

# Editorial

## Welcome to the IALS Student Law Review

### Tuğçe Yalçın

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Welcome to the *COVID-19 Special Issue* of the Institute of Advanced Legal Studies' Student Law Review (ISLRev).

The COVID-19 pandemic threw not only the world into a serious shock to all intents and purposes but caused an historic decline in economic outputs in many countries and raised numerous questions for states and the societal functioning in general.

The severe and challenging situation also ushered in a rethink of our old habits and seeming obviousnesses such as meeting friends or working in shared environments. It reminds us about what is really essential in life, or simply: recalling our humanity and reality – our natural limits of necessity.

In this *COVID-19 Special Issue*, we will be reflecting on how the COVID-19 pandemic has affected local legal systems, the introduction of legal regimes to confront the new realities, economies, governments and the society at large.

We are pleased to introduce the following articles of this *COVID-19 Special Issue* of the ISLRev:

**Dr. Marijana Opashinova Shundovska** discusses whether emergency measures in response to the COVID-19 pandemic are a threat to the democracy by analysing the case of North Macedonia. This new world order 'Covidism', both autocratic and liberal, proved to be more dangerous in the long run than the virus which took thousands of lives and infected millions of people worldwide. The 'COVID-19 victimisation' and 'de-democratisation' made representative houses revert to old emergency situations, conveying the lead to the executives to carry on the entire decision-making process, putting into question their definition as pillar institutions in the systems of representative democracy. Fighting for decades to maintain the representative democracy due to the monopolisation of legislation by the executives in the EU member states, and to the rising of autocratic processes in developing countries, national parliaments have felt sisyphied over again. Having in mind the ongoing fight with the virus, one might question how long it will take until national parliaments put the rock up on the hill, this time for good.

**Dr. Fotios Fitsilis and Athanasius Pliakogianni** examine the Hellenic Parliament's response to the COVID-19 pandemic. Legislatures face political crises constantly – they navigate through them using an institutional weaponry made out of constitutional and standing order provisions, often accompanied by informal regulations, so-called 'soft law'. Nevertheless, the COVID-19 pandemic took whole societies by surprise. Constitutions and standing orders do not contain dedicated provisions for such crises. In the absence of similar precedents, parliaments needed to improvise, often adopting expansive interpretation of existing provisions. To complicate things further, countries have used various approaches to combat the pandemic – a fact that also affected the behavior of parliaments.

**Dr. Afrim Krasniqi** explores the critical situation in Albania due to the COVID-19 pandemic. Since the nineties, Albania has declared several national emergencies. The violent riots of 1991 and 1997 were prominent cases thereof. The state of emergency was invoked six more times since that time owing to natural disasters. The situation with the COVID-19 pandemic in 2020 marks a new, unique experience with fundamental differences from the past. In none of the previous states of emergency have public, private, parliamentary and judicial activity been effectively suspended, and state propaganda and police force used as creatively as in 2020. The outbreak of the COVID-19 pandemic in early 2020 found the country in a situation of political crisis, whilst stuttering in its efforts to recover from the natural disaster caused by the heavy earthquake of November 2019.

**Carmelina Sessa** assesses the effects of the COVID-19 pandemic on the rule of law and pursues the question of the compatibility of fundamental rights with mass surveillance technologies in democratic systems by using Italy as an example – ie, the first state in Europe to launch containment measures of the spread of the virus and to protect public health. Through a comparative approach, she examines

the assumptions and the impact of the emergency legislation on the Italian democratic system. Despite undoubted short-term benefits, the concern is to safeguard both the protection of personal data and health, in the face of this 'invisible enemy', considering that the link between emergency regulation and prolonged compression of rights in technological innovation also requires special attention.

**Sossi Tatikyan** examines the adoption, enforcement and parliamentary oversight of the emergency measures in response to the COVID-19 pandemic, and their impact on the democracy, human rights and good governance in Armenia. The Government of Armenia declared a State of Emergency (SoE) in March 2020 and extended it five times followed by a similar regime of quarantine in order to manage the spread of COVID-19 in Armenia. At the same time, the decisions accompanying the SoE constantly adapted to the evolving situation. Authorities introduced a number of tools and mechanisms as well as different levels of lockdowns and restrictions depending on the situation. Armenia is one of the few countries that continued parliamentary plenary and committee sessions through physical attendance without skipping any regular parliamentary sitting.

**Dr. Elohor Stephanie Onoge** analyses the emergency measures implemented by the Nigerian government and human rights' infractions and considers the Post-Legislative Scrutiny to mitigate the government's legislative actions as a safeguard for human rights and democracy in Nigeria. The threat posed by passing emergency laws and policies in response to the COVID-19 epidemic, can be said to be a critical precursor of human rights abuses. In response to the COVID-19 pandemic, the Nigerian President issued the COVID-19 Regulation 2020 exercising his powers under the Federal Quarantine Act, CAP Q2 Laws of the Federation of Nigeria 2004. Based on this, the Nigerian Federal Government has undertaken stringent measures, including enforced restrictions, cessation of movement, and restrictions on social and economic activities in Nigeria, to curtail the pandemic. Nigeria has employed human control to stop the spread of the disease, including travel bans, quarantine orders, social distancing and lockdowns. The measures applied to curtail the spread of COVID-19 have had an undoubted impact on human rights.

**Emmanuel Saffa Abdulai** presents a paper on how conceptualisation of a state of emergency has emerged in the discourse of politics, international human rights and constitutional law. During the ongoing COVID-19 pandemic, state of emergency has become a tool for the violation of fundamental human rights not only in the West African region, but globally. He examines the origin of the concept of a state of emergency in international law and constitutional jurisprudence in order to understand whether recent claims of many governments declaring states of emergency can be justified. Furthermore, he analyses and reviews the constitutional history of the use of state of emergency in Europe, the United States and eventually in three West Africa countries such as Ghana, Nigeria and Sierra Leone.

Finally, we are hugely thankful to our authors for their submissions. We would like to encourage any postgraduate student, practitioner and academic who would like to submit an article to get in touch with us. The details for submission can be found below:

<https://ials.sas.ac.uk/digital/ials-open-access-journals/ials-student-law-review/ials-student-law-review-editorial-board>

We look forward to hearing from prospective contributors. Until then, please enjoy the *COVID-19 Special Issue* of the ISLRev!

Tuğçe Yalçın & the ISLRev Editorial Board.

# Constitutional Theories, International Legal Doctrines and Jurisprudential Foundation for State of Emergency

Emmanuel Saffa Abdulai

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## Origin and use of State of Emergency

The liberal democratic tradition from Western Europe of the nineteenth century can be credited with the birth of modern legal concepts of state of emergency born out of the artificial legal concept of norm and exception 'which endorses a bifurcated approach to balancing the interests of societal goals and individual rights. The concept is regarded as a tag that legitimises governmental limitation of individual rights'.<sup>1</sup>

The concept has been given different names in different contexts including, but not limited to, 'states of emergency,' 'states of exception', 'states of siege', and 'martial law'.<sup>2</sup> At the same time, major international human rights treaties provide for a derogation from the enshrined rights to allow state parties to 'temporarily adjust their obligation under the treaties in exceptional circumstances'.<sup>3</sup>

To fully understand the origin and extent of the concept of a state of emergency under international human rights law, three leading questions ought to be answered which are at the centre of the derogation regimes. First, has a situation degenerated to a level of a 'public emergency, threatens the life of the nation'? Second, whether the measures taken by the state are 'strictly required by the exigencies of the situation'. Third, should the state derogating from international law notify the treaty depositary thereby alerting the other state parties to its public emergency derogation?<sup>4</sup>

There is almost a consensus amongst legal scholars that human rights enjoyment should not be curtailed during a state of emergency.<sup>5</sup> However, in practice, the interpretations as to when a state can derogate from human rights regimes have been co-opted and distorted. The perverseness of the introduction and enforcement of state of emergency was discovered by an in-depth U.N. study, which concluded that about ninety-five states, representing half the world's countries, have been under a state of emergency. Either they have declared it, indirectly, or have openly introduced a state of emergency during the period between 1985-1997.<sup>6</sup>

The French Revolution witnessed an overt introduction of a legal regime of state of emergency, which spiraled over to most national legal systems by the mid-twentieth century.<sup>7</sup> Contextually, a state of emergency involves government action taken during a great national crisis that usually entails a broad restriction on human rights in order to resolve the crisis.<sup>8</sup> Despite this conceptualisation, the concept is believed to have stretched as far back as the Roman Empire when a 'dictator' was nominated during exceptional circumstances as external invasion occurred, or civil strife threatened the peace of the

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1 Kim Lane Scheppele, Law in a Time of Emergency: States of Exception and the Temptations of 9/11, 6 U. PA. J. CONST. L. 1001 (2004).

2 Ibid 34.

3 Special Rapporteur for States of Emergency, The Administration of Justice and the Human Rights of Detainees: Question of Human Rights and the States of Emergency: Tenth Annual Rep., 11 20, 33, 48, Comm'n on Human Rights, U.N. Doc. E/CN.4/Sub.2/1997/19 (23 June 1997) (by Leandro Despouy) [hereinafter Special Rapporteur's Tenth Report].

4 International Covenant on Civil and Political Rights art. 4, 16 December 1966, S. TREATY Doc. No. 95-20, 999 U.N.T.S. 171 [hereinafter ICCPR]; see also Human Rights Committee [H.R. Comm.], General Comment No. 29: the States of Emergency, 1 2, 4, U.N.Doc. CCPR/C/21/Rev.1/Add.11 (31 August 2001) [hereinafter General Comment No. 29] ("Before a State moves to invoke article 4, two fundamental conditions must be met: the situation must amount to a public emergency which threatens the life of the nation, and the State party must have officially proclaimed a state of emergency.").

5 Ibid supra 13.

6 See Special Rapporteur for States of Emergency, The Administration of Justice and the Human Rights of Detainees: Question of Human Rights and States of Emergency: Final Rep., add., U.N. Doc. E/CN.4/Sub.2/1997/19/Add.1 (June 9, 1996) [hereinafter Special Rapporteur's Final Report].

7 Stephen Humphreys, Legalising Lawlessness: On Giorgio Agamben's State of Exception, 17 E.U.R. J. INT'L L. 677, 677-78 (2006) (book review).

8 Claudio Grossman, A Framework for the examination of States of Emergency Under the America Convention on Human Rights. 1 AM U. J Int'l L & Pol'y 35, 36 (1986).

society. Importantly, it was during the eighteenth and nineteenth centuries that 'European constitutions... tentatively began to elaborate on the idea of a constitutional state of emergency'.<sup>9</sup> Interestingly, the role of separate legislation to regulate the state of emergency was left out.

In practice, however, the French General Constituent Assembly first decreed in 1789 the introduction of what is regarded as the first modern version of a state of emergency. This decree differentiated between a 'state of peace' from a 'state of siege'. The 'state of siege' provides that 'all functions entrusted to the civilian authority for maintaining order and internal policing pass to the military commander, who exercise them under his exclusive responsibility'.<sup>10</sup> The evolution of a state of emergency was taken forward after the 1848 French Revolution when the French Constitution of the Second Republic restricted the powers during 'state of siege.' It provides that the 'occasion, forms and effects' of the 'state of siege' were to be provided for, and elaborated, in law.<sup>11</sup>

North America also embraced the concept of a state of emergency, with U.S. constitutional law and practice taking heed of the need for extended powers in times of great need. President Lincoln boldly suspended the operationalisation and guarantees of the *habeas corpus* right under Article 1 of the U.S. Constitution. Justifying this harsh decision, the President claimed that it was necessary to suspend the said right and also to institute censorship of the mail. He went further to order the arrest and detention of people suspected to be 'disloyal and [undertaken] treasonable practice'.<sup>12</sup> In an infamous speech to Congress at the beginning of the war, President Lincoln justified his action on the basis that 'whether strictly legal or not' the actions were needed 'under what appeared to be a popular demand and a public necessity'.<sup>13</sup>

Before the United Nations was formed, when the international Bill of Rights was adopted, European nations also experienced the introduction of 'the need to keep society safe' under strict actions of the government. Germany's Weimar constitution, which was drafted and adopted after World War I, 'tried harder than most constitutions to ensure that constitutional failure in a time of emergency [would] not occur'. To ensure this, Article 48 of the Weimar Constitution provided the President with extraordinary powers that would be utilised to address exceptional threats to the system. It meant the President could take 'measures necessary to re-establish law and order, if necessary, using armed force and including the suspension of a particular and limited set of rights'.<sup>14</sup> Alarming, Article 48 was invoked two hundred and fifty times during the life of the Weimar Constitutions.<sup>15</sup> Furthermore, when Adolf Hitler took over power, during Germany's great depression, he 'proclaimed the Decree for the Protection of the people and the State', which suspended the Articles in the Weimar Constitution concerning personal liberties.<sup>16</sup> This Decree remained in force for the entire period of Adolf Hitler's reign, and as Agamben notes 'from a judicial standpoint, the entire Third Reich can be an exception that lasted twelve years'.<sup>17</sup>

Throughout wars, the state of emergency has been instituted even by democratic nations to access and use executive powers that they would not otherwise have. Notable is the U.S. government domestic internment of 110,000 people of Japanese descent, during World War II. Seventy thousand of those placed in what would otherwise be referred to as concentration camps were U.S. citizens who had the same rights as all other Americans. Further to this, a severe impact of the state of emergency by a U.S. democratic government could be traced to the Cold War era when President Truman declared a state of emergency in response to the conflict in Korea and 'communist imperialism' in 1950. This particular state of emergency lasted nearly half a century without repeal. This was not the last

9 Kim Lane Scheppelle, Law in a Time of Emergency: States of Exception and the Temptations of 9/11, 6 U. PA. J. CONST. L. 1001 (2004).

10 Giorgio A.G.A.M.B.E.N., THE STATE OF EXCEPTION (Kevin Attell trans., Univ. of Chi. Press 2005) (2003).

11 John Ferejohn & Pasquale Pasquino, The Law of the Exception: A Typology of Emergency Powers, 2 INT'L J. CONST. L. 210 (2004).

12 Giorgio Agamben, The State of Exception (Kevin Atteli Trans., Univ. of Chi Press 2005).

13 Ibid at 234.

14 The see The Reich Constitution of 11 August 1919 (Weimar Constitution) with Modifications, PSM DATA, <http://www.zum.de/psm/weimar/weimar-vve.php> (last visited, 2, 10, 2020).

15 Ibid.

16 Agamben, supra, at 3. See Translation: Decree of the Reich President for the Protection of the People and State, U.S. Holocaust Mem'l Museum.

17 Agamben supra at 1008.

emergency that was declared in response to communism by a U.S. Government.<sup>18</sup> Scheppele aptly notes that 'between the 1930s and 1970s, Congress passed about 470 statutes that empowered the executive branch to act under emergency powers'.<sup>19</sup>

The above historical outline of the state of emergency manifests that emergency has generally taken place in the context of exceptional threats, including situations of war, and where the nation was or was perceived to be fighting for survival.

## Conceptualizing the State of Emergency

Two major fields of studies have dissected the concept of a state of emergency: International Human Rights Law and constitutional law. Rich literature from constitutional law started during the cold war by Clinton Rossiter and Carl Freidrich. Additionally, the conceptual foundation is in political theory and philosophy going back to philosophers like Aristotle, followed by Carl Schmitt of Germany who has looked extensively at the foundational element.

The rational and conceptualisation of state of siege appear to be reasonably straightforward, taking its roots in the character of exceptional. Undeniably, when a given polity faces a challenge to its existence, there will be a need for a government to 'temporarily be altered to whatever degree is necessary to overcome the peril and restore normal condition'.<sup>20</sup> The International Commission of Jurist, in 1983, brought together fifteen experts to study the various national implementations of emergencies in a number countries and the study suggested that 'state of emergency is the counterpart in international law of self-defence in penal law'.<sup>21</sup> The thought of state defending itself in times of external aggression or internal strife is underpinned by the unusual balance between collective interests – in the right to life of the nation. Furthermore, the interest of an individual is predominately protected by international human rights law, commonly referred to as civil liberties. Derogation is a concession to the 'inevitability of exceptional state measures in times of emergency, and also as a means to control these measures'.<sup>22</sup> The allowance to derogate is based on the balancing of human rights with collective goals such as public order and national security terms that are not easily defined by law.<sup>23</sup>

Striking a balance is not akin to derogation during emergencies, as it takes a long history of the general corpus of international human rights law that embeds limitations and are an inherent feature. According to McGoldrick, the 'idea of limitation is based on the recognition that most human rights are not absolute but rather reflect a balance between individuals and community interests'.<sup>24</sup>

What is clear, however, is that derogation in terms of exception 'arises in an especially acute way, which raises issues of the scope' of international human rights, and its 'relationship with the concept of a state of sovereignty'.<sup>25</sup> What underpins the state of exception concept is the need to restore normalcy in which the full range of human rights can be protected. The derogation concept is a product of a critical distinction between normalcy, which is the general state of affairs, and emergency (for example, the French 'state of siege'), which is the state of exception.<sup>26</sup> That said, however, a clear distinction in practice between normalcy and exception is recognised as somewhat artificial.<sup>27</sup> As Abi-Saab suggests,

18 For examples of rights abuses justified by emergency declarations to combat communism, see Scheppele, *supra* note 8, at 1018-19.

19 *Ibid supra* note 8, at 1018-19.

20 C.L.I.N.T.O.N. L. ROSSITER, *CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES* (1948).

21 INT'L COMM'N OF JURISTS [I.C.J.], *STATES OF EMERGENCY: THEIR IMPACT ON HUMAN RIGHTS*, at iii, 413 (1983) [hereafter ICJ STUDY]; see also MANFRED NOWAK, *U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY* 84 (2d rev. ed. 2005) ("[I]t offers a State's democratically legitimate, supreme constitutional organs a basis for avoiding exceptional, irreparable damages to the general public ....").

22 Tom R. Hickman, *Between Human Rights and the Rule of Law: Indefinite Detention and the Derogation Model of Constitutionalism*, 68 M.O.D. L. REV. 655 (2005).

23 *Ibid.*

24 Dominic McGoldrick, *The Interface between Public Emergency Powers and international law*, 2 INT'L J. CONST. L. 380, (2004).

25 *Ibid.*

26 Hickman *supra* 21 at 23.

27 Georges Abi-Saab, *Foreword to SVENSSON-MCCARTHY*, *supra* note 33, at v, vi.

we should refute an apparent dichotomy between ordinary limitations and great derogations, as they 'partake of the same nature and constitute a legal continuum'.<sup>28</sup>

## International Human Rights Law on State of Emergency

Any assessment of international human rights treaties and their coverage of specific issues relating to human rights protection should start with the Universal Declaration of Human Rights (UDHR). Being the parent of subsequent human rights treaties, the UDHR is regarded as the first international Bill of Rights. A cursory review of the UDHR reveals that it omitted to provide a regime for a state of emergency. It attempted to balance individual rights and public interests in a 'general clause on the permissible limitations on the exercise of rights'.<sup>29</sup> Specifically, Article 29 places on the individual 'duties to the community in which alone the free and full development of his personality is possible'. It postulates a requirement that when the individual exercises their rights and freedoms, there is corresponding limitation of those rights to secure respect for the rights of others and 'of meeting the just requirements of morality, public order and the general welfare in a democratic society'.<sup>30</sup>

The second treaty, which provided extension for state of emergency is the International Covenant on Civil and Political Rights (ICCPR). It is believed that the provisions in the ICCPR were provided by the United Kingdom representative in 1947 for several reasons. Article 4 provides that:

- 1) In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present 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.
- 2) No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.
- 3) Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.<sup>31</sup>

This derogation provision has critical elements that should be examined: first, it set a threshold of severity cause; second, there is the requirement of national proclamation and international notification to the treaty depositary; third, there must be consistency of the derogation with the state's other international obligations; fourth, a level of proportionality of the measures to the situation; fifth, there should be non-discrimination in applying the measures; and sixth, the protection of non-derogable rights.<sup>32</sup> The intent of Article 4 is to create a vehicle which permits states to temporarily limit and modify the rights and obligations set out in the ICCPR, with the exception of the extent to which those rights are non-derogable.

Despite the above explanation, the secretary-general of the UN in 1955 spelt out the underlying reasons for the derogation that 'It was also crucial that State parties should not be left free to decide for themselves when and how they would exercise emergency powers because it was necessary to guard against States abusing their obligations under the Covenant'. Reference was made to the history of the

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28 Ibid.

29 Universal Declaration of Human Rights, *supra* note.

30 Ibid 29.

31 Ibid.

32 A.G.A.M.B.E.N., *supra* note 12, at 1 (quoting Alessandro Fontana, *Du Droit de resistance au devoir d'insurrection*, in *LE DROIT DE RESISTANCE* 16 (Jean-Claude Zancarini ed., 1999)).

past epoch during which emergency powers had been invoked to suppress human rights and to set up dictatorial regimes.<sup>33</sup>

The next two regional treaties to provide for derogations from human rights during a period of a state of emergency are the European Convention on Human Rights and the Inter-American Convention on Human Rights. Their derogation provisions are similar, though not identical to, the provisions of Article 4.<sup>34</sup> Interestingly, the British initiated the derogation provisions at the European Convention negotiation, and in as much as the European Convention was concluded in 1950, sixteen years earlier than the Covenant, the negotiations for derogation were underway before the ICCPR was passed.

The African Charter on Human and Peoples Rights (ACHPR) of 1981 also omitted to provide for the state of emergency or regulate it. Instead, the ACHPR relied on the general limitation of the UDHR.<sup>35</sup> Further, the Arab Charter on Human Rights of 2004 includes a derogation regime.<sup>36</sup> It is important to note that non-derogable rights differ from treaty to treaty. Therefore, state parties are subjected to a different regime based on which treaty they accede to and domesticate, where necessary. The Covenant's derogations article, for example, provides for more non-derogable rights than the correlative article of the European Convention.

## UN Body Interpretation

Several UN bodies have guided the use of state of emergency and provided extensive literature to inform academic research. The UN Working Group on Arbitrary Detention blames states of emergency as a 'root cause' of arbitrary detention.<sup>37</sup> Undeniably, the imposition of states of emergency adversely affects economic, social, and cultural rights as well as civil and political rights of citizens. This is more the case with vulnerable groups who are most affected, especially minorities and refugees, as well as journalists and human rights workers.<sup>38</sup> The International Commission of Jurists (ICJ) has frowned at perpetual state of emergencies, or, 'states of emergency to become perpetual or to effect far-reaching authoritarian changes in the ordinary legal system'.<sup>39</sup> Since state of emergency regimes are transient, semi-permanent states of emergency will only be institutionalising the limitations on human rights. This idea of 'institutionalising the emergency' is well summed up by the UN Special Rapporteur for States of Emergency, Mr. Leandro Despouy:

[T]he normal legal order subsists although, parallel to it, a unique, para-constitutional legal order begins to take shape . . . allowing the authorities to invoke, according to the needs of the moment, either the typical legal system or the particular system, although in practice the former is relinquished for the latter.<sup>40</sup>

The UN Human Rights Commission appointed a Special Rapporteur (SR) for States of Emergency with a mandate that lasted from 1985 to 1997.<sup>41</sup> Primarily, the SR was mandated to monitor the

33 U.N. Secretary-General, *supra* note 7, ch. V, J 37.

34 See American Convention on Human Rights art. 27, Nov. 22, 1969, 1144 U.N.T.S.123 [hereinafter IACHR]; European Convention on Human Rights art. 15, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR]. For the drafting history of the IACHR.

35 Compare African Charter on Human and Peoples' Rights art. 27(2), 27 June 1981, O.A.U. Doc. CAB/LEG/67/3 ('The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.'). with Universal Declaration of Human Rights, *supra* note 41, art. 29(2) ('In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely to secure due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.').

36 Arab Charter on Human Rights, League of Arab States, art. 4, 22 May 2004, reprinted in 12 *Irr'L Hum. R.T.s. R.E.P.* 893, (2005).

37 Special Rapporteur's Tenth Report, *supra* note 1, 1 172. The 1983 I.C.J. study focused on fifteen states and analysed in-depth the human rights issues and violations. The I.C.J. study revealed the extensive impact on society of states of emergency that it described as affecting not only freedom from arbitrary detention but also the right to a fair trial.

38 Special Rapporteur's Tenth Report, *supra* note 1, 91 173, 175.

39 See ICJ STUDY, *supra* note 36, at 415; Special Rapporteur's Tenth Report, *supra* note 1, 1 127. FITZPATRICK, *supra* note 11, refers to Brunei, Egypt, Turkey, Paraguay, the Occupied Palestinian Territory (at 4-5), the United Kingdom (at 6-7), Chile (at 10), and Malaysia (at 17).

40 *Ibid.*

41 Special Rapporteur's Tenth Report, *supra* note 1, 1 13.

implementation of Article 4 of the ICCPR and to: draw up an annual list of state parties enforcing a regime of a state of emergency; examine emerging issues of compliance in an annual report; draw up guidelines for the development of legislation on the issue and providing technical assistance. This proves useful until the SR was starved of resources which inhibited the mandate holder's ability to gather and analyse information. In its final report in 1997, recommendations were made for an updated General Comment, and adopted by the Committee in 2001. The work of the Special Rapporteurs' collaborative research and work has aided the conceptual debate going forward and provided significant foundations for the updated UN Human Rights Committee general comment.

In 1982, the Dutch delegation to the Covenant's meetings of state parties suggested among other things empowering the Human Rights Committee to institute special proceedings in the event of a state of emergency.<sup>42</sup> The Dutch suggestion was met with a procedural objection from the Soviet Union delegate, and the suggestion was not taken any further.<sup>43</sup> In 1982 and 1983, Human Rights Committee member Torkel Opsahl of Norway proposed an Article 4(1)(b) special report for states that would be triggered by a state of emergency's declaration.<sup>44</sup> This proposal was rejected in the Committee based on differing views on the Committee's authority and competence.<sup>45</sup> The first Special Rapporteur, Mrs. Nicole Questiaux, also proposed that the powers of the UN Secretary-General as the Covenant's depositary be extended to 'seek[ing] additional information and explanations which would be transmitted to the States Parties and the specialist bodies so that the international surveillance authorities have sufficient material on which to reach a decision.'<sup>46</sup> This would, however, require a substantive monitoring role for the Secretary-General, who would need to make a judgment that the information provided by the derogating state was insufficient and more was required. This proposal is a massive political step forward from current practice that would be strongly resisted by many states.

## Derogation from human rights during emergencies

There are different treaties on international human rights; however, as stated above, embedded in these documents are powers of state parties to derogate from the rights protected. The Universal Declaration on Human Rights is the mother of dozens of global and regional treaties protecting fundamental human rights. Further, there is the International Covenant on Civil and Political Rights (ICCPR) which was signed in 1966 and came into effect in 1976. The ICCPR is now part of customary international law. Regionally, the African Charter on Human and Peoples Rights (ACHPR) signed in 1981, the American Convention on Human Rights (ACHR) signed in 1969 but came into force in 1978, and the European Convention on Human Rights (ECHR) signed in 1950 and came into force in 1953 have all formed part of customary international law.

This treaty ecosystem provides and recognised that national emergencies require flexibility; however, they refused to allow national emergency excuse and justification for states to derogate on all rights. Apart from the ACHPR, all the three treaties require the right to life, prohibition of slavery and torture, and freedom from retroactive legislation be respected at all times. The ICCPR and ACHR further maintain the right to legal personality and freedom of thought and religion. These treaties insist that domestic remedies via judicial processes should remain protected at all times. Further, the ICCPR prohibits imprisonment for civil matters for inability to fulfill a contractual obligation. Additionally, the ECHR prohibits the use of the death penalty even in the most extreme situation of crisis<sup>47</sup> and protection from *ne bis in idem* or double jeopardy.<sup>48</sup> The ACHR, which is one treaty that has the most extended

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<sup>42</sup> MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 84 (2d rev. ed. 2005).  
<sup>43</sup> *Ibid.*

<sup>44</sup> Torkel Opsahl, Emergency Derogation from Human Rights, 5 N.O.R.D. J. Hum. R.T.s. at 4 (1987).

<sup>45</sup> ICJ STUDY, *supra* note 38, at 454. The UN Working Group on Arbitrary Detention, for example, has recommended that as soon as it is informed of such a declaration, or a state invokes an emergency, an emergency mission by one of the UN special procedures should take place to verify on the ground whether the state of emergency meets the criteria. See Rep. of the Working Group on Arbitrary Detention, *supra* note 179, 98.

<sup>46</sup> For a significant list of UN Human Rights Committee reports noting the non-reporting of states of emergency, see FITZPATRICK, *supra* note 11, at 91. The Special Rapporteur has also noted this. See Special Rapporteur's Tenth Report.

<sup>47</sup> Protocol 13, Article 2 of the ECHR.

<sup>48</sup> Protocol 7, Article 4(3).

set of non-derogable rights, requires continued observance of humane treatment while in custody, freedom from forced labour, rights of the child and the family, rights of name and nationality, and the right to participate in government.<sup>49</sup>

The meaning of emergencies remains vague, and it has been argued that emergencies are in the eye of the beholder. Like its constitutional counterpart, international human rights law fails to provide any detail, explanatory and exhaustive meaning of when an emergency arises and what it actually should be. The ICCPR made it look very simplistic by referring to it as 'time(s) of public emergency'<sup>50</sup> the ECHR added a more stringent requirement that emergencies arise during the war.<sup>51</sup> Furthermore, the ACHR goes further to include 'public danger'. What is however common among these treaties is that they understand emergencies to threaten 'the life of the nation'.<sup>52</sup> The ACHR further uniquely describes it as a threat against 'the independence or security of a State'.<sup>53</sup> The margin of appreciation is with the national governments to decide if and when these threats exist. Once proclaimed, they may temporarily limit any derogable rights.

It is now clear that the wide-ranging, self-assessed margin of appreciation for derogations from international human rights law should meet specific criteria. These criteria include: first, that derogation should be proportionate to the crisis at hand; be necessary for protecting the nation and responding to the threat; not to discriminate on the basis of race, colour, sex, language, religion, or social origin; must remain compatible with the state's other international law obligations, and last only as long as necessary.<sup>54</sup> However, the form and extent of derogation remain open to the national government's interpretation. There remains a gap between the various principles espoused and actual international decisions and determination of whether the state's narrow margin of appreciation meets the test and spirit of international human rights law. The lacuna is inevitable because there are different international convention provisions and as the UN Commission on human rights put it, interpreting the derogation of the various conventions 'might produce complicated problems of interpretation and give rise to considerable abuse'.<sup>55</sup>

The centrality of the problem of interpretation is the determination of when an emergency situation exists. That is one that threatens the life of the nation, which, for all intents and purposes, should justify derogation from international human rights law obligation by the affected state. A nagging question is why the state has emerged victorious irrespective of how, and for what purpose, the emergency came about. Various international human rights treaty bodies, more often than not, have abdicated the responsibility to make this determination, for example, in Europe the European Court of Human Rights through the 'margin of appreciation'.<sup>56</sup> Human Rights bodies have seldom overturned the assertion of a state of emergency by any government.<sup>57</sup> They rather prefer to focus instead on the issue of proportionality of the emergency measures or rely on other elements of the legal test. In a leading case, the European Court of Human Rights agreed with the UK government that the threat of terrorism before

<sup>49</sup> The UN Human Rights Committee confirmed this in its General Comment 29. General Comment No. 29, supra note 2, 2, 4; see also Gross & Nf Aoldin, supra note 45, at630; Colin Warbrick, *States of Emergency-Their Impact on Human Rights*.

<sup>50</sup> Article 4(1) of the ICCPR.

<sup>51</sup> Article 15(1) European Convention on Human Rights.

<sup>52</sup> Article 27(1) African Charter on Human and Peoples Rights.

<sup>53</sup> African Charter on Human and Peoples' Rights art. 27(2), 27 June 1981, O.A.U. Doc. CAB/LEG/67/3 ('The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.'), with Universal Declaration of Human Rights, supra note 41, art. 29(2) ('In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely to secure due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.').

<sup>54</sup> ICCPR Article 4(1), ACHR Article 27(1), ECHR Article 15(1), ESC Article F(1).

<sup>55</sup> UN Secretary-General, Annotations on the Text of the Draft International Covenants on Human Rights, ch. V, 36, U.N. Doc. A/2929 (1 July 1955).

<sup>56</sup> The 'margin of appreciation' doctrine associated with the European Convention on Human Rights (ECHR) is based on the notion that each society is entitled to certain latitude in balancing individual rights and national interests, as well as in resolving conflicts that emerge as a result of diverse moral convictions. Eyal Benvenisti, *Margin of Appreciation, Consensus, and Universal Standards*, 31 INT'L L. & P.O.L. 843, 844-45 (1999).

<sup>57</sup> Kim Lane Scheppele, *Law in a Time of Emergency: States of Exception and the Temptations of 9/11*, 6 U. PA. J. CONST. L. 1001 (2004).

any actual attack was a public emergency threatening the life of the nation.<sup>58</sup> With such a potentially low threshold, it has become commonplace for regimes that do not respect human rights to claim a state of emergency in many situations that are ill-fitted to the language and intent of the international human rights treaties. The elasticity of what jurisprudentially constitutes a 'state of emergency' has provided a veneer of legality to specious claims by governments. It has undermined the normativity of the law.

There is, therefore, a problem of conceptualising the issue of a state of emergency. However, there has been no shortage of prescriptive solutions provided by academic programs and projects. What is clear is that solution to the issue has been more formalistic by calling for stricter and more rules, presupposing an unrealistic reform proposal of human rights implementation mechanisms. It is further evident that scholars have held extensive debates on the key underlying themes of state of emergency but have failed to grapple with and come up with meaningful regimes of derogation in consonant with human rights treaties and the principles of international law.

This Article demonstrates that the long-existing problem should be treated with the nuanced understanding that fails to account for theory and politics. This conception is based heavily on a rule of law model; as opposed to the sovereignty model the traditional dichotomy of normality and exception although without necessary implementation superstructure of support such as traditional assumptions. The jurisprudence has failed to grapple with other critical challenges including the role of separation of powers, emergencies based on ongoing terrorist threats, democracy as a check on emergency powers, and issues of emergencies caused by government.

## Jurisprudential Interpretation of States' Derogation During State of Emergency

State of Emergency has attracted various legal challenges at regional and international courts as it curtails fundamental human rights. International human rights bodies have also provided an extensive interpretation of the permissible derogations under Article 4 of the ICCPR. This section will review and analyse some of the jurisprudence on state of emergency to provide a sort of compendium for reference, and to compare how these international human rights bodies have interpreted derogation and margin of appreciation.

At the United Nations level, the Human Rights Committee has reviewed a small number of complaints brought to it under the Optional Protocol dealing with Article 4 of the Covenant. These communications are from South American countries, in particular, Uruguay during the 1970s and 1980s. The Human Rights Committee has underscored the theoretical basis for the declaration of a state of emergency by affirming the rights of the state to declare an emergency when necessary. It went on to emphasize, however, that 'a measure of international supervision over that national determination' be instituted.<sup>59</sup> The Human Rights Committee adopted an approach of not assessing the reason or justification of State of Emergency, but to review any measures and violations of the ICCPR irrespective of the derogation. In *Landinelli Silva v. Uruguay* one of the earliest communications which concerns a military dictator in Uruguay declaring a state of emergency led to the complainant banned from running their political party office for a period of fifteen years. They complained that the action violated Article 25 of the Convention. On its part, the government of *Uruguay* failed to provide the necessary information, in the derogation notice, on the nature of the public emergency or measures taken to address the emergency. The Human Rights Committee refused to determine the existence of the state of emergency, but instead found that based on 'the assumption that there exists a situation of emergency in Uruguay,' the measures in

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<sup>58</sup> *A & Others v. United Kingdom*, App. No. 3455/05, 175-181 (Eur. Ct. H.R.2009), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-91403>; see also infra text accompanying notes 246-258.

<sup>59</sup> McGoldrick, supra note 33, at 399-400, 400 n.128. To support this, McGoldrick refers to several communications concerning balancing of rights with national security, but none that focused on Article 4. Id.

question were not 'necessary'.<sup>60</sup> In essence, the legal assessment of the public emergency's existence was replaced by an assumption in favour of the state's assertion.

The *Consuelo Salgar de Montejo v. Colombia* communication involves the Colombian government submitting a notice of derogation in 1980 to the treaty depository. In the communication, the Colombian government mentioned the existence of a state of emergency that came into place in 1976.<sup>61</sup> The Colombian government claimed that this emergency 'decree was issued because of the social situation created by the activities of subversive organizations which were disturbing public order intending to undermine the democratic system in force in Colombia.'<sup>62</sup> The UN Human Rights Committee followed the same pattern by refusing to determine whether or not there was a public emergency, instead the UN Human Rights Committee focused primarily on the government having notified derogation of the incorrect ICCPR articles and substantive rights affected by the derogation.<sup>63</sup> While the government had referred to 'temporary measures' that limited Articles 19(2) and 21 of the Covenant (freedom of expression, right of peaceful assembly), the Committee ruled that in reality there was a violation of Article 14(5) on the right of appeal 'because Mrs. Consuelo Salgar de Montejo was denied the right to review of her conviction by a higher tribunal'.<sup>64</sup> These two cases herald a consistent approach of the UN Human Rights Committee refusing to determine the justification of the state of emergency.

There are cases in which the declaration of a state of emergency became tools used for the violation of non-derogable rights such as Article 7's right, which is the right against torture enshrined in the ICCPR, rendering the issues of derogation, or not, manifestly irrelevant in the entire scheme of protecting and promoting human rights.<sup>65</sup> While reviewing cases, individual committee members had expressed dismay and concern over the justification for a particular public emergency. In contrast, some members have 'suggested that Article 4 allows states considerable latitude in deciding when a public emergency [s] derogation and that the determination concerning the emergency [is] a sovereign act.'<sup>66</sup> It is clear that the mandate of the UN Human Rights Committee to deal with the state of emergency has been reneged on by the UN Human Rights Committee itself and has instead ruled on issues not germane to the centrality of the reasons for the existence of a state of emergency.

It is essential to review General Comment 29 of 2001 which provides the main statement on the interpretation of Article 4<sup>67</sup> surpassing early but limited comment that the UN Human Rights Committee released in 1981 on state reports and communications from South African countries such as Chile, Syria, Colombia, and Uruguay.<sup>68</sup> General Comment 29 addresses a wide range of issues, which for present purposes are not central to this Article. It addresses the central issues of what constitutes a public emergency and struggled with whether to allow its application to go beyond the general principles already articulated in Article 4. While the UN Human Rights Committee did not provide any comprehensive definition for a public emergency, it did, however, touch on instances when a state of emergency can be declared. It went on that some of the attributes of a public emergency that threatens the life of the nation include 'armed conflict', 'a natural catastrophe, a mass demonstration including

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<sup>60</sup> *Silva v. Uruguay*, Commc'n No. 34/1978, H.R. Comm., I 2, 3.1, U.N. Doc. CCPR/C/121D/34/1978 (8 April 1981).

<sup>61</sup> *de Montejo v. Colombia*, Commc'n No. R.15/64, H.R. Comm., 1.2 (18 December 1979), in Rep. of the H.R. Comm., 14th-16th Sess., Oct. 19-30, 1981, Mar. 22-Apr. 9, 1982, July 12-30, 1982, annexe XV, U.N. Doc A/37/40 (22 September 1982); G.A.O.R., 37th Sess., Supp. No. 40 (1982).

<sup>62</sup> *Id.* 45.

<sup>63</sup> *Id.*

<sup>64</sup> General Comment 29 does not provide that notification of the substantive articles derogated is a requirement of notification. However, the UN Human Rights Committee's guidelines for Article 40 periodic reports provide that for Article 4, 'full explanations should be provided concerning every article of the Covenant affected by the derogation.' H.R. Comm., Guidelines for the Treaty-Specific Document to Be Submitted by States Parties Under Article 40 of the International Covenant on Civil and Political Rights, T 39, U.N. Doc. CCPR/C/2009/1 (4 October 2010).

<sup>65</sup> *Id.*

<sup>66</sup> *de Guerrero*, U.N. Doc. CCPR/C/15/D/45/1979, 1 12.2; *Silva v. Uruguay*, Commc'n No. 34/1978, H.R. Comm., 17, U.N. Doc. CCPR/C/12/D/34/1978 (8 April 1981). The Colombian cases of state-of-emergency decrees often involved nondelegable rights, so the Committee saw no need to analyse Article 4.

<sup>67</sup> *Id.* 45.

<sup>68</sup> *Id.*

instances of violence [and] a major industrial accident'.<sup>69</sup> The UN Human Rights Committee went on to restate that the emergency must threaten 'the life of the nation' but failed to provide any exact meaning of what 'the life of the nation' should entail. On the issue of the proportionality test, the UN Human Rights Committee states that 'the extent strictly required by the exigencies of the situation' concerns the 'duration, geographical coverage and material scope of the state of emergency and any measures of derogation resorted to because of the emergency'.<sup>70</sup>

By contrast, the European jurisprudence of the European system can be regarded as more progressive and developed. For example, the European Court of Human Rights in interpreting the emergency Article 15 allows for state derogation and provides quite an illuminating jurisprudence. The Cyprus case is regarded as the first case in which the European Court decided on the issue of derogation and it came way before the European Commission on Human Rights decided two interstate applications by Greece brought against the United Kingdom in 1956 on allegations of human rights violations and mistreatment of prisoners.<sup>71</sup> In the first case, the Commission ruled on the jurisdiction and declared that it was competent to review the case and decide whether there was derogation. It went on to find in favour of the complainant, the United Kingdom that 'the Government should be able to exercise a certain measure of discretion in assessing the extent [of measures] strictly required by the exigencies of the situation'.<sup>72</sup>

The next case at the European platform was *Lawless v. Ireland* which concerned extrajudicial detentions by the Government of Ireland of Irish Republican Army members in Ireland. The detention happened outside of Northern Ireland, which could be regarded as part of the United Kingdom. In its ruling, the Commission accepted that a 'certain discretion - a certain margin of appreciation - must be left to the [Irish] Government' in determining what constituted a public emergency that threatens the life of the nation. This determination extended that issue of discretion previously held in the Cyprus case to the public-emergency question. There was a dissenting opinion as a minority of members refused to buy into this new 'margin of appreciation' concept. The dissent argued that the determination should be whether the situation in Ireland reached the threshold of a public emergency, and that there was no need for such a legal determination.<sup>73</sup> The case went before the European Court of Human Rights to determine 'if a government complied with Article 15'. It was held that the 'natural and customary meaning' of the words of Article 15(1) were sufficiently clear as 'they refer to an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed'.<sup>74</sup> The Court said terrorist activities were an unprecedented crisis that threatened the life of Ireland as a nation.<sup>75</sup>

Following the *Irish Case* was the *Greek Case* which interrogated the issues of constitutional suspension in Greece and the introduction of martial law after a military coup in 1967.<sup>76</sup> Quite uniquely, this case involved the overthrow of a constitutional government by the military, and the Commission expressly acknowledged the margin of appreciation concept under Article 15 after Greece pleaded it.<sup>77</sup> The Commission relies on the *Lawless* case to make a critical statement that a public emergency must have the following characteristics: (1) It must be actual or imminent. (2) Its effects must involve the whole nation. (3) The continuance of the organised life of the community must be threatened. (4) The crisis or

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<sup>69</sup> H.R. Comm., General Comment 5: Article 4 (Derogations) (1981), reprinted in United Nations, International Human Rights Instruments, U.N. Doc. H.R.I./GEN/1/Rev.9 (Vol. I) (27 May 2008); N.O.W.A.K., supra note 38, at 86, 88.

<sup>70</sup> Id.

<sup>71</sup> Greece vehemently argued that the alleged mistreatment of prisoners in Cyprus related to obligations that could not be derogated from under Article 15. *Greece v. United Kingdom (First Cyprus)*, App. No. 176/56, 1958-1959 Y.B. Eur. Conv. on H.R. 174, 174 (Eur. Comm'n on H.R.).

<sup>72</sup> For provisions on interstate complaints, see, for example, ICCPR, supra note 2.

<sup>73</sup> *Lawless*, Eur. Ct. H.R. (ser. B) at 82.

<sup>74</sup> The Commission President also raised the margin of appreciation with the Court in the hearing. See *Lawless*, Eur. Ct. H.R. (ser. B) at 408. The French version of this statement, which was the authoritative judgment, included the word that corresponded with 'imminence'. *Lawless*, 1961 Y.B. Eur. Conv. on H.R. 28.

<sup>75</sup> The Court found the emergency was against human rights.

<sup>76</sup> *The Greek Case* App. Nos. 3321/67, 3322/67, 3323/67, 3344/67, 1969 Y.B. Eur. Conv. on H.R. 1 (Eur. Comm'n on H.R.).

<sup>77</sup> Ibid.

danger must be exceptional, in that the normal measures or restrictions, permitted by the Convention for the maintenance of public safety, health and order, are inadequate. In response, the Greek military argued that the 'revolution' is a necessity to protect Greece from the communists and their allies and that the threat from these groups had brought about the state of emergency and the need for derogation. In its finding, the Commission said 'it established beyond dispute' that Greece had experienced political instability, tension, and public disorder<sup>78</sup> however, it rejected the communist argument by the military government.<sup>79</sup> Therefore, there was no justification for the declaration of the state of emergency applying similar principles as it did in the *Lawless* case, although it reached the opposite result. As Svensson McCarthy points out, though, as 'compared to the *Lawless* case, the Greek situation was .... marked by much more violence and unrest within the national borders.'<sup>80</sup> In addressing the 'public emergency' in Greece, the Commission effectively 'lifted the veil' by considering the causation of the public emergency.

In 2009, the European Court had, after a long lull in emergency cases, the case of *A & Others v. United Kingdom*. Here the case provided an opportunity for the Court to settle the jurisprudence scattered in the *Lawless* and *Cyprus* cases. It was also an opportunity to assess the issues of terrorism especially after the 9/11 September terrorist attacks on the twin towers, and ultimately resulted in a unanimous decision of the Grand Chamber (the highest level within the Court). The case involves the passing of legislation that provides for indefinite detention without trial of foreign nationals suspected of terrorism if the Government was unable to deport them. The framework to detain suspected terrorists had been established pursuant to an Article 15 derogation by the United Kingdom. The United Kingdom's House of Lords decided in 2004 that the existence of the public emergency was a 'political question' not for the Court, but that the proposed measures would not be proportionate and therefore were a violation.<sup>81</sup> Lord Hoffman provided a sterling dissent asserting that the terrorist threat was indeed a question for the Court and did not amount to a threat to the life of the nation. He went on that 'terrorist violence, serious as it is, does not threaten our institutions of government or our existence as a civil community.' The European Court of Human Rights, however, decided to treat the case differently by endorsing an available position for a wide margin of appreciation, both on the existence of the emergency and the proportionality of measures. The Court held that the margin of appreciation should fall to the contracting state who has the task and responsibility for 'the life of [its] nation', to further determine whether that life is threatened by a 'public emergency' and, if so, how far it is necessary to go in attempting to overcome the emergency.

The European Court appeared deferential to, rather than concerned by, the fact that the United Kingdom was the only European government that felt it necessary to derogate under the Convention post-9/11. The Court dismissed Lord Hoffman's dissenting opinion and based its ruling on the fact that Lord Hoffman had 'interpreted the words as requiring a threat to the organised life of the community which went beyond a threat of serious physical damage and loss of life.'<sup>82</sup> It went on to hold in the past it concluded that emergencies existed even though 'the institutions of the State did not appear to be imperiled to the extent envisaged by Lord Hoffman.'<sup>83</sup> The Court completely omitted to mention the previous interpretation of its threshold, ie that of 'a threat of serious physical damage and loss of life' and merely referred to taking into account a 'broader range of factors' than Hoffman.<sup>84</sup> This acceptance of a state of emergency in the United Kingdom before any actual terrorist attack by Al Qaeda or its sympathisers provided a broad precedent for the applicable threshold in many other situations.

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<sup>78</sup> Ibid 59.

<sup>79</sup> Ibid 153.

<sup>80</sup> Anna-Lena Svensson-McCarthy, *The International Law of Human Rights and States of Exception: With Special Reference to the Travaux Préparatoires and Case-law of the International Monitoring Organs* (1998).

<sup>81</sup> Oren Gross, 'Once More unto the Breach': The Systemic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies, 23 *YALE J. INT'L L.* 437 (1998).

<sup>82</sup> Special Rapporteur Despoux, in his annual report, suggested that other special rapporteurs and the Working Group on Arbitrary Detention pay attention to the issue. See Special Rapporteur's Tenth Report, *supra* note 1, 192.

<sup>83</sup> *Id* 172.

<sup>84</sup> *Id* 181.

This regrettably suggested that misinterpretation, misapplication, or manifest abuse were the objective standards by which the Grand Chamber would set aside the deferential margin of appreciation, rather than measures that cannot be shown as 'strictly required by the exigencies of the situation' (that is, the wording of Article 15). Finally, the Court also rejected the UN Human Rights Committee's view that measures must be exceptional and temporary. The Court stated that it 'has never, to date, explicitly incorporated the requirement that the emergency is temporary, although the questions of proportionality of the response may be linked to the duration of the emergency.'<sup>85</sup> The unanimous decision by the Grand Chamber of the European Court in *A & Others* served only to consolidate the problems in the European jurisprudence on Article 15. The case stands for general principles that simply do not work, are not able to protect human rights during an emergency and are internally inconsistent. It provided a weak threshold for both the emergency and proportionality of measures, including by expressly endorsing a wide margin of appreciation on both legal questions; public emergency and proportionality of measures. However, the foundations of the Grand Chamber's reasoning in *A & Others*, including on margin of appreciation, are not rock solid, due to a feeling that perhaps the Court would have reasoned differently if there had been no House of Lords decision to rely on. Even if so, judicial reasoning is hardly satisfying.

In summation, a review of the European jurisprudence evidences a pattern of caution and deference in which the Court has failed to impose strict and objective standards for derogations.<sup>86</sup> Since the case of *Lawless*, the margin of appreciation has featured in all cases before the Commission and the Court on derogations, and more recently it has usually been a wide margin of appreciation. Aside from the *Greek Case*, the Commission and Court have consistently adopted a deferential approach to governments' assertions of a public emergency.<sup>87</sup> The European judiciary 'chose to defer to the "better position" of the national authorities both to determine the existence of an emergency and to select measures.'<sup>88</sup>

## Constitutional Foundation for the State of Emergency in West Africa

Some West African nations, like many nations around the world, declared a state of public health emergency from the onset of the coronavirus outbreak. Questions have raged whether there are any legal bases for these declarations. The declarations are anchored on provisions within the respective constitutions of several states. This section will review the constitutional provision on the state of emergency of Ghana, Nigeria and Sierra Leone and analyse the check mechanisms curtailing the excessive powers under emergency in the Economic Community of West African States (ECOWAS) in these three Anglophone West African nations.

### Nigeria's Federal Constitution

Nigeria's constitution elaborately provides for the declaration of a state of emergency. The Federal Constitution provided a meaning for the state of emergency when it unequivocally declared, particularly section 45(3), thus:

*In this section, a period of emergency means any period during which there is in force a proclamation of a state of emergency declared by the President in the exercise of the powers conferred on him under section 305 of this constitution.*<sup>89</sup>

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<sup>85</sup> The U.N. Human Rights Committee, by contrast, states that the '[m]easures derogating from the provisions of the Covenant must be exceptional and temporary in nature.' See General Comment No. 29, *supra* note 2.

<sup>86</sup> Special Rapporteur's Tenth Report, *supra* note 1, 3.

<sup>87</sup> *Id.*

<sup>88</sup> A. Brauch, *The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law*, 11 *COLUM. J. EUR. L.* 113, 115-16 (2005).

<sup>89</sup> Nigeria (1992). *The Constitution of the Federal Republic of Nigeria*. Lagos: Federal Military Government of Nigeria.

Further, the Federal Constitution provides succinctly and in lucid terms the necessary constitution that should warrant the declaration of a state of emergency by the President.<sup>90</sup> The conditions are when: (a) the Federation is at war; (b) the Federation is in imminent danger of invasion or involvement in a state of war; (c) there is the actual breakdown of public order and public safety in the Federation or any part thereof to such extent as to require extraordinary measures to restore peace and security; (d) there is a clear and present danger of an actual breakdown of public order and public safety in the Federation or any part thereof requiring extraordinary measures to avert such danger; (e) there is an occurrence or imminent danger, or the occurrence of any disaster or natural calamity, affecting the community or a section of the community in the Federation; (f) there is any other public danger which constitutes a threat to the existence of the Federation; or (g) the President receives a request to do so following the provisions of subsection (4) of this section.

The Federal Constitution went further to guide the procedural steps in declaring a state of emergency when it provides that:

*Subject to the provisions of this Constitution the President may by instrument published in the Official Gazette of the Government of the Federation issue a proclamation of a state of emergency in the Federation or any part thereof<sup>91</sup>.*

The President shall immediately publish, transmit copies of the official Gazette containing the Proclamation including the details of the emergency to the President of the Senate and the Speaker of the House of Representative, each of whom shall forthwith convene or arrange for a meeting of the House of which he is President or Speaker, as the case may be, to consider the situation and decide whether or not to pass a resolution approving the Proclamation.<sup>92</sup>

Further, a sitting Governor of a state may require the President to proclaim a state of emergency in the requesting state where there is in the existence of the situations specified in section 305 and such a situation does not extend beyond the boundaries of the state.

Despite these explicit provisions, the declaration of a state of emergency is restricted to crossing two hurdles to be legal. First, the declaration has to be published in the Official Gazette of the government of the Federation. Second, the direct transmission of copies of the Official Gazette containing the Proclamation including details of the emergency to the National Assembly for approval which shall then consider the situation and decide whether or not to pass a resolution approving same.

## Ghana

Ghana's hybrid constitution<sup>93</sup>, combining elements of the United States constitutional model with the Westminster model, provides in Article 31 of the 1992 Constitution for emergency powers to the executive in times of necessary needs. Article 31 of the 1992 Constitution is placed immediately after the Bill of Rights provisions which makes it a derogation of the fundamental rights of citizens provided for in the Ghanaian constitution.

The 1992 Constitution expressly provides for instances when a state of emergency could be justified thus:

*a natural disaster; a situation in which action has been taken or threatened to be taken by anyone which is calculated or likely to deprive the community of the essentials of life; a situation in which action has been taken or threatened to be taken by anyone which renders necessary the taking of measures necessary to secure the public safety, the defence of Ghana and the*

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<sup>90</sup> Ibid 305 (3).

<sup>91</sup> Ibid Section 305 (1).

<sup>92</sup> Ibid Section 305 (2).

<sup>93</sup> Constitution of the Republic of Ghana [Ghana], 7 January 1993, available at <https://www.refworld.org/docid/3ae6b5850.html> [accessed 30 October 2020].

*maintenance of public order and supply the needed services essential to the life of the community.*

Despite the protection of fundamental human rights, there are permitted derogations from which the rule of law can be abrogated from in the constitution. It states that '[n]othing in, or done under the authority of an Act of Parliament shall be held to be inconsistent with, or in contravention of, Articles 12 to 30 of the Constitution to the extent that the Act in question authorises the taking, during any period *when a state of emergency is in force of measures that are reasonably justifiable to deal with the situation that exists during that period.*'<sup>94</sup>

Under which condition then does the President declare a state of emergency? Article 31(1) of the 1992 Constitution answers this question by guiding that the President of Ghana may, acting on the advice of the Council of State, through Proclamation published in the Gazette declare that a state of emergency exists in Ghana or any part of it for the provisions of the constitution.<sup>95</sup> It is therefore clear that the President can only declare a state of emergency on the advice of the Council of State. It has been interpreted that without the advice of the Council of State, the President cannot declare a state of emergency. Importantly, the Council of State is, under the 1992 Constitution, an advisory body to the President that is very distinct from Cabinet.

Interestingly, Article 89(1) of the 1992 Constitution provides that: *[t]here shall be a Council of State to counsel the President in the performance of his functions.*

In restricting the state of emergency powers of the President, the constitution mandates for facts and circumstances leading to the declaration of the state of emergency to be made known and put in writing before Parliament.<sup>96</sup> Within 72 hours, the House of Parliament should debate and decide, through a vote, whether the facts, conditions, and circumstances for emergency powers are sufficient enough for parliament to endorse the emergency invoked by the President. Like every democracy, the President is legally bound by the decision of Parliament. If Parliament approves the Proclamation of the state of emergency, then it shall continue in force for three months. Parliament can subsequently, by a majority vote, extend the approval of the emergency that has been declared by the president for a period not exceeding one month at a time. Parliament may also by a resolution of a majority of its members revoke the state of emergency.

## Sierra Leone

The 1991 Constitution<sup>97</sup>, like her counterparts in Ghana and Nigeria, elaborately provides for a state of emergency to be declared by the President. Section 29 of the Constitution states:

*Whenever in the opinion of the President a state of public emergency is imminent or has commenced, the President may, at any time, by Proclamation which shall be published in the Gazette, declare that— a) a state of public emergency exists either in any part or in the whole of Sierra Leone; or b) a situation exists which, if it is allowed to continue, may lead to a state of public emergency in any part of or the whole of Sierra Leone.*<sup>98</sup>

Unlike Ghana and Nigeria, the Sierra Leone constitution places the onus lightly on the 'opinion of the president' to determined that there is a breakdown of law or order, or when these situations are 'imminent'. Meaning it does not have to occur, but whether in the subjective thinking of the President, there is a likelihood of a threat to the life of the state. This provision is unique but vague and unguided.

The constitution went further to provide that.

<sup>94</sup> Ibid 134.

<sup>95</sup> Ibid section 33 (1).

<sup>96</sup> Ghana Constitution Article 31(2).

<sup>97</sup> Sierra Leone Constitution. Act No 6 of 1991.

<sup>98</sup> Ibid section 29 subsection (1)(a) & (b).

*The President may issue a Proclamation of a state of public emergency only when (a) Sierra Leone is at war; (b) Sierra Leone is in imminent danger of invasion or involvement in a state of war; or (c) there is the actual breakdown of public order and public safety in the whole of Sierra Leone or any part thereof to such an extent as to require extraordinary measures to restore peace and security; or (d) there is a clear and present danger of an actual breakdown of public order and public safety in the whole of Sierra Leone or any part thereof requiring extraordinary measures to avert the same, or (e) there is an occurrence of imminent danger or the occurrence of any disaster or natural calamity affecting the community or a section of the community in Sierra Leone, or (f) there is any other public danger which constitutes a threat to the existence of Sierra Leone.<sup>99</sup>*

For an emergency to happen there is a four-part test that has to be met. First, the President, in his opinion, should decide that an actual, or perceived, threat to the life of the state warrants a proclamation of a state of emergency. According to Kanu<sup>100</sup>, the Supreme Court in interpreting the wide latitude opined that the provisions '*connote abnormality, and curtailment of our rights and freedoms [...and an emergency,] empowers the President to take measures as he sees fit or necessary to control and contain a crisis*'.<sup>101</sup> Secondly, a declaration of emergency can be either in the whole or part of Sierra Leone. Third, there should be in existence a 'situation', whether real or perceived, which if uncontrolled will degenerate into a state of public emergency in part or the whole of Sierra Leone. In guiding the executive on what constitutes such situation, the Supreme Court in *S v Osman and Others* regulated that:

*'A situation', could be wide-ranging and encompasses a multiplicity of situations ad infinitum. It lies in the sole power and discretion of the President to determine a situation, which at any given time in his estimation, deserves a declaration by Proclamation of a state of public emergency. The exercise of this power is unquestionable and unchallengeable. The situation could be described as 'Economic' 'Political – 'National Disaster, and like situations, too numerous to mention here. Indeed, they are many and varied'.<sup>102</sup>*

Finally, there should be a publication of the Presidential Proclamation in the *Gazette*. '*The Gazette [is one which is] published by order of the Government of Sierra Leone and includes any supplement thereto...*' as provided for in section 4 of the *Interpretation Act 1971*.<sup>103</sup> It is therefore important to note that publication is a significant step for the Proclamation of the President to take effect. Otherwise, the declaration will have no effect.

An interesting judicial interpretation of the state of emergency provision in the Constitution underscores that the declaration of a state of emergency constitutes a threat to the enjoyment of human rights enshrined in the Constitution. The Supreme Court stated that '*Emergency Regulations are laws to which the fundamental rights constitutionally have to give way. They take a back seat to the extent the Emergency Regulations take the front seat. There is no room for both in the front seat. An emergency is what the word means*'. This meaning was adopted by Rodrigo J. in *Visuvalingam & Ors v Liyanage & Ors*, in the Sri Lanka Supreme Court.<sup>104</sup>

## Conclusion

Legal theories, principles and jurisprudence remain consistent on the state of emergency at both national constitutional level and international human rights platform. This is because emergency issues have been left to the state to determine the margin of appreciation. That being the case, politics rather than legality has determined the various interpretations of what constitutes a state of emergency. The

<sup>99</sup> Ibid section 29 (2) (a) to (f).

<sup>100</sup> Ibid section 29 (c).

<sup>101</sup> *S v Osman and Others*.

<sup>102</sup> Ibid.

<sup>103</sup> S.C. Applications No. 85/83 AND No. 6/84.

<sup>104</sup> Supreme Court of Sri Lanka, Law Reports of the Commonwealth, 1985, pp. 919-922.

outbreak of COVID-19 presents an exciting opportunity for judicial interpretation not just in developed democracies, but in countries such as Ghana, Nigeria and Sierra Leone.

This article has presented the existing international law and judicial decisions outside of West Africa, and it has discussed the constitutional provisions with varying powers and margin of appreciation. What remains uncontested, however, is that the declaration of states of emergency has remained a dent on the full enjoyment of the fundamental human rights anywhere in the world.

**Emmanuel Saffa Abdulai**

*Emmanuel Saffa Abdulai is a legal practitioner and a lecturer of Law at the Department of Law, Fourah Bay College, University of Sierra Leone. He is also a PhD Scholar at the Institute of Advanced Legal Studies, School of Advanced Studies, University of London. Emmanuel is Deputy Editor of the Institute of Advanced Legal Studies Student Law Review. He is a civil society practitioner working on human rights and democratic governance in Sierra Leone.*

# The Hellenic Parliament's Response to the COVID-19 Pandemic

## A Balancing Act between Necessity and Realism

Dr Fotios Fitsilis and Athanasia Pliakogianni

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### Introduction

Legislatures face political crises constantly; they navigate through them using an institutional weaponry made out of constitutional and standing order provisions, often accompanied by informal regulations, so-called 'soft law'. By soft law, one describes regulations or guidelines, so-called 'rules of conduct', which produce legal and practical effects without having legally binding force.<sup>1</sup> Nevertheless, the COVID-19 pandemic took whole societies by surprise.<sup>2</sup> Pandemics are primarily health crises with certain signature characteristics. They develop in multiple waves,<sup>3</sup> with different intensity and duration. Constitutions and standing orders do not contain dedicated provisions for such crises. In the absence of similar precedents, parliaments needed to improvise, often adopting expansive interpretation of existing provisions. To complicate things further, countries have used various approaches to combat the pandemic, a fact that affected the behavior of parliaments as well.<sup>4</sup> As the pandemic evolved, it became clear that parliaments faced disruptions that affected their operation over a longer period and tested their ability to adapt.

The novel situation posed several dilemmas for parliamentary institutions.<sup>5</sup> On the practical level, social distancing and other measures of protection needed to be adopted.<sup>6</sup> For instance, parliamentary personnel needed to wear protective masks and regularly clean premises and workbenches. Protective barriers were installed. On the political level, as each parliament has a dedicated tradition and a line of conduct, legislatures have chosen different ways of doing business. In general, parliamentary operation declined (Table 1). According to recent data,<sup>7</sup> when in plenary, only 14% of the parliaments continued conducting their business as usual, whereas 20% suspended operation completely. The majority of parliaments (53%) limited the number of plenary sessions or held remote and hybrid meetings. Interestingly, the relevant figure for committee meetings is much lower. Compared to plenaries, committees have a lower number of MPs and need less administrative personnel to operate, while the framework of operation according to standing orders or other internal regulations is generally less strict. This implies that committees may alter or adjust their operation to changing circumstances swiftly.

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<sup>1</sup> Oana Stefan, 'COVID-19 Soft Law: Voluminous, Effective, Legitimate? A Research Agenda' (2020) 5 *European Papers* 663.

<sup>2</sup> See Solomon Hsiang/Daniel Allen/Sébastien Annan-Phan/Kendon Bell/Ian Bolliger/Trinetta Chong/Hannah Druckenmiller/Luna Yue Huang/Andrew Hultgren/Emma Krasovich/Peiley Lau/Jaecheol Lee/Esther Rolf/Jeanette Tseng/Tiffany Wu, 'The effect of large-scale anti-contagion policies on the COVID-19 pandemic' (2020) 584 *Nature* 262.

<sup>3</sup> Terminology-wise, this is not to be confused with the phases of a pandemic, as defined by the World Health Organization (WHO), which constitute an alert system. See Tom Jefferson/Carl Heneghan, 'Covid 19 – Epidemic 'Waves'' (30 April 2020) Center for Evidence Based Medicine University of Oxford <<https://www.cebm.net/covid-19/covid-19-epidemic-waves/>> accessed 22 December 2020.

<sup>4</sup> For more information see: Erica Rayment/Jason VandenBeukel, 'Pandemic Parliaments: Canadian Legislatures in a Time of Crisis' (2020) 53 *Canadian Journal of Political Science* 379; Felix Uhlmann/Eva Scheifele, 'Legislative response to Coronavirus (Switzerland)' (2020) 8 *The Theory and Practice of Legislation* 115; Patricia Popelier, 'COVID-19 legislation in Belgium at the crossroads of a political and a health crisis' (2020) 8 *The Theory and Practice of Legislation* 131; Jan Petrov, 'The COVID-19 emergency in the age of executive aggrandizement: what role for legislative and judicial checks?' (2020) 8 *The Theory and Practice of Legislation* 71.

<sup>5</sup> See Ittai Bar-Siman-Tov, 'Covid-19 meets politics: the novel coronavirus as a novel challenge for legislatures' (2020) 8 *The Theory and Practice of Legislation* 11

<sup>6</sup> Detailed protection measures and relevant guidelines are to be found in: World Health Organisation, 'Pandemic Influenza Preparedness and Response: A WHO Guidance Document' (2009) <<https://www.ncbi.nlm.nih.gov/books/NBK143061/>> accessed 24 October 2020; World Health Organisation, 'Keeping Safe from COVID-19: Precautions at your workplace' (2020) <<https://www.who.int/southeastasia/outbreaks-and-emergencies/novel-coronavirus-2019/protective-measures/workplace-precautions>> accessed 20 December 2020.

<sup>7</sup> The Inter-parliamentary Union (IPU), a global organization of national parliaments with 179 member parliaments, constitutes the largest organization of representative institutions in the world. It closely follows developments in the COVID-19 front and maintains a country compilation of parliamentary responses to the pandemic. In late July 2020, it provided aggregated data based on surveys, which described in more detail some of the principal decisions that relate to parliamentary operation during the pandemic. For more, see IPU (n 7).

State	Plenary (%)	Committees (%)
Parliament not in session	20	6
No meetings taking place	14	15
Meetings taking place as normal	14	11
Limited meetings	36	21
Remote/hybrid meetings	17	47

**Table 1.** Survey data showing the response of parliaments, plenary and committees, to the pandemic<sup>8</sup>

Exactly this seems to have happened, as committees in roughly half of the parliaments (47%) have conducted fully remote or hybrid meetings. On several occasions, committee meetings were completely disrupted and inquiry sessions were postponed for an uncertain time. The passing of legislation through parliaments has been hindered and a rise in authoritarian leadership and 'pandemic populism' could be observed.<sup>9</sup> What probably constitutes one of the most significant facets is the fact that parliamentary control could hardly be conducted.<sup>10</sup>

It is probably too early to say what the implications of the operational decline of parliaments to the democratic system are. One can argue that there might be a connection between declined parliamentary activity and concerns for democratic malfunctions. Less parliamentary work probably means less control over the executive, what in some cases could possibly lead to misuses of delegated power, as the executive acts without or with limited checks and balances. Extended recesses of the plenary inevitably hold back necessary legislation that needs to be passed to combat health, economic and other societal effects of the pandemic. Moreover, one can expect a limited interaction between MPs, such as traditional lobbying between and during sessions, or limited political discourse during debates. In general, one could argue that throughout the COVID-19 crisis, parliamentary and governmental procedures become less accessible to the electorate and vice versa, MPs have fewer channels to reach their electorate, which would also explain issues of misinformation and miscommunication.

As the situation is complex and still developing, safe sources of data are necessary for researchers to evaluate local, regional or even global parliamentary response. Early in the pandemic, significant parliamentary organizations and stakeholders such as the Inter Pares, the Inter-Parliamentary Union (IPU), the Westminster Foundation for Democracy (WFD) and the ParlAmericas, have started to compile relevant surveys and collect data.<sup>11</sup> Apart from such independent sources of information, there

<sup>8</sup> Inter-Parliamentary Union [IPU], 'Country compilation of parliamentary responses to the pandemic' (2020) <<https://www.ipu.org/country-compilation-parliamentary-responses-pandemic>> accessed 21 December 2020; IPU data from a presentation by Andy Williamson at the digital conference 'Conversation about Parliaments in the face of the COVID-19 Pandemic - The accelerating phenomenon of the e-Parliament', Austral Universidad Argentina, 27 July 2020. Through a rounding mistake, percentages for plenary add up to 101.

<sup>9</sup> See e.g. Klaus Dodds/Vanesa Castan Broto/Klaus Detterbeck/Martin Jones/Virginie Mamadouh/Maano Ramutsindela/Monica Varsanyi/David Wachsmuth/Chih Yuan Woon, 'The COVID-19 pandemic: territorial, political and governance dimensions of the crisis' (2020) 8 *Territory Politics Governance* 289.

<sup>10</sup> In this regard, it has also been argued that during the pandemic new digital oversight practices have been developed to counterbalance governmental superiority; see Elena Griglio, 'Parliamentary oversight under the Covid-19 emergency: striving against executive dominance' (2020) 8 *The Theory and Practice of Legislation* 1.

<sup>11</sup> Jonathan Murphy, 'Parliaments and Crisis: Challenges and Innovations (Parliamentary Primer No. 1)' (2020) Inter Pares <<https://www.inter-pares.eu/sites/interpares/files/2020-05/Parliaments%20and%20Crisis%20Challenges%20and%20Innovations%20Primer.pdf>> last accessed 24 October 2020; IPU (no 7); Westminster Foundation for Democracy, 'Pandemic Democracy Tracker' (2020) <<https://tracker.wfd.org/>> accessed 24 October 2020; ParlAmericas, 'COVID-19 and Parliaments Role During a Pandemic' (2020) <[http://parlAmericas.org/uploads/documents/COVID19\\_and\\_Role\\_of\\_Parliaments\\_ENG.pdf](http://parlAmericas.org/uploads/documents/COVID19_and_Role_of_Parliaments_ENG.pdf)> last accessed 23 October 2020.

are also relevant reports from parliamentary research services.<sup>12</sup> However, one should be particularly careful while evaluating such information, as the above surveys seem to exclusively record and report on the parliamentary response during the first wave of the pandemic. As organizational change in parliaments is an evolutionary and dynamic process, parliaments are expected to further react to forthcoming local - maybe also to regional - pandemic surges.

The present article seeks to approach the response of parliaments to the COVID-19 pandemic, with a special focus on the Hellenic Parliament case. The study captures the events from the first institutional response to the pandemic in March 2020 until August 2020, when a second pandemic wave in Greece seemed to be *ante portas*. The Hellenic Parliament, after an initial shock period, focused on the continuation of its operation, while protecting the health of its members, officials and personnel. At this point, the authors underline the necessity to study the current pandemic in a holistic way, both from an institutional and academic point of view, in order to understand what has occurred and to learn valuable lessons for future conduct with similar disruptive events.<sup>13</sup> The article moves forth with a presentation of the steps taken by the Hellenic Parliament to remain operational, despite restrictions imposed by the necessity to efficiently combat the pandemic. A protocol of the different measures is presented and discussed. Special attention is vested on the digital dimension of the measures, followed by a primary evaluation of parameters such as level of urgency and potential for permanent use. The article concludes with recommendations on the handling of a lasting pandemic situation.

## Determinants of parliamentary responses throughout the COVID-19 pandemic

Parliamentarians during the pandemic faced an unprecedented situation. Lack of knowledge and information in such cases can inevitably lead to overestimation or underestimation of reality.<sup>14</sup> In fact, recent research shows that often parliaments have taken action without a real estimation of the dangers posed by the pandemic, driven more from general institutional determinants.<sup>15</sup> At the same time, parliamentarians had to deal with the very nature of the parliamentary systems, full of regulations and procedures that do not favour easy and quick adaptation.<sup>16</sup> In cases like these, the personal initiative shown by key personalities has probably been the key to the continuation of the parliamentary life.

Organizations in periods of crisis seek to adapt to the emerging environment, to secure their efficiency and protect themselves from a potential organizational decline.<sup>17</sup> There is no reason to assume that parliaments would act in a different way. Therefore, one expects that an important concern of parliaments throughout the pandemic would be to secure the effective continuation of operation for the efficient fulfillment of their function. Parliaments have an undisputed role in the institutional system, with their function being multifaceted.<sup>18</sup> Policymaking belongs to the core parliamentary roles.<sup>19</sup> However, power over the control of policies does not simply stem from the power to vote for or against a proposed agenda. The very position of parliaments in the democratic chain of delegation and accountability as the ones directly elected by the ultimate principal, the electorate, obliges parliaments to serve the

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<sup>12</sup> Indicatively, see the reports: María Díaz Crego/Rafael Mañó, 'Parliaments in emergency mode: How Member States' parliaments are continuing with business during the pandemic' (2020) European Parliamentary Research Service <[https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/649396/EPRS\\_BR\(2020\)649396\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/649396/EPRS_BR(2020)649396_EN.pdf)> last accessed 24 October 2020; Michaela Del Monte, 'Remote voting in the European Parliament and national parliaments' (2020) European Parliament Research Service <[https://www.europarl.europa.eu/RegData/etudes/ATAG/2020/649348/EPRS\\_ATA\(2020\)649348\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/ATAG/2020/649348/EPRS_ATA(2020)649348_EN.pdf)> accessed 24 October 2020.

<sup>13</sup> Ideally, such an interdisciplinary study needs to be conducted post-pandemic.

<sup>14</sup> See Ittai Bar-Siman-Tov (n 5).

<sup>15</sup> Israel Waismel-Manor et al., 'COVID-19 and Legislative Activity: A Cross-National Study' (2020) 20-12 Bar Ilan University Faculty of Law Research Paper.

<sup>16</sup> See Ittai Bar-Siman-Tov (n 5);

<sup>17</sup> Marleen Dieleman, 'Shock-imprinting: External shocks and ethnic Chinese business groups in Indonesia' (2010) 27 Asia Pac J Manag 481.

<sup>18</sup> Ulrich Sieberer, 'The Institutional Power of Western European Parliaments: A Multidimensional Analysis' (2011) 34 West European Politics 731.

<sup>19</sup> Kaare Strøm, 'Delegation and accountability in parliamentary democracies' (2000) 37 European Journal of Political Research 261.

interests of the principal and at the same time awards parliaments a series of powers.<sup>20</sup> In this sense, parliaments' elective power directly controls the executive and the judiciary by selecting some of its members, such as officers, presidents, court members and others.<sup>21</sup> By electing, parliaments delegate further the mandate they have received from the ultimate principal. Parliaments' control function secures the reverse effect of the democratic chain.<sup>22</sup> The mentioned agents are not only obliged to serve the electorate but through parliament, they are also accountable to the electorate for their actions. Hence, parliaments are also powerful tools of control. The continuation of regular parliamentary operation is in fact the ultimate means a democratic institutional system possesses to secure democratic function and control of the executive in unprecedented times, when the latter forces emergency measures and concentrates powers on the expense of the legislature.<sup>23</sup> Parliaments have the potential to prevent authoritarian governments from gaining excessive power, to protect rights and secure transition to political normality after the end of the pandemic.<sup>24</sup> Pandemics do not last forever, emergency measures are not there to stay and parliaments are the ones to ensure that whatever power delegated to the executive within the framework of crisis management should return immediately to the legislature, where it ultimately belongs.

Presumably, the greatest puzzle for parliaments has been to secure operational efficiency and at the same time to protect the health of their personnel and members.<sup>25</sup> Realistically, one may assume that throughout the pandemic, healthcare concerns have been the major driver of the behavior of parliaments. Parliaments constitute places of concentration of large numbers of people – and can therefore facilitate the spread of the virus.<sup>26</sup> The majority of parliamentarians are themselves part of the population at risk, due to age, gender and health condition.<sup>27</sup> What is even more important, parliamentarians are constantly in contact with their electorate and other society's stakeholders. Thus, in case of infection, they pose a danger for the community.<sup>28</sup> In this reality, on-site meetings and normal operation seem far from a rational behaviour, both for parliamentarians individually and for parliaments as collective bodies.

With the above in mind, most parliaments have managed to react swiftly and implement a series of innovations, probably unthinkable in a normal period. After an initial shock-period, the majority of parliaments resumed operation, while hybrid and virtual sessions experienced a sharp rise. Parliaments worldwide entered a giant digital transformation exercise. Technological innovations have always been a means to institute changes,<sup>29</sup> especially in times of crisis, in which institutions face external pressures and are forced up to a point to adapt. The very existence and quick deployment of new technologies practically made a swift institutional COVID-19 response feasible. Software and hardware solutions, along with the expansion of all kinds of networks, have secured the ability of parliaments to respond adequately to the pandemic. Hence, overall, the digitization of parliamentary procedures during the pandemic has probably been one of the major wins for parliaments. While in several sectors of human conduct the effect of the virus has been devastating, in parliaments it has evidently left an overall positive (digital) footprint. This development, should it persist, has the potential to thoroughly transform the function of parliaments in the future.

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<sup>20</sup> *ibid.*

<sup>21</sup> See Sieberer (n 18).

<sup>22</sup> *ibid.*

<sup>23</sup> On the need for parliamentary control over the executive to prevent panic measures and abuse or appropriation of excessive power, to protect the rights of minorities and secure transition to normality once the emergency is over, see Jan Petrov, 'The COVID-19 emergency in the age of executive aggrandizement: what role for legislative and judicial checks?' (2020) 8 *The Theory and Practice of Legislation* 71.

<sup>24</sup> *ibid.*

<sup>25</sup> See Griglio (n 10).

<sup>26</sup> See Ittai Bar-Siman-Tov (n 5).

<sup>27</sup> *ibid.*

<sup>28</sup> *ibid.*

<sup>29</sup> Timothy Hargrave/Andrew H. Van De Ven, 'A Collective Action Model for Institutional Innovation' (2006) 31 *The Academy of Management Review* 864.

## The Hellenic Parliament Case

'We have kept our parliament open and did not succumb to the voices that wanted it closed',<sup>30</sup> declared Konstantinos Tasoulas, the Speaker of the Hellenic Parliament in July 2020. But while this is generally true, the Hellenic Parliament was indeed found largely unprepared in front of a crisis of the magnitude of the COVID-19 pandemic. In the following, the article outlines the parliamentary response during the period from March to August 2020.<sup>31</sup> The general response is timely divided into two groups of actions. Furthermore, these actions are classified into two distinct dimensions, health and safety, and digital transformation. Health and safety actions are directly related to combating the pandemic, whereas digital actions are linked to enabling the functional capability of parliament.

### Action Group A (March - June 2020)

On 25 February 2020, the Greek government issued its first executive order 'Urgent measures to avoid and limit the spread of the coronavirus'. Several others followed. According to art. 44 of the Constitution, such orders need to be ratified by parliament by law within 40 days. For the first one, this happened on 2 April 2020.<sup>32</sup> Moreover, on 12 March 2020, the Conference of Parliamentary Chairmen convened to decide on the safety measures for personnel, officials and Members of Parliament (MPs), as well as on the adjustment of parliamentary procedures in the light of the developing pandemic situation.

General measures included the implementation of social distancing measures, both for MPs and parliamentary personnel. This had a profound effect on parliamentary work.<sup>33</sup> For instance, in the plenary, the presence of MPs was limited to one per parliamentary group while the speaking time was halved. Later, in May, up to 60 MPs were allowed to enter the plenary. Under these conditions, standing committees continued to operate. On the contrary, the work of special permanent committees was suspended<sup>34</sup> and parliamentary control was reduced to once a week, whereas administration operated with safety personnel with the rest switching to home office. In addition, by the end of May 2020, in the context of community screening within the parliamentary environment, more than 1000 tests were conducted for molecular identification of the new coronavirus SARS CoV 2 (pcr).

The pandemic also seems to have significantly sped up digital transformation in parliament. Teleconferencing facilities have been installed to enable remote/hybrid meetings for standing committees.<sup>35</sup> At the same time, a range of new services and digital facilities have been planned or introduced, such as speech recognition for semi-automatic minute generation, digital signatures for MPs, enhanced cyber security and collaboration infrastructure. Interestingly, there was little to no disruption in the operations of the Scientific Service, since it had long adopted a distributed and project-based working culture based on electronic collaboration.

### Action Group B (July - August 2020)

On 1 July 2020, Greece fully opened its borders and allowed, with some restrictions, inbound flights. This 'official' opening of the summer season allowed for a further spreading of the virus that became

<sup>30</sup> Hellenic Parliament, 'Ο ιός δεν έπληξε τον ναό της δημοκρατίας [Our temple of democracy did not suffer from the virus]' (27 July 2020) 1 Βουλή επί του περισταλίου [Official Journal of the Hellenic Parliament] 6.

<sup>31</sup> This period roughly corresponds to the first pandemic wave in Greece, though there are expert opinions according to which the first wave has not ended yet.

<sup>32</sup> Act 4682/2020 (April 2020) ΦΕΚ [Official Gazette] 76/A/3.

<sup>33</sup> Also at this point, it is underlined that the imminent response covered the first pandemic wave, while it was still unclear how long it would last and whether it would be a second or multiple follow-up waves. A general presentation of these measures was made by Speaker Konstantinos Tasoulas on 24 June 2020; see Hellenic Parliament, 'Speech of the President of the Hellenic Parliament regarding the Greek Presidency of the Council of Europe' (24 June 2020) Press Release <<https://www.hellenicparliament.gr/Enimerosi/Grafeo-Typou/Deltia-Typou/?press=6fb0b542-a8a6-444f-a7cd-abe401560ba4>> last accessed 22 December 2020.

<sup>34</sup> An informal virtual meeting did take place on 8 April 2020 upon personal initiative by the President of the Special Permanent Committee of Environmental Protection; see Inter Pares, 'Responding to COVID-19: The Hellenic Parliament holds virtual meetings' (2020) <<https://www.inter-pares.eu/news/responding-covid-19-hellenic-parliament-holds-virtual-meetings>> last accessed 21 December 2020.

<sup>35</sup> Standing Orders of the Hellenic Parliament, Art. 38.

visible in the increase of the detected cases. On 28 July 2020, the government responded by issuing a Joint Ministerial Decision related to the mandatory use of masks in closed spaces.<sup>36</sup> The Hellenic Parliament immediately reacted by issuing a 'particularly strong recommendation' for mask use in all common areas, such as corridors, canteens, meeting rooms and offices.<sup>37</sup> On the same day, by decision of the Speaker and following recommendation by the Infectious Diseases Commission, the mandatory use of masks in the plenary was announced, but only when there are more than 100 MPs in session.<sup>38</sup> As of July 1, up to 120 MPs were permitted to be in the same space, allowing the plenary to resume – more or less – its regular operation.<sup>39</sup> Moreover, some premises (exhibition spaces) have been reconstructed for the operation of various committees. It also needs to be noted that the parliament donated 50 fully equipped intensive care beds to the health care system to help combat the pandemic.<sup>40</sup>

After the summer recess, and in view of the increasing COVID-19 cases, the parliament activated new special health precautionary measures against the pandemic. At first, by decision of the Speaker, parliamentary operation under safety personnel continued.<sup>41</sup> At the same time, mask use has become mandatory in all closed areas of the parliament and a new series of tests for employees and MPs was announced to be carried out by the National Organization of Public Health.<sup>42</sup> Furthermore, by decision of the Speaker on 24 August 2020, the above measures were immediately followed by additional ones, such as a further limitation of the number of MPs in sessions to 60, special markings for seating and a general prohibition of visits to the parliament as well as to MPs' offices.<sup>43</sup>

What becomes apparent in the above handling of the situation through multiple decisions and regulations, particularly in the second action group, is an overall anxiety to avoid any transmission and spreading of the virus within the parliamentary environment. As the parliament enjoys a major institutional status and needs to display leadership and integrity at all times, specifically during the ongoing pandemic, such an event could prove disastrous. The authors recognize the urgency and hence the necessity of these decisions. In the case of the special permanent committees, the decision was made to suspend their operation. However, as demonstrated by the Special Permanent Committee of Environmental Protection, the parliament could opt for a full virtual operation, in order not to have to suspend operation on practical grounds, such as lack of suitable meeting rooms or procedural shortcomings. What also deserves a mention is the fact that during the first pandemic wave, the parliament introduced a series of digital tools and services, while also planning for additional ones in the near future. Even though such services are not to be immediately linked to support operational changes during the pandemic, this may prove that the pandemic did have an overall positive impact on digital transformation.

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<sup>36</sup> ΚΥΑ Αριθμ ΔΙα/ΓΠ οικ 48002/2020 – ΦΕΚ 3131/Β/28 Ιουλίου 2020' [Ministerial Decision No ΔΙα/ΓΠ οικ 48002/2020 Official Gazette 3131/Β/28.07.2020]. It was later replaced by the Ministerial Decision No ΔΙα/ΓΠ οικ 48967/2020 – Official Gazette 3162/Β/31.07.2020.

<sup>37</sup> This announcement was made by the Directorate for Human Resources and Training. Additional, more strict, measures and limitations were announced for other areas within the parliament such as the doctor's office and elevators.

<sup>38</sup> The announcement was made by the Vice-Speaker Nikitas Kaklamanis: Hellenic Parliament, Plenary Minutes (29 July 2020) <<https://www.hellenicparliament.gr/UserFiles/a08fc2dd-61a9-4a83-b09a-09f4c564609d/es20200729.pdf>> last accessed 22 December 2020.

<sup>39</sup> See Hellenic Parliament (n 30) 7.

<sup>40</sup> *ibid.*

<sup>41</sup> The decision excluded the General Directorate of Parliamentary Work from this measure, in order for it to be able to support committee meetings and the plenary sessions of the parliament; Hellenic Parliament, 'Πως αντιμετώπισε η Βουλή των Ελλήνων τον νέο κορωνοϊό [How the Hellenic Parliament reacted to the novel Corona virus]' (1 December 2020) 8 Βουλή επί του περισταλίου [Official Journal of the Hellenic Parliament] 31.

<sup>42</sup> Special Health Coverage Service of the parliament, Announcement on 21 August 2020. A recommendation for open spaces was also issued.

<sup>43</sup> Hellenic Parliament (no 41) 31.

Dimension	Actions	[U]rgency / [P]ermanent Use
Health and Safety	• Structural adjustments due to social distancing <sup>44</sup>	U/P
	• Use of masks <sup>45</sup>	U
	• Extended testing for infected individuals	U
	• Plenary: limited presence and speaking time	U
	• Standing Committees: continued working	U
	• Special Permanent Committees: suspended	
	• Parliamentary control sessions: limited to once a week	U
• Administration: safety personnel <sup>46</sup>	U	
Digital Transformation	• Expansion of teleconferencing facilities	U/P
	• Electronic submission of parliamentary control means	U/P
	• VPN access to administrators	U/P
	• Planning and introduction of new digital services	P

**Table 2.** The two dimensions of parliamentary change during COVID-19 pandemic

Table 2 displays a broad overview of these two dimensions of change. The table also includes an assessment of the urgency of the specific actions ('U' marks the urgent nature) as well as the possibility for permanent use (marked with a 'P'). Several of the actions mentioned above may not be one-off and are meant to be used further in the future. On the one hand, this could be true for the structural elements for social distancing, as well as for the overall health and safety planning. On the other hand, this seems to be particularly the case for most of the adopted digital transformation steps. The expansion of the teleconferencing equipment, the widened use of the electronic submission of parliamentary control means, the online access of parliamentary administrators to their workbench via secure Virtual Private Network and the use of digital signatures by MPs and staff belong to the tools and services that will continue to be used in the future.

With the above in mind, a question arises on the performance of the Hellenic Parliament vis à vis the global response as revealed by the IPU findings, above at Table 2. The Hellenic Parliament joins a larger group of parliaments (36%) with limited plenary sessions. After a short shock-period, like most parliaments (68%), it also kept organizing limited committee meetings and, on some occasions, hybrid and remote ones. These operational changes were not all made at the same time, a remark which implies that the parliamentary adaptation process is dynamic and additional changes may be necessary, should the pandemic intensify. However, it certainly needs to be mentioned here that declined or modified parliamentary operation does not automatically mean democratic deficit and the Hellenic Parliament seems to have overcome this danger by displaying an ability to adapt and evolve. It has also shown a willingness to secure transition to normality. Moreover, it has found for itself new roles, actively supporting the fight against the pandemic. More importantly, while the second wave of the pandemic is making its way to Greece, the above experience and lessons learned need to flow into a realistic 'battle plan'.

<sup>44</sup> E.g. special construction or markings.

<sup>45</sup> As mentioned previously, by the end of August 2020 the level of mask use rose from 'particularly strong recommendation' to 'mandatory'.

<sup>46</sup> Where necessary, exceptions are made to facilitate parliamentary operation.

Another point that needs to be clarified is the legal background of the decisions issued by the hierarchy of the administration and the political leadership, ie, the Speaker and the Secretary General. As pointed out earlier on, parliamentary rules of procedure and other types of soft law were unlikely to contain provisions for crises of this magnitude. At the same time, it was not possible to convene the plenary to proceed with possible amendments before an unknown enemy. Hence, the Hellenic Parliament has been guided through multiple oral, and therefore informal, instructions. Nevertheless, the legality of these actions has never been questioned as the Speaker of the Parliament enjoys broad authorization by the plenary, with enhanced freedoms and rights, to lead the organization.<sup>47</sup>

## Conclusions

The COVID-19 pandemic placed parliaments in an unprecedented situation; they had to change and they had to do it quickly. Parliaments as traditional organizations, or better said as organizations that rely on tradition, are not used to change. Nevertheless, in general, parliaments responded to the situation with a broad range of urgent measures to protect the health of personnel and MPs, but also to adjust parliamentary procedures to the new environment. This finding is supported by an IPU study on the global parliamentary response to COVID-19.

Within this context, the article presented and discussed in detail the actions taken by the Hellenic Parliament to combat the pandemic. Methodologically, parliamentary response has been divided into two groups of actions and these actions were classified into two distinct dimensions, health and safety and digital transformation. Apart from an extensive set of social distancing measures, the Hellenic Parliament seems to join a larger group of parliaments that used the capabilities of modern technology to further enable parliamentary operation during the pandemic. Within this unknown and dynamic crisis situation the political leadership had to display novel flexibility and a timely response. The informal nature of some landmark decisions has been discussed and was found to be in-line with the broad administrative authorization vested in the Speaker of the Hellenic Parliament.

Scholars largely agree that the pandemic distorted the institutional equilibrium in favor of the executive. Yet, what is being described above could be merely a snapshot, given that the pandemic seems far from being over and that the situation may very well shift with time. Hence, any preliminary results, also on the national level, need to be handled with care and a rigid research framework might be needed to fundamentally understand what has happened to the democratic institutions during the crisis. This article highlights the point that it is maybe wrong to evaluate existing findings in the midst of an ongoing crisis.

On the other hand, the pandemic has also presented parliaments with difficult problems and hard decisions needed (and still need) to be made. What parliaments need to ensure is a local, regional and global knowledge base and that the lessons learned are incorporated into new crisis response plans to ensure that such a disruption cannot happen again. A broad base for cooperation among all necessary stakeholders will be needed to facilitate this parliamentary transformation, an approach rigidly connected with the incorporation of new and rapidly maturing digital technologies, such as legal informatics<sup>48</sup> and advanced algorithms,<sup>49</sup> which enhance systemic robustness and enable broad interoperability. Finally, the sustainability of any agreed upon solutions needs to be ensured and, if possible, linked to the United Nations Agenda 2030 for Sustainable Development.<sup>50</sup>

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<sup>47</sup> In controversial cases, the Speaker may rely on the legal opinion of the Scientific Council of the Hellenic Parliament; see Fotis Fitsilis/Vasilis Bayiokos, 'Implementing structured public access to the legal reports on bills and law proposals of the Scientific Service of the Hellenic Parliament, Greece' (2017) 13 *Knowledge Management for Development Journal* 63.

<sup>48</sup> See Giovanni Sartor/Monica Palmirani/Enrico Francesconi/Maria Angela Biasiotti (eds.) *Legislative XML for the Semantic Web* (4 Law, Governance and Technology Series, Springer 2011).

<sup>49</sup> See Fotis Fitsilis, *Imposing Regulation on Advanced Algorithms* (Cham: Springer 2019).

<sup>50</sup> Fotis Fitsilis/Franklin De Vrieze, 'How parliaments monitor sustainable development goals – a ground for application of post legislative scrutiny' (2020) 26 *The Journal of Legislative Studies* 448.

**Dr Fotios Fitsilis**

*Dr Fotios Fitsilis has an academic background in law, economics and engineering. Since 2007, he has worked at the Hellenic Parliament; currently, as Head of the Department for Scientific Documentation and Supervision in the Scientific Service. His primary areas of research are parliamentary development and the digital evolution of parliamentary institutions. He is the author of several books and scientific publications. In 2017, Dr Fitsilis co-founded the Hellenic OCR Team, a crowdsourcing initiative for the processing and analysis of parliamentary data.*

**Athanasia Pliakogianni**

*Athanasia Pliakogianni works as Academic Manager for the Bamberg Graduate School of Social Sciences, University of Bamberg. She holds a Master's Degree in Political Science with a focus on Comparative Politics from the University of Bamberg in Germany, and a Master's Degree in Politics and Economics of Eastern and Southeastern Europe from the University of Macedonia in Greece.*

# Impact on Democracy of Emergency Measures Against Covid-19: The Case of Albania

Dr Afrim Krasniqi

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## Introduction

Since the nineties Albania has declared several national emergencies. The violent riots of 1991 and 1997 were prominent cases thereof. The state of emergency was invoked six more times since that time owing to natural disasters. The situation with COVID-19 in 2020 marks a new, unique experience with fundamental differences from the past. In none of the previous states of emergency has public, private, parliamentary and judicial activity been effectively suspended and state propaganda and police force used as creatively as in 2020.

The outbreak of COVID-19 in early 2020 found Albania in a situation of political crisis, whilst stuttering in its efforts to recover from the natural disaster caused by the heavy earthquake of November 2019. The two subsequent emergencies left little breathing space and took a combined heavy toll on the Albanians whilst developing against a backdrop of growing political and institutional dysfunctionality. In February 2019 the opposition had collectively waived its parliamentary mandates and did not participate in political institutions since then.<sup>1</sup>

Prior to that, the local elections of June 2019 had taken place in the absence of the opposition. As a result of this, the Socialist Party of Prime Minister Rama easily gained control of 100% of Albania's municipalities, as its candidates had virtually no competition or just makeshift opposition candidates. The legitimacy of the local elections is still awaiting a ruling by the Constitutional Court, while political life remains stuck in a situation of permanent conflict. As of 1 January 2020, Albania took over the chairmanship of the Organisation for Security and Cooperation in Europe (OSCE) and Prime Minister Edi Rama, at the same time Minister of Foreign Affairs, is currently the OSCE Chairman in Office till the end of 2020.

The outbreak of the pandemic followed by the declaration of a state of natural disaster on 23 March 2020 constituted a virtually uninterrupted extension of the state of emergency, as from November 2019 to 31 March 2020 a good part of Albania was officially in a state of natural disaster due to the earthquake of 26 November 2019. The November 2019 earthquake<sup>2</sup> wreaked havoc on a country already in shambles in terms of constitutional safeguards. At that time, Albania lacked a Constitutional Court and a High Court. It still does. Both courts continue to be dysfunctional because of the vetting of the judiciary. The absence of these key institutions of the justice system, the deepening crisis of the parliamentary and local government system, make the Albanian case unique in relation to other countries, as Albania had to face COVID-19 in a situation marked by the absence and/or poor functioning of some of its key democratic institutions.

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<sup>1</sup> The parliament continues to function with only 122 out of 140 deputies, 39-40 of whom are MPs without a clear political identity, coming from the proportional lists as replacements for the outgoing opposition. Over 80% of the 'new opposition' MPs are pro-government, so all government acts easily pass in parliament with only 10-20% of votes against.

<sup>2</sup> On November 26, 2019, Central Albania was hit by strong seismic tremors, 6.4 Richter, the largest earthquake since 1979. Over 50 citizens lost their lives and over 2000 were injured. The scale of damage was extraordinary for a country with a fragile economic system and infrastructure.

## Legal framework on crisis administration in Albania

The legal basis behind the management of emergency situations in Albania consists of the Constitution of Albania (1998), the law 'On Civil emergency' (2019), the law 'On the prevention and fight against infections and infectious diseases' (2016), and 'Law on Public Health' (2009).

The Constitution of Albania (1998) regulates the decision-making practices for the state of emergency. Article 170 of the Constitution stipulates that:

acts taken in the framework of extraordinary measures must be proportional to the degree of risk and must aim at restoring as soon as possible the conditions for the normal functioning of the state. In situations requiring extraordinary measures, none of the following laws can be changed: the Constitution, the laws on elections for the Assembly of Albania and local government bodies, and the laws on extraordinary measures.

Article 74 of the Constitution enables the convening of the parliament in an extraordinary session for the purpose of the adoption of emergency-related measures, limited in time and scope as per the provisions of Article 174. Additionally, Article 84 states that in case of extraordinary measures, as well as in case of urgency, with the consent of the President, the law shall enter into force immediately after being publicly announced. The law must be published as soon as possible in the latest issue of the Official Gazette.

## Circumventing the legal framework

In the state of emergency of December 2019, the government passed in the parliament a bill on anti-defamation, severely criticised by the media and civil society as an initiative against the media and freedom of information. An Opinion of the Venice Commission on 19 June 2020 criticised this lawgiving initiative and suggested substantial changes to the legislation passed.<sup>3</sup>

In February 2020 the Assembly of Albania reduced the powers of the President of the Republic, who until that time was in charge of swearing in constitutional judges. In its June 2020 Opinion, the Venice Commission considered this initiative of the government majority to be wrong. In the second state of emergency situation of March-July 2020 the Assembly continued to hastily pass an astonishing number of legal acts, some of which through expedited procedure. The adoption of such acts, falling under the conditions of a state of emergency are expressly prohibited by the Constitution. This applies in particular to the amendments made to the Criminal Code (April 2020) and to the amendments to the Electoral Code and to the Constitution itself (July 2020).

The changes in the powers of the President, the changes in the regulatory framework of the media and the changes to the Constitution became a source of intense political conflict, as just 10 months before the parliamentary elections, the parliamentary majority unilaterally decided to apply sweeping changes to the electoral system, banning pre-electoral coalitions, a move that was clearly to the benefit of the current government. The online debate on constitutional changes lasted only five days, making Albania, perhaps, the only country in the world to change its constitution in the COVID-19 period through an expedited online procedure.

Just a few days before the declaration of the state of emergency, on March 5, the Assembly approved a normative act of the government called 'On preventive measures in the framework of strengthening the fight against terrorism, organised crime, serious crime and consolidation of public order and security', a law that allowed the police to request seizure for any property of suspects, in the case of non-justification of the origin of the property, within 48 hours.

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<sup>3</sup> Venice Commission, Opinion No. 980 / 2020, CDL-AD (2020)013, <https://rm.coe.int/vc-opinion-albania-0620/16809ec9c9>.

The growingly unchecked government control over parliament enabled the former to push the latter to approve a host of new pieces of legislation including financial amnesties for individuals in possession of money outside the banking system, changes in the legislation entitling state police to eavesdrop on citizens without a prior court and prosecutorial decision, legislation on the territorial reorganisation of the country related to the upcoming election campaign, privatisation contracts, a law on capital markets, anti-defamation legislation and so on. The government backed down from the fiscal amnesty only after criticism by the IMF followed by pressure from the EU.<sup>4</sup> It proceeded unimpeded with the remaining pieces of legislation, with the exception of the government-sponsored anti-defamation bill that was also heavily criticised by an international organisation.<sup>5</sup>

Constitutional experts maintain that in a state of emergency, no acts of a permanent nature should be passed unless absolutely necessary. The (mis)use of an emergency situation to spearhead constitutional changes was a severe deviation from sound constitutional practice in Albania. As a consequence of these actions, at least three lawsuits against the government were brought to the Constitutional Court. The President of the Republic used his veto powers to return to parliament at least 13 laws and normative acts passed in the same period.<sup>6</sup> Of the latter, the Assembly accepted to reconsider only one of the returned laws, whilst overturning all remaining presidential decrees, thus leaving in force the laws as previously approved.

In the period 15 March – 23 June, the Council of Ministers adopted 30 normative acts with the force of law. The Constitution of Albania, Article 101, recognizes the right of the Council of Ministers, in case of need and under conditions of urgency, to issue normative acts that have the force of law, as temporary measures. These normative acts are to be immediately sent to the Assembly, which has to come together in a plenary to decide on their merits within 5 days from receiving them. According to this article, all acts adopted in such a manner become null and void, if they are not upheld by the Assembly within 45 days.

By the first meeting of parliament under the circumstances of COVID-19 the government had already adopted 13 normative acts. In total, 12 other normative acts were adopted as the parliament convened without respecting the constitutional 5-day deadline. Through its normative acts, the government bluntly violated the constitutional principle of separation and balance of powers and brought the focus of decision-making to itself by causing a significant weakening of the institution of the parliament. According to former judge at the European Court of Human Rights, Ledi Bianku, while most of the acts in response to the COVID-19 pandemic were adopted with a legitimate aim, their legal form, the lack of control by parliament within the Constitutional deadlines and the nature of that parliamentary control do not seem to comply with the Constitutional provisions.<sup>7</sup>

The two constitutional key preconditions – need and urgency for emergency measures – which would make the passing of the said normative acts justifiable, were not fulfilled in most of the cases. Parliament did not initiate in any case investigations or request clarifications from the executive on such need and urgency. Overall, most of normative acts with the force of law adopted by the Council of Ministers brought restrictions on the freedoms and constitutional rights of citizens. Decision 20/2006 of the Constitutional Court lays out that fundamental rights and freedoms can not be restricted by bylaws such as decisions of the Council of Ministers, but only by "law". Numerous lawyers criticised the contradiction between the adopted legal acts, the consequences of which, among other things, restricted human rights and freedoms.

In addition to Article 74 of the Constitution, Law 9000/2013 'On the organisation and functioning of the Council of Ministers' stipulates that all legal acts (normative acts, laws, government instructions, etc.) take effect after their publication in the Official Gazette. Orders of the Prime Minister and of the

<sup>4</sup> <https://www.reporter.al/pas-terheqjes-nga-shkarkimi-i-metes-qeveria-terhiqet-edhe-nga-amnistia-fiskale/>.

<sup>5</sup> <https://www.reporter.al/anti-shpifja-nje-ligj-ge-mund-te-mbroje-oligarket-thote-venecia/>

<sup>6</sup> <https://www.parlament.al/LigjeRishqyrtim>.

<sup>7</sup> Ledi Bianku. Legal Framework, and Previous Experiences, of the Use of Emergency Powers in Albania Albania –Exceptional Extraordinary Measures, <https://verfassungsblog.de/albania-some-exceptional-extraordinary-measures/>, May 2020.

Ministers, in addition to the publication in the Official Gazette, may enter into force immediately after being notified to the interested parties and announced, for at least 3 days, in a visible place of the respective institution. It turns out that some of the orders and acts issued during COVID-19 were never published in the Official Gazette and were not made known to the public.<sup>8</sup>

In a report on the violations of human rights and freedoms during the COVID-19 period, the People's Advocate cited two acts of the Ministry of Health that have not been published in the Official Gazette, adding that 'despite the constitutional obligation to publish the new acts, the measures laid out in the two normative bylaws have been implemented and are being implemented by state structures without gaining legal force as they have not yet been published in the Official Gazette. The public has been informed of the existence of such measures solely through the declarations of the Prime Minister, by the notifications of the State Police or by the media.'<sup>9</sup>

On 17 April, the Prime Minister announced that 13,518 fines imposed during the period 15 March 15-17 April for violations to the ban on circulation and movement rules imposed by the government would be pardoned. Of these, 7107 fines applied to pedestrians who were caught outside their apartments in violation of the schedule of movement restrictions. The fine consisted of a penalty of 10 thousand ALL and of the removal of the right to use a personal vehicle for up to three months. Experts criticised the fact that fines and sanctions were imposed before the legal measures necessary for their enforcement took legal effect, which forced the government to *de facto* forgive the consequences of an illegal act. Whilst the Council of Minister's Decision on the declaration of the state of emergency banned travel outside the territory of Albania, there were cases when senior state officials, including MPs, traveled abroad and upon their return, were not subject to mandatory quarantine. The Prime Minister, after being confronted by the media, admitted that in May 2020 he traveled by special plane to Paris, on a trip for which the Minister had not informed the media or the public.

## A faded-out parliament

From 12-30 March, Parliament suspended its sessions. On 31 March it decided to resume work online, by amending its Rules of Procedure. Work resumed online in the parliamentary committees and with limited physical presence in plenary sessions. The amendment of the Rules of Procedure of the Parliament was made on 16 April, with 30 days of retroactive effect. The changes to the rules were made within 4 days, without a public consultation. The restriction on the adoption of acts by accelerated procedure was removed, as well as the restrictions related to parliamentary procedures, especially those related to public consultations, and accountability. There is no end in sight of the online activity of the Parliament, despite the fact that the state of natural disaster officially ended on 23 June 2020.

During the four months of the pandemic, Parliament held 18 plenary sessions, adopted about 150 acts, of which 30 were normative acts on the situation of COVID-19. In July 2020, seven plenary sessions were held in quick succession: 3 sessions within 3 days, on 27, 29 and 30 July 2020.<sup>10</sup> The high number of normative acts passed by the Parliament was clearly linked to the pre-electoral political agenda of the government majority. In the last week of July, the majority initiated and approved the amendment of the Albanian Constitution with regard to the electoral system. The Albanian legislation on the state of natural disaster entrusts the essential decision-making to specialised bodies, while the political institutions are supposed to exercise political control over the legality and effectiveness of the acts proposed by the specialised bodies.

Over a period of four months, the Parliament did not hold a single question-and-answer session on the situation of COVID-19. It did not set up a commission of inquiry into the epidemic, and did not set up a monitoring structure on the measures taken by the executive branch. It conducted 7 interpellations, but

<sup>8</sup> <http://isp.com.al/wp-content/uploads/2020/06/KUVENDI-I-SHQIP%C3%8BRIS%C3%8B-MASAT-LIGJORE-DHE-ZHVILLIMI-I-AKTIVITETIT-N%C3%8B-PERIUDH%C3%8BN-E-COVID-19.pdf>

<sup>9</sup> [www.avokatipopullit.gov.al/media/manager/ëëbsite/media/Rekomandim%20lidhur%20me%20aksesin%20shtetasve%20ne%20aktet%20normative%20date%2026%20mars%20seksioni%20i%20vecante.pdf](http://www.avokatipopullit.gov.al/media/manager/ëëbsite/media/Rekomandim%20lidhur%20me%20aksesin%20shtetasve%20ne%20aktet%20normative%20date%2026%20mars%20seksioni%20i%20vecante.pdf)

<sup>10</sup> ISP, Assembly of Albania during COVID – 19, Report, Tirana, August 2020.

none of them related to the problems of COVID-19. Two urgent interpellations were related to the demolition of the National Theatre, two to education and two to the situation of the crime in the country. The COVID-19 situation disrupted the functioning of political parties and cancelled their political agendas. Naming the pandemics as a reason, Prime Minister Rama's Socialist Party cancelled two of its general assemblies, one scheduled in March and another scheduled in July. These general assemblies would have elected the party's steering board, as its statutory mandate had already expired.

## Operational management of the pandemic

The first cases of COVID-19 were identified in citizens coming from Italy. Between 8-13 March 2020, several thousand citizens entered the country from Italy. The Albanian authorities failed to establish a testing system for the reception of incoming Albanians from Italy. Institutionally, after identifying 'the patient 0', the government reacted immediately by announcing several restrictive measures. On 11 March, the Ministry of Health declared the state of pandemic and on 15 March, the Council of Ministers approved the normative act 'On special administrative measures during the period of infection caused by COVID 19'. On 12 March Parliament decided to suspend its own activity. It imposed a national traffic ban, a 14-day quarantine system, the suspension of administrative activities, the suspension of the education system, the suspension of public, political, sports and cultural activities, as well as most private activities.

The scale of suspensions was drastic. It created a situation of uncertainty with heavy consequences for the citizens, institutions and businesses. All restrictive measures, initially envisaged for two weeks were extended on 1 April until the end of the pandemic. On 24 March, under growing public pressure the government declared the state of natural disaster. This decision limited 5 constitutional human rights. Just a week later, on 31 March, Albania submitted to the Council of Europe a verbal note on the provisional derogation of Articles 8 and 11 of the European Convention on Human Rights<sup>11</sup> until further notice. On 25 March, the Council of Ministers decided to postpone all court hearings on administrative, civil and criminal cases planned by all courts in the country. The suspension of court proceedings at all levels removed all legal guarantees for civil rights, as well as judicial control of normative acts and parliamentary control. The suspension of the activity of the administrative courts denied all opportunity of access to justice to Albanian citizens involved in administrative cases.

According to Article 3 of Council of Ministers' Decision 243/2020 'On the declaration of the state of natural disaster', the highest body for coordination and cooperation of all institutions and financial and material resources for coping with the natural disaster following the epidemic caused by COVID-19, is the Inter-Ministerial Committee for Civil Emergencies (KNEC). KNEC is chaired by the Prime Minister. It consists of 8 ministers and 5 senior officials of the police, army and civil emergency personnel. To date, KNEC has not conducted any documented meetings and has no online presence. All bylaws during the COVID-19 period were issued by the Ministry of Health, while by law KNEC should be the responsible body for this. On 31 January 2020 the Ministry of Health set up a Task Force to prevent the spread of COVID-19, as well as a Temporary Committee on COVID-19.<sup>12</sup> Both structures are headed by the Deputy Minister of Health. They report to the minister and consist of people working under her responsibility. *De jure* all government decisions during COVID-19 were made on behalf of this committee of experts, whose decision-making was never made public.

*De facto* the Committee of Experts did not make any public deliberations on the management of the pandemic except for publishing statistics on the dead and those under treatment. All technical and political statements for the media were made personally by the Prime Minister or by the Minister of Health. The day to day and the strategic management of the pandemic was purely political. The committee was simply a public relations tool used by the government to announce its decisions and to justify them when they turned out to be wrong. None of the government measures were reviewed by

<sup>11</sup> Council of Europe. Reservations and Declarations for Treaty No.005 - Convention for the Protection of Human Rights and Fundamental Freedoms, Albania <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/declarations?>

<sup>12</sup> <https://www.covid19healthsystem.org/countries/albania/livinghit.aspx?Section=5.1%20Governance&Type=Section>.

the committee. On two occasions, the Minister, on behalf of the Committee of Experts, spoke against the activities and attitudes of the political opposition, and always in favour of government acts, even when some of the latter were contrary to the law on the natural disaster situation and violated the rights of citizens. In addition to this, the Government of Albania actively used the application of strict quarantine rules and curfews to keep civil society activists away from the National Theatre building that was swiftly demolished with a legally questionable intervention reminiscent of a police state, just a few hours before the quarantine expired.

## Key features of emergency management

Albania's health system has a markedly poor infrastructure. Large numbers of qualified Albanian health professionals constantly emigrate towards EU countries in search of more decent pay. The local health services suffer under a cumbersome and heavily centralised decision-making system. In the period 2013-2020 most hospital services were handed out as concessions to private companies, most of which were blatantly unqualified for the job. The owner of the main private company in charge of the concession of the national health check-up service was herself infected by COVID-19. At the height of the epidemic she chose to be treated in a private hospital in Turkey, causing massive public outcry. Senior state officials affected by COVID-19, including the chairman of the parliamentary committee on health, the directors of major health insurance companies, etc., chose to be treated privately in Turkey, Switzerland, Austria, etc. They chose to avoid receiving treatment in the very national health system they jointly managed.

Albania identified its patient zero in the first week of March 2020. *De jure* Albania was already in a state of emergency due to the recent earthquake. Until early March, the authorities consistently declared that Albania was immune to COVID-19 and harshly criticised any dissenting voice or action that pointed to the contrary. On 23 February 2020, a non-public school in Tirana decided to suspend its teaching activity for two weeks and switch to online teaching due to the spread of the coronavirus in neighboring Italy.

The Albanian government reacted harshly to the school's decision, accusing it of spreading panic and fake news. The Ministry of Education stated that there was no viral situation in Albania and in addition to revoking the school's licence, filed a criminal report against it in the prosecutor's office. Just two weeks later the Ministry of Education issued an order to stop the entire teaching process in the country due to the outbreak of COVID-19, but it did not suspend its decision to revoke the licence of the school that had acted to prevent the spread of the virus. The Prime Minister himself, a day before the announcement of the epidemic, called it a common flu and spoke against the use of protective masks. The government did not accept any responsibility; on the contrary, it considered its role in managing the situation as an historic success and seized upon the opportunity to launch an intensive campaign to improve its image.

The government produced and aired a host of TV spots featuring the measures taken to contain the pandemic, with the Prime Minister and ministers appearing daily whilst warning of danger, leading the emergency efforts and comforting the victims' families. These TV spots showed MPs and state officials engaged in handing out state aid packages, and police and military showing solidarity to those affected.

Previously, the Prime Minister had personally accompanied every foreign delegation in the earthquake-stricken areas. He invited two children who lost their parents in a meeting with famous footballers Ronaldo and Buffon in Turin (Italy) in a well-publicised move to de-dramatise the heavy consequences of the earthquake, and to shift the public attention away from the responsibilities of the state officials who had given construction permits in unsafe areas and had allowed poor quality construction to spread throughout the country. Six months after the earthquake, no high-level state official has faced justice, despite the dramatic consequences resulting in considerable loss of life and widespread material damage.

In the period January-June 2020, Freedom House, Transparency International, Reporters without Borders, and other watchdog organisations published reports that were highly critical of Albania, in the areas of democracy, good governance, media and human rights and freedoms.

## Monopolisation of public information under emergency conditions

Until 2020, in Albania natural disasters usually led to two easily predictable consequences: 1) reduction of political tensions paving the way to a consensual handling of the crisis; 2) increased support *for* and increased influence *of* the government. After the Gerdec tragedy of 2008<sup>13</sup>, the opposition gave public support to the government, and the latter, although heavily involved in the scandal, went on to win the parliamentary elections of 2009. When Albania was hit by an earthquake in 2019, politicians of all camps joined in the humanitarian response. The support for the government increased significantly. In cases of disaster and tragic events, the political culture in Albania tends to shun serious investigations into actual responsibilities, in favour of entrusting the government with managing the situation, and in rallying behind the usually weak and ill-prepared state authority to weather the crisis.

Traditionally, in times of natural disasters, in view of the low capacity of the institutions to handle crisis situations, Albanian leaders make exceptional personal efforts to prop up their humanitarian credentials; they make donations, distribute aid and establish direct communication with those affected; they quickly mobilise the support of their local party structures to maximise public outreach. In addition to these understandable, but not always commendable efforts, the state apparatus has a penchant to fight critical voices in the media through different ways of putting pressure on those having an opinion that does not suit the government narrative.

In 2020, this old phenomenon grew into a new dimension. All public communications were ostensibly focused on the messianic function of the Prime Minister, the institutions faded away and the critical voices died out. To date, for the whole duration of the COVID-19 regime in Albania there exists no publicly available data (film footage, photographs, etc.) proving that there were regular meetings of the Council of Ministers. In the second week of March 2020, the government announced the launch of its official online portal (e-albania), through which citizens could apply for a permit to move out of their residences or to use their personal vehicles for work and emergency purposes. During the first month of the pandemic, 2.2 million applications were issued for exit permits alone.<sup>14</sup>

In the period March-May 2020, application on this online portal became the only way to resolve claims, while according to Eurostat data in January 2020 only 68% of Albanian citizens had internet access. The concentration of all queries onto only one government portal, not only excluded from the vital public services about 30-32% of citizens without internet access, but also another large number of users who do not possess the technical knowledge or are otherwise unable to use an online portal. Although it is arguable that the over-concentration of citizen queries, reduced bureaucracy and prevented corruption, it also weakened the institutions and administrative mechanisms in charge of the state-citizen relations. Furthermore, the unregulated and therefore unlimited use of their personal data has created a database that can be misused for electoral purposes.

## Repercussions on the freedom of the media

The media sector in Albania, which employs about 6,120 journalists, editors, operators and support staff, was severely affected by the pandemic. According to the data received by journalists' associations, during the pandemic more than 45 journalists lost their jobs, 40% of all media employees had their salary reduced<sup>15</sup> by up to 50 percent.<sup>16</sup> Journalists lacking personal employment contracts

<sup>13</sup> The Gerdec explosion took place in a military facility 11 km from Tirana on 15.3.2008. It killed 26 people, over 300 were wounded and 4,000 people were evacuated. Even though top-level state officials and their relatives were allegedly involved in the incident, only low-tier officials were investigated and prosecuted.

<sup>14</sup> <https://akshi.gov.al/karcanaj-pandemia-deshmoi-se-investimet-teknologjike-ne-shqiperi-jane-reale/>

<sup>15</sup> <https://al.ejo-online.eu/ekonomia-e-medias/cipa-media-pesoi-goditje-te-rende-nga-pandemia>, 18.07.2020.

<sup>16</sup> Deutsche Welle, 29.04.2020.

make up more than 90 percent of the workforce in the media market. Most journalists work based on collective agreements, and a minority work illegally. The media owners did not compensate the laid-off workers, taking advantage of the “natural disaster” clause.<sup>17</sup> The print media that tried to continue to run business as usual were prevented from doing so because local authorities banned the activity of newspaper sellers.<sup>18</sup>

After the closure of the print media, the main role for informing the public was taken by the visual media and especially by online portals. The government decision on March 13 set a limit of two people in all shows or debates on television stations. Some media outlets were administratively sanctioned over this restriction measure by the health authorities, but public pressure forced the audiovisual media authority to suspend the penalties.

In December 2019, in the period of the first state of emergency, the Prime Minister described as ‘criminals’ those journalists who made critical reports of the situation and within a short time after his statement, 5 journalists and 3 media managers were put under investigation by the state authorities on accounts of false reporting.<sup>19</sup> The investigations concluded that the journalists were correct in their reporting and all were declared innocent. According to the 2019 report of Reporters without Borders, Prime Minister Rama periodically labelled media and journalists with denigrating and insulting words, such as “*forgers, pigs, villains, hypocrites, parasites, liars, lazy, hostile, irresponsible, ignorant, villagers.*”<sup>20</sup>

The absence of journalists in the field, owing to the significant travel restrictions, and to the limited resources at hand, put all sources of information in the hands of the state, with Prime Minister Rama’s online television channel, ERTV, taking the lion’s share amongst the official sources of information. The Prime Minister appeared on average 3 times a day on his TV channel, commenting on the situation, giving advice, announcing government decisions, commenting on his critics, making political statements and promoting the decisions of his government.

The dominance of the Prime Minister over the sources of public information began on 12 March, when in an unprecedented action, the Prime Minister sent a personal audio and text message to all Albanian citizens who owned mobile devices, warning them to beware of the media and its reports with regard to the pandemic. On 27 April he used the personal email addresses of every citizen, sending a message that asked for support for the measures announced by his government. The Prime Minister readily used the national network of telephone services, emails and personal data only 4 months after he appointed one of his close advisers as the director of the national regulatory body for electronic communications, AKEP. His public appeals directed against the media and the use of citizens’ personal data provoked critical reactions at home and abroad.<sup>21</sup> AKEP justified its actions as follows: “*In the absence of coordination between institutions and powers, the Prime Minister proposed to send a vocal message to all citizens. This message was sent out for the purpose of raising awareness and the Prime Minister with the approval of the network operators requested that it be limited in time, only for the weekend.*” In addition to being unfounded in law, this action highlighted the real lack of preparation and coordination between institutions whilst coping with COVID-19.

In this period, the Prime Minister extensively compared the situation of the pandemic to a state of war and intensively used the terms ‘war’ and ‘enemy’, in relation to the pandemic management and to the virus respectively, a discourse that was criticised for its penchant to create panic and to silence critical voices. On 12 March, the Prime Minister told ERTV that the country is at war and the response to the enemy will be the same as in wartime. The Prime Minister went on with daily lectures on ‘wartime wages’ (state financial aid), ‘war hospitals’ (COVID-19 medical facilities), ‘resistance in times of war’ (quarantine), ‘fake news at war times’ (media criticism), and so on. According to the government ‘war

<sup>17</sup> Deutsche Welle, 29.04.2020.

<sup>18</sup> Aleksandra Bogdani, BIRN, 30.3.2020.

<sup>19</sup> Geri Emiri, BIRN, 20.7.2020.

<sup>20</sup> <https://vertetmates.mk/censura-dhe-autocensura-ulen-indeksin-e-lirise-se-medias-ne-shqiperi/>.

<sup>21</sup> Media Freedom Violations in the EU under COVID-19 <https://ipi.media/media-freedom-violations-in-the-eu-under-covid-19/>

narrative', 'fighting the invisible enemy' justified all measures and outweighed all costs.<sup>22</sup> The government's main thesis was 'crazy measures for crazy times'<sup>23</sup>, in response to criticisms for taking actions that ran contrary to the constitution and to the law in force. On March 20, the Prime Minister distributed to the media footage and photos of Albanian military units in armoured vehicles fitted with heavy machine guns whilst patrolling the streets of Tirana, noting that the army '*will protect the people from a very small minority of irresponsible individuals, real traitors, who can do us a lot of harm and should not be allowed in any way to wreak havoc upon thousands and thousands of innocents, and to bring great suffering upon them*'<sup>24</sup>.

Through his online personal channel (ERTV), the PM became the only source of insight into any decision-making on the situation in the country. He used this opportunity to experiment in creating the perception that the government had everything under control and that all penalties and privileges were his personal monopoly and would be enforced under his direct and exclusive discretion.

On 18 March, the Prime Minister announced a ban on citizens leaving their apartments with other people by their side, adding to the penalties not only a financial fine, but also their exclusion from state aid and the financial solidarity package. There was no normative act, no government decision or any other official document with regard to the added penalty. Yet the purely verbal order of the Prime Minister came into force and was implemented by the police and financial authorities. Partial restrictions on the population enforced following the verbal orders continued throughout the period March-May 2020.<sup>25</sup>

## Use and abuse of emergency measures: the demolition of the National Theatre and police repression in the name of COVID-19

For 27 months in a row, numerous artists, actors, public intellectuals, ordinary citizens and civil society activists had protested against the government's plans to demolish the National Theatre building to favour a private development thinly disguised as the construction of a new theatre. The protest for the protection of the historic building of the national theatre is the longest protest in the history of transition in Albania.

Over the last three years, the Government of Albania and the Tirana Municipality led by Mayor Erion Veliaj tried various ways to demolish the building, including removing it from the list of protected heritage, its declaration as structurally unsafe, and finally on 8 May 2020, through its transfer under the ownership of the municipality, which is 100% controlled by the Socialist Party of Prime Minister Rama. This gave free rein to Mayor Veliaj to proceed with the destruction of the building. Accordingly, the municipality with an expedited procedure, wholly non-transparent and contrary to the legislation, 24 hours before an announced meeting of the Municipal Council announced that the meeting was to be held online and the demolition of the theatre was voted for unanimously by email. At least two members of the city council resigned, claiming they did not vote in favor of the demolition. An investigation was launched by the judiciary; however the case was subsequently archived.

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<sup>22</sup> <https://exit.al/midis-dy-zjarreve-media-ne-kohen-e-covid19/>.

<sup>23</sup> Skender Minxhozi. Human Rights or right to stay alive, Java News, 10.4.2020.

<sup>24</sup> Edi Rama. <https://dritare.net/ngjarjet-e-dites/video-ushtria-del-ne-terren-rama-do-te-mbrojne-popullin-nga-nje>.

<sup>25</sup> On April 17, the Prime Minister announced that the movement of retired people for April 18 was allowed as of 11.00 hrs accompanied by only one person. Another act allowed the limited movement of authorized vehicles and only one person sitting in the back of it, 'positioned diagonally with the driver of the vehicle'. A day later, the Prime Minister announced for next Sunday the permission to leave the apartment until 11.00 for mothers with children up to 10 years old. Another order increased the age of children to 14 years old. On April 24, the Prime Minister announced that in the green zone the movement of vehicles with only 2 people in the car was allowed and stopped the movement of more than two people together in public. On April 25, the Prime Minister announced that retired persons could leave between 06.00-08.30 unaccompanied by another person. He banned the movement of any other person other than those with authorization. The Prime Minister announced on May 4 that retirees could leave the apartment for 60 minutes, between 09.00-10.00, and between 11.00-17.30 parents were be allowed to move with children under 14 years old. On May 8, the Prime Minister changed the schedule of pensioners to 9.30 and that of parents, allowing only one of them.

The illegitimate decision of the city council provoked harsh criticism.<sup>26</sup> Civic groups, the arts community and opposition parties announced a 24-hour non-stop action in defence of the theatre, while the government announced it would launch criminal proceedings against individuals violating rules in force to contain the pandemic. On 17 May, in the early hours of the morning, special police forces violently intervened against the civic activists inside the building. In a few hours they demolished the Theatre building. Following the news, several thousand citizens gathered in protest. Albania made news in the international media which covered the violent police intervention, the destruction of the national heritage, and the repressive measures against civil society activists.

Under the COVID-19 safety regime, more than 500 citizens, most of them supporters of the opposition, were prosecuted on charges of violating traffic schedules or participating in protests and public activities. Between 15-17 May 2020, during the civil and political reactions in defence of the National Theatre, the State Police penalised 42 citizens (on 15 May), 47 citizens (16 May), detained 34 and penalised 64 (May 17). The police did not comply with the safety anti-COVID measures and protocols whilst holding citizens responsible for failing to follow them. The situation became so absurd that for example, the same person was punished 2-3 times within 72 hours with a fine and revocation of his driving licence, when the latter can be revoked only once if the person possesses it.

On 14 May, the police imposed administrative fines and the withdrawal of driving licences for 11 citizens, who posted a joint photo in a closed environment (cafe), in violation of the COVID-19 measures. All those penalised were leaders of the political opposition. A few days later an open-air public activity was held against gender-based violence in Tirana with a significantly higher turnout. In this case, there was no reaction from the authorities and no penalties were imposed. On this occasion, the People's Advocate Institution argued that in the case of the demolition of the National Theatre the police acted on the basis of order 132/2020 of the Ministry of Health, which prohibited any form of public gathering during a situation of a pandemic. On the other hand, normative act 3/2020 passed as a law in Parliament on special administrative measures, prohibited only 'mass gatherings', and not 'non-massive' ones. Apparently the government-sponsored massive events were aptly considered as 'non-massive' gatherings.<sup>27</sup>

Most punitive measures against the citizens were based on the order of the Ministry of Health and not on the normative act of the Council of Ministers, despite the fact that in the legal hierarchy the normative act with the force of law supersedes the order of a ministry. On 8 May, the state police arrested and sent to the prosecutor's office 10 civil society activists for illegally protesting in Tirana's main square. Three of them were accused by the police of calling through social media for protests. In a communication with the People's Advocate, the State Police reported that in the period March-June 2020, 27 rallies and protests were held, on account of which 21 of their organisers were detained, arrested or sent for criminal prosecution. From the monitoring of the daily announcements of the State Police, it appears that in fact the Police detained about 320 citizens, most of whom were prosecuted, on charges of violating the circulation restriction and especially for participating in public activities in the period of the COVID-19 pandemic.<sup>28</sup>

In the period March-June 2020, over 65 local protests took place, mostly by workers demanding unpaid wages or protesting against collective dismissal, by social groups with minimal economic demands, with individuals and small groups of civil society protesting against flagrant cases of abuses by the authorities. Also, further protests against the demolition of the National Theatre took place in several cities across Albania, including the major cities of Durres, Shkodra and Korca. State authorities persistently applied double standards in addressing public rallies, by actively taking each and every opportunity to penalise voices critical of the government and by openly tolerating public activities that

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<sup>26</sup> <https://portavendore.al/2020/05/15/tirane-keshilli-bashkiak-miraton-fshehtas-shembjen-e-teatrit-kombetar-shoqeria-civile-merr-ne-mbrojtje-godinen/>.

<sup>27</sup> [www.avokatipopullit.gov.al](http://www.avokatipopullit.gov.al).

<sup>28</sup> ISP. Legal measures under the COVID – 19 regime, Tirana, June 2020.

saw the participation of personalities close to the ruling majority, as shown by the case of the aforementioned Tirana open-air event.<sup>29</sup>

During the COVID-19 pandemic, several state entities and institutions, first and foremost the Municipality of Tirana, the State Police, as well as most of the ministries organised public activities, concerts, and even beauty contests in full violation of the safety protocols in force. However in none of these cases reported in the media, was there any investigation or any administrative penalty such as a fine or revocation of the driving licence as was the case with the activities that saw the slightest note of criticism against the government.

The main concern regarding the handling of all forms of expression of dissatisfaction with the government was related to the fact that in this period all legal and constitutional mechanisms for the protection of rights were absent. In the absence of the Constitutional Court and of the judicial system, the citizens did not have a defence mechanism to address their grievances. In this period, in addition to a lawsuit filed by the President of the republic, twelve lawsuits were filed by civil society groups against police violence, human rights violations and illegal practices pursued by the state authorities. At the time of the writing of this paper, there is still no investigation underway further to the lawsuits nor any response to them.

## Conclusions

This article has discussed the main areas where the emergency measures taken against COVID-19 have actually eroded Albania's democratic fibre. It has argued that the Government of Albania has actively instrumentalised the pandemic to advance its political agenda, whilst undermining public scrutiny, free expression and free press. In a situation marked by the absence of the key institutions of the justice system, including the lack of a Constitutional Court as a result of a highly problematic justice system reform, the Government of Albania remained the only player in the field, to the expense of the other democratic institutions, and to the detriment of the constitutional balance of powers. As the evidence shows, the overinflated presence of the Prime Minister, the hastily passed pieces of legislation in breach of the Constitution and the politicisation of the pandemic and the personalisation of the government narrative of the relief efforts centred on the Prime Minister, wreaked havoc on the already fragile democratic fibre of the country. It is therefore concluded that in a system lacking the minimal checks and balances, the room for manoeuvre for safeguarding a viable democracy is shrinking, and vigorous efforts are needed from all levels of society and by the international community to reverse this trend.

### Dr Afrim Krasniqi

*Dr Afrim Krasniqi is Professor of contemporary history at the Academy of Albanian Studies in Tirana. He holds a PhD in History and International Relations from the University of Tirana, where he obtained his BA in History, and an MA in Communication and International Affairs from the University of Viadrina (Germany). Dr Krasniqi was a political advisor to the President of the Republic of Albania during the years 2002-2007 and 2010-2012 and is Executive Director of the Institute for Political Studies (ISP), a leading local NGO implementing bold and ambitious projects pertaining to good governance, civic engagement, democratisation, and accountability. He has published books about political parties, history, civil society, election and democracy in Albania and SEE-Countries.*

<sup>29</sup> On June 4, 2020, a large-scale event was staged against a case of sexual abuse and violence against women. Thousands of citizens, including politicians and public figures, took part in it. Although the demonstration took place in violation of the restrictions of the COVID-19 epidemic, the authorities allowed it and nobody was penalised for infringing upon safety protocols.

# Monitoring and Evaluating the Impact (Post-Legislative Scrutiny) of Emergency Regulation in Response to the COVID-19 Pandemic: A Case Study of Nigeria

Elohor Stephanie Onoge

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A paper prepared for the Academic Seminar on Response to COVID-19 co-organized by the Institute of Advanced Legal Studies (IALS), University of London and the Westminster Foundation for Democracy (WFD).

## Introduction

This paper seeks to examine Post-Legislative Scrutiny's operationalisation in examining emergency regulations passed by the President of Nigeria in response to the COVID-19 pandemic that has led to human rights violations in Nigeria.<sup>1</sup> The study's importance lies in the fact that it explores a much-needed balance between the COVID-19 regulations and human rights concerns in emergency situations by the Legislature's oversight to ensure the perpetuation of democracy. The study is based on De Vrieze theory, which states that the legislative process is incomplete without the Post-Legislative Scrutiny (PLS) component, which involves legislatures reviewing the legislation they have passed to determine whether the laws passed are being implemented and whether the intended policy objectives are met.<sup>2</sup>

The emergence of the novel coronavirus disease (COVID-19) in December 2019 in Wuhan, in the Chinese province of Hubei, halted the ever-busy human society and threatened every nation.<sup>3</sup> Following the World Health Organisation (WHO) declaration on 11 March 2020, COVID-19 was declared a public health emergency of international concern.<sup>4</sup> On 25 February 2020, sub-Saharan Africa's first confirmed case of COVID-19 was announced in Nigeria,<sup>5</sup> as at 21 August 2020, there were 51 304 confirmed cases, 37 885 patients discharged and 996 deaths were recorded in 36 States and the Federal Capital Territory<sup>6</sup>. As the country faced such a pandemic and a steady increase in the number of confirmed cases, the government had to take proactive steps to curtail the spread of the virus by passing regulations.

Nigeria has a federal system of government with a federal government and 36 state governments. As a Federal state and by the Constitution, Nigeria vests the power to make laws in the legislative arm at both the Federal and State levels.<sup>7</sup> Legislation in Nigeria is the process of deliberate law-making by the National Assembly of the Federal Republic of Nigeria, recognised by the Constitution of the Federal Republic of Nigeria 1999 as having the power and authority to declare the law.<sup>8</sup> The Federal Legislative arm of government has two chambers, the Senate and the House of Representatives responsible for the representation, law-making and oversight at the national level. Simultaneously, the 36 state assemblies are responsible for the same roles at the state level. The Constitution distributes functions and legislative authority, between the federal government and the state governments. There is no

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<sup>1</sup> Africanews.com: 18 dead in the enforcement of Nigeria COVID-19 lockdown 2020 <<https://www.africanews.com/2020/04/17/18-dead-in-enforcement-of-nigeria-covid-19-lockdown-report/>> accessed 27 August 2020. Khalid I: Coronavirus: Security forces kill more Nigerians than Covid-19 -Mixed message from the president. 2020 <<https://www.bbc.co.uk/news/world-africa-52317196>> accessed 27 August 2020.

<sup>2</sup> F. De Vrieze, 'Principles for Post-Legislative Scrutiny by Parliament', Westminster Foundation for Democracy, London, 2017, 4.

<sup>3</sup> M. T Osterholm, M. Shaker, 'Deadliest Enemy: Our War Against Killer Germs' (Hachette UK: London, UK, 2017).

<sup>4</sup> World Health Organisation, 'WHO Director-General Opening Remarks at the Media Briefing on COVID:19- 11 March 2020' <<https://www.who.int/dg/speeches/detail/who-directorgeneral-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>> accessed 12 April 2020.

<sup>5</sup> BBC News 'Coronavirus: Nigeria confirms first case in sub-Saharan Africa' (28 February 2020) < [www.bbc.com](http://www.bbc.com) > accessed 27 August 2020.

<sup>6</sup> NCDC, 'COVID-19 Nigeria, Nigeria Centre for Disease Control' <<https://covid19.ncdc.gov.ng/>> accessed 21 August 2020.

<sup>7</sup> Constitution of the Federal Republic of Nigeria, s4.

<sup>8</sup> *ibid*, s 4(1) and (2).

gainsaying that the Legislature's core legislative, oversight and representation functions provide an essential contribution to democracy and governance.

## Nigeria's Legal Response to COVID-19

The President of the Federal Republic of Nigeria, in response to the COVID-19 pandemic on Sunday, 29 March 2020, detailed the stringent measures and restrictions the government would implement to contain the spread of the coronavirus. Based on powers given under the Quarantine Act of 1926, the President ordered the cessation of movement for Nigerians' safety and protection.<sup>9</sup> The Quarantine Act 1926, gives the President and the country's health authorities broad powers to deal with public health crises. It allows the President to declare a place within the country an 'infected local area', and he is empowered, based on such a declaration, to make relevant regulations. It is also important to emphasise that quarantines are an 'exclusive matter' under the Constitution, and only the Federal Government has the authority to make laws relating to quarantines. The President chose not to invoke the provisions of Section 45, which read with Section 305(d) and (e) of the 1999 Constitution, empowers the President to declare a state of emergency when there is a clear and present danger of an actual breakdown of public order and public safety in the Federation or any part thereof, requiring extraordinary measures to avert such threat to a section of the community in the Federation. Declaring a state of emergency is the only constitutionally approved requirement needed to confer legitimacy on civic rights' derogation. Rather than declaring a state of emergency, the President issued regulations, exercising powers conferred on him under the Quarantine Act 1926. These regulations passed by the President did not have to be laid before the Legislature. The regulations, as subsidiary legislation, are not in most cases brought before the Legislature for approval. On the other hand, a state of emergency declared by the President of the Federation of Nigeria would have necessitated publishing the proclamation in a gazette and the details of the state of emergency sent to the President of the Senate and the Speaker of the House of Representatives, for the legitimacy of any containment measures taken during the period of the pandemic.

The President is authorised under the Quarantine Act (the Act), among other things, to declare any infectious disease dangerous, to declare any area in or outside of Nigeria an infected area, and to issue regulations that prevent the spread of any dangerous contagious diseases. The power to issue regulations under the Quarantine Act has only been exercised once by the President, with the issuing of the Quarantine (Ships) Regulations, which authorised or required port health officers to take a host of measures to prevent the importation and spread of infectious diseases into and within Nigeria.<sup>10</sup>

The Quarantine Act is the primary law governing the prevention and suppression of dangerous infectious diseases. The Act states that it is to regulate 'the imposition of quarantine and make other provisions for preventing the introduction into and spread in Nigeria, and the transmission from Nigeria, of dangerous infectious diseases'.<sup>11</sup> The Act further authorises the President to issue regulations to prevent or suppress a dangerous infectious disease in an infected local area, any other area in Nigeria, or any area outside of Nigeria.<sup>12</sup> Backed by the powers of the Quarantine Act 1926, the President of the Federal Republic of Nigeria passed the COVID-19 Regulations 2020.

Based on the President's powers under the Quarantine Act, and passing the COVID-19 Regulations 2020, the Nigerian government took restrictive containment measures to curtail fundamental citizen rights. These include lockdowns of various states and a cessation of social and economic activities except those relating to essential services. While these measures followed existing public health advisories to curb the COVID-19 Pandemic, these curtailing powers have raised significant legal,

<sup>9</sup> Victoria Ibezim-Chaaeri, 'COVID-19: The Legality and Limits of the Presidents Emergency Powers' *Vanguard* (April 3, 2020) <<https://www.vanguardngr.com/2020/04/covid-19-the-legality-and-limits-of-the-presidents-emergency-powers/>> accessed 14 August 2020.

<sup>10</sup> Quarantine Act of 1926, pmbi., 14 Laws of the Federation of Nigeria, Cap. Q2 (rev. ed. 2004).

<sup>11</sup> *ibid.*

<sup>12</sup> Quarantine Act of 1926.

constitutional, human rights, and legitimacy issues and concerns.<sup>13</sup> Initially, there was the public acceptance of the restrictions of the COVID-19 Regulations, signified by a high degree of compliance, but the manner of enforcement of the restrictions in several areas around the country led to reports of human rights abuses; killings, incarcerations without court orders in places where *physical distancing* was impossible, *demolition of buildings*<sup>14</sup> and *deportation of young 'almajiris' (child beggars)*.<sup>15</sup> These measures were not subject to any form of review or scrutiny by the Legislature. The challenges to human rights and the issues arising during the pandemic have necessitated and given grounds for the National Assembly to propose new legislation. The National Assembly has been presented with bills from both the House of Representatives and the Senate, which aim to strengthen Nigeria's public health institute, the Nigeria Centre for Disease Control's mandate and clarify the manner of declaring a public health emergency. However, there are concerns relating to both bills, which have hindered the passing of the bills into law.<sup>16</sup> Consequently, the extant law and legal framework for combating the pandemic remains the Quarantine Act 1926.

Given the emerging incidences of human rights breaches during the pandemic in Nigeria, entrenching a robust framework of Post-Legislative Scrutiny (PLS) of passed legislation is an imperative that cannot be ignored.

Delegation of law-making powers can be traced to the Constitution, Sections 4(1) and 4(6) vest the legislative powers on the National Assembly and the State Houses of Assembly.<sup>17</sup> Regulations allow for quick changes to be made without the government having to push through new legislation, and they can be used for those issues that require high levels of flexibility in their implementation.<sup>18</sup>

The Nigerian President exercised delegated powers under the Quarantine Act 1926, passing regulations prescribing and regulating its measures under an executive control without any recourse to the National Assembly.<sup>19</sup> While the Emergency law may provide for any danger or disaster and requires a cumbersome process, the Quarantine Act is specific and dwells solely on health and infectious diseases. The COVID-19 pandemic falls under 'plague' in the definition of 'dangerous infectious disease' under Section 2 of the Quarantine Act, and all fundamental rights can be circumscribed in the interest of public health.

Considering the flexibility and appeal of regulations in emergency situations, the delegated powers to legislate should not be left unchecked; otherwise, this can pose a threat to democracy. Thus, there is a need for the Legislature to have structures that promote the effective application of the post-legislative scrutiny of primary legislation and delegated or subsidiary legislation as part of the legislative process.

## Regulations and Post-Legislative Scrutiny (PLS)

The Legislature, while giving away the power to pass legislation under a delegated authority<sup>20</sup>, should have safeguards in place to ensure that these laws, when passed, fulfil the purpose for which they were enacted and produce the regulatory results intended by the policymakers.<sup>21</sup> Regulations are delegated legislation and form a massive part of any legal system as they form part of the legislative process.

<sup>13</sup> Cheluchi Onyemelukwe, 'The Law and Human Rights in Nigeria's Response to the COVID-19 Pandemic' (June 4, 2020) <<https://blog.petriefrom.law.harvard.edu/2020/06/04/the-law-and-human-rights-in-nigerias-response-to-the-covid-19-pandemic/>> accessed 15 August 2020.

<sup>14</sup> Oluwatosin Adeshokan, 'Coronavirus Demolition of Hotels in Rivers State: Illegal Use of Lockdown?' (The African Report Corona Chronicles 18-22 May 2020) <<https://www.theafricareport.com/28420/coronavirus-demolition-of-hotels-in-rivers-state-illegal-use-of-lockdown/>> accessed 17 August 2020.

<sup>15</sup> BBC NEWS, 'Coronavirus in Nigeria: The Child Beggars at the Heart of the Outbreak, 16 May 2020' <<https://www.bbc.co.uk/news/world-africa-52617551>> accessed 17 August 2020.

<sup>16</sup> Yusuf Akinpelu, '#StoptheNCDCBill: Controversy trails Bill Sponsored by Gbajabiamila to fight infectious Diseases', <<https://www.premiumtimesng.com/news/top-news/390724-stopthencdcbill-controversy-trails-bill-sponsored-by-gbajabiamila-to-fight-infectious-diseases.html>> accessed 16 August 2020.

<sup>17</sup> Constitution FRN 1999 as Amended.

<sup>18</sup> H Xanthaki, *Thornton's Legislative Drafting*, (5th edn, Bloomsbury Professional, 2013) 404.

<sup>19</sup> Henry Ojelu and Dania Onozure, 'Nigeria: COVID-19 - Lawyers Divided Over President's Power to Invoke State of Emergency, Quarantine Act', 2 April 2020 <<https://allafrica.com/stories/202004020172.html>> accessed 17 August 2020.

<sup>20</sup> Xanthaki (n18) 403, 523.

<sup>21</sup> Helen Xanthaki, 'The Problem of Quality in EU Legislation: What on Earth is Really Wrong' (2001) VLE.

Broad areas of laws that require significant amounts of detail are regulated by delegated legislation.<sup>22</sup> They have an equal force of law as the empowering Act<sup>23</sup> because they have legitimacy from Acts of the Legislature. They can only be made where there is an express provision in the Primary Legislation to do so.<sup>24</sup>

The Executive can make regulations without passing them on to Parliament for scrutiny,<sup>25</sup> therefore, control over delegated legislation by the Legislature has been criticised in Nigeria.<sup>26</sup> It has been argued that the Legislature which gives these powers, should be able to exercise the highest control over delegated legislation.<sup>27</sup> The Legislature should be able to ensure proper oversight of the COVID-19 Regulations 2020 passed by the President.

This can be done by looking at the enabling clause and prescribing several control features like tabling and disallowance, and prescribing some procedural requirements like consultation, publication, and the affirmation by both Houses of Parliament<sup>28</sup> before regulations can be said to be in force, but this is non-existent in Nigeria today.

As a country, Nigeria does not have an adequate system of legislative scrutiny of delegated legislation in place. Instead, there is total reliance on the Executive arm of government and where the provisions are in dispute, on judicial control, to conduct scrutiny after the passing of regulations, which is not enough.<sup>29</sup> This may be due to the political structure of Nigeria, which operates the Presidential system where the Executive is separate from the Legislative and Judicial arms of government and practices separation of powers, and it is argued that scrutiny of regulations made by the Executive arm is the prerogative of the Executive arm of government.<sup>30</sup> And this practice raises questions about the adequacy of the process of delegated legislation in Nigeria<sup>31</sup>.

The President's exercise of powers and passing of the COVID-19 Regulations 2020 for the response to COVID-19 has legal justification. Because of the pandemic it was necessary to make regulations without prior Legislative approval, which introduced lockdown and restriction of movements within and between States in Nigeria in response to the COVID-19 pandemic, even though Chapter IV of the 1999 Constitution upholds the legal enforcement of the fundamental rights.

The rule of law underpins peaceful societies and encourages the monitoring of statutes to protect fundamental rights and the enhancement of human dignity and liberty.<sup>32</sup> Therefore, there should be scrutiny and monitoring of the restrictions on human rights put in place to upend the Covid-19 pandemic. In Nigeria there have been cases of rights' violations of vulnerable groups perpetrated by law enforcement officials in enforcing the regulations<sup>33</sup> which authorise these restrictions. These regulations have not been brought before the Legislature for scrutiny. The Rule of Law requires proper law-making procedures to be followed. The longer these emergency procedures are imposed without review or

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<sup>22</sup> Ian McLeod, *Principles of Legislative and Regulatory Drafting*, Oxford and Portland Oregon, 2009, 159.

<sup>23</sup> D R Miers and A C Page, *Legislation*, London Sweet and Maxwell 1982, 140.

<sup>24</sup> S O Imhanobe, 'Delegated Legislation', *Fundamentals of Legislative Drafting*, edited by Epiphany Azinge, Vivian Madu, Nigerian Institute of Advanced Legal Studies 2012, 196.

<sup>25</sup> D R Miers and A C Page, *Legislation* (London Sweet and Maxwell 1982) 140.

<sup>26</sup> A Toriola Olewo, *Administrative Law in Nigeria* (Jator Publishing Company 1997) 66.

<sup>27</sup> Oleyami T.O, *The Challenges of Controlling Administrative Legislation in Nigeria*, [www.nials.nigeria.org](http://www.nials.nigeria.org), assessed 12 July 2014.

<sup>28</sup> Chapter 15, *Legislation and Disallowance* Department of Parliamentary Services 325.

<sup>29</sup> Beatson, Matthews and Elliott's, *Administrative Law text and Materials*, third edn, Oxford University Press 2005, 635.

<sup>30</sup> An Interview with Senator Ita Enang, Chairman Senate Committee on Rules and Business, Nigerian National Assembly, Nigeria (13 May 2015).

<sup>31</sup> Ben Nwabueze, *Constitutional Law of the Nigerian Republic* 1964, 205.

<sup>32</sup> *Federal Republic of Nigeria v Ifegwu* (2003) FWLR (Pt 167) 703 – 758 (Uwaifo J), Solomon Amadasun, 'COVID-19 palaver: Ending rights violations of vulnerable groups in Africa'.(June 25,2020) <10.1016/j.worlddev.2020.105054> accessed 21 August 2020.

<sup>33</sup> Solomon Amadasun, 'COVID-19 palaver: Ending rights violations of vulnerable groups in Africa'.(June 25,2020) <10.1016/j.worlddev.2020.105054> accessed 21 August 2020.

scrutiny, the less 'Rule of Law' compliant such regulations are,<sup>34</sup> encouraging dictatorship and violations of the rights of the people.

Given that there is no existing structure for post-legislative scrutiny of laws and delegated legislation in Nigeria, introducing it may raise fundamental questions about the relationship between the Executive and the Legislature. This may be one of the main reasons why an evaluation of PLS application in Nigeria's Legislature does not offer any evidence of its practice. This paper argues that it is imperative that an analysis of the impact of laws passed by the Legislature be institutionalised into the legislative process to ensure that the process is consistent with good legislative practice. After the law is passed, PLS can reveal and address implementation gaps.

Experts have argued that general statutory provisions relating to delegated legislation should be introduced and laid before the Legislature.<sup>35</sup> The principle of laying is for the Legislature to scrutinise these instruments either before or after they are made, to ensure that they are in line with the stated requirements. The laying requirement is applicable in Britain, but there is no such process in Nigeria. Most times, and by default, scrutiny of regulations passed are left to the Executive and Ministerial departments which passed these instruments, leaving the Legislature with little or no control.<sup>36</sup>

## Post-Legislative Scrutiny: A Safeguard for Human Rights and Democracy in Nigeria

The Legislature of Nigeria ought to put in place a process for scrutinising legislation and regulations passed. The Legislature should be seen to exercise oversight of the implementation of these procedures. At present, the Nigerian Legislature does not have provisions for such procedure or structure in the Federal Constitution, any legislative instrument, the Senate's standing orders or House of Representative Rules. It appraises the content and resultant effects of most enacted legislation, but there are no parameters in place for measuring the effectiveness or ineffectiveness of legislation in Nigeria.<sup>37</sup>

Evaluation of legislation establishes a link between the law and its effects<sup>38</sup>. It is a crucial element of legislative methodology as it ensures that legislation is responsive to social reality and checks legislative actions' social adequacy.<sup>39</sup> Chukwuma posits that Nigeria appears to have been left behind in the measurement revolution and that her government's decisions are not based on an evaluation, leading to ineffectiveness and inefficiency.<sup>40</sup> Ihedioha reiterates this, stating that legislative functions do not cease with the passage of a bill. There is still the need to ensure systematic monitoring of legislation's implementation to know if it is effective and what its consequences are in practice.<sup>41</sup>

Although there are unique situations where the principal Act would expressly state that regulations passed by the Executive be laid before the Legislature<sup>42</sup>, the scrutiny of such instruments, mostly done by a standing committee, are mostly affirmative. There are 146 standing committees in both houses in the National Assembly<sup>43</sup>, two of which are designated to carry out post-legislative scrutiny of legislation.

<sup>34</sup> Ronan Cormacain, 'Parliamentary Scrutiny of Coronavirus Lockdown Regulations: A Rule of Law Analysis' (28 September 2020) <<https://binghamcentre.bicl.org/publications/parliamentary-scrutiny-of-coronavirus-lockdown-regulations-a-rule-of-law-analysis>> accessed 15 December 2020.

<sup>35</sup> Report of the Elias Commission of Inquiry into the Administration, Economic and Industrial Relations of the Nigerian railway Corporation in 1960, 20.

<sup>36</sup> Jemina Fabiawari Benson, 'Delegated Legislation in Nigeria: The Challenges of Control', LLM Dissertation 2014.

<sup>37</sup> Interview with Senator Victor Ndoma Egba, Senate Leader, National Assembly, Nigeria (7 May 2015).

<sup>38</sup> Koen Aeken, 'From Vision to Reality: Ex Post Evaluation of Legislation' (2011) 5 (1) *Legisprudence* 55.

<sup>39</sup> L Mader 'Evaluating the Effects: A Contribution to The Quality of Legislation' (2001) 22 (2) *Statute Law Review* 119-131.

<sup>40</sup> Innocent Chukwuma and Eban Ebai, 'Promoting the Rule of Law Through Evaluation and Performance Measurement in Nigeria: Challenges and Prospects' (2008) CLEEN Foundation

<[https://worldjusticeproject.org/sites/default/files/promoting\\_the\\_rule\\_of\\_law\\_through\\_evaluation\\_and\\_performance\\_measurement\\_in\\_nigeria\\_chukwuma\\_ebai.pdf](https://worldjusticeproject.org/sites/default/files/promoting_the_rule_of_law_through_evaluation_and_performance_measurement_in_nigeria_chukwuma_ebai.pdf)> 2 May 2019.

<sup>41</sup> Emeka Ihedioha, 'The Legislative Role Misconceptions and Experiencing in the Consolidation of Democracy in Nigeria', Public Lecture Organized by The Department of Political Science, University of Lagos, (25th June, 2012) 5.

<sup>42</sup> National Assembly Service Commission Act 2000, S13(2), 7 Laws of the Federation of Nigeria.

<sup>43</sup> Federal Republic of Nigeria, National Assembly

<[https://en.wikipedia.org/wiki/List\\_of\\_committees\\_of\\_the\\_National\\_Assembly\\_of\\_Nigeria#:~:text=This%20is%20a%20list%20of](https://en.wikipedia.org/wiki/List_of_committees_of_the_National_Assembly_of_Nigeria#:~:text=This%20is%20a%20list%20of)

In the Senate, it is the Committee on Business and Rule, and in the House of Representatives, it is the Committee on Rules and Business. The role of these committees is to monitor the implementation of laws and regulations in the respective Houses. But this is hardly done because, as stated earlier, from the standpoint of separation of powers, it is argued that under the Nigerian Presidential system of government, post-legislative scrutiny is the prerogative of the Executive arm of government.<sup>44</sup>

Even though structures exist to trigger post-legislative scrutiny, standardised methodologies and procedures are absent. The absence of political will to operationalise post-legislative scrutiny may be the reason for the deficit.

The Nigerian government would greatly benefit from having guiding principles on assessing legislation by post-legislative scrutiny. Post-legislative scrutiny is the review of a piece of legislation which is in force. It is sometimes undertaken in an *ad hoc* manner by government departments. It can be prompted by a 'review clause' inserted into a specific piece of legislation or may be undertaken through a structured process which covers all or most Acts. A lack of post-legislative scrutiny method may effect difficulty in evaluating the quality of legislation. Since there are presently no parameters for measuring the effectiveness of the laws passed and there is no feedback system<sup>45</sup>, there have been recommendations that best practice should be institutionalised into the process of law-making<sup>46</sup> and integrating society through transformative legislation.<sup>47</sup>

Post-legislative scrutiny can show what worked, what did not work and why, and what needs to be changed,<sup>48</sup> therefore, the solution to the problem would be to ensure that the standing committees in both Houses of the National Assembly carry out effective post-legislative scrutiny. Their committees have clear terms of reference that are most suited to perform this function of scrutiny. In effect, this would make the government and administrative officers who make delegated legislation more careful in their exercise of these powers.

Post-legislative scrutiny can also be considered as one aspect of oversight over legislation passed by the Legislature; the oversight of the laws that have been enacted to ensure scrutiny of the Executive's activities for efficiency and probity.<sup>49</sup> Oversight may link the legislative role with the oversight role of Legislature, with the potential to enhance the iterative relationship between legislation and oversight in the Legislature's governance role and the scrutiny process.

There can be an established link between the Legislature's legislative and oversight role to evaluate legislation after it has been passed. Legislators are tasked with law-making; they also supervise and scrutinise government performance. Section 62(1) of the 1999 Constitution and the Standing Orders & Rules of the House of Representative and the Senate empower both Houses of Assembly to carry out oversight functions, which can also be applied to laws passed. Having this process of oversight institutionalised within the committee mandate, in principle, prevents the risk of legislative work being divorced from consideration of its outcomes. The oversight of laws passed may lead to a considerable increase in the workload of the committee. Still, this form of post-legislative scrutiny could be considered particularly useful in establishing a realistic but effective oversight of legislation passed, and to locate PLS clearly within the framework of legislative responsibilities of the members of the Legislature in Nigeria. PLS can be operationalised as a part of the committee's oversight function, bringing in

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[%20the%20standing%20committeesHouse%20of%20Representatives%20currently%20has%2089%20standing%20committee s>accessed 27 August 2020.](#)

<sup>44</sup> An Interview with Senator Ita Enang, Chairman Senate Committee on Rules and Business, Nigerian National Assembly, Nigeria (13 May 2015).

<sup>45</sup> Victor Ndoma Egba (n35).

<sup>46</sup> O B Agu, 'Legislative Drafters and a Transformative Laws' in Epiphany Azinge and Adejoke Adediran (eds) *Legislative Drafting and Transformative Laws* (Nigerian Institute of Advanced Legal Studies, 2013) 106-107.

<sup>47</sup> J Y Fashagba, 'The Nigerian Legislature and Social- Political Re-Engineering in the Fourth Republic' in E Azinge and A. Adediran (eds) *Legislative Drafting and Transformative Laws* (NIALS Press, 2013) 14.

<sup>48</sup> Franklin De Vrieze, *Post-Legislative Scrutiny. Guide for Parliaments*, Westminster Foundation for Democracy, 2017.

<sup>49</sup> K John and T. N Robert (1999), A Concept Paper on Legislatures and Good Governance-<[www.pogar.org](http://www.pogar.org)>accessed 27 August 2020.

legislative monitoring of enacted legislations in the legislative system and a presidential system of government.

As a continuous process, the core of PLS is to harvest lessons learned and best practices to inform better drafting and implementation of the law to narrow the gap between policy intents and its outcomes. The absence of a PLS method by legislatures runs the risk of an uncontrolled lack of full enactment of laws, with specific legal provisions of the law not being brought into force and therefore ineffective. The law may ultimately fail to meet the intended policy objectives and hence, there is the risk of dead-letter laws.

## Conclusion

The COVID-19 pandemic is a first of its kind and a test for Nigeria's legal framework in determining the appropriate procedure and limits on emergency powers in response to infectious diseases. Post-legislative scrutiny is an approach which may identify the gap in the Nigerian regulations and suggest ways that could improve the system in Nigeria. It may be argued that this is a practice in the British system and not applicable to the Nigerian political system. Though the political system operative in Nigeria, which is the government's presidential system, is different from the parliamentary system in the United Kingdom, post-legislative scrutiny can also be operationalised in Nigeria. Post-legislative scrutiny ought to be a part of the legislative work in holding the Executive to account.<sup>50</sup> It is assumed that the Executive arm of government will conduct the scrutiny or review of enacted legislation. There is a Commission that addresses this in Nigeria called the Law Reform Commission. The Law Reform Commission was established by the Nigerian Law Reform Commission Act 1979. The Commission identifies laws that require amendments or repeal.

According to some Senate members in the National Assembly, the Law Reform Commission is dormant and may be ineffective<sup>51</sup>. From 2007 to 2020 the Commission only attempted seven reforms.<sup>52</sup>

Post-Legislative scrutiny should involve both the Executive and the Legislature and combine internal departmental scrutiny with legislative scrutiny. It is suggested that post-legislative scrutiny procedures will be most justified if concerned with legislation that has a substantial social impact<sup>53</sup>, and the Regulation on COVID-19 falls within this purview.

Post-legislative scrutiny takes the form of a separate mechanism within the Legislature. The evaluation process will also be a by-product of a Legislature carrying out effective oversight and effective law-making and abiding by statutory obligations.<sup>54</sup>

It is evident from the discussion that post-legislative scrutiny of delegated legislation practised in jurisdictions like the United Kingdom is not presently being operationalised in Nigeria. The kind of control that exists in Nigeria can be said to be from the Executive because regulations are usually made by the President or by the Governor in Council or if the powers are to be exercised by some other persons, on the approval of a higher authority.<sup>55</sup> It has been argued that this is to some extent, a kind of scrutiny in itself but the position in this paper is that such level of scrutiny carried out by the Executive is not effective in curbing possible abuse of human rights. And the laying of regulations before the Legislature, when it is done, does not necessitate any further action from the Legislature.

The Legislature cannot effectively control the exercise of delegated legislation if the delegated legislation is not laid before it with the proper legislative procedure for challenging unsatisfactory

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<sup>50</sup> F. De Vrieze (n2).

<sup>51</sup> Henry Omoru, 'Law Reform Commission is Dormant' Vanguard (Nigeria May 21, 2020) <<https://www.vanguardngr.com/2020/05/law-reform-commission-is-dormant-%E2%80%95senate/>> Samson Atekoja Usman 'Nigerian Law Reform Commission Dormant' Dily Post (Nigeria May 20, 2020) <https://dailypost.ng/2020/05/20/nigerias-law-reform-commission-dormant-senator-opeyemi/>> accessed 14 December 2020.

<sup>52</sup> *ibid.*

<sup>53</sup> F. De Vrieze(n2)13.

<sup>54</sup> F. De Vrieze(n2).

<sup>55</sup> S O Imhanobe, 'Delegated Legislation' in Epiphany Azinge, Vivian Madu(eds) *Fundamentals of Legislative Drafting* (Nigerian Institute of Advanced Legal Studies 2012) 196.

regulations. The Legislature will only be able to fulfil a supervisory function over delegated legislation if stipulations can be made for detailed scrutiny of specific regulations in legislative committees with narrow but clearly defined terms of reference and this will go a long way to curtail the risk of constitutionally undesirable features being imported into delegated legislation.<sup>56</sup>

The Legislature has no existing guidelines for the scrutiny of delegated legislation or the laying of regulations after they have been passed. The powers granted to the Executive to make rules are exercised; there is no scrutiny over it to ensure that it is within the limits of the powers conferred. As such the breadth of powers currently enjoyed by executive bodies, such as Public Health authorities and security forces under the COVID-19 Regulation 2020, cannot be brought before the Legislature to be scrutinised or reviewed.

The Nigerian Legislature is empowered to have oversight<sup>57</sup> and ensure democratic rule and respect for human rights. It can operationalise scrutiny procedures to scrutinise regulations passed, and this can be operationalised to scrutinise the COVID-19 Regulation 2020.

Oversight will ensure that the COVID-19 Regulation 2020 is brought before a relevant Standing Committee for oversight to investigate if it is achieving its intended purpose. The committees are already used to carrying out these functions. Still, in this case, regarding legislation that has been passed into law already, this is in line with international human rights commitments to ensure that these temporarily imposed restrictions on rights do not become permanent.

It cannot be overemphasised that the breadth of powers that executive authorities currently enjoy should be under regular scrutiny and review. Safeguards ought to be in place, and multiple layers of oversight should be conducted.

This paper has found that PLS does not occur in Nigeria and Nigeria is among the countries in Africa that have not implemented Post-Legislative Scrutiny in the national legislative process. There is a need for legislative accountability that ensures that the Legislature having oversight powers must check the Executive's activities to implement government policies and programmes for the citizens' benefit and interest and uphold international human rights commitments.

**Dr Elohor Stephanie Onoge**

*Dr Elohor Stephanie Onoge is a law researcher and practitioner in the field of drafting; she has been involved in the drafting of legislation in the legislative arm of the Nigerian Government. Her interests include the field of legislative training and drafting.*

<sup>56</sup> Kersell, John E, *Parliamentary Supervision of Delegated Legislation: The United Kingdom, Australia, New Zealand and Canada*, (London Stevens, 1960) 111.

<sup>57</sup> Constitution of the Federal Republic of Nigeria, s4(1) and (2).

# Coronavirus and Effects on the Rule of Law: How Fundamental Rights Live with Mass Surveillance Technologies in Democratic Systems – An Analysis of Europe and Italy in a Global View

Carmelina Sessa

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## Pandemic and legal implications: not just Science, the Law at the time of Covid-19

From 11 March 2020, following the Pandemic status declared by the WHO due to the SARS-Cov-2 virus, also called new Coronavirus, and the relative pathology affecting the respiratory tract named COVID-19, a public health emergency of global<sup>1</sup> significance was declared. The indiscriminate spread of a new disease easily transmitted and characterized by a high degree of lethality,<sup>2</sup> in combination with the lack of effective pharmacological protocols and specific vaccines, has been representing a global threat for months.

An unprecedented event such as this is producing a complex and novel situation, with a significant impact on people's individual and social lives. The effects of the infection intensity are evident, not only in the health industry but also in other fields such as the legal sector as we would like to discuss here. This new health emergency revives one of the modern topics of highest global concern, the growth of the link between Law and Science. It reflects the sphere in which Law is working alongside scientific research to curb this pandemic in its legislative dimension to guarantee public order and compliance.

The implications of Coronavirus in Europe, in strictly legal terms, will be the subject of reflection from here on out. This calls for the duty of examining the current and in perspective liberal-democratic stability of the Rule of Law, in the face of the 'disruptive' government measures that have been adopted to counter and marginalize contagions. The case study of Italy will act as a pilot in the context of the discussion.

## Health emergency in Europe: an analysis of the Italian and inter- constitutional order

Unforeseen, the Covid-19 Pandemic caught states and humanity unprepared. Since the initial disorientation and the bland ability to quickly understand the extent of the threat, at the beginning the response in Europe resulted in the isolated reaction from each country. The first European state affected by a manifestly high number of infections was Italy, which began, alone, to implement the first restrictive and containment measures of the infection.<sup>3</sup> The spread of the epidemiological emergency has gradually created an extraordinary situation and each state developed a pandemic plan, to be constantly updated based on WHO guidelines.<sup>4</sup> It was only sometime after isolated actions that the need for greater global cooperation was deemed necessary.

Since then, together with health care professionals and experts, governments and public security authorities have been working at the forefront of managing and combating the 'invisible enemy'. Given the extreme ease with which the virus is transmitted from one individual to another, the political choices made in Italy, and similarly in other European countries,<sup>5</sup> have gone in the direction of preparing 'social distancing' to avoid its spread through social contacts, thereby strongly limiting the exercise of fundamental rights and freedoms. It is believed that framing the regulatory management of the Pandemic in the perspective of the emergency legislation is decisive for ensuring compliance with

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<sup>1</sup> Speech of the WHO Director General of 12 March 2020 <<https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19--11-march-2020>>.

<sup>2</sup> Official data are available on the WHO web site at <<https://www.who.int/emergencies/diseases/novel-coronavirus-2019>>.

<sup>3</sup> The Italian government's first act was the Declaration of a State of emergency <[www.gazzettaufficiale.it/eli/id/2020/02/01/20A00737/sg](http://www.gazzettaufficiale.it/eli/id/2020/02/01/20A00737/sg)>-

<sup>4</sup> WHO Country & Technical Guidance Coronavirus disease (COVID-19) <<https://www.who.int/emergencies/diseases/novel-coronavirus-2019/technical-guidance>>.

<sup>5</sup> Lorenzo Cuocolo (Ed.), *I diritti costituzionali di fronte all'emergenza Covid-19. Una prospettiva comparata* (federalismi.it, 5 May 2020) <<https://federalismi.it/index.cfm>>?

fundamental rights, contracts, and compromises in their expansion.<sup>6</sup> Without prejudice to this assumption, it seems essential to reflect on the legitimacy of adopting these measures to contain the spread of Covid-19. The issue has a significant role to play in International legal contemplation. By investigating it, we can better assess whether, in the face of the emergency, the compression of fundamental rights and freedoms in a democratic system is compatible with the superior principles, foreseen from the constitution and International Charters on Human Rights. To what extent can the succession of exceptional events call into question the essential safeguards of the constitutional guarantee, in the name of *extra-ordinem* management of the current crisis, and with what implications for democratic structures? Before discussing the problems, the question appears relevant if we bear in mind that it will be unthinkable to assume that in the long run we would abandon the Rule of Law, barring unexpected situations and associated repercussions on democratic systems.

### **Balancing of fundamental rights and Italian Decrees. Hold of the institutional structure and reflections on the system of sources of Law**

It is evident to everyone that the Coronavirus emergency has undermined the norms that regulate the ordinary functioning of liberal-democratic systems. As a result, it has shown the fragility of ontological and structural certainties namely the separation of powers and the protection of fundamental rights taken for granted until a few months ago. Likewise, in Italy the 'more difficult crisis that the country has been experiencing since the Second World War'<sup>7</sup> has caused a tension in the constitutional order between the system of fundamental rights and the system of sources, affecting the organization of public powers. The Italian constitutional system lacks the ability to set out rules for a general state of emergency or to transfer special powers to a specific institution in times of crisis, unlike other EU Member States' constitutions do, such as in France (Articles No. 16 and 36) and Spain (Article No. 116). In fact in the EU, the French Constitution and primary law (Law No 55-385 of 1955) deal with exceptional events, a threat or potential danger to the French nation through three sets of provisions for derogating from the law: i) 'presidential exceptional powers'; ii) the 'state of siege'; and iii) the 'state of emergency'. In addition, in Spain Article 116 of the Constitution, together with Organic Law 4/1981, allows the possibility to declare three different states of emergency. Contrariwise Italy's legal order does not include similar mechanisms for historic reasons. In the Italian context the constituent fathers wanted to avoid a situation where powers were concentrated within a single body, after experiencing the Fascist regime. The only emergency regime provided by the Italian Constitution is activable under Articles 60 and 78 in case of war, which is not comparable to a pandemic. Pursuant to these provisions, the government can adopt decrees having the same force of law being able to derogate or suspend rights and freedoms protected by the Constitution. Furthermore, the government can step in and replace Regions and Municipalities in the exercise of their powers for reasons of public security, to preserve the legal and economic unity of the state or to guarantee essential levels of assistance concerning social and civil rights (Article 120 of the Constitution).

Yet, contemporary threats such as health emergencies or international terrorism led the public debate to reflect on the necessary constitutional regulation not limited to war for protecting the legal system and its fundamental principles. Presently, this would have ensured the action of the public powers to address the emergency within form and limits already pre-established, averting possible fractures due to the pressures arising from the emergency condition. Even at the supranational level the emergency clauses in compliance with Articles No. 15 of the ECHR and No. 4 of the ICCPR are designed to delimit the powers' expansiveness in the state of emergency. However, it should be noted that only the Spanish government declared a state of alarm, whereas the French parliament preferred to adopt a law on urgent measures (Law No 2020-290) instead of applying a state of emergency to the health crisis.<sup>8</sup>

After the resolution on the state of emergency was approved by the Executive on 31 January 2020, the Italian crisis management began through a chain of *extra-ordinem* acts, involving the Centre and the Periphery: State at the central level with Regions and local authorities at the peripheral level.<sup>9</sup> The resulting regulatory framework is extremely broad and complex to coordinate, being made up of a

<sup>6</sup> European Agency for the Protection of Fundamental Rights, *Coronavirus Pandemic in the EU - Fundamental Rights implications*, Bulletin No.1 (20 March 2020) <<https://fra.europa.eu>>.

<sup>7</sup> Statements by the Italian President of the Council of Ministers (PCM) on the new measures to contain the Pandemic <<http://www.governo.it/it/articolo/dichiarazioni-del-presidente-conte/14361>>.

<sup>8</sup> Krisztina Binder et al., States of emergency in response to the coronavirus crisis: Situation in certain Member States (European Parliamentary Research Service, June 2020) <[https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/649408/EPRS\\_BRI\(2020\)649408\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/649408/EPRS_BRI(2020)649408_EN.pdf)>.

<sup>9</sup> Marco Olivetti, *Le misure di contenimento del Coronavirus, fra Stato e Regioni (Il Quotidiano giuridico*, 10 April 2020) <<https://www.quotidianogiuridico.it>>.

variety of provisions including civil protection orders and Health Ministry decrees and orders, in addition to local ordinances.<sup>10</sup>

Without going into the merits of the single measures enacted, this article will discuss 3 main categories: the obligation of home quarantine and possible compulsory hospitalization of COVID-19 positive individuals; the precautionary quarantine of individuals who have had close contact with individuals tested positive for COVID; and the obligation to apply forms of 'social distancing' as a precautionary practice.

Legally speaking, the Italian government has adopted the regulatory instrument for instant emergencies according to Article 77 of the Italian constitution, *id est* the Law Decree. The first restrictive measures were initially approved by the first Italian Law Decree 23 February 2020 No. 6 and were later implemented by the Decree of the President of Council of Ministers (Decree of the PCM) for only Northern regions (Lombardy and Veneto); subsequently, they were extended to the whole national territory with the Decree adopted by PCM of 9 March.<sup>11</sup> At the beginning, the measures were targeted to specific areas but were standardized later with the Decree of the PCM of 11 March and with the order of the Ministry of Health of 20 March 2020, until the adoption of a provision to close all non-essential production activities with Decree of the PCM of 22 March.

At least formally a laceration of the constitutional order seems to be averted so far. The measures are issued by the Law Decrees which are a source of primary legislation allowed by the constitution in 'extraordinary cases of necessity and urgency' and have limited validity in time. The temporal factor is crucial since their constitutionality depends on the provisional nature and limitation in terms of effectivity. However, particular attention needs to be paid to the rapid succession over time of many Law Decrees which very often relate to the same or similar objects. This might undermine the meaning and value of the required temporariness. The risk that the constitution can be progressively eroded and violated has to be assessed, due to the prolonged stress to which it has been subjected.

In any case, the Italian scholars argue that this 'urgent legislation' finds endorsement in the constitution as a response from the pandemic because the latter could only be insured with the Law Decree and not otherwise<sup>12</sup>.

Conversely, using non-legislative acts such as the Decrees of the PCM for implementing the restrictive measures of inviolable rights raised major doubts of constitutionality and violation of the principle of legality.

According to Art. 3 of Law Decree 6/2020 the PCM can adopt his Decrees to enact '*any other necessary measures*' to stop the spread of the disease. Overall, the PCM's 'self-attribution' of *extra-ordinem* powers creates 3 specific problems. Firstly, as the constitution prescribes that rights and freedoms can only be restricted by Law or acts having the force of Law, the Decrees of the PCM do not have legal force and cannot even regulate the details of restrictions or impose criminal sanctions; secondly, unlike the Law Decrees, the Decrees of the PCM are excluded from the control of the parliament and the President of the Republic; thirdly, the highly controversial 'open clause' allows the PCM to limit rights without precise criteria and provisions to be followed. The genericity of Art. 3 was corrected under Law Decree 19/2020 with a more precise forecast of the limits to respect in the adoption of prime ministerial decrees.<sup>13</sup>

The preference of the Decree of the PCM has been justified for being a more agile and flexible tool to manage an evolving and unpredictable emergency; in fact, it does not imply, unlike the Law Decree, the approval by the Council of Ministers or the transposition into Law by the parliament within 60 days without losing effect. On the other hand, marginalizing the parliament for limiting contagion acts as a counterpoint and could be extremely dangerous to democracy. If some authors<sup>14</sup> interpret the Decrees

<sup>10</sup> Gaetano Azzariti, *I limiti costituzionali della situazione d'emergenza provocata dal Covid-19* (Questione giustizia, 27 March 2020) <[www.questionegiustizia.it](http://www.questionegiustizia.it)>.

<sup>11</sup> *Collection of documents containing urgent measures regarding the containment and management of the epidemiological emergency from COVID-19*, Official Gazette of the Italian Republic <https://www.gazzettaufficiale.it>.

<sup>12</sup> Antonio Ruggeri, *Il coronavirus, la sofferta tenuta dell'assetto istituzionale e la crisi palese, ormai endemica, del sistema delle fonti* (1/2020, ConsultaOnline, 2020) <[www.giurcost.org](http://www.giurcost.org)>.

<sup>13</sup> Law Decree 19/2020 <<https://www.gazzettaufficiale.it/eli/id/2020/03/25/20G00035/sq>>.

<sup>14</sup> Mazzarolli L., «*Riserva di legge*» e «*principio di legalità*» in tempo di emergenza nazionale. *Di un parlamentarismo che non regge e cede il passo a una sorta di presidenzialismo extra-ordinem, con ovvio, conseguente strapotere delle pp.aa. La reiterata e prolungata violazione degli artt. 16, 70 ss., 77 Cost., per tacer d'altri* (federalismi.it, 13 March 2020) <<https://federalismi.it>>, according to which the Law Decrees, as a primary source, must dictate immediately applicable rules, without being implemented by administrative act as the Decrees of PCM.

of the PCM as the inadequacy of the emergency powers, for others<sup>15</sup> it is the proof that the constitutional framework is effective even in the face of an exceptional pandemic crisis. A more precise emergency discipline, missing in Italy, would offer an evident advantage regulating the limits of non-legislative interventions and would clarify conditions for the parliamentary action to reach a more effective constitutional balance.

The health emergency has required a reconciliation of different constitutional values in conflict. In this scenario, the balancing technique is indispensable to overcome conflicts of rights and fundamental principles at stake, through a proportionate and reasonable weighting. On these assumptions, the constitutional framework has held up because fundamental rights and freedoms have been sacrificed by the public authorities. Civil liberties and social rights, rights to work and to free economic initiative and private property, and to rapid justice have been progressively compressed to assign priority protection to the fundamental rights of life and health, in the individual and collective under Article 32 of the Constitution. The legitimacy of the measures adopted raising the question of their proportionality will be subject to a degree of parliamentary oversight. Redress against the emergency decrees also remains subject to the ordinary rules on jurisdiction (constitutional, ordinary and administrative).

### **A look at Europe through Italy: measures from Covid-19, ECHR and ICCPR**

After an initial divergence, the European countries affected by COVID-19 have progressively conformed to the so-called 'Italian model'<sup>16</sup> of social distancing. First the countries of Mediterranean Europe and shortly afterwards the countries of northern Europe (Iceland, Holland and the United Kingdom, which initially aimed at the rapid development of 'herd immunity'), as well as the Russian Federation adopted measures similar to those in Italy, following the scientific criteria developed internationally by the WHO. The Italian regulatory complex hinders a rational reconstruction, being the result of numerous and heterogeneous measures. Having produced restrictive measures on fundamental human rights, it has impacted not only on the constitution as mentioned, but also on the most important International agreements, which constitute the inter-constitutional order.<sup>17</sup> Among these, we will deal with the European Convention on Human Rights (ECHR) and the International Covenant on Civil and Political Rights (ICCPR). It should be emphasized that we are preparing to face a phenomenon that involves almost all the states parties to these agreements. So much so that the Council of Europe<sup>18</sup> and the Human Rights Committee<sup>19</sup> have intervened to warn member states against the risk that measures to combat the pandemic could lead to unacceptable sacrifices to human rights. The analysis is conducted considering the most critical aspects which emerged in the legal doctrine with reference to the Italian regulatory situation.

Taking up the framework of freedoms and rights involved in the anti-virus measures, outlined without any claim to completeness in the previous paragraph, we can see how these have been compromised despite many internationally guarantees: personal freedom,<sup>20</sup> freedom of movement,<sup>21</sup> the right to private and family life,<sup>22</sup> right to privacy,<sup>23</sup> which may also be limited by the use of Software and Apps,<sup>24</sup> the right of peaceful assembly, religious freedom,<sup>25</sup> freedom of expression,<sup>26</sup> the right to education,<sup>27</sup>

<sup>15</sup> Massimo Luciani, *Il sistema delle fonti del diritto alla prova dell'emergenza* (ConsultaOnline, 11 April 2020) <http://www.giurcost.org>.

<sup>16</sup> European Union Agency FRA – For fundamental rights, *Coronavirus COVID-19 outbreak in the EU Fundamental Rights Implications* <[https://fra.europa.eu/sites/default/files/fra\\_uploads/italy-report-covid-19-april-2020\\_en.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/italy-report-covid-19-april-2020_en.pdf)>.

<sup>17</sup> Meaning the interactions between both national and supranational constitutional charters within a "system of systems". Antonio Ruggeri, *Per uno studio sui diritti sociali e sulla costituzione come "Sistema". Notazioni di metodo* (ConsultaOnline, 2015) <<http://www.giurcost.org>>.

<sup>18</sup> UN-experts, *COVID-19: States should not abuse emergency measures to suppress human rights* (Office of the High commissioner, 16 March 2020) <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25722>>.

<sup>19</sup> Commissioner for Human Rights, *States must give a renewed impetus to realizing human rights for all* (Council of Europe, 3 June 2020) <<https://rm.coe.int/speech-at-the-greek-cm-chairmanship-event-effectively-responding-to-a-s/16809e9323>>.

<sup>20</sup> Article No. 5 ECHR and Article No. 9 ICCPR.

<sup>21</sup> Article No. 2 of Protocol No. 4 to the ECHR of 16 November 1963 and Article No. 12 ICCPR.

<sup>22</sup> Article No 8 of the ECHR and Article No. 17 ICCPR.

<sup>23</sup> Article No. 11 ECHR and Article No. 21 ICCPR. The issue will be examined in detail in the next paragraph (2.3) of this paper.

<sup>24</sup> The issue will be examined in detail in the last paragraph (3) of this paper.

<sup>25</sup> Article No. 9 ECHR and Article No. 18 ICCPR.

<sup>26</sup> Article No. 10 ECHR and Article No. 19 ICCPR.

<sup>27</sup> Article No. 2 of the Additional Protocol n.1 to the ECHR of 20 March 1952.

the right to a fair trial and the judicial protection of one's rights,<sup>28</sup> the right to work and economic initiative.<sup>29</sup>

The evident prejudice suffered by internationally guaranteed human rights does not automatically entail their violation or the illegality of the measures applied. In compliance with the principle of proportionality, some clauses of these agreements allow restrictions and derogations in time of public emergency. Although the doctrine is not unanimous on which is the distinctive element between restrictions and derogations,<sup>30</sup> we consider as decisive on the point the 'exceptionality' of the derogation clauses compared to the 'ordinariness' of the restriction clauses.

Even if the measures adopted by the Italian government can be contemplated as necessary and proportionate to fight an unprecedented world health crisis, this should comply with the relevant provisions of the ECHR and the ICCPR. Some problems have been raised in legal doctrine casting doubt on the complete legitimacy of the measures themselves. It should be noted that the questions would not have arisen if Italy had made use of the procedure of derogation from the obligations under the agreements. As provided for by Articles No. 15 of the ECHR and No. 4 of the ICCPR, Italy remained within the framework of 'ordinary' restrictions on individual human rights, unlike other States<sup>31</sup> which have resorted to exceptions. This critical profile is particularly relevant since if the measures were not legitimately adoptable according to these agreements' provisions, the relative legislative acts (Law Decree and Laws that confirm the Law Decree) could be declared unconstitutional by the Italian Constitutional Court for violation of Article No. 117.<sup>32</sup> or subjected to review by the European Court of Human Rights and the Human Rights Committee. Because the pandemic emergency is undisputedly part of the regime of derogations of the ECHR and the ICCPR, Italy's decision not to use it raised the issue whether an obligation was breached or not.

Firstly, it should be considered that despite strict measures, Italy would not have been obliged to require the procedural requirements under Article No. 15, par. 3, ECHR and Article No. 4, par. 3, ICCPR. In fact, states parties have a right and not an obligation to activate the derogation procedures. The explanation can be seen by considering that there is no automatic symmetry between the emergency nature of the situation to be faced and the measures that can be adopted. Thus, in the face of an exceptional situation that threatens the life of the citizens, the state, on case-by-case evaluation, has a margin of appreciation and discretion in deciding to suspend certain rights or to take restrictive measures (generally permitted for ordinary situations).<sup>33</sup>

Secondly, excluding the non-activated derogation regime, the Italian measures only have the possibility to fall under the discipline of restrictions. As restrictions of rights, such measures must be enacted to compress - and not totally suppress - human rights and must be traced back to the protection of health or the general interests of society or the rights of others. The Italian measures tend to be motivated by the need to fight a pandemic which is able to jeopardize its population's welfare and survival. In a democratic society, restrictions over human rights are allowed for public health interests<sup>34</sup>, if provided for by law. The recognized proportionality of measures in relation to the purpose of protection does not exhaust the questions relating to their lawfulness.

A further problem concerns the compliance of the restrictions with the principle of legality. What has already been said regarding the interactions between the Law Decree (primary source having the force of law) and Decree of the PCM (secondary source act) could be recalled. However, human rights can be limited only by a legislative act that respects the requirement of legality both formally and substantially. Satisfying the general character of a legislative act, from a substantive point of view, implies that the legislation must be accessible, precise, predictable. The emergency regulations in Italy

<sup>28</sup> Articles No. 6, par. 1, and 13 of the ECHR and Article No. 14, par. 1, ICCPR.

<sup>29</sup> Article No. 1 of the Protocol No. 1 to the ECHR.

<sup>30</sup> The Human Rights Committee believes that «*derogation from some obligations in emergency situations is clearly distinct from restrictions or limitations allowed even in normal times under several provisions of the Covenant*», *General Comment No. 29: Article 4: Derogations during a state of emergency*, 31 August 2001, par. 4.

<sup>31</sup> Some member States of the Council of Europe have communicated the derogation for the COVID-19 emergency, such as Romania, Armenia, Moldova, and Latvia. Patricia Zghibarta, *The Whos, the Whats, and the Whys of the Derogations from the ECHR amid COVID-19*, (EJIL: Talk!, 11 April 2020) <[www.ejiltalk.org](http://www.ejiltalk.org)>.

<sup>32</sup> Article No. 117.1 Italian Constitution: «*Legislative powers shall be vested in the State and the Regions in compliance with the Constitution and with the constraints deriving from EU legislation and international obligations*».

<sup>33</sup> Declaration of the Human Rights Committee, (24 April 2020): «*States parties should not derogate from Covenant rights or rely on a derogation made when they can attain their public health or other public policy objectives through invoking the possibility to restrict certain rights*».

<sup>34</sup> Additional Protocol No. 1 to the ECHR, Art. No. 1 (20 March 1952): States can regulate by Law the use of goods following the general interest; ECHR, Art. No. 6, par. 1 and ICCPR, Art. No. 14, par. 1: exceptions to publicity are allowed for national security matters.

being the result of a variegated and heterogeneous plurality of acts, coming from different organs including State, Regions, Municipalities, are far from easy to be known, understood, and coordinated<sup>35</sup>.

It is difficult to determine whether the measures in question can only be defined as 'restrictions' for upholding the exercising of human rights or, on the other hand, as genuine 'derogations' particularly in situations where the distinction is not as evident as it is on the theoretical level. This makes the matter complex because the Italian government has not exercised the right to derogate from its obligations through official and public adherence.<sup>36</sup> In this way, if the measures adopted against the COVID-19 pandemic were to cause exceptions to the rights involved and not restrictions, there would be a violation of the international announcements contained in the two agreements (ECHR and ICCPR).

## **COVID-19 and mass surveillance needs: the principle of proportionality and exceptions to the protection of personal data**

The current crisis is revolutionizing our society in several fields and it seems reasonable to believe that these challenges will intensify for its entire duration, although we are not able to foresee the extent of the stabilization of their effects. COVID-19's impact on all national policies has influenced the digital industry. It could not have been otherwise if we just think that due to social distancing many work, educational and social functions have been transferred thanks to digital technologies. This has generated an impressive push towards digitization and placing of impressive quantities of personal data on the Internet network. A technological deficit in Italy is particularly evident in the management of public services such as public education and justice which have relied on private IT platforms in the absence of public ones.

The tracking of personal contacts for health surveillance purposes and the relative protection of health data are other issues of the 'emergency law' at the time of COVID-19. The processing of personal data determined from the adoption of contact-tracing systems also evokes the dual theme so far discussed of the limit within which the fullness of safeguards and the balance between different rights and interests are possible.

On this point as for the European context the EU agenda through the work of the Commission is focused on the ability to produce clusters of data<sup>37</sup> in a technological and regulatory European dimension, where protection is enhanced. Science and Law are intertwining together with digital technology and health to combat the pandemic, paving the way for a new debate on strategies connected to the rights of the protection of personal data (GDPR, Article No. 4 n. 1) and privacy. The disclosure of controversial mass surveillance programs for national security has evoked an international debate on the right of citizens to be protected from the illegitimate or warrantless collection and analysis of their data and meta-data.<sup>38</sup> The use of big data to track citizens in quarantine, surveillance of individuals, development of tracing apps with sharing information with the various authorities, are further safeguards that governments can choose to adopt as virus containment measures, in addition to social distancing. We are moving towards the field of mass surveillance measures and contact tracing activities, aimed at outlining the chain of contagion of the virus and preparing a more effective and targeted reaction.<sup>39</sup>

*"You can't fight fire blindfolded. And we can't stop this pandemic if we don't know who is infected".*<sup>40</sup>

<sup>35</sup> Ugo Villani, *Le misure italiane di contrasto al Covid-19 e il rispetto dei diritti umani* (2/2020, La Comunità internazionale, 2020) p. 165-188.

<sup>36</sup> In the absence of an official and public notice of derogation, Article 15 does not apply to the Statal measures (*Cyprus v. Turkey*, Commission report of 4 October 1983, §§ 66-68). European Court of Human Rights, *Guide on Article 15 of the European Convention of Human Rights. Derogations in time of emergency* (31 December 2019) <<https://www.echr.coe.int>>, 11.

<sup>37</sup> [European] Commission and Germany's Presidency of the Council of the EU underline importance of the European Health Data Space, Brussels (11 November 2020) <[https://ec.europa.eu/commission/presscorner/detail/en/ip\\_20\\_2049](https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2049)>. A legislative proposal on a European health data space is planned for 2021 <[https://ec.europa.eu/info/publications/2021-commission-work-programme-key-documents\\_en](https://ec.europa.eu/info/publications/2021-commission-work-programme-key-documents_en)>.

<sup>38</sup> Science and Technology Options Assessment, *Mass Surveillance Part 1: Risks and opportunities raised by the current generation of network services and applications* (European Parliamentary Research Service, December 2014) <<https://www.statewatch.org/media/documents/news/2015/jan/ep-stoa-report-mass-surveillance-part-1.pdf>>.

<sup>39</sup> The tracking of human Epidemics infections using Artificial Intelligence tools were used for Ebola Epidemics. In terms of experimentation, the BBC4 program in UK in 2018 tried to trace a "simulated" virus while moving through an app named "Pandemic" installed on the smartphones of groups of volunteers. Gianpaolo Maria Ruotolo, *Alcune osservazioni sulle app di tracciamento dei contatti e dei contagi alla luce del diritto dell'Organizzazione Mondiale del Commercio* (SIDIBlog, 13 May 2020) <[www.sidiblog.org](http://www.sidiblog.org)>.

<sup>40</sup> Tedros Adhanom Ghebreyesus, in *WHO Director-General in the media briefing* (16 March 2020) <<https://www.who.int>>.

The high capacity of data collection and analysis of recent technologies represents a precious resource in emergency situations. It is also important not to underestimate the consequences for individual rights and freedoms, and hence a balance must be maintained. Tracking technology devices represent innovations that can't ignore the regulatory framework for the processing of personal data, because of public interest, based on the principles of proportionality and social solidarity.

This purpose can be detected in the combined reading of multiple supranational and national sources, where the right to privacy finds regulatory confirmation and possible exceptions. The exceptions are offered above all in relation to data relating to health, for which, in most cases, superior safeguards are expressly demanded. Some international and regional regulations that Italy is part of, will be considered. The ICCPR warns that '*the protection of privacy is necessarily relative*' (Article No. 17) and may be derogated in accordance with the regime established by Article No. 4, paragraph 7. Generally prohibited (General Comment No. 16 of the Human Rights Committee), interference is legitimate if authorized by Law and if it conforms to the provisions, aims, and objectives of the agreement itself (paragraphs 3 and 4). Within the Council of Europe, the Article No. 8 par. 2 of the ECHR lists the conditions of interference: they must be provided for by a Law; necessary in the framework of a democratic society; correspond to the protected purposes, among which national security and health protection are indicated. Coming to the European Union we first refer to the Article No. 23 of the GDPR requiring that a limitation respects '*the essence of fundamental rights and freedoms*', as a necessary and proportionate measure in a democratic society '*to safeguard [...] public health*'. According to Article No. 4 n. 15, the surveillance techniques concern the category of data relating to health subject to special treatment, since, pursuant to Recital No. 51, this deserves increased protection being particularly sensitive. Article No. 9 paragraph 2 indicates the public health sector and the health (letter 'h' and 'i') among the ten cases in which the prohibition on the processing of special data ceases. Also, the EU Charter of Fundamental Rights reiterates the non-absoluteness of the fundamental rights of privacy and protection of personal data under Articles No. 7 and 8. Furthermore, under Article No. 52 the rights and freedoms can be limited by legislative provision and in compliance with the principle of proportionality, for meeting general interests recognized by the Union or for protecting the rights and freedoms of others.

So far, the research has revealed the prominent recognition assigned to the principle of proportionality<sup>41</sup> in allowing emergency measures to compress human rights, including contact tracing ones. This principle consists of three components: suitability, necessity, and proportionality in the strict sense, or adequacy.<sup>42</sup> In turn, all three are a phase of the proportionality test, developed as a dynamic system of interdependencies with progressive concatenation. It unfolds through a distinct and sequential examination of each element, which is a logical deductive presupposition of the other occurred in the next phase.<sup>43</sup>

It is no coincidence that the scheme underlying the principle of proportionality is contained within numerous European documents relevant to the issue dealt with here. Starting from 2002, Article No. 15 of the e-Privacy Directive<sup>44</sup> guarantees the member states the possibility of limiting data confidentiality obligations with 'legislative provisions' for specific purposes and provided that it is 'a necessary, appropriate and proportionate measure within a democratic society'. The same concept is addressed in the guidelines redacted by the European Data Protection Supervisor before the pandemic<sup>45</sup> and taken up in numerous documents drawn up by a plurality of national and international actors, following the spread of COVID-19.<sup>46</sup>

<sup>41</sup> Stefano Cognetti, *Principio di proporzionalità, Profili di teoria generale e di analisi sistematica* (Giappichelli Editore, 2011).

<sup>42</sup> Suitability is the ability of the means used to achieve the aim pursued. Necessity indicates its irreplaceable with another milder means for the equal realization of the goal. Proportionality in the strict sense is the need that the means, even if appropriate and necessary, not to be too burdensome compared to the convenience of the result. *Ivi*.

<sup>43</sup> Only if suitability and necessary have given a positive result, can we move to proportionality. The last phase of balancing interests and values is subjected to a cost-benefit assessment.

<sup>44</sup> European parliament and the Council, *Directive 2002/58/EC (12 July 2002)*, concerning the processing of personal data and the protection of privacy in the electronic communications sector, <https://eur-lex.europa.eu>.

<sup>45</sup> European Data Protection Supervisor (EDPS), *Assessing the necessity of measures that limit the fundamental right to the protection of personal data: A Toolkit* (11 April 2017) <[https://edps.europa.eu/sites/edp/files/publication/17-04-11\\_necessity\\_toolkit\\_en\\_0.pdf](https://edps.europa.eu/sites/edp/files/publication/17-04-11_necessity_toolkit_en_0.pdf)>; *Idem*, *Guidelines on assessing the proportionality of measures that limit the fundamental rights to privacy and to the protection of personal data* (19 December 2019) <<https://edps.europa.eu>>.

<sup>46</sup> Such as the *European Commission Recommendation (8 April 2020)*, [eur-lex.europa.eu](https://eur-lex.europa.eu); *the documents prepared by the e-Health Network* (15 April 2020) <<https://ec.europa.eu>>; *the European Commission guidelines* (16 April 2020) <<https://ec.europa.eu>>; *the European Committee Guidelines for the protection of personal data 4/2020* (21 April 2020) <[edpb.europa.eu](https://edpb.europa.eu)>; *the indications of the Italian Minister for technological and digital innovation* (21 April 2020) <<https://innovazione.gov.it>>; *The Immune Task Force legal technical report about the adoption of a contact tracing solution* (30 April 2020); *Communication from the Commission to the European parliament and the Council Data Protection as a pillar of citizens' empowerment and the EU's approach to the digital transition, Brussels* (24 June 2020) <<https://ec.europa.eu>>.

Some governments, especially in Asia, hastened to expand their use of surveillance technologies to track the movements of geolocated individuals and map the movements of the virus. China, South Korea and Israel are examples of countries which created a system of ‘contact tracing’ to monitor the spread of COVID-19 to have constant control over the position and status of people who tested positive and collect a huge amount of data, coming from government databases and beyond<sup>47</sup>. China has developed a surveillance system with the use of 200 million security cameras and specific applications for the creation of big data clusters, to enforce the quarantine of infected patients and to map the movements of potentially infected individuals and therefore of the virus. The tracing systems require users to register with their name, national identification number and telephone number. Through an online search on the code of the report, it is possible to retrieve a cross-data analysis discovering further details of the infected person, including the face, photographs, and family information. South Korea preferred to completely sacrifice the right to privacy, derogating from the ‘General South Korean Data Protection Regulation’ and the principle of data minimization, which requires that the processing of personal data must be adequate, relevant, and limited to what is necessary under the circumstances. Another country that has decided to use technological systems to deal with the pandemic of surveillance, sacrificing the right to privacy, is Israel. The Israeli prime minister authorized the internal secret service to use confidential technological tools, normally used to fight terrorism, to follow coronavirus patients without statutory authorization. However, by an intervention of the Israeli Supreme Court<sup>48</sup> these measures did not actually enter into force.

Conversely the European attitude has remained more attentive to the safeguards to be guaranteed due to a democratic, cultural, and legal frame of reference. The adoption of contagion tracing apps, as implementation of the anti-contagion measures already mentioned, has involved many EU countries (although not in their entirety<sup>49</sup>) making masks, quarantine and a mandatory ban on public gatherings.

The opportunity to dwell on the European framework at this point is given to us by the possibility of analysing the solution chosen in Italy: a platform for the management of a virtual alert system, ‘*Immuni*’ established through a Law Decree<sup>50</sup> and authorized for use by the National Data Protection Authority.<sup>51</sup> This app is downloadable on smartphones and tracks people’s interactions, triggering an alarm if one of them is positive. The mechanism notifies, in the form of anonymous encrypted codes, close contacts with subjects who tested positive. In accordance with the National Authority, *Immuni* respects the criteria defined at the national level, based on European legislation, following the purpose (public health), the legal requirement with primary sources (Law Decree later converted into Law)<sup>52</sup>, and voluntariness (no prejudicial consequences or penalties are envisaged for those who do not make use of it). The transparency criteria are respected allowing users, before activating the app, to receive clear and complete information on the purposes, processing operations concerning only necessary data, pseudonymization techniques, and data retention times (Article 6 paragraph 2 letter A). The use is subject to the acceptance of the privacy policy and terms of service. Regarding the burning issue of personal data protection, *Immuni* does not geo-locate the user, the entire data registration mechanism is decentralized to guarantee privacy and to avoid the risk of identification as required by European guidelines. The user data collection is destined to be deleted or made anonymous by 31 December 2021, to further ensure privacy.<sup>53</sup> On one hand, the effectiveness of the app is affected by the digital divide, there is a digital divide among the population where individuals with poor digital skills such as the elderly who are more at risk would be affected;<sup>54</sup> on the other hand, the Bluetooth technology used to geo-locate can be deactivated by the user himself. This makes the app more of an ‘active’

<sup>47</sup> Martina Cardone, Marco Cecili, *Osservazioni sulla disciplina in materia di tutela dei dati personali in tempi di Covid-19. L'Italia e i modelli sudcoreano, israeliano e cinese: opzioni a confronto*, (1/2020, Nomos, 2020) <<https://www.nomos-leattualitaneldiritto.it/wp-content/uploads/2020/05/Cardone-Cecili-1-2020-REV-1.pdf>>.

<sup>48</sup> Adv. Shachar Ben Meir v. The Prime Minister (19 March 2020) HCJ 2019/2020 <<https://supreme.court.gov.il/sites/en/Pages/FullCase.aspx?&CaseYear=2020&CaseNumber=2109>>.

<sup>49</sup> European Commission, Mobile contact tracing apps in EU Member States <[https://ec.europa.eu/info/live-work-travel-eu/coronavirus-response/travel-during-coronavirus-pandemic/mobile-contact-tracing-apps-eu-member-states\\_en](https://ec.europa.eu/info/live-work-travel-eu/coronavirus-response/travel-during-coronavirus-pandemic/mobile-contact-tracing-apps-eu-member-states_en)>.

<sup>50</sup> Art. 6 of the Law Decree 30 April 2020, n. 28, converted into Law by Law 25 June 2020, n. 70.

<sup>51</sup> Garante per la protezione dei dati personali, *Provvedimento di autorizzazione al trattamento dei dati personali effettuato attraverso il Sistema di allerta Covid-19, App Immuni* (1 June 2020) <<https://www.gpdp.it>>.

<sup>52</sup> On 10 August, the Italian Authority for the protection of personal data denounced the phenomenon of the proliferation of invasive data-tracking applications, unauthorized and illegal, which violate privacy <<https://www.garanteprivacy.it/home/docweb/-/docweb-display/docweb/9447462>>.

<sup>53</sup> Vincenzo Cuffaro, Roberto D’Orazio, *La protezione dei dati personali ai tempi dell’epidemia* (il Corriere giuridico 6/2020, 2020).

<sup>54</sup> The Digital Economy and Society Index – DESI (19 June 2020) <<https://ec.europa.eu/digital-single-market/en/desi>>.

Bioethics Commission, *Tracing of contacts for the containment of the infection from SARS-CoV-2*, Accademia Nazionale dei Lincei (8 May 2020) <<https://www.lincci.it/>>.

surveillance, depending on user collaboration.<sup>55</sup> Another doubt relates to the collection of data since the Law Decree (Art. 6 par. 2 letter e) does not clarify where the data will be stored 'other than on mobile devices'. Despite these latter aspects about the effectiveness of its functioning<sup>56</sup> raised by Italian legal doctrine, based on the considerations made so far, the app seems compatible with the European and national legislation on the protection of personal data.<sup>57</sup>

## Conclusions

*How is the rule of law doing today?*

The moment of overcoming the acute crisis we are experiencing in Europe needs a legal reflection. The emergency is set to continue for months<sup>58</sup> and inevitably leads us to ponder upon the direction we are moving. Further extensions of the state of emergency are highly possible and a 'normalization' of the emergency cannot be excluded *a priori*. To sum up, what stands out from the analysis is that the emergency, despite being a legal condition, can legitimize limitations of freedoms provided they are proportionate and confined to this period.

In the EU, the Pandemic is posing unprecedented institutional challenges obliging governments to adopt strict measures affecting citizens' rights. Crucial aspects discussed here dealt with the exercise of public powers under a global health threat. The paper offered an overview of the institutional responses adopted in Italy, compared to those of other States, in the light of i) the inter-constitutional framework and of ii) the kinds of measures adopted within the emergency legislation and their legitimation.

Although the measures taken to address the public health emergency are similarly invasive in the EU member states from a content point of view, the divergent constitutional frameworks caught our attention. Unlike some European constitutions that include detailed rules providing for a state of emergency as in France or Spain, Italy addressed the pandemic by making use of constitutional rules foreseen to manage urgent and exceptional situations, modifying the normal balance between the executive and legislative powers. While having emphasized in the Italian constitution the lack of regulation of emergency, we have also highlighted that some countries have not activated it, despite the provisions in the constitution. It is interesting how, even with specific emergency constitutional mechanisms, France preferred not to trigger them because they were perceived as too repressive.

Up to now, the pandemic does not seem to compromise the stability of the European constitutional systems. Our analysis focused on emergency legislation questions inherent to legal certainty, scope and proportionality, and temporal limitations. The Italian response to Coronavirus was led by using governmental legal instruments in the form of Law Decrees, Decrees of the PCM and ministerial orders. The Law Decrees and related Prime Minister Decrees were formally the viable solution in the face of a pandemic emergency. From a substantive point of view, on the proportionality of the measures taken it is, on the one hand, up to the parliament to confirm them or to let them expire within sixty days after their adoption (during the necessary transposition procedures from Law Decrees into Laws) and on the other hand, to the judges to rule on the merits of the content of the measures. The degree of parliamentary and judicial control over the measures adopted is helping to assure the resilience of the system. The Italian trend to use Decrees (government) instead of Laws (parliament) in existence before the emergency<sup>59</sup> leads us to be more vigilant now that it implies a constant limitation of the fundamental rights based on the progress of an situation persistently unpredictable.

As required by the national constitutions and supranational Charters, human rights and freedoms are subject to the checks and balances system in compliance with the principle of proportionality and the incompressibility of their essential core. On the supranational level the continuing lack of communication of derogation under the ECHR and the ICCPR may be worrying since derogation constitutes an obligation in the case of generalized suspension of the protected rights. This aspect is strictly related to the issue that the complex emergency normative has to be coordinated with the principle of legality on

<sup>55</sup> Marco Plutino, "Immuni". *Un'exposure notification app alla prova del bilanciamento tra tutela dei diritti e degli interessi pubblici* (2/2020, [dirittifondamentali.it](https://dirittifondamentali.it), 26 May 2020) <<https://dirittifondamentali.it/>>.

<sup>56</sup> Dianora Poletti, *Il trattamento dei dati inerenti alla salute nell'epoca della Pandemia: cronaca dell'emergenza* (Persona e Mercato, 2020).

<sup>57</sup> Art. No. 23 of the GDPR, Art. No.15 of the e-privacy Directive, Edbp's guidelines 4/2020, the Italian Code for the protection of personal data.

<sup>58</sup> WHO Director-General, Tedros Adhanom Ghebreyesus: «*We hope to get out of this pandemic within two years*» (Corriere della sera, 21 August 2020).

<sup>59</sup> Giovanni Di Cosimo, *The evolution of the form of government in Italy*, in Massimo Meccarelli et al., *Innovation and transition in Law: Experiences and Theoretical Settings* (Editorial Dykinson, 2020).

which the 'restrictions' are currently adopted, based on the provisions of both the ECHR and ICCPR, as discussed. The lockdown measures produce a substantial impact on many fundamental rights, and the possibility to have crossed the borders within which simple 'restrictions' are allowed arouses apprehension<sup>60</sup>, considering that rights might continue to be compressed, given the current increase in infections.

A final examination to verify the state of the rule of law regarded the impact of Artificial Intelligence and potential invasive technologies on people's daily lives to pursue national purposes in European democratic societies. The tracing apps are paradigmatic of the dynamic balancing between the interest to protect the subjective rights of citizens (privacy and data confidentiality) and to ensure public health interests.

The European identity trait of high standards of personal data protection has required an organic approach to the adoption of the tracing apps. Unlike what happened at the beginning of the emergency, the European institutions have guided the regulatory process on digital issues through guidelines to direct the State policies towards providing national solutions. The COVID-19 pandemic is driving an acceleration towards the digital transition and it is not hard to believe the digital approach incisiveness is destined to grow. Because of this, the technique of balancing fundamental human rights is even more important now. In this scenario adapting the regulatory framework to the emergency implies any possible derogation as long as it is not irreversible. Precise limits established are indispensable with the management of human rights and personal data protection, pondering that there is no turning back from technological innovation. Moreover, the combination of emergency regulation and technology matters should require, at the end of the pandemic, that government fully re-establishes the constitutional guarantees which are suppressed during the pandemic. Maximum attention needs to be given to data protection and the digital divide to ensure a humanly and legally sustainable digital transformation.

**Carmelina Sessa**

*Carmelina Sessa is currently a legal advisor in Cyberlaw and International Business Law and pursues her academic career at the University of Queensland (UQ) in Australia where she was awarded the Europe Global Leaders Scholarship. Having graduated with honour in Law at the University of Macerata, she was a student at its School of Advanced Studies for research and scientific writing purposes. Trainee Lawyer in Dublin and Italy, and Judicial Intern as Assistant of a Prosecutor in Court of Appeal of Salerno. She has gained experience in Constitutional, Criminal, European and International Law so far.*

<sup>60</sup> Ugo Villani, *Le misure italiane di contrasto al Covid-19 e il rispetto dei diritti umani*, op.cit.

# Are Emergency Measures in Response to COVID-19 a Threat to Democracy?

## Fact and Fiction – The case of North Macedonia

Dr Marijana Opashinova Shundovska

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### Introduction

The current COVID-19 pandemic, which threw the world into a serious lock-down for months with no signs for improvement in the near future, raised numerous questions for the paralyzed states and society functioning in general. The situation also drew a lesson regarding the need for an increased use of the information technology and re-modeling of our working environment. Several decades ago, a majority of countries agreed that a state of public emergency should not cause subversion of the democratic constitutional order, or violate internationally recognized human rights and fundamental freedoms, and that normal functioning of the legislative bodies to the highest possible extent should be ensured.<sup>1</sup>

The Venice Commission in its latest report stated that even in a state of emergency, the fundamental principle of the rule of law must prevail.<sup>2</sup> Nonetheless, the Secretary General of the Council of Europe this spring received notifications about derogation from the European Convention on Human Rights (ECHR)<sup>3</sup> from several countries, related to the state of emergency as a result of the massive spread of the COVID-19 virus. The crisis brought to the surface the justified fears that autocrats around the world may (ab)use the situation to further strengthen their power to the absolute limits, especially in ex-communist countries and those in the developing world. They found fertile grounds to *façade* (the front of a building) their undemocratic behavior<sup>4</sup> behind the pandemic, to silence the public, ban political gatherings, introduce harsh censorship measures or spread information fitting their own benefit, hence perfectly undermining the check and balance mechanism. By using the corona narrative, they turned the war against COVID-19 into war against freedom and democracy. On the other hand, fake news by various interest groups brought dangers to the general management of the crisis on a global level. Many leaderships made timely interception by sending official statements via the media channels and/or by appearing frequently in public, showing that fake news is best confronted through government transparency rather than with penalties.<sup>5</sup>

In times of emergency, liberal democracies have also failed to curb the executive power primacy, especially regarding the hasty healthcare public procurement. This forced the Council of Europe authorities to call for full respect of the convention as a binding international act in the criminal law field, on counterfeiting of medical products and similar crimes involving threats to public health, i.e. the so-called MEDICRIME Convention<sup>6</sup>. The Convention as the first criminal law instrument obliges state parties to criminalize the manufacturing of forged medical products that do not comply with the

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<sup>1</sup> Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE, (1991) <[www.osce.org/files/f/documents/2/3/14310.pdf](http://www.osce.org/files/f/documents/2/3/14310.pdf)> accessed on 30 July 2020.

<sup>2</sup> European Commission for Democracy through Law (Venice Commission) [2020], 'Report on respect for democracy, human rights and the rule of law during states of emergency: Reflections', <[www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2020\)014-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2020)014-e)> accessed on 30 July 2020; and European Commission for Democracy through law (Venice Commission), 'Compilation of Venice Commission Opinions and Reports on States of Emergency', CDL-PI[2020]003, <<https://rm.coe.int/venice-commission-compilation-on-states-of-emergency-eng/16809e85b9>> accessed on 30 July 2020.

<sup>3</sup> Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14 supplemented by Protocols Nos. 1, 4, 6, 7, 12, 13, <[https://www.echr.coe.int/Documents/Convention\\_ENG.pdf](https://www.echr.coe.int/Documents/Convention_ENG.pdf)> accessed on 30 July 2020.

<sup>4</sup> T Ginsbur and A Z Hug, How to Save a Constitutional Democracy, (2nd edn, University of Chicago Press 2019).

<sup>5</sup> Florian Bieber, Authoritarianism in the Time of the Coronavirus, (Foreign Policy, 30 March 2020) <<https://foreignpolicy.com/2020/03/30/authoritarianism-coronavirus-lockdown-pandemic-populism/>> accessed on 2 August 2020

<sup>6</sup> Council of Europe, Convention on the counterfeiting of medical products and similar crimes involving threats to public health, [28.X.2011], Treaty Series, No.211, <[www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168008482f](http://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168008482f)>, accessed on 4 August 2020.

necessary requirements, their supply and trafficking, as well as the forgery of documents for their distribution.

This new world order 'Covidism', both autocratic and liberal, proved to be more dangerous in the long run than the virus which took thousands of lives and infected millions of people worldwide. Most of the countries were caught unprepared for this newly emerged situation. Institutions as pillars of democracy were forced to restrain their openness to the public and implement social distancing measures that contradict the definition of democracy in every sense of the word. National parliaments have been among the first of them, despite the calls to keep them open so that the virus does not bring down democracy<sup>7</sup>.

The COVID-19 victimization and de-democratization<sup>8</sup> made representative houses revert to old emergency situations, conveying the lead to the executives to carry on the entire decision-making process, putting into question their definition as pillar institutions in the systems of representative democracy.<sup>9</sup> It influenced the parliamentary oversight of the emergency measures, curbed citizens' freedoms in the name of public health and affected the transparency and accountability of government actions, thus bringing to the forefront the dormant 'de-parliamentarization' process.<sup>10</sup> Fighting for decades to maintain the representative democracy, due to the monopolization of legislation by the executives in the EU member states and the increase of autocratic processes in developing countries, national parliaments have felt sisyphied over again. Having in mind the ongoing fight with the virus, one might question how long it will take until national parliaments put the rock up on the hill, this time for good.

## COVID-19 outbreak and the domestic constitutional labyrinth

Although Montesquieu is of an opinion that there is no ideal constitution,<sup>11</sup> yet emergency provisions in most modern constitutions provide conditions for harmonization of emergency powers with safeguards for their restriction, i.e. enabling legislature to approve and end the declaration of an emergency, as a purpose of balanced power, with an ultimate goal to preserve the constitutional order and not to change it.<sup>12</sup>

The first registered Corona case in the Republic of North Macedonia was on 24 February 2020, several days after the President of the Assembly of the Republic of North Macedonia, Talat Xhaferi, signed the Decision Scheduling Early Parliamentary Elections<sup>13</sup> on 12 April 2020. This came as a result of a negotiated solution reached by the political party leaders at the meeting with the State President, Stevo Pendarovski, held in October 2019. It was followed by the election of a technical government in the parliament with a Minister of Interior and Minister of Social Affairs and several deputy-ministers elected on a proposal by the opposition, commitment taken from the so-called Przino Agreement in 2015.<sup>14</sup> Its main competence was to organize parliamentary elections, three months before the scheduled election date.

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<sup>7</sup> European Parliament Research Service, Remote voting in the European Parliament and national parliaments, <[https://www.europarl.europa.eu/RegData/etudes/ATAG/2020/649348/EPRS\\_ATAG\(2020\)649348\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/ATAG/2020/649348/EPRS_ATAG(2020)649348_EN.pdf)> accessed on 5 August 2020.

<sup>8</sup> Reimund Seidelmann, 'Democracy-Building in the European Union: Conditions, Problems, and Options' in Mario Telo (ed.): *Democratie et Construction Européenne*, (Edition des l'Université de Bruxelles 1995) 73.

<sup>9</sup> Katrin Auel and Arthur Benz, 'The Europeanisation of Parliamentary Democracy', (2005) JLS, 11.

<sup>10</sup> John O'Brennan and Tapio Raunio, 'Deparliamentarization and European Integration' in John O'Brennan and Tapio Raunio (eds) *National parliaments within the enlarged European Union: from „victims” of integration to competitive actors?* (eds), (2007), 8.

<sup>11</sup> Martin Loughlin, 'Contemporary Crisis of Constitutional Democracy' OJLS, Vol. 39, No. 2 (2019), 435.

<sup>12</sup> T Ginsburg, and AZ Hug, *How to Save a Constitutional Democracy* (University of Chicago Press; 1s edn 2018).

<sup>13</sup> Official Gazette of the Republic of North Macedonia, No 43/2020 of 16 February 2020.

<sup>14</sup> Statement by Commissioner Hahn and MEPs Vajgl, Howitt and Kukan, 'Agreement in Skopje to overcome political crisis', European Commission Press Corner, (Brussels, 15 July 2020). <[https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT\\_15\\_5372](https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_15_5372)> accessed on 5 August 2020.

The authorities believed that the sporadic occurrence of corona cases would not influence the election date and continued with the electoral preparations. The ongoing events proved the opposite, forcing the political party leaders to agree on postponement and look for legal solutions for such an extraordinary situation. For the first time since the independence in 1991, the State President Stevo Pendarovski signed a Decision to Establish State of Emergency.<sup>15</sup> According to Article 125 of the Constitution, a state of emergency is determined by the Assembly on a proposal by the President of the Republic, the Government or by at least 30 MPs. It requires a two-thirds majority in Parliament, with a duration of a maximum of 30 days, without provisions for a possible extension. In case the Parliament cannot convene, the decision can be taken by the State President, but he or she is obliged to submit it to the Parliament for approval once the parliament convenes. Gaps in the existing legislative framework spurred various interpretations on the possibility to re-convene a dissolved parliament. The State President had to sign the Decision to Establish State of Emergency on a proposal by the Government, after the official notification by the President of the Parliament that a dissolved parliament cannot re-convene. The Constitution does not indicate whether the President can declare a state of emergency on a proposal by the government, which would be a logical step once the parliament is unable to convene; but it rather leaves it only in the competence of the parliament.

Current constitutional provisions do not specify whether the existence or establishment of an emergency situation is determined by international or national legal act. The Constitution does not make a clear distinction between the notion of 'epidemics' and 'emergency situation', thus implying that each epidemic will lead to the establishment of an emergency situation in the state. An emergency situation is a constitutional category that implies special legal competences and activities for the state institutions and certain limitations of human rights and freedoms, unlike the epidemic that may not always require declaration of an emergency situation.<sup>16</sup> The Constitution also fails to define whether the emergency situation declared by the State President has the same duration as when adopted by the Parliament. The Parliament on the other hand, has no clearly prescribed competence once it is convened, as to whether it can approve the decision by State President adopted without its consent and the decisions with legal force adopted by the Government during the emergency situation. Broadly seen, its competences to adopt laws and have oversight of the government activities provides enough manoeuvre for the incoming MPs to take the whole legal emergency package on board, assess its implications and confirm the declared state of emergency.

Another poorly defined aspect that allows different interpretations is a dissolved parliament in an emergency situation and the mandate of the MPs. The impossibility to re-convene does not automatically refer to a dissolved parliament, due to the fact that the Constitution<sup>17</sup> stipulates that the Parliament is in permanent session (Article 66)<sup>18</sup>, the term of office of MPs can be extended during state of war or emergency (Article 63)<sup>19</sup>, and that their mandate lasts until the verification of mandates in the new parliamentary composition (Article 9, Law on Election of MPs)<sup>20</sup>. The dissolution does not impose cessation of its work, but rather is envisaged to avoid abuse of electoral campaign during parliamentary sessions. Therefore, the generally accepted notion by the Assembly authorities that a dissolved parliament cannot re-convene endangers the principle of separation of powers and its oversight function over the executive.

The authorization vested in the government to adopt decrees with the force of law, valid until the termination of the state of emergency, should be given by the Parliament. This nebulous provision does not provide the possibility for the President to declare or terminate the state of emergency, including the government actions in such situations. In our case, the emergency situation has been extended

<sup>15</sup> Official Gazette of the Republic of North Macedonia, No 68/20 of 18 March 2020.

<sup>16</sup> V Kambovski, A. Pavlovska-Daneva, G. Lazetic, E. Mujovska-Trpevska, and K Bitrakov, 'Legal Aspects of the Emergency Situation', MANU (2010), <[www.manu.edu.mk](http://www.manu.edu.mk)> accessed on 1 August 2020.

<sup>17</sup> The Constitution of the Republic of North Macedonia, <<https://www.sobranie.mk/the-constitution-of-the-republic-of-macedonia.nspix>> accessed on 15 August 2020.

<sup>18</sup> Ibid.

<sup>19</sup> Ibid.

<sup>20</sup> Law on Election of MPs in the Assembly of the Republic of North Macedonia <[https://www.sobranie.mk/izborni-zakoni-ns\\_article-zakon-za-izbor-na-pratenici-vo-sobranieto-na-republika-makedonija.nspix](https://www.sobranie.mk/izborni-zakoni-ns_article-zakon-za-izbor-na-pratenici-vo-sobranieto-na-republika-makedonija.nspix)> accessed on 15 August 2020.

twice for 30 days, on 17 April and 17 May 2020 respectively, as well as on 15 June for another 8 days to observe the electoral deadlines. Once adopted, the government decrees with the force of law have been published directly in the Official Gazette, without being submitted to the State President for signature, also not envisaged in the Constitution. It would have been proper if the State President, within the frames of his competences, had broadened the decision declaring an emergency situation by specifying in detail the scope and the details of government actions.

## **Government decrees with legal force: general benefits in times of pandemic or abuse of power**

The international instruments stipulating the general principles for an emergency situation, the UN International Covenant on Civil and Political Rights (ICCPR)<sup>21</sup>, ECHR (Article 4) and the Convention for the Protection of Human Rights and Fundamental Freedoms of the Council of Europe (Article 15)<sup>22</sup> in particular, envisage that the derogation therefrom should be in cases when the situation inevitably represents immediate threat to the community, that it is not in conflict with the state party commitments under international law and that it does not involve any kind of breach of the rule of law and any discrimination on the ground of race, color, sex, language, religion or social origin.

The Republic of North Macedonia informed the Council of Europe's Secretary General on 2<sup>nd</sup> April 2020 that the country had derogated from the Convention on the entire territory of the state. The Government has thoroughly elaborated the legal and circumstantial grounds for such derogation, and on the temporary suspension of certain human rights and fundamental freedoms guaranteed by the Constitution such as: suspension of primary, secondary and university classroom education and replacement with distance learning, restriction of public gatherings, events and conferences, closing of museums, theatres and cinemas for visitors, suspension of air travel, establishment of isolation measures and state-organized quarantine for citizens entering the territory, ban or special regime of movement in parts and on the entire territory of the country, as well as additional movement restrictions. The implementation of measures caused derogation from certain obligations of the country under Article 8 and Article 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 2 of the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms and Article 2 of Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms.<sup>23</sup> Part of the decisions taken to introduce full quarantine for all citizens, except for those with permission, were questioned in terms of whether they produced the expected results, since the number of infected persons was constantly rising despite the limitations.<sup>24</sup> In the first set of quarantine measures, the government also did not envisage the practice of daily walks for certain health categories of people, a decision that was corrected in the next series of adoption of such measures.

The government's new role as a legislator in times of pandemic with a dissolved parliament left its hands untied for decision-making. The system proved that there are no separate provisions for decrees with legal force;<sup>25</sup> the procedure is the same as for other government acts. In order to avoid ambiguities and marginalization, the uniqueness of this situation requires special procedures to be included in the Rules

<sup>21</sup> International Covenant on Civil and Political Rights, <<https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>> , accessed on 1 August 2020.

<sup>22</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, <<https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005>> accessed on 2 August 2020.

<sup>23</sup> Council of Europe - Directorate of Legal Advice and Public International Law (2020), Note Verbale, JJ9021C Tr./005-232, <<https://rm.coe.int/16809e1288>> accessed on 1 August 2020.

<sup>24</sup> Ministry of Health Care of the Republic of North Macedonia, 'Covid-19 State Statistics', <<https://koronavirus.gov.mk/stat>> accessed on 30 July 2020.

<sup>25</sup> Government of the Republic of North Macedonia, Rules of Procedure, <<https://vlada.mk/sites/default/files/dokumenti/%D0%94%D0%B5%D0%BB%D0%BE%D0%B2%D0%BD%D0%B8%D0%BA%20%D0%BD%D0%B0%20%D0%92%D0%BB%D0%B0%D0%B4%D0%B0%D1%82%D0%B0%20%D0%BD%D0%B0%20%D0%A0%D0%B5%D0%BF%D1%83%D0%B1%D0%BB%D0%B8%D0%BA%D0%B0%20%D0%9C%D0%B0%D0%BA%D0%B5%D0%B4%D0%BE%D0%BD%D0%B8%D1%98%D0%B0.pdf>> accessed on 3 August 2020.

related to the adoption of such decrees. Instead of taking this step at the beginning of the emergency situation, the government continued to work according to the existing Rules.

With the aforementioned legislative framework, many open possibilities have appeared on the horizon. Until the end of the emergency situation, the government has adopted more than 200 decrees with legal force, as well as other acts covering many areas that rightfully have been questioned and will be analyzed in details by experts in future about the real necessity of their adoption.

In our political system, the decrees with legal force are legal act *sui generis* with unique status. They can neither be fully placed in the category of laws, nor as by-laws. From a legal point of view, they are adopted by an institution authorized by the Constitution in an extraordinary situation to secure the functioning of society. They should be adopted in a reasonable and balanced manner, for a definite period of time, and are subject to review by the Constitutional Court.

Despite constitutional and legal imperfections and lack of experience in such cases, the state authorities, both the Government and the State President, managed the pandemic situation quite well. It was the first emergency situation declared after state independence. However, the speed and the number of decrees adopted in the past several months undoubtedly challenged their true democratic legitimacy. The Government, as a parliamentary proxy, did not undergo supervision by the State President regarding the legality of acts in accordance with international treaties and the Constitution; on the contrary, they have been adopted on a fast track and published directly in the Official Gazette of the Republic of North Macedonia. Hence, there were few decrees that failed to respect the principle of proportionality and necessity, like the decree on the salaries of employees in the Special Prosecutors' Office, elected officials and judges, banknotes, on elections and financing in universities, etc. For example, the decree of the government to cut down salaries of publicly elected officials, including judges and prosecutors was reviewed, stopped and later annulled by the Constitutional Court with an explanation that the Government constitutional competence related to adoption of decrees with legal force does not imply its arbitrariness in the assessment to adopt decrees with legal force and to regulate issues outside the emergency situation and to restrict citizens' freedoms and rights outside the Constitution.<sup>26</sup> In fact, the Constitutional Court was one of the most active courts during the pandemic, closely following the adoption of decrees with legal force adopted by the government. In the past couple of months, the Constitutional Court reviewed and decided upon 127 government decrees, which is around 50% of all adopted acts in this period<sup>27</sup>.

Another government decree with legal force<sup>28</sup> stopped court procedures during the emergency situation, except for cases that follow deadlines for penalty obsolescence. All legal deadlines were ceased. The submission of appeals and the response to a lawsuit were postponed. It was a direct interference in the judicial system as a separate branch of government and deprived citizens of their rights for a fair trial and judgment in a reasonable time frame. Such actions created a pile of court cases put on hold, including case investigations. Compared with last year, the number of closed cases is two to three times smaller. The courts justified their mode of work due to the government measures, as well as of non-existence of a separate law on state of emergency.<sup>29</sup> As a result of the outdated equipment and lack of human resources, the courts claim that it is impossible to continue with full online working; further complications include the fact that online working violates the principle of directness between the judge

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<sup>26</sup> Decision No 135/20, Constitutional Court, Official Gazette of the Republic of North Macedonia, <<http://www.slvesnik.com.mk/Issues/f290962b7c4a4f379e6f749e073633ff.pdf>> accessed on 15 July 2020.

<sup>27</sup> V Magleshev, 'Corona tested the Immunity of Judiciary', Balkan Investigative Reporting Network, (Skopje, 13 August 2020), <<https://prizma.mk/koronata-go-testirasho-imunitetot-na-pravosudstvoto/>> accessed on 15 August 2020.

<sup>28</sup> Decree with Legal Force on the Deadlines in Court Procedures during Emergency Situation and Activities in Courts and Public Prosecutor Offices, Official Gazette of the Republic of North Macedonia, No 84 of 30 March 2020, <<http://www.slvesnik.com.mk/Issues/65e3a64a3e6a48d0a785d9448273b930.pdf>> accessed on 15 July 2020. Decree with Legal Force Amending the Decree with Legal Force on the Deadlines in Court Procedures During Emergency Situation and Activities in Courts and Public Prosecutor Offices, Official Gazette of the Republic of North Macedonia, No 89/20 of 3 April 2020, <<http://www.slvesnik.com.mk/Issues/f983e808a26d4cdf9a7411080df910a8.pdf>> accessed on 15 July 2020.

<sup>29</sup> 27, Ibid.

and the defendant and the principle of public transparency. If accepted as a possible option in the future, it has to be included in the existing legal framework with two-thirds majority in parliament.

The election of judges by the Judicial Council in different courts right before the dissolution of the Parliament and their official announcement during the pandemic<sup>30</sup> questioned the influence of the executive over the judiciary, having in mind that constitutional arrangements prescribe that part of the members of the Council are elected by the parliament on a proposal by the parliamentary Committee on Elections and Appointment Issues and by the State President, as well as that the Minister of Justice is a member *ex officio* in the Council. The explanation by the Judicial Council was that the decisions were in accordance with the existing laws and internal regulations.

The requirement to send military troops abroad became even more significant, after the country achieved its strategic goal<sup>31</sup> and this year became the 30<sup>th</sup> Member of NATO. With the emergency situation the decision, initially a competence of the Parliament, has been taken by the technical government as a decree with legal force that is not contrary to the constitutional arrangements prescribed for emergency situations, but distorts the weight of such a decision adopted by a regular and democratic parliamentary procedure with support of the majority of parties represented in parliament.

The Government has also decided at its last session to adopt a Decree amending a previous decree for the election of MPs in the Parliament<sup>32</sup>, which initially implied implementation of provisions from the Electoral Code, and amend the proportional representation of the opposition in the media. It has been the subject of reaction by the biggest opposition party, who filed a report to the Agency for Audio and Audiovisual Media Services. In normal times the Electoral Code, as a systemic law, in order to be amended requires a two-thirds majority in parliament. In this case, the technical government, by expressly adopting a government decree with legal force and making major amendments right before parliamentary elections, put into question the political correctness of the action in a sensitive period and its authority to adopt such a decision.

There were also several decrees regarding the minimum wage in the state,<sup>33</sup> the promotion of a shopping and tourist card for certain categories of citizens<sup>34</sup> and state aid for private companies.<sup>35</sup> Despite the government's good intention to help those in need and boost domestic economy, all were seen as a possible populist step before the election date for obtaining more citizens' votes. Public procurement of medical supplies and respiratory machines was done in a fast procedure without

<sup>30</sup> Decisions for Election of Judges in the Civil and Criminal Courts and in the Court of Appeal, Official Gazette of the Republic of North Macedonia, No 68/20 of 18 March 2020, <<http://www.slvesnik.com.mk/Issues/4049500a3fc544da898402bee6a65758.pdf>> accessed on 16 July 2020.

<sup>31</sup> 'Decision for Membership of Republic of Macedonia in NATO', Official Gazette of the Republic of North Macedonia No 78/93 of 27 December 2020, <<http://www.slvesnik.com.mk/Issues/91d136c2e341423f8ddd9b6d71d24cca.pdf>> accessed on 20 July 2020.

<sup>32</sup> Decree with Legal Force Regarding the Elections of MPs in the Assembly of the Republic of North Macedonia, Official Gazette of the Republic of North Macedonia No 160/20 of 15 June 2020, <<http://www.slvesnik.com.mk/Issues/4513e43cbd044a2393d2e443aca46ade.pdf>> accessed on 30 July 2020.

Decree with Legal Force Amending the Decree with Legal Force Regarding the Elections of MPs in the Assembly of the Republic of North Macedonia, Official Gazette of the Republic of North Macedonia, Official Gazette of the Republic of North Macedonia No169/20 of 22 June 2020< <http://www.slvesnik.com.mk/Issues/826f6b15f59c48cd8725e7f0fe3cb5f8.pdf>> accessed on 30 July 2020.

<sup>33</sup> Decree with Legal Force for Implementation of the Law on Minimum Wage during Emergency Situation in the Republic of North Macedonia, Official Gazette of the Republic of North Macedonia No 88/20 of 3 April 2020, <<http://www.slvesnik.com.mk/Issues/60b5ea0140e64926b71ad8b95d3314f4.pdf>> accessed on 5 August 2020.

<sup>34</sup> Decree with Legal Force for Financial Support of Citizens and Employees with Low Income, Young People and Health Care Workers, in a Form of Domestic Payment Card Intended for Purchase of Macedonian Products and Services during Emergency Situation, Official Gazette of the Republic of North Macedonia No 137/20 of 27 May 2020, <<http://www.slvesnik.com.mk/Issues/9f80e42f7ba941e69fc6593116e26eb8.pdf>> accessed on 5 August 2020.

Decree with Legal Force Amending the Decree with Legal Force for Financial Support of Citizens and Employees with Low Income, Young People and Health Care Workers, in a Form of Domestic Payment Card Intended for Purchase of Macedonian Products and Services during Emergency Situation, Official Gazette of the Republic of North Macedonia No147/20 of 3 June 2020, <<http://www.slvesnik.com.mk/Issues/cc0fe71b9e904437980323176922d8a3.pdf>>, accessed on 5 August 2020.

Decree with Legal Force for Issuing of Tourism Vouchers for Employees with Low Income to Boost Domestic Tourism in Emergency Situation, Official Gazette of the Republic of North Macedonia No 141/2020 of 30 May 2020, <<http://www.slvesnik.com.mk/Issues/cb1f5841f2324600a3821d05d21d7384.pdf>>, accessed on 5 August 2020.

<sup>35</sup> Decree with Legal Force for Establishment of a Fond for Assistance and Support to the Crisis caused by the Corona Virus COVID-19, Official Gazette of the Republic of North Macedonia No 106/20 of 21 April 2020, <<http://www.slvesnik.com.mk/Issues/41ee7284988d4ebb894986e8b1e40b05.pdf>>, accessed on 5 August 2020.

sufficient control, which although generally well managed, inspired rumors about its legality and transparency.

## Re-installment of parliamentary democracy after the elections: fact or myth?

To be fully functional, parliaments must perform their electoral role as conferred by the citizens to voice their needs and demands through legislation, to inform or teach the citizens of the things they are not aware of and to regularly check the public expenditure.<sup>36</sup> Placing different opinions on public issues and critical thinking in parliament<sup>37</sup> are pivotal for the public especially in emergency times. For the purpose of maintenance of balance of power, the Venice Commission states that the legislative control during an emergency over the executive is of importance for the rule of law and parliamentary life and due to this fact, they welcome constitutions where dissolution of the legislature is forbidden in times of emergency.<sup>38</sup> Furthermore, the Venice Commission demands the post hoc parliamentary powers such as the oversight and conduct of inquiries and investigations to be implemented once the necessary conditions are created.<sup>39</sup> It presupposes that the parliament will have to deal in a regular parliamentary procedure with the negative consequences of the state of emergency and measures for their compensation. The return to normal functioning of the state must occur as soon as the conditions are met and all acts adopted during the emergency situation should be the subject of parliamentary and judicial oversight; the post-parliamentary democracy<sup>40</sup> must quickly renew the link between the demos and the parliament.<sup>41</sup>

Our domestic legal system does not clearly prescribe the validity of government decrees adopted in an emergency situation and whether they are only related to amendments of existing legislation or if the government can adopt decrees regulating a new area that has not been subject to regulation so far. The international framework requiring restrictiveness and observance of the principles of necessity and proportionality as part of our domestic legislation provides guidance for adoption of all decrees with legal force in an emergency situation. On the other hand, our historical tradition entails acceptance of the notion of the 'letter of the law', meaning that nothing is obligatory unless prescribed by law. This might have been used as an excuse for adoption of acts not strictly related to the emergency situation.

A decision taken by the Constitutional Court<sup>42</sup> approved the duration of some decrees with legal force after the end of the emergency situation, like for example the mandate of the State Electoral Commission that had to carry out the parliamentary elections on 15 July 2020 in the state. In this way, the Court filled the existing legal gap regarding the enforcement of decrees after the end of the emergency situation. The prolonged duration of these decrees is justified only if these acts regulate matters closely related to the cause provoking the emergency situation, or that cover legal matters that occurred before the emergency situation. The Parliament constituted on 4 August 2020 and the new mandate is authorized to put on the agenda all the decrees with prolonged duration for revision, and decide on their annulment or adoption as amendments to the existing laws. This should be done as a

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<sup>36</sup> Walter Bagehot, *The English Constitution*, (2nd edn, 1873), 135, <<http://socserv2.socsci.mcmaster.ca/econ/ugcm/3ll3/bagehot/constitution.pdf>>, accessed on 1 August 2020.

<sup>37</sup> Mill, John Stuart, *Considerations on Representative Government* (1 supp 1861, Gutenberg, 2013) <<https://www.gutenberg.org/files/5669/5669-h/5669-h.htm>>, accessed on 10 August 2020.

<sup>38</sup> European Commission for Democracy through law (Venice Commission) [1995], 'Emergency Powers' <[https://www.venice.coe.int/webforms/pages/?p=02\\_emergencypowersobservatory&lang=en](https://www.venice.coe.int/webforms/pages/?p=02_emergencypowersobservatory&lang=en)>, accessed on 30 July 2020.

<sup>39</sup> European Commission for Democracy through Law (Venice Commission) [2020], 'Report on respect for democracy, human rights and the rule of law during states of emergency: Reflections' <[https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2020\)014-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2020)014-e)> accessed on 30 July 2020.

<sup>40</sup> A Maurer, 'The Convention and the National Parliamentary Dimension', (2005), 05/01 ARENA Working Papers, <[http://www.arena.uio.no/publications/papers/wp05\\_01.pdf](http://www.arena.uio.no/publications/papers/wp05_01.pdf)> accessed on 1 July 2020.

<sup>41</sup> Richard Bellamy and Dario Castiglione, 'Democracy by Delegation? Who Represents Whom and How in European Governance, Government and Opposition', [2011], *IJCP*, CUP, Vol. 6, Issue 1, 101.

<sup>42</sup> Constitutional Court Decision, No 47/20 of 28 April 2020, <<http://ustavensud.mk/?p=19072>> accessed on 2 July 2020.

priority in order to avoid constitutional misinterpretation. Nonetheless, the adopted decrees with legal force during the emergency situation will most probably be also under scrutiny by the Venice Commission, in the framework of its observation on the situation of the states of emergency around the world.

Due to the outcome of the parliamentary elections, where the SDSM led coalition won 46 seats, VMRO-DPMNE coalition 44, the Left 2 seats in the Macedonian block, and DUI 15, the AAA 12 seats and DPA 1 seat in the Albanian block, numbers reveal a possible troublesome mandate for the incoming executive. The contradictory provisions in the Constitution and in the Rules of Procedure related to the constitutive session of Parliament also led to a different interpretation on the deadline for handing over of the mandate to the candidate of the party/ies that have a majority in Parliament. Despite the conflicting opinions, State President Pendarovski handed over the mandate to the SDSM leader Zoran Zaev on 13 August 2020<sup>43</sup>. It took weeks for previous coalition partners SDSM and DUI to go into a long process of negotiations and to reach an agreement by declaring the formation of a new government.

The political agreement in parliament resulted with the re-election of Mr. Talat Xhaferi as the President on 21 August 2020 to lead the Parliament for the next 4 years. In the 120-seat Parliament, the ruling coalition will have 61 MPs for adoption of simple majority decisions. This implies that the government may have a limited manoeuvre due to a narrow majority, which will seriously put in question the pre-election reform programs as well as the measures that need to be adopted to deal with the pandemic, both in medical and economic terms.

The country is expected to start negotiation talks for EU membership by the end of the year and to continue with the implementation of the obligations assumed under the treaties signed with neighbouring Greece and Bulgaria, including opening some very sensitive issues of national identity and national history. The Parliament will have its major role in these processes. All that said, one may conclude that the present domestic political landscape will definitely complicate the decision making in parliament and will influence the quality of the adopted legislation.

## Conclusion

'Knowledge institutions' are fundamental components of successful constitutional democracies<sup>44</sup> that were often endangered in authoritarian regimes. Emergency situations allowing governments to broaden state surveillance and control cellular data, infringe freedom of assembly and expression, censor news media and adopt legislation on a fast track around the world, have revealed some features of these regimes by accident or by intention. The pandemic has definitely redefined norms, threatening to go beyond the realm of public health, crippling democratic institutions.<sup>45</sup> The ability of the state to cope with exceptional circumstances while respecting the rule of law represents a direct test of its democratic capacity. On the top of it, the crisis showed that functioning of the parliaments is needed like never before.

The pandemic, which will have long lasting effects in the economy and other societal fields in the Republic of North Macedonia as elsewhere in the world, entails sound functioning of state institutions in the period to come. The official start of the negotiations for EU accession with the Inter-Governmental Conference where the country is expected to gradually adopt the *acquis communautaire*, may be the right moment to correct the legal ambiguities and the constitutional cacophony for emergency situation together with the other legal EU package, including the 'annulation' of parliamentary democracy in an

<sup>43</sup> Frosina Naskovic, 'Pendarovski Hands Over the Mandate to Zaev', (MIA, 13 August 2020) <<https://mia.mk/pendarovski-hands-over-mandate-to-zaev/?lang=en>> , accessed on 15 August 2020.

<sup>44</sup> Vicky C Jackson, 'Knowledge Institutions in Constitutional Democracies: Objectivity and Decentralization', (Harvard Law Review Blog, 29 August 2020) <<https://blog.harvardlawreview.org/knowledge-institutions-in-constitutional-democracies-of-objectivity-and-decentralization/>> accessed on 16 August 2020.

<sup>45</sup> Tom Ginsburg and Mila Versteeg, 'States of Emergencies: Part I', (Harvard Law Review Blog, 17 April 2020) <<https://blog.harvardlawreview.org/states-of-emergencies-part-i/>> accessed on 10 August 2020.

emergency situation. The negotiations should go in favour of setting clearer provisions that will secure the competences of the Parliament, the Government, the State President and the Constitutional Court, the legal acts, their scope and duration, as well as regarding the functioning and the capacities of relevant institutions to cope with any future pandemic.

As representatives of the people, parliamentarians must be involved and closely follow the creation and implementation of government measures during emergency situations. The Assembly of the Republic of North Macedonia, first and foremost, has to amend its Rules of Procedure and enable MPs to work during lockdowns and at a distance, eliminating the past perception that parliaments are traditionally in favour of working 'in physical presence' and that they can well serve their citizens by working under new conditions. The best example that parliamentarians can meet, exchange opinions and experiences and decide on number of issues in times of pandemic, were the numerous online meetings within the framework of international parliamentary assemblies like that of the Council of Europe, NATO, OSCE, IPU, etc. The Coronavirus does not recognize borders, nationality, race, sex or religion and the challenges that have risen in the past few months in the world with features of authoritarianism, as well as the economic consequences that are about to deliver their bill, make it even more important that parliaments function properly and help their citizens in the best possible way.

In the following years, the elected officials will have to face the challenges in the health and the economic sector that will be most probably pandemically inter-linked due to recession and loss of jobs, and create even greater divisions in society. Trends have revealed that economic problems give rise to nationalistic parties which, in turn, lead to democratic backsliding and international disassociation and cooperation, pushing their countries to be more focused on national rather than on international topics, something which is very difficult to achieve in a globalized world. This will definitely have grave consequences on multilateralism. It is up to the parliaments, through legal means and appropriate measures, to prevent such trends gaining momentum. The lesson that the pandemic gave to the world is that constitutional democracies need to be revised, and not replaced by a new order.

**Dr Marijana Opashinova Shundovska**

*Dr Marijana Opashinova Shundovska completed her PhD in Political Science at the Faculty of Law in Skopje in 2017. She holds a Master's degree in public policy and management from the University of Pittsburgh, USA, and from the Centre International de Formation Européenne - Office in Berlin, as well as a number of certificates in EU affairs, IPA funds and project management. In addition to her scholarly activities, she has extensive experience in parliamentary work and international affairs. She is also a member of the Governing Board to the European Movement in North Macedonia. In 2018, Dr Shundovska was elected as Professor of Practice at the University American College in Skopje, where she teaches Public Policy.*

# The Impact of COVID-19 Related Emergency Measures on the Democracy and Human Rights in Armenia

## Sossi Tatikyan

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The Government of Armenia declared a State of Emergency (SoE) in March 2020 and extended it five times followed by a similar regime of quarantine in order to manage the spread of COVID-19 in Armenia. At the same time, the decisions accompanying the SoE constantly adapted to the evolving situation. Authorities introduced a number of tools and mechanisms and different levels of lockdowns and restrictions depending on the situation. While in the beginning they underestimated the risks related to the pandemic, shortly after they decided to take strict measures to prevent further spread of the virus but were not consistent in their reinforcement. Some of the measures were proportionate but there were instances when the restrictions were eased at the peak of the pandemic and when disproportionate measures were put in place, due to political and economic realities.

Armenia is one of the few countries that continued parliamentary plenary and committee sessions through physical attendance without skipping any regular parliamentary sittings but also convened a large number of extraordinary sittings, both for the purpose of extending the SoE and endorsing decisions by the Commandant's Office established by the Executive, as well as following its regular agenda.

The most sensitive issues that transpired in relation to the impact of emergency measures on human rights, democracy and good governance were the choice of the legal modality of the SoE, its duration and replacement with quarantine, information restrictions, inability to combat disinformation, digital tracking, cancellation of the constitutional referendum, ban on civic protests, disproportionate behaviour of the police, and punitive nature of some of the measures. The complaints by citizens addressed to the Office of Human Rights Defender (HRD) have multiplied during the pandemic. Parliamentary oversight was active but ineffective, which resulted in the establishment of an Inquiry Committee in relation to COVID-19 in the second semester. Although awareness raising of the authorities' public and strategic communication was often successful, it was inconsistent at times. It faced additional challenges during the 44-day war in Nagorno Karabakh making it difficult to follow anti-pandemic guidance and ensure timely response. Overall, the inefficiency of imposed measures resulted in a general public perception that the authorities have failed to effectively manage the pandemic throughout 2020.

## Background Information and Chronology

Since April 2020, Armenia has been severely affected by COVID, having the highest ratio of new cases per capita in the region and being included in the list of high-risk countries globally between May and July.<sup>1</sup>

Armenia confirmed its first case of COVID-19 on 1 March 2020 originating from Iran. The government had started taking measures to prevent the penetration and spread of the virus in Armenia beforehand, such as the suspension of the newly introduced visa-free regime with China and closure of the border with Iran. Citizens were urged to suspend non-essential travel to high-risk countries, passengers coming from Iran were urged to isolate, schools and universities were shut down and transitioned to online mode.<sup>2</sup> However, some of the measures were inconsistent and belated. For example, Ryan Air started Yerevan-Milan flights in January 2020, one of which brought two virus carriers at the beginning of March who were not quarantined and consequently spread the virus.<sup>3</sup>

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<sup>1</sup> 'Armenia' Worldometer  
<[www.worldometers.info/coronavirus/country/armenia/](http://www.worldometers.info/coronavirus/country/armenia/)> accessed 9 February 2021.

<sup>2</sup> Lusine Sargsyan, 'Observations About Armenia's COVID-19 Response' EVN Report (6 July 2020)  
<[www.evnreport.com/covid-19/observations-about-armenia-s-covid-19-response](http://www.evnreport.com/covid-19/observations-about-armenia-s-covid-19-response)> accessed 7 February 2021.

<sup>3</sup> 'COVID-19: Updates From Armenia' EVN Report (13 March 2020) <[www.evnreport.com/raw-unfiltered/covid-19-updates-from-armenia](http://www.evnreport.com/raw-unfiltered/covid-19-updates-from-armenia)> accessed 7 February 2021.

On 16 March, when Armenia had 30 confirmed cases, the Government published a decision declaring a state of emergency (SoE), accompanied by measures to be applied, temporary restrictions on rights and freedoms, and measures ensuring the legal regime of the SoE.<sup>4</sup> Measures introduced included, but were not limited to, travel restrictions for citizens and residents from high-risk countries and the formation of an Office of Commandant for the SoE led by Deputy Prime Minister Avinyan. All citizens and residents of Armenia, as well as their family members and representatives of diplomatic missions based in Armenia and the family members of those categories were allowed to enter Armenia. Testing, hospitalization, contact tracing and isolation were the key elements of the prevention strategy.

On 24 March, a national lockdown was imposed. Stricter measures to enforce the restrictions on movement were introduced in April when everyone was required to self-isolate in their residences and leave their homes only for essential purposes and having filled out a standardised form about their movement. Public authorities were required to work remotely, when and if possible. Public transport did not operate. Hotels were used to quarantine people, including asymptomatic patients and those who had interacted with patients. A number of hospitals were dedicated to treating COVID-19 patients, and the healthcare sector increased its capacity. Between mid-March and mid-September, the Government extended the state of emergency five times, replacing it with the quarantine regime starting on 11 September.

At the same time, starting on 3 May, strategies for easing lockdown and other restrictions were adopted, and economic activities were resumed in several stages. At the time of the easing of the lockdown, there was insufficient evidence about the stable decrease of the spread of virus. The easing of restrictions was accompanied by strict rules of co-existence. The Government's strategy was focused on ensuring that the number of people infected stayed as low as possible and remained manageable for the healthcare system, at the same time not allowing the economy to collapse. People were requested to exercise social responsibility and follow anti-epidemic guidance.<sup>5</sup> However, a significant part of the population did not comply due to scepticism about the seriousness of the risk or the sense of social responsibility.

On 25 May, Armenia made the wearing of face masks compulsory in closed areas. The government admitted that Armenia had very high rates of COVID-19 per capita regionally and globally. The Prime Minister expressed frustration with the lack of discipline by citizens, the spread of fake news and conspiracy theories about the virus and instructed the police to be strict in enforcing the measures determined by the Commandant.

With effect from June, wearing masks was required not only in closed but also open areas. The measure was eased in mid-August and then again in January 2021. The apparent peak of the first wave of pandemic in Armenia was in June-July. This measure generated public debate on its health implications, feasibility and proportionality. Some believed that this measure was aimed at penalizing citizens and collecting fines, rather than preventing the spread of the virus.

On 12 August, even though the SoE was extended for the fifth and last time, in light of the decrease of new daily cases, a number of restrictions were eased due to public pressure. Holding of assemblies and strikes was allowed with certain rules, the entry to Armenia by non-citizens and non-residents was allowed, given that they would be tested or self-isolate.

On 11 September, the SoE was replaced with a quarantine regime for four months, which was extendable for up to 6 months, causing significant dissatisfaction by the opposition which claimed that it was aimed at suppressing the civic space. As from 15 September, schools and universities, libraries and museums re-opened, and open-air cultural events reconvened. Wearing masks was still required

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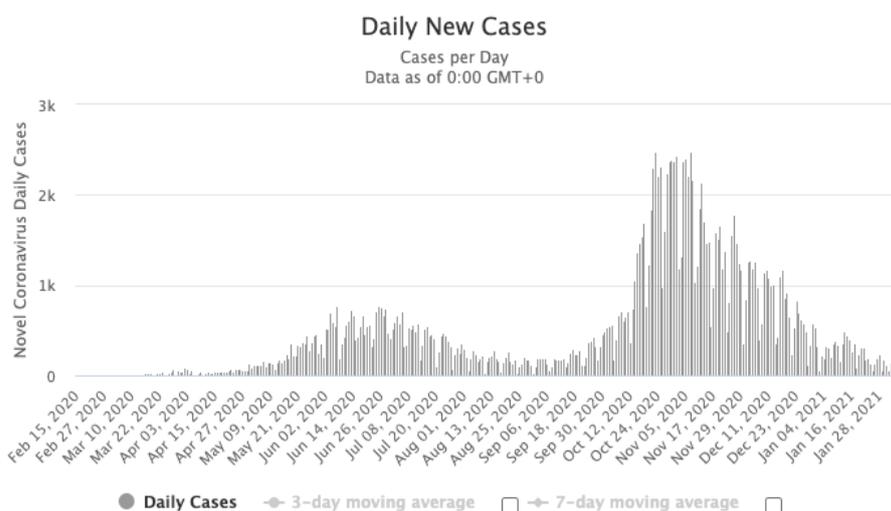
<sup>4</sup> 'The Government of the Republic of Armenia Decision on Declaring a State of Emergency in the Republic of Armenia' Ministry of Justice of the Republic of Armenia (16 March 2020) 298-N <[www.moj.am/storage/uploads/298voroshum\\_ENG\\_24032020.pdf](http://www.moj.am/storage/uploads/298voroshum_ENG_24032020.pdf)> accessed 7 February 2021.

<sup>5</sup> 'Armenia: State of Emergency Guidelines: 17 March 2020' EVN Report <[www.evnreport.com/raw-unfiltered/armenia-state-of-emergency-guidelines](http://www.evnreport.com/raw-unfiltered/armenia-state-of-emergency-guidelines)> accessed on 7 February 2021.

on public transport and in taxis but not in personal cars and open-air non-crowded areas in nature. No new fines were introduced but those applied during the SoE were maintained. The requirement of wearing masks for citizens remained in place and the Commandant's Office stopped functioning.

The number of new daily cases had reduced to 328 by 26 September, and the country had started to overcome COVID-19.<sup>6</sup> However, Azerbaijan started a war in Nagorno Karabakh on 27 September, which was in violation of the appeal of the UN Secretary General for a global cease-fire during COVID-19.<sup>7</sup> As a security guarantor of ethnic Armenian population of Nagorno Karabakh, Armenia was deeply involved in the military support and humanitarian assistance to it. Large numbers of people were displaced, wounded and required medical care, which put the health-care systems of both Armenia and Nagorno Karabakh under unprecedented pressure. A large number of the military servicemen and volunteers were mobilized to be part of the defence army. Regular bombardments forced civilians of Nagorno Karabakh to seek refuge in large groups in basements and bunkers within confined spaces, thus increasing the chance of further spread of the virus. During 44 days of war, the daily number of COVID-19 cases in Armenia increased multifold reaching 2,476 at its highest on 7 November. Since the cease-fire was established on 9 November, the COVID-19 situation has been gradually improving. As of the first week of February, the average number of daily new cases has decreased to 143-211.<sup>8</sup>

## Daily New Cases in Armenia



Source: Worldometers<sup>9</sup>

## The State of Emergency (SoE)

Article 120 of the Constitution adopted in 2015 and the Law on the Legal Regime of the State of Emergency of Armenia authorize the Government to declare a SoE in the event of an imminent danger

<sup>6</sup> Airazat M Kazaryan, Bjørn Edwin, Ara Darzi, Gevorg N Tamamyanyan, Mushegh A Sahakyan, Davit L Aghayan, Åsmund A Fretland, Sheraz Yaqub, Brice Gayet, on behalf of the Doctors Against The War collaborators, 'War in the time of COVID-19: humanitarian catastrophe in Nagorno-Karabakh and Armenia' *The Lancet* (27 November 2020) Published by Elsevier Ltd under the CC BY-NC-ND 4.0 license  
<[www.thelancet.com/action/showPdf?pii=S2214-109X%2820%2930510-6](http://www.thelancet.com/action/showPdf?pii=S2214-109X%2820%2930510-6)>.

<sup>7</sup> '170 signatories endorse UN ceasefire appeal during COVID crisis' *UN News* (24 June 2020)  
<<https://news.un.org/en/story/2020/06/1066982>> accessed 6 February 2021.

<sup>8</sup> 'Armenia' Worldometer  
<[www.worldometers.info/coronavirus/country/armenia/](http://www.worldometers.info/coronavirus/country/armenia/)> accessed 9 February 2021.

<sup>9</sup> 'Armenia' Worldometer  
<[www.worldometers.info/coronavirus/country/armenia/](http://www.worldometers.info/coronavirus/country/armenia/)> accessed 9 February 2021.

posed to the constitutional order, including attempts to change or overthrow it by force, attempted seizure of power, armed riots, national, racial and religious conflicts, terrorist acts, seizure or blockade of special facilities, organization and activities of illegal armed groups.<sup>10</sup>

The package of decisions by the Government to announce a SoE starting 16 March prescribed the measures and temporary restrictions on the rights and freedoms to be applied in line with the principle of proportionality. A number of amendments to the Code of Administrative Violations and the Criminal Code were endorsed, including fines for noncompliance with the rules of isolation, self-isolation and other restrictions on freedom of movement including not having identification documents. In cases when noncompliance with the rules would lead to certain consequences, ie infecting others, they would be charged with criminal responsibility<sup>11</sup>.

According to the modalities of the SoE, upon the instruction of the Commandant units of the Police, the National Security Service (NSS) and the Ministry of Defence could have been involved in ensuring the implementation of measures and the application of temporary restrictions on the rights and freedoms. It is worth noting that armed forces or special services were not involved in enforcing the SoE, and it was tasked to the police, the Ministry of Emergency Situations and various inspectorates under the auspices of the Government.

## The Choice and the Duration of the Emergency Measures

The choice of the legal regime of the SoE was not straightforward. In his speech the PM acknowledged that the SoE did not envisage epidemic situations.<sup>12</sup> The government explained the choice of this legal regime by the following factors:

- a) The massive spread of the infection is a threat to the life and health of people, and thus to the constitutional order. The human being is the highest value, and the State is obliged to take measures for the protection of life and health.
- b) The implementation of appropriate preventive activities and measures aimed at ensuring the protection of life and health of persons requires restricting the fundamental rights and freedoms of citizens, in particular, personal liberty (Article 27 of the Constitution), right to freedom of movement (Article 40), freedom of assembly (Article 44), right of ownership (Article 60), etc.

There is another legal regime provided by the Law on the Population Protection in Emergency Situations adopted in 1998, applicable for a major accident, man-made, natural or environmental disaster, epidemic, livestock epidemic, widespread infectious disease of plants and agricultural crops, which leads to or may lead to human casualties, significant damage to human health and the environment, major material losses, and disruption of normal living conditions.<sup>13</sup>

Shortly before the start of the pandemic, a new draft law on Disaster Risk Management and Protection of Population was finalised with the assistance of the experts of the Disaster Risk Reduction project of UNDP in Armenia. It specifies the modalities of the declaration of 'emergency situations', which is different from the 'state of emergency', the first applies to disasters and the second to threats to constitutional order. The draft law provides guidance on citizens' rights and obligations and the protection of population throughout emergency situations, the system of central and local self-government bodies and organizations involved in it, reduction of disaster risks, quick response in

<sup>10</sup> Amendments to the Constitution of the Republic of Armenia (adopted 06.12.15) Constitution of the Republic of Armenia (with the Amendments of 27 November 2005) National Assembly of the Republic of Armenia <[www.parliament.am/legislation.php?sel=show&ID=1&lang=eng](http://www.parliament.am/legislation.php?sel=show&ID=1&lang=eng)> accessed 7 February 2021.

<sup>11</sup> 'Decisions of emergency commandant. Covid-19' The Government of the Republic of Armenia <[www.gov.am/am/commandant-decisions](http://www.gov.am/am/commandant-decisions)> accessed on 7 February 2021.

<sup>12</sup> 'Remarks Delivered by Prime Minister Nikol Pashinyan at National Assembly Debate on Declaring State of Emergency in the Republic of Armenia' The Prime Minister of the Republic of Armenia (16 March 2020) <[www.primeminister.am/en/statements-and-messages/item/2020/03/16/Nikol-Pashinyan-National-Assambly](http://www.primeminister.am/en/statements-and-messages/item/2020/03/16/Nikol-Pashinyan-National-Assambly)> accessed 7 February 2021.

<sup>13</sup> The Law of the Republic of Armenia on Population Protection in Emergency Situations (adopted 02.12.1998) National Assembly of the Republic of Armenia <[www.parliament.am/legislation.php?sel=show&ID=1760&lang=eng](http://www.parliament.am/legislation.php?sel=show&ID=1760&lang=eng)> accessed 7 February 2021.

emergency situations and the implementation of the post-disaster recovery. During the working discussion on the draft law initiated by the parliamentary Standing Committee on Defence and Security on 19 February, the Chair of the Committee, participants from the Ministry of Emergency Situations and UNDP, including the author of this paper referred to the differences between the definitions 'state of emergency' and 'emergency situation,' implying that the first is applicable for an attempt to overthrow the constitutional order, violent civil unrest, terror attack and the second for a natural or man-made disaster.<sup>14</sup> However, parliamentary hearings on this draft were postponed indefinitely due to the pandemic, the war and post-war crisis management.

Article 5 of the Law on the Legal Regime of the State of Emergency defines that the SoE shall be established for 30 days and can be extended in the whole territory of the country for up to 60 days. At the same time, it leaves room for further extension if the reasons for declaring a SoE haven't been eliminated.<sup>15</sup> This provision has been used by the Government to justify the extension, the legitimacy of which was questioned by the opposition and civil society. In particular, they raised the issue of ensuring fundamental freedoms and human rights, such as civic protests, labour rights, freedom of information, digital tracking of personal data and proportionality of the law enforcement during a six-month lengthy period of the SoE. The opposition claimed that the real objective of extending the state of emergency after having lifted the lockdown and having allowed most of the economic activities since May was to suppress the opposition and the activists' ability to exercise their right of expression through civic protests in light of the accumulating problems in the country.

Finally, based on the Law on Making Amendment and Addenda to the Law on Ensuring the Sanitary-Epidemiological Security of the Population of the Republic of Armenia and the associated draft legislative package introducing amendments to a number of laws to allow further measures, penalties and restrictions beyond the State of Emergency, the SoE was replaced by a quarantine on 11 September.<sup>16</sup> It was endorsed by the PM for 4 months and subsequently extended up to 11 July 2021. The opposition, the Human Rights Defender, human rights advocates and civil society questioned the measures, penalties and restrictions imposed under a new regime, in particular: access by the state bodies to the personal medical, travel and contact information of citizens, restriction of fundamental freedoms and human rights during self-isolation, the precedence of the WHO requirements over the national legislation without ratification of an international convention, the right of the police to use force to suppress civic protests and public gatherings, restrictions on the access to information, the requirement for citizens to wear masks both in closed and open public spaces, and finally, 11 types of fines for breaking the requirements of quarantine. Apart from the restrictions of human rights and fundamental freedoms, the opposition expressed concern in relation to the potential long-term stigmatization of Armenia and its citizens as high-risk for the pandemic preventing inward and outward tourism. After the defeat in the war, some opposition figures and experts have suggested that the hidden agenda of maintaining the quarantine is preventing probable migration caused by the post-war crisis.

## Information Restrictions and Infodemic

Between mid-March and mid-April, media agencies and social media users were required not to post unverified news and information on COVID-19 and to refer to official sources. The proposed amendment to Article 183 (8) of the Code of Administrative Violations established that if information doesn't comply and is not deleted within one day after the notification, a fine will be imposed.

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<sup>14</sup> 'Working Discussion on Draft Law on Disaster Risk Management and Defense of Population' National Assembly of the Republic of Armenia (19 February 2020) <[www.parliament.am/news.php?cat\\_id=2&NewsID=12687&year=2020&month=02&day=19&lang=eng](http://www.parliament.am/news.php?cat_id=2&NewsID=12687&year=2020&month=02&day=19&lang=eng)> accessed 7 February 2021>

<sup>15</sup> Law of the Republic of Armenia of April 12, 2012 No. ZR-106 About the Legal Regime of Emergency State (as amended on 05-05-2020) Legislation of 11 countries members of Commonwealth of Independent States <<https://cis-legislation.com/document.fwx?rgn=66655>> accessed 8 February 2021.

<sup>16</sup> 'Quarantine: Police informs' Police of the Republic of Armenia (14 September 2020) <[www.police.am/en/news/view/haytkarant140920.html](http://www.police.am/en/news/view/haytkarant140920.html)> accessed 7 February 2021.

In response to concerns raised about media restrictions, the Government amended this provision. The original amendment required the use of reports from the Commandant's Office, however in the amended version they could also refer to reports by public officials, official websites or social media pages of the heads of state or government bodies and official websites of international organizations accredited in Armenia or affiliated with Armenia. Those restrictions were also lifted on 13 April due to the criticism about media censorship.<sup>17</sup>

At the same time, Armenia was severely affected by infodemics and conspiracy theories in relation to COVID-19. A significant number of Armenians, including some prominent figures and doctors claimed that they did not believe in the existence of the virus or severity of the disease, and linked it to the conspiracies by globalists, with further claims of the intention to vaccinate people. Open Caucasus Media, an independent media organisation revealed that some of the authors of fake news were financed by or linked with foreign sources.<sup>18</sup> These have been largely anti-globalist, anti-liberal and anti-vaccination sources also active in other countries. Monitoring of social media shows that in other cases the authors of fake news have a domestic origin, being linked with the opposition and discouraging people to follow the guidelines and restrictions recommended by the government, but subsequently accusing it of failure to manage COVID-19.

The authorities were criticised also for the failure to combat fake news on COVID-19. However, human rights defenders believe that legal restrictions and censorship are not the right way to fight fake news and that, instead, the government needs to develop consistent and adequate communication strategies to neutralize the impact of fake news.

## Tracking Mobile Phone Data

On 31 March, the legislative package on Making Addenda to the Law on Legal Regime of the State of Emergency and on Making Addendum to the Law on Electronic Communication was adopted.

The amendment authorized the government to gather information available to mobile operators and consolidate them into a centralised database, including the location of users of mobile phones, the phone numbers of those they contacted, and the start and end times of the communication. The justification was the necessity of identifying the circle of contacts of those who test positive for COVID-19 so as to place them under quarantine.

The government clarified that the restrictions exclusively pertain to the SoE declared due to the pandemic, that the data will be deleted once the SoE is lifted, and that the system is fully automated with no human intervention. However, the bill raised many concerns among the opposition, the Human Rights Defender's Office (HRDO)<sup>19</sup>, civil society and the public in general. One issue was the oversight of the body that was tasked to collect and destroy the information. Others questioned the logic of the measure since telecommunication doesn't necessarily indicate a physical meeting.<sup>20</sup>

Although the legislative package was passed by parliament, the members of the National Assembly (NA), especially those from the opposition, continued to question how the measure was applied and what its results were during the sittings of the NA. Human Rights Watch has expressed an opinion that the adopted amendments impose restrictions on the right to privacy and allow the authorities access to confidential medical information related to people exposed to the virus.<sup>21</sup> The impact of this measure

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<sup>17</sup> 'Armenia: State of Emergency Guidelines: 17 March 2020' EVN Report <[www.evnreport.com/raw-unfiltered/armenia-state-of-emergency-guidelines](http://www.evnreport.com/raw-unfiltered/armenia-state-of-emergency-guidelines)> accessed on 7 February 2021.

<sup>18</sup> 'Armenian COVID-19 'fake news' site was funded by US', OC Media 28 May 2020 <<https://oc-media.org/armenian-covid-19-fake-news-site-was-funded-by-us>> accessed 7 February 2021.

<sup>19</sup> 'Legal position of the Human Rights Defender on draft laws restricting the privacy of correspondence and other rights' Human Rights Defender of the Republic of Armenia (31 March 2020) <[https://ombuds.am/en\\_us/site/ViewNews/1137](https://ombuds.am/en_us/site/ViewNews/1137)> accessed 8 February 2021.

<sup>20</sup> Lusine Sargsyan, 'Observations About Armenia's COVID-19 Response' EVN Report (6 July 2020) <[www.evnreport.com/covid-19/observations-about-armenia-s-covid-19-response](http://www.evnreport.com/covid-19/observations-about-armenia-s-covid-19-response)>.

<sup>21</sup> 'Armenia: Law Restricts Privacy Amid COVID-19 Fight. Any Limits Require Human Rights Protections' Human Rights Watch (3 April 2020) <[www.hrw.org/news/2020/04/03/armenia-law-restricts-privacy-amid-covid-19-fight](http://www.hrw.org/news/2020/04/03/armenia-law-restricts-privacy-amid-covid-19-fight)>.

was not visible, therefore its feasibility and necessity remained questionable until the end of its application in mid-September.

## **The Planned Referendum to Resolve a Constitutional Court Crisis and its Cancellation Due to the Pandemic**

A constitutional referendum of significant political importance was planned in Armenia on 5 April. The referendum was aimed at amending Article 96 of the Constitution in order to resolve a crisis over the tenure of the Constitutional Court in line with the vision of the majority faction in spite of the disagreement of the opposition to it.<sup>22</sup> Between mid-February and mid-March, the ruling majority and its supporters were conducting a campaign for the referendum. They were criticised by the opposition and the civil society for not delaying the campaign as a result of the pandemic, even though there were no known cases of the spread of the virus due to the campaign. In mid-March the campaign was suspended, and a few days later it was postponed upon the declaration of the SoE. According to the Constitution and the Electoral Code, referendums cannot be held in Armenia during a SoE. Once the SoE concludes, any postponed referendums must be held within 50-65 days.<sup>23</sup> However, during the months of the SoE, there was an apparent decrease of popularity of the majority faction due to the alleged failure of COVID-19 management but not limited to it, and subsequently undermined confidence that the referendum would result in its intended outcome.

In May, the Ministry of Justice sent a request to the European Commission of Democracy through Law (Venice Commission) for its opinion on a new alternative solution for the constitutional crisis.<sup>24</sup> In its opinion, the Venice Commission acknowledged the NA's power to revoke its own decision calling for a referendum.<sup>25</sup> Moreover, it recognised that the aim of implementing fully the provisions of the constitution concerning the composition of the Constitutional Court is legitimate and invited the Armenian authorities to be guided by the Venice Commission recommendations to overcome the constitutional crisis through smooth implementation of the relevant provisions of the 2015 Constitution and in accordance with the Council of Europe standards.<sup>26</sup>

A draft amendment to the 'Law on Referendums' proposed by the majority faction allowed the NA to cancel the referendum and avoid the automatic resumption of the referendum campaign after the expiry of the SoE.<sup>27</sup> In spite of objections by the opposition, the NA approved constitutional changes calling for the immediate dismissal of some members of the country's Constitutional Court on 22 June. According to the monitoring of the media, including social media, some of the opposition claimed that coronavirus was an excuse for the government to cancel the constitutional referendum, because the authorities were not sure they maintained sufficient public support for the constitutional amendment in question. The leading party justified its cancellation with health concerns during the pandemic.

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<sup>22</sup> Dr. Nerses Kopalyan, Lusine Sargsyan, 'Resolving the Constitutional Court's Crisis of Legitimacy' EVN Report (25 June 2020) <[www.evnreport.com/politics/resolving-the-constitutional-court-s-crisis-of-legitimacy](http://www.evnreport.com/politics/resolving-the-constitutional-court-s-crisis-of-legitimacy)> accessed 8 February 2021.

<sup>23</sup> Electoral Code of the Republic of Armenia (amended as of 30 June 2016) Legislationonline by ODIHR <[www.legislationline.org/download/id/6201/file/Armenia\\_Electoral\\_Code\\_as%20of%2030June2016.pdf](http://www.legislationline.org/download/id/6201/file/Armenia_Electoral_Code_as%20of%2030June2016.pdf)> 8 February 2021.

<sup>24</sup> 'Armenia - Three legal questions in the context of the draft constitutional amendments concerning the mandate of the judges of the Constitutional Court' CDL-REF(2020)025-e (Strasbourg, 26 May 2020) <[www.venice.coe.int/webforms/documents/?pdf=CDL-REF\(2020\)025-e#](http://www.venice.coe.int/webforms/documents/?pdf=CDL-REF(2020)025-e#)> accessed 8 February 2021.

<sup>25</sup> 'Armenia - Opinion on three legal questions in the context. of draft constitutional amendments concerning the mandate of the judges of the Constitutional Court adopted by the Venice Commission on 19 June 2020 by a written procedure replacing the 123rd Plenary Session' CDL-AD(2020)016-e (Strasbourg, 22 June 2020) <[www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2020\)016-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2020)016-e)> accessed 8 February 2021.

<sup>26</sup> 'Secretary General: 'The constitutional crisis in Armenia can be solved with the Venice Commission's guidance' (22 June 2020) <[www.coe.int/en/web/portal/-/secretary-general-the-constitutional-crisis-in-armenia-can-be-solved-with-the-venice-commission-s-guidance->](http://www.coe.int/en/web/portal/-/secretary-general-the-constitutional-crisis-in-armenia-can-be-solved-with-the-venice-commission-s-guidance->)> accessed 8 February 2021.

<sup>27</sup> Ejmin Shahbazian, Maritsa Mandalyan, 'What Happened to the Constitutional Referendum?' EVN Report (7 June 2020) <[www.evnreport.com/politics/what-happened-to-the-constitutional-referendum](http://www.evnreport.com/politics/what-happened-to-the-constitutional-referendum)> accessed 8 February 2021.

## Right to Freedom of Peaceful and Unarmed Assembly

According to Article 29 of the Constitution, everyone shall have the right to freedom of peaceful and unarmed assembly; however, that right is restricted during SoE. While in the first two months of the SoE this restriction was not questioned since the threat of the pandemic was of the highest priority, other issues of the concern for the opposition and the civil society gradually re-emerged. Starting in May, there were a number of protests by individuals associated with the previous authorities, the opposition faction Prosperous Armenia and environmental activists, and the right for civic protests became an issue in light of their total ban during the SoE. Some protesters were apprehended, and in some cases, allegedly disproportionate force was applied by the police. Prosperous Armenia was accused of violating COVID-19 rules during their protests, resulting in the infection of some of its members. As from May, the right to civic protests was raised by the opposition in the NA and debated in discussions and public hearings organised by the Human Rights Defender's Office and civil society representatives, and the conclusion was that the restriction of this right cannot be absolute as summarised in a report sent to the Commandant by the HRD. In particular, it was underlined that citizens shall still be entitled to exercise their right of protest and assembly following certain rules, such as social distancing, wearing masks and avoiding a large number of participants.<sup>28</sup>

In June and July respectively, two minority political factions, Bright Armenia and Prosperous Armenia, presented a draft decision of the NA on Declaring Invalid the Implementation of the Events Designed by the Legal Regime of the State of Emergency, proposing to challenge the restrictions and bans on organizing assemblies or public events established by Chapter 4 of the decision supplement of the March 16 N 298-N by the government. The majority faction voted against it in both cases thus reinforcing the ban on civic protests and public gatherings.<sup>29</sup>

The extension of the SoE on 12 August was accompanied by a decision to allow the holding of assemblies and strikes with certain rules of social distancing and wearing masks, finally resolving the issue of civic protests.

## Law Enforcement

The police were instructed to monitor the movement of people, which included stopping people to check their compliance with the measures determined by the Commandant such as carrying identification documents, leaving the apartment only in cases defined by law during several weeks of lockdown between March and May, and wearing masks since the end of May.

The police have been criticised for either lack of enforcement of the rules or excessive use of force, and a rigid approach on one side, inconsistency of enforcement or double standards on the another, while fining or apprehending citizens for not complying with the established rules.

During the lockdown, the police were predominantly ignoring the non-compliance of citizens with the rules of lockdown. Such soft behaviour combined with citizens' lack of willingness to comply with imposed measures, led to the inefficiency of the anti-pandemic measures. Subsequently, once the failure of effective management of the pandemic became apparent in May-June, the police were largely perceived as responsible for it by authorities, as well as citizens with a high sense of social responsibility. The Chief of the Police was replaced on 8 June, and the PM publicly instructed the police to strictly reinforce the application of law enforcement measures in relation to the pandemic, with a

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<sup>28</sup> 'The restriction on the freedom of assembly due to the State of Emergency should not be absolute: The Defender sent the results of the discussion to the Commandant's Office' Human Rights Defender of the Republic of Armenia (8 August 2020) <[www.ombuds.am/en\\_us/site/ViewNews/1273](http://www.ombuds.am/en_us/site/ViewNews/1273)> accessed 8 February 2021.

<sup>29</sup> 'Special Sitting of National Assembly Convened' The National Assembly of the Republic of Armenia (13 July 2020) <[www.parliament.am/news.php?cat\\_id=2&NewsID=13186&year=2020&month=07&day=13&lang=en](http://www.parliament.am/news.php?cat_id=2&NewsID=13186&year=2020&month=07&day=13&lang=en)> accessed 8 February 2021.

focus on wearing masks in public places and carrying ID cards because of the lack of social responsibility of the people.<sup>30</sup>

The instructions about the enforcement of COVID-related rules by the Commandant's Office were of a general nature, and there were no legal regulations or Standard Operating Procedures (SOPs) accompanying them. The police were automatically following orders and were unable to tailor their enforcement to in different situations, without applying analytical thinking on a case-by-case basis to identify whether the given person has really created a risk to become infected, or to infect, in the given situation, focusing on form rather than substance. Apart from the lack of detail in the decisions, this was explained by the lack of respect between the police and the citizen, the lack of trust between the command of the police and regular policemen since the first expected the latter to fine a certain number of citizens to demonstrate results, and most importantly, lack of appropriate training and critical thinking skills of the police to make the right situational decisions.<sup>31</sup>

This became especially obvious as from 3 June, when wearing masks became obligatory not only in closed but also open spaces. It led to the tendency of wearing masks not for the purpose of prevention of infection or infecting others with the virus but rather to avoid being stopped, fined or apprehended by the police. Since the police mostly patrol the streets and parks in Armenia, citizens started wearing masks in open public spaces where the risk of infection was minimal, more diligently due to the risk of being penalized by the police. However, there was apparently a higher risk of being infected or infecting in closed public spaces such as public transportation, supermarkets, banks or post offices where the police are rarely ever present in Armenia. This was apparently counterproductive and risky behaviour. The enforcement of this measure by the police was neither consistent nor proportionate – they would penalize someone walking on an empty street or in a park alone or with nuclear family but ignore groups and gatherings in crowded places and enclosed places. Moreover, there was an obvious application of double standards, evidence of which were complaints by young women for being stopped by the police more frequently than men because there were seen as soft targets.<sup>32</sup>

On 17 September, the HRD stated that the conduct of the Police with regard to fining persons for not wearing a mask, or for failure to wear it properly, and their apprehension by the Police had become punitive, the minimal rights of the apprehended persons were not ensured, and cases of disproportionate use of force have been recorded. On the other hand, he noted that the police officers themselves have become the 'legal victims' of the existing uncertain and unpredictable regulations. There should be detailed rules or guidelines for police officers with regard to their work under the conditions of the coronavirus pandemic. The police officer should take an individual approach in carrying out his activities, given the peculiarities of a particular case. Police officers should undergo training on minimum requirements, so that they are able to explain to citizens both the legal and health consequences of not wearing a mask and support them. Finally, the HRD stated that disciplinary proceedings had acquired an episodic and ineffective character.<sup>33</sup>

There have been written and verbal interpellations to the Police on those issues, mostly by the opposition MPs. This may be due to the acknowledgment by the majority faction that the police had an instruction from the executive to be tough after the initial failure to enforce the quarantine, and the tendency not to question but rather justify the executive in key issues.

Finally, internal or external oversight of the police by the executive or the legislative has been a long-pending issue in Armenia due to the abolition of the Ministry of Interior in the 2000s and the direct reporting of the police to the PM after Armenia's transition to the parliamentary governance system. It

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<sup>30</sup> Observations based on monitoring by the author.

<sup>31</sup> Observations verified through confidential interviews with several senior officers of the Police of the Republic of Armenia in July-August 2020.

<sup>32</sup> Observations based on monitoring by the author.

<sup>33</sup> 'It is evident that the administrative fine for not wearing a mask or failure to wear it properly and depriving a person of liberty are acquiring a punitive nature: Legal Opinion by the Human Rights Defender of Armenia' Human Rights Defender of the Republic of Armenia (17 September 2020) <[https://ombuds.am/en\\_us/site/ViewNews/1301](https://ombuds.am/en_us/site/ViewNews/1301)> accessed 8 February 2021.

created problems for the parliamentary oversight of the police since according to the Constitution, only Ministers but not the Heads of Security Agencies are called to the parliament for interpellations.

The main focus of the parliamentary oversight of the police has been the development of the police strategy led by the Ministry of Justice, with strategic contribution by the Standing Committee of Defence and Security of the NA, based on the realization that police need to be reformed fundamentally. The police reform strategy and its 2020-2022 action plan were approved by the government on 23 April, including the provision on the establishment of a Ministry of Interior (MoI).<sup>34</sup> The Ministry will be in charge of policy-making and will bear political responsibility for the implementation of reforms. It will also facilitate the institutionalized parliamentary oversight of the police. The creation of the Ministry is envisaged for the first semester of 2021.

## Parliamentary Oversight

Parliamentary oversight is even more crucial and sensitive during the SoE, lockdowns and quarantines to ensure checks and balances, good governance, human rights and rule of law.

Armenia switched from presidential to parliamentary system of governance in 2018. The leading faction, My Step, occupied 88 out of 132 seats in the NA. The minority factions are Prosperous Armenia and Bright Armenia. Due to the current parliamentary governance system in Armenia, and because the parliamentary majority has formed the government, publicly it mostly allies with the government on key issues. It is assumed that there is more oversight by the legislature towards the executive taking place backstage through internal discussions.

Armenia is one of the few countries that continued parliamentary plenary and committee sessions through physical attendance without skipping any regular parliamentary sittings but also convened a large number of extraordinary sittings, both for the purpose of extending the SoE and endorsing decisions by the Commandant's Office and also debating and endorsing accumulated draft laws.

Article 48 of the Constitution requires convening a special sitting of the NA in case of a declaration of a SoE. However, it doesn't require the NA to approve the SoE before starting its application, instead giving it a right to cancel the SoE or the implementation of measures provided for under its legal regime by a majority of votes.

Upon the promulgation of the decision on the SoE by the PM and pursuant to Paragraph 2 of Article 120 of the Constitution and Article 48 of the Constitutional Law of the Rules of Procedure of the National Assembly (NA), a special sitting was convened. The Speaker Mirzoyan affirmed that the SoE would not affect the activities of the legislative body in any way. No parliamentary faction challenged the government's initiative to declare a SoE.<sup>35</sup>

Every month since the pandemic, in accordance with Paragraph 2 of Article 120 of the Constitution and Article 48 of the Constitutional Law of the Rules of Procedure of the NA, a special sitting was convened, and Extending the State of Emergency and on Making Amendments and Addenda of the N 298-N Decision of the RA Government of 16 March 2020 was discussed.<sup>36</sup> The Commandant presented the Government proposal to extend the SoE for another month, presented the current state of the pandemic, and provided answers to the questions of members of the NA.

At the same time, the modalities of the SoE prohibited gatherings involving more than 20 people and imposed social and physical distancing of 1.5 meters. The reaction of the public to the continuing NA sittings was controversial – on one side, it has been positive showing their work, and on the other side,

<sup>34</sup> 'Police Reform Strategy of the Republic of Armenia approved' Ministry of Justice of the Republic of Armenia (23 April 2020) <[www.moj.am/en/article/2706](http://www.moj.am/en/article/2706)> accessed 8 February 2021.

<sup>35</sup> 'RA National Assembly Convenes Special Sitting' National Assembly of the Republic of Armenia (16 March 2020) <[www.parliament.am/news.php?cat\\_id=2&NewsID=12789&year=2020&month=03&day=16&lang=eng](http://www.parliament.am/news.php?cat_id=2&NewsID=12789&year=2020&month=03&day=16&lang=eng)> accessed 8 February 2021.

<sup>36</sup> The Constitutional Law of the Republic of Armenia, Rules of Procedure of the National Assembly, (adopted 16 December 2016) National Assembly of the Republic of Armenia <[www.parliament.am/parliament.php?id=bylaw&lang=eng](http://www.parliament.am/parliament.php?id=bylaw&lang=eng)> accessed 8 February 2021

many citizens believed that the sittings were conducted in violation of the SoE and lockdown rules, discriminating between MPs and regular citizens and increasing health risks.<sup>37</sup>

The NA could not switch to online mode due to the lack of e-voting rights in the legislation. However, the current legislation allows the NA to conduct meetings and public hearings online. With the assistance of international organisations, such as but not limited to UNDP, the transition into digitalisation of their work increased with the deterioration of COVID-19 dynamics. It also established a rotational system of physical presence of the staff in the premises of the NA, which was 20% at its lowest during lockdown.<sup>38</sup>

One tool that was negatively affected by COVID-19 is inclusive and participatory parliamentary hearings that were common in 2019. Due to restrictions caused by the SoE and restrictions in relation to large gatherings causing health risks, there haven't been any parliamentary hearings between the beginning of the pandemic in March and 24 September 2020. They have been replaced with predominantly online public discussions that are not comparable in terms of inclusiveness, participation and interaction. Some stakeholders are not fond of virtual discussions, even if they participate in them. While HRDO, leading CSOs and many MPs seem to have got used to it, the security institutions and law enforcement bodies rarely practice online discussions. Online discussions, mostly organised by international actors, addressed some issues related to human rights and rule of law issues during COVID-19 management, the impact of the crisis on marginalised groups, domestic violence, economic implications and mitigation measures but seemed to avoid the most sensitive issues such as the behaviour of the police mentioned above or lack of the consistent communication strategy on COVID-19 by the authorities.<sup>39</sup> On 16 July, an amendment to the Constitutional Law on the Rules of Procedure of the RA NA established the possibility for MPs to vote in writing if they have been instructed to be in isolation by the Commandant's Office.<sup>40</sup>

It was frequently underlined that MPs were expected to be role models for the public, and whether they chose to wear masks or not, the public might follow their example. The public saw a large number of MPs attending plenary or committee meetings without preserving physical distance or wearing masks for several weeks after it had become obligatory for all other citizens. Although individual MPs were voluntarily wearing masks during sittings, it only became mandatory as of 26 June when a number of MPs were infected with COVID-19. The public perceived this late adoption of a key anti-pandemic measure by the legislature as either elitism or negligence.<sup>41</sup>

In August, the opposition MPs were against the extension of the SoE, insisting that there was no ground for it, presenting a draft law on Removing the State of Emergency authored by Bright Armenia. They suggested amending and applying the Law on Protection of the Population in Emergency Situations to replace the legal regime of the SoE with a less restrictive one. They also expressed concern about the actions of the police to enforce wearing masks. However, the Commandant insisted that extending the SoE was the best legal solution and the majority faction voted against it.

Finally, a parliamentary scrutiny mechanism was established to oversee COVID-19 management by the Executive. On 2 July, in accordance with Article 20.1 of the Constitutional Law on the Rules of Procedure of the NA, an intention to establish an Inquiry Committee (IC) was announced in order to prevent the spread of COVID-19, to have effective measures carried out by the government and the Commandant's Office for mitigating or eliminating the consequences of the fight against the virus, as well as to study the efficiency and the legality of the restrictions of human rights and fundamental freedoms during the period of the SoE. This Committee has been established based on the request of two opposition factions - Prosperous Armenia and Bright Armenia and is chaired by the latter. The

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<sup>37</sup> Observations based on the monitoring by the author

<sup>38</sup> Ibid

<sup>39</sup> Ibid

<sup>40</sup> 'At Extraordinary Sitting of RA NA Standing Committee on State and Legal Affairs' National Assembly of the Republic of Armenia (16 July 2020)

<[http://www.parliament.am/news.php?cat\\_id=2&NewsID=13206&year=2020&month=07&day=16&lang=eng](http://www.parliament.am/news.php?cat_id=2&NewsID=13206&year=2020&month=07&day=16&lang=eng)>.

<sup>41</sup> Observations based on the monitoring by the author.

Committee has 12 members, out of which the majority faction has 7, and the minority Prosperous Armenia and Bright Armenia factions respectively 3 and 2 members. It is expected to function for a six-month period, to be renewed once and to have the investigative and oversight powers of the Standing Committees. After less than two weeks, Armenia got involved in the defence of Nagorno Karabakh in a 44-day war with Azerbaijan and most of the parliamentary activities were either frozen or focused on the war-related issues during that period. However, it finally convened its first session on 25 January 2021 during which the ruling faction reiterated that the process to combat the pandemic has not ended yet, and there is still no best model for it.

The Chair has stated that the work of the Committee will be based on studies by experts, including lawyers and economists.<sup>42</sup>

## Conclusions

The government has invested a lot of effort to manage pandemics; however, the measures undertaken have not always been timely, consistent and proportionate. The assessment of the management of COVID-19 in Armenia is over-politicized, when the opposition has been accusing the government of failing to manage COVID-19, not taking sufficient responsibility for it and blaming citizens for the lack of social responsibility, at the same time making the government's task even more difficult by organizing protests or refusing to wear masks. The majority faction has been supporting the government in endorsing measures aimed at pandemic management, aiming to justify failure to effectively manage it by the global nature of the problem, similar failure of other countries, the lack of social responsibility of citizens, and accusing the opposition of manipulating the problem of COVID-19 and politicizing it against authorities.

The very active work of the Armenian NA has been impressive by its intensity, but it could have improved oversight over the executive and law enforcement in pandemic management in relation to sensitive issues related to human rights, rule of law, law enforcement, democracy and good governance. Discussions involving members of parliament, HRDO and civil society during the COVID-19 situation addressed some but not all of the human rights issues, avoiding the most sensitive such as law enforcement and communications strategy. The NA of Armenia could increase its digitalisation through amending regulations in relation to e-voting. The establishment of an Inquiry Committee to scrutinise the problems of COVID-19 management is a positive but belated step; it would have been much more efficient to have established an ad hoc Committee during the first wave of the pandemic to monitor the implementation of anti-pandemic decisions and measures, and assess their proportionality and impact.

The Human Rights Defender has made statements and expressed legal opinions on a range of issues that were generated during the pandemic, such as information restrictions, digital tracking, labour rights, civic protests and the alleged abuse and excessive use of force by the police while stopping and apprehending people to enforce COVID-19 related measures. The problem of information restrictions was resolved within a month due to the criticism about censorship by the HDR, NA and civil society.

Finally, the most obvious violation of a global cease-fire in relation to COVID-19, and the subsequent 44-day war in the Caucasus proved the direct correlation between the military operations, mobilization of the military personnel and volunteers, displacement of people on one side, and the growth of COVID-19 cases and the reduction of the absorption capacity of hospitals to ensure appropriate medical treatment to the injured in the war and pandemic patients on the other side at the same time.

In more general terms, it would be useful to focus on the feasibility, substance and effectiveness rather than the form and punitive nature of the measures in relation to the enforcement of COVID-19 related measures. Towards that end, the role of strategic communication and awareness raising through

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<sup>42</sup> 'First Sitting of NA Inquiry Committee Held' National Assembly of the Republic of Armenia (25 January 2021) <[www.parliament.am/news.php?cat\\_id=2&NewsID=13626&year=2021&month=01&day=25&lang=eng](http://www.parliament.am/news.php?cat_id=2&NewsID=13626&year=2021&month=01&day=25&lang=eng)>.

dialogue between the authorities and the public and well-designed effective public campaigns would be useful.

**Sossi Tatikyan**

*Sossi Tatikyan has a Diploma from Yerevan State University, Master of Public Administration from Harvard Kennedy School of Government and Executive MBA from ESCP Europe Business School. She has worked in the Armenian Foreign Ministry for over a decade, mostly dealing with Armenia's relations with NATO, International Atomic Energy Agency, international human rights bodies and Iran. She has been providing advisory services to public, non-profit and private organisations both in Armenia and globally. Currently, she is the Project Coordinator of Freedom House in Armenia.*

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