



RIGA
GRADUATE
SCHOOL OF
LAW

**Freedom of Expression and the Times of
Emergency: Analysis of Article 15 of the
European Convention on Human Rights and
Derogations Made by Turkey and Hungary
During COVID-19 Pandemic**
BACHELOR THESIS

AUTHOR:

Alīna Lazdāne
LL.B 2020/2021 year student
student number B018022

SUPERVISOR:

Marika Laizāne-Jurkāne
Dr.soc.pol

DECLARATION OF HONOUR:

I declare that this thesis is my own work, and that all references to, or quotations from, the work of others are fully and correctly cited.

(Signed)

RIGA, 2021

ABSTRACT

COVID-19 pandemic is regarded not to be solely a health crisis, but also human rights crisis. The pandemic limited freedom of movement, freedom of expression, right to education, food security, and other rights. The thesis focuses on the limitation to the freedom of expression in Europe under the ECHR framework during the COVID-19 pandemic in Turkey and Hungary. In Europe, there are more than one hundred alerts on the limitation to the freedom of expression during the pandemic. The thesis is to provide an in-depth understanding and analysis of the derogation procedure of the ECHR under Article 15 ECHR and the limitation procedure to the freedom of expression under Article 10(2) ECHR. Based on the interpretation of the derogation and limitation clause, introduced Coronavirus bill and the amendments to the Criminal Code to criminalise spread of untrue facts or misinterpreted true facts in Hungary and amendments to the Social Media Law in Turkey are to be analysed.

KEYWORDS: European Convention on Human Rights, freedom of expression, COVID-19, Turkey, Hungary.

SUMMARY

The present thesis focuses on the impact of the COVID-19 pandemic on the protection of the freedom of expression in Turkey and Hungary. The limitations to the freedom of expression are analysed based on the ECHR framework and Article 15 ECHR, and Article 10(2) ECHR.

COVID-19 pandemic is the first global health crisis in the last 100 years. It proved to affect not only health of people around the globe and economies of states but also human rights and fundamental freedoms. Several international organisations adopted statements on the protection of human rights during the pandemic and urged states not to use the COVID-19 pre-text to derogate from human rights. United Nations stressed that the effective response to the pandemic shall include the protection of fundamental freedoms, which is of high importance during the crisis. States are obliged to follow the guidelines of the organisations and comply with their international commitments. Despite the call of the organisations to respect human rights during the crisis, several European states have derogated from the ECHR and other Conventions, such as ICCPR. Freedom of expression is regarded to be the basis for the democratic society, however, according to the CoE, there are more than one hundred alerts in Europe on the limitations to the freedom of expression. The thesis focuses on the limitations to the freedom of expression to derive a conclusion whether the discretion left to the state to the extent required by the situation or limit the right when its necessary in a democratic society affects the protection of freedom of expression in Turkey and Hungary.

Analysis of the derogations and limitations is based on the four-step derogation criteria: public emergency measures strictly required by the situation measures consistent with other international law obligations, notifications requirement. According to the interpretation of Article 15, ECHR nor Turkey nor Hungary complied with all four requirements of the derogation clause. The introduction of the clause to criminalise the spread of untrue facts or misinterpreted true facts in Hungary considered to be disproportionate as according to the ECtHR practice sanctions such as imprisonment for up to five years are disproportionate sanctions which can be introduced if other serious breaches of also other rights under ECHR occurred. Sanctions to decrease bandwidth for up to ninety percent for social media platforms that do not comply with the representation requirement is a disproportionate limitation introduced using a pre-text of the COVID-19 pandemic. Moreover, both states have failed to comply with all three-step criteria under Article 10(2) ECHR: prescribed by law, measures introduced to secure interests under Article 10(2) ECHR, necessary in a democratic society. Despite in both states, limitations were prescribed by law, states failed to comply with other two criteria. In Hungary, a limitation is not necessary for a democratic society because introduced penalties and the vague wording of the provisions adopted to restrict the freedom and discourages citizens to publish their opinions and journalists to pursue their job. In Turkey, sanctions for non-compliance with the requirement create disproportionate restrictions on all the information published on the platforms.

Based on the analysis, the author concludes that both states have failed to comply with the derogation clause and the limitation clause to the freedom of expression Article 10(2) ECHR, therefore, the discretion left for the states to comply to derogate or limit the freedom of expression negatively impact the protection of the right. CoE and other international organisations, such as the UN, HRW, Amnesty International, Reporters without Borders, expressed their concern over the situation of the protection of the freedom of expression and introduced amendments in Turkey and Hungary. It is of a high probability that in the nearest

future there will be cases pending before the ECtHR on the protection of the right against Turkey and Hungary. For the due protection of human rights during the pandemic ECtHR shall consider the inclusion of the derogatory measures in the priority policy of the Court.

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LIST OF ABBREVIATIONS

CJEU – Court of Justice of the European Union

CoE – Council of Europe

Coronavirus bill - Bill T/9790 of 2020 on Protection Against Coronavirus of the Hungarian Government

COVID-19 – Coronavirus disease or Sars-CoV-2 virus

ECHR, the Convention – the Convention for the Protection of Human Rights and Fundamental Freedoms

ECtHR, the Court – European Court of Human Rights

EU, the Union – European Union

FL – Fundamental Law of Hungary

HRW – Human Rights Watch

ICCPR – 1966 United Nations International Covenant on Civil and Political Rights

ICJ – International Court of Justice

LGBTIQ – lesbian, gay, bisexual, transgender, intersex, and questioning individuals

MS – Member states

OSCE – Organization for Security and Cooperation in Europe

Social Media Law – Law No. 5651 on the Regulation of Internet Broadcasts and Prevention of Crimes Committed through Such Broadcasts – Social Media Law

TEU – Treaty on European Union

UK – the United Kingdom of Great Britain and Northern Ireland

UN – United Nations

US, U.S. – the United States of America

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INTRODUCTION

COVID-19 pandemic proves not to be solely a health crisis or an economic crisis, but also human rights crisis.¹ Several international organizations, such as the UN, CoE, OSCE, adopted statements on the response to the pandemic with a message for the states not to use the pre-text of the COVID-19 to derogate from the rights drafted in the international conventions' states are contracting parties to.² Governments are obliged to protect rights during the crisis and comply with their international commitments and respect the order drafted in the conventions. Human rights protection is to be included in the crisis response. Freedom of expression is one of the rights to be secured as during the crisis the access to information shall be ensured for people to extract information freely, as well as media, shall have the right to publish information.³ However, several European states limited the right to freedom of expression despite the call of the organizations to secure the right, which is regarded as the basis for the democratic society. Several European states used a disinformation imperative to limit the freedom of expression and introduced sanctions for non-compliance with the states' order.⁴ Such limitations to the freedom of expression which are not compatible with the ECHR derogatory clause Article 15 ECHR or the limitation criteria under Article 10(2) ECHR undermine the core European values and values of the CoE.

The legal problem of the thesis is the unlawful limitation and the derogation from the freedom of expression under ECHR during the COVID-19 pandemic with the focus on the limitations introduced in Turkey and Hungary. Limitations are analyzed based on the interpretation of Article 15 ECHR and Article 10(2) ECHR. Based on the interpretation it is to analyze two case-studies and draw a conclusion whether the limitations to the freedom of expression are compatible with the ECHR framework and CoE values. The main method used in the research is the doctrinal method and qualitative research method because the analysis of the limitations is based on the interpretation of the Article 15 ECHR and Article 10(2) ECHR based on the books, academic articles, and case-law. Author mainly relies on the ECHR, CoE official publications, and ECtHR case-law for the analysis of the derogation and limitation framework under ECHR. The cross-sectional research method introduces interdisciplinarity in the research by examining the case-studies in the CoE contracting states Hungary and Turkey and the response of the organization to the limitations.

The bachelor thesis intends to answer the following research question - **How did the discretion left to the states to derogate 'to the extent strictly required by the situation' or limit the right when its necessary in democratic society impact the protection of the freedom of expression in Turkey and Hungary during the COVID-19 pandemic?** The impact is to be assessed based on the compliance of the limitation or the derogation with the

¹ Sanja Jovičić, "COVID-19 restrictions on human rights in the light of the case-law of the European Court of Human Rights," *ERA Forum* volume 21 (2021), p. 545, available on: Springer. Accessed February 15, 2021.

² Patrick Penninckx, "Crises should not be used to hamper media freedom and freedom of expression," *Council of Europe* (2020), available on: <https://www.coe.int/en/web/portal/covid-19-crises-should-not-be-used-to-hamper-media-freedom-and-freedom-of-expression>. Accessed March 16, 2020.

³ Human Rights Watch. *Human Rights Dimensions of COVID-19 Response*. (March, 2020), available on: https://www.hrw.org/news/2020/03/19/human-rights-dimensions-covid-19-response#_Toc35446579. Accessed March 16, 2021.

⁴ Vazha Datuashvili, "The Bounds of "Margin of Appreciation" of the State in Restraining Freedom of Expression during the Pandemic," *Journal of Constitutional Law* 2020 no.2 (2020): p. 114, available on: HeinOnline. Accessed March 16, 2021.

formal procedure outlined in the Article 15 ECHR and Article 10(2) ECHR, compliance of the limitation with the necessity and proportionality doctrine, and examination of consequences which occurred after the limitation was introduced. The author's hypothesis is the following - **Discretion left to the states to derogate or to limit the freedom of expression under the ECHR framework in Turkey and Hungary was based on the unproportionate COVID-19 pandemic pre-text and has not complied with the formal requirements of Article 15 ECHR and Article 10(2) ECHR.** Based on the analysis provided in the four chapters of the thesis the research question is to be answered and the hypothesis to be approved or disapproved in the conclusion.

The main aim of the thesis is to derive a conclusion whether the COVID-19 pandemic proved to improve or worsen the protection of freedom of expression in Europe. One of the goals of the thesis is to analyze if human rights violations and weak protection of the rights is a standard in EU MS or non-EU MS with the undemocratic rhetoric. The objectives of the thesis are to provide an in-depth analysis of the derogation and limitation procedure under the ECHR framework, as well as to analyze case-studies in Turkey and Hungary based on the interpretation of Article 15 ECHR and Article 10(2) ECHR. Moreover, it is to conclude whether both states complied with the derogation and the limitation ECHR framework. Based on the analysis it is to provide the answer to the research question. The findings of the bachelor thesis are to be seen in the light of some limitations. COVID-19 pandemic is the first global health crisis in the last 100 years; therefore, it is important to analyze influence of the pandemic on the protection of human rights. The topicality of the present research presupposes the limitation which is the lack of previous research studies of the topic on the impact of the COVID-19 pandemic on the freedom of expression in Europe. The outlined limitation is to incentivize legal scholars to pursue the analysis on the impact of the pandemic on the protection of human rights in Europe and analyze the derogatory clause based on the protection of public health concerns.

The structure of the paper is divided into four chapters and each of them is considered necessary to answer the research question. The first chapter is fundamental and presents a necessary overview of the general impact of the COVID-19 pandemic on human rights and the supervision mechanism which are granted under ECHR. The second chapter concerns the analysis of the derogation clause Article 15 ECHR and the limitation clause to the freedom of expression Article 10(2) ECHR. Chapter two outlines the derogation procedure which is based on the four-step criteria to be followed by the Contracting state to derogate from the articles in the Convention, as well as the three-step freedom of expression limitation procedure under ECHR. Chapter two provides a basis for the analysis of the case-studies in Chapter three and Chapter four. Chapter three provides an outlook on the case-study on the limitation of the freedom of expression in Hungary introduced through the Coronavirus bill and the amendments to the Criminal Code of Hungary. The final chapter analyses the limitations to the freedom of expression introduced in Turkey through the amendments to the Social Media law. After the analysis of the four chapters, the bachelor thesis presents an overview of the protection of freedom of expression during the COVID-19 pandemic in Europe and the conclusions ultimately answer the research question and provide guidance for further research in the field.

1. THE IMPACT OF COVID-19 ON HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS AND THE SUPERVISION OF DEROGATIONS

The main focus of the first chapter is to analyse the impact of the COVID-19 pandemic on human rights and fundamental freedoms focusing on the effect on the freedom of expression and media freedom in Europe. The rationale of the chapter is to provide an in-depth analysis of the current situation on human rights protection and the supervision mechanisms to analyse whether emergency powers granted to the states do not produce a vulnerable regime for the protection of human rights. The first chapter provides an outlook of the situation based on which the derogations or restrictions in Turkey and Hungary will be analysed.

COVID-19 pandemic is regarded to be a crisis for the economy and proved to limit human rights and fundamental freedoms. The health crisis proved to affect everyone and forced states to make decisions that might affect the rights of people.⁵ The pandemic is affecting all civil, political, social, and economic rights.⁶ Most of the international organisations protecting human rights and fundamental freedoms came up with statements on the impact of COVID-19 on human rights and the importance of their protection during the pandemic. On March 6, 2020, UN High Commissioner for Human Rights Michelle Bachelet stated that governments shall introduce measures to limit the spread of the virus, however, such decisions shall not harm people's lives. Moreover, measures to combat the spread of the virus shall be made in strict compliance with the human rights commitments of the states, and be proportionate and necessary.⁷ Michel O'Flaherty, the Director of the EU Fundamental Rights Agency, stressed that the best practice forms when the response to the crisis goes along with the respect to the fundamental freedoms. Measures imposed by the states shall respond to the need of all of the population of the states in all its diversity, including the vulnerable groups. Moreover, Michel O'Flaherty stressed that the EU MS strategies must ensure that limitations to the human rights and fundamental freedoms if any shall only last as long as necessary.⁸ On April 7, 2020, the Secretary-General of the CoE, Marija Pejčinović Burić, stated that the Contracting States during the COVID-19 pandemic are to respect human rights and the rule of law, and the action of the states during the pandemic shall not destroy the core values of the international organization, and MS shall effectively respond to the crisis while respecting Europe's core values and fundamental freedoms.⁹ COVID-19 restricted the

⁵ Jovičić, *supra* note 1, p. 545.

⁶ Sarah Joseph, "COVID-19 and Human Rights: Past, Present and Future," *Journal of International Humanitarian Legal Studies, Griffith University Law School Research Paper* No. 20-3 (April, 2020): p. 1, available on: SSRN. Accessed March 16, 2021.

⁷ United Nations Human Rights Office of the High Commissioner. *Coronavirus: Human rights need to be front and centre in response*. United Nations: United Nations: Human Rights Office of the High Commissioner (March 6, 2020), available on: [https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25668&LangID=E%3E](https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25668&LangID=E%3E;);. Accessed March 15, 2021.

⁸ European Union Agency for Fundamental Rights. *Coronavirus Pandemic in the EU – Fundamental Rights Implications*. Luxembourg: Publications Office of the European Union (2020): p. 7, available on: https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-coronavirus-pandemic-eu-bulletin_en.pdf. Accessed March 15, 2021.

⁹ 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 SG/Inf(2020)11*. (April 7, 2020): p.2, available on: <https://www.coe.int/en/web/human-rights-rule-of-law/-/coronavirus-guidance-to-governments-on-respecting-human-rights-democracy-and-the-rule-of-law>. Accessed March 15, 2021.

freedom of movement, media freedom, food security, education, healthcare, etc.¹⁰ Disproportionate restrictions on press freedom, restrictions freedom of assembly, and rights of vulnerable groups, such as LGBTIQ, Roma, migrants, etc, proved to be affected during the pandemic.¹¹ Freedom of movement was considered as the main right from which the derogations were made at the beginning of the COVID-19 pandemic in March 2020.

Based on legal and political theorist Carl Schmitt's reasoning, the state of emergency shows the sovereign in a state. Legislators and laws might be set aside by the true sovereign. However, based on the reasoning of legal researcher Alan Greene, the reasoning of Carl Schmitt might be set aside after the adoption of the human rights treaties and the established human rights supervision mechanisms under the treaties. According to Greene, in the closest future “the ideal state of emergency” is a solution for the protection of human rights. The ideal state of emergency refers to the restriction to human rights made through the framework of the international treaty and proves necessary and proportionate.¹² According to International law scholar Martin Scheinin, the international notification of an emergency or the restriction of human rights under international treaties reflects the commitment to legality.¹³ Moreover, according to Ineta Ziemele, the judge at the CJEU and the former President of the Constitutional Court of the Republic of Latvia emphasized the complexity of the situation and the importance of the role of the state during the crisis. Each state shall ensure stability and due protection to fundamental freedoms and human rights. On the other hand, Ineta Ziemele stressed the importance of judicial powers during the pandemics, European judicial powers must draw conclusions and ensure the effective protection of fundamental freedoms based on the international commitments of the state.¹⁴ Therefore, during the COVID-19 certain rights can be lawfully limited through the derogation clauses in the international treaties, and the commitment of the states to fulfil all of the requirements under derogation clauses refers to the right intention of the state to overcome the crisis without unlawful limitations to the human rights. The further subchapter focuses on the impact of the pandemic on the freedom of expression and media freedom as it is crucial for the functioning of the democratic society and is the major focus of the Bachelor Thesis.

1.1. The impact of the COVID-19 pandemic on freedom of expression and media freedom

The present subchapter focuses on the impact the pandemic has on the freedom of expression and media freedom. The rationale of the subchapter is to analyse challenges the pandemic

¹⁰ Advocates for International Development (A4ID), “The Rule of Law in Times of Health Crises,” *Rule of Law Expertise* (2020): p. 23, available on: https://www.roleuk.org.uk/sites/default/files/files/RULE%20OF%20LAW%20IN%20TIMES%20OF%20Health%20Crises_FINAL.pdf. Accessed March 15, 2020.

¹¹ Dunja Mijatović, “The impact of COVID-19 on human rights and how to move forward,” *Council of Europe CommDH/Speech(2020)15* (December 10, 2020), available on: <https://rm.coe.int/human-rights-rights-talk-covid-19-and-human-rights-lessons-learned-fro/1680a0a7c3>. Accessed March 15, 2021.

¹² Martin Scheinin, “COVID-19 symposium: to derogate or not to derogate?” *International Commission of Jurists Opinio Juris* (April 6, 2020): p.3, available on: <https://opiniojuris.org/2020/04/06/covid-19-symposium-to-derogate-or-not-to-derogate/>. Accessed March 15, 2021.

¹³ Scheinin, *supra* note 12.

¹⁴ Constitutional Court of the Republic of Latvia. *President of the Constitutional Court Ineta Ziemele speaks at an international conference about the Covid 19 caused challenges in the area of human rights.* (September 22, 2020), available on: <https://www.satv.tiesa.gov.lv/en/press-release/president-of-the-constitutional-court-ineta-ziemele-speaks-at-an-international-conference-about-the-covid-19-caused-challenges-in-the-area-of-human-rights/>. Accessed March 26, 2020.

brought to the enjoyment of the right and the consequences it has for the society during the pandemic and the spread of disinformation. According to Patrick Penninckx, the Head of the information society at the CoE states that during the COVID-19 pandemic people consume more news with a staggering 99% to access news about the COVID-19, therefore, society shall have an access to information and the media can function effectively with minimum restrictions. Crisis shall not be used as an excuse to limit freedom of expression and media freedom when public interest is at stake.¹⁵ HRW emphasized that during the pandemic governments shall be responsible for the protection of rights, therefore combating the virus is to include access to information about the virus which is accessible to all.¹⁶ The media shall have the freedom to gather and publish the relevant information, especially during a crisis when public interest is on a high level. COVID-19 brought certain restrictions to the journalists: limitations to freedom of movement impacted the ability of journalists to gather information abroad, measures to combat disinformation proved to limit the scope of what can be published by the media representatives, additionally, in some countries, the number of cases of violence against journalists risen.¹⁷

As noted by the CoE Commissioner for Human Rights Dunja Mijatović, several governments are using the disinformation imperative to introduce not proportionate restrictions to press freedom by adopting decisions or legislation to limit the work of the media, besides, the Commissioner outlined that measures imposed by the states to combat the virus shall not prevent the work of the media.¹⁸ During the pandemic the access to information is crucial, therefore, limited access to information is a limitation to the right. In some countries, such as Hungary, Spain, Armenia and Serbia, Romania, Russian Federation, Turkey, authorities were exercising their emergency powers by limiting access to information by denying journalists access, and question the crisis response announcements of the authorities.¹⁹ Armenia, the CoE MS, introduced a Regulation to ban and impose fines on the media who publish the information about COVID-19 from non-official sources of the government. According to the ECtHR, any restriction to the right to access information shall be prescribed by law, necessary and proportionate.²⁰ The regulation imposed by Russia presupposes that a person might be sentenced to five years in prison for the publication of harmful information about the COVID-19 pandemic. Granted that Russia is a Contracting Party to the ECHR within the next years will likely witness cases against Russia regarding the limitation and restriction of the right of the freedom of expression.²¹ Freely and easily accessible information is a benefit for society whereas pandemic allowed the ‘fake news’ to impact the perception of individuals of the current state of both domestic and international affairs.²² Resolution 2217 adopted by the CoE in 2018 acknowledged the impact of

¹⁵ Penninckx, *supra* note 2.

¹⁶ Human Rights Watch *supra* note 3.

¹⁷ Peter Noorlander, “COVID and Free Speech. The impact of COVID-19 and ensuing measures on freedom of expression in Council of Europe member states,” *Council of Europe Publications* (November, 2020): p. 5, available on: <https://rm.coe.int/covid-and-free-speech-en/1680a03f3a>. Accessed February 28, 2021

¹⁸ Council of Europe. *Press freedom must not be undermined by measures to counter disinformation about COVID-19*. (April, 2020), available on: <https://www.coe.int/en/web/commissioner/-/press-freedom-must-not-be-undermined-by-measures-to-counter-disinformation-about-covid-19>. Accessed March 16, 2021.

¹⁹ Noorlander, *supra* note 17, p. 6.

²⁰ *Ibid.*

²¹ Datuashvili, *supra* note 4, p. 114.

²² Rebecca K Helm and Hitoshi Nasu, “Regulatory Responses to ‘Fake News’ and Freedom of Expression: Normative and Empirical Evaluation,” *Human Rights Law Review*, 2021, 21 (February, 2021): p. 305, available on: Oxford Journals Online, doi: 10.1093/hrlr/ngaa060.

disinformation on public order, and the situation has worsened during the pandemic.²³ Several EU MS adopted measures to avoid the spread of disinformation during the pandemic, however, in most cases, such restrictions proved incompatible with the European values and principles. During the crisis, Hungary adopted a legislative act to criminalise the spread of disinformation.²⁴ The actions of the states shall be assessed by the ECtHR and supervisory bodies to conclude whether the limitations to the rights imposed in the Contracting States are compatible with the provisions of the ECHR.

Therefore, the emergency legislation adopted by the states proves to worsen the protection of human rights. It is also to acknowledge that more than 250 journalists worldwide are in detention due to the performance of their duties.²⁵ Furthermore, according to the CoE, there are currently 140 alerts on the limitation of the freedom of expression in 30 Contracting States. The attacks on journalists and the media prove that the freedom of expression is being limited.²⁶ To conclude, freedom of expression has been severely limited during the COVID-19 pandemic. Several international organizations stressed the importance of human rights during the emergency powers states are exercising, moreover, states are obliged to take responsibility for the protection of rights and not use the response to the pandemic as an excuse to limit the fundamental rights. Within the CoE, there are numerous cases when media freedom and access to information have been restricted. It is to examine in the further subchapter which supervision mechanisms are offered under the ECHR and whether such mechanisms are effective, especially during the pandemic.

1.2. Supervision mechanisms under European Convention on Human Rights

The number of restrictions to the fundamental rights has grown during the COVID-19 pandemic, therefore there is a need to analyse what supervision mechanisms are offered under the ECHR and whether such is effective to cope with the limitations imposed in the European states. In the information document published by the CoE on April 7, 2020, the organization stressed that it is to carry its mandate during the pandemics, therefore it is to provide through the competent bodies and mechanisms the forum for collectively ensuring that limitations to the fundamental rights imposed by the states remain proportionate and limited in time.²⁷ The CoE Commissioner for Human Rights Dunja Mijatović stressed that the states not fulfilling their obligations under the ECHR must restore respect to the Convention and make sure that the limitations imposed are compatible with the Convention and are proportionate.²⁸ CoE shall fulfil its mandate and ensure the supervision of derogations and limitations if such are introduced in the Contracting States.

The ECHR offers a monitoring function to protect fundamental rights through an institution external to the state. The ECtHR acts as the supervisory mechanism for derogations under the ECHR. The mandate of the organization does not stress the review of the abstract problem, but only the review is based on the specific facts of the case pending before the

²³ Rebecca K Helm and Hitoshi Nasu, *supra* note 22.

²⁴ Datuashvili, *supra* note 4, p. 119.

²⁵ Datuashvili, *supra* note 4, p. 120.

²⁶ Kristina Cendic and Gergely Gosztonyi, "Freedom of Expression in Times of COVID-19: Chilling Effect in Hungary and Serbia," *Journal of Liberty and International Affairs (JLIA)* 6, no. Thematic Issue (2020): p. 15, available on: HeinOnline. Accessed March 16, 2021, doi: <https://www.doi.org/10.47305/JLIA2060014c>.

²⁷ Mijatović, *supra* note 11.

²⁸ Council of Europe, *supra* note 18.

ECtHR. Therefore, as the ECtHR focuses on individual complaints, it cannot address the whole situation on the derogation's regimes in the Contracting States.²⁹ Moreover, derogatory measures do not fall under the priority policy of the Court, therefore resulting in years to make a decision or provide interim measures.³⁰ Challenges to the supervision of derogations and limitations were already addressed by the Parliamentary Assembly of the CoE in the 2018 Resolution 2209. Resolution 2209 advises MS to constantly review the necessity and proportionality of the derogations and limitation imposed, additionally, to provide based on such review the information to the Secretary-General. Recommendations to the CoE include opening the inquiry under Article 52 ECHR and based on the information provided by the MS, to engage in the dialogue with the derogating state and ensure the derogations and restrictions are compatible with the Convention standards.³¹ Through Article 52 ECHR, Secretary-General is empowered to engage in the dialogue with the MS and fulfil its mandate.³² As the COVID-19 is the first instance when the numerous states derogated from the Convention or limited rights which are granted in the Convention, the recommendations provided by the Parliamentary Assembly are to be tested.

During the COVID-19 pandemic, the number of cases when the fundamental freedoms were limited has grown, especially the freedom of expression with more than 110 journalists being detained in Europe. For the protection of human rights under the ECHR, the supervisory mechanism is based on the case-review system by the ECtHR which does not provide a priority policy to the cases which include derogations or limitations to the rights. To conclude, if the recommendations of the Parliamentary Assembly are fulfilled by both the organization and the MS and the ECtHR fulfils its mandate, the due protection is granted to the fundamental rights secured by the Convention. However, the possibility to impose interim measures by the ECtHR shall be recommended to ensure the restrictions to the derogation before the ECtHR judgment is issued. Based on the analysis of the first chapter, most of the international organisations protecting the rule of law, human rights, and fundamental freedoms and legal scholars emphasized the importance of human rights during times of crisis. This proves that the COVID-19 pandemic is seen as a challenge to their protection. The number of journalists and media workers detained in Europe, the impact on the vulnerable groups shows the negative impact of the pandemic on human rights. The protection of human rights, thus, is only based on the protection offered by the state and international organisations. The derived conclusions emphasize the importance of the supervision mechanisms and the attitude of the states towards the protection of rights during the crisis. The further chapter focuses on the derogation procedure under Article 15 ECHR and the procedure to impose limitations to the freedom of expression under Article 10 ECHR.

²⁹ Anmed Tawhida, "The Opposition of the CJEU to the ECHR as a Mechanism of International Human Rights Law," *Journal of International and Comparative Law* 4, no. 2 (December 2017): p. 334, available on: HeinOnline. Accessed March 22, 2021.

³⁰ Kushtrim Istrefi, "Supervision of Derogations in the Wake of COVID-19: a litmus test for the Secretary General of the Council of Europe," *EJIL* (April 6, 2020): p. 2, available on: <https://www.ejiltalk.org/supervision-of-derogations-in-the-wake-of-covid-19-a-litmus-test-for-the-secretary-general-of-the-council-of-europe/>. Accessed March 22, 2021.

³¹ Parliamentary Assembly of the Council of Europe. *State of emergency: proportionality issues concerning derogations under Article 15 of the European Convention on Human Rights Parliamentary Assembly Resolution 2209* (2018), available on: <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=24680&lang=en>. Accessed March 22, 2021.

³² Istrefi, *supra* note 30.

2. INTERPRETATION OF ARTICLE 15 AND ARTICLE 10 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

The main focus of the second chapter is on the interpretation of Article 15 ECHR and Article 10 ECHR. Both Articles give a basis for the derogation from the Convention. The main rationale of the chapter is to examine the derogations procedure of Article 15 ECHR and the condition for the restrictions to the freedom of expression under Article 10 ECHR. The chapter provides an in-depth understanding of the derogations procedure and the criteria to follow for the restriction or the derogation to be lawful. The second chapter provides the guide to follow to analyse the derogations or restrictions imposed by the Contracting States. For the present thesis, the analysis of the second chapter will provide the basis for the analysis of the derogations or restrictions imposed by Turkey and Hungary during the COVID-19 pandemic.

Article 15 ECHR outlines the procedure to derogate from the derogable rights of the Convention. The article lists formal criteria for derogations being the requirement for the existence of the public emergency, derogations imposed are required by the exigencies of the situations and the derogations must be compatible with other international obligations of the state. Article 10 ECHR stresses the importance of the freedom of speech for the whole Convention as the right is regarded as the foundation of the democratic society. Article 10 ECHR outlines the procedure where the right can be lawfully limited if it is prescribed by law, is necessary in a democratic society, and restrictions are needed to protect the interest of the Contracting State.³³ State of emergency poses significant challenges to safeguarding human rights.³⁴ Derogation clauses of the international conventions give Contracting states the possibility to lawfully derogate from fundamental rights. However, it has been stated that the rationale of the Article 15 ECHR is to strike a balance between the interests of the Contracting States to overcome the emergency and safeguard the fundamental rights which might be limited during the crisis.³⁵ It is to examine whether the rationale of the Article 15 ECHR does not contradict the worsening situation with regards to human rights violations in times of crisis. Moreover, as regarded by the ECtHR³⁶³⁷, freedom of expression is the basis for democracy in the society, however, if the right can be limited under certain circumstances, especially in light of the crisis, this might give effect to weakening the protection of democracy as such. The subchapter on the interpretation of Article 10 ECHR is to provide an in-depth outlook on the procedure under which the right can be limited and whether the margin of appreciation left to the states to derogate from the right does not decrease the value of democracy in the European states and diminish the value of the fundamental rights granted by the Convention.

³³ Council of Europe. European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, available on: https://www.echr.coe.int/documents/convention_eng.pdf. Accessed February 14, 2021.

³⁴ Triestino Mariniello, "Prolonged Emergency and Derogation of Human Rights: Why the European Court Should Raise Its Immunity System," *German Law Journal* 20, no. 1 (2019): p. 47, available on: Cambridge Journals Online. Accessed February 26, 2021.

³⁵ *Ibid.*

³⁶ *Lingens v. Austria*, App No 9815/82, Case No 12/1984/84/131, A/103, [1986] ECHR 7, (1986) 8 EHRR 103, (1986) 8 EHRR 407, IHRL 58 (ECHR 1986), 8th July 1986, European Court of Human Rights [ECHR]

³⁷ *Şener v. Turkey*, App No 26680/95, [2000], 18th July 2000, European Court of Human Rights [ECHR]

2.1. Interpretation of Article 15 of the European Convention of Human Rights

The first subchapter of Chapter 2 focuses on the analysis and interpretation of Article 15 ECHR to determine the requirements for the derogation from the Convention. Article 15 allows States to derogate from Articles in the ECHR, thus, to suspend human rights during ‘the time of war or other public emergency threatening the life of the nation’.³⁸ The second requirement for the derogation under the Article 15 ECHR is its strict requirement ‘by the exigencies of the situation’, and the consistency of measures with other obligations of the state under international law. Finally, the CoE shall be informed about the derogations. In light of the COVID-19 crisis, when states derogate from their human rights obligations, it is to determine whether the COVID-19 pandemic itself can be considered as the public emergency threatening the life of the nation and whether states can lawfully derogate from their human rights obligations. Based on the analysis of Article 15 ECHR the derogation procedure is to be determined. Additionally, based on the wording of Article 15 ECHR, it is to be concluded whether the discretion left for the state to derogate from their human rights commitments leads to the abuse of human rights.

2.1.1. ‘Public emergency threatening the life of nation’ and the COVID-19 pandemic

The emergency situation is what might occur for every state, during which states use the emergency powers. As the focus of the Bachelor Thesis is made on the derogations of states made during the COVID-19 pandemic, it is crucial to define the ‘state of emergency’ and derive to the conclusion whether the COVID-19 pandemic may classify as the state of emergency itself. There is no precise definition in the Convention of the ‘state of emergency’. International Law Association concluded that it is not possible to stipulate what particular types of events might constitute a public emergency; each case is to be judged individually taking into account the concept of the democratic society.³⁹ Nevertheless, in 1959 the ECtHR and the members of the Commission in a report on the *Lawless* case⁴⁰ have for the first time defined the concept of “public emergency threatening the life of the nation”.⁴¹ The report states that public emergency is

a situation of exceptional and imminent danger or crisis affecting the general public, as distinct from particular groups, and constituting a threat to the organised life of the community which composes the state in question.⁴²

The Court in the *Lawless* judgment, however, referred to a more general definition, which further translated into the Court’s jurisprudence and the Court afterward referred to ‘public emergency’ definition from the case. In *A and Others v. United Kingdom*⁴³, the ECtHR supported its reasoning from the *Lawless* case on the definition of public emergency and

³⁸ Council of Europe, *supra* note 33.

³⁹ Mohamed M. El Zeidy, "The ECHR and States of Emergency: Article 15-A Domestic Power of Derogation from Human Rights Obligations," *Michigan State University-Detroit College of Law's Journal of International Law* 11, no. 2 (Summer 2002): p. 264, available on: HeinOnline. Accessed February 14, 2021.

⁴⁰ *Lawless v. Ireland*, Judgment on Merits, App no 332/57 (A/3), [1961] ECHR 2, (1961) 1 EHRR 15, IHRL 1 (ECHR 1961), 1st July 1961, European Court of Human Rights [ECHR]

⁴¹ Council of Europe, *supra* note 33.

⁴² El Zeidy, *supra* note 39.

⁴³ *A and Others v. United Kingdom*, Application no. 3455/05, Council of Europe: European Court of Human Rights, 19 February 2009.

concluded that from the customary meaning of the ‘public emergency threatening the life of the nation’ it is clear that the Convention refers to the

an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community.⁴⁴

The Court also proved to stick to the definition in its jurisprudence, e.g. *Mehmet Hasan Altan v Turkey*⁴⁵, the ECtHR referred to the public emergency as the imminent danger, where the states are to prove it is necessary to derogate from the Convention and the states are to determine the existence of the public emergency as they are better placed than the international judge.⁴⁶ Moreover, in the *Lawless* case, the Court referred to three main preconditions to declare public emergency: exceptional situation, affecting the whole population, and a threat to the organised life of the community.⁴⁷ However, the Court elaborated on the preconditions in the *Greek* case⁴⁸ and established the four-step criteria for the public emergency:

- I. Actual or imminent;
- II. The effect of emergency must involve the whole population;
- III. The organised life of the community must be threatened;
- IV. The danger must be exceptional and the measures implemented by the High Contracting parties are ought to be permitted to maintain public order, health, and safety.⁴⁹

Greek case criteria remain the leading in the Court’s jurisprudence on which the public emergency is based. COVID-19 pandemic threatens mostly the right to life and the right to health based on the number of victims and ill people, therefore states have a due diligence obligation to protect public health. Based on the abovementioned criteria, the COVID-19 pandemic is an actual threat the world is facing, the pandemic affects the whole population all around the world, the life of the community is threatened based on the fact that the virus is spreading fast and it affects the health of people. Finally, the danger is exceptional and the states are permitted to restore public health and safety. However, the measures implemented shall be on an individual basis assessed by the Court to qualify to maintain public security, health, or safety.

In early speeches, President of France Emmanuel Macron and Chancellor of Germany Angela Merkel referred to COVID-19 using a metaphor of ‘war’.⁵⁰ Moreover, the President of the European Commission Ursula von den Leyen referred to COVID-19 as a “shock” and the crisis governments, economies and people are facing.⁵¹ Based on the analysis of the “public

⁴⁴ *A and Others v. United Kingdom*, *supra* note 43, para 176.

⁴⁵ *Mehmet Hasan Altan v. Turkey*, Application no. 13237/17, Council of Europe: European Court of Human Rights, 20 March 2018.

⁴⁶ *Ibid*, para 91.

⁴⁷ *Lawless v. Ireland*, *supra* note 40.

⁴⁸ *Denmark, Norway, Sweden and the Netherlands v. Greece* (the “Greek case”), 3321/67, 3322/67, 3323/67, 3344/67, [1970]

⁴⁹ *Ibid*.

⁵⁰ Audrey Lebet, “COVID-19 pandemic and derogation to human rights,” *Journal of Law and the Biosciences Volume 7, Issue 1 (May, 2020)*: p. 1, available on: <https://academic.oup.com/jlb/article/7/1/Isaa015/5828398>. Accessed February 14, 2021.

⁵¹ European Commission. *Remarks by President von der Leyen at the joint press conference with Executive Vice-Presidents Vestager and Dombrovskis to present the economic response to the Coronavirus crisis European*

emergency” definition under ECHR and the case-law, it can be concluded that the COVID-19 pandemic must be considered as the public emergency to which derogations are possible based on the leading *Greek* case criteria, however, the Court is to assess whether the measures implemented are compatible with the fourth *Greek* case criteria and obligations under Article 15 ECHR must also be assessed case-based. However, despite the COVID-19 pandemic is under the *Greek* case criteria considered a public emergency, Article 15 ECHR requires the ‘public emergency’ to be declared under the derogation mechanism in the ECHR. Therefore, for the first criteria to be satisfied, not only the imminent danger must exist, but also the declaration of the state of emergency via the ECHR, as otherwise failure to declare the state of emergency through the derogation mechanism of the treaty, might leave the Contracting States less accountable to their international commitments.⁵² The requirement is considered to be linked to the requirement to inform the Secretary-General about the derogation.

To conclude, a public emergency is considered as the imminent danger affecting the general public and constituting a threat to the organised life of the community of the Contracting States, where the parties to the Convention are to assess the existence of the ‘public emergency’ as they are better placed than international judges. COVID-19 pandemic in the particular state based on the leading *Greek* case criteria is to qualify as the state of emergency, however, the fourth *Greek* case criteria is to be analysed case-based. The further subchapters interpret the meaning of the strict requirements imposed by the exigencies of the situations, such as the proportionality, necessity, and margin of appreciation and the consistency of measures implemented with the international law obligations and notification procedure.

2.1.2. “Strictly Required by the Exigencies of the Situation”: Necessity, Proportionality and the Margin of Appreciation

If established that the first precondition, the existence of the public emergency, has been satisfied, the second requirement prescribes the derogation to be ‘strictly required by the exigencies of the situation’ is to be examined. The requirement outlined in Article 15(1) ECHR defines the rationale of the Article is to safeguard the interests of the Contracting States to the Convention, however, on the other hand, to secure the fundamental human rights by providing the precondition for the derogations to be proportionate, necessary and duration of the derogation shall be strictly required by the situation. Based on legal scholars Van Dijk and Van Hoof’s reasoning derogations shall be **necessary** to cope with the threat, measures undertaken shall be **proportionate** given the threat and the duration of the derogation is to be examined.⁵³ ⁵⁴ The doctrine of necessity is founded on the state responsibility principles, moreover, it is considered as the principle in international law.⁵⁵ When the case concerns the derogation from human rights the conditions for the valid derogation to satisfy the necessity doctrine include that the derogation was made to safeguard the essential interest of the state

Commission Statement 20/465 (March 13, 2020): p. 1, available on: https://ec.europa.eu/commission/presscorner/detail/en/statement_20_465. Accessed March 15, 2020.

⁵² Alan Greene, “Derogating from the European Convention on Human Rights in Response to the Coronavirus (COVID-19) Pandemic,” *University of Birmingham Publications* (July, 2020): p. 1, available on: <https://www.birmingham.ac.uk/Documents/research/Public-Affairs/2019-20/uob-briefing-greene-article-15-echr-and-covid-19-July-2020.pdf>. Accessed April 7, 2021.

⁵³ Pieter van Dijk, Fried van Hoof, Arjen van Rijn, Leo Zwaak, *Theory and Practice of the European Convention on Human Rights*. Kluwer Law and Taxation Publishers 3rd edition (1997): p. 400.

⁵⁴ El Zeidy, *supra* note 39, p. 271.

⁵⁵ El Zeidy, *supra* note 39, p. 272.

during the grave peril.⁵⁶ According to legal scholar Oraá, derogations under the ECHR must not be used unless all other remedies were exhausted. Therefore, states are obliged to validate their conduct and prove the derogation being extremely essential to derogate from the Convention under Article 15 ECHR.⁵⁷ During the COVID-19 pandemic, derogations made by the states are to satisfy the necessity doctrine when the states made derogations to safeguard the interests of the state more importantly the health of their citizens.

The other two requirements to be satisfied by the states are the principle of proportionality and the duration of the derogation. The Convention does not provide any definition nor the requirement to satisfy the proportionality principle. According to Rosalyn Higgins, former President of ICJ, derogations from human rights are lawful when the events made them necessary and they are proportionate to the present danger.⁵⁸ Particularly in the *Lawless* case, the Commission established the 'strict requirement' for the derogations to satisfy the proportionality doctrine where the state was to prove that the derogation from the human rights was seen as the final resort. However, the Commission chose to interpret the proportionality principle in the wider sense granting states a wider margin of appreciation. In the view of the Commission, states are considered to be in a better position to know the best action in case of crisis. In the view of the ECtHR, national authorities are to make an initial assessment of whether particular action of the state conforms with the Convention.⁵⁹ The main dilemma arises to understand whether the discretion left to states does not weaken the protection of human rights under the Convention. The margin of appreciation is to be tested case-based. The further subchapters give an outlook on the other conditions to derogate from the rights in the Convention under Article 15: measures consistent with other international law obligations, notification requirement.

2.1.3. Consistency of measures under other obligations under international law of the Contracting State

For the Contracting State to derogate from the ECHR under Article 15, a state must in case of derogation comply with its other international obligations. However, not much case-law and Court's reflection exists on the requirement so far, the conventional mechanisms of the ECHR leave an impression for the precondition to overlook for the consistency with other international legal obligations.⁶¹ In *Cyprus v. Turkey*⁶², the ECtHR held that Turkey could not rely on the Article 15 ECHR to derogate from the Convention, as the actions of the Contracting state constituted aggression which was in breach of the UN Charter.⁶³ In

⁵⁶ El Zeidy, *supra* note 39, p. 273.

⁵⁷ Jaime Oraá, "The Protection of Human Rights in Emergency Situations under Customary International Law," in *The Reality of International Law: Essays in Honour of Ian Brownlie* ed. Guy S. Goodwin-Gill and Stefan Talmon (Oxford: Oxford University Press, 1999): p. 223. Accessed February 27, 2021.

⁵⁸ Rosalyn Higgins, "Derogations under Human Rights Treaties," *British Yearbook of International Law*, Volume 48, Issue 1 (1976): p. 223, available on: Oxford Journals Online. Accessed February 28, 2021.

⁵⁹ *Handyside v. United Kingdom*, Merits, App No 5493/72, A/24, [1976] ECHR 5, (1976) 1 EHRR 737, (1979) 1 EHRR 737, IHRL 14 (ECHR 1976), 7th December 1976, European Court of Human Rights [ECHR].

⁶⁰ Thomas A. O'Donnell, "The Margin of Appreciation Doctrine: Standards in the Jurisprudence of the European Court of Human Rights," *Human Rights Quarterly* 4, no. 4 (1982): p. 478, available on: JSTOR. Accessed February 28, 2021.

⁶¹ Aly Mokhtar, "Human Rights Obligations v. Derogations: Article 15 of the European Convention on Human Rights," *International Journal of Human Rights Vol. 8, No. 1* (Spring, 2004): p. 74, available on: Taylor & Francis Online. Accessed February 14, 2021.

⁶² *Cyprus v. Turkey*, 25781/94, Council of Europe: European Court of Human Rights, 10 May 2001.

⁶³ Mokhtar, *supra* note 61, p. 75.

*Brannigan and McBride v. United Kingdom*⁶⁴ the applicant was arguing before the Court that an essential requirement for the derogation is the requirement of the valid derogation under Article 4 ICCPR to which the UK is a Contracting Party. The Court held that it is outside the competence of the Court to define the meaning of the “officially proclaimed” term, however, then it is ought to examine whether there is a basis for the argument of the applicant. The applicant informed the Court that the derogation was made based on the procedure outlined in Article 15 ECHR and Article 4 ICCPR.⁶⁵ Therefore, based on the wording of the provision and the above-mentioned case-law, the Court has to test the derogatory measures for consistency of them with the international law regardless of the question brought by the applicant.⁶⁶ To conclude, consistency with other international law obligations is to be checked by the ECtHR. For the thesis, as both Hungary and Turkey are contracting states to ICCPR, the consistency of derogations will be checked under the ICCPR derogation clause. The further subchapter examines the notification requirements under Article 15 ECHR as the requirement to derogate from the Convention.

2.1.4. Notification Requirements

It has been concluded in the first subchapter of Chapter 1 that the COVID-19 pandemic based on the *Greek* case criteria classifies as a public emergency. Between March and April 2020, ten Contracting States to the Convention made notifications on the derogations using COVID-19 as the ‘public emergency’ basis, such states include, Latvia, Romania, Armenia, the Republic of Moldova, Estonia, Georgia, Albania, North Macedonia, Serbia, and San Marino.⁶⁷ Based on the February 2021 data, no other states except the abovementioned derogated from the Convention and derogations are still in the Republic of Moldova and Georgia.⁶⁸ *Table 2.1.* illustrates the date when the notification of the derogation was received and the date of the withdrawal of the derogation.

Table 2 1.

Derogations Made by the Contracting States from 1 March 2020 to 9 February 2021⁶⁹

Contracting State derogating from the Convention	Date of notification of the derogation was received by the Secretary-General	Date of the withdrawal of the derogation
Albania	1 April 2020	25 June 2020
Armenia	20 March 2020	16 September 2020
Estonia	20 March 2020	18 May 2020
Georgia	23 March 2020	Derogation is in place
Latvia	1. 16 March 2020	1. 10 June 2020

⁶⁴ *Brannigan and McBride v. United Kingdom*, 14553/89, App No 14554/89, A/258-B, IHRL 2592 (ECHR 1993)

⁶⁵ Mokhtar, *supra* note 61, p. 75.

⁶⁶ *Ibid.*

⁶⁷ Jovičić, *supra* note 1, p. 547.

⁶⁸ Council of Europe. *Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 5). Notifications under Article 15 of the Convention in the context of the COVID-19 pandemic.* Last amended February 9, 2021. Available on: <https://www.coe.int/en/web/conventions/full-list/-/conventions/webContent/62111354>. Accessed February 26, 2021.

⁶⁹ Council of Europe, *supra* note 68.

	2. 31 December 2020	2. 6 April 2021
North Macedonia	2 April 2020	30 June 2020
Republic of Moldova	1. 20 March 2020 2. 6 April 2021	1. 20 May 2020 2. Derogation is in place
Romania	18 March 2020	15 May 2020
San Marino	14 April 2020	8 July 2020
Serbia	7 April 2020	13 October 2020

Article 15(3) ECHR names notification as to the requirement to derogate from the derogable rights in the Convention. The Convention refers to the requirement of the notification of the Secretary-General and the CoE of the measure the High Contracting State took and the reasons behind the measures.⁷⁰ According to the interpretation of the requirement by the CoE, if the requirement under Article 15(3) ECHR is not fulfilled, Article 15 does not apply to the derogations made by the Contracting State.⁷¹ Notification requirement comes as the last requirement when the other requirements under the Article are satisfied. The notification procedure facilitates monitoring of the derogations, thus, controls the proportionality of the derogations notified about.

According to the ECHR Guide of Article 15 ECHR, as the system is based on the collective enforcement mechanism the purpose of the requirement of making the derogation public derives from the inner nature of the Convention.⁷² The time element under Article 15(3) ECHR shall be considered. Article 15(3) of the Convention does not explicitly refer to the time when the derogation is to be made, however, the ECtHR elaborated on the time element in the case-law. In *Greece v. the United Kingdom*,⁷³ the Commission elaborated on the wording of Article 15(3) that the notification shall not be made before the derogations from the ECHR are introduced. However, it was also found by the Commission that the Article does not provide for the time element when the notification is ought to be notified about.⁷⁴ The Commission does not specify the precise time element in case-law; however, it refers to the concept of ‘unavoidable delay’ or ‘unjustified delay’. In the *Lawless case*, where Ireland made its notice twelve days after derogations were made, the ECtHR found that a twelve-day delay in notification was not considered as an unjustified delay, however, in the *Greek case*, Greece notified the Commission of the three months delay after the derogations were made. The Commission concluded that the delay is not in conformity with the requirements listed in Article 15 ECHR and the delay in the notification cannot be justified.⁷⁵ The Commission has not elaborated on the concept of the time element of the notification procedure and there is no precise timeframe communicated by the CoE when the notification is presented. To conclude, the wording of the Article 15(3) ECHR does not refer to the precise time element when the notification on the derogations from the Convention is to be communicated. The Commission referred to the ‘unjustified delay’ element, however, no

⁷⁰ Council of Europe, *supra* note 33.

⁷¹ European Court of Human Rights. *Guide on Article 15 of the European Convention on Human Rights*. Last amended August 2020, p. 12. Available on: https://www.echr.coe.int/documents/Guide_Art_15_ENG.pdf. Accessed February 14, 2020.

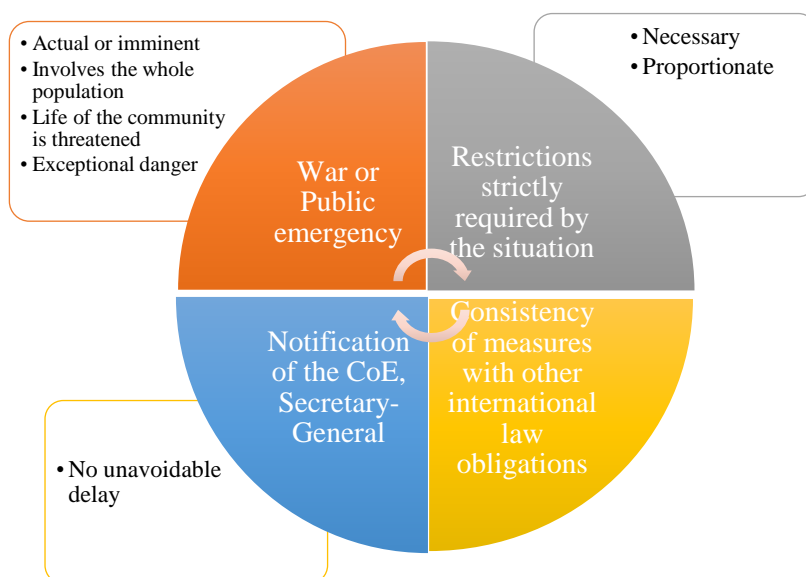
⁷² European Court of Human Rights, *supra* note 71.

⁷³ *Greece v. United Kingdom*, Application No. 176/56, Decision of the European Commission of Human Rights [1958]

⁷⁴ Jovičić, *supra* note 1.

⁷⁵ El Zeidy, *supra* note 39, p. 281.

assessment criteria nor interpretation of the ECtHR on the concept is provided. The most precise time elements communicated by the Commission derive from the *Greek case* and *Lawless case*. Based on the cases, the timeframe indicated between justified and justified delay in notification is from twelve days to three months. *Figure 2.2.* presents the graphical illustration of the requirements to derogate from the Convention under Article 15 ECHR.



*Figure 2. 1. Requirements for the valid derogation made under Article 15 ECHR*⁷⁶

Based on the analysis of Chapter two, according to the four-step criteria of the *Greek case*, the COVID-19 pandemic classifies as a public emergency. Between March and April, 2020 ten states derogated from certain Articles in the ECHR and made an official notification. Contracting states are allowed to derogate from the right, moreover, Article 10 also prescribes the limitation procedure from the right in question.

2.1. Interpretation of Article 10 of the European Convention on Human Rights

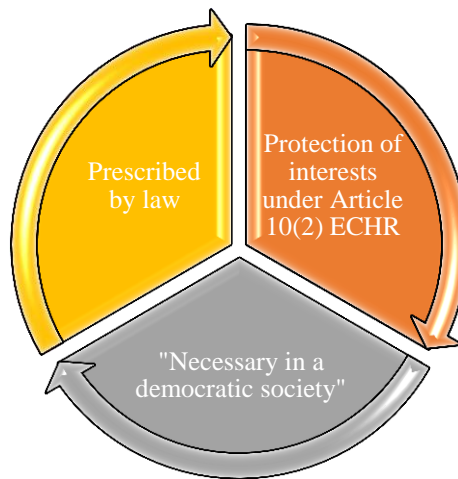
The ECtHR referred to the importance of the freedom of expression as a key for democracy and an essential element for the protection of all rights and freedoms in the Convention.⁷⁷ Pandemic exacerbated already pre-existing weaknesses in freedom of expression protection. In the view of the CoE, states should not introduce any restrictions on media freedom beyond the allowed limitations under Article 10 ECHR, moreover, the crisis shall not be used as the justification to restrict the public's access to information.⁷⁸ Times of emergency pose a significant burden on the states and the protection of human rights weakens. For the analysis of cases in Hungary and Turkey, not just the analysis of the derogation's procedure is to be analysed, but also the limitations states may pose to the freedom. The test outlined in the Article is strict, however, the Court also referred to the margin of appreciation states enjoy to decide how to limit the freedom of expression.⁷⁹ Article 10(2) ECHR establishes a three-part

⁷⁶ European Court of Human Rights, *supra* note 71.

⁷⁷ Toby Mendel, "Freedom of Expression: A Guide to the Interpretation and Meaning of Article 10 of the European Convention on Human Rights," *Council of Europe Publications, Center for Law and Democracy*: p. 2, available on: <https://rm.coe.int/16806f5bb3>. Accessed February 28, 2020.

⁷⁸ Noorlander, *supra* note 17, p. 5.

⁷⁹ Mendel, *supra* note 77, p. 3.



restrictions on freedom of expression, firstly, the restriction must be prescribed by law, secondly, the restriction must protect one of the interests listed in Article 10(2), and finally, the restriction must be “necessary in a democratic society”.⁸⁰ *Figure 2.2.* presents the graphical illustration of the requirements to restrict the freedom of expression under Article 10 ECHR.

*Figure 2.2. Three-step criteria to restrict freedom of expression under Article 10(2) ECHR*⁸¹

Each of the steps from the test under Article 10(2) ECHR and the requirements are to be analysed in the further subchapters.

2.2.1. Restrictions prescribed by law and restrictions to protect national security and health

One of the requirements to restrict the freedom of expression under the Article 10 ECHR is that such restriction shall be prescribed by law. Restriction to be prescribed by law reflect the importance of the right being the basis in a democratic society, therefore, only the legislature is granted the power to limit the fundamental right. The Court recognized that primary legislation, secondary legislation, and rules of international law might be relied on to satisfy

⁸⁰ Mendel, *supra* note 77, p. 33.

⁸¹ Council of Europe and European Court of Human Rights. *Guide on Article 10 of the European Convention on Human Rights. Freedom of Expression.* Last updated August 31, 2020, p. 21, available on: https://www.echr.coe.int/Documents/Guide_Art_10_ENG.pdf. Accessed March 1, 2021.

the requirement.⁸² Additionally, the Court held that the norm is not regarded as “law” unless it is not formulated as precise to enable citizens to regulate their conduct and foresee the consequences the action might entail. In *Bayev and Others v. Russia*⁸⁴ Court held that not merely the quality of law is assessed, but also the necessity of such law. Laws shall be compatible with the notions of equality, pluralism, and tolerance which are the basis to form a democratic society.⁸⁵ In the case of *ATV Zrt v. Hungary*⁸⁶, Hungary enacted a law banning presenters to express any opinion on the news that was being broadcasted. The Court held that the provision met the requirement of listing the consequences for non-compliance, however, the question pending before the Court was to determine whether banning the term ‘far-right’ in the news program was necessary for the democratic society. The Court notes that the notion of ‘opinion’ is a broad term and that the Act lacks precision and is not necessary for a democratic society.⁸⁷ Therefore, for the analysis of the cases in the present paper not only the presence of the legislative act is the determining factor to satisfy the requirement, but also the compatibility of the act with the equality and tolerance principles which are considered as important in the democratic society.

The other two requirements under Article 10(2) ECHR are considered – a necessity in a democratic society and restrictions necessary to protect national security and health. Based on the wording of Article 10(2) ECHR, the list of interests under which Contracting states might restrict freedom of expression is broad. Legitimate aims to restrict freedom include national security, public safety, protection of health and morals, protection of reputation.⁸⁸ For the analysis of the paper, the analysis will focus on the restrictions to protect national security and health. For the protection of health, COVID-19 restrictions might be considered as valid to justify the restrictions, however, the Court establishes that the restrictions relating to the protection are examined case-based and Court is to carefully examine whether the measures were proportionate to the aim pursued. The aim of the Contracting State shall be particularly linked to the health of the population.⁸⁹ In *Castells v. Spain*⁹⁰, the Court held that the evidence to be presented by the applicant to protect national security and prevent disorder.⁹¹ Therefore, national security proved to be a valid justification for the restriction of Article 10 ECHR. In *Kenedi v. Hungary*⁹², the Hungarian Government argued that the restrictions posed to the Article 10 ECHR are justified based on national security, which was accepted by the Court as the legitimate aim under the Article. However, in the case the failure to provide access to information to the applicant failed to comply with the ‘prescribed by law’ requirement,

⁸² Mendel, *supra* note 77, p. 34.

⁸³ *Groppera Radio AG and ors v. Switzerland*, App no 10890/84, A/173, (1990) 12 EHRR 321, IHRL 95 (ECHR 1990), 28th March 1990, European Court of Human Rights [ECHR].

⁸⁴ *Bayev and others v. Russia*, Application No. 67667 [2017], European Court of Human Rights [ECHR].

⁸⁵ Council of Europe and European Court of Human Rights, *supra* note 81.

⁸⁶ *ATV Zrt v. Hungary*, Application No. 61178/14 [2020], 28th April 2020 European Court of Human Rights [ECHR]

⁸⁷ Council of Europe and European Court of Human Rights, *supra* note 81.

⁸⁸ Mendel, *supra* note 77, p. 38.

⁸⁹ Council of Europe and European Court of Human Rights, *supra* note 81, p. 96.

⁹⁰ *Castells v. Spain*, App No 11798/85, A/236, (1992) 14 EHRR 445, IHRL 2936 (ECHR 1992), 23rd April 1992, European Court of Human Rights [ECHR].

⁹¹ Council of Europe and European Court of Human Rights. *National Security and European case-law*. Published in 2013, p. 17, available on: https://www.echr.coe.int/Documents/Research_report_national_security_ENG.pdf. Accessed March 1, 2021.

⁹² *Kenedi v. Hungary*, App No 31475/05, 26th May 2009, (2009) European Court of Human Rights [ECHR].

therefore Court was not considering the ‘legitimate aim’ test.⁹³ In the case *Társaság a Szabadságjogokért v. Hungary*⁹⁴ the Court concluded that the access to original documents and information constitutes an essential element to exercise the freedom of expression.⁹⁵ Courts are to ensure the legitimate aim is not a mere probability. The proportionality of the restrictions is to be determined following their necessity in a democratic society.

2.2.2. Restrictions ‘necessary in a democratic society’

To fulfil the third requirement for the lawful restriction of the right, the Court is subject to verify the proportionality of the restriction by validating that the restriction is necessary for a democratic society. In *Observer and Guardian v. the United Kingdom*⁹⁶, the Court stated that the requirement under Article 10(2) ECHR is satisfied when it is established that the ‘pressing social need’ is present. Despite states have a margin of appreciation in assessing whether the pressing need exists, the supervision of the European courts shall be present. In the proportionality test assessment, public interest and the severity of the sanctions will be particularly emphasized by the authorities.⁹⁷ The Court on many occasions noted that the freedom of expression does not apply only to the information and ideas that are regarded as inoffensive but also to the information which is regarded as shocking, offensive, or disturbing. Even if the information is regarded as harmful to the Contracting State, certain groups, or organizations, such information shall be regarded as covered by the freedom of expression.⁹⁸ Based on the case-law of the Court, sanctioning journalists, publishers, and broadcasters is considered a violation of Article 10 ECHR.⁹⁹ Since the *Sunday Times* case¹⁰⁰, many European countries violated the right to freedom of expression, the ECtHR ruled on various occasions the restrictions imposed on politicians, journalists, broadcasters, individuals, etc. proved disproportionate, unjustified, and not necessary in a democratic society. The approach of the Court grants a high level of protection to journalistic reporting and discussion on matters of public interest, where the limitations are not considered as justified in a democratic society.¹⁰¹ In *Ahmet Yildirim v. Turkey*¹⁰², the Court introduced the right to access the internet and ruled the wholesale blocking of the internet as non-necessary and unjustified in a democratic

⁹³ Antoine Buyse and Michael Hamilton. *Transitional Jurisprudence and the ECHR. Justice, Politics and Rights*. Cambridge University Press (2011): p. 147.

⁹⁴ *Társaság A Szabadságjogokért (Hungarian Civil Liberties Union) v. Hungary*, App No 37374/05, 14th April 2009, European Court of Human Rights [ECHR].

⁹⁵ *Castells v. Spain*, *supra* note 90, para 43.

⁹⁶ *Observer and Guardian v. United Kingdom*, App no 13585/88, A/216, [1991] ECHR 49, (1992) 14 EHRR 153, IHRL 2952 (ECHR 1991), 26th November 1991, European Court of Human Rights [ECHR].

⁹⁷ Dominika Bychawska-Siniarska, “Protecting the Right to Freedom of Expression under the European Convention on Human Rights,” *Council of Europe* (July 2017): p. 44, available on: <https://rm.coe.int/handbook-freedom-of-expression-eng/1680732814>. Accessed March 2, 2021.

⁹⁸ Dirk Voorhoof, “The Right to Freedom of Expression and Information under the European Human Rights System: Towards a more Transparent Democratic Society,” *Robert Schuman Centre for Advanced Studies Centre for Media Pluralism and Media Freedom* 2014/12 (2014): p. 5, available on: http://diana-n.iue.it:8080/bitstream/handle/1814/29871/RSCAS_2014_12.pdf?sequence=1&isAllowed=y. Accessed March 2, 2021.

⁹⁹ E.g., *Pedersen and Baadsgaard v. Denmark*, App No. 49017/99, 17 December 2004, European Court of Human Rights [ECHR].

¹⁰⁰ *The Sunday Times v. United Kingdom*, App No. 6538/74, 26 April 1979, European Court of Human Rights [ECHR].

¹⁰¹ Bychawska-Siniarska, *supra* note 97, p. 8.

¹⁰² *Ahmet Yildirim v. Turkey*, App No. 3111/10; [2012] ECHR 3003, 18 December 2012, European Court of Human Rights [ECHR].

society.¹⁰³ Internet is considered to be the information platform for gathering information and expressing opinions, which is protected under Article 10 ECHR.

Based on the analysed above case-law, the Court grants high-level protection to journalists, politicians and the freedom of expression do extend to the offending or shocking content. Moreover, the Court emphasized the protection of the right on the internet and ruled that blocking content on the internet is considered a violation of freedom of speech as access to information is considered as the basis for the existence of the democratic society.

The margin of Appreciation refers to the room for manoeuvre granted to the Contracting States to fulfil their obligations under the Convention. Article 10(2) ECHR provides a narrow margin of appreciation as it is constrained by the two factors listed in the provision.¹⁰⁴ In *Handyside v. the United Kingdom*, the Court concluded that Article 10(2) ECHR leaves the Contracting States a margin of appreciation.¹⁰⁵ In the *Sunday Times* case, Court concluded that the narrower margin of appreciation is granted to the matters relating to the public interest and national security, as the right to be properly informed shall prevail in a democratic society over the restrictions that could be imposed by the states.¹⁰⁶ Where freedom of the press is at stake the margin of appreciation can be considered to be restricted.¹⁰⁷¹⁰⁸ The margin of appreciation left to the state in the protection of public interest does not weaken the protection of freedom of expression if the legitimate aim of pursuing the restriction is public interest and national security. The further chapter analyses the restrictions to the freedom of expression in Hungary after the adoption of Coronavirus bill.

¹⁰³ Bychawska-Siniarska, *supra* note 97, p. 7.

¹⁰⁴ Steven Greer, "The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights," *Council of Europe Publishing Human Rights Files No. 17* (July 2000): p. 9, available on: [https://www.echr.coe.int/librarydocs/dg2/hrfiles/dg2-en-hrfiles-17\(2000\).pdf](https://www.echr.coe.int/librarydocs/dg2/hrfiles/dg2-en-hrfiles-17(2000).pdf). Accessed March 2, 2021.

¹⁰⁵ *Handyside v. United Kingdom*, *supra* note 59, para 48.

¹⁰⁶ Voorhoof, *supra* note 98.

¹⁰⁷ Council of Europe and European Court of Human Rights, *supra* note 81, p. 22.

¹⁰⁸ *Dammann v. Switzerland*, App. No. 77551/01 (2006), 25 April 2006, European Court of Human Rights [ECHR], para 51.

3. EXAMINATION OF THE LIMITATIONS TO THE FREEDOM OF EXPRESSION DURING THE COVID-19 PANDEMIC: CASE-STUDY ON HUNGARY

The main focus of the third chapter is on the case-study of the violation of human rights, namely the freedom of expression, during the COVID-19 pandemic in Hungary. The rationale of the chapter is to analyse the restrictions imposed by Hungary on the freedom of expression based on the interpretation and the framework of Article 15 ECHR and Article 10(2) ECHR. The chapter provides an in-depth analysis of the case from the four-step derogation criteria of the Article 15 ECHR and the three-step criteria for the restrictions under Article 10(2) ECHR. State of emergency poses a significant threat to the protection of human rights¹⁰⁹, where states have due diligence to protect fundamental rights and freedoms and comply with their international commitments.

As many of the international organisations, such as CoE, the UN, the EU, made statements obliging states to comply with international standards during the pandemic, it can be concluded that the pandemic poses threat to the protection of human rights. On March 24, 2020, Marija Pejčinović Burić, the CoE Secretary-General, in the letter to Viktor Orbán, the Prime Minister of Hungary, warned the country about the lack of protection of human rights in the state during the pandemic, which especially concerns the freedom of expression and access to information and forced the government to uphold its obligations in the organisation, and invited the state to accept help and assistance provided to secure the protection of rights from the CoE.¹¹⁰ Freedom of expression proved to be the basis for the democratic society and the free and independent media shall be seen as a tool for the public to exercise their right to receive and access information to form an opinion.¹¹¹ In 2018, European Parliament adopted Resolution 2017/2131(INL) by stating that the European Council is to determine the risk of a breach of European values and human rights, amongst the values being the freedom of expression.¹¹² In 2018 the EU initiated the procedure under Article 7 TEU after the breach of the common values of the EU in the state, thus, rejected the liberal constitutional democracy and the rule of law promoted by the EU. Hungary is considered to classify as an illiberal democracy.¹¹³ Since 2018, the Hungarian Government has not improved the situation and the further violations and limitations to the right based on the reasoning of the state happened due to the ‘national strategic importance’ and ‘public interest’.¹¹⁴ According to the World Press

¹⁰⁹ Mariniello, *supra* note 34.

¹¹⁰ Council of Europe. *Letter from Council of Europe Secretary General Marija Pejčinović Burić, for the attention of Viktor Orbán, Prime Minister of Hungary*. Published on March 25, 2020, available on: <https://www.coe.int/en/web/portal/-/secretary-general-writes-to-victor-orban-regarding-covid-19-state-of-emergency-in-hungary>. Accessed April 7, 2021.

¹¹¹ Kristina Cendic and Gergely Gosztony, *supra* note 26.

¹¹² European Parliament resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2017/2131(INL)) (September 12, 2018), available on: https://www.europarl.europa.eu/doceo/document/TA-8-2018-0340_EN.html. Accessed March 29, 2021.

¹¹³ Tímea Drinóczi, Agnieszka Bień-Kacała, *Rule of Law, Common Values, and Illiberal Constitutionalism: Poland and Hungary within the European Union* (New York: Routledge, 2020), pp. 26, 33.

¹¹⁴ Kristina Cendic and Gergely Gosztony, *supra* note 26, p. 20.

Freedom Index 2020, Hungary ranked in 89th place.¹¹⁵ The present chapter will analyse the background information of the case from the lens of the derogation clause in the ECHR and the Article 10 ECHR and analyse the lawfulness of the derogations or restrictions imposed by Hungary. The further subchapter focuses on the factual analysis of the situation.

3.1. Background Information of the Case

The present subchapter focuses on the analysis of the factual information of the situation, the adoption of the Coronavirus bill, and its impact on the freedom of expression. The rationale of the subchapter is to provide an overview for the further analysis of the Coronavirus bill through the derogation clause provided in the ECHR and Article 10(2) ECHR. Over the past several years, Hungary extended its control over the media representatives and journalists and continues to silence independent bodies and opinions of individuals criticising the government. During the COVID-19 pandemic Hungary adopted numerous legislative acts to protect public health, however, received international criticism.¹¹⁶ Dunja Mijatović, the CoE Commissioner for Human Rights, expressed concerns over the protection of freedom of expression in Hungary since 2010. The disregard of the national and international court's judgments poses a threat to respect to the rule of law and consequently to the freedom of expression.¹¹⁷ Despite the CoE expressed concerns over the protection of the freedom of expression in Hungary, during the COVID-19 pandemic the state continued its practice to limit the fundamental rights.

On March 11, 2020, the government of Hungary issued Decree no. 40/2020 declaring the 'state of danger'.¹¹⁸ According to Article 54 of the FL, human rights can be restricted during a state of danger. Special guarantees are granted to the right to life and human dignity, the prohibition of torture, inhuman and degrading treatment or punishment, human trafficking, etc., which are considered as non-derogable rights. From March 11, 2020, the Hungarian government issued more than seventy decrees until May 1, 2020.¹¹⁹ On March 30, 2020, the Coronavirus bill was adopted by the majority of the Parliament. Coronavirus bill extends the powers of the government by extending the effect of the government decrees which are to be executed without the control of the Parliament.¹²⁰ Moreover, the Coronavirus bill grants the power to the authorities to limit media freedom, restrict the freedom of expression, freedom of the press.¹²¹ The Coronavirus bill namely adds two crimes to the

¹¹⁵ Reporters Without Borders. *Hungary: Things do not improve*. Published on 2021, available on: <https://rsf.org/en/hungary>. Accessed March 30, 2021.

¹¹⁶ Amnesty International. *Hungary: Government must not use Extraordinary Power to Roll Back Human Rights Amis COVID-19 Emergency Public Statement EUR 27/2046/2020*. Published on March 21, 2020, p.3, available on: <https://www.amnesty.org/download/Documents/EUR2720462020ENGLISH.PDF>. Accessed March 31, 2021.

¹¹⁷ Council of Europe. *It is high time for Hungary to restore journalistic and media freedoms Commissioner for Human Rights Country Memorandum*. Published on March 30, 2021, available on: <https://www.coe.int/en/web/commissioner/-/it-is-high-time-for-hungary-to-restore-journalistic-and-media-freedoms>. Accessed March 31, 2021.

¹¹⁸ Megan Cox, "States of Emergency and Human Rights During a Pandemic: A Hungarian Case Study," *Human Rights Brief Volume 24 Issue 1* (2020): p. 33, available on: <https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1956&context=hrbrief/>. Accessed March 30, 2021.

¹¹⁹ Gábor Mészáros, "Carl Schmitt in Hungary: Constitutional Crisis in the Shadow of Covid-19," *MTA Law Working Papers 2020/17* (2020): p. 11, available on: http://real.mtak.hu/121759/1/2020_17_Meszaros.pdf. Accessed March 30, 2021.

¹²⁰ Cox, *supra* note 118.

¹²¹ *Ibid.*

Criminal Code of Hungary – spreading disinformation during the state of danger and the violation of the epidemical confinement.¹²² After the adoption of the bill, the Criminal Code of Hungary was amended correspondingly. Section 337 amends the previous provision and adds criminal penalties for spreading disinformation during the special legal order:

Section 337(1): 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.

(2) 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.¹²³¹²⁴

The introduced amendment prevents the spread of disinformation and as a consequence introduces imprisonment for spreading false information for up to five years. Moreover, the Criminal Code nor the Constitutional Court has not elaborated on the definition of an ‘untrue fact’ or ‘misinterpreted true fact’. The introduced amendments triggered Hungarian civil society organizations and thousands of citizens to protest against the Coronavirus bill. Additionally, the Coronavirus bill received criticism from several international organizations, such as HRW, CoE, EU, and the OSCE.¹²⁵ Moreover, former Italian Prime Minister Matteo Renzi and the former US National Security Advisor Susan Rice raised concern over the membership of Hungary in the EU and called for its withdrawal from the Union, however, no such withdrawal mechanism is possible under the EU law.¹²⁶ It shall be concluded, that following the issue of Decree no. 40/2020, the adopted Coronavirus bill introduced two crimes, from which the criminalisation of spreading the disinformation is of importance for the present thesis. The Criminal Code was amended correspondingly by adding the punishment by imprisonment for spreading untrue facts or misinterpreted true facts. Several international organisations, as well as the Hungarian citizens and civil society organisations expressed their concern over the adoption of the Coronavirus bill, which is to give power to the Prime Minister to rule by decree and limit fundamental human rights. The following subchapter focuses on the analysis on the legality of the limitation to the right of the freedom of expression based on the derogation clause in the ECHR Article 15 and Article 10(2) ECHR.

¹²² Tímea Drinóczi, “Hungarian Abuse of Constitutional Emergency Regimes – Also in the Light of the COVID-19 Crisis,” *MTA Law Working Papers 2020/13* (2020): p. 19, available on: http://real.mtak.hu/121764/1/2020_13_Drinoczi.pdf. Accessed March 30, 2021.

¹²³ Act C of 2012 on the Criminal Code of Hungary (as in force on 31 March 2020), available: https://njt.hu/translated/doc/J2012T0100P_20200331_FIN.PDF. Accessed March 31, 2021.

¹²⁴ András Koltay, “The Punishment of Scaremongering in the Hungarian Legal System. Freedom of Speech in the Times of the COVID-19 Pandemic,” (November 23, 2020): p. 10, available on: SSRN. Accessed March 31, 2021.

¹²⁵ Amnesty International, *supra* note 116.

¹²⁶ Daniel Baer, “The Shocking ‘Coronavirus Coup’ in Hungary Was a Wake-Up Call,” *Foreign Policy* (March 31, 2020), available on: <https://foreignpolicy.com/2020/03/31/viktor-orban-hungary-coronavirus-coup/>. Accessed March 31, 2021.

3.2. Analysis of the Limitation of the Freedom of Expression under Article 15 ECHR and Article 10(2) ECHR

The present subchapter focuses on the analysis of the restriction imposed on the freedom of expression by Hungary through the adoption of the Coronavirus bill. The rationale of the present subchapter is to conclude whether the restriction to the right qualifies as the lawful derogation under Article 15 ECHR and all of the four-step criteria is satisfied: the existence of a public emergency, a restriction is strictly required by the situation, measures imposed are consistent with other international law obligations and Secretary-General was notified about the existence of the derogation.¹²⁷ Moreover, based on the analysis of the subchapter it is concluded whether the limitation to the freedom of expression satisfies the three-step criteria of Article 10(2) if the limitation fails to comply with the Article 15 ECHR test.

3.2.1. Derogation from the Freedom of Expression under Article 15 ECHR

The present subchapter is to analyse the derogation under Article 15 ECHR and draw the conclusion whether the limitation to the freedom of expression introduced in Hungary through the Coronavirus bill is considered a lawful derogation under Article 15 ECHR. The first criteria for the analysis are the existence of a public emergency. According to Article 15 ECHR, there shall be an imminent danger affecting the life of the population. It was concluded that the COVID-19 pandemic satisfies the leading *Greek* case criteria and is to be considered as the ‘state of emergency’. The additional criteria which is linked to the notification requirement to be satisfied is the declaration of the state of emergency via Article 15 ECHR. Decree no. 40/2020 introduced by the Hungarian officials on March 11, 2020, introduces the state of danger on the whole territory of Hungary based on Article 53(1), 53(2), and Article 15(1) of the FL. The state of danger was introduced on the territory of the state as a consequence of the “epidemic endangering the safety and life of the Hungarian citizens”.¹²⁸ However, such declaration of the state of emergency is considered lawful only by the constitutional provisions of the state. The informal requirement to introduce the state of emergency under Article 15 ECHR has not been satisfied. The official declaration of the state of emergency under the derogation clause in the ECHR is supposed to prevent the exercise of emergency powers in times of normalcy. Formally, the requirement prescribed in Article 15(1) is satisfied as the COVID-19 situation in Hungary meets the requirements of the *Greek* case criteria, being, the pandemic is considered to be an actual and imminent danger, pandemic involves the whole population of Hungary, organised life of the community is threatened as the virus is spreading through the population, and lastly, the COVID-19 in Hungary is an exceptional danger and the state is limiting the rights to protect public health and public order.¹²⁹ Therefore, formally the requirement prescribed in Article 15(1) ECHR and the ECtHR interpretation of the Article in the leading *Greek* case, satisfies the requirement of the existence of the public emergency.

The second requirement under the derogation clause in the ECHR is that the derogation shall be strictly required by the situation, where the ECtHR prescribes the proportionality and the necessity test. Freedom of expression is not an absolute right from

¹²⁷ European Court of Human Rights, *supra* note 71.

¹²⁸ Hungary. Government Decree 40/2020 (III. 11.) on the Declaration of State of Danger (March 11, 2020), available on: [https://ils.hu/storage/covid-19/en/Government%20Decree%2040-2020%20\(III.11.\)%20State%20of%20Danger.pdf](https://ils.hu/storage/covid-19/en/Government%20Decree%2040-2020%20(III.11.)%20State%20of%20Danger.pdf). Accessed April 7, 2021.

¹²⁹ *Denmark, Norway, Sweden and the Netherlands v. Greece*, *supra* note 48.

which derogations are possible. On March 26, 2020, in the statement to Parliament, Victor Orbán stated that the limitations and the governmental decrees are to protect the lives of Hungarians and not to repeat the scenario of Italy, therefore, the restrictions imposed are in the public interest and the interest of public health.¹³⁰ According to the ECtHR interpretation of Article 15 ECHR, derogation shall be necessary to avert the present emergency.¹³¹ According to Orbán, spreading fake news is regarded as not being in the interest of the general public.¹³² In the view of the ECtHR, measures introduced by the state shall be considered as the genuine response to the emergency.¹³³¹³⁴ Limitation to the freedom of expression introduced in the Coronavirus bill and further translated into the Criminal Code must not be considered as a genuine response to the emergency, as according to the officials of the CoE, such as Patrick Penninckx, the Head of the information society at the CoE, crisis shall not be considered as an excuse to limit the freedom of expression. Moreover, in the view of the organisation as opposed to the view of Victor Orbán, access to information and media freedom serve the public interest.¹³⁵ Moreover, according to the Guidelines of the Committee of Ministers of the Council of Europe on protecting freedom of expression and information in times of crisis adopted in 2007, free access to information shall be ensured for the effective resolving of the crisis.¹³⁶ Besides, in *Fatullayev v. Azerbaijan*¹³⁷, the Court held that the media has a vital role to serve in the interest of the public in the democratic society. In the view of the Court, press officials may only be sentenced to prison in exceptional circumstances, where they breach other fundamental rights prescribed by the Convention impaired with the hate speech or violence¹³⁸, therefore, the imprisonment of both media representatives and citizens for publishing an untrue fact or misinterpreted true fact must be conserved not to be in line with the reasoning of the Court. The Court held that the disturbing and shocking information must be covered by the freedom of expression.¹³⁹ Based on the reasoning of the officials of the CoE freedom of expression shall be secured during the crisis as it serves for the protection of public interest. According to the reasoning of the Court in *Fatullayev v. Azerbaijan*, imprisonment of media representatives shall be considered as the last resort in the case of the severe crime. Thus, the requirement for the state to impose derogations that are strictly required by the situation is not fulfilled by Hungary in the case of the adoption of the Coronavirus Bill as cannot be considered necessary nor proportionate.

The third requirement to be fulfilled by Hungary is that measures imposed by the state shall be consistent with other international obligations. Being a state party to the ICCPR since

¹³⁰ Prime Minister Viktor Orbán's statement in Parliament, responding to reactions to his address before the start of daily business, (March 26, 2020), available on: <https://perma.cc/JKE3-WKYY>. Accessed April 7, 2021.

¹³¹ European Court of Human Rights, *supra* note 71, p. 7.

¹³² *Supra* note 130.

¹³³ European Court of Human Rights, *supra* note 71, p. 8.

¹³⁴ *Brannigan and McBride v. United Kingdom*, *supra* note 64, para. 51.

¹³⁵ Penninckx, *supra* note 2.

¹³⁶ Council of Europe. *Guidelines of the Committee of Ministers of the Council of Europe on protecting freedom of expression and information in times of crisis*. Published on 26 September 2007, available on: https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805ae60e. Accessed April 7, 2021.

¹³⁷ *Fatullayev v. Azerbaijan*, App. No. 40984/07, 4th April 2010, European Court of Human Rights [ECHR].

¹³⁸ European Court of Human Rights. *Press release issued by the Registrar Chamber Judgment in Fatullayev v Azerbaijan*. Published on April 22, 2010, available on: <https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-3098666-3440142&filename=003-3098666-3440142.pdf>. Accessed April 7, 2021.

¹³⁹ Voorhoof, *supra* note 98.

1974, Hungary shall uphold its international obligations drafted in the ICCPR.¹⁴⁰ The right to freedom of expression is protected under Article 19 ICCPR. Freedom shall include the protection to receive and seek information of all kinds however, may be restricted for the protection of national security, order, health, or morals. Article 4 ICCPR prescribes the derogation procedure from the rights prescribed in the ICCPR which similarly prescribes the derogation requirement to notify the parties to the ICCPR and the Secretary-General of the UN about the derogation.¹⁴¹ Based on the UN Depository Notifications since 30 March 2020, 23 states notified the Secretary-General of the UN about the derogations from the ICCPR.¹⁴² Hungary has not notified the Secretary-General of the UN about the derogations. For the present thesis, Hungary has not made its notification from the derogation of Article 19 freedom of expression. Therefore, Hungary has not fulfilled the third requirement for the valid derogation under Article 15 ECHR as the measures imposed by the state – the adoption of the Coronavirus Bill – is not consistent with the ICCPR.

The fourth requirement under the Article 15 ECHR is the notification requirement. According to Article 15(3) ECHR, derogating state shall immediately inform the Secretary-General and the Constricting States to the Convention about the derogation.¹⁴³ Based on the reasoning of the Court for the notification requirement to be satisfied the notification shall be made without unavoidable delay. In the *Greek* case, the ECtHR concluded that the notification after three months of the derogation constitutes an unavoidable delay.¹⁴⁴ Based on the data from April 7, 2021,¹⁴⁵ Hungary not made a notification to the Secretary-General, therefore as more than a year passed from the adoption of the Coronavirus Bill, in case if Hungary is to make a derogation on the issue, that would constitute an unavoidable delay and the fourth requirement under Article 15 ECHR is not satisfied.

Based on the analysis of the present subchapter, formally Hungary satisfied the first derogation requirement on the existence of the public emergency, as the COVID-19 situation in the state proved to satisfy the four-step criteria of the leading *Greek* case. The second criteria have not been satisfied by the state as the derogation from the freedom of expression proved not to be strictly required by the situation and failed to satisfy the necessity and proportionality test, because based on the statements of the officials during the crisis freedom of expression shall not be limited as it is considered to solve the public interest, moreover, according to the *Fatullayev v Azerbaijan* case imprisonment of journalists shall be the last resort if they had breached also other fundamental rights impaired with hate speech or violence. The third requirement is not satisfied as Hungary breached the ICCPR by restricting the freedom of expression under Article 19 ICCPR and the failure to derogate from the articles in the ICCPR under Article 4, therefore, failed to uphold its other international commitments. Lastly, the fourth criteria under Article 15 ECHR are not satisfied due to the unavoidable delay of more than one year to notify the Secretary-General about the derogation. The delay of one year constitutes a delay, which is considered as a failure to fulfil the

¹⁴⁰ United Nations. *Status of Treaties. International Covenant on Civil and Political Rights 1976*. Available on: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=en. Accessed April 7, 2021.

¹⁴¹ International Covenant on Civil and Political Rights (23 March 1976), available on: <https://www.ohchr.org/documents/professionalinterest/ccpr.pdf>. Accessed April 7, 2021.

¹⁴² United Nations Treaty Collection. *Depository Notifications (CNs) by the Secretary-General*. Available on: <https://treaties.un.org/Pages/CNs.aspx?cnTab=tab2&clang=en>. Accessed April 7, 2021.

¹⁴³ Council of Europe, *supra* note 33.

¹⁴⁴ El Zeidy, *supra* note 39, p. 281.

¹⁴⁵ Council of Europe, *supra* note 68.

requirement. Therefore, derogation from the freedom of expression – through the adoption of the Coronavirus Bill and the law to imprison those publishing untrue facts or misinterpreted true facts – does not constitute the lawful derogation under Article 15 ECHR. The further subchapter analyses the limitation to the freedom of expression under the Article 10(2) ECHR three-step criteria to conclude whether the limitation to the right was lawful.

3.2.2. Limitation to the Freedom of Expression under Article 10(2) ECHR

According to the limitation procedure under Article 10(2) ECHR, for the lawful limitation to the right the three-step criteria shall be satisfied, being the limitation shall be prescribed by law, one of the interests prescribed under Article 10(2) shall be protected, the limitation shall be necessary for a democratic society. The first requirement was satisfied by Hungary as Hungary prescribed the limitations to the freedom of expression in the Coronavirus Bill which was adopted on March 30, 2020, and entered into force on April 1, 2020. However, in *Bayev and Others v. Russia*, the ECtHR held that not merely the existence of the law is assessed but also the quality of the law and its compatibility with equality, rule of law, and other principles on which the democratic society shall be made.¹⁴⁶ Moreover, foreseeability requires to be satisfied. However, the lack of clarification of the terms ‘untrue facts’ or ‘misinterpreted true facts’ by the Constitutional Court does not satisfy the foreseeability requirement. Therefore, formally the ‘prescribed by law’ requirement is satisfied; however, it is to assess by the Court whether the law is compatible with the rule of law, equality, and transparency principles.

Secondly, for the limitation to be lawful under Article 10(2) ECHR, the state may limit the right to ensure the protection of certain principles such as national security, public order, protection of health, and others.¹⁴⁷ According to Orbán, the spreading of fake news goes against the protection of public order and the protection of health, therefore limitation to the freedom of expression during the imposed state of emergency is justified to limit the spread of the virus.¹⁴⁸ The overall intention to spread the virus through the adoption of the measures to combat coronavirus, such as restrictions on public gatherings, quarantine shall be considered as protecting the public health and security, however, the decree to imprison for the publication of untrue facts or misinterpreted true facts for up to 5 years are not.

The analysis of the second requirement is to be linked with the third requirement for the limitation to be lawful under Article 10(2) ECHR, which prescribes the limitation to be necessary for a democratic society. Freedom of expression forms the basis for a democratic society especially in times of crisis. In the CoE guidance about the actions of the states during the pandemic, the organization stressed that the most effective response shall be the constant and transparent communication of the part of the government, which is to improve trust between citizens and the government, which consequently is to reduce the impact of fake news on the public opinion. States shall not introduce vague bans on ‘misinformation’ or information to create panic’. Moreover, it is considered that there shall be no justification for censorship on certain topics on media communication platforms.¹⁴⁹ The protection afforded under Article 10 ECHR covers a wide scope of information including misinformation,

¹⁴⁶ Council of Europe and European Court of Human Rights, *supra* note 81.

¹⁴⁷ Mendel, *supra* note 77, p. 38.

¹⁴⁸ *Supra* note 130.

¹⁴⁹ Council of Europe. *COVID-19 and media freedom – guidance based on the Council of Europe standards*. Available on: <https://rm.coe.int/en-mitigating-a-global-health-crisis-while-maintaining-freedom-of-expr/16809e2d1e>. Accessed April 8, 2021.

shocking information, value judgments, and opinions.¹⁵⁰ With regards to the severity of the sanctions imposed on journalists, the ECtHR held that the penalty shall not amount to such censorship that would result in discouraging the press from the fulfilment of their duties.¹⁵¹ Therefore, such harsh restrictions on the freedom of expression and the media freedom introduced by Hungary restrict the freedom which is considered to form the basis of democracy as the wide protection is granted also to opinions, misinformation, and other types of information. Government shall restrain to introduce severe restrictions as those would undermine the willingness of the citizens and media representatives to pursue their duties.

To conclude, the provisions introduced in the Coronavirus Bill to sentence for publication of untrue facts or misinterpreted true facts for up to five years in prison is considered not compatible with the second and the third requirement introduced in Article 10(2) ECHR test, thus, the limitation to the freedom introduced by Hungarian officials shall not for the valid limitation. The present cases of the limitation of the right include the detention of two men for the social media posed criticising the government, one of which was the member of the Hungarian Momentum Party Janos Csoka-Szucs, member of the ruling Orbán's party.¹⁵² To conclude, Hungary failed to prove the lawfulness of the derogation from the freedom of expression under Article 15 ECHR by formally meeting just one of the four-step criteria test, the existence of a public emergency. According to Article 10(2) ECHR three-step criteria, Hungary failed to satisfy two criteria. The limitation has not served to protect interests, such as public order or the protection of health as on the opposite the freedom of expression and the media shall not be restricted to protect public order and the information provided by journalists is to foster the communication about the updates about the virus. Moreover, limitation is not necessary for a democratic society as the introduced harsh penalties and the vague wording of the provisions adopted to restrict the freedom and discourages citizens to publish their opinions and journalists to pursue their job. Based on the analysis provided in the present chapter, the ECtHR shall fulfil its mandate and rule on the action of Hungary to unlawfully limit the freedom of expression.¹⁵³ The organization is to provide guidance and assistance to the state to restore the favourable environment for human rights and fundamental freedoms. Based on the conclusion of the chapter that Hungary failed to derogate under the Article 15 ECHR procedure and failed to comply with the tree-step test under Article 10(2) ECHR, it is likely that several cases are to be pending before the ECHR in the upcoming years. The next chapter will provide an analysis of the case-study on the limitation to the freedom of expression based on the derogation clause Article 15 ECHR and Article 10(2) ECHR in Turkey during the COVID-19 pandemic.

¹⁵⁰ Tarlach McGonagle, "'Fake News': False fears or real concerns?" *Netherlands Quarterly of Human Rights* 35(4) (2017): p. 208, available on: https://pure.uva.nl/ws/files/19892347/Fake_News.pdf. Accessed April 8, 2021. Doi: <https://doi.org/10.1177/0924051917738685>.

¹⁵¹ Council of Europe and European Court of Human Rights, *supra* note 81, p. 23.

¹⁵² Cox, *supra* note 118, p. 40.

¹⁵³ *Ibid.*

4. EXAMINATION OF THE LIMITATIONS TO THE FREEDOM OF EXPRESSION DURING THE COVID-19 PANDEMIC: CASE-STUDY ON TURKEY

The main focus of the fourth chapter is on the analysis of the case on the limitation to the freedom of expression in Turkey during the COVID-19 pandemic. The main rationale of the chapter is to provide an in-depth analysis of the case based on the four-step criteria for the derogation to qualify as lawful under ECHR, moreover, it is to analyse whether the restriction introduced by Turkey in the amendment to the Social Media Law conforms with the three-step criteria under Article 10(2) ECHR.

Since 2019, the Turkish parliament started actively blocking the content on the internet and placed it under the review of the High Council for Broadcasting. According to the Freedom House, Internet freedom is also considered as ‘not free’.¹⁵⁴ The CoE Commissioner Dunja Mijatović concluded that the restrictions to the freedom of expression which been introduced on the Internet shall not be considered necessary in a democratic society. Mijatović stressed that Turkish authorities on several occasions resorted from the values and their obligations under ECHR, which in the view of the Commissioner is completely unacceptable.¹⁵⁵ However, despite the decline in human rights protection in Turkey and the criticism from international organisations, such as the UN, OSCE, CoE, on March 2, 2021, President of Turkey Recep Tayyip Erdogan announced the Human Rights Action Plan initiative to be implemented in two years. According to Erdogan, the country will continue to protect the lives, dignity, and value of people. Moreover, one of the listed priorities in the action plan includes the right to express the views or criticism not violating the personality rights of others.¹⁵⁶ This initiative is to be considered as a positive sign for change in the protection of human rights in Turkey, however, on the other side, the amendments introduced to Social Media Law previously is pursuing the feeling of the absence of change in the future based on the authoritarian rule of Erdogan. The next subchapter will focus on the contents of the amendments introduced to the Social Media Law on July 29 of 2020, which are to be analysed in the further subchapter based on the criteria of Article 15 ECHR and Article 10(2) ECHR.

4.1. Background Information of the Case

The present subchapter aims to analyse the contents of the amendments introduced on July 27 in 2020 in the Social Media Law and its impact on the freedom of expression. The rationale of the subchapter is to provide a factual analysis of the situation for the analysis on the further subchapters. The amendments are to be analysed based on the criteria for the valid derogation under Article 15 ECHR and Article 10(2) ECHR.

¹⁵⁴ Turkey: Freedom in the World 2021, *Freedom House* (2021), available on: <https://freedomhouse.org/country/turkey/freedom-world/2021>. Accessed April 13, 2021..

¹⁵⁵ Council of Europe. *Commissioner publishes observations on internet blocking in Turkey*. Published on November 25, 2019. Available on: <https://www.coe.int/en/web/commissioner/-/commissioner-publishes-observations-on-internet-blocking-in-turkey>. Accessed April 13, 2021.

¹⁵⁶ Havva Kara Aydin, “New human rights plan for the people: Turkish leader President Recep Tayyip Erdogan announces ground-breaking Human Rights Action Plan, set to be implemented over 2-year period,” *Anadolu Agency* (March 2, 2021), available on: <https://www.aa.com.tr/en/politics/new-human-rights-plan-for-the-people-turkish-leader/2162111>. Accessed April 13, 2021.

Despite the advice from the international organizations to which Turkey is a member state, authorities used emergency powers to adopt amendments to the Social Media Law No. 5651. Despite WHO declared a ‘public health emergency of international concern’ on January 30, 2020, Turkey has not introduced a national emergency. Turkey activated preparedness plans to fight the pandemic.¹⁵⁷ Despite the call to secure human rights during the COVID-19 pandemic, the Turkish government used the pandemic to pursue the needed policies. First, the amendments were introduced in the April bill on combating COVID-19, however, was after withdrawn.¹⁵⁸ On 21 July 2020, Justice and Development Party, the governing party in Turkey, proposed an amendment to the Social Media Law. The purpose of the amendments is to tighten state control over social media platforms, concerning platforms with more than 1 million daily users. After the proposal was made, on 29 July 2020, the Turkish Parliament passed a law giving authorities more control over social media.¹⁵⁹ The introduced amendments require companies to have representatives in Turkey and in case of non-compliance with the requirement to introduce sanctions that limit the freedom of expression.¹⁶⁰ Based on the CoE database on media freedom alerts, the organisation labelled the introduced amendments in Turkey as a ‘Level 2’ alert, meaning the amendments introduced are considered as a serious threat to media freedom, restrict access to information, and constitute disproportionate legislation. Turkey has not responded to the alert of the organisation yet.¹⁶¹ For the present thesis, amendments introduced to Article 9 of Social Media Law are to be analysed.

According to the amendment to Article 9, foreign-based social media network providers with more than one million daily users are to appoint social media representatives in Turkey.¹⁶² For non-fulfilment of the obligation, the first sanction for non-compliance is an administrative fine of ten million Turkish liras, and as the last resort, after the Court issued an advertisement ban after three months of non-compliance, the Court may rule to deduct the traffic bandwidth by ninety per-cent, which will result in almost blocking the social media platform in the country.¹⁶³ President Recep Tayyip Erdoğan in July 2020 said that media platforms shall be under constant control and are to be brought into order. Moreover, as the President noted social media platforms do not suit the country nor the people, therefore shall

¹⁵⁷ Bekir Keskinliç, Irshad Shaikh, Ahmet Tekin, Pavel Ursu, Emine Alp Meşe, “Turkey’s response to covid-19: first impressions,” *Copenhagen: WHO Regional Office for Europe* (July, 2020): p. 6, available on: <https://apps.who.int/iris/bitstream/handle/10665/335803/WHO-EURO-2020-1168-40914-55408-eng.pdf>.

Accessed April 14, 2021.

¹⁵⁸ Human Rights Watch. *Turkey: Social Media Law Will Increase Censorship: Parliament Should Reject it; Social Media Firms Should Oppose It*. Published on July 27, 2020. Available on: <https://www.hrw.org/news/2020/07/27/turkey-social-media-law-will-increase-censorship>. Accessed April 14, 2021.

¹⁵⁹ Council of Europe. *Turkey Proposes Social Media Law, Threatening Press Freedom*. Published on 27 July, 2020. Available on: https://www.coe.int/en/web/media-freedom/detail-alert?p_p_id=sojdashboard_WAR_coesojportlet&p_p_lifecycle=0&p_p_col_id=column-2&p_p_col_pos=4&p_p_col_count=9&sojdashboard_WAR_coesojportlet_alertPK=69502351. Accessed April 14, 2021.

¹⁶⁰ *Ibid.*

¹⁶¹ Human Rights Watch, *supra* note 158.

¹⁶² Herdem Attorneys at Law, “New Obligations for Social Media Platforms in Turkey,” *Lexology* (4 August, 2020), available on: <https://www.lexology.com/library/detail.aspx?g=f54fb6e9-7a83-4209-89c4-824a9a2c2719>. Accessed April 14, 2021.

¹⁶³ İlay Yılmaz, “Social Media Related Amendments to the Internet Law,” *Esin Attorney Partnership* (31 July, 2020), available on: <https://www.esin.av.tr/2020/07/31/social-media-related-amendments-to-the-internet-law/>. Accessed April 14, 2021.

be controlled.¹⁶⁴ The CoE Commissioner for Human Rights on her Twitter account announced that the Social Media Law is incompatible with the CoE standards, therefore, the introduced amendments will make the legal framework even worse. According to the Commissioner, the government shall withdraw the introduced amendments.¹⁶⁵ Twenty non-governmental human rights organisations, such as Reporters Without Borders, HRW, International Press Institute, etc., in the open letter to the President of the European Council and the European Commission, expressed their concern about the human rights situation in Turkey and the lack of protection of the freedom of expression. Organisations urged the EU to reconsider the bilateral relations with Turkey and send a strong message with regards to the human rights violations in the state.¹⁶⁶ To conclude, 29 July 2020 amendments introduced amendments to the Social Media Law are introducing a requirement for the foreign social media platforms to have the local representation in Turkey, and in case of non-compliance and after several sanctions introduced the traffic of the platform might be deducted up to 90% which will result in the shutdown of the platform. CoE Commissioner expressed its concern over the adoption of the amendments and forced the Turkish Government to remove the legislative act which goes against the values of the CoE. The further subchapter will focus on the analysis of the introduced amendment to Article 9 of the Social Media Law based on the four-step Article 15 ECHR criteria for the derogation and three-step criteria in the Article 10(2) ECHR.

4.2. Analysis of the Limitation of the Freedom of Expression under Article 15 ECHR and Article 10(2) ECHR

The focus of the present subchapter is on the analysis of the limitation to the freedom of expression introduced by Turkey through the amendments to the Social Media Law in July 2020. The subchapter is to provide an in-depth analysis of the limitation to freedom from the four-step derogation criteria under Article 15 ECHR and the three-step criteria for the limitation under Article 10(2) ECHR. The further subchapter is to provide an analysis based on the derogation clause criteria: the existence of a public emergency, a restriction is strictly required by the situation, measures imposed are consistent with other international law obligations and Secretary-General was notified about the existence of the derogation.¹⁶⁷ The analysis is to provide an understanding of whether the derogation or the limitation is considered lawful under ECHR.

4.2.1. Derogation from the Freedom of Expression under Article 15 ECHR

The present subchapter is to analyse the amendments introduced to the Social Media Law as a derogation from the freedom of expression under the four-step criteria under Article 15 ECHR. The first criteria for the analysis are the existence of the public emergency. As concluded in the second Chapter of the present thesis, the COVID-19 pandemic classifies as an emergency under the *Lawless* case definition of ‘public emergency’ and the criteria under

¹⁶⁴ Committee to Protect Journalists. *Turkey proposes social media law, threatening press freedom*. Published on 23 July, 2020. Available on: <https://cpj.org/?p=48320>. Accessed April 14, 2021.

¹⁶⁵ Dunja Mijatović, Commissioner for Human Rights, Twitter Post, July 22, 2020, available on: <https://twitter.com/CommissionerHR/status/1285950390140272642>. Accessed April 14, 2021.

¹⁶⁶ Article 19. *Turkey: Open letter to the Presidents of the European Council and the European Commission ahead of their visit to Turkey*. Published on April 1, 2021. Available on: <https://www.article19.org/resources/turkey-open-letter-to-eu/>. Accessed April 14, 2021.

¹⁶⁷ European Court of Human Rights, *supra* note 71.

the *Greek* case. COVID-19 pandemic is considered as an imminent and actual threat, an emergency involves the whole population¹⁶⁸, knowing that the disease is spreading rapidly and might involve the whole population of the country. Thirdly, the organised life of the community is threatened as several restrictions have been imposed and announced on March 12, 2020. Presidential Spokesperson Kalin on March 12, 2020, announced the closure of schools, restrictions on public gatherings, and other travel restrictions.¹⁶⁹ Therefore, the organised life of the community was threatened based on the numerous restrictions introduced in different sectors. Lastly, the danger is considered an exception, and measures introduced are to maintain public order, health, or safety.¹⁷⁰ COVID-19 pandemic is regarded as an exceptional danger, however, the limitation introduced to the freedom of expression through the Social Media Law amendment to impose financial sanctions and as the last resort to deduct the traffic bandwidth by ninety percent in case of non-compliance with the requirement to have the representation of the social media platform in Turkey is not considered to maintain public order, health or safety.

The analysis of the last criteria under the *Greek* case is to be analysed with the criteria ‘strictly required by the exigencies of the situation’. Presidential Spokesperson Kalin expressed his view over the impact of panic during the pandemic, which can cause more harm to the people than the virus.¹⁷¹ Therefore, according to Kalin what is to be fought is the panic, which in the view of the Turkish government is social media. However, access to information, which also can be accessed through social media platforms, is crucial to exercise the right to access information, especially during a crisis.¹⁷² In the *Delfi AS v Estonia*,¹⁷³ the Grand Chamber concluded that user-generated activity on the Internet to a certain platform is considered to be covered by Article 10 ECHR, therefore, such platforms provide the exercise of the freedom of expression. Moreover, such platforms enhance access to information and foster the emergence of citizen journalism.¹⁷⁴ David Kaye, Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression in the UN Human Rights Office, urged the states not to shut down the Internet and create any other limitation, as for the effective response to the COVID-19 pandemic governments are to create trust with the citizens by publishing daily news and providing press conferences about the developments. Otherwise, the criminalisation of infodemic or the other sanctions introduced to the Internet is to disincentivise citizens to trust the government.¹⁷⁵ Moreover, based on the reasoning of the ECtHR in the *Ireland v. the United Kingdom*¹⁷⁶, the derogation imposed shall attempt to overcome the emergency in the state and this is to be review by the ECtHR whether the

¹⁶⁸ *Greek case*, *supra* note 48.

¹⁶⁹ Presidency of the Republic of Turkey. Presidential Spokesperson Kalin: “We have the capability to get through the fight against coronavirus without any panic or complacency”, Presidency of the Republic of Turkey (12 March, 2020), available on: <https://www.tccb.gov.tr/en/news/542/117023/presidential-spokesperson-kalin-we-have-the-capability-to-get-through-the-fight-against-coronavirus-without-any-panic-or-complacency->. Accessed April 19, 2021.

¹⁷⁰ *Greek case*, *supra* note 48.

¹⁷¹ *Supra* note 169.

¹⁷² Noorlander, *supra* note 17, p. 7.

¹⁷³ *Delfi AS v. Estonia*, App. No. 64569/09, 16 June 2015, European Court of Human Rights (ECHR).

¹⁷⁴ Council of Europe and European Court of Human Rights, *supra* note 81, p. 106.

¹⁷⁵ David Kaye, “COVID-19 pandemic exposes repression of free expression and right to information worldwide,” *United Nations Human Rights Office of the High Commissioner* (10 July 2020), available on: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26075&LangID=E>. Accessed July 19, 2021.

¹⁷⁶ *Ireland v. the United Kingdom*, App. No. 5310/71, Council of Europe: European Court of Human Rights, 13 December 1977.

already existing laws have not been sufficient to meet the danger caused by an emergency.¹⁷⁷¹⁷⁸ The requirement to have the social media outlet representation in Turkey which otherwise can result in the shut-down of the platform is not to be considered as a necessary limitation to the right as it does not serve a purpose to combat the pandemic and protect the right to health, public order, etc. Moreover, according to Dunja Mijatović, Social Media Law before the amendments already constituted a threat to the values of the CoE, therefore, the introduced amendments make the situation deteriorate and prove the amendments not required by the situation and shall not be considered as proportionate to the present situation. Therefore, the amendment does not satisfy the fourth criteria of the *Greek* case – the amendment is not introduced to maintain public order, health, or safety. Thus, the amendments introduced do not satisfy the first criteria on the existence of public emergency in full and do not satisfy the criteria on the strict requirement of the amendments during the pandemic.

The third requirement under Article 15 ECHR prescribes that derogation shall be consistent with other international obligations of the state. Turkey ratified the ICCPR in 2003, therefore shall comply with the obligations imposed by the Convention.¹⁷⁹ Under Article 19 ICCPR states shall secure the right to the freedom of expression. The UN Human Rights Committee clarified that Article 19 ICCPR extends also to the ‘electronic and internet-based modes of expression’. Moreover, as the internet is considered as the global network for information exchange, states shall ensure their such services function independently and be accessible.¹⁸⁰ Article 4 ICCPR prescribes the derogation procedure from the rights prescribed in the ICCPR which similarly prescribes the derogation requirement to notify the parties to the ICCPR and the Secretary-General of the UN about the derogation.¹⁸¹ Based on the UN Depository Notifications since 30 March 2020, 23 states notified the Secretary-General of the UN about the derogations from the ICCPR.¹⁸² Turkey has not notified the Secretary-General about the derogation from the freedom of expression, therefore, the third criteria under Article 15 ECHR are not satisfied. Lastly, the fourth criteria are the notification requirement. Under the requirement, derogating state shall notify the Secretary-General of the organisation and the state parties without any ‘unavoidable delay’.¹⁸³ In the *Lawless* case, the ECtHR concluded that 12-day delay is not regarded as an unavoidable delay, however, in the *Greek* case, the ECtHR concluded that the notification after three months of the derogation constitutes an unavoidable delay and shall not be considered to satisfy the notification requirement under the Article 15(3) ECHR.¹⁸⁴ Based on the information of April 19, 2021, Turkey has not presented its notification about derogation to the Secretary-General.¹⁸⁵ Therefore, as almost 9 months passed since the amendments were introduced, nine months shall be considered an unavoidable delay, thus, Turkey fails to meet the notification requirement.

¹⁷⁷ European Court of Human Rights, *supra* note 71, p. 8.

¹⁷⁸ *Ireland v. the United Kingdom*, *supra* note 176, para 212.

¹⁷⁹ United Nations, *supra* note 140.

¹⁸⁰ The International Commission of Jurists. *Wikimedia Foundation, Inc. v. Turkey*, Application no. 25479/19 *Intervention*. Published on 22 November 2019. Available on: https://www.icj.org/wp-content/uploads/2020/01/Europe-Wikimedia-v-Turkey_TPI-Advocacy-Legal-submissions-2020-ENG-.pdf. Accessed April 19, 2021.

¹⁸¹ International Covenant on Civil and Political Rights, *supra* note 141.

¹⁸² United Nations Treaty Collection, *supra* note 142.

¹⁸³ European Court of Human Rights, *supra* note 71, p. 12.

¹⁸⁴ *El Zeidy*, *supra* note 39, p. 281.

¹⁸⁵ Council of Europe, *supra* note 68.

Turkey failed to meet all of the derogation requirements under Article 15 ECHR. Turkey failed to fully comply with the first criteria the existence of the public emergency and the fourth criteria for the ‘public emergency’ according to the *Greek* case as concluded measures introduced are not to protect public health, order, and safety during the pandemic. Secondly, the amendments to the Social Media Law failed to comply with the second requirement as the amendments are considered not strictly required in the present situation during the pandemic. Amendments to the Social Media Law on the contrary during the crisis social media serve as a tool for both expressing views and opinions and also to gather all necessary information and updates about the pandemic. The third criteria have also been not satisfied as Turkey being the member state of the ICCPR failed to comply with the Article 4 ICCPR derogation procedure and failed to secure freedom of expression under Article 19 ICCPR. Lastly, as the amendments were introduced nine months ago, the nine months is recognized as an unavoidable delay, therefore, the notification criteria are not satisfied. Based on the analysis in the present subchapter, the derogation from the freedom of expression through the adoption of the amendments to the Social Media Law does not constitute a lawful derogation under ECHR. The next subchapter is to analyse the limitation to the freedom of expression through the amendment to the Social Media Law based on the Article 10(2) three-step criteria.

4.2.2. Limitation to the Freedom of Expression under Article 10(2) ECHR

The present subchapter is to analyse the legality of the limitation introduced to the freedom of expression through the amendments to the Social Media Law during the COVID-19 pandemic. The analysis is based on the three-step criteria: prescribed by law, protection of interests under Article 10(2) ECHR and is ‘necessary in a democratic society’. Based on the analysis provided in the subchapter it is to conclude whether the limitation to the right is compatible with Article 10 ECHR.

The first criteria which outlines that limitation to the right is to be prescribed by law is satisfied by Turkey. On July 29, 2020, the Turkish Parliament passed the new amendments, which after publication in the Official Gazette entered into force on July 31, 2020.¹⁸⁶ However, it is for the Court to decide whether the quality of law satisfies the criteria. The second criteria under Article 10(2) ECHR is considered satisfied is the limitations introduced to the freedom aim to protect outlined interests of the state. Limitations shall pursue a legitimate aim, such as national security, protection of health, public safety, etc.¹⁸⁷ According to Erdogan, social media platforms such as YouTube, Twitter, Facebook, etc. eradicate immorality and in the lack of monitoring such platforms, the public security in Turkey could be endangered.¹⁸⁸ However, in *Handyside v the United Kingdom* and in the Explanatory Memorandum of the CoE Steering Committee on Media and Information Society, it is outlined that freedom of expression applies to information and ideas which might offend, shock, or disturb.¹⁸⁹¹⁹⁰ Moreover, the purpose of the amendment to decrease the bandwidth of

¹⁸⁶ Özlem Akay and Cankat Sir, “Turkey's New Regulation On Social Media; Social Network Provider, Content Extraction, Representation And More,” *Mondaq* (3 February, 2021), available on: <https://www.mondaq.com/turkey/social-media/1024302/turkey39s-new-regulation-on-social-media-social-network-provider-content-extraction-representation-and-more>. Accessed April 21, 2021.

¹⁸⁷ Mendel, *supra* note 77, p. 38.

¹⁸⁸ Al Jazeera, “Turkey: Erdogan vows social media controls over insults to family,” Al Jazeera News Agency (July, 2020), available on: <https://www.aljazeera.com/news/2020/7/1/turkey-erdogan-vows-social-media-controls-over-insults-to-family>. Accessed April 21, 2021.

¹⁸⁹ *Handyside v. the United Kingdom*, *supra* note 59, para 49.

the platform to up to ninety percent concerns the use of it in its entirety, which concerns information and ideas both disturbing, shocking, and not which is published on the platform. Thus, the introduced sanction for non-compliance with the obligation to have a social media platform representation in Turkey concerns both the right to receive information and the right to express an opinion. Protection of interests under Article 10(2) ECHR are not compatible with the sanctions imposed to the non-compliance with the obligations to have the platform representation in Turkey. The requirement itself does not provide any ground for the protection of the interests outlined in the article, therefore, the second-criteria of the Article 10(2) ECHR test is not satisfied.

The third criteria under the Article 10(2) ECHR test prescribed the limitation to be ‘necessary in a democratic society’. According to the ECtHR freedom of expression forms, the basis for the democratic society and the limitations introduced shall be compatible with the test introduced by the Court to limit the margin of appreciation of the Contracting States.¹⁹¹ It is considered that there shall be no justification for censorship on certain topics on media communication platforms.¹⁹² In *Wikimedia Foundation, INC. v Turkey*¹⁹³, the Turkish Constitutional Court concluded that blocking the free, multilingual encyclopaedia Wikipedia violated the freedom of expression, which is guaranteed in the Turkish Constitution and ECHR. The Constitutional Court concluded that the ban has to refer to the pressing social need.¹⁹⁴ Moreover, the Constitutional Court concluded that the ban on the website constitutes the violation of the right of the portal to impart information and the right to access information for the users of the platform.¹⁹⁵ Therefore, the decrease in the bandwidth up to ninety percent which is to ban access to the platform, constitute a disproportionate restriction of the freedom of expression for both the platform and the users. Amendments adopted during the COVID-19 pandemic worsen the situation as international organisations on the protection of human rights, such as the UN, CoE, EU, expressed their concerns over the restrictions imposed on the freedom of expression during the pandemic. Moreover, according to the Guidelines of the Committee of Ministers of the CoE on protecting freedom of expression and information in times of crisis adopted in 2007, free access to information is to be ensured for the effective communication of crisis.¹⁹⁶ Therefore, no additional restrictions not aiming to protect public health or other interests under Article 10(2) ECHR during the pandemic shall be considered as proportionate and necessary.

The pandemic was considered as a pre-text for the Turkish Government to introduced restrictions to the freedom of expression. Based on the analysis of the Constitutional Court of Turkey in the case *Wikimedia Foundation, INC. v Turkey*, a complete ban of the website is limiting the right and is considered disproportionate. Therefore, the decrease in the bandwidth

¹⁹⁰ Steering Committee on Media and Information Society (CDMSI). *Recommendation CM/Rec(2014)6 of the Committee of Ministers to member States on a guide to human rights for Internet users – Explanatory Memorandum*, CM/Rec(2014)6 (16 April, 2014), available on: https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805c6f85#_ftn23. Accessed April 21, 2021.

¹⁹¹ Mendel, *supra* note 77, p.2.

¹⁹² Council of Europe, *supra* note 149.

¹⁹³ *Wikimedia Foundation, INC. v. Turkey*, Case No. 2017/22355, no. 26.12.2019, Constitutional Court of Turkey (2019).

¹⁹⁴ The Case of Wikimedia Foundation Inc. and Others, Columbia University Global Freedom of Expression, available on: <https://globalfreedomofexpression.columbia.edu/cases/the-case-of-wikimedia-foundation-inc-and-others/>. Accessed April 21, 2021.

¹⁹⁵ *Ibid.*

¹⁹⁶ Council of Europe, *supra* note 136.

of up to ninety percent is considered as the ban on the website which restricts the freedom to express information and opinion on the platform and the right to access information. Protection of interests under Article 10(2) ECHR criteria is not satisfied as the sanction to decrease the bandwidth for up to ninety percent for non-compliance with the requirement to have a representation in Turkey does not protect any interest under Article 10(2) ECHR. Despite President Erdogan statement to introduce the amendment with the purpose to control foreign social media portals and protect the citizens from ‘immoral’ content¹⁹⁷, the adopted amendments do not cover expressly immoral content or hate speech, but create restrictions for all of the social media portals with more than one million daily users. Therefore, such restrictions do not comply with the second and the third criteria of the Article 10(2) test.

Based on the analysis in the present Chapter, the amendment introduced to the Social Media Law on July 29, 2020, for the social media platforms with more than one million users daily does not comply with the Article 15 ECHR requirements for the valid derogation for the derogable rights under ECHR and limitation for the freedom of expression under Article 10(2) ECHR. The amendment does not comply with the four-step derogation criteria under Article 15 ECHR. The public emergency criteria is not satisfied based on the leading *Greek* case fourth criteria, as the measures introduced do not aim to protect public safety, order or health. Restrictions introduced by Turkey are not considered to be strictly required by the situation of crisis, as the freedom of expression is considered to be an important right to be protected during the pandemic to inform the citizens, and the UN Human Rights Office expressed the view that shut down of Internet during the pandemic shall not be considered as the part of a response to the COVID-19 pandemic.¹⁹⁸ Thirdly, by derogating from the right to the freedom of expression Turkey violated Article 19 ICCPR and therefore failed to comply with the obligation under Article 15 ECHR to comply with other international law obligations. Lastly, the duty to inform has not been fulfilled by Turkey, because the state failed to inform the Secretary-General about the derogation without ‘unavoidable delay’. The amendments adopted to the Social Media Law failed to comply with the Article 10(2) limitation three-step criteria. The first criteria is implemented, as the amendments are prescribed by law and are adopted after their official publication in the Official Gazette on July 31, 2020. However, the criteria for the amendment to protect interests under Article 10(2) and their necessity in the democratic society is not satisfied. Amendment introduced prescribes sanctions to decrease bandwidth up to ninety percent limits the right to receive and publish information for all social media platforms which do not comply with the representation requirement, therefore, the sanction for non-compliance with the requirement creates disproportionate restrictions on all the information published on the platforms.

Since 2012, OSCE and the CoE outline the incompatibility of the Social Media Law with the international law standards and the ECHR. According to the OSCE, the government shall urgently amend the law to make it compatible with international standards and the ECHR.¹⁹⁹²⁰⁰ In 2019, Dunja Mijatović expressed the concern over and Social Media Law in Turkey and concluded that the spirit of the law is “directly causing numerous violations of the

¹⁹⁷ Al Jazeera, *supra* note 188.

¹⁹⁸ Kaye, *supra* note 175.

¹⁹⁹ Yaman Akdeniz, “Report of the OSCE Representative on Freedom of the Media on Turkey and Internet Censorship,” *Organization for Security and Co-operation in Europe* (11 January, 2011): p. 35, available on: <https://www.osce.org/fom/41091>. Accessed April 21, 2021.

²⁰⁰ OSCE. *Assessment of draft amendments to Law No 5651*. (31 January 2014): p. 9, available on: <https://www.osce.org/fom/110823>. Accessed April 21, 2021.

right to the freedom of expression”.²⁰¹ Therefore, the 2020 amendments to the Social Media Law shall be considered to worsen the protection of the freedom of expression in Turkey within the framework incompatible with international standards of Social Media Law. Turkey shall ensure the due protection of the freedom and abolish the law to comply with its international commitments under Article 10 ECHR and its Constitutional provisions.

CONCLUSION

COVID-19 pandemic proved to be a major test for the protection of human rights and fundamental freedoms for both the states and people around the world. The pandemic limited the freedom of movement, right to education, media freedom, food security, etc. According to the UN study on human rights protection during the pandemic, states shall be open and transparent in their decisions for people to build trust, moreover, authorities shall allow people to express their views and listen to the criticism from the citizens. To protect freedom of expression, the government shall not restrict freedom of expression which can result in censorship but provide reliable information in the sources people trust.²⁰² MS should constantly monitor introduced limitations to the rights and monitor their compliance with proportionality and necessity doctrines. Freedom of expression shall be regarded as a right to be secured during the crisis as access and publication of information are of high importance. The response to the pandemic shall respect core European values and fundamental freedoms. Although during the pandemic spread of disinformation has risen, criminalising the spread of ‘fake news’ or limiting the work of independent media is not considered as proportionate, or actions of such European states are to be compatible with the ECHR framework and values of the CoE.

Despite the call from the international organizations to provide due protection to the freedom of expression which is the basis for democracy, several European states disregarded statements of organisations, which resulted in more than 100 alerts on the limitation of freedom of expression in Europe. Nevertheless, Contracting States to the ECHR can use a derogation clause Article 15 ECHR to derogate from the derogable rights in the Convention or limit the right to the freedom of expression satisfying Article 10(2) ECHR criteria. According to Article 15 ECHR to derogate from the rights four criteria are to be implemented: public emergency, restrictions are required by the situation, consistency of measures introduced with other international obligations, and the notification of the Secretary-General. To limit the freedom of expression under Article 10(2) ECHR, states shall satisfy three-step criteria, which is limitation prescribed by law, necessary in a democratic society, and secure interests under Article 10(2) ECHR.

According to the research provided, based on the case-studies on Hungary and Turkey it is regarded that both states failed to comply with the ECHR derogation clause and the three-step criteria on the limitation of the freedom of expression under Article 10(2) ECHR. According to the derogation clause, both states have formally complied with the existence of

²⁰¹ Council of Europe. *Third party intervention by the Council of Europe Commissioner for Human Rights under Article 36, paragraph 3, of the European Convention on Human Rights Application no. 25479/19 Wikimedia Foundation, INC. v. Turkey CommDH(2019)28* (18 November 2019): p. 4, available on: <https://rm.coe.int/third-party-intervention-before-the-european-court-of-human-rights-app/168098e542>. Accessed April 21, 2021.

²⁰² United Nations. *COVID-19 and Human Rights: We are all in this together*. Published on April, 2020, p. 14, available on: https://www.un.org/victimsofterrorism/sites/www.un.org.victimsofterrorism/files/un_human_rights_and_covid_april_2020.pdf. Accessed April 14, 2021.

public emergency criteria, however, according to the leading *Greek* case criteria, it is to establish whether measures introduced are to secure public safety, order, or health. However, not Turkey nor Hungary have complied with other criteria. Restrictions introduced are not required by the situation, as freedom of expression proves to be of public concern during the pandemic, which also been noted by the CoE, moreover, both states have failed to comply with the ICCPR Article 4 derogation clause, thus, failed to satisfy the third criteria of the ECHR derogation clause. Consequently, both states failed to notify the Secretary-General about the derogation without unavoidable delay, which is established to be less than three months.

Based on the three-step criteria to limit the freedom of expression under Article 10(2) ECHR, Hungary and Turkey have complied with the criteria for the limitations to be prescribed by law, however, not the restrictions to criminalise publishing untrue facts or misinterpreted true facts nor the decrease in bandwidth to 90 percent of the social media websites for non-compliance with the representation requirement are considered as necessary in a democratic society and are not considered to protect criteria listed in the Article 10(2) ECHR, such as public order, public health, public security, etc. In the case *Fatullayev v. Azerbaijan*, the Court held that press officials may only be sentenced to prison in exceptional circumstances, where the breach of other fundamental rights prescribed by the Convention are found²⁰³, therefore, limitations introduced in Hungary are not considered as proportionate. Additionally, in *Wikimedia Foundation, INC. v. Turkey*, ECtHR ruled that blocking the website violated the provisions of the ECHR²⁰⁴, thus, the decrease in 90 percent of the bandwidth of social media, which results in the almost blocking of the network, is not proportionate in a democratic society and not necessary during the pandemic when public interest is at stake.

CoE referred to both limitations to the freedom of expression and published them under the CoE alert system. The organisations indicated that both criminalisation of publishing untrue facts or misinterpreted true facts in Hungary and the amendments to the Social Media Law in Turkey do not comply with the ECHR framework and values of the organisation. Turkey used the pre-text of the pandemic to introduce Erdogan's desired amendments to control social media networks. On the other hand, Hungary, being a member of the EU, by introducing the Coronavirus bill disregarded values of the Union which are press freedom and media pluralism. Article 7 TEU procedure has already been launched against Hungary in 2018, the European Commission and General Affairs Council of the EU shall come back on the analysis of the Coronavirus bill and determine the risk of a serious breach of the EU values. International organisations, such as HRW, Amnesty International, Article 19, Reporters Without Borders, etc., referred to the limitations to the freedom of expression in Hungary and Turkey as unacceptable and disproportionate to the threat states are now facing.

To answer the research question, the author holds that the discretion left to the states to derogate to the extent strictly required by the situation negatively impacted protection of the freedom of expression, because both Hungary and Turkey failed to comply with Article 15 ECHR and Article 10(2) procedure, nor limitations introduced were proportionate and necessary, and the CoE referred to the limitations as breaching the values of the organisation. Therefore, the hypothesis that the limitations were based on the pre-text of the COVID-19

²⁰³ *Fatullayev v. Azerbaijan*, *supra* note 137.

²⁰⁴ *Wikimedia Foundation, INC. v. Turkey*, *supra* note 193.

pandemic and are disproportionate in a democratic society is approved. Weak protection of human rights is proved to be a practice in illiberal European states with the undemocratic rhetoric, which used the pandemic as a pre-text to limit the protection of fundamental freedoms.

The author suggests that the ECtHR based on the current findings and the number of alerts on the limitation to the freedom of expression during the COVID-19 pandemic shall include derogatory measures and measures to limit freedoms under the priority policy of the ECtHR to introduce immediate interim measures if the complaint was lodged. Moreover, the Secretary-General shall constantly fulfil its mandate and engage in the dialogue with the Contracting States if the alert on the situation in the state was issued.

For further research it is suggested to analyse forthcoming judgements and decisions of the ECtHR related to the limitation or the derogation from the freedom of expression during the COVID-19 pandemic in the ECHR Contracting States. It is to analyse the approach of the Court towards the protection granted to the rights secured by the Convention during the pandemic and the reasoning of the Court provided based on the fourth *Greek* case criteria on the measures protecting public health, safety, or security.

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