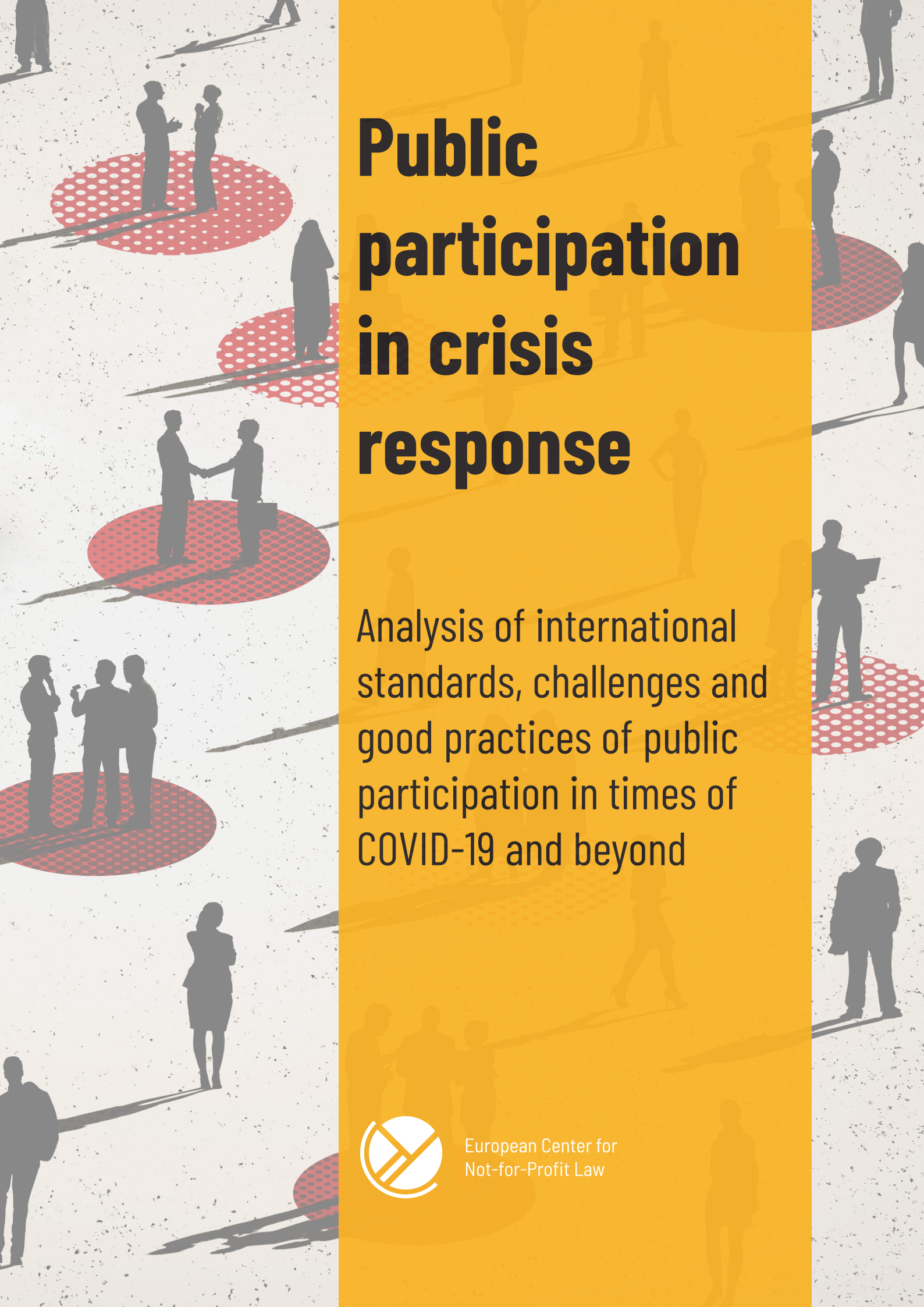

Public participation in crisis response

Analysis of international standards, challenges and good practices of public participation in times of COVID-19 and beyond

European Center for
Not-for-Profit Law

European Center for
Not-for-Profit Law

European Center for Not-for-Profit Law Stichting
5 Riviervismarkt, 2513 AM The Hague, Netherlands
www.ecnl.org twitter.com/enablingNGOlaw

This research was prepared by Berna Keskindemir, Legal Advisor of the European Center for Not-for-Profit Law Stichting (ECNL) and Anna Rurka, *Past President of the Conference of INGOs* with support from Vanja Skoric, ECNL' s *Program Director.*

This paper was prepared as part of the 'United Nations: Greater Protection and Standard Setting' project, managed by the European Center for Not-for-Profit Law Stichting (ECNL). The project is made possible by the Internationawl Center for Not-for-Profit Law (ICNL) through the Civic Space Initiative, financed by the Government of Sweden. The Government of Sweden does not necessarily share the opinions here within expressed. The authors bear the sole responsibility for the content.

May 2021

Cover photo by rawpixel

Table of Contents

Participation in the design of responses to the crisis is a right, and is the smart thing to do.

(Office of the High Commissioner for Human Rights, OHCHR, May 2020)

The COVID-19 pandemic fundamentally undermined democratic processes including the right and access of individuals and organisations to decision-making and possibility to provide opinions or influence such processes. Civil society organizations (CSOs) and the public at large have rarely been consulted in the process of designing, implementing or reviewing the adopted emergency measures or subsequent laws aimed to stop the spread of COVID-19, including those that lead to the limitation of civil rights and freedoms. Additional challenges of addressing the economic and social fall out of the pandemic already emerged, leaving everyone question of how the 'new normal' should and will look like.

It is important to remember and reflect why public participation is crucial for an effective response to the pandemic, and what is needed to prevent negative impact on our democratic societies and institutions in the short and long term. ECNL in collaboration with Anna Rurka, Past President of the Conference of INGOs undertook research and developed the following overview. More specifically, this analysis evaluates the trends we observe in light of the COVID-19 emergency responses, the extent to which CSOs were able to participate meaningfully in decision making, what we can learn from existing good practices and what is needed to further enhance the policy and standards of participation so to ensure that they can be applied in such situations in the future.

I. What exactly is public participation?

The right to participate in public affairs[1] entails a deliberative process by which interested or affected people, CSOs, and government actors are involved in policy-making before a (political) decision is taken. It is a continuum of interaction between the government and the public, ranging from informing and listening at one end, to implementing jointly agreed solutions at the other, with dialogue, debate, analysis and evaluation in between. As identified by, among other international documents, the UN Guidelines for States on the effective implementation of the right to participate in public affairs, there are three main levels of public participation: ***1) access to information, 2) consultations and 3) active involvement of the public through dialogue and partnership.***

The Revised Code of Good Practice for Civil Participation in the Decision-Making Process adopted in October 2019 by the Conference of INGOs and the Congress of Local and Regional Authorities of the Council of Europe underlines that participation at these different levels requires the respect of the following principles: openness, trust, independence, participation, transparency, accessibility, non-discrimination, inclusiveness and accountability. [2]

Regarding different levels of participation, **informing the public**[3] is one of the most important right underlying the whole process of participation. Whilst it means that the government informs the public about its plans and the types of documents it wants to adopt at the beginning of the process, it also highlights the right of the public to have access to all information (e.g., drafts, comments and reasoning) throughout the process. Another level is consultation, whereby the government invites the public to provide its opinion, comments, views and feed-back on a specific document. The issues on which the public is consulted are defined by the government, however, this process should also allow for the public to express opinion on other relevant topics. Finally, **active involvement** includes the level of collaboration with the public and jointly undertaken responsibilities at all stages of the decision-making process (agenda setting, issue identification, drafting, decision and implementation).

1 As enshrined in international law: Article 21 of the Universal Declaration of Human Rights (UDHR); article 25 of the International Covenant on Civil and Political Rights (ICCPR); as well as in articles of other international treaties such as the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), the International Convention on the Elimination of all forms of Racial Discrimination (ICERD), and the Convention on the Rights of Persons with Disabilities (CRPD).

2 The Revised Code of Good Practice for Civil Participation in the Decision-Making Process https://rm.coe.int/code-of-good-practice-civil-participation-revised-301019-en/168098b0e2 .

3 As reflected in the 2018 Recommendation of the Council of Europe Committee of Ministers on civil society space, access to information, including official documents, is of key importance for the effective enjoyment of human rights in the Council of Europe. However, the example of the Council of Europe Convention on Access to Official Documents (CETS No.205) shows in which extend this right needs a strong political will from the States to be implemented. This treaty was open to signature in 2009 and not yet entered into force.

II. Civic freedoms and participation interlinked - one cannot exist without the other

In order to exercise the right to participate in public affairs, we need an enabling environment for civic freedoms – such as the right to freedom of assembly and association, freedom of expression, and the right to access to information as integral part of the right to freedom of expression. These rights are intertwined with the right to public participation. As mentioned, access to information is crucial for public participation as it is necessary for the public to form a well-informed opinion on legislation or policy that concerns them and be informed timely when the measure is planned so that they can provide input. It also helps ensure that governments can be held accountable early on in the process. The same applies to the freedom of assembly, association and expression – these are needed to respond to the information and contribute meaningfully to political decision making.

Participation is democracy in action including various forms of activism. Therefore, open and vibrant civic space allows for meaningful public participation and vice versa. It also means that restrictions on civic freedoms that lead to closing of civic space, deter and restrict meaningful public participation. This results in a negative loop that leads to further derogation of democratic processes. On the contrary, supporting public participation will only strengthen democracies. Nowadays, decision-making on issues that have social consequences and collective implications carried out without the input of the affected persons is simply a bad and undemocratic practice. Deliberation should allow to compare alternative solutions, to confront contradictory visions, to reframe and transform sometimes personal aspirations or sectorial private interests into the general interest and, if needed, a compromise. It is therefore vital that authorities take steps to facilitate meaningful public participation, which includes creating and maintaining an enabling environment for civil society.

III. Benefits of participation in the pandemic response

Considering the ongoing crisis, open civic space and vibrant civil society is crucial to respond effectively to the public health and economic emergency. As the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association stated in light of the COVID-19 government responses: "*Civil society organizations are key in helping States to frame inclusive policies, disseminate information, and provide social support to vulnerable communities in need.*" It is indeed critical that public participation, especially for CSOs, is not restricted at a time when they could be a partner.

Over the last year, we are witnessing how fast, efficiently and effectively CSOs have responded to the pandemic. CSOs managed to adopt quickly to the changing work environments due to restrictions on the freedom of movement by moving activities online. CSOs also managed to re-plan their activities to respond to the new needs of their communities, often adding to and/or replacing their regular activities. For example, In Cameroon, a human rights advocacy focussed CSO reoriented its activities to distributing masks for free and provide hand-washing points in several communities. This example is just one of the many civil society responses to the pandemic collected by Civicus, which also includes how CSOs defended rights and how civic action was sustained through new and alternate means. CSOs have managed to do this despite the existing and newly emerging restrictions to civic freedoms. This shows the vital role they play in their communities, not only in delivery function but also as a (political) bridge between policy makers and the groups they represent.

The civil society response since the start of the pandemic proves yet again that CSOs gain easier information regarding needs from the ground and have community's trust. The governments benefit from such nuanced knowledge to develop locally responsive policies which are evidence-based and take into consideration the impact on different sectors of the community, in particular the most vulnerable and marginalised. This allows for measures that respond to the actual needs and prevent disproportionate, overbroad, and counter-productive responses by the government. Moreover, co-developing effective emergency responses with the public and CSOs who operate in conjunction with the government to address pandemic responses, creates more trust in and compliance of these measures. The effects of the current pandemic are expected to linger for a long time after the emergency is over. These effects are not only related to public health issues, but also includes social and economic concerns. Public participation is needed to address the short and long term impact of the pandemic in a timely manner and help design measures that are needed to create policies that can mitigate the negative impact on people's lives.

IV. How are governments responding?

Current trends of government actions that are observed since the start of the pandemic happen in a context of closing civic space that has been an issue long before the pandemic started. Closing civic space has a direct negative impact on civil participation, so it is important to illustrate this context briefly here. It constitutes a tangible obstacle to free and legitimate expression and to civil society's contribution to democracy. A variety of specific legal provisions or political decisions restrict civic space. Some of these restrictions are unintentional. However, their manifestations include: difficulties in accessing funding, online and offline personal attacks, restrictions on freedom of movement, smear campaigns targeting advocacy groups, restrictions as part of counter-terrorism measures, limited access to public media, deterrent effects on CSOs which are victims of discrimination, hate speech and hate crime. Since the pandemic, closing civic space has also additionally hindered the meaningful participation of civil society in public decision making.

During "pre-COVID-19 time" many of us observed several counter-productive measures. Especially when they are not evidence-based, decided without prior impact assessment, when the right of appeal is not provided, the administrative processes related to decision-making about the grants are extended, etc. In "normal time" such measures and practices undoubtedly weaken the civil society sector, its participation in democracy and its interaction with public authorities. The restrictions caused by the pandemic are very conductive to magnify the scope of such measures and practices, this time justified by the state of emergency declared in the concerned countries. Even if the number of CSOs impacted concretely can be limited during the global lockdown, the restrictions provoke a "chilling effect" on participation in public affairs.

Some of the observed trends include the following:

Urgency as a way to dismiss engagement and legitimize executive overreach

Many governments used the urgency as a legitimization for completely dismissing engagement. Responses to the current health crisis, either unintentionally or on purpose, have led to a concentration of executive power and the lack of oversight. For example, in Hungary, the Prime Minister used his two-thirds majority in the Hungarian Parliament to pass emergency legislation enabling him to rule by decree, with no Parliamentary oversight, until the COVID-19 crisis is over – a date which he alone will decide. The French National Commission for Public Debate also noted the lack of democratic debate in the management of the health crisis in France. Russia, Uganda, have suspended virtually all judicial proceedings while their countries were in lockdown, granting in practice more power to the executive branch.

Governments are also securitizing the pandemic by declaring "war" on COVID-19, which is used to justify measures that restrict civic freedoms as casting the health

crisis as a national security threat. This makes it easier to defend extraordinary measures that infringe rights and freedoms and undermines civil society's ability to push back. For example, in Egypt, the President approved new amendments to the emergency law, granting the army the right to arrest and prosecute civilians, which is in violation of the constitution and the law. At the same time, Serbia, Lebanon, the Philippines among others have deployed the military to enforce emergency measures at various stages of the emergency.

Unnecessary restrictions on civic freedoms and public participation

Some governments used the emergency situation as a pretext for putting unnecessary and disproportionate limitations on civil society by preventing them to enjoy their fundamental freedoms, contributing to further closing of civic space. For example, at the beginning of the pandemic authorities in 7 MENA-countries[4] banned the printing and sale of newspapers. The ban was justified by the authorities on the grounds that newspapers contributed to the spread of COVID-19. However, no evidence of a link between print media and spreading the virus was provided. The ban resulted thereby in disproportionate restriction of press freedom and access to informed concerning the pandemic, especially in areas where internet access is limited. In Slovenia, after some restrictions were softened by the government that allows for gatherings, the government still kept in place the restriction to gather for the purpose of protesting. Similarly, Hungary adopted measures against the second wave of the pandemic that puts a blanket ban on assemblies in public spaces.

Furthermore, governments enacted emergency measures that suspend access to public information laws. This includes details of their countries' COVID-19 caseloads and official recovery programs and plans. As mentioned, access to information is necessary in order to participate meaningfully. Even though some governments have made an unprecedented effort to transmit information on the evolution of the pandemic, through various public and social media, a distinction must be made between the request for public information by public, and the information presented by the authorities on their own initiative.

Moreover, in order to address "misinformation" around COVID-19, more than a dozen countries have enacted criminal penalties or increased enforcement of "fake news" laws. However, in numerous cases this also includes criticism of the government's response to the crisis. Countries have created new criminal penalties for spreading "false information" (Russia), causing "uncertainty" (Bolivia), and even sharing online satire related to the virus and the government's response that could harm "national integrity" (Jordan). COVID-19 regulations in Zimbabwe include a prison sentence of up to 20 years for false statements about an official involved in the government's pandemic strategy. These measures are highly frustrating civil society's ability to participate due to the chilling effect it has on their freedom of expression.

Push for non-emergency related issues

Another worrisome trend includes governments pushing proposals and adoption of regulations that are not related to addressing the pandemic, but endanger fundamental freedoms and rights. These regulation efforts take place without public consultation and participation. For example, the government in Poland rushed discussions on tightening the anti-abortion law amidst a national lock-

4 Jordan, Algeria, United Arab Emirates, Oman, Morocco, Saudi Arabia, and Yemen.

down, when the public and opposition were not able to organize protests. In India, environmentally damaging projects are being pushed through while people are unable to organize protests or have other means to participate effectively in these decision making processes.

Some proposals are directly linked to civic space. In Kazakhstan, for example, the Parliament rushed through the first vote on a bill that would ultimately maintain the government's tight control over peaceful assembly. Without public consultation, civil society has no ability to influence this process, which ultimately affects their ability to express and organize. In Moldova, the government has decided to finalize the draft law on non-profit organizations that is meant to improve the civic society environment, but without sufficient transparency in the process. This raises the concern that the initially envisioned changes will not occur and that the bill will not pass. In Slovenia, stricter conditions are introduced for environmental NGOs that want to participate in the construction permit procedures .[5]

5 See also our paper on legislative efforts aimed to restrict participation for climate activists here: https://ecnl.org/publications/green-voices-public-participation-climate-activists#:~:text=How%20government%20restrictions%20restrain%20meaningful,actors%20working%20on%20climate%20justice.

V. Moving participation space online – new challenges for inclusion

The health crisis spurred creativity of civil society, especially with increasingly moving and executing their actions online. In the face of threats, the extraordinary success of civil society organizations consists in their growing internationalization. Global, regional and international platforms are created by civil society organizations that serve to connect isolated organizations aimed to protect them and to mutualize actions and amplify impacts. Online activism and the digital environment are contributing to this evolution.

The creation and use of online spaces and opportunities with information and communications technology (ICT) can allow the public and civil society to participate meaningfully, including when physical distancing measures are in place. In order to make participation fully safe and inclusive, such broad shift to online space requires the ICT tools to be widely available to the public and secure.

However, moving towards an online participation also brings challenges that need to be addressed and taken into consideration when facilitating online opportunities for public participation. Even as digital technology makes it possible for people in countries with high connectivity to participate from home, it is a privilege not enjoyed by all, in particular the poor and vulnerable who do not have the same level of access to the internet and needed technologies. Women and girls are particularly disproportionately affected.[6] This gender gap has been growing rather than narrowing, standing at 17 per cent in 2019, and was even larger in the least developed countries, at 43 per cent.[7] Similar challenges affect migrants, refugees, internally displaced persons, older persons, young people, children, persons with disabilities, rural populations and indigenous peoples. Therefore, Internet coverage as well as free access is crucial for all.

Furthermore, even though digital technologies provide new means to advocate, defend and exercise human rights, they can also be used to suppress, limit and violate human rights. New technologies are too often used for surveillance, repression, censorship and online harassment, especially of vulnerable people and human rights defenders. More specifically, researchers have observed that surveillance technologies have, in many situations, allowed for serious breaches of privacy, by governments, individuals and the private sector.[8] There are also reports of targeted communications surveillance and facial recognition software that could lead to arbitrary arrests or detentions and violation of the right to peaceful protest.[9] This misuse of technologies does have a chilling effect and self-censorship on civil society and prevents them from meaningfully participating in political decision-

6 International Telecommunications Unions (ITU), Measuring Digital Development. Facts and figures 2019 (Geneva, 2019).

7 Ibid

8 Jackie Wang, Carceral Capitalism, Semiotext(e) Intervention Series, No. 21 (South Pasadena, California, Semiotext(e), 2018, pp. 228–252.

9 Kristine Hamman and Rachel Smith, "Facial recognition technology: where will it take us?", Criminal Justice, vol. 34, No. 1 (Spring, 2019), p. 10; and Monique Mann and Marcus Smith, "Automated facial recognition technology: recent developments and approaches to oversight, University of New South Wales Law Journal, vol. 40, No. 1 (2017).

making as it creates fear of expressing and organizing their views.

It is therefore necessary to facilitate an inclusive and secure access to ICT along with non-digital ways of participating, when possible. When creating avenues for online participation and feedback, countries should reach out to those most at risk and those most likely to be excluded and ensure that they are engaged and able to participate in policy-making on an equal basis. This is also where civil society, and more specifically grassroot movements, play a vital role. As mentioned, there are a lot of civil led initiatives providing services in response to the pandemic. This means that civil society works the closest to various groups and have a better understanding of their needs as they can gather information directly from those communities.

VI. Standards for Participation – Including in Times of Health Emergencies

During a state of emergency, the States cannot act guiding only by the political will. There is a set of rules which should apply globally and regionally. Globally, the UN International Covenant on Civil and Political Rights (ICCPR) in its Article 4 stipulated that the States Parties may take measures derogating from their obligations under the Covenant "to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin". Moreover, ICCPR Article 25 guarantees the right to participation in public life by stating that every citizen shall have the right and the opportunity to take part in the conduct of public affairs.

On the regional level, the Council of Europe has a set of standards to ensure civil participation in public affairs.[10] In the time of the pandemic and state of emergency, these norms should be articulated with those which apply to the exceptional restrictions applicable in the time of health crises. The legitimate aim of protection of health is contained in Article 5 paragraph 1e, paragraph 2 of Articles 8 to 11 ECHR and Article 2 paragraph 3 of Protocol No 4 to the ECHR. "These limitations are subject to a triple test of legality (are prescribed by law), legitimacy (pursue a legitimate aim) and necessity (are needed to reach the aim and proportionate to it)".[11]

Civil participation is the direct result of the rights enshrined in Articles 10 and 11 of the European Convention on Human Rights (freedom of expression, assembly and association) and under the restriction of these rights are regulated among others by the Article 18 of the Convention which provides that the "restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed".

Globally, the emergency measures and derogations from human rights treaties must be terminated once the exceptional situation is over. Each time and in different circumstances, few States are criticized for prolonged and excessive use of emergency measure and excessive powers given for example to the police or

10 Including: -the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 5) and its additional protocols;
- the Council of Europe Convention on Access to Official Documents (CETS No. 205)
- the Aarhus Convention on "Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters Informed citizens, "
- the 2019 Revised Code of good practice for civil participation in the decision-making process.
- the Additional Protocol to the European Charter of Local Self-Government on the right to participate in the affairs of a local authority (CETS No. 207);
- Recommendation CM/Rec(2007)14 of the Committee of Ministers to member states on the legal status of non-governmental organisations in Europe;
- The Recommendation CM/Rec(2018)4 on the participation of citizens in local public life;
- Recommendation CM/Rec(2018)11 of the Committee of Ministers to member States on the need to strengthen the protection and promotion of civil society space in Europe.

11 Venice Commission (May 2020). RESPECT FOR DEMOCRACY, HUMAN RIGHTS AND THE RULE OF LAW DURING STATES OF EMERGENCY REFLECTIONS https://www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2020)005rev-e

law enforcement agencies under anti-terrorism laws.[12] The UN Human Rights Committee in its "Statement on derogations from the International Covenant on Civil and Political Rights in connection with the COVID-19 pandemic"[13] underlined that freedom of expression and access to information and a civic space where a public debate can be held constitute important safeguards for ensuring that States parties resorting to emergency powers in connection with the COVID-19 pandemic comply with their obligations under the Covenant". According to the UN Office of the High Commissioner for Human Right, the states of emergency should not be a means to suppress and curtail the participation of citizens in public affairs.[14]

During state of emergency, the "emergency decrees or other emergency measures should not be (ab)used to introduce permanent changes in legislation or administration. In principle, amendments to the constitution should not be made during states of emergency" [15]. Council of Europe warned that "States should avoid measures derogating from the guarantees of Article 15 ECHR that are broadly and vaguely worded, lack foreseeability and/or are likely to lead to overcriminalisation".[16] Finally, according to the Venice Commission opinion, "the concept of emergency rule is founded on the assumption that in certain situations of political, military and economic emergency, the system of limitations of constitutional government has to give way before the increased power of the executive. However, even in a state of public emergency the fundamental principle of the rule of law must prevail .[17] "The rule of law consists of several aspects which are all of eminent importance and have to be maintained in an integral way. These elements include, among others, human rights, democratic participation in supervision on public decision-making, transparency of government, freedom of expression, association and assembly."[18] In addition, the Venice Commission underlined that "the procedure of adoption of emergency measures should be inclusive for civil society, either before the proposal reaches the parliament or simultaneously as the proposal is discussed in the parliament. In both cases, sufficient time has to be made available".[19]

Right to Information and Expression

As free flow of information and freedom of expression are crucial for meaningful participation, the Council of Europe Convention on Access to Official Documents ("the Tromsø Convention") encourages "the public authorities to take the necessary measures to make public official documents and reinforce an informed

12 United Nation (2003. Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyer. New York and Geneva p. 854

13 Human Rights Committee Statement on derogations from the Covenant in connexion with the COVID-19 pandemic", General 30 April 2020. https://www.ohchr.org/Documents/HRBodies/CCPR/COVIDstatementEN.pdf

14 Coronavirus: Human rights need to be front and centre in response, says Bachelet (6 March 2020). https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25668&LangID=E

15 Venice Commission (May 2020). RESPECT FOR DEMOCRACY, HUMAN RIGHTS AND THE RULE OF LAW DURING STATES OF EMERGENCY REFLECTIONS https://www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2020)005rev-e

16 https://www.coe.int/en/web/freedom-expression/freedom-of-expression-and-information-in-times-of-crisis

17 CDL-AD(2011)049, Opinion on the draft law on the legal regime of the state of emergency of Armenia, § 44

18 Venice Commission. respect for democracy, human rights and the rule of law during states of emergency – reflections p. 4

19 Venice Commission. respect for democracy, human rights and the rule of law during states of emergency – reflections p. 17

participation by the public in matters of general interest"[20] . The Council of Europe warned several times on the necessity to respect and reinforce the media freedom and freedom of expression during COVID-19, especially under attempts to fight misinformation. It is understandable that public authorities wish to limit misinformation, but at what cost? The rule of law principles underlined that "journalists and non-governmental organisations are seen by the Court as having a responsibility to provide reliable and accurate information when acting in a watchdog role". [21] The restrictions bring a risk of limiting public debate, public deliberation and criticism regarding the public decisions taken. The Council of Europe's guidance states clearly that "journalists and media, medical professionals, along with civil society activists and members of the general public, should have the right to criticise the authorities and scrutinise their response to the crisis"[22]. This is particularly important regarding the protection of the watchdog civil society organisations and whistle-blowers.[23]

Right to Freedom of Assembly

As freedom of assembly is interlinked closely with participation, Jeremy Mc Bride underlined the importance of the alternative means of protest as well as of the fact that "restrictions would be harder to justify for a prolonged period. Providing such a justification for this could well be linked to the impact of any restrictions on the freedom to receive and impart information and ideas in exercise of the right guaranteed by Article 10 ECHR".[24] Consequently, the right to freedom of assembly should be placed at the top of the list of freedoms and rights to be restored, even in a prolonged health crisis, as gathering to express opinion or grievances is essential for public participation.

Participation in the context of Right to Health

International Covenant on Economic, Social and Cultural Rights guarantees the right to health in its Article 12 and its key element includes participation of the population in health-related decision- making at the national and community

20 SG/Inf(2020)11. Respecting democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis A toolkit for member states. https://rm.coe.int/sg-inf-2020-11-respecting-democracy-rule-of-law-and-human-rights-in-th/16809e1f40

21 Jeremy Mc Bride. Analysis of Covid-19 Responses and ECHR Requirements. https://echrblog.blogspot.com/2020/03/an-analysis-of-covid-19-responses-and.html?fbclid=IwAR3kR77ryVmCFXeDPLlrW97Ohnjz49eEq6WDQn1wa_GC8hYiJQPLGYA11Kw
See also see, e.g., Magyar Helsinki Bizottság v. Hungary [GC], no. 18030/11, 8 November 2016 and Radio France and Others v. France, no. 53984/00, 30 March 2004) and so there can be responsibility for publishing false information without any step being taken to check its veracity (Sallusti v. Italy, no. 22350/13, 7 March 2013).

22 Guidelines of the Committee of Ministers of the Council of Europe on protecting freedom of expression and information in times of crisis https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805ae60e

23 Recommendation CM/Rec(2014)7 of the Committee of Ministers to member States on the protection of whistleblowers https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805c5ea5

24 "The Court has accepted that a general ban on demonstrations can be justified if (a) there is a real danger of these resulting in disorder which cannot be prevented by other less stringent measures and (b) the disadvantage of the ban's impact on demonstrations which do not by themselves constitute a danger to public order is clearly outweighed by the security considerations invoked to justify it (see Lashmankin and Others v. Russia, no. 57818/09, 7 February 2017, at para. 434). Similar considerations could also be invoked where gatherings in public of any size would generally pose a real risk of facilitating the spread of infection – even if some might not – and thus afford a justification for the resulting interference with political, religious or social gatherings that are protected by Articles 11, 9 and 8 ECHR respectively." https://echrblog.blogspot.com/2020/03/an-analysis-of-covid-19-responses-and.html?fbclid=IwAR3kR77ryVmCFXeDPLlrW97Ohnjz49eEq6WDQn1wa_GC8hYiJQPLGYA11Kw

levels.[25] The right to health is also a purpose of the international monitoring mechanisms. As stipulated by World Health Organisation and UN OHCHR, such monitoring contributes to the accountability of State and its positive obligations to ensure the access and implementation of rights to health for all. In addition to judicial mechanisms the democratic processes, citizen and civil society participation and advocacy contribute to accountability. Civil society organizations play an important role in the monitoring mechanisms holding the Governments accountable in relation to the right to health .[26] The civil participation can only foster a multi-stakeholder's monitoring mechanism, by making it closer to the ordinary experience of people.

The Council of Europe EUR-OPA Major Hazards Agreement working on disaster risk reduction underlined some good recommendations in regard to the shared disaster risk management and democratic governance:

To create the platforms allowing two-way communication among individuals, governmental authorities, non-governmental organizations (NGOs) and private sector actors in order to inform about the initiative and to identify the conditions of social vulnerability. The identified needs of the population and the conditions of vulnerability often conduct to incorrect planning and decision-making processes.

"To support evidence-based decision-making and disaster risk governance by providing the local government, relevant private sector actors, and NGOs and civil society organizations with access to open data on the social vulnerability of, and the risks faced by citizens".[27] It can "empower citizens by giving visibility to their concerns, better enabling them to join or influence the governance process and facilitating their access to the information needed to create grass-roots solutions".[28]

Practical Guidance for Participation

In practice, participation fosters trust in the democratic and public institutions, builds democratic security and a wider sense of "ownership" of the resulting decisions. Quite simply, the people who are involved in the political and public policy-making process at the regional or national level, and in everyday decisions at the local community or municipality level, are more likely committed to the public affairs and trust their elected representatives on a sustained basis.

The UN OHCHR Guidelines for States on the effective implementation of the right to participate in public affairs[29] underline the importance to implement the right to participation continually; before, during and after the decision-making process, in the electoral and non-electoral contexts. In addition, this instrument guides also the international and intergovernmental institutions regarding their own framework which should foster the capacity of rights holders to participate in the work conducted, in particular those who are distant from international institutions,

25 UN General comment N° 14 (2000) on the right to health, adopted by the Committee on Economic, Social and Cultural Rights.
26 World Health Organisation and UN OHCHR. The Right to Health. Fact Sheet n° 31 https://www.ohchr.org/Documents/Publications/Factsheet31.pdf
27 MICI, OIM, EUR-OPA. Migrants in Disaster Risk Reduction Practices for Inclusion. https://rm.coe.int/migrants-in-drr-web-final/1680716585
28 idem
29 UN OHCHR (2018). Guidelines for States on the effective implementation of the right to participate in public

such as grass roots and local civil society organizations, individuals or groups that are marginalized or discriminated.

The Council of Europe recognize the democratic value of the contribution made by citizens saying that the "legal regulation of lobbying activities should not, in any form or manner whatsoever, infringe the democratic right of individuals to express their opinions and petition public officials, bodies and institutions, whether individually or collectively; campaign for political change and change in legislation, policy or practice within the framework of legitimate political activities, individually or collectively".[30]

The guidelines adopted by the 47 member States of the Council of Europe in 2017[31] define civil participation in political decision-making as a distinct from political activities in terms of direct engagement with political parties and from lobbying in relation to business interests. The highest level of the participation promoted by the guidelines is an "active involvement" implies the co-development of documents and policies and laws by public authorities, civil society and citizens who jointly can create the working groups or committees composed on the base of the transparent criteria. The transparency, accountability, openness, trust, independence, accessibility, non-discrimination and inclusiveness are the common principles of civil participation.[32] The enabling environment for civil participation is determined by "the rule of law, adherence to fundamental democratic principles, political will, favourable legislation, clear procedures, long-term support and resources for a sustainable civil society, and shared spaces for dialogue and cooperation. These conditions allow for a constructive relationship between NGOs and the public authorities, built on reciprocal trust and mutual understanding for participatory democracy."[33]

30 Recommendation of the Committee of Ministers to member States on the legal regulation of lobbying activities in the context of public decision-making, adopted by the Committee of Ministers on 22 March 2017.

31 Guidelines for civil participation in political decision-making https://rm.coe.int/guidelines-for-civil-participation-in-political-decision-making-en/16807626cf#:~:text=Civil%20participation%20should%20be%20promoted,b.

32 The Code of Good Practice for Civil Participation established in 2009 by the Conference of INGOs and revised in 2019

33 Revised Code of Good Practice for Civil Participation in the Decision Making Process, adopted by the Conference of INGOs and the Congress of Local and Regional Authorities of the Council of Europe in October 2019.

VII. A way forward - good practice examples

A strong and resilient civil society can only function if we have a healthy public discourse on the democratic role played by CSOs and if the enabling political environment is translated into law, policy and practice. In some countries, we observe steps in setting up specific online mechanisms for public participation during emergency times. Though it is not clear yet to what extent these countries enable meaningful follow-up, these examples do provide concrete (online) mechanisms that enable meaningful participation, even in times of physical distancing.

Mechanisms for input by civil society

Some countries established platforms through which public can give input to governments. Some of these are specifically meant for input on emergency measures. For example, National Treasury of South-Africa has set up an email address where the public can send in suggestions on how best it can deal with the pandemic. Other platforms are designed to collect input on issues relevant after the pandemic. In France, for example, over 60 senators of the parliament launched a platform to collect citizen opinion on the post-COVID-19 world. Similarly, in Kenya, the Senate committee overseeing COVID-19 responses invited public submissions regarding key issues relating to the pandemic and considered this input in drafting a pandemic response and management bill

There are also examples that incorporate a more direct form of participation or already have had a direct follow-up. In the Bahamas and Belize, governments have included civil society representatives in COVID-19 policymaking committees. In the Netherlands, human rights concerns about regional emergency decrees have spurred the central government to design a less strict, less ambiguous, and more transparent national law that would replace such decrees and when the Dutch public expressed its worries about how fast the process of adoption the government communicated, they took a step back and allowed for more time for parliament and civil society to give input.

Mechanisms for public oversight

Another important component of public participation is to enable public oversight and provide relevant information. A good practice has been launched in the United Kingdom where the Joint Committee on Human Rights has called the public to submit the evidence on the impact of emergency measures on human rights. Or Brazil, where the Ministry of Health created a data website that allows the public to monitor the number of needed medical supplies available in each state. In Kenya, the Senate established an oversight ad hoc committee on COVID-19 that meets publicly online, allowing for oversight by the public as well.

Joint efforts by governments and civil society to come up with effective COVID-19-measures

There are also joint efforts by governments and civil society to provide solutions to dealing with the pandemic. For example, in Colombia, local government and different civil society organizations joint efforts to launch a Hackaton to provide solutions to the challenge of mobilizing critical workers while reducing contagion among citizens. In the Netherlands, university researchers have developed and used a tool to gauge citizens opinion about restriction (i.e. emergency measures) and a number of possible policy options, including it's effects. The developers use this tool for the purpose of public participation, policy evaluation and policy contribution and report their findings to the government. In Tunisia, the ministry in charge of relations with CSOs launched an initiative to create a nationwide group of more than 500 CSO representatives and activists which would support the national initiative, implemented in coordination with local authorities, to collect and distribute food and supplies to low-income families and at-risk groups. In Somalia, civil society was able to partner with the ministry of health to raise awareness about the virus and safety measures in healthcare through a range of communication channels that especially reach the most vulnerable and excluded groups.

Civil society contributing to enhancement of public participation processes of national authorities

Another set of national examples come from civil society organizations that provide tools and mechanism to national authorities for the purpose of public participation. For example, in Argentina, civil society organizations have developed a guide for subnational governments to manage the pandemic from the perspective of how to make decisions, what health policies to take, what technologies to use and how to communicate actions to the public.

Even in the context where the public authorities did not provide specific mechanisms or platforms for dialogue with civil society, the latter remained active, formulated and sent proposals to the authorities. For example, in France, in response to the Prime Minister's communication of 28 April to the National Assembly on the conditions for implementing deconfinement as of 11 May. The 55 organisations that make up the Power to Live Pact, have noted that too many people have been forgotten in these announcements: job seekers, the homeless, households and young people in difficulty, migrants, school dropouts, and other vulnerable and marginalized groups, which represents millions of people. These organisations of the Power to Live Pact – which are associations, trade unions, foundations, mutual societies - have decided to send the Prime Minister the 15 essential measures to be implemented as soon as the confinement ends.

In Ukraine, despite the Covid-19 pandemic, the Drohobych city council ensured effective citizens' engagement in the decision-making regarding the reconstruction of a street in the City Center. In this context, the Online Academy of Civil participation is developed for local public servants and representatives of civil society in order to assess the local needs of the population.[34]

34 See also https://vimeo.com/415195008.

Georgia adopted Environmental Impact Assessment Code, which regulates participation of wider public in making decisions on large scale infrastructural projects, which potentially could affect natural environment and biodiversity.

VIII. Recommendations

Based on the above analysis in light of the international standards on participation, the challenges for public participation exacerbated by the ongoing pandemic and promising good practices, we provide a set of recommendations that states should take into consideration going forward and which should also guide responses to any future pandemics:

1. Engage civil society in inception, development, implementation and evaluation of pandemic or health-emergency related measures, including decision-making efforts related to whether or not to use digital technology for the management of the health crisis.

2. In addition to academic representatives, the various committees that provid advice to public authorities should include the representatives of specialized civil society and representatives of the groups most at risk.

3. Reinforce civic oversight of emergency measures, either through existing mechanisms (such as parliamentary oversight) or developing new inclusive and accessible (online) tools. Involve meaningfully in development and implementation of measures the organizations providing services to vulnerable and marginalized population (including elderly, migrants and refugees, remote and rural population, etc.). Provide relevant funding for such services as well as full access to those groups and places under clear or non-excessive regulations.

4. Reinforce the bottom-up initiative based on democratic deliberation. Give greater legitimacy to the citizen assembly and other forms of democratic deliberation, facilitated online or with social distancing measures, by providing and reinforcing the link between them and the national parliaments.

The Covid-19 pandemic has shown that no state can act alone in the face of a health crisis of such a scale. It is the thousands of associations that have ensured the presence and facilitated the lives of millions of citizens. Will these actions be recognized by decision makers in the post-pandemic period and during a possible new pandemic crisis? Will associations and the non-profit sector be a priority for governments? We need to think about participation in a sustainable way and build an institutional support for a systemic participation which includes vulnerable and marginalized groups and effective assistance.

European Center for Not-for-Profit Law Stichting

5 Riviervismarkt, 2513 AM,
The Hague, Netherlands

www.ecnl.org

twitter.com/enablingNGOlaw

European Center for
Not-for-Profit Law