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Briefing Paper

Covid-19 and the impact on freedom of expression, access to information and freedom of the media

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Introduction

This paper is intended to provide IMS departments and colleagues with an overview of the trends and challenges to freedom of expression, freedom of the media and access to information stemming from national governments' responses to the Coronavirus pandemic. First, the paper look into the general rules established under international human rights law which define requirements for legitimate rights limitations or derogations from the human rights instruments. Then follows a consideration of the most pressing issues pertaining to media such as, *inter alia*: procedural shortfalls, disinformation, hate speech, troubles in accessing information, and impediments to journalistic freedom. Finally, a conclusion with a listing of likely future trends and suggestions of possible areas of involvement and response strategies for IMS and its local partners.

This text was informed by conversations with IMS local staff members and partners across different regions and countries: Africa (Zimbabwe), Asia (Sri Lanka), Middle East and North Africa (Algeria, Egypt, Iraq, Lebanon, Morocco, Tunisia), Eastern Europe (Belarus, Ukraine).

This analysis is based on data and insights kindly shared by the IMS global network. Any findings and propositions should not be read as a country- or a regional survey.

Background

Official responses to the Covid-19 pandemic have quickly turned into a real human rights crisis¹ which is ever more dangerous exactly for the reason of its global nature: rights and freedoms have been drastically restricted almost everywhere, including in established democracies.

Though the most evident restrictions were related to freedom of assembly, freedom of movement and privacy rights, it is indeed difficult to name any single right or freedom which is not being affected by the pandemic countermeasures. Human rights constitute a complex ecosystem, where a state's interaction with even one or two of its elements will normally impact all other elements as well. In the first place, such measures as social distancing and unprecedented bio-surveillance² undermine the very basis of the human rights system – human dignity and free will. If in the long term our human nature is profoundly changed due to these measures, the essence of our freedom and rights will inevitably change too.

When crises of this scale happen, a useful question to ask ourselves is: What is new? How does the present situation differ from what we experienced before? Pandemics are definitely not new, and neither is the fear that traditionally accompanies them. What is novel, however, is the global instant communication system which helps information (and disinformation) about the virus to travel globally in a matter of seconds and which consequently facilitates standardised, unified responses to the pandemic in different contexts and under different conditions. Another important difference is that in the framework of the anti-Covid-19 measures, people are motivated not only by fear but also by the benign intention of "caring about others". It is the combination of these two incentives that induced societies to accept rights restrictions readily and without much hesitation.

By this moment, we have already observed a surge in discrimination and inequality, outbreaks of domestic violence; lockdowns have been ruining the fragile achievements of feminism³ and preventing people from

¹ https://www.theguardian.com/world/2020/apr/23/coronavirus-pandemic-is-becoming-a-human-rights-crisis-unwarns?fbclid=IwAR3Al00zIsfYK3-OLOviJWbKsgUeNkcOhCRz8GC1eA6DujvicbfsHfZTKpo

² https://www.ft.com/content/19d90308-6858-11ea-a3c9-

 $[\]underline{1} \underline{fe6} \underline{fedcca75?} \underline{fbclid} \underline{=} \underline{IwAR2m5JJ5ctTQ5zeN7QZQlns6jUZ8hVqJ42dIk7Owtwwp9ybBMqAnfpbi-jY}\underline{$

https://www.theatlantic.com/international/archive/2020/03/feminism-womens-rights-coronavirus-covid19/608302/?fbclid=lwAR1 GPmfx8lYhtcmUMrU8Al3X-zLY4zmsCXJaz4g9gxroHk6k3GLRX-V6JU

accessing justice. You can find the reports on the overall human rights impact of the pandemic in the *List of relevant publications* provided in the last chapter below. However, for the purposes of this paper we shall focus on freedom of expression, access to information and freedom of the media.

Limitations of rights and derogations in International Human Rights Law

Before proceeding with mapping trends and challenges in media policy and regulation resulting from the Covid-19 countermeasures, it is worth providing an overview of the requirements that would make rights limitations legitimate under international human rights law and list the derogation mechanisms included in the major international human rights conventions.

Most rights are not absolute and could be legitimately limited if a prevailing public interest exists. Freedom of Expression is not an exception. However, all limitations of rights should be 1) prescribed by law; 2) pursuing legitimate aim (including *inter alia* public health protection) and 3) necessary in a democratic society. As it is normally less complicated for states to meet the first two requirements of a limitation being prescribed by law and pursuing legitimate aim, international courts or semi-judicial mechanisms often pay more attention to assessing whether a limitation in question satisfies the third criterion of necessity.

The necessity element is explained in the case-law of the European Court of Human Rights through establishing the existence of the "pressing social need" to impose certain limitation to the right as well as through the notion that the restrictive measure applied should be proportionate to the aim sought⁵ and reasons adduced to justify interference should be "relevant and sufficient".

It is exactly this substantial criterion of necessity that is normally carefully investigated in each limitation case and should be in focus of public discussions of any policy measure – including the ones adopted as part of the emergency response.

There is also a derogation mechanism which is normally a part of the major human rights treaties⁷. Derogation regime means that states are permitted to suspend some of their obligations under human rights instruments if a state of emergency requires them to do so. So far, in terms of the anti-Covid-19 measures, at least 9 states officially declared derogations from certain rights (mostly the right to liberty, the right to liberty of movement and the right of peaceful assembly) under International Covenant on Civil and Political Rights (ICCPR)⁸ and 10 states officially declared derogations under European Convention on Human Rights (ECHR)⁹.

Activation of the derogation regime should signify the existence of a threat to "the life of the nation", a very high threshold, and even an armed conflict does not automatically create such a "public emergency". It remains to be seen whether the current pandemic indeed threatened "the life of the nation" in each of the derogating states.

⁴ D Bychawska-Siniarska, Protecting the Right to Freedom of Expression under the European Convention on Human Rights.A handbook for legal practitioners (Council of Europe 2017) p.44-45.

⁵ D Moeckli, S Shah, and S Sivakumaran, International Human Rights Law (Oxford University Press 2014) p.112.

⁶ Zana v. Turkey App no 69/1996/688/880 (ECHR, 25 November 1997) para 51.

⁷ Please see inter alia Article 4 of the International Covenant on Civil and Political Rights, ICCPR and Article 15 of the European Convention of Human Rights, ECHR; importantly, African Charter on Human and Peoples' Rights, ACHPR does not have a derogation mechanism.

⁸ https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang= en&mtdsg no=IV-4&src=IND

⁹ https://www.coe.int/en/web/conventions/full-list/-/conventions/webContent/62111354

Issues

a. Due process and timing

As one can sense from the above chapter, thorough consideration of the requirement of "necessity" or of the (non)existence of the "threat to the life of the nation" by the decision-makers does require proper timing and due process – such essential elements of good policy-making were largely absent from the recent coronavirus response. In many places rights restrictions were adopted literally overnight with no time allocated for public discussion. Moreover, those "temporary emergency measures" were often designed without any sunset clauses and could potentially transform into a new "normal". This is counter to international law requirements, which require clear territorial and duration scopes defined for derogations or emergency rules.

Another issue has been de facto and/or de jure transfer of decision-making powers from parliaments to executive authorities. This move undermines basic principles of division of powers and of checks-and-balances systems. In Sri Lanka, the Police Media Division issued a special notice regulating media conduct. In Zimbabwe, a "statutory instrument" deals with the emergency situation. Even within the EU, in Hungary, the executive "high jacked" the decision-making process in the country¹⁰. In the long run, a misbalance of powers within the state system could make countries more susceptible to authoritarian rule. It is also unlikely that any limitations of rights and freedoms, which were not "provided by law" e.g. adopted within the due process established in the national legislation, would be recognized as "legitimate" by international human rights institutions and courts.

On the other hand, the international human rights community seems to have been taken by surprise and worried reactions came with a certain delay.

b. Disinformation

The pandemic brought along a 'disinfodemic' as UNESCO named the phenomenon¹¹. There is clear evidence of how our societies are flooded with disinformation narratives on all continents and in all communities: from small villages to multi-million cities. Usual suspects such as Russia and China are active¹² in creating, spreading, and amplifying disinformation narratives. Interestingly, Russia has been targeting not only Europe¹³ and the US, ¹⁴ but also Africa¹⁵. At the same time, the mere novelty of the virus lends itself to disinformation. Given the lack of sufficiently proven research data, it is easier to trust outlier claims and hard facts are not

https://en.unesco.org/covid19/disinfodemic?fbclid=IwAR1I81f76_uQLwJ3jGvlsfNOiz3inrMeLN6PWDWDgUR8vo4VZLvlWtEZj9

https://www.youtube.com/watch?v=Fa1lbeEHAVA&utm_source=newsletter&utm_medium=email&utm_campaign=invitation_how_are_china_russia_manipulating_the_global_pandemic&utm_term=2020-06-03

https://www.ft.com/content/e479043f-a197-41f1-86c8-ff6c922e3492

https://www.atlanticcouncil.org/event/covid19-disinformation-in-africa/

 $\underline{https://www.forbes.com/sites/emmawoollacott/2020/03/13/russian-trolls-outsource-disinformation-campaigns-to-to-africa/\#7317cf291a26$

¹⁰ https://www.dw.com/en/hungary-passes-law-allowing-viktor-orban-to-rule-by-decree/a-

^{52956243?}utm source=newsletter&utm medium=email&utm campaign=kremlin watch briefing the unexpected journey of russ ian ventilators from russia to the us and back again&utm term=2020-06-03

¹³ https://www.politico.eu/article/russia-china-disinformation-coronavirus-covid19-facebook-google/?fbclid=IwAR0AbHF26b0aJApdKXTWImp7Swxq UzGUPPfAhvP-lGWwfuqbk9vGGBiHno

¹⁴ https://www.nytimes.com/2020/04/13/science/putin-russia-disinformation-health-coronavirus.html

https://www.voanews.com/covid-19-pandemic/us-pushes-back-against-russian-chinese-iranian-coronavirus-disinformation

¹⁵ https://fsi.stanford.edu/news/prigozhin-africa; https://africacenter.org/spotlight/russian-disinformation-campaigns-target-africa-interview-shelby-grossman/

always existing to counter claims. This is also evident in the fact that over the last several months, leading scientists and WHO have changing positions.

Disinformation inspired and supported by foreign actors continues to misuse popular stereotypes, fears and convictions: anti-Western, anti-EU, anti-American, anti-immigration etc. However, if before disinformation challenged sovereignty of the states either in terms of the elections processes or in conflict conditions, Covid-19 disinformation narratives challenge states' sovereignty via compromising the mere capacity of a democracy to respond to a crisis of the present scale. In this respect it is not evident that providing more accurate facts through professional media or via the "digital first responders" network, ¹⁶ recently launched by the UN, would help in effectively turning audiences' attention away from blooming conspiracy theories and onto verified scientific data.

Legal regulation of disinformation has been looming ever since the US presidential elections in 2016, which brought manipulative use of social networks and foreign meddling into the spotlight. Nevertheless, media development community has long been reluctant to discuss possible criteria for sensible regulation of weaponized narratives, fearing potential abuse of norms and censorship. In the absence of such criteria, it is not surprising that now, following public demand for "radical measures", the disproportionate and clearly over-restrictive policy responses prevail. Thus, for spreading "fake news" or mis/disinformation one can potentially get 3 years in prison in Hungary¹⁷, 10 years in Algeria and 20 years in Zimbabwe. In certain instances, special new provisions have been adopted to tackle disinformation; in others – existing norms, such as on sedition, are being applied. Quite often disinformation laws are just a variation of defamation legislation specifically aimed at protecting the "good name and reputation" of the governments and used selectively to target "uncomfortable" dissenting voices.

c. Hate speech

Hate speech and in some cases acts of xenophobic violence have also become a widespread element of the current pandemic: starting with the incidents of verbal and physical hostility against persons of Asian origin and transcending into fuelling existing tensions between communities in many countries across the world. When people are implicitly instructed to consider their fellow citizens as a potential source of infectious threat, deeply enshrined negative stereotypes and xenophobic attitudes may surface. This trend is especially dangerous for post-conflict societies where Covid-19 may trigger a renewal of violence outbreaks.

It is important to note that according to Article 20 of the ICCPR, states have a positive obligation to employ active measures against hate speech via legislative prohibitions. Given an increase in hate speech volume and intensity, we can reasonably expect new attempts to regulate it from both states and social media companies. Where it concerns IMS programme countries, hate speech laws have already been applied selectively to stifle critical voices and this tendency is not likely to vanish. On the contrary: governments lacking good faith will eagerly abuse necessary emergency action against hate speech to attack their opponents. Where we deal with the global tech platforms, they are continuously required to improve their reaction to the harmful content online and hence, regulation via algorithms will be further expanding.

 $[\]frac{16}{\text{https://news.un.org/en/story/2020/05/1064622?fbclid=lwAR16bslyLMTK8j3w8eNuSMlinPA12dR-JeDORMD-ZkceTuBgFftkm-l25kw}{\text{125kw}}$

¹⁷ http://abouthungary.hu/blog/coronavirus-and-freedom-of-speech-in-a-state-of-danger/?utm source=newsletter&utm medium=email&utm campaign=kremlin watch briefing the unexpected journey of rus sian ventilators from russia to the us and back again&utm term=2020-06-02

d. Access to information

Access to information is not only an important constitutive element of Freedom of Expression, it is also essential for the professional work of media and journalists across the globe. During public emergencies, lack of timely access to quality information could be life-threatening.

Over the last months of global lockdown, media witnessed both heightened public demand for information and ever more impeded access to reliable data retained by public authorities. In IMS programme countries specific advocacy actions to push for the governments to disclose information of public interest are underway in Iraq and Zimbabwe¹⁸.

The UN High Commissioner on Human Rights stated that relevant information on the COVID-19 pandemic and response should reach all people, without exception and discrimination. She also stressed the role of unhindered online access and the need to bridge any gender digital divide¹⁹. The international media rights NGO Article 19 published a report named *Ensuring the Public's Right to Know in the COVID-19 Pandemic*²⁰ where they reviewed states' international obligations vis-à-vis access to information and suggested that data should be pro-actively disclosed by authorities to facilitate anti-pandemic action.

On a positive note, Ukraine has ratified the Council of Europe (CoE) Convention on Access to Official Documents, ²¹ the first binding international legal instrument to recognise a general right of access to official documents held by public authorities. As signatory state number ten Ukraine's thereby also activated the convention for the entire world, making it an internationally binding document.

e. Media freedom

Emergency measures further aggravated already troubled conditions for media operations on all continents²². IMS staff and partners reported cases of harassment and arrests of journalists and/or citizen-bloggers in the course of the pandemic response. Incidents at a varying scale took place across all regions where IMS works.

Media were often not recognized as essential services and thus, de facto not allowed to effectively perform their professional functions under the lockdowns. In Zimbabwe, private media were affected disproportionately as state media were granted the "essential services" status.

New regulations on disinformation or a perverted application of existing laws on sedition or hate speech prompted journalists to exercise self-censorship out of fear of persecution. Another reason for "filtering" one's expression stems from concerns over possible public disapproval where criticising government's response to the pandemic may be perceived as unwillingness to "save lives".

f. Civic activism

A couple of words on the pandemic-related trends in civic activism and protest movements which will influence the global situation with regard to rights and freedoms and hence, IMS's work. In the Carnegie

¹⁸ Campaign pushing for the adoption of access to information legislation in Iraq and court litigation on access to information in Timbeburg

¹⁹ https://www.ohchr.org/EN/NewsEvents/Pages/COVID19Guidance.aspx

²⁰ https://www.article19.org/wp-content/uploads/2020/05/Ensuring-the-Publics-Right-to-Know-in-the-Covid-19-Pandemic Final-13.05.20.pdf

²¹ https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680084826

²² https://www.rferl.org/a/crackdown-on-journalists-covering-covid-19-

^{/30585587.}html?fbclid=IwAR3E949WwroXFzM TPEfNoRyX8xfS4vKzxzD jjLrUOrw34GxfpEh5F2q1o

Endowment for International Peace researchers have been recording radically opposing trends over the last several years: on the one hand, closing space for freedom and civil society; on the other hand, activation of civic movements and invigorated activism. Their most recent observations lead to the conclusion that the pandemic has only exacerbated this already existing dualism of non-governmental actors around the world looking for new forms of mobilisation, ²³ now that offline activism is obstructed due to lockdown restrictions. In this regard, the decision of the German Constitutional Court which recognized that a blanket ban on public protests would be unconstitutional ²⁴ stands out as a good "reminder" that limitations of rights should comply with the requirements of necessity and proportionality.

Interestingly, recent surveys in Argentina and Ukraine on civil disobedience in the time of Covid-19 demonstrated that people are still willing to attend physical, offline protests at high rates - even in violation of lockdown rules and despite fears of getting infected. Concerns about "disappearance" of protest culture may be misplaced. "Governments—autocracies and democracies alike—should not assume they have a free pass because of the crisis. Despite a drop in public gatherings as the new coronavirus spreads, protests may resurge, even in the face of the COVID-19 threat."

Conclusions

With the trends and challenges discussed above in mind, the following developments are highly likely:

- Intensified media regulation by states in particular on online disinformation and hate speech.
- Intensified content regulation by and of the big tech companies as de facto "global speech moderators" and the related increase in algorithm-driven solutions.
- Emergency measures may transform into a more permanent status quo.
- Media operations can be more frequently obstructed, and access to publicly important information impeded or denied.
- Outbreaks of hate speech may trigger violence in conflict-prone communities and undermine peacebuilding processes.

It is true that IMS media partners have experienced spikes in audience attention due to this pandemic but popular interest in Covid-19 will eventually fade as "pandemic fatigue" is steadily spreading along with the virus. On the contrary, rights restrictions are likely to stay, and we shall need to think of creative ways to pursue advocacy initiatives in our attempt to push back, including but not limited to strategic litigation challenging the imposed limitations in national and international courts. IMS and partners may also need to engage in searching for the innovative policy solutions where it concerns hate speech and/or disinformation (if civil society actors are not willing to make such an effort, we shall have to put up with the solutions proposed by states and global tech companies). In this regard, IMS and/or its partners may look into the possibilities of more active interaction with the likes of Facebook, which has recently established its Oversight Board in charge of reviewing its content-related decisions²⁶. Solid representation of different regions and voices on this Board could eventually improve policy-making of the company itself and hence, IMS's local partners may wish to nominate candidates to the Board.

²³ https://carnegieendowment.org/2020/05/20/global-civil-society-and-pandemic-event-7330

²⁴ https://www.aljazeera.com/news/2020/04/germans-protest-pandemic-court-rules-

^{200416163510305.}html? fbclid=IwAR2SoBxR4tiurg2HQZN7l2EBu-ANCHOcMhEF9vOGM1HlYRaMExdbRbtiGn0

²⁵ http://politicalviolenceataglance.org/2020/05/26/will-the-protesters-return-civil-disobedience-in-the-time-of-covid-19/?fbclid=IwAR3uiKHqA9NY54rTE1GEGSirS5RAJIy1h8ujXmoQ4CLJJFXE67ktOb-BWSM

²⁶ https://www.oversightboard.com/news/announcing-the-first-members-of-the-oversight-board/

In relation to the increasing number of attacks and harassment incidents targeting journalists as well as adoption of the restrictive media regulations, we should be prepared to support local partners with enhanced legal aid and pro bono legal advice as their "conflicts" with state authorities and the law will likely become more frequent.

List of relevant publications on Covid-19 and Human Rights

- 1. UN High Commissioner on Human Rights: *Covid-19 and HR Guidance* https://www.ohchr.org/EN/NewsEvents/Pages/COVID19Guidance.aspx
- 2. UN Policy Brief "Covid-19 and Human Rights" https://www.un.org/sites/un2.un.org/files/un-policy-brief-on-human-rights-and-covid-23-april-2020.pdf
- 3. Council of Europe: "Respecting democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis: A toolkit for member states" https://rm.coe.int/sg-inf-2020-11-respecting-democracy-rule-of-law-and-human-rights-in-th/16809e1f40
- 4. Council of Europe: "Mitigating a global health crisis while maintaining freedom of expression and information" https://rm.coe.int/en-mitigating-a-global-health-crisis-while-maintaining-freedom-of-expr/16809e2dle
- 5. European Union: "Coronavirus Pandemic in the EU Fundamental Rights Implications" https://fra.europa.eu/sites/default/files/fra uploads/fra-2020-coronavirus-pandemic-eu-bulletin-1 en.pdf
- 6. OSCE High Commissioner on National Minorities: *Recommendations on short-term responses to Covid-19 that can support social cohesion* https://www.osce.org/hcnm/449170
- 7. Human Rights Watch: *Human Rights Dimensions of COVID-19 Response* https://www.hrw.org/news/2020/03/19/human-rights-dimensions-covid-19-response
- 8. Human Rights Watch: *Covid-19: A Human Rights Checklist* https://www.hrw.org/news/2020/04/14/covid-19-human-rights-checklist
- 9. Bonavero Institute of Human Rights, University of Oxford: *A Preliminary Human Rights Assessment of Legislative and Regulatory Responses to the COVID-19 Pandemic across 11 Jurisdictions* https://www.law.ox.ac.uk/sites/files/oxlaw/v3 bonavero reports series human rights and covid 19 20203.pdf?fbclid=IwAR2tzCn1aJ50VrggW0 emg8DCCCdHDi2ohoeC5ELdnpM3lHgK75kvCSRZfQ
- 10. The Danish Institute for Human Rights: Probing Paper "Covid-19 response and recovery must build on human rights and SDGs" https://www.humanrights.dk/publications/covid-19-response-recovery-must-build-human-rights-sdgs
- 11. The Danish Institute for Human Rights: "Covid-19 and Human Rights Law" https://www.humanrights.dk/publications/covid-19-human-rights-law
- 12. Blog: An Analysis of Covid-19 Responses and European Convention on Human Rights Requirements https://echrblog.blogspot.com/2020/03/an-analysis-of-covid-19-responses-and.html

