over information or undermining media independence pose direct and significant threats to the fundamental pillars of democracy⁷⁰.

Thus, the Hungarian Constitutional Court tried to balance and facilitate the strict nature of the statutory provisions made to the Criminal Code, thereby narrowing down the scope of the definition and framing its applicability circumstances. Overall, the measures taken by the Government amplified the deteriorating state of the freedom of the press in Hungary. Except for the above-mentioned criminal sanctions in response to the disinformation, other measures included the curtailment of the support for the press by public funds, complicating the licensing procedure for independent journalists and media outlets, and so on. According to the 2020 ranking statistics of the Media Freedom Index by Reporters without Frontiers, Hungary positioned in 89th place out of 180 countries, declining 25 places since 2014⁷¹.

68. See *ibid.*

69. See Aneta Stojanovska-Stefanova and Hristina Runcheva Tasev, *The Mass Media Freedom in a State of Emergency: Infodemic vs. COVID-19 Pandemic*, 15(1) South East European University Review, at 46 (2020), available at <https://sciendo.com/article/10.2478/seeur-2020-0003> (last visited November 29, 2023).

70. See *id.*, at 52.

71. See *id.*, at 62.

3.2 Russian Federation

During the COVID-19 pandemic, the Russian Federation was one of the countries that set statutory norms and regulations for preventing the dissemination of fake news. The respective adopted bills and amendments were made to the Criminal Code of the Russian Federation; the Code of Administrative Offenses; and the Federal Law on Information, Information Technologies, and the Protection of Information. Spreading disinformation about the pandemic is now punished with prison sentences⁷².

On April 1, 2020, a new Article was incorporated into the Criminal Code through the Federal Law. As outlined in Article 207, paragraph 1 of the Criminal Code⁷³, disseminating knowingly false information publicly, disguised as reliable reports regarding circumstances that jeopardize the lives and safety of citizens, as well as information about government measures taken to safeguard the population and territories, is subject to legal consequences⁷⁴. While the Article previously regulated the spread of fake news about an act of terrorism⁷⁵, the scope of application extended to the State's health emergency operations during the pandemic. Here, the cardinal reason for the expansion of misinformation could potentially be a distrust in political

72. Tariq Ahmad, et al., U.S. Global Legal Research Directorate Law Library of Congress, *Freedom of expression during COVID-19* at 44 (The Law Library of Congress, Global Legal Research Directorate, 2020) 44, available at <https://www.loc.gov/item/2020714999/> (last visited November 29, 2023).

73. See Article 207.1, The Criminal Code of Russia Federation 1 April 2020, available at <https://base.garant.ru/10108000/37c73f2864615edbc14df2a73fccde7c/> (last visited November 29, 2023).

74. The offenders may face penalties, including fines ranging from 300,000 to 700,000 rubles. Alternatively, the penalty may be equivalent to the convicted person's wage, salary, or any other income, spanning a duration of one year to eighteen months. In addition to fines, punishment may involve compulsory labor for up to three hundred and sixty hours, corrective labor for up to one year, or a restriction of freedom lasting up to three years.

75. See Art. 207, The Criminal Code of Russian Federation 28 December 2004, available at https://www.imolin.org/doc/amlid/Russian_Federation_Criminal_Code.pdf (last visited November 29, 2023).

institutions⁷⁶. This contributes to the dissemination of false information and amplifies its impact on official media outlets.

Consequently, the repercussions of this phenomenon pose significant harm to democracy. Moreover, it was noted in Article 207, paragraph 1 that circumstances that pose a threat to the life and safety of citizens are recognized as natural or man-made emergencies⁷⁷. Therefore, there is no doubt that Article 207, paragraph 1 directly addresses the disinformation acts related to the COVID-19 pandemic.

The second paragraph of Article 207 is devoted to the public dissemination of knowingly false, socially significant information that entails grave consequences. According to the provision, public distribution of deliberately false socially significant information under the guise of reliable messages, which negligently entailed infliction of harm to human health or caused the death of a person or other grave consequences is also punishable by certain terms of deprivation of freedom, among other types of sanctions⁷⁸. The main difference between the first and second paragraphs of Article 207 is distinguished in the consequences that the action brought. While the consequences of the first paragraph should be deliberate, the second paragraph requires those repercussions through negligence. For instance, erroneous exposure of state measures on COVID-19 or a presentation of false infection numbers is sufficient to consider the action as criminal either under paragraph 1 or 2 of Article 207.

Although deliberate nature plays a paramount role in the categorization of the wrongful act as a crime, dissemination of the information negligently is also subject to punishment at the administrative level. Article 101 of Administrative Code⁷⁹ enshrines that the dissemination of false information about circumstances that pose a threat to the safety of citizens and about the government's emergency

76. See Andreu Casero-Ripollés, *Impact of COVID-19 on the media system. Communicative and democratic consequences of news consumption during the outbreak*, 29(2) *El Profesional de la Información* 2 (2020), available at <http://dx.doi.org/10.3145/epi.2020.mar.23> (last visited November 29, 2023).

77. See *id.*, at 75.

78. See *ibid.*

79. See Art. 13.15, Russian Administrative Code April 2020, available at <https://base.garant.ru/12125267/07a4a413953ad94308be69165d05fd74/> (last visited November 29, 2023).

operations will be punishable⁸⁰. An interesting point is that besides the constitutional legitimacy of those legislative provisions, even before the new statutory norms were adopted, the Investigative Committee of the Russian Federation stated on its official website⁸¹, stressing that the investigations are launched against the spreading of fake news about the number of individuals being infected with COVID-19 in the capital city, Moscow⁸². According to the text of the statement, those investigations were carried out under Articles 237 (distortion of information about events, facts, or phenomena endangering human life or health)⁸³ and 281.1 (defamation)⁸⁴ of the Criminal Code of the Russian Federation.

Following this, the material, so-titled "Death from coronavirus is the lesser evil" by Elena Milashina, published in the "Novaya Gazeta"⁸⁵ stated that doctors do not have enough protective equipment and that local authorities carry out mass detentions for violating self-isolation⁸⁶. Roskomnadzor (the Federal Service for Supervision of Communications, Information Technology, and Mass Media)⁸⁷, in response to the issued article, filed an administrative complaint against Novaya Gazeta and its editor-in-chief Dmitry Muratov for two publications. The executive organ stated that the alleged statement contained unreliable

80. See Ahmad et al., *Freedom of expression during COVID-19* at 45 (cited in note 73).

81. Available at <https://sledcom.ru/news/item/1451926/> (last visited November 29, 2023).

82. See Ahmad et al., *Freedom of expression during COVID-19* at 45 (cited in note 73).

83. See Art. 237, The Criminal Code of Russian Federation (cited in note 76).

84. See Art. 281.1., The Criminal Code of Russian Federation (cited in note 76)

85. Available at <https://novayagazeta.ru/articles/2020/04/12/84851-smert-ot-koronavirusa-menshee-zlo> (last visited November 29, 2023).

86. Available at <https://perma.cc/L44L-JADL> (last visited November 29, 2023).

87. The Federal Service for Supervision in the Field of Communications, Information Technologies and Mass Communications (Roskomnadzor) is a federal executive body exercising control and supervision functions in the field of mass media, including electronic and mass communications, information technologies and communications, functions for control and supervision of compliance of the processing of personal data with the requirements of the legislation of the Russian Federation in the field of personal data, as well as functions for organizing the activities of the radio frequency service, available at <https://rkn.gov.ru/about/> (last visited November 29, 2023).

socially significant information, which poses a threat of harm to the health of citizens and threatens public safety⁸⁸. After the supportive demands by the Prosecutor General's Office, the article was removed from the site before the case was ruled by the judiciary.

Roskomnadzor later lodged a complaint against the Ekho Moskvyy radio station. According to the factual background of the case, on March 16, 2020, a guest during an interview in the program expressed doubts about the reliability of the Government's official statistics on COVID-19. After the Roskomnadzor initiated administrative proceedings, a court fined the radio station 260,000 rubles for knowingly spreading false news that posed a threat to human health⁸⁹. The editor-in-chief of the radio station, Alexei Venediktov, was also fined 60,000 rubles, due to the deliberate dissemination of false news and entailing a threat to the life and health of persons.⁹⁰ Moreover, the Roskomnadzor ordered the online editors of Ekho Moskvyy to remove the interview from the website⁹¹.

The limited availability of public records is most likely the main reason for the proliferation of fake news. Utilitarianism philosophers, like John Milton and John Stuart Mill⁹², believed that individuals had certain natural rights that transcended any social contract⁹³. They opined that if individuals were properly informed of what was happening around them, then they would rationally get to the truth, either on their own or through informed public debate. It is no coincidence that the European Court of Human Rights (ECHR) ruled in various cases that the grounds for restrictions on accessibility to public information materials should be minimized and the margin of appreciation

88. See also The European Center for Press and Media Freedom, at 46 (cited in note 62).

89. See *id.*, at 47.

90. See *ibid.*

91. See *ibid.*

92. Lindsay Palmer, *Press Freedom during COVID-19: The Digital Discourses of the International Press Institute, Reporters Sans Frontières, and the Committee to Protect Journalists*, 10(6) *Digital Journalism*, 3 (2022), available at <https://doi.org/10.1080/21670811.2021.1943480> (last visited November 29, 2023).

93. See *ibid.*

from that perspective is narrowed down⁹⁴ also. As I mentioned earlier in this chapter, political institutions create social concern via restricted access to information. Inherently, the lack of transparent, accountable, and precise governmental communication prompts multiplicities in content material. In emergencies, restrictions for a temporary period aim to mitigate public safety risks and discourage the dissemination of false information in a way that is palatable under constitutional principles. However, the reflection of those limitations via criminal prosecutions becomes excessive and might lead to abuses of power.

After discussing the legislative provisions and their application in practice, I would also like to highlight the proportionality criterion of those provisions in the Russian Federal Constitution. Specifically, the Constitution delineates the circumstances under which restrictions on human and civil rights and liberties are permissible. According to this constitutional provision, such limitations can only be imposed by federal law and must be tailored to the extent necessary for safeguarding fundamental aspects of the constitutional system. This includes considerations of morality, health, and the protection of the rights and lawful interests of other individuals. Moreover, these restrictions are deemed justifiable when they contribute to ensuring the defense of the country and the overall security of the state⁹⁶. In a state of emergency, the Constitution provides that, individual restrictions of rights and liberties with identification of the extent and term of their duration, may be instituted in conformity with the federal constitutional law under conditions of the state of emergency, to ensure the safety of citizens and protection of the constitutional system⁹⁷.

The freedom of the press is not considered one of the non-derogable rights under Article 56, paragraph 3 of the Federal Constitution. Another fact that is worth mentioning is that legislative provisions

94. See *Mamere v. France*, ECHR 12697/03 (2006), available at [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-77843%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-77843%22]}) (last visited November 29, 2023).

95. See *Hertel v. Switzerland*, ECHR 25181/94 (1998), available at [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-59366%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-59366%22]}) (last visited November 29, 2023).

96. See Art. 55, Russian Federation Constitution.

97. See Art. 56, Russian Federation Constitution.

in the Criminal Code and Administrative Code were adopted at the outset of COVID-19. In that regard, the substantial grounds that aggravated the situation to the extent of imposing administrative or criminal sanctions on individuals are highly debatable. The legal policy undertaken by the Government from the outset of the pandemic in relation to the freedom of the press enshrined in Article 29 of the Federal Constitution, was not in accordance with the legal necessity and proportionality principle, which we also encountered in the Hungarian Constitution. As we discussed, soft laws published by United Nations organs and the Council of Europe strongly recommend minimizing the restrictions on fundamental rights. Even if the limitations are imposed, they should be consistent with the international obligations of a state. It should be borne in mind that soft laws have an indirect effect and European Court rules according to those laws when the pending case concerns the balance between the pressing social needs. However, in the case of the Russian Federation and Hungary, emergency powers apply criminal prosecution because of the unreliable information in the media. Therefore, considering those administrative and criminal provisions as constitutional is not straightforward..

3.3 *Azerbaijan*

Similar bills and amendments were also made in the legislative system of the Republic of Azerbaijan.

According to the Law of March 17, 2020, on amending the Code of Administrative Offenses⁹⁸ of the Republic of Azerbaijan, new provisions were added to Article 388-1 of the Code of Administrative Offenses. The legislation stipulates that failure to comply with the regulations concerning the dissemination of prohibited information on an internet resource by the owner of the domain name can result in fines. Specifically, individuals may face fines ranging from five hundred to one thousand manats for such violations. Officials, on the other hand, may incur fines between one thousand to one thousand and five hundred manats, or in certain circumstances, they could be subject to administrative imprisonment for a maximum of one month. The

98. See The Law on Amendments to the Criminal Code (2020).

severity of the penalty takes into consideration the recurring nature of the offense. Legal persons found in violation may be fined from one thousand five hundred to two thousand manats⁹⁹. That provision covers the dissemination of false information about the coronavirus or spreading material that could cause people to alarm. It was also noted in the provision that such administrative sanctions are applied when the perpetrated act does not lead to criminal liability. However, it should be mentioned that criminal proceedings might only be initiated under Article 139-1 of the Criminal Code¹⁰⁰ in case the violation of the anti-epidemic regime, sanitary, hygiene, or quarantine regimes causes the spread of diseases or creates a real threat to the spread of diseases. That provision is not exclusively devoted to restricting the freedom of the press in the territory of the Azerbaijan Republic.

Article 13-1 of the Law of the Republic of Azerbaijan "On Information, the Provision of Information and the Protection of Information" envisages the procedural rules for the elimination of materials whose dissemination is prohibited by the administrative provisions. According to the regulatory norms, the Ministry of Digital Development is tasked with identifying cases in which prohibited information is being accessed on an internet resource. The Ministry may discover the violation on its motion or via notifications by individuals, legal entities, or state institutions. After verification, the Ministry issues a written official warning to the owner of the internet information resource, the possessor of the domain name, and the hosting provider¹⁰¹. In the content of the notice, there should be an indication of prohibition by law on disseminated information. The recipient of that warning is requested to remove the relevant information or to restrict access to the Internet resource or its relevant part. The notice also contains

99. See The Law on Amendments to the Code of Administrative Offenses (2020).

100. If the violation of the anti-epidemic regime, sanitary-hygiene or quarantine regime causes the spread of diseases or creates a real threat for the spread of diseases, individuals will be punished with a fine in the amount of 2500 to 5000 manats or restriction of freedom for a period of up to three years or deprivation of liberty for a period of up to three years.

101. See Art. 13-3, paragraph 1, The Law On Information, the Provision of Information and the Protection of Information.

information about measures to be taken if the relevant request is not fulfilled promptly.

If information prohibited by law remains on an Internet resource beyond the stipulated time frame of 8 hours from the issuance of the notice, the Ministry of Digital Development takes further action¹⁰². In such cases, the Ministry sends a notification and proceeds to file an application with the relevant district court. The purpose of this legal action is to request the court's intervention in the removal or restriction of access to the internet information resource or its specific section that contains the prohibited content. This underscores a legal process initiated by the Ministry when timely compliance with content removal or access limitations is not achieved.

The court considers the application within 5 days and takes a decision¹⁰³. The decision enters into force immediately after its ruling, and filing an appeal against the decision does not prevent its execution. Subsequently, the Ministry attaches the information resource to the list of "Dissemination Prohibited"¹⁰⁴. Immediately after the Internet information resource is added to the list, the hosting provider and Internet service providers are required to prohibit entry to the entire Internet information resource. Simultaneously, they are obligated to communicate the ensuing consequences to the owner of the internet information resource.

When evaluating a legal measure, the discussed procedural regulations appear transparent and aligned with the principle of a valid purpose. Initially, a warning to remove information within 8 hours, backed by valid reasons, signifies intent by the disseminator. Failure to comply might result in alternative administrative penalties. However, imposing administrative imprisonment for up to one month contradicts the Council of Europe's April 7, 2020 Guidance and lacks proportionality concerning actions taken during the COVID-19 period.

When restricting press freedom, it is crucial to consider legitimate intent and proportionality. In Azerbaijan's legislation, while there were valid reasons for adopting bills and amending criminal and

102. See *id.*, paragraph 2

103. See *id.*, paragraph 5.

104. See *id.*, paragraph 6.

administrative laws, the imposition of administrative imprisonment and deprivation of liberty exceeds the due consequences.

4 *Conclusion*

Overall, the newly established administrative sanctions in the legislation do not seem to be in accordance with the requirements of the Constitution of the Republic of Azerbaijan. According to Article 71, paragraph 3 of the Constitution, upon declaration of war, martial law, and emergency, certain human rights and freedoms may be partially and temporarily restricted. This curtailment is carried out in accordance with the international obligations of the Republic of Azerbaijan. The provision reflects a recognition that, under exceptional circumstances, there may be a need to limit certain rights for the sake of national security or public welfare, aligning with the country's commitment to international standards and agreements. Article 3, paragraph 6 of the Constitutional (Organic) Law on the Implementation of Human Rights and Freedoms in the Republic of Azerbaijan defines the freedom of the press as a derogable right for the purposes of protection of health and morality. Moreover, the Constitutional Law encapsulates the legitimate aim and the principle of proportionality regarding the restrictions. Even if the protection of life and health could be interpreted as serving legitimate aims, it can hardly be considered proportionate regarding the consequences. The Code of Administrative Code enshrines the administrative imprisonment sentence, and it looks rigid and excessive regarding the restrictions on freedom of the press.

On the other hand, the criminal sanctions established in Hungarian and Russian codes, take an analogical position in the Criminal Code of Azerbaijan as well. Article 139-1 of the Criminal Code envisages the applicability of the provision in a wide range of fields. The textual interpretation of the provision, as well as the notice in Article 388-1 in the Code of Administrative Offenses, gives us sufficient grounds to consider its applicability in the media sector. While the criminal provision in the Russian Code distinguishes the deliberateness, the Article in the Azerbaijani Code does not differentiate the purposiveness or negligence in dissemination. The obscure points in the text of the

criminal provision shrink the quality of the law in terms of the foreseeability criterion. Thus, neither the administrative nor the criminal sanctions established in the relevant Codes during the pandemic were proportionate to the due consequences of the legitimate aim.