



// COVID-19 and civic freedoms in Europe

1. Introduction

We will remember 2020 as a year of global public health crisis, with Government responses that had an unprecedented impact on basic freedoms. Various measures adopted to protect public health have directly restricted the possibility for individuals to exercise their civic freedoms of association, assembly, and participation among others. While some of them are justifiable, it is essential to scrutinize the restrictions especially for their necessity and proportionality.

ECNL and ICNL set up the COVID-19 Civic Freedom Tracker to monitor and identify those COVID-19 related measures that shaped civic space in Europe so that we can analyse and reflect on their impact. Typically, they took the form of legislative responses, government/public authorities' practices and court decisions or they occurred as incidents. This paper summarizes trends in adoption of these measures in 2020 using examples from all around Europe and basing information mainly from the tracker. While some of the measures are still in force, other may have been repealed in the course of 2020 or shortly after the publication of this paper. For any updates, we recommend to consult the [tracker](#) and our [webpage](#) dedicated to COVID-19 and civic freedoms.

2. Legislative responses to the COVID-19 pandemic that affected civic freedoms

Since the beginning of the outbreak of COVID-19 pandemic in Europe until the end of 2020, we have recorded over 187 legislative measures adopted in 45 countries. These were adopted with the intention to prevent the spread of COVID-19; however, they directly affected the ability to exercise basic civic freedoms. Following are the most common trends we have identified based on our Tracker by the end of December 2020:

- **Extensive use of the state of emergency regimes and in most cases without proper notification of the derogation from international commitments** – 38 countries have declared the state of emergency either in the first wave of the outbreak, or later on when the virus continued to spread throughout the continent. Declarations of the state of emergency were followed by adoption of unprecedented restrictions to human rights and civic freedoms contradicting their international and regional commitments. However, only

10¹ countries in Europe submitted an official notification of the derogation from their obligations under Article 15 of the European Convention on Human Rights.

In the second wave of the pandemic, some countries replaced the state of emergency with other regimes, such as a state of alert (Romania), quarantine regime (Armenia, Azerbaijan, and Ukraine), state of crisis (North Macedonia) or other similar regimes. These allowed them to limit human rights in order to manage the health crisis, without declaring a state of emergency and submitting an official derogation. However, as some were declared without proper legal framework, they are criticized for their lack of transparency and impartial oversight.

- **Prohibition of free movement to the extent used during wartime-** 40 countries have somehow restricted the free movement in their territories in the past 9 months. Most commonly, they introduced curfews (Montenegro, Spain), travel bans for incoming or outgoing travellers (Czech Republic, Hungary) as well as travel within different regions/departments of the country itself (France, Italy, Slovakia). In some countries, these measures have not been used since the Second World War (Belgium, the Netherlands) and are inherently connected with the military regimes.
- **Introduction of blanket restrictions to public gatherings and assemblies –** Public gathering were somehow restricted in all countries throughout Europe. In most cases the focus of the restrictions is on any form of gathering. However, in some countries, the measures target public and/or private spaces (e.g. Portugal, Malta), indoor and/or outdoor gatherings (e.g. Austria) as subject of restriction.

Also, the thresholds of the maximum number of people that can gather together vary throughout Europe and range between 3 persons (Moldova) to 30 persons (Bosnia and Herzegovina). The thresholds are sometimes vaguely defined as "large numbers" (Cyprus) "where the level of proposed attendance at the event could reasonably be considered to pose a risk of infection with COVID-19 to persons attending the event" (Ireland) providing room for arbitrary interpretation by the law enforcement bodies.

On a positive note, some countries have provided exceptions from the bans on public gatherings for holding assemblies. In Denmark, the law adopted as a reaction to COVID-19, allows the Government to ban gatherings of 10 or more people with the exception of opinion-shaping assemblies, including demonstrations and political meetings. In the Netherlands, a bill has been drafted that provides extensive power to the government to adopt wide-

¹ Albania, Armenia, Estonia, Georgia, Latvia, North Macedonia, Moldova, Romania, San Marino, Serbia.

ranging restrictions. At the same time, even when gatherings are restricted, the bill guarantees a right to organize a peaceful assembly as long as other health related measures are respected, such as keeping safe distance.

- **Adoption of surveillance measures disproportionately intruding into the right to privacy** – We have identified numerous measures throughout Europe that affected privacy of individuals. Besides contact tracing apps that we further describe under practical measures below, decision makers around Europe have adopted legislative measures allowing public authorities to intrude into individuals' privacy under the pretext of tackling the health crisis. For example, the emergency decree in Armenia obliges electronic network operators to provide state bodies with information on the customers' location and phone numbers the customers' have contacted, including dates and duration of phone calls. This information is further connected and analysed with the personal data of the tested, infected, treated patients, as well as those that had contact with the infected persons. The emergency law adopted in Bulgaria enabled police to monitor everyone's mobile phone traffic metadata and internet contacts without a court order to trace people that have violated their quarantine.

Some countries have resorted to derogating from their legal regulation on protection of personal data. For example, in Hungary, the government restricted data protection rights as stipulated by the General Data Protection Regulation. This allows the Government to use the personal data of individuals without clear regulations about when they can use it, and for what purpose. In Ukraine, derogations from the Law on Personal Data Protection providing data privacy guarantees have been introduced for the period of a “quarantine regime”. Some of the derogations include loosened requirements for collecting and processing of sensitive health data without the data subject's prior consent.

- **Monopolization of the right to information and expression by state authorities**- Access to information of public interest has been limited with the reasoning that it may jeopardize the completion of tasks required by the emergency situation. Some countries have prolonged the statutory periods for responding to access to information requests (Hungary) or completely abolished the obligation to respond to such requests during the state of emergency (Georgia).

Several countries have introduced limitations on sharing the information about COVID-19, rationalizing it as the fight against the “spread of false information”. Some of these countries established a complete ban on information about COVID-19 that has not been published by government agencies (Armenia) or following its strict guidelines (Moldova). Others have

adopted measures that provide for prosecution of media outlets or individuals for spreading information vaguely described as “false” or “disinformation” (Hungary, North Macedonia, Turkey), or with a potential to harm the life and health of its citizens (Azerbaijan).

- **Freedom of association and limitations to governing bodies’ meetings** – The restrictions on movement naturally also limited CSO ability to have in-person meetings of members of government bodies. Some countries, such as Turkey; however, adopted measures that specifically restricted members of CSOs to physically meet, including their board and/or general assembly meetings. Specifically, the circular on coronavirus measures temporarily postponed all meetings and activities of CSOs that bring people physically together, including trainings, workshops, and general assembly meetings. On the other hand, Luxembourg, passed a law with different measures that allows the governing bodies of any company or legal entity to hold their meetings without requiring the physical presence of their members.

3. Measures implemented in practice and incidents that occurred under the pretext of battling COVID-19

In our COVID-19 Civic Freedom Tracker, we have been also following the impact of government practices and incidents that occurred during the pandemic on civic freedoms. Some of them were a result of implementation of some legislative measure, others happened outside of any legal context. What they all have in common is that they occurred under the pretext of protecting public health. Following are the most frequently observed practices:

- **Crackdown on journalists and government critiques hindering the freedom of expression** – We have identified several cases when public authorities misused the coronavirus restrictions for cracking down on their critiques. In Azerbaijan and Turkey, activists and journalists were detained and criminally prosecuted for criticizing or reporting on the COVID-19 pandemic. In Turkey, several social media users were arrested for “unfounded and provocative” social media comments about the coronavirus. In Belarus, several foreign journalists were stripped of their accreditation.
- **Adoption of restrictions on reporting on COVID-19 limiting the access to information** – As mentioned above, numerous countries adopted restrictions related to the reporting on COVID-19 pandemic. Due to that, media outlets were forced to edit or remove content (Armenia) or were not allowed to express their own opinions on topics concerning COVID-19 pandemic to ensure “maximum accuracy and correctness” (Moldova).

- **Use of new technologies for extensive surveillance of Individuals hampering their right to privacy** – With the broad use of new technologies, countries are looking to tackle the health crisis through novel “smart solutions”. Therefore, they introduced various contact tracing apps and smart quarantines that were raising concerns about their privacy compliance. [The StopCovid app](#) introduced in France was collecting more data than necessary to stop the spread of the virus, and thus was not in compliance with data minimization principle. In Czech Republic, the government has designed the "[smart quarantine](#)" in spring 2020 without any prior consultation with the personal data protection supervisory authority. Some countries also introduced innovative solutions for monitoring the compliance with COVID-19 restrictions. For example, the city of [Trabizon in Turkey](#) installed cameras at bus stops, using facial recognition technology to detect and mock persons not properly wearing face masks. Those identified by the technology as not properly covering their mouth and nose are shown on a big TV screen installed at bus stops. As this technology allows for unique identification of individuals, it may be used for surveillance and further punishment of individuals caught on the camera.
- **Arbitrary use of sanctions and police force when facilitating peaceful assemblies** - Numerous cases of selective use of excessive force and imposition of fines were reported in 2020. Protesters have faced this selective justice and violent response from the law enforcement bodies in Albania, Bosnia and Herzegovina, North Macedonia and Slovenia. We have monitored and analysed assemblies organized after and between COVID-19 lockdowns in our recent paper on right to freedom of assembly.
- **Imposition of inherent security-based measures setting up a hostile atmosphere** - Many countries across Europe have resorted to a rhetoric of war, identifying the coronavirus as a new enemy to combat. With this rhetoric, they justify the imposition of inherent security-based measures. For example, to ensure proper enforcement of emergency measures, such as lockdowns and curfews, some countries deployed large numbers of police and military forces (Hungary, Romania). Some countries have also imposed criminal liability on individuals breaching COVID-19 restrictions (Albania, Belarus and Romania) or jailing individuals for petty crimes due to the fact that they occurred during a state of emergency (Czech Republic). You may find more information in our paper [Securitized response to the COVID-19 pandemic - impact on civic freedoms](#) that is dedicated to this topic.

4. Court decisions tackling restrictions to civic freedoms

Courts played a pivotal role in the balancing of restrictions imposed during the COVID-19 pandemic and their full impact is yet to be seen. As impartial bodies in the democratic system, they have been reviewing numerous actions filed by civil society, lawyers, and activists to dispute legitimacy of the adopted restrictions. Despite their typically lower ranking in open justice indices, we have identified several positive examples of judgements from Western Balkan countries.² In these judgements, courts from Kosovo, Montenegro and Bosnia and Herzegovina rejected the restrictions and set precedents on the material and formal aspects of adopting restrictions on fundamental freedoms.

Some of the already issued court decisions we have identified can be divided into:

- **Rulings on the merits of the restrictions** – Since the beginning of the pandemic, many important court decisions have been issued throughout Europe reviewing the principles of proportionality, necessity and time limitation of the restrictions. According to the regional and international instruments for the protection of human rights, these principles shall be respected when introducing restrictions to basic freedoms.
 - *Proportionality*

The question of proportionality of the restrictions to the aim pursued, namely the protection of public health, has been reviewed by the [Germany's Federal Constitutional Court](#). In its ruling, the Court stated that competent authorities cannot rely on blanket restrictions towards the right to peacefully assemble and must consider the specific case before deciding to prohibit an assembly. The Court noted that the city's administration could have agreed with the organisers on respecting measures that would limit the risks of transmission, such as limiting the number of participants, sufficient distance between participants etc.
 - *Necessity*

The necessity of the Government's actions have been reviewed by the [Constitutional Court](#) in Montenegro. After a successful initiative of the civil society challenging the decision of the Government to publish the names of individuals ordered to self-isolate, the Constitutional Court annulled this decision. Following this judgment, [more than 300 individuals](#) affected by this Government's decision filed lawsuits against the state for publishing their names

² See, for example, World Justice Project: WJP Rule of Law Index. Available at: <https://worldjusticeproject.org/rule-of-law-index/>

- *Time limitation*

In Bosnia and Herzegovina, the [Constitutional Court](#) ruled that the restrictions on movement imposed on minors and seniors “violated important human rights.” Besides rejecting them as not proportionate, the Court also stated that the restrictions are not strictly limited in time and regularly reviewed to ensure that they last only as long as they are necessary.

- **Rulings on the formal aspects of the restrictions** – The formal aspects of process of adopting laws that restrict fundamental freedoms are often overshadowed by the content and impact of the adopted measures. However, if restrictions are necessary, it is equally important to adopt them in accordance with their local legal framework, following the prescribed procedure. A public health crisis should not serve as an excuse for derogating from the legal framework.

- *Form of the restriction*

When derogating from human rights, the restrictions shall be prescribed by law. An important decision in this respect was issued by the [Constitutional Court in Romania](#). The Court ruled that isolation at home, quarantine and hospitalisation cannot be imposed based on ministerial order. According to the decision, measures such as these that are restricting individual rights and freedoms can only be established by a law, and clearly regulated. Similarly, in Kosovo, the [Constitutional Court](#) ruled that the preventive measures adopted during the coronavirus pandemic were unconstitutional, because they were too extensive to be adopted without Assembly's authorization.

- *Procedure of adoption*

A legally prescribed procedure should be followed when adopting a restriction to avoid introduction of unjustified and arbitrary rules. For example, in Finland the Chancellor of Justice ruled that government did not adequately inform the public about the decisions to restrict cross-border traffic and their binding character was not clear. It also concluded that the analysis of the measures and their impact on fundamental rights and on different population groups was inadequate.

- *Jurisdiction*

The restrictions, when necessary, shall be introduced by an authority that has jurisdiction over the issue and is competent to decide on the matter. In Spain, [Madrid's Highest Regional Court](#) annulled a lockdown imposed by Spain's central government on the capital region of Madrid in order to contain the spread of COVID-19. In its ruling, the Madrid's Court said that

the central government did not have jurisdiction and therefore was not competent to introduce such restrictions.

5. Conclusion

State authorities throughout Europe adopted complex set of measures affecting various civic freedoms under the pretext of fighting COVID-19 pandemic. While protection of public health is a serious concern, civic freedoms should not be completely abandoned and restricted contrary to the legally prescribed conditions. Decision makers should therefore continuously review the proportionality and necessity of the restrictions and limit their duration. Civil society organisations play a significant role in monitoring of restrictions and holding decision makers accountable for example by initiating court proceedings. As the situation with the pandemic develops, it is even more important for the decision makers to justify the measures they are imposing and maintain only restrictions that are strictly necessary and directly related to tackling the health crisis.