

Human Rights during the COVID-19 Pandemic in Bosnia and Herzegovina

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During the COVID-19 pandemic, Bosnia and Herzegovina, like many countries in the world, introduced a series of rigid measures to combat the crisis. These measures often violated the fundamental human rights and freedoms of the citizens. Measures at certain times and in certain places included a curfew, mandatory mask wearing in public, restricting the freedom of movement of young and old, mandatory quarantine after international travel, public disclosure of personal information about those who travelled, lock-in of certain cantons (regions), and the like. The paper analyses a broad spectrum of human rights and freedoms violations in Bosnia and Herzegovina, while taking into account two significant characteristics of the country. First, Bosnia and Herzegovina is an extremely decentralized country, which means that COVID-19 measures are partially adopted by different governments. In practice, this means that half of the country has a curfew imposed and a half does not. Second, the Constitutional Court of Bosnia and Herzegovina is not only independent but also protective of liberal values like the human rights. The main reason for this is that in addition to domestic judges, it is made up of foreign judges. Consequently, the Court has issued a series of judgments where the government's actions have been declared unconstitutional. These and other cases of human rights violations will be analysed in this paper.

Key words: Bosnia and Herzegovina, COVID-19, human rights, Constitutional Court, federalism.

Introduction

In March 2020, the World Health Organization (WHO) declared a pandemic caused by the COVID-19 virus. In the same month, Bosnia and Herzegovina began implementing restrictive measures aimed at protecting the local population from the new virus. As in many other countries of the world, these measures were on the verge of not respecting human rights and caused numerous controversies. The Constitutional Court of Bosnia and Herzegovina was called upon to adjudicate several of them.

What is specific to Bosnia and Herzegovina is that it is an extremely decentralized country, with a state system defined by the 1995 Dayton Peace Agreement (DPA). Its state system was primarily intended as a guarantee of peace after the Yugoslav wars of the 1990s. Nevertheless, certain legal provisions have been incorporated in the DPA that guarantee legal recognition and protection of human rights in the long run, such as Annex 6 entitled “Agreement on Human Rights”. It secures to all persons within their jurisdiction the highest level of internationally recognized human rights and fundamental freedoms, as detailed in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols and various international agreements listed in an appendix. Thirteen rights are set out in Article 1 of Annex 6 (and again in Article II (3) of the Constitution) and are to be enjoyed without discrimination (Sloan, 1996). However, in practice, there are numerous examples of violations of these rights.

The specific state system implies that in different parts of the country and by different levels of government during the COVID-19 pandemic, vastly different measures were adopted that significantly affected the lives of citizens and their human rights and freedoms. Accordingly, depending on the place of residence, the citizens of Bosnia and Herzegovina have been subjected to various repressive measures by the state. This unequal treatment of the citizens was problematized by non-governmental organizations (e.g., BIRN's reaction to Bosnia and Herzegovina's Coronavirus Curbs on Children and Older People), state institutions (e.g., The Ministry of Security of Bosnia and Herzegovina when Canton 10 tried to close itself), and by the Constitutional Court of Bosnia and Herzegovina as the highest court in the country.

Human rights crisis

The COVID-19 pandemic has caused general uncertainty, both in the world and in Bosnia and Herzegovina. Like any other crisis, this one has several social consequences (Čavalić, 2015; Knowles et al., 1999), including those initially short-term, but possibly long-term outcomes which relate to respect for human rights and freedoms. At the height of the pandemic, countries across the world took certain measures that had a greater or lesser impact on the human rights of citizens, especially marginalized groups (Human Rights Watch, 2021). According to the United Nations (UN) (2021) report, the COVID-19 pandemic has had a negative impact on all sectors of society, highlighting existing inequalities and undermining the enjoyment of human rights. The pandemic is testing the limits of human rights, as noted by Spadaro (2020).

The basic question is how to establish the right balance between respect for human rights on the one hand and public health policy on the other. For that purpose, we will examine both the constitutional framework in Bosnia and Herzegovina and international law. First, the rights of every individual in Bosnia and Herzegovina are regulated by the Constitution of Bosnia and Herzegovina, international treaties or conventions signed by Bosnia and

Herzegovina, and the law itself. Chapter II of the Constitution is dedicated to the protection of human rights through the Commission on Human Rights, which consists of the Office of the Ombudsman and the Human Rights Council. The Commission for Human Rights operates at the Constitutional Court of Bosnia and Herzegovina. The Joint Commission for Human Rights of Bosnia and Herzegovina considers issues related to the exercise of human rights and fundamental freedoms guaranteed by the Constitution and legislation: citizenship; emigration, immigration, refugees and asylum; implementation of Annexes 6 and 7 of the General Framework Agreement for Peace in Bosnia and Herzegovina; movement and stay of foreigners; realization and protection of human rights and freedoms and measures for their more effective protection; personal data protection and cooperation with the Agency for Personal Data Protection in Bosnia and Herzegovina; the rights of national minorities; petitions regarding violations of human rights and fundamental freedoms; cooperation with the Commission for Human Rights and the Commission for Displaced Persons and Refugees, as well as the commissions for human rights in the Parliament of the FB&H and the National Assembly of the RS.

Second, in international law The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights (1985) require that any measure taken to protect the population, which restricts individual rights and freedoms, in order to comply with human rights standards restrictions should, at a minimum, be:

- provided for and carried out in accordance with the law;
- directed toward a legitimate objective of general interest;
- strictly necessary in a democratic society to achieve the objective;
- the least intrusive and restrictive available to reach the objective;
- based on scientific evidence and neither arbitrary nor discriminatory in application; and
- of limited duration, respectful of human dignity, and subject to review.

In line with the presented principles, the state must take into account the legal basis of the measure, its necessity, and its scientific basis. Measures must be transparent and open to review, especially by the media and the professional public. It is especially important that the measures be limited in time, i.e., proportional to the goal to be achieved. This limits the so-called naive intervention, about which Nassim Nicholas Taleb wrote extensively (2012).

These B&H constitutional and ECHR principles will be used as a benchmark in the paper to determine whether violations of human rights and freedoms of the citizens of Bosnia and Herzegovina occurred during the COVID-19 pandemic.

The course of the crisis

A state of natural or other disaster was declared at the highest state level of Bosnia and

Herzegovina on March 17, 2020 (Official Gazette of B&H, 2020). In the meantime, Republika Srpska (RS) declared a state of emergency on March 16 and a general emergency on March 28, 2020 (Official Gazette of RS, 2020) and the Federation of Bosnia and Herzegovina (FB&H) and the Brčko District of the federation declared a state of emergency on March 16, 2020. Bosnia and Herzegovina has since adopted several measures that are not in line with the principles of the ECHR. Some of the measures were adopted at the beginning of the pandemic, in March 2020, and were lifted very quickly. Others have been declared unconstitutional by the Constitutional Court of Bosnia and Herzegovina, which will be the subject of the other chapters of this paper. A significant number of the COVID-19 measures enacted in Bosnia and Herzegovina, such as the curfew, are still in place, despite not meeting the time limit requirement or being based on solid scientific evidence.

Numerous reports have identified a number of human rights violations, including the *Policy Brief: The Western Balkans in Times of the Global Pandemic* report, which states that the primary focus of the state in Bosnia and Herzegovina has been enforcing physical distancing through restrictive measures and repression, including steep penalties, instead of education and communication (Bieber et al., 2020). Muratagić (2020) states that in its violations of the rights to freedom of movement, freedom of expression and freedom of assembly, the executive power in Bosnia and Herzegovina left citizens in a state of legal uncertainty.

Examples of human rights violations

The Banjaluka Center for Human Rights (2020), the Organization for Security and Cooperation in Europe (OSCE) Mission to B&H, published a report *Ljudska prava u periodu COVID-19. Utvrđeni propusti u ostvarivanju ljudskih prava u Bosni i Hercegovini* (Eng. Human Rights in times of COVID-19. Identified omissions in the realization of human rights in Bosnia and Herzegovina) identifies the endangerment of the following rights: the right to provide and receive information, the right to privacy, stigmatization, hate speech and discrimination, freedom of movement, freedom of expression, freedom of assembly, freedom of religion, treatment of prisoners, increased vulnerability (migrants and refugees, persons with disabilities, Roma population and users of social protection services), labor rights, access to health care and general abuse. This report concludes that the measures implemented to contain the spread of the coronavirus were quite restrictive and proved to be to some extent effective. However, the restrictions imposed were clearly not based on scientific data, nor were less restrictive measures considered, and often the restrictions were not limited in time, resulting in human rights violations. The measures that followed did not incorporate the principle of proportionality. The subsequent easing of the measures, in fact, followed the same mode of action of the restrictions and as a result, the distrust of the general population towards the authorities increased. According to the report, this can in turn lead to citizens not respecting future measures.

Examples of human rights violations in Bosnia and Herzegovina during the COVID-19 pandemic will be discussed next. The citizens of Bosnia and Herzegovina did not receive **timely and credible information** from the state or cantonal authorities as to whether there were enough coronavirus tests and respirators in the country, that too few people were tested and that the tests, among other things, were done selectively, as highlighted by the Human Rights Ombudsman of Bosnia and Herzegovina Jasminka Džumhur on March 22, 2020 (Interview.ba). Information was often inconsistent (MediaCentar, 2020), especially in the FB&H, which has 10 cantons and where the ungrateful task of coordination was placed on the Federal Civil Protection Administration (Korajlić, Smailbegović, 2020). Further, according to the OSCE report (2020, page 40-41), problems in communicating measures were particularly evident among the most vulnerable in society, who were less likely to receive information about government measures directly and were largely dependent on the media or other citizens. These practices highlighted another phenomenon - journalistic scepticism towards the information provided by the government (MediaCentar, 2020). All these developments led to misinformation, general confusion, a growing number of pandemic conspiracy theorists and even fake news (Interview.ba).

Freedom of expression is one of the most important freedoms that ensure the functioning of a democratic society. Although as such there may be abuse in terms of spreading misinformation, restricting it would mean violating all other rights and freedoms, as well as individual dignity, which has been shown in the context of the coronavirus pandemic. Restrictions on freedom of movement also indirectly affected the media, making it more difficult for them to investigate and gather information, and the measures introduced to combat misinformation directly restricted the freedom of expression of both the media and the public, the right to provide and receive information. Ironically, these measures were introduced to prevent inducing panic. However, they ended up having a counter-effect by deepening panic, exacerbating citizens' distrust of the authorities, the emergence of further conspiracy theories, and the polarization of society. One of the few cases where this was called into question was when the Prijedor Police Department filed a misdemeanour charge against Maja Stojić Dragojevič, a cardiologist and member of the presidency of the opposition Serbian Democratic Party, for violating the March 19, 2020 decision made by the Government of the RS to penalise false news and the spreading of panic. The report was filed in response to her statements that there were not enough ventilators, beds, or intensive care services in Republika Srpska (RS), and for claims that RS was unprepared for the coming crisis. She was accused of spreading false news and was ordered to pay a fine in the amount of 500 euros (Balkan Insight, 2020; Zurnal.info, 2020). In addition, immediately after RS declared a state of emergency, President Željka Cvijanović issued a decree prohibiting the media and the public from spreading fake news that might incite panic and providing significant fines for those who do so (Official Gazette of RS 2020). The key question that should be asked in the context of this case is who decides what is fake news and what is true, especially if we are talking about a virus that is in itself unexplored and unknown?

Authorities in B&H decided to try to prevent the spread of the COVID-19 virus among the population by prohibiting gatherings in open and private areas, and to that end, the authorities have made decisions on bans and cancellations of gatherings, and absolute bans on gatherings (Anadolu Agency, 2020; Slobodna Evropa, 2020). With the absolute limitation on the **right of assembly**, the problem of disproportion arises again. To wit: the bans on gatherings followed as one of the first measures in the fight against the virus, without taking into account certain milder measures, such as prescribing that social gatherings must be held in public, that masks must be worn, and that there should be as little physical contact with others as possible. The absolute ban on assembly should be the last choice of the authorities, for example, in cases where more lenient measures would not successfully combat COVID-19. The B&H authorities did not even try to reduce the spread of the virus with less restrictive measures, but immediately decided to limit one of the basic rights of citizens. The ban on gatherings stifled the possibility of expressing a collective opinion, which is a precondition for a democratic society, and which, in combination with other bans, paralyzed the citizens of B&H to take action against the general violation of their freedoms, rights and dignity.

When it comes to the **right to privacy**, this right has been violated in B&H several times via the publication of personal data such as the names, surnames, year of birth, city of residence, date of isolation, and telephone numbers of persons required by the state to self-isolate. Shortly after the start of this practice, the Agency for Personal Data Protection of B&H (the Agency) on 24.03.2020. issued a decision stating that the disclosure of data to the public regarding persons who were positive for coronavirus and those who were in (self-)isolation but did not violate the said measures, was not in the public interest. For example, it is possible that people who had been potentially infected with the virus would not report this, thus achieving the opposite effect than was planned. As part of the decision, the Agency ordered the removal of such lists (Agency for Personal Data Protection of B&H, 2020). Violation of the right to privacy and disclosure of personal data has caused a large number of cases to occur that can be characterized as stigmatization, discrimination, and hate speech. People who tested positive due to the failure of the responsible authorities were exposed to 'witch hunts' in the form of threats, evictions, and public lynching (Sokol, 2020). One of the first victims of the above was Sandra Šahat, who, after publication of her positive test result, was subjected to threats by her fellow citizens as well as threats of eviction from the apartment she had rented in order to isolate herself (Oslobođenje, 2020).

One of the first coronavirus containment measures in B&H was the restriction of **freedom of movement**. On March 22, 2020, Canton 10 (the largest of the cantons of the FB&H) issued an order banning citizens from the rest of the country to enter the canton. The order was sharply criticized as unconstitutional and created fierce political disagreement (N1, 2020; Oslobođenje, 2020). It was withdrawn within a few hours of being introduced (Herceg-Bosna County Government, 2020). Regarding freedom of movement, it is also neces-

sary to draw attention to the state's position vis-a-vis foreign nationals. The Ministry of Foreign Affairs discouraged the country's diplomatic corps from sending citizens to their home country (Danas.rs, 2020), which is contrary to Article 12 of the International Covenant on Civil and Political Rights (1966), which states that "[n]o one shall be arbitrarily deprived of the right to enter his own country". In March and April 2020, various authorities in B&H issued orders prohibiting gatherings of people in both open and closed areas. To that end, the authorities have banned and cancelled gatherings, and imposed absolute bans on gatherings.[1] Instead of these arbitrary measures, it would be better to require everyone to apply evidence-based strategies, including social distancing, hand washing, and isolation of those who become ill or have been exposed to the virus. Such measures, which can be monitored and reviewed during a pandemic, would help protect the right to health and prevent disease transmission without discrimination (Balkan Insight, 2020).

Measures in Light of the B&H Constitution and International Law

The complete ban on freedom of movement was challenged before the Constitutional Court of B&H. Two state entities, FB&H on March 20 and RS on March 21, 2020, introduced more restrictive measures regarding movement for certain age groups. With these orders, persons over the age of 65, and in the FB&H also persons under the age of 18, have been required to remain under house arrest, which completely limits their freedom of movement.

In the RS, the mandate for people over the age of 65 to stay at home was eased on March 30, 2020, while in the FB&H it remained in force until April 24, when it was modified in light of the Constitutional Court decision (AP1217/20 of March 22, 2020). On April 22, more than a month after the imposition of the ban, the Constitutional Court of Bosnia and Herzegovina ruled that the FB&H was in violation of human rights. The court determined the violation was of the right to freedom of movement under Article II / 3.m of the Constitution of Bosnia and Herzegovina and Article II of Protocol 4 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The Constitutional Court found that no proportionality had been established between the prescribed measure and the legitimate aim of protecting the health of citizens. Movement bans did not include any exceptions, nor consider the specific (health) needs of those in the affected categories. The court found that the complete ban on freedom of movement, among other things, neglected the issue of employment of persons over 65, and that possible alternatives were not considered. The court ordered the government to amend the measures within five days, and the latter responded with the Federal Civil Protection Staff order (12-40-6-148-143/20 of April 24, 2020), which allowed the movement of persons under 18 and over 65 on special days, according to the instructions of the Constitutional Court.

Restrictions on freedom of movement for these two categories of persons are also contradict the basic principles of the Convention for the Protection of Human Rights and Funda-

mental Freedoms (European Convention on Human Rights – ECHR) (1950). This measure was not necessary to prevent the spread of the pandemic, the principle of proportionality was not respected, and it was not based on scientific evidence. Further, the movement ban had a negative impact on the mental and physical health of those affected (Human Rights Watch, 2020), who were further marginalized. Our original research (carried out by Aldina Jahić) regarding the ban found that 75% of 56 respondents agreed with the statement, “I believe that in making the decision to ban the movement of minors and those over 65 years, the basic human needs and psychophysical health of these persons were not considered”.

In another decision (AP-3683/20 of 22 December 2020), the Constitutional Court found that the decisions of the Crisis Staff with respect to the ban on movement and mandatory wearing of protective masks constituted "interference with basic human rights and freedoms guaranteed by the B&H Constitution and the European Convention on Human Rights" (Balkans Aljazeera, 2020). "In this particular case, there are violations of the right to private life and freedom of movement, which were committed by orders of narrow segments of the executive power on mandatory wearing of protective masks and restriction of movement, crisis staffs of health ministries," the Constitutional Court said (Decision of the Constitutional Court of Bosnia and Herzegovina, AP-3683/20 of 22 December 2020; Balkans Aljazeera, 2020). It is also stated that the decision of the Ministry of Health was a violation of these human rights, given that "there was no active participation in the adoption and review of ordered measures by the highest legislative and executive bodies" (Radio Free Europe, 2020).

State authorities in the Herzegovina-Neretva Canton (HNK) have adopted a measure restricting freedom of movement in the form of a ban on movement outside one's place of residence, with the goal of restricting civil movement, the implementation of which is the responsibility of the Ministry of the Interior of the HNK (Order of the Civil Protection Headquarters of the HNK, 2020).

On 20 May 2020, the state Constitutional Court announced its decision to decline the appeal filed by Slaven Raguž and Ivan Džalto (AP 1485/20) challenging the orders of the HNK Crisis Staff on 9 April 2020, and its amendments of 10 April 2020, prohibiting movement outside one's place of residence. The request was rejected due to a change in the legal circumstances of the case whereby the disputed orders had been revoked. However, the both the government and the Crisis Staff interpreted the Court's ruling as saying that their decisions were not unconstitutional and had been made in the interest of public health. In addition, they asserted that the appeal to the Court had been only a political game of the opposition (i.e., the Croatian Republican Party) (Vlada Hercegovina-neretvanske županije/kantona, 2020). The Applicants noted, however, that the Court had found a violation of human rights despite a change of legal circumstances, which was the intent of their motion.

Conclusion

The COVID-19 pandemic poses a generational challenge to governments around the world. The world is experiencing a change in both political and social paradigms. At the same time, whenever tectonic changes occur, human rights are the first to come under attack. This is what happened in Bosnia and Herzegovina. Specifically, as this paper shows, human rights violations in B&H did in fact occur in some cantons. Although in emergencies states may legally deviate from certain obligations under human rights law, it is their duty to bring these deviations into line with the principles of legitimacy, temporality, proportionality, non-discrimination, and the balancing of collective and individual interests. The alignment of containment measures with these principles during a pandemic is a test of democracy and human rights that many countries, including B&H, have failed to pass. Under the pretext of protecting life and public health, the authorities have resorted to abuse of power, leading many an ordinary citizen to echo the words of Ayn Rand (1966): “We are nothing. Humanity is everything. Only by the grace of our brothers are we enabled to live. We exist from our brothers, through our brothers and for our brothers who make up the State.”

Violations of human rights and freedoms via restrictive, unjustified, repressive and asymmetrical measures, together with the lack of coordination among the levels of government and the lack of adequate strategy, have only deepened the crisis that the COVID-19 pandemic brought with it, especially regarding the democratic functioning of institutions in Bosnia and Herzegovina.

As such, the human rights crisis brought about by the pandemic is, in the words of Karl Popper (2003), “a warning that if we relax our watchfulness, and if we do not strengthen our democratic institutions while giving more power to the state by interventionist ‘planning’, then we may lose our freedom. And if freedom is lost, everything is lost.”

[1] See, for example, among other things, the Conclusion on the mandatory implementation of measures to respond to the occurrence of diseases caused by the new coronavirus (COVID-19) in the RS, [1-3 / 20, March 17, 2020]; Order prohibiting gatherings in one place for more than 5 persons, and prohibition of movement in the period from 22:00 to 5:00, [12-40-6-148-155 / 20, April 29, 2020]; Order on the Prohibition of Assemblies and Joint Movement, [01.1-1141SM-045/20, 23 March 2020].

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